Land Use and Sustainable Development: Cases and Materials

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APA Equity in Zoning Policy Guide

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1. Introduction and Overview

1.1 Goals of the Policy Guide

In 2019, after an inclusive two-year effort by its members, the American Planning Association (APA) adopted its Planning for Equity Policy Guide, which articulates the organization's advocacy positions on that topic. That Policy Guide reviews the pervasive impacts of both overt and unintended planning practices that result in racial, ethnic, and gender bias and exclusion in many plans and policies adopted by local governments throughout America. It also reviews the complex web of institutional practices beyond the planning profession that reinforce the inequitable outcomes of these practices, and the ways in which they collectively disadvantage large segments of the American populace. It addresses the serious lack of diversity and inclusion in the planning and zoning professions, along with the role and responsibility of planners to undo the unfairness woven into many current planning practices. Every planner, planning official, or elected official interested in making their communities more equitable should carefully read and follow that Policy Guide and implement its recommendations.

In addition, APA has adopted recent Policy Guides that set forth its advocacy positions on Hazard Mitigation (2020), Housing (2019), Surface Transportation (2019), and Healthy Communities (2017), each of which recommends changes that would improve equitable practices and outcomes in our profession.

The goal of this Policy Guide is not to repeat and restate any of that work, but to build on it and to focus on the ways in which planning bias is reinforced and implemented through zoning. Equitable planning is essential to eliminate those zoning and design regulations that disproportionately burden by Black, Latino, Indigenous, and other communities of color, the elderly, persons experiencing disabilities, persons of different national origins or religious faiths, and the lesbian, gay, bisexual, transgender, queer/questioning, intersex, and asexual/aromantic/agender (LGBTQIA) community — which are often referred to in this document as "historically disadvantaged and vulnerable " communities and individuals. Where zoning rules or procedures have a particularly negative impact on one or more of the communities included in that phrase, they are sometimes identified separately.

In many states, however, plans are only advisory – while zoning is the law. Even in those states that mandate comprehensive or land use planning and require that zoning be consistent with those plans, there is always a gap between the aspirational and inspirational language of the plan and what parts of that vision become the law governing development and redevelopment of property.

The goal of this Policy Guide is to identify specific ways in which the drafting, public engagement, administration, mapping, and enforcement of zoning regulations can be changed to dismantle the barriers that perpetuate the separation of historically disadvantaged and vulnerable communities. While acknowledging the importance of dramatic changes in plans and policies, this Policy Guide focuses on identifying and removing those (often facially neutral) zoning laws and regulations that implement and perpetuate inequitable planning policies, including but not limited to the pervasive and continuing effects of "Redlining", particularly on the Black community. It sets forth APA's

advocacy positions to improve equity in zoning, and calls on all practicing planners and planning officials to support these positions.

1.2 The Need for Local, State, and National Action

Because most zoning decisions are made by local governments, this Policy Guide focuses on actions that could and should be taken by city and county governments to improve the equity of their zoning systems. However, local zoning authority sometimes operates within a regional governance structure, and in those cases the changes recommended in this document are addressed to those regional entities.

More importantly, local zoning authority almost always operates within the limits established in state constitutions and zoning enabling legislation. In many cases, the changes recommended in this Policy Guide would be accelerated if state governments acted to prohibit the exclusionary use of zoning powers, and some states have already moved in that direction. In addition, or as an alternative, states could offer financial incentives or condition access to other state funds on local government implementation of some or all of these recommended changes.

The federal government also has an important role in promoting more equitable zoning. Congress should authorize the U.S. Department of Housing and Urban Development to take a closer look at the exclusionary and discriminatory zoning rules of those local governments to which it allocates funds, and to condition receipt of HUD funds on actions taken to remove the barriers to equitable housing and economic opportunity identified in this Policy Guide. Congress should also allocate additional funds to help local governments revise their local zoning controls, and should incentivize local efforts to better align land use, transit, housing, and jobs – particularly in historically disadvantages and vulnerable neighborhoods.

1.3 Cross-Cutting Issues That Compound the Impacts of Zoning

Before focusing on how to make zoning more equitable, it is important to acknowledge the many systems that reinforce discrimination and systems of privilege, and that thwart better opportunities and outcomes for many American households. The intertwined impacts of these systems all tend to compound the unfair impacts of zoning—and will continue to do so even if zoning is "fixed." While better zoning alone cannot end systemic racial and ethnic segregation, prevent the erosion of cultural communities that wish to remain intact, or dismantle long-established systems of privilege, it can be used as a tool to help achieve all of those goals. In fact, it is a particularly important tool, because it is the law, and many other financial and economic institutions point to and use the exercise of the "police power" through zoning as the reason why they cannot or need not reform their own practices. Fixing zoning can have a "trickle-up" effect to promote broader change to reduce the human costs of impacts of racist practices throughout the economy and the nation.

A. Lack of Diversity in the Profession

Like other parts of the planning profession, the drafting, application, mapping, and enforcement of zoning regulations remains an overwhelmingly white and largely male occupation. This means that most of the people determining what types of development, housing, and other land uses are allowed in different parts of the community often have little experience living or working in historically disadvantaged and vulnerable communities and little understanding of how zoning might impact them differently. Members of these communities remain significantly underrepresented in all aspects of zoning practice, and

until that changes, many zoning rules will be crafted and decisions will be made without due regard for the interests of those highly diverse communities. This problem is so serious that in some communities the current planning and zoning staff and officials may not be the best persons to decide which sources of inequity to tackle and how to address them. It may be necessary to appoint a more representative group with significant representation from historically disadvantaged and vulnerable communities to make these threshold decisions. APA's Equity, Diversity, and Inclusion Steering Committee, Advisory Committee, and its Population-Based Divisions and Interest Groups are pursuing a number of strategies to increase the visibility of the profession and access to the profession within under-represented populations. Ideally, the local government staff and consultants engaged in drafting, applying, and enforcing zoning should reflect the demographic makeup of the neighborhoods where the zoning will be applied.

B. Real Estate and Lending Practices

For generations, some portions of the real estate and banking industries have favored lending to, constructing, and selling properties in whiter and wealthier neighborhoods while discouraging those activities in communities with more Black, Latino, or other non-white households. Close relationships between a predominantly white development and banking industries and local governments administering zoning regulations compound these impacts. The federal government has systematically supported those efforts through a variety of mechanisms, including FHA regulations favoring single-household suburban housing "occupied by the same racial and social classes," funding highways and other public improvements that made it easier for households to segregate by income, locating interstate highways to divide neighborhoods based on race or ethnicity, making it difficult or impossible for returning Black soldiers to qualify for the G.I Bill, and making mortgage interest deductible for those favored buyers who were able to buy homes. These practices have led to vast disparities in income and wealth through appreciation in property values. While the federal government has taken some steps to mitigate some of the impacts of past decisions through legislation like the Fair Housing Act or the Community Reinvestment Act, current lending and sales practices will continue to make it more difficult for historically disadvantaged and vulnerable communities to access some of the increased opportunities that better zoning can create. Working together, these practices are a very important form of embedded racism.

C. Infrastructure and Public Facility Location and Financing

The equity and opportunity available in America's neighborhoods are heavily influenced by the location of infrastructure, streets, sidewalks, schools and pre-schools, parks, trails, and open spaces, which are largely determined not by zoning but by local government and school district decisions about where to spend their available discretionary funds. While developers can be required to mitigate their impacts on each of these public facilities, individual developers generally cannot be legally required to do "more than their fair share" through zoning to make up for systemic injustices of the past. Where strong market forces support development developers are often willing to do more than what the law requires through a Community Benefits Agreement (CBA), and zoning can encourage or require these types of agreements. Importantly, zoning generally cannot be used to force the replacement or upgrading of infrastructure or amenities unrelated to a proposed development, or to force the local government to allocate discretionary funding in specific neighborhoods.

D. Private Covenants

Many neighborhoods in America have a second level of legal protection against types of structures and land uses that they do not want to see in their neighborhoods – restrictive covenants that buyers agree to when they purchase their homes, and that are enforced by Homeowner's Associations that may not share the goals of equitable zoning reform. Covenants are "private law" among the property owners (and sometimes the developer) to which the city or county government is often not a party. Local governments generally do not enforce restrictive covenants, and do not modify their zoning to match private covenants. Although enforced through private lawsuits, covenants can be and often are just as effective as zoning in preventing affordable housing, innovative types of housing, rental units, Accessory Dwelling Units (ADUs), or social services from entering a neighborhood. Zoning does not have the power to rescind private covenants; that generally requires the action of the state or federal government to declare specific types of covenants unenforceable. In addition, private covenants often include private assessments that result in their communities having streets, sidewalks, open space, and recreational facilities far better than those in other neighborhoods. For all of these reasons, the aims of equitable zoning reforms are often thwarted by private covenants.

E. Serious Income Disparities

One of the most important structural challenges that leads to racially or ethnically segregated communities is the fact that American law does not prohibit many forms of discrimination against low-income populations. Since a disproportionate percentage of low-income households are headed by Blacks, Latinos, Indigenous, or other communities or color, or by women, the elderly, or persons experiencing disabilities, laws and regulations that tend to make land and houses and other goods more expensive have especially harmful impacts on the very groups we try to protect through anti-discrimination laws. While federal laws like the Fair Housing Amendments Act and the Americans with Disabilities Act prevent some forms of discrimination, they do not require that equivalent housing or facilities be made equally available to the poor who are not part of a protected class of citizens at prices they can afford.

As Richard Rothstein demonstrates in The Color of Law, when the Supreme Court invalidated overt racial zoning, many communities realized that zoning based on permitted forms of housing or minimum lot size could achieve the same result by making many neighborhoods less affordable to less white, less abled, and less wealthy households. While originally adopted as a successor to overtly racial exclusion targeting Blacks and Asians, zoning has had the effect of excluding much broader segments of the American population from many residential areas and job opportunities. Zoning cannot change the fact that anything that makes housing, education, transportation, health care, or childcare more expensive will tend to perpetuate the disadvantages faced by historically disadvantaged and vulnerable communities as well as other low-income Americans.

While zoning regulations do not grant or withhold development permission based on the race, ethnicity, color, national origin, or religious faith (and only rarely based on the gender, age, or disability) of the property owner or occupant, they often have disparate impacts based on the income of the occupant. Larger lots, bigger houses, bigger parking lots, and higher open space requirements make property more expensive and limit the number of low-

income households who can afford to use, own, or occupy neighborhoods with those benefits.

Over the last 70 years, the combination of zoning, banking and real estate practices, infrastructure decisions, and private covenants have tended to reinforce each other in ways that have created vast disparities in wealth between households headed by persons of color, women, the disabled, the elderly, and other American households. The generational impacts on wealth between Non-Latino White, Black, and Latino households has been particularly well documented. Zoning has been a complicit – and in some cases intentional -- part of the systemic reinforcement of inequity and should be reformed to remove the rules and practices that create and perpetuate it. Zoning reform alone cannot "fix" the overlapping institutions that reinforce racism and segregation, but that is not a reason for inaction — it just highlights the importance of fixing the part of the problem that is within our control through better zoning regulations.

F. The Need for Complementary Non-Zoning Solutions

Many of the impacts of zoning on historically disadvantaged and vulnerable communities can only be mitigated by actions that are not part of zoning regulations. Effective mitigation of negative zoning impacts may require the execution of Community Benefit Agreements obligating the developer to employ persons or provide services or resources directly benefitting the neighborhood where development occurs. While complementary agreements often accompany zoning actions, they are contracts that are distinct from the zoning approvals that allow a project to happen. Alternately, mitigation may take the form of a decision by the local government to build or repair or upgrade a neighborhood park or other facility. Or mitigation could include a developer offering compensation for or providing a right-of-return for residents displaced by new development at prices those residents can afford, or other benefits that are also generally documented in contracts separate from the zoning approvals themselves. Or mitigation may come in the form of a land bank or land trust created to give the local government or a non-profit new ways to stabilize and reinforce the existing culture and economy of a neighborhood without gentrification. Because the specific impacts of each development on each neighborhood are different, it is difficult to agree in advance about what types of offsets or benefits need to be offered, but it does seem clear that there is a growing need for non-zoning agreements and commitments to accompany zoning actions if the equity of zoning outcomes is going to improve.

2. What is Equity in Zoning?

At the start, it is important to define what is meant by "zoning equity"—and that requires revisiting the difference between "equity" and "equality." Simply put, equality requires that everyone be given the same opportunities to participate and benefit from a project or program. But different people have different abilities to participate in or influence zoning rules and procedures. Equal opportunity often leads to unequal outcomes—and in America those outcomes are often disproportionately felt by Blacks, Latinos, women, those experiencing disabilities, and other historically disadvantaged and vulnerable individuals. Equity in zoning means that those who write, administer, or enforce zoning regulations take clear steps to avoid or "undo" the unfair outcomes compounded by unequal ability to

participate in all parts of the zoning process. The AICP Code of Ethics and Professional Conduct underscores this duty, and this Policy Guide identifies specific steps to do that.

The job is difficult because zoning is inherently designed to exclude. Zoning is very good at preventing individual property owners from making investments in property, building structures, or engaging in activities that the local government has decided should not occur in a certain location because potential harm to the public health, safety, and welfare. While it can prevent money from being spent in ways that are not in the community's interest, zoning is much less effective in making investors build things they do not want to build or to use properties in ways they do not want to use them. It can seldom force investors to invest where they do not want to invest--unless it subsidizes that development. Zoning can condition permission to do something an investor wants on their willingness to do some things the community wants, but if those conditions make the investment uneconomic, and the local government does not agree to make up the difference, the investor can decide to walk away.

While the exclusionary nature of zoning is simply a fact, the impacts of that fact harm historically disadvantaged or vulnerable communities more than others. Often, the most serious impacts are on households headed by Blacks, Latinos, women, or those experiencing disabilities . As zoning is used to selectively exclude unwanted types of buildings and land uses from some neighborhoods (or to allow them in some neighborhoods while excluding them from others), some areas become more attractive to investors than others, and the same is true for residents and business owners. Those with more time to participate in the system have more ability to influence the rules, and those with more money have more ability to buy property, operate businesses, and live in the neighborhoods that best meet their needs.

2.1 Ending Disproportionate Exclusionary Impacts

To identify those specific steps to end disproportionate exclusionary impacts, this Policy Guide focuses on the substantive zoning rules about what can be built or not built, what activities can be conducted or not conducted, what incentives the community offers builders to build what it prefers, how it drafts those rules and incentives, how it drafts maps to apply those rules, who participates in drafting the rules or changing the rules, how well they know the likely impacts of those rules and changes in those rules on their neighborhoods, how the rules are enforced, and how all of those decisions are made.

Because the Planning for Equity Policy Guide addresses the drafting and implementation of more equitable plans, this Policy Guide assumes that plans consistent with those policies are already under discussion or have already been adopted, and zeroes in on how zoning rules, maps, and procedures can be changed to implement those more equitable plans. More specifically, this document identifies ways in which planners can look beyond the facially-neutral text of zoning rules to focus on the disproportionate impacts of those rules on some individuals and neighborhoods, and then redraft and remap zoning to reduce those impacts.

While zoning can be revised to be less exclusive, the impacts of those changes may be very different when mapped in different neighborhoods. A change that could allow new types of housing that reduce exclusion from wealthy residential neighborhoods (for example, removing a ban "Missing Middle" housing or rental housing) could open new opportunities

for speculators to build the same types of housing in low-income neighborhoods, often leading to displacement and gentrification. For that reason alone, zoning needs to be better tailored based on its human impacts in different neighborhoods, and may need to include stronger anti-displacement conditions than it has in the past. It also needs to carefully consider whether each zoning change will increase or decrease opportunities or protection for historically disadvantaged or vulnerable populations.

This Policy Guide also addresses how apparently neutral zoning rules may need to be carefully tailored and mapped to avoid unintended consequences. In many cases, this will require different zoning tools to be applied in different neighborhoods of similar size, scale, and character, opening some neighborhoods to new types of development while protecting others from the same type of development. In many cases, these distinctions may need to be based largely on whether the change will have a positive or negative impact on those most seriously harmed by past zoning practices and decisions, and to prevent similar practices from arising in new forms in the future.

2.2 Three Kinds of Equity in Zoning

Removing the disproportionate impacts of zoning on historically disadvantaged and vulnerable communities involves close examination of three different aspects of zoning:

1. Equity in the "Rules" of zoning – what the substantive rules of zoning allow, prohibit, or incentivize in different parts of the community.
2. Equity in the "People" in zoning – who is involved in drafting the rules and incentives, who is notified and engaged in whether to change those rules for different areas of the community and who is involved in enforcement.
3. Equity in the "Map" of zoning districts – where the rules are applied through zoning maps and whether that reduces or reinforces exclusion and segregation in America.

Each of these topics is addressed in the next three chapters of this Policy Guide.

3. The Rules – Equity in Substantive Zoning Regulations

This chapter addresses the "substantive" rules and incentives in zoning regulations—as distinguished from the "procedural" rules about how zoning is drafted, applied, and enforced, (addressed in Chapter 4) and the "map" that applies zoning rules to geographic areas of a community (addressed in Chapter 5). Substantive rules include all the complex and cross-cutting land use regulations limiting the size and shape of lots and buildings, how those lots and buildings can be used, and the physical design of those lots and buildings.

In many cases, a change that could be achieved by changing the rules could also be achieved by remapping lands into a different zoning district where different rules apply (as discussed in Chapter 5). For most communities, there is no "right' way. A change to the zoning ordinance text that would allow more diverse housing in a given zoning district (a rule change) could also be achieved by adopting an remapping the area to allow those same types of housing in a specific area (a map change). The right way is the one that produces outcomes that undo past harms and avoid creating new harms to historically disadvantaged and vulnerable communities, and for which planners can gain the political support necessary to make the change. While each community will need to identify its historically

disadvantaged and vulnerable communities based on its unique context, some relevant factors may include race and ethnicity, and: household composition and size, average median income, concentrations of substandard public facilities and infrastructure, poor access to good jobs and services, and other available historical data.

There are five major equity concerns directly impacted by substantive zoning regulations:

1. **Public Health.** Land use patterns are linked to public health by influencing the provision of green open space, the distribution and quality of health care and rehabilitation services, the walkability and "bike-ability" of neighborhoods, the availability of affordable, healthy, and culturally appropriate food, and access to places of nature, recreation, and physical activity.
2. **Environmental Justice.** According to the EPA, environmental justice is achieved when all residents maintain "the same degree of protection from environmental and health hazards and equal access to the decision-making process to have a healthy environment in which to live, learn, and work." Communities of color, in particular, have long been exposed to higher levels of environmental and health hazards due to zoning that permits housing near pollution from major highways and waterways, as well as regulations that permit or concentrate industries and facilities that create those risks in certain neighborhoods. Climate change will exacerbate these impacts by increasing the frequency and intensity of flood and fire events.
3. **Fair Access to Housing.** Fair access to housing goes beyond the ability for any resident, regardless of income, to afford the mortgage or rent payments required for the available housing in their community; it also considers the ability for residents to live near their place of employment, in their preferred housing and ownership type, and in communities with a shared culture or identity if they so choose. The APA Housing Policy Guide provides much more detailed policy guidance on this topic.
4. **Fair Access to Economic Opportunity and Services.** The ability to use, create, or reach a place to earn a living, to form and expand a business, and to access quality education and necessary civic institutions and public services are also strongly influenced by zoning through use controls, design controls, and the length and complexity of administrative procedures.
5. **Aging in Place.** As the share of adults who are 65 or older increases, the accessibility, affordability, functionality, and safety of the built environment becomes increasingly important. The types and mix of uses allowed in a zoning district, maximum residential densities, development standards related to universal design, and connectivity requirements are all components of standard zoning regulations that effectively determine if an adult can stay in the same community as they age.

For purposes of this Policy Guide, the recommendations have been organized to follow the structure of a traditional zoning ordinance. Due to the interwoven nature of zoning regulations, many recommendations are intended to address more than one of the larger "themes" described above, even if only one particular theme is highlighted.

Although the rules discussed in this chapter often appear in the zoning ordinance, some of the rules may instead appear in design standards or guidelines in separate documents. Often these documents are referred to in the zoning ordinance, and property owners are required to comply with them just as if they were part of the zoning ordinance. To fully

remove the sources of zoning inequities, they will need to be addressed in both the zoning ordinance itself and in related development and design standards and guidelines.

3.1 ZONING DISTRICTS

Most zoning ordinances divide their communities into districts based on the forms of buildings permitted ("form-based" zoning), based on mitigating the specific impacts of proposed development or matching community character ("performance" zoning), or based on the uses of land and buildings in the district ("use-based" or "Euclidean" zoning), or a mix of the three. In many communities, this blend of controls is approved as a negotiated "Planned Unit Development" unique to a specific property. While the labels "form-based" or "use-based" generally describe the primary focus of the regulations, in practice almost all zoning districts regulate both the form and use of land and buildings within their boundaries. While form-based districts often have more flexible regulations on the use of property and eliminate or minimize the need for public hearings on the use of land, many retain use controls very similar to those in use-based zoning (particularly for lower density residential neighborhoods). Similarly, while use-based zoning districts often have relatively simple building form controls (e.g., maximum heights and minimum/maximum building setbacks), others include much more detailed building design standards. The regulation of both building forms, performance, and permitted uses can create barriers to opportunities for historically disadvantaged and vulnerable communities, and overly detailed controls of any type should be avoided. The discussion in this chapter will address sources of inequitable zoning arising from both building form and building use regulations, regardless of the "Euclidean," "performance-based," "form-based," "Planned Unit Development" or other label attached to the zoning district.

In most communities, implementation of the policies described below will require careful consideration of the demographics, economics, social and physical vulnerability, and potential for displacement of the existing population. The same zoning change that may open up opportunities for better housing, livelihoods, and services in one part of the community may lead to speculative investments and displacement of historically disadvantaged and vulnerable households and businesses in another. New zoning rules must be tailored and applied so that they increase opportunities rather than leading to speculative displacement of these households and businesses, and must be applied carefully to avoid being co-opted as tools to further protect wealth and privilege.

A. Base Zoning Districts

- Zoning District Policy 1. Establish new residential zoning districts or amend existing residential districts to allow more types of housing types, and avoid districts limited to only single-household detached dwellings. History shows that single-household residential zoning has a disproportionate impact on the ability of historically disadvantaged and vulnerable groups to access both housing and the wealth accumulation that has often accompanied housing ownership. If maximum residential densities are regulated, they should accommodate the revised broader menu of housing options. This often means allowing a broader range of building forms, lot sizes, and residential uses in low-density residential neighborhoods. More information on policies to create more affordable housing are available in the APA Housing Policy Guide.

- Zoning District Policy 2. Establish new mixed-use zoning districts or allow a wider mix of uses in existing zoning districts to increase opportunities for historically disadvantaged and vulnerable populations to live closer to sources of employment and needed services. Cities and counties should consider existing conditions and demographics and identify neighborhoods that have traditionally been separated from employment opportunities and that would benefit from additional permitted uses. Take care to avoid introducing new uses that could significantly increase land values and lead to forced displacement of existing residents.

