

JUST LOOK AT THE MAP: BOUNDING ENVIRONMENTAL REVIEW OF HOUSING DEVELOPMENT IN CALIFORNIA

BY

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California faces a dire housing crisis. California's land-use regulatory system remains a key driver of this crisis. State law grants local governments broad power to craft their own regulations on how to review and approve housing development. Though state law may limit a locality's ability to outright deny some types of housing development, local governments can and do use creative ways to stall approvals or functionally deny housing by making it infeasible to develop. One such strategy is to demand more intensive environmental review of new housing projects under the California Environmental Quality Act (CEQA) than what state law requires. More intensive environmental review can create substantial delay and uncertainty, increasing the costs for the construction of new housing. Although the state has made many efforts to streamline the process of both local land-use regulation and CEQA review, delays and uncertainty remain.

We propose that the state address this ongoing problem by (1) issuing an authoritative map of urban "infill priority areas" (IPAs) where new housing is expected to provide net social and environmental benefits, and (2) limiting the scope of environmental review, within the IPAs, to environmental impacts identified by the city or members of the public within a brief temporal window and demonstrated by the proponent of environmental review to be significant. In effect, the law would presume no impact from new

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housing within an IPA unless significant impacts are quickly and unambiguously identified. We also propose enforcement mechanisms. New infill housing reduces carbon emissions, exposure to wildfire risk, and threats to habitat. Environmental review should be calibrated accordingly.

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I. INTRODUCTION

California faces a series of overlapping crises. Skyrocketing housing costs have put housing out of reach for too many Californians, contributing to soaring rates of homelessness.¹ Those costs have driven low-income residents and families out of core metro areas or even out of the state, exacerbating the state's high levels of inequality and poverty, and leading to long-distance commutes for lower-income people with significant negative impacts on health and happiness.² The exclusion of lower-income Californians from the state's vibrant metro areas hampers both economic productivity and social mobility.³ A key driver of economic growth is agglomeration effects—the economic benefits of people being located close to each other.⁴ Restricting dense urban development undermines agglomeration effects and associated economic growth.⁵

At the same time, the state is confronting environmental challenges. Producing cheap suburban, single-family housing may have worked in the 1950s and 1960s, but today this approach produces sprawling, car-dependent development that undermines the state's

¹ See Greg Rosalsky, *How California Homelessness Became a Crisis*, NPR (Jun. 8, 2021, 6:30 AM) <https://perma.cc/NEY2-BZVQ> (stating that the primary cause of the homelessness crisis is that housing is too scarce and expensive, which creates a ripple effect in the housing market where high and middle income earners must rent which pushes low income earners out of the rental market and into homelessness); Manuela Tobias et al., *Californians: Here's Why Your Housing Costs are so High*, CALMATTERS <https://perma.cc/A362-3JFN> (Mar. 3, 2022) (stating that the median California home is priced nearly 2.5 times higher than the median national home and seven of the ten most expensive cities for renters are in California).

² See Moira O'Neill, Giulia Gualco-Nelson & Eric Biber, *Sustainable Communities or the Next Urban Renewal?*, 47 *ECOLOGY L.Q.* 1061, 1063, 1064 n.6, 1066 n.19 (2020) [hereinafter O'Neill, Gualco-Nelson, & Biber, *Sustainable Communities*] (showing that the cost of living in specific cities is extraordinarily high which results in poverty, households struggling to meet their basic needs, and the concentration of poverty and racial residential segregation within the “outer edges” of high-cost urban areas).

³ See Eric Biber et al., *Small Suburbs, Large Lots: How the Scale of Land-Use Regulation Affects Housing Affordability, Equity, and the Climate*, 2022 *UTAH L. REV.* 1, 3, 43–44 (2022) (explaining that metropolitan areas with high levels of agglomeration economics provide major economic opportunities for residents who live in outlying areas and for children from families in lower socioeconomic categories who live and grow up in wealthier neighborhoods).

⁴ *Id.* at 29 & n.91.

⁵ *Id.* at 39–40. The concentration of economic growth and higher-wage jobs makes it cheaper and easier for individuals to move into these urban areas, thereby expanding the pool of people who stand to benefit from these economic opportunities and advancing social mobility. *Id.* at 44; David Schleicher, *Stuck! The Law and Economics of Residential Stagnation*, 127 *YALE L.J.* 78, 101 (2017).

efforts to reduce its greenhouse gas emissions.⁶ The single largest sector for greenhouse gas emissions in California is transportation, and the single largest component of that sector is emissions from gasoline-powered automobiles.⁷ While the state has prioritized electrification of the automobile fleet as an approach to reducing greenhouse gas emissions, the state it does not believe electrification is sufficient to emissions from the transportation sector.⁸ Accordingly, the state has called for reducing vehicle miles traveled (VMT)—in other words, encouraging Californians to drive less.⁹ That, in turn, requires shifting housing development to locations where alternative transportation modes—such as walking, biking, or public transit—are accessible for Californians. Such modes are much more feasible in dense urban neighborhoods.

In addition, people living in coastal California cities on average produce significantly less carbon emissions than people living in other states.¹⁰ The mild climate in coastal cities, combined with significant investments in climate policies like energy efficiency and decarbonization of its electricity grid, mean that every person who chooses to live in California rather than Texas or Arizona saves on average anywhere from three to fourteen tons of carbon per year.¹¹

Sprawling development also leads to the production of housing in areas vulnerable to wildfire hazards. California has seen unprecedented levels of wildfire activity over the past few years—activity that has also caused catastrophic damage to property and homes.¹² Though multiple factors contribute to the increases in wildfire activity and related damage, increased development in high-fire hazard areas is an important contributor.¹³ The increase in housing and other development in high-fire hazard areas contributes to the expansion of the wildland-urban interface (WUI), the area where human development is interspersed into ecosystems that have high fire hazards, such as

⁶ Biber et al., *supra* note 3, at 3, 14–17.

⁷ O'Neill, Gualco-Nelson, & Biber, *Sustainable Communities*, *supra* note 2, at 1064.

⁸ CAL. AIR RES. BD., 2018 PROGRESS REPORT: CALIFORNIA'S SUSTAINABLE COMMUNITIES AND CLIMATE PROTECTION ACT 28 (2018), <https://perma.cc/N5N6-SXUD>.

⁹ CAL. AIR RES. BD., CALIFORNIA'S 2017 CLIMATE CHANGE SCOPING PLAN 25 (2017), <https://perma.cc/W648-TYSW>; GOVERNOR'S OFF. PLAN. & RSCH., A STRATEGY FOR CALIFORNIA @ 50 MILLION: SUPPORTING CALIFORNIA'S CLIMATE CHANGE GOALS, THE GOVERNOR'S ENVIRONMENTAL GOALS AND POLICY REPORT 2 (2015), <https://perma.cc/RV25-TTEF> (listing reduction of VMT as one of top three planning goals for the state).

¹⁰ Edward L. Glaeser & Matthew E. Kahn, *The Greenness of Cities: Carbon Dioxide Emissions and Urban Development*, 67 J. URB. ECON. 404, 411 (2010).

¹¹ See U.S. ENERGY INFO. ADMIN., ENERGY-RELATED CARBON DIOXIDE EMISSIONS BY STATE, 2005–2016 18–19 tbl. 6 (2019), <https://perma.cc/P5GY-D87P> (showing per capita carbon outputs for residents of California, Arizona, and Texas in 2016).

¹² Eric Biber & Moira O'Neill, *Building to Burn? Permitting Exurban Housing Development in High Fire Hazard Zones*, 48 ECOLOGY L.Q. 943, 944–45 (2021).

¹³ *Id.* at 945–46, 949–52.

chaparral or some Western pine forests.¹⁴ Development in the WUI increases both the potential damage to people and property from fire, and the risk of fire itself.¹⁵

Sprawl also undermines other key state goals to protect biodiversity, agricultural areas, and open space. California has a rich heritage of species and ecosystems, many of which face significant threats.¹⁶ The state has long sought to protect its biodiversity through laws such as the California Endangered Species Act.¹⁷ Protecting biodiversity requires protection of habitat for that biodiversity, and Governor Newsom has proposed significantly increasing protected lands within the state to help advance biodiversity protection.¹⁸ Protecting habitat requires avoiding significant housing development in rural areas where important intact habitat remains. Relatedly, lands that the state protects as habitat for species can provide important benefits to people as well. Wetlands, forests, and other functioning ecosystems provide ecosystem services such as reducing flood risks, improving water quality, sequestering carbon, and improving air quality.¹⁹ The state has recognized these benefits of natural lands, which both directly address greenhouse gas emissions by absorbing and sequestering carbon, and allow for adaptation to the impacts of climate change.²⁰ Similarly, the state has a longstanding policy of protecting prime agricultural lands from development.²¹ Concentrating development in

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Eric Biber, *Reforming the California Endangered Species Act*, 44 ENVIRONS 127, 128 (2021).

¹⁷ *Id.* at 128–29; CAL. FISH & GAME CODE §§ 2050–2089.25 (West 2023).

¹⁸ See Cal. Exec. Order No. B-54-18 (Sept. 7, 2018) (calling for all State agencies to work together to protect biological diversity); Cal. Exec. Order N-82-20 No. (Oct. 7, 2020) (calling for efforts to protect California’s biodiversity, including conservation of at least 30% of state lands and waters).

¹⁹ See James Boyd & Spencer Banzhaf, *What are Ecosystem Services? The Need for Standardized Environmental Accounting Units*, 63 ECOLOGICAL ECON. 621, 622–24 (2007) (discussing how ecosystem services from wetlands, forests, and nature cover provide several health benefits).

²⁰ See CAL. AIR RES. BD., *supra* note 9, at 13–14, 81–85 (discussing California’s targets and plans to reduce GHG emissions from natural and working lands).

²¹ See CAL. GOV’T CODE § 65041.1(b) (West 2023) (establishing California’s planning goal to “protect environmental and agricultural resources by protecting, preserving, and enhancing the state’s most valuable natural resources, including working landscapes such as farm, range, and forest lands”); A STRATEGY FOR CALIFORNIA @ 50 MILLION, *supra* note 9, at 2 (listing agricultural land protection as one of top three goals for the state). The state has advanced that policy through contracts in which farmers are given significant property tax breaks in return for maintaining land in agricultural production. See California Land Conservation Act of 1965 (Williamson Act), CAL. GOV’T CODE § 514200–51297.5 (West 2023); *id.* § 51242 (enables local government to enter into contracts with private landowners to preserve agricultural lands in exchange for a lower tax assessment); CECILY TALBERT BARCLAY & MATTHEW S. GRAY, CALIFORNIA LAND USE & PLANNING LAW 276–78 (36th ed. 2018) (providing an overview of provisions of the Williamson Act). The state has

urban areas reduces pressure to convert agricultural land to other uses such as residential or commercial uses.²² Taken together, California's protections for habitats, working lands, ecosystems, and agricultural lands can be understood as an overarching policy to protect open space, which the state requires local governments to consider in their own planning processes.²³

Scholars, policymakers, and the state legislature have repeatedly identified denser residential development in urban areas—i.e., infill development—as the best solution to these overlapping challenges.²⁴ Infill housing development promises more units in places that are less car-dependent and less vulnerable to fire risk, thus avoiding interference with habitat for endangered species and valuable agricultural lands.²⁵ Still accelerating urban infill residential development has been a challenge. Scholars and policymakers have identified two key barriers to successful infill development in the state: abuse of the environmental review process required by the California Environmental Quality Act²⁶ (CEQA) intended to stop development

also encouraged local governments to coordinate land-use regulation to protect agricultural lands. See discussion *infra* at note 161 and accompanying text (discussing the tension between state land use policy of protecting the environment and state housing element law that supports housing development). The state also authorizes local governments to include an agricultural element in general plans. See CAL. GOV'T CODE § 65563 (West 2023) (“[E]very city and county shall prepare, adopt and submit . . . a local open-space plan for the comprehensive and long-range preservation of open-space land within its jurisdiction.”); see also *id.* § 65560(h)(2) (defining “open-space land” to include “agricultural lands”).

²² We note that there is an active debate in the academic literature on the merits of policies to protect agricultural lands from urban or suburban development. Coline Perrin, et al., *Preserving Farmland on the Urban Fringe: A Literature Review on Land Policies in Developed Countries*, MDPI: LAND, July 9, 2020, 9070223, at 1, 5. However, given its prominence in California state law, we can assume that agricultural protection is an important goal for developing land-use policy in the state.

²³ See CAL. GOV'T CODE § 65561(a)–(b) (West 2023) (identifying state policy to protect open space including “discouraging premature and unnecessary conversion of open-space land to urban uses is a matter of public interest and will be of benefit to urban dwellers because it will discourage noncontiguous development patterns which unnecessarily increase the costs of community services to community residents”); *id.* §§ 65302(a) (directing plans to include land use elements, “including agriculture”); *id.* 65563 (directing local governments to submit plans); see also BARCLAY & GRAY, *supra* note 21, at 16–17 (noting that local open space elements must be consistent with the policy articulated in CAL. GOV'T CODE § 65561).

²⁴ See, e.g., CAL. GOV'T CODE § 65041.1(a) (West 2023) (setting priorities for urban planning in the state, including to “promote infill development”); A STRATEGY FOR CALIFORNIA @ 50 MILLION, *supra* note 9, at 2 (listing, as one of top three development goals, for the state to “[r]educe land consumed for development 50 percent relative to today’s trend by 2050”); *id.* at 2, 12, 14 (emphasizing need to “[p]rioritize and support infill development to build healthy, equitable, and sustainable communities”).

²⁵ U.S. ENV'T PROT. AGENCY, SMART GROWTH AND ECONOMIC SUCCESS: INVESTING IN INFILL DEVELOPMENT 1 (2014), <https://perma.cc/85LZ-NDNR>.

²⁶ CAL. PUB. RES. CODE §§ 21000–21189.91 (West 2023).

projects²⁷ and the use of local land-use regulations to constrain or effectively bar multifamily development.

CEQA poses one challenge to accelerating housing development primarily because of how opponents of new housing projects use CEQA processes to block development. CEQA review and litigation can promote vital environmental goals, but project opponents can also use CEQA to thwart much needed housing development. Sometimes it may be neighbors who object to the approval of a residential project by a local jurisdiction and then use CEQA to try and stop or delay the project.²⁸ Other times, local jurisdictions themselves may rely on (sometimes specious) claims of environmental impacts inadequately addressed through CEQA.²⁹ The result has been a chorus of scholars, lawyers, stakeholders, and policymakers calling for significant reform of how CEQA relates to residential development.³⁰

Improving how localities implement CEQA review is particularly important because of the costly nature of the information and analysis that CEQA demands. CEQA often requires government decision makers to conduct a thorough review of the environmental impacts of a proposed project, alternatives to the project, and possible mitigation measures.³¹ That level of review can be time-consuming, expensive, and full of uncertainty, and it opens the door to political and legal challenges.³²

While reforming CEQA to accelerate urban infill development is an essential task for California, it is also true that CEQA serves critical environmental goals. CEQA has played a significant role, for instance, in ensuring the reduction of the greenhouse gas emissions from residential projects.³³ CEQA regulations are also an important element in ensuring that new development is not located in high-fire hazard

²⁷ Jennifer Hernandez, *California Environmental Quality Act Lawsuits and California's Housing Crisis*, 24 HASTINGS ENV'T L.J. 21, 24–25, 41–42 (2018).

²⁸ *Id.* at 35, 41 (citing Chang-Tai Hsieh and Enrico Moretti, *How Local Regulations Smother the U.S. Economy*, N.Y. TIMES (Sept. 6, 2017), <https://perma.cc/85KC-BPKE>).

²⁹ See Hernandez, *supra* note 27, at 40–41 (describing courts' "creative[] interpretat[ions]" of environmental impacts).

³⁰ See, e.g., Liam Dillon, *Which California Megaprojects Get Breaks from Complying with Environmental Law? Sometimes, it Depends on the Project*, L.A. TIMES (Sept. 25, 2017, 11:15 AM), <https://perma.cc/G5M9-LLMZ> (discussing legislative attempts to sidestep or narrow review of new projects under CEQA); Angela Hart, *Here's Why California's Historic Housing Legislation Won't Bring Down Costs Anytime Soon*, SACRAMENTO BEE (Sept. 27, 2017, 2:10 PM), <https://perma.cc/DLD3-KXCN> (arguing that proposed housing bill will not decrease housing prices due to several reasons, including development being stifled by CEQA).

³¹ CEQA, CAL. PUB. RES. CODE § 21061 (West 2023).

³² Hernandez, *supra* note 27, at 21–22, 43, 62.

³³ See, e.g., *Ctr. for Biological Diversity v. Cal. Dep't of Fish & Wildlife*, 361 P.3d 342, 345 (Cal. 2015) (holding that the environmental impact report employed used a permissible determination of impacts from greenhouse gases).

areas³⁴ and that it does not harm important habitat or ecosystems.³⁵ The key to finding a balance between reforms and the state's environmental goals will be ensuring that CEQA is applied in the right place, at the right time.

Another key obstacle to urban infill development is much larger: the web of land-use regulation in California. Ultimately, in California (as in most United States), it is local governments that regulate and approve individual development projects, including housing.³⁶ As a result, local regulation of land-use can be byzantine, highly variable from jurisdiction to jurisdiction, with local governments allowed to veto most any significant project, frequently in response to pressure from neighbors.³⁷ Moreover, local governments often do not have incentives to approve housing projects because, although those projects will provide regional benefits in reducing housing costs, they impose negative impacts on neighbors.³⁸ Simply reforming CEQA may be necessary to eliminate its role as an obstacle for infill residential development, but it will not be sufficient to address the challenge of producing more infill residential development.

These two key obstacles are intertwined. The trigger for CEQA review is regulatory discretion,³⁹ so local governments' choices about how to regulate land use and housing development—whether to apply a ministerial or discretionary process⁴⁰—also affect the reach of CEQA. The California legislature has increasingly sought to curtail local discretion to delay, deny, or downsize housing development projects that

³⁴ Biber & O'Neill, *supra* note 12, at 955–58; *see also* Order Granting Petition for Writ of Mandate Filed by Climate Resolve at 53, 60, *Climate Resolve v. Cnty. of Los Angeles*, No. 19STCP01917 (Cal. Super. Ct. Apr. 5, 2021) (remanding CEQA review for housing project because of inadequate analysis of wildfire impacts on areas outside the project based on the risk that the project would increase the risks of fire ignition); Alissa Walker, *Climate-Change-Related Lawsuit Nixes Huge California Development*, CURBED (Apr. 20, 2021), <https://perma.cc/1X3L-QJHS> (discussing efforts to block development through CEQA review in areas with wildfire risk).

³⁵ CAL. PUB. RES. CODE § 21001(c).

³⁶ Biber & O'Neill, *supra* note 12, at 946–47.

³⁷ *See* Biber et al., *supra* note 3, at 12–13, 37–38 (describing the various ways in which local government use zoning laws as leverage over projects).

³⁸ *See infra* Part II.B. Local Government Incentives (exploring the ways that small cities are not incentivized to produce adequate housing because “small cities experience the negative externalities of development, such as noise and impacts on public services, but may not reap major benefits in terms of housing affordability or economic development, because such benefits are likely to be diffused across a regional or state-wide geographic scale”).

³⁹ Rozalynne Thompson, *Somewhere in Between: The Classification and Standard of Review of Mixed Ministerial—Discretionary Land Use Decisions*, 15 W. NW. J. ENV'T L. & POL'Y 325, 331 (2009).

⁴⁰ A ministerial process generally allows for the application of clear objective standards to regulatory decisions, while a discretionary process uses subjective standards. *See infra* text accompanying notes 86–87.

comply with applicable, objective local standards.⁴¹ The state’s “Housing Accountability Act” (HAA) prevents cities from denying or reducing the density of most projects that comply with applicable, objective general plan and zoning standards, but it does not foreclose CEQA review and it allows discretionary conditions of approval that do not reduce density.⁴² As a result, CEQA offers a pathway when a local planning agency or city council would like to deny a project but finds itself hemmed in by the HAA. Rather than deny the project outright—which could expose the city to fines, attorneys fees, a court-ordered approval of the project, among other consequences⁴³—the city may delay the project indefinitely by demanding environmental reviews that go far beyond what CEQA mandates. It appeared for many years that cities’ demands for additional environmental study were essentially unreviewable. Cities enjoyed *de facto* “one-way discretion” to require more, but not less, environmental study than CEQA demands.⁴⁴ A recent bill and a pathbreaking judicial decision have begun to limit that discretion, but it is by no means clear what the new equilibrium will be.

Addressing the two obstacles—local legislative discretion with respect to land use, and local (one-way) administrative discretion with respect to CEQA—poses a set of difficult problems related to incentives and information. On the incentives side, local governments may be disinclined to approve infill housing because of resident objections to the micro-level negative impacts of development.⁴⁵ Local elected officials therefore often rely on any available legal tool to obstruct infill housing development—whether it is CEQA or local land-use regulation.

On the information side, CEQA demands the production and dissemination of information about the environmental impacts of

⁴¹ See *infra* Part II.C. State Reform Efforts (discussing how some California land use “legislation also seeks to eliminate local discretion over the application of CEQA and/or land-use regulation”).

⁴² See discussion *infra* Part II.A.3. State Efforts to Speed Review of Proposed Housing Projects (detailing the way that various acts substantively limit cities’ discretionary ability to deny projects that are arguably compliant, yet still allow for discretionary review and conditions of approval that do not reduce density, in addition to allowing CEQA review).

⁴³ See discussion *id.* (exploring the substantive limits certain housing acts place on city discretion and the fines associated with violations imposed by those housing laws, as well as how cities leverage CEQA as a loophole to bypass these limits).

⁴⁴ We call this one-way discretion because the local government’s decision to require more CEQA is unreviewable, but its decision to require less CEQA is reviewable. See *infra* text accompanying notes 109–116 (describing the reviewability of agencies’ decisions regarding CEQA).

⁴⁵ See *infra* Part II.B (exploring the way that small cities are not incentivized to produce adequate housing because “small cities experience the negative externalities of development, such as noise and impacts on public services, but may not reap major benefits in terms of housing affordability or economic development, because such benefits are likely to be diffused across a regional or state-wide geographic scale”).

proposed projects.⁴⁶ Requiring full CEQA analysis for every project depends on two key assumptions: one, that the benefits of compiling the relevant information for all projects are significant; and two, that the costs of compiling the relevant information are relatively small. However, these assumptions are likely inaccurate for a significant subset of infill projects. Indeed, it is reasonable to presume that in most circumstances the environmental benefits of an infill project in many California cities will exceed its costs for the reasons articulated above.⁴⁷ The costs of compiling the relevant information are often high, because analysts' ability to assess environmental impacts has greatly increased,⁴⁸ and the range of impacts that plausibly might be characterized as environmental has also increased,⁴⁹ resulting in vastly more complex environmental review.⁵⁰ It is no accident that in the early days of environmental review, advocates assumed that review documents might be in the dozens of pages, but today they are often in the hundreds of pages.⁵¹

⁴⁶ ASS'N OF ENV'T PRO., 2023 CEQA CALIFORNIA ENVIRONMENTAL QUALITY ACT STATUTE AND GUIDELINES 3 (2023).

⁴⁷ For example, renewable energy development and compact, walkable housing developments are widely considered to have benefits that outweigh project costs. *See, e.g.*, TRIEU MAI ET AL., A PROSPECTIVE ANALYSIS OF THE COSTS, BENEFITS, AND IMPACTS OF U.S. RENEWABLE PORTFOLIO STANDARDS 45–46 (2016) (performing a cost/benefit analysis of national renewable portfolio standards, which are a driver for the growth and development of renewable energy infrastructure, and concluding that the environmental and economic benefits of increased renewable energy infrastructure outweigh the associated costs); *see also* U.S. ENV'T PROT. AGENCY, *supra* note 25, at i, 19 (arguing that compact and walkable housing developments on urban brownfield properties are an environmental boon while also providing economic profit incentive to real estate developers).

⁴⁸ *See* Appu Haapio & Pertti Viitaniemi, *A Critical Review of Building Environmental Assessment Tools*, 28 ENV'T IMPACT ASSESSMENT REV. 469, 469–70 (2008) (describing the development of tools and indicators to assess the environmental impacts of buildings).

⁴⁹ *Understanding the Connection Between Climate Change and Human Health*, U.S. ENV'T PROT. AGENCY (Aug. 14, 2023), <https://perma.cc/7NCJ-2A3T>.

⁵⁰ While the ease of analyzing information can reduce information costs about environmental impacts, for instance through tools such as remote sensing and geographic information systems, the increased information about environmental impacts can also increase the number of opportunities for project opponents to create arguments about why a project's environmental impacts have not been adequately assessed or mitigated. Project opponents can draw on the increased data availability to argue for additional analysis and data acquisition to resolve additional questions about a project. Catherine Dinsmore, *GIS: Saving Time and Costs With Real-World Data*, AREA DEV. (June/July 2010) <https://perma.cc/R2AG-GVL8> (detailing the benefits of geographic information systems and how they reduce associated costs).

⁵¹ *See generally* CAL. DEP'T OF FISH & WILDLIFE, CEQA NOTICES AND DOCUMENTS, <https://perma.cc/2FJ8-A4HS> (last visited Nov. 9, 2023) (providing access to documents submitted pursuant to CEQA, some of which are hundreds of pages long); *see also* CAL. DEP'T OF FISH & WILDLIFE, FINAL ENVIRONMENTAL IMPACT REPORT: INCIDENTAL TAKE PERMIT AND LAKE AND STREAMBED ALTERATION AGREEMENTS FOR PACIFIC GAS AND ELECTRIC COMPANY'S SOUTHERN CALIFORNIA DESERT GAS PIPELINE OPERATION AND MAINTENANCE ACTIVITIES (2022) (final environmental impact report submitted pursuant to CEQA is over 800 pages long).

Local land-use regulation has important informational elements as well. For instance, local regulatory processes often require public hearings for individual projects to allow for the identification of issues important to the community that can, in turn, form the basis for additional restrictions on new projects.⁵² Those hearings often impose significant time delays and cost increases on projects, which means that, on the margin, less infill development is produced.

Local governments responding to resident opposition to housing proposals can leverage CEQA to delay controversial projects for years, signaling to developers that if they do not go along with the city's political demands, they will be stuck in limbo indefinitely. Foreseeing as much, the rational developer will avoid controversial projects altogether.⁵³ Thus, local governments can use their discretion over zoning and development standards to foreclose the dense infill development that the state says it wants.

Local governments incentivized to stop or delay projects therefore use both CEQA and local land-use regulation to obstruct essential infill development. The state has recently intervened, to some extent, in the arena of local land-use regulation.⁵⁴ Though there have been numerous state efforts to reduce the informational and regulatory barriers to infill housing production, especially under CEQA,⁵⁵ the process has become increasingly complex. In its efforts to boost infill development, California developed carveouts exempting various projects from full or any CEQA review. As a result, the state has accumulated a bewildering array of CEQA exemptions and state-level interventions that have a varying range of prerequisites.⁵⁶

This in turn has created a different kind of informational problem—how to determine whether a project qualifies for a CEQA exemption or state land-use streamlining provision. A project proponent often must undertake significant research to identify the applicable provisions for their project or to determine what changes a project might require to be eligible for CEQA exemptions or land-use streamlining.⁵⁷ It is not just legal research that might be required, though this itself can be

⁵² JANET SMITH-HEIMER ET AL., CEQA IN THE 21ST CENTURY: ENVIRONMENTAL QUALITY, ECONOMIC PROSPERITY, AND SUSTAINABLE DEVELOPMENT IN CALIFORNIA 39 (2016).

⁵³ LEGISLATIVE ANALYST'S OFFICE, CONSIDERING CHANGES TO STREAMLINE LOCAL HOUSING APPROVALS, No. 3470 (2016), <https://perma.cc/527Q-933N>.

⁵⁴ See, e.g., Housing Crisis Act of 2019 (S.B. 330), ch. 654, 2019 Cal. Stat. 5608 (2019).

⁵⁵ See *infra* Part II.

⁵⁶ See *infra* Part II.

⁵⁷ See EXEC. OFF. PRES. U.S. & CAL. OFF. PLAN. & RSCH., NEPA AND CEQA: INTEGRATING FEDERAL AND STATE ENVIRONMENTAL REVIEWS (2014), <https://perma.cc/2Z7B-CBNH> (describing the process by which agencies identify whether exemptions or exceptions apply to a project undergoing NEPA or CEQA review); see also, e.g., *infra* text accompanying notes 106–108. (describing the process of determining the applicability of CEQA exemptions and some associated informational burdens).

daunting: Because of uncertainty about the meaning of relevant statutory provisions or about the characteristics of a project site, a proponent may find themselves undertaking time-consuming research into, for instance the presence of wetlands or of historical or tribal cultural resources, with potential residual uncertainty about whether the project ultimately will meet the relevant requirements.⁵⁸ Even if it is determined that the project does qualify, the project proponent cannot make a reasonable guess about whether the city will issue the exemption (as opposed to using its one-way discretion to demand extra environmental review) unless they know the local byways of CEQA practice and can predict local political opposition to the project. Though California's Housing Accountability Act⁵⁹ (HAA) tries to reduce developers' informational costs by preventing cities from denying or downsizing projects based on subjective standards,⁶⁰ CEQA allows local governments to recreate much the same problem under the guise of environmental review.

