

# THE NEW EXCLUSIONARY ZONING

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## INTRODUCTION

The term “exclusionary zoning” is understood to apply only to suburbs, where municipalities dominated by homeowner cartels anxious about property values and taxes demand land use regulations that prevent certain kinds of development and raise housing costs above what low-income families can afford to pay.<sup>1</sup> (“Housing costs” are just “property values” viewed from a different angle.) Decades of scholarship—legal and sociological—outline how these policies left low-income families stranded in faltering cities whose abandonment by suburban homeowners-to-be at least left behind a large supply of low-cost housing.<sup>2</sup> In cities, where renters predominate, and whose size and heterogeneity opened the door to special interest politics, developers had more power and a

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1. See WILLIAM FISCHER, *THE HOMEVOTER HYPOTHESIS* (2001); Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1 (1990); Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385 (1977); see also *S. Burlington Cnty. NAACP v. Twp. of Mount Laurel (Mount Laurel II)*, 456 A.2d 390 (N.J. 1983); *S. Burlington Cnty. NAACP v. Twp. of Mount Laurel (Mount Laurel I)*, 336 A.2d 713 (N.J. 1975).

2. GERALD E. FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS* 8 (1999); DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 45 (1993); see also Roderick Hills, Professor of Law, N.Y. Univ. Sch. of Law, Presentation at the Fordham Urban Law Journal Symposium: What Is Urban Law Today (Feb. 23, 2013) (calling “White Flight”—the abandonment of central cities by whites in the mid-Twentieth Century—“the largest affordable housing program in U.S. history”).

much freer hand. To the extent they wanted to build, they could.<sup>3</sup> In the 1960s, '70s, and beyond, many cities were desperate for any development they could get.

A separate and newer strain of scholarship—primarily economic—has complicated and updated this story. Urban populations and incomes grew as people of relative means trickled back in to certain cities starting in the 1970s and '80s, then streamed in as urban crime subsided and the economy boomed into the 2000s. These new residents expected to exert a measure of control over their cities and neighborhoods, and demand for development controls increased as cities got denser and richer.<sup>4</sup> Starting with San Francisco and Los Angeles, and later Boston, New York, and Washington, D.C., and now spreading to the interior, development is not keeping pace with the number of people who want to live in these regions.

As in the suburbs, cities began to employ land use restrictions to limit the density of housing, impose lengthy approvals processes that provide ample hooks for NIMBYs, and mandate expensive forms of housing.<sup>5</sup> Many of the country's most desirable and most economically vibrant cities are no longer "Growth Machines." They may be getting richer, and in that sense "growing," but an emphasis on building housing and adding population is a thing of the past. Consequently, housing prices in these post-Growth Machine cities have risen much faster than the national average.<sup>6</sup> The effect has been the same as in the exclusionary suburbs: The anti-development orientation of certain cities is turning them into preserves for the wealthy as housing costs increase beyond what lower-income families can afford to pay. The phenomenon deserves a similar name—the New Exclusionary Zoning.

If low-income families can't afford the suburbs and they can't afford the cities, where should they go? For the first time in American history, it makes sense to talk about whole regions of the country "gentrifying"—whole metropolitan areas whose high housing costs have rendered them inhospitable to low-income families, who, along with solidly middle class families, also feeling the

3. See generally Harvey Molotch, *The City as a Growth Machine: Toward a Political Economy of Place*, 82 AM. J. SOC. 309 (1976).

4. WILLIAM A. FISCHER, *THE ECONOMICS OF ZONING LAWS* 66 (1985); Albert Saiz, *The Geographic Determinants to Housing Supply*, 125 Q. J. OF ECON. 1253, 1255 (2010); David Schleicher, *City Unplanning*, 122 YALE L.J. 1670, 1674-75 (2013).

5. "NIMBY" stands for "not in my backyard" and is used as a pejorative term for groups opposed to an excessively wide-range of development in their neighborhoods or municipalities. FISCHER, *supra* note 4, at 207-30; FISCHER, *supra* note 1, at xi-i; Nicole Stelle Garnett, *Unbundling Homeownership: Regional Reforms from the Inside Out*, 119 YALE L.J. 1904, 1910-12 (2010); Schleicher, *supra* note 4, at 33-52.

6. See generally Edward Glaeser et al., *Why Have Housing Prices Gone Up?*, 95 AMER. ECON. REV. 329 (2005); Saiz, *supra* note 4; Joseph Gyourko et al., *Superstar Cities* (Nat'l Bureau Econ. Research, Working Paper No. 12355, 2006); Andrew D. Paciorek, *Supply Constraints and Housing Market Dynamics* (Federal Reserve Board, Finance and Economic Discussion Series 2012), available at <http://www.federalreserve.gov/pubs/feds/2012/201201/201201pap.pdf>.

crunch, have been paying higher housing costs or migrating to low-housing cost (and low-wage) areas like Texas, Arizona, or North Carolina.<sup>7</sup>

Underlying both of these phenomena—high housing costs in the suburbs and high housing costs in the cities—is a relatively straightforward problem of supply and demand. As demand to live in a particular suburb or city outstrips the existing housing stock, two things can happen: more housing gets built to meet the demand, or prices get bid up to ration the existing stock. In the regions that form this Article’s focus, the second effect predominates.<sup>8</sup>

This is uncontroversial among urban economists but not broadly understood by low-income families, advocates for low-income families, housing activists, and their allies in academia, policy, and government—in short, the housing advocacy community. In the face of higher housing costs, the housing advocacy community tends to argue for a “kludgy”<sup>9</sup> set of policies that can actually *prevent* new development and end up *increasing* housing prices—campaigns to impose building moratoria, for example, or downzonings, community benefits agreements and other exactions, lengthy approvals procedures that disadvantage developers relative to NIMBYs, various forms of rent control, and a focus on affordable housing to the exclusion of other types of development.<sup>10</sup> Many of these tools have their uses—many low-income families

7. RYAN AVENT, *THE GATED CITY* 861-1007 (2011); EDWARD GLAESER, *TRIUMPH OF THE CITY*, 64-67 (2011); Peter Ganong & Daniel Shoag, *Why Has Regional Convergence in the US Stopped?* (Harv. Kennedy Sch. Working Paper No. RWP12-028, 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2081216](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2081216). For most of American history, people have migrated from areas with low incomes to areas with high incomes in search of economic opportunity (this is also a driver of global migration). Over the last couple decades, however, the fastest growing regions, in terms of population, have all had incomes below the national median, and the regions with the highest incomes have been growing more slowly than the national average. The most likely culprit is that, for the first time in American history, people are migrating toward low housing costs rather than towards high incomes. See MATTHEW YGLESIAS, *THE RENT IS TOO DAMN HIGH* 364-508 (2012).

8. EDWARD GLAESER & JOSEPH GYOURKO, *RETHINKING FEDERAL HOUSING POLICY: HOW TO MAKE HOUSING PLENTIFUL AND AFFORDABLE* 341-554 (2008); Edward L. Glaeser et al., *Housing Supply and Housing Bubbles*, 64 J. URB. ECON. 198, 204 (2008).

9. STEVEN M. TELES, NEW AM. FOUND., *KLUDGEOCRACY: THE AMERICAN WAY OF POLICY* (Dec. 20, 2012), available at [http://www.newamerica.net/publications/policy/kludgeocracy\\_the\\_american\\_way\\_of\\_policy](http://www.newamerica.net/publications/policy/kludgeocracy_the_american_way_of_policy).

10. Almost none of the legal research and writing on gentrification draws on the economic research into the nature of housing markets and housing pricing, for reasons addressed below. See generally Keith Aoki, *Race, Space, and Place: The Relation Between Architectural Modernism, Postmodernism, Urban Planning, and Gentrification*, 20 FORDHAM URB. L.J. 699, 818 (1993); Jorge O. Elorza, *Absentee Landlords, Rent Control and Healthy Gentrification: A Policy Proposal to Deconcentrate the Poor in Urban America*, 17 CORNELL J. L. & PUB. POL’Y 1, 51 (2007); Matthew Jerzyk, *Gentrification’s Third Way: An Analysis of Housing Policy & Gentrification in Providence*, 3 HARV. L. & POL’Y REV. 413 (2009); Deliah D. Lawrence, *Can Communities Effectively Fight Displacement Caused By Gentrification?*, 11 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 357, 360 (2002); Diane K. Levy et al., *In the Face of Gentrification: Case Studies of Local Efforts to Mitigate Displacement*, 16 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 238 (2007); Peter Marcuse, *Gentrification, Abandonment, and Displacement: Connections, Causes, and Policy Responses in New*

continue to need subsidies even where housing is cheap—but they should be considered in light of broader drivers of housing costs—namely, supply and demand.

A city's ability to remain affordable depends most crucially on its ability to expand housing supply in the face of increased demand. Among the people who care most about high housing costs there is a lack of understanding of the main causes and the policy approaches that can address them. The central message of this Article is that the housing advocacy community—from the shoe-leather organizer to the academic theoretician—needs to abandon its reflexively anti-development sentiments and embrace an agenda that accepts and advocates for increased housing development of all types as a way to blunt rising housing costs in the country's most expensive markets.

In the suburbs, the politics of exclusionary policies are hopeless: the cartel-like interests of suburban “homevoters” are well-served by current exclusionary policies, state and federal courts for the most part won't intervene, and there is very little interest among state legislators to impose regional or state-wide solutions.<sup>11</sup> The picture is less bleak in exclusionary cities: renters, who would directly benefit from lower housing prices, are a majority in many of these cities, and advocates for affordable housing already form a politically influential bloc—but they use their power to ends that are often counterproductive.<sup>12</sup> While there are other serious obstacles to expanding housing supply, the housing advocacy community could and should become an important part of the

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York City, 28 WASH. U. J. URB. & CONTEMP. L. 195 (1985) [hereinafter Marcuse, *Gentrification, Abandonment, and Displacement*]; Peter Marcuse, *To Control Gentrification: Anti-Displacement Zoning and Planning for Stable Residential Districts*, 13 N.Y.U. REV. L. & SOC. CHANGE 931 (1985) [hereinafter Marcuse, *To Control Gentrification*]; John A. Powell & Marguerite L. Spencer, *Giving Them the Old “One-Two”*: *Gentrification and the K.O. of Impoverished Urban Dwellers of Color*, 46 HOW. L.J. 433 (2003); Molly McUsic, Note, *Re-assessing Rent Control: Its Economic Impact in a Gentrifying Housing Market*, 101 HARV. L. REV. 1835 (1988); Dara K. Newman, Note, *If You Can't Build It, They Won't Come: Condominium Construction Moratoria and Gentrification*, 35 B.C. ENVTL. AFF. L. REV. 593 (2008).

11. The legal academy hasn't completely run out of ideas. See, e.g., LEE ANNE FENNELL, *THE UNBOUNDED HOME: PROPERTY VALUES BEYOND PROPERTY LINES* (2009) (arguing for a new set of policies that would redefine homeownership to align the interests of risk-averse homeowners with those of the regional public). Other articles argue for judicial intervention or removing control of land use to regional or state bodies; these ideas have been around for a while and there is no indication that they will be embraced in the face of settled doctrine and massive unpopularity, respectively.

12. I assume simply that affordable housing advocates want housing prices to be lower, though I want to acknowledge the dangers of using a narrow economic lens into real property and land use issues. Housing markets and land use debates are drenched in sentiment and not completely legible through rational economic analysis. See, e.g., Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821 (2009).

fight against urban land use regimes that systematically privilege a city's wealthiest and most powerful residents.<sup>13</sup>

This Article considers these issues through the lens of housing costs in gentrifying neighborhoods, defined as low-income neighborhoods experiencing an increase in demand and a consequent rise in housing costs and average incomes.<sup>14</sup> There are a couple reasons to shift down in scale. First, gentrification and exclusion are intimately related at a neighborhood level. If a high-demand, high-cost neighborhood won't build, developers and people looking for housing will be diverted to the nearest low-cost neighborhoods. That increases demand and development and leads to gentrification. (Don't blame in-movers or developers for gentrification—they'd rather be in the high-cost neighborhoods. Blame the exclusionary practices of people in the high-cost neighborhoods.) Second, gentrifying neighborhoods are the most contentious and perhaps the most important front of the affordable housing wars—they are the areas where costs are rising the fastest and most consequentially. For the universe of people concerned with the ability of low-income families to house themselves, gentrifying neighborhoods present the starkest picture of the problem.

This Article uses economics as a positive analytic tool to think through the causes and potential solutions of some of the problems that attend gentrification in low-income neighborhoods. It does not use economics as a source of normative commitments.<sup>15</sup> The proposals in this Article do not seek to maximize economic efficiency, land values, consumer surplus, welfare,<sup>16</sup> or similar topics. This Article also makes no arguments (despite their considerable merits!) about the benefits of agglomeration to individual productivity or about the benefits of density for local, regional, and national economic output,<sup>17</sup> locational efficiency,<sup>18</sup> and the environment.<sup>19</sup> Much of the voluminous qualitative and

13. The problem also has a very significant procedural aspect as well. See Schleicher, *supra* note 4, for a fascinating account of the way the structures of city politics and land use procedure lead to levels of development that are suboptimal from a city-wide, regional, or national perspective. See also David Schleicher & Roderick Hills, *Balancing the "Zoning Budget,"* 62 CASE W. RES. L. REV. 81 (2011).

14. Jacob L. Vigdor, *Does Gentrification Harm the Poor?*, BROOKINGS-WHARTON PAPERS ON URB. AFF. 133 (2002); Ingrid Gould Ellen & Katherine M. O'Regan, *How Low Income Neighborhoods Change: Entry, Exit and Enhancement*, (U.S. Census Bureau Center for Economic Studies, Paper No. CES-WP-10-19, 2010), available at <http://ssrn.com/abstract=1687759>; Veronica Guerrieri et al., *Endogenous Gentrification and Housing-Price Dynamics*, (Fed. Reserve Bank of Cleveland, Working Paper No. 10-08R, 2012), available at <http://papers.ssrn.com/abstract=1657176>.

15. Eduardo M. Peñalver, *supra* note 12, at 832–846. Peñalver makes the very helpful distinction between the use of economics as a positive analytical tool and the use of economics as a source of normative commitments. He sees the former as extremely useful and the latter as overreach.

16. LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* (2006).

17. AVENT, *supra* note 7; GLAESER, *supra* note 7; Schleicher, *supra* note 4.

18. See Daniel B. Rodriguez & David Schleicher, *The Location Market*, 19 GEO. MASON L. REV. 637 (2012).

social-theoretical work on gentrification is indispensable, but this Article proceeds in the belief that when studying the consequences of various policy prescriptions one should not ignore economics.<sup>20</sup>

### I. LOOKING AT HOUSING MARKETS SCHEMATICALLY

Housing markets, like other markets, are fundamentally a function of supply and demand. To say so is not an attempt to minimize the extraordinary degree to which housing markets are structured and influenced by non-quantitative, affective, not-strictly-economic factors like racial prejudice or senses of identity, belonging, and personhood.<sup>21</sup> Both supply and demand in housing markets are dynamic and influenced by factors that range from the extremely local—neighborhood cachet or a nuisance next door—to the national and global—credit markets or the state of the world economy.<sup>22</sup>

It is important also to keep in mind that housing is a composite good whose price reflects the house itself and the land it sits on, but also a full range of locational amenities and disamenities. A good school district, pleasant weather, and access to a booming economy are capitalized into housing prices, as are high crime rates or proximity to a waste transfer station.<sup>23</sup> Housing markets have a dependent relationship with mortgage markets, as well—looser lending, as during the boom years, can have a dramatic effect on the supply of and demand for housing, as can a credit crunch.<sup>24</sup>

Eliding all that for a moment, it will be helpful to take a schematic look at the typical functioning of housing markets before delving into the particular pathologies of housing markets in the areas of concern to this Article.

In most of the country, geographically speaking, demand for housing and supply of housing maintain a rough balance.<sup>25</sup> In a typical region, an increase in demand for housing will lead to a temporary housing shortage. Prices will increase as potential buyers outbid each other for a scarce supply of housing. This increase in price signals to developers that there are profits to be made and that it's time to build. New land is brought under development, or old land is

19. See DAVID OWEN, *GREEN METROPOLIS: WHY LIVING SMALLER, LIVING CLOSER, AND DRIVING LESS ARE THE KEYS TO SUSTAINABILITY* (2010).

20. See Peter Byrne, *Rhetoric and Realities of Gentrification: Reply to Powell and Spencer*, 46 HOW. L.J. 491, 494 (2003); Peñalver, *supra* note 12.

21. See, e.g., DEBRA SATZ, *WHY SOME THINGS SHOULD NOT BE FOR SALE: THE LIMITS OF MARKETS* (2010).

22. Adam Levitin & Susan Wachter, *Why Housing?*, (Univ. of Pa. Inst. for Law & Econ., Research Paper No. 12-28, 2013), available at <http://ssrn.com/abstract=2114620>.

23. FISCHER, *supra* note 4, at 105.

24. We've of course seen both situations, in exaggerated fashion, over the last decade. The boom and bust also illustrate the extent to which markets are driven by not-strictly-economic stories and beliefs—in 2008, for example, the story that housing prices would continue to rise indefinitely.

25. Glaeser et al., *supra* note 8.

developed more densely. As developers build, the housing shortage eases and prices start to fall. Developers will continue to build so long as they can sell it for what they spent to build it—the cost of land plus construction costs and normal profit.<sup>26</sup> In these parts of the country, then, housing costs roughly equal land costs plus construction costs plus normal profit.<sup>27</sup> When demand for housing increases, as in Houston, or Phoenix, or Wichita, more housing gets built.<sup>28</sup> Today, the median sale price of a house in Phoenix is about \$160,000.<sup>29</sup>

There are other parts of the country where the supply of housing is greater than the demand for housing. These tend to be places with shrinking economies and not much else in the way of amenities to recommend them. Think of Detroit or Buffalo or other parts of the Rust Belt or Great Plains, that are much smaller today, population-wise, than they once were. In these places, there are more houses on the market than there are people who want to buy them or live in them. There's a glut. There's no shortage of owners willing to unload existing housing at below the cost of new construction. How far below replacement depends on how big the supply and how weak the demand. The median sale price of a house in Detroit in 2013 was about \$40,000.<sup>30</sup>

In these parts of the country, then, housing costs are below the cost of land and construction. Not much new development happens in places like this.<sup>31</sup> If a developer built a house and tried to charge land costs plus construction costs, she would be hard-pressed to find a buyer because the market is glutted with lower-cost substitutes—decent existing housing that the current owners are willing to unload below the cost of new construction. Since a developer would not be able to recoup her costs and would therefore lose money, she will not build.

Finally, there are parts of the country where demand for housing is greater—and sometimes much greater—than the supply of housing. Think of the famously high housing costs in San Francisco and Manhattan.<sup>32</sup> Demand for housing outstrips the supply, and there is a housing shortage. Unlike Wichita or

26. From here on out, this Article will subsume normal profit into construction costs. ARTHUR O'SULLIVAN, *URBAN ECONOMICS* 374-76 (1996).

27. GLAESER & GYOURKO, *supra* note 8, at 491-554; Paciorek, *supra* note 6, at 3.

28. I make the simplifying assumption that the costs of renting a house and costs of buying a house bear a rough-and-ready relation to each other across the different types of housing markets discussed in this Part. If the cost of buying housing goes up in a particular area, the cost of renting in that area will follow, and if the cost of buying housing in one area is greater than the cost of buying housing in a second area, the cost of renting will be higher in the first area as well. See Paciorek, *supra* note 6, at 7.

29. *Phoenix Market Trends*, TRULIA.COM, [http://www.trulia.com/real\\_estate/Phoenix-Arizona/market-trends](http://www.trulia.com/real_estate/Phoenix-Arizona/market-trends) (last visited Mar. 30, 2014).

30. *Detroit Market Trends*, TRULIA.COM, [http://www.trulia.com/real\\_estate/Detroit-Michigan/market-trends](http://www.trulia.com/real_estate/Detroit-Michigan/market-trends) (last visited Mar. 30, 2014).

31. GLAESER & GYOURKO, *supra* note 8, at 1377.

32. Glaeser et al., *supra* note 6, at 329-31; Gyourko et al., *supra* note 6, at 2-4; Paciorek, *supra* note 6, at 1-4; Saiz, *supra* note 4, at 1253-55.

Phoenix, this is not a temporary condition. Developers want to build—there are certainly profits to be made—but they can’t for reasons we’ll explore below.

In the face of capped supply, housing costs in these areas are higher than land costs plus construction costs on a seemingly permanent basis.<sup>33</sup> The median sale price of a house in San Francisco in 2013 was about \$850,000. The median sale price of a house in Manhattan in 2013 was just over \$1,000,000.<sup>34</sup>

Implicit in the above discussion is the fact that prices are set by the market, not by developers or, for that matter, buyers. If a developer builds a median-quality house in Phoenix and attempts to sell it for \$850,000, she will not be able to sell the house. The median sales price for a home in Phoenix—\$160,000—indicates that there are many similar-quality houses on the market for a lot less. As much as the developer would like to make several hundred thousand dollars in profit, she will not make anything until she lowers the house to a competitive price. There will be no demand for houses so high above the market price.

The same rules apply in San Francisco, even though the market looks very different. Many, many people want access to San Francisco’s booming economy, mild climate, world-class consumption opportunities, and its refined-yet-relaxed lifestyle. If a developer wanted to charge \$160,000 for a median-quality house in San Francisco, she would be inundated with thousands of potential buyers—there would be tremendous demand because similar houses in the area are selling for much, much more. The developer might try to narrow down the pool of potential buyers by gradually raising the price, kind of like an auction. As the price rose, fewer and fewer buyers would be interested, until at last there would only be one potential buyer—the person with the greatest willingness to pay. Chances are that person would be willing to pay roughly what other similar-quality houses are going for. If the price were higher than that, the potential buyer would just buy a similar-quality house for less. If the price were lower than that, there would likely be more than one potential buyer and the developer would be able to raise the price a bit.

In both situations, the developer would like to sell the house for more, and the buyer would like to buy the house for less, but both are “price takers”—that is, in the context of a big regional housing market, no single developer and no single buyer has the power to dictate price.<sup>35</sup> The price is determined by the interaction of supply and demand on the market. The concept of “price-taking” is important and we’ll return to it later in the Article.

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33. It is worth noting that land costs and construction costs tend to be higher in these areas than elsewhere, but that does not wholly account for the price differences between places like Manhattan and places like Phoenix. Richard C. Schragger, *Rethinking the Theory and Practice of Local Economic Development*, 77 U. CHI. L. REV. 311 n.82 (2010).

34. *New York Market Trends*, TRULIA.COM, [http://www.trulia.com/real\\_estate/New\\_York-New\\_York/market-trends](http://www.trulia.com/real_estate/New_York-New_York/market-trends) (last visited Mar. 30, 2014).

35. See PAUL SAMUELSON & WILLIAM NORDHAUS, *ECONOMICS* (1998).



## II. POLICY AND POLITICS OF THE NEW EXCLUSION

Why do these areas have such low housing supply elasticities? Stated another way: when prices go up, why doesn't the housing supply expand? A good deal of economic scholarship over the last decade has sought to answer this question. The answer is basically two-fold: the first reason is that many high-demand areas have a limited supply of developable land.<sup>36</sup> Compare Omaha to Los Angeles. Pick a point at the center of downtown Omaha, and imagine a fifty-mile radius extending from that point. The circle described encompasses overwhelmingly flat, dry, developable land. Developers could build almost anywhere on it. Do the same thing for Los Angeles and the circle described encompasses thousands of square miles of ocean and mountains that are undevelopable. This relative dearth of potentially developable land afflicts all coastal cities, as well as those surrounded by mountains, wetlands, etc. (Coastal California gets a double and sometimes triple whammy.) This raises the price of land, which goes into the land costs plus construction costs baseline, but can also prevent municipalities from quickly expanding housing supply, which, in high-demand areas, can help to send prices above the land costs plus construction costs baseline, at least temporarily.

The second and probably more crucial reason behind low housing supply elasticity is that various land-use regulations and political pressures prevent increases in housing supply.<sup>37</sup> This factor is more important because even along the coast and in other land-constrained areas, the technical capacity to develop more densely exists but is not exploited. San Francisco, for instance, whose housing prices, in real terms, increased nearly three times the national average, or about 458%, from 1960 to 2000, added just 269 housing units in 2011.<sup>38</sup> San Francisco grew more between 1950 and 1960 than it has since then.<sup>39</sup> But many parts of the city could be developed much more densely. How did this happen in San Francisco and other places where housing demand is greater than the supply?

A main factor has been the ascendance of nearly plenary local power over zoning, which limits the bulk of buildings and thereby the density at which developers can build. The zoning power, granted to municipalities by state enabling acts starting in the 1920s, is ostensibly limited by the police power to serve public health, safety, and the general welfare.<sup>40</sup> As late as the 1950s and '60s, municipalities that wanted to, say, zone out a particular hotel would have

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36. See generally Saiz, *supra* note 4.

37. Edward Glaeser et al., *Why is Manhattan So Expensive?: Regulation and the Rise in House Prices*, 48 J.L. & ECON. 331 (2005); Glaeser et al., *supra* note 6; Gyourko et al., *supra* note 6; Paciorek, *supra* note 6.

38. Gyourko et al., *supra* note 6, at 8; Amanda Erickson, *The Number of the Day: 418*, ATLANTIC CITIES (May 21, 2012), <http://www.theatlanticcities.com/housing/2012/05/number-day-418/2065>.

39. Gyourko et al., *supra* note 6, at 18.

40. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

to make the argument that a hotel in that location would encourage the spread of venereal disease or corrupt the morals of youth.<sup>41</sup> No more. Now any old justification will do, be it health- and safety-based, or simply economic or aesthetic.<sup>42</sup> As long as there are no bald violations of equal protection or due process rights, state courts will uphold zoning laws. The Supreme Court has shown little interest in upsetting this state of affairs. Cities and other municipalities, formerly “chilled” by legal uncertainty, have zoned up with alacrity in the intervening decades.<sup>43</sup>

Municipalities use Floor-Area Ratios (FAR) and other bulk limits embedded in zoning laws to keep densities as low as they want.<sup>44</sup> If San Francisco or Washington, D.C., wants to zone for low-density row houses rather than multi-family apartment buildings near BART or Metro stops, they are free to do so. If they want to impose robust parking requirements, which further limit density and add to the cost of development, they are free to do that, too. Certain constituencies demand it and so cities supply it, and that legally and practically limits the supply response in high-demand areas.<sup>45</sup>

A host of new approvals procedures have also become popular over the last few decades. There might be a second layer of review, creating what’s known as “double-veto approvals,” as in parts of California, where locally approved projects then go before the California Coastal Commission.<sup>46</sup> Many projects in New York City must go through the multi-layered Uniform Land Use Review Procedure (ULURP), involving separate approvals by community boards, the borough president, the City Planning Commission, and sometimes City Council and the Mayor. Not all of these layers are empowered to veto a project, but the process creates multiple pressure points for anti-development activists to block developments.<sup>47</sup>

The rise of environmentalism and environmental review has also been consequential, giving municipalities a positive rationale for growth control

41. RICHARD BABCOCK, *THE ZONING GAME* 35 (1965).

42. *See* *Berman v. Parker*, 348 U.S. 26 (1954).

43. FISCHEL, *supra* note 4, at 49; Robert C. Ellickson, *The Irony of “Inclusionary” Zoning*, 54 S. CAL. L. REV. 1167, 1207-10 (1981).

44. Schleicher, *supra* note 4, at 18.

45. Michael Manville, *Parking Requirements as a Barrier to Housing Development: Regulation and Reform in Los Angeles* (Lewis Ctr. for Reg’l Policy Studies, Inst. of Transp. Studies, UCLA, 2010), *available at* [http://www.its.ucla.edu/research/rpubs/Manville\\_ARO\\_DEC\\_2010.pdf](http://www.its.ucla.edu/research/rpubs/Manville_ARO_DEC_2010.pdf).

46. Matthew Kahn et al., *The Housing Market Effects of Discrete Land Use Regulations: Evidence from the California Coastal Boundary Zone*, 19 J. OF HOUSING ECON. 269 (2010); FISCHEL, *supra* note 4, at 26.

47. Michael H. Schill, *Removing Regulatory Barriers: One City’s Experience* (Furman Ctr. for Real Estate & Urban Policy, Working Paper No. 04-05, 2004), *available at* <http://furmancenter.org/files/publications/RemovingRegulatoryBarrierscombined0504.pdf>.

measures that are, in practice, exclusionary.<sup>48</sup> Many projects require an Environmental Impact Statement (EIS) under federal or state laws, and it is a tried-and-true tactic for opponents of a development to smuggle as many potential impacts as possible, whether conventionally “environmental” or not, into the public meetings that determine the scope of the EIS.<sup>49</sup>

The advent of historic preservation in the 1960s is also part of this secular trend. Historic preservation districts effectively remove parts of the city from the stock of developable land and impose additional approvals for development within them. This makes development more expensive or prevents it outright, both of which raise housing prices in high-demand areas.<sup>50</sup> Open meetings laws also make it difficult or impossible for developers and city officials open to development to negotiate workable compromises and streamlined approvals.<sup>51</sup> Imagine the scene if Tea Party activists were entitled to be present during high-level federal budget negotiations and you will get a sense of the effect of NIMBYs at a planning board meeting.

All of these approval processes make development more costly (adding to our land costs plus construction costs baseline) and also systematically skew the approvals game in favor of anti-development activists by giving them more hooks for legal action, more opportunities for delay, and in general more chances for them to win and for developers to lose. And while the remedy in a successful NIMBY suit is a blocked development, the remedy in a successful developer suit is typically the privilege of starting the costly approvals process all over again.<sup>52</sup> Delay can kill projects outright if carrying costs and approvals costs become too burdensome. The developer loses the property or simply gives up.<sup>53</sup>

To be clear, this is not an argument that approvals processes, community participation, environmental review, historic preservation, or open meetings laws should not exist. These laws and procedures have legitimate purposes and worthy ends. Frequently unacknowledged is the fact that they also raise the cost of development, which raises the cost of housing.<sup>54</sup> I’ll sketch potential policy

48. William A. Fischel, *Do Growth Controls Matter? A Review of Empirical Evidence on the Effectiveness and Efficiency of Local Government Land Use Regulation* 1-3 (Lincoln Inst. of Land Policy, Working Paper No. 87-9, 1990).

49. See *Chinese Staff & Workers Ass’n v. City of New York*, 68 N.E.2d 359 (N.Y. 1986); Ellickson, *supra* note 43, 1204-05.

50. David B. Fein, Note, *Historic Districts: Preserving City Neighborhoods for the Privileged*, 60 N.Y.U. L. REV. 64 (1985); GLAESER, *supra* note 7, at 148-152.

51. FISCHEL, *supra* note 4, at 26.

52. *Id.* at 42.

53. I have experienced this first-hand as a land use attorney for Fair Share Housing Development, an affordable housing developer in South Jersey that grew out of the Mount Laurel exclusionary zoning cases in the 1970s and ‘80s. Suburban municipalities will baldly reject conforming applications for multifamily affordable development, knowing that applicants will most likely not be able to carry a property through a drawn-out legal battle.

54. Ellickson, *supra* note 43, at 388-403; Fischel, *supra* 48, at 1.

reforms in the final Part, but a first and basic step toward reform is acknowledging the costs and negative consequences of the laws and procedures and balancing them against their benefits. As it is, demand for restrictive land use regulations only gets greater as cities get richer and denser. In places like San Francisco or Brownstone Brooklyn, any increase in development pressure seems to induce a countervailing demand by local residents for stricter regulation of development.<sup>55</sup>

Many housing advocates look favorably upon government regulation as a solution to the problem of rising housing costs, and in many cases regulations might help. Almost wholly unacknowledged by housing advocates is the role that the regulations outlined above have played in creating the problem. Whatever their virtues, these regulations, as they've evolved in urban areas, have helped relatively high-income homeowners increase property values and exert *de facto* private control over their neighborhoods to the detriment of renters and potential in-movers.<sup>56</sup> In the areas of primary concern for this Article, these regulations (and the anti-development politics they enable) have ushered in a new kind of exclusionary zoning.

Restricted development in high-demand urban regions creates a number of pathologies beyond unnecessarily high housing costs. Among these are reverse filtering, a bias toward luxury development, a bias toward large-scale development, and a bias toward politically savvy and capital-rich developers at the expense of smaller developers. These pathologies of course have a disproportionate impact on low-income people and communities. Most in the housing advocacy community place the blame squarely on developers, but these pathologies are more accurately described as the consequences of a dysfunctional and restricted housing market.

What is filtering? In smoothly functioning housing markets, where demand for housing is met by a supply response, new housing gently degrades over time, decreases in price and quality relative to subsequently built housing, and "filters" down to people of lower income levels.<sup>57</sup> Think of the car market: Expensive new cars become cheaper used cars, and are owned by people of suc-

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55. FISCHEL, *supra* note 4, at 66; see Francois Ortalo-Magne & Andrea Prat, *The Political Economy of Housing Supply: Homeowners, Workers, and Voters* (LSE STICERD, Research Paper No. TE514, 2007).

56. It is doubtful that the political force behind zoning was ever about "health, safety, and welfare." See SEYMOUR TOLL, *ZONED AMERICAN* (1969) for an account of the passage of New York's comprehensive zoning ordinance in 1916. Neighboring landowners pushed for zoning for bulk after the construction of the massive Equitable Building eased a shortage of office space in the financial district and pushed down rents. Wealthy merchants pushed for zoning for use to keep the immigrant hordes employed in the garment district away from the swank Ladies' Mile shopping corridor.

57. ANTHONY DOWNS, *GROWTH CONTROLS AND AFFORDABLE HOUSING: DO THEY CONFLICT?* 5 (2004); FISCHEL, *supra* note 4, at 329; DANIEL R. MANDELKER & ROGER MONTGOMERY, *HOUSING IN AMERICA: PROBLEMS AND PERSPECTIVES* 161-203 (1979); ARTHUR O'SULLIVAN, *URBAN ECONOMICS* 376-80 (1996); Ellickson, *supra* note 43, at 1184-87.

cessively lower income levels. Many in the housing advocacy community are skeptical of the idea of filtering, at least in part because of the unfortunate resonance with the widely disparaged theory of “trickle-down economics” from the Reagan Era. But “filtering” is not a policy so much as a description of what happens in well-functioning housing markets. In fact, filtering provides the overwhelming majority of low-income housing in the United States.<sup>58</sup> By increasing the supply and facilitating filtering, even the construction of luxury housing can help to blunt the rise of housing costs for the entire market.<sup>59</sup>

In areas with a capped supply and increasing demand, housing in effect “filters up”—housing formerly occupied by low-income people becomes housing for high-income people. If high-income people are unable to build new housing for themselves, they will buy existing housing and fix it up. (Now think of the Cuban car market: Restrictions on sales and imports cap the supply, meaning that even clunkers from the 1950s cost tens of thousands of dollars.)<sup>60</sup> This is the story of the Mission in San Francisco, Harlem in New York, or Logan Circle in Washington, D.C. “Filtering up” is just another word for “gentrifying.”<sup>61</sup> This might be another reason why housing advocates are skeptical of filtering—because of capped supply, housing does not filter down in the cities where they live.

Restricting development in high-demand areas also biases the market toward luxury development. If profit-maximizing developers can only build a limited number of units, they will build the units with the highest margins—for instance, luxury housing.<sup>62</sup> Not until upper-end demand is sated will developers build lower-margin products that meet demand lower down the income scale. This dynamic has been at work in Washington, D.C., where an unusually large pipeline of “Class A” luxury development has driven down Class A rents and led to increased investment in the Class B and C markets.<sup>63</sup>

The flipside of restricted supply is pent-up demand, and pent-up demand can create the conditions for development on a scale that harkens back to the Urban Renewal era. A common NIMBY complaint is that a particular development is “out of scale,” or that it would change neighborhood character or dis-

58. DOWNS, *supra* note 57, at 5.

59. FISCHER, *supra* note 4, at 337.

60. Nick Miroff, *In Cuba, A Used Car Is No Bargain*, NPR (Nov. 12, 2013), <http://www.npr.org/2011/10/31/141858419/in-cuba-a-used-car-is-no-bargain>.

61. Jed Kolko, *The Determinants of Gentrification* (2007) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=985714](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=985714).

62. A similar dynamic was observed in the American market for Japanese automobiles in the 1980s and ‘90s after the imposition of import quotas. When Japanese automakers substituted high-margin luxury vehicles for less expensive models, their revenues actually increased. See David Sanger, *Japanese Seen Extending Auto Quotas* (N.Y. TIMES), Jan. 12, 1990, <http://www.nytimes.com/1990/01/12/business/japan-seen-extending-auto-quotas.html>.

63. Philip Tilly, *Vacancies Up, Rents Down for Class B Apartments in Region*, WASH. POST (July 28, 2013), [http://articles.washingtonpost.com/2013-07-28/business/40864693\\_1\\_class-b-rents-class-a](http://articles.washingtonpost.com/2013-07-28/business/40864693_1_class-b-rents-class-a).

rupt an existing community. Large-scale development can certainly do these things, as the Urban Renewal era showed us. A city that keeps up with demand over time by allowing small-scale, piecemeal, organic development has no need for potentially destructive mega-developments.

Finally, multilevel approvals and opposition to development represent a tremendous barrier to entry for smaller developers and can be insurmountable to all but the largest, savviest, and richest developers with the closest ties to city government.

These developers are easily cast as villains by a housing advocacy community that fights on behalf of a low-income constituency that could never afford a spot in one of the developers' projects. While the typical for-profit developer is axiomatically an amoral, profit-seeking creature, the pathologies outlined above are the consequences of restricting development in high-demand areas, not of the greed of developers.<sup>64</sup>

### III. TWO TAKES ON RISING HOUSING COSTS

Now that we have a basic set of intuitions about housing markets, this Article will move down in scale to the neighborhood. This Article has implicitly treated housing costs as uniform across a city, but obviously that's not true—housing costs vary dramatically from neighborhood to neighborhood.<sup>65</sup> People with higher incomes will tend to outbid people with lower incomes for nice homes in desirable locations, so neighborhoods with high-quality homes and good locational amenities will tend to have people of higher incomes, and neighborhoods with low-quality homes and poor locational amenities will tend to have people of lower incomes.<sup>66</sup> Although some neighborhoods remain anchored to high or low incomes owing to persisting amenities or disamenities, other neighborhoods go from high-income to low-income and back again over time.<sup>67</sup>

There are two general types of neighborhood change: the first is preference- or taste-driven change.<sup>68</sup> The move from city to suburb, for instance, was driven in part by the desire of many people for detached single-family homes with garages and yards—the suburban lifestyle.<sup>69</sup> A couple decades later,

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64. As Ice-T said, "Don't hate the player, hate the game." ICE-T, *Don't Hate the Playa*, on *THE SEVENTH DEADLY SIN* (Coroner/Atomic Pop 1999).

65. Guerrieri et al., *supra* note 14, at 2.

66. See Sanghoon Lee & Jeffrey Lin, *Natural Amenities, Neighborhood Dynamics, and Persistence in the Spatial Distribution of Income* (Fed. Reserve Bank of Phila., Working Paper No. 13-48, Dec. 6, 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2365778](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2365778).

67. *Id.* at 2-3.

68. Vigdor, *supra* note 14, at 140.

69. Of course this preference was heavily shaped and incentivized by government intervention. See KENNETH JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* (1987).

brownstones and other traditional architectural styles became fashionable, and those neighborhoods became more desirable again.<sup>70</sup> With preference-driven change, the level of demand in a given city isn't necessarily changing; it's just directing itself from one type of housing to another and from particular neighborhoods to others.<sup>71</sup> Prices in neighborhoods will change, but regional price levels may not.

This Article is much more concerned with a second type of change: change driven by the expansion of the regional economy and the consequent increase in regional demand for housing.<sup>72</sup> In the case of a region-wide boom, for instance, housing demand will increase and prices will begin to rise. In areas with low housing-supply elasticities, the increase in demand leads to higher prices instead of an expanded supply of housing. As an area experiences a regional demand increase, housing costs across the city do not rise uniformly.<sup>73</sup> The relatively low-income neighborhoods with low initial housing costs appreciate at a much faster rate than high-income neighborhoods with housing costs that are already high.<sup>74</sup> To draw that out a bit—in areas that cannot or will not build, low-income neighborhoods are systematically hit the hardest. Renters in low-income neighborhoods suffer the most.

Housing costs in low-income neighborhoods in high-demand, low-elasticity areas do not appreciate at a uniform rate, however. According to a study that comprehensively tracked intracity variation in housing prices in such areas over time, the low-income neighborhoods that border high-income neighborhoods appreciate at a substantially higher rate than the low-income neighborhoods that are farther away from high-income neighborhoods.<sup>75</sup> As a metropolitan area gets richer and housing prices increase, neighborhoods like Harlem, which abuts high-income areas, will gentrify before neighborhoods like Brownsville, Brooklyn, which is relatively isolated from high-income areas.

The phenomenon makes sense when considered within a supply and demand framework—the highest-demand neighborhoods will tend to be the highest income, since high-income people generally have a higher willingness (and ability) to pay. High-income people tend to find and sit on the highest amenity neighborhoods.<sup>76</sup> For a variety of reasons, these neighborhoods also tend to

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70. SULEIMAN OSMAN, *THE INVENTION OF BROWNSTONE BROOKLYN: GENTRIFICATION AND THE SEARCH FOR AUTHENTICITY IN POSTWAR NEW YORK* (2012); Aoki, *supra* note 10.

71. See Marcuse, *Gentrification, Abandonment, and Displacement*, *supra* note 10, for a discussion premised on preference-driven change that assumes a stable population, meaning that population inflows to certain neighborhoods (gentrification) necessitates population outflows from other neighborhoods (abandonment).

72. Vigdor, *supra* note 14, at 3-4.

73. Guerrieri et al., *supra* note 14, at 2-6.

74. *Id.* at 4.

75. *Id.* at 5.

76. Lee & Lin, *supra* note 66.

have the most restrictive regulations—the relationship between property values and restrictive land-use regulations takes the form of a positive feedback loop; high-income residents usually make the best organized, best connected, and most forceful NIMBY groups; and many historic districts exist in high-income neighborhoods.<sup>77</sup> People who want to live in these neighborhoods but who cannot afford housing there will seek out the closest substitutes that they can afford, and most often those substitutes are the nearest neighborhoods of sufficiently low cost. When metropolitan regions experience an upsurge in demand, high-income, high-housing-cost neighborhoods will basically expand as housing in neighboring low-income, low-housing-cost neighborhoods gets bid up. In this sense, gentrification is fundamentally a *demand-side spillover phenomenon*. People want to live in the highest-income, highest-demand areas, but there's no room and it's too expensive. Instead, they go to the nearest low-income neighborhood and bid up prices there.

As demand to live in particular neighborhoods increases, *ceteris paribus*, housing costs increase. This Article assumes that gentrification is a policy concern because it displaces low-income people *or* forces them to pay higher housing costs, both of which are potentially harmful.<sup>78</sup> This Article sidesteps the debate between housing advocates who maintain that gentrification causes widespread displacement<sup>79</sup> and certain academic skeptics who maintain that the empirical data is ambiguous.<sup>80</sup> It is not necessary to resolve these debates if we grant that unnecessarily high housing costs are a bad thing. Whether or not those costs cause displacement, they have to be borne by the people who live in a neighborhood in a way that disproportionately burdens low-income people. Studies that use housing cost, household income, and demographic data can readily identify low-income neighborhoods experiencing increases in housing costs and incomes. There is good and unambiguous data on this. The economic

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77. FISCHEL, *supra* note 4, at 173-75; GLAESER, *supra* note 7, at 148-52.

78. This Article remains agnostic as to whether gentrification is good or bad on balance, though I agree with many of the arguments about the benefits to low-income people of gentrifying neighborhoods. Less crime, cleaner streets, better schools, access to higher-paying jobs, wealthier markets, and a wider array of goods and services are good things. *See, e.g.,* J. Peter Byrne, *Two Cheers for Gentrification*, 46 *HOW. L.J.* 405 (2003). Many housing advocates claim that these benefits are either inaccessible to longtime residents or outweighed by the loss of the neighborhood and the relationships among people in that neighborhood as they were prior to the influx of higher-income people. *See* NEIL SMITH, *THE NEW URBAN FRONTIER: GENTRIFICATION AND THE REVANCHIST CITY* (1996); Powell & Spencer, *supra* note 10.

79. Byrne, *supra* note 78; Marcuse, *Gentrification, Abandonment, and Displacement*, *supra* note 10; Marcuse, *To Control Gentrification*, *supra* note 10.

80. Lance Freeman & Frank Braconi, *Gentrification and Displacement: New York City in the 1990s*, 70 *J. AM. PLAN. ASS'N.* 39-52 (2004); Lance Freeman, *Displacement or Succession? Residential Mobility in Gentrifying Neighborhoods*, 40 *URB. AFF. REV.* 463-91 (2005); Vigdor, *supra* note 14.



studies this Article relies on most heavily track gentrification in this more elegant and less ambiguous way.<sup>81</sup>

Note the driver of gentrification in this model: demand.<sup>82</sup> Inflation aside, prices will not increase unless there is an increase in demand relative to supply.<sup>83</sup> The resulting increase in prices indicates to developers that it's time to build. The potential profitability of a project depends on how much revenue it can generate from rents or from the sale of units. Developers will not build and, crucially, lenders will not lend, unless the rents or sales of units will cover operating expenses and debt service plus profit.<sup>84</sup> As the general price level in a neighborhood increases, projects that would not have been profitable to build at Time A become profitable to build at Time A+1. Developers' appetite for risk will vary, and sometimes development decisions are made based on speculative increases rather than current levels. Still—new development follows demand and the price increases and profit-making opportunities it occasions.

Remember: individual developers are price-takers. While developers use marketing, various amenities, and whatever else in the attempt to maximize rents and sale prices in their buildings, they have no control over the general price level in the housing market. As such, new construction in a gentrifying neighborhood is just a symptom of increased demand; try as they might, developers cannot drive the gentrification process by building luxury buildings and charging a lot to live there. If they build in areas without sufficient demand, they will lose money. Their choice in that situation will be to charge market rents and operate at a loss, or try to charge the rents necessary for the project to pencil out and operate an empty building.

Housing advocates may want to prevent the construction of new housing in low-income neighborhoods—a phenomenon explored in the next Part—but by the time a developer wants to build a luxury building in a neighborhood, it's already too late. High-income people are coming to bid up housing prices whether the building gets built or not.

It may not be the case that new construction can *never* induce its own demand. Perhaps some signature project by a high-profile architect can draw people to a previously non-gentrifying neighborhood through some residential analog to the Bilbao Effect, though it is difficult to imagine a developer who would try. And government infrastructure investment is a type of development that *can* induce demand—see the “Greenline Effect” in Washington, DC, that made low-income neighborhoods more convenient and attractive to higher-income

81. For an instance where this is done elegantly, see Guerrieri et al., *supra* note 14.

82. AVENT, *supra* note 7, at 1008-1296; GLAESER, *supra* note 7, at 161-63; YGLESIAS, *supra* note 7, at 664-740.

83. This could also come from a sudden decrease in supply, as after a natural disaster, though this is much less common. Note, though, that gentrifying neighborhoods often experience a marginal decrease in supply as smaller, lower-cost dwellings are combined into larger, higher-cost dwellings. See *infra* note 121 and accompanying text.

84. BABCOCK, *supra* note 41, at 44.

residents.<sup>85</sup> But, in the main, private developers will only build if the demand is already there to pay for the development.

Most in the housing advocacy community subscribe to what might be called a *supply-side theory* of gentrification. This theory is based on the idea that new buildings, renovated housing, and shops catering to high-end tastes *cause* gentrification.<sup>86</sup> If you want to know whom to blame, look to developers and financial institutions that target neighborhoods for gentrification and develop buildings that low-income residents can't afford, necessitating an influx of high-income residents.<sup>87</sup> Developers and other businesses set up shop to serve the new higher-income clientele, not the existing low-income residents. Higher housing costs force some residents to move; neighborhood character changes, leaving a less hospitable environment for anybody who can afford to pay higher rents and stay. In short, development causes gentrification.

This theory has serious implications for their recommended policy prescriptions. If development *causes* gentrification, then the best way to stop gentrification is to stop development. Iconic anti-gentrification campaigns in New York, Washington, D.C., San Francisco, and elsewhere involve coalitions of low-income people, activists and organizers, community groups, and allied elected officials working together to prevent some luxury high-rise or another from being built in a low-income area designated as the new "cool" neighborhood. Efforts to prevent particular developments often go hand-in-hand with proposals to downzone neighborhoods facing development pressure, to impose moratoria on forms of development associated with gentrification, or to exact Community Benefits Agreements to any development that does occur, or to push new construction of affordable housing to the exclusion of other forms of development.<sup>88</sup> Some of these policies have useful and important applications, but all express an impulse to clamp down on development in the face of gentrification pressure. These strategies increase housing costs by restricting a housing supply response or by increasing development costs.<sup>89</sup> If the goal is to

85. YGLESIAS, *supra* note 7, at 683.

86. GLAESER, *supra* note 7, at 144-148; YGLESIAS, *supra* note 7, at 664-740.

87. See JANE JACOBS, *DEATH AND LIFE OF GREAT AMERICAN CITIES* 187-99 (1956).

88. See, e.g., Meredith Hoffman, *Bushwick Housing Boom Draws Local Backlash*, DNA INFO (Mar. 28, 2013), <http://www.dnainfo.com/new-york/20130328/bushwick/bushwick-housing-boom-draws-local-backlash>; Jennifer 8. Lee, *Lower East Side Rezoning Plan Has Defenders*, N.Y. TIMES (Aug. 7, 2008), <http://cityroom.blogs.nytimes.com/2008/08/07/lower-east-side-rezoning-plan-has-defenders>. For the spate of films that document anti-gentrification movements in New York City (and that are themselves anti-gentrification and anti-development), see, for example, *BATTLE FOR BROOKLYN* (Rumur Films 2011); *BROOKLYN MATTERS* (Building History Films 2007); *GUT RENOVATION* (Outcast Films 2012); *MY BROOKLYN* (Anderson 2012); *THE VANISHING CITY* (Senko and DeRosa 2009). Furthermore, see *Chinese Staff & Workers v. City of N.Y.*, 68 N.Y.2d 359 (1986), as an example of the many lawsuits anti-gentrification groups bring in an effort to stifle development.

89. Affordable housing development is a partial exception that we'll explore further below—it typically creates a relatively small number of subsidized units reserved for fami-

moderate housing price increases so that existing residents can remain in the neighborhood, this is not the policy agenda to pursue.

Supply-side theories of gentrification animate the work of many advocacy organizations. One classic example comes from a case initiated by the Chinese Staff & Workers Association, a remarkable coalition of low-income restaurant and garment workers in New York City. In *Chinese Staff & Workers Association, et al. v. City of New York*,<sup>90</sup> Chinese Staff sued the City under the State and the City Environmental Quality Review Acts (SEQRA and CEQR) to rescind the permits for a luxury high-rise apartment building, the Henry Street Towers, which was slated to be built on a vacant lot in Chinatown. They argued that the Environmental Impact Statement required under SEQRA and CEQR failed to consider “the potential displacement of local residents and businesses is an effect on population patterns and neighborhood character.”<sup>91</sup> An amicus brief from the Association for Neighborhood and Housing Development, or ANHD, one of the New York City’s largest alliances of tenants’ advocates and affordable housing nonprofits, argued that environmental review under SEQRA and CEQR should consider socioeconomic impacts and the growing problem of gentrification.<sup>92</sup> The New York Court of Appeals agreed. Rather than ordering an amended declaration, the court rescinded the permits and directed the City and the developer to begin environmental review anew, a remedy that was assured to delay the project for years and cost hundreds of thousands of dollars. The suit is premised on the belief that developing new market-rate housing in the neighborhood would lead to gentrification, higher housing costs, and increased displacement. (Note that the project was to be built on a vacant lot, so no direct displacement would have occurred.) The court remained agnostic on the merits of that argument, but imposed an ostensibly split-the-baby ruling that actually had the effect of stopping the project. The case demonstrates in early form what has become a common tactic among groups opposed to a particular project—introduce as large and as diverse a set of concerns as possible into environmental review at the scoping stage in the hopes of blocking the project or slowing down the approvals process.

Similar sentiments drive efforts to fight gentrification today. In Bushwick, Brooklyn, probably New York City’s fastest-gentrifying neighborhood, local housing advocates led by St. Nick’s Alliance, a neighborhood affordable housing advocacy organization, pushed for a down-zoning to prevent high-rise housing development in the face of massive increases in average rents.<sup>93</sup> Note

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lies below certain percentages of Area Median Income, or AMI, but affordable housing requirements can prevent development and do raise the cost of development.

90. 68 N.Y.2d 359 (1986).

91. *Id.* at 366.

92. *Id.* at 361.

93. Meredith Hoffman, ‘Abnormal’ Leap Hikes Bushwick Rents by Nearly 20 Percent, *Report Says*, DNA INFO, Mar. 7, 2013, <http://www.dnainfo.com/new-york/20130307/bushwick/abnormal-leap-hikes-bushwick-rents-by-nearly-20-percent-report-says> (“The last

that these anti-gentrification efforts, and many like them, use the same tactics—environmental lawsuits, say, or restrictive zoning laws—as exclusionary suburban NIMBY groups. Campaigns like this are led by coalitions of renters and affordable housing groups who will not benefit from restricted housing supply and higher housing costs. Why do they engage in these campaigns?

It's not difficult to imagine why the housing advocacy community would embrace a supply-side theory of gentrification. First, new buildings are the most obvious signs of the unwelcome changes that gentrification brings. They are often a completely different style of construction that clashes with surrounding structures; they will house different, higher-income people; they serve as a potent symbol of a new presence that may or may not care that much about what came before. New buildings are typically expensive, and low-income people can't afford to live in them. If those new buildings weren't built, the thinking goes, the neighborhood could remain affordable for low-income residents.<sup>94</sup> Second, and relatedly, most in the housing advocacy community are concerned over all else with preserving neighborhoods for the people who live in them already, and it's highly intuitive to assume that *physical* change in a neighborhood is inextricably linked with the *social* and *demographic* change that is at the bottom of housing advocates' concerns. These different types of change have to be separated conceptually by any realistic policy program that seeks to mitigate the harmful effects of gentrification.<sup>95</sup> You can save buildings or people, but it is hard to save both. Third, as with most political questions, there's an element of identity and folk ideology here—many in the housing advocacy community define themselves in opposition to developers, landlords, big business, "Growth Machine" politicians, and other winners in the apparently zero-sum competition in increasingly unequal American cities. Opposing luxury development and rich developers makes for a powerful symbolic politics. The idea that what developers do might in most cases be broadly beneficial and even specifically beneficial to low-income constituencies is typically not entertained.

It is very worth noting that the political culture of community opposition to development traces back to the time of Urban Renewal, redlining, and block-busting when the enemies most definitely *were* the developers, landlords, and financial institutions on the supply-side.<sup>96</sup> Look at the opposition to massive

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thing Bushwick needs is high rises. It needs affordable housing,' said Rolando Guzman, a Bushwick resident who worked with the North Brooklyn non-profit St. Nick's Alliance throughout Williamsburg's rezoning process in 2005. 'And there needs to be some rule to prevent the displacement of local businesses and residents.'"); Hoffman, *supra* note 88.

94. JACOBS, *supra* note 87, at 187-99.

95. For an interesting take on the difference between physical preservation of a neighborhood and "social preservation" of a neighborhood, see JAPONICA BROWN SARACINO, *A NEIGHBORHOOD THAT NEVER CHANGES: GENTRIFICATION, SOCIAL PRESERVATION, AND THE SEARCH FOR AUTHENTICITY* (2010).

96. WILLIAM SIMON, *THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT: LAW, BUSINESS, AND THE NEW SOCIAL POLICY* 7 (2001).

and destructive Urban Renewal programs in the 1950s and '60s led by Jane Jacobs, among others. The wholesale razing of entire low-income neighborhoods in the name of slum clearance is not the type of investment and organic, steady, piecemeal development that growing cities need in order to increase housing supply in a nondestructive way and moderate increases in housing costs.<sup>97</sup> With redlining, financial institutions and government policy conspired to starve certain neighborhoods—overwhelmingly low-income and minority neighborhoods—of capital, leading to inevitable decline.<sup>98</sup> Contemporary, big-city anti-gentrification movements in many ways grow out of the urban participatory politics developed during these battles, and also owe a debt to the spirit of civil rights and student movements of the 1960s.<sup>99</sup> Despite admirable origins, many housing advocates, by opposing development, fight yesterday's battles.

Supply-side gentrification also comes in academic variants. In the legal academy, the Community and Economic Development (CED) movement emerged in the 1960s as an alternative to and a defense against the top-down imposition of Urban Renewal. (To this day there are CED clinics in law schools around the country.) It was and is intended as a neighborhood-based effort to empower low-income communities to develop their own jobs, housing, and business opportunities, and to protect themselves from the incursion of gentrification and other outside development.<sup>100</sup> It aims to substitute sub-local political structures for citywide institutions controlled by elites, and forwards community-based organizations as a third way between government bureaucracy and the market. Bill Simon, a law professor at Columbia and the dean of CED practitioners, writes in his treatise on the movement that CED employs something of a "double standard"—decrying the actions of exclusionary suburbs or the NIMBY groups that exercise ever-greater control in wealthy neighborhoods, while encouraging and empowering low-income communities to do the same.<sup>101</sup>

This argument has a certain appeal, and in a way pushes against the *status quo* in high-demand, high-cost regions, where NIMBYs prevent development in wealthy areas and effectively push it onto low-income neighborhoods. But it accedes to a certain kind of competition that low-income communities will be hard-pressed to win—wealthy communities can always exclude outsiders based on the high-cost of living there; low-income communities must depend on political action and anti-displacement policies like rent control that just does not work over time if high-income people want to move into the community. To the extent that low-income communities succeed in excluding outsiders and preventing development, they contribute to the sub-local political factors in-

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97. For accounts of the destructiveness of urban renewal in New York City, see ROBERT CARO, *THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK* (1975).

98. JACKSON, *supra* note 69.

99. OSMAN, *supra* note 70; SARACINO, *supra* note 95.

100. SIMON, *supra* note 96, at 3.

101. *Id.* at 76.

creasing housing prices for everyone, including themselves and other low-income communities.

In the social sciences, the main academic experts are urban geographers and sociologists like the late Neil Smith, formerly of the City University of New York; Sharon Zukin at Brooklyn College; Peter Marcuse at Columbia University; Harvey Molotch at NYU; and others who, in the words of Zukin and Smith, seek explanations for gentrification and other forms of urban change that are “cultural and capital-centered” rather than “economic and demand-driven.”<sup>102</sup> These writers come out of Marxian or Marxian-inflected traditions that emphasize identity-based narratives of exploitation of the poor by social and economic elites—in this context, developers, landlords, financial institutions, and their partners in government.<sup>103</sup> The driving forces, in their analysis, are the machinations of profiteers and strategically deployed flows of capital.<sup>104</sup>

Neil Smith had perhaps the best-developed Marxian economic analysis of gentrification, which he calls the rent gap theory.<sup>105</sup> The rent gap is the disparity between the potential rent a property might generate and the actual rent under current land use. When neighborhood decline widens the gap sufficiently, developers, previously neglectful landlords, and financial institutions flood a neighborhood with capital, transforming it for a new and wealthier population. This may accurately describe the lifecycle of certain neighborhoods, but it does not create a convincing supply-side explanation—potential rent is not some quality inherent to a property but a function of demand to live there. In the absence of demand, potential rent plunges toward zero and gentrification does not happen. Academic solutions to gentrification tend to look like Peter Marcuse’s supply-side proposals in his article “Gentrification, Abandonment, and Displacement”—a series of development controls that would heavily restrict development in desirable and gentrifying neighborhoods.<sup>106</sup> In today’s high-demand, low-elasticity markets, this is precisely the wrong strategy for housing

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102. See SMITH, *supra* note 78, at 41.

103. See, e.g., DAVID HARVEY, *REBEL CITIES: FROM RIGHT TO THE CITY TO URBAN REVOLUTION* (2012); DAVID HARVEY, *SPACES OF GLOBAL CAPITALISM: A THEORY OF UNEVEN GEOGRAPHICAL DEVELOPMENT* (2006); SMITH, *supra* note 78; SHARON ZUKIN, *THE CULTURES OF CITIES* (1996); Marcuse, *Gentrification, Abandonment, and Displacement*, *supra* note 10; Marcuse, *To Control Gentrification*, *supra* note 10; Molotch, *supra* note 3.

104. The ivory tower is not as far removed from ground-level anti-gentrification efforts as one might think. The most prominent national coalition of grassroots tenant advocates, housing activists, and other anti-gentrification groups is Right to the City, which takes its name from the book *Le Droit à la Ville* by French Marxist sociologist Henri Lefebvre. HENRI LEFEBVRE, *LE DROIT À LA VILLE* (1968); see also *Member Organizations*, RIGHT TO THE CITY, <http://www.righttothecity.org/index.php/about/member-organizations> (last visited Mar. 30, 2014). “Right to the City” was also the title of a subsequent article by CUNY geographer David Harvey. David Harvey, *The Right to the City*, 53 *NEW LEFT REV.* 23 (2008).

105. SMITH, *supra* note 78, at 67-69.

106. Marcuse, *Gentrification, Abandonment, and Displacement*, *supra* note 10, at 230-36.

advocates who want to moderate housing price increases and avoid displacement.

#### IV. FIGHTING THE NEW EXCLUSION

At the most basic level, this Article frames the problem with intro-level economics: supply and demand. The apparent simplicity of that story doesn't mean solutions are easy to come by. In reality, the problem emerges from a complex tangle of policy and politics, a proliferation of overlapping land use regulations, broadly defined, that exist in reciprocal relationship to growing neighborhood-level opposition to development in urban areas. Development is hard because people want it to be hard.

Urban homeowners, who benefit greatly from the status quo, may not be as omnipotent as their suburban counterparts, but the rise of sub-local politics has aggrandized their power relative to pro-growth constituencies like developers. Housing advocates, by and large, have inherited a reflexively anti-development stance from an earlier era with a different set of problems. The politics of urban land-use reform, while not as hopeless as in exclusionary suburbs, are nonetheless daunting.

What to do? I'd like to divide this prescriptive section into three parts: first, a word on conventional affordable housing strategies, since they dominate the policy conversation in high-cost cities today; second, a note on the implications of this Article's analysis for the housing advocacy community, the primary audience for this Article and an indispensable party to meaningful reform; and finally, a brief sketch of the types of reforms that, despite the entrenchment of the land use policies that have led us to our current predicament, can begin to turn the ship in the decades ahead.

What about conventional affordable housing strategies, like inclusionary zoning, government subsidies, and policies like rent control? It depends.

Under inclusionary zoning programs, developers set aside a percentage of market-rate developments as affordable housing for low- and moderate-income families, typically in exchange for density bonuses and subsidies.<sup>107</sup> The programs can be mandatory or optional. The density bonuses can allow for more units than would be permitted under the default regulatory baseline, but affordable units always increase the costs of development.<sup>108</sup> Depending on the structure of the program and local housing market conditions, those additional costs can serve to block development and exacerbate the supply problem.<sup>109</sup>

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107. Jenny Schuetz et al., *31 Flavors of Inclusionary Zoning: Comparing Policies from San Francisco, Washington, D.C., and Suburban Boston* 15-16 (Furman Center for Real Estate and Urban Policy, Working Paper No. 08-02).

108. *Id.* at 15.

109. Ellickson, *supra* note 1, at 400-03.

Inclusionary zoning aside, there are several government subsidy programs for the new construction of affordable units—the Low-Income Housing Tax Credit (LIHTC) program, for instance. LIHTC is the largest affordable housing program, producing an average of 100,000 units per year over the last twenty years.<sup>110</sup> Government outlays for these programs can run to several hundred thousand dollars per unit in big cities, not counting ongoing operating subsidies. At that cost, the programs can't produce enough units to make a dent in the underlying problem. Units are allocated by lottery, meaning that a small number of families—typically not the lowest income families—get enormous subsidies while everyone else gets nothing.<sup>111</sup>

New construction subsidies don't maximize the usefulness of the limited funds available for affordable housing. Subsidies that help to preserve existing affordable units or help to convert existing housing to affordable units can create more units with the same amount of funds.<sup>112</sup> The same goes for demand-side subsidies like housing vouchers. The \$300,000 in initial subsidies used to create one new-construction affordable unit can provide many, many more families with housing vouchers.

Other advocates forward rent control as a possible solution.<sup>113</sup> While plausible on its face, rent control policies have a poor record of effectively targeting the intended recipients.<sup>114</sup> If all units are covered, it can strongly discourage investment and new development by limiting the income that buildings can generate and interfering with the price signals that induce developers to build.<sup>115</sup> If some units are covered and others are not, rent control can artificially push up prices in unregulated units, harming new potential residents and low-income people not fortunate enough to have regulated units.<sup>116</sup> It can create a system of insiders and outsiders that replicates the dysfunctional incentives of exclusionary zoning. Rent control also creates a series of bad incentives for landlords that must be addressed with additional regulations. A typical rent control scheme would also have to include a warranty of habitability to prevent under-maintenance, eviction restrictions to prevent increases attendant to unit turnover, a moratorium on condo conversion, and other residential zoning restrictions—quite a messy set of policies and an uncertain outcome.<sup>117</sup>

110. *Low-Income Housing Tax Credits*, U.S. DEP'T OF HOUSING & URB. DEV., <http://www.huduser.org/portal/datasets/lihtc.html> (last visited Mar. 30, 2014).

111. *See, e.g.*, Current Housing Lotteries, N.Y.C. DEP'T OF HOUSING PRESERVATION & DEV., <http://www.nyc.gov/html/hpd/html/apartment/lotteries.shtml> (last visited Mar. 30, 2014).

112. GLAESER & GYOURKO, *supra* note 8, at 141.

113. McUsic, *supra* note 10.

114. ANTHONY DOWNS, RESIDENTIAL RENT CONTROLS: AN EVALUATION 17-28 (1988).

115. *Id.*

116. *Id.*; *see also* Adam Davidson, *The Perverse Effects of Rent Regulation*, N.Y. TIMES (July 23, 2013), <http://www.nytimes.com/2013/07/28/magazine/the-perverse-effects-of-rent-regulation.html>.

117. McUsic, *supra* note 10.



But some form of housing subsidies (or at least cash equivalents that people can use as they see fit) will always be necessary. Even highly elastic and highly filtered housing markets will never provide housing for everyone, though there is a difference between not being able to afford housing that is artificially expensive due to market restrictions and not being able to afford housing due to a simple lack of money. The former is a housing market problem and the latter is a poverty problem.<sup>118</sup> The fact is that no politically or fiscally conceivable number of new units can solve the affordability problem in high-demand, highly inelastic housing markets, and a better functioning housing market will reduce the subsidies necessary to ensure that all are adequately housed.<sup>119</sup> As it is, the government policies mentioned above are aimed at problems created by other government policies—restrictive land use regimes. The result is that cities like New York and San Francisco lose affordable units to rising housing costs faster than they can produce them through conventional subsidy strategies.<sup>120</sup>

If the conventional strategies to fight rising housing costs and gentrification are flawed, what should the housing advocates be fighting for instead? Since the problem is at base one of supply and demand, effective solutions should serve either to increase supply or decrease demand.

First, on the supply-side, neighborhood-level housing advocates should not attempt to clamp down on development in the face of increasing demand. It's obviously difficult for people attempting to preserve a gentrifying neighborhood to allow it to change physically, but it's a necessary evil for moderating housing prices so as to allow as many existing residents as possible to remain in the neighborhood.

To impose the conventional suite of anti-development policies only makes housing costs increase more quickly. Once a neighborhood experiences an upsurge in demand, the public can make room for in-movers or watch as they outbid low-income people for the limited supply of existing units, exacerbating rent increases and displacement. Think of Logan Circle in Washington, D.C., or parts of Brownstone Brooklyn where wealthy people have been more than happy to buy mansions that had been subdivided into apartments and convert them back into mansions.<sup>121</sup> (The conversion from multi-family to single family compounds the supply problem by decreasing density.) Even luxury housing

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118. GLAESER & GYOURKO, *supra* note 8, at 19.

119. DOWNS, *supra* note 57, at 17.

120. Cindy Rodriguez, *As Bloomberg Built Affordable Housing, City Became Less Affordable*, WNYC (July 9, 2013), <http://www.wnyc.org/story/304422-new-york-remade-city-more-desirable-ever-also-too-expensive-many>.

121. Marc Santora, *Brooklyn's Gold Rush*, N.Y. TIMES (June 1, 2012), [http://www.nytimes.com/2012/06/03/realestate/brooklyns-gold-rush.html?\\_r=0](http://www.nytimes.com/2012/06/03/realestate/brooklyns-gold-rush.html?_r=0) ("With so few single-family homes available, buyers have also been eagerly snatching up two- and three-family homes with the goal of converting them to single-family residences.").

can redound to the ultimate benefit of low-income people by increasing the supply of housing.<sup>122</sup>

This is true of the neighborhood, but also the region at large—preventing development in a particular neighborhood just contributes to the sub-local collective action problem that drives up costs region-wide. Even if the strategy were effective in slowing rent increases in the gentrifying neighborhood—this Article argues it isn't—it would be hurting similar low-income neighborhoods with the marginal rent increases that come with preventing development.

Second, and on the demand side: housing advocates should become the most forceful constituents for increasing development throughout high-demand metropolitan regions—especially in high-cost, high-demand areas where wealthy homeowner cartels successfully prevent denser development. Remember: gentrification is fundamentally a spillover phenomenon. People bid up prices in low-income neighborhoods adjacent to high-income neighborhoods when there isn't any room in the high-income neighborhoods. Increasing supply in high-demand, high-cost neighborhoods—the West Villages and Dupont Circles—will reduce demand and moderate housing cost increases in outlying lower-cost neighborhoods.<sup>123</sup>

Let's face it: allowing development in low-income neighborhoods may be a rational move for housing advocates, but it will never be a satisfying program. It's a little too passive for the self-respecting activist. On the other hand, fighting the new exclusionary zoning in high-cost, high-demand areas appeals to the need for action. High-income people, and especially high-income homeowners, are the primary beneficiaries of the recent trend toward restrictive land use regulations in major cities.<sup>124</sup> In too many cases, the high-income and well-connected use land-use regulations for private ends, to protect their neighborhoods at the expense of other neighborhoods, just like the suburbs. This is not a form of regulation that serves the general public or protects low-income people. The political problems with opposing exclusionary zoning in the suburbs are intractable, but cities, with their heterogeneous, majority-renter populations, can begin to solve these political problems, especially if housing advocates switch sides in the development wars. NIMBY politics in high-income neighborhoods thrive on long queues of neighbors, all but unopposed, decrying new development. An equal or greater number of housing advocates at those meet-

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122. FISCHER, *supra* note 4, at 339.

123. This is the converse of the argument that development restrictions in desirable areas are good because they spread development around. "Spreading development around" equals "gentrification." See Kaid Benfield, *The Urbanist Case for Keeping DC's Height Restrictions*, ATLANTIC CITIES (Nov. 19, 2012), <http://www.theatlanticcities.com/politics/2012/11/urbanist-case-keeping-dcs-height-restrictions/3934>.

124. Schleicher, *supra* note 4, at 33-52.

ings could alter the political equation as a local NIMBY group in Washington, D.C., has started to do.<sup>125</sup>

Finally, what approach to reform can begin to unravel the complex tangle of policy and politics that have led us to the current predicament? This really deserves to be the subject of a separate paper, but a quick sketch will have to do for now.

Reformers first have to acknowledge the difficulty of reform. The *status quo* serves a number of the most powerful constituencies, like urban homeowners, pretty well, and the problems it causes have unfolded only gradually over the last few decades. It's hard to imagine some public education campaign that could convince homeowners to go against their immediate self-interest, or some sudden land-use cataclysm that could galvanize reform.<sup>126</sup>

The conventional reform proposal for exclusionary municipalities is some form of regional government or some state-level intervention that would impose development on places that don't want it.<sup>127</sup> Related proposals seek simply to deregulate in order to let developers do their thing. These straightforward proposals share an impulse to remove decision-making power from lower-level political subdivisions to higher-level ones, effectively disempowering those lower down the chain. The most powerful constituencies in this story—homeowners—obviously don't like this. This presents a serious problem for advocates of these reforms: Are they plausible when they're also wildly unpopular?

A very few places have attempted reforms along these lines, but these exceptions prove instructive: look at New Jersey, where the *Mount Laurel* decisions have occasioned decades of political backlash. Note also that an exceptionally activist judiciary imposed the reform, which has just barely kept the doctrine alive in the face of broad-based hostility and constant interference by

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125. Rachel Nania, *Meet Michael Hamilton, Creator of "In My Back Yard, DC"*, BORDERSTAN.COM (Feb. 6, 2013), <http://www.borderstan.com/02/meet-michael-hamilton-creator-of-in-my-back-yard-dc>. Other ways to reduce demand in gentrifying neighborhoods might include a strategically deployed and well-publicized crime wave. Anti-gentrification advocates in Pilsen, a primarily Mexican low-income neighborhood in Chicago, engaged in a high-profile intimidation campaign against high-income newcomers to keep future waves away. Whatever one thinks of their tactics, their economic logic is sounder than that of most anti-gentrification groups. See David Wilson et al., *Successful Protect-Community Discourse: Spatiality and Politics in Chicago's Pilsen Neighborhood*, 36 ENV. & PLANNING 1173 (2004).

126. The frame for this discussion is adapted from Heather Gerken's "here-to-there" pieces on election law. See Heather Gerken, *Getting From Here to There in Election Reform*, 34 OKLA. CITY. UNIV. L. REV. 33 (2009); Heather Gerken, *Getting From Here to There in Redistricting Reform*, 5 DUKE J. OF CON. L. & PUB. POL. 1 (2010).

127. See, e.g., MYRON ORFIELD, *AMERICAN METROPOLITICS: THE NEW SUBURBAN REALITY* (2002); DAVID RUSK, *CITIES WITHOUT SUBURBS: A CENSUS 2010 PERSPECTIVE* (2013); Richard Briffault, *Localism and Regionalism*, 48 BUFF. L. REV. 1 (2000).

the legislative and executive (i.e., the more democratic) branches.<sup>128</sup> There's a reason David Barron calls regionalism and like proposals the "*deus ex machina*" of land use reform.<sup>129</sup>

A more fruitful approach to reform will not wish away difficult politics or rely on impossible-to-achieve victories like restructuring local government. Instead, it will focus on smaller scale reforms that preserve a space for sub-local politics while altering, sometimes subtly, the incentives that political actors face and the procedures by which they arrive at decisions. The problems described in this Article are decades in the making and their causes, as this Article has tried to show, are varied and multitudinous; their solutions will not come all at once or through any one policy.

Several economists and law professors have forwarded financial tools that could alter the incentives that drive homeowner opposition to development. Most simply, William Fischel proposes home value insurance to ameliorate risk-aversion opposition to development.<sup>130</sup> Robert Shiller has been instrumental in setting up a housing futures market that might one day help homeowners transfer the risk of declining home values onto more risk-tolerant parties.<sup>131</sup> These proposals don't address the affective component of homeowner opposition to development, and they have a ways to go in terms of market design and depth, but they are welcome as pieces of a broader program.

Others have proposed ways to compensate people who live in a neighborhood for the costs associated with increased development. David Schleicher, for instance, proposes TILTs—Tax-Increment Local Transfers—that could enable neighborhood homeowners to share directly in the benefits of additional development.<sup>132</sup> With TILTs, some portion of the tax-increment from new development could be transferred to people within a defined neighborhood in the form of tax breaks or direct payments for a period of time.

Others have sought to alter land use decision-making procedures in ways that increase overall development without stripping sub-local actors of a meaningful role. Rick Hills and David Schleicher have proposed a "zoning budget" to alter the NIMBY dynamics typical of citywide efforts to increase density.<sup>133</sup> Local governments, in their proposal, would set a hard target for increases in development capacity. Any downzoning in one neighborhood would have to be matched an equivalent upzoning elsewhere. NIMBY groups would be forced to

128. See *Mount Laurel Material*, NEW JERSEY DIGITAL LEGAL LIBRARY, <http://njlegallib.rutgers.edu/mtlaurel/aboutmtlaurel.php> (last visited May 1, 2014).

129. David Barron, *The Community Economic Development Movement: A Metropolitan Perspective*, 56 STAN. L. REV. 701, 732 (2003).

130. William Fischel, *An Economic History of Zoning and a Cure for Its Exclusionary Effects*, 41 URB. STUDIES 317 (2004).

131. ROBERT SHILLER, *THE SUBPRIME SOLUTION: HOW TODAY'S GLOBAL FINANCIAL CRISIS HAPPENED, AND WHAT TO DO ABOUT IT* 149 (2008).

132. Schleicher, *supra* note 4, at 59.

133. Hills & Schleicher, *supra* note 13.

horse-trade and compete with one another for limited political victories. Ed Glaeser proposes something similar for historic preservation: a cap on the number of buildings that can be protected.<sup>134</sup> If preservation boards want to put a new building on the register, they'd have to free up room by kicking another building off.

Individually, none of these reforms will solve the problems outlined in the Article, but small, incremental reforms like these will be the way forward as the problems of the new exclusionary zoning come to broader public attention. The options are pretty clear: build more, or stand by as low-income and middle-class people get priced out of ever-wider swaths of the country.

Critics of increased development bring up a number of valid points. First, there's what might be called the Houston problem. Houston is a high-demand region that has relatively unrestricted land-use regulations and high housing supply elasticity. Housing costs are low and partially for that reason Houston has attracted large numbers of in-movers over the last few decades. Houston is also reputed to be ugly, not like New York or San Francisco or other high-demand areas that don't allow for easy increases in housing supply. If these areas allowed for more development, or enough development to make a dent in housing costs, would they render themselves as unprepossessing as Houston? I have no idea. My personal take is that aesthetics and housing costs are incommensurate goods, with housing costs being the more important. Housing costs for many speak to basic needs in a way that the aesthetic concerns of more privileged groups should not be able to trump so easily, even though they typically do so today. It also should be said that the new exclusionary zoning is a relatively recent phenomenon, a few decades out of urban histories that span hundreds of years. The aspects of New York and San Francisco that aesthetes love date from a time when developers operated in those cities with a much freer hand. I agree with Jane Jacobs when she says "a city cannot be a work of art."<sup>135</sup>

Second, and related, will cities become too congested? Call this the Mumbai problem. Will lower housing costs under a regime of freer development simply induce more demand until no one wants to live there anymore because it's too crowded?<sup>136</sup> Again, this strikes me as a concern of those who like cities just the way they are—namely, high-income homeowners. Even if cities removed all density restrictions—which this Article does not propose—cities would not become infinitely dense. While it is impossible to say exactly where a less-restricted market would balance, the cities discussed in this Article have a lot of development to do before they reach this dystopian overcrowding fu-

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134. GLAESER, *supra* note 7, at 161.

135. JACOBS, *supra* note 75, at 372.

136. This might also be called the Yogi Berra Problem.

ture. (And, by the way, Mumbai is horribly congested because of its strict height regulations.)<sup>137</sup>

As it is, the housing advocacy community should realize that land use is crucially important to the future of affordability in their cities. They should realize the ways in which current land use regimes privilege homeowners, the wealthy, and the well-connected. They should fight the new exclusionary zoning that is turning many of our cities into enclaves for the well-off. They should engage in a broad-based campaign to expand housing supply in high-demand cities and embrace the dozens of policy tweaks and adjustments that it will take to get us there. Such a campaign is the only path to broadly affordable housing.

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137. GLAESER, *supra* note 7, at 157.

# THE ECONOMICS OF EXCLUSIONARY ZONING AND AFFORDABLE HOUSING

Benjamin Harney\*

## I. INTRODUCTION

The President of the United States created a Commission to study local zoning regulations and their impact on housing costs.<sup>1</sup> After two years of intense research, the Commission submitted its much-anticipated report to the President.<sup>2</sup> The 504-page report concluded:

Zoning affects land values in a number of ways. *First*, by protecting development against the encroachment of undesirable uses, it can help to maintain and enhance property values. Indeed, much of the interest and concern in the zoning system by homeowners is based on this desire to preserve their investment. *Second*, zoning may raise the price of land designated for certain uses by restricting the supply of such land.<sup>3</sup>

The report specifically concluded that such zoning regulations greatly increase the price of land for housing, and that rising land prices “further explain[ ] the squeeze on low-income families seeking decent housing.”<sup>4</sup> The report noted that communities were particularly hostile to high-density housing;<sup>5</sup> to mitigate this hostility, the report recommended that local governments discourage

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1. Time.com, *Why U.S. Housing Costs Too Much*, <http://www.time.com/time/magazine/article/0,9171,838452-1,00.html>. (June 7, 1968) (noting that Senator Paul Douglas was the chairman of President Johnson’s commission).

2. *Building the American City: Report of the National Commission on Urban Problems to the Congress and to the President of the United States*, H.R. Doc. No. 91-34, at vii (1968).

3. *Id.* at 225.

4. *Id.* at 18.

5. *Id.* at 242.

citizen involvement in the overall planning process.<sup>6</sup> In response to the landmark report, affordable housing activists launched a coordinated, national campaign to repeal pernicious zoning regulations that restricted the supply of land for housing.<sup>7</sup>

A paradigm shift for affordable housing policy? Hope at last? No, it is a flashback to 1968, when the Douglas Commission submitted its report to President Lyndon Johnson,<sup>8</sup> except affordable housing activists did not respond with a coordinated, nationwide campaign to repeal the zoning regulations that have driven low-income housing prices to unaffordable levels. Instead, zoning regulations that restrict the supply of developable land have proliferated,<sup>9</sup> creating an artificial scarcity of land for new housing and driving up the price of housing.<sup>10</sup> This has resulted in 82% of households in the bottom quintile of the income distribution not being able to afford median-priced housing in their area.<sup>11</sup> Even worse, (according to the U.S. Census Bureau) 71% of households in the bottom quintile cannot afford modestly-priced housing.<sup>12</sup>

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6. *Id.* at 238–239.

7. Kevin Fox Gotham, *Separate and Unequal: The Housing Act of 1968 and the Section 235 Program*, 15 *Sociological Forum* 1, 20 (Mar. 2000) (commenting on the demands of housing activists to revive the stock of housing available to “poor people” and nonwhites).

8. *Id.*

9. See William A. Fischel, *An Economic History of Zoning and a Cure for Its Exclusionary Effects*, 41 *Urb. Stud.* 317, 328–333 (2004) (tracing the rapid rise of exclusionary zoning regulations after 1970).

10. Edward Glaeser, Jenny Schuetz & Bryce Ward, *The Price Is (Not) Right: Large Lots and Other Requirements Drive Up the Cost of Bay State Homes*, *CommonWealth: Growth & Development Extra* 99 (2006); William K. Jaeger, *The Effects of Land-Use Regulations on Property Values*, 36 *Envtl. L.* 105, 110 (2006).

11. U.S. Census Bureau, *Affordability Status of Families and Unrelated Individuals for a Median-Priced Home*, <http://www.census.gov/hhes/www/housing/hsgaffrd/afford2k2/TAB02508FX24.xls> (accessed May 1, 2009). The collapse of the U.S. housing bubble has led to a massive oversupply of housing, but this oversupply is overwhelmingly comprised of single-family houses. As discussed below, low-income families predominantly live in multi-family housing developments. Low-income families tend to upgrade their housing through a process of filtering, in which middle-income families move into houses vacated by wealthy families, and low-income families move into the houses vacated by middle-income families. The large overhang of single-family housing inventory will dramatically slow the filtering process, as it will take years to sell off the excess inventory of single-family houses.

12. U.S. Census Bureau, *Affordability Status of Families and Unrelated Individuals for a Modestly-Priced Home*, <http://www.census.gov/hhes/www/housing/hsgaffrd/afford2k2/TAB02508FX34.xls> (accessed May 1, 2009). “Modestly-priced” housing is housing that is priced so that 25% of all housing in the particular area is below this value and 75% is above. U.S. Census Bureau, *Who Could Afford to Buy a Home in 2002?* 2 (Washington D.C., July 2007).



Since 1970, despite spending hundreds of billions of dollars on housing policies,<sup>13</sup> the proportion of the housing stock that is considered affordable to households in the bottom quintile has actually *decreased*.<sup>14</sup>

As a preliminary matter, a definition of terms is necessary. “Affordable housing” is generally defined as housing that costs no more than 30% of a household’s income.<sup>15</sup> Because “affordability” necessarily depends on the buyer’s ability to pay, which in turn depends on the buyer’s income,<sup>16</sup> “affordable housing” is a poor catch-all for housing for the poor. This Article, therefore, refers to housing for the poor as “low-income housing.”<sup>17</sup> This Article also uses the term “community” as shorthand for all other types of local governing bodies (e.g., municipalities, counties, and townships). Furthermore, the line between zoning and other land-use law is often imprecise—as a leading treatise on land-use law notes, “the planning process, building codes, subdivision control law, and growth management systems, are so often intertwined with zoning that drawing a clear distinction between them is difficult.”<sup>18</sup> For the sake of simplicity, this Article follows the convention of using “zoning” as shorthand for all forms of land-use regulations.<sup>19</sup> Finally, while not everyone agrees on the definition

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13. U.S. Census Bureau, *Statistical Abstract of the United States: 2008*, 307 tbl. 458 (127th ed., 2007).

14. John M. Quigley & Steven Raphael, *Is Housing Unaffordable? Why Isn't It More Affordable?* 18 J. Econ. Perspectives 191, 199 (2004). For example, 13% of all rental housing units were affordable to households in the bottom fifth of the income distribution. *Id.* In 2000, only 7% of rental housing units were affordable to those households. *Id.*

15. 42 U.S.C. § 12745(a) (2006); Fla. Stat. § 420.602(3) (2006).

16. See *Merriam-Webster's Online Dictionary*, <http://www.merriam-webster.com/dictionary/affordable> (accessed May 1, 2009) (defining “afford” as “to be able to bear the cost of”).

17. See 42 U.S.C. § 1437a(b)(1) (2006) (defining “low-income housing” as “decent, safe, and sanitary dwellings [available to low-income families]”).

18. Julian Conrad Juergensmeyer & Thomas E. Roberts, *Land Use Planning and Control Law* 41 (West 1998).

19. See e.g. William A. Fischel, *Zoning and Land Use Regulation*, in *Encyclopedia of Law and Economics: Civil Law and Economics* vol. 2, 403 (Boudewijn Bouckaert & Gerrit De Geest, eds., Edward Elgar 1999) (conflating zoning and other land-use regulations); Juergensmeyer & Roberts, *supra* n. 18, at 41 (treating land-use controls as part of zoning); David E. Mills, *Is Zoning a Negative-Sum Game?* 65 Land. Econ. 1, 1 (1989) (stating that “[z]oning is the primary tool used by localities to regulate land use”); Norman Williams & John M. Taylor, *American Land Planning Law: Land Use and The Police Power* § 17.3 (West 2003) (defining “zoning” “to include various nonzoning controls, covering the same subject matter but in fact embodied in free-standing ordinances”).

of “exclusionary zoning,”<sup>20</sup> this Article uses the term “exclusionary zoning” to refer to zoning regulations that directly or indirectly prohibit new low-income housing.

Any discussion of affordable housing policy must revolve around two questions. First, why is housing unaffordable to the poor? Second, what should affordable housing policy do about it? The answer to the first question must guide the answer to the second question because devising a solution without sufficient regard for the nature of the problem is unlikely to yield positive results.

Why is housing unaffordable to the poor? The current high prices for low-income housing are not only the natural result of cruel market forces; they are the result of supply restrictions distorting the market.<sup>21</sup> Zoning regulations prescribe the permissible uses of land and thus control the supply of developable land.<sup>22</sup> As demand for housing increases—and it must, due to sheer population growth—zoning regulations that restrict the supply of developable land will increase housing prices.<sup>23</sup> To be sure, there are other factors that make housing unaffordable to the poor,<sup>24</sup> but the focus of this Article is the distorting effect that exclusionary zoning regulations have on low-income housing. Moreover, strong empirical evidence shows that housing is unaffordable to the poor primarily because of an insufficient supply of low-income housing.<sup>25</sup>

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20. J. R. Kemper, *Comment Note—Exclusionary Zoning*, 48 A.L.R.3d 1210 (1973); see Lawrence Gene Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent*, 21 Stan. L. Rev. 767, 781 (1969) (coining the phrase “exclusionary zoning” and defining it as zoning regulations that “exclude a class of potential residents whose income thresholds are exceeded because of the cost increment attributable to the ordinances”).

21. Bruce W. Hamilton, *Zoning and the Exercise of Monopoly Power*, 5 J. Urb. Econ. 116, 117 (1978).

22. Juergensmeyer & Roberts, *supra* n. 18, at 22.

23. Glaeser, Schuetz & Ward, *supra* n. 10, at 99; see *supra* n. 11, at 5 tbls. 1–2 (showing U.S. population data since 1790). Population growth has proceeded at an annual rate of roughly 1% for the past 50 years, and with a current population of just over 300 million, we can expect to gain roughly 3 million new U.S. citizens each year. *Id.* at 5 tbl. 2.

24. See Maria Cristiano Anderson & Paula A. Franzese, *Solutions to the Crisis in Affordable Housing: A Proposed Model for New York City*, 3 Rutgers J. L. & Urb. Policy 84, 90 (2005) (discussing the disparity between housing prices and income levels).

25. See e.g. John M. Quigley & Larry A. Rosenthal, *The Effects of Land Use Regulation on the Price of Housing: What Do We Know? What Can We Learn?* 8 Cityscape 69 (2005) (reviewing the extensive empirical literature on the link between zoning regulations and housing prices).

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Turning to the second question: What should affordable housing policy do about the high cost of low-income housing? This Article argues that affordable housing policy should alter communities' incentives to discourage them from adopting exclusionary zoning regulations. Exclusionary zoning regulations impose costs on non-community residents; but when communities adopt exclusionary zoning regulations, they only consider the costs that the regulations will impose on community residents.<sup>26</sup> Affordable housing policy should force communities to bear the full costs of exclusionary zoning regulations.<sup>27</sup> Increasing the cost to the community of excluding low-income housing will discourage communities from adopting exclusionary zoning regulations.<sup>28</sup> Fewer exclusionary zoning regulations will mean fewer restrictions on the supply of low-income housing, which in turn will lead to increasing supply and decreasing prices for low-income housing.<sup>29</sup>

Therefore, to reduce the number of exclusionary zoning regulations, this Article proposes a tax on exclusionary zoning regulations, creatively called the Exclusionary Zoning Tax. Under the Exclusionary Zoning Tax, a developer who wants to build low-income housing on a particular parcel of property will first file an application to the state rather than the community. Once a developer files an application, the state will essentially conduct a private auction between the community and the developer for the right to build low-income housing on that parcel of property. The community will submit its bid, which will be unsealed to the state

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26. William A. Fischel, *Externalities and Zoning*, 35 Pub. Choice 37, 39 (1980); William A. Fischel, *A Property Rights Approach to Municipal Zoning*, 54 Land Econ. 64, 64–65 (1978); Christopher J. Webster, *Public Choice, Pigouvian and Coasian Planning Theory*, 35 Urb. Stud. 53, 70 (1998).

27. See William M. Landes & Richard A. Posner, *The Positive Economic Theory of Tort Law*, 15 Ga. L. Rev. 851, 871–877 (1981) (explaining that internalization of harmful externalities results in an efficient level of harmful activities); Steven Shavell, *Foundations of Economic Analysis of Law* 55 (Belknap Press 2004) (noting that the law should encourage internalization of costs when “the sale of property would result, directly or indirectly, in harm to people not involved in the transaction itself”); see also Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. Chi. L. Rev. 681, 684 (1973) (observing that “harmful externalities [must] be ‘internalized’ to eliminate excessive amounts of nuisance activity”).

28. Cf. N. Gregory Mankiw, *Principles of Economics* 67–71 (3d ed., Thomson 2004) (establishing that raising the price of a product will lead a given consumer to buy less of that product).

29. When restrictions on the supply of a high-demand product are dropped, supply will increase, and the price of the product will come down to equilibrium. *Id.* at 71.

first. To prevent the community from stalling, it will have 30 days to submit its bid after the developer files an application. After the community submits its bid, the developer then has a choice: either match the community's bid, or withdraw the application to build the low-income housing. If the developer matches the community's bid, the state will approve the developer's application to build the low-income housing. In effect, the developer will buy the right to build low-income housing from the community.<sup>30</sup> However, if the developer does not match the community's bid, the community must pay a tax equal to its bid for excluding the low-income housing. The revenues from this tax will be diverted into a statewide fund that will be used to subsidize impact fees for low-income housing developments, also creatively called the Impact Fee Fund. For example, suppose that the community submits a bid of \$100,000. The developer can either pay the community \$100,000 and build the low-income housing, or withdraw its application. If the developer withdraws its application, the community will have to pay a \$100,000 tax for excluding low-income housing, and that \$100,000 will be diverted into the Impact Fee Fund.

## II. THE LEGAL LANDSCAPE

Zoning, as its name suggests, separates land in a jurisdiction into zones and prescribes permissible land uses within each zone.<sup>31</sup> Zoning is an exercise of the police power—it encompasses the authority to regulate the use of land to protect the public health, safety, and welfare.<sup>32</sup> State legislatures have largely delegated the zoning authority to communities.<sup>33</sup> In 1922, the United States Department of Commerce issued a model zoning enabling

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30. Cf. Robert Cooter, *Prices and Sanctions*, 84 Colum. L. Rev. 1523, 1525 (1984) (stating that "[a] price is payment of money which is required in order to do [something]"); Bradley C. Karkkainen, *Zoning: A Reply to the Critics*, 10 J. Land Use & Env. L. 45, 78 (1994) (observing that "[z]oning . . . can be seen as a peculiar kind of property rule—one in which developers can in limited ways 'buy' the rights to develop contrary to the zoning entitlement").

31. Juergensmeyer & Roberts, *supra* n. 18, at 22.

32. *Id.* at 45.

33. *Id.* at 45; *The Legal Guide to Affordable Housing Development* 5 (Tim Iglesias & Rochelle E. Lento eds., ABA 2005).

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act, entitled the Standard State Zoning Enabling Act.<sup>34</sup> Four years later, the U.S. Supreme Court ruled in *Euclid v. Ambler Realty Company*<sup>35</sup> that zoning was a constitutional exercise of the police power. The Court held that zoning was rationally related to legitimate governmental interests in preventing congestion and separating incompatible land uses.<sup>36</sup> All 50 states have adopted zoning enabling acts modeled after the Standard State Zoning Enabling Act.<sup>37</sup>

Zoning regulations must foster a legitimate public purpose, but because zoning is an exercise of the police power, this simply means that it must foster the public health, safety, morals, and general welfare.<sup>38</sup> Courts will defer to legislative determinations as to what constitutes a legitimate public purpose unless it is “palpably without reasonable foundation.”<sup>39</sup> A zoning regulation must have a reasonable connection to the particular public purpose it seeks to foster,<sup>40</sup> but courts similarly defer to the legislature on the proper means. As the Supreme Court stated in *Berman v. Parker*:<sup>41</sup>

Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.<sup>42</sup>

With the chosen means subject to minimal judicial interference, communities are generally free to adopt zoning regulations as long as the link between the zoning regulation and the public

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34. A Standard State Zoning Enabling Act (1926) (reprinted in *Model Development Code* 210–221 (Tent. Draft No. 1, 1968)).

35. 272 U.S. 365 (1926).

36. *Id.* at 397.

37. Juergensmeyer & Roberts, *supra* n. 18, at 46.

38. Peter W. Salsich, Jr. & Timothy J. Tryniecki, *Land Use Regulation: A Legal and Practical Application of Land Use Law* 8 (2nd ed., ABA 2003) (noting that what constitutes a proper public purpose is “coterminous with the scope of a sovereign’s police powers”).

39. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984) (quoting *Gettysburg Elec.*, 160 U.S. at 680).

40. *Nollan v. Cal. Coastal Commn.*, 483 U.S. 825, 861 (1987) (requiring a “reasonable relationship” between the land-use regulation and the public purpose being advanced).

41. 348 U.S. 26 (1954).

42. *Id.* at 35–36.

health, safety, morals, and general welfare, is not “palpably without reasonable foundation.”<sup>43</sup>

### A. Zoning and Nuisance

Zoning is best viewed as an extension of nuisance law.<sup>44</sup> In fact, when the Supreme Court upheld the constitutionality of zoning in *Euclid*, it explicitly analogized zoning to nuisance law.<sup>45</sup> Nuisance law resolves land use disputes in which one person engages in an activity that injures a neighbor in a continuing way.<sup>46</sup> Nuisance disputes generally involve land uses that generate negative externalities—land uses that have harmful spillover effects on neighboring property.<sup>47</sup> The standard example of a nuisance dispute involves an owner of a polluting factory and a nearby resident.<sup>48</sup> Broadly speaking, nuisance law evolved to internalize these negative externalities.<sup>49</sup>

43. See Salsich & Tryniecki, *supra* n. 38, at 10 (noting the extremely broad authority to regulate land use given to local governments).

44. See Ellickson, *supra* n. 27, at 691–699 (evaluating zoning as a mechanism for controlling nuisances); see also William A. Fischel, *The Economics of Zoning Laws* 27 (Johns Hopkins U. Press 1985) (noting that “[t]he law of nuisance was a predecessor of zoning”); Juergensmeyer & Roberts, *supra* n. 18, at 634 (noting that nuisance law is sometimes called “judicial zoning”); Williams & Taylor, *supra* n. 19, at § 17.1 (noting that nuisance law and zoning are both methods of regulating land use, and that zoning has evolved into the most dominant form of land-use control).

45. See *Euclid*, 272 U.S. at 387–388 (observing that “the law of nuisances . . . may be consulted, not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of, the power”).

46. Juergensmeyer & Roberts, *supra* n. 18, at 634.

47. See Ellickson, *supra* n. 27, at 686 (classifying nuisance law as a system designed to internalize externalities); Timothy Swanson & Andreas Kontoleon, *Nuisance*, in *Encyclopedia of Law and Economics: Civil Law and Economics*, *supra* n. 19, at 380 (noting that nuisance disputes are often the result of externalities).

48. See *Restatement (Second) of Torts* § 826 cmt. e (using “noise and smoke from a factory” as an example of a nuisance); see also *Signal Mt. Portland Cement Co. v. Brown*, 141 F.2d 471 (6th Cir. 1944) (holding that the operation of a cement factory constituted a nuisance because the factory emitted dust and smoke that settled on neighboring residential properties); *Lunda v. Matthews*, 46 Or. App. 701 (Or. App. 1980) (holding that a cement factory that produced “clouds of dust,” “substantial noise at all hours, and noxious fumes” was a nuisance even though the owner operated the factory just like any other cement factory); cf. A. Mitchell Polinsky, *Controlling Externalities and Protecting Entitlements: Property Right, Liability Rule, and Tax-Subsidy Approaches*, 8 J. Leg. Stud. 1, 5 (1979) (noting that the “classic example” of a nuisance involves a “smoke-belching factory next to an otherwise unpolluted . . . outdoor laundry”).

49. See Thomas J. Miceli, *Property*, in *The Elgar Companion to Law and Economics* 250 (Jürgen G. Backhaus ed., 2d ed., Edward Elgar 2005) (stating that nuisance law is the “principal common law remed[y] for externalities”); Shavell, *supra* n. 27, at 82 (noting that

Zoning was also designed to regulate land uses that generate negative externalities.<sup>50</sup> However, such negative externalities differ from those that nuisance law regulates because zoning encompasses the much broader right to regulate the use of land to protect the public health, safety, and welfare.<sup>51</sup> Zoning can regulate land uses that do not amount to nuisances, whereas nuisance law can, quite obviously, only regulate land uses that amount to nuisances.<sup>52</sup> As shown in Figure 1, the police power authorizes much greater interference with a landowner's property rights than nuisance law.<sup>53</sup> To that end, an important purpose of zoning, if not the *most* important purpose, has become the protection of property values.<sup>54</sup> Zoning can be employed to prohibit a land use that,

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nuisance law promotes the internalization of negative externalities); Frank H. Stephens, *Land Development Controls*, in *The New Palgrave Dictionary of Economics and the Law* vol. 2, 429 (Peter Newman, ed., Macmillan Reference Limited 1998) (noting that nuisance law is one of the "private solutions to externality problems").

50. Robert H. Nelson, *Private Neighborhoods and the Transformation of Local Government* 144 (Urb. Inst. 2005); see Richard A. Epstein, *How to Create—or Destroy—Wealth in Real Property*, 58 Ala. L. Rev. 741, 758 (2007) (noting that zoning originated as "a way to prevent various kinds of nuisances"); see also Ellickson, *supra* n. 27, at 687 (classifying zoning as the most centralized system for internalizing negative externalities arising from land uses); Mills, *supra* n. 19, at 1 (observing that "[t]he economic purpose of zoning is to remedy market failure stemming from externalities among urban land uses").

51. Nelson, *supra* n. 50, at 144. Additionally, nuisance law differs from zoning because a nuisance suit is a *remedy*, and thus is necessarily backward-looking; zoning, on the other hand, is proscriptive in nature, and thus is necessarily forward-looking. See Stephens, *supra* n. 49, at 429 (observing that nuisance law "only come[s] into play after the externality has occurred," whereas zoning "lay[s] out in advance what types of development will be permitted in a particular area and what types will not").

52. See Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 Iowa L. Rev. 1, 61 (2000) (noting that zoning does not "encompass only uses that generate negative externalities"). *Id.* at 17 (noting that "[w]hile traditional notions of nuisance grant the community some power to limit land use, zoning shifts certain additional property rights from the landowner to the community"); William A. Fischel, *Equity and Efficiency Aspects of Zoning Reform*, 27 Pub. Policy 301, 318 (1979) (explaining that the difference between nuisance law and zoning is that "nuisance law is defined as activities, whereas zoning is defined on a necessary input to those activities").

53. Nelson, *supra* n. 50, at 144.

54. See Katia Brener, *Belle Terre and the Single-Family Home Regulations: Judicial Perceptions of Local Government and the Presumption of Validity*, 74 N.Y.U. L. Rev. 447, 448, 466–467 (1999) (observing that one of the original purposes of zoning was to protect property values); Martha A. Lees, *Preserving Property Values? Preserving Proper Homes? Preserving Privilege?: The Pre-Euclid Debate Over Zoning For Exclusively Private Residential Areas, 1916–1926*, 56 U. Pitt. L. Rev. 367, 404–406 (1994) (describing the preservation of property values as a primary motivation for zoning); see also Juergensmeyer & Roberts, *supra* n. 18, at 52–53 (observing that the protection of property values is often regarded as the primary purpose of zoning); Mills, *supra* n. 19, at 1 (noting that most experts consider the protection of property values to be the primary purpose of zoning).

while generating no other negative externalities, will simultaneously reduce property values.<sup>55</sup> In 1974, the U.S. Supreme Court, in its *Village of Belle Terre v. Boraas*<sup>56</sup> decision, wholeheartedly endorsed the use of zoning to prohibit low-income housing on the basis of, among other things, the preservation of property values. In upholding a zoning regulation that limited housing to one-family dwellings, the Court stated:

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one . . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.<sup>57</sup>

Since *Belle Terre*, at least fifteen other states have upheld the constitutionality of single-family home regulations.<sup>58</sup>

### B. Regulatory Takings

If the police power represents one end of the spectrum of permissible government regulations of private property, the regulatory takings doctrine represents the other end.<sup>59</sup> Under the regulatory takings doctrine, a regulation of property that is otherwise a valid exercise of the police power constitutes a compensable taking when, in the words of Justice Holmes, it “goes too

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55. Brener, *supra* n. 54, at 466–467; Lees, *supra* n. 54, at 404–406; see e.g. *City of Fargo v. Harwood Township*, 256 N.W.2d 694, 697 (N.D. 1977) (stating that “the essential purpose of zoning . . . [is] to rationally coordinate land-use planning to promote orderly development and preservation of property values”) (emphasis added); *Lantos v. Zoning Hrg. Bd. of Haverford Township*, 621 A.2d 1208, 1211–1212 (Pa. Commw. Ct. 1993) (listing the preservation of property values as within the legitimate scope of the police power); *State v. Wieland*, 69 N.W.2d 217, 222 (Wis. 1955) (stating that “[a]nything that tends to destroy property values of the inhabitants of the village necessarily adversely affects the prosperity, and therefore the general welfare, of the entire village”).

56. 416 U.S. 1 (1974).

57. *Id.* at 9.

58. Brener, *supra* n. 54, at 454 n. 39.

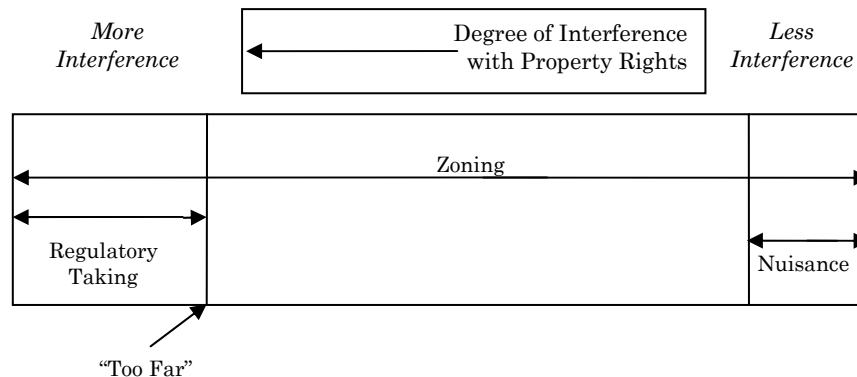
59. The Fifth Amendment requires the government to provide just compensation to property owners when it “takes” the private property through its power of eminent domain. U.S. Const. amend. V.



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far.”<sup>60</sup> Whether a particular regulation has gone “too far” is ultimately decided on a case-by-case basis and is beyond the scope of this Article.<sup>61</sup> However, suffice it to say that the most common exclusionary zoning regulations—large-lot zoning, growth controls, etc.—are probably not compensable takings.<sup>62</sup>

FIGURE 1



### III. WHY IS HOUSING UNAFFORDABLE?

The principle underlying the exclusionary zoning view of affordable housing is simple: when demand for housing rises but the supply of developable land remains the same, housing prices

60. *Pa. Coal v. Mahon*, 260 U.S. 393, 415 (1922). The purpose of the regulatory takings doctrine is to prevent the government “from forcing some people to alone bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

61. There is no “set formula” for determining when a regulation crosses over from an ordinary exercise of the police power to a compensable taking. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regl. Plan. Agency*, 535 U.S. 302, 326 (2002). While a regulation that deprives an owner of “all economically beneficial uses” of his property is a compensable taking, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992), “[m]ere fluctuations in value” do not establish a compensable taking. *Danforth v. United States*, 308 U.S. 271, 285 (1939). The Court has stated that a regulation that causes a diminution in value of 75% is not a compensable taking. *Concrete Pipe and Prods. of Cal., Inc. v. Constr. Laborers Pen. Trust for S. Cal.*, 508 U.S. 602, 645 (1993); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 131 (1978).

62. The Court has held that a zoning regulation restricting “the use of only limited portions of the parcel, such as setback ordinances,” does not constitute a compensable taking. *Tahoe-Sierra*, 535 U.S. at 327.

increase.<sup>63</sup> The empirical literature convincingly demonstrates that restrictive zoning regulations raise housing prices.<sup>64</sup> In 1990, Dartmouth economist William Fischel conducted an exhaustive critique of the empirical literature on restrictive zoning regulations and housing prices, concluding the following:

Land-use controls, especially overall growth control programs, are important constraints on the land market. This in turn affects housing values, especially in suburban and exurban communities . . . . Growth controls and other aggressive extensions of land use regulations probably impose costs on society that are larger than the benefits they provide. The higher housing prices associated with communities that impose growth controls are more likely the result of wasteful supply constraints than benign amenity production.<sup>65</sup>

Subsequent empirical research has confirmed Fischel's conclusions and has also more fully revealed the intimate connection between zoning regulations and housing prices.<sup>66</sup>

In a 2005 study, Richard Green, Stephen Malpezzi, and Stephen Mayo found that restrictive zoning regulations make the supply of housing inelastic—that is, less responsive to demand.<sup>67</sup> In one of the most revealing studies, Harvard economists Edward Glaeser and Bryce Ward examined the effects of zoning regulations in the Boston metropolitan area.<sup>68</sup> They found that each ex-

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63. Glaeser, Schuetz & Ward, *supra* n. 10, at 99; Jaeger, *supra* n. 10, at 110; see Morris A. Davis & Michael G. Palumbo, *The Price of Residential Land in Large U.S. Cities*, 63 J. Urb. Econ. 352, 352 (2008) (showing that residential land values account for roughly 50% of the total market value of housing). This is simply an application of the law of supply and demand. Mankiw, *supra* n. 28, at 75–80.

64. See William A. Fischel, *Do Growth Controls Matter? A Review of Empirical Evidence on the Effectiveness and Efficiency of Local Government Land Use Regulations*, in *Perspectives on Property Law* 466 (Robert C. Ellickson, Carol M. Rose & Bruce A. Ackerman, eds., Little, Brown and Co. 1990) (reviewing the research on restrictive zoning and housing prices and concluding that restrictive zoning regulations undoubtedly inflate housing prices).

65. *Id.* at 53.

66. See Quigley & Rosenthal, *supra* n. 25, at 69–72 (reviewing, in detail, the extensive research on the link between zoning regulations and housing prices).

67. Richard K. Green, Stephen Malpezzi & Stephen K. Mayo, *Metropolitan-Specific Estimates of the Price Elasticity of Supply of Housing, and Their Sources*, 49 AEA Papers & Proceedings 334, 338 (2005).

68. Edward L. Glaeser & Bryce A. Ward, *The Causes and Consequences of Land Use*

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tra zoning regulation decreases new construction by roughly 10%, and increases housing prices by roughly 10%.<sup>69</sup> Glaeser and Ward were also able to isolate the effect of large-lot zoning regulations—that is, zoning regulations that mandate a minimum lot size.<sup>70</sup> They found that each extra acre of minimum lot size decreases new construction by roughly 40% and increases housing prices by roughly 10%.<sup>71</sup> In short, the empirical evidence is overwhelming—restrictive zoning regulations artificially constrain the supply of housing, thus driving housing prices up.<sup>72</sup>

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*Regulation: Evidence from Greater Boston*, NBER Working Paper 12601 (Oct. 2006).

69. *Id.* at 17.

70. *Id.* at 2–3.

71. *Id.* at 13.

72. See e.g. Theo S. Eicher, *Municipal and Statewide Land Use Regulations and Housing Prices across 250 Major US Cities* 3, [http://depts.washington.edu/teclass/landuse/housing\\_020408.pdf](http://depts.washington.edu/teclass/landuse/housing_020408.pdf) (Jan. 14, 2008) (examining data from 250 metropolitan areas across the country and finding that both statewide and local regulations significantly impact housing prices); Edward L. Glaeser, Joseph Gyourko & Raven Saks, *Why Is Manhattan So Expensive? Regulation and the Rise in Housing Prices*, 48 J.L. & Econ. 331, 366 (2005) (observing that restrictive land-use regulations restrict the supply of housing across the country, especially in Manhattan); Min Hwang & John M. Quigley, *Economic Fundamentals in Local Housing Markets: Evidence from U.S. Metropolitan Regions*, 46 J. Regl. Sci. 425, 443–445 (2006) (finding that new construction is substantially less responsive to changes in demand in communities with restrictive zoning regulations relative to communities without restrictive zoning regulations); Keith R. Ihlanfeldt, *The Effect of Land Use Regulation on Housing and Land Prices*, 61 J. Urb. Econ. 420, 432 (2007) (finding that large-lot zoning and open-space zoning increased housing prices in surrounding communities, especially when the number of competing jurisdictions was small); Ned Levine, *The Effects of Local Growth Controls on Regional Housing Production and Population Redistribution in California*, 36 Urb. Stud. 2047, 2065 (1999) (finding that land-use regulations removing land from development or requiring less intense development increased housing prices in surrounding jurisdictions); Randal O'Toole, *The Planning Tax: The Case against Regional Growth-Management Planning*, Policy Analysis No. 606, at 1 (Cato Inst. Dec. 6, 2007) (finding that housing prices in the ten states with mandatory growth management planning are significantly higher than housing prices in other states); Quigley & Raphael, *supra* n. 14, at 210 (reviewing the empirical literature and concluding that high housing prices are a result of supply restrictions and not demand-side factors); John M. Quigley, *Regulation and Property Values: The High Cost of Monopoly* 61–62 (Fischer Ctr. for Real Estate & Urb. Econ. Working Paper No. W06–004, August 2006) (concluding that “[h]ousing prices are much higher in areas with more stringent land-use regulation” and that “[h]ousing supply is much less responsive to economic incentives in such areas . . .”); C. Tsurriel Somerville & Christopher J. Mayer, *Government Regulation and Changes in the Affordable Housing Stock*, 9 Fed. Reserve Bank of N.Y. Econ. Policy Rev. 45, 53 (June 2003) (finding that “regulation does matter: when new construction is more constrained, as measured either by a lower supply elasticity or the presence of certain regulations, affordable units are more likely to filter up and become unaffordable, relative to remaining in the affordable stock”).

## A. Exclusionary Dominos

One community's adoption of exclusionary zoning regulations can spark a domino effect, which can eventually result in every community in a metropolitan area adopting exclusionary zoning regulations.<sup>73</sup> This domino effect is analogous to a trade war: automakers in the U.S. complain to Congress about low-cost Japanese cars, so the U.S. imposes a tariff on Japanese cars; Japan responds with a tariff on U.S. steel; the U.S. responds to Japan's steel tariff with a tariff on Japanese electronics; and so on.<sup>74</sup> When one community adopts exclusionary zoning regulations to protect its property values, the demand for low-income housing in that community shifts to neighboring communities.<sup>75</sup> In response to the increased demand, the neighboring communities, also wanting to protect their property values, adopt exclusionary zoning regulations as well.<sup>76</sup> This shifts the demand for low-income housing to yet more communities, which then also adopt exclusionary zoning regulations, and so on. This can eventually result in an entire metropolitan area in which no suburban community allows low-income housing.<sup>77</sup>

## B. The Affordable Socks Crisis

To bridge the gap between identifying the problem and devising a solution, consider the story of the Affordable Socks Crisis. The fictional story may seem trivial and irrelevant, but it is a powerful tool for understanding both the nature of the affordable housing crisis and the problem with many existing affordable housing policies.

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73. Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 Stan. L. Rev. 1115, 1134 (1996); see also Henry O. Pollakowski & Susan M. Wachter, *The Effects of Land-Use Constraints on Housing Prices*, 66 Land Econ. 315, 323 (1990) (showing that restrictive zoning regulations have external effects on surrounding communities).

74. See Timothy Taylor, *Principles of Economics: Economics and the Economy* 562–564 (FreeLoad Press 2008) (describing how one protectionist tariff can lead to an escalating trade war that ultimately harms both countries).

75. See Jaeger, *supra* n. 10, at 110 (explaining that zoning regulations that prohibit particular land uses shift demand for those land uses to surrounding communities).

76. Briffault, *supra* n. 73, at 1134.

77. *Id.*

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The Affordable Socks Crisis began when all the clothing manufacturers conspired to restrict the number of socks they manufacture. As the output of socks slowed to a trickle and socks became scarce, retailers bid up the price of available socks, and the retail price of a pair of socks increased from \$1 to \$50.<sup>78</sup> Retailers, aware that demand for socks far outpaced supply, begged the manufacturers to make more socks, but the manufacturers resisted. Newspaper editorials condemned the retailers for only selling socks to the rich; affordable socks advocates, outraged at sight of poor people walking barefoot in the winter, demanded government action. Congress was sympathetic, though bitterly divided. After much partisan wrangling, Congress finally passed the Socks Availability Act, a three-prong plan to fight the affordable socks crisis. First, the Act provided \$49 subsidies to people who were too poor to buy \$50 socks; second, the Act offered tax credits to retailers who sold socks at affordable prices; and third, the Act created a new agency, the Federal Socks Authority, to manufacture cheap socks for the poor. Affordable socks advocates lauded the Act, and newspaper editorials across the country declared victory in the affordable socks crisis.

### *1. Socks and Housing*

The story of the Affordable Socks Crisis, while obviously absurd, is useful because it is a simplified version of the affordable housing crisis; and the Socks Availability Act is, unfortunately, a simplified version of existing affordable housing policies. Replace “socks” with “housing,” “retailers” with “developers,” and “clothing manufacturers” with “suburban communities,” and you more or less have the affordable housing crisis. Suburban communities use zoning regulations to restrict the supply of housing—new housing necessarily requires developable land, so restricting the supply of developable land restricts the supply of housing. As developable land becomes scarce, developers bid up the price of the

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78. Cf. Harrison Hong, Jose Scheinkman & Wei Xiong, *Asset Float and Speculative Bubbles*, 61 J. Fin. 1073, 1076 (2006) (explaining that when an asset’s “float” (i.e., tradable shares) is small relative to its total shares, the buying and selling of the float is confined to only the most optimistic investors, who bid up the price of the asset).

developable land that is available, which then increases the price of housing.<sup>79</sup>

## 2. *The Lesson of the Affordable Socks Crisis*

The story of the Affordable Socks Crisis holds important lessons for how to deal with the affordable housing crisis, and, perhaps more importantly, how *not* to deal with the affordable housing crisis. Why did socks become unaffordable to the poor? It was not because greedy retailers were willfully forsaking the poor; retailers increased prices because the cost of acquiring socks from the manufacturers rose. Nor was it because lower-class incomes had failed to keep pace with the price of socks. While lower-class income levels are a legitimate concern, they do not explain why socks that were previously affordable to the poor suddenly became unaffordable. The problem was that the clothing manufacturers created an artificial scarcity of socks when they restricted the supply, which pushed up the price of socks to an unaffordable level. In fact, the problem in the Affordable Socks Crisis seems so painfully obvious that one might wonder how anyone could possibly miss it—but miss it they did.

The Socks Availability Act, though enacted with good intentions, was fundamentally misguided because it assumed that \$50 was the proper market price for a pair of socks—that is, it assumed the market for socks was operating efficiently. Instead of focusing on why the price of socks had gone from \$1 to \$50, the Act focused on making sure that poor people could afford \$50 socks. Similarly, instead of focusing on why the price of low-income housing is so high,<sup>80</sup> affordable housing policy seems to focus on: (1) ensuring that the poor have enough money to pay the inflated low-income housing prices;<sup>81</sup> (2) ensuring that developers

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79. Benjamin Powell & Edward Stringham, *"The Economics of Inclusionary Zoning Reclaimed": How Effective Are Price Controls?* 33 Fla. St. U. L. Rev. 471, 491 (2005); cf. Hong, Scheinkman & Xiong, *supra* n. 78, at 1076 (explaining that when an asset's "float" (i.e. tradable shares) is small relative to its total shares, the buying and selling of the float is confined to the most optimistic investors, who consequently bid up the price of the asset).

80. 42 U.S.C. § 1437 ("Declaration of Policy and Public Housing Agency Organization").

81. See e.g. Department of Housing and Community Development Act of 1987, 42 U.S.C. § 1437f (establishing the "Section 8" rental housing vouchers program, a means-

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have enough money to pay the inflated prices for the land they need to build low-income housing;<sup>82</sup> and (3) having the government build low-income housing directly.<sup>83</sup> The Housing Choice Voucher Program (“Section 8”) ensures that the poor can live in market-rate housing,<sup>84</sup> but why is market-rate housing unaffordable to the poor in the first place? The Low-Income Housing Tax Credit (LIHTC) ensures that developers can profitably build affordable low-income housing,<sup>85</sup> but why does it cost developers so much to build affordable low-income housing on their own? The government, through public housing programs, builds low-income housing directly,<sup>86</sup> but why has it become necessary for the government to step in at the bottom of the housing market? Failing to address these fundamental questions is akin to ignoring the role of the clothing manufacturers in the Affordable Socks Crisis.

#### IV. WHAT SHOULD AFFORDABLE HOUSING POLICY DO?

Low-income housing is unaffordable because exclusionary zoning regulations restrict the supply of low-income housing.<sup>87</sup> Reducing the number of exclusionary zoning regulations will increase the supply of low-income housing, thereby lowering the price of low-income housing.<sup>88</sup> Therefore, the primary goal of affordable housing policy should be, and must be, to reduce the number of exclusionary zoning regulations.<sup>89</sup>

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tested program in which qualifying low-income individuals can live in market-rate housing and only pay 30% of their income on rent, with the federal government paying the difference).

82. See *e.g.* Tax Reform Act of 1986, 26 U.S.C. § 42 (establishing the Low-Income Housing Tax Credit, which provides tax incentives to developers to build low-income housing).

83. See *e.g.* Wagner-Steagall Housing Act, 42 U.S.C. §§ 1437–1440 (permitting federal and state public housing agencies to construct low-income housing); United States Housing Act of 1949, 42 U.S.C. §§ 1441–1446 (providing for new public housing construction to replace urban slums).

84. *Id.* at § 1437f.

85. 26 U.S.C. § 42.

86. 42 U.S.C. §§ 1437–1446.

87. Fischel, *supra* n. 64, at 53.

88. *Cf.* Mankiw, *supra* n. 28, at 71–73 (discussing how shifts in the supply curve affect price).

89. *Id.* at 71.

Communities adopt exclusionary zoning regulations because homeowners, who dominate local government politics,<sup>90</sup> fear that allowing low-income housing in their community will lower their property values.<sup>91</sup> A home is an investment to most homeowners, so they have an incentive to ensure that their home “will continue to prove attractive to others on the resale market.”<sup>92</sup> The current zoning regime allows communities to act on this fear regardless of whether the fear is justified.<sup>93</sup> Moreover, the current zoning regime does not give communities an incentive to find out whether their fears of falling residential property values is justified.<sup>94</sup>

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90. William A. Fischel, *The Homevoter Hypothesis: How Home Values Influence Local Government Taxation, School Finance, and Land-Use Policies* 30 (Harv. U. Press 2001); Lee Anne Fennell, *Contracting Communities*, 2004 U. Ill. L. Rev. 829, 870 (2004). Denise DiPasquale and Ed Glaeser conducted a study of local government politics and found that 77% of homeowners vote in local elections, while only 52% of renters do so. Denise DiPasquale & Edward L. Glaeser, *Incentives and Social Capital: Are Homeowners Better Citizens?* 45 J. Urb. Econ. 354, 365 (1999). They also found that 40% of homeowners report having actively participated in trying to solve local problems, while only 24% of renters do so, and that homeowners are significantly more likely to know the names of their local political leaders. *Id.*

91. Fischel, *supra* n. 9, at 327.

92. Lee Anne Fennell, *Exclusion's Attraction: Land Use Controls in Tieboutian Perspective*, in *The Tiebout Model at Fifty: Essays in Public Economics in Honor of Wallace Oates* 9 (William A. Fischel, ed., Lincoln Institute of Land Policy 2006).

93. Abraham Bell & Gideon Parchomovsky, *Taking Compensation Private*, 59 Stan. L. Rev. 871, 882 (2006); Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 Yale L.J. 385, 458 (1977). Whether low-income housing does, in fact, lower residential property values is a controversial question that is beyond the scope of this Article. However, it is important to note that there is some evidence that, contrary to conventional wisdom, low-income housing does not depress property values. See Ingrid Gould Ellen, Michael H. Schill, Amy Ellen Schwartz & Ioan Voicu, *Does Federally Subsidized Rental Housing Depress Neighborhood Property Values?* 29–30 (Furman Ctr. for Real Estate & Urb. Policy Working Paper 05–03 2005) (finding that the presence of federally-subsidized housing does not depress property values, but in some circumstances can actually increase property values); George C. Galster, Jackie M. Cutsinger & Ron Malega, *The Social Costs of Concentrated Poverty: Externalities to Neighboring Households and Property Owners and the Dynamics of Decline*, 41 (Jt. Ctr. for Hous. Stud. Working Paper RR07-4, March 2007) (finding that “there is no substantial relationship between neighborhood poverty changes and property values or rents when poverty rates stay below ten (10) percent”). In reality, though, whether low-income housing actually depresses property values is irrelevant; it is a self-fulfilling prophecy. Residential property values are determined by the amount that a buyer would be willing to pay; if buyers believe that low-income housing depresses residential property values, then they will not be willing to pay as much for property near low-income housing. So the mere belief that low-income housing depresses residential property values guarantees that low-income housing will, in fact, depress property values.

94. Bell & Parchomovsky, *supra* n. 93, at 882; William A. Fischel, *Zoning and Land Use Reform: A Property Rights Perspective*, 1 Va. J. Nat. Resources L. 69, 76–77 (1980).



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Even when a low-income housing development will lower residential property values, communities do not have an incentive to determine whether the developer and the prospective residents of the low-income housing are willing to compensate the community for the drop in property values.<sup>95</sup>

Exclusionary zoning regulations impose costs on non-community residents because they restrict the area-wide supply of low-income housing<sup>96</sup>—in economic terms, they have negative externalities.<sup>97</sup> Exclusionary zoning regulations impose costs on non-community residents in two ways. First, they restrict the total supply of low-income housing in the surrounding area, thus raising low-income housing prices in other communities in the area.<sup>98</sup> Second, they prevent would-be residents from moving into the new low-income housing that the exclusionary zoning regulations blocked. When a community decides whether to adopt exclusionary zoning regulations, or whether to block a particular low-income housing development, the community does not have an incentive to consider the costs that its decision will impose on non-community residents because the community will not bear any of those costs.<sup>99</sup> In short, communities adopt exclusionary zoning regulations because they reap the benefits without bearing all of the costs.<sup>100</sup> It follows then, that forcing communities to bear all the costs of exclusionary zoning regulations will reduce the amount of exclusionary zoning regulations—after all, consumers buy less of a product when it is more expensive.<sup>101</sup> Raising the

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95. Fischel, *supra* n. 94, at 76–77; Christopher Serkin, *Big Differences for Small Governments: Local Governments and the Takings Clause*, 81 N.Y.U. L. Rev. 1624, 1634 (2006).

96. Fischel, *supra* n. 64, at 53; *see also* Fischel, *supra* n. 44, at 85–86 (explaining how intra-community activities can have external effects).

97. A “negative externality” is the uncompensated cost that one party’s actions impose on a nonconsenting party. Mankiw, *supra* n. 28, at 830. A negative externality arises whenever the social costs of an activity exceed its private costs. *Id.* at 830.

98. Pollakowski & Wachter, *supra* n. 73, at 323 (presenting evidence that restrictive zoning regulations in one community raises housing prices in surrounding communities as well).

99. Fischel, *supra* n. 26, at 39; Webster, *supra* n. 26, at 70.

100. Fischel, *supra* n. 44, at 98–100; *see* Briffault, *supra* n. 73, at 1134 (discussing the external effects of zoning out particular land uses); Amnon Lehari, *Intergovernmental Liability Rules*, 92 Va. L. Rev. 929, 940 (2006) (noting that zoning creates externalities whenever a zoning regulation has extraterritorial impacts).

101. *See* Mankiw, *supra* n. 28, at 67–71 (establishing that raising the price of a product will lead a given consumer to buy less of that product).

cost to communities of adopting exclusionary zoning regulations is the equivalent of raising the price of exclusionary zoning regulations.<sup>102</sup> To raise the price of exclusionary zoning regulations, we must understand how communities price zoning regulations.<sup>103</sup> In other words, we must examine how communities weigh the costs and benefits of zoning regulations.<sup>104</sup>

### A. Entitlements and Externalities

In land use, an “entitlement” represents the right to engage in a particular land use on a particular parcel of property.<sup>105</sup> Zoning regulations are collective property rights held by the community.<sup>106</sup> Landowners enjoy a bundle of property rights, which includes limited rights to use their property and to exclude others from it.<sup>107</sup> The traditional Blackstonian bundle of property rights included absolute rights to use the land, to exclude others from using the land, and to transfer the entire bundle of property rights.<sup>108</sup> However, the modern bundle of property rights does not include an absolute right to use the land, because some land uses have spillover effects.<sup>109</sup> The owner of a polluting factory and his neighbor cannot both have absolute rights to use their land—the polluting factory’s preferred land use (i.e., pollution) would inter-

102. Edwin Woerdman, *Tradable Emission Rights*, in *The Elgar Companion to Law and Economics* 372 (Jürgen G. Backhaus, ed., 2d ed., Edward Elgar 2005).

103. Lawrence Blume, Daniel L. Rubinfeld & Perry Shapiro, *The Taking of Land: When Should Compensation Be Paid?* 99 Q. J. Econ. 71, 72 (1984); Serkin, *supra* n. 95, at 1634.

104. Karkkainen, *supra* n. 30, at 78; Thomas C. Schelling, *Prices as Regulatory Instruments*, in *Perspectives on Property Law* 536 (Robert C. Ellickson, Carol M. Rose & Bruce A. Ackerman, eds., Little, Brown & Co. 1995).

105. Fennell, *supra* n. 52, at 16–17.

106. Fennell, *supra* n. 52, at 16–17; Fischel, *supra* n. 19, at 404.

107. Robert C. Ellickson, *Property in Land*, 102 Yale L.J. 1315, 1363 (1993).

108. William Blackstone, *Commentaries on the Laws of England* vol. 3, 212–214 (Oceana Publications 1967); *see also* Ellickson, *supra* n. 107, at 1362–1363 (summarizing the Blackstonian bundle of rights); Thomas J. Miceli, *The Economic Approach to Law* 162 (Stan. U. Press 2004) (noting that the typical bundle of property rights includes the rights of use, exclusion, and disposal).

109. *See* Lee Anne Fennell, *Common Interest Tragedies*, 98 Nw. U. L. Rev. 907, 967 (2004) (explaining that all landowners have the right to be free of certain spillovers from neighboring land uses); Elinor Ostrom, *Private and Common Property Rights*, in *Encyclopedia of Law and Economics: Civil Law and Economics*, *supra* n. 19, at 342 (observing that “[e]ven private [property] owners have responsibilities not to generate particular kinds of harms for others”); Francesco Parisi, *The Asymmetric Coase Theorem: Dual Remedies for Unified Property* 8 (Geo. Mason U., L. & Econ. Working Paper No. 01-13, 2001).

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fere with the resident's preferred land use (i.e., live pollution-free).<sup>110</sup> To resolve such land-use disputes, zoning takes certain entitlements from individual landowners and transfers them to the community, creating collective property rights.<sup>111</sup> In other words, when a community enacts a zoning regulation prohibiting polluting factories, it transfers one "stick" in the bundle of property rights—the right to operate a polluting factory—from each individual landowner to the community.<sup>112</sup> Thus, a zoning regulation is a community property right.<sup>113</sup>

### 1. Externalities and Zoning

When a landowner wants to engage in a land use that has spillover effects on a neighboring property, the law must step in to resolve the dispute.<sup>114</sup> The resolution of a dispute involving land uses with negative externalities involves two steps: (1) the initial allocation of entitlements; and (2) the choice of protection for the entitlement.<sup>115</sup> In allocating the entitlement, the state decides who is entitled to prevail. In the polluting factory example, the state can grant the polluter the right to pollute, or it can grant the resident the right to be free of pollution.<sup>116</sup> In choosing how to protect the entitlement, the state generally chooses between a property rule (i.e., an injunction) and a liability rule (i.e., damages).<sup>117</sup> Under a property rule, no one can take the entitle-

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110. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089, 1115–1116 (1972) (providing as the classic example of incompatible land uses the right to pollute versus the right to clean air).

111. Robert H. Nelson, *Zoning and Property Rights: An Analysis of the American System of Land-Use Regulation* 16 (MIT Press 1977); Fennell, *supra* n. 52, at 16.

112. See Stephens, *supra* n. 49, at 430 (noting that "[a]ny system of land-use controls can be seen as withdrawing from the bundle of property rights, which constitute the ownership of land, the stick which represents the 'right to develop'").

113. Fischel, *supra* n. 19, at 403–404.

114. Calabresi & Melamed, *supra* n. 110, at 1090.

115. *Id.* The Supreme Court recently acknowledged this distinction when it stated that "the creation of a right is distinct from the provision of remedies for violations of that right." *eBay Inc. v. MercExchange, L.L.C.*, 126 S. Ct. 1837, 1840 (2006).

116. Calabresi & Melamed, *supra* n. 110, at 1090.

117. *Id.* at 1092; see A. Mitchell Polinsky, *Resolving Nuisance Disputes: The Simple Economics of Injunctive and Damage Remedies*, 32 Stan. L. Rev. 1075, 1076 (1980) (noting that a property rule grants the entitlement holder the right to injunctive relief, while a liability rule grants the holder the right to damages).

ment from the entitlement holder unless the holder sells it in a voluntary transaction.<sup>118</sup> Under a liability rule, someone may take the entitlement, but the taker must pay an objectively determined price to compensate the holder for the loss of the entitlement.<sup>119</sup>

In a perfect world, the state's initial allocation of property entitlements would ensure that landowners fully internalize the costs of their activities.<sup>120</sup> However, a perfectly efficient initial allocation of entitlements is clearly unrealistic.<sup>121</sup> Whenever the state has inefficiently allocated an entitlement—for example, granting the resident the right to be free of pollution when it would be more efficient for the factory to pollute and pay the resident damages—rearranging the allocation of entitlements can increase efficiency.<sup>122</sup> The Coase theorem holds that if transaction costs are zero and all parties have perfect information, bargaining will *always* lead to an efficient allocation of entitlements, regardless of how the state initially allocates entitlements.<sup>123</sup> In other words, when transaction costs are zero and all parties have perfect information, bargaining will always lead to the internalization of negative externalities.<sup>124</sup>

## 2. Transaction Costs

In reality, however, transaction costs—the costs that parties incur in identifying the relevant parties, bargaining, and enforcing agreements<sup>125</sup>—are never zero.<sup>126</sup> When the transaction costs

118. Calabresi & Melamed, *supra* n. 110, at 1092.

119. *Id.* A classic example of an entitlement protected by a liability rule is *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870 (1970). In *Boomer*, a group of neighboring landowners sought an injunction barring the owner of a cement plant from emitting harmful dirt and smoke. *Id.* at 871. The Court found that the plant's harmful emissions constituted a nuisance, but allowed the plant owner to pay the neighboring landowners permanent damages in exchange for the right to continue to emit dirt and smoke. *Id.* at 873.

120. Fennell, *supra* n. 52, at 21.

121. *Id.* at 20.

122. Guido Calabresi, *Transaction Costs, Resource Allocation and Liability Rules*, 11 J.L. & Econs. 67, 68 (1968).

123. Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & Econs. 1, 15 (1960).

124. *Id.*

125. Jerry Ellig, *The Economics of Regulatory Takings*, 46 S.C. L. Rev. 595, 607 (1995). Coase described transaction costs as follows:

In order to carry out a market transaction it is necessary to discover who it is that one wishes to deal with, to inform people that one wishes to deal and on what terms, to conduct negotiations leading up to a bargain, to draw up the contract, to under-

are higher than the potential gains from an exchange, an otherwise efficient exchange will not occur.<sup>127</sup> For example, suppose that Mr. Burns owns a polluting factory, and that Marge, the owner of land near the factory, wishes to use her land free of pollution. Mr. Burns holds the entitlement to pollute, which is protected by a property rule. Operating the polluting factory imposes a cost of \$20 on Marge, and it would cost Mr. Burns \$15 to install a filter that would abate the pollution. If transaction costs are zero, Marge would pay Mr. Burns to install the filter, and both parties would benefit from the exchange. The outcome changes, however, when transaction costs are high. Assume now that it would cost Marge \$10 to locate a manufacturer who makes the filter—in other words, the transaction costs are \$10. Marge would now have to spend a total of \$25 to abate the pollution (\$10 to find the manufacturer, and \$15 to install the filter). However, because the harm to Marge of allowing the polluting factory to operate is only \$20, she will not spend \$25 to abate the pollution—no exchange will occur.

In the presence of positive transaction costs, the efficiency of the final allocation of entitlements depends on both the initial allocation of entitlements and the form of protection.<sup>128</sup> For in-

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take the inspection needed to make sure that the terms of the contract are being observed, and so on.

Coase, *supra* n. 123, at 15. Transaction costs are zero when market transactions in entitlements are costless. *Id.* at 15–16.

126. See *id.* at 16 (acknowledging that an assumption of zero transaction costs is “a very unrealistic assumption”). Over twenty years after publishing his foundational article, Coase himself stated, “while consideration of what would happen in a world of zero transaction costs can give us valuable insights, these insights are, in my view, without value except as steps on the way to the analysis of the real world of positive transaction costs.” Ronald H. Coase, *The Coase Theorem and the Empty Core: A Comment*, 24 J.L. & Econ. 183, 187 (1981).

127. Ellig, *supra* n. 125, at 607; Michael G. Faure, *Environmental Regulation*, in *Encyclopedia of Law and Economics: Civil Law and Economics*, *supra* n. 19, at 447.

128. Parisi, *supra* n. 109, at 2; see Coase, *supra* n. 123, at 27 (noting that “[i]n a world in which there are costs of rearranging the rights established by the legal system, the courts . . . are, in effect, . . . determining how resources are to be employed”). The relative efficiency of property rules and liability rules has long been the subject of intense academic debate. See e.g. Ian Ayres & J.M. Balkin, *Legal Entitlements as Auctions: Property Rules, Liability Rules, and Beyond*, 106 Yale L.J. 703, 704 (1996) (arguing that “higher-order” liability rules, which allow for successive and reciprocal options to take, are more efficient than both property rules and normal liability rules); Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade*, 104 Yale L.J. 1027, 1037–1038 (1995) (asserting that liability rules are more efficient when information is

stance, transaction costs of \$10 prohibited Marge from paying Mr. Burns for his entitlement to pollute, even though an exchange would have been efficient. Suppose that instead of a property rule, Mr. