

**Note**

**Environmental Review as an Incentive for Parking Provision in New York and California: Moving From Conservatism to Conservation**

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I. INTRODUCTION

Parking is often treated as a peripheral feature of the built environment, overshadowed in the world of development by residences and offices and in the transportation sector by roads, rail and other major infrastructure. The *New York Times* recently referred to parking garages as “the grim afterthought of American design.”<sup>1</sup> Increasingly, however, urban planners are rediscovering the importance of parking. Given the rapid proliferation of parking supply in recent decades—here in New Haven, for example, the amount of off-street parking has more than tripled since 1960<sup>2</sup>—this research has emphasized the high social costs of oversupplying parking and in particular, the costs of government-mandated parking provision. These urban planners have offered three primary critiques: by producing a supply of parking greater than the market would otherwise supply, parking mandates increase housing costs, promote the use of the automobile, and negatively affect the aesthetics of the built environment.<sup>3</sup> In each of these areas, the effect of parking mandates is substantial. The New York chapter of the American Institute of Architects (“AIA”), for example, has argued that parking requirements drive the size and shape of new development more than traditional zoning tools that directly regulate a building’s bulk.<sup>4</sup>

As government regulators, urbanist activists, and scholars have come to understand the importance of parking in land use and transportation planning,<sup>5</sup> reform efforts have focused on the mandatory parking mini-

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1. Michael Barbaro, *A Miami Beach Event Space. Parking Space, Too.*, N.Y. TIMES (Jan. 23, 2011), <http://www.nytimes.com/2011/01/24/us/24garage.html>.

2. Christopher McCahill, *FORUM: Too Many Parking Lots Hurt New Haven*, NEW HAVEN REG. (Oct. 30, 2011), <http://www.nhregister.com/articles/2011/10/30/opinion/doc4eab2e5ce2780560243630.txt?viewmode=fullstory>.

3. See *infra* Part II.

4. AIA N.Y. CHAPTER - HOUSING TASK FORCE, TEN STEPS TO CREATE MORE AFFORDABLE HOUSING IN NEW YORK CITY 5 (2003) [hereinafter AIA NY], available at <http://aiany.org/committees/Housing/Statements/housingcode.pdf>.

5. While this argument has taken on new prominence in the last decade, this is not the first time that policymakers have seen parking as a mechanism for influencing urban transportation policy. In the 1970s, New York City, Boston, and Portland, Oregon all imposed limits on the amount of off-street parking that could be built in order to comply with the requirements of the

mums included in local zoning codes.<sup>6</sup> These zoning requirements demand a certain number of off-street parking spaces be built with all new construction.<sup>7</sup> For residential units, this might be one parking space for every dwelling unit; for commercial or industrial space, parking requirements are derived from square footage, with detailed prescriptions based on the precise use intended.<sup>8</sup> Efforts to reduce or eliminate these zoning-based parking mandates are underway in cities from Boston and San Francisco to Buffalo, New York.<sup>9</sup> These zoning minimums are, without a doubt, the most important mechanism by which the government regulates the provision of off-street parking.<sup>10</sup> However, the emphasis on zoning-based parking requirements has obscured the other public—and private<sup>11</sup>—policies that encourage the over-production of parking.<sup>12</sup>

This note studies another, particularly perverse way that the government requires and incentivizes the production of excess off-street parking: environmental review. In states like New York and California, strong state-level equivalents of the National Environmental Protection Act apply to private projects seeking governmental permits and also impose substantive requirements on those projects.<sup>13</sup> The result is that in large private developments subject to these laws, the environmental review process can encourage or even require the construction of large amounts

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Clean Air Act. Rachel Weinberger, John Kaehny & Matthew Rufo, *U.S. Parking Policies: An Overview of Management Strategies*, INST. FOR TRANSP. DEV. & POL'Y 43 (Feb. 2010), [https://www.itdp.org/wp-content/uploads/2014/07/ITDP\\_US\\_Parking\\_Report.pdf](https://www.itdp.org/wp-content/uploads/2014/07/ITDP_US_Parking_Report.pdf).

6. See *infra* notes 16-20 and accompanying text.

7. See Weinberger et al., *supra* note 5, at 7.

8. See, e.g., NEW YORK CITY, N.Y., ZONING RESOLUTION art. XIII, ch. 1, § 131-51 (2013) (generally requiring one parking space for every 2,000 square feet of commercial floor area, but requiring two parking spaces for every 1,000 square feet of floor area for new water parks).

9. See Noah Kazis, *If DCP Won't Scrap Downtown BK Minimums, Is Broader Parking Reform Dead?*, STREETS BLOG NYC (June 5, 2012), <http://www.streetsblog.org/2012/06/05/if-dcp-wont-scrap-downtown-bk-minimums-is-broader-parking-reform-dead/>.

10. See Weinberger et al., *supra* note 5, at 7.

11. Market actors, too, encourage an oversupply of parking. Many developers and local governments complain that risk-averse banks refuse to lend to projects that do not supply traditional suburban levels of parking. See Michael Manville & Donald C. Shoup, *Parking Requirements as a Barrier to Housing Development: Regulation and Reform in Los Angeles* 20 (Univ. of Cal. Transp. Ctr., Research Paper No. UCTC-FR-2010-03), available at <http://www.escholarship.org/uc/item/1qr84990> (“Lenders are reluctant to finance a residential development in Los Angeles that provides no parking at all . . .”); Derek P. Jensen, *Are Banks a Roadblock to Walkable Development?*, SALT LAKE TRIB. (Oct. 12, 2009, 5:55 AM), [http://www.sltrib.com/news/ci\\_13529914](http://www.sltrib.com/news/ci_13529914) (“Transit-oriented development isn’t stymied by outdated zoning, unwilling developers or a lack of space. It turns out, banks, wedded to old-fashioned lending standards that stress parking, may pose the biggest blockade by denying financing.”).

12. See discussion *infra* Parts II, III.

13. See Heather E. Ross, *Using NEPA in the Fight for Environmental Justice*, 18 WM. & MARY ENVTL. L. & POL'Y REV. 353, 370-71 (1994).

of parking.<sup>14</sup> Sometimes, environmental review even demands more parking be built than is required by the zoning code.<sup>15</sup> In those cases, environmental review, not zoning, is the ultimate cause of parking oversupply. I argue that this counterintuitive outcome, seemingly contrary to the purpose of environmental law, stems from environmental review's deep-seated orientation. Environmental review, at least in its transportation analysis, has become a system not intended to improve the environmental outcomes of ecological sustainability and public health but meant to protect the status quo, broadly defined. Conservatism, not conservationism, is environmental review's ideological stance.

In contrast to zoning code-mandated parking minimums, the connection between environmental review and parking supply has not been thoroughly researched. Donald Shoup's *The High Cost of Free Parking*, the book most responsible for putting parking reform on the urbanist agenda, does not mention environmental review,<sup>16</sup> nor does a major 2010 report outlining best practices in American parking policy.<sup>17</sup> Popular commentary on parking mandates by scholars such as Edward Glaeser often implies that the zoning code is the only government intervention into the parking market.<sup>18</sup> The academic literature is also silent on the issue. In isolated instances, local advocates for urbanist policies have taken on the issue.<sup>19</sup> A coalition of the major urban planning organizations in New York City, for example, discussed environmental review as one plank in its parking reform platform, but dealt with the issue only briefly and focused its advocacy on zoning requirements.<sup>20</sup>

Even so, state and local officials have been quietly moving to reform the treatment of parking under environmental review. In New York City, New York State, and California, administrators have attempted to prevent environmental review from working to the detriment of the environment through the mandating of excess parking.<sup>21</sup> These efforts have had only limited success so far, but reform efforts continue apace. In the fall

14. See *infra* Part C.

15. See *infra* notes 94-104 and accompanying text.

16. See generally DONALD C. SHOUP, *THE HIGH COST OF FREE PARKING* (2005).

17. See generally Weinberger, *supra* note 5.

18. See Matthew Yglesias, *Out, Damned Spot*, SLATE MAG. (July 9, 2013, 12:31 PM), [http://www.slate.com/articles/business/moneybox/2013/07/free\\_parking\\_isn\\_t\\_free\\_parking\\_mandates\\_hurt\\_america\\_s\\_cities.html](http://www.slate.com/articles/business/moneybox/2013/07/free_parking_isn_t_free_parking_mandates_hurt_america_s_cities.html); see also Edward L. Glaeser, Op-Ed., *Don't Require More Spaces; Price Curbside Ones Properly*, BOS. GLOBE (July 13, 2013), <http://www.bostonglobe.com/opinion/columns/2013/07/12/parking-minimums-squander-space-money-and-environment/6clXo4xOrlkAnWnXUqpHbK/story.html>.

19. Letter from Kent Barwick, Pres., Mun. Art Soc'y of N.Y., et al., to Michael Bloomberg, Mayor, N.Y.C. (Aug. 17, 2008), available at [http://transalt.org/files/news/reports/suburbanizing\\_the\\_city.pdf](http://transalt.org/files/news/reports/suburbanizing_the_city.pdf).

20. *Id.*

21. See *infra* Part V.

of 2013, the California legislature entered the fight, decisively removing parking from environmental review in transit-accessible urban areas.<sup>22</sup> Even in California, though, where the issue has been relatively high profile compared to other jurisdictions, it has received little public attention. Public commentary there has instead focused on broader concerns about environmental protection versus economic development;<sup>23</sup> transportation activists have focused on reforms to the study of traffic impacts in environmental review.<sup>24</sup>

Of course, the negative effects of parking oversupply on housing affordability, transportation and urban design remain the same whether mandated by local zoning codes or state environmental law. The legal pathway by which that oversupply is created, however—and therefore the path to reform—differs dramatically. This paper aims to establish the need for such reform and explore potential avenues by which such reform might be achieved. Part II details the negative impacts of excess parking on housing affordability, transportation policy and environmental quality, and urban design. Part III demonstrates that environmental review laws in fact have acted as parking mandates in New York and California, the two states where environmental review plays the largest role in the land use development process. Part IV explores why environmental review has come to cause the decidedly un-environmentalist effect of encouraging the use of motor vehicles. Part V reviews recent administrative reform efforts in New York and California, which met with only mixed success. Finally, Part VI discusses California's recent legislation address-

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22. S.B. 743, 2013 Leg., Reg. Sess. (Cal. 2013).

23. See, e.g., Dan Verel, *Efforts to Reform CEQA Environmental Law Fizzle*, N. BAY BUS. J., Oct. 28, 2013, <http://www.northbaybusinessjournal.com/81937/efforts-to-reform-ceqa-environmental-law-fizzle/> (noting that the business community had been hoping for “much more comprehensive changes” to the procedural mechanics of CEQA); D.J. Waldie, *Were Flimsy Laws on Beer, Basketball Purposefully Written Poorly?*, KCET (Nov. 1, 2013, 5:05 PM), [http://www.kcet.org/updaily/social\\_focus/commentary/where-we-are/were-flimsy-laws-on-beer-basketball-purposefully-written-poorly.html](http://www.kcet.org/updaily/social_focus/commentary/where-we-are/were-flimsy-laws-on-beer-basketball-purposefully-written-poorly.html) (calling SB 743 “another poisoned pill to environmental review”). See also Josh Eidelson, *Very Sneaky, Walmart: How the Mega-Retailer Rolled Back California Regulations*, SALON.COM (Oct. 14, 2013), [http://www.salon.com/2013/10/14/very\\_sneaky\\_walmart\\_how\\_the\\_mega\\_retailer\\_rolled\\_back\\_california\\_regulations/](http://www.salon.com/2013/10/14/very_sneaky_walmart_how_the_mega_retailer_rolled_back_california_regulations/) (analyzing SB 743 as a pro-Walmart, anti-labor law).

24. For representative coverage within this already specialized discourse, which focused on reforms to the “level of service” methodology for measuring traffic congestion, see Matthew Roth, *CA Poised to Reform Auto-Centric Level of Service Environmental Rules*, STREETS BLOG SF (Oct. 26, 2009, 5:30 PM), <http://sf.streetsblog.org/2009/10/26/ca-poised-to-reform-auto-centric-level-of-service-environmental-rules> and Amanda Eaken, *How Did Sustainable Communities Fare This Leg. Session in CA? Turns Out, Pretty Well.*, SWITCHBOARD, NATURAL RESOURCES DEFENSE COUNCIL STAFF BLOG (Sept. 24, 2013), [http://switchboard.nrdc.org/blogs/aeaken/how\\_did\\_sustainable\\_communitie.html](http://switchboard.nrdc.org/blogs/aeaken/how_did_sustainable_communitie.html). But see Ethan Elkind, *CEQA Reform 2013 Holds Promise for Improving the Environment*, THE BERKELEY BLOG (Oct. 16, 2013), <http://blogs.berkeley.edu/2013/10/16/ceqa-reform-2013-holds-promise-for-improving-the-environment/> (calling the removal of parking and aesthetic impacts from environmental review “another huge win.”).

ing the issue and suggests how New York's reform efforts can be augmented and improved.