It is not just project proponents who face an informational problem; the state does as well. As noted above, the primary reason for the state to develop CEQA exemptions and to facilitate or mandate local approval of infill residential projects is that local governments do not have adequate incentives to approve infill housing. But ironically, many of the state-level CEQA exemptions depend on local governments to determine whether they apply to an individual project.⁶¹ Given the uncertainty and ambiguity around whether any one project might satisfy one or more CEQA exemptions or land-use streamlining provisions, it is extremely difficult for a state as large as California to know whether a given local government is implementing those provisions in good faith. There is, in fact, ample evidence that local governments often do not do so, as demonstrated by various local evasions of state efforts to facilitate the development of accessory dwelling units (ADUs) in residential neighborhoods.⁶² Thus, the state

⁵⁸ See, e.g., Bob Egelko, *Court OKs Housing Development at Side of Ohlone Shell-mound in Berkeley*, S.F. CHRON. (Apr. 21, 2021, 4:10 PM), <https://perma.cc/2M79-K4NZ> (highlighting dispute over whether state law accelerating approval of certain affordable housing projects applies to a parcel landmarked by a local government to protect tribal cultural resources).

⁵⁹ CAL. GOV'T CODE § 65589.5 (West 2023).

⁶⁰ See *Amici Curiae Brief of Law Professors Christopher S. Elmendorf, Michelle Wilde Anderson, Anika Singh Lamar, Dave Owen, Darien Shanske, and Kenneth Stahl*, Cal. Renters Legal Advoc. & Educ. Fund v. City of San Mateo, 68 Cal. App. 5th 820 (2021) (No. 18CIV02105) (noting that the "reasonable person" standard in the HAA is not strange, but provides transparency and predictability).

⁶¹ EXEC. OFF. PRES. U.S. & CAL. OFF. PLAN. & RSCH., *supra* note 57, at 10.

⁶² Accessory dwelling units (ADUs) are additional units built on a parcel that already has a residential unit; the accessory unit is smaller than the primary unit, and often replaces an existing garage. *Accessory Dwelling Units*, AM. PLAN. ASS'N, <https://perma.cc/XM2Y-S7E5> (last visited Nov. 1, 2023). For discussion of local efforts to evade ADU rules, see Margaret F. Brinig & Nicole Stelle Garnett, *A Room of One's Own?*

faces an informational problem in monitoring local government implementation of state-level efforts to facilitate infill development.

These are the four challenges that California faces in advancing urban infill development: local governments incentivized to restrict infill housing production; regulatory systems that impose high informational costs on project proponents to gain approvals; local governments with broad power to implement those regulatory systems in ways that can deter housing production; and significant limitations on the effectiveness of the state's efforts to remove these obstacles. Costly delays in the land-use regulatory process—including from administrative appeals and litigation—are often the result of these incentive and informational dynamics. This is particularly evident when opponents to any one individual project can use environmental review, local land-use regulations, and the complexity and ambiguity around the applicability of streamlining provisions together to challenge a project.

Our goal in this piece is to advance a solution to these challenges within the state-local framework already in place, and thus to help California advance infill urban residential development to address the environmental, equity, and economic crises that the state faces. Our solution is to map the development of infill priority areas (IPAs) across the entire state, identifying to the parcel level where to curtail CEQA review of development and where existing CEQA requirements would remain. The map ultimately resolves many of the challenges articulated above—it clearly identifies locations where the state *ex ante* is aware that the environmental and social benefits of housing production exceed the environmental and social costs of housing production; it clearly indicates to project proponents where development will be encouraged; and it allows the state to more easily supervise local implementation of environmental review and land-use regulation to achieve urban infill development, or even to mandate environmental review approvals, overriding local discretion.

CEQA would continue to apply to projects in the infill priority areas, but subject to a very different set of assumptions and procedures. Housing projects and upzoning proposals would be presumed to have no environmental impact unless the city or a member of the public shows, within a brief window of time following public notice of the project proposal, that the project will in fact have a significant impact. The ensuing CEQA review (if any) would be limited just to those shown-to-

Accessory Dwelling Unit Reforms and Local Parochialism, 45 URB. LAW. 519, 522 (2013) (discussing the impact of accessory dwelling unit reforms on local parochialism). For a study documenting local government efforts to resist state-wide upzoning under S.B. 9, see Mahammed Alameldin & David Garcia, *State Law, Local Implementation: How Cities Are Implementing Senate Bill 9*, TERNER CTR. HOUS. INNOVATION, UC BERKELEY (June 8, 2022), <https://perma.cc/4BRJ-SJBV> (analyzing of how cities are implementing Senate Bill 9). See also S.B. 9, ch. 162, sec. 1, § 65852.21(a), sec. 2, § 66411.7(a), 2021 Cal. Stat. 4129, 4131, 4133 (2021) (codified at CAL. GOV'T CODE §§ 65852.21, 66411.7).

be-significant impacts. Readily foreseeable local impacts could still be mitigated through CEQA, but CEQA would no longer provide hooks for delay because some remote possibility was allegedly not studied in sufficient detail.

We develop our proposal in detail to demonstrate that it is feasible to enact by the state legislature. We provide details about the mapping information that is now available to develop the IPAs on a parcel-level basis—this is the key informational advantage of our approach. Where there is a potential conflict between infill development and another important environmental goal (such as endangered species protection), this map data would allow individual parcel owners, project proponents, the state, local governments, and the public to easily and quickly determine how to resolve the conflict for any one parcel. This would be a quantum leap in advancing development in the state.

In Part II, we describe the legal obstacles to increasing infill urban residential development in California, particularly environmental review under CEQA and local regulation of land-use in the state, and the interaction between the two bodies of law. We then discuss local government incentives to obstruct dense infill housing development and assess state-level efforts to reduce these obstacles. Finally, we describe how these efforts have produced a complex, often confusing, web of exemptions and statutory provisions that increase the informational costs for proponents, the state, the public and local governments to determine where development is feasible.

In Part III, we develop our proposal in detail: where to draw the lines, what resources to protect within the IPAs, and the implications of the IPAs for development proposals within their borders. At heart, our proposal is to reverse the default informational presumption for residential projects within the IPAs—these projects would be presumed to have no significant environmental impact unless project opponents met a heavy burden of demonstrating that they do have significant impacts, such that CEQA review is required. This presumption is the opposite of that which currently applies to residential projects, within or outside the IPAs. Our proposal would also apply to local land-use zoning changes that increase residential density within the IPAs. To address the “one-way discretion” that local governments currently have in applying CEQA, we would create an external review process by which project proponents or others could appeal a local government’s refusal to apply the CEQA IPA exemption.

In Part IV, we explain why these challenges require state-level action, as opposed to regional-level efforts, to advance infill development. We also discuss the relationship between our proposal and urban growth boundaries (UGBs). Historically developed in urban planning, UGBs have been implemented to constrain development within core urban areas and reduce sprawling development that adversely affected farmland, habitat, and other environmental

resources.⁶³ UGBs have been criticized at times for potentially limiting development and raising home prices by constraining the geographic areas available for housing.⁶⁴ Our proposal can be thought of as a “reverse UGB”—where map lines are drawn to facilitate more development within urban areas. In other words, IPAs in California are an approach to recalibrate a default regulatory regime that is currently overly restrictive of growth overall; a targeted recalibration to facilitate more development in infill areas, but not in exurban areas. Importantly, whereas UGBs are typically associated with mandatory increases or decreases in allowable density,⁶⁵ mapping IPAs would not in any way preempt local zoning. Rather, this tool would offer relief from more intense environmental review in areas where local zoning already allows for additional development. State-level mapping of IPAs would allow local governments to comply with their obligations under existing state law more effectively by eliminating obstacles for local governments themselves to rezone for denser development.

II. LOST IN TRANSLATION: THE CHALLENGES OF USING STATUTORY TEXT TO STREAMLINE INFILL DEVELOPMENT AND CONSTRAIN LOCAL DISCRETION

Numerous factors have contributed to California’s inability to produce sufficient housing: labor shortages in the construction industry; increased hard costs to physically construct housing; and significant fees imposed on development projects by local governments.⁶⁶ But a central challenge has been the legal obstacles to development—in particular, environmental review under CEQA and local land-use regulations. Indeed, these legal obstacles interact with each other: any changes to land-use regulation must also comply with CEQA review requirements. The state has made multiple efforts to reduce these obstacles in the context of infill residential development, sometimes with reforms that have been the subject of dramatic political debates.⁶⁷ These reforms

⁶³ Nick Christensen, *UGB 101: Everything You Wanted to Know About the Urban Growth Boundary, but Were Afraid to Ask*, Metro (Jan. 19, 2018), <https://perma.cc/4GJM-EA9W>.

⁶⁴ Justin Phillips & Eban Goodstein, GROWTH MANAGEMENT AND HOUSING PRICES: THE CASE OF PORTLAND, OREGON, 18 CONTEMP. ECON. POL. 334 (2000).

⁶⁵ ROLF PENDALL ET AL., BROOKINGS INST., HOLDING THE LINE: URBAN CONTAINMENT IN THE UNITED STATES 33 (2002), <https://perma.cc/CN7D-3MTL>.

⁶⁶ See HAYLEY RAETZ ET AL., TERNER CTR. HOUS. INNOVATION, U.C. BERKELEY, THE HARD COSTS OF CONSTRUCTION: RECENT TRENDS IN LABOR AND MATERIALS COSTS FOR APARTMENT BUILDINGS IN CALIFORNIA 2, 3, 9 (2020), <https://perma.cc/7MK9-GDS9> (discussing how these factors contribute to the rising cost of building housing); HAYLEY RAETZ ET AL., TERNER CTR. HOUS. INNOVATION, U.C. BERKELEY, RESIDENTIAL IMPACT FEES IN CALIFORNIA, at 4 (2019), <https://perma.cc/8TQV-WUZV>

⁶⁷ See Vivian Kahn, *Facing Opposition to Infill: Still Passionate About Planning*, CAL. PLANNING ROUNDTABLE, <https://perma.cc/A5GN-NNKT> (last visited Oct. 30, 2023) (noting

reduce the informational requirements that a project must meet before approval and, in some cases, mandate local approvals of individual projects.

But these reforms have two key weaknesses that have undermined their success. First, they depend on a welter of complicated, varying, and sometimes unclear geographic limitations as to which projects and parcels they apply to.⁶⁸ This confusion and complexity directly undermines the informational benefits the reforms are intended to produce and hampers the effectiveness of California's efforts to advance infill residential development. By conveying authoritative information via text (rather than via a map), the state limits the ability of developers, policymakers, and members of the public to identify where new housing both can and should be built. Second, in many cases these reforms still depend on local government determinations as to whether they apply, which means local governments can still use their discretion to obstruct infill development.

In this Part, we lay these challenges out in detail, building the basis for our proposal for reform in Part III.

A. The Basics of Land-Use Law and CEQA

Land-use law in California involves many layers of state and local law. The state has sought to both empower and constrain local governments in regulating land-use to ensure that housing needs are met across the state. Here, we provide an overview of these layers of law to help explain why providing greater clarity and certainty to CEQA review for infill housing in California is so important, and why current legal structures do not yet address this need. We first describe the basic framework by which local governments regulate land-use, including the state requirements for local governments to develop general plans to guide land-use regulation. We next describe how CEQA works, how it is deeply embedded in land-use regulation in California, and how it effectively gives local governments broad and often unreviewable discretion to determine whether and when to approve proposals for infill housing projects. Third, we explain how the state has sought to require local governments to provide speedy and clear approval processes for housing proposals that comply with existing local zoning regulations, and how CEQA effectively provides a loophole for these state efforts. Finally, we describe housing element law—another approach the state has taken to ensure local governments provide adequate amounts of

that “opponents of infill pack public meetings and attack proposed projects from every conceivable angle.”)

⁶⁸ As we discuss, *infra*, the state has created a website, Site Check, that helps with some of these information challenges. However, Site Check does not have legal force, which limits its utility. See *Site Check*, *infra* note 263.

housing for Californians. We discuss how housing element law intersects with local zoning and CEQA, and how recent state efforts to substantially increase requirements on local governments to allow for housing will likely trigger substantial CEQA obligations for local governments.

1. Local Land-Use Planning and Zoning

Land-use regulation in California (as in almost every other state) is delegated to local governments, who have the ultimate say as to what is or is not built.⁶⁹ That local regulatory system is at the heart of California's housing crisis. As recent studies have amply documented, housing projects in many California cities face extended timeframes for approval.⁷⁰ Longer timeframes to approve a project increase the costs of construction because they increase the costs to a developer of financing the project.⁷¹ In addition, local governments generally require housing projects to go through a "discretionary review" in which the local government has the ability to reject or impose onerous conditions on a project.⁷² Discretionary review increases the uncertainty about whether a project will be approved, which drives up project costs.⁷³ Costs also can be increased by analytic requirements—many housing projects in California are required to undergo some form of environmental review in which the environmental impacts of a project are analyzed and

⁶⁹ BARCLAY & GRAY, *supra* note 21, at 1.

⁷⁰ See MOIRA O'NEILL ET AL., CAL. AIR RES. BD. & CAL. ENV'T PROT. AGENCY, EXAMINING ENTITLEMENT IN CALIFORNIA TO INFORM POLICY AND PROCESS: ADVANCING SOCIAL EQUITY IN HOUSING DEVELOPMENT PATTERNS 3900-19STC005, 57–58 (Mar. 18, 2022), <https://perma.cc/K9F8-CA45> (summarizing entitlement timeframes and average steps to approval in California cities).

⁷¹ See Biber et al., *supra* note 3, at 12–13 n.34 (collecting sources both noting how local governments may delay projects and the connection between project delay and costs); KATHERINE LEVINE EINSTEIN ET AL., THE POLITICS OF DELAY IN LOCAL POLITICS: HOW INSTITUTIONS EMPOWER INDIVIDUALS 14 (2017), <https://perma.cc/4R5K-7GU5> (noting that additional approval stages increase costs to developers and decrease the probability of development).

⁷² Biber et al., *supra* note 3, at 12–13. Note, however, that California's Housing Accountability Act now limits local governments' authority to use discretionary review to deny a project outright or reduce its density. See Megan Kirkeby, *Memorandum for Planning Directors and Interested Parties* at 1, DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT DIVISION OF HOUSING POLICY DEVELOPMENT (Sept. 15, 2020) ("[T]he HAA was intended to overcome the lack of certainty developers experienced by limiting local governments' ability to deny, make infeasible, or reduce the density of housing development projects.").

⁷³ See Biber et al., *supra* note 3, at 12 n.34 (noting the connection between local government control over a project, project delay, and rising development costs); James C. Clingermayer, *Heresthetics and Happenstance: Intentional and Unintentional Exclusionary Impacts of the Zoning Decision-making Process*, 41 URB. STUD. 377, 385 (2004) ("[M]ore delay and more uncertainty in approval decisions discourage increases in housing supply, which in turn diminishes housing affordability.").

publicly disclosed under CEQA.⁷⁴ These analytic requirements often necessitate hiring consultants to produce site-specific studies.⁷⁵ Finally, opponents to a project (often neighbors in the infill context) can use administrative appeals within a local government's land-use regulatory system or litigation in court to challenge projects, further increasing uncertainty and delay.⁷⁶ Understanding what is wrong with the system requires a brief explanation of how it works.

Local land-use regulation in California begins with the general plan, a document that the state requires local governments to develop that provides the guiding principles for how the local government will develop over the foreseeable future.⁷⁷ California law also mandates that all other local land-use regulations (zoning regulations and specific plans) in the locality be consistent with the general plan,⁷⁸ although some courts have been deferential to local governments in cases where consistency is unclear.⁷⁹ General plans have a number of key elements required by state law, including a housing element, a land-use element, and an open-space element.⁸⁰

The core components of land-use regulation are restrictions on the use of land and on the density of improvements on the land. In California, these core components typically exist in zoning ordinances⁸¹ or specific plans.⁸² Uses might be restricted to residential, commercial,

⁷⁴ O'NEILL ET AL., *supra* note 70, at 51–56 (noting that most projects in California go through discretionary local land-use review processes that require environmental review, and collecting data showing that most projects go through some sort of environmental review process).

⁷⁵ Moira O'Neill et al., *Examining the Local Land Use Entitlement Process in California to Inform Policy and Process* 19 (Berkeley L. Ctr. L., Energy, & Env't, Working Paper No. 2), <https://perma.cc/2RRC-3YXA> (last visited Oct. 30, 2023) (recognizing that navigating a discretionary process often involves hiring consultants).

⁷⁶ O'NEILL ET AL., *supra* note 71 at 78–95. Data on litigation and administrative appeals for approved projects in major jurisdictions in California showing that appeal rates are high, litigation rates are relatively low, but both appeals and litigation can significantly lengthen the timeframe for approval for a project. *Id.*

⁷⁷ See CAL. GOV'T CODE § 65300 (“Each planning agency shall prepare and the legislative body of each county and city shall adopt a comprehensive, long-term general plan for the physical development of the county or city.”).

⁷⁸ See CAL. GOV'T CODE § 65860 (directing localities to amend zoning ordinances that are inconsistent with plans); *id.* § 65454. (“No specific plan may be adopted or amended unless the proposed plan or amendment is consistent with the general plan.”).

⁷⁹ See *e.g.*, *Naraghi Lakes Neighborhood Pres. Ass'n. v. City of Modesto*, 204 Cal. Rptr. 3d 67, 74–75 (Cal. Ct. App. 2016) (finding that since there was no way to decipher what was in compliance, the court would defer to local government).

⁸⁰ See CAL. GOV'T CODE § 65302 (noting that a housing element, land-use element, and open space element are three of the many elements required for a general plan).

⁸¹ See *O'Loane v. O'Rourke*, 231 Cal. App. 2d 774, 780 (1965) (elaborating on the distinction between zoning and planning and defining zoning).

⁸² See CAL. GOV'T CODE § 65451(a). Density, here, refers to both traditional density in zoning (dwelling units per acre) and form-based zoning that does not designate use but also regulates density through constraints on the building form—rather than providing a dwelling units per acre restriction.

industrial, or other, often much more specific categories.⁸³ Governments may restrict density through form—setbacks, height limits, and other standards that dictate the size, shape, and placement of a building on a parcel—or direct limits on the number of residential units allowed on a parcel.⁸⁴ Local governments often layer additional regulatory programs, such as design or architectural review, to further restrict development.⁸⁵

Local governments have additional flexibility in how they review projects that meet the use and density requirements. Local governments may use a ministerial process, in which a government official compares the project proposal to relatively clear, objective standards and cannot use “personal, subjective judgement” in their decision making.⁸⁶ Or local governments may choose to use a discretionary process, one which allows zoning-compliant projects to be denied or modified in order to address aesthetic, community-character, or other idiosyncratic concerns specific to a project.⁸⁷ Nominally ministerial processes may also be discretionary in practice, if the objective standards are so restrictive that nearly any viable project depends on (discretionary) administrative waivers⁸⁸ or a rezoning.⁸⁹ Current data indicates that discretionary review, rather than ministerial review, is common at the local government level in the state.⁹⁰

Discretionary review matters in California for several reasons: it often adds one or more public hearings to the approval process for a project;⁹¹ it can create significant uncertainty and delay for a project; and, critically, discretion is the trigger for environmental review obligations under CEQA.⁹²

2. CEQA

CEQA requires state agencies (including local governments) to fully analyze, publicly disclose, and where feasible, mitigate potentially

⁸³ CAL. GOV'T CODE § 65302(a) (stating the various categories that can be approved land uses).

⁸⁴ CAL. GOV'T CODE § 65850.

⁸⁵ O'NEILL ET AL., *supra* note 70, at 18.

⁸⁶ *See* Prentiss v. City of S. Pasadena, 15 Cal. App. 4th 85, 90 (1993) (“A ministerial decision involves only the use of fixed standards or objective measurements, and the public official cannot use personal, subjective judgment in deciding whether or how the project should be carried out”).

⁸⁷ O'NEILL ET AL., *supra* note 70, at 17–18.

⁸⁸ This is frequently done through a variance. BARCLAY & GRAY, *supra* note 21, at 59–60.

⁸⁹ O'NEILL ET AL., *supra* note 70, at 17–18.

⁹⁰ *Id.* at 57–58, 58 nn.6, 8 (showing numbers of discretionary reviews by city and noting Los Angeles City and County, permitted far more discretionary projects than ministerial).

⁹¹ *See* Biber et al., *supra* note 3, at 12.

⁹² BARCLAY & GRAY, *supra* note 21, at 144.

significant environmental impacts of projects the agency is proposing.⁹³ “Projects” include government permitting of private activities, such as housing development.⁹⁴ CEQA may require significant and costly analyses of topics such as traffic, air quality, wildlife, historic preservation, and public services.⁹⁵ Project opponents also may use disputes over the adequacy of CEQA analysis to contest projects in public hearings, to administratively appeal projects through the local government’s internal land-use regulatory process, and, eventually, to litigate approved projects.⁹⁶

There is a hierarchy of CEQA review processes, going from least to most onerous. At one extreme, certain kinds of projects are exempt from environmental review altogether, either through legislation (“statutory exemptions”) or through regulations (“categorical exemptions”).⁹⁷ For non-exempt projects, an environmental impact report (EIR)—the most intensive form of review—is required if there is a “fair argument” based on substantial evidence that the project might have any significant environmental effect.⁹⁸ There is no weighing of environmental benefits and costs; a project that would have large net environmental benefits must still undergo an EIR if it might also have any significant adverse impact on the local environment.⁹⁹ An intermediate form of review, called a negative declaration (ND), is issued in cases where the agency determines by substantial evidence that there’s no fair argument that the project—either as originally defined or with mitigation to reduce impacts—might have a significant environmental effect.¹⁰⁰

⁹³ *Id.* at 143.

⁹⁴ See *Friends of Mammoth v. Bd. of Supervisors*, 8 Cal. 3d 247, 252, 262–63 (1972) (holding that local government must prepare an environmental impact report prior to granting permit for private condominiums).

⁹⁵ ASS’N OF ENV’T PRO., *supra* note 47, at 149, 194, 225.

⁹⁶ *Id.* at 263, 278, 286; Moira O’Neill, Giulia Gualco-Nelson & Eric Biber, *Developing Policy from the Ground Up: Examining Entitlement in the Bay Area to Inform California’s Housing Policy Debates*, 25 HASTINGS ENV’T. L.J. 1, 16–17 (2019) [hereinafter O’Neill, Gualco-Nelson & Biber, *Developing Policy*] (describing the use of citizen suits to enforce CEQA).

⁹⁷ See BARCLAY & GRAY, *supra* note 21 at 150–51 (nothing that “[s]tatutory exemptions generally apply to classes of projects determined by the Legislature to promote an interest important enough to justify foregoing the benefits of environmental review,” while “categorical exemptions are classes of projects that the Secretary of resources has found do not have a significant effect on the environment”).

⁹⁸ *Id.* at 157, 159. For flow charts with the application of CEQA to local land-use decisions, see *id.* at 154–55.

⁹⁹ *Id.* at 158.

¹⁰⁰ *Id.*; see also *No Oil, Inc. v. City of L.A.*, 13 Cal. 3d 68, 74–75 (1974) (explaining that if an initial threshold study “demonstrates that the project ‘will not have a significant effect,’ the agency may so declare in a brief Negative Declaration”); CAL. CODE REGS. § 15064(f)(1) (“If the lead agency determines there is substantial evidence in the record that the project may have a significant effect on the environment, the lead agency shall prepare an EIR.”).

CEQA's core idea—"look (at impacts) before you leap (approve development)"—is innocuous enough, but, as the balance of this subsection explains, three features of the law combine to pose a serious threat to infill housing production. First, *politicized decisionmaking*: CEQA designates the elected governing body of a city or county as the local government's official CEQA decisionmaker, thus inviting politicized project review even in cities that would prefer to delegate these matters to an administrative body insulated from electoral politics.¹⁰¹ Second, *baffling complexity*: CEQA has numerous statutory and regulatory exemptions for infill housing (among other things), but the exemptions have arcane requirements and include ambiguous exceptions. Many questions about the application of exemptions receive deferential review in court, which means that the (political) CEQA decisionmaker has a fairly broad zone of discretion to issue or deny exemptions without running afoul of the law.¹⁰² Third, *asymmetric litigation risk and remedies*: CEQA makes it easy for project opponents to get into court and challenge a local government that has allegedly shirked environmental review, but traditionally, CEQA afforded project proponents no recourse when a city demanded excessive, unnecessary environmental studies.

Politicized Decisionmaking

As noted above, cities often have a variety of local pathways for processing development applications. Planning staff may review and approve some types of projects without a public hearing and with no right of appeal to the city council. Projects assigned to the planning commission, on the other hand, usually require a mandatory public hearing. Others may fall directly under the purview of the city council or be appealable to the council. CEQA vitiates this variation by designating the local *elected* governing body as a local agency's final CEQA decision maker.¹⁰³ While a city may delegate CEQA determinations to an administrative body that has authority to approve the project, such as a planning commission, CEQA dictates that the body's CEQA determination must be appealable to the elected governing body.¹⁰⁴ Thus, even if the neighbors who oppose a project cannot appeal the planning department's issuance of permits to the city council, they

¹⁰¹ CAL. PUB. RES. CODE § 21151(c); *see also infra* text accompanying notes 103–105.

¹⁰² *See infra* Part II.D.

¹⁰³ CAL. PUB. RES. CODE § 21151(c) ("If a nonelected decisionmaking body of a local lead agency certifies an environmental impact report, approves a negative declaration or mitigated negative declaration, or determines that a project is not subject to this division, that certification, approval, or determination may be appealed to the agency's elected decision-making body, if any.")

¹⁰⁴ *Id.*

can get the project before the council by appealing the CEQA clearance. While the city council could not reject the permits, it could toss sand in the gears by overturning the CEQA clearance and remanding for further, more intensive environmental studies.¹⁰⁵

Baffling Complexity

Whether a project is even eligible for the lowest level of CEQA review—the exemption—is often hard to determine. The categorical exemptions (promulgated as regulations by the Secretary of Resources in the CEQA Guidelines)¹⁰⁶ are themselves subject to various exceptions. Specifically, they do not apply if there is a reasonable probability of a significant environmental impact due to unusual circumstances, or significant cumulative impacts from projects of the same type, or impacts on a uniquely sensitive environment.¹⁰⁷ However, local agencies receive deference on disputed questions of fact concerning a project's eligibility for an exemption.¹⁰⁸ The upshot is that it can be difficult for a project proponent to assess, *ex ante*, whether a particular project even qualifies for a CEQA exemption. And even if the project does qualify, the city council may use its fact-finding discretion to deny the exemption. Predicting the issuance of an exemption thus requires deep knowledge of local politics, not just knowledge of the law and the evidentiary record.

¹⁰⁵ See generally Christopher S. Elmendorf & Timothy G. Duncheon, *When Super-Statutes Collide: CEQA, the Housing Accountability Act, and Tectonic Change in Land Use*, 49 *ECOLOGY L. Q.* 655, 677–84 (2022).

¹⁰⁶ CAL. CODE REGS. tit. 14, §§ 152300, 152300.2.

¹⁰⁷ See *id.*, § 152300.2; BARCLAY & GRAY, *supra* note 21, at 152 (summarizing situations when exceptions to the categorical exemptions would not apply).

¹⁰⁸ See *Save the Plastic Bag Coal. v. City & Cnty. of San Francisco*, 222 Cal. App. 4th 863 (2014) (refusing to apply a categorical exemption to a local ordinance); *Concerned Dublin Citizens v. City of Dublin*, 214 Cal. App. 4th 1301 (2013) (affirming denial of a petition of a writ of mandate challenging application of an exemption); BARCLAY & GRAY, *supra* note 21, at 151, 156 (describing categorical exemptions and describing the burden-shifting “to the challenging party to produce evidence that one of the exceptions applies” once an agency determines that a categorical exclusion applies to the project). The same goes for factual questions about exceptions to the exemption. See *Berkeley Hillside Pres. v. City of Berkeley*, 60 Cal. 4th 1086, 1114 (2015); *Walters v. City of Redondo Beach*, 1 Cal. App. 5th 809, 820 (2016). If a local government applies an exemption, but does not explicitly determine whether the unusual circumstances exception to the exemption applies, then the court “will review the record to determine whether it contains substantial evidence to support a fair argument that any purported unusual circumstances identified by the petitioner may have a significant effect on the environment.” BARCLAY & GRAY *supra* note 21 at 152 (citing *Respect Life S. S. Francisco v. City of South San Francisco*, 15 Cal. App. 5th 449 (2017)). The burden is on project opponents to provide evidence that an exception to the exemption applies. *Id.* at 156; *Berkeley Hillside Pres.*, 60 Cal. 4th at 1105.

Asymmetric Litigation Risk and Remedies

CEQA's remedial framework compounds the problems of complexity and politicization. If the local agency does *less* environmental review than CEQA requires (e.g., a MND instead of an EIR), any project opponent who participated in the administrative proceeding may attack the inadequate review in court.¹⁰⁹ The standard remedy is an injunction, putting the project on hold until the agency has fully complied with CEQA.¹¹⁰ Because project financing is hard to obtain while litigation is ongoing, even far-fetched legal claims can hold up a project for years.¹¹¹ By contrast, if a city demands *more* environmental study than CEQA requires (e.g., demanding an EIR for a project that qualifies for an exemption), the project proponent has traditionally been out of luck. CEQA provides no cause of action against excessive environmental review, and CEQA expressly instructs that “[nothing]” in it “authorizes any court to direct any public agency to exercise its discretion in any way.”¹¹² Background principles of administrative law, like ripeness and finality, also cut against judicial review when an agency asserts that its CEQA process is ongoing.¹¹³

Prior to 2024, as best we can tell, only one court had even entertained the argument that it could be an abuse of discretion for an agency to demand a more intensive form of environmental review than CEQA actually requires for a project.¹¹⁴ Other courts said that an agency's CEQA decision is not judicially reviewable until the agency certifies the decision as complete.¹¹⁵ The cases on point were few, which

¹⁰⁹ See generally STEPHEN L. KOSTKA & MICHAEL H. ZISCHKE, PRACTICE UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT §§ 23.97–23.109 (2nd ed., Mar. 2023 update, Linda C. Klein & Stephen L. Kostka authors) [hereinafter CEQA PRACTICE GUIDE] (summarizing exhaustion requirements for CEQA litigation).