B. Overlay Zones

- Zoning District Policy 3. Where supported by a historically disadvantaged or vulnerable business community, consider establishing specialized or overlay zones to help preserve business districts that have historically served and been focused on the needs of these communities. In many communities, traditional business, entertainment, or service centers serve as sources of jobs, revenue, and pride for the historically disadvantaged and vulnerable areas they serve. This is particularly true when businesses serve a racial, ethnic, or religious groups or the LGBTQIA community that want specific goods and services in a context not often provided by the broader economy. An overlay district can be used to recognize and preserve their cultural and economic contribution to the community, as well as allowing the additional flexibility in building forms and uses needed to accommodate current activities and to strengthen the image of the area for the future. These types of overlay districts acknowledge that it is not always a unique building or architectural style that fosters a unique sense of place, but rather a collection of businesses, residential dwellings, and/or civic uses that establish a shared community identity.
- Zoning District Policy 4. Where supported by a historically disadvantaged or vulnerable residential neighborhood, consider establishing specialized or overlay zones to help protect "Naturally Occurring Affordable Housing" (residential properties that are affordable to low- and moderate- income, but are unsubsidized or protected by any local, state, or federal program) from speculative development pressures. This can be done by defining and protecting established building forms, by prohibiting the demolition of more affordable types of housing, or by limiting the amount by which existing single-family homes can be expanded within a given time period. Preserving the existing scale and fabric of smaller and more affordable housing can help slow the replacement of smaller, affordable housing with much larger and more expensive homes in those neighborhoods that want to preserve current levels of affordability. This tool should be used only with the clear understanding that restricting private investment will mean that the existing housing stock may age and may remain substandard compared to surrounding areas without a similar overlay district. In addition, this tool should be clearly limited to disadvantaged and vulnerable neighborhoods, and should not be used to protect islands of protected housing in neighborhoods of wealth and privilege.
- Zoning District Policy 5. Establish specialized or overlay zones to improve health outcomes and environmental justice by preventing concentrations of polluting or harmful facilities and activities near historically disadvantaged and vulnerable communities. A key element of pursuing environmental justice is balancing preventative and mitigative strategies. An overlay zone can accomplish both by severely restricting the expansion of

existing harmful industrial uses or requiring environmental remediation for redevelopment. These types of zoning districts should be developed in close collaboration with the surrounding BIPOC and other disadvantaged communities so that concerns about health, the environment, and employment reflect the values of the community.

3.2 Lot and Building Form and Design Standards

Building form and design standards were first established to advance public health, safety, and welfare during a time when overcrowded urban housing was spreading disease and increasing fire risk. Early zoning ordinances focused on setbacks between buildings to limit the spread of fire, ensuring access to clean air and sanitation to slow the spread of disease, and protecting public space and streets from overcrowding and congestion. More recently, building form and design standards have focused on public welfare (rather than health and safety) with regulations that protect neighborhood character, advance sustainability, and improve development quality. Each of these regulations has impacts on both development and human opportunities, and some of those negative impacts are disproportionately borne by historically disadvantaged and vulnerable communities. Cities and counties should consider how building form and design standards may increase the cost of building and maintaining a property, create barriers to access, and encourage or discourage investment and livelihoods in these communities.

A. Lot and Building Dimensional Standards

The most common form of zoning regulation influencing building form are those establishing minimum lot sizes, minimum setbacks from streets and other buildings, maximum building coverage, and maximum building heights.

- Form and Design Policy 1. Reduce or eliminate single home residential minimum lot size requirements and eliminate minimum dwelling size standards and maximum Floor Area Ratio limits that effectively require construction of more expensive homes. While large minimum lot sizes are often defended on the basis of neighborhood character, their impact has been to perpetuate patterns of economic and demographic segregation of historically disadvantaged and vulnerable communities. There are many examples of neighborhoods with broad mixes of lot sizes and housing that maintain very high qualities of life without perpetuating those exclusionary impacts. Allowing a greater diversity of housing through changes to both form and use regulations is a key to allowing less expensive "missing middle" housing (a range multiple units housing types similar in scale and from with detached single-family homes, such as townhouses, cottage housing developments, manufactured housing, and accessory dwelling units) in more locations.
- Form and Design Policy 2. Reduce or remove limits on multi-household development density, minimum dwelling unit sizes, or maximum dwelling units per acre that tend to force the construction of fewer, larger, more expensive dwelling units within these buildings. In addition to limiting the ability of households to live closer to needed schooling, child care, employment, and services, these types of artificial limits make it difficult for America's aging population to "age in place" in the neighborhoods they love. Regulations that focus on the form, size, and placement of these types of buildings, rather than the number of dwelling units in them, should be considered. If larger units

are needed to accommodate growing populations of larger families, regulations may better promote the needed housing by requiring more units with more bedrooms.

B. Lot and Building Form and Design Standards

As noted earlier, form-based zoning regulations generally focus more on ensuring that building forms fit their context while offering increased flexibility for the permitted uses of those buildings. While careful building form and design controls can help ensure that new development preserves traditional patterns of development in historically disadvantaged and vulnerable neighborhoods these standards do not make it difficult and expensive to develop and redevelop properties.

- Form and Design Policy 3. Avoid adopting building form and design standards that significantly or unnecessarily increase the costs of development, and avoid those that could prevent historically disadvantaged and vulnerable households from moving into a neighborhood, creating or growing a business in that neighborhood, or from making improvements to their property.
- Form and Design Policy 4. Add standards to allow those with reduced mobility or without access to a motor vehicle to easily access and circulate in all neighborhoods. These include standards requiring Universal Design or other accessibility programs that go beyond the minimum requirements of the Americans with Disabilities Act, in order to ensure that our neighborhoods function for the elderly as well as those experiencing disabilities.
- Form and Design Policy 5. Avoid drafting or allowing the use of architectural style design standards that have negative connotations among communities of color and vulnerable populations. For example "Antebellum" and "Spanish-Colonial" styles may discourage Black, Latino, or Native American households from feeling welcome in a neighborhood or community due to the historical use of these architectural styles to assert power over these communities. Other defined styles may create similar reactions from Asian or Pacific Islander communities.
- Form and Design Policy 6. Remove or modify restrictions on specific building or site features that are commonly found in historically disadvantaged and vulnerable neighborhoods. Examples of development standards that place disparate burdens include bans on window-mounted air-conditioning units, outdoor clothes lines, parking of a single commercial vehicle, basketball hoops, or carports. Limits or prohibitions on these types of typical site features should only be developed in collaboration with those neighborhoods most likely to be affected by them.

3.3 PROPERTY USE REGULATIONS

Use regulations identify the types of uses allowed by-right, conditionally, with discretionary review, or as accessory or temporary uses in different zoning districts and often include standards to mitigate potential impacts of those uses. Whether they appear in form-based or use-based zoning districts, use regulations can disproportionately affect historically disadvantaged and vulnerable populations in several ways. Narrowly defined uses that focus on the name of the activity rather than its land use, traffic, or environmental impacts sometimes single out additional restrictions for unpopular forms of retail, sales, or production activities that are frequent sources of employment for these communities. The

same is true for strict limits on home occupations based on their names rather than their impacts on the neighborhood, since these communities are more likely to need to use their homes to generate income to live and raise their families. Requirements for public hearings and discretionary approvals for specific uses also tend to have disproportionate impacts on these households, since they are often less able to invest the time and energy necessary to complete those procedures. The large number of use-related recommendations in this portion of the Policy Guide is indicative of the wide range of ways in which permitted use controls have created inequitable zoning results.

A. Residential Uses

Most of the land in most American communities is zoned for residential development and use. Historically, many zoning districts are grounded in idealized concepts of a small, nuclear, two-generation family that is no longer the norm. Many of these districts permitted only single-household, detached houses (and sometimes supporting civic uses like schools and places of worship). The wide use of these practices has contributed significantly to rising housing prices and the inability of historically disadvantaged and vulnerable households to find quality affordable housing in areas with quality schools and services, as well as demographic and income segregation in many communities. In many cities and counties, making a wider range of diverse forms of housing available will require changes to both building form and use controls.

- Permitted Use Policy 1. Where supported by historically disadvantaged and vulnerable populations, expand the list of allowed residential use types to include one or more of the following "non-traditional" and "missing middle" housing that is more available to America's diverse, aging population. Types of housing that are missing from many zoning ordinances—or only available following a public hearing—include cottage or courtyard dwellings, duplexes, triplexes, fourplexes, attached single-household homes (townhouses or stacked townhouses), co-housing, tiny houses, live-work dwellings, single-room occupancy (SRO), and both attached and detached accessory dwelling units (ADUs). By including appropriate standards on these uses, they can often be made available in a wide range of residential zoning districts without the need for a public hearing or negotiated approval. To support the viability of ADUs, co-housing, and multi-generational living, a second kitchen should generally be permitted.
- Permitted Use Policy 2. Allow accessory dwelling unit (ADUs) without the need for a public hearing, subject to only those conditions needed to mitigate potential impacts on neighboring properties. ADUs are complete, smaller, secondary dwelling units that are located within a principal dwelling or in a detached accessory structure, and administrative approval of ADUs significantly decreases the time, cost, and risk of the development review process for applicants and encourages property owners to use their own resources to increase housing diversity. While ADUs may support the stability of existing neighborhoods by accommodating extended families or creating an opportunity to generate revenue from tenants, they can also spur speculative investment that displaces current residents – and that is particularly true when ADUs are used as short-term rentals -- so this tool should only be used in historically disadvantaged and vulnerable communities when supported by those communities.
- Permitted Use Policy 3. Allow manufactured homes in many residential districts, protect existing manufactured housing parks, and allow the creation of new manufactured

housing parks with quality common open space and amenities. While the redevelopment of older or underused properties for higher intensity uses is part of a healthy local economy, redevelopment of manufactured or housing parks can create unusual hardships if the residents cannot afford to pay to move their units or cannot find affordable replacement housing. Cities and counties should allow the installation of individual manufactured homes in a variety of residential districts, as well as the creation of new manufactured home parks in desirable residential areas. They should protect existing manufactured housing parks from predatory redevelopment and displacement of residents by limiting options for redevelopment without the approval of the governing body.

- Permitted Use Policy 4. Treat assisted living facilities, congregate care communities, retirement villages, and supportive housing types as residential and not commercial uses and allow them in a wide variety of residential zoning districts. Although supportive housing facilities often include commercial activities such as providing healthcare or other support services, they function as residential facilities and should be treated as such. Classifying supportive housing types as residential uses also expands opportunities for existing, elderly residents to "age in place."
- Permitted Use Policy 5. Treat housing with supportive services for people with disabilities the same as similarly sized residential uses. Group homes or supportive housing for those with physical and mental disabilities are protected by the federal Fair Housing Amendments Act (FHAA), and the required broad reading of the FHAA means that zoning should not treat group homes any differently than similar sized homes for people without disability. Under court decisions interpreting the FHAA, this approach needs to extend to residential facilities for those in programs to address substance abuse and addiction, which is a recognized form of disability. Ensure that the zoning regulations allow small group homes wherever single-household homes are permitted and allow large group homes wherever multi-family housing of the same size is permitted.
- Permitted Use Policy 6. Replace zoning references to "family" with a definition of "household" that includes all living arrangements that function as a household living unit. The definition of "family" is an important, and often overlooked, part of zoning regulations when it comes to disproportionate impacts on historically disadvantaged and vulnerable communities. Many definitions related to household composition are based on outdated concepts of small, nuclear families and a largely white cultural-specific concept of family live that excludes other ways of living (for example. South Asian joint families or Latino multi-generational living). Ensure that the definition includes people related by adoption, guardianship, or foster placement, and accommodates larger groups of unrelated individuals living as single households in a cooperative community. If the definition includes a maximum number of unrelated persons, ensure that it is no lower than the number of related persons that would be permitted in the same size residential home.
- Permitted Use Policy 7. Allow administrative approval of "Reasonable Accommodation" for persons experiencing disabilities. The FHAA requires that requests for reasonable variations and exceptions to zoning rules to accommodate persons experiencing disabilities (such as a request that a wheelchair ramp that extends into a required setback) be considered and that decisions on those requests be reasonable. Establish a

clearly defined administrative process for approval of requests for Reasonable Accommodation (perhaps in consultation with a caretaker or representative of persons experiencing disabilities). As opposed to the typical and sometimes lengthy variance process, an administrative process avoids a public hearing that will call attention to the disability of the applicant and may create public pressure on decision-makers to deny or condition approval of the request in ways that place an additional burden on the person experiencing disability.

- Permitted Use Policy 8. Consider adopting Universal Design requirements for a significant portion of new housing construction to better accommodate the needs of the elderly and those persons experiencing disabilities. While the Americans with Disabilities Act (ADA) generally does not require accessible design for single-household homes, Universal Design requirements ensure that some key accessibility provisions (like doorways wide enough to accommodate wheelchairs and at least one at-grade entrance) are incorporated into single-household dwellings. Requiring these elements in a portion of new homes constructed can substantially expand the ability to "age in place."

B. Commercial Uses

Commercial uses, including retail, personal, and medical services, are not only a large source of employment, but they also provide necessary goods and services for community residents and drive many local and regional economies. Historical practices in commercial zoning have resulted in inequitable patterns of development and a lack of fair access to employment and basic necessities. The recommendations below are intended to dismantle the negative stereotypes of some commercial uses, expand the provision of essential goods and services into historically disadvantaged and vulnerable neighborhoods, and increase access to employment opportunities.

- Permitted Use Policy 9. Evaluate the permitted uses regulations applied to small-scale commercial uses and eliminate any restrictions and standards that are not based on documented public health, safety, economic, or other land use impacts of the use on surrounding areas. Businesses such as check cashing, massage parlors, plasma clinics, nail salons, and tattoo parlors are often limited or prohibited in most commercial zoning districts despite the fact that they have similar operating characteristics and land use impacts as other commercial uses like banks, personal services, and urgent care clinics. In many communities, these uses serve as significant providers of goods, services, and employment in the surrounding areas. Any restrictions on commercial uses should be based on documented land use impacts and should be adopted only after consultation with the business communities that will be affected to balance those impacts with potential employment opportunities and to avoid over-concentration of those uses in historically disadvantaged and vulnerable neighborhoods.

- Permitted Use Policy 10. Allow small-scale child and elder care and outpatient medical and health support facilities in a wide variety of zoning districts to allow convenient access by all residents, and treat non-residential addiction services like other outpatient treatment facilities. America's aging population will require increasing amounts of medical, dental, physical and occupational therapy, and other supportive services located conveniently to the neighborhoods where they "age in place." In addition, serious shortages of convenient childcare have a disproportionate impact on single-parent, often female-headed, households. Outpatient addiction treatment centers operate similarly to

other types of outpatient facilities and should be treated as such. Because substance addiction is a growing medical and mental health challenge that affects all demographics, these facilities should be allowed with few restrictions in a wide variety of commercial zoning districts, and should not be subject to public hearing or development standards that are not also applied to other types of outpatient treatment facilities. For each of these use, avoid regulations that add costs or repeat state regulations or licensing requirements.

- Permitted Use Policy 11. Ensure access to healthy food by allowing smaller grocery stores, local cuisine restaurants, and artisanal food producers with limited operational impacts near low-density residential neighborhoods and in "food deserts", and by ensure that there is not an overconcentration of food outlets that do not carry fresh, healthy food in disadvantaged. Grocery stores and local food producers are important contributors to public health and are needed in almost every part of the community on a daily basis. Zoning regulations and procedures that create barriers to these uses should be removed or revised to allow wider access to healthy food. At the same time, the overconcentration of convenience stores and other stores that provide easy access to health compromising substances like alcohol and tobacco in historically disadvantaged and vulnerable communities should be limited or removed entirely.

C. Industrial Uses

Due to a long history of zoning practices that located or allowed environmentally harmful or polluting uses in or near historically disadvantaged and vulnerable neighborhoods, these communities, and particularly BIPOC communities, have suffered disproportionate burdens from air and water pollution, lack of safe or clean open and green space, and other environmental hazards. While current environmental regulations sometimes prohibit the creation of similar new industrial uses, existing sources of environmental risk often remain in place and are protected by their "legal nonconforming" status. The recommendations below are intended to reduce the disproportionate impacts from environmental hazards on these communities. This topic is also addressed in Chapter 5.3, and can be addressed through changes to zoning maps as well as rules.

- Permitted Use Policy 12. To improve environmental justice, prohibit the location of new industrial uses and the expansion of existing industrial uses that do not meet current public health and environmental safety standards, and (where permitted by law) use amortization powers to end the operation of these nonconforming uses, particularly in historically disadvantaged and vulnerable communities. Where existing environmentally harmful uses continue to operate as legal nonconforming uses, prohibit expansion of those uses unless the expansion will result in reduction and remediation of existing risks to public health and safety. When these uses are located close to schools, health care facilities, and other facilities serving vulnerable populations, expansion should be prohibited regardless of the size of the facility. Amortization allows municipalities to terminate nonconforming land uses to eliminate continuing industrial operations that exacerbate adverse health outcomes without displacing residents.
- Permitted Use Policy 13. Classify low-impact and artisan manufacturing uses as commercial uses and allow them in more zoning districts. While the term "industrial" is typically associated with large facilities with large neighborhood impacts, there are many small-scale assembly, processing, and fabrication activities with few or no negative

impacts on the surrounding area. Because these uses are often grouped with the more intense industrial uses, there are often significant unnecessary limits on where they can be located. Allowing the small scale artisanal production and retail sale of products in the same building lowers the barriers to economic activity to those without the resources to maintain multiple properties to run their business.

D. Agricultural Uses

Agricultural use regulations, especially those related to urban agriculture, are an integral component of sustainable and equitable access to healthy, safe, and affordable food. Local production of food is increasingly allowed in many or all zoning districts but is particularly important in and near those historically disadvantaged and vulnerable neighborhoods where access to healthy food is difficult. The recommendations below are fundamentally intended to help not only increase access to healthy food sources but to empower and strengthen local food producers related to local and regional food systems.

- Permitted Use Policy 14. Allow small-scale urban agriculture – including but not limited to community gardens, greenhouses, beekeeping, and poultry raising – in a wide variety of zoning districts, and allow light processing, packaging, and sales of products grown on the property. To protect public health, ensure that soil conditions on an urban agriculture site are not contaminated, particularly when the site has been previously used for commercial or industrial purposes. Remove barriers to construction of supporting facilities needed to protect plants due to climatic or soil conditions. Allowing light processing, packaging, and sales of community agricultural products as accessory uses related to the growing of local food also provides a source of local employment.
- Permitted Use Policy 15: Allow farmer's markets and other facilities for local food distribution in a wide variety of zoning districts, as either temporary or permanent uses. Wide public access to healthy food is as important as the technical availability of healthy food – particularly for those who do not have the ability to grow it themselves.

E. Home Occupations

Zoning regulations often severely limit the types of revenue earning activities that can be conducted from a residential dwelling unit, which has a significant impact on those who do not have the resources to rent a separate business location, including but not limited to historically disadvantaged and vulnerable communities. In some cases, zoning limits are based on stereotypes regarding the activity being conducted rather than its impacts on the surrounding neighborhood. Removing prohibitions or overly restrictive requirements on home-based businesses are of particular benefit to single-parent or guardian households or other households with small children, elderly relatives, or other dependents by allowing them to run a business or maintain employment without the additional costs of childcare, eldercare, or commuting.

- Permitted Use Policy 16: Update home occupation regulations to broaden the types of activities allowed to be conducted from dwelling units of all types. Ensure that any restrictions on home occupations are based on documented neighborhood impacts and eliminate special permit requirements where possible. Regulations should focus on preventing negative impacts on the surrounding area, rather than trying to list specific permitted home businesses. Limits on the use of accessory buildings, prohibitions on employment of even one person from outside the household, additional requirements for

off-street parking, and prohibitions on cottage food operations all create significant barriers to economic activities and likely have a disproportionate impact on historically disadvantaged and vulnerable communities.

F. Temporary Events

- Permitted Use Policy 17. Reduce zoning barriers for temporary events, entertainment, and outdoor sales, including garage/yard sales in residential areas, "pop-up retail" sidewalk sales and mobile food vendors where those barriers are likely to reduce social and economic opportunities for historically disadvantaged and vulnerable individuals. Temporary use regulations are often heavily restricted due to perceived or potential traffic and noise impacts, even though those impacts will be short-lived. Temporary events are often tied to cultural celebrations that foster a sense of community within a neighborhood and offer additional sources of temporary employment without the need to invest in a permanent place of business. Temporary use restrictions should be based on balancing the short-term impacts of these events with the social, economic, and cultural benefits they create. Larger temporary events should be required to be accessible to those using mobility devices such as wheelchairs and walkers, and to provide accessible support facilities (such as parking and restrooms).

3.4 Site Development Standards

Site development standards address the physical layout and quality of the lots and parcels on which buildings are built and permitted activities are conducted, including access to the site, the number of parking spaces (if any) required, the amount of landscaping (if any) required, what kinds of outdoor lighting fixtures are permitted or prohibited, and permitted signage. The recommendations below address several major elements of site development standards common to zoning ordinances and how they can be used to improve equity for historically disadvantaged and vulnerable communities.

A. Who Must Comply

Because site development standards can add significant costs to a new development or redevelopment project, it is important to clarify what level of investment triggers the need to comply with those standards. Smaller investments generally require only partial compliance, or are exempt altogether, while larger investments require full compliance. Site development regulations are often tailored to allow additional flexibility for infill and redevelopment projects and can also be tailored to allow additional flexibility if necessary to allow needed investment and employment in historically disadvantaged and vulnerable neighborhoods.

- Site Development Policy 1. Draft thresholds for compliance with specific site development standards to avoid disproportionate impacts on historically disadvantaged and vulnerable neighborhoods. The "triggers" for compliance with different types of site development standards should be developed after close consultation with the affected neighborhoods so that they reflect a good balance between the desire to maintain and upgrade the quality of the neighborhood with the need to sustain investment and employment by existing businesses and affordability to residents of the area. These thresholds may differ based on the cultural backgrounds or traditional living arrangements and workplaces of different communities.

B. Access and Connectivity

Access and connectivity standards address internal circulation within a site, connections between development sites, and multiple modes of mobility to and throughout the site. Connectivity standards accommodate the many individuals who rely on public transit, walking, and biking as alternatives to vehicular travel, those who must rely on mobility aids, those using strollers for small children, and children who need safe routes to school. Fire and emergency response times are often longer in historically disadvantaged and vulnerable neighborhoods, and improved connectivity can shorten those response times.

- Site Design Policy 2. Require high levels of accessibility and connectivity for pedestrians, bicycles, and motor vehicles in all new development and significant redevelopment. Require that bicycle routes, sidewalks, internal walkways, and pedestrian crossings are safe and usable by persons experiencing disabilities. Consider requiring Complete Streets and going beyond the standard requirements of the Americans with Disabilities Act and embrace a Universal Design approach to create neighborhoods that are "usable by all people, to the greatest extent possible, without the need for adaptation or specialized design." Prohibiting the creation of new "gated communities" with single or limited points of access, which lengthen walking, bicycling, and motor vehicle trips and are a significant contributor to exclusionary development patterns. Consider requiring large projects with multiple buildings across multiple lots to incorporate low vision, blind-supportive, and deaf-friendly design features such as wide sidewalks, raised crosswalks, and other tactile markers to differentiate pathways.