## II. HOW TOO MUCH PARKING HARMS URBAN AREAS

Excess parking imposes extremely high costs on urban areas.<sup>25</sup> While the benefit of parking is relatively apparent—it allows those driving to a destination convenient access—the costs are more varied and less well known. This section summarizes the growing body of research detailing the many ways in which over-supplied parking harms urban, and often suburban, areas. Specifically, excess parking inefficiently increases the cost of housing; encourages automobile use, thereby increasing congestion, traffic fatalities and pollution; and creates dead zones of asphalt and poor urban design.

Parking mandates affect housing affordability in two ways. First, parking mandates directly increase the cost of construction.<sup>26</sup> In New York City, for example, a single surface parking space costs \$21,000 to build,<sup>27</sup> while an underground space costs \$50,000.<sup>28</sup> These increased housing costs are economically inefficient. If parking is only built due to a government mandate, that means that the developer believes that housing consumers value parking at less than the cost of construction—where consumers valued parking at more than the cost of construction, developers would voluntarily build it. Assuming that developers pass all or most of the cost of parking construction on to consumers, parking mandates thereby force consumers to pay more for parking than the amount they actually value it.<sup>29</sup> In other words, the increased housing costs caused by parking mandates directly reduce consumer welfare.

Second, parking requirements decrease the overall supply of housing by making it economically or architecturally infeasible to build. The impact of parking requirements on housing supply can be more restrictive than outright limits on the physical bulk of buildings.<sup>30</sup> The New York

25. See generally SHOUP, *supra* note 16.

26. Simon McDonnell, Josiah Madar, & Vicki Been, *Minimum Parking Requirements and Housing Affordability in New York City* 11 (Furman Ctr. for Real Estate & Urban Policy, Working Paper 2011), available at [http://furmancenter.org/files/publications/Min\\_Parking\\_Requirement\\_TRB\\_1.pdf](http://furmancenter.org/files/publications/Min_Parking_Requirement_TRB_1.pdf); *Searching for the Right Spot: Minimum Parking Requirements and Housing Affordability in New York City*, FURMAN CTR. FOR REAL ESTATE & URBAN POLICY 6 (Mar. 2012), [http://furmancenter.org/files/publications/furman\\_parking\\_requirements\\_policy\\_brief\\_3\\_21\\_12\\_final\\_2.pdf](http://furmancenter.org/files/publications/furman_parking_requirements_policy_brief_3_21_12_final_2.pdf) [hereinafter *Searching for the Right Spot*].

27. McDonnell, et al., *supra* note 26, at 11.

28. *Searching for the Right Spot*, *supra* note 25, at 6.

29. See Scott Bernstein, *Op-Ed: This Space for Rent, or How Cities Can Prioritize People Over Parking*, NEXT CITY (Mar. 26, 2014), <http://nextcity.org/daily/entry/this-space-for-rent-how-cities-can-prioritize-people-over-parking> (noting that developers pass the cost of parking on to housing consumers).

30. AIA NY, *supra* note 4, at 5.

chapter of the AIA, for example, has stated that “[p]arking requirements often limit the size of a building footprint more than floor area ratio.”<sup>31</sup> The impact on the housing market is measurable, and substantial. In Los Angeles, one study found that where certain projects were exempted from parking requirements, more housing was built, in more varied forms and at lower prices.<sup>32</sup> In San Francisco, consumers found housing without parking a better deal; those units sold 41 days faster than similar units with the price of parking bundled in.<sup>33</sup> A major study of housing affordability in New York City declared that “[t]he largest and most difficult zoning constraint affecting the development of new housing has been the requirement of building on-site parking spaces” and called for the reduction or removal of parking minimums.<sup>34</sup> Parking mandates thus serve as an artificial constraint on housing supply, driving up housing prices according to basic economic theory. The current concern over affordable housing in large coastal cities can be attributed in part to governmental parking mandates.

With regards to transportation, research suggests that parking mandates encourage both increased car ownership and increased use of those cars.<sup>35</sup> By increasing the supply of parking, mandates reduce the monetary cost of using a parking space—in suburban locations, often to zero—as well as the cost in time and frustration of searching for a parking space close to one’s destination.<sup>36</sup> Ample and low-cost workplace parking has been consistently shown to encourage driving to work.<sup>37</sup> One study of the Portland metro area found that putting a daily \$6 charge on previously free workplace parking more than doubles transit ridership.<sup>38</sup> Recently, transportation planner Rachel Weinberger analyzed the impact of residential parking availability on transportation behavior.<sup>39</sup> Looking at

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31. *Id.*

32. Manville & Shoup, *supra* note 11, at 6.

33. Wenyu Jia & Martin Wachs, *Parking Requirements and Housing Affordability: A Case Study of San Francisco* 9 (Univ. of Cal. Transp. Ctr., Working Paper No. 380, 1998), available at <http://www.uctc.net/papers/380.pdf>.

34. JERRY J. SALAMA, MICHAEL H. SCHILL, & JONATHAN D. SPRINGER, FURMAN CTR. FOR REAL ESTATE & URBAN POLICY, REDUCING THE COST OF NEW HOUSING CONSTRUCTION IN NEW YORK CITY: 2005 UPDATE 62–63 (2005), available at <http://furmancenter.org/files/publications/NYCHousingCost2005.pdf>.

35. SHOUP, *supra* note 16, at 14.

36. Manville & Shoup, *supra* note 11, at 2.

37. Daniel Baldwin Hess, *The Effects of Free Parking on Commuter Mode Choice: Evidence from Travel Diary Data* 15 (The Ralph & Goldy Lewis Ctr. for Reg’l Policy Studies at UCLA, Working Paper No. 34, 2001), available at <https://escholarship.org/uc/item/12s4j6zr>.

38. *Id.*

39. Rachel Weinberger, *Death by a Thousand Curb-Cuts: Evidence on the Effect of Minimum Parking Requirements on the Choice to Drive*, 20 TRANSPORT POLICY 93, 100 (Jan. 2012) [hereinafter Weinberger, *Death by a Thousand Curb-Cuts*], available at [http://works.bepress.com/cgi/viewcontent.cgi?article=1010&context=rachel\\_weinberger](http://works.bepress.com/cgi/viewcontent.cgi?article=1010&context=rachel_weinberger).

the New York City boroughs of Brooklyn, Queens and the Bronx, Weinberger found a statistically significant relationship between access to parking at home and both car ownership and driving to work in Manhattan.<sup>40</sup> The scale of the effect is enormous. In a separate work, Weinberger found that if New York City's parking requirements remain in effect as the city gains an estimated one million new residents, the parking requirements alone would induce an estimated 1.09 to 1.15 billion vehicle miles traveled each year.<sup>41</sup> Another study found that the mandated provision of on-street parking spaces increased car ownership rates by 8.8 percent.<sup>42</sup> The problem is not limited to urban areas. Similar effects were found in suburban Southern California.<sup>43</sup>

Automobile use imposes a number of significant harms on urban areas. Traffic congestion costs the public \$121 billion a year, in the form of wasted time and wasted fuel, according to one widely cited metric.<sup>44</sup> In 2012, 33,561 people were killed in motor vehicle crashes.<sup>45</sup> In urban areas, that burden falls disproportionately on pedestrians, cyclists and other "vulnerable users."<sup>46</sup> More cars on the road will lead to more congestion and more crashes, only worsening these problems.<sup>47</sup>

Most importantly for this note, which concerns environmental law, motor vehicles are major polluters, emitting around half the toxic air pollutants, nitrogen oxides, and smog-forming volatile organic compounds,

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40. *Id.*

41. Rachel Weinberger, Mark Seaman & Carolyn Johnson, *Residential Off-Street Parking Impacts on Car Ownership, Vehicle Miles Traveled, and Related Carbon Emissions*, 2118 *TRANSP. RES. REC.: J. TRANSP. RES. BD.* 24, 29 (2009).

42. Zhan Guo, *Minimum On-Street Parking Requirements and Household Car Ownership Decisions 20–21* (unpublished manuscript), available at <http://www.sre.wu.ac.at/ersa/ersaconfs/ersa11/e110830aFinal01701.pdf>.

43. See Richard W. Willson, *Suburban Parking Requirements A Tacit Policy for Automobile Use and Sprawl*, 61 *J. AM. PLANNING ASS'N* 29 (1995).

44. DAVID SCHRANK, BILL EISELE & TIM LOMAX, TEXAS A&M TRANSP. INST., TTI'S 2012 URBAN MOBILITY REPORT 1 (2012), available at <http://d2dtl5nnpfr0r.cloudfront.net/tti.tamu.edu/documents/mobility-report-2012.pdf>. This calculation, though high profile, has been roundly criticized on methodological grounds. Other studies report a cost of congestion ranging from \$14 billion to \$222 billion. TODD ALEXANDER LITMAN & ERIC DOHERTY, *TRANSPORTATION COST AND BENEFIT ANALYSIS II – CONGESTION COSTS 5.5-15* (2d ed. Supp. 2013), available at <http://www.vtpi.org/tca/tca0505.pdf>.

45. *Fatality Analysis Reporting System (FARS) Encyclopedia*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., <http://www-fars.nhtsa.dot.gov/Main/index.aspx> (last visited Jan. 17, 2015) (follow "FARS Data Tables" hyperlink; then follow "Summary" hyperlink).

46. See Rob Viola, Matthew Roe & Hyeon-Shic Shin, *The New York City Pedestrian Safety Study & Action Plan*, N.Y.C. DEP'T OF TRANSP. 15 (Aug. 2010), [http://www.nyc.gov/html/dot/downloads/pdf/nyc\\_ped\\_safety\\_study\\_action\\_plan.pdf](http://www.nyc.gov/html/dot/downloads/pdf/nyc_ped_safety_study_action_plan.pdf).

47. Cambridge Systematics, Inc., *Crashes vs. Congestion: What's the Cost to Society?*, AAA (Nov. 2011), [http://newsroom.aaa.com/wpcontent/uploads/2011/11/2011\\_AAA\\_CrashvCongUpd.pdf](http://newsroom.aaa.com/wpcontent/uploads/2011/11/2011_AAA_CrashvCongUpd.pdf).

and around three-quarters of the carbon monoxide in the United States.<sup>48</sup> The transportation sector is responsible for 28 percent of American greenhouse gas emissions.<sup>49</sup> Non-porous pavement also worsens stormwater runoff, a major source of water pollution.<sup>50</sup> Transportation policy that incentivizes the use of automobiles imposes dramatic costs, including environmental degradation, on all of society.

Finally, mandated parking imposes substantial design restrictions on architects, developers and urban planners. At the building level, “[a]rchitects often complain that they must shoehorn a building into the space remaining after the parking requirement has been satisfied, compromising the design.”<sup>51</sup> At the level of the streetscape or neighborhood, “most parking lots are asphalt breaks in the urban fabric, and most parking structures present blank walls to the street.”<sup>52</sup> While a few architects have tried to bring high-quality design to parking, such efforts are rare and success more so.<sup>53</sup> The result is the degradation of the pedestrian environment and an increase in the distances between active uses facing the sidewalk. On Brooklyn’s Fourth Avenue, where zoning codes encouraged large amounts of parking, the Wall Street Journal called the result a “depressing wasteland” and “like walking in the suburbs, bereft of the interaction between pedestrian and building.”<sup>54</sup> Pedestrian-friendly streets have been tied to everything from lower crime to an improved retail market to higher social capital.<sup>55</sup> Excess parking can make urban areas not only uglier, but also socially impoverished.

Given the many harms imposed by parking, governments must avoid producing excess parking. Indeed, limiting the amount of parking that

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48. *Cars, Trucks, Buses, and “Nonroad” Equipment*, U.S. ENVTL. PROTECTION AGENCY, [http://www.epa.gov/airquality/peg\\_caa/carstrucks.html](http://www.epa.gov/airquality/peg_caa/carstrucks.html) (last updated Oct. 28, 2014).

49. *Transportation’s Role in Climate Change*, U.S. DEP’T OF TRANSP., <http://climate.dot.gov/about/transportations-role/overview.html> (last visited Jan. 17, 2015).

50. *Stormwater Management Research*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/nrmrl/wswrd/wq/stormwater/> (last updated July 2, 2014).

51. Vinit Mukhija & Donald Shoup, *Quantity Versus Quality in Off-Street Parking Requirements*, 72 J. AM. PLANNING ASS’N 296, 296 (2006).

52. *Id.*

53. See generally ERAN BEN-JOSEPH, *RETHINKING A LOT: THE DESIGN AND CULTURE OF PARKING* (2012).

54. Robbie Whelan, *Brooklyn’s Burden: Fourth Avenue*, WALL ST. J. (June 17, 2012, 9:50 PM), <http://online.wsj.com/article/SB10001424052702303703004577472753921529304.html>.