¹¹⁰ *Id.* §§ 23.86–23.98 (explaining preliminary injunction requirements).

¹¹¹ Cf. Press Release, Holland & Knight, CEQA Lawsuits Remain a Roadblock to Housing in California, Holland & Knight Study Finds (May 26, 2023), <https://perma.cc/6LV7-L3D7> (“[T]he unpredictability of CEQA lawsuit outcomes has created a low-cost, no-risk strategy for project opponents to block even benign and beneficial projects until litigation, inclusive of appeals, is completed — typically in four to five years. This judicial outcome uncertainty has made lenders, investors and grantors unwilling to fund projects while CEQA lawsuits remain pending.”).

¹¹² CAL. PUB. RES. CODE § 21168.9(c).

¹¹³ Elmendorf & Duncheon, *supra* note 105, at 679–84.

¹¹⁴ See *Oro Fino Gold Mining Corp. v. City of El Dorado*, 225 Cal. App. 3d 872, *passim* (1990) (rejecting, on the merits, a mining company's appeal to overturn agency's EIR requirement, rather than finding the agency's decision judicially unreviewable).

¹¹⁵ See *Schellinger Bros. v. City of Sebastopol*, 179 Cal. App. 4th 1245, 1255–56 (2009) (noting—without reaching the correctness of—a trial court's determination that courts lack “the authority to review the appropriateness of” a city's decision to require additional environmental study and another round of public comment following circulation of a draft EIR); *Order Re: Demurrer at 6, Yes In My Backyard v. City & Cnty. of San Francisco*, Case No. CPF-22-517661 (Super. Ct. Cal., Cnty. of S.F., Sept. 9, 2022) (“[A]s no final EIR has been certified, the cause of action [alleging that city council abused its discretion by

we think reflects the fact that such abuse-of-discretion claims were legal longshots, and, further, that even if a court were to agree with the developer on the merits, it's not clear that the court could provide an effective remedy.¹¹⁶

But the winds may be changing. In 2023, a closely divided legislature amended the Housing Accountability Act to provide a cause of action against CEQA abuse with respect to certain types of housing projects.¹¹⁷ To qualify, a project must provide at least fifteen dwelling units per acre and must be located on an environmentally benign infill site outside of fire-danger zones.¹¹⁸ The bill effectively requires cities to issue a CEQA exemption if the developer asks for it and if, on the record before the local agency, the exemption would hold up in court.¹¹⁹ The bill also limits cities' authority to demand further environmental studies after the preparation and presentation for adoption of a legally adequate EIR or ND.¹²⁰

Short on the heels of AB 1633, the Court of Appeal in *Hilltop Group, Inc. v. County of San Diego*¹²¹ held that when a city denies a so-called "community plan exemption," the denial may be challenged in court as an abuse of discretion.¹²² Projects are eligible for the community-plan exemption if they conform to the "density established [for the site] by existing zoning, community plan, or general plan

vacating planning commission's certification of EIR and directing further study] is not yet ripe.").

¹¹⁶ CAL. PUB. RES. CODE § 21168.9(c) ("Nothing in this section authorizes any court to direct any public agency to exercise its discretion in any way."); see also *Schellinger Bros.*, 179 Cal. App. 4th at 1262, 1266 (holding that, in principle, a court may order an agency that is sitting on an EIR to make up its mind about *whether* to certify an EIR as complete (as opposed to requiring further study), but that a court may not address the merits of an EIR until an agency decides to certify it as complete). The *Schellinger Bros.* court also vitiated the project sponsor's abuse-of-discretion claim by holding that the sponsor had, by cooperating with the city's CEQA review past the nominal statutory deadline, forfeited the right to sue on the deadline in the hopes of getting a court to order the local agency even to make a decision on whether to certify the EIR. *Id.* at 1250. Notably, CEQA's provision for the local agency's filing of a "Notice of Exemption," signifying finality of the exemption determination and starting the statute of limitations for litigation, states that it may only be issued upon *approval* of the project. CAL. PUB. RES. CODE § 21108(b). There is no corresponding procedure for noticing a final determination that a project is ineligible for an exemption, and there is no statutory procedure for challenging an agency's decision to prepare an EIR for a project that could have been processed with an exemption or negative declaration.

¹¹⁷ AB 1633, ch. 768, 2023–2024 Leg. Sess. (Cal. 2023) (enacted) was adopted by a one-vote margin. See *A.B. 1633 Housing Accountability Act: Disapprovals: California Environmental Quality Act*, CAL. LEG. INFO. (2023–2024), <https://perma.cc/V6YP-AEAW> (reporting vote totals in each chamber).

¹¹⁸ CAL. GOV'T CODE § 65589.5(h)(6)(D) & (E).

¹¹⁹ CAL. GOV'T CODE § 65589.5(h)(6)(D).

¹²⁰ CAL. GOV'T CODE § 65589.5(h)(6)(E).

¹²¹ *Hilltop Grp., Inc. v. Cnty. of San Diego*, 318 Cal. Rptr. 3d 336 (Cal. Ct. App. 2024).

¹²² *Id.* at 368.

policies for which an EIR was certified,” with the caveat that certain project-specific effects may require further study.¹²³ The *Hilltop* court held, however, that a local government may only deny a community-plan exemption if it finds by substantial evidence that the project’s environmental effects would not be substantially mitigated by generally applicable mitigation measures required by the zoning code, community plan, or general plan.¹²⁴ Notably, the *Hilltop* court relied not on AB 1633 (for which the project did not qualify), but on the text of the community-plan exemption, which, as the court saw it, implied that issuance of the exemption was mandatory.¹²⁵ *Hilltop* may well clear a path through CEQA for housing and other projects that 1) conform to a local government’s land-use regulations and 2) will not result in types of impacts that were unforeseen when the city adopted its rules.

In sum, thanks to AB 1633 and *Hilltop*, the problem of asymmetric litigation risk and remedies under CEQA looks considerably less severe than it did just a year ago. But we should acknowledge that AB 1633 remains untested in court, and it is also unclear whether courts can provide workable remedies in *Hilltop*-like cases, given CEQA’s explicit prohibition on judicial control of the lead agency’s exercise of discretion.¹²⁶ Also, to the extent that AB 1633 and *Hilltop* open a path through the CEQA maze, they only do so for discrete projects, not for legislative updates to a city’s zoning code or general plan. Finally, determining the scope and applicability of both AB 1633 and CEQA exemptions eligible for treatment under *Hilltop* may present significant challenges, but a map-based system would make implementation much easier.

3. State Efforts to Speed Review of Proposed Housing Projects

Local agencies’ CEQA discretion is becoming increasingly anomalous as California’s framework for regulating housing development evolves. The HAA, passed in 1983, strictly limits California cities’ authority to deny or reduce the density of projects that comply with applicable, objective general plan and zoning standards.¹²⁷ Denials and conditions of approval that reduce density are only allowed if the city finds, by a preponderance of the evidence, that the project would have a “specific, adverse effect on public health or safety,” in violation of “objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed

¹²³ CAL. CODE REGS. tit. 14, § 15183 (West 2023).

¹²⁴ *Hilltop*, 318 Cal. Rptr. 3d at 359.

¹²⁵ *Id.* at 355–57.

¹²⁶ CAL. PUB. RES. CODE § 21168.9(c) (“Nothing in this section authorizes a court to direct any public agency to exercise its discretion in any particular way.”).

¹²⁷ CAL. GOV’T CODE § 65589.5 (West 2023).

complete.”¹²⁸ If there is a question about whether a project complies with applicable general plan and zoning standards (as opposed to health and safety standards), the project is “deemed consistent, compliant, and in conformity” as matter of law if a reasonable person *could* deem it compliant.¹²⁹

Under the HAA, cities also forfeit their authority to deny a housing project for noncompliance with objective general plan and zoning standards if they fail to provide the developer with “written documentation identifying [the standards and explaining] the reason or reasons [the city] considers the housing development to be inconsistent” within thirty to sixty days of “the date that the application for the housing development project is determined to be complete.”¹³⁰ Whereas CEQA politicizes project review by making any CEQA clearance appealable to the city council, this provision of the HAA does just the opposite, estopping city councils from denying projects based on local development standards that city staff did not include in their thirty-to-sixty day notice of noncompliance.

The HAA does leave cities with a relatively free hand to impose discretionary conditions of approval that do not reduce density,¹³¹ but such conditions would not address resident objections concerning the size of a project or the number of people it would bring into a quiet neighborhood.

The remedial provisions of the HAA are rigorous. At a minimum, courts that find a violation are to retain jurisdiction and issue an order compelling the municipality’s compliance within sixty days.¹³² If the court finds that the local agency violated the HAA in bad faith, or if the agency fails to comply with the initial court order within sixty days, the court may order the project approved.¹³³ Cities that delay complying with a court’s HAA order risk serious fines.¹³⁴ If a city wants to appeal an HAA judgment, the city must post a bond and compensate the developer’s attorney fees and costs of suit if the city loses the appeal.¹³⁵

¹²⁸ *Id.* § 65589.5(j)(1).

¹²⁹ *Id.* § 65589.5(f)(4).

¹³⁰ *Id.* § 65589.5(j)(2).

¹³¹ *Cal. Renters Legal Advoc. & Education Fund v. City of San Mateo*, 68 Cal. App. 5th 820, 846 (2021) (“[E]ven with respect to standards that are not objective, the HAA does not bar local agencies from imposing conditions of approval; rather, it prohibits conditions of approval ‘that the project be developed *at a lower density*,’ unless public health or safety findings are made.” (quoting HAA, CAL. GOV’T CODE § 65589.5(j)(1)). Note, however, that if the project meets certain affordability requirements, the HAA also prevents local agencies from imposing conditions of approval “that render[] the . . . project infeasible for development for the use of very low, low-, or moderate-income households.” HAA, CAL. GOV’T CODE § 65589.5(d).

¹³² CAL. GOV’T CODE § 65589.5(k).

¹³³ *Id.*

¹³⁴ *Id.* § 65589.5(k), (l).

¹³⁵ *Id.* § 65589.5(m).

Complementing the HAA are strict statutory limits on how much time a city may spend processing a development application. The Permit Streamlining Act¹³⁶ (PSA) established a transparent process for filing project applications.¹³⁷ Cities must compile a public list of everything required for a given application and include the criteria the city will use to determine the application's completeness.¹³⁸ Within thirty days of receiving a project application, the city must make a written determination of whether the application is complete and, if not, "provide the applicant with an exhaustive list of items that were not complete."¹³⁹ Resubmittal of a revised project application triggers an additional thirty-day review period.¹⁴⁰ If the city misses its response deadline, the application is "deemed complete" by operation of law.¹⁴¹

Once the city determines a project application is complete, two other important clocks begin to tick. First, as noted above, the HAA gives the city thirty to sixty days to notify the developer of any applicable general plan, zoning, and development standards that the project violates, on pain of the project being "deemed to comply" as a matter of law.¹⁴² Second, under CEQA, the city has thirty days after marking an application as complete to decide whether to process the project with an EIR or an ND.¹⁴³ The California Department of Housing and Community Development has interpreted this thirty-day period to also apply to exemption determinations.¹⁴⁴ CEQA further provides that an EIR shall be completed within one year, and an ND within six months, of the application completeness date.¹⁴⁵

¹³⁶ *Id.* § 65920–65964.5.

¹³⁷ *See id.* §§ 65940(a), 65940.1(a) (requiring public agencies to increase procedural transparency for applicant parties).

¹³⁸ *Id.* §§ 65940, 65941(a).

¹³⁹ *Id.* § 65943(a).

¹⁴⁰ *Id.*

¹⁴¹ *Id.* § 65943(a)–(b).

¹⁴² HAA, CAL. GOV'T CODE § 65589.5(j)(2).

¹⁴³ CEQA, CAL. PUB. RES. CODE §§ 21080.1, 21080.2 (requiring lead agency to make "final" determination of whether to prepare an environmental impact report, negative declaration, or mitigated negative declaration within 30 days of the date that "the application has been received and accepted as complete"). Though this phrasing is slightly different, this probably refers to the date application was determined or deemed complete pursuant to the PSA, CAL. GOV'T CODE § 65943(a).

¹⁴⁴ Letter from Shannan West, Hous. Accountability Unit Chief, Dep't of Hous. & Cmty. Dev., to Sharon Gong, Senior Planner, City of Berkeley (June 3, 2022), <https://perma.cc/T8V7-MCPY>.

¹⁴⁵ CEQA, CAL. PUB. RES. CODE § 21151.5(a) (requiring local agencies to establish time limits not to exceed one year for completing an EIR and not to exceed 180 days for completing and adopting a negative declaration); CAL. CODE REGS. tit. 14, § 15107 (West 2023) ("[T]he negative declaration [for a private project that requires public permits] must be completed and approved within 180 days from the date when the lead agency accepted the application as complete."); *id.* § 15108 ("[T]he final EIR [for a private project that requires public permits shall be completed] within one year after the date when the lead agency accepted the application as complete.").

After the city wraps up its CEQA review, time limits for project approval or denial mandated in the PSA kick in.¹⁴⁶ Cities are given sixty days to make up their mind following an exemption or ND and up to 180 days after an EIR.¹⁴⁷ The city is allowed a one-time, ninety-day extension if the applicant consents,¹⁴⁸ but if a city fails to approve or deny the project within the PSA-prescribed time period, the project is again “deemed approved” by operation of law.¹⁴⁹ A deemed-approved permit is similar to a ministerial permit in that it may be challenged in court on the ground that the project was not, in fact, approvable under applicable local and state standards.¹⁵⁰

Another method California has employed to speed up its permitting process is to cap the number of public hearings on a project. Under the Housing Crisis Act of 2019,¹⁵¹ a city must either approve or deny the project by a project’s fifth hearing,¹⁵² with a hearing continued to another date counted as a new hearing.¹⁵³

The Achilles’ heel of this elaborate scheme is that, in practice, CEQA’s time limits have not been enforceable. If a city sits on an apparently completed environmental review document after the deadline has passed and refuses to take any action whatsoever, a court may order the city to *exercise discretion* about whether to approve the CEQA clearance or require further study, but, in contrast to an HAA case, the court may not order the city to approve it.¹⁵⁴ There is no such

¹⁴⁶ PSA, CAL. GOV’T CODE § 65950(a).

¹⁴⁷ *Id.* §§ 65950(a)(1), (4)–(5).

¹⁴⁸ *Id.* § 65957.

¹⁴⁹ *Id.* § 65956(b). There is an open question about what kind of notice, if any, the developer or city must provide to affected neighbors before a project may be deemed approved. *Compare Mahon*, 139 Cal. App. 4th 812, 824 (2006) (holding that due process under state constitution is satisfied so long as affected neighbors were notified that project could be deemed approved without a hearing), *with American Tower Corp v. City of San Diego*, 763 F.3d 1035, 1048–49 (9th Cir. 2014) (disagreeing with *Mahon* and interpreting the California constitution to require a public hearing before project may be deemed approved).

¹⁵⁰ *Ciani v. San Diego Trust & Sav. Bank*, 233 Cal. App. 3d 1604, 1613 (1991) (holding that a deemed-approved permit “bears all the legal entitlements of a tangible permit issued by the agency” and is subject to appeal beyond the local agency—i.e. to a state agency or in court, as applicable—in the same manner and on the same ground as a tangible permit); *see id.* at 1614 (reserving the question of whether a deemed-approved permit is subject to internal appeal within the local government, while noting arguments that internal appeals could effectively “gut[]” the PSA).

¹⁵¹ S.B. 330, ch. 654, 2019 Cal. Stat. 5608 (2019) (amending and adding CAL. GOV’T CODE §§ 65589.5, 65940, 65943, 65950, 65905.5, 65913.10, 65941.1, 66300–66301).

¹⁵² CAL. GOV’T CODE § 65905.5(a).

¹⁵³ *Id.*

¹⁵⁴ *Schellinger Bros.*, 179 Cal. App. 4th 1245, 1262–66 (2009) (holding that, in principle, a court may order an agency that is sitting on an EIR to make up its mind about whether to certify an EIR as complete, as opposed to requiring further study, but that a court may not address the merits of an EIR until an agency decides to certify it as complete); CEQA, CAL. PUB. RES. CODE § 21168.9(c) (“Nothing in this section authorizes a court to direct any public agency to exercise its discretion in any particular way.”).

thing as a “deemed approved” CEQA clearance,¹⁵⁵ let alone one which is “deemed to comply” as a matter of law. Moreover, the California Court of Appeal created something of a “catch-22” when it held that a CEQA-deadline suit by an applicant who had cooperated with the city past the deadline was barred by laches.¹⁵⁶ Yet if the applicant does not cooperate, they will be unable to catch and correct substantive shortcomings in the environmental review document—shortcomings that could result in the project being delayed by CEQA lawsuits filed by project opponents. In another recent decision, California’s Superior Court held that the five-hearing limit of the Housing Crisis Act is not enforceable until after the local government has certified its CEQA review as complete.¹⁵⁷

The tandem administration of the HAA, the PSA, and the Housing Crisis Act strictly limits the substantive grounds on which cities may deny or downsize an arguably compliant housing project, the amount of time that cities may take to approve or deny it, and the extent to which cities may delay the decision via public hearings and review by the city’s elected governing body. But CEQA represented a major loophole in this scheme, as it seemed to enable city councils to delay indefinitely (with unwarranted demands for further environmental studies) the very same projects the HAA says the city may not deny. Whether AB 1633 and the *Hilltop* case effectively close the CEQA loophole remains to be seen.

4. Housing Element Law

To address obstacles to housing production in California, local governments should reform their land-use rules to reduce discretionary review for housing projects, and thus also reduce the application of CEQA.¹⁵⁸ Though local governments may not wholeheartedly embrace this approach (for reasons we discuss below), by its text, state law provides strong incentives for local governments to remove these regulatory obstacles. State law requires local governments to adopt housing elements as part of their general plan.¹⁵⁹ Those housing

¹⁵⁵ *Schellinger Bros.*, 179 Cal. App. 4th at 1260.

¹⁵⁶ *Id.* at 1250, 1267–70.

¹⁵⁷ Order Re: Demurrer, *supra* note 115, at 3–4. The court also intimated (without deciding) that CEQA hearings perhaps do not count toward the five-hearing cap because “the [CEQA] Guidelines encourage public hearings.” *Id.* at 4.

¹⁵⁸ See, e.g., Liam Dillon, *This is How California’s Governor Wants to Make it Easier to Build Affordable Housing*, L.A. TIMES (May 14, 2016, 12:05 AM), <https://perma.cc/8HQW-RQZP> (reporting on proposal by then-Governor Brown for more by-right approvals of housing, overriding local development restrictions, as well as support for the proposal from academics); Ethan Elkind, *Obama Administration Takes on Local Barriers to New Housing*, LEGALPLANET (Sept. 26, 2016), <http://perma.cc/6RDV-Q2M6> (reporting on similar recommendation by Obama Administration).

¹⁵⁹ BARCLAY & GRAY, *supra* note 21, at 14. State law requires local governments to enact a general plan that serves as a “constitution” for development within the jurisdiction; all zoning and land-use regulatory decisions must be consistent with the plan. *Id.* at 9–10.

elements must provide adequate capacity for housing to meet a local government's fair share of regional housing needs, identify obstacles to meeting that fair share, and provide a program to remove those obstacles.¹⁶⁰ Failure to enact adequate housing elements can result in financial penalties and subject the city to a "builder's remedy" that exempts 20% low-income and 100% moderate-income projects from the city's zoning code and the general plan.¹⁶¹ Adequate enforcement of state law could therefore pressure even reluctant local governments to reduce legal obstacles to housing.¹⁶²

One of the most effective ways a local government can remove obstacles to housing production is through "upzoning"—reducing the stringency of use and density restrictions on housing development so that more projects with more units can be approved through an efficient, by-right process that does not trigger CEQA review.¹⁶³ However, in

¹⁶⁰ For an overview, see BARCLAY & GRAY, *supra* note 21, at 457 (outlining the requirements when an element limits the number of housing units); *Building Blocks: Land Use Controls*, CAL. DEP'T HOUS. & CMTY. DEV., <https://perma.cc/5VH5-5QG2> (last visited Oct. 31, 2023). For specific provisions, see CAL. GOV'T CODE §§ 65302.8, 65863.6 (directing plans that include local limits on housing to be justified in the housing element of the plan).

¹⁶¹ CHRISTOPHER S. ELMENDORF, UCLA LEWIS CTR. FOR REG'L POL'Y STUD., A PRIMER ON CALIFORNIA'S "BUILDER'S REMEDY" FOR HOUSING-ELEMENT NONCOMPLIANCE 3 (2022), <https://perma.cc/8MGH-PE93>.

¹⁶² Historically, the state has not aggressively enforced the housing element law. Liam Dillon, *California Lawmakers Have Tried for 50 Years to Fix the State's Housing Crisis. Here's Why They've Failed*, L.A. TIMES (June 29, 2017, 3:00 AM), <https://perma.cc/A9W7-UUPP>. However, recent changes to the legislation make enforcement easier, and the state appears to be becoming more assertive in its enforcement efforts. Christopher Elmendorf et al., *Making It Work: Legal Foundations for Administrative Reform of California's Housing Framework*, 47 ECOLOGY L.Q. 973, 1052–53, 1055 tbl.A-1 (2020) (providing an overview of many of those recent changes); J.K. Dineen, *State Investigating S.F.'s Decision to Reject Turning Parking Lot Into 500 Housing Units*, S.F. CHRON. (Oct. 29, 2021, 2:41 PM), <https://perma.cc/2LEQ-3GPG> (reporting on letter from state investigating whether San Francisco is approving sufficient housing to meet demand). There can be a tension between state housing element law, which pushes local governments to authorize more housing development, and other components of state land-use policy that seek to protect habitat, open-space, agricultural lands, and reduce fire hazard risks. Biber & O'Neill, *supra* note 12, at 976–77; *see also infra* notes 8–22. State housing element law attempts to reconcile this tension to some extent by limiting some legal tools to advance housing to urban areas. For instance, the Housing Accountability Act (HAA), which requires streamlined approvals for some kinds of housing projects, does not apply on agricultural lands or outside of urbanized areas. BARCLAY & GRAY, *supra* note 21, at 450.

¹⁶³ *See, e.g.*, DYLAN CASEY, CAL. RENTERS LEGAL ADVOC. & EDUC. FUND, A GUIDE TO ENDING SINGLE FAMILY ZONING: LESSONS LEARNED FROM 39 YEARS OF ADU LEGISLATION 10–11 (2021) (summarizing proposals to increase housing production through by reducing zoning regulations and delays for approvals); JARED NOLAN, TERNER CTR. HOU. INNOVATION, U.C. BERKELEY, UPZONING UNDER SB 50: THE INFLUENCE OF LOCAL CONDITIONS ON THE POTENTIAL FOR NEW SUPPLY 1, 6, 14–15 (2019), <https://perma.cc/8SSJ-XJV6> (finding that a proposed bill, SBS.B. 50, focused on "relaxing zoning requirements," would "unlock development potential" around transit sites while also laying out other barriers to development that might interfere with housing construction even with this change); Jenny Schuetz, *Democrats Hear the "Yes in My Backyard" Message*, ATLANTIC

California there is a catch: Local governments that upzone are taking a government action that might affect the environment, and so must do CEQA review of the proposals to upzone themselves, providing a thorough analysis of the potential environmental impacts of denser housing within the jurisdiction.¹⁶⁴

Despite this potential drawback, this kind of CEQA review is tractable and regularly performed by local governments. Indeed, we have found that many local jurisdictions heavily rely on “tiering,” the practice of specific, individual projects borrowing from the completed neighborhood or city plan and zoning CEQA analyses to make the CEQA review of the individual project quicker and easier.¹⁶⁵ This process incorporates the public participation and engagement solicited at the planning stage, when the city is developing its overall zoning for an area, thus expediting review for individual projects (perhaps with no hearings at all).¹⁶⁶

But CEQA review of zoning-level plans can be expensive. Like individual proposals, zoning-level CEQA analyses face public hearings, uncertainty, and the possibility of litigation. But unlike individual project-specific CEQA review, which tends to be paid for by the project proponent, CEQA analysis for this kind of large-scale zoning reform is paid for by the local government, which may have limited funds, or a limited appetite, to pay for the review.¹⁶⁷

As the state, through housing element law, pushes local governments to upzone more to facilitate more housing development, these challenges may be exacerbated. The state sets a Regional Housing Need for each major metropolitan area in the state that is the basis for determining the Regional Housing Need Allocation (RHNA) for each local government within that metropolitan area.¹⁶⁸ A higher Regional Housing Need means higher RHNAs for each local government, which in turn imposes a higher burden in the housing element process on local governments to demonstrate their zoning provides adequate opportunity for the construction of housing to meet their RHNA. The Regional Housing Need in the Bay Area increased almost three-fold, from 187,990

(July 30, 2019), <https://perma.cc/S6QH-73P9> (summarizing calls for upzoning and other housing reforms by 2020 Democratic presidential candidates); Jenny Schuetz, *To Improve Housing Affordability, We Need Better Alignment of Zoning, Taxes, and Subsidies*, BROOKINGS INST. (Jan. 7, 2020), <https://perma.cc/F3W9-WJRW> (advocating for upzoning alongside other housing reforms).

¹⁶⁴ See Vivan Kahn & Daniel A. Muller, *Zoning*, in CONTINUING EDUCATION OF THE BAR, CALIFORNIA LAND USE PRACTICE ch. 4, § 4.32(a) (2023) (explaining that amending a zoning ordinance requires a CEQA analysis on the potential environmental impacts).

¹⁶⁵ O'NEILL ET AL., *supra* note 70, at 70, 75–77, 77 tbl.19, 115; see also O'Neill, Gualco-Nelson & Biber, *Developing Policy*, *supra* note 96, at 13 (defining tiering and its relation to CEQA).

¹⁶⁶ O'NEILL ET AL., *supra* note 70, at 20–21, 73.

¹⁶⁷ *Id.* at 20.

¹⁶⁸ *Id.* at 25.

units in the 2014–22 period to 441,176 units in the 2022–30 period.¹⁶⁹ For the Los Angeles region, the Regional Housing Need increased from less than 450,000 units for the 2013–21 period to more than 1,340,000 units for the 2021–2029 period.¹⁷⁰ In other words, many local governments may be forced to rezone so their cities can accommodate three times more housing than was originally allowed and planned for.

But as is the case for most housing challenges, finding a viable solution is complicated—as recent research makes clear, most housing development projects do not use the maximum amount of zoning available to them in terms of either the sites that are available or the building envelope or number of units that are actually constructed.¹⁷¹ In addition, only a small fraction of sites that could, in theory, be developed will ever, in fact, be developed over the eight-year period for RHNA planning.¹⁷² Consequently, the zoning envelope—the amount of density that the zoning ordinance theoretically allows¹⁷³—will have to be significantly larger than the production target. To increase housing production over historic rates, cities will need to do more than upzone an area for the exact quantity of housing needed—they must instead upzone for far greater density than needed to actually achieve their specific target.¹⁷⁴ That of course, means that even more ambitious zoning reform will be required.

¹⁶⁹ *Compare*, Letter from Glen Campora, Assistant Deputy Dir., Cal. Dep't of Hous. & Cmty. Dev., to Ezra Rapport, Executive Director, Ass'n of Bay Area Gov'ts, Regional Housing Need Determination for Housing Element Updates, Dep't of Hous. & Cmty. Dev. (Feb. 24, 2011), *with*, Megan Kirkeby, Deputy Director, Cal. Dep't of Hous. & Cmty. Dev., to Theresa W. McMillan, Executive Director, Ass'n of Bay Area Gov'ts, Final Housing Need Determination (June 9, 2020).

¹⁷⁰ Letter from Glen A. Campora, Assistant Deputy Dir., Cal. Dept. of Hous. & Cmty. Dev., to Hasan lkhata, Executive Director, S. Cal. Ass'n of Gov'ts, Regional Housing Need Assessment Determination (Aug. 17, 2011) (announcing target for 5th planning period); Letter from Douglas McCauley, Acting Director, Cal. Dept. of Hous. & Cmty. Dev., to Kome Ajise, Executive Director, S. Cal. Ass'n of Gov'ts, Final Regional Housing Need Assessment (Oct. 15, 2019) (announcing target for 6th planning period); LOS ANGELES CITY PLANNING, LOS ANGELES HOUSING ELEMENT OF THE GENERAL PLAN, HOUSING NEEDS ASSESSMENT, 2021–2029 (2021), <https://perma.cc/AD2A-MMLZ>.

¹⁷¹ *See* Elmendorf, *supra* note 162, at 988–89, 88 n.83 (showing that many housing development projects do not use the maximum zoning available to them).

¹⁷² *See* SIDHARTH KAPUR ET AL., UCLA CTR. REG'L POL. STUD., WHAT GETS BUILT ON SITES THAT CITIES “MAKE AVAILABLE” FOR HOUSING? 14, 22 (2021), <https://perma.cc/5J39-4Z58> (providing data for Bay Area); Issi Rommen & Samantha Wilkinson, *Creating a Stronger Housing Element: The Example of Los Angeles*, TERNER CTR. FOR HOUSING INNOVATION, U.C. BERKELEY (2021), <https://perma.cc/B4WP-LCAQ> (providing data for Los Angeles).

¹⁷³ The zoning envelope is applied differently by different California counties. *Compare* CORTE MADERA, CA ZONING, ch. 18.4 § 100 (1994) *with* GLENDORA, CA ZONING, ch. 21.13 § 300.

¹⁷⁴ *See* Elmendorf, *supra* note 162, at 988–89, 1020–26 (providing examples of additional policy options to upzoning).