C. Required Parking

Minimum off-street parking regulations raise the cost of housing and other development and often make redevelopment of older infill sites difficult or impossible, which likely has a disproportionately negative impact on historically disadvantaged and vulnerable neighborhoods. Often, these minimum requirements far exceed what is needed to achieve their original purpose, which was to protect public health and safety by reducing congestion on surrounding streets and to prevent overflow parking and related traffic from commercial uses in adjacent residential areas. Average temperatures are often higher in historically disadvantaged and vulnerable neighborhoods, and reducing parking reduces the amount of impervious surfaces that create those urban heat islands. Reducing or eliminating parking minimums can also increase the amount of land used to build housing, parks and open space, or other community-supporting uses rather than maintaining large swaths of surface parking or parking structures that sit vacant or underused.

- Site Design Policy 3. Eliminate or reduce minimum off-street parking requirements in areas where those requirements serve as significant barriers to investment and are not necessary to protect public health and safety or pedestrians, bicyclists, or motorists using the facility. Minimum parking requirements are often based on newer suburban development precedents that may not be applicable to denser, urban contexts or redevelopment projects. However, because of poor public transit access to employment opportunities, some historically disadvantaged and vulnerable households may have no choice but to own a motor vehicle (or more than one) to reach more dispersed work opportunities, and some employers may need more off-street parking because their workforce arrives from widely dispersed neighborhoods not served by other forms of transportation. Reductions in parking requirements should be based on careful

consultation with affected neighborhoods and employers to balance the affordability and walkability benefits of less parking with the need to accommodate vehicles needed for employment without compromising public health and safety.

- Site Planning Policy 4. Do not require minor building expansions, minor site redevelopment projects, or adaptive reuse of existing buildings to provide additional parking unless the change will create significant impacts on public health or safety due to increased traffic congestion or overflow parking in residential neighborhoods. A major barrier to opening a small business or operating a restaurant or personal service use is additional parking requirements that are triggered when the intensity of site use increases. This can disproportionately impact historically disadvantaged and vulnerable businesses owners who have more constrained sites may lack the resources to make significant site improvements to accommodate a relatively small change in use. Often, the time involved in evaluating incremental parking requirements for small changes in property use far outweighs the benefits of those parking adjustments to public health and safety.

D. Landscaping, Open Space, and Tree Canopy

Many historically disadvantaged and vulnerable neighborhoods have lower levels of vegetation, landscaping, and open space for outdoor gatherings and activities that promote public health and well-being and increase property values. They often have less tree canopy to cool properties and offset heat island effects, which make many of these neighborhoods significantly warmer than others and creates health challenges for the elderly and persons experiencing disabilities. Some of these discrepancies are caused by lower levels of public investment compared to wealthier, whiter neighborhoods, while others are caused by zoning regulations that do not require the same levels private investment on private property. Tailored site design standards can help reverse these shortcomings over time.

- Site Planning Policy 5. Draft zoning standards that require or incentivize new development and redevelopment to increase the amount of landscaping, open space, and tree canopy in those neighborhoods that currently have less of these site design features. This may mean tailoring zoning standards to require higher levels of these site features in some neighborhoods, which may in turn require that the zoning rules provide added flexibility on other standards to offset added development costs. Ensure that new landscaping is located and sized to avoid obscuring sight lines for pedestrians, bicyclists, and motor vehicles that would increase risks to public health and safety.

E. Lighting for Public Safety

Because many historically disadvantaged and vulnerable neighborhoods are located in older areas of our communities, they often contain many properties that were developed before minimum lighting standards to protect public health and safety were adopted. Nighttime safety is important to all residents of the community, but particularly important to vulnerable populations, including the elderly, persons experiencing disabilities, women, children, and those relying on public transit.

- Site Planning Policy 6. Require adequate levels of lighting of sidewalks, walkways, public transit stops, and parking lots to protect the health and safety of vulnerable populations, Through shielding requirements, “dark sky” fixtures, limits on uplighting, and better light trespass standards, lighting needed for public safety can be readily balanced with

community desires :to see the stars." Because excessive lighting standards have sometimes been used to increase surveillance of Black, Latino, and other persons of color, lighting standards should be drafted after careful consultation with the residents and businesses in the neighborhoods where they will be applied, so that they balance public safety for all.

4. The People – Equity in Zoning Procedures

While community participation has long been emphasized in creating community plans, it is not always a priority when drafting and implementing zoning regulations. This may be in part because zoning is perceived as a "technical" topic. It is one thing for residents to discuss a vision and goals for their community, but another for them to grasp and debate the legal ramifications of specific zoning regulations, let alone an entire zoning ordinance. But that is a serious mistake, because informed participation is critical to eliminating racism and discrimination in zoning. All community members have a right to be involved in the drafting, administration, and enforcement of zoning controls, as well as in changes to the zoning map. Equity in zoning requires that communities ensure diverse, inclusive, and effective participation in writing and changing the zoning rules; drawing and changing the zoning map; applying the zoning ordinance to development applications; and deciding how the rules will be enforced.

The continuing need to achieve much greater diversity and maximum participation in the planning profession was addressed both in the Planning for Equity Policy Guide, and in the introduction to this Policy Guide, so that discussion is not repeated here. Additionally, the Planning for Equity Policy Guide includes several important recommendations regarding community engagement and empowerment that apply to zoning as well as planning, and those policies are not repeated here. Instead, this section focuses on specific opportunities to improve engagement and participation related to zoning.

- Capacity-Building Policy 1: Design and offer events or classes to help historically disadvantaged and vulnerable communities to understand and participate in zoning procedures, and to learn from members of those communities how current zoning procedures are affecting their neighborhoods, businesses, and quality of life. Cities and counties that have offered "zoning 101" or "zoning academy" events and programs often report a significant increase in public understanding of the most effective ways to make their wishes known and understood throughout the zoning process. In seeking diverse participants, cities and counties may need to make accommodations for non-traditional work schedules and participants' needs to bring children to sessions. Events offering public education or seeking public input should be offered both virtually and in-person, at varying hours, potentially at locations where participants normally gather. If possible, offer childcare, meals, and possible stipends to recognize the value of participants' time.
- Capacity-Building Policy 2: Ensure that planners receive diversity, equity, and inclusion (DEI) training. As the planning profession works to build diversity over time, planners at work should enhance their sensitivity and knowledge of issues and concerns relevant to historically disadvantaged and vulnerable populations and neighborhoods, as well as their co-workers who are members of these communities.

4.1 APPOINTING ADVISORY AND DECISION-MAKING BOARDS

Although the ultimate authority to adopt and apply zoning regulations is almost always held by an elected City Council or Board of Commissioners, some powers are often delegated to appointed boards that are authorized to make recommendations or to make certain types of decisions. Examples include Planning Boards, Zoning Commissions, Historic Preservation Committees, Zoning Appeals boards, and officials appointed to conduct public hearings on zoning applications. The extent of authority granted to these bodies varies widely, but that does not change the importance of ensuring that their composition reflects the demographic and economic makeup of the community they represent. This Policy Guide has previously noted that the planning profession remains a predominantly "white" profession that often does not reflect the diversity of the communities it serves, and the same is often true of appointed zoning-related boards and officials. Some of the inequities in drafting, applying, and enforcing zoning regulations discussed in Sections 4.2 through 4.5 below may not be fully addressed until these boards truly reflect the diverse populations of our cities and counties.

- Appointment Policy 1. The composition of non-elected boards and advisory committees should reflect the community, including proportionate representation from historically disadvantaged and vulnerable communities. While "expertise" in zoning, planning, real estate development, and real estate markets has often been the key criterion for appointment to these boards, that approach often results in membership that does not reflect the makeup of the community. Professional expertise is important, but these boards also need to include significant local community expertise and lived experience. Their memberships need to brings those different kinds of knowledge that can be conveyed by more diverse voices that better understand the impacts of zoning decisions on all of our neighborhoods.

4.2 WRITING AND CHANGING THE ZONING RULES

While full rewrites of a zoning ordinance are relatively rare, amendments to the current zoning rules occur frequently. This section address both large-scale and more targeted changes to the text of the zoning regulations. Two equity considerations arise when communities draft or update zoning regulations: (1) Who is writing or amending the rules, and (2) Who will be affected by the proposed changes. To the greatest extent possible, the task forces, consultants, and advisory committees involved in writing or amending zoning rules should reflect the demographic makeup of the community. Staff or advisory groups should also include individuals living, educating, or doing business in the areas that will be affected by the new rules under consideration.

In addition, zoning rewrite projects must include significant outreach efforts so they reflect input from diverse groups in the community, and particularly from historically disadvantaged and vulnerable communities. The rewrite process should include input from a standing advisory committee reflective of the community composition, and any proposed changes should be subject to public review and feedback long before there is an actual hearing on adopting those changes.

Just as importantly, the zoning drafting process should include specific opportunities to evaluate the potential impact of revised zoning regulations on all of our diverse neighborhoods. Some of these impacts may become evident through the community

engagement process, but a more wide-ranging review by planners who will implement any updated regulations should also figure in the process. It may be appropriate to perform an equity audit of the current zoning regulations based on the recommendations in this Policy Guide. This consideration should extend beyond zoning district boundaries on a map, and will necessarily rely on knowledge of local circumstances. For example, would a change to home occupation permissions make it difficult for small child or adult daycare services to operate from family homes? Would new industrial use limitations disproportionately impact public health or employment in lower-income neighborhoods? Considering unintended or secondary consequences, and who will be most affected by them, is paramount to any zoning regulation update effort.

- Drafting Policy 1. Those framing, writing, and/or reviewing the zoning rules should reflect the demographic composition of the community and should include representatives from historically disadvantaged and vulnerable communities. Ideally, input from these groups should occur twice: once when amended language is being drafted, and again *before* that language is presented to a decision-making body. If changes are not incorporated based on public input prior to the hearing, discussion of that input should become part of the public hearing.
- Drafting Policy 2. Ensure that drafting efforts include tenants as well as property owners. This is important because historically disadvantaged and vulnerable communities generally have a higher percentage of renters than the overall population, and because the zoning changes can lead to gentrification and displacement that particularly impacts these community residents.
- Drafting Policy 3. Ensure that there are multiple opportunities for review of potential zoning impacts on historically disadvantaged and vulnerable communities. These reviews need to happen with sufficient time to receive meaningful and equitable input before public hearings on the proposed regulations begin.
- Drafting Policy 4. Avoid overly complicated regulations. Complicated regulations, and those that require detailed supporting documentation, make it difficult for residents (and particularly non-English speakers) to engage effectively in the drafting process. They also discourage zoning applications from those who do not have the resources to hire professional help to get through the zoning process.
- Drafting Policy 5. Draft objective and clear standards and review criteria to ensure a more transparent and efficient zoning ordinance. Similar to overly complicated regulations, vague and subjective standards are difficult and time-consuming to interpret, Overly subjective standards also make it easier for those individuals familiar with the public process (who are typically wealthier and often white) to oppose projects that might reduce zoning barriers to more equitable development.

4.3 APPLYING THE ZONING RULES TO INDIVIDUAL PROPERTIES

Although the drafting of zoning rules discussed in Section 4.2 and the adoption of area-zoning maps discussed in Section 5.1 are very important, most zoning activities involve the application of zoning rules that have already been drafted and adopted. The activities discussed in Sections 4.2 and 5.1 are often called “legislative” actions because they affect large areas of a community, they are almost always approved by the governing body, and that body has wide discretion to do what it thinks is best for the entire community.

In contrast, most zoning activity involves "administrative" and "quasi-judicial" actions that affect only one or a few properties. These types of decisions can include changing the zoning map for one or a few properties (often called a "rezoning"), approving a conditional use permit, development permit, demolition permit, or variance from the strict terms of the zoning rules, as well as many others. In most communities, these include:

- Decisions made by staff to confirm whether a development application complies with the adopted rules (often called an "administrative" or "ministerial" action, because it involves no discretion),
- Decisions by an appointed body that involve some level of discretion as to whether a development application meets standards and criteria stated in the zoning code (sometimes called a "quasi-judicial" decision, because the appointed body is acting similarly to a judge who applies the law to the facts of a specific case), and
- Decisions by the City Council or County Commissioners regarding an application covering one or a few properties (which are generally also "quasi-judicial" actions).

A. Administrative and Ministerial Decisions

Administrative and ministerial decisions are generally made by staff, and are the most common type of zoning decision. Because these decisions do not require staff to exercise discretion or judgment, the key to equity is to ensure that the zoning rules themselves do not have disproportionate impacts on historically disadvantaged and vulnerable communities (See Section 4.3 above). Because staff are often trained to make the same decision in the same way for similar applications, without knowledge of the applicant's race, ethnicity, national origin, religious affiliation, gender, sexual orientation, or level of physical or mental ability, some of the opportunities for inequity through the public hearing process (discussed below) can be removed. The "applicant neutrality" of this type of decision-making has led some communities to focus on making as many zoning decisions as possible administrative decisions. The alternative is to make the same type of decision a "quasi-judicial" decision before an appointed or elected body, and then make exceptional efforts to overcome the potential biases introduced through a public hearing requirement (also discussed below).

B. Decisions That Require a Public Hearing

While requiring a public hearing before making a zoning decision can increase opportunities for members of historically disadvantaged and vulnerable groups to be heard before decisions are made, they also create opportunities for inequities to enter the zoning decision-making process. In addition to the common use of vague or subjective criteria (discussed above), inequity can enter the hearing process because of (1) how the public is notified or those hearings; (2) the ways in which the public is permitted to participate in the hearing; and (3) the ability of different segments of the community to understand and participate in the hearing.

C. Notifying the Public

The importance of effective public notification, and improved ways to do that, are addressed in APA's Planning for Equity Policy Guide, and those same recommendations apply in the zoning context. Traditionally, notice has been provided to property owners within a defined radius of the proposed development project. There are several inherently inequitable aspects to this practice.

First, limiting notification to owners of property effectively disenfranchises the significant proportion of any community's population that does not own property. Beyond limiting the number of people who receive notice, mailing requirements often do not include notice to renters. Because historically disadvantaged and vulnerable communities are often disproportionately renters rather than property owners, mailing requirements that ignore renters introduce significant bias into the public hearing process. Because property owners are, by and large, older, whiter, and wealthier than other segments in a community, that means that notice may not be received by a proportionate number of the households in these communities. In areas with significant tribal or indigenous populations, ensure effective notice to those groups when developments are proposed on adjacent lands.

If who is notified can prejudice outcomes, that bias can be further exacerbated by how the public is notified. Depending on the type of decision being made, many zoning ordinances require mailed notice (sometimes certified), advertisements to be published in a "newspaper of record," and/or posted signs on the potential development site. Posted signs are an effective means of reaching a broad audience—anyone passing by can see the sign, learn what is proposed on a site, and understand how they can express their opinion on the proposal—provided the passersby can read them. Any community with significant numbers of residents whose first language is not English should require signs in alternate languages, or at least non-English instructions on how to find additional information in other languages.

The limitations of publishing an ad in a newspaper of record are multiple. Ads of this type are likely to be seen by a group similar in age and background to the property owners who received notice. It is not likely to be seen by younger residents who rely on electronic media for news and information, and almost guaranteed not to reach anyone in the community whose first language is not English.

Local governments have access to numerous means of communication that can more readily reach a diverse audience: their city or county website, social media accounts, and electronic notification by email or text notices. Many communities are already making use of these tools, but relatively few have written them into zoning regulations or put them on a par with required mailings or newspaper ads.

The amount of time that notices are required before the public hearing introduces another form or potential bias. The shorter the notice given, the less likely those with children or other dependents to care for, those working multiple jobs, and those with fixed work schedules will be able to participate, and those individuals often include a disproportionate number of historically disadvantaged and vulnerable persons.

- Zoning Notification Policy 1. Review, update, and expand traditional notification procedures. Expand the range of acceptable venues where notice required to be published will reach a wider range of recipients. Send mailed notice to tenants as well as property owners. If the neighborhood where the property is located has significant numbers of non-English speakers, send the notification in multiple languages, or at least indicate how non-English speakers can follow up to learn more. Expand posted notice requirements to apply to more application types, possibly even those that do not require a public hearing. Be sure each type of notice is translated into languages commonly spoken in the neighborhood where the property is located, and that notice is provided in a form that is accessible to those with visual impairment.

- Zoning Notification Policy 2. Formalize and expand requirements to use newer means of notification. To ensure that historically disadvantaged and vulnerable communities are notified, identify interested community members and groups (housing authorities, tenants unions, community activist groups) and maintain updated lists of their contact information. Use websites, social media, text messages, or other electronic means to provide additional notice. Every application should be available for review on the city or county website, even for administrative decisions that do not require a public hearing. When a public hearing will be held, the site should include a way for the public to submit project-related comments rather than requiring them to write a letter or draft an email. Social media should be used provide notice about project applications, and to publicize upcoming public hearings. While not everyone can receive electronic notices, it is a valuable means of additional notice for many and should become a mandatory way to contact neighborhood associations and interest groups. Most communities publish electronic Board and Council agendas, and these calendars should be easy to find, and accessible by links from related pages.

D. Conducting the Public Hearing

As noted above, requiring a public hearing introduces a predictable source of bias into zoning administration. While most people care about their neighborhoods, some have a greater understanding of zoning laws and regulations, how to engage with their local government, and how to express themselves in ways that can influence zoning decisions. Historically disadvantaged and vulnerable communities are often less able than others to engage effectively in public hearings. For this and other reasons, many newer zoning ordinances reduce the number of decisions that require a public hearing and instead focus on extensive, representative public engagement to draft zoning rules and incentives that allow more decisions to be made administratively while avoiding negative impacts on these communities.

When public hearings are required, they should be conducted with as few barriers to participation as possible. Limiting public comment to a fixed time of day (particularly during working hours) and at a fixed location automatically disadvantages those who have work or family obligations at that time or lack the mobility to attend. Fortunately, many communities are offering expanded opportunities for virtual engagement in public hearings. Others are requiring planning staff to record staff reports a week or more in advance of the hearing, making it available through the city or county website, and offering the ability to write or record comments that are then replayed and made a part of the record during the public hearing itself. However, there is still a serious "digital divide" in most communities, as well as a language divide, and those who do not have high-speed internet access from home or a working understanding of English are the same groups that have typically been disenfranchised by traditional methods of participation.

- Public Hearing Policy 1. Require public hearings when there is a genuine need to use discretion in applying zoning criteria and standards to the facts of a specific proposal and property. To the greatest degree possible, draft objective standards and criteria that effectively avoid unintended negative impacts on historically disadvantaged and vulnerable individuals and neighborhoods, and allow those decisions to be made administratively.

- Public Hearing Policy 2. Maximize the ways in which individuals can participate in public hearings, and avoid limiting engagement to a specific time and place. Allowing public comment for a period before the hearing itself, and allowing virtual participation, can significantly increase participation from historically disadvantaged and vulnerable communities.
- Public Hearing Policy 3. Bridge the digital, language, and ability divides. After expanding public notice as discussed in Section 4.4, provide ways for public comments to be received through verbal conversations with staff or in writing. Make materials related to the hearing available in commonly spoken languages other than English, and in a format accessible to those experiencing visual impairment. Provide interpretation and translation services for those languages commonly spoken in the neighborhood where the property is located.

4.4 Enforcing the Zoning Rules

Once the zoning rules and maps are adopted, and decisions about proposed developments are made, decisions must be made about how zoning will be enforced. This is another area where unfairness can enter the process. Because most local governments have limited zoning enforcement staff, they often cannot investigate every alleged zoning violation, and zoning administrators often have significant flexibility to decide which alleged violations are most serious and create the greatest threats to public health, safety, and welfare.

Historically disadvantaged and vulnerable communities are sometimes less familiar with what zoning requires, the need to apply for zoning approvals, or the need to maintain their property in compliance with zoning standards. Because these communities often have lower than average incomes, they may also be less able to respond quickly to bring their properties into compliance with zoning standards.

This is particularly true in the case of "nonconformities," which are buildings and activities that were legally created but have become out of compliance with zoning rules due to a change in those rules or for some other reason that was not caused by the property owner or tenant. Nonconformities are situations that "happen to" property owners and tenants, often without their knowledge or understanding, and where particular flexibility in enforcement while still protecting public health and safety is necessary.

- Zoning Enforcement Policy 1. Ensure that local government discretion to enforce zoning rules is not disproportionately focused on historically disadvantaged and vulnerable neighborhoods, unless the residents of the neighborhood itself have requested higher levels of zoning enforcement. In some cases, disadvantaged neighborhoods request additional enforcement to address negligent landlords, tenants, or poor maintenance that creates public health and safety risks for the surrounding area, Those requests should be respected.
- Zoning Enforcement Policy 2. Adopt a wide range of ways to bring violations into compliance with zoning requirements, and adequate time for people to do that. Keep in mind that residents of historically disadvantaged and vulnerable neighborhoods may not have as much time or money to do so quickly, or the same ability to obtain loans needed to bring the property into compliance.

- Zoning Enforcement Policy 3. When nonconformities are discovered, focus enforcement efforts on those that create significant threats to public health and safety, while allowing wide latitude to continue using buildings and engaging in activities that do not create risks of injury, death, or damage to surrounding properties. Because many historically disadvantaged and vulnerable communities have fewer options about where to live and how to earn a living, the ability to continue to use existing buildings and to continue to operate and support existing businesses that do not create risks to others is particularly important.

5. The Map – Equity in Zoning Maps

Regardless of how good the zoning rules are, and regardless of who wrote them, zoning rules do not exist in a vacuum. They are applied through zoning maps, and those maps can embed and perpetuate disproportionate impacts on historically disadvantaged and vulnerable communities just as effectively as unfair rules and procedures. More specifically, many current zoning maps reflect the damaging overuse of Urban Renewal powers in some neighborhoods, the location of freeways to divide neighborhoods based on race or ethnicity, and initial reliance on "redlining" maps that discouraged investment in Black, Latino, and Asian neighborhoods. More recently, zoning maps have been revised to implement planning for climate resilience, to increase residential densities to promote affordability, and to respond to the removal of outdated freeways, but each of these changes also has the potential to create disproportionate impacts on historically disadvantaged and vulnerable communities. Amending zoning maps to promote social, climate, or economic equity is difficult work, because each action carries with it the likelihood of unintended consequences. This chapter addresses ways to think about and minimize those consequences.

In many cases, a change that could be achieved by changing the zoning map as recommended in this chapter could also be achieved changing the rules that apply in the existing zoning district (as discussed in Chapter 3). For most communities, there is no "right' way. The right way is the one that produces outcomes that are more equitable for these communities, and for which planners can gain the political support necessary to make the change.

Zoning maps can institutionalize inequitable opportunities and outcomes in one of four ways. They can:

- Constrain land supply for needed types of development;
- Concentrate polluting and harmful land uses and facilities in some neighborhoods;
- Limit access to key public services and facilities; and
- Perpetuate separation of populations based on old "redlining" maps.

Each of these sources of inequity are discussed separately below. In many cases, these unfair outcomes could be addressed by changing the zoning rules applicable in different zoning districts (as discussed in Section 3.1), but they can also be addressed by changing the zoning designations applied to different neighborhoods.

5.1 DRAWING AND CHANGING THE AREA-WIDE ZONING MAPS

While community-wide replacements of a zoning map are relatively rare, many communities amend their current zoning maps regularly—sometimes on a monthly or weekly basis. This section addresses all types of zoning map changes—those affecting the entire community, or a large area of the community, as well as those affecting only one or a few properties.

Initiatives to consider community-wide or area-wide changes to the zoning map raise the same kinds of challenges to effective engagement as changes to zoning rules—and Drafting Policies 1, 2, and 3 apply to these types of community-wide or area-wide map changes. Because they affect large numbers of property owners and renters, it is particularly important that consultants, advisory groups, and assigned staff reflect the makeup of the areas to be affected as much as possible. In addition, because historically disadvantaged and vulnerable populations are particularly affected by the impacts of map changes, it is particularly important that the proposed changes be reviewed for potential impacts on affordability, gentrification, and environmental justice.

In almost all revisions of zoning maps, Drafting Policies 1, 2, 3 described in Section 4 (The People) above, also apply. In the context of zoning map actions, those policies are:

- Zoning Map Policy 1. Those recommending changes to the zoning map should reflect the demographic composition of the community, and should include representatives of historically disadvantaged and vulnerable communities.
- Zoning Map Policy 2. Ensure that zoning map revision actions include residential tenants as well as property owners.
- Zoning Map Policy 3. Ensure that there are multiple opportunities for review of potential zoning impacts on historically disadvantaged and vulnerable communities.

5.2 MAKING LAND AVAILABLE FOR NEEDED TYPES OF DEVELOPMENT

Because membership in a historically disadvantaged and vulnerable community tends to be correlated with lower-than-average income, members of these communities may be more likely to live in particular types of housing and to earn their livings in different types of employment. In many communities, they are more likely to live in multi-family apartments, in smaller houses on smaller lots, or a particular configuration of the home, such as a traditional “shotgun” house or mill village. Zoning maps that designate too little land for these types of housing have a very serious disproportionate impact on these communities by driving up the cost of housing.

The same disparity can often be found in the businesses owned and operated by members of historically disadvantaged and vulnerable communities, and the industries, services, and establishments that employ members of these communities. In many communities, these individuals are more likely to work in personal service, food service, hospitality, heavy commercial, construction, or industrial jobs, or rely on home occupations as first or second jobs. Again, zoning maps that make too little land available for these types of needed—and often essential—workplaces tend to make it harder for these individuals to form, grow, or be employed in the work needed to support their households.

While it is important to zone enough land to accommodate each of these activities, it is equally important to ensure that the locations of those lands do not perpetuate segregation

based on race, ethnicity, national origin, or religion. In addition to revising zoning rules to allow these forms and types of housing and workplaces in more zoning districts, these disparities can be addressed by remapping more areas of the community into zoning districts that allow them.

- Zoning Map Policy 4. Analyze local conditions to determine development types that correlate with homes, businesses, and services needed by and affordable to historically disadvantaged and vulnerable communities. Apply zoning districts that make adequate amounts of land available in locations that do not perpetuate historic patterns of segregation.
- Zoning Map Policy 5. Where rezoning occurs as a part of development application, and the development could be built under multiple zoning districts, designate the one that permits the greater variety of alternative development forms that could provide housing, employment, and service opportunities for disadvantaged and communities. Avoiding over-restrictive or highly detailed zoning regulations allows a wider range of property owners and investors to develop in ways that reflect the existing fabric and scale of the community.

5.3 Removing Disparities in Neighborhood Health Risk

A second way in which zoning maps can create or perpetuate disproportionate impacts on Black, Latino, and other communities of color is by concentrating polluting or harmful land uses, or the forms of structures that can accommodate them, in or close to the neighborhoods where these populations live. The environmental justice movement and stronger environmental regulations are two forces already working to reduce these inequities. Because of their potential impacts on health and property values, these types of uses are sometimes referred to as Locally Unwanted Land Uses (LULUs). There is dramatic evidence that individuals exposed to polluting industries, highways, or other activities for extended periods of time have significantly higher health risks and shorter life expectancies, and pre-existing health conditions are made worse through that exposure.

Fixing this situation is more difficult than it sounds, however, for a variety of reasons. Some types of facilities logically need to be located in particular locations. Water treatment plants generally need to be near a river, and trucking terminals often pollute the community less when located near the highways used by the truckers.

In addition, the relocation of LULUs leads to re-sorting of the population. Those with more resources tend to move away from unpopular facilities and developments, which can lower land values and make housing more affordable to lower-income populations, which then move in. Since historically disadvantaged and vulnerable communities tend to have lower-than-average incomes, the proximity of these households to LULUs may tend to re-establish itself over time. The lower land value itself can become a seemingly rational reason additional LULUs would be built nearby, further concentrating the effect.

Finally, some LULUs are important sources of employment to individuals who do not have many employment options and making it difficult for them to continue in operation in their current locations can result in loss of jobs and livelihoods. However, the fact that zoning cannot prevent market responses to zoning changes does not imply that zoning should reinforce existing patterns of exposure to harmful environmental forces—and it clearly should not.

- Zoning Map Policy 6. Revise zoning maps to avoid the future location of polluting or environmentally harmful facilities and other Locally Unwanted Land Uses in neighborhoods that already contain a disproportionate share of those uses and facilities. Ensure that zoning maps allow practical locations for these and future similar uses in other areas of the community where they will not exacerbate health impacts on populations that have already been exposed to these and similar negative health impacts. This analysis should consider how long existing nonconforming uses are likely to operate and how that affects the concentration of uses in different neighborhoods.
- Zoning Map Policy 7. Where zoning districts include protections from potential negative effects of development in adjacent districts, revise zoning maps to avoid shifting those potential negative impacts onto historically disadvantaged and vulnerable communities. Ensure that zoning districts containing significant populations of color include the same protections from the impacts of nearby development as those containing whiter and more wealthy citizens.

5.4 Removing Disparities in Access to Key Services and Facilities

A third way in which zoning maps can create or perpetuate disproportionate negative impacts on historically disadvantaged and vulnerable communities is by making it difficult for those individuals to access open spaces or public or private health, educational, religious, or civic facilities or services. While needs differ for each neighborhood, these often include childcare centers, health clinics, hospitals, mental health facilities, good schools, places of worship, recreation centers, and sources of healthy food. In many cases, these types of facilities are built and operated by the local government, and many local governments have programs to locate new facilities where they are currently in short supply. In other cases these types of needed facilities are built and/or operated by private companies or non-profit organizations, and the local government has little control over their strategies to provide and expand (or contract) their services. Zoning cannot force any of these service providers to budget more money to close these gaps more quickly, but it can ensure that they are permitted and easy to develop where they are needed.

One way to address the shortage of needed facilities in these neighborhoods is to revise the zoning rules to allow or incentivize them in high need. However, where cities, townships, or counties require approval of a public facility base or overlay zoning district to locate new facilities, the answer may include revised zoning maps.

- Zoning Map Policy 8. Revise zoning maps to ensure that needed health, educational, religious, and civic facilities or services are permitted and simple to establish in or near all residential areas of the city, including historically disadvantaged and vulnerable neighborhoods. In many cases this simply involves removing prohibitions on specific uses based on outdated stereotypes about the scale, impacts, or clientele that may need these services.

5.5 Removing Historic Segregation through Mapping

A fourth way in which zoning maps create inequity is by perpetuating zoning boundaries that were initially designed to separate historically disadvantaged and vulnerable communities from other neighborhoods. In recent years, there has been increasing attention on the origins of the zoning maps used in American communities. More specifically, the attention has focused on the fact that traditional zoning emerged after the U.S. Supreme Court

invalidated overtly racial zoning in *Buchanan v. Warley*, and appears to have been aimed at least in part on the same goal of separating different segments of the population from each. As discussed in Section 1.2.E, there is a strong correlation between historically disadvantaged and vulnerable populations and lower-than-average incomes, so zoning that separates people based on income levels has the indirect effect of also separating them based on race, ethnicity, gender, and ability.

Increasing attention has also been focused on the federal mortgage insurance system, which historically often led lenders to "redline" neighborhoods with high levels of BIPOC households. Many current zoning maps look surprisingly like those redlining maps. Together, these discussions have led to a stronger understanding of how today's zoning maps may have institutionalized dividing lines based largely on race and ethnicity, even if historically disadvantaged and vulnerable persons are no longer prohibited from buying property or obtaining a loan on either side of those lines.

In some cases, the zoning boundaries that formalized these separations were reinforced by public investments, like the location of a highway, park, or open space to create a physical and psychological wall between different populations, and there have been calls for local governments to remove those highways and barriers to "re-knit" the divided urban fabric. While zoning generally cannot force a local government to spend money to remove those barriers, it has a lot to do with whether the zoning maps reinforce those barriers, as well as what happens when and if the barrier comes down.

One answer to redline-based zoning maps is simply to remap both divided neighborhoods to the same zoning district, thereby equalizing the opportunities for investment and development on both sides of the line. But that solution has potentially serious consequences. The effect of redline-based zoning maps was often to decrease the value of land in the historically disadvantaged and vulnerable neighborhood and increase it in the neighborhood next door or across the highway. Adopting the same zoning district in both areas may well lead to speculative investment in the disadvantaged neighborhood. That new investment may well come from investors outside the neighborhood and could lead to gentrification and displacement of the existing residents. If this happens, the result of "equalizing" the zoning map may mean that few existing residents can obtain the loans needed to redevelop their properties and that living conditions do not improve for those living in the formerly redlined neighborhood. Map changes may be more effective if paired with sustained technical and financial assistance to the residents of formerly redlined neighborhoods, so that the residents can remain in their neighborhoods of choice and become their own advocates to remove physical and regulatory barriers.

- Zoning Map Policy 9. Analyze zoning map boundaries based on discriminatory lending policies or the construction of divisive public works, and revise maps to remove those historical boundaries if doing so would increase the economic health and welfare of the historically disadvantaged and vulnerable community. Do not remove those zoning boundaries when they are desired by the existing residents and businesses to discourage speculative investment, gentrification, or displacement of its residents. Removal of redline-based barriers should only be done after close consultation with the affected community to balance increased economic opportunity with the preservation of desired cultural or community character.

- Zoning Map Policy 10. Where zoning map changes have potential impacts on historically disadvantaged and vulnerable neighborhoods, consider the use of non-zoning agreements and commitments to offset those impacts or offer compensating benefits to the neighborhood. This may involve the creation of a revolving loan fund to expand the resources available to current residents, or other agreements requiring that developers share the new opportunities created by remapping by employing or partnering with existing residents, property owners, and business owners in the neighborhood. It could also include granting a "right of return" allowing existing residents displaced by redevelopment to own or rent housing or business locations within the new development. It is important that efforts to "un-redline" zoning maps anticipate these types of impacts on the existing neighborhoods and include tools to mitigate their impacts.

6. Related Policy Guides

Aging in Community (2014)
Community Residences (1997)
Environment: Waste Management (2002)
Factory Built Housing (2001)
Food Planning (2007)
Hazard Mitigation (2020)
Healthy Communities (2017)
Historical and Cultural Resources (1997)
Homelessness (2003)
Housing (2019)
Planning for Equity (2019)
Provision of Child Care (1997)

7. References and Further Reading

[In process]

California Housing Legislation

Governor Newson, California to Build More Housing Faster (Sep 28, 2022)
https://www.gov.ca.gov/2022/09/28/california-to-build-more-housing-faster/

AB 2011 The Affordable Housing and High Road Jobs Act
(Sep 28, 2022)
https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB2011
https://cayimby.org/ab-2011/
https://urbanfootprint.com/blog/policy/ab2011-analysis/

AB 2221 Accessory dwelling units
(Sep 28, 2022)
https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB2221
https://cayimby.org/ab-2221/

AB-721 Covenants and restrictions: affordable housing
(Sep 28, 2022)
https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB721

AB 602 Development fees: impact fee nexus study
(Sep 28, 2021)
https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB602

SB 886 California Environmental Quality Act: exemption: public universities: university housing development projects
(Sep 28, 2022)
https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB886
https://cayimby.org/sb-886/

SB 478 Planning and Zoning Law: housing development projects
(Sep 28, 2021)
https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB478

SB 9 Housing development: approvals
(Sep 16, 2021)
https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB9
https://cayimby.org/sb-9/

SB10 Planning and zoning: housing development: density
(Sep 16, 2021)
https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220SB10

Dwight Merriam
2022-11-27

Uniform Law Commission

Restrictive Covenants in Deeds Act
[Proposed new name: Removal of Prohibited Restrictions in Deeds Act]

https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=6d6633ef-e04b-a7fc-d341-a8980fb523c0&forceDialog=0

This committee will draft uniform or model state legislation enabling an owner of land for which a discriminatory restrictive covenant appears in the chain of title to have that covenant released or expunged from the records. The committee is charged with establishing a general policy approach, subject to review of the Executive Committee, before it begins to draft.

Dwight Merriam
ABA Section Advisor to the Committee
2022-11-27

The Urban Lawyer

The National Journal on
State and Local Government Law

Affordable Housing: Three Roadblocks to Regulatory Reform

Dwight Merriam*

Much has been written and debated about how we might provide more affordable housing to not only meet the essential need for shelter, but also to advance diversity, equity, and inclusion across the board. Fair housing and equal opportunity are what we all want in our ideal of a just society.

Affirmative action in promoting affordability requires orchestrating a myriad of programs, initiatives, and techniques. Some attention, though, might be paid to what is holding us back, what unnecessarily blocks our way, and what keeps us from getting all that we might out of our best efforts.

Three of those roadblocks deserve the closest attention and concerted action and must be knocked down, once and for all, to get

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This article first took shape in the Fall of 2021 as part of a panel presentation for the annual meeting the American College of Real Estate Lawyers. In December 2021, the issues were discussed as part of a panel at the 20th Annual Alfred B. DelBello Land Use and Sustainable Development Conference sponsored by the Land Use Law Center at Elisabeth Haub School of Law at Pace University Center for Continuing Legal Education. Prof. John R. Nolon, Distinguished Professor of Law Emeritus and Counsel and Faculty Liaison to the Land Use Law Center at Pace University's Elisabeth Haub School of Law, was especially helpful in reviewing the section on Home Rule. Later, the *Journal of Comparative Urban Law and Policy* chose to publish a version, still a work in progress, as it must necessarily remain as we learn more daily, as part of its Festschrift volume in honor of Prof. Arthur Christian Nelson.

the housing that we so desperately need: the myth of Home Rule, limitations of the Fair Housing Act, and the pervasive use of private covenants and restrictions.

1. The Home Rule Myth

To understand the myth of Home Rule, one must start with the basics. The authority to plan and regulate land use is fundamentally the exercise of the police power to protect and promote the public's health, safety, and general welfare. Chief Justice Marshall described the police power as "that immense mass of legislation, which embraces everything within the territory of a State, not surrendered to the general government."[1]

The Ninth and Tenth Amendments of the U.S. Constitution reserve to the states all those powers not previously delegated or prohibited to the states and the people. That gives the states the individual and exclusive responsibility for granting to local governments the authority to regulate, including regulations promoting affordable housing. Local land use regulation is an exercise of the police power.

Understanding the extent of any form of the grant of powers to local government requires a refresher course in Home Rule, the Dillon Rule, and the Cooley Doctrine. Anyone who wants to help remove the roadblocks to affordable housing needs a grasp of these concepts.

Home Rule

Most simply stated, Home Rule is the authority of local governments, through their charters, if they have one, and through their local ordinances, to exercise their governmental power independently, within the terms of the state constitutional requirements and statutory provisions. Home Rule fundamentally defines the degree to which those state police powers have been delegated to local governments exclusively.

Home Rule might be viewed as a long continuum, extending from the extreme of the Dillon Rule for strong state legislative control over local governance at one end, to the other extreme of the Cooley Doctrine of unfettered, independent local authority at the other

1. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 202 (1824).

end. Along this continuum, many states fall in a great, ambiguous, and increasingly ill-defined middle ground.

Spoiler alert. Herein lies the fundamental problem of the Home Rule myth: in the vast majority of instances regarding local land use regulation, there has been no immutable delegation of exclusive authority to regulate land use at the local level, yet those who oppose affordable housing continue to invoke Home Rule as a shield to any state law changes that might override what has been the exclusive province of local governments. This has resulted in the segregative effects that drive advocates to seek social, economic, and racial equity in our land use system.

The Dillon Rule

In *Clinton v. Cedar Rapids & Missouri Railroad Co.*,[2] Iowa Supreme Court Justice John F. Dillon famously saw local governments as creatures of the state, subject to the limitations of the grant of authority to them by the state. The case was about the right of a railroad company to use the city streets for their trackage. The railroad company had its own authority from the state to expand trackage. The city objected to the railroad using the dedicated city streets and challenged whether the railroad had the right to use them under the law and, if it did, whether the city should be compensated for what it alleged was a taking of the city's property interest. Of course, the railroad argued that it had been given all the authority it needed directly by the state.

The court held for the railroad, and in doing so Judge Dillon created the rule that came to bear his name:

> The true view is this: Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so may it destroy. . . . [T]he legislature might, by a single act . . . sweep from existence all of the municipal corporations in the State, and the corporation could not prevent it. We know of no limitation on this right so far as the corporations themselves are concerned. They are, so to phrase it, the mere tenants at will of the legislature.[3]

John R. Nolon, Distinguished Professor of Law Emeritus and Counsel to the Land Use Law Center at the Elisabeth Haub School

2. Clinton v. Cedar Rapids & Mo. R.R. Co., 24 Iowa 455 (1868).
3. *Id.* at 477–78.

of Law at Pace University, has recently written a definitive analysis of what he sees as the end of Dillon's Rule.[4] In his analysis, Prof. Nolon points to an important nuance in Dillon's Rule, namely that it has two parts. The first was that created in the *Clinton* case, which Professor Nolon describes as the "servient entity rule," whereby municipalities are mere "tenants at will," whose powers may be taken back or changed at the will of the state legislature.

The second part of Dillon's Rule is found in *Merriam v. Moody's Executors*,[5] decided a month after *Clinton*, in which the court established a rule of construction:

> [I]t must be taken for settled law, that a municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily implied or necessarily incident to the powers expressly granted; third, those absolutely essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable; fourth, any fair doubt as to the existence of a power is resolved by the courts against the corporation—against the existence of the power.[6]

Most people speak of the Dillon Rule as a monolithic rule and not one of two parts. A consequence of the multi-factor rule of construction from *Merriam v. Moody's Executors* is that the Dillon Rule states apply the Dillon Rule in varying fashion. In some states, eight of them, the Dillon Rule is limited, such as in Indiana where it applies only to townships. Elsewhere, in thirty-two states, Home Rule is provided for in the state's constitution with twenty-one of those states recognizing it as self-executing and eleven requiring enabling legislation. Finally, eight other states enable Home Rule by statute, not by their state constitutions, and limit to varying degrees what local governments may be able to use Home Rule powers. Figures 1 and 2 present Dillon Rule and Home Rule states, respectively. Another useful resource with graphics and lists of states is available on the American City County Exchange website.[7]

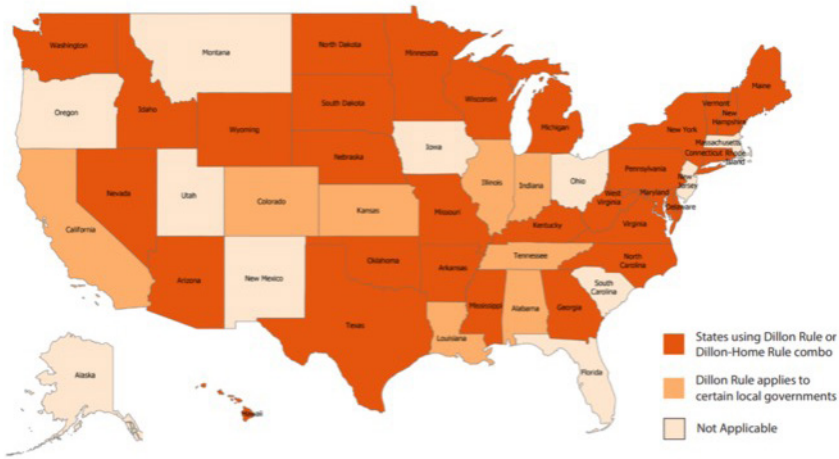
4. John R. Nolon, Death of Dillon's Rule: Local Autonomy to Control Land Use (Oct. 11, 2020), https://ssrn.com/abstract=3709379 or http://dx.doi.org/10.2139/ssrn.3709379.

5. Merriam v. Moody's Executors, 25 Iowa 163 (1868).

6. *Id.* at 170.

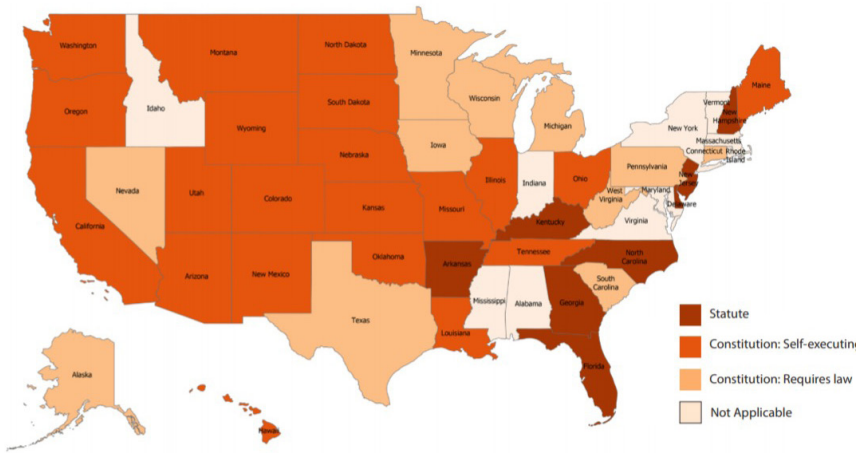
7. Hon. John D. Russell & Aaron Bostrom, *White Paper: Federalism, Dillon Rule, and Home Rule*, AM. CITY CNTY. EXCH. (Jan. 2016), https://alec.org/wp-content/uploads/2016/01/2016-ACCE-White-Paper-Dillon-House-Rule-Final.pdf.

Figure 1. Dillon Rule and Dillon-Home Rule States



Source: Travis Moore, *Dillon Rule and Home Rule: Principles of Local Governance*, Neb. Legis. Rsch. Office (Feb. 2020).[8]

Figure 2. Source of Home Rule Authority



Source: Travis Moore, *Dillon Rule and Home Rule: Principles of Local Governance*, Neb. Legis. Rsch. Office (Feb. 2020).[9]

8. Travis Moore, Dillon Rule and Home Rule: Principles of Local Governance 2 (2020), https://nebraskalegislature.gov/pdf/reports/research/snapshot_localgov_2020.pdf.

9. *Id.*

The U.S. Supreme Court took up the matter in 1907 in *Hunter v. Pittsburgh*.[10] There, the Court made clear that local governments were very much the subordinates of the state:

> Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the state within the meaning of the Federal Constitution. The state, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may, by such changes, suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right, by contract or otherwise, in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the state, and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it.[11]

The Cooley Doctrine

Just three years after *Clinton v. Cedar Rapids & Missouri Railroad Co.*, another state's highest court handed down a decision in which it was argued that large numbers of local governments had essentially a vested right to Home Rule. Michigan Supreme Court Justice Thomas M. Cooley wrote a concurring opinion in 1871, in *People ex rel. Le Roy v. Hurlbut*,[12] arguing that, because local governments were in existence before the states were organized, they have powers of their own, independent of the states, and that those powers were not abridged when the union was formed:

10. Hunter v. Pittsburgh, 207 U.S. 161 (1907).
11. *Id.* at 178–79.
12. People *ex rel.* Le Roy v. Hurlbut, 24 Mich. 44 (1871).

> But when we recur to the history of the country, and consider the nature of our institutions, and of the government provided for by this constitution, the vital importance which in all the states has so long been attached to local municipal governments by the people of such localities, and their rights of self-government, as well as the general sentiment of hostility to everything in the nature of control by a distant central power in the mere administration of such local affairs, and ask ourselves the question, whether it was probably the intention of the convention in framing, or the people in adopting, the constitution, to vest in the legislature the appointment of all local officers, or to authorize them to vest it elsewhere than in some of the authorities of such municipalities, and to be exercised without the consent, and even in defiance of the wishes of the proper officers who would be accountable rather to the central power than to the people over whose interests they are to preside,—thus depriving the people of such localities of the most essential benefits of self-government enjoyed by other political divisions of the state—when we take all these matters into consideration, the conclusion becomes very strong that nothing of this kind could have been intended by the provision. And this conviction becomes stronger when we consider the fact that this constitution went far in advance of the old one, in giving power to the people which had formerly been exercised by the executive, and in vesting, or authorizing the legislature to vest, in municipal organizations a further power of local legislation than had before been given to them. We cannot, therefore, suppose it was intended to deprive cities and villages of the like benefit of the principle of local self-government enjoyed by other political divisions of the state.[13]

The Unsupportable Invocation of Home Rule to Stop Affordable Housing

So, why does all this somewhat arcane doctrinal history of local government law matter in the context of trying to promote affordable housing? First, those who are opposed to state and substate regional approaches that potentially override local zoning are quick to throw up the shield of Home Rule. Sometimes, it is just that locals do not want to give up local control. Sometimes, it is more sinister, as opponents are seeking to continue exclusionary land use practices.

Second, whether Prof. Nolon is right or not in believing that the Dillon Rule has faded, it is important to recognize that in those states that have a constitutional provision, the Home Rule powers may be implemented, and limited, by statute. Connecticut is one of those states. The Connecticut Constitution provides that "[t]he general assembly shall by general law delegate such legislative authority as from time to time it deems appropriate to towns, cities and

13. *Id.* at 66–67; *see also* Brett A. Stroud, Preserving Home Rule: The Text, Purpose, and Political Theory of California's Municipal Affairs Clause, 41 Pepp. L. Rev. 587 (2013), https://digitalcommons.pepperdine.edu/plr/vol41/iss3/3.

boroughs relative to the powers, organization, and form of government of such political subdivisions."[14]

Opponents of the state taking back a bit of its delegated authority over certain aspects of land use regulation that impede the development of affordable housing like to talk about Home Rule. For example, consider this from Connecticut State Senator Tony Hwang in opposition to recent affordable housing initiatives proposed for the state's enabling legislation, as posted on his official website:

> Senator Hwang said, "I am deeply concerned about how this bill has been misleadingly purported to 'empower' local zoning and land use rules. In reality, this bill does not offer data proof toward improving social equity, segregation, or even affect the affordability of living in Connecticut, all concepts which I strongly believe in and support. If the legislature truly wanted to implement visionary solutions in affordable housing regulations, then we should re-explore CT General Statute section 8-30g which has not been examined since 1989. The partisan Democratic vote further raises the alarming fear of the camel's nose under the tent regarding expansive zoning, land use legislative mandates evident by the multiple overreaching bills passed out of committees throughout the CT General Assembly this session."
>
> During the discussion, Senator Hwang offered two amendments, both of which failed along a party line vote. One was to prevent a one-size fits all mandate, but instead preserve "Home Rule" and "local control" on not only land use and zoning but also on education, local finances and taxation, and environmental protection. The second proposed amendment hoped to provide a better balance between the represented stakeholders on the newly created working group ensuring that local experts and members of all political backgrounds had a voice in the future of zoning and land use in the state.[15]

The former mayor of Norwalk, Connecticut, a proponent of affordable housing, described the problem in this way:

> Our Home Rule law pretty much allows towns to "maintain their character" by strictly controlling multifamily housing if they so desire. Most of the rich ones do so. This is one reason our cherished state is so "leafy." People who cannot afford to own property with trees are invited to live somewhere else. Where? Don't ask.[16]

14. CONN. CONST. ART. 10, § 1.

15. Sen. Hwang Offers Amendments and Passionate Senate Debate to Preserve Local Zoning, Land Use and Affordable Housing "Home Rule" Decision-Making, CONN. SENATE REPUBLICANS. COMM. (May 28, 2021), https://ctsenaterepublicans.com/2021/05/sen-hwang-offers-amendments-and-passionate-senate-debate-to-preserve-local-zoning-land-use-and-affordable-housing-home-rule-decision-making.

16. Bill Collins, *Another Scheme for Affordable Housing*, CT. MIRROR (Jan. 10, 2020), https://ctmirror.org/category/ct-viewpoints/another-scheme-for-affordable-housing.

One proposal to promote affordable housing in Connecticut was to eliminate "character of the district" as a proper basis for zoning under the state's enabling statute. "Character of the district" has been a rationale to support exclusionary zoning. Typical of the opposition to this reform, a resident of Fairfield, Connecticut, with an average home value of $662,000[17] and an African American population of 2.1 percent, had this response:[18]

> Today, considering "character of the district" in land use decisions continues to be fundamental as towns modify their plans and zoning regulations. By eliminating this language, our zoning boards will no longer be allowed to consider the existing built environment and the "character of the district" when they render decisions. This won't be good for our communities.[19]

The state legislature, in the end, did adopt the amendment.

Professor David Schleicher of Yale Law School has written a scathing critique of the National League of Cities' proposed new Model Constitutional Home Rule Article, which would strengthen the ability of local governments to fend off efforts by the state to create affordable housing.[20] In it, he lays bare the ways in which the Home Rule myth has been used to perpetuate exclusion:

> Through the 1970s or 1980s, the central political challenge to zoning was that it was economically exclusive at the level of the individual town. Rich suburbs used zoning to reduce construction and to ensure high per capita property values, keeping outsiders from accessing the high-quality services paid for with taxes on those high per capita property values. There were well-known legal and political challenges to exclusionary zoning in the suburbs, from the Mt. Laurel cases to the Fair Housing Act's requirement that federal agencies administer programs in order to "affirmatively further fair housing." Well-known legal scholar Charles Haar famously argued that there should be a "constitutional right to live in the suburbs."[21]
>
> But no one thought zoning had effects at the regional level. Big cities, a few progrowth suburbs and exurban areas allowed for enough construction

17. *Fairfield Home Values*, Zillow (May 31, 2022), https://www.zillow.com/fairfield-ct/home-values.

18. U.S. Census Bureau, Quick Facts: Fairfield town, Fairfield County, Connecticut, https://www.census.gov/quickfacts/fairfieldtownfairfieldcountyconnecticut (last visited June 12, 2022).

19. Alexis Harrison, *Zoning Reform Must Consider the Character of Each Town*, Ct. Mirror (Dec. 17, 2020), https://ctmirror.org/category/ct-viewpoints/zoning-reform-must-consider-the-character-of-each-town.

20. David Schleicher, *Constitutional Law for NIMBYs: A Review of "Principles of Home Rule for the 21st Century" by the National League of Cities*, 81 Ohio St. L.J. 883 (2020).

21. *Id.* at 900.

> of new housing such that people could be housed and access regional job markets.
>
> But, starting in the 1970s and 1980s, this changed. As demand to live in them increased, big cities in our richest and most innovative metropolitan areas became less hospitable to growth, and sprawl hit some natural limits (and the few pro-growth suburbs changed their tune). Each town and city excluded new development and, in so doing, created limits on growth at the metropolitan level. When paired with strong demand, zoning restrictions started to drive up prices at the regional level in places like San Francisco and New York. This process has even stalled national economic convergence. In the hundred or so years before the 1980s, the poorest and richest states were getting closer together in per capita economic performance, as capital flowed to poor states and workers moved to richer ones. But, among strictly zoned states, this process slowed in the 1980s and has now stopped completely.[22]

To illustrate how bad this can get, here is a resolution by a small-town land use agency, with final legislative authority as to zoning, holding up Home Rule as the rampart that should stop the state from messing with their local control:

> **A RESOLUTION IN SUPPORT OF "HOME RULE" IN MUNICIPAL ZONING DECISION MAKING**
>
> **WHEREAS** Connecticut's towns and cities successfully use local zoning and planning processes to balance private property rights, the community's interests, demands on infrastructure, housing needs, and economic growth; and
>
> **WHEREAS** local control and decision making empowers the residents and taxpayers of each town and city to carefully tailor zoning policies that reflect its unique geography, economy, and housing market; and
>
> **WHEREAS** localized decision making ensures the greatest level of accountability while allowing affected community members the greatest level of input and the platform through a public hearing to provide specific, relevant information on potential impacts that only they would have knowledge of; and
>
> **WHEREAS** local control and local input enable neighbors and the local community to provide beneficial suggestions, identify errors and maximize community buy-in on zoning proposals; and
>
> **WHEREAS** proposals have been introduced in the General Assembly to strip local planning and zoning processes from towns and cities; and
>
> **WHEREAS** proposals have been introduced in the General Assembly to allow BY RIGHT market value multi-family development that will not generate any new affordable housing units; and

22. *Id.* (internal citations omitted).

> **WHEREAS** proposals have been introduced in the General Assembly to allow outside Housing Authorities within 15 miles radius to develop affordable housing projects within our town; and
>
> **WHEREAS** BY RIGHT multi-family development can lead to exponential market value overbuilding and can cause adverse impacts to town infrastructure; and
>
> **WHEREAS** BY RIGHT development gives outsized rights to builders over all other property owners and prevents local Planning and Zoning Commissions from identifying the potential impacts of their project and imposing conditions upon a developer to address those direct impacts; and
>
> **WHEREAS**, eliminating public hearings and community input on zoning matters would have unintended consequences such as increased infrastructure costs, increased local property taxes, and reduced home and business values which will be borne by the town residents; and
>
> **WHEREAS** each town and city already have the choice to modify or abolish its zoning ordinances if the elected town or city government decides it best serves the community's interests; and
>
> **NOW BE IT RESOLVED** the Planning and Zoning Commission of the Town of Winchester opposes State Mandated one size fits all Zoning Legislation and the ability of any outside housing authority to have jurisdiction on our town's Affordable Housing plan and any similar legislation that would further overrule, remove, or diminish local control and decision making related to planning and zoning or affordable housing from the Town of Winchester; and
>
> **BE IT FURTHER RESOLVED** that a copy of this resolution shall be sent to all State Representatives and State Senators representing this town, to all members of the State Legislature's Planning and Development, Finance, and Housing Committees, and to all legislators sponsoring bills that remove local control of planning and zoning and affordable housing.[23]

What to Do?

The doctrinal chaos of Home Rule, grounded along that continuum of the Dillon Rule and the Cooley Doctrine, and rendered ambiguous in many places by the common law interpreting state constitutions and statutes, demands that states reform Home Rule, at least as to local land use regulation, especially for affordable housing. The plain fact is that many state and local governments simply do not know

23. Winchester, Conn., Planning and Zoning Commission Ordinance (Mar. 8, 2021). This resolution was unanimously approved at the Town of Winchester Planning and Zoning Commission on March 8, 2021, regular meeting by George Closson, Craig Sanden, Jerry Martinez, Peter Marchand, and Willard Platt.

the limits of their authority, and, consequently, almost comically, Home Rule is held up as both a sword and a shield. Mostly, when locals invoke Home Rule, they do so with little or no basis in the law. And the states are wary about how far they can go. When they do attempt to promote affordable housing, they may lose, as Ohio did in *City of Canton v. State*[24] where the court rejected the state's attempt to promote affordable housing with mobile, manufactured housing because it could not meet the four-part test as a general law:

> To constitute a general law for purposes of home-rule analysis, a statute must (1) be part of a statewide and comprehensive legislative enactment; (2) apply to all parts of the state alike and operate uniformly throughout the state; (3) set forth police, sanitary, or similar regulations, rather than purport only to grant or limit legislative power of a municipal corporation to set forth police, sanitary, or similar regulations; and (4) prescribe a rule of conduct upon citizens generally.

Perhaps of greater concern is, as Prof. Schleicher warns, the potential for backpedaling from where we are to a more *Cooley*-esque position where local governments are given greater, unbridled authority at the very time the need for affordable housing dictates statewide and substate regional mandates.

Reforms under a concept of Home Rule making clear that the state may take back some of its authority might include prohibiting certain local regulations that hinder affordable housing development. California did that with accessory dwelling units, essentially requiring local governments to allow them.

In 2021, the Governor of California signed into law Senate Bill 9 that, among other things, allows lot splits in many circumstances to create opportunities for ownership and the building of generational wealth.[25] In the late 1970s, the Connecticut state legislature did something similar, but more targeted, with an amendment to the enabling statute that took away the right of local governments to zone out certain types of group homes of six or fewer persons when the state legislators found the exclusion intolerable:

> Regulation of community residences for persons with intellectual disability, child-care residential facilities, community residences for persons receiving mental health or addiction services and hospice facilities. (a) No zoning

24. City of Canton v. State, 766 N.E.2d 963 (Ohio 2002).

25. *SB-9 Housing Development: Approvals Bill Information*, LEGIS. COUNSEL'S DIG. (Sept. 17, 2021), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB9.

> regulation shall treat the following in a manner different from any single family residence: (1) Any community residence that houses six or fewer persons with intellectual disability and necessary staff persons and that is licensed under the provisions of section 17a-227.[26]

Call it "creeping incrementalism," if you will, but creeping may be better than standing still.

Reform might also be had through education, helping people understand the extent of the problem through analysis, outreach, and graphics. Desegregate Connecticut, a nonprofit advocacy organization that successfully promoted legislative reforms during the 2021 state legislative session in Connecticut, has done a remarkable job in identifying the extensive exclusionary zoning in the state. It is a model for what others can do.[27]

Figures 3 and 4 are two illustrations from the town where I live, the first with land zoned for single-family use (everything but the light gray and green areas, which are public lands) and the second with the areas zoned for four-family and more multi-family uses (only the two dark fuchsia areas). The implications of this type of mapping are easy to see as it illustrates the epitome of sprawl, with one-acre lots predominating the landscape of a town that has extensive public water and sewer service and is just ten miles from Hartford, the fourth most populous city in the state and its capital.

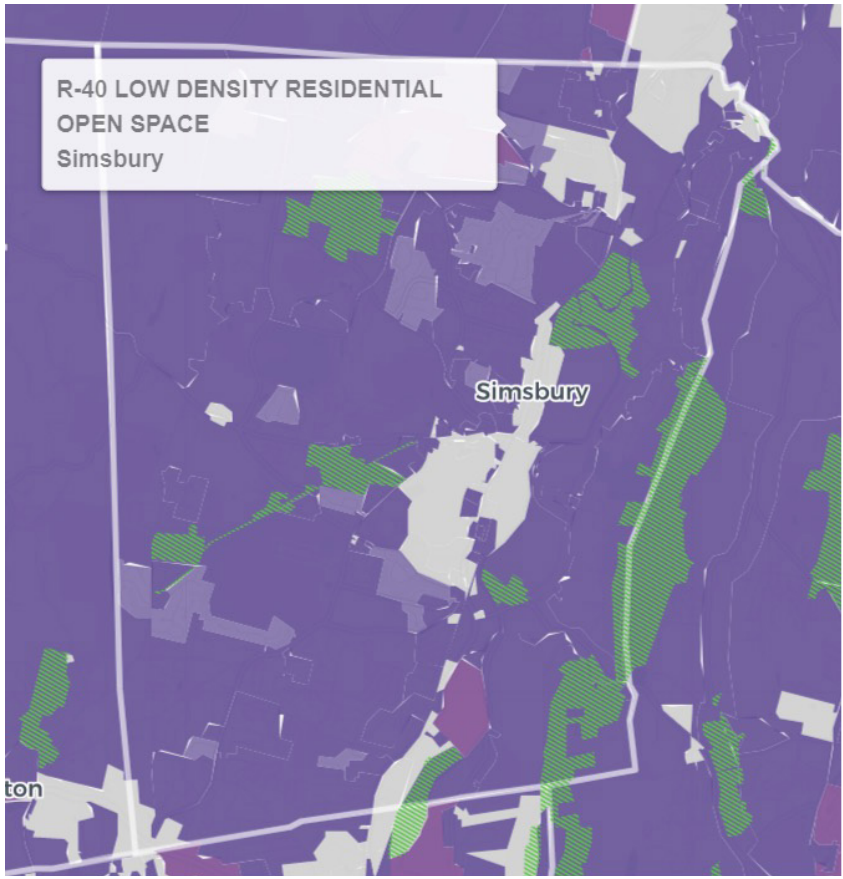
Education also includes training the public decision-makers. Some states are especially effective in that. North Carolina is one that comes to mind. The School of Government at the University of North Carolina in Chapel Hill is "the largest university-based local government training, advisory, and research organization in the United States" serving more than 12,000 public officials yearly.[28] The legislation adopted this year in Connecticut includes a provision mandating training for land-use commissioners.

26. Conn. Gen. Stat. § 8-3e (effective Oct. 1, 2016).

27. *Connecticut Zoning Atlas*, Desegregate Conn., https://www.desegregatect.org/atlas (last visited Mar. 20, 2022); *see* Sara C. Bronin, *Zoning by a Thousand Cuts: The Prevalence and Nature of Incremental Regulatory Constraints on Housing*, Cornell J. of L. & Pub. Pol. (forthcoming 2022), https://ssrn.com/abstract=3792544 or http://dx.doi.org/10.2139/ssrn.3792544).

28. *About*, UNC Sch. of Gov't (2022), https://www.sog.unc.edu/about (last visited June 12, 2022).

Figure 3. R-40 (in purple) is single-family zoning for lots of 40,000 square feet and larger.

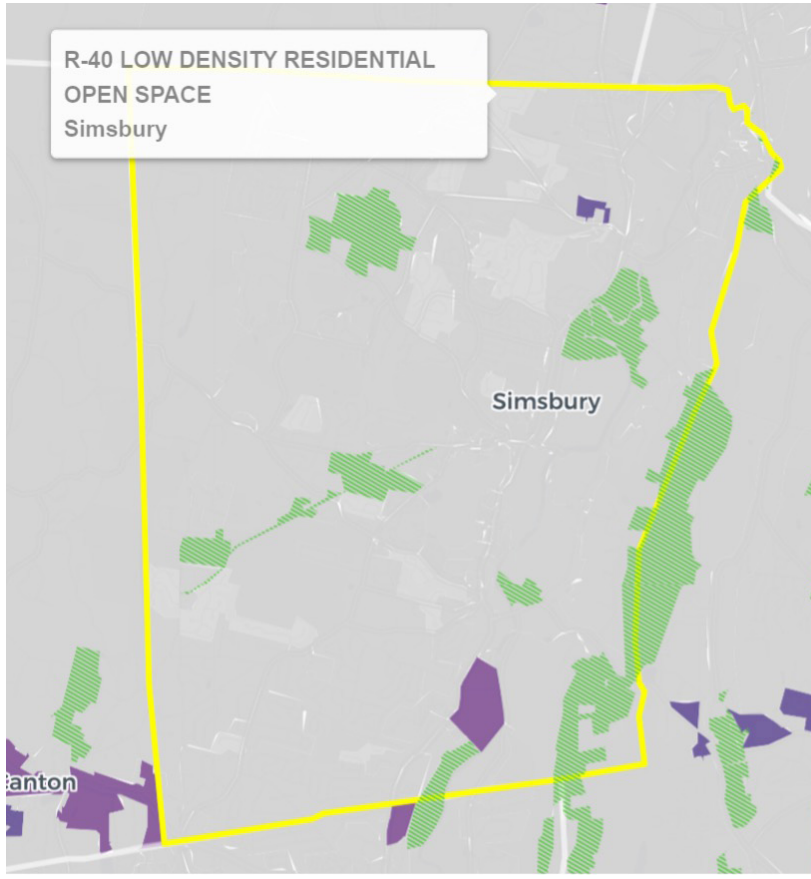


2. Limitations of the Fair Housing Act

Of all our federal laws, one would think the Fair Housing Act is always there to prevent discrimination and, in so doing, is aiding access to affordable housing for all. The Declaration of Policy is unequivocal: "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."[29] Unfortunately, an exemption in the Act takes away much of what the Declaration of Policy promised.

29. 42 U.S.C. § 3601.

Figure 4. Areas where 4-family and more housing is permitted are in purple.



The "Mrs. Murphy" Exemption

The exemption is commonly known as the "Mrs. Murphy Exemption," which precludes enforcement to overcome discrimination in dwellings intended to be occupied by four families or fewer, so long as the property owner lives there:

> Nothing in section 3604 of this title . . . shall apply to . . . rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence.[30]

30. *Id.* § 3603(b)(2).

The Mrs. Murphy Exemption was a necessary compromise to get the legislation through in 1968.[31] It is anachronistic today.

There is another exemption for single-family homes if the owner does not own more than three, limited to one sale in every twenty-four months for the homes in which the owner does not live.[32]

Overcoming the Exemption

STATE ACTION

Nothing says you cannot have state and local protections that go beyond the federal, including taking the wind out of the sails of the Mrs. Murphy Exemption. Some states have limited or eliminated the exceptions.[33] A state may expand the federal exemption under certain circumstances. Here is an example from Oregon:

> Discrimination in selling, renting or leasing real property prohibited. (8) The provisions of subsection (2)(a) to (d) and (f) of this section that prohibit actions based upon sex, sexual orientation or familial status do not apply to the renting of space within a single-family residence if the owner actually maintains and occupies the residence as the owner's primary residence and all occupants share some common space within the residence.[34]

Or a state may limit the exemption, as in Massachusetts where the exemption is cut from four units to two units, noting that "this subsection shall not apply to the leasing of a single apartment or flat in a two family dwelling, the other occupancy unit of which is occupied by the owner as his residence."[35]

Connecticut, this session, was the first state to include the requirement to "affirmatively further fair housing" in its zoning enabling statute, stating "(b) Zoning regulations adopted pursuant to subsection (a) of this section shall: . . . (2) Be designed to . . .

31. For more on the origins of the term, see James D. Walsh, *Reaching Mrs. Murphy: A Call for Repeal of the Mrs. Murphy Exemption to the Fair Housing Act,* 34 HARV. C.R.-C.L. L. REV. 605 (1999); *see also* Marie Failinger, *"Remembering Mrs. Murphy: A Remedies Approach to the Conflict Between Gay/Lesbian Renters and Religious Landlords*, 29 CAP. U. L. REV. 383 (2001)..

32. 42 U.S.C. § 3603(b)(1)

33. A list of parallel state exemption laws has been compiled by Scott Badami of Fox Rothschild LLP. Scott M. Badami, *United States: The FHA's "Mrs. Murphy Exemption"—A 50 State Guide*, MONDAQ (Apr. 23, 2013), https://www.mondaq.com/unitedstates/real-estate/235406/the-fhas-mrs-murphy-exemption--a-50-state-guide.

34. OR. REV. STAT. § 659A.421.

35. MASS. GEN. LAWS ch. 151b, § 4 (7).

(J) affirmatively further the purposes of the federal Fair Housing Act, 42 USC 3601 et seq., as amended from time to time."[36]

The Policy Surveillance Program, a Law Atlas Project at the Center for Public Health Law Research at Temple University Beasley School of Law, has an interactive website where you can see every state's fair housing protections.[37]

LOCAL ACTION

Local governments can and should remove their Mrs. Murphy Exemption, if they have them in local fair housing codes. They need not wait for the state to act. In 2019, the City of Shaker Heights, Ohio removed its Mrs. Murphy Exemption.[38]

Yes, we need federal action to amend the Fair Housing Act to get rid of the Mrs. Murphy Exemption, and yes, we need state action to adopt fair housing laws that encourage affordable housing; but every big and small local government can act. Eugene, Oregon, has done just that in adopting an action-forcing analysis of fair housing choice, as outlined in Figure 5.[39]

The latest development in promoting housing equity through impact analysis is from New York City where, on June 17, 2021, the City Council adopted a local law requiring that developers assess the impacts of their proposals on racial equity, including "how the proposed project relates to the goals and strategies to affirmatively further fair housing and promote equitable access to opportunity identified within the city's fair housing plan . . . ." The law amends the Uniform Land Use Review Procedure and is described on the Council's website:

> This bill would require an online citywide equitable development data tool with citywide, borough wide, and where statistically reliable data is available,

36. Substitute H.B. 6107, Conn. Pub. Act. No. 21-29, An Act Concerning the Zoning Enabling Act, Accessory Apartments, Training for Certain Land Use Officials, Municipal Affordable Housing Plans and a Commission on Connecticut's Development and Future (2021), https://legiscan.com/CT/text/HB06107/2021.

37. *See* State Fair Housing Protections, Policy Surveillance Program (2019), https://lawatlas.org/datasets/state-fair-housing-protections-1498143743#:~:text=The%20federal%20Fair%20Housing%20Act,%2C%20familial%20status%2C%20and%20disability.

38. Shaker Heights, Ohio, Ordinance 19-49, § 515 (passed July 22, 2019).

39. Eugene-Or. Gov., Eugene Analysis of Impediments to Fair Housing Choice 2020-2024, https://www.eugene-or.gov/DocumentCenter/View/55253/Eugene-Analysis-of-Impediments-Summary-4-20-2020- (last visited Nov. 27, 2021).

Figure 5. Eugene, Oregon analysis of impediment to fair housing.

Impediment	Strategies
Lack of Affordable Housing	The City recognizes the impact of high housing costs on residents, working on several initiatives expanding affordable housing stock throughout the City and is taking multiple actions including creation of the Affordable Housing Trust Fund and retooling the ADU policy to increase development. The City should continue to monitor and promote these and other activities that support development of additional affordable housing options. Continue to allocate and further leverage Federal grants to preserve affordable housing.
Community Education	**Resident Education**: Both the *Renters Experience Survey* and the survey conducted for the development of the AI indicate that many residents are not aware of the fair housing protections provided to them. The City should continue to partner with the Fair Housing Council of Oregon (FHCO) in facilitating trainings and workshops marketed to residents, which provide education on fair housing issues. **Provider Education**: Service providers that directly interact with any individual from a protected class (to include low-income in this instance) should be knowledgeable on fair housing policies that impact the communities they serve. Providers need not deeply understand fair housing regulation but should be able to facilitate the process with a client or community they believe to be impacted.
Landlord Education	Ensure landlords with limited portfolios fully understand their fair housing obligations. The City is encouraged to research feasibility of developing a policy mechanism, such as an annual certification, that would ensure that landlords understand their role. Similarly, the City can help ensure that large property management companies understand their fair housing obligations.
Discrimination in Renting	Continue to work with FHCO on enforcement of fair housing allegations. Consider supporting FHCO to conduct regular fair housing testing throughout the community; both administrative and audit testing. Administrative testing is a review of a landlord's or property management company's lease agreement terms. Audit testing is having someone from a protected class go through the process of renting a unit with the purpose of identifying potentially problematic procedures.
Planning, Land Use, and Zoning Practices	Review definition of "family" in the City's Municipal Code related to number of persons living in a single housekeeping unit. The City is encouraged to continue to integrate equity and impact assessments into the policy and planning process; particularly how proposed changes or regulatory efforts will impact protected classes (to include low-income in this instance).
Lending/Sale Discrimination	The current lending and mortgage data are limited in scope and has small sample sizes of protected classes. The City is encouraged to consider outreach to local banks and lending institutions to review their practices and acquire data that could supplement the data within the AI. Data within the AI suggests Hispanic populations originate loans at a lesser rate than do White households. The State of Oregon has established the Task Force on Addressing Racial Disparities in Home Ownership, the City is encouraged to consider dedicating staff time/resources to identify a point of contact for this task force, staying abreast of key findings and associated actions/strategies.

> neighborhood level and community district level data. Data would be provided for six specific categories, and be disaggregated by race and ethnicity, where available. Racial equity reports on housing and opportunity would be required for certain land use applications, using data from the equitable development data tool. The substance of racial equity reports would vary by application type, but all would include a statement of how the proposed project relates to the goals and strategies to affirmatively further fair housing and promote equitable access to opportunity. Residential projects would state the expected rents for market rate and affordable units and the incomes needed to afford them without incurring housing cost burden. The equitable development data tool would provide the race/ethnicity for such households.[40]

Patrick McNeill, an intern with the Center for New York Law and a student at New York Law School, reports that "the opinion of the voters on the law was very positive with the value of the research and making informed decisions based on the collected information being seen as invaluable."[41] He describes Local Law 78 as having

> its goal to help address racial equity issues that exist as a result of land use, construction, zoning, etc. It establishes requirements for land use applications to provide information on their potential impact on racial equity in the area and thus allows elected officials to make more informed decisions and better protect communities of color from displacement and other effects.[42]

This is a local initiative worth watching to see if it might be used elsewhere as an action-forcing strategy.

3. Private Covenants

Legally Enforceable Private Covenants Are Widely Used

It is remarkable how many people live in homes and neighborhoods where private covenants dictate the occupants' physical environments and how they conduct their daily activities. These controls are

40. N.Y.C. Council Law No. 2021/78, https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3963886&GUID=D2C9A25B-0036-416E-87CD-C3AED208AE1B); *see also New Land Requires Equity Reports in Certain Land Use Applications,* N.Y. Law School: City Land (Aug. 19, 2021), https://www.citylandnyc.org/new-law-requires-racial-equity-reports-in-connection-to-certain-land-use-applications/. Like most legislation, it is not without its critics: Eric Korber, *Entrenching an Inequitable Land-Use Process* City J. (June 18, 2021), https://www.city-journal.org/new-york-city-council-racial-equity-legislation-will-hamstring-development#:~:text=But%20the%20city%20council's%20recently,would%20hamstring%20the%20next%20mayor.

41. E-mail from Patrick McNeill to author (Mar. 24, 2022).

42. *Id.*

not obvious from outward appearances. Taking just those neighborhoods governed by homeowners' associations (HOAs), and leaving aside all those individual lots and older subdivisions without HOAs, consider these numbers:

- 58% of homeowners live in HOA communities.
- HOA communities increased 261.1% from 1980 to 1990.
- 73.9 million Americans live in HOAs, condominium communities, or cooperatives.[43]

These pervasive covenants, some unenforceable as a matter of federal and state law, and others enforceable today, have had and continue to have, through the development patterns they dictate and perpetuate, a profound impact on the ability to develop more affordable housing.

Racial, Religious, and Other Unenforceable Covenants

Of course, racial, religious, and other covenants violative of federal, state, and local law are unenforceable,[44] but they remain in the chain of title. Many people, understandably, find it disturbing to see the covenant in a title report. They do not want it to be part of the record of their ownership of the property. The perpetuation of these covenants is something states can act on, and some have. There is a recent decision in the Court of Appeals of the State of Washington regarding the state law on removing certain provisions from deeds.[45]

The law was enacted over thirty years ago but has been subject to little interpretation. In this decision, the court held that the offending language did not have to be "physically and permanently removed from existing records," but that it would be sufficient to declare the "language stricken, thereby removing the language as a matter of law." In short, the offending language remains in the

43. *HOA Statistics*, IPROPERTYMANAGEMENT.COM (Apr. 23, 2022), https://ipropertymanagement.com/research/hoa-statistics#facts. Another source cites a great number of people living in gated communities. *Gated Community Data*, GATED CMTY. NEWS (2021), https://gatedcommunitynews.com/gated-community-data.

44. *See* Shelley v. Kraemer, 334 U.S. 1, 23 (1948).

45. *See* WASH. REV. CODE § 49.60.227 (providing a method for property owners and others to "petition to strike racially discriminatory provisions from real property contracts"); *see also* May v. Spokane County, No. 37179-4-III (Wash. Ct. App. Feb. 23, 2021), https://www.courts.wa.gov/opinions/pdf/371794_pub.pdf.

original documents, but it is not reflected in later recitations of title. As the court explained its reasoning:

> By its plain terms, RCW 49.60.227 provides a method for repudiating racially restrictive covenants while still preserving the historical record and integrity of a property's chain of title. This balance makes good sense. Real estate documents with racially restrictive provisions are "offensive, morally reprehensible, and repugnant." *Mason v. Adams County Recorder*, 901 F.3d 753, 757 (6th Cir. 2018). But such documents are part of "our living history." Id. A policy of whitewashing public records and erasing historical evidence of racism would be dangerous. It would risk forgetting and ultimately denying the ugly truths of racism and racist housing practices. Such an outcome cannot be squared with the antidiscrimination purposes of Washington's Law Against Discrimination. See RCW 49.60.010.

The Supreme Court of Washington reviewed the Court of Appeals decision and held that it need not address the statute interpreted by the Court of Appeals because the legislature amended the statute under which the covenants were struck and eliminated.[46] The Court, in reviewing the amendments and remanding the case for the trial court to reconsider it in light of the amendments, observed:

> We believe that the legislature's intent is clear and that the amendments provide a remedy that strikes the balance between keeping a historical record of racism in covenants, while also allowing homeowners to remove the repugnant covenants from their chains of title. Removing all trace of these discriminatory covenants would *not* effectuate the legislature's intent to eradicate discrimination. It would destroy only the physical evidence that this discrimination ever existed. It would be all too easy for future generations to look back at these property records with no physical evidence of the discriminatory covenants and conclude that the covenants never existed at all. . . .
>
> We must ensure that future generations have access to these documents because, although the covenants are morally repugnant, they are part of a documented history of disenfranchisement of a people. It is our history.[47]

The objective of the statute is to enable striking the void provisions and eliminating them from the public records while preserving the original instrument so that future generations may have an accurate record of the unfortunate history and know how people later worked to right the wrong. That may prove to be the best approach.[48]

46. *In re* Portion of Lots 1 & 2, Block 1, Comstock Park, 506 P.3d 1230 (Wash. 2022); *see* Wash. Rev. Code § 49.60.227.

47. *In re Portion of Lots 1 & 2*, 506 P.3d at 1238.

48. 1 *Kings* 3:16-28 (King James) (Solomonic wisdom).

Another example of a state statute that allows removal of unlawful restrictive covenants is in Delaware:

> § 9628. Redaction of unlawful restrictive covenant.
>
> (a) An owner of real property that is subject to an instrument that contains a provision that is in violation of § 9605(b) of this title, including a governing document of a common interest community, may request that the recorder for the county in which the instrument is recorded redact and strike the provision from the instrument.
>
> (b)(1) Before granting a request made under subsection (a) of this section, a recorder must submit the request and the instrument at issue to the county attorney.
>
> a. The county attorney shall determine whether the instrument contains an unlawful restrictive covenant in violation of § 9605(b) of this title.
>
> b. The county attorney shall inform the recorder of the county attorney's decision . . . .
>
> c. The recorder shall deny a request made under subsection (a) of this section if the county attorney determines that the instrument does not contain an unlawful restrictive covenant in violation of § 9605(b) of this title.
>
> (2) The county attorney may compile a list of phrases identified as unlawful restrictive covenants in violation of § 9605(b) of this title. . . .
>
> (c) A recorder may prescribe the form and required contents of a request under subsection (a) of this section . . . .
>
> (e) (1) Upon request for inspection, copying, or any other public disclosure of an instrument that has had an unlawful restrictive covenant in violation of § 9605(b) of this title redacted from it under this section, a recorder shall make available only the redacted version of that instrument.
>
> (2) A recorder may disclose the unredacted version of an instrument that has had an unlawful restrictive covenant in violation of § 9605(b) of this title redacted from it under this section only in response to a subpoena or order of a court of competent jurisdiction.[49]

Note the involvement of the county attorney.

The Uniform Law Commission (ULC) has a Restrictive Covenants in Deeds Committee developing a uniform or model state law that will enable "an owner of land for which a discriminatory restrictive covenant appears in the chain of title to have that covenant

49. DEL. CODE ANN. tit. 9, § 9628, https://delcode.delaware.gov/title9/c096/index.html.

released or expunged from the records."[50] The committee is charged with first developing a "general policy approach" to be approved by the Executive Committee of the ULC before the it begins to draft. The committee posts minutes of its meetings to ensure that the development of the policy and ultimately the uniform or model law may be followed. The minutes of the January 19, 2022, committee meeting provide a background on the issues and a preliminary overview of three possible legislative approaches: notice and modification, modification or redact-and-sequester, and search-and-destroy. The committee invites input, and anyone can become an "Observer" and attend the meetings by applying.[51]

Enforceable Covenants that Limit Diverse and Affordable Housing

What do HOA conditions, covenants, and restrictions (CC&Rs) permissibly govern? The late Gurdon H. ("Don") Buck, widely acknowledged as the country's leading authority on common interest communities throughout his career, often said that the HOAs govern: "cars, kids, dogs, and trash."[52] But beyond the mundane, there are of course the rigid controls on design, construction, density, occupancy, appearance, maintenance, and physical changes. Designs were meant to be immutable, for the most part. People buy into the CC&R regimes to be guaranteed that their neighbors will not do anything untoward. Single-family is often meant to remain single-family. Density in dwelling units per acre is baked in.

Roadblocks Ahead

What do we typically see in these CC&Rs that might affect affordability? A totally random Internet search produced a Declaration of CC&Rs for a subdivision known as Shepherd's Creek Planned

50. Uniform Law Comm'n, Restrictive Covenants in Deed Committee (2021), https://www.uniformlaws.org/committees/community-home?CommunityKey=f263def2-f766-4c76-af56-016f6878034f (The author is an ABA Section Advisor to the Committee).

51. Uniform Law Comm'n, Observer Participation Guidelines, https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=ebea8bb4-c43e-7a0f-4805-278b626a0f70&forceDialog=0 (last visited June 12, 2022).

52. He was the author's mentor, and they practiced law together until his passing.

Figure 6. A home in the Shepherd's Creek Planned Development.

Courtesy Zillow

Development in Collierville, Shelby County, Tennessee.[53] It popped up first in the search.

The Shepherd's Creek developer has received many awards, and the gallery of homes evidences a quality high-end development.[54] Zillow shows a five-bedroom, six-bath, 6,976-square-foot buildable plan, the price of which increased $85,000 on March 29, 2022, available now for $1,605,000.[55] With its proposed eighty-nine luxury homes, Shepherd's Creek is not looking like an affordable community.[56]

53. DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS FOR SHEPHERD'S CREEK PLANNED DEVELOPMENT (NOV. 1, 2013), https://www.yourmagnoliahome.com/wp-content/uploads/2018/02/Shepherds-Creek-Covenants.pdf [hereinafter Shepherd's Covenant].

54. Magnolia Homes, Shepherd's Creek, https://www.yourmagnoliahome.com/community/shepherds-creek (last visited June 12, 2022).

55. *Shepherd's Creek*, ZILLOW, https://www.zillow.com/community/shepherd-s-creek/2065530657_zpid (last visited June 12, 2022).

56. *Community Spotlight: Shepherd's Creek*, MAGNOLIA HOMES (2022), https://www.yourmagnoliahome.com/community-spotlight-shepherds-creek.

What does the declaration have to say? Here are some highlights of provisions that preclude affordability:

> The minimum heated livable area of any residence, excluding garages, basements, porches, storage rooms, workshops, etc., shall be not less than 3,500 heated square feet for a two-story residence.[57]
>
> The majority of the dwelling must be brick or stone.[58]
>
> Garages must be a minimum of three-car . . . .[59]
>
> No Lot shall be used except for residential purposes and no building shall be erected, altered, placed, or permitted to remain on any Lot other than one single family dwelling, unless otherwise provided for herein. No Lot shall be subdivided.[60]
>
> "Family" shall mean and refer to only those persons who live in the same household, or are related, such as father, mother, son, or daughter.[61]

It is these types of occupancy, use, size, building materials, and density restrictions—and the difficulty in altering them—that make affordable zoning initiatives, whether initiated locally or imposed by the state or federal government, doomed to fail unless the CC&Rs can be released or amended. They are perfectly legal and enforceable, at least under current legal precedent. For example, if the CC&Rs limit development to one dwelling unit per lot, as this declaration does, there is no chance for an accessory dwelling unit.

And, in the category of "oh, by the way," there will be no short-term rentals here; the declaration also states, "No lease may be entered into for less than a one (1) year period, and all leases must be in writing,"[62] an issue of frequent controversy in many HOAs.

A BIG PROBLEM

Many people, estimated at almost sixty-six million in 2013, live in homes where there are restrictive CC&Rs of various types, some of which preclude the development of affordable housing. Covenants

57. Shepherd's Covenant, *supra* note 53, at 16.
58. *Id.* at 17
59. *Id.*
60. *Id.* at 18.
61. *Id.* at 3.
62. *Id.* at 24.

are now found in sixty-one percent of all new dwellings according to the Community Associations Institute.[63]

Taking just those neighborhoods governed by HOAs, these statistics evidence an ever-increasing impact:

- HOA residents increased 208.3% from 1980 to 1990.
- 40 million housing units are part of HOA communities.
- About 8,000 new HOAs form each year.
- 74.5% of homes sold in 2019 were part of HOA communities.
- 61.8% of newly constructed homes are part of HOA communities.
- 3.54 million or 11.1% of homeowners live in "community access secure" neighborhoods, which may include walls or fences.[64]

Professor Robert C. Ellickson of Yale Law School recently published an article on the subject, with suggestions on how "stale" covenants might be addressed.[65] It provides an excellent history and useful discussion of the principal approaches to removing unwanted covenants. The section on governmental initiatives to limit covenants provides several illustrations. Minnesota law terminates covenants when they no longer have more than nominal value. In Massachusetts, covenants are limited to thirty years unless fifty percent of the owners vote to extend the term.

Still, covenants generally, not racial and other illegal covenants, are widely respected. The Boston Zoning Code, for example, provides:

> In their interpretation and application, the provisions of this code shall not be construed to repeal, abrogate, annul or in any way impair or interfere with the provisions of other regulations, laws or ordinances except Chapter 488 of the Acts of 1924, as amended, which is repealed on the effective date of this code, or with provisions of private restrictions placed upon property by covenant, deed or other private agreement, or with provisions of restrictive

63. Erin A. Hopkins, *The Impact of Community Associations on Residential Property Values: A Review of the Literature*, CMTY. ASS'N. INST. (Nov. 2015), https://foundation.caionline.org/wp-content/uploads/2017/07/VATech_Property_Values.pdf.

64. *HOA Statistics*, *supra* note 43. Another source cites a great number of people living in gated communities. *Gated Community Data*, GATED CMTY. NEWS (2021), https://gatedcommunitynews.com/gated-community-data.

65. Robert C. Ellickson, *Stale Real Estate Covenants*, YALE LAW & ECON. RSRCH PAPER, SSRN (Aug. 21, 2020), https://ssrn.com/abstract=3678927.

> covenants running with the land to which the City is a party. Where this code imposes a greater restriction than is imposed or required by any of the aforesaid provisions, the provisions of this code shall prevail.[66]

LIMITED JUDICIAL SUPPORT FOR REMOVAL

An important decision illustrating the difficulties in removing covenants that roadblock affordable housing is *Viking Properties, Inc. v. Holm*.[67] There the court severed a racial covenant and declared it void. That was easy. But then it had to deal with a covenant limiting development to one dwelling on one-half acre or more. Because it was able to sever the racial restriction, the court turned to the density restriction. Although no affordable housing claim was made, the Growth Management Act was alleged to mandate densification in the developed areas. The court rejected the argument and firmly held that the density restrictions did not violate public policy:

> Quite separate from the racial restriction, the last two sentences provide that only one dwelling may be built on each one-half acre of land. Not only is this the logical, common-sense construction of the covenant's language, it is also the construction that best guards "the homeowners' collective interests."[68] It has been so understood for over 50 years.[69]
>
> The instant case is an appropriate vehicle to illustrate the effect of public policy. In contrast with the racial restriction, it cannot be maintained that the density limitation has a "tendency to evil," nor has the legislature explicitly expressed an intent to override contractual property rights, let alone invalidate those that predate the GMA . . . .
>
> Third, although the City's zoning regulations call for a minimum density of four dwelling units per acre, nothing in the regulations compels property owners to develop their parcels to any particular minimum density. . . . Moreover, the City has correctly conceded that it "has no authority" to enforce or invalidate restrictive covenants, CP at 201, and explicitly accounted for the existence of such covenants in its comprehensive plan by forecasting that areas subject to covenants would experience less future growth than other areas within the City. Finally, the city's planning manager, on advice of the city attorney, determined that the covenant was not in irremediable conflict with city policy, and that the City "would process building permits on a lot

66. Boston, Mass. Zoning Code § 1-3, https://library.municode.com/ma/boston/codes/redevelopment_authority?nodeId=ART1TIPUSC.

67. Viking Properties, Inc. v. Holm, 118 P.3d 322 (Wash. 2005).

68. Riss v. Angel, 934 P.2d 669 (Wash. 1997) (quoting Lakes at Mercer Island Homeowners Ass'n v. Witrak, 810 P.2d 27 (Wash. App. 1991)).

69. *Viking*, 118 P.3d at 328.

with area that exceeded the minimum densities under the code for the land use district as a nonconforming lot." CP at 310. Accordingly, the density limitation does not violate public policy.[70]

OVER THE HORIZON TARGETING

Over the horizon targeting takes special skill. Just as those engaged in warfare must attempt to see beyond what their eyes take in to wage a successful attack, we must do what we can to discern how these covenants, now and in the future, beyond our present time horizon, will affect our efforts to create more affordable housing. We do not know, but it is reasonable to expect, that some people learning about state and local initiatives to promote affordable housing may be even more interested in private covenants to fend off affordable housing. Developers may include restrictive covenants in contemplation of what the market wants. Indeed, that is most often the case, and homebuyers are stuck with contracts of adhesion. If they want that lot or that home, they have to buy into the restrictions laid down before the first lot or home goes on the market.[71]

At best, the extent of this reaction to government-led affordability efforts is a "known unknown."[72] It would be a good research project for a graduate student in planning to determine the extent to which there may be increased use of private covenants in response to affordable housing initiatives. The discussion that follows starts with fixing the problems created in the past and then addresses how to avoid problems in the future. Perhaps the order ought to be the other way around. Truly, both need to be done at once.

70. *Id*. at 331.

71. This is exactly what happened with the author who bought the last lot in a subdivision twenty-three years ago and had to accept what the declaration mandated, which included restrictions like that of the Shepherd's Creek Planned Development.

72. "As we know, there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns—the ones we don't know we don't know." Donald Rumsfeld, *Rumsfeld's Knowns and Unknowns: The Intellectual History of a Quip*, ATLANTIC (Mar. 27, 2014), https://www.theatlantic.com/politics/archive/2014/03/rumsfelds-knowns-and-unknowns-the-intellectual-history-of-a-quip/359719.

Possible Fixes

There are several ways in which we might remove or diminish the effect of covenants that are roadblocks to affordability. Not all have been tried, and the effectiveness of others has been questionable, at least as they are presently used.

VOLUNTARY CC&R AMENDMENTS

What can be done? The Community Associations Institute supports fair housing[73] and advocates for better legal mechanisms to enable removing discriminatory covenants,[74] but it does not address covenants that preclude greater affordability, such as through increasing density. There is nothing that precludes most HOAs from amending their CC&Rs, though in some instances it may be difficult or even impossible without a 100% vote, or supermajority, of the unit owners.

Even voluntary amendments can run into problems, as seen in a recent Arizona case where CC&R amendments were struck down because they were somehow outside the unit owners' expectations of the scope of the restrictions. While the amendments created greater limitations on affordability, rather than increasing the potential for affordability, the takeaway is the same. Dale A. Whitman, the former James E. Campbell Professor of Law at the University of Missouri in Columbia who retired in 2007, in a posting on the listserv DIRT List, has given us a rather complete view of the decision that is important to understanding the limitations on even voluntary amendments:

> Kalaway owned a 23-acre lot in a five-lot subdivision. The other lots were smaller, ranging from 3.3 to 6.6 acres. A set of restrictive covenants covered the subdivision, and provided that they could be amended by a majority vote of the lot owners.
>
> In 2018 the other lot owners, without Kalaway's knowledge or consent, amended the covenants. According to the court, "the new restrictions include limiting owners' ability to convey or subdivide their lots, restricting the size and number of buildings permitted on each lot, and reducing the maximum number of livestock permitted on each lot."

73. Cmty. Ass'ns Inst., Fair Housing, https://www.caionline.org/Advocacy/PublicPolicies/Pages/Fair-Housing.aspx (last visited June 12, 2022).

74. Cmty. Ass'ns Inst., Amendment Process to Remove Discriminatory Restrictive Covenants (Feb. 27, 2020), https://www.caionline.org/Advocacy/PublicPolicies/Pages/RestrictiveCovenants.aspx (last visited June 12, 2022).

Kalaway brought this action to have the new restrictions declared unenforceable. His argument was based largely on Dreamland Villa Community Club, Inc. v. Raimey, 224 Ariz. 42, 226 P.3d 411, 420 (Ariz. App. 2010). Dreamland involved a group of subdivisions which had been subjected to a majority vote amendment (like the present case) that changed them by placing them, for the first time, in an association that had the power to assess annual dues or fees against their owners. The Arizona Court of Appeals had struck down this amendment because the original declarations did not provide "proper notice that such servitudes could be imposed non-consensually under the generic amendment power." In effect, the court had held that this sort of change was simply too great and too unexpected.

The Arizona Supreme Court adopted the reasoning of Dreamland and applied it here. It held that "future amendments cannot be "entirely new and different in character," untethered to an original covenant. Otherwise, such an amendment would infringe on property owners' expectations of the scope of the covenants."

So how did the changes here fare under the court's standard? Not very well at all. The court struck down the following changes because they were too far afield from the original covenants, too different in character, and too unexpected.

1. A requirement a dwelling must have at least 60% living space and at most 40% garage space.
2. The 50-foot front setback of the original covenants was now applied not only to structures, but to all improvements, such as driveways, patios, and landscaping. (The effect was apparently to freeze the existing front yards in their present state.)
3. Voting, which was on a per-lot basis, would remain allocated to the original lots in the event of lot splits or subdivisions, thus diluting the votes of the owners of new lots.
4. The original declaration allowed up to six livestock per 3.3 acres. The amendment limited the definition of livestock to only chickens, horses, and cattle. The amendment also capped the total number of livestock per lot at 15, irrespective of the size of the lot. (The court was highly dubious of defining chickens as livestock.)

These changes were all struck down by the court, as well as numerous limitations on the size, height and location of non-dwelling structures, and several amendments imposing limitations and requiring approvals for improvements and subdivision of lots.[75]

75. D. Whitman, *Recent Development: Kalaway v. Calabria Ranch HOA, LLC*, 2022 WL 840185 (Ariz. Mar. 22, 2022), DIRT LIST BLOG, http://dirt.umkc.edu/ Apr. 5, 2022 (noting that an amendment by majority vote to a restrictive covenant will be struck down if it is too unexpected). Prof. Whitman offered this comment on the decision:

> COMMENT. This is all well and good, but it is a very expensive form of legal advice, coming as it does from the Supreme Court of Arizona. How on earth is a landowner or a lawyer supposed to be able to figure out which amendments are so "new and different in character" that they will be struck down, and which ones are so "ordinary" or "normal" or "expected" or . . .

EMINENT DOMAIN

First off, it is likely that covenants are constitutionally protected "private property" in most states and that taking them would require compensation for any loss in value. So sayeth none other than Gideon Kanner, Professor of Law Emeritus at the Loyola Law School in Los Angeles, in response to my "All Points Bulletin," sent to more than a dozen of California's best known land use gurus about how to rid ourselves of these pesky covenants. Prof. Kanner: "In California covenants running with the land are a property right that is compensable in eminent domain. See *So. Calif. Edison Co. v. Bourgerie* (Cal.)."[76] Turns out, Prof. Kanner won the case for the property owner. The question in *Bourgerie* was this:

> The sole question at issue is whether a building restriction in a deed constitutes "property" for purposes of article I, section 14, of the California Constitution so that compensation must be made to a landowner who has been damaged by the construction of an improvement which violates the restriction on land acquired by eminent domain.[77]

The court interpreted Article I, section 14, of the California Constitution, which provides in relevant part, "Private property shall not be taken or damaged for public use without just compensation having first been made to . . . the owner . . . ."

The court overruled a forty-three-year-old precedent to find the taking of a restriction was compensable:

> Under the minority view, compensation is denied to persons whose property may have been damaged as a result of the violation of a valid deed restriction, thereby placing a disproportionate share of the cost of public improvements upon a few individuals. Neither the constitutional guarantee of just compensation nor public policy permit such a burdensome result.[78]

Nothing precludes federal, state, and local governments from using their power of eminent domain to remove covenants impeding

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well, pick your adjective—that they will be sustained by the court. The test is so vague as to be completely useless. Unless the original covenants spell out the types of amendments that will be acceptable, nobody can ever be sure without litigating the issue. In case you can't tell, I think this is appallingly bad judicial lawmaking.

76. Email from Gideon Kanner, Professor of Law Emeritus at the Loyola Law School,Los Angeles, to the author (Apr. 2, 2022); *see also* S. Cal. Edison Co. v. Bourgerie, 507 P.2d 964 (Cal. 1973).

77. *S. Cal. Edison Co.*, 507 P.2d 964.

78. *Id.*

affordability. Nothing, of course, except the backlash from the notorious *Kelo v. New London*[79] decision. In many places, it did not just chill governmental use of eminent domain, it cryogenically froze it. While there are kinder and gentler ways for government to get what it needs,[80] targeted, limited eminent domain with modest takings might be appropriate as part of a variety of techniques.

To avoid the cost and trouble of going to court when the compensation is disputed, a local, adjudicatory process might be required as a step precedent to litigation to see if the compensation can be resolved short of judicial proceedings. Yes, it would be a ripeness requirement, similar to the one that the U.S Supreme Court did away with,[81] but it could save time and expense for all the stakeholders. Consider it a form or pre-litigation mediation.

One question is, what would be the extent of compensation? No one knows. More "known unknowns." The value of exclusivity might be greater in the marketplace than we wish to acknowledge. On the other hand, freeing up some land for more intensive use might create value. One ADU design-build consultant in California claims, "With an average cost per square feet of approximately $470 in the City of Los Angeles, your new 1,000 square foot, detached ADU could increase your property value by an average of $470,000," and "For an investment of around $250,000, homeowners in Los Angeles can add an average of $470,000 to the value of their property."[82]

KINDER AND GENTLER

A kinder and gentler approach would be to offer cash payments, maybe through an auction, to keep the cost as low as possible. Those HOAs willing to amend their CC&Rs and open up their enclaves to

79. Kelo v. New London, 545 U.S. 469 (2005).

80. Dwight Merriam, *Time to Make Lemonade from the Lemons of the Kelo Case Commentary Essays*, 48 CONN. L. REV. 339 (2016), https://opencommons.uconn.edu/law_review/339.

81. Knick v. Township of Scott, Pa., 139 S. Ct. 2162 (2019), https://www.supremecourt.gov/opinions/18pdf/17-647_m648.pdf; *see also* Dwight Merriam, *Rose Mary Knick and the Story of Chicken Little*, 47 FORDHAM URB. L.J. 639 (2020), https://ir.lawnet.fordham.edu/ulj/vol47/iss3/5. As to anticipatory remedies generally, see Thomas W. Merrill, *Anticipatory Remedies for Takings*, 128 HARV. L. REV. 1630 (2015), https://scholarship.law.columbia.edu/faculty_scholarship/347.

82. Charlie Melvin, *Top 3 ADU Types That Increase Property Values,* CALI ADU (Mar. 10, 2020), https://www.cali-adu.com/blog/top-3-adu-types.html#:~:text=With%20an%20average%20cost%20per,the%20value%20of%20their%20property.

further development and densification, that would include affordable units, could bid for government compensation. In this reverse auction,[83] government would offer to pay HOAs for releasing their affordable-housing-restricting covenants and committing to develop affordable housing. The HOAs willing to do both at the least cost would win. Why would they ever do that? Many HOAs are strapped for cash, especially the older ones without adequate capital reserves. A natural disaster can put them underwater, literally and figuratively. That happened with the North Pier Villas Homeowners Association, forced into bankruptcy when their forty-two-unit Carolina Beach, North Carolina condominium was severely damaged in Hurricane Dorian in 2019. The HOA could not afford the repairs, especially with a downturn in timeshare revenues. They were forced into bankruptcy and a sale.[84]

The awards might be vested and escrowed, with payment released upon certificates of occupancy being issued for the affordable units. The cost of acquiring the releases could be offset by tax increment financing with the new revenues from the infill development. It might be that developers looking for development opportunities could do much the same, but privately through brokers who would seek out opportunities and help make offers to purchase development rights created with the release of restrictions. Even a modest program of enabling accessory dwelling units could help increase the supply of smaller, more affordable homes, better suited to the changing demographics of single-person households.

THE NUCLEAR OPTION

In 2021, the Governor of California signed into law legislation that enables setting aside of certain private covenants that preclude affordable housing developments:

> This bill would make any recorded covenants, conditions, restrictions, or limits on the use of private or publicly owned land contained in any deed, contract, security instrument, or other instrument affecting the transfer or sale that restricts the number, size, or location of the residences that may be

83. James Chen, *Reverse Action*, Investopedia (Feb. 27, 2021), https://www.investopedia.com/terms/r/reverse-auction.asp.

84. Emma Dill, *A 'Spirited Auction" and $8.3 Million Later, a Bankrupt Carolina Beach Condo Complex Has a New Owner*, Wilmington StarNews (Apr. 8, 2022), https://www.starnewsonline.com/story/news/2022/04/08/north-pier-ocean-villas-sell-wilmington-nc-company-cerka-inc/9510886002.

> built on the property, or that restricts the number of persons or families who may reside on the property, unenforceable against the owner of an affordable housing development, as defined.[85]

California Assemblyman Richard Bloom authored the legislation.[86] His Office issued a summary of the bill:

> AB 721 will clarify that these density restrictions in private covenants cannot be used to curtail an affordable or supportive housing development that is otherwise consistent with local zoning. The bill proposes that an owner of a property who commits to building 100% affordable units for lower income households may build as many units as the local zoning code and land use laws would allow.[87]

The soundbite version is that AB 721 takes aim at the number, size, and location of homes allowed under covenants and restrictions on how many people and families can reside within a development. The development must be 100% affordable, below market rate. The covenants are not released or removed; they are just declared unenforceable against the affordable housing developer. That seems a distinction without a difference.

The Act, provided in the Appendix, is not all that long, and reading it in its entirety may be helpful. The crux of AB 721 is this:

> Recorded covenants, conditions, restrictions, or private limits on the use of private or publicly owned land contained in any deed, contract, security instrument, or other instrument affecting the transfer or sale of any interest in real property that restrict the number, size, or location of the residences that may be built on the property, or that restrict the number of persons or families who may reside on the property, shall not be enforceable against the owner of an affordable housing development, if an approved restrictive covenant affordable housing modification document has been recorded in the public record as provided for in this section, except as explicitly provided in this section.[88]

85. An Act to Add Section 714.6 to the Civil Code, Relating to Real Property." A.B. 721, Reg. Sess, (Cal. 2021–22), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB721.

86. Press Release, Bill to Remove Racist Housing Covenants Awaits Governor's Signature (Sept. 2, 2021), https://a50.asmdc.org/press-releases/20210902-bill-remove-racist-housing-covenants-awaits-governors-signature.

87. Office of Assembly Member Richard Bloom, Assembly Bill 721 (Bloom) Exclusionary Housing Covenants, https://www.housingsandiego.org/s/AB-721-Fact-Sheet.pdf (last visited June 12, 2022).

88. A.B. 721, Reg., Sess. (Cal. 2021–2022).

Restrictive covenant is defined:

> "Restrictive covenant" means any recorded covenant, condition, restriction, or limit on the use of private or publicly owned land contained in any deed, contract, security instrument, or other instrument affecting the transfer or sale of any interest that restricts the number, size, or location of the residences that may be built on the property or that restricts the number of persons or families who may reside on the property, as described in subdivision (a).[89]

In responses to my All Points Bulletin (APB) to leaders in California land use law, I hoped to learn more about how AB 721 may be the San Andreas fault of restrictive covenants. Turns out, there seems to be not even a tremor.

One veteran of several decades in land use law said:

> Thanks for reaching out. I can see that this law would not allow an HOA to enforce CC&Rs that preclude ADUs or second units.
>
> I wonder if this new law "voids" conservation easements that have been required on approvals of tentative maps and other development approvals that preclude certain areas from being developed. Contra Costa County (because of the involvement of influential environmental groups) typically requires this type of conservation deeds. I would think so, right? How do they become "unenforceable"? I cannot imagine the holder of the deed (whoever that may be) will give it up. How do they get removed from title?[90]

Good question. It turns out Assemblymember Brooks saw that coming and neatly excluded restraints on enforcement of conservation restrictions:

> (g) (1) Subject to paragraph (2), this section does not apply to:
>
> (A) Any conservation easement, . . . that is recorded . . . , and held by any of the entities or organizations set forth in Section . . . .
>
> (B) Any interest in land comparable to a conservation easement that is held by any political subdivision and recorded in the office of the county recorder of the county where the land is situated.[91]

Some people, who are concerned about the obvious need to protect private property rights and the private contracts in these covenants but who are also equally troubled by the lack of affordable

89. *Id.*

90. E-mail from Patricia E. Curtin, Attorney, Fennemore Wendel, to author (Apr. 7, 2022, 13:28 PST) (on file with author).

91. *Id.*

housing, are torn. One of the respondents to the APB most clearly expressed this conundrum. In response, maybe the answer is compensation and a strong bias in favor of voluntary action, such as with the reverse auction.

It seems likely that compensation will be due unless common law develops that makes some of these covenants unenforceable as contrary to public policy. So, far, however, there does not appear to be any move in that direction.

If someone pays a premium for property in Phase 1 of a development that is exclusive, restricted, and gated, and then the developer sells off the proposed later three phases and they are stripped of the covenants as to density and house size, resulting in a significant loss of value, is that compensable taking? This could be a variation of *Bormann v. Board of Supervisors in and for Kossuth County*[92] in which the Iowa Supreme Court invalidated a right-to-farm law by eliminating the right of those living close to farms to bring nuisance actions. It imposed a kind of easement on their property, which could only be done if just compensation were paid. That is something to ponder. Many of these cases, however, are destined to devolve into valuation battles. The damages may prove to be negligible.

Bryan Wenter, a land use planner and lawyer in Walnut Creek, California, who is an astute observer of the realities of California's state-level affordable housing advocacy, is outspoken in his critique of what this legislation means:

> Thanks for reaching out on this. I am aware of it but not tracking it. Fortunately, restrictive covenants have never been a barrier to any housing development project I have handled. Unfortunately, the things that are barriers are more systemic and much harder to legislate away due to lack of legislative will to do so for a variety of purely political reasons. In my view, the legislature and governor are only partially serious about addressing California's housing supply problem, which will only be fixed if they ever decide to squarely take on some hard issues.
>
> . . .
>
> There are lots of ways of slicing things, but we need to do things like eliminate CEQA for housing projects (or seriously curtail CEQA review), eliminate discretion in considering housing projects (or seriously curtail discretion), make project opponents pay for the cost of their administrative appeals and litigation and be on the hook for paying the developer's attorney fees when

92. Bormann v. Bd. of Supervisors in and for Kossuth County, 584 N.W.2d 309 (Iowa 1998).

> they lose, make project opponents post bonds when they challenges housing projects, limit standing under CEQA and in housing project challenges, etc. We also need to talk about the fact we have a housing SUPPLY problem that has an affordable component. The problem is not principally an affordability problem, as folks are now erroneously saying and as plays into the hands of the opponents, who have figured out that if they lard up projects with heavy affordable obligations, they may kill those projects.[93]

Another California land use planner and lawyer whom I have been pleased to know for forty-five years, Deborah M. Rosenthal, FAICP, of FitzGerald Kreditor Bolduc Risbrough LLP in Irvine,[94] had many great insights on this legislation and what we can expect, as well as the problems generally in California (similar to other places we assume):

> These are my personal views, based primarily on experience with California housing development over the past 35 years. I actually think that certain members of the legislature are absolutely serious about increasing the affordable housing supply, but they are so focused on higher density northern California projects in urban areas that they are missing the point that high density doesn't belong everywhere. A one-size solution doesn't fit every community, and it's been hard to get them to focus on Inland or SoCal projects.
>
> Orange County, where I live, is almost entirely controlled by CC&Rs for planned subdivisions, most of them imposed as conditions of approval to cover infrastructure/maintenance costs since Prop 13 was adopted during the 1970s. Just like pre-1950 CC&Rs incorporated racial covenants, the more recent ones impose use restrictions, pet exclusions, design requirements, landscape palettes, and every other possible rule known to homeowner groups. About 20 years ago, the Legislature adopted a law that overruled covenants that completely prohibited solar panels. Two or three years ago, the Legislature adopted a law that arguably allowed ADUs on any property that was large enough, regardless of CC&Rs, So, the new laws on affordable housing that you cite follow these other similar laws that have affected the enforceability of CC&Rs. On the other hand, pet lovers lost out when the California Supreme Court held that CC&Rs prohibiting even totally indoor pets were enforceable. *Nahrstedt v. Lakeside Village,* 8 Cal.4th 361 (1994). The State Legislature overruled this decision, holding that CC&Rs could not be enforced to the extent of at least one pet. Cal. Civ. Code §4715.
>
> There is an interesting legal question that I have occasionally discussed one of my neighbors who is a well-respected local judge. The racial covenants and, to the best of my knowledge, the solar exclusions were found by the

93. Email message from Bryan Wenter, land use planner/lawyer in Walnut Creek, Cal., to author (Apr. 7, 2022) (quoted with permission). The author was pleased to have worked with Bryan Wenter for several years. He maintains a website at Miller Star Regalia, https://www.msrlegal.com/our-people/bryan-w-wenter.

94. Deborah M. Rosenthal, FAICP, FitzGerald Kreditor Bolduc Risbrough LLP, https://businesslawyerorangecounty.com/attorneys/deborah-m-rosenthal-faicp (last visited June 12, 2022).

Legislature to violate public policy and, therefore, to be unenforceable by the courts. Private individuals did not have the right to enter into contracts that violated public policy, even voluntarily. The judge had no problem with finding the contract clause had no applicability in this situation (although it was a hypothetical discussion). The new affordable housing rule overriding local regulations and covenants does not find that exclusion of affordable housing is a violation of public policy, nor does it cite the existence of a 50-year-old housing "emergency" for support. Instead, it finds creation of affordable housing is a matter of statewide, not local concern, which gives the Legislature a right to overrule local regulation. Matters of statewide concern, though, do not necessarily reach private agreements. Although the new State legislation appears to prohibit private density or use restrictions, it does not directly address contract issues arising when CC&Rs prohibit higher density housing as a matter of private contract and community expectation. BTW, I have almost never seen a CC&R that prohibits affordable housing or requires a minimum house size—minimum lot sizes and use restrictions are much more common.

Bryan [Wenter] points out that restrictive covenants are rarely used to prevent affordable housing. In the real world, this makes sense. The recent legislation allows 100% affordable projects to be built at higher density regardless of private restrictions. Almost no developer wants to build 100% affordable units unless they are set up specifically to manage the multiple funding sources needed to package a reasonably sized project. The cost of relatively small lots in Beverly Hills, for instance, would never justify a 2–4 unit affordable project, and even the ADU legislation simply assumes smaller units will be affordable. Although I didn't dig into the statute, requirements for prevailing wages increase costs up to 30% and can kill any interest in affordable projects. Plus, the paperwork would make a small affordable infill project impossible.

As a result, despite its best intentions, this legislation is likely to have a very limited impact because it requires higher-density development that overrides CC&Rs to be 100% affordable. Unless the stars align, this situation doesn't come up very often, especially where land values are high. The real problem arises when the legislature allows significantly higher density (including a development bonus) surrounded by low-density residential in return for a minimal (15%) number of affordable units. Not to sound cynical, but most of my experiences with these situations involve relatively isolated properties where there is totally inadequate public transportation to serve high-density affordable housing and the Legislature simply assumes poor people don't need cars or other services.

Given that Orange County has a few high-density nodes surrounded by huge expanses of low or moderate density suburban housing, with pitifully limited public transportation, I am a big fan of ADUs and hope cities will develop ways to encourage them. For the most part, ADUs have been successfully "sold" as granny/adult children flats and there is usually plenty of room for them to be tucked into existing backyards. Even my own 20-unit HOA is in favor of allowing smaller second units to serve aging parents or Gen [fill in the alphabet] children. Unfortunately, to date, I haven't seen developers or manufactured housing companies figure out how to propose ADUs on more than a one-at-a-time or single-lot basis. Some cities are very supportive. Others want architect-designed ADUs before they will even

begin review. We need "off the shelf" or manufactured designs that cut costs and approval time to the minimum.

Enjoy your presentation. As usual, the devil is in the details. In this case, the details include the contract clause and the challenge that 100% affordable housing projects are rarely feasible without substantial public financial support. ADUs or second units offer a middle ground with a modest increase in density and the possibility of significant financial advantages to both the landlords and tenants.

Preventing the Problem

Finally, or perhaps first and foremost, we need to avoid the problem of restrictive covenants precluding affordability by requiring an impact assessment in all land use permitting applications in which the CC&Rs are a part. The private CC&R regulation is as important, maybe more important, than the public regulation. No government should approve a residential development without reviewing the declaration. Land use regulations should establish standards of what is acceptable in the private regulation. Most restrictions should not be in perpetuity but might be time-limited. Amendments of CC&Rs should be subjected to an affordability impact analysis.

There is a lot to unpack in these suggestions. What is remarkable is that there is little in the literature about action-forcing strategies at the permitting stage to avoid encumbering property in ways that discriminate and preclude redevelopment to enable affordability.

4. Conclusion

There is so much we can do and so much that must be done to promote affordable housing. We will not get where we need to be if we do not remove unnecessary roadblocks. A careful review of state constitutional and statutory law is critical to amend them as necessary to bring order to the chaos that currently exists with regard to Home Rule. Eliminating unacceptable exemptions from fair housing under federal, state, and local law will advance the cause of diversity, inclusion, and social, economic, and racial equity. Ridding ourselves of those private covenants and other restrictions that create and perpetuate social silos is important. People have the right to manage their private property in concert with others through private restrictions. At the same time, we have the legal and moral responsibility to do what we can to promote development of more affordable

housing. It is, and will continue to be, a difficult balancing problem and to some extent a zero-sum game. In the context of land-use controls, we sometimes use the theory of the "average reciprocity of advantage," wherein we may suffer some disadvantage by subjecting ourselves to the common interest, but, at the same time, when working together we get the reciprocal advantage of a better community. That applies here as to removing the roadblocks.

Assembly Bill No. 721

CHAPTER 349

An act to add Section 714.6 to the Civil Code, relating to real property.

[Approved by Governor September 28, 2021.
Filed with Secretary of State September 28, 2021.]

BILL TEXT

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1.

The Legislature finds and declares all of the following:

(a) The lack of available and safe affordable and supportive housing equitably distributed throughout California presents a crisis for Californians that threatens the health of California citizens and their communities.

(b) The Legislature has previously taken action to expand access to affordable and supportive housing.

(c) Recorded covenants burdening real estate have historically been used to perpetuate discrimination and racial segregation in housing throughout the state and have hampered the effectiveness of efforts to expand the availability of affordable and supportive housing.

(d) The safety and welfare of the general public is promoted by eliminating, with limited exceptions as specified herein, the ability of recorded covenants, conditions, restrictions, or private limits on the use of land to prevent the construction or maintenance of additional affordable and supportive housing particularly in areas that have historically excluded this type of housing.

(e) Ensuring access to affordable and supportive housing and the production of additional affordable and supportive housing is a matter of statewide concern and is not a municipal affair as that term is used in Section 5 of Article XI of the California Constitution. It is the intent of the Legislature that this act therefore apply statewide to all cities and counties, including charter cities, and to

all conditions, covenants, restrictions, or private limits on the use of land, whether recorded previous to the effective date of this act or recorded at any time thereafter.

SEC. 2.

Section 714.6 is added to the Civil Code, to read:

714.6.

(a) Recorded covenants, conditions, restrictions, or private limits on the use of private or publicly owned land contained in any deed, contract, security instrument, or other instrument affecting the transfer or sale of any interest in real property that restrict the number, size, or location of the residences that may be built on the property, or that restrict the number of persons or families who may reside on the property, shall not be enforceable against the owner of an affordable housing development, if an approved restrictive covenant affordable housing modification document has been recorded in the public record as provided for in this section, except as explicitly provided in this section.

(b) (1) The owner of an affordable housing development shall be entitled to establish that an existing restrictive covenant is unenforceable under subdivision (a) by submitting a restrictive covenant modification document pursuant to Section 12956.2 of the Government Code that modifies or removes any existing restrictive covenant language that restricts the number, size, or location of the residences that may be built on the property, or that restricts the number of persons or families that may reside on the property, to the extent necessary to allow the affordable housing development to proceed under the existing declaration of restrictive covenants.

(2) (A) The owner shall submit to the county recorder a copy of the original restrictive covenant, a copy of any notice the owner believes is required pursuant to paragraph (3) of subdivision (g), and any documents the owner believes necessary to establish that the property qualifies as an affordable housing development under this section prior to, or simultaneously with, the submission of the request for recordation of the restrictive covenant modification document.

(B) Before recording the restrictive covenant modification document, pursuant to subdivision (b) of Section 12956.2 of the

Government Code, the county recorder shall, within five business days of receipt, submit the documentation provided to the county recorder by the owner pursuant to subparagraph (A) and the modification document to the county counsel for review. The county counsel shall determine whether the original restrictive covenant document restricts the property in a manner prohibited by subdivision (a), whether the owner has submitted documents sufficient to establish that the property qualifies as an affordable housing development under this section, whether any notice required under this section has been provided, whether any exemption provided in subdivision (g) or (h) applies, and whether the restriction may no longer be enforced against the owner of the affordable housing development and that the owner may record a modification document pursuant to this section.

(C) Pursuant to Section 12956.2 of the Government Code, the county counsel shall return the documents and inform the county recorder of the county counsel's determination within 15 days of submission to the county counsel. If the county counsel is unable to make a determination, the county counsel shall specify the documentation that is needed in order to make the determination. If the county counsel has authorized the county recorder to record the modification document, that authorization shall be noted on the face of the modification or on a cover sheet affixed thereto.

(D) The county recorder shall not record the modification document if the county counsel finds that the original restrictive covenant document does not contain a restriction prohibited by this section or if the county counsel finds that the property does not qualify as an affordable housing development.

(E) A modification document shall be indexed in the same manner as the original restrictive covenant document being modified. It shall contain a recording reference to the original restrictive covenant document, in the form of a book and page or instrument number, and date of the recording. The effective date of the terms and conditions of the modification document shall be the same as the effective date of the original restrictive covenant document, subject to any intervening amendments or modifications, except to the extent modified by the recorded modification document.

(3) If the holder of an ownership interest of record in property causes to be recorded a modification document pursuant to this section that modifies or removes a restrictive covenant that is not authorized by this section, the county shall not incur liability for recording the document. The liability that may result from the unauthorized recordation shall be the sole responsibility of the holder of the ownership interest of record who caused the unauthorized recordation.

(4) A restrictive covenant that was originally invalidated by this section shall become and remain enforceable while the property subject to the restrictive covenant modification is utilized in any manner that violates the terms of the affordability restrictions required by this section.

(5) If the property is utilized in any manner that violates the terms of the affordability restrictions required by this section, the city or county may, after notice and an opportunity to be heard, record a notice of that violation. If the owner complies with the applicable affordability restrictions, the owner may apply to the agency of the city or county that recorded the notice of violation for a release of the notice of violation, and if approved by the city or county, a release of the notice of violation may be recorded.

(6) The county recorder shall charge a standard recording fee to an owner who submits a modification document for recordation pursuant to this section.

(c) (1) Subject to paragraph (2), this section shall only apply to restrictive covenants that restrict the number, size, or location of the residences that may be built on a property or that restrict the number of persons or families who may reside on a property. This section does not apply to any other covenant, including, but not limited to, covenants that:

(A) Relate to purely aesthetic objective design standards, as long as the objective design standards are not applied in a manner that renders the affordable housing development infeasible.

(B) Provide for fees or assessments for the maintenance of common areas.

(C) Provide for limits on the amount of rent that may be charged to tenants.

(2) Paragraph (1) shall not apply to restrictive covenants, fees, and assessments that have not been consistently enforced or assessed prior to the construction of the affordable housing development.

(d) In any suit filed to enforce the rights provided in this section or defend against a suit filed against them, a prevailing owner of an affordable housing development, and any successors or assigns, or a holder of a conservation easement, shall be entitled to recover, as part of any judgment, litigation costs and reasonable attorney's fees, provided that any judgment entered shall be limited to those costs incurred after the modification document was recorded as provided by subdivision (b). This subdivision shall not prevent the court from awarding any prevailing party litigation costs and reasonable attorney's fees otherwise authorized by applicable law, including, but not limited to, subdivision (d) of Section 815.7 of the Civil Code.

(e) Nothing herein shall be interpreted to modify, weaken, or invalidate existing laws protecting affordable and fair housing and prohibiting unlawful discrimination in the provision of housing, including, but not limited to, prohibitions on discrimination in, or resulting from, the enforcement of restrictive covenants.

(f) (1) Provided that the restrictions are otherwise compliant with all applicable laws, this section does not invalidate local building codes or other rules regulating either of the following:

(A) The number of persons who may reside in a dwelling.

(B) The size of a dwelling.

(2) This section shall not be interpreted to authorize any development that is not otherwise consistent with the local general plan, zoning ordinances, and any applicable specific plan that apply to the affordable housing development, including any requirements regarding the number of residential units, the size of residential units, and any other zoning restriction relevant to the affordable housing development.

(3) This section does not prevent an affordable housing development from receiving any bonus or incentive pursuant to any statute listed in Section 65582.1 of the Government Code or any related local ordinance.

(g) (1) Subject to paragraph (2), this section does not apply to:

(A) Any conservation easement, as defined in Section 815.1, that is recorded as required by Section 815.5, and held by any of the entities or organizations set forth in Section 815.3.

(B) Any interest in land comparable to a conservation easement that is held by any political subdivision and recorded in the office of the county recorder of the county where the land is situated.

(2) The exclusion from this section of conservation easements held by tax-exempt nonprofit organizations, as provided in subparagraph (A) of paragraph (1), applies only if the conservation easement satisfies one or more of the following:

(A) It was recorded in the office of the county recorder where the property is located before January 1, 2022.

(B) It is, as of the date of recordation of the conservation easement, held by a land trust or other entity that is accredited by the Land Trust Accreditation Commission, or any successor organization, or is a member of the California Council of Land Trusts, or any successor organization, and notice of that ownership is provided in the text of the recorded conservation easement document, or if that notice is not provided in the text of the recorded conservation easement document, the land trust or other entity provides documentation of that accreditation or membership within 30 days of receipt of either of the following:

(i) A written request for that documentation.

(ii) Any written notice of the intended modification of the conservation easement provided pursuant to paragraph (3).

(C) It was funded in whole or in part by a local, state, federal, or tribal government or was required by a local, state, federal, or tribal government as mitigation for, or as a condition of approval of, a project, and notice of that funding or mitigation requirement is provided in the text of the recorded conservation easement document.

(D) It is held by a land trust or other entity whose purpose is to conserve or protect indigenous cultural resources, and that purpose of the land trust or other entity is provided in the text of the recorded conservation easement document.

(E) It, as of the date of recordation of the conservation easement, burdens property that is located entirely outside the boundaries of any urbanized area or urban cluster, as designated by the United States Census Bureau.

(3) (A) At least 60 days before submission of a modification document modifying a conservation easement to a county recorder pursuant to subdivision (b), the owner of an affordable housing development shall provide written notice of the intended modification of any conservation easement to the parties to that conservation easement and any third-party beneficiaries or other entities that are entitled to receive notice of changes to or termination of the conservation easement with the notice being sent to the notice address of those parties as specified in the recorded conservation easement. The notice shall include a return mailing address of the owner of the affordable housing development, the approximate number, size, and location of intended structures to be built on the property for the purposes of affordable housing, and a copy of the intended modification document, and shall specify that it is being provided pursuant to this section.

(B) The county recorder shall not record any restrictive covenant modification document unless the county recorder has received confirmation from the county counsel that any notice required pursuant to subparagraph (A) was provided in accordance with subparagraph (A).

(h) This section shall not apply to any settlement, conservation agreement, or conservation easement, notice of which has been recorded, for which either of the following apply:

(1) It was entered into before January 1, 2022, and limits the density of or precludes development in order to mitigate for the environmental impacts of a proposed project or to resolve a dispute about the level of permitted development on the property.

(2) It was entered into after January 1, 2022, and limits the density of or precludes development where the settlement is approved by a court of competent jurisdiction and the court finds that the density limitation is for the express purpose of protecting the natural resource or open-space value of the property.

(i) The provisions of this section shall not apply to any recorded deed restriction, public access easement, or other similar covenant that was required by a state agency for the purpose of compliance with a state or federal law, provided that the recorded deed restriction, public access easement, or similar covenant contains notice within the recorded document, inclusive of its recorded exhibits, that it was recorded to satisfy a state agency requirement.

(j) For purposes of this section:

(1) "Affordable housing development" means a development located on the property that is the subject of the recorded restrictive covenant and that meets one of the following requirements:

(A) The property is subject to a recorded affordability restriction requiring 100 percent of the units, exclusive of a manager's unit or units, be made available at affordable rent to, and be occupied by, lower income households for 55 years for rental housing, unless a local ordinance or the terms of a federal, state, or local grant, tax credit, or other project financing requires, as a condition of the development of residential units, that the development include a certain percentage of units that are affordable to, and occupied by, low income, lower income, very low income, or extremely low income households for a term that exceeds 55 years for rental housing units.

(B) The property is owned or controlled by an entity or individual that has submitted a permit application to the relevant jurisdiction to develop a project that complies with subparagraph (A).

(2) "Affordable rent" shall have the same meaning as defined in Section 50053 of the Health and Safety Code.

(3) "Lower income households" shall have the same meaning as defined in Section 50079.5 of the Health and Safety Code.

(4) "Modification document" means a restrictive covenant modification document described in paragraph (1) of subdivision (b).

(5) "Restrictive covenant" means any recorded covenant, condition, restriction, or limit on the use of private or publicly owned land contained in any deed, contract, security instrument, or other instrument affecting the transfer or sale of any interest that restricts the number, size, or location of the residences that may be built on

the property or that restricts the number of persons or families who may reside on the property, as described in subdivision (a).

SEC. 3.

If the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code.

1 Powell on Real Property Special Alert

Special Alert: Not Quite a Requiem for Single-Family Zoning[1]

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Richard E. Nelson Eminent Scholar Chair in Local Government
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Author, ***Powell on Real Property®***
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Scope

On September 16, 2021, California Governor Gavin Newsom, fresh from surviving a recall vote, signed SB 9, the California Housing Opportunity and More Efficiency (HOME) Act. California thereby joined a small but growing number of states and localities that have taken aim at single-family zoning as an impediment to increasing the supply of affordable housing and as a means of socioeconomic and racial exclusion. According to the governor's press release, the new legislation "facilitates the process for homeowners to build a duplex or split their current residential lot, expanding housing options for people of all incomes that will create more opportunities for homeowners to add units on their existing properties," while including measures designed "to prevent the displacement of existing renters and protect historic districts, fire-prone areas and environmental quality."[2] Over the last few years, Minneapolis, Minnesota, and the state of Oregon have composed their own variations on this theme; still, when the largest state (by far) pipes up, other governments are bound to listen.

§ SFA.01 Features of California's SB 9 (2021)

The key features of California's SB 9 (2021) are provisions allowing certain landowners in single-family zones to create duplexes with units each containing at least 800 square feet of floor area, or to split their lots into two residential parcels of at least 1200 square feet, subject to several exceptions, as summarized in the Legislative Council's Digest for the bill:

> This bill, among other things, would require a local agency to ministerially approve a parcel map for an urban lot split that meets certain requirements, including, but not limited to, that the urban lot split would not require the demolition or alteration of housing that is subject to a

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[1] Written by Professor Michael Allan Wolf. This Special Alert originally appeared in the Land Use Law treatise coauthored by Professor Michael Allan Wolf. It can be cited as Daniel R. Mandelker and Michael Allan Wolf, Land Use Law, *Special Alert: Not Quite a Requiem for Single-Family Zoning*, written by Michael Allan Wolf (6th ed. LexisNexis Matthew Bender).

[2] Office of Governor Gavin Newsom, Governor Newsom Signs Historic Legislation to Boost California's Housing Supply and Fight the Housing Crisis (Sept. 16, 2021), available at https://www.gov.ca.gov/2021/09/16/governor-newsom-signs-historic-legislation-to-boost-californias-housing-supply-and-fight-the-housing-crisis/.

recorded covenant, ordinance, or law that restricts rents to levels affordable to persons and families of moderate, low, or very low income, that the parcel is located within a single-family residential zone, and that the parcel is not located within a historic district, is not included on the State Historic Resources Inventory, or is not within a site that is legally designated or listed as a city or county landmark or historic property or district.

The duplex and lot-split provisions of the bill will be codified in new Cal Gov't Code §§ 65852.21 and 66411.7.

The reach of the new measure is far from ubiquitous, as the directives to local governments to permit the duplexes and lot splits do not apply to rent-controlled properties, affordable housing governed by covenants or ordinances, housing that has been occupied by a tenant within the last three years, historic districts and landmark structures, wetlands, some farmland, certain fire hazard and earthquake fault zones, certain flood hazard areas and regulatory floodways, lands subject to certain conservation and resource protection plans and protected species habitats, and lands subject to conservation easements. Units created by these provisions cannot be used for short-term rentals (of 30 days or less), which will reduce their attractiveness for some owners looking for relief from large mortgage payments. For these and other reasons, one analysis has concluded that "SB 9's primary impact be to unlock incrementally more units on parcels that are already financially feasible under existing law, typically through the simple subdivision of an existing structure," and that "[r]elatively few new single-family parcels are expected to become financially feasible for added units as a direct consequence of this bill."[3]

§ SFA.02 Features of Oregon's HB 2001 (2019)

Oregon's HB 2001 (2019) requires cities with populations of between 10,000 and 25,000 to allow duplexes on individual lots in (erstwhile) single-family, detached dwelling zones, and cities with populations of at least 25,000 to allow such duplexes on single lots as well other forms of "middle housing" such as triplexes, quadplexes, cottage clusters,[4] **and townhouses, in single-family, detached dwelling zones.**[5] Smaller cities were given until June 30, 2021, to adopt appropriate land use regulations or amend their comprehensive plans to incorporate this change; otherwise a model ordinance developed by the state would be applicable.[6] Larger cities were given one more year to comply. Lawmakers allowed extensions of the deadlines "where the local government has identified water, sewer, storm drainage or transportation services that are either significantly deficient or are expected to be significantly deficient before December 31, 2023, and for which the local government has established a plan of actions that will remedy the deficiency in those services that is approved by the department."[7]

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[3] Ben Metcalf et al., Will Allowing Duplexes and Lot Single-Family Create New Homes?: Assessing the Viability of New Housing Supply Under California's Senate Bill 9, at 2 (Terner Center for Housing Innovation, UC Berkeley, July, 2021), available at https://ternercenter.berkeley.edu/wp-content/uploads/2021/07/SB-9-Brief-July-2021-Final.pdf.

[4] *See* Ore. Rev. Stat. § 197.758(1)(a) (" 'Cottage clusters' means groupings of no fewer than four detached housing units per acre with a footprint of less than 900 square feet each and that include a common courtyard.' ").

[5] *See* Ore. Rev. Stat. § 197.758(1)(c) (" 'Townhouses' means a dwelling unit constructed in a row of two or more attached units, where each dwelling unit is located on an individual lot or parcel and shares at least one common wall with an adjacent unit.").

[6] For the Middle Housing Model Codes for medium and large cities and for updates on the progress in implementing zoning changes in various municipalities, see https://www.oregon.gov/lcd/UP/Pages/Housing-Choices.aspx.

[7] 2019 Ore. HB 2001 § 4(2).

§ SFA.03 Features of Minneapolis, Minn. Ordinance No. 2019-048 § 2 (amending 20 Minneapolis Code of Ordinances § 521.10(1))

Minneapolis officials, in 2019, designated all residential districts as "Multiple-family," thereby reclassifying the two "Single-family" and "Two-family" residence districts.[8] The genesis for this change can be found in the city's comprehensive plan—Minneapolis 2040. Policy 1 of the plan, "Access to Housing: Increase the supply of housing and its diversity of location and types," explains that the move away from single-family housing is a response to a long history of exclusion and segregation:

> Areas of our city that lack housing choice today were built that way intentionally, through zoning regulations and racially-restrictive federal housing policies during the first half of the twentieth century. Today, our city reflects those past policies which determined, based on their race, where generations of Minneapolis residents had access to housing. These policies and regulations left a lasting effect on the physical characteristics of the city and the financial well-being of its people. Areas of Minneapolis with higher densities and a mix of land uses experienced disinvestment, in part because banks were not lending in these areas. On the outskirts of the city, a post-depression development pattern emerged with little variation in housing types and density, and few areas for commercial development. Today, the zoning map in these areas remains largely unchanged from the era of intentional racial segregation. This comprehensive plan is an opportunity to foster inclusive communities free from barriers to housing choice.[9]

Of course, no simple change in zoning, not even a profound one, can serve as the sole vehicle for reversing a century of racial and socioeconomic exclusion.

§ SFA.04 Words of Caution

While there is much to admire in these efforts to address the problems of the exclusive single-family zone, some words of caution are in order. There are at least four reasons why this trend may prove to be more of a band-aid than a cure. First, many subdivisions, especially older ones, are already built out, meaning that unless current buildings are razed these ordinances and statutes will have little if any impact. Second, homeowners association (HOA) fees run on average from a few to several hundred dollars a month. This additional expense could easily price many moderate-income families out of the formerly single-family neighborhood. Third, there is a high likelihood that the neighborhoods in single-family residential zones are covered by restrictive covenants that prohibit more than one building per lot, duplexes, townhouses, and other more intensive uses of undeveloped lots. Unless the state passes preemptive legislation, as California has done in its accessory dwelling unit (ADU) legislation,[10] duplexes, triplexes, and quadplexes will face covenant-based opposition by neighbors.[11] Fourth, if "missing middle" housing must still meet the area (for example setbacks)

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[8] Minneapolis, Minn. Ordinance No. 2019-048 § 2 (amending 20 Minneapolis Code of Ordinances § 521.10(1)).

[9] Minneapolis 2040, Policy 1, https://minneapolis2040.com/policies/access-to-housing/.

[10] Cal Civ Code § 4751(a) ("Any covenant, restriction, or condition contained in any deed, contract, security instrument, or other instrument affecting the transfer or sale of any interest in a planned development, and any provision of a governing document, that either effectively prohibits or unreasonably restricts the construction or use of an accessory dwelling unit or junior accessory dwelling unit on a lot zoned for single-family residential use that meets the requirements of Section 65852.2 or 65852.22 of the Government Code, is void and unenforceable.").

[11] Even if the state chooses to preempt, zealous private property right defenders might decide to challenge the state statute as a regulatory taking of the neighbors' rights to enforce the covenant, especially if the neighbors can provide testimony that preemption will reduce the value of their

and height requirements for the most restrictive zoning classification, the impact of these measures will be limited. In order to overcome the last two barriers, state lawmakers who are serious about creating a blend of single- and multi-family housing in new neighborhoods (and in those with available lots) should introduce legislation preempting covenants and height and area restrictions that frustrate good-faith efforts to address segregation by class and race and to augment the supply of affordable housing in desirable communities.

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property. If a court accepted this argument it would be unfortunate but not unexpected given the dramatic expansion of the reach of the Takings Clause over the last few decades.