55. See, e.g., FED. HIGHWAY ADMIN., U.S. DEP’T OF TRANSP., FHWA-SA-07-016, *A RESIDENT’S GUIDE FOR CREATING SAFE AND WALKABLE COMMUNITIES* 43, 53 (2008), available at [http://safety.fhwa.dot.gov/ped\\_bike/ped\\_cmunity/ped\\_walkguide/residentsguide.pdf](http://safety.fhwa.dot.gov/ped_bike/ped_cmunity/ped_walkguide/residentsguide.pdf); *The Economic Benefits of Sustainable Streets*, N.Y.C. DEP’T OF TRANSP. 2 (2013), <http://www.nyc.gov/html/dot/downloads/pdf/dot-economic-benefits-of-sustainable-streets.pdf>; DONALD APPELYARD, *LIVABLE STREETS* (1981) (describing effect of pedestrian-friendly streets on neighborhood social capital). See generally JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (1961).

can be built by private parties may, in some instances, be good policy.<sup>56</sup> Yet, state and local government policies work to increase the amount of parking beyond what consumers or developers desire, through multiple policy levers. The next Part details the mechanisms by which environmental review has become a force for over-producing parking.

### III. ENVIRONMENTAL REVIEW AS PARKING MANDATE

#### A. ENVIRONMENTAL REVIEW IN NEW YORK AND CALIFORNIA

After the National Environmental Policy Act (“NEPA”)<sup>57</sup> was signed into law in 1970, a number of states passed their own “little NEPAs” establishing state-level environmental review processes.<sup>58</sup> Like NEPA, these laws had two major components. First, the laws required public agencies to study and disclose all the significant negative impacts their actions would have on the environment.<sup>59</sup> These disclosures, in their fullest form, take the shape of environmental impact statements (“EIS”) (also known as environmental impact reports (“EIR”) in California<sup>60</sup>), documents that can range in the thousands of pages, filled with technical data describing the impact on everything from wildlife and air quality to aesthetic values and traffic conditions. Preparation of an EIS, which is usually outsourced to private consultants, can take years and cost millions of dollars.<sup>61</sup> Second, the laws issued state agencies an “aspirational command” to affirmatively and holistically integrate environmental thinking into all their actions.<sup>62</sup>

In certain states, such as California and New York, a combination of three factors has made environmental review laws—specifically, the California Environmental Quality Act (“CEQA”) and New York’s State Environmental Quality Review Act (“SEQRA”)<sup>63</sup>—essential components of the land use regulatory system. First, these states apply their little NEPAs to local governments, the primary regulators of land use.<sup>64</sup> Sec-

56. See Weinberger et al., *supra* note 5.

57. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (codified as amended at 42 U.S.C. §§ 4321-4335 (2014)).

58. See Philip Michael Ferester, *Revitalizing the National Environmental Policy Act: Substantive Law Adaptations from NEPA’s Progeny*, 16 HARV. ENVTL. L. REV. 207, 209 (1992).

59. *Id.*

60. CAL. PUB. RES. CODE § 21002.1.

61. See Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government’s Environmental Performance*, 102 COLUM. L. REV. 903, 908-23 (2002) (noting that the average EIS prepared by the Federal Highway Administration takes 3.6 years to complete, while the average EIS prepared by the Department of Energy takes 33 months).

62. James A. Henderson, Jr. & Richard N. Pearson, *Implementing Federal Environmental Policies: The Limits of Aspirational Commands*, 78 COLUM. L. REV. 1429, 1456-62 (1978).

63. CAL. PUB. RES. CODE §§ 21000-21189.3; N.Y. ENVTL. CONSERV. LAW §§ 8-0101-0117.

64. See Stewart E. Sterk, *Environmental Review in the Land Use Process: New York’s Expe-*

ond, the grant of a discretionary permit by a government agency is deemed public action, triggering an EIS requirement for many private projects.<sup>65</sup> Finally, unlike NEPA, these state laws impose substantive requirements on agencies beyond disclosure. The agencies must actually minimize or mitigate the environmental harms disclosed.<sup>66</sup> These factors place environmental review at the very heart of the development process in these two states. In California, there is “no other state law that relates as intimately to so many aspects of development planning” as CEQA,<sup>67</sup> and environmental review is seen as “overshadow[ing] the planning process.”<sup>68</sup>

The procedural details of environmental review vary state by state, but some features important to parking reform efforts should be noted. Generally, agency regulations define certain kinds of project as always subject to environmental review and others as exempt.<sup>69</sup> For types of projects not expressly listed in either category or for projects of intermediate scale, the state requires an environmental assessment.<sup>70</sup> Essentially short, preliminary reviews of potential environment impacts, environmental assessments are used to determine whether a full EIS will be required. By identifying certain issues as important in the environmental assessment process, or by setting explicit thresholds for what constitutes a “significant” environmental impact, the state uses the environmental assessment process as a gatekeeper to specify what kinds of projects must go through full environmental review.<sup>71</sup>

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*rience with SEQRA*, 13 CARDOZO L. REV. 2041, 2090 (1992) (contrasting New York’s application of SEQRA to local governments to the little NEPAs in Wisconsin and Maryland, which only subject state actions to environmental review).

65. *Id.* at 2042-44 (contrasting New York and California’s application of their little NEPAs to projects which require discretionary government permits with states like Connecticut and North Carolina, which only apply their laws to direct state action).

66. *See, e.g.,* Jackson v. N.Y. State Urban Dev. Corp., 494 N.E.2d 429, 434 (N.Y. 1986) (noting that, “unlike its Federal counterpart and model, the National Environmental Policy Act (NEPA), SEQRA is not merely a disclosure statute; it ‘imposes far more ‘action-forcing’ or ‘substantive’ requirements on state and local decisionmakers than NEPA imposes on their federal counterparts”) (citations omitted).

67. ELISA BARBOUR & MICHAEL TEITZ, PUB. POLICY INST. OF CAL., CEQA REFORM: ISSUES AND OPTIONS, at iii (2005), available at [http://www.ppic.org/content/pubs/op/OP\\_405EBOP.pdf](http://www.ppic.org/content/pubs/op/OP_405EBOP.pdf).

68. PAUL SEDWAY, S.F. PLANNING & URBAN RESEARCH ASS’N, FORM AND REFORM: FIXING THE CALIFORNIA ENVIRONMENTAL QUALITY ACT 4 (2006), available at [http://www.spur.org/sites/default/files/publications\\_pdfs/SPUR\\_FixingCEQA.pdf](http://www.spur.org/sites/default/files/publications_pdfs/SPUR_FixingCEQA.pdf).

69. 6 N.Y. COMP. CODES R. & REGS. § 617.4-617.5 (2015).

70. *Id.* § 617.6(3).

71. *See, e.g.,* *Environmental Review Process*, N.Y.C. DEP’T OF CITY PLANNING, [http://www.nyc.gov/html/dcp/html/env\\_review/env\\_review.shtml#eas](http://www.nyc.gov/html/dcp/html/env_review/env_review.shtml#eas) (last visited Jan. 17, 2015) (stating that an environmental assessment’s “purpose is to assist the lead agency in assessing whether identified adverse effects on the environment may be significant enough to warrant further analysis in an Environmental Impact Statement”).

Additionally, environmental review regulations can prescribe more or less rigid standards for how applicants should measure environmental impacts. New York City provides quantitative thresholds for significance and extremely detailed methodological instructions to applicants in its City Environmental Quality Review (“CEQR”) Technical Manual.<sup>72</sup> Though technically only recommendations, “applicants who seek to deviate from the Manual’s ‘guidance’ have a heavy burden of persuasion.”<sup>73</sup> State regulations tend to be looser and less prescriptive.<sup>74</sup> Efforts to reform the treatment of parking in environmental review have addressed both the environmental assessment process and the technical guidance provided by agencies.

As applied to private developments, environmental review shapes what is built in a number of ways. First, the disclosure requirements of environmental review encourage developers to avoid negative impacts that will prove unpopular with stakeholders. No developer wants an official declaration that its project will worsen air quality or stall traffic.<sup>75</sup> The importance of disclosure is made clearly visible by NEPA, which has been construed to be a purely procedural statute but still hailed as transformative.<sup>76</sup> Second, the high cost of preparing a full EIS will incentivize the design of projects that do not have significant impacts.<sup>77</sup> Developers will work to secure a decision during the environmental assessment process that they do not need to continue on to the creation of a full EIS, called a “negative declaration” or “finding of no significant impact.” Third, some state environmental review laws, including those of California and New York, impose substantive requirements. New York requires the minimization or mitigation of environmental impacts to the maximum extent practicable, as balanced with other social and economic considerations; California requires that projects only be approved if there are no feasible alternatives or mitigation measures that would substantially

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72. See N.Y.C. MAYOR’S OFFICE OF ENVTL. COORDINATION, CITY ENVIRONMENTAL QUALITY REVIEW TECHNICAL MANUAL (Mar. 2014) [hereinafter CEQR TECHNICAL MANUAL], available at [http://www.nyc.gov/html/oec/downloads/pdf/2014\\_ceqr\\_tm/2014\\_ceqr\\_technical\\_manual.pdf](http://www.nyc.gov/html/oec/downloads/pdf/2014_ceqr_tm/2014_ceqr_technical_manual.pdf).

73. MICHAEL B. GERRARD, DANIEL A. RUZOW & PHILIP WEINBERG, 2-8A ENVIRONMENTAL IMPACT REVIEW IN NEW YORK § 8A.04(4)(a) (2014).

74. See generally *id.*

75. Cf. Warren St. John, Op-Ed., *Shadows Over Central Park*, N.Y. TIMES, Oct. 28, 2013, at A29, available at <http://www.nytimes.com/2013/10/29/opinion/shadows-over-central-park.html> (noting that “the public filing of shadow assessments” through environmental review “can ignite opposition”).

76. See, e.g., William H. Rodgers, Jr., *The Most Creative Moments in the History of Environmental Law: “The Whats”*, 2000 U. ILL. L. REV. 1, 31 (2000) (finding in an informal survey of environmental lawyers that “[t]he most admired of all the environmental laws is the NEPA.”).

77. See Karkkainen, *supra* note 61, at 936.

lessen the environmental impact.<sup>78</sup> Fourth, developers will err on the side of caution in all the above respects. Challenging the environmental review process is overwhelmingly the favored litigation strategy for project opponents.<sup>79</sup> Developers accordingly treat their EISs as “litigation insurance” and do what it takes to avoid costly delays. The threat of even unsuccessful lawsuits will encourage developers to play it safe, strengthening the above mechanisms. Finally, the aspirational commands of the little NEPAs may encourage agencies to shape projects so as to avoid negative environmental impacts. Whether the aspirational commands of environmental review have any practical effect is debated, but many scholars believe that environmental laws have encouraged agencies to internalize an ethos of avoiding negative impacts.<sup>80</sup> Because environmental review law defines the provision of too little parking as a negative environmental impact, each of these factors can contribute to developers’ decision of how much parking to supply.

#### B. “PARKING SHORTFALLS” AND ENVIRONMENTAL REVIEW’S INCORPORATION OF TRAFFIC ENGINEERING

To understand how environmental review encourages the production of excess parking spaces, it is essential to understand how environmental review incorporates certain traffic engineering principles. Environmental review first performs a traffic analysis that determines how many people will drive to a project and only then analyzes parking: it assumes that the availability of parking will not affect how people choose to travel. The environmental review process also sets as its goal that all users of a project will be able to park as easily as those who currently live and work in the area, even if the project is making the area significantly more urban. In both these ways, the environmental review process aims to insulate the transportation status quo from changes caused by development: it seeks to keep drivers in their cars, with the same ease of parking as before the development was built. Using the CEQR Technical Manual as a guide,<sup>81</sup> this subsection now walks through how environmental review analyzes

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78. See N.Y. ENVTL. CONSERV. LAW § 8-0109(8) (McKinney 2006); CAL. PUB. RES. CODE § 21002 (West 1996).

79. See Michael B. Gerrard, *Litigation Under SEQRA Declining, Exemption Use Is Rising*, 244 N.Y. L.J. (Aug. 5, 2010), [http://www.arnoldporter.com/resources/documents/Arnold&PorterLLP\\_NYLJ\\_Michael\\_Gerrard\\_080510.pdf](http://www.arnoldporter.com/resources/documents/Arnold&PorterLLP_NYLJ_Michael_Gerrard_080510.pdf) (calling SEQRA “by far the most fertile source of environmental litigation in New York”).

80. See Sterk, *supra* note 64, at 2041 (“Without question, these little NEPAs have made local officials and developers more sensitive to environmental concerns.”).

81. See CEQR TECHNICAL MANUAL, *supra* note 72, at 16-1. The CEQR Technical Manual, thanks to its prescriptive detail, provides the clearest summary of how environmental review analyzes parking, but the same basic framework is also used outside New York City.

parking, demonstrating how conservative, rather than conservationist, ends are achieved.

