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WHY OUR FAIR SHARE HOUSING LAWS FAIL*

Ben Field**

It is well documented that California is facing a housing crisis. Population growth during the 1980s far exceeded the growth in housing supply. ¹ High demand, resulting from population growth and limited supply, has dramatically increased home prices. However, family income has not kept pace.² As a result, fewer families are able to afford homes.³ The rise in the cost of rental housing has also exceeded the increase in family income.⁴ Using almost any measure, housing costs in California exceed housing costs in the rest of the country. The state hosts thirteen of the fifteen metropolitan areas with the nation’s least affordable housing.⁵

¹ Many people contributed to this article, but four were especially important to its progress. Although they may not entirely agree with the article, Nancy Scott, Jerome Field, Michael Rawson, and Professor Ira Michael Heyman each shaped and improved it.


1. California’s population grew 24% during the 1980’s to more than 29 million people. Bradley Inman, Population Gains Outpace Housing, Sacramento Bee, September 9, 1990, at I1. Housing supply grew 20% during the 1980’s to 11.2 million units. Id. Based on an average household size of 2.7, this represents a shortfall of 129,621 housing units statewide. Id.

2. The median price of an existing single-family home increased 580% from $24,300 in 1970 to 165,600 in 1988, while the median family income rose 234% from $10,828 to $36,200 during the same period. California Association of Realtors, California’s Housing Crisis: The American Dream Deferred, Policy Recommendations for State and Local Housing Issues 10 (August, 1989) [hereinafter Realtors].

3. Thirty to 35% of California households were renters during the 1960’s, and the rest owned their homes. By the end of the 1980’s the statistics were reversed, with the vast majority of households renting. Bradley Inman, Rental Crunch in the State’s Future, Sacramento Bee, April 21, 1991, at H1.

4. The median rent in California increased 125% from $126 in 1970 to $283 in 1980, while median family income rose 99% from $10,828 to 21,537 during the same period. See Realtors, supra note 2.

5. Bay Area Council, Housing and Development Report: What’s Wrong With Bay Area Housing Elements (July, 1991) (on file with author) [hereinafter Bay Area Council]. These figures are based on the percentages of households
The shortage of affordable housing in California has a profound effect on people living in California. The state's population growth, coupled with the shortage of affordable housing, has caused overcrowding in almost twenty percent of the state's rental units. The shortage of affordable housing close to employment centers is forcing workers to live farther and farther from their jobs. The resulting increase in commuting causes traffic congestion and adverse environmental impacts. The lack of affordable housing also places strains on family life. "In order to locate affordable housing, many family members are working longer hours, multiple jobs or commuting long distances to work. All these factors take a toll on family life, leaving less time for parents to spend with their children and adding to the stress of an already long work day." The shortage of affordable housing is at the core of complex interrelated problems.

The impact of exclusionary land use controls on the cost and supply of housing has been well documented. According to the Department of Housing and Community Development (HCD) over half of the rental units in California were overcrowded in 1992. In 1982, only 10.5% of the state's rental units were overcrowded. HCD defines "overcrowded" as "more than one person living in each bedroom." Household size has increased from 2.67 people in 1980 to 2.8 people in 1990. Richard T. LeGates, Regional Housing Issues in the San Francisco Bay Area 220-22 (1990) (discussing the housing/jobs imbalance in the Bay Area). See also Robert Cervero, Suburban Gridlock, Berkeley U.C. Press, June 15, 1986, at AI. (describing the national trend—exemplified in California—of increasing commute times).

For the purpose of this article, exclusionary land use controls are regulations that significantly interfere with the development of low- and moderate-cost housing where it is needed. Norman Williams, Jr. & Thomas Norman, Exclusionary Land Use Control: The Case of North Eastern New Jersey, 22 Syracuse L. Rev. 475, 478 (1971). A list of types of exclusionary zoning may be instructive.

The arsenal of tools for the process of exclusion is steadily growing. Lower percentage land occupancy—larger minimum plots—minimum house sizes—complicated building codes—limiting number of building permits issued per year—non look-alike clauses (including a recent New Jersey ordinance against interior look-alikes)—costlier road spec-
ing to the Association of Bay Area Governments (ABAG), the regional Council of Governments\(^\text{11}\) for the San Francisco Bay Area, “[l]and use controls . . . usually create the most significant housing constraints in a city or county.”\(^\text{12}\) The amelioration of exclusionary land use controls is essential to the creation of affordable housing opportunities.\(^\text{13}\)

Local governments in California have a legal obligation to help meet their region's housing needs by enacting land use ordinances conducive to the development of the locality's fair share of the affordable housing needed in the region.\(^\text{14}\) Nevertheless, some localities refuse to uphold this obligation, retaining instead their exclusionary land use ordinances.\(^\text{15}\)

The first part of this article evaluates current regional housing statutes and the implementation of these statutes.\(^\text{16}\) It examines the law pertaining to regional housing targets, fair share housing targets for localities, and requirements of localities vis-à-vis their fair share targets. It also describes the mechanism for enforcing the fair share statutes.

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\(^{\text{11}}\) A Council of Governments is “a single multi-county council created by a joint powers agreement pursuant to Government Code Chapter 5, between cities and/or counties in the same region.” \textit{Cal. Gov't. Code} § 65582(b) (Deering 1987 & Supp. 1993). Its purpose is to address issues of regional concern.

\(^{\text{12}}\) \textit{Local Housing Element Assistance Project, Blueprint for Bay Area Housing, A HANDBOOK FOR ADDRESSING THE CRITICAL HOUSING SHORTAGE IN THE BAY AREA} 27 (May 1990) [hereinafter \textit{Local Housing}].

\(^{\text{13}}\) See Mallach, \textit{ supra} note 10.


\(^{\text{15}}\) See discussion \textit infra} part II.

\(^{\text{16}}\) See discussion \textit infra} part I.
The second part of this article examines the extent of noncompliance with the fair share housing statutes. It discusses past efforts to compel localities to meet their fair share housing obligations, and it examines the effect of the fair share statutes on local government housing policies.

The third part of the article evaluates the mechanism for enforcing the fair share housing laws. The cornerstone of the enforcement mechanism is a private right of action against non-complying localities. Analysis of this enforcement mechanism reveals significant shortcomings that arise from its dependence on litigation and judicial intervention in local land use decisions.

The fourth part of the article argues that the existing judicial enforcement mechanism should be replaced by an administrative enforcement mechanism. It describes the basic attributes the new enforcement mechanism should have.

I. CURRENT FAIR SHARE HOUSING STATUTES

A. The Housing Element of the General Plan and Other Requirements

California Government Code section 65300 requires every locality to "adopt a comprehensive, long-term general plan for the physical development of the county or city." The plan consists of "a statement of development policies . . . diagrams and text setting forth objectives, principles, standards and plan proposals," and must include seven elements: land use, circulation, housing, conservation, open space, noise and safety. "The general plan is atop the hierarchy of local government law regulating land use." Courts have analogized it to "a constitution for all future developments."

Of the seven elements that state law requires in each locality's general plan, the housing element must meet the most detailed specifications. The structure and function of a housing element can be broken into six parts: review of the

17. See discussion infra part II.
18. See discussion infra part III.
19. See discussion infra part IV.
21. Id.
23. Id.
previous housing element, existing and projected housing needs assessment, resource inventory, governmental and nongovernmental constraints on housing, quantified housing objectives, and housing programs.\textsuperscript{24}

The primary factor in a locality's housing needs assessment for the future should be the Regional Housing Needs Plan (RHNP), prepared by the regional Council of Government (COG); each housing element must "include the locality's share of the regional housing need in accordance with section 65584," which mandates COG fair share targets.\textsuperscript{25} However, localities treat the fair share targets set by their region's COG as advisory, because the statute does little to punish localities that fail to incorporate fair share targets and does not reward localities that comply with fair share requirements.\textsuperscript{26}

The section of the housing element that sets forth the locality's housing programs should identify specific sites to accommodate housing needs for each household income level.\textsuperscript{27} Legislation enacted in 1991 further requires that those sites be zoned for densities that will permit the needed low-income housing.\textsuperscript{28} The legislation also requires development standards that will enable the development of affordable housing.\textsuperscript{29}

The statute does not restrict localities' freedom to undertake housing programs of their own choosing. The regulatory and land use techniques that localities may use to encourage the development of housing on the designated sites include: procedural reform to streamline the development approval process, lower development standards, higher density, density bonuses, inclusionary zoning, office/housing linkage, re-zoning vacant land, infill housing, mixed-use zoning, and growth control exemptions.\textsuperscript{30} The statute states that housing elements should be reviewed by the State Department of Housing and Community Development (HCD) as frequently as possible, but at least once every five years.\textsuperscript{31} HCD evalu-

\textsuperscript{24} \textsc{Cal. Gov't. Code} § 65583 (Deering 1987 & Supp. 1993).
\textsuperscript{25} \textit{Id.} § 65583(a)(1).
\textsuperscript{26} \textit{See infra} discussion part III.
\textsuperscript{27} \textsc{Cal. Gov't. Code} § 65583(c) (Deering 1987 & Supp. 1993).
\textsuperscript{28} \textit{Id.}
\textsuperscript{29} \textit{Id.}
\textsuperscript{30} \textit{See} \textit{Local Housing}, \textit{supra} note 12, at 37-60.
ates housing elements for compliance with basic statutory requirements and for their effectiveness in attaining community housing goals and objectives.\textsuperscript{32} HCD's housing element review schedule sets deadlines for all first and second revisions of housing elements. These deadlines have passed.\textsuperscript{33} By now, all localities in California's metropolitan areas should have adopted housing elements approved by HCD.

California Government Code section 65400 requires each city's and county's planning agency to report annually to HCD on the status of its general plan and on progress made toward implementing the elements of the plan.\textsuperscript{34} HCD suggests that localities demonstrate their progress by indicating the number of housing units added in the reporting year and the affordability of those units, and comparing the number of units added to the locality's regional share objectives.\textsuperscript{35} These reporting requirements are relatively new.\textsuperscript{36} Little information on the localities' progress toward regional housing goals can be gleaned from the annual reports.