Upzoning itself would not necessarily make the CEQA analytic process more difficult. It does, however, make the politics more difficult—residents might be upset to find that upzoning may require increased density across the entire city, including in single-family residential neighborhoods, not just a few underused commercial and industrial areas.¹⁷⁵ This reality is likely to increase opposition. To stall or stop upzoning reform, opponents may use the CEQA review process, including through public hearings, administrative appeals, or litigation.

B. Local Government Incentives

Local government decision making is at the heart of California's housing crisis. As described above, local governments have significant authority to adjust their local regulatory structures to increase the capacity of a zoning system to allow for infill housing development and to use CEQA streamlining techniques to advance individual projects. Conversely, local governments also have the power to use CEQA and land-use regulation to obstruct housing production. Which direction should we expect local governments to take, on average?

There is ample theoretical and empirical evidence that local governments, left to their own devices, underproduce housing—at least when those local governments are small relative to the size of their overall metropolitan area, as is the case for many California cities.¹⁷⁶ Small cities experience the negative externalities of development, such as noise and impacts on public services, but may not reap major benefits in terms of housing affordability or economic development, because such benefits are likely to be diffused across a regional or state-wide geographic scale.¹⁷⁷ So small cities will have less incentive to produce the adequate amount of housing from a societal perspective.

Many of the reasons that a state might want to focus development in infill areas relate to environmental and social problems with large-scale impacts. For instance, reducing VMT has global-scale climate

¹⁷⁵ For coverage of local resistance to upzoning and increased density in California cities, see, for example, Liam Dillon, *Southern California Cities Cite "Chaos" in Rejecting State Push for More Housing*, L.A. TIMES (June 18, 2019, 9:57 AM), <https://perma.cc/6EYY-FXAJ> (demonstrating local leaders dissatisfaction with state efforts to remove their control over zoning); Hannah Fry, *Amid Housing Crunch, Officials Want Orange County to Stay the Way It Is*, L.A. TIMES (Jan. 22, 2022, 5:00 AM), <https://perma.cc/PMJ8-4R5E> (reporting on efforts by city officials to oppose a state mandate that cities rezone for additional housing); Alexei Koseff, *California Cities Rush to Limit New Law Increasing Density of Single-Family Neighborhoods*, S.F. CHRON. (Nov. 24, 2021), <https://perma.cc/3EWQ-S65V> (discussing resistance by cities and homeowner groups to a law making it easier to split residential lots).

¹⁷⁶ See Biber et al., *supra* note 3, at 28–37 (finding that local governments underproduce housing, particularly smaller jurisdictions, due to homeowners opposing development, spillover effects that reduce incentives, and variations in land-use regulations).

¹⁷⁷ *Id.* at 27.

benefits.¹⁷⁸ Protecting habitat for endangered species benefits all of humanity by protecting biodiversity.¹⁷⁹ Ecosystem services provided by intact ecosystems can have regional benefits by improving water quality and managing runoff.¹⁸⁰ Given the large geographic scale of many of these benefits, local governments may lack incentives to adopt supportive zoning policies at the neighborhood scale. Thus, although the state has encouraged local governments to use their planning processes to reduce, for example, transportation emissions by allowing infill development,¹⁸¹ absent a mandate to do so (which is not currently present), local governments may not have sufficient motivation to effect the changes necessary for such development.¹⁸²

Local legislatures—city councils or county boards of supervisors—are the ultimate decision makers regarding local land-use regulation and CEQA implementation, which exacerbates the incentive problems. Local legislators should be responsive to the interests of their constituents—and as noted above, the local impacts of much development may be negative even if the regional or state-level impacts are positive. As a result, if legislators are elected from individual, single-member districts (as is the case for most large local jurisdictions in California)¹⁸³ then they will face strong incentives to focus on the negative local impacts of development, rather than the larger-scale

¹⁷⁸ *Id.* at 40–42.

¹⁷⁹ Richard T. Corlett, *Safeguarding our Future by Protecting Biodiversity*, 42 PLANT DIVERSITY 221, 222–23 (2020).

¹⁸⁰ See e.g., Stephen D. Wratten et al., *Pollinator Habitat Enhancement: Benefits to Other Ecosystem Services*, 159 AGRIC., ECOSYSTEMS, & ENV'T 112, 113, 117 (2012) (discussing how intact pollinator habitats remove soil sediment from runoff, thereby protecting water quality of adjacent streams).

¹⁸¹ STATE OF CAL., GOVERNOR'S OFF. PLAN. & RSCH., GENERAL PLAN GUIDELINES 42 (2017), <https://perma.cc/DSA6-XNS4>.

¹⁸² California Office of Planning and Research's (OPR) guidelines for local general plans suggest using land-use element to reduce transportation emissions but place no mandate. See *id.* at 7, 9 (noting that OPR's land use guidelines are "simply recommendations"); see also *id.* at 83, 105 (encouraging but not requiring consideration of reduction of VMTs through land-use planning and encouraging infill development). In general, state planning law provides minimal constraints on local government decision making about how to relate housing and transportation. *Id.* at 76 (citing *Federation of Hillside & Canyon Ass'ns. v. City of Los Angeles*, 126 Cal. App. 4th 1180, 1196 (2004)); see also *id.* at 78 (noting discretion of local governments to trade off mobility with other goals). Local governments must account for regional transportation plans and congestion management plans, where those exist, though these plans often do not have significant details about the interaction of land-use with regional planning. *Id.* at 74. As noted below, S.B. 375, ch. 726, 2008 Cal. Stat. 5065 (2008), is not binding on local governments. See *infra* note 321 and accompanying text.

¹⁸³ Jonathan Vankin, *District vs. At-Large Races: The Final Frontier of Voting Rights*, CAL. LOC. (Jun. 7, 2021, 12:00 AM), <https://perma.cc/PHPL-PV65> (noting that California's five largest cities use single-member district elections).

benefits.¹⁸⁴ Moreover, when contested projects reach a local legislature, the legislature often defers to the preferences of the legislator whose district includes the project—increasing the power of local residents who may object to the project.¹⁸⁵ In other words, increasing local discretion over land-use regulation and CEQA in California can often mean increasing the power of a single legislator whose district includes the project, and who therefore may be the most hostile to the project.

C. State Reform Efforts

One can summarize the baseline as this: Local land-use regulation, plus environmental review under CEQA, constrains development of infill housing in California. Even if local governments seek to reduce those barriers, they face significant environmental review requirements under CEQA that might deter them from acting. So local governments can only reduce the informational barriers to infill residential development through additional review and approval processes. Those efforts might be worth the long-term benefits, but they entail costs that may discourage even cities that are enthusiastic about change. Moreover, as described above, research indicates that local governments would not be eager to change and instead would use their discretion in implementing both CEQA and land-use regulation to obstruct the production of infill housing.

California's state legislature has directly addressed informational barriers to infill residential development over the past several years through a variety of legislation. Some laws exempt certain classes of projects from CEQA review while leaving local requirements for discretionary review intact.¹⁸⁶ The concept is to make development easier in places the legislature wants to encourage development, such as sites in urbanized areas where new development would reduce per capita VMT. In some cases, local jurisdictions have taken advantage of these exemptions to permit substantial new housing development.¹⁸⁷

A second class of laws focuses primarily on individual projects, but exempts certain types of projects from discretionary review by local governments as well as CEQA.¹⁸⁸ For instance, S.B. 35,¹⁸⁹ enacted in

¹⁸⁴ See Biber et al., *supra* note 3, at 35–37, nn.115–16, 118 (summarizing the literature and describing how localities with geographically-based electors are linked to lower multi-family construction).

¹⁸⁵ *Id.* at 36–37, 37 n.118.

¹⁸⁶ O'NEILL ET AL., *supra* note 70, at 17, 19.

¹⁸⁷ See *id.* at 70–78, tbls.13–14, 19 (finding that jurisdictions with high percentages of CEQA exemptions approved housing projects faster).

¹⁸⁸ See BARCLAY & GRAY, *supra* note 21, at 150–53, 150 n.4 for an overview of the exceptions to CEQA.

¹⁸⁹ S.B. 35, ch. 366, § 3, 2017–2018 Cal. Stat. 2935, 2940 (2017) (codified at CAL. GOV'T CODE § 65913.4).

2017, requires local governments that have not met their fair share of housing production under state housing element law to apply a ministerial process for certain housing projects.¹⁹⁰ It also declares that such projects do not count as “projects” for CEQA purposes.¹⁹¹ Likewise, A.B. 2011¹⁹² requires ministerial review for residential housing projects built along major commercial corridors in the state.¹⁹³

A third class of laws—so far largely a class of one—empowers local governments to upzone certain areas without requiring compliance with CEQA. Specifically, S.B. 10 allows cities to upzone for infill developments of up to ten units per parcel without CEQA review.¹⁹⁴ To similar if less dramatic effect, A.B. 2011, a commercial-corridors upzoning bill, also allows cities to waive certain setback requirements without CEQA review.¹⁹⁵

And still other nascent laws directly override local zoning in certain areas and increase opportunities for ministerial review, again reducing the need for CEQA compliance. A.B. 2011 authorizes 4-5 story buildings on commercial corridors and near transit stops, on any lot which the local government has zoned for commercial or parking uses.¹⁹⁶ Under S.B. 9,¹⁹⁷ local governments must approve up to two residential units on any urban owner-occupied parcel of land zoned for residential uses, and generally must approve a split of any single such parcel into two (thus allowing up to four residential units for any current existing owner-occupied residential parcel).¹⁹⁸ In effect, S.B. 9 eliminates the impact of zoning ordinances that restricts development to single-family homes.¹⁹⁹

All this legislation, in one form or another, seeks to reduce the informational costs imposed on development projects through CEQA, local land-use regulation, or both—and the resulting uncertainty and delay for projects. The premise of this approach is the assumption that certain types of projects or zoning decisions are net beneficial for the state—economically, environmentally, and socially—and therefore do

¹⁹⁰ *Id.*

¹⁹¹ CAL. GOV'T CODE § 65913.4(o) (“The determination of whether an application for a development is subject to the streamlined ministerial approval process provided by subdivision (c) is not a ‘project’ as defined in Section 21065 of the Public Resources Code.”).

¹⁹² Affordable Housing and High Roads Jobs Act of 2022 (A.B. 2011), ch. 647, sec. 3, art. 3, 2022 Cal. Stat. 7571, 7609–10 (codified at CAL. GOV'T CODE § 65912.120–.121).

¹⁹³ *Id.*

¹⁹⁴ S.B. 10, ch. 163, sec. 1, § 65913.5(c)(1), 2021 Cal. Stat. 4137, 4139 (2021) (codified at CAL. GOV'T CODE § 65913.5).

¹⁹⁵ CAL. GOV'T CODE § 65912.123(d)(4)(B), § 65912.114 (o).

¹⁹⁶ Affordable Housing and High Roads Jobs Act of 2022 (A.B. 2011), ch. 647, sec. 3, art. 3, 2022 Cal. Stat. 7571, 7609–10 (codified at CAL. GOV'T CODE § 65912.120–.121).

¹⁹⁷ S.B. 9, ch. 162, sec. 1, § 65852.21(a), sec. 2, § 66411.7(a), 2021 Cal. Stat. 4129, 4131, 4133 (2021) (codified at CAL. GOV'T CODE §§ 65852.21, 66411.7).

¹⁹⁸ *Id.*

¹⁹⁹ For a conceptual framework of these four kinds of state reform efforts, see *infra* Table 1.

not require individualized review under either CEQA or the local land-use regulatory system or both.

D. Confusion, Gaps, and Uncertain Outcomes in the State Reform Efforts

State reforms will be effective only to the extent that they address both the problems with information and incentives detailed above. Local governments continue to oppose new housing, and one-way CEQA discretion remains a powerful mechanism for these governments to evade the many state laws requiring changes in local planning and zoning practices. A clear, authoritative delineation of CEQA-exempt sites would close this loophole. Under the present approach, developers may be unsure whether a potential project is eligible for a particular CEQA exemption, or whether an exception to an exemption applies. Like the project approval process, local governments have broad and largely unreviewable discretion to determine exceptions to the exemptions. Meanwhile, local officials operating in good faith to address the state's housing shortage have no straightforward way to determine how the various CEQA exemptions interact at a broad geographic scale and will often be subject to CEQA review when attempting to upzone for infill development.

1. Uncertain and Ambiguous Exemption Criteria

Table 2 summarizes eleven CEQA exemptions that relate to infill development projects. As this list reveals, it is often difficult to determine which projects might qualify for which exemptions.²⁰⁰ The uncertainty and confusion stem from several sources. First, in many cases, a developer will need to undertake additional analysis to determine whether a particular exemption covers a given parcel. For example, some exemptions exclude areas that are habitat for endangered species or wildlife; others do not.²⁰¹ Second, the criteria for some of the analysis a developer must undertake are ambiguous. For example, one exemption requires a proposed project to be “substantially surrounded by urban uses,”²⁰² but does not define what “substantially” means in the context of the statute.

Geographic scope is not the only point of potential confusion. For instance, some exceptions require significant environmental benefits from a project, such as energy self-generation or low water use; others

²⁰⁰ We also provide a comparable summary for state laws that mandate upzoning. See *infra* Table 3. Those laws similarly have a wide range of diverse requirements and scope requirements.

²⁰¹ See, e.g., CAL. CODE REGS. tit. 14, § 15333(a) (West 2023) (exempting small projects, but only if those projects would have “no significant adverse impact on endangered, rare or threatened species or their habitat”).

²⁰² *Id.* § 15332(b).

do not.²⁰³ The intensity of different projects can, at least in part, explain the variation in exemption rules. As an illustration, the exemption for the construction of individual single-family houses (Class 3) has no requirements for environmental analysis but is limited to small projects.²⁰⁴ However, the level of intensity does not clarify all rule variation; the exemption for residential projects near mass transit (under Public Resources Code 21155) also has no such environmental analysis requirements, but no cap based on project size.²⁰⁵

Even when the areas qualifying for infill development are relatively well-defined, those definitions vary substantially between exemptions for reasons that are not always obvious. Some exemptions depend on the project being located in “urban” or “urbanized” areas, which apply to areas in or adjoining incorporated areas that have a minimum population size,²⁰⁶ but there are different relevant definitions of such areas.²⁰⁷ Other exemptions apply to projects that are close to high-quality transit or are in transit priority areas.²⁰⁸ Still others are limited to “infill” projects, which are defined by proximity to other parcels developed with urban uses.²⁰⁹ These varying definitions may overlap, with multiple definitions and requirements applying to a single exception.²¹⁰ In many cases, it is plausible that a given project would

²⁰³ See, e.g., *id.* § 15328 (exempting some small hydroelectric generation projects).

²⁰⁴ See *id.* § 15303.

²⁰⁵ CEQA, CAL. PUB. RES. CODE § 21155.4 (West 2023).

²⁰⁶ See *id.* §§ 21155, 21094.5, 21071, for varying definitions of this concept. These requirements apply to the exemptions in CEQA Sections 21094.5 and 21159.24, *id.* §§ 21094.5, 21159.24, and to some Class 3 exemptions under Guideline 15303, CAL. CODE REGS. tit. 14, § 15303(b). Class 32 exemptions require that a project be located in an incorporated city. *Id.* § 15332(b).

²⁰⁷ For example, according to a technical advisory from the California Governor’s Office of Planning & Research, one exemption for transit-proximate infill housing requires locating the project in an “urbanized area” as defined by CEQA, CAL. PUB. RES. CODE § 21071(a)–(b)(B); while another exemption for transit-proximate infill housing relies on a slightly different definition of “urban area” governing project location, *id.* § 21094.5(e). See also STATE OF CAL., GOVERNOR’S OFF. PLAN. & RSCH., TECHNICAL ADVISORY: CEQA REVIEW OF HOUSING PROJECTS A-1 2–3, 6 (2020), <https://perma.cc/M7SS-JPTJ> (comparing location requirements of CEQA Sections 21159.24 and 21094.5, CAL. PUB. RES. CODE §§ 21159.24(a)(2), 21094.5).

²⁰⁸ The statutory definition of transit priority areas requires the project be within walking distance to existing or planned major transit centers. CAL. PUB. RES. CODE § 21099(a)(7). The transit requirements also apply to projects under Public Resources Code section 21159.24 and to at least some projects under section 21094.5. *Id.* § 21155.1 (exempting certain transit projects); *id.* §§ 21159.24, 21094.5.

²⁰⁹ The exceptions in CEQA Sections 21095.4 and 21159.25, *id.* §§ 21094.5, 21159.25, have this requirement, which is defined in CAL. PUB. RES. CODE § 21072. The Class 32 exemption in the Guidelines similarly requires that a project be “substantially surrounded by urban uses.” *Id.* § 15332; STATE OF CAL., *supra* note 199, at 8.

²¹⁰ See CAL. PUB. RES. CODE § 21159.24 (requiring location proximate to transit, status as an infill site, and status as an urbanized area).

qualify for several exemptions simultaneously²¹¹—but, on the other hand, it is also clear that some exceptions sweep more broadly than others. For instance, projects need not be in urbanized areas at all to fall within the scope of the Class 3 exemption for individual single-family houses.²¹²

2. Local Discretion to Determine Exceptions to the Project-Level Exemptions

There is a second key weakness to many of the state efforts to advance infill development: state interventions that in many cases still leave local governments with the discretion to determine whether exemptions from CEQA apply in the first place. The state-developed CEQA exemptions—for individual projects and for rezoning—authorize local governments to determine whether those exemptions apply. For example, a local government can disqualify any project from a categorical exemption by naming some purported “unusual circumstance[]” or “cumulative impact.”²¹³ Overall, under many of the state’s housing reform laws, the decision to advance infill housing development remains with local governments that, as noted above, may not have strong incentives to do so.²¹⁴

3. Remaining Constraints on Upzoning for Infill

A final key weakness is that few of these provisions apply to local government efforts to upzone and increase housing capacity under existing zoning ordinances. Of the recent spate of housing legislation, only S.B. 10 attempts to streamline local government upzoning, and that provision has significant limitations (most importantly, capping upzoning at ten units per parcel).²¹⁵ But as noted above, upzoning is at the core of how the state expects local governments to use housing element law to facilitate increases in housing production. Upzoning entire communities or neighborhoods can be far more efficient in terms

²¹¹ We have found in our research that cities often rely on multiple overlapping CEQA exemptions for projects.

²¹² CAL. CODE REGS. tit. 14, § 15303(a) (West 2023).

²¹³ *Id.* § 15300.2.

²¹⁴ Biber et al., *supra* note 3, at 6–7. In this respect, state laws that make certain projects ministerial or preempt local zoning have two advantages over state laws that simply allow projects or local rezoning to be exempt from CEQA. First, by making projects ministerial or by preempting local zoning, these state laws prevent local governments from refusing to apply CEQA exemptions to a project, even if the project qualifies for the exemption. Second, these state laws also eliminate the risk that an exception from the exemption might require CEQA to apply to individual projects, which as noted above can increase uncertainty for project proponents. In other words, these state laws significantly reduce local government one-way discretion and related uncertainty over CEQA analyses that is present for CEQA exemptions.

²¹⁵ See *supra* text accompanying notes 191–192.

of increasing overall housing capacity in infill areas than can project-specific changes. However, upzoning is subject to the same incentive and informational challenges outlined above so even when a local legislature seeks to upzone to promote infill, the decision will be subject to challenges under CEQA.

E. Why the Complexity Matters

The uncertainty created by the complex and confusing scope of many state-level housing reforms is a significant obstacle to advancing infill development in California. Uncertainty is a barrier to project proponents and developers who need to understand which projects might qualify for which exemptions. The complicated statutory framework, particularly for CEQA exemptions, then collides with local regulatory processes that vary significantly from jurisdiction to jurisdiction.²¹⁶ The resulting informational barriers impair developers' certainty of where and when more streamlined approval processes are available, and, in turn, which projects are ultimately feasible.

One intended purpose of the state provisions that promote upzoning and reduce or eliminate CEQA analysis is to reduce the informational costs of CEQA analysis and local land-use regulation for projects that can be reasonably presumed to have significant environmental, economic, and social benefits. But if it is difficult for project proponents to understand exactly which projects qualify for streamlining and when, then fewer projects will be able to take advantage of those reduced informational analysis burdens—fewer than required to achieve the state's ambitious climate goals and ameliorate its considerable housing affordability problem.²¹⁷ In other words, in many ways the state has offset the informational analysis benefits of its streamlining laws by setting up other informational barriers to determine when they apply.

Local agencies' one-way discretion to demand putatively environmental analysis that goes beyond what CEQA requires exacerbates informational costs.²¹⁸ Though the state's Housing

²¹⁶ See Biber et al., *supra* note 3, at 11–13 (explaining the complexity of local regulatory processes); *id.* at 35–37 (explaining the variation between jurisdictions).

²¹⁷ See Sarah Mawhorter et al., *California's SB 375 and the Pursuit of Sustainable and Affordable Development*, 21–22 (Turner Ctr. for Hous. Innovation, U.C. Berkeley, Working Paper, 2018), <https://perma.cc/H2ER-9V6U> (describing limited use of several CEQA streamlining provisions summarized in Table 2, and attributing the lack of take-up to the complexity of those provisions and the limited relief that the exemptions provide from notification and hearing requirements associated with CEQA).

²¹⁸ In the language of CEQA, the local government is the “lead agency” responsible for compliance with CEQA. CAL. CODE REGS. tit. 14, §15367; see also BARCLAY & GRAY, *supra* note 21, at 144 n.3 (“The agency responsible for carrying out the mandates of CEQA is called the ‘lead agency.’”). The main exception to this principle would involve litigation or outside political pressure on a local government that generally requires stricter CEQA review than the local government initially selected.

Accountability Act serves to clarify local general plan and zoning standards,²¹⁹ these benefits are largely vitiated by the discretion local governments have in how they apply CEQA. Making it easy for developers to figure out whether a proposed project could be denied does not do much good if the developer remains completely in the dark about whether it will be delayed indefinitely.

Thus, even where the terms of any given CEQA exemption are relatively clear, the benefits in terms of reducing informational burdens may still be minimal, given the complexity of the exceptions and local governments' one-way discretion about whether to honor them. This variability has two important implications. First, for project proponents and developers, variability adds to the costs of trying to understand where and when to use the streamlining provisions. Project proponents now must also know how a particular local government applies the CEQA exemptions in practice, which requires knowledge of the particular practices of individual local governments—something that is often only available to developers with long-standing connections to a particular local government. This informational burden creates real barriers to entry for project developers and increases the costs of development.²²⁰

Second, the complexity of the exemptions constrains the ability of the state to monitor local governments and determine whether they are truly complying with the letter and spirit of state law and advancing state housing policy. The scope of the geographic and substantive applicability of the various exemptions is ambiguous so effective state oversight requires contextual understanding of specific projects to know whether the city has properly applied those exemptions. But the state agencies charged with oversight currently have little capacity for such close review of local government application of law to individual projects on a state-wide level.²²¹

Exacerbating the state's constrained ability to monitor cities applications of CEQA exemptions, or the lack thereof, is the absence of a comprehensive registry of which projects are using which CEQA exemptions. Although the state does require that government agencies submit CEQA documentation for EIRs and Negative Declarations to the Office of Planning and Research (OPR), which maintains a central database of those documents,²²² state law does not require an agency to submit its CEQA exemption determinations, although the agency can do so voluntarily.

²¹⁹ See HAA, CAL. GOV'T CODE § 65589.5(a)(2)(K), (d)(5) (West 2023) (noting the section's intent to facilitate infill development and mandating local agencies to articulate specific reasons for denying projects).

²²⁰ See Biber et al., *supra* note 3, at 37–39.

²²¹ *Id.* at 57–59.

²²² CAL. CODE REGS. tit. 14, §§ 15075, 15094 (2023).

Overall, it is difficult for the state (or anyone else) to assess how well the current system is working to advance infill development and whether local governments are using the exemptions appropriately, if at all. But there is some evidence that cities underutilize these exemptions. For instance, a recent study found that few jurisdictions had taken advantage of CEQA streamlining provisions that apply to projects consistent with regional plans to reduce VMT.²²³ It would appear that local governments are choosing to ignore CEQA exemptions and imposing needless review requirements on projects they wish to deter or stop, contrary to the intent of the state legislature.

The complexity of the current system means that local governments' application of state efforts to advance housing production are underinclusive and exclude too many projects that should be eligible. However, recent research also indicates that some CEQA exemptions might be *overinclusive*, facilitating development that is not truly infill and does not therefore reduce VMT or achieve other key state policy goals. As depicted in Table 4, data from a recent study of how selected California cities and counties approve housing projects indicate that projects in low-VMT areas are barely more likely receive the Class 32 exemption for infill development than projects in high-VMT areas.²²⁴

So although CEQA exemptions might in theory provide a solution to the challenges that CEQA poses to urban infill development, in practice those exemptions have seen limited effectiveness. The CEQA exemption regime is incomplete, its coverage inconsistent and conflicting. Existing exemptions have substantial carve-outs and there remains significant ambiguity about whether they actually apply to a given project. Because of these factors, the informational costs of determining which exemptions may apply to a given project can be exorbitant. This increases overall costs and uncertainties for project proponents. And because local governments determine whether exemptions apply to most development projects, these factors also empower cities that seek to deter housing construction. Uncertainty and ambiguity give those local governments the power to judge whether CEQA exemptions should apply and, as noted above, local governments are not incentivized to encourage infill development even if that development primarily advances state-wide goals. Observing whether local governments are accurately implementing the CEQA exemptions is difficult for the state or other actors, especially given the lack of a central registry for the use of those exemptions. Finally, to further complicate these streamlining efforts, there appears to be a range of circumstances where CEQA exemptions are overinclusive, facilitating

²²³ See Mawhorter et al., *supra* note 217, at 21 (reporting results of a survey finding over 80% of localities had not used available CEQA streamlining).

²²⁴ See *infra* Table 4.

non-infill development that may not advance statewide goals to reduce sprawl or VMT.

State-level direct interventions into land-use, such as S.B. 35 and S.B. 9, are not sufficient solutions to these problems. To some extent, these provisions have more clarity as to their scope of applicability than the CEQA exemptions; but more importantly, by mandating ministerial approval mechanisms, these provisions restrict the ability of local governments to use their discretion over the land-use and CEQA processes to block or delay projects.²²⁵ However, at a practical level, these state-level interventions significantly alter local regulations and make the reforms more politically challenging to enact. Also, to the extent that local control over zoning allows for valuable tailoring of regulation to local conditions, sweeping state intervention in local land use power does have costs. In contrast, CEQA exemptions leave the local zoning structure in place.

Our goal is a solution that balances between these poles—reducing the ability of local governments to use one-way discretion under CEQA to delay housing—while still retaining the core power of local governments to set zoning regulations, and applying this solution to a wide range of projects in infill areas in a manner that is transparent and simple for project proponents, the public, and the state to identify.

* * *

A crucial issue for many of the major pathways for facilitating housing development in California—whether it is trying to develop CEQA exemptions for individual projects, supporting local government efforts to upzone across neighborhoods or cities to facilitate development more broadly, or having the state intervene to restrict local discretion in land-use regulation—is ensuring that the pathway actually produces housing where state officials want it, and not where they do not. CEQA can be used to obstruct the construction of infill housing that will advance opportunity and climate goals in one geographic area; but in another area, CEQA could helpfully channel development away from high-fire hazard areas that produce high VMT development (or ensure that new development in outlying locations mitigates fire risks and VMT impacts). Even when state efforts allow cities to bypass CEQA by, for instance, mandating local approval of specific housing development projects, those laws should operate to advance statewide goals, not impede them. For example, as it stands, current state housing element law could require substantial housing production in jurisdictions that are located almost entirely in high fire hazard areas.²²⁶

²²⁵ S.B. 35, ch. 366, sec. 3, 2017–2018 Cal. Stat. 2935, 2940 (2017) (codified at CAL. GOV'T CODE § 65913.4); S.B. 9, ch. 162, sec. 1–2, 2021 Cal. Stat. 4129, 4131, 4133 (2021) (codified at CAL. GOV'T CODE §§ 65852.21, 66411.7).

²²⁶ Biber & O'Neill, *supra* note 12, at 947–48; *see, e.g., Wildland Urban Interface*, FIRE SAFE MARIN, <https://perma.cc/8UPZ-E76T> (last visited Dec. 20, 2021) (showing map of Marin County indicating that many communities are in the WUI, including cities like Mill Val-

III. LINES ON A MAP: WHY AND HOW TO USE MAPPING TO ADD CLARITY TO STATE INTERVENTIONS IN LAND-USE REGULATION

Incentives and informational problems are significant obstacles to advancing infill housing development in California. Our proposal has four key components that set it apart from the state's existing legislation and administrative tools keyed toward this goal. First, our map-based regulatory system—the infill priority area—offers clarity and relative simplicity, thus addressing many of the informational problems around determining where streamlined CEQA review processes should apply. Second, our proposal provides a default CEQA exemption for all residential development within IPAs, as well as for all upzoning that is primarily residential in IPAs, thereby providing greater certainty as to the applicability of CEQA exemptions. This default exemption would flip the burden of demonstrating that CEQA review is required for projects in IPAs, significantly increasing the certainty and clarity about whether a particular project qualifies. Third, our proposal would address the “one-way discretion” issue by allowing for an enforcement mechanism to reduce local government discretion that can undermine CEQA streamlining. Fourth, by applying to both projects and to changes to planning and zoning ordinances, our proposal would enable significant revisions at the community or neighborhood scale to increase zoning capacity for infill housing production.

Importantly, our proposal would retain existing local control over zoning regulation. It limits the discretion of local governments to use CEQA to block projects already consistent with local zoning rules, complementing the HAA and PSA, and it empowers local governments to advance upzoning in infill areas if they wish through streamlined CEQA processes.