There are three basic components of transportation analysis in the environmental review process. First, “trip generation” is analyzed: this is the total number of trips that will be made to and from the new development.<sup>82</sup> The data can be derived from other nearby projects or from published standards such as those developed by the Institute of Transportation Engineers (“ITE”).<sup>83</sup> Second, the “modal split” of those trips—the share of trips taken by car, taxis, bus, foot, etc.—is predicted. Original surveys of comparable projects provide the best data, but Census data is commonly used.<sup>84</sup> Finally, the “trip assignment” process predicts the routes of each trip, allowing the impact on particular intersections or subway stations to be estimated.<sup>85</sup>

The parking analysis is then built off of the traffic analysis. Every vehicular trip generated requires a parking spot within walking distance. Walking distance is generally defined as a quarter-mile radius, though that number can vary based on context.<sup>86</sup> Within that study area, the number of publicly available on-street and off-street parking spaces is counted, including those being built as part of the project, and those spaces’ occupancy rates are surveyed over the course of the day.<sup>87</sup> This allows a calculation of whether, hour-by-hour, each automobile trip will have a space to park, both on-site and in the area. If the project cannot supply enough parking for all the trips it generates, it is considered to have a “parking shortfall.” As the CEQR Technical Manual notes, “Should the proposed project generate the need for more parking than it provides, this shortfall of spaces may be considered significant.”<sup>88</sup>

Importantly, parking analysis uniformly comes after traffic analysis: the underlying premise of transportation analysis is that the supply of parking does not affect people’s transportation choices. The trip generation and modal split numbers determine the number of parking spaces needed, not the other way around. Despite significant evidence to the

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82. *Id.* § 311.

83. *Id.* The ITE standards, which are based on suburban land use patterns, must be adjusted for urban areas.

84. *Id.* § 312. Note that these methods generally assume that the existing modal split will not be affected by the new development. Some traffic analyses attempt to adjust for the change in conditions caused by the new project, but not all.

85. *Id.* § 321.

86. *Id.* § 381. Drivers might be expected to walk further from their parking space to their destination at the beach or less far in a location that feels dangerous.

87. *Id.* § 383. These numbers are generally adjusted to account for foreseeable changes in supply or occupancy rates.

88. *Id.* § 450.

contrary<sup>89</sup> and basic common sense, the standard engineering assumption is that changing the ease and cost of parking will not meaningfully change anyone's mind about whether to drive. This assumption is frequently followed to illogical extremes. The EIS for the rezoning of Manhattan's Hudson Square, for example, determined that the expected number of new automobile trips generated would lead to a peak hour public parking utilization rate of 112 percent.<sup>90</sup> It is rather more likely in downtown Manhattan that the excess drivers would switch to the subway, but there is no room for that kind of thinking in the model. In reality, though, parking supply feeds back into mode choice. In an area like Hudson Square, where taking transit, riding a bike and walking are easy and already popular options, the ease of driving affects mode choice. Generate a "parking shortfall" and drivers will just get there another way.

The environmental review concept of a "parking shortfall" is not just technically inadequate. Rather, it is an ideological construct that embodies a particular approach toward transportation policy, one which locks in the modal status quo. In the context of developing and densifying areas, that generally means protecting the use of the automobile from land use changes that would otherwise discourage driving.<sup>91</sup> Imagine a low-density industrial area being redeveloped into high-density residential and retail uses, a common scenario along the waterfront of many American cities. Census data or neighborhood surveys will reveal that the former residents of the industrial area tended to drive: there was nowhere to walk to and there was plenty of on-street parking to go around. After redevelopment, the increased density will almost by definition create more places to walk, better transit service and less space to park per person. Mandating that parking be supplied based on existing modal split numbers would require that the new high-rise condo dwellers, whose neighborhood now looks very different, be provided with as much parking as they would need to drive as easily as the previous residents. There is no acknowledgement that the construction of a thousand-unit residen-

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89. See Hess, *supra* note 37, at 15; Weinberger, *Death by a Thousand Curb-Cuts*, *supra* note 39, at 100.

90. N.Y.C. CITY PLANNING COMMISSION, *Chapter 13: Transportation, in HUDSON SQUARE REZONING FINAL ENVIRONMENTAL IMPACT STATEMENT* 13-83 (2013), available at [http://www.nyc.gov/html/dcp/pdf/env\\_review/hudson\\_square/13\\_feis.pdf](http://www.nyc.gov/html/dcp/pdf/env_review/hudson_square/13_feis.pdf).

91. Interestingly, this status quo bias can in particular contexts have the opposite effect. For example, one office building off the side of the Whitestone Expressway mistakenly built fewer parking spaces than required by the zoning code. When the error was discovered years later, the owner applied for a retroactive reduction in the parking requirement. The environmental assessment statement for the approval found that there would be no significant impact, because the building was already up and operating and its parking lot was not full. N.Y.C. DEP'T OF CITY PLANNING, CEQR No. 12DCP116Q, ENVIRONMENTAL ASSESSMENT STATEMENT: 30-50 WHITESTONE EXPRESSWAY PARKING AUTHORIZATION 2-3 (2012), [http://www.nyc.gov/html/dcp/pdf/env\\_review/eas/12dcp116q\\_eas.pdf](http://www.nyc.gov/html/dcp/pdf/env_review/eas/12dcp116q_eas.pdf).

tial project might require, or even allow, the new residents to get around differently. This methodology also protects the surrounding residents from changes in their neighborhood; new drivers are not supposed to spill over and take up their neighbors' spaces. Thus, the idea of the "parking shortfall," as imported into environmental review, is not so much conservationist as conservative: it aims to preserve the existing balance between transportation modes rather than encourage environmentally friendly mode shifts.

The environmental review process not only defines so-called parking shortfalls—which are often really mode shifts away from the automobile—as negative environmental impacts, it then encourages "mitigation" by requiring additional parking to be built. Indeed, in New York City, CEQR regulations single out inadequate parking supply as a significant environmental impact where mitigation is especially important: "In general, where a parking shortfall or significant impact has been identified, a proposed project must strive to provide the amount of parking it needs as part of the proposed project rather than relying on available off-site parking supplies."<sup>92</sup> In general, building more parking spaces is the standard form of mitigation.<sup>93</sup> Thus, environmental review first assumes that drivers' current ease of parking must be maintained, and then demands that developers build enough parking to make that a reality. Environmental review thus encourages parking be built.

As a final note, this essay will use the terminology of "parking shortfall" as used in the context of environmental review, but it is important to remember throughout that these shortfalls do not necessarily mean that drivers will continue to arrive in cars and circle the block endlessly looking for an empty space. Instead, counter to the assumptions of environmental review, many will shift to more sustainable modes of transport. In many cases, parking shortfalls are desirable policy outcomes.

### C. ENVIRONMENTAL REVIEW AND THE PRODUCTION OF EXCESS PARKING

The environmental review process encourages the provision of parking, as demonstrated in the previous subsection. This essay will now show that this process actually changes what is built. Environmental review in both New York and California meaningfully changes development patterns, helping drive an over-supply of parking. Importantly, environmental review can sometimes lead developers to build more parking than

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92. See CEQR TECHNICAL MANUAL, *supra* note 72, at § 550.

93. *Id.* The Technical Manual does allow new transit services or bicycle infrastructure to qualify as mitigation measures as well, though increased parking supply is the most common mitigation measure.

necessary even to comply with the already high mandates of zoning-based parking requirements. In practice, not just in theory, both New York and California's little NEPAs encourage the provision of parking and impede developments with a parking shortfall.

Take, for example, the New Domino development proposed for the Brooklyn waterfront, at the foot of the Williamsburg Bridge. Under a previous plan for the project, 1,694 parking spaces would have served 2,200 new residences.<sup>94</sup> Only 1,042 parking spaces were required by zoning requirements.<sup>95</sup> According to Susan Pollock, a senior vice president with then-developer CPC Resources, the extra 650 parking spaces—and effectively, the additional 650 car-owners in New York City—could be attributed to the environmental review process.<sup>96</sup> CPC Resources would have been happy to build less parking, she said. Parking decisions, however, were made in “a world called SEQRA-land.”<sup>97</sup> Once new Census data was released showing that car-ownership rates had decreased on the Williamsburg waterfront (an inevitable result of the area's transformation from a mostly-empty industrial area to a developing residential area where parking was scarce), she said, they might be able to update their EIS and reduce the amount of parking they planned to provide without showing a significant adverse impact.<sup>98</sup>

The New Domino project is not the only development to be pushed to build excess parking by the environmental review process. It is uncommon to find a developer willing to speak so directly about SEQRA's impact on their parking provision as CPC Resources was—better to take credit for the generally-popular supply of parking than to state that it is being imposed upon you, perhaps—but the case law suggests that the provision of additional parking spaces is a not-infrequent result of the SEQRA review process. In one case, for example, the court noted that “[a]s a mitigation measure, the Environmental Impact Statement provides for construction of the parking ramps to provide permanent parking in replacement of those spaces lost by construction of the stadium.”<sup>99</sup> Excess parking, beyond what was planned or demanded by the private

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94. Noah Kazis, *Billyburg's "New Domino" Mixes Parking Disaster with Bike-Ped Benefits*, STREETS BLOG NYC (Mar. 4, 2010), <http://www.streetsblog.org/2010/03/04/billyburgs-new-domino-mixes-parking-disaster-with-bike-ped-benefits>.

95. *Id.*

96. Noah Kazis, *Brooklyn CB 1, CM Levin, Beep All Demand Less Parking at New Domino*, STREETS BLOG NYC (Apr. 30, 2010), <http://www.streetsblog.org/2010/04/30/brooklyn-cb-1-cm-levin-beep-all-demand-less-parking-at-new-domino>.

97. *Id.*

98. *Id.*

99. *Main Seneca Corp. v. Erie Cnty. Indus. Dev. Agency*, 510 N.Y.S.2d 326, 327 (N.Y. App. Div. 1986).

developer, is being provided to comply with the mitigation requirements of SEQRA.

In California, too, environmental review in fact encourages the construction of additional parking, though the evidence is less direct. The courts have generally ruled against CEQA challenges alleging the provision of inadequate parking. However, the logic of those decisions reveals that inadequate parking can constitute a violation of CEQA's substantive requirements, thereby signaling to developers that they must increase the amount of parking they provide. For example, one court concluded that a shortfall of three on-street spaces and additional visitor parking would not be a "significant" impact in the context of a 14-story residential building.<sup>100</sup> The clear implication is that a larger shortfall would be significant, and, therefore, legally problematic.<sup>101</sup> Similarly, plaintiffs challenged the EIR for a Sacramento convention center expansion on the grounds that it did not commit to a particular method of mitigating the parking shortfall it created.<sup>102</sup> The court upheld the EIR, stating that it was enough that the city had committed itself to mitigation; the city was free to disclose a menu of possible mitigation measures from which it would select later.<sup>103</sup> Those options included different locations for building new parking garages or contracting with other garages to secure parking spaces for the convention center.<sup>104</sup> Again, the implication of the court's decision is that Sacramento was not free to leave the parking shortfall unmitigated and expand its convention center without sufficient parking. Rather, it had to provide the additional parking to comply with CEQA, it just had the option to choose how best to secure the extra parking. Presumably, the lack of reported cases in which the court sides with the plaintiffs demanding more parking can be explained because, as sophisticated parties, developers avoid the egregious undersupplies of parking that a court would strike down.

Moreover, environmental review laws do not only shape developer behavior through litigation and direct substantive mandates. Though unlike NEPA, neither SEQRA nor CEQA is "merely a disclosure statute," the information-disclosing aspects of these laws remain essential aspects of their functioning. A developer courting the public as it seeks governmental approvals, for example, will be loath to be publicly tagged as having a "significant adverse impact" on the neighbors' ability to find a

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100. *Banker's Hill, Hillcrest, Park West Cmty. Pres. Grp. v. City of San Diego*, 42 Cal. Rptr. 3d 537, 558 (Cal. Ct. App. 2006).

101. *Id.*

102. *Sacramento Old City Ass'n v. City Council of Sacramento*, 280 Cal. Rptr. 478, 484-85 (Cal. Ct. App. 1991).

103. *Id.* at 490.

104. *Id.*

parking spot. Additionally, the threat of costs and delay from even unsuccessful litigation—and the presence of multiple appellate-level environmental cases on the issue of parking suggests that this threat is credible—serves to discipline developers from either pushing the limits of the law or angering the neighbors. Indeed, even advocates of environmental review laws have argued that the potential cost of litigation provides an important mechanism by which these laws shape development.<sup>105</sup> Finally, developers of mid-size projects will avoid parking shortfalls in order to obtain a negative declaration and avoid the cost of a full EIS. Accordingly, it is a safe assumption that prudent developers are strongly encouraged by environmental review laws to provide sufficient parking even where they might not be required to do so.

#### IV. WHY DO ENVIRONMENTAL REVIEW LAWS REQUIRE AN UN-ENVIRONMENTAL OUTCOME?

It seems paradoxical that landmark environmental legislation would encourage and even mandate the increased use of the automobile. As outlined in Part II, increased use of motor vehicles is generally considered environmentally harmful. Moreover, the little NEPAs' broad definitions of "environment" include socio-economic, transportation and aesthetic impacts. The impacts of parking on housing affordability, congestion and urban design should, therefore, also be protected against. Surely, then, a proper environmental protection law should not promote driving. Yet at least with regards to parking, the little NEPAs do so.