**B. Regional Housing Needs Plan**

HCD determines each COG's share of California's housing needs.\textsuperscript{37} Based on this allotment, COGs prepare Regional Housing Needs Plans (RHNPs) for the localities within their region. The RHNPs indicate existing housing needs as of January 1, 1988, and projected housing needs through April 1, 1995.\textsuperscript{38} The evaluation of existing housing needs and the projection of future housing needs take into account market demand for housing, employment opportunities, availability of suitable sites and public facilities, commuting patterns, type and tenure of existing housing, loss of existing affordable housing, and housing needs of farm workers.\textsuperscript{39} The statute also requires that the distribution of regional housing

\textsuperscript{32} Id.

\textsuperscript{33} Id. § 65588(b).

\textsuperscript{34} Id. § 65588.5.

\textsuperscript{35} Memorandum from Nancy J. Javor, Chief, Division of Housing Policy Development, to Interested Parties, 3-4 (Dec. 1990) (on file with author).

\textsuperscript{36} The reporting requirement was included in S.B. 1019, enacted in 1991. CAL. GOV'T. CODE § 65588.5 (Deering 1987 & Supp. 1993).


\textsuperscript{38} Id. § 65588(a).

\textsuperscript{39} Id. § 65584.
needs minimize the further concentration of low-income housing in low-income areas.\textsuperscript{40}

Housing needs are broken down by household income into four categories: very low-income (below fifty-one percent of median area income), low-income (fifty-one to eighty percent of median area income), moderate-income (81-120 percent of median area income), and above moderate-income (above 120 percent of median area income).\textsuperscript{41} The COGs regularly consult with HCD as they develop their housing plans. They also submit their draft RHNP for local comment and conduct public hearings on the RHNP.\textsuperscript{42} Localities then propose revisions to the RHNP before it becomes final.\textsuperscript{43}

The statute gives little guidance to COGs on how to determine each locality's fair share of the region's housing needs. The COGs design the methodology for calculating regional housing needs.\textsuperscript{44} ABAG, the COG for the San Francisco Bay Area, determines each locality's existing housing need by subtracting the number of units available for permanent occupancy within the locality's jurisdiction from the number of units that are needed to accommodate the households in the jurisdiction with a regional vacancy goal rate of 4.5 percent.\textsuperscript{45} The Southern California Association of Governments (SCAG), the COG for the Los Angeles area, determines each locality's existing housing need by calculating the number of low-income households (i.e., households with incomes of less than eighty percent of the area median household income) that pay more than thirty percent of their income for housing.\textsuperscript{46} The number of low-income households without housing are added, and the number of households receiving government housing subsidies are subtracted from that figure.\textsuperscript{47} The existing housing need calculation for each locality increases or decreases in order to reach an ideal va-

\textsuperscript{40} Id.
\textsuperscript{41} Id.
\textsuperscript{42} Id.
\textsuperscript{43} Id.
\textsuperscript{44} Id.
\textsuperscript{45} ASS'N OF BAY AREA GOV'TS, SAN FRANCISCO BAY AREA HOUSING NEEDS DETERMINATIONS 5 (1989).
\textsuperscript{46} SOUTHERN CAL. ASS'N OF GOV'TS, REVISED REGIONAL HOUSING NEEDS ASSESSMENT III-1 (1988).
\textsuperscript{47} Id. at III-2.
cancy rate of two percent for single-family homes and five percent for multi-family housing.48

Projected housing need equals the number of units necessary to accommodate growth in each locality. The growth factor takes into account market demand for housing, projected job growth, availability of sites, commuting patterns, type and tenure of housing, and housing needs of farm workers.49 ABAG estimates that each Bay Area locality's future fair share equals the average of projected housing need for that locality, its county, and the region.50 Each locality has separate fair share targets for each of the four household income categories.51 SCAG uses a different approach to determine fair share targets. It starts with a goal of achieving a fair share distribution of the housing it projects will be needed in twenty years.52 It then works backward incrementally from each locality's twenty-year fair share target.53 The housing targets for each five years move one-fourth of the way toward a regional distribution of housing adequate for all income levels.54 SCAG identifies "impacted areas" (i.e., areas that host a high concentration of very low- and low-income housing) and adjusts housing targets for those areas in order to avoid further concentrating low-income housing.55 The methodology for determining existing and projected housing needs varies from region to region.56

It is beyond the scope of this article to suggest how fair share housing determinations could be improved. However, the lack of uniformity among regions in determining localities' fair shares raises questions regarding the precision and correctness of the various methodologies.57

48. Id.
49. ASS'N OF BAY AREA GOV'TS, supra note 45, at 5.
50. Id.
52. See SOUTHERN CAL. ASS'N OF GOV'TS, supra note 46, at IV-1.
53. Id.
54. Id.
55. Id.
56. Id.
57. In recognition of the need for statewide reform, the 1993 Governor's Growth Management Report proposed eliminating fair share allocations and substituting "performance standards." GOVERNOR'S INTERAGENCY COUNCIL ON GROWTH MANAGEMENT, STRATEGIC GROWTH: TAKING CHARGE OF THE FUTURE 34 (1993). The Association of Bay Area Governments Regional Planning Subcommittee on Restructuring the Housing Needs Process also advocated reform, stating that "[t]he current housing needs determination process is ineffective,
C. The Mechanism for Enforcing the Fair Share Housing Statutes

Neither the state government nor the COGs have statutory power to compel localities to meet their fair share housing targets. The law requires localities to take into account fair share allocations, but localities may reach different conclusions about their housing needs. HCD reviews of local housing elements are purely advisory. HCD has no power to compel localities to incorporate into their housing elements the fair share targets set by the regional COG.

The housing element statute permits court action initiated by a private party, not regulatory action by HCD or the COGs. One remedy in a successful suit against a locality that has failed to comply with the housing element statute is injunctive relief under California Code of Civil Procedure section 1085, which provides for a writ of mandate to compel a city to meet its legal obligations. If a locality's general plan is successfully challenged because of the inadequacy of the housing element, the issuance of building permits, alteration of zoning ordinances, and approval of subdivision maps are per se inconsistent with the plan and therefore illegal. Under California Government Code section 65755, the court may suspend the locality's authority to:

1. issue building permits, or any category of building permits, and all other related permits;
2. grant any and all categories of zoning changes, variances or both; and
3. grant subdivision map approvals for any and all categories of subdivision map approvals.

Thus, the courts wield substantial power to overrule local land use powers.


59. Id. § 65583.
60. Id.
61. Id.
62. Id. § 65587(b).
The courts have exercised their prerogative to suspend the local land use powers in a number of cases. However, recently, the Fourth District Court of Appeal indicated, in dicta, that where a locality's housing element (or other element of the general plan) is inadequate, California Government Code sections 65753, 65754, and 65755 provide the appropriate statutory remedy. Section 65753 provides for an expedited hearing schedule for housing element cases. Section 65754 mandates court orders requiring compliance within 120 days where a locality's housing element is found to be out of compliance. In Garat, the court stated that these provisions serve as the primary judicial remedies in cases of local noncompliance, and that invalidating the locality's general plan would have been inappropriate.

II. THE EXTENT OF NONCOMPLIANCE WITH FAIR SHARE HOUSING LAWS

A. Evidence of Noncompliance

A substantial number of California localities fail to comply with statutory housing element requirements. In the nine Bay Area counties, only 14 of 106 local governments adopted a valid housing element by the July 1992 statutory deadline. Of the final housing elements HCD has received and reviewed, only thirty percent complied with state stan-


68. Id. § 65754.

69. Garat, 3 Cal. Rptr. 2d at 531-32.

70. Id. A separate but related compliance problem concerns localities where the housing element conflicts with local land use policies. Id. This problem presents some different obstacles than litigation over the adequacy of a housing element. If the locality is a charter city, there is an insurmountable obstacle: The zoning and other enactments of a charter city do not have to be consistent with the city's general plan unless the city adopts the consistency requirement. Id. at 281. See also Mira Dev. Corp. v. San Diego, 252 Cal. Rptr. 825 (1988). The perverse effect of this statutory interpretation is to allow charter cities to undermine the fair share housing laws through conflicting land use policies once they have adopted valid general plans. There is no statistical evidence of the frequency of cases in which local land use ordinances conflict with a locality's housing element. Although it is beyond the scope of this article to address the inconsistency problem, it is important to bear this problem in mind.

71. See Bay Area Council, supra note 5.
Forty-four percent of the final adopted housing elements did not comply, and twenty-six percent were obsolete.73

In light of prevalent noncompliance with the housing element law, it is not surprising that localities are not meeting their fair share targets. The failure to meet fair share targets most severely impacts the lower end of the housing market. In 1985, it was estimated that 600,000 low-income units would be needed by 1990.74 Only sixteen percent, or 97,424, of the needed units were built.75 Twenty-four percent of California localities did not produce a single low-income housing unit during the five-year period from July 1987 to July 1992.76 Although localities appear to have been more successful in generating moderate-cost housing development,77 there remains a substantial gap between median home prices and the incomes of first-time home buyers.78 The inadequacy of local efforts to meet their fair share targets raises the question of whether the fair share housing statutes discourage local exclusionary land use practices at all.

B. Fair Share Housing Statutes Have Little or No Affect on Local Land Use Policies

Some localities comply with the fair share housing statutes, but probably not because of the prospect of an enforcement action.79 There is only weak evidence that the legisla-

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73. Id. These figures do not include the housing elements that have not been submitted to HCD, and that therefore missed the statutory deadline for submission.


75. Id. at 1, 3.

76. Id. at 1.

77. Id.

78. In 1990, the median price for a single family detached home in the Bay Area was approximately $245,000. BAY VISION, supra note 8, at 8. Fewer than 15 percent of first-time home buyers could afford this price. Id.