A. The Benefits of Map-Based Regulation

As described in the prior Part, current state efforts to advance infill housing production in California fall short for two reasons. First, there are the informational costs for developers to understand where and when the state (and local governments, when they are so inclined) wish to advance development through the application of streamlined

ley). Specifically, these communities will shortly receive regional housing needs allocation (RHNA) quotas that require significant production of housing under state law, with a range of potential consequences that might occur if those quotas are not met, including the ability for developers to construct housing inconsistent with components of the local jurisdiction's zoning regulations. See ASS'N OF BAY AREA GOV'TS, FINAL REGIONAL HOUSING NEEDS ALLOCATION (RHNA) PLAN: SAN FRANCISCO BAY AREA, 2023–2031, at 24, 26 tbl.4 (2021), <https://perma.cc/RLF7-P4X6> (requiring, in a draft proposal, the city of Mill Valley to produce 865 units between 2024 and 2031); S.B. 35, CAL. GOV'T CODE § 65913.4(a) (requiring approval of certain affordable housing projects if a local jurisdiction has not satisfied its RHNA quota for low-income housing).

environmental review and land-use regulatory processes. Second, there is the risk that local governments may not use CEQA exemptions or streamlining to advance housing production in infill areas where development would provide significant environmental, economic, and equity benefits.

In addition to these two weaknesses in current reform efforts, we want to emphasize another problem with both CEQA and land-use regulation in California that we believe a map-based approach would help address: the limitations of the current focus on project-level review of the impacts of individual development projects.

On the one hand, the current focus on project-level review forces too many infill projects to undertake detailed, site-specific reviews even though on net, their environmental benefits clearly surpass their environmental costs, and the very process of doing the analysis will deter some beneficial projects. Of course, any environmental review program must necessarily balance when it is appropriate to perform such detailed examination of the environmental costs and benefits of a project, and when it is better to apply strong (or perhaps absolute) presumptions that particular projects are always beneficial, such that detailed review is not required. The CEQA exemptions discussed above identify when to apply a presumption that detailed environmental review is unnecessary or counterproductive.

But in practice, as we have described, all too often those presumptions do not apply or local governments choose not apply them. As a result, the assessment of a project's costs and benefits operates through a site-specific, bespoke analysis via the CEQA and local land-use review processes. The result is expensive and time-consuming analysis that can delay projects. Moreover, local governments looking to stop or delay projects in response to resident objections can use the inevitable uncertainty of the review process to impose additional informational requirements on projects.

On the other hand, the project-level review dominant in CEQA and land-use regulation does not adequately assess or account for significant environmental impacts. An important facet to understanding environmental impacts is the consideration of cumulative impacts—the interaction of the impacts of a proposed project with other existing and proposed projects.²²⁷ For instance, many harms to wetlands, water quality, or wildlife habitat are due to the aggregation of impacts from

²²⁷ Erin E. Prahler et al., *It All Adds Up: Enhancing Ocean Health by Improving Cumulative Impacts Analyses in Environmental Review Documents*, 33 STAN. ENV'T L.J. 351, 359–64 (2014) (explaining the importance of analyzing cumulative impacts interactions under CEQA and NEPA).

many different activities²²⁸—climate change is the most prominent and important example.²²⁹

But the current system does not consider cumulative impacts well, primarily because the assessment of cumulative impacts occurs at a project-by-project level when the information about cumulative impacts may be more difficult to aggregate and analyze.²³⁰ The consideration of cumulative impacts is often better undertaken at a higher level of spatial analysis than individual projects.²³¹ Undertaking that analysis at a larger level than individual projects may not just produce better analysis, but also quicker and cheaper analysis.

In some contexts, extensive development may be appropriate because of the economic and environmental benefits of development. Infill urban housing projects, for example, can provide both agglomeration and climate benefits by decreasing auto-centered development. In other contexts, development should be significantly limited or strictly prohibited due to the environmental benefits of protecting resources such as ecosystems, habitats, or working lands from development. These kinds of large-scale spatial externalities do not usually require project-specific analysis. Whether a parcel is a good infill site, or important for conservation, can be identified *ex ante* by policymakers without consideration of particular project proposals. But the current system provides only partial consideration of the latter case (where development should generally be precluded for conservation reasons) through zoning categories such as open space designations,²³² or through critical habitat designations under state and federal

²²⁸ See, e.g., *id.* at 354–55 (describing how the cumulative impacts of nutrient runoff from agriculture along the Mississippi River creates “dead zones” in the Gulf of Mexico).

²²⁹ Kevin M. Stack & Michael P. Vandenbergh, *The One Percent Problem*, 111 COLUM. L. REV. 1385, 1402–12 (2011).

²³⁰ See generally Gail Kamaras, *Cumulative Impact Assessment: A Comparison of Federal and State Environmental Review Provisions*, 57 ALB. L. REV. 113 (1993) (arguing that CEQA, NEPA, and other environmental review statutes should better clarify their terms and definitions of impacts as they relate to cumulative impact assessment in order to better fulfill their policies and goals); Giulia Gualco-Nelson, *Reversing Course in California: Moving CEQA Forward*, 44 ECOLOGY L.Q. 155, 163–64 (2017) (explaining how CEQA EIRs are unable to capture the cumulative effects of a proposed project combined with historical uses and public transit decisions on traffic patterns).

²³¹ Robert B. Olshansky, *The California Environmental Quality Act and Local Planning*, 62 J. AM. PLAN. ASS'N. 313, 317 (1996) (arguing that unlike General Plans, CEQA misses the bigger picture and long-range perspective by analyzing projects on a project-by-project basis, rather than “burden[ing] a single project with all of a region’s problems”).

²³² See Katie S. Heffernan, *The Special Benefits of Open Space Conservation: Financing Open Space with Special Assessments*, 56 SUFFOLK L. REV. 325, 326 (2023) (describing how local ordinances favor development over open space conservations).

endangered species laws.²³³ And it provides very little consideration of the former case, where development should generally be allowed.

As an example of this type of problem, consider a recent dispute from the wealthy, exclusive, and exurban town of Woodside. Under S.B. 9, local governments generally must approve up to two residential units on any single parcel of land zoned for residential uses.²³⁴ Woodside sought to exclude itself from the application of S.B. 9 and the increased development it might produce by designating itself as habitat for mountain lions, a species that might become protected under state law in the near future.²³⁵ The state attorney general responded with a letter stating that the town could not unilaterally exempt itself from S.B. 9 and that determination of whether a parcel was mountain lion habitat required an individualized analysis of whether that particular parcel was actually suitable habitat.²³⁶ Under withering political criticism and the threat of a lawsuit by the state, the town of Woodside retreated and revoked its proposed designation as a mountain lion habitat.²³⁷

Both the original proposal from Woodside and the response from the state attorney general's office exemplify the incentive and informational problems at the heart of California's land-use challenge. Woodside's effort shows how some local governments will strategically use the full range of legal tools to evade state mandates to develop housing. Although Woodside's effort received significant press attention, perhaps due to its brazenness, there have been a wide range of other local efforts along these lines that have not been stopped.²³⁸ These local efforts to use the full range of local land-use regulatory tools to prevent development also create informational costs for project proponents who have to identify whether a particular parcel might be excluded from the operation of S.B. 9. On the other hand, the state's proposed solution of individual analysis of whether a particular parcel should be eligible for denser residential development simply replicates the information challenges posed by CEQA—imposing significant informational costs on any individual project proposed for the parcel. Indeed, if there is any

²³³ See Isabella Kendrick, *Critical Habitat Designations Under the Endangered Species Act in an Era of Climate Crisis*, 121 COLUM. L. REV. 81, 92 (2021) (describing how critical habitat designations can influence development).

²³⁴ CAL. GOV'T CODE § 65852.21 (West 2022).

²³⁵ See Liam Dillon, *Wealthy Town Has an Answer Against Building Affordable Housing: Mountain Lions*, L.A. TIMES (Feb. 4, 2022, 6:00 AM), <https://perma.cc/ZJV5-L9MV> see also Memorandum from Jackie Young, Plan. Dir., to Residents of & Applicants to, Town of Woodside (Jan. 27, 2022), <https://perma.cc/TT9V-JBBF>.

²³⁶ Letter from Rob Bonta, California Att'y Gen., to Kevin Bryant, Woodside Town Manager 1–2 (Feb. 6, 2022), <https://perma.cc/A5UE-S2KX>.

²³⁷ Maria Cramer & Alan Yuhas, *California Town Says Mountain Lions Don't Stop Housing After All*, N.Y. TIMES (Feb. 7, 2022), <https://perma.cc/7BYP-BQGN>.

²³⁸ Manuela Tobias, *Duplex Housing Law Met with Fierce Resistance by California Cities*, CALMATTERS (Apr. 11, 2022), <https://perma.cc/E6QJ-YW9W> (summarizing ways local governments have tried to avoid compliance with S.B. 9).

question that is better examined on a landscape level *ex ante*, rather than on an individual project on particular parcel level, it is the question of what kind of habitat we should protect for a species like mountain lions that requires large areas of contiguous habitat.

We propose a solution that relies on clear lines on a map to specifically and precisely articulate where *ex ante* evaluation can presume that infill development will be economically, environmentally, and socially beneficial. Clear lines mapped on a parcel-level basis will help address the informational challenges discussed above. An easily referenced map allows a developer to quickly and clearly delineate where development is favored (and where it is not). In other words, it reduces the informational costs for project proponents to identify what projects and what locations will receive streamlined consideration. Likewise, by allowing state officials to quickly identify which projects are eligible for streamlined processes, a map can facilitate supervision of local government compliance with state housing laws. By reducing or eliminating detailed project-specific review for infill residential development, a map-based system would address the high informational costs of environmental review and local land-use regulation by clearly identifying where the state has concluded that the benefits of development outweigh the costs. It can also eliminate or reduce opportunities for local governments to use their discretion over land-use regulation and environmental review to stymie infill housing projects or other state efforts to advance housing like the HAA. Finally, by undertaking large-scale *ex ante* determinations of where significant environmental benefits and costs from development may occur, a map-based system would reduce unnecessary, inefficient, and duplicative evaluation of large-scale environmental impacts such as the mountain lion habitat example from Woodside. In essence, the map-based approach is a basic, large-scale environmental review intended to identify where additional environmental review is unnecessary.

While innovative in the context of California's current housing crisis, our proposal of a map-based approach is not a break from historic practice in land-use law and regulation. Most local government zoning ordinances include maps as a central part of their regulatory structure, identifying what kinds of uses and development are permissible in which locations.²³⁹ In fact, it is precisely because of the informational benefits of maps that local zoning ordinances rely so heavily on them. As the state increasingly guides local land-use regulation to advance housing development, it too would do well to rely on the informational benefits of maps.

²³⁹ Jenny Schuetz, *Is Zoning a Useful Tool or a Regulatory Barrier?*, BROOKINGS (Oct. 31, 2019), <https://perma.cc/3B35-EYKQ>.

B. Drawing the Lines

However, the lines on a map do not just appear. What should the map include within the lines of any IPA in California? And what should be the specific regulatory implications for planning, zoning, and project-level decisions within the IPA? Here we provide an overview of the major issues to help legislators determine what resources and issues to consider when drawing the lines on the map, what the legal implications of including parcels on one side of a line or another should be, and how the map will be kept up to date as conditions change. Our discussion will necessarily leave legislators with a fair amount to decide as they balance different policy goals when drawing the lines—our goal is simply to inform those decisions.

1. Uncertainty and Drawing the IPA

Simply put, infill development is development in urban areas.²⁴⁰ Legislators should therefore locate IPAs in primarily urban areas. However, planning and legal literature has not cohered around a consistent definition of what constitutes “urban.”²⁴¹ Nor can we draw on a ready-made definition of the kind of development that is undesirable, i.e., “sprawl,” because the planning literature has also not cohered around a consistent definition of that term.²⁴² And as noted above, state

²⁴⁰ See *supra* text accompanying note 24.

²⁴¹ While the Census Bureau provides definitions of urban and urbanized areas using population density criterion, planners debate whether those definitions may not match up with the true scope of urban development. Jeffrey D. Kline, *Comparing States with and Without Growth Management Analysis Based on Indicators with Policy Implications Comment*, 17 LAND USE POL'Y 349, 350 (2000) (arguing census definition may underestimate sprawl); Jackie Cutsinger et al., *Verifying the Multi-Dimensional Nature of Metropolitan Land Use: Advancing the Understanding and Measurement of Sprawl*, 27 J. URB. AFFS. 235, 237 (2005) (arguing census definition may be underinclusive in terms of covering areas that are urban or exurban developed); Russ Lopez & H. Patricia Hynes, *Sprawl in the 1990s: Measurement, Distribution, and Trends*, 38 URB. AFFS. REV. 325, 328–29 (2003) (arguing census definition may result in inaccuracies).

²⁴² For examples of the different ways in which sprawl has been defined in the planning literature, see Cutsinger et al., *supra* note 241, at 238 (defining sprawl based on density, concentration, centrality, intra-use proximity, (mono) nuclearity, inter-use proximity, continuity, and mix of uses); Jerry Weitz & Terry Moore, *Development Inside Urban Growth Boundaries: Oregon's Empirical Evidence of Contiguous Urban Form*, 64 J. AM. PLAN. ASS'N 424, 431 (1998) (defining sprawl as non-contiguous development); Edward L. Glaeser, et al., *Job Sprawl: Employment Location in U.S. Metropolitan Areas*, BROOKINGS INST. (May 2001) (measuring sprawl by distance between residential development and urban centers); Shima Hamidi et al. *Measuring Sprawl and Its Impacts: An Update*, 35 J. PLAN. EDUC. & RSCH. 35, 36–37 (2015) (defining sprawl as lack of accessibility and automobile dependence, with separation of land-uses); REID EWING ET AL., MEASURING SPRAWL AND ITS IMPACT, SMART GROWTH AMERICA 2 (2014) (defining sprawl as low density, separated land-uses, lack of activity centers, and poor street connectivity); Sarah Mubareka, et al., *Development of a Composite Index of Urban Compactness for Land Use Modelling Applications*, 103 LANDSCAPE & URB. PLAN. 303 (2011) (defining sprawl as leapfrogging,

law in California has a wide range of differing definitions of where urban infill exemptions from CEQA should apply. State law does provide a definition of urbanized area, although it is somewhat circular, as it depends in part on whether a local jurisdiction has already designated a UGB.²⁴³ Nor have other states developed straightforward answers;²⁴⁴ Oregon has had litigation over the meaning of the term “urban” in its growth management statutes.²⁴⁵

However, our purposes do not require a complete, precise, and comprehensive definition of either urban or sprawl. In the following pages, we survey the range of options for a starting point to define what is urban, but as we note, it is likely not crucial what specific option is ultimately selected, given the limited differences among the definitions. We think it is even less important to create a definition of sprawl, since our goal is to identify where to facilitate development, rather than where to constrain it. Thus, rather than going through the many different multi-factor definitions of sprawl in the literature, we focus instead on the goals that have been highlighted in state law and policy to this point in time: reducing VMT and fire hazard and protecting important resources such as wetlands, wildlife habitat, and prime

branching, and ribbon development); Ming Yin & Jian Sun, *The Impacts of State Growth Management Programs on Urban Sprawl in the 1990s*, 29 J. URB. AFFS. 149, 156–57 (2007) (defining sprawl based on density and compactness and mixing of land-uses); Russ Lopez & H. Patricia Hynes, *Sprawl in the 1990s: Measurement, Distribution, and Trends*, 38 URB. AFFS. REV. 325, 332 (2006) (“A metropolitan area that has more of its population that is concentrated appears less sprawled than one with a population that is evenly distributed across a region.”); Reid Ewing, *Is Los Angeles-Style Sprawl Desirable?*, 63 J. AM. PLANNING ASSN. 107, 108 (1997) (“[Sprawl is] most often characterized as . . . (1) leapfrog or scattered development, (2) commercial strip development, or (3) large expanses of low-density or single-use development.”). For discussion of the difficulty of measuring sprawl, see Shima Hamidi et al., *supra*, at 35 (“There is still little agreement on the definition of sprawl or its alternatives.”); Lopez & Hynes, *supra*, at 326 (making a similar point); Ming Yin & Jian Sun, *supra*, at 155 (2007) (“[M]easuring sprawl is a difficult task . . . and there is still no consensus on how to measure it.”).

²⁴³ See CAL. PUB. RES. CODE § 21071 (defining an urbanized area as areas within an incorporated city that meet population or density standards, or unincorporated areas that meet density standards or are within an UGB, or areas designated by a local government).

²⁴⁴ Washington’s Growth Management Act, WASH. REV. CODE §§ 36.70A (2023), “does not specify minimum standards of development density or intensity for UGAs. Urban growth is vaguely defined as that which involves intensive improvement of land incompatible with primary natural resource use, and which necessitates ‘urban governmental services’ when ‘allowed to spread over wide areas.’” Richard L. Settle, *Washington’s Growth Management Revolution Goes to Court*, 23 SEATTLE U.L. REV. 5, 14 (1999).

²⁴⁵ See 1000 Friends Or. v. Land Conservation and Dev. Comm’n, 724 P.2d 268, 272, 305 (Or. 1986) (noting lack of definition of “urban” in relevant state law and attempting to define “urban intensity” and “urban-type” development); see also Edward J. Sullivan, *Urbanization in Oregon: Goal 14 and the Urban Growth Boundary*, 47 URB. LAW. 165, 176 (2015) (noting lack of definition of “urban” in Oregon planning law).

agricultural lands, while also ensuring that there is adequate land available for housing production.²⁴⁶

Critical to any implementation of our proposal is ensuring that there is data available to allow the precise mapping of the IPA on the ground. There is now far more data than would have been available in the 1970s when states across the country began to implement statutes like CEQA, and this data can be far more easily accessed and distributed.²⁴⁷ As a result, we have significant site-specific information about how development on any one parcel might affect the relevant policy goals. Of course, perfect information will never be available. That in fact is the challenge we are seeking to address with our proposal, at least with respect to CEQA analysis. The current problem with CEQA is that it demands significant levels of information gathering and analysis to assess the risk of development, restricts development until the developer completes that assessment, and delegates determination as to the sufficiency of the data analysis to local governments that are often skeptical of development. In other words, CEQA presumes that there is significant risk from development until the developer or agency collects greater information and presumes that delaying development until data collection is fully complete is environmentally beneficial.

That is in sharp tension with the challenges we outlined in the beginning of this Article: that increased infill development is essential to address overlapping climate, wildfire, housing, and economic challenges in California. As one California Supreme Court justice noted, if development does not occur in one location, it likely will occur in another location.²⁴⁸ Infill development will consistently have lower

²⁴⁶ The planning literature has identified a connection between sprawl and VMT. See, e.g., Ewing, *supra* note 242, at 113; Hamidi et al., *supra* note 242, at 41; Keith Ihlanfeldt, *Vehicle Miles Traveled and the Built Environment: New Evidence From Panel Data*, 13 J. TRANSP. & LAND USE 23, 44 (2020) (finding that dense urban development reduces VMT); Christopher M. Jones et al., *Carbon Footprint Planning: Quantifying Local and State Mitigation Opportunities for 700 California Cities*, URB. PLAN., April 24, 2018, at 35; Mi Diao & Joseph Ferreira Jr., *Vehicle Miles Traveled and the Built Environment: Evidence from Vehicle Safety Inspection Data*, 46 ENV'T & PLAN. A 2991 (2014). But compare Mark Stevens, *Does Compact Development Make People Drive Less?* 83 J. AM. PLAN. ASS'N 7, 8 (2017) (reviewing studies and finding only small declines in driving with compact development), with R. Ewing & R. Cervero, "Does Compact Development Make People Drive Less?" *The Answer Is Yes*, 83 J. AM. PLAN. ASS'N 19, 19 (2017) (critiquing the Stevens study as inadequate and underestimating VMT reductions with compact development).

²⁴⁷ See Daniel C. Esty, *Environmental Protection in the Information Age*, 79 N.Y.U. L. REV. 115, 156–61 (2004) (describing the quantity, quality, and accessibility of environmental metrics available as of the date of the article publication as well as predicting that such data will become more accessible in the future).

²⁴⁸ See *Ctr. for Biological Diversity v. Cal. Dep't of Fish & Wildlife*, 361 P.3d 342, 367 (Cal. 2015) (Chin, J., dissenting) ("CEQA is not a population control measure. If the development is not built, the 58,000 or so residents the planned community is intended to house, along with the necessary infrastructure and the proposed commercial enterprises, will be someplace else. Accordingly, the majority correctly rejects the project opponents'

environmental impacts and greater societal benefits than many of those alternative locations.²⁴⁹ Accordingly, imposing costly review on development proposals for infill development is counterproductive to achieving environmental goals, especially if that costly review ends up pushing development to other, less environmentally favorable locations.

Within the IPA, there would be a default presumption of no significant risk from development, thereby reducing the analytic and informational burdens imposed on development projects. The IPA, in other words, serves as a line that switches the burden for information and risk assessment: Outside the IPA, the default requires that information collection and risk assessment occur before development, because we presume the environmental risks of development are significant. Within the IPA, the default does not require that information collection and risk assessment occur before development begins because the environmental risks of development are presumptively insignificant.

However, there will always be residual uncertainty as to the data with respect to environmental impacts and resources,²⁵⁰ and that uncertainty presents a challenge as to where to draw the IPA, and thus determines where the default rule should flip. Accordingly, in drawing the IPA to include or exclude any given parcel or location, policymakers must balance between false negatives, such as rejecting development in that location even though development would achieve our policy goals, and false positives, such as allowing development in that location even though development interferes with our policy goals. Because we aim to reduce substantive and procedural obstacles to development, our proposed approach is to minimize false positives, at the expense of increasing the number of false negatives. One can minimize false positives in two ways: Legislation can err on the side of a smaller geographic scope for the IPA, at least initially. Alternatively, the legal consequences of a parcel being within the IPA could be less significant, in terms of streamlining.

We propose this approach because any initial IPA proposal is a first cut that the state can refine over time with better information. Subsequent refinements allow for more careful delineation of where the IPA should be located (whether it is expansion or reduction) or the legal consequences for projects located within the IPA (whether it is

argument that the only permissible method is to compare the development with no development.” (internal citation omitted))

²⁴⁹ See GOVERNOR’S OFF. PLAN. & RSCH., *supra* note 9, at 14 (arguing that infill development “helps to relieve pressure on [California’s] natural and working lands” and “provide[s] benefits for [California’s] urban and rural areas”).

²⁵⁰ See Aud Tennøy, Jens Kværner & Karl Idar Gjerstad, *Uncertainty in Environmental Impact Assessment Predictions: The Need for Better Communication and More Transparency*, 24 IMPACT ASSESSMENT & PROJ. APPRAISAL 45, 48–49 (2006) (observing data errors and unavoidable uncertainty in various environmental impact assessment predictions).

increasing or reducing the streamlining benefits for those projects). In the meantime, even with a risk-averse process that minimizes false positives, there should be plenty of space for improved development potential within a newly created IPA. Over time, the state will need updated data to determine how development achieves its policy goals. As methodologies of collecting, analyzing, and mapping data advance, continuous refinement of the IPA will be possible and will likely allow it to expand as we better understand the policy implications of development on additional parcels of land.

2. *What to Include, What to Exclude*

Our approach in drawing the IPA is to therefore focus on using readily available data to both articulate a rough approximation of the urban and contiguous urban areas where facilitating development has clear benefits, and to then carve out important resource areas within those urban and contiguous urban areas. The first step ideally would help achieve the state policy goals of reducing VMT and sprawl, while the second step would help advance the additional goals of reducing negative impacts on important natural resources.

One option for the first step of the process—identifying a useful proxy for urban and contiguous urban areas—would be to draw on both the state’s own definition of an urbanized area and the census definition of urbanized areas. The state definition includes incorporated cities that have populations over 100,000 or that are contiguous to two other incorporated cities that all together aggregate more than 100,000.²⁵¹ It also includes unincorporated areas surrounded by incorporated cities that meet the above criteria where the unincorporated area has the same or greater density as the surrounding cities.²⁵² Unincorporated areas within a local or regional UGB also qualify as urbanized, as well as unincorporated areas where the county government has completed a planning process providing for well-managed growth.²⁵³ Many of the CEQA exemptions summarized in Table 2 rely on this state definition.²⁵⁴

²⁵¹ CAL. PUB. RES. CODE § 21071(a) (West 2024).

²⁵² *Id.* § 2107(b).

²⁵³ For unincorporated areas within a UGB to be an urbanized area, the “general plan” must be “consistent with principles that encourage compact development.” *See id.* § 21071(b). The state also has a definition of “urban area” which is limited to incorporated areas that meet the standard of 21071(a) and unincorporated areas that are surrounded by qualifying incorporated areas and have comparable density. *See id.* § 21094.5(e)(5) (“‘Urban area’ includes . . . an unincorporated area that is completely surrounded by one or more incorporated cities [where] [t]he population of the unincorporated area and the population of the surrounding incorporated cities equal a population of 100,000 or more [and] [t]he population density of the unincorporated area is equal to, or greater than, the population density of the surrounding cities.”).

²⁵⁴ *See infra* Table 2 (listing varying “Location” requirements).

The problem with relying on this definition is that it might be over-inclusive. Some cities with populations over 100,000 can include substantial undeveloped areas that might be best mapped outside an IPA. Moreover, the provision allowing for counties to designate areas as eligible through planning processes may give local governments too much power to adjust the IPA border unilaterally.

Alternatively, IPA delineation could primarily rely on census-designated urbanized areas or urban clusters. Unlike the state definitions, the U.S. Census Bureau defines urbanized areas based primarily on population density, not on incorporated status, so long as the combined area meets a minimum population threshold.²⁵⁵ The census also includes lower density areas within an urbanized area where those areas are primarily surrounded by urbanized areas.²⁵⁶ Historically, the planning literature has criticized the census definitions for excluding large areas of sprawling development from the definition of urbanized areas.²⁵⁷ But, given the goal of VMT reduction, this aspect of the Census Bureau's definition may be desirable.

As a third option, one could synthesize the provisions of the various CEQA infill exemptions to create a single, coherent definition of where urban infill development should generally occur. However, given the diversity of approaches that the different exemptions take, it might be challenging to come up with such a single, coherent definition. For instance, some exemptions are limited to areas within a half mile of a transit stop, which is underinclusive from the perspective of an IPA.²⁵⁸ Several others simply require that the developer to locate the project site in an urbanized area,²⁵⁹ which is quite similar to the first option.

A fourth option would be to use the measure of developed land in the National Land Cover Database (NCLD) combined with some

²⁵⁵ Areas generally must have a population density over 425 housing units per square mile to be included, though there are exceptions. Urban Area Criteria for the 2020 Census—Final Criteria, 87 Fed. Reg. 16706, 16711 (March 24, 2022). The census also includes areas with high impervious surface coverage or high job density to include non-residential areas. *See id.* at 16711–12 (“The Census Bureau will consider for inclusion all census blocks that: . . . [c]ontain a three-year average of at least 1,000 commuter destinations.”). The population threshold is 2,000 housing units or a population of 5,000. *Id.* at 16707.

²⁵⁶ For the detailed methodology, including indentations and enclaves, see *id.* at 16711–12. The census will also “hop” or “jump” to include non-contiguous high-density areas that are geographically proximate to the core urban area. *Id.* at 16711.

²⁵⁷ *See, e.g.*, Kline, *supra* note 241, at 349 (critiquing other studies' reliance on census data); Lopez & Hynes, *supra* note 241, at 328 (same); Cutsinger et al., *supra* note 241, at 237 (opining that reliance on census data “may under-bound” measurement areas).

²⁵⁸ *See, e.g.*, CEQA, CAL. PUB. RES. CODE §§ 21159.24(a)(8), 21155.1(b) (West 2024).

²⁵⁹ *See, e.g.*, CAL. CODE REGS. tit. 14, § 15332 (2023) (nothing that for the exemption to apply, the proposed development must occur “within city limits on a project site of no more than five acres substantially surrounded by urban uses”).

threshold for a minimum area of nearby developed land.²⁶⁰ The NCLD is a high-resolution dataset that can be used to classify land at the parcel level.²⁶¹ High levels of development intensity would be mapped within the IPAs.²⁶² In all cases, legislators may want to require that any system of lines and urban/infill definitions be validated with VMT estimates for development in different locations.²⁶³ This would help ensure that the ultimate IPA does advance the state's goals to reduce automobile use.

Whatever tool the state decides to use to articulate the basic urban and contiguous urban areas that should fall within the IPA, the second step we propose is to use additional resource data to identify areas that initially fall within the IPA but that should be excluded from it due to potential impacts to important resources. Again, the goal here is to undertake this up front and to minimize the informational and analytic burdens for local jurisdictions making planning, zoning, and project-level decisions.

We propose excluding the following areas from any IPA: federally and state protected wetlands, habitat for state and federally listed endangered and sensitive species, prime agricultural lands, and very high fire hazard severity zones. California has consistently sought to protect these resources, as outlined in the Introduction,²⁶⁴ and thus exclusions for these resources would align the IPA with overall state land-use policy. Many of these resources already have detailed statewide maps available for them as well as tractable regulatory definitions in other parts of state law, allowing their inclusion in any overall IPA system.

For instance, the Governor's Office of Planning and Research has already developed Site Check, a web-based tool that allows parcel-level mapping for a range of resources, including earthquake faults, fire

²⁶⁰ See *All National Land Cover Database (NLCD) Land Cover 2021 CONUS Land Cover*, MULTI-RESOLUTION LAND CHARACTERISTICS CONSORTIUM, <https://perma.cc/YPL7-3QCJ> (last visited Oct. 31, 2023).

²⁶¹ See *id.* (while using the tool, zoom in to see parcel-level data).

²⁶² The NCLD has categories for Developed High Intensity, Developed Medium Intensity, and Developed Low Intensity. *Id.* An initial option would be to designate all Developed High Intensity and Developed Medium Intensity parcels in IPAs and include Developed Low Intensity parcels as within IPAs if more than 50% of the area within a half mile radius are Developed High Intensity or Developed Medium Intensity.