The reasons why reflect the particular brand of environmentalism instantiated in these statutes and their regulations, as well as the limits that have been imposed on environmental review by courts and legislatures. The result is in many ways the worst of both worlds: laws too narrow to accurately capture the full range of environmental harms caused by parking yet broad enough to study parking as an environmental impact and with the teeth to impose substantial costs by doing so.

##### A. OVER-BROAD ENVIRONMENTAL REVIEW: WHY IS PARKING CONSIDERED AN ENVIRONMENTAL IMPACT AT ALL?

Fundamentally, environmental review encourages the provision of parking because courts have defined ample parking as part of the environment being protected. Once protecting someone's ease of finding a parking space is placed into the same category as protecting endangered species' habitats or other traditional environmental goals, it is easy to see

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105. See Karkkainen, *supra* note 61, at 918-19 (arguing that the cost of writing "litigation proof" EISs encourages federal agencies to avoid significant environmental impacts in the first place).

how the environmental review process would end with the creation of more parking spaces. However, the definition of parking shortfalls as environmental impacts is not compelled by either statute or regulation. Rather, it reflects a judicial sentiment that people ought to be protected from unwanted changes to their neighborhoods.

Neither New York nor California's environmental statute requires the study of parking as a textual matter. CEQA, for example, defines "environment" as "the physical conditions which exist within the area which will be affected by a proposed project, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance."<sup>106</sup> SEQRA, which was modeled after CEQA, defines the environment more broadly, adding to that list "existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character."<sup>107</sup> Neither statutory definition explicitly mentions parking or even traffic patterns as part of the environment, though New York's inclusion of "character" could perhaps be considered a broad catch-all category.

Nor do environmental review regulations define parking supply as part of the "environment." New York's regulations list as "indicators of significant adverse impacts on the environment: a substantial adverse change in existing air quality, ground or surface water quality or quantity, traffic or noise levels . . ."<sup>108</sup> Though traffic is included, parking itself is not. Interpreting this regulation, the courts could, and perhaps should, have said that parking shortfalls are not environmental impacts, except insofar as they cause drivers to cruise for parking spaces or otherwise cause a listed environmental impact. California's regulations essentially restate the statutory definition of the environment and so provide no explanation of how parking became part of that state's environmental review.<sup>109</sup>

Given the ambiguous statutory and regulatory mandate for considering parking shortfalls in environmental review, the courts have weighed in on the issue. In New York, the landmark case *H.O.M.E.S. v. New York State Urban Development Corporation*, which established the "hard look" standard of review for SEQRA cases, held that both traffic and parking impacts must be studied.<sup>110</sup> The *H.O.M.E.S.* court did not, however, meaningfully explain why parking impacts needed to be studied. The court recited a variety of impacts that must be studied in an EIS,

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106. CAL. PUB. RES. CODE § 21060.5 (West 2014).

107. N.Y. ENVTL. CONSERV. LAW § 8-0105(6) (McKinney 2014).

108. 6 N.Y. COMP. CODES R. & REGS. § 617.7(c)(1)(i) (2015).

109. 14 CAL. CODE REGS. § 15382 (2015).

110. *H.O.M.E.S. v. N.Y. State Urban Dev. Corp.*, 418 N.Y.S.2d 827, 832 (N.Y. App. Div. 1979).

including noise levels, air quality, encouraging large numbers of people to congregate in one place, and the impairment of community character, but at no point connected any particular set of those factors to parking.<sup>111</sup> That leap may be a reasonable one—certainly, neighbors routinely consider losing parking spaces an intolerable attack on their community<sup>112</sup>—but the court did not make it. Rather, it leaned on a policy argument, expressing concern that “the residents in the area have extreme difficulty entering and leaving their homes and enjoying the use thereof but, more importantly, even fire fighting equipment and other emergency vehicles will be unable to get through to serve the public.”<sup>113</sup> The court understood environmental protection to, in some sense, protect citizens from any unwanted change to their neighborhood and inserted its own policy judgment that parking shortfalls are the kind of change citizens must be protected from.

The California courts have more actively debated whether an under-supply of parking constitutes an environmental impact. CEQA does not treat social impacts as significant impacts on the environment, unless they in turn trigger secondary physical impacts.<sup>114</sup> Citing that principle, the California Court of Appeal for the First District rejected the idea that parking shortfalls could be considered environmental impacts in 2002. In *San Franciscans Upholding the Downtown Plan v. City & County of San Francisco* (“*SFUDP*”), the court held that parking impacts were merely social impacts, except insofar as they cause real environmental harms to air quality or traffic.

[T]here is no statutory or case authority requiring an EIR to identify specific measures to provide additional parking spaces in order to meet an anticipated shortfall in parking availability. The social inconvenience of having to hunt for scarce parking spaces is not an environmental impact; the secondary effect of scarce parking on traffic and air quality *is*.<sup>115</sup>

In part, the court was motivated by San Francisco’s “transit-first policy,” which called for mitigating air quality and traffic impacts through more sustainable alternatives than providing parking. The court was rightfully hesitant to impose an additional 1,250 new parking spaces on

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111. *Id.*

112. See Aaron Weiner, *This Is How Much People Care About Parking*, WASHINGTON CITY PAPER, HOUSING COMPLEX (Oct. 12, 2012, 11:21 AM), <http://www.washingtoncitypaper.com/blogs/housingcomplex/2012/10/12/this-is-how-much-people-care-about-parking/>; Eve Bachrach, *SaMo Freaking Out Over Plan to Slash Parking Requirements*, CURBED L.A. (Mar. 29, 2013), [http://la.curbed.com/archives/2013/03/samo\\_freaking\\_out\\_over\\_plan\\_to\\_slash\\_parking\\_requirements.php](http://la.curbed.com/archives/2013/03/samo_freaking_out_over_plan_to_slash_parking_requirements.php).

113. H.O.M.E.S., 418 N.Y.S.2d at 832.

114. 14 CAL. CODE REGS. § 15131 (2015).

115. *San Franciscans Upholding the Downtown Plan v. City of San Francisco*, 125 Cal. Rptr. 2d 745, 775 (Cal. Ct. App. 2002).

downtown San Francisco in the name of the environment.<sup>116</sup> The court also, correctly, noted that no textual basis for requiring the study of parking impacts existed under CEQA.

However, the First District's holding was firmly rejected by the Fourth District in *Taxpayers for Accountable School Bond Spending v. San Diego Unified School District* ("Taxpayers").<sup>117</sup> After calling the discussion of parking in *SFUDP* both dicta and only applicable to special circumstances, the court went on to argue that "cars and other vehicles are physical objects that occupy space when driven and when parked. Therefore, whenever vehicles are driven or parked, they naturally must have some impact on the physical environment."<sup>118</sup> The court continues on to argue that parking impacts could also fall under "overcrowding of a public facility that causes an adverse effect on people," a category that CEQA regulations define as a significant impact.<sup>119</sup>

Behind this doctrinal elaboration, however, likely rests the policy judgment that parking shortfalls are precisely the kind of environmental change that the law should protect people from. That argument was made, entirely without reference to the statutory or regulatory language, by the First District soon after CEQA was enacted:

"[W]e cannot agree with respondents' contention that traffic and parking congestion cannot have a significant effect on the environment within the meaning of CEQA. . . [T]he state may not put a traffic snarling, parking congesting activity, slam-bang in the middle of a quiet, single-family residential area, thus drowning that area in a sea of automobiles without the necessity of first obtaining an environmental impact report."<sup>120</sup>

Just as in *H.O.M.E.S.*, the court identified parking shortfalls as the kind of thing that neighborhoods should be protected against on policy grounds, despite no statutory indication that environmental review was meant to play that role. It is hard not to see this intuitive defense of residents' ease of parking as underlying the inclusion of parking shortfalls as environmental impacts in both California and New York.

The California courts never settled the issue decisively. The First District reaffirmed its *SFUDP* decision in 2013.<sup>121</sup> The Second District has struck a middle position, citing *SFUDP* in a 2009 decision but then proceeding to analyze whether the project in question would in fact cre-

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116. *Id.*

117. *Taxpayers for Accountable Sch. Bond Spending v. San Diego Unified Sch. Dist.*, 156 Cal. Rptr. 3d 449, 479 (Cal. Ct. App. 2013).

118. *Id.* at 479.

119. *Id.* at 480.

120. *City of Orange v. Valenti*, 112 Cal. Rptr. 379, 386 (Cal. Ct. App. 1974).

121. *Coal. for Adequate Review v. City of San Francisco*, No. A131487, 2013 WL 3226761, at \*18-19 (Cal. Ct. App. June 25, 2013).

ate a significant parking shortfall anyway.<sup>122</sup> Moreover, both sides of the debate have reasonable legal arguments. Textually, *SFUDP*'s argument seems more plausible: the difficulty of finding parking looks like a social impact, not a physical impact. At the same time, the *Taxpayers* position has precedent on its side: courts have been requiring parking to be studied under CEQA for decades.<sup>123</sup> California precedent also calls for interpreting CEQA "in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language."<sup>124</sup> Given the California legislature's recent amendment of CEQA to exclude parking impacts, this interpretive question is moot. The debate does, however, explain why environmental review has the seemingly paradoxical effect of promoting driving, with all its concomitant environmental harms. Many courts consider "too little" parking to be an environmental harm. Their language evokes the same kind of neighborhood injury as if a smog-belching factory was placed into a bedroom suburb. So long as environmental review is interpreted to treat too little parking as akin to too much pollution, the environmental review process will always, by its design, encourage more parking to be built.

Arguably, these cases also reveal that there is no paradox: the courts' inclusion of parking impacts in environmental review reveals a conception of environmental law as intended to promote the status quo, broadly defined, not to move toward more ecologically sustainable outcomes. Observers have long argued that NEPA's status quo bias limits the law's environmental benefit, for example by failing to account for the costs of inaction.<sup>125</sup> Other commentators have noted the expansive definition of the environment under many environmental review statutes.<sup>126</sup> Parking falls at the intersection of these two aspects of American environmental review: judges seem to feel the law empowers them to protect people

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122. *City of Long Beach v. L.A. Unified Sch. Dist.*, 98 Cal. Rptr. 3d 137, 162-63 (Cal. Ct. App. 2009).

123. *Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.*, 764 P.2d 278, 300 (Cal. 1988); *City of Orange*, 112 Cal. Rptr. at 386.

124. *Friends of Mammoth v. Bd. of Supervisors of Mono Cnty.*, 502 P.2d 1049, 1056 (Cal. 1972).

125. See Note, *Does NEPA Require an Impact Statement on Inaction?*, 81 MICH. L. REV. 1337 (1983). See also Jeffrey Thaler, *Fiddling As the World Floods and Burns: How Climate Change Urgently Requires A Paradigm Shift in the Permitting of Renewable Energy Projects*, 42 ENVTL. L. 1101, 1155 (2012) (proposing ways to "evolve NEPA from a statute that only looks at the costs of doing something, to a statute that also looks at the costs of doing nothing in the face of climate-driven need for more GHG emission-free electricity generation.").

126. See George J. Skelly, *Psychological Effects at NEPA's Threshold*, 83 COLUM. L. REV. 336, 341 (1983) (endorsing "the view that the 'environment' encompasses the totality of man's physical surroundings, that the 'human environment' refers to the reciprocal interaction of people with their surroundings, and that 'environmental impacts' include both the effects that people have on the physical environment and the effects that changes in the physical environment have on people.").

from changes in the transportation system: quiet neighborhoods are to be protected from traffic and drivers from the need to hunt for a parking space. In effect, unlike many other environmental laws, environmental review acts not as a mechanism to improve the environment—whether defined narrowly in terms of air quality and other traditionally “environmental” factors or broadly to include community character—but to preserve whatever currently exists. In many contexts, protection of the status quo is environmentalist: preventing a new discharge protects water quality; preventing new development protects a wetland. But in the context of urban transportation, and parking in particular the conservationist goal and the conservative goal come apart. Securing the environmental benefits of less parking, from less fossil fuel use to cleaner water, requires disrupting the transportation status quo. By preserving parking supply—by protecting the transportation status quo—environmental review blocks shifts towards greater density and reduced automobile use. Environmental review laws reflect the idea that by disclosing, mitigating and preventing unwanted change, the law can prevent ecological harms. Transportation and parking forced judges to choose between environmental review’s conservative and conservationist strands: the judges by and large chose conservatism.

#### B. TOO NARROW ENVIRONMENTAL REVIEW: CUMULATIVE EFFECTS AND GLOBAL VS. LOCAL ENVIRONMENTALISM

The breadth of environmental review—its ability to include even parking as a part of the environment—is not always matched by its depth. The environmental review process is focused primarily on the local impacts of individual projects. For objects like parking, where benefits are concentrated locally and costs are diffused, environmental review can lead to perverse outcomes.

Most importantly, environmental review fails to adequately capture the cumulative impacts of small actions, although California comes closer to doing so. In New York, the Court of Appeals first mandated the study of cumulative effects in *Save the Pine Bush, Inc. v. City of Albany*, but then sharply limited that requirement in *Long Island Pine Barrens Society v. Planning Board of the Town of Brookhaven*, a case concerning several hundred individual projects planned for an environmentally sensitive area.<sup>127</sup> Now, cumulative impact analysis is only required when there is a “larger plan” for development in the area. Otherwise, individual projects need only be assessed for their individual impact, which may be insignifi-

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127. *Save the Pine Bush, Inc. v. City of Albany*, 512 N.E.2d 526, 530-31 (N.Y. 1987); *Long Island Pine Barrens Soc’y, Inc. v. Planning Bd. of Brookhaven*, 606 N.E.2d 1373, 1377-79 (N.Y. 1992).

cant in isolation. California requires the study of cumulative effects by statute,<sup>128</sup> but the practical reach of that requirement is entirely unclear. Indeed, a former counsel for the California Natural Resources Agency, which writes the CEQA Guidelines, has stated that “[a]bsolutely nobody knows what ‘cumulatively considerable’ means.”<sup>129</sup>

Relatedly, EISs only examine the effect of a development on a designated “study area.” This limits analysis to a defined area surrounding the project and forecloses analysis of effects further away. For example, the CEQR Technical Manual calls for a parking study area of around 0.25 miles, roughly the distance drivers would walk from a parking space.<sup>130</sup> The study does not need to analyze what will happen further away. The combination of limited cumulative impacts analysis with tightly drawn study areas is to focus environmental review on the definite, local impacts of a development and away from macro-level analysis.

This approach suffuses the environmental review process. This is dramatically illustrated by New York’s exemption of moratoria on land development from environmental review.<sup>131</sup> If nothing is allowed to change, the argument goes, there could not be any environmental impact. In a narrow sense, this may be true. But a moratorium on development in one jurisdiction may mean a building boom in the next town out. The result could be more sprawl, more driving and more habitat destruction: exactly the kind of hard-to-see environmental harms which environmental review’s study and disclosure-based process is best targeted to address.<sup>132</sup> Yet that kind of regional-level effect will generally go unmentioned, even in the longest EIS.<sup>133</sup> A series of less extreme limitations on development will similarly go unstudied unless it can cross the threshold of cumulative effects analysis.

This locally focused approach to environmental analysis exacerbates the problems with environmental review’s treatment of parking. After

128. CAL. PUB. RES. CODE § 21083 (West 2014).

129. Paul Shigley, *CEQA Ruling Confounds Planners*, 18 CAL. PLANNING & DEV. REP., no. 1 (Jan. 1, 2003, 1:00 AM), [www.cp-dr.com/node/813](http://www.cp-dr.com/node/813).

130. See CEQR TECHNICAL MANUAL, *supra* note 72, at § 381.

131. 6 N.Y. COMP. CODES R. & REGS. § 617.5(c)(30) (2015).

132. See Sterk, *supra* note 64, at 2053 (suggesting that environmental review might be justified because “[w]ithout information—often information generated only by extensive inspection of the property on which a proposed project is to be located—decisionmakers will have no basis for balancing environmental consequences against other factors.”).

133. As the former President of the City of Los Angeles Planning Commission wrote, “Until now, CEQA has tended to focus on the neighborhood impacts of proposed development. EIRs are particularly good at spotlighting all the imaginable harmful consequences of building at any particular location. But CEQA offers scant guidance on where it would be best to locate the 600,000 or so new residents expected to arrive or to be born in California each year between now and 2015.” George Lefcoe, *Should CEQA Require Local Governments to Analyze the Impacts of Development Displaced by Restrictive Land Use Planning?*, 33 *ECOLOGY L.Q.* 1015, 1043 (2006).

all, the impact of a new development on parking supply is discrete and local. Each project can be studied in isolation, and a study area can be delineated beyond which the project will not affect parking availability at all. In this sense, measuring parking shortfalls is similar to measuring noise pollution or the like. Conversely, many of the negative effects of mandating parking are diffuse. If parking mandates decrease the supply of housing and thereby increase housing costs, that effect will manifest across an entire housing submarket, a much larger and more hazily defined area than 0.25 miles; the same is true for effects on the cost of parking to consumers. Environmental review traditionally emphasizes local impacts over regional or global impacts.<sup>134</sup> With parking, it is no different. Where costs are regional and benefits are local, environmental review will improperly overemphasize the latter and underemphasize the former.<sup>135</sup> In other words, environmental review's treatment of parking supply as an environmental good is not the only problem; even an environmental review system more methodologically attuned to the costs of parking oversupply would still miss costs far from the project site.

Environmental review's over-supply of parking thus reveals a central flaw of contemporary environmental review law. In some ways, the law is too broad, including under its ambit nearly all changes to the status quo. In others, the law is too narrow, limiting its inquiry to the local impacts of particular projects. Expanding the scope of environmental review to include deeper analysis of global and cumulative impacts while limiting its scope to traditional environmental impacts like air and water quality, therefore, would make environmental review a more effective tool for ecological protection. This essay, however, now turns away from the analysis of environmental review writ large and looks at specific strategies for reforming the treatment of parking in environmental review.

## V. THE LIMITED SUCCESS OF ADMINISTRATIVE REFORMS

In recent years, both New York City and California attempted to reduce the extent to which the environmental review process incentivizes

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134. This may start to change as environmental review begins to study greenhouse gas emissions, an inherently global environmental challenge. See DANIEL R. MANDELKER, *NEPA LAW AND LITIGATION*, 2D, ch. 12 § 12:15.20 n.1 (2013).

135. That said, there is not always a direct causal connection between environmental review's mistreatment of parking and its emphasis on local impacts. For example, the New Domino development mentioned above would have built 1,694 parking spaces to satisfy its CEQR requirements. If the environmental review process was attuned to the costs of parking, it could analyze that amount of parking without needing to employ cumulative effects analysis or look at a more than local level. The garages would be more than large enough to promote driving and appear on the development's balance sheet on their own. See Kazis, *supra* note 94 (quoting planning professor Dave King as arguing that 1,700 parking spaces at the New Domino would "really overwhelm the community").

parking construction as part of larger reforms of their environmental review regulations. As this Part describes, however, both administrative reform efforts have proven less than fully successful. In New York City, technical guidance exempting projects in many locations from studying parking impacts has not caused developers to change their behavior. In California, administrative rulemaking eliminated parking as an environmental impact; the courts effectively ignored these reforms and continued to apply old law, eventually prompting the legislature to intervene. New York State is currently overhauling its environmental review regulations for the first time in decades. While that process is not yet complete, the ambiguous treatment of parking in draft documents suggests that any salutary effect may be limited.

#### A. NEW YORK CITY: PARKING AS AN INSIGNIFICANT IMPACT

In 2010, New York City attempted to solve the problem of environmental review and parking over-supply by declaring insignificant all parking impacts in certain particularly transit-accessible locations.<sup>136</sup> This reform effort came as part of a major overhaul of the CEQR Technical Manual, the detailed guidance document that prescribes certain methodological approaches to environmental review in the city.<sup>137</sup> Parking reform was considered so minor a revision that it was not even included in the city's enumeration of changes to the Technical Manual.<sup>138</sup> Under the new Technical Manual guidance, for all projects in Manhattan and certain neighborhoods in Brooklyn, the Bronx, and Queens, "the inability of the proposed project or the surrounding area to accommodate a project's future parking demands is considered a parking shortfall, but is generally not considered significant due to the magnitude of available alternative modes of transportation."<sup>139</sup> Because SEQRA does not demand the study of insignificant environmental impacts, this would seem to categori-

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136. Compare N.Y.C. MAYOR'S OFFICE OF ENVTL. COORDINATION, CITY ENVIRONMENTAL QUALITY REVIEW TECHNICAL MANUAL § 420, at 30-28 (Oct. 2001), [http://www.nyc.gov/html/oc/download/pdf/2001\\_ceqr\\_tm/2001\\_ceqr\\_tm\\_ch30\\_traffic\\_and\\_parking.pdf](http://www.nyc.gov/html/oc/download/pdf/2001_ceqr_tm/2001_ceqr_tm_ch30_traffic_and_parking.pdf), with N.Y.C. MAYOR'S OFFICE OF ENVTL. COORDINATION, CITY ENVIRONMENTAL QUALITY REVIEW TECHNICAL MANUAL § 450, at 16-65 (May 2010), [http://www.nyc.gov/html/oc/download/pdf/2010\\_ceqr\\_tm/2010\\_ceqr\\_tm\\_ch16\\_transportation.pdf](http://www.nyc.gov/html/oc/download/pdf/2010_ceqr_tm/2010_ceqr_tm_ch16_transportation.pdf).

137. See *Changes in the 2010 CEQR Technical Manual*, N.Y.C. MAYOR'S OFFICE OF ENVTL. COORDINATION, [http://www.nyc.gov/html/oc/download/pdf/2010\\_ceqr\\_tm/2010\\_ceqr\\_tm\\_whats\\_changed.pdf](http://www.nyc.gov/html/oc/download/pdf/2010_ceqr_tm/2010_ceqr_tm_whats_changed.pdf) (last visited Jan. 18, 2015).

138. *Id.*

139. CEQR TECHNICAL MANUAL, *supra* note 72, at § 450; *CEQR Parking Zones*, N.Y.C. MAYOR'S OFFICE OF ENVTL. COORDINATION, [http://www.nyc.gov/html/oc/download/pdf/2014\\_ceqr\\_tm/2014\\_ceqr\\_tm\\_ch16\\_transportation\\_parking\\_citywide.pdf](http://www.nyc.gov/html/oc/download/pdf/2014_ceqr_tm/2014_ceqr_tm_ch16_transportation_parking_citywide.pdf) (last visited Jan. 18, 2015) (referencing the South Bronx, Downtown Brooklyn and the surrounding brownstone neighborhoods, Greenpoint and Williamsburg, parts of Western Queens, Jamaica, and Flushing as covered locations).

cally exempt all projects in these areas from any requirement of studying parking shortfalls.<sup>140</sup> Of course, it does nothing to remove CEQR as an effective parking mandate in other parts of the city, including some locations very well served by transit.

But three years later, at least, developers, their environmental consultants, and even city agencies have not embraced the changes even where they do apply. So far, those going through environmental review appear unwilling to rely on the Technical Manual exemption, preferring to undertake a full parking analysis. For example, in Trinity Church's application for a rezoning of Manhattan's Hudson Square area, its EIS notes the new exemption from analyzing parking impacts.<sup>141</sup> It still includes seven pages of detailed analysis, maps and tables.<sup>142</sup> The EIS for the city's own proposed rezoning of East Midtown provides 14 pages of parking impact analysis after reciting the Technical Manual's exemption.<sup>143</sup> The EIS for New York University's expansion plan found that the project would create a significant parking shortfall in the recommended quarter-mile radius, but not in the allowable half-mile radius; it tacked on a mention of the Technical Manual's treatment of parking impacts in Manhattan, but hardly relied on it.<sup>144</sup> Notably, none of these EISs admit to creating a significant parking shortfall, excusing that shortfall based on the Technical Manual exemption. Rather, they find no significant impact, and then add the exemption as an extra safety net.<sup>145</sup>

In other words, developers may be building exactly as much parking as before the exemption was created, just to be safe. This pattern of behavior fits with many developers' conception of a lengthy EIS as "litigation insurance." Since the defeat of the Westway highway project, developers and agencies alike have considered it preferable to overdo environmental review rather than lose a lawsuit and be forced to start their project over.<sup>146</sup> Indeed, the example of California's reforms, dis-

140. See N.Y. ENVTL. CONSERV. LAW § 8-0109(2) (McKinney 2014).

141. AKRF, INC. & SHoP ARCHITECTS PC, CEQR No. 12DCP045M, HUDSON SQUARE REZONING FINAL ENVIRONMENTAL IMPACT STATEMENT 13-5 to 13-6 (2013) [hereinafter HUDSON SQUARE FEIS], available at [http://www.nyc.gov/html/dcp/pdf/env\\_review/hudson\\_square/13\\_feis.pdf](http://www.nyc.gov/html/dcp/pdf/env_review/hudson_square/13_feis.pdf).

142. *Id.* at 13-77 to 13-84.

143. N.Y.C. CITY PLANNING COMM'N, CEQR No. 13DCP011M, EAST MIDTOWN REZONING AND RELATED ACTIONS FINAL ENVIRONMENTAL IMPACT STATEMENT 12-226 to 12-239 (2013) [hereinafter EAST MIDTOWN FEIS], available at [http://www.nyc.gov/html/dcp/pdf/env\\_review/east\\_midtown/12\\_feis.pdf](http://www.nyc.gov/html/dcp/pdf/env_review/east_midtown/12_feis.pdf).

144. See AKRF, INC., CEQR No. 11DCP121M, NYU CORE FINAL ENVIRONMENTAL IMPACT STATEMENT 14-111 (2012) [hereinafter NYU CORE FEIS], available at [http://www.nyc.gov/html/dcp/pdf/env\\_review/nyu\\_core/14\\_feis.pdf](http://www.nyc.gov/html/dcp/pdf/env_review/nyu_core/14_feis.pdf).

145. HUDSON SQUARE FEIS, *supra* note 141, at 13-5 to 13-6; EAST MIDTOWN FEIS, *supra* note 143, at 12-36, 12-226; NYU CORE FEIS, *supra* note 144, at 14-6.

146. HOPE COHEN, RETHINKING ENVIRONMENTAL REVIEW: A HANDBOOK ON WHAT CAN

cussed in the following subsection, suggests that developers' unwillingness to take the risk of depending on a single provision of the Technical Manual may be quite prudent: courts may not be willing to go along with the administrative reforms. In any case, it seems that New York City's exemption has not actually encouraged developers to build projects with a "parking shortfall." Environmental review still promotes the production of excess parking in New York City.

#### B. CALIFORNIA: PARKING AS A NON-ENVIRONMENTAL IMPACT

In California, the state promulgated new regulations intended to remove parking from the environmental review process.<sup>147</sup> By removing parking from a list of environmental impacts, the state meant to prevent environmental review from requiring excess parking.<sup>148</sup> However, this administrative effort failed.<sup>149</sup> Courts read parking right back into environmental review, essentially undoing the regulatory reforms.<sup>150</sup>

California addressed CEQA's analysis of both parking and traffic as part of a major rulemaking package in 2009.<sup>151</sup> Most of the 2009 regulations were promulgated in response to a statute amending CEQA to cover greenhouse gas emissions.<sup>152</sup> The new parking and transportation-related regulations, however, were not legislatively mandated.<sup>153</sup> Rather, the City of San Francisco had independently lobbied the state Office of Planning and Research for a set of changes to the environmental review process that would replace metrics focused on automobile use to ones that prioritize walking, biking and transit use.<sup>154</sup> The goal of the reforms, therefore, was explicitly to promote a more sustainable transportation policy and to discourage driving.<sup>155</sup>

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BE DONE 4 (2007), available at [http://www.manhattan-institute.org/html/rethinking\\_environmental\\_review.htm](http://www.manhattan-institute.org/html/rethinking_environmental_review.htm).

147. See CAL. NATURAL RES. AGENCY, ADOPTED TEXT OF THE CEQA GUIDELINES AMENDMENTS (2009) [hereinafter CEQA GUIDELINES AMENDMENTS], available at <http://ceres.ca.gov/ceqa/docs/>

Adopted\_and\_Transmitted\_Text\_of\_SB97\_CEQA\_Guidelines\_Amendments.pdf.

148. *Id.* at 51.

149. See *Taxpayers for Accountable Sch. Bond Spending v. San Diego Unified Sch. Dist.*, 156 Cal. Rptr. 3d 449, 479 (Cal. Ct. App. 2013).

150. *Id.*

151. See CEQA GUIDELINES AMENDMENTS, *supra* note 147.

152. *Id.* at *passim*.

153. See S.B. 97, 2007 Leg., Reg. Sess. (Cal. 2007) (directing the Natural Resources Agency to adopt amendments to the CEQA Guidelines for greenhouse gas emissions, without requirements for parking or transportation reform).

154. See Matthew Roth, *Paradise LOST (Part II): Turning Automobility on its Head*, STREETS BLOG SF (Jan. 27, 2009), <http://sf.streetsblog.org/2009/01/27/paradise-lost-part-ii-turning-automobility-on-its-head/>.

155. *Id.*

The 2009 transportation-related reforms rewrote the “environmental checklist form” used as part of the environmental assessment process.<sup>156</sup> With regard to parking, the checklist had previously asked applicants whether their project would “result in inadequate parking capacity.”<sup>157</sup> Undersupplied parking was thereby explicitly defined as a significant environmental impact that needed to be disclosed in an EIS. That question was eliminated entirely, while the checklist was otherwise revised in ways that could have helped disincentivize the oversupply of parking. For example, one question asked whether the project would decrease the performance or safety of bicycle, pedestrian or transit facilities.<sup>158</sup> This administrative reform would appear to be a decisive turn away from a CEQA-created parking requirement.

The California courts, however, did not hear the message. In 2013, three years after inadequate parking was removed from the CEQA regulations, an appellate court found that inadequate parking supply was an adverse environmental impact under CEQA in *Taxpayers for Accountable School Bond Spending*.<sup>159</sup> The court noted the absence of parking from the environmental checklist, but argued that “the Guidelines do not set forth an exclusive list of all potential impacts that must be addressed.”<sup>160</sup> It then proceeded to insert parking supply right back into CEQA, stating, “The Guidelines include a section on transportation and traffic, which issues presumably include parking issues even though parking is not expressly listed.”<sup>161</sup> The administrative removal of parking from the CEQA checklist earned a mention in a footnote of the case, but with the opposite gloss that one would expect.<sup>162</sup> The court pointed out that previous versions of the CEQA regulations had “expressly listed parking as a potential significant environmental impact.”<sup>163</sup> Rather than seeing the removal of parking from the regulations as evidencing intent to take parking impacts out of environmental review, the court interpreted their previous presence as suggesting that parking was precisely the kind of thing that CEQA was meant to study. The court failed to recognize or effectuate the intended purpose of the 2010 rulemaking, which was to prevent CEQA from acting as a state-level parking mandate.

Nor was the *Taxpayers* court the only one to ignore the revisions. When the First District reaffirmed its position that parking shortfalls were

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156. See CEQA GUIDELINES AMENDMENTS, *supra* note 147, at 41-52.

157. *Id.* at 51.

158. *Id.*

159. *Taxpayers for Accountable Sch. Bond Spending v. San Diego Unified Sch. Dist.*, 156 Cal. Rptr. 3d 449, 479 (Cal. Ct. App. 2013).

160. *Id.* at 479.

161. *Id.*

162. *Id.* at 479 n.25.

163. *Id.*

not environmental impacts under CEQA this year, it too ignored the 2010 regulatory revisions, instead relying on its own precedent.<sup>164</sup> Courts on both sides of the issue have turned a deaf ear to the administrative statement on parking impacts. Given the extent to which the threat of CEQA litigation drives the environmental review process in California, these judicial statements were definitive. Regulatory reform in California failed. As Part VI will describe, California was forced to turn to a legislative solution.

### C. NEW YORK STATE: AN AMBIGUOUS TREATMENT OF PARKING

New York State is also in the midst of a major revision of SEQRA, the largest in decades.<sup>165</sup> It too, would change the way parking is treated in the environmental review process, though to what end remains unclear. Not all the new language has been finalized, though enough documents have been released to begin to analyze the proposal. Parking, at this point, is treated ambiguously and even inconsistently. Unlike the New York City and California administrative reforms, which were clearly meant to mitigate environmental review's encouragement of excess parking, the New York State reforms do not yet take a clear approach toward parking. Accordingly, these SEQRA reforms are unlikely to significantly improve matters.

In general, the purpose of the proposed reforms would be to exempt many more projects from environmental review, particularly, but not exclusively infill development, solar panel installation and other projects more likely to be "green."<sup>166</sup> These reforms have already affected the treatment of parking under SEQRA in at least one way by amending the environmental assessment forms that serve as the gateways to full environmental review, the tack taken by California in its administrative reforms. Based on those new forms, it is surprisingly ambiguous whether the proposal does or does not treat parking shortfalls as significant environmental impacts.

The new environmental assessment form, adopted in September 2013, asks applicants how much parking they are providing, but does so in

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164. *Coal. for Adequate Review v. City of San Francisco*, No. A131487, 2013 WL 3226761, at \*18-19 (Cal. Ct. App. June 25, 2013).

165. Jennifer M. Porter, *Throw Out Your Old SEQRA Forms – The Revised Model SEQRA Environmental Assessment Forms Take Effect October 7, 2013*, GIBBONS REAL PROPERTY & ENVTL. LAW ALERT (Oct. 4, 2013), <http://www.rpelawalert.com/2013/10/articles/environmental-green-issues/throw-out-your-old-seqra-forms-the-revised-model-seqra-environmental-assessment-forms-take-effect-october-7-2013/>.

166. See N.Y. STATE DEP'T OF ENVTL. CONSERVATION, FINAL SCOPE FOR THE GENERIC ENVIRONMENTAL IMPACT STATEMENT (GEIS) ON THE PROPOSED AMENDMENTS TO THE STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA) 5 (2012), available at [http://www.dec.ny.gov/docs/permits\\_ej\\_operations\\_pdf/617finalscope.pdf](http://www.dec.ny.gov/docs/permits_ej_operations_pdf/617finalscope.pdf).

such a way that the importance of that number remains unclear. Part One of the form asks for the existing number of parking spaces on-site, the proposed number, and the net increase or decrease.<sup>167</sup> This shows that SEQRA will remain concerned with parking, but does not make clear whether it will look at parking shortfalls as significant impacts by themselves or simply as causing other environmental harms. Part Two does not clarify the matter. On the one hand, it does not expressly mention parking supply, making it look somewhat like the post-reform California checklist.<sup>168</sup> On the other hand, the form asks whether the proposed action “may alter the present pattern of movement of people or goods.”<sup>169</sup> This could easily be interpreted to cover parking supply, which even in traditional traffic engineering is seen to affect transportation patterns through the trip assignment process.<sup>170</sup> Certainly a judiciary inclined to leave parking impacts intact in the environmental review process would have ample room to interpret the regulations to that effect.

The new SEQRA workbook, meant to walk applicants through filling out the environmental assessment forms, only introduces additional inconsistencies in SEQRA’s treatment of parking. In one location, the workbook states that

[u]nderstanding the demands new development places on a community’s street and road network and transportation services is an important part of evaluating the overall impacts of that development. New development can generate or change traffic . . . . Additionally, increased traffic levels resulting from a proposed project may also require parking lots or garages.<sup>171</sup>

This clearly contemplates parking shortfalls as an “impact” of development. It also strongly implies that SEQRA may require the mitigation of those impacts through the provision of additional parking spaces. This section would appear to support the use of SEQRA as a parking mandate.

But elsewhere, the workbook seems to suggest that parking only affects the environment through its secondary effects on other aspects of

167. *Full Environmental Assessment Form, Part 1 – Project and Setting*, N.Y. STATE DEP’T OF ENVTL. CONSERVATION 7, [http://www.dec.ny.gov/docs/permits\\_ej\\_operations\\_pdf/feafpart1.pdf](http://www.dec.ny.gov/docs/permits_ej_operations_pdf/feafpart1.pdf) (last visited Jan. 22, 2015).

168. *See Full Environmental Assessment Form, Part 2 – Identification of Potential Project Impacts*, N.Y. STATE DEP’T OF ENVTL. CONSERVATION 8, [http://www.dec.ny.gov/docs/permits\\_ej\\_operations\\_pdf/feafpart2.pdf](http://www.dec.ny.gov/docs/permits_ej_operations_pdf/feafpart2.pdf) (last visited Jan. 22, 2015) (Question 13(b) asks whether 500 or more paved parking spaces will be built, but this is meant as a proxy for overall scale of development, traffic impacts and water quality problems).

169. *Id.*

170. *See supra* text accompanying notes 83-85.

171. *Full Environmental Assessment Form (FEAF) Workbook*, N.Y. STATE DEP’T OF ENVTL. CONSERVATION 53, [http://www.dec.ny.gov/docs/permits\\_ej\\_operations\\_pdf/feafprint.pdf](http://www.dec.ny.gov/docs/permits_ej_operations_pdf/feafprint.pdf) (last visited Jan. 22, 2015).

the environment. In its instructions for applicants, it tells them how to calculate the net increase or decrease in parking supply, but does not state that a net decrease or insufficient increase would constitute a significant impact.<sup>172</sup> That section then concludes, “Parking lots can impact the environment by increasing stormwater runoff, changing the aesthetic character of an area, and introducing or expanding glare and lighting.”<sup>173</sup> Parking shortfalls, and even secondary effects on traffic, are excluded from that list of the potential environmental impacts caused by parking lots. In this section of the workbook, it would seem that New York is espousing the logic of the *SFUDP* case and saying that parking affects the environment but is not itself part of the environment. Internally, the workbook appears to be inconsistent.

It is not clear how to interpret the potential effect of New York State’s SEQRA reforms on parking. Proposed reforms to the SEQRA regulations themselves have not yet been released; those rules may clarify matters. It may be that additional agency guidance or litigation will be necessary before the effect becomes clear. However, given that New York State’s reforms are at this point much more ambiguous than either New York City or California’s clear efforts, it seems unlikely that they will more effectively prevent environmental review from serving as a parking mandate.

## VI. NEXT STEPS FOR REFORM: LEGISLATION, REGULATION, LITIGATION

The administrative attempts to reform the treatment of parking in environmental reform have, so far, proven less than successful. Recognizing the shortcomings of existing reforms, the California legislature amended CEQA directly in 2013, eliminating parking as an environmental impact in certain urban areas. This section looks at that legislation and its regulatory aftermath, then explores whether and how New York might itself move forward with more solid reforms.

The California legislature, seemingly recognizing the failures of the previous administrative attempt to reform the treatment of parking under CEQA, amended the law directly this fall. SB 743, championed by California Senate President pro Tempore Darrell Steinberg and supported by Governor Jerry Brown, states explicitly that “[p]arking impacts of a residential, mixed-use residential, or employment center project . . . on an infill site . . . within a transit priority area . . . shall not be considered significant impacts on the environment.”<sup>174</sup> Essentially, this removes

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172. *Id.* at 56.

173. *Id.*

174. S.B. 743, 2013 Leg., Reg. Sess. (Cal. 2013).

parking from the scope of environmental review for these infill projects.

The inclusion of this language represents a major victory for parking reformers.<sup>175</sup> An earlier version of Steinberg's legislation would have imposed standardized thresholds for parking impacts.<sup>176</sup> Essentially, that bill would have reasserted that parking impacts are covered by CEQA, in contrast with the *SFUDP* decision and the 2010 administrative reforms, potentially worsening the problem. SB 743, in contrast, creates a clear statutory directive that, within the defined geographic zones, parking is not considered a significant environmental impact. Unlike the 2009 administrative reforms, which left only regulatory silence on how to treat parking in environmental review, this new statute leaves little to no room for courts to judicially reinsert parking as a significant environmental impact. In the urban areas it covers, SB 743 should definitively remove parking from environmental review.<sup>177</sup>

Rulemaking pursuant to other sections of SB 743 looks likely to further transform the way environmental review treats parking. SB 743 required that the state not only change how CEQA analyzed parking, but transportation more generally. A major rulemaking is underway to create a new system of traffic analysis for environmental review in California. Those wider reforms necessarily touch on parking as part of the traffic analysis process, and appear likely to go even further than SB 743's treatment of parking. Rather than simply remove parking from the environmental review process, the proposed regulations may use environmental review to actually discourage parking production. For example, proposed regulations would deem "limiting parking supply" to be a mitigation measure for traffic impacts, on the grounds that doing so would reduce the total amount of driving.<sup>178</sup> Another regulation would explain that while "excess parking" might reduce congestion in the short term, it increases total greenhouse gas emissions in the long-run.<sup>179</sup> Just using the

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175. See Eidelson, *supra* note 23 (credit for that victory may be owed to a coalition of strange bedfellows: one major lobbyist for removing parking as a significant impact was Walmart.)

176. Press Release, Steinberg Introduces Bill to Modernize the California Environmental Quality Act (Feb. 22, 2013), available at <https://web.archive.org/web/20130308132657/http://sd06.senate.ca.gov/news/2013-02-22-steinberg-introduces-CEQA-modernize-bill>.

177. But see Ellen Berkowitz, Jonathan Shardlow & Daniel Freedman, *Business Alert: Recent CEQA Reform Leaves Uncertainty Over Whether a Project's Parking Impacts are an Environmental Impact or a Mere Social Inconvenience*, GRESHAM SAVAGE (2013), [http://www.greshamsavage.com/media/article/50\\_Revised%20%20CEQA%20Parking%20Article%20dff.pdf](http://www.greshamsavage.com/media/article/50_Revised%20%20CEQA%20Parking%20Article%20dff.pdf) (noting that outside urban infill areas, SB 743 may actually increase uncertainty).

178. *Updating Transportation Impacts Analysis in the CEQA Guidelines*, GOVERNOR'S OFFICE OF PLANNING & RESEARCH 17 (Aug. 6, 2014), [http://www.opr.ca.gov/docs/Final\\_Preliminary\\_Discussion\\_Draft\\_of\\_Updates\\_Implementing\\_SB\\_743\\_080614.pdf](http://www.opr.ca.gov/docs/Final_Preliminary_Discussion_Draft_of_Updates_Implementing_SB_743_080614.pdf).

179. *Possible Topics to Be Addressed in the 2014 CEQA Guidelines Update*, GOVERNOR'S OFFICE OF PLANNING & RESEARCH (Dec. 30, 2014), <http://www.opr.ca.gov/docs/PossibleTopics2014CEQAGuidelinesUpdate.pdf>.

term “excess parking” reflects a fundamental reorientation of CEQA’s understanding of parking; substantively, these regulations aim to transform environmental review from a process that sees parking as an environmental good into one that sees parking as an environmental bad. Seemingly, the California statute eliminated the harmful effects of environmental review’s treatment of parking in urban areas; regulation is now being prepared to make environmental review actually helpful in reducing the harmful effects of excess parking.

In New York, however, a legislative route to reform appears unlikely in the short term. SEQRA reform generally is not a top-tier legislative issue (CEQR is a mayoral creation, so the legislature is largely irrelevant in New York City).<sup>180</sup> There is no pending legislation that would impose more than isolated changes to SEQRA or which has the backing of the leadership.<sup>181</sup> The advocacy organizations pushing for reform, moreover, have not targeted transportation as an area of concern, even within New York City. The Manhattan Institute’s recommendations for CEQR reform, for example, suggested focusing more closely on “the natural environment, infrastructure [and] municipal services,” keeping traffic and parking, in other words, but excluding aesthetic and socioeconomic factors from environmental review.<sup>182</sup> The 2001 Alliance for CEQR Reform, made up of groups like the Regional Plan Association that might be expected to emphasize transportation issues, instead focused on updating and streamlining CEQR procedures.<sup>183</sup> The business community’s proposed reforms similarly emphasize procedural ways to lighten the burden of SEQRA rather than substantive changes.<sup>184</sup> Moreover, the leading academic treatise on SEQRA seems to endorse traffic as an appropriate focus of environmental review noting, “Vehicular traffic is the bane of city residents and visitors.”<sup>185</sup> To the extent that the New York legislature amends SEQRA, it seems improbable that it will address parking. That leaves two primary avenues for reform in New York: another round of administrative reforms or litigation and judicial action.

The reform efforts discussed in Part V each arose through adminis-

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180. See Exec. Order No. 91 of 1977, as amended in R.C.N.Y. tit. 43, § 6 (1977), available at [http://www.nyc.gov/html/oec/downloads/pdf/ceqr/Exec\\_Order\\_91.pdf](http://www.nyc.gov/html/oec/downloads/pdf/ceqr/Exec_Order_91.pdf).

181. Recent two-house bills included, for example, H.R. A7155, 2013-14 Assemb., Reg. Sess. (N.Y. 2013) (expanding standing for SEQRA suits); H.R. A742, 2013-14 Assemb., Reg. Sess. (N.Y. 2013) (removing certain exemptions from SEQRA for the Metropolitan Transportation Authority).

182. COHEN, *supra* note 146.

183. See THE ALLIANCE FOR CEQR REFORM, PROPOSAL FOR IMPROVING THE CEQR PROCESS 1-3 (2001).

184. See Memorandum from The Business Council of N.Y. State, Inc. (Aug. 9, 2011), available at <http://www.bcnys.org/inside/env/2011/SEQRA.pdf>.

185. GERRARD ET AL., *supra* note 73, at § 8A.04.

trative action. Their existence shows a desire to take on parking reform at the administrative level in at least New York City, and perhaps New York State as well. One possibility would be for these already-engaged agencies to continue to revise their regulations. The best approach would learn from California's example and intervene earlier in the environmental review process. California, in both its administrative and legislative reforms, attempted to define parking shortfalls as not environmental impacts and, therefore, not covered by CEQA at all; New York City, in contrast, has merely determined that shortfalls in certain locations were not *significant* environmental impacts. New York State could similarly define parking as outside the purview of SEQRA (New York City does not have this option; its rules must be "no less protective of environmental values" than the state's<sup>186</sup>).

Because the CEQR Technical Manual prescribes specific methodologies for environmental review, New York City also has the option of retaining but reversing parking analysis. Rather than recommend that parking analysis follow traffic analysis, the Technical Manual could suggest that all traffic analyses take into account the supply of parking. Under this kind of analysis, the environmental impact of providing parking would be the inducement of more automobile trips. In more urban areas, parking supply might primarily affect modal split; where non-automotive transportation options are less convenient, parking supply would affect trip generation as well. This would require significant bureaucratic effort on the part of New York City; the current approach borrows heavily from work by the Institute of Transportation Engineers and other standard-setters, with quantitative adjustments made for New York City's uniquely urban environment. Feeding parking supply into transportation analyses, in contrast, would require the development of a new approach altogether. That said, California's ongoing reform efforts may provide a model New York could copy.

The courts also have room to act. Unlike in California, a leading New York precedent strongly supports the inclusion of parking as an environmental impact. *H.O.M.E.S. v. New York State Urban Development Corp.*, a landmark early SEQRA decision, overturned a negative declaration for not having reviewed traffic and parking impacts.<sup>187</sup> Though the court did not spell out the statutory or regulatory basis for requiring the study of parking impacts under environmental review,<sup>188</sup> no court since appears to have challenged the idea that parking shortfalls constitute environmental impacts.

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186. 6 N.Y. COMP. CODES R. & REGS. § 617.14(b) (2015).

187. *H.O.M.E.S. v. N.Y. State Urban Dev. Corp.*, 418 N.Y.S.2d 827, 832 (N.Y. App. Div. 1979).

188. *See supra* text accompanying notes 110-113.

Litigants working in the New York courts have another tool at their disposal, however. The SEQRA statute requires consideration of both the short-term and long-term effects of the proposed action.<sup>189</sup> Similarly, CEQR rules require consideration of both the primary and secondary environmental effects of an action.<sup>190</sup> The courts have construed long-term effects to require that the agency “examine environmental consequences into the foreseeable future, not to examine theoretical possibilities that were steeped in nothing more than unsupported speculation.”<sup>191</sup> Arguably, the standard environmental review parking analysis fails to look at the long-term, secondary impact of large amounts of parking. Examining whether the trips generated can be served by the parking provided, as SEQRA analyses do, is a short-term and static analysis. No secondary effects, such as the generation of more automobile use over time, are studied.

Generally, challenges to the adequacy of an EIS are doomed for failure. Michael Gerrard describes the typical pattern of such litigation:

Opponents presented voluminous expert reports urging that the EIS analysis was deeply flawed. The court would have none of it; the defendant City of New York had studied the issues and reached a reasoned conclusion. It was not for the courts to second-guess the City’s judgments. This deference is the major reason why, as just noted, plaintiffs seldom win cases in which EISs have been prepared.<sup>192</sup>

The exception to this rule, however, is when an EIS simply ignores an issue altogether.<sup>193</sup> As Gerrard notes, where an EIS simply ignores an issue altogether, the courts are more willing to declare the agency’s review insufficient.<sup>194</sup> Because no long-term impacts of parking are studied in the average EIS at all, there may be the possibility of a successful lawsuit. Rather than remove parking from environmental review, as administrative and legislative reform has tried to do, this litigation strategy would instead force SEQRA to acknowledge the traffic-inducing effects of parking and try to mitigate those. This approach has a different political valence—one less deregulatory and more prescriptive—that could win the support of a different political coalition, including environmentalists skeptical of weakening environmental review. Whichever strategy New York pursues, the time is now ripe to stop environmental review law from acting to un-environmentalist ends.

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189. See *Chinese Staff & Workers Ass’n v. City of N.Y.*, 502 N.E.2d 176, 180 (N.Y. 1986).

190. *Id.*

191. *Fisher v. Giuliani*, 720 N.Y.S.2d 50, 55 (N.Y. App. Div. 2001).

192. Michael B. Gerrard, *Judicial Review Under SEQRA: A Statistical Study*, 65 ALB. L. REV. 365, 369 (2001).

193. See *id.* at 379.

194. *Id.*

## CONCLUSION

Quietly, environmental review law incentivizes the construction of excess parking in two of the country's largest and most urbanized states, increasing the cost of housing, disrupting the urban fabric and, perversely, degrading the environment. And almost as quietly, lawmakers in both New York and California have begun to take on the issue. In California administrative reform was first ineffective; recent legislative action should prove decisive. In New York, reform has been limited at the city level and entirely muddled at the state level. This paper exposes the problem, reviews the progress New York and California have made so far, and outlines the potential for further reform.

In so doing, this paper also reveals a deep-seated feature of environmental review's treatment of transportation, particularly as elaborated by the judiciary: environmental review aims not to improve ecological functioning, public health or natural resource conservation, but to maintain the status quo, broadly defined. Environmental review law is, in this sense, deeply conservative. This is the crucial context for understanding many efforts to reform environmental review. California's SB 743, for example, includes a variety of efforts to limit the environmental review of urban infill projects, in addition to removing parking from environmental review. Because increased urban development reduces per capita environmental impacts and protects undeveloped land from suburban sprawl, this can be seen as an effort to turn CEQA from a conservative statute into a conservationist statute. As business groups continue to demand relief from environmental review, this distinction between the conservative and conservationist strands of the law can perhaps guide the debate. Environmentalism should not be the defense of any and every status quo condition, up through the protection of a neighborhood's ease of parking. Indeed a system properly called *environmental* review ought not be turned into a tool to guarantee every person a place to park, in perpetuity. Environmental review's slow and expensive, yet effective, process should be reserved for those ecological features truly in need of protection.