79. Localities where a large number of affordable housing units are being built are four times more likely to have a valid housing element than localities where no affordable housing is being built. See California Planning, supra note 72, at 5. However, 60 percent of the localities with a commitment to the construction of affordable housing do not have valid housing elements. Id.
tion creating regional housing targets and strengthening the housing element requirements is generating more affordable housing. Localities that encourage the construction of a substantial number of affordable housing units are four times more likely to have a housing element in compliance with state law than localities that host no new affordable housing. However, sixty percent of the localities found to have a major commitment to affordable housing lack housing elements that meet state standards. Currently, the primary impetus for the development of affordable housing comes from the localities themselves, not from the COGs or the state. Statistical evidence indicates that the fair share targets play, at best, a minor role in localities' housing policies.

The connection between fair share legislation and affordable housing production is especially tenuous toward the lower end of the housing market. Of the twenty-eight counties that exceeded their overall residential construction needs, only two — Plumas and Colusa — exceeded their low-income housing construction needs. Plumas and Colusa counties are rural and bear responsibility for a very small proportion of statewide housing need. In absolute terms, these counties made a very small contribution toward meeting state low-income housing needs. The state's major population centers produced a fraction of their low-income needs: Los Angeles County produced the highest proportion with thirty-three percent. Fresno County produced only five percent of its low-income housing need through the housing element cycle that ended December 31, 1989. In most counties, the difference between the percentage of low-income housing needs met and overall housing needs met was signifi-

80. Id.
81. Id.
82. Id.
83. Id.
84. Id.
85. See California Coalition, supra note 74, at 7.
86. Id.
87. Id. at Appendix G.
88. Id.
89. Id.
III. EVALUATION OF THE ENFORCEMENT MECHANISM FOR FAIR SHARE HOUSING LAWS

Understanding the underlying reasons for the failure of the fair share housing enforcement mechanism is essential to determine a solution to the problem. The cornerstone of the enforcement mechanism is a private right of action against non-complying localities. HCD and the COGs play only advisory roles and have no enforcement powers. The fair share housing laws are not enforced without litigation.

The deficiency of the enforcement mechanism for fair share housing laws could stem from four possible sources: (1) a lack of adequate judicial enforcement powers; (2) the disinclination of litigants to challenge non-complying localities; (3) the reluctance of courts to use their enforcement powers; and (4) the courts' incapacity to adequately enforce the statute. This section shows that courts have adequate enforcement powers, but that they rarely have the opportunity to use them because of obstacles and disincentives to litigation. Moreover, when courts have the opportunity to enforce the fair share statutes, they are reluctant to intervene in local land use decisions. This reluctance may derive from their incapacity to adequately enforce the statute. Even if the courts were not reluctant to enforce the statute, they would remain unable to do so.

A. Judicial Enforcement Does Not Fail for Lack of Enforcement Power

The courts wield substantial power to compel local compliance with the fair share housing statutes. Under California Civil Procedure Code Section 1085 and Government Code Section 65755, the courts may penalize non-complying locali-
ties by suspending their land use powers. In the few cases where a court has used this injunctive power against a non-complying locality, the localities have responded by bringing themselves into compliance. The extent of noncompliance does not reflect a deficiency in enforcement powers.

The suspension of land use powers would dramatically affect any locality because of the importance of those powers to local government and the frequency with which those powers are exercised. The suspension of a locality's authority to issue building permits, grant zoning variances, and approve subdivision maps would have a dramatic impact on all commercial and residential development in the non-complying locality. These enforcement powers are sufficiently coercive to force local compliance.

The suspension of a locality's land use powers would prevent powerful local interests from moving ahead with plans to build and renovate. Although suspension of land use powers would ultimately affect the entire non-complying locality, the penalties would impact most those land owners who want to develop, improve, or change the use of their property. This group of landowners is a politically powerful constituency. Moreover, local government may stand to benefit

98. See infra part I.C.
99. See, e.g., Camp v. Mendocino County Bd. of Supervisors, 176 Cal. Rptr. 620 (1981); Buena Vista Gardens v. City of San Diego, 220 Cal. Rptr. 732 (1985) (these cases resulted in injunctions against Mendocino County and the City of San Diego suspending their land use powers pending the adoption of valid housing elements). Both Mendocino County and the City of San Diego adopted valid housing elements in response to the injunctions. Department of Housing and Community Development, Summary of Current Housing Element Activity (October, 1993) (on file with author).
100. Richard Briffault, Our Localism: Part I—The Structure of Local Government Law, 90 COLUM. LAW REV., 1, 3 (1990) (arguing that land use control is the most important local regulatory power).
101. Id.
102. Id. Coerciveness is not, however, the only criterion for enforcement powers. The burden of penalties against noncomplying localities should not fall on those in need of affordable housing. This group has already been injured by the locality's noncompliance with the fair share statutes. Further burdening this group would, in a perverse way, reward the noncomplying locality. The burden of the penalty should be borne by the people or institutions with the power to bring the locality into compliance.
103. See, e.g., Buena Vista, 175 Cal. Rptr. at 734 (superior court issues writ of mandate to set aside the San Diego City Council's approval of a development permit for two developers). See also infra note 110, interview with Michael Rawson.
significantly from increased tax revenue from the desired development. Thus, the burden of the penalty falls on a group capable of exerting substantial pressure for compliance.

Recent litigation against the City of Alameda revealed the political dynamics that result when a locality faces the threat of a court order suspending its land use authority. In *Guyton v. City of Alameda*, two low-income Alameda residents claimed that the planning element (called the Combined Land Use Plan, or CLUP) of Alameda's general plan conflicted with state law requiring elements of the general plan to "comprise an integrated, internally consistent and compatible statement of policies . . . ." Alameda's policy, embodied in the CLUP and a local ballot measure, Measure A, which Alameda voters passed, limited the allowable number of subsidized low- and moderate-income housing units in Alameda to the percentage of such units in other San Francisco East Bay Area cities. The complaint in *Guyton* argued that the CLUP, and Measure A, rendered compliance with the housing element law impossible. The plaintiffs sought and obtained a court order suspending Alameda's land use powers.

The effect of the court order on Alameda demonstrates the efficacy of judicial enforcement powers. Those who wanted land use changes for their property in Alameda continued to request them from the city, but, after the court order, they were told that the city could no longer grant the requests. The court order had a pervasive effect not only on developers but also on homeowners who wanted to substantially remodel their homes, widen their driveways, or

106. Id.
107. *Id.* See also CAL. GOV'T. CODE § 65300.5 (Deering 1987 & Supp. 1993).
110. Information about the *Guyton* case was obtained in interview with Michael Rawson, Staff Attorney, Legal Aid Society of Alameda County. See also Kathleen Kirkwood, *Judge Gives City 120-Day Housing Element Extension, Alameda J.*, July 28, 1989, at 3 (discussing suspension of Alameda's power to grant building permits).
111. See Kirkwood, *supra* note 110.
make other improvements that required city approval.\textsuperscript{112} Displeasure with the city government grew, and ultimately Alameda moved to comply with the fair share housing statutes.\textsuperscript{113} Nine months after the court order, Alameda adopted a housing element that satisfied the plaintiffs, and the judge lifted the order suspending land use powers.\textsuperscript{114} Guyton shows that forcing local government to accept the political onus for noncompliance is a powerful means of compelling compliance.\textsuperscript{115} A court order suspending local land use powers can induce local compliance because local governments and their constituents have a strong interest in maintaining local control of land use decisions. Local noncompliance does not result from a lack of judicial enforcement power.

\section*{B. Why They Do Not Sue: Obstacles to Litigation}

Despite the sweeping powers available to California judges who find localities out of compliance with the fair share statutes, judicial enforcement of the law has not brought about compliance.\textsuperscript{116} Nor has the mere existence of judicial powers to suspend local land use authority deterred noncompliance.\textsuperscript{117} The unlikelihood of enforcement results from obstacles to litigation that are inherent in the existing scheme of judicial enforcement.

Low- and moderate-income people and developers of low- and moderate-income housing are potential litigants against noncomplying localities, because they stand to gain most directly from the enforcement of the fair share housing laws.\textsuperscript{118} Each group faces different obstacles to litigation. The rules governing standing do not create a significant impediment to

\textsuperscript{112} See generally id.

\textsuperscript{113} Karen Matthews, By Making Loophole in Law, Alameda May Have Saved It, ALAMEDA TIMES STAR, Apr. 26, 1990, at 2.

\textsuperscript{114} Id.

\textsuperscript{115} Steve Massey, Lawsuits a Tool for Building Homes: Low-cost Housing Advocates Suing Cities, SAN FRANCISCO CHRON., June 18, 1990, at A8.

\textsuperscript{116} See discussion supra part II.

\textsuperscript{117} See discussion supra part II.

\textsuperscript{118} Most of the housing that would be developed if localities were forced to comply with the fair share housing laws would be affordable for low- and moderate-income families. CALIFORNIA COALITION, supra note 74, at Appendix G. Upper-income housing development in California actually exceeded regional housing needs. Id.
litigation. For low- and moderate-income people, legal costs are the greatest obstacle to litigation. The expense of litigation is prohibitive for moderate-income people, and there is no organization that represents their interests in the enforcement of the fair share housing laws. Moderate-income people do not have access to free legal services. Moreover, they are unlikely to organize in support of a class action suit against a locality.

Low-income people are forced to depend on limited legal services. Legal Aid offices have been the only ones to take on these cases for low-income people. However, Legal Aid attorneys are primarily occupied with urgent cases that have


120. Private attorneys can file fair share housing suits on behalf of taxpayers and collect attorney's fees. See CAL. CODE OF CIV. PROC. § 1021.5 (Deering 1991). However, there are no published cases in which this has occurred.

121. There are only three published fair share housing cases brought by citizens' groups. See Camp v. Mendocino County Bd. of Supervisors, 176 Cal. Rptr. 620 (1981); Buena Vista Gardens v. City of San Diego, 220 Cal. Rptr. 732 (1985); Garat v. City of Riverside, 3 Cal. Rptr. 2d 504 (1991) (citizens joined by development consortiums).

122. It is the purpose of Legal Aid offices to serve the legal needs of those least able to afford legal assistance. 45 C.F.R. § 1611.1 app. A. Each Legal Aid office establishes a maximum income level for its clients. Id. That income level cannot exceed 125% of the official Federal Poverty Guidelines, adjusted for family size. Id. § 1611.3. The income limit is $14,463 for a family of three and $17,438 for a family of four. Id. § 1611.

123. A full discussion of the reasons for the failure of moderate-income families to organize in support of fair share housing litigation is beyond the scope of this article. However, one reason may be that many families that stand to benefit from the development of affordable housing in a locality live outside that locality. See John Landis, Do Growth Controls Work?, C.P.S Brief, Feb. 1992, at 5 (describing recent growth trends in California). They are a diffuse group that has no voice in the locality's land use decision-making. Id. Moreover, moderate-income families living in noncomplying localities have historically sought affordable housing elsewhere rather than sue the localities for noncompliance. Id.

124. Based on interviews with Michael Rawson, whose experience with fair share housing litigation is discussed above, and John Huerta, who trains legal aid attorneys on housing element litigation for the Western Center on Law and Poverty, legal services offices have provided the only legal representation for low-income people in fair share housing litigation. Telephone interview with Michael Rawson, Staff Attorney with the Legal Aid Society of Alameda County in the Guyton case, March 23, 1993. Telephone interview with John Huerta,
an immediate and direct impact on the lives of low-income people.\textsuperscript{125} The length of litigation and the development process eliminate any prospect of quickly generating the development of more affordable housing through the enforcement of fair share statutes.\textsuperscript{126} Moreover, low-income plaintiffs might not benefit directly from the enforcement of fair share housing laws because, even if enforcement does eventually generate the development of affordable housing, they might not live in that housing.\textsuperscript{127} Because fair share housing litigation does not produce immediate results that have a direct impact on low-income people, Legal Aid attorneys concentrate on other means of meeting their clients’ affordable housing needs.\textsuperscript{128}

Housing developers treat the legal costs related to the development of housing as a business expense and factor those costs into the project’s budget. Legal costs, like any other development cost, may preclude development.\textsuperscript{129} Low-income housing developers in particular may not have the capital to wage an extended legal battle before breaking ground on a new project.\textsuperscript{130}

Even if legal costs are not prohibitive, housing developers are likely to be reluctant to wage legal battle against localities. If their litigation were successful and forced a locality to alter its land use policies, without the locality’s good

Staff Attorney with the Western Center on Law and Poverty, February 25, 1993.

125. The Legal Services Corporation employs a number of methods to discourage impact litigation. The primary disincentive to impact litigation is the mechanism for funding legal services offices, which rewards offices for maximizing the number of clients they serve directly. 45 C.F.R. §§ 1620.3, 1620.5 (regarding priorities in the allocation of resources). In addition, legal services attorneys must surmount certain procedural hurdles before filing class action law suits. See 45 C.F.R. §§ 1617.3, 1605 (appeals).


127. Id.

128. Id.

129. See Jerry Harris, Comment, Rezoning—Should It Be A Legislative or Judicial Function, 31 BAYLOR L. REV. 409, 420 (1979); Briffault, supra note 100, at 45.

130. See FRED BOSSelman AND DAVID CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROL 319 (1971) (explaining that developers of expensive housing can more easily absorb the cost of land use regulations than developers of affordable housing).
will, other impediments to development might arise. De-
velopers are unwilling to sour a relationship with a locality on which the developer depends for cooperation with ongoing or future projects.

Finally, the time required for an extensive legal battle may impede development. Instead of paying cash, developers generally obtain financing for the acquisition of the land they plan to develop. If the developer has an option on the site for the proposed development, a delay caused by litigation may force the developer to lose the option or spend more money to extend the option. Commitments for private financing for housing development do not wait for the resolution of litigation; they expire within a set period of time. Moreover, certain government low-income housing programs, such as the low-income housing tax credit, must be used within one year or they are lost. Thus, litigation may dramatically alter the financing for a project by delaying it.

Obstacles to litigation preclude the comprehensive enforcement of the fair share laws through the courts. Judicial enforcement actions can occur only in response to fair share housing litigation. Therefore, obstacles to litigation render judicial enforcement irregular and erratic. Lack of local compliance that goes unnoticed by the courts is an inherent feature of the existing scheme of judicial enforcement.

131. See Briffault, supra note 100, at 45 n.182. One notorious exclusionary zoning case was decided by the Pennsylvania Supreme Court six years after it was filed. In Girsh v. Township of Nether Providence, 263 A.2d 395 (Pa. 1970), the court ordered the Township of Nether Providence to make land available for the development of multifamily housing. Id. In response, the Township rezoned a quarry for apartment development instead of rezoning the plaintiff's property. Id. The plaintiff returned to court; unfortunately, by the time the court finally granted an order directing the Township to issue a building permit to the plaintiff, the plaintiff had died. Id.


133. GRANT S. NELSON AND DALE A. WHITMAN, REAL ESTATE TRANSFER, FINANCE AND DEVELOPMENT, 887 (3d ed. 1987)

134. Id. at 891.

135. Id. at 890.

136. See 26 U.S.C.A. 42. A building does not qualify for low-income housing tax credit unless it meets the tax credit requirement within the first year of the credit period for the building. Id.

137. See discussion supra part I.C.
C. Court Reluctance to Use Its Enforcement Powers

The dearth of fair share housing litigation conceals an underlying problem. The courts are unwilling to evaluate the substance of localities' housing elements. Instead, they limit themselves to reviewing facial compliance with the housing element law. Even if the obstacles to litigation were greatly reduced, it is not likely the courts would adequately enforce the fair share statutes.

The standard of review in cases concerning the adequacy of a housing element demonstrates judicial aversion to dealing with the substance of housing elements. Housing elements must be in “substantial compliance” with state law.\textsuperscript{138} The courts have said that “substantial compliance” means “actual compliance in respect to the substance essential to every reasonable objective of the statute, 'as distinguished from mere technical imperfections of form.'"\textsuperscript{139} However, this language is somewhat misleading, because it suggests that courts evaluate the substance of housing elements. The courts do not evaluate the substance of housing elements to see whether they meet the reasonable objectives of the statute.\textsuperscript{140} Instead, the courts determine whether housing elements include the components set forth in the statute.\textsuperscript{141} The courts look only at the face of the housing elements, not at their content.\textsuperscript{142} Thus, the court’s test is really one of facial compliance.

In \textit{Camp v. Mendocino County Board of Supervisors},\textsuperscript{143} the court enjoined Mendocino County from exercising certain land use powers because the County lacked an adequate housing element and other requirements for a valid general plan.\textsuperscript{144} The County’s housing element consisted of a pamphlet entitled \textit{The Housing Element of the General Plan}, but the pamphlet described itself as the initial housing ele-

\begin{footnotesize}
\begin{enumerate}
\item[138.] Camp v. Mendocino County Bd. of Supervisors, 176 Cal. Rptr. 620, 629 (1981).
\item[139.] Id. See also Buena Vista Gardens v. City of San Diego, 220 Cal. Rptr. 732 (1985) (quoting Camp, 176 Cal. Rptr. at 629).
\item[140.] \textit{See generally Camp}, 176 Cal. Rptr. at 620 and Buena Vista, 220 Cal. Rptr. at 732.
\item[141.] \textit{See generally Camp}, 176 Cal. Rptr. at 620 and Buena Vista, 220 Cal. Rptr. at 732.
\item[142.] \textit{See generally Camp}, 176 Cal. Rptr. at 620 and Buena Vista, 220 Cal. Rptr. at 732.
\item[143.] 176 Cal. Rptr. 620 (1981).
\item[144.] Id.
\end{enumerate}
\end{footnotesize}
The pamphlet amounted to little more than an inventory of housing in the County, based on information that was ten years old. The housing element did not designate adequate sites for housing development or make adequate provisions for the housing needs of all economic segments of the community, as required by law. On its face, Mendocino County's housing element lacked the required components of a housing element. The *Camp* court did not test the rigorousness of the "actual compliance" standard, because Mendocino County's housing element was facially invalid.

The court considered a challenge to a somewhat more complete housing element in *Buena Vista Garden Apartments Association v. City of San Diego*. In *Buena Vista*, the court found that the City of San Diego's housing element met six of seven statutory requirements, which the plaintiffs claimed were lacking. However, the court's scrutiny of the housing element did not exceed that necessary to determine whether it facially complied with the statutory requirements. The court doubted the adequacy of various parts of San Diego's housing element, but nevertheless found them substantially in compliance with the housing element statute. For instance, the court held that the housing element did not violate the statute despite its failure to quantify the amount of land available for assisted housing. The statute states, "[t]he housing element shall consist of . . . a statement of goals, policies, quantified objectives and scheduled programs for the preservation, improvement and development of housing." Although HCD criticized San Diego for not quantifying the goals of its housing programs, and the court stated that it was possibly "of the opinion City should adopt Department's recommendations," the court acquiesced to the un-

145. *Id.* at 631.
146. *Id.*
147. *Id.* See also *CAL. GOV'T. CODE* § 65302(c) (Deering 1987 & Supp. 1993).
149. *Id.*
151. *Id.* at 737-42.
152. *Id.* at 738-40, 741.
153. *Id.* at 741.
quantified description of San Diego housing programs. Even though a plan or its parts may not, from a court's subjective point of view, be 'satisfactory' or 'suitable,' nonetheless, unless there is a statutory requirement on point, such unsatisfactoriness or unsuitability may not form a basis for concluding that the plan is legally inadequate. The court drew a distinction between a legally adequate housing element and a housing element that is "'acceptable,' 'appropriate,' 'satisfactory,' and 'suitable.'" When put to the test in Buena Vista, the "actual compliance" standard showed itself to be no more than a facial validity requirement.

The standard of review for housing elements prior to Camp and Buena Vista revealed the court's prevailing attitude of reluctance to determine whether each challenged housing element met the policy objectives of the statute. Before Camp and Buena Vista, the court would not strike down a housing element "[a]bsent a complete failure or at least substantial failure on the part of a local governmental agency to adopt a plan which approximates the Legislature's expressed desires." The court recognized that it is "ill-equipped to determine whether the language used in a local plan is 'adequate' to achieve the broad goals of the legislature." The court adopted a stricter standard of review in response to the enactment of more detailed housing element requirements. However, the new legislative requirements did not dispel the court's reluctance.

The advent of the stricter "actual compliance" standard set forth in Camp and Buena Vista reflects the court's desire to strengthen enforcement of the housing element statutes. There remains, however, an underlying unwillingness to delve beneath the surface of localities' housing elements. The courts' ambivalence manifested itself in Buena Vista. Although the court specifically "rejected the complete or substantial failure" standard, the only part of the housing ele-

157. Id.
159. Id.
ment that failed to pass court scrutiny did so because it did not evidence any program to conserve affordable housing stock, as required by the statute.\textsuperscript{161} Applying the old standard and the new statutory requirements might well have yielded the same result.

The unwillingness of the courts to go beneath the surface of housing elements is apparent from their disinclination to consider evidence extrinsic to the housing element itself. In \textit{Camp}, the court of appeals refused to consider the extrinsic "findings of fact" on which the trial court had based its determination of compliance.\textsuperscript{162} In \textit{Buena Vista}, the court found part of San Diego's housing element in substantial compliance even though it would have been out of compliance but for a specific reference to documents outside the general plan that fulfilled statutory requirements.\textsuperscript{163} However, "a deficient element cannot be saved by consideration of documents which are not relied upon in the discussion of that element."\textsuperscript{164} Localities cannot use documents external to the housing element to prove the legal adequacy of the housing element if those documents are not mentioned in the localities' general plans.\textsuperscript{165} Just as the courts refuse to look behind the facial sufficiency of housing elements, they refuse to entertain the question of whether extrinsic evidence saves a housing element.\textsuperscript{166} The courts avoid any question that would require an analysis of the actual—as opposed to the legal—adequacy of housing elements; the courts avoid substantive analysis of housing elements.

A source of judicial reluctance to intervene in fair share housing disputes is the courts' conception of their role in local land use decision-making. During the latter half of this century, the courts generally deferred to localities' decisions on local land use questions.\textsuperscript{167}

\textsuperscript{161} Id. at 744. \textit{See also} CAL. GOV'T CODE § 65583 (Deering 1987 & Supp 1993).
\textsuperscript{162} Camp v. Mendocino County Bd. of Supervisors, 176 Cal. Rptr. 620, 622 (1981).
\textsuperscript{163} \textit{Buena Vista}, 220 Cal. Rptr. at 744.
\textsuperscript{164} Kings County Farm Bureau v. Hanford, 270 Cal. Rptr. 650, 678 (1990).
\textsuperscript{165} Id.
\textsuperscript{166} Id.
\textsuperscript{167} The courts have generally approved restrictive land use laws. For example, the courts have consistently deferred to local judgment regarding minimum lot requirements. In Clemons v. Los Angeles, 222 P.2d 939 (1950), the California Supreme Court approved minimum lot size zoning requirements,
Decision making power in the area of land use planning still rests with the local governmental agencies to be exercised within the constraints prescribed by enactment's of the state Legislature. When any attack is made upon the exercise of that decision making power and the adequacy of the general plan within which it is to be exercised, a presumption of validity attaches to the actions of the local governmental agency.

The "scheme of law" pertaining to land use decision-making promotes judicial deference to local control. The objective of this "scheme of law" is to ensure that decisions affecting the growth of a community will take into account the "various interrelated aspects of community life." The role of the courts within this "scheme of law" is one of detachment from local decision-making and tolerance for its results. Thus, the court's role constrains judicial intervention in local land use decision-making. More specifically, it precludes substantive judicial analysis of housing elements.

The courts look to the legislature and to the localities, which exercise power delegated by the legislature, to decide

noting that smaller lots created slums. In Morse v. County of San Luis Obispo, 112 Cal. Rptr. 919 (1974), the court of appeals approved a five-acre minimum lot zoning ordinance. In Gisler v. County of Madera, 112 Cal. Rptr. 919 (1974), the court upheld an eighteen-acre minimum lot size requirement, which may have been the largest minimum lot size permitted in the United States. See also Robert Linowes and Don Allensworth, The Politics of Land Use Law: Planning, Zoning and the Private Developer 111-15 (1976).

California Government Code § 65580, which reads in part:

(d) Local and state governments have a responsibility to use the powers vested in them to facilitate the improvement and development of housing to make adequate provision for the housing needs of all economic segments of the community.

(e) The Legislature recognizes that in carrying out this responsibility, each local government also has the responsibility to consider economic, environmental, and fiscal factors and community goals set forth in the general plan and to cooperate with other local governments and the state in addressing regional housing needs.


170. Bownds, 170 Cal. Rptr. at 345.


172. See John M. Payne, From the Courts, 12 Real Estate L.J. 359 (1984) (describing the prevalence of the traditional judicial role in Pennsylvania fair share housing cases).
between competing political rationales for land use decisions.\textsuperscript{173} They seek "to maintain an appropriate distance and dis-involvement from the legislative function of plan/ordinance adoption and . . . to refrain from making [perhaps unwarranted] assumptions as to what should be invalidated and what should not . . . ."\textsuperscript{174} The courts consider the adoption of housing elements by localities to be essentially a legislative act.\textsuperscript{175} Substantive judicial analysis of localities' housing elements would invade the legislative function.\textsuperscript{176}

Judicial deference to local land use decision-making stems from the court's conviction that it:

\[\text{[C]annot and should not involve itself in detailed analysis of whether the elements of the [general] plan are adequate to achieve its purpose. To do so would involve the court in the writing of the plan. That issue is one for determination by the political process and not by the judicial process.}\textsuperscript{177}

Substantive judicial analysis of localities' housing elements would invade the legislative function, embroiling the court in decisions that are essentially political. For example, the housing element statute requires localities to identify and to zone specific sites for affordable housing.\textsuperscript{178} However, decisions regarding the zoning designations necessary to accommodate affordable housing are not made by applying a rule of law. These decisions are shaped by a process involving input from various parties in the community, each with their own set of interests and preferences.\textsuperscript{179} The courts seek to avoid


\textsuperscript{174} Garat v. City of Riverside, 3 Cal. Rptr. 2d 504, 532, n.33 (Ct. App. 1991).

\textsuperscript{175} In the context of fair share housing cases, the New York Court of Appeals has spoken to this point more forcefully than any other:

\text{Zoning . . . is essentially a legislative act. Thus, it is quite anomalous that a court should be required to perform the tasks of a regional planner. To that end, we look to the Legislature to make appropriate changes in order to foster the development of programs designed to achieve sound regional planning.}


\textsuperscript{177} Bownds, 170 Cal. Rptr. at 347.

\textsuperscript{178} CAL. GOV'T. CODE § 65583(c) (Deering 1987 & Supp. 1993).

\textsuperscript{179} LINOWES & ALLENSWORTH, \textit{supra} note 167, at 13-20.
substituting their personal opinions regarding land use for the local decision-making process.  

Local land use decision-making is a participatory process. Parties interested in this process include: planning boards; locally elected officials; planning staffs; developers; homeowners associations; neighborhood groups; minority organizations; the business community; and transit, housing, and redevelopment agencies. Each participant in the decision-making process may have a different conception of the community's interest—or even a different conception of the community. In contrast to this participatory process, fair share housing litigation focuses on a particular dispute between a locality and a plaintiff or definable class of plaintiffs. The central question presented to the court in fair share housing cases is whether the fair share housing laws require a locality to treat a particular party differently. The process of litigation treats fair share housing cases as a contest between two sides. However, judges recognize the multifaceted nature of local land use questions. The issues raised by the plaintiffs in fair share litigation necessarily concern a broader community whose interests are not represented in court. Courts are reluctant to bypass the political process, which exists to provide a forum for community participation in the land use decision-making process.

Although judges may want to provide relief for injured parties, they limit themselves to ruling on the legal adequacy of local actions, even while acknowledging the actual inadequacy of local policy. A "court looks only to ensure the requirements of [the fair share housing laws] are met and not whether, in the court's judgment, the programs adopted are adequate to meet their objectives or are the programs which the court thinks ought to be there." Courts outside Califor-
nia that have taken a more interventionist and activist approach to land use cases are criticized for acting arbitrarily and without a set standard of review.\(^{188}\) The California courts have avoided this charge by deferring to localities on the substance of housing elements and limiting themselves to reviews of facial compliance.\(^{189}\) The California courts recognize the political nature of local land use decision-making.\(^{190}\) Fair share housing cases raise issues that the political process must resolve, and litigation does not permit the necessary political discourse.\(^{191}\) Consequently, the courts acquiesce to a detached role from local land use decision-making and are reluctant to impose remedies.\(^{192}\)

D. Lack of Court Capacity: The New Jersey Experience

Court scrutiny of housing elements is minimal not merely because of court reluctance to intervene, but because courts lack the capacity to engage in more comprehensive and probing evaluations of local policies. Because local land use decisions, including implementation of the fair share housing statutes, are guided primarily by political and policy considerations, these decisions do not lend themselves to judicial review.\(^{193}\) Moreover, the courts lack the technical expertise in planning, the time, and the personnel to adequately enforce the fair share housing statutes.\(^{194}\) Designing a housing element requires the collection and analysis of information on housing market conditions, land availability, existing zoning patterns, population growth and income, infrastructure capacity, and other data.\(^{195}\) Familiarity with sites, building standards, community character, and finance is necessary in order to assess the feasibility of affordable housing at a par-

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189. See supra notes 168-169.
193. See, e.g., Linowes & Alensworth, supra note 167; Babcock, supra note 184, at 168; Payne, supra note 172, at 28; Mayo, supra note 173, at 780.
ticular location. Judges may lack this familiarity. Unlike local land use decision-makers, courts do not have the advice and assistance of staff planners, economists, demographers, and civil engineers. Because of their lack of professional staff, the courts are also ill-equipped to monitor local compliance after they have rendered a decision. Some commentators argue that the courts are too slow and inflexible to adapt to the changing demands of land use decision-making. The courts' incapacity to enforce the fair share housing statutes underlies all other defects in the existing enforcement scheme.

The record of judicial action on fair share housing cases in California is, perhaps, insufficient evidence of the lack of judicial capacity. The extent of noncompliance suggests the magnitude of the task of enforcing the law, and the language of the courts suggests judicial awareness of the courts' inadequacy for the task. However, there has not been enough fair share litigation to test the capacity of California courts to decide these matters.

The state with the most experience handling fair share housing litigation is New Jersey. In 1972, a group of low-income blacks and Hispanics sued the Township of Mount Laurel, New Jersey on the grounds that its land use ordinances unlawfully excluded low- and moderate-income families. The plaintiffs claimed Mount Laurel had violated state statutes prohibiting localities that had not provided their fair share of low- and moderate-income housing from preventing the development of low- and moderate-income housing. According to the plaintiffs, Mount Laurel enacted zoning ordinances so restrictive in minimum lot area, lot

196. See generally Mayo, supra note 173, at 777.
197. See id. at 760.
198. See id. at 777.
199. See id.
201. See, e.g., discussion supra part III.C.
202. Supreme courts in four states—California, Pennsylvania, New York and New Jersey—have undertaken significant review of local exclusionary zoning. With the exception of the New Jersey Supreme Court, these courts did not alter local control over land use and did not mandate effective oversight by the state. See Briffault, supra note 100, at 43.
204. Id. at 716.
frontage, and building size requirements that they prevented the development of low- and moderate-income housing.\textsuperscript{205}

The Supreme Court of New Jersey held that a developing municipality "cannot foreclose the opportunity . . . for low and moderate-income housing and . . . its regulations must affirmatively afford that opportunity, at least to the extent of the municipality's fair share of the present and prospective regional need therefore."\textsuperscript{206} When a developing municipality's restrictive land use regulations prevent the development of low- and moderate-income housing, those regulations violate substantive due process and equal protection under the New Jersey State Constitution.\textsuperscript{207} Although the New Jersey Court found a much greater local obligation to facilitate the development of low- and moderate-income housing,\textsuperscript{208} basic similarities between the New Jersey and California fair share housing cases exist. Both the New Jersey and the California courts were called on to enforce fair share housing laws.\textsuperscript{209} In both states, the enforcement of those laws demanded court intervention in local land use decisions.\textsuperscript{210} In both states, the courts intervened by mandating certain local actions, although they did so to different degrees.

Mount Laurel and its progeny\textsuperscript{211} tested the ability of courts to enforce fair share housing laws. The New Jersey Supreme Court's commitment to enforcing the Mount Laurel doctrine cannot be questioned. The court went out of its way to rule against Mount Laurel's development ordinance even though the ordinance had been repealed.\textsuperscript{212} The Mount Laurel doctrine generated a number of lawsuits against localities

\textsuperscript{205.} Id. at 719.
\textsuperscript{206.} Id. at 724.
\textsuperscript{207.} Id. at 728.
\textsuperscript{208.} See generally Mt. Laurel I.
\textsuperscript{209.} See generally Buena Vista Gardens v. City of San Diego, 220 Cal. Rptr. 732, 740 (1985) and infra note 211.
\textsuperscript{210.} See generally Buena Vista, 220 Cal. Rptr. at 740 and infra note 211.
\textsuperscript{212.} Mount Laurel I, 336 A.2d at 729 (court held that questions raised by the ordinance were not moot because of its "importance generally" and because the ordinance could be re-enacted).
for failure to meet their fair share obligations.\textsuperscript{213} In 1983, the New Jersey Supreme Court revisited the issue of noncompliance with the \textit{Mount Laurel} doctrine.\textsuperscript{214} The \textit{Mount Laurel II} court recognized the continuing pervasiveness of noncompliance, but voiced its determination to make the doctrine work.\textsuperscript{215} The court's previous efforts to enforce the \textit{Mount Laurel} doctrine had not induced local compliance. The court concluded:

Ten years after the trial court's initial order invalidating [Mount Laurel's] zoning ordinance, Mount Laurel remains afflicted with a blatantly exclusionary ordinance. Papered over with studies, rationalized by hired experts, the ordinance at its core is true to nothing but Mount Laurel's determination to exclude the poor.\textsuperscript{216}

In addition to exemplifying widespread noncompliance in New Jersey, the \textit{Mount Laurel} case became infamous.\textsuperscript{217} Municipalities disregarded the Supreme Court's decision.\textsuperscript{218} In response, the appellate court reluctantly set forth guidelines for calculating fair share housing, removing local restrictions and exactions, and providing incentives for the construction of low- and moderate-income housing.\textsuperscript{219}

The court recognized that the problem of noncompliance was better left to the legislature.\textsuperscript{220} However, the \textit{Mount Laurel II} court felt compelled to expand its role in the enforcement of fair share housing laws.\textsuperscript{221} In the absence of executive or legislative action to satisfy the constitutional obligation underlying the Mount Laurel doctrine, the court believed it had no choice but to enforce the obligation itself.\textsuperscript{222}

The \textit{Mount Laurel II} court optimistically assessed its ability to enforce the fair share requirements:

\textsuperscript{213} \textit{Mount Laurel II} was actually the consolidation of six cases against municipalities for violating the Mount Laurel doctrine. \textit{Mount Laurel II}, 456 A.2d at 410, n.1.

\textsuperscript{214} \textit{Id.} at 390.

\textsuperscript{215} \textit{Id.} "This Court is more firmly committed to the original Mount Laurel doctrine than ever, and we are determined, within appropriate judicial bounds, to make it work." \textit{Id.} at 410.

\textsuperscript{216} \textit{Id.}

\textsuperscript{217} \textit{Id.}

\textsuperscript{218} \textit{Id.}

\textsuperscript{219} \textit{Id.}

\textsuperscript{220} \textit{Id.} at 417.

\textsuperscript{221} \textit{Id.}

\textsuperscript{222} \textit{Id.}
We hope that individualized case management, the constant growth of expertise on the part of the judges in handling these matters, the simplification and elimination of issues resulting from our rulings and from the active involvement of judges early in the litigation, and the requirement that, generally, the matter be disposed of at the trial level in its entirety before any appeal is allowed, will result in an example of trial efficiency that needs copying, not explaining.\textsuperscript{223}

However, the judicial system was poorly equipped to handle the demands of enforcing fair share requirements. In the third and final \textit{Mount Laurel} case in 1986, the court recognized the "total disregard by municipalities of the judiciary's attempts to enforce the [fair share] obligation."\textsuperscript{224}

Judicial enforcement of the \textit{Mount Laurel} doctrine failed because the courts lacked the essential capacity to assist each locality in crafting zoning ordinances tailored to the locality and in compliance with fair share requirements.\textsuperscript{225} The judges lacked the time, the staff, and the necessary technical expertise in planning to bring each locality in New Jersey into compliance with the statute.\textsuperscript{226} The New Jersey Supreme Court recognized its limitations and mandated the appointment by trial judges of special masters to assist the parties in negotiating the requirements under the fair share laws.\textsuperscript{227} Essential enforcement efforts were to occur outside of the courtroom, under the direction of special masters.\textsuperscript{228} Judges, by themselves, would have been unable to determine specific requirements for individual localities, much less provide detailed advice on compliance.

The courtroom proved to be a poor forum for the resolution of noncompliance issues. If fair share housing litigation is inherently costly, time-consuming, and inefficient as an instrument of enforcement, then it is additionally wasteful because judgment against a locality only means a further enforcement process.

\begin{itemize}
  \item \textsuperscript{223} \textit{Id.} at 459.
  \item \textsuperscript{224} \textit{Mount Laurel III}, 510 A.3d 621, 642 (N.J. 1986).
  \item \textsuperscript{225} \textit{Id.} at 634 (citing \textit{Mount Laurel II}, 456 A.2d 390 (N.J. 1983)).
  \item \textsuperscript{226} \textit{Mount Laurel II}, 456 A.2d at 440-41.
  \item \textsuperscript{227} \textit{Id.} at 435-54 (Special master's compensation was to be paid entirely by the municipality, and was due upon final judgment).
  \item \textsuperscript{228} \textit{Id.}
\end{itemize}
The waste of judicial energy involved at every level is substantial and is matched only by the often needless expenditure of talent on the part of lawyers and experts. The length and complexity of trials is often outrageous, and the expense of litigation is so high that a real question develops whether the municipality can afford to defend or the plaintiffs can afford to sue.\footnote{229}

*Mount Laurel* and its progeny suggested that an administrative agency capable of mediating fair share disputes would be better equipped to enforce fair share requirements.

Ultimately the New Jersey Legislature responded to the *Mount Laurel* decisions by enacting the Fair Housing Act (the Act), which established an administrative framework for the enforcement of fair share housing requirements.\footnote{230} The Act created the Council on Affordable Housing (the Council), which has the power to define housing regions, determine regional low- and moderate-income housing needs, and establish criteria for local fair share determinations.\footnote{231} The Council does not initiate actions against noncomplying localities.\footnote{232} It handles the cases that were pending in court and also the cases of any additional localities that voluntarily seek certification.\footnote{233} A locality initiates Council review by submitting a Resolution of Participation.\footnote{234} The transfer of a locality’s case to the Council is treated the same way as a Resolution of Participation.\footnote{235} In both cases, the Council prepares a submission schedule for the locality, setting forth deadlines for draft and final housing elements and fair share plans.\footnote{236}

The Act mandates a mediation process for the resolution of disputes between the Council and localities that disagree with the Council’s determination of their fair share require-
ments. If mediation does not produce a resolution, an administrative law judge handles the dispute. After receiving the judge's recommendation, the Council makes the final determinations regarding certification.

Certification benefits localities by protecting them from litigation. Litigants against a locality that has obtained certification from the Council must meet a heightened burden of proof; they must prove noncompliance by clear and convincing evidence. In addition, plaintiffs must join the Council as an adverse party.

There is insufficient evidence to determine whether the New Jersey approach will bring about compliance in most localities. The Council has been in full operation since July 1986. One hundred and thirty-six municipalities were certified by the Council as of September 1992.

The court in Mount Laurel III lauded the Act for establishing a regulatory system that obviates most lawsuits: "[i]f the Council conscientiously performs its duties . . . a successful Mount Laurel lawsuit should be a rarity." A locality that receives the Council's certification can be virtually certain that it is safe from legal challenge. The establishment of the Council and the transfer of the fair share cases from the courts to the Council enabled the courts to withdraw from the field of enforcement. The court's activism provoked criticism throughout the state, and the court was eager to shed its responsibility for enforcing fair share requirements. The

238. Id. § 15(c), 52 N.J.S.A. 27D-315(c).
239. Id.
240. Id. § 17, 52 N.J.S.A. 27D-317.
241. Id. § 17(c), 52 N.J.S.A. 27D-317(c).
242. COUNCIL ON AFFORDABLE HOUSING, COUNCIL ON AFFORDABLE HOUSING NEWSLETTER (1987).
245. Governor Kean publicly denounced Mount Laurel II and rescinded the state planning documents the court used in rendering its decision. RICHARD F. BABCOCK & CHARLES L. SIEMAN, THE ZONING GAME REVISITED, 221-31 (1985). Numerous local elections attacked the decision. In a non-binding state referendum, New Jersey voted to abolish the decision. Briffault, supra note 100, at 53-54. See also Housing the Poor in Suburbia: Vision Lags in New Jersey, NEW YORK TIMES, June 1, 1987, at B1.
246. In Mount Laurel III, the court stated, "[i]nstead of depending on chance—the chance that a builder will sue—the location and extent of lower
The court recognized that an administrative mechanism would have a greater capacity to enforce the fair share laws.  

IV. A New Enforcement Mechanism for the Fair Share Housing Statutes

A. The Need for a New Enforcement Mechanism

The conspicuous failure of the fair share housing laws to generate the construction of affordable housing is drawing attention to the defects in those laws. There are several proposals to reform the processes for determining fair share and local compliance with the fair share laws. Unfortunately, current proposals for reform treat enforcement of the fair share housing laws as a tangential issue. The proposed reforms might facilitate enforcement simply by lowering the standards for compliance so that noncompliance becomes less common, but even then, enforcement problems would remain.

Fair share determinations could be made fairer, and the goals of the fair share laws could be made easier for localities.
to attain, but questions regarding local compliance cannot be avoided. As long as localities play the dominant role in land use decision-making, they will exercise discretion in choosing sites for the development of fair share housing and in modifying land use ordinances to accommodate that development. If, for instance, a locality's fair share of the region's projected housing need for low-income families is 100 units, the local land use decision-making process will determine where that housing should be located and what land use ordinances are necessary to make the housing feasible. The locality may, for example, designate in its housing element a fifty-acre site for the development of low-income housing. Alternatively, the locality may choose to locate the low-income housing on smaller, "scattered" sites. The locality would also specify in its housing element changes to the land use ordinances for the designated site or sites, which, according to the locality, would permit the development of the desired housing. The locality may reduce frontage requirements, increase height restrictions, or make some other modification to the land use ordinances for the designated site or sites. No formula or legal rule can specify the sites each locality must designate for fair share housing or dictate how each locality must modify its land use ordinances to promote the desired development.

The fair share laws restrict local decision-making latitude regarding compliance with the fair share requirements. However, within the parameters of the fair share laws, there exists an arena of decision-making animated by local politics. Inevitably, some decisions made in this political arena will seek to skirt fair share requirements. Amendments to the fair share laws will not preclude conflicts between local political interests and regional and state interests unless those amendments end local control over land use decision-making. Since local control over land use exemplifies tenets deeply embedded in our legal system, it is all but certain that reforming the fair share laws will not eliminate the need for an enforcement system to fairly adjudicate questions regarding local compliance with those laws.

252. See discussion supra part I.A.
253. Briffault, supra note 100, at 43.
B. What a New Enforcement Mechanism Would Look Like

The courts have failed to comprehensively and effectively enforce the fair share statutes. Obstacles to litigation diminish the number of fair share housing cases to a small percentage of all the cases where noncompliance occurs. The inherent lack of a comprehensive scheme for judicial enforcement is aggravated by the courts' unwillingness and inability to adequately enforce the statutes in the cases they do adjudicate. However, the conclusion that the courts are incapable of comprehensively and effectively enforcing the fair share housing statutes is not an ending point, but a starting point.

A new mechanism for the enforcement of the fair share housing statutes is needed. The new enforcement mechanism should deal comprehensively with the noncompliance problem and not let obstacles to litigation narrow its effect. To achieve this goal, the new enforcement mechanism should have the capacity — which the courts currently lack — to promote, negotiate, and ultimately compel compliance on a case-by-case basis. In other words, the new enforcement mechanism should have both a more widespread and a more individualized effect on localities.

The procedure for action against non-complying localities would be divided into three stages: the advice and negotiated agreement stage, the administrative dispute resolution stage, and the appeal stage.

1. The Advice and Negotiation Stage

The purpose of the new enforcement mechanism would not be to coerce, but rather to engender cooperation. In the advice and negotiation stage, a regional or state agency would assist localities in designing housing elements that comply with fair share housing statutes and that address local concerns. After detailed discussions with the regional

254. See discussion supra part II.
255. See discussion supra part III.B.
256. See discussion supra parts III.C and III.D.
257. Although this article does not attempt to identify the entities that would perform the advice and negotiation and administrative dispute resolution functions, a brief discussion of the considerations involved in choosing these entities is valuable. State agencies, such as HCD, and regional agencies, such as the COGs, both present distinct advantages and disadvantages. A regional agency would be more accessible to localities. Its decisions might more
or state agency, each locality would submit its housing element to the agency for approval. The agency would approve the housing element or indicate its reasons for denying approval. Localities would respond to the agency's review either by incorporating proposed changes to their housing element or by explaining their reasons for not doing so. If, after a set period of time, the agency determined that negotiations with a locality were no longer progressing toward a valid housing element, the agency would request administrative dispute resolution. Localities that failed to submit housing elements for review would also be referred to the dispute resolution stage of enforcement.

2. The Administrative Dispute Resolution Stage

Disputes that are not resolved during the advice and negotiation stage would be aired at a hearing before a neutral, fact-finding, dispute resolution agency. The regional or state agency that advised the localities would present evidence supporting its determination of noncompliance, chronicle the localities' efforts to meet their fair share obligation, if any such efforts were made, indicate where those efforts fell short, and report their findings regarding the requirements for localities' housing elements. The localities would be notified and their presence at the hearings requested. Representatives of the localities would be entitled to present the localities' cases at the hearings.258

The dispute resolution agency closely reflect local desires and might be more attuned to local needs. On the other hand, regional administration might be overly susceptible to local influences, particularly the influence of the dominant localities in the region. Local influence over a regional agency could cause excessive parochialism, particularly if the regional agency represented each of the localities in its jurisdiction, as is the case with the COGs. Finally, regional administration could result in the balkanization of the enforcement process in the state, with each region implementing different enforcement policies. Enforcement by a state agency presents the problem of reducing local participation in, and control over, land use decisions. A state agency might be less sympathetic to local desires but more mindful of statewide needs. On the other hand, a state agency's distance from local politics would not preclude the possibility of politicization at the state level. The competing needs for local influence over enforcement and non-parochial, standardized enforcement must be balanced. The determination of which agency or agencies enforce the fair share housing laws is, therefore, critical.

258 At least one commentator has expressed concern that non-judicial hearings of the sort described here might not meet due process requirements. See generally, Holman, supra note 180. However, there is no reason that an administrative hearing on local compliance with the fair share statutes could not meet due process requirements. Although an advantage of a new administrative en-
would determine whether localities had complied with the fair share housing statutes on the basis of evidence presented. If the localities had not complied with the statutes, the dispute resolution agency would issue an order mandating compliance. These orders would instruct localities to fulfill the requirements for compliance set forth during the advice and negotiation stage, or some modification of those requirements. The dispute resolution agency would assess penalties for continued noncompliance, including any of the forms of injunctive relief the courts can currently impose. The dispute resolution agency could also suspend non-complying localities' land use powers.

The dispute resolution hearings would also provide a forum for input from other interested parties.259 Moreover, those in disagreement with the compliance measures agreed upon by a locality and the state or regional advisory agency could petition for dispute resolution. However, as an incentive for local compliance, approval of a locality's housing element at the advice and negotiation stage would create a presumption of compliance with the fair share statutes.

3. The Appeal Stage

In the third stage, localities could appeal arbitration decisions to the court of appeals.260 The court of appeals would apply the same facial validity standard it uses currently, but it would apply the standard to decisions mandating require-

forcement scheme might be its streamlined procedure, this procedure would have to meet state and federal due process standards. Bernard Schwartz, Administrative Law 202-10 (2d ed. 1984). If the procedure did not pass constitutional muster, then disputes over local housing activities would end up in court, negating the advantage of the administrative scheme.

The basic due process requirements of notice and opportunity to be heard could be incorporated in the administrative agency's hearings on local noncompliance. The issues raised at these hearings, the scope of discovery, and the actions taken pursuant to adjudication could be limited so as to expedite the resolution of disputes without undermining due process. Presumptions favoring HCD determinations would not violate due process standards. Mt. Laurel III, 510 A.3d 621, 632-34 (N.J. 1986). Localities would retain their right to appeal administrative decisions to the courts, though their likelihood of success would be reduced.

259. An important function of this hearing would be to create a record that could be used by the courts on appeal.

ments for compliance. Unless dispute resolution required a locality to take an action which, on its face, violated the fair share statutes, the dispute resolution would stand. Localities could also challenge the validity of the dispute resolution process. Any flaw in the proceedings that violated due process requirements and prejudiced the locality's case would be grounds for new dispute resolution. Under no circumstances would the courts be called upon to conduct a substantive analysis of local land use policies. Their standard of review for cases involving alleged noncompliance with the fair share housing laws would not change. However, under the new enforcement scheme, the minimal level of judicial scrutiny applied in fair share housing cases would favor an administrative determination of substantive compliance, instead of facial compliance. The presumption favoring the dispute resolution would discourage localities from appealing to the courts.

Those in disagreement with the determination of local compliance at the dispute resolution stage could petition the court of appeals to hear their complaints. However, as an incentive for local compliance and a disincentive to litigation, an approval of a locality's housing element at the dispute resolution stage would create a presumption of compliance with the fair share statutes. The party appealing from dispute resolution approval of a locality's housing element would bear the burden of showing that the housing element was facially invalid. Only then would the court remand the case for new dispute resolution. The approval of a locality's housing element would serve the same function as the certification New Jersey municipalities receive from the Council on Affordable Housing.\textsuperscript{261} The New Jersey experience shows that some localities voluntarily seek certification of their compliance with fair share laws in order to protect themselves from litigation.\textsuperscript{262} The approval of a locality's housing element by the dispute resolution agency would protect the locality from fair share litigation, creating an added incentive for local compliance.

\textsuperscript{261} See discussion supra part III.D.
\textsuperscript{262} Id.
B. The New Enforcement Mechanism Would Lack the Flaws of the Existing Enforcement System

The new enforcement mechanism would address the three root causes of the failure of the existing enforcement system: (1) the disinclination of litigants to challenge non-complying localities; (2) the reluctance of courts to use their enforcement powers; and (3) the courts' incapacity to adequately enforce the fair share housing statutes.

1. The Disinclination to Litigate

The new enforcement mechanism would circumvent obstacles to litigation that reduce the amount of fair share housing litigation and that consequently prevent the courts from comprehensively enforcing the fair share housing statutes. Instead of depending on litigants to exercise their private right of action against noncomplying localities, the new enforcement mechanism would work pro-actively with localities to promote compliance. During the advice and negotiation stage, a regional or state agency would assist localities in designing housing elements that met the fair share requirements and that took into account local concerns.

The new enforcement mechanism would emphasize consultation and compromise at the advice and negotiation stage of enforcement. The risk of being penalized for noncompliance at the dispute resolution stage would create a strong incentive for localities to resolve disputes during the advice and negotiation stage. The power of the dispute resolution agency to suspend local land use decision-making would discourage local intransigence. The prospect for obtaining a reversal of a dispute resolution by appealing to the court of appeals would be slight because of the strong presumption favoring dispute resolution.

The new enforcement mechanism would also encourage compliance by protecting localities deemed to be complying with the fair share housing laws from lawsuits alleging non-compliance. The approval of a locality's housing element by the dispute resolution agency would create a strong presumption in the locality's favor. The new enforcement mechanism would not foreclose the opportunity to exercise the private right of action against non-complying localities; litigants who were dissatisfied with a locality's efforts to comply with the fair share housing laws could request dispute resolution and
ultimately appeal to the courts. However, administrative enforcement of the statutes would preclude most litigation.

2. Court Reluctance to Enforce the Statute

The new enforcement mechanism would avert the problem of judicial reluctance to enforce the fair share housing statutes. Disputes remaining after the administrative enforcement process would require only a low level of scrutiny. The presumptions favoring dispute resolution would shield the courts from the land use questions they have attempted to avoid. The courts would maintain their traditional distance from local land use decisions.

Unlike the existing system of judicial enforcement, the new enforcement mechanism would accommodate the participatory nature of land use decision-making. Assistance to localities during the advice and negotiation stage would not decrease local involvement in designing housing elements. Local governments would continue to play the central role in land use decision-making. Moreover, the regional or state agency responsible for advising localities would not be impervious to local political pressure. In the case of COGs, local political pressure would have a strong influence, since COG members are generally elected officials from the localities. During the dispute resolution stage of enforcement, there would still be opportunities for local participation, since the resolution of disputes would consider input from interested parties. Those not satisfied with local efforts to meet the fair share requirements could request dispute resolution even if the regional or state agency responsible for advising the locality did not seek dispute resolution. The new enforcement mechanism would open the process of generating local compliance with the fair share housing statutes to a larger part of the affected community.

3. Lack of Court Enforcement Capacity

By shifting enforcement responsibilities, the new enforcement mechanism would eliminate the problem of the courts' lack of capacity. Regional and state agencies, such as the COGs and HCD, currently have staff with planning expertise. The COGs and HCD would, however, require additional staff and funding before assuming enforcement responsibilities. One objection to the new enforcement mechanism
would be the cost of creating the necessary enforcement capacity in the agencies charged with enforcement.

C. Concern About Cost

Evaluating the cost of the new enforcement mechanism is a complex and speculative undertaking. This article does not presume that the costs of administrative or judicial enforcement can be accurately estimated, much less that the author is capable of estimating them. However, it is possible to delineate some of the costs. Although potential enforcement agencies—the COGs and HCD—already exist, there would certainly be an additional expense to giving those agencies increased enforcement responsibilities. There would also be an added cost to localities of designing valid housing elements. To the extent that localities comply with the fair share statutes without COG assistance, this cost would reduce the cost of COG oversight.

The costs of administrative enforcement must be evaluated keeping in mind all the costs of the existing enforcement scheme. To those who would charge that administrative enforcement is unjustifiably expensive, it should be pointed out that judicial enforcement constitutes a substantial subsidy for litigation. Moreover, the cost of the proposed administrative enforcement scheme would have to be weighed against the cost of exclusionary zoning. The cost of exclusionary zoning is difficult to assess and varies by locality. However, many commentators agree that exclusionary zoning (some would say all zoning) substantially increases the cost and decreases the construction of affordable housing. Any estimate of the cost of exclusionary zoning must also reflect the impediments to regional planning it creates. The development of affordable housing near jobs is a central goal of regional planning. To the extent that exclusionary zoning impedes the development of affordable housing near jobs, the cost of exclusionary zoning must reflect the numerous traffic, environmental, and other regional problems to which exclu-

263. Babcock, supra note 184, at 172 (arguing that administrative enforcement may be cheaper than judicial enforcement).
265. See Muth, supra note 10.
266. Bay Vision, supra note 8, at 3.
sionary zoning contributes. Any calculation of the cost of administrative enforcement must take into account the savings realized through the reduction of exclusionary zoning.

Administrative enforcement would spread enforcement costs. Instead of forcing plaintiffs to bear part of the cost, the state would fund enforcement actions. The current system of judicial enforcement places the financial burden of enforcement on those who are unable or unwilling to sue noncomplying localities.267 Moreover, the existing enforcement mechanism places the financial burden of enforcement on those who have already been injured by exclusionary zoning, and it attempts to achieve the policy goals of the statute through court action that potential plaintiffs are disinclined to initiate.

IV. CONCLUSION

Land use decisions have not traditionally been the province of the judiciary.268 However, recent commentators on litigation challenging exclusionary land use controls argue that enforcement problems should be addressed primarily through the courts.269 This view has not always been so prevalent. The proposal to reform land use by creating an administrative agency to review the decisions of local authorities is not new.270

Local control over land use has shown itself to be deeply embedded in the Constitution and our legal system.271 There has been a trend during the last twenty to thirty years toward growth control, stronger local general planning, and home rule.272 Even advocates for state and regional land use controls have come to admit that local government has been the engine of progress in planning.273 Nevertheless, much of

267. See discussion supra part III.B.

268. See Holman, supra note 180 (containing a brief, but well documented, history of legislative pre-eminence in the field of zoning).

269. Mayo, supra note 173, at 755. See also Prahl, supra note 176; Harris, supra note 129; Mytelka, supra note 194.

270. See Babcock, supra note 184, at 154. See also Fred Bosselman & David Callies, The Quiet Revolution in Land Use Control (1971); Williams & Norman, supra note 10.

271. Briffault, supra note 100, at 112.


273. It is interesting to compare the following two passages. In 1971, David Callies and Fred Bosselman wrote, “[t]his country is in the midst of a revolution in the way we regulate the use of our land . . . . The ancien régime being over-
the past criticism of local land use control remains valid today, and it is echoed here.

California has a strong tradition of highly restrictive local land use laws.\textsuperscript{274} Although these laws serve some constructive purposes, they also contribute to the shortage of affordable housing and other closely related problems. There is not a single person living in a metropolitan region of California who does not suffer from the shortage of affordable housing. Aside from the high cost of housing, which results from the shortage in supply, many workers are forced to commute long distances to their jobs.\textsuperscript{275} The results are congested roads, increased air pollution, and wasted time. California’s fair share housing statutes are intended to help address these complex, interrelated problems.

Ample evidence shows that the fair share housing statutes are not effectively enforced.\textsuperscript{276} Litigation has shown itself to be a poor enforcement tool.\textsuperscript{277} Although the courts have substantial enforcement powers, they are reluctant to enforce the fair share housing statutes. Moreover, they lack the staff and expertise to do so. New Jersey’s experience provides some indication of how an administrative scheme might improve enforcement.

The primary function of administrative enforcement of the fair share statutes should be to assist localities in complying with the law. An administrative scheme need not subsume traditionally local land use powers. However, where a locality employs its land use powers to constrain the development of affordable housing, those powers should be suspended. The symmetry of this enforcement scheme has a cer-thrown is the feudal system under which the entire pattern of land development has been controlled by thousands of individual local governments, each seeking to maximize its tax base and minimize its social problems, and caring less what happens to others.” Bosseman \& Callies, supra note 270, at 1. In 1980, Callies wrote, “[i]t is probably more accurate to characterize the ‘ancient regime’ of local land use controls as having metamorphosed rather than having been overthrown.” Callies, supra note 272, at 142.

274. A prime example of restrictive land use laws in California are local ordinances that set minimum lot sizes. A number of these ordinances have been challenged in court. See, e.g., Clemons v. Los Angeles, 222 P.2d 439 (1950); Gisler v. County of Madera, 112 Cal. Rptr. 919 (1974). See also Linowes \& Allensworth, supra note 167, at 111-15.

275. See supra text accompanying note 7.

276. See discussion supra part II.

277. See discussion supra part III.
tain strength. Local government would be prevented from exercising land use powers unless it used those powers to help meet regional housing needs.