²⁶³ For instance, Caltrans has explored techniques to screen areas as presumptively low VMT. For details, see Elisa Barbour et al., *S.B. 743 Implementation: Challengers and Opportunities*, in ELISA BARBOUR ET AL., U.C. CTR. FOR ECON. COMPETITIVENESS IN TRANSP., FINAL REPORT 2019-TO 039-65AO592 25, 29–38 (2019), <https://perma.cc/S6EE-SBY4>. See also DEBORAH SALON, INST. TRANSP. STUDIES, UC DAVIS, FINAL REPORT: QUANTIFYING THE EFFECT OF LOCAL GOVERNMENT ACTIONS ON VMT 88 (2014) <https://perma.cc/Q8Q9-4UNE>; AUSTIN L. BROWN ET AL., DRIVING CALIFORNIA'S TRANSPORTATION EMISSIONS TO ZERO 232–34 (2021) <https://perma.cc/3EEM-C5HU>.

²⁶⁴ See *supra* notes 8–24 (discussing California's goals to reduce wildfire risks, protect biodiversity, and maintain agricultural lands).

hazard, and flood plains, as well as mapping high-quality transit locations and urbanized areas as defined in some of the CEQA provisions.²⁶⁵ The tool provides significant guidance for project proponents, local and state officials, and the public as to where development might be both more likely to qualify for a CEQA exemption and be environmentally beneficial.²⁶⁶ The datasets driving Site Check could be important building blocks for mapping IPAs.²⁶⁷

Wetlands and wildlife habitat present more significant data obstacles for our proposal. Site Check provides data on whether an individual parcel is located within wetlands or sensitive wildlife habitat and whether the parcel requires site-specific review for wetlands or wildlife habitat, with the important caveat that such information is tentative.²⁶⁸ However, because certainty is an important goal of our proposal, requiring additional site-specific reviews for all parcels within IPAs for wetlands and wildlife habitat would be problematic.

One possible solution to this challenge would be to identify two categories of parcels within the IPA. One category would be already-developed parcels, such as parking lots and existing commercial or residential development. These parcels are extremely unlikely to contain protected wetlands or sensitive wildlife habitat, and thus the IPA can include them without any additional review requirements.²⁶⁹ A second category would be parcels that contain undeveloped land. For these parcels, the state would predicate an IPA exemption on a review of the parcel for wetlands habitat or sensitive species habitat.²⁷⁰

There are two additional issues that the state must resolve before preparing any IPA: 1) whether to include historic resources within an IPA and 2) how to address equity concerns about where development is

²⁶⁵ See Conservation Biology Institute, *Site Check*, CA.GOV [hereinafter Site Check Website], <https://perma.cc/BMN3-NTD2> (last visited Oct. 31, 2023).

²⁶⁶ However, the Site Check tool is not legally binding. The website emphasizes that it provides general guidance only, cannot determine whether a project qualifies for CEQA, and only covers some of the relevant conditions for CEQA exemptions. *See id.* For instance, it does not provide data on agricultural lands and resources. For these reasons, Site Check does not provide the certainty and clarity that a UGB would.

²⁶⁷ Our proposal has significant differences from Site Check. First, it would be legally binding in a way that Site Check is not. Second, by switching the burden of proof for exceptions to the IPA exemption, it would provide greater clarity than currently exists under the existing CEQA exemptions. Third, our proposal provides for enforceability of the applicability of the IPA exemption, something not currently available under the CEQA exemptions, and a key driver of local discretion over housing. Finally, by providing a coherent map, rather than an individual search tool that operates parcel by parcel, our proposal would be more transparent.

²⁶⁸ Site Check Website, *supra* note 265.

²⁶⁹ Our exceptions to the IPA exemption could cover in the unlikely scenario where wetlands or sensitive species habitat might be located on these parcels.

²⁷⁰ An additional data layer that is important for our proposal is a state-wide parcel map. Preparing such a map and verifying it to a level that allows its use as a legal definition may require substantial resources to prepare and maintain.

located within an IPA. With respect to historic resources, many local governments in California already restrict development within designated landmarks or historic districts.²⁷¹ Many of these designations are intended to protect important cultural and historical resources in California.²⁷² However, there is also evidence that historic preservation can be a proxy for generic opposition to development and a contributor to exclusionary zoning.²⁷³ Prior research on the approval of housing projects in California has indicated that historic resource issues are not a major driver of delays or uncertainty in most jurisdictions, but these issues can be significant in individual districts or in particular cities.²⁷⁴ One possible way to protect important historical resources while also not allowing local governments to use historical resources as a strategic tool to obstruct infill development would be to exclude only state-designated (rather than locally-designated) historical resources from IPAs.²⁷⁵

Equity issues are also a critical component of any IPA system in California. Land-use regulation in California and elsewhere has strong connections with efforts to exclude people from high-resource areas on the basis of class and race.²⁷⁶ There is evidence that development in some California cities continues to be disproportionately located in areas that are socioeconomically disadvantaged and has, at times, led to direct displacement of lower-income residents.²⁷⁷

²⁷¹ See, e.g., Aldo Toledo, *Palo Alto Council Could Use Historic Preservation to Skirt S.B. 9 Lot Splitting Law*, MERCURY NEWS (Mar. 19, 2022), <https://perma.cc/L7A3-WUYD> (describing how the City of Palo Alto is considering expanding designation of historical districts to restrict application of state upzoning law); Egelko, *supra* note 58 (describing how the City of Berkeley is relying on landmark designation for Native American site to contest residential project).

²⁷² See, e.g., KENNETH A. MANASTER, 5 CALIFORNIA ENVIRONMENTAL LAW & LAND USE PRACTICE § 71.10 (2023) (examining *Gettysburg Electric* and the history of historic preservation as public use).

²⁷³ For instance, the City of Pasadena is considering an ordinance to broadly designate landmark districts within its borders to exclude them from S.B. 9, the state-upzoning law that allows for duplexes on residential lots. See The Times Editorial Board, *Editorial: Here's a Warning, Pasadena. Don't Even Think About Trying to Evade S.B. 9*, L.A. TIMES, (March 20, 2022, 5:00 AM), <https://perma.cc/NY5T-NB55> (describing the City of Pasadena's attempt to use "landmark districts" to evade S.B. 9).

²⁷⁴ See O'Neill, , Gualco-Nelson & Biber, *Sustainable Communities*, *supra* note 2; Mac Taylor, *California's High Housing Costs*, CALIFORNIA LEGISLATIVE ANALYST'S OFFICE (March 17, 2015) <https://perma.cc/657J-A2JZ>.

²⁷⁵ One could achieve greater protection of historical resources by creating a process by which the state could approve local designation of historical resources and give those resources equivalent protection of state-designated resources.

²⁷⁶ See Biber et al., *supra* note 3, at 15–17. See generally JESSICA TROUNSTINE, SEGREGATION BY DESIGN: LOCAL POLITICS AND INEQUALITY IN AMERICAN CITIES (2018) (providing an overview of the role of race in zoning in America).

²⁷⁷ See O'Neill, Gualco-Nelson & Biber, *Sustainable Communities*, *supra* note 2, at 1069, 1074 (finding significant concentration of new residential construction in historically disadvantaged neighborhoods in California).

The state can address equity issues in numerous ways. As discussed in more detail below, California could still require urban planning and rezoning proposals within the IPA to go through a public participation process that emphasizes engagement with all members of the community, even without detailed CEQA review. This would facilitate consideration of equity issues in the decision-making processes of local governments.

State fair housing law—specifically the state law requiring local governments to affirmatively further fair housing—should apply to local government planning, zoning, and project-level decision making.²⁷⁸ Application of such requirements pushes local governments away from concentrating development, and affordable housing in particular, in certain neighborhoods. Additionally, the state could still apply its laws that protect tenants or restrict the direct displacement of renters to projects within an IPA.²⁷⁹ Recent amendments to state law have significantly increased the minimum protections that all tenants within the state receive.²⁸⁰

Finally, we note that facilitating infill development in and of itself should advance equity goals. Promotion of infill development can facilitate the development of below market rate units through inclusionary zoning requirements that directly advance housing affordability. In addition, infill development would reduce pressures on existing lower-rent housing stock by creating additional, market-rate units that would be available to higher income tenants or residents.²⁸¹

²⁷⁸ See CAL. GOV'T CODE § 8899.50(a)(1) (West 2023) (defining “[a]ffirmatively furthering fair housing”).

²⁷⁹ For instance, S.B. 330 has a “right of return” provision that allows low-income renters displaced by new construction to be able to rent affordable units in the new housing. CAL. GOV'T CODE § 66300(d) (West 2023).

²⁸⁰ See CAL. CIV. CODE § 1946.2 (West 2023) (imposing rent caps and just cause eviction protections); CAL. CIV. PROC. § 706.050(a) (West 2023) (limiting the use of wage garnishment in the collection of rent and other debts); CAL. CIV. CODE § 1946.7(a) (West 2023) (increasing domestic violence protections for renters).

²⁸¹ See Brian J. Asquith et al., *Local Effects of Large New Apartment Buildings in Low-Income Areas*, 105 REV. ECON. & STATS. 359, 359, 361 (2023) (finding that new market-rate housing in low-income areas in 11 major U.S. cities, including Los Angeles and San Francisco, decreases rents in nearby units relative to units farther away by 5–7% and that new market-rate housing in low-income areas leads to greater in-migration from other low-income areas); Kate Pennington, *Does Building New Housing Cause Displacement?: The Supply and Demand Effects of Construction in San Francisco* 1, 4–5 (Univ. of Cal. Berkeley Working Paper, 2021), <https://perma.cc/6ABA-YGN6> (finding that within a 500-meter radius of a market rate project, rents fall by 1.2–2.3% and displacement risk decreases by 17.14%, relative to similar areas without market-rate development); see also Kacie Dragan et al., *Does Gentrification Displace Poor Children and Their Families? New Evidence from Medicaid Data in New York City*, REG. SCI. & URB. ECON., July 2020, at 103481 (2020) (finding, based on multiple definitions of gentrification, “that children who start out in a gentrifying area experience larger improvements in some aspects of their residential environment than their counterparts who start out in persistently low-socioeconomic status areas”); Quentin Brummet & Davin Reed, *The Effects of Gentrification on the Well-Being*

3. *The Legal Impacts of the Map*

What would be the impact of our proposal on local planning and zoning decisions within an IPA? First and most importantly, we would apply an across-the-board CEQA exemption for residential projects within the IPA, as well as for local government planning and zoning changes that increase residential zoning capacity within the IPA. This would facilitate upzoning and increased infill development, whether it is through project-level development under existing local zoning rules or through local initiatives to upzone their lands within the IPA. Our proposed exemption would thus enable several of the pathways we identified above by which local governments can increase housing production, or by which the state can encourage or require local governments to increase housing production.

A broad CEQA exemption for residential projects within the IPA builds on the theoretical insight we developed early in this Article: Weighty environmental review requirements, like CEQA, presume that projects might have significant environmental effects and require substantial analysis to determine whether and what those impacts are. In contrast, within the IPA, California would presume that residential projects do not have significant environmental impacts, obviating the need for CEQA review. As mentioned earlier, based on the climate and other benefits of dense infill development, infill development is overall a net benefit environmentally for the state, further justifying the CEQA exemption.

A broad and simple CEQA exemption for residential projects within the IPA would provide clarity and certainty for project proponents, in contrast to the complicated web of current CEQA exemptions, many of which have significant exclusions. Moreover, the clarity and simplicity of the IPA exemption would undermine the ability of hostile local governments to stop beneficial residential development projects.²⁸² A city that stops a project that is within the IPA, and presumptively should be exempt from CEQA, provides a clearer example of local obstruction of development than the question of whether one of many different, overlapping CEQA exemptions should apply to a project. Another approach to writing a broad exemption could be to declare residential projects within the IPA to be “not projects” at all for CEQA purposes.²⁸³ For instance, Washington State recently enacted a similar

and Opportunity of Original Resident Adults and Children 2 (Fed. Rsrv. Bank Phila., Working Paper No. 19-30, 2019), <https://perma.cc/Q72L-J2L6> (providing causal evidence “that gentrification creates some important benefits for original resident adults and children and few observable harms”).

²⁸² For an example of local government use of CEQA to delay or obstruct projects, see *Sonoma—149 Fourth St*, CAL. HOUS. DEF. FUND, <https://perma.cc/9GB7-BC62>.

²⁸³ Several recent housing bills carve a class of projects out of CEQA by declaring them to be “not a project” for CEQA purposes. *See, e.g.*, S.B. 9, ch. 162, sec. 1 § 65852.21(j), 2021

law that categorically exempts zoning-compliant projects in “urban growth areas” from environmental review.²⁸⁴

A more modest option is to pair the substantive standards of the existing CEQA exemptions with an evidentiary norm and remedies borrowed from the HAA. A city would have to approve an exemption within the IPA if a “reasonable person” could deem the project exempt on the record before the local agency.²⁸⁵ Cities that fail to exempt eligible projects would face the full suite of HAA remedies: a court order compelling compliance within sixty days; attorney fees; and, if the court

Cal. Stat. 4129, 4131 (2021) (“An ordinance adopted to implement this section shall not be considered a project under [CEQA].”); A.B. 2011 (Cal. 2022), Gov’t Code § 65912.114(d) (“The determination of whether a proposed project submitted pursuant to this section is or is not in conflict with the objective planning standards is not a “project” as defined in Section 21065 of the Public Resources Code.”); LAND USE: STREAMLINED HOUSING APPROVALS: MULTIFAMILY HOUSING DEVELOPMENTS, S. B. 423 (Cal. 2023), CAL. GOV’T CODE § 65914(o) (“The determination of whether an application for a development is subject to the streamlined ministerial approval process provided by subdivision (c) is not a “project” as defined in Section 21065 of the Public Resources Code.”).

²⁸⁴ S.B. 5412, ch. 368, 2023 Wash. Sess. Laws (to be codified at WASH. REV. CODE § 43.21C.229).

²⁸⁵ The Housing Accountability Act stipulates that if a reasonable person *could* deem a project to be consistent with applicable general plan, zoning and development standards, then the project *is* consistent as a matter of law, even if other reasonable people might disagree. See HAA, CAL. GOV’T CODE § 65589.5(f)(4) (West 2023). In using the HAA’s “reasonable person” standard, it follows that the assessment is an objective one and that no deference would be provided by the court to a local government’s determination that there are significant environmental impacts. We recommend an objective standard that does not involve judicial deference to local agency findings of significant environmental impacts because of the history of local governments using CEQA and local land-use regulation to obstruct housing development. See Part II. That history and skepticism of local government development practice motivated the legislature to change the standard of review under the HAA to a “reasonable person” standard. CA B. AN, A.B. 3194 Sen., 2017–2018 Reg. Sess., (Cal. 2023) (West). By drawing on the HAA standard, we can draw on the (limited) caselaw that has begun to apply it. See, e.g., *Cal. Renters Legal Advoc. & Educ. Fund*, 68 Cal. App. 5th 820, 851, 853–54 (2021) (holding that the HAA’s restriction of local government’s ability to deny an application to build a housing project that complied with objective review standards if there was substantial evidence for a reasonable person to conclude that the project complied with those standards did not violate the procedural due process rights of project opponents, did not unconstitutionally delegate municipal functions to private persons, did not divest the city of final decision making authority, and did not violate the charter city’s constitutional right to home rule); *Bankers Hill 150 v. City of San Diego*, 74 Cal. App. 5th 755 (2022) (upholding a city council’s approval of a development application for a mixed-use building on the grounds that it was consistent with city policies under the reasonable person standard); *Highway 68 Coal. v. County of Monterey*, 14 Cal. App. 5th 883, 896 (2017) (holding that an organization challenging the construction of a shopping center had not met its burden of showing that no reasonable person could have deemed a project consistent with the general plan); *Save Livermore Downtown v. City of Livermore*, 87 Cal. App. 5th 1116, 1125–26, 1130 (2022) (applying the reasonable person standard to find that an affordable housing development was consistent with the city’s downtown specific plan as was required for it to be approved).

finds bad faith, fines and a court-issued entitlement for the project.²⁸⁶ California's AB 1633 largely adopts this strategy, although it limits attorney fee recovery to cases of bad faith and gives cities the benefit of the doubt in cases where the developer concedes that the project does not qualify for a CEQA exemption.²⁸⁷

A third option is for the state to create an entirely new, more limited framework for environmental review within the IPAs, one which would presume that a project has no significant impact unless the contrary is affirmatively shown within a brief window of time. For example, California could require cities to give public notice whenever a housing project or upzoning ordinance is proposed in the IPA. Members of the public would have said thirty to sixty days to submit written comments and evidence of potential impacts.²⁸⁸ The state could then limit the environmental review to the impacts the city or a project opponent identifies and *shows to be likely* to be significant during this initial round of comments. This approach echoes a provision of the HAA that allows cities to deny or reduce the density of a code-compliant project only if they find "by a preponderance of the evidence" that the project would violate an objective health or safety standard and that the violation cannot be mitigated.²⁸⁹ Notably, the state Legislature has also helpfully instructed that health and safety violations within the meaning of the HAA "arise infrequently."²⁹⁰

Similarly, we propose that if, on the assembled record, any reasonable person would conclude that an IPA project is *likely* to have one or more significant environmental effects, the city should conduct an "EIR lite" that analyzes project alternatives with respect to *only those identified impacts* and either mitigates the impacts or makes a finding of overriding consideration. Conversely, if a reasonable person could conclude (even if other reasonable persons might disagree) that the city or project opponents did not show that the project would be likely to have a significant environmental effect, the project would be exempt as

²⁸⁶ This is the basic strategy of Assembly Bill 1633 (AB 1633), ch. 768, 2023–2024 Leg. Sess. (Cal. 2023) (enacted), which one of the authors of this paper advised on, and which was adopted by a one-vote margin. See *A.B. 1633 Housing Accountability Act: Disapprovals: California Environmental Quality Act*, CAL. LEG. INFO., <https://perma.cc/V6YP-AEAW> (reporting vote totals in each chamber). The main difference is that A.B. 1633 uses a textual definition of good-for-development areas, rather than a map, and A.B. 1633 does not enable plaintiffs to obtain attorneys from a city unless the court finds that the city denied a CEQA clearance in bad faith. A.B. 1633.

²⁸⁷ A.B. 1633, 2023–2024 Leg. Reg. Sess. (Cal. 2023).

²⁸⁸ Similarly, the HAA requires cities to notify a developer within 30–60 days of receiving a complete project application of any zoning or development standard that the project violates. If the city fails to provide this notice, the project is deemed to comply as a matter of law. CAL. GOV'T CODE § 65589.5(j)(2) (West 2023).

²⁸⁹ HAA, CAL GOV'T CODE § 65589.5(d) (West 2023).

²⁹⁰ *Id.* § 65589.5(a)(3).

a matter of law, and a city that demands further study or mitigation would face liability similar to that assigned in HAA.

This third approach is much simpler and is more supportive of infill development than the current standards under CEQA's manifold exemptions.²⁹¹ Our test is a rigorous one because the benefits of streamlining within the IPA can only be achieved if projects are very unlikely to incur the cost, delay, and uncertainty of environmental review. It is also rigorous because the detailed and thorough mapping of the IPA would establish a high burden on project opponents to show that the IPA has missed a significant environmental impact.

Project opponents who seek to require CEQA review of projects within the IPA, and who are unsuccessful in persuading the local jurisdiction to undertake that review, could still seek judicial review of the project, as is permitted today.²⁹² However, project opponents would bear a heavy burden of proof to demonstrate that any reasonable person would conclude that the project is *likely* to have significant negative environmental impacts. This inverts CEQA's traditional "fair argument" standard, which requires an EIR if any reasonable person could conclude that there is a fair argument that the project might have a significant environmental effect.²⁹³

It is essential that project proponents are able to seek outside review of a local government's decision not to exempt an IPA project, but we are agnostic about whether this review should be judicial or administrative. Judicial review may be a more politically feasible route to take and would not require establishing a new administrative appeal process. However, court decisions on CEQA cases can be slow to resolve and time is often of the essence for a project proponent. Because developers may be wary of antagonizing a local government through litigation, it would be prudent to allow the state attorney general's office and citizens groups to initiate outside review of a local government's decision to impose CEQA review on a project.²⁹⁴

²⁹¹ If a city grants an exemption under CEQA, and project opponents challenge the exemption, the standard of review is "substantial evidence" on the facts, and de novo on the law. See *Sierra Club v. County of Fresno*, 431 P.3d 1151, 1159 (Cal. 2018) (noting standards of judicial review of agency CEQA decisions). If the city denies the exemption, the decision is unreviewable. If the city determines that the project is not eligible for an exemption and issues a negative declaration or mitigated negative declaration, then the standard is whether there is a no fair argument that the project could have any environmental impact. CEQA PRACTICE GUIDE, *supra* note 109, § 6.37 (citing *Quail Botanical Gardens Found. v. City of Encinitas*, 29 Cal. App. 4th 1579, 1602 (1994)).

²⁹² See Kevin Woldhagen, *The Environment Is Our Home: Ensuring Swift Judicial Review for Green Housing*, 53 U. PAC. L. REV. 501, 503, 505 (2022).

²⁹³ CAL. CODE REGS. tit. 14, § 15064(f) (2023).

²⁹⁴ See Jessie Agatstein, Note, *The Suburbs' Fair Share: How California's Housing Element Law (and Facebook) Can Set a Housing Production Floor*, 44 REAL EST. L.J. 219, 247 (2015) (noting the role that pro-housing litigation can play in driving housing production in California).

The CEQA exemption should extend not just to individual projects but also to local government revisions to planning and zoning ordinances that aim to increase residential density. All upzoning actions by local governments that are within the IPA and are predominantly residential would fall within the CEQA exemption.²⁹⁵ Local governments seeking to use the CEQA exemption for upzoning within the IPA should be required to 1) provide a rigorous and thorough public participation process for the upzoning, consistent with the state and federal mandates to affirmatively further fair housing²⁹⁶ and 2) demonstrate that the upzoning will provide a significant net gain in housing for the jurisdiction.²⁹⁷

The public participation requirement provides a check on local government decision making to help ensure that decision makers adequately consider equity impacts. Public forums provide an opportunity for community members to raise issues, including socioeconomic impacts, which may not be appropriately dealt with through CEQA but may nonetheless be important issues for consideration by the local government when making planning and zoning decisions. A public participation provision also ensures that local governments do not use the CEQA exemption as an opportunity to push through local land-use changes without any consideration or feedback

²⁹⁵ In our proposal, we would allow mixed-use upzoning where the “predominant” amount (e.g., more than 75%) of the square feet allowed would be residential. This facilitates upzoning for residential purposes along commercial corridors and allows for mixed-use development that can reduce VMT. Other state upzoning statutes have used similar cut-offs to allow mixed-use development that is predominantly residential to qualify for streamlined approval processes. See CAL. GOV’T CODE § 65913.4(a)(2)(C)(ii) (West 2023) (requiring projects to be two-thirds residential by square footage to be eligible for accelerated approval process).

²⁹⁶ See *supra* text accompanying note 280.

²⁹⁷ One potential concern is that project proponents currently often rely on the larger-scale CEQA analysis for general plan or zoning changes to support CEQA review for individual projects through tiering. It might be that, without CEQA review at the general plan or zoning level, individual projects might be more vulnerable to CEQA challenges, even with the exemptions provided within the IPA. We believe this concern is unlikely to be a major one in practice. Our proposal provides a significant amount of protection for individual projects within the IPA from CEQA challenges—it would require a project opponent to find a major problem with an individual project to be able to challenge it. In addition, local governments could always choose to provide CEQA analysis for their general plan and zoning actions if they wish to provide support for later tiering. Finally, if this is an issue that does require addressing, we could change our proposal to exempt all individual residential projects within the IPA from claims about cumulative impacts, the type of CEQA claims that is most likely to be affected by the loss of tiering analysis. We think this change is supportable since the IPA, by definition, presumes that in the aggregate residential development within the IPA is beneficial for the environment, and it is only exceptional projects that might have individual-level effects.

from residents.²⁹⁸ The CEQA IPA exemption draws its justification from the principle that residential development will provide significant environmental benefits. It is this principle that drives our proposed requirement that any upzoning provide a significant net gain in housing. Accordingly, it is appropriate if exclusionary jurisdictions that seek to downzone within the IPA are faced with a tangle of CEQA review and compliance.

The IPA need not affect state-level constraints on development. For instance, the IPA would not override the applicability of the Coastal Act,²⁹⁹ nor the requirement that a project proponent prove they have adequate water rights before approval of their project.³⁰⁰ These constraints are not likely to negatively impact infill development goals because they are limited in their geographic scope, like the Coastal Act, or because they have relatively straightforward application, like water rights requirements.

As currently developed, our proposal is limited to residential and mixed-use development projects that are predominantly residential.³⁰¹ The CEQA exemptions would not apply for industrial projects, primarily commercial projects, or large public infrastructure projects. Although these types of projects might have great social value, they are more likely to have substantial negative environmental impacts, particularly in urban areas with high population densities. As such, the benefits of avoided or mitigated environmental impacts are more likely to outweigh the cost—a more detailed environmental review—for these kinds of projects, compared to residential projects.³⁰²

4. *Updating the Map*

The state should also provide a regular process for reviewing IPAs to take into account growth in housing needs in the future as is recommended by the planning literature.³⁰³ We would suggest a review every eight to ten years of the IPA in a metro area, a review that draws on data such as population numbers, job growth, and housing costs to

²⁹⁸ One possibility is that if the local governments provide appropriate public participation for the preparation of its housing element, the government could rely on that public participation in enacting upzoning to implement the housing element.

²⁹⁹ The California Coastal Act of 1976, CAL. PUB. RES. CODE §§ 30000–30900 (West 2023).

³⁰⁰ See CAL. GOV'T CODE § 66473.7 (West 2023) (establishing water availability requirements for proposed projects).

³⁰¹ See *supra* Part III.B.3.

³⁰² Of course, our proposal could expand to include a range of commercial development projects, if the legislature believed that the benefits from those projects in infill areas warranted the relevant CEQA streamlining. Infill commercial projects may provide important VMT reduction benefits. However, they also may have more substantial impacts on communities.

³⁰³ See *infra* note 362 and accompanying text.

determine whether additional land should be mapped into the IPA. Additional lands should be included within the IPA based on the same principles that we used to draw the IPA in the first place: avoiding resources that warrant state-wide protection and minimizing the increase in VMT from additional development. To further streamline the process, the state could pair review with the development of RHNA numbers for metropolitan areas, as the data for both would overlap in a significant way.

The state should also revise an IPA if updated mapping based on important environmental resources indicates new areas should be excluded from the IPA, or alternatively, areas that were excluded from the IPA in the past to protect a resource no longer need to be so based on the updated information. If, for instance, a new species is listed for protection under the federal or California Endangered Species Act, the habitat for that species should be removed from the IPA even before the regular update for the IPA for that metro area. We believe that such changes are likely to be infrequent. Significant changes should prompt a mid-cycle reevaluation of the IPA for a metro area where the IPA is expanded in other directions to offset the losses for the update.

5. *Who Draws the Map*

The final issue is who should draw the IPA. While the legislature should articulate the principles that guide the IPA, such as what policy goals the IPA should advance and what resources the state wants to protect from development, the drawing of the actual IPA border will be a time-consuming and resource-intensive process. That is particularly so because we envision a highly precise IPA, mapped down to the parcel level. And although we believe some of the cost of mapping can be reduced by relying on data layers and improved data analysis, there will still necessarily be time, effort, and, perhaps most importantly, judgment in applying the various policies and resources to the mapping of the IPA.

We do not think local governments should make these choices, for all the reasons we have articulated in this Article. The choice should either be regional, through Local Agency Formation Commissions (LAFCOs),³⁰⁴ Councils of Governments (COGs),³⁰⁵ or a state-level agency. Given the limited administrative capacity of many regional

³⁰⁴ *Local Agency Formation Commission*, CITY & CNTY. S.F., <https://perma.cc/JQ2S-T9WB> (last visited Oct. 31, 2023) (“Local Agency Formation Commissions are independent regulatory bodies that oversee changes to the boundaries of cities and special districts.”).

³⁰⁵ *What are Councils of Governments?*, W. RIVERSIDE COUNCIL GOV'TS, <https://perma.cc/7RZA-XQZY> (last visited Oct. 31, 2023) (“Councils of Governments (COGs) are voluntary associations that represent member local governments, mainly cities and counties, that seek to provide cooperative planning, coordination, and technical assistance on issues of mutual concern that cross jurisdictional lines.”).

governance structures in California discussed in the next Part,³⁰⁶ a state-level agency such as the Department of Housing and Community Development (HCD) might be most appropriate. A state-level agency can draw on the expertise of all of the various state government agencies with interests in protecting resources that are relevant to the IPA setting, such as protecting wetlands or endangered species. A state-level agency is less susceptible to pressure from individual local governments, unlike regional entities, and is accountable to state-wide elected officials or to the state legislature. State-level agencies also can draw on the resources of the state government, which are more substantial than those of regional or local governments. Of course, given the cost of drawing the IPA to begin with, we imagine that setup the IPA, and to collect the relevant datasets, will require substantial initial funding. Maintenance of the relevant databases and mapping tools that are the basis of the IPA and any subsequent updates will also require substantial ongoing funding.

Even though we would encourage the state to draw the IPA lines, local and regional entities should have a say in the process. The state should provide a public notice and comment process, and ideally significant stakeholder engagement, in drawing the IPA lines. This may take valuable time and energy, but it would pay off if it produces IPA lines that are generally accepted and can provide stability for all stakeholders for the next eight to ten year cycle.

IV. WHY A STATE MAP? IS THIS JUST A UGB?

Two questions might occur to skeptical readers of our proposal. One question relates to policy: Why should the state and not regional governments take the lead in advancing infill development? The second question is more theoretical: Our proposal has some similarities with the concept of urban growth boundaries (UGBs), but UGBs have been subject to significant criticism in the academic literature for harming housing production. How is our proposal different and better than a UGB in advancing housing production?

A. Why Not a Regional Approach?

California itself has led many of the efforts to address the housing crisis. But is a state-led approach necessary? Perhaps instead the state should have to eliminate as many of the barriers local authorities face when regulating land-use regulation as possible, including CEQA, so that local governments can maximize upzoning and use their own regulatory powers to restrict development in problematic locations. For instance, local governments throughout California have enacted various

³⁰⁶ See *infra* Part IV.A.

policies, which might be characterized as UGBs, that restrict development to areas that are urbanized or contiguous to urbanized areas.³⁰⁷ This approach would require some state intervention, such as substantial revisions to CEQA to remove obstacles to local choice, but it would not entail state-level mandates to local governments as to where they must allow or disallow housing to be built.

Our discussion in Part II.B explains why many local governments might not take the lead on facilitating infill housing development. The political incentives faced by local governments have not pushed them to advance infill development in general, and in fact often push those governments in the opposite direction. Indeed, much of our proposal is an effort to create an appropriately narrowly tailored restriction on local government discretion to prevent infill housing development.

There is also good evidence that when local governments enact growth-management policies on their own, without broader regional or state-level coordination, the results often can exacerbate sprawling development that produce high VMT outcomes.³⁰⁸ When one jurisdiction restricts development within its borders, the result pushes developers and consumers of new housing to the next jurisdiction, often the next jurisdiction further from the metropolitan area center.³⁰⁹ In this way,

³⁰⁷ For instance, Lodi had voter approval requirement for annexations until 1990, paired with denser zoning within the existing city borders. John D. Landis, *Do Growth Controls Work? A New Assessment*, 58 J. AM. PLAN. ASS'N 489, 493, 503 (1992) [hereinafter Landis, *Do Growth Controls Work?*]. San Jose has had a UGB program since the 1970s. John D. Landis, *Land Regulation and the Price of New Housing: Lessons from Three California Cities*, 52 J. AM. PLAN. ASS'N 9, 11 (1986).

³⁰⁸ John D. Landis, *Growth Management Revisited: Efficacy, Price Effects, and Displacement*, 72 J. AM. PLAN. ASS'N 411, 418, 426 (2006) [hereinafter Landis, *Growth Management Revisited*]; Rolf Pendall et al., Solimar Rsrch. Grp., *Holding the Line: Urban Containment in the United States* 33 (August 2002), (discussion paper prepared for Brookings Inst. Ctr. on Urban & Metropolitan Pol'y), <https://perma.cc/U7HS-QNJH> (“[L]ocal urban containment policies, free from regional goals and tied to local growth limitations, have clearly led to *unplanned* leapfrog development.” (emphasis in original)); *id.* at 37 (“Urban containment works less well when pursued only at the local or municipal level because of the spillover effect and the frequent creation of satellite communities.”); WILLIAM FULTON ET AL., SOLIMAR RSCH. GRP., *GROWTH MANAGEMENT BALLOT MEASURES IN CALIFORNIA* iv (2002) (“[A] poorly constructed UGB program will sometimes encourage leapfrog development to the other side of the UGB or to more distant towns or cities.”). For general discussion of how local land-use growth controls can produce sprawl more broadly, see Arthur C. Nelson, *Comparing States With and Without Growth Management: Analysis Based on Indicators with Policy Implications*, 16 LAND USE POL'Y 121, 122, 126 (1999) (arguing that local-level growth management is ineffective and state-level interventions reduce sprawl and VMT); Robert L. Liberty, *Oregon's Comprehensive Growth Management Program: An Implementation Review and Lessons for Other States*, 22 ENV'T L. REP. 10367, 10376–77 (1992); Landis, *Do Growth Controls Work?*, *supra* note 307, at 489. The California Supreme Court has also recognized the potential spillover effects of local land-use regulation on regional housing markets. *Associated Home Builders Greater Eastbay v. City of Livermore*, 557 P.2d 473, 487 (Cal. 1976).

³⁰⁹ Biber et al., *supra* note 3, at 31–33, 31 n.98.

from a policy perspective the uncoordinated local growth management or zoning approaches can be counterproductive.³¹⁰

What about regional governance models, which aggregate local government efforts at a larger, metropolitan level scale? These models theoretically address the issues we have identified earlier in this Article. Regional governments can consider the larger-scale benefits of producing more housing and avoiding development that has negative climate or environmental impacts. And through coordination, regional governments can better ensure that UGBs do not produce leapfrog development patterns that undermine the very purpose of UGB policies.

Unfortunately, California has very weak regional governance,³¹¹ and local governments tend to control those regional governance entities that do exist. This is true for all three of the state's regional entities that coordinate work related to land-use.

First are Councils of Governments (COGs), which usually do not perform land-use work directly. For the purposes of our proposal, the most important work of the COGs relates to land-use: COGs are responsible for fairly allocating the housing that each local government within the COG's metropolitan area is required to facilitate under state housing element law—the regional housing needs allocations, or RHNA's.³¹² As with state housing element law, this has historically been rather toothless: local governments have ignored their RHNA quotas without much consequence.³¹³ But, as noted above, this might be changing. Recent amendments to state law have put real teeth into the mandate that a local government must prepare a housing element that plausibly allows it to meet its RHNA.³¹⁴ The state has also greatly

³¹⁰ The state encourages, but does not require, local governments to coordinate decisions around housing and land-use when preparing their general plans. STATE OF CAL., *supra* note 181, at 19–21 (2017). Local governments must consult with other entities affected by plan decisions but are not required to consider those responses when they make their decisions. *Id.* at 68 (citing CAL. GOV'T CODE § 65352 (West 2023)).

³¹¹ Janice Griffith, *Regional Governance Reconsidered, Democracy in Action: The Law & Politics of Local Governance*, 21 J.L. & POL. 505, 511 (2005) (explaining that a 2002 California Institute for County Government report describes California as a “state of regions” and concludes “state and local governments lack sufficient legal and constitutional authority to effectuate regional solutions”).

³¹² CAL. GOV'T CODE § 65584.4; CAL. GOV'T CODE § 65584.5; *see* PUB. INT. L. PROJ., CALIFORNIA HOUSING ELEMENT MANUAL: LAW, ADVOCACY, AND LITIGATION 13, 18–23 (5th ed. 2023) (discussing the adoption of the California Housing Element Law in 1980, which requires state and local communities to “affirmatively further fair housing”).

³¹³ Liam Dillon, *California Lawmakers Have Tried for 50 Years to Fix the State's Housing Crisis. Here's Why They've Failed.*, L.A. TIMES (Jun. 29, 2017, 3 AM), <https://perma.cc/4EV3-6H3A>; *see also* Jeff Clare, *Because Housing is What? Fundamental. California's RHNA System as a Tool for Equitable Housing Growth*, 46 ECOLOGY L.Q. 373, 393–95 (2019) (examining RHNA's lack of enforcement and weak reporting requirements); F. NOEL PERRY ET AL., NEXT 10, MISSING THE MARK: EXAMINING THE SHORTCOMINGS OF CALIFORNIA'S HOUSING GOALS 6 (2019) (noting lack of compliance with RHNA standards by local governments).

³¹⁴ *See supra* note 162.

increased the RHNA quotas for metropolitan areas, requiring COGs to in turn greatly increase the RHNA quotas for individual cities.³¹⁵ Whether this will matter in terms of producing housing depends in part on enforcement of state housing law, and the outcome of the local upzoning process discussed above. In other words, COGs can pressure local governments to do additional zoning for housing by shaping their RHNA quotas, but that process still must navigate the legal and political obstacles outlined previously.³¹⁶

Moreover, COGs are called “Councils of Governments” for a reason: they are voluntary associations made up of the local governments in a given metropolitan area.³¹⁷ This means that, as assemblies of locally elected officials, COGs are unlikely to take actions that those officials do not wish to undertake.³¹⁸ And as discussed earlier, locally elected officials have incentives to underproduce housing and shift housing burdens outside of their borders.³¹⁹ As a result, COGs have a history of

³¹⁵ See *supra* text accompanying notes 167–169 (noting that the state has tripled and doubled the RHNA for the Bay Area and Los Angeles respectively).

³¹⁶ Some COGs use grants to encourage local governments to develop plans and zoning rules that facilitate low-VMT infill development. The Association of Bay Area Governments (ABAG) has created a priority development area (PDA) program that supports local governments seeking to upzone infill areas. *PDA—Priority Development Areas*, ASS’N OF BAY AREA GOV’TS, <https://perma.cc/AE2V-8WY9> areas (last visited Nov. 22, 2023). However, the PDA program is purely voluntary, and again upzoning pursuant to the PDA program is still subject to the legal and political obstacles outlined above. *Id.*

³¹⁷ Local jurisdictions form COGs through joint power agreements. See CAL. GOV’T CODE § 65582(b) (West 2023). At a national level, federal grant programs in housing and community development encouraged the creation of regional councils of government to provide data collection and planning support. PAUL G. LEWIS & MARY SPRAGUE, PUB. POL’Y INST. CAL., *FEDERAL TRANSPORTATION POLICY AND THE ROLE OF METROPOLITAN PLANNING ORGANIZATIONS IN CALIFORNIA* 29–30 (1997).

³¹⁸ See Stephanie Pincetl, *The Regional Management of Growth in California: A History of Failure*, 18 INT’L J. URB. & REG’L RSCH. 256, 258, 261–62 (1994) (arguing that COGs in CA have traditionally protected local government autonomy); see also MICHAEL N. DANIELSON, *THE POLITICS OF EXCLUSION* 246–48 (1976) (arguing that COG members generally protect their parochial interests). Moreover, because COGs often provided a one-jurisdiction, one-vote system of representation, they tended to over weigh the interests of smaller governments, which can exacerbate the deference to the interests of small-scale local governments and further undermine housing production. See Elisa Barbour & Elizabeth A. Deakin, *Smart Growth Planning for Climate Protection: Evaluating California’s Senate Bill 375*, 78 J. AM. PLAN. ASS’N 70, 72 (2012).

Indeed, there is evidence that the COGs for the Bay Area and Los Angeles were formed precisely to prevent the formation of more powerful regional governments. LEWIS & SPRAGUE, *supra* note 317, at 36. As an example of COGs advancing the interests of local governments, the COG for the Los Angeles metropolitan area voted to endorse a ballot measure that would eliminate state intervention in local land-use regulation. See David Wagner, *SoCal Politicians Endorse Campaign to Overturn New State Housing Laws*, LAIST (Jan. 7, 2022, 12:59 PM), <https://perma.cc/3C7K-64CM>.

³¹⁹ See *supra* Part II (explaining incentives local officials have to not build housing in their jurisdictions); see also *Bozung v. Loc. Agency Formation Comm’n of Ventura Cnty.*, 529 P.2d 1017, 1030–31 (1975) (“Speaking generally, therefore, it seems clear that the officials of a municipality, which has cooperated with a developer to the extent that it re-

shifting RHNA quotas to the exurban fringe, where local governments welcome housing.³²⁰ This pattern is in sharp tension with all of the reasons for prioritizing urban infill housing laid out above. That tension, however, does not necessarily mean COGs will fail to take any action at all. The Southern California Association of Governments (SCAG), the COG for the Los Angeles metropolitan region, for instance, has recently taken steps to allocate the large increase in RHNA quotas for the next cycle of housing element revisions to infill jurisdictions that are close to transit and work.³²¹ But nonetheless, COGs may not be a reliable partner for advancing infill housing production.

The second form of regional governance in California are Metropolitan Planning Organizations (MPOs).³²² These are entities formed pursuant to federal law, which requires the state and local communities to cooperatively undertake regional planning for the expenditure of federal transportation funds in a metropolitan area.³²³ As a result, MPOs have historically focused on transportation planning, whether it be highways, bridges, or public transit.³²⁴ In some areas, MPOs and COGs are territorially coextensive and share staff.³²⁵ Senate Bill 375, passed by the state in 2008, requires MPOs to plan and adopt coordinated regional transportation and land-use plans, to be called sustainable communities strategies (SCSs), to better facilitate

quests an annexation of that developer's property for the express purpose of converting it from agricultural land into an urban subdivision, may find it difficult, if not impossible, to put regional environmental considerations above the narrow selfish interests of their city.”).

³²⁰ See NOEL ET AL., *supra* note 313, at 32 (noting that highest RHNA quotas were set for rural counties); Shine Ling, *How Fair is Fair-Share? A Longitudinal Assessment of California's Housing Element Law iii* (2018) (M.A. thesis, U.C.L.A.), <https://perma.cc/SH8S-WDU545g2k3fp> (finding that the COG for the Los Angeles metropolitan area placed higher RHNA for communities farther from downtown Los Angeles).

³²¹ See Liam Dillon, *Coastal Cities Give in to Growth. Southern California Favors Less Housing in Inland Empire*, L.A. TIMES (Nov. 7, 2019, 6:22 PM), <https://perma.cc/XU3Z-PLXW> (explaining political issues at play in SCAG's work in Los Angeles).

³²² In most of California, the MPO is also the relevant COG for the metropolitan area, but there are exceptions. See Bill Higgins, *Regions 101*, CALCOG (Aug. 29, 2020), <https://perma.cc/QYC6-2DUV>; See *Our Members*, CALCOG, <https://perma.cc/KX4Y-2JNM> (last visited Nov. 29, 2023) (providing lists of regional governance entities in California, including which ones are COGs and MPOs). For instance, in the Bay Area, the COG is the Association of Bay Area Governments, but the MPO is the Metropolitan Transportation Commission. Member Profile: Association of Bay Area Governments, CALCOG, <https://perma.cc/4X35-TKUZ> (last visited Nov. 29, 2023); Member Profile: Metropolitan Transportation Commission (MPC), <https://perma.cc/6TD4-T7HJ> (last visited Nov. 29, 2023).

³²³ For an overview of the role of MPOs and their history, see LEWIS & SPRAGUE, *supra* note 317, at 27–28 (1997), <https://perma.cc/H6CB-YMRM>. The MPOs also have important roles in allocating state highway funding in California. *Id.* at 22–23. Like COGs, most MPOs operate on a one-jurisdiction, one-vote basis. *Id.* at 38.

³²⁴ *Id.* at 75.

³²⁵ *Id.* at 36.

development that reduces VMT.³²⁶ However, the law does not require local governments to align their own general plans or planning and zoning rules with the relevant SCS.³²⁷ Local governments that do align their zoning with the SCS can get streamlined CEQA review for some projects.³²⁸ However, most observers have been unimpressed with the impact that S.B. 375 has had on local planning, in part because of the lack of any mandates for local governments.³²⁹

And again, like COGs, MPOs are representatives of the local governments in the metropolitan area.³³⁰ This overlap hampers the ability of an MPO to aggressively push the local governments in its metropolitan area to advance infill development if those local governments are not already interested in doing so themselves.

The third form of regional governance in California are Local Agency Formation Commissions (LAFCOs). California has a dizzying range of local public entities, ranging from cities to school districts, park

³²⁶ See CAL. GOV'T CODE § 65080(a)–(b)(2) (West 2023) (“The regional transportation plan shall be an internally consistent document and shall include . . . [a] sustainable communities strategy prepared by each metropolitan planning organization”).

³²⁷ *Id.* § 65080(b)(2)(K) (“Neither a sustainable communities strategy nor an alternative planning strategy regulates the use of land Nothing in a sustainable communities strategy shall be interpreted as superseding the exercise of the land use authority of cities and counties within the region.”)

³²⁸ See CEQA, CAL. PUB. RES. CODE. §§ 21155.1–.3 (West 2023) (exempting transit priority projects from certain review processes if they meet specified standards). The state and MPOs have also provided financial incentives to local governments that align their planning and zoning with the relevant SCS. Mawhorter et al., *supra* note 217, at 12–16.

³²⁹ See Alejandro Camacho & Nicholas Marantz, *Beyond Preemption, Toward Metropolitan Governance*, 39 STAN. ENV'T L.J. 125, 182 (2020) (“Because [the SCS] does not otherwise alter municipal authority over land use planning or regulation, however, it has not meaningfully altered municipal incentives to disregard regional transportation and pollution needs.”); *id.* at 185 (“California’s metropolitan planning mandate has had only a limited effect on emissions outcomes.”); Alejandro E. Camacho et al., *Mitigating Climate Change Through Transportation and Land Use Policy*, 49 ENV'T L. REP. 10473, 10474, 10479, 10482 & n.77, 10486 (2019) (noting the lack of meaningful reductions from S.B. 375); Mawhorter et al., *supra* note 217, at 22–23 (calling for more enforcement for S.B. 375); see also Barbour & Deakin, *supra* note 318, at 74–75 (noting lack of enforcement in S.B. 375); ELISA BARBOUR ET AL., BERKELEY INST. TRANSP. STUD. & U.C. DAVIS INST. TRANSP. STUD., MPO PLANNING AND IMPLEMENTATION OF STATE POLICY GOALS 9 (2021) (“[T]he lack of adequate provisions to ensure RTP/SCS implementation has hampered [S.B. 375’s] success, proving to be its Achilles heel.”); Mawhorter et al., *supra* note 217, at 21 (quoting one local planner as stating that the exemptions were rarely used because of “[o]verly complicated exemptions that don’t fit most projects”).

³³⁰ See Bill Higgins, *Regional Governance: 9 Takeaways*, CALCOG (Nov. 21, 2018), <https://perma.cc/733K-XBAG> (describing regional governments in California as “wholly-owned subsidiaries” of their local governments); Elisa Barbour, *Evaluating Sustainability Planning Under California’s Senate Bill 375*, 2568 TRANSP. RSCH. REC.: J. TRANSP. RSCH. BD. 17, 19 (2016) (“Lacking independent authority, MPOs are coordinators, interfacing between levels of government as well as single-purpose agencies (e.g., transit agencies). Most California MPOs, constituted as councils of government, have governing boards composed of local officials. This structure fosters consensus-building but it also means that MPOs embody fractures in authority for transportation and land use.”).

districts to municipal utility districts, and irrigation districts to mosquito abatement districts. The state created LAFCOs to coordinate and plan for the creation, dissolution, and boundary adjustments for many of these entities.³³¹ Most important, for our purposes, is the control LAFCOs have over cities' ability to annex additional territory,³³² which may in turn determine whether a particular area is subject to urban or suburban development. Annexation of land from a county to a city can increase in the availability of services and possibly change who decides whether a development project will be approved, which might in turn mean the difference between whether or not a project is approved.³³³ Thus, while LAFCOs do not have direct control over land-use, their review of municipal annexation may have real implications for land-use.³³⁴

State law requires LAFCOs to consider the impacts of municipal annexation decisions on urban sprawl,³³⁵ including impacts to

³³¹ CAL. GOV'T CODE § 56375 (West 2023); BARCLAY & GRAY, *supra* note 21, at 413–14.

³³² FULTON ET AL., *supra* note 308, at 15.

³³³ *See id.* (“The LAFCO does not make decisions about land-use and growth; rather, it ‘decides who decides,’ in the sense that it determines which property will be inside the boundaries of cities (and, in some cases, which of several competing cities will get the land), and which property will remain in unincorporated areas.”).

³³⁴ State law specifically prohibits LAFCOs from having direct regulatory control over land-use. CAL GOV'T CODE § 56375(a)(6) (“A commission shall not impose any conditions that would directly regulate land use density or intensity, property development, or subdivision requirements.”). For discussion of how important in practice LAFCO decisions can be for land-use decision-making, see COMM'N ON LOC. GOVERNANCE FOR THE 21ST CENTURY, GROWTH WITHIN BOUNDS: REPORT OF THE COMMISSION ON LOCAL GOVERNANCE FOR THE 21ST CENTURY 49 (2000) (“Although the Cortese-Knox Act denies LAFCOs the power to directly control land use, they are nevertheless indirectly involved.”); *Bozung*, 529 P.2d 1017, 1029 (Cal. 1975) (describing how an annexation proposal being considered by a LAFCO was triggered by development and will likely lead to development).

The connection between annexation and development in California varies significantly depending on the county and city involved. In some counties, most development occurs within incorporated cities, and so annexation is a predicate for development. However, in other counties substantial amounts of urban and suburban development occur outside of incorporated cities. In these jurisdictions, LAFCO policies on annexation will have limited or no impacts on land-use development patterns. *See* FULTON ET AL., *supra* note 308, at 15.

³³⁵ *See* BARCLAY & GRAY, *supra* note 21, at 411; CAL. GOV'T CODE § 56001 (West 2023); *see also id.* § 56425(a) (promulgating LAFCO decisions about potential future borders for local agencies must also “promote . . . logical and orderly development”); CAL. GOV'T CODE § 56430 (explaining regular LAFCO review of potential future borders must consider impacts on development); BARCLAY & GRAY, *supra* note 21, at 415 (providing more details on regular LAFCO reviews emphasizing how they consider factors related to sprawl); GOVERNOR'S OFF. PLAN. & RSCH., LOCAL AGENCY FORMATION COMMISSION MUNICIPAL SERVICE REVIEW GUIDELINES 26, 35–40 (2003), <https://perma.cc/GTM9-D8DX> (detailing how sprawl factors in to regular LAFCO reviews); *id.* app. 15–16 (outlining statutory municipal service review requirements, goals, and objectives, including the promotion of orderly growth and development).

Significant revisions by the state legislature to the LAFCO system in 2000 were driven by a state report noting the important role LAFCOs could play in constraining sprawl, and the need for more powers and duties for LAFCOs to control sprawl. TAKING THEIR PULSE:

agricultural lands and natural resources.³³⁶ LAFCOs have the ability to adopt their own policies to guide their review and approval of annexation decisions, and several LAFCOs have developed policies that discourage or presumptively reject annexation proposals that contribute to sprawl.³³⁷ In particular, there are LAFCOs that have developed UGB or UGB-like policies that restrict annexation to urbanized areas or to areas contiguous to urbanized areas.³³⁸ In general, these LAFCO policies build on, and are consistent with, UGB policies developed by an individual city.³³⁹ However, there are other LAFCOs that have no policies, or very vague policies, that manage exurban development.³⁴⁰ Even for those LAFCOs with UGB policies, those policies do not necessarily translate into implementation in individual decisions about annexation.³⁴¹

Finally, just like the other two forms of regional governance in California, local governments strongly influence LAFCOs. The membership of any given LAFCO is derived from the elected officials of the member local governments, in addition to a selected member of the public.³⁴² While state law requires LAFCO members to make decisions without reference to the particular interests of the local government they represent, it is unclear how effective that constraint is in

HOW THE LAFCOs IMPLEMENTED AB2838 2 (Herzberg, 2000) <https://perma.cc/49DV-Y8PW>.

³³⁶ CAL. GOV'T CODE §§ 56426, 56426.6, 56668, 56377 (West 2023); *see also* BARCLAY & GRAY, *supra* note 21, at 424 (explaining that LAFCOs must consider the effect of proposals on maintaining the integrity of agricultural lands).

³³⁷ State law authorizes LAFCOs to consider the regional growth impacts of their decisions. CAL. GOV'T CODE § 56668.5 (West 2023); BARCLAY & GRAY, *supra* note 21, at 428.

³³⁸ Santa Clara County LAFCO, in coordination with cities in 1970s, developed restrictions on urban annexations and development out of the urban limits previously identified by cities within the county, with LAFCO approval required for any changes. CAL. STRATEGIC GROWTH COUNCIL ET AL., CREATING SUSTAINABLE COMMUNITIES AND LANDSCAPES 10–12 (2018). Stanislaus County LAFCO set limits on urban annexations based on twenty-year growth projections, and has a policy requiring cities to develop agricultural preservation plans. CAL. STRATEGIC GROWTH COUNCIL ET AL., *supra*, at 13. Ventura County LAFCO has developed a UGB and farmland preservation program. Pendall et al., *supra* note 308, at 23; CAL. STRATEGIC GROWTH COUNCIL ET AL., *supra*, at 16. Sonoma County's LAFCO enforces a "community separator" program that creates greenbelts between cities, a program that was adopted by the County in the 1980s. CAL. STRATEGIC GROWTH COUNCIL ET AL., *supra*, at 19.

³³⁹ For instance, Santa Clara and Ventura County's LAFCO programs were based on programs developed by cities initially. CAL. STRATEGIC GROWTH COUNCIL ET AL., *supra*, note 338, at 7, 10, 16; *see also* FULTON ET AL., *supra* note 308, at 15 ("In many cases, cities, counties, and LAFCOs work together to ensure that UGBs and spheres of influence coincide, but differing political agendas sometimes preclude this from happening.").

³⁴⁰ *See* FULTON ET AL., *supra* note 308, at 15 (commenting how, when development occurs in unincorporated county territory, "the LAFCO's decision may not be as meaningful in determining where growth does and does not go").

³⁴¹ Cities have at times sought to overturn or evade LAFCO UGB programs. *See* CAL. STRATEGIC GROWTH COUNCIL, *supra*, note 338, at 11.

³⁴² CAL. GOV'T CODE § 56325 (West 2023).

practice.³⁴³ For instance, a local elected official might believe that what is best for their jurisdiction is also what is best for other jurisdictions or the county as a whole. Thus, there are significant limits to how independent LAFCOs can be from their member jurisdictions—a point reflected in the fact that most LAFCO UGB policies build on cooperative efforts with their member jurisdictions. Indeed, LAFCO decision making must be consistent with underlying local general plans, so if local governments do not wish to cooperate, a LAFCO has limited leverage.³⁴⁴

The upshot is that regional governance in California has limited possibilities to overcome the reluctance of many local governments to advance significant production of urban infill development. The relationship of regional governments with land-use decisions in California is indirect. In general, regional governance bodies do not have the power to significantly change the legal and political context that shapes zoning decisions by local governments. For instance, regional governments do not have the power to exempt local government upzoning decisions from public participation requirements, CEQA review, or the risk of litigation. Regional governments are in many ways creatures of the local governments, therefore reducing the chance that they will take actions that are inconsistent with the preferences of those local governments. Regional governments in California might, for example, coordinate action among willing local governments, which would help local governments avoid making land-use decisions that inadvertently produce leapfrog development. But regional governments have limited power to overcome collective action failures by sanctioning local governments who refuse to coordinate on land-use decisions, let alone mandate that local governments coordinate when most refuse to do so.

B. The Concept of the Urban Growth Boundary

As noted above, our proposal bears some similarities to the traditional urban growth boundary (UGB) that is familiar to urban planners, land-use regulators, and has been used across the country.³⁴⁵ The basic concept of a UGB is simple: it attempts to restrict urban growth to areas that are either already developed or contiguous to those already developed areas.³⁴⁶ If a UGB is created at the appropriate scale, meaning at least regionally, it can minimize the risk of leapfrog development caused by uncoordinated local land-use regulation.

³⁴³ BARCLAY & GRAY, *supra* note 21, at 413–14; CAL. GOV'T CODE § 56375(a)(1).

³⁴⁴ CAL. GOV'T CODE § 56375(a)(7).

³⁴⁵ See MD. OFF. PLAN., *MANAGING MARYLAND'S GROWTH MODELS AND GUIDELINES: URBAN GROWTH BOUNDARIES 3–7* (1992) (surveying urban growth boundary from states across the country).

³⁴⁶ FULTON ET AL., *supra* note 308, at 6.

In its standard form, a UGB involves government regulation that restricts development to locations in existing urbanized areas or those contiguous to urbanized areas.³⁴⁷ There are a range of policy approaches that are related to the classic UGB. A “greenbelt,” for example, is an area that adjoins—and often encircles—an urban area that is intended to permanently set aside land from development.³⁴⁸ Greenbelts differ from a UGB in that a greenbelt is intended to set permanent restrictions on development in specific areas, while UGBs are generally flexible and allow development areas to expand in response to housing and growth needs.³⁴⁹

Urban service boundaries limit the development of municipal services such as utilities, roads, and schools and restricts those services to areas within or contiguous to the already urbanized areas.³⁵⁰ Unlike UGBs, urban service boundaries are therefore not strictly regulatory as they simply restrict where public investments will occur. Urban service boundaries do seek to advance similar goals as UGBs by channeling development to urbanized or adjacent areas.³⁵¹

In this Article, our proposal is akin to a “true” UGB, in which there are significant regulatory distinctions between projects within the UGB and outside of the UGB and, more specifically, different treatments for zoning processes and development projects under CEQA within and outside of the UGB. But, unlike UGBs, the IPA is only procedural. IPAs, under our proposal, would have no bearing on allowable densities. Instead, they would simply facilitate rezonings initiated by local governments, as well as development at densities allowed by local zoning or other state law, such as the Density Bonus Law.³⁵²

Urban growth boundaries have been applied around the United States, as well as globally.³⁵³ One of the most famous examples is the regional UGB for the Portland metropolitan area, a program that has

³⁴⁷ A similar concept to a UGB is an urban growth area, an “area in which urban growth shall be encouraged and outside of which growth can only occur if it is not urban in nature.” *Id.*

³⁴⁸ Pendall et al., *supra* note 308, at 4.

³⁴⁹ *Id.* at 4–5 (noting that greenbelts often involve publicly owned land that is protected from development, while UGBs are generally regulations imposed on private land). To facilitate flexibility in the future to account for future growth needs, UGB programs may have “urban reserves,” or “area[s] outside of an urban service area but within an urban growth boundary in which future development and extension of services are planned.” Ful-ton et al., *supra* note 308, at 6. As the quote indicates, urban service areas often can be paired with UGBs.

³⁵⁰ Pendall et al., *supra* note 308, at 5.

³⁵¹ *Id.* at 24.

³⁵² CAL. GOV’T CODE §§ 65915–65918 (West 2023).

³⁵³ Yimin Chen et al., *Simulating Urban Growth Boundaries Using a Patch-based Cellular Automaton with Economic and Ecological Constraints*, 33 INT’L J. GEOGRAPHICAL INFO. SCI. 55, 56 (2019) (noting that UGBs have been applied in Canada, Australia, Korea, Saudi Arabia, and China).

inspired by far the most research on the effectiveness of UGBs.³⁵⁴ That literature has generally found the Portland UGB to be effective in constraining development outside the urban area,³⁵⁵ although its effect on densification within the urban area is more ambiguous.³⁵⁶

One potential risk of UGBs is that by restricting urban growth outside of a boundary, UGBs can constrain the production of housing and increase housing costs.³⁵⁷ This is a non-trivial concern for a state like California where housing costs have soared.³⁵⁸ Our proposal avoids this concern precisely because, to the extent that it resembles a UGB at all, it functions more like a “reverse UGB.” Instead, the IPA is a

³⁵⁴ The Portland UGB program is part of an Oregon state-level planning system that requires all cities in the state to establish UGBs. Liberty, *supra* note 308, at 10375–76.

³⁵⁵ Jerry Weitz & Terry Moore, *Development Inside Urban Growth Boundaries: Oregon’s Empirical Evidence of Contiguous Urban Form*, 64 J. AM. PLAN. ASS’N 424, 436 (1998); Hongwei Dong & John Gliebe, *Assessing the Impacts of Smart Growth Policies on Home Developers in a Bi-state Metropolitan Area: Evidence from the Portland Metropolitan Area*, 49 URB. STUD. 2219, 2233 (2012); Robert W. Wassmer, *The Influence of Local Urban Containment Policies and Statewide Growth Management on The Size of United States Urban Areas*, 46 J. REG’L SCI. 25, 56, 62 (2006); Carl Abbott, *The Portland Region: Where City and Suburbs Talk to Each Other—and Often Agree*, 8 HOUS. POLY DEBATE 11, 31 (1997). *But see* Myung-Jin Jun, *Are Portland’s Smart Growth Policies Related to Reduced Automobile Dependence?* 28 J. PLAN. EDUC. & RSCH. 100, 105 (2008) (finding that Portland’s UGB was not associated with reduced VMT). As discussed below, there is some evidence that Portland’s UGB pushed development across the state line into Washington.

³⁵⁶ Myung-Jin Jun, *The Effects of Portland’s Urban Growth Boundary on Urban Development Patterns and Commuting*, 41 URB. STUD. 1333, 1345–46 (2004) [hereinafter Myung-Jin Jun, *Portland Urban Development and Commuting*]; Myung-Jin Jun, *The Effects of Portland’s Urban Growth Boundary on Housing Prices*, 72 J. AM. PLAN. ASS’N 239, 241 (2006); Jae Hong Kim, *Measuring the Containment and Spillover Effects of Urban Growth Boundaries: The Case of the Portland Metropolitan Area*, 44 GROWTH & CHANGE 650, 666, 670 (2013).

³⁵⁷ Andrew Aurand, *Density, Housing Types and Mixed Land Use: Smart Tools for Affordable Housing?* 47 URB. STUD. 1015, 1017–18 (2010); Shishir Mathur, *Impact of Urban Growth Boundary on Housing and Land Prices: Evidence from King County, Washington*, 29 HOUS. STUD. 128, 129 (2014); *see also* Seong-Hoon Cho et al., 38 REV. REG’L STUD. 29 (2008) (finding that UGB increases prices within the border in Knoxville, Tennessee); John D. Landis, *Land Regulation and the Price of New Housing: Lessons from Three California Cities*, 52 J. AM. PLAN. ASS’N 9 (1986) (describing case study of San Jose UGB which may have increased housing prices); Thomas L. Daniels, *The Use of Green Belts to Control Sprawl in the United States*, 25 PLAN., PRACTICE & RSCH. 255, 266 (2010) (noting the criticism that UGBs restrict land supply and therefore increase housing prices); Anthony Downs, *Have Housing Prices Risen Faster in Portland Than Elsewhere?* 13 HOUS. POLY DEBATE 7, 9 (2002) (assuming land prices influence housing prices).

³⁵⁸ The California Department of Housing and Community Development identifies UGBs as a growth management tool that can produce barriers to housing and may require a response by a local government under state housing element law. *Building Blocks: Land Use Controls*, CAL. DEPT’ HOUS. & CMTY. DEV., <https://perma.cc/9PMM-64QA> (last visited Nov. 11, 2023) (“Ordinances, policies, procedures, or measures imposed by the local government that specifically limit the amount or timing of residential development should be analyzed as potential governmental constraints and mitigated, where necessary . . . [including] the impact of the growth management or controls process and procedure on the cost and affordability of housing.”).

mechanism to streamline land-use regulation and environmental review for specified parcels throughout the state, a measure that on net reduces regulatory burdens.

Planning literature has long advocated for the upzoning of land within UGBs. Upzoning within UGBs would facilitate significant construction of denser development and substantial reductions of procedural obstacles to development projects, which would in turn prevent UGBs from increasing housing costs.³⁵⁹ Our proposal would similarly facilitate denser development within infill areas by reducing procedural obstacles for efforts to upzone within the IPA. In contrast, the traditional UGB imposes stricter standards outside the UGB that must be offset by facilitating denser development within the UGB.³⁶⁰ But in the California context, the stricter standards outside the UGB already exist; we propose to add the facilitation of upzoning within the UGB to address the need for more housing.³⁶¹

Planning literature has also pushed for the regular reevaluation of UGBs and, when needed, expansion of a UGB to incorporate more additional land to meet housing needs in the future.³⁶² As discussed above, we also incorporate such flexibility into our proposal.

³⁵⁹ See Aurand, *supra* note 357, at 1020–23; Arthur C. Nelson, *Comment on Anthony Downs's "Have Housing Prices Risen Faster in Portland Than Elsewhere?"*, 13 HOUS. POL'Y DEBATE 33, 36 (2002) (“[I]f [housing policies] restrict the supply of land while facilitating housing production at a level needed to meet market demand, housing prices need not rise.”); Landis, *Growth Management Revisited*, *supra* note 308, at 418, 426; Henry R. Richmond, *Comment on Carl Abbott's "The Portland Region: Where City and Suburbs Talk to Each Other—and Often Agree,"* 8 HOUS. POL'Y DEBATE 53, 58 (1997) (noting importance of density within UGB to advance fair housing goals); Robert Stacey, *Urban Growth Boundaries: Saying "Yes" to Strengthening Communities*, 34 CONN. L. REV. 597, 602 (2002) (noting importance of upzoning and quick review within the UGB); Myron Orfield, *Land Use and Housing Policies to Reduce Concentrated Poverty and Racial Segregation*, 33 FORDHAM L.J. 877, 891 (2006) (noting the importance of upzoning within the UGB); Pendall et al., *supra* note 308, at 35 (“Tighter containment strategies tend to encourage greater increases in density in areas designated for growth, as long as local policy permits it.”); FULTON ET AL., *supra* note 308, at 75 (emphasizing need for higher permitted densities within UGBs and the need not to have voter approval requirements for higher density within UGB); Abbott, *supra* note 355, at 29, 41 (“[G]rowth boundaries are long-term commitments, not quick fixes. They work best when they are part of a planning implementation package that includes public transit investment, infill development, and affordable housing strategies.”).

³⁶⁰ Pendall et al., *supra* note 301, at 35.

³⁶¹ We do not necessarily believe that there is no need for more regulation in the right context outside of urbanized areas. Given the dire housing crisis California faces, we make our primary focus in this project the facilitation of housing in urbanized areas.

³⁶² Pendall et al., *supra* note 308, at 31 (“Urban containment systems . . . can raise land prices, and the longer they are in effect and the more tightly they are drawn around existing development, the more severe this inflationary effect. When the boundaries encompass sufficient land to encompass sufficient land to accommodate future growth . . . they may not have this inflationary effect.”); Downs, *supra* note 357, at 29 (recommending expansion of a UGB when a metro area has a period of “great prosperity”); Landis, *Growth Management Revisited*, *supra* note 308, at 428 (“UGBs that leave too little undeveloped land with-

A second major risk of UGBs is that, if they cover only a portion of a housing market, they may be ineffective and even enable sprawling development. For instance, as with all land-use regulation, if the individual local governments within a metropolitan area with highly fragmented local governance impose a UGB on a piecemeal basis, subsequent growth may be diverted from jurisdictions with UGBs to jurisdictions without UGBs.³⁶³ This can lead to leapfrog development that in turn can produce significant sprawl.³⁶⁴ The spillover effects of local UGBs can be even worse if they are not paired with increased development opportunity within the UGB, such that even more development is pushed into other jurisdictions.³⁶⁵ For instance, Boulder, Colorado implemented a very strict UGB and greenbelt program, but did not increase development capacity in the zones within the UGB; the result has been expensive housing within the UGB and leapfrog development in neighboring communities.³⁶⁶

Even UGBs that are adopted at a level above the local level but that do not cover an entire metropolitan area can produce leapfrog development.³⁶⁷ For instance, there is some research that questions the effectiveness of the Portland UGB in constraining growth, noting that as state-level policy, the Portland UGB cannot constrain development across the Columbia River in neighboring Vancouver, Washington, where a newer but weaker UGB program exists.³⁶⁸ There is also

in their boundaries relative to demand will also reduce sprawl and increase infill, but cause significant housing price increases.”); Arthur Grimes & Yun Liang, *Spatial Determinants of Land Prices: Does Auckland’s Metropolitan Urban Limit Have an Effect?* 2 APPLIED SPATIAL ANALYSIS & POL’Y 23, 25 (2009) (arguing that UGBs’ “need to be revised on a continuous basis reacting to the available supply and price of vacant land”).

³⁶³ Pendall et al., *supra* note 308, at 35.

³⁶⁴ See Nelson, *supra* note 359, at 38 (“The San Francisco Bay Area UGBs adopted piecemeal by local governments arguably save local open space but at the expense of pushing new low-density subdivisions into the San Joaquin Valley . . .”).

³⁶⁵ *Id.* at 37–38 (noting how UGBs in many other cities are not paired with facilitating development within the boundary, and thus are “patently exclusionary, are fraught with permitting delay, do not consciously accommodate the regional demand for development, and are not done from a regional or metropolitan perspective”). Reciprocally, local UGBs that do allow for adequate development potential within the UGB may not have the same spillover effects. Pullsung Byun, et al., *Spillovers and Local Growth Controls: An Alternative Perspective on Suburbanization*, 36 GROWTH & CHANGE 196, 207 (2005); Pendall et al., *supra* note 308, at 35 (“Tighter containment strategies also make it more likely that new growth will jump the ‘greenbelt.’”).

³⁶⁶ Pendall et al., *supra* note 308, at 18–20. The authors also criticize local UGB efforts in California for suffering some of the same flaws. *Id.* at 22–23.

³⁶⁷ See Kurt Paulsen, *The Effects of Growth Management on the Spatial Extent of Urban Development, Revisited*, 89 LAND ECON. 193, 193 (2010) (finding that regional growth measures may be ineffective in reducing sprawl or even increase it, while state measures might be effective).

³⁶⁸ Myung-Jin Jun, *Portland Urban Development and Commuting*, *supra* note 356, at 1333 (finding that Portland UGB diverted sprawl across the Columbia River to Washington State); Hongwei Dong & Gliebe, *supra* note 355, at 1, 17 (finding that UGB concen-

evidence that local governments have obstructed implementation of the Portland UGB by refusing to upzone for higher density within the UGB.³⁶⁹ Accordingly, state-wide or metropolitan area-wide policies are more likely to be effective in addressing sprawling development.³⁷⁰

The advantage of a state-level approach to facilitate development within California's urban areas is not just that it will be more effective than piecemeal land-use regulation by fragmented local governments. In addition, given the size of the state, there are unlikely to be any significant cross-border spillovers. A state-level policy of facilitating development within specific infill areas will provide comprehensive coverage of all the metropolitan areas within the state.

V. CONCLUSION

This Article focuses on California because of the state's complex regulatory system and its dire need for increased housing production. Accordingly, we dove into the details of California's environmental review and land-use regulatory system so that we could provide a concrete proposal that policymakers could readily adopt.

But even a detailed proposal must be politically feasible. The tenor of the recent debate over Assembly Bill 68 in the California legislature might provide some insights on the political feasibility of our proposal. A.B. 68 would require local governments to approve housing in "climate smart" locations and would have made it significantly more difficult for local governments to approve housing in "climate risk" or "climate refugia" locations.³⁷¹ The press heralded A.B. 68 as the product of a grand coalition between pro-housing groups, sometimes called "YIMBYs,"³⁷² and environmental groups.³⁷³ But it also received fierce opposition. The California Chamber of Commerce identified A.B. 68 as a "job killer" because of its restriction on development.³⁷⁴ The California

trated development in Oregon but had less of an effect in area of Washington State adjoining Portland).

³⁶⁹ See, e.g., Sullivan, *supra* note 245, at 165, 198 (noting example of local government requiring voter approval for all major development projects).

³⁷⁰ Wassmer, *supra* note 355, at 56.

³⁷¹ A.B. 68 (AB 68), 2023–2024 Leg. Reg. Sess. (Cal. 2023); CHRISTOPHER WARD, FACT SHEET: AB 68, THE HOUSING AND CLIMATE SOLUTIONS ACT (March 16, 2023), <https://perma.cc/XKS9-QVRH>.

³⁷² YIMBY stands for "Yes in My Backyard." Dustin Gardner, *YIMBYs and Environmentalists Have Been at Odds on Housing. Now They are Teaming up to Fight Sprawl*, S.F. CHRON. (March 17, 2023, 7:53 PM), <https://perma.cc/YW38-Y85B>.

³⁷³ *Id.*; Ethan Elkind, *Infill Housing & Conservationists Finally Team Up*, LEGAL PLANET (March 27, 2023), <https://perma.cc/RV8L-9RB6>.

³⁷⁴ See Denise Davis, *CalChamber Tags AB 68 as a Job Killer*, CAL. CHAMBER COM. (Mar. 23, 2023), <https://perma.cc/492B-3Q2F>. The Chamber's identification of a bill as a job killer frequently leads to its demise. See Dan Walters, *'Job Killer' List Tests Capitol's Ideological Bent*, CALMATTERS (Mar. 30, 2022), <https://perma.cc/AE2Q-MLKD>.

Building Industry Association opposed the bill as a “housing killer.”³⁷⁵ The California State Association of Counties also opposed the bill.³⁷⁶ Sponsors pulled the bill before it received even a single committee hearing.³⁷⁷

Our proposal does have some similarities with A.B. 68. The bill was an attempt to create something like a state-wide map where denser housing would be encouraged,³⁷⁸ just as our proposal aims to do. But A.B. 68 was significantly more intrusive than our proposal in its impact on local land-use control. Under, A.B. 68 local governments would have been required to approve housing projects in “climate smart” locations and been restricted in their ability to impose even basic controls like setbacks, height limits, and floor area ratios in those locations.³⁷⁹ In contrast, our proposal would not infringe on local land-use planning and zoning powers. It would simply restrict the ability of local governments to use CEQA, a state law, to restrict housing and it would empower local governments that wished to upzone or approve housing.³⁸⁰ In addition, A.B. 68 would have constrained the ability of local governments to approve housing in wide swaths of the state, including high-severity wildfire and flood zones, areas at risk for sea level rise, and areas important for wildlife habitat.³⁸¹ Our proposal does not impose additional constraints on local government approval of housing.

The fight over A.B. 68 is further evidence that large-scale changes to housing policy in California are contentious, as demonstrated by the many bitter debates over housing legislation in the state over the past several years. However, the relatively limited nature of our proposal may reduce opposition from building and business groups and local governments. In the context of the difficult politics of California housing, the nuanced nature of our proposal may too help identify a

³⁷⁵ See *Housing Killers and Creators*, CAL. BUS. INDUS. ASS'N, <https://perma.cc/9CTX-5TEW> (last visited Nov. 19, 2023).

³⁷⁶ Ryan Morimune et al., *CSAC Policy Committees Meet at the 2023 Legislative Conference*, CAL. STATE ASS'N COUNTIES (Apr. 14, 2023), <https://perma.cc/H4ME-TWNM>.

³⁷⁷ Jeremy B. White et al., *Of Houses and Warehouses*, POLITICO (Apr. 27, 2023, 9:09 AM), <https://perma.cc/9A5Z-U2MY>.

³⁷⁸ A.B. 68, 2023–2024 Leg. Reg. Sess. (Cal. 2023).

³⁷⁹ See *id.* § 3.

³⁸⁰ It is possible that the IPA could become a standardized definition of where the state specifically wishes increased development to occur, and therefore could also be used as a template or element for other state legislative efforts to increase housing. For instance, if the legislature did wish to override other state-level constraints on housing, the IPA map would provide a simple reference point to facilitate both policymaking and compliance by project proponents. The IPA map can also be used as a template for determining where other positive incentives for development should occur. To take another example, the map could be used as the basis for a state law that provides even larger density bonus provisions for affordable housing specifically located in IPAs. But these extensions are not a necessary component of our proposal, and we do not develop them in more detail here.

³⁸¹ See A.B. 68, § 4.

path forward that can encourage more housing production in the right places in the state.

There is evidence from California's northern neighbors, Oregon and Washington, for the political feasibility of our approach. As discussed throughout our analysis, Oregon has long had a system that attempts to encourage development in urban areas and restrict it outside those urban areas—an urban growth boundary. Indeed, Oregon's system is far more ambitious than our proposal, yet it remains popular in the state.³⁸² And in 2023, Washington State enacted legislation that exempted all housing production within “urban growth areas” that is consistent with local zoning from the state's environmental review process,³⁸³ a proposal that is at least as ambitious as ours.

While the need for infill residential development, and the challenges facing that development, may be the most acute in California, these are issues that many metropolitan areas confront. Metropolitan areas across the United States face skyrocketing housing costs and seek to produce housing that requires less VMT while also advancing equity goals.³⁸⁴ Even if most other states do not have the complicated environmental review system that California has, many still have local governments that have primary control over land-use regulation.³⁸⁵ Like in California, these local governments may not have the incentives to encourage infill development and can use byzantine land-use regulatory systems to control and deter development projects. And as in California, it may be difficult for state governments to adequately monitor how local governments use their regulatory powers and whether they are undermining state efforts to encourage infill development.

The proposal we have developed here for California can therefore be important even in states without significant environmental review requirements. States should use our proposal to overcome informational challenges to their efforts to liberalize local land-use regulation. It can also allow for more direct state preemption of local land-use regulation targeted to protect important environmental resources and advance equity goals. More direct state preemption can in turn reduce the risk of

³⁸² Deborah Howe, *Land Conservation and Development Commission (LCDC)*, OR. ENCYCLOPEDIA, <https://perma.cc/JD6H-TXXM> (Jun. 28, 2022).

³⁸³ WASH. REV. CODE § 43.21C.229(a) (2023). Urban growth areas in Washington are areas designated for high-density development under Washington's Growth Management Act; the legal framework is similar to Oregon's UGB program. *See* Settle, *supra* note 244, at 11–12 (providing an overview of Washington's program); Henry W. McGee, Jr., *Washington's Way: Dispersed Enforcement of Growth Management Controls and the Crucial Role of NGOs*, 31 SEATTLE U. L. REV. 1, 8 (2007) (same).

³⁸⁴ ROGER MILLAR & NORENE PEN, WASHINGTON STATE DEP'T TRANSP., VEHICLE MILES TRAVELED (VMT) TARGETS—FINAL REPORT 49–51 (2023), <https://perma.cc/293X-3KWF>.

³⁸⁵ ORG. FOR ECON. COOP. & DEV., THE GOVERNANCE OF LAND USE: COUNTRY FACT SHEET UNITED STATES (2017), <https://perma.cc/C43S-DEQH>.

local governments successfully undermining state efforts to advance infill housing development.

How our proposal could apply in other states and metropolitan areas will vary a great deal in its specifics, given the legal, political, economic, and environmental context for each place. We hope, however, that our proposal for California—where the housing crisis is dire and hard to solve—could inspire similar thinking in other places facing similar challenges.

APPENDIX I – TABLES

Table 1: Categories of State Reform Efforts

	CEQA streamlining for local decisionmaking	State mandate or preemption
Project-Level	CEQA project-specific exemptions (e.g., Class 32, Class 3)	Require ministerial approval of certain projects (e.g., SB 35)
Zoning-Level	CEQA exemptions for local rezoning (e.g., SB 10)	State preemption of local land-use regulation (e.g., SB 9)

Table 2: Overview of Conditions for State Statutes and Guidelines Relating to CEQA Streamlining

[Part 1]

	PRC 21159.25	PRC 21159.24	PRC 21155.1	PRC 21094.5/ Guideline 15183.3	PRC 21155.4
Type of Housing Eligible	Multifamily (residential or mixed use, max 33% commercial) housing	Residential or mixed use (max 25% commercial)	Residential or mixed-use (use max 50% commercial)	Residential or mixed-use	Residential or mixed-use
Location	Unincorporated counties that are within urbanized area or urban cluster, substantially surrounded (75%) by qualified urban uses	Urbanized area, within 1/2 mile of major transit stop, on an infill site (PRC 21064.3)	Within 1/2 mile of rail, ferry or high-quality transit corridor; No conflict with industrial uses	Urban area (PRC 21094.5) and, previously developed site or 75% adjoins qualified urban uses; App. M: Below average VMT, 1/2 mile to major transit stop or high-quality transit corridor or provides 100% affordable housing	Transit priority area (defined by PRC 21099)

	PRC 21159.25	PRC 21159.24	PRC 21155.1	PRC 21094.5/ Guideline 15183.3	PRC 21155.4
Density/ Unit Minimum	Density is equal to or greater than surrounding density, or at least 6 units/acre; at least 6 units overall	10-20 du/acre minimum		Consistent with SCS, 20 units/acre or FAR of 0.75, or walkable community project (PRC 21094.5(e)(4))	
Density/ Unit Maximum		Less than 100 units; No building over 100,000 sq. ft	200 units or less, buildings 75000 sq ft or smaller on a single level	Less than 300 units if 100% affordable	
Parcel Size Limits	Less than 5 acres	Less than four acres	Less than eight acres		

	PRC 21159.25	PRC 21159.24	PRC 21155.1	PRC 21094.5/ Guideline 15183.3	PRC 21155.4
Plan Consistency Require- ments	Consistent with general plan and zoning	Consistent with general plan and mitigation measures; Prior community-level environmental review within 5 years; No substantial changes or new information since prior community-level environmental review	Consistent with SCS and general plan	Consistent with SCS	Consistent with specific plan with completed EIR; Consistent with SCS and general plan; No supplemental review required since EIR
Affordabil- ity Require- ments		Affordable housing requirement	No net loss of affordable housing; Affordable housing or public open space provision	App. M: Below average VMT, close to transit, or provides 100% affordable housing	

	PRC 21159.25	PRC 21159.24	PRC 21155.1	PRC 21094.5/ Guideline 15183.3	PRC 21155.4
Protected resources	No endangered species habitat	No wetlands; No wildlife habitat or harm to endangered species; No significant impact on historical resources; Not in open space; Not within state conservancy	No wetlands or riparian areas; No significant value as wildlife habitat; No harm to endangered species; No significant impact on historical resources; Not in open space		
Hazardous Waste Site Restrictions?		Not listed by DTSC under Govt Code 65962.5 (hazardous waste site)	Not listed by DTSC under Govt Code 65962.5 (hazardous waste site)	App. M: Remediation if toxic site under 65962.5	
Natural Hazard Restrictions?		Not wildland fire hazard; No risk of fire or explosion; No public health exposure risk; Not on earthquake fault zone; Not in flood or landslide zone	Not wildland fire hazard; No risk of fire or explosion; No public health exposure risk; Not on earthquake fault zone; Not in flood or landslide zone		

[Part 2]

	PRC 21099	PRC 21083.3/ Guidelines 15183	Govt 65457	Guidelines 15303 (Class 3 exemption) (Urbanized area as defined in PRC 21071)	Guidelines 15303 (Class 3 exemption) (Outside Urbanized area)	Guidelines 15332
Type of Housing Eligible		Residential or mixed-use	Residential		Residential	Residential or mixed-use
Location	Transit priority area (defined by PRC 21099)		None			Within city limits, substantially surrounded by urban uses
Density/ Unit Minimum						
Density/ Unit Maximum				Apartments of six units or less OR up to three single-family residences	Multi-family of four units or less OR One single-family residence	
Parcel Size Limits						Site 5 acres or less

	PRC 21099	PRC 21083.3/ Guidelines 15183	Govt 65457	Guidelines 15303 (Class 3 exemption) (Urbanized area as defined in PRC 21071)	Guidelines 15303 (Class 3 exemption) (Outside Urbanized area)	Guidelines 15332
Plan Consistency Requirements		Consistent with zoning or plan with certified EIR; No supplemental review required	Consistent with specific plan with completed EIR; No supplemental review required			Consistent with plan and zoning
Affordability Requirements						
Protected Resources						No endangered species habitat
Hazardous Waste Site Restrictions?						
Natural Hazard Restrictions?						

Table 3: Overview of Conditions for State Statutes and Guidelines Relating to Upzoning

	Govt 65913.4 (SB 35)	Gov't 65852.21, 66411.7 (SB 9)	Gov't 65912.111-.113 (AB 2011)	Govt' 65912.121-.123 (AB 2011)	SB 10
Type of Housing Eligible	Multifamily housing		Multifamily housing	Multifamily housing	
Location	Within urbanized area or urban cluster, 75 percent of perimeter developed with urban uses; Zoned for residential use or mixed-use; Jurisdiction not in compliance with RHNA or housing element	Within urbanized area or urban cluster	Zoned for office, retail, or parking as principally permitted use; Within urbanized area or urban cluster, 75 percent of perimeter developed with urban uses; Not close to freeway; Not close to oil or gas facility; No more than 1/3 square footage in industrial use	Zoned for office, retail, or parking as principally permitted use; Within urbanized area or urban cluster, 75 percent of perimeter developed with urban uses; Not close to freeway; Not close to oil or gas facility; No more than 1/3 square footage in industrial use; No zoning prohibition of multifamily housing	One-half mile to major transit stop OR Within urbanized area or urban cluster, 75 percent of perimeter developed with urban uses, and zoned residential (in-fill)
Density/ Unit Minimum			Minimum density for lower income households (Section 65583.2(c)(3))		

	Govt 65913.4 (SB 35)	Gov't 65852.21, 66411.7 (SB 9)	Gov't 65912.111- .113 (AB 2011)	Govt' 65912.121- .123 (AB 2011)	SB 10
Density/ Unit Max- imum	Relevant objective zoning standards	Two to four units/parc el	Relevant objective zoning standards	Local zon- ing limits or 20-50 units/acre, whichever greater; 70 units/acre near major transit stop (limits vary by parcel size and urbaniza- tion)	Ten units per par- cel
Parcel Size Limits				Site 20 acres or less	
Plan Con- sistency Require- ments			If neigh- borhood plan, per- mits use	If neigh- borhood plan, per- mits use	
Affordabil- ity Require- ments	Affordable housing require- ment; Not a mobile home park; No prior dem- olition of rental housing	No demo- lition of affordable housing; No prior demoli- tion of rental housing	100% af- fordable housing; Not a mo- bile home park	Affordable housing re- quirement; Not a mo- bile home park; No prior demo- lition of rental housing; No occupancy by one to four dwell- ing units	

	Govt 65913.4 (SB 35)	Gov't 65852.21, 66411.7 (SB 9)	Gov't 65912.111- .113 (AB 2011)	Govt' 65912.121- .123 (AB 2011)	SB 10
Protected resources	Not prime farmland, not wetlands, no endangered species habitat, not conservation easement; No demolition of historic resource; Not coastal zone; No tribal cultural resource	Not prime farmland, not wetlands, no endangered species habitat, not conservation easement; No demolition of historic resource	Not prime farmland, not wetlands, no endangered species habitat, not conservation easement; No demolition of historic resource; No tribal cultural resource	Not prime farmland, not wetlands, no endangered species habitat, not conservation easement; No demolition of historic resource; No tribal cultural resource	Not open space
Hazardous Waste Site Restrictions?	Not listed by DTSC under Govt Code 65962.5 (hazardous waste site)	Not listed by DTSC under Govt Code 65962.5 (hazardous waste site)	Not listed by DTSC under Govt Code 65962.5 (hazardous waste site); Remediation if contamination found	Not listed by DTSC under Govt Code 65962.5 (hazardous waste site); Remediation if contamination found	
Natural Hazard Restrictions?	Not wildland fire hazard; Not on earthquake fault zone; Not in flood zone	Not wildland fire hazard; Not on earthquake fault zone; Not in flood zone	Not wildland fire hazard; Not on earthquake fault zone; Not in flood zone	Not wildland fire hazard; Not on earthquake fault zone; Not in flood zone	Not wildland fire hazard

Table 4: CEQA Class 32 Exemption and neighborhood VMT levels

Project located in TAZ with VMT above MPO Average?	Project used Class 32 exemption?	
	Yes	No
Yes	57 (13%)	220 (15%)
No	377 (87%)	1237 (85%)
Total	434 (100%)	1457 (100%)

Data from the CALES project (on file with authors) and the California Statewide Travel Demand Model (2016). *Cal. Statewide Travel Demand Model*, N. CAL. INST. OF TRANSP. ENG'RS. (Mar. 7, 2016), <https://perma.cc/C7MY-SRMB>. The table identifies projects by whether they use the Class 32 exemption under CEQA (CEQA Guidelines 15332) that is intended to advance infill development with lower VMT. "Project located in TAZ with VMT above MPO Average" indicates that the transportation analysis zone containing the project has household-based VMT above the average for the relevant metropolitan planning area (the regional governance structure that manages transportation planning in California). Number is the total number of projects in each category, and percent is the percentage of Class 32 exemption projects, and non-Class 32 exemption projects, that fall in each VMT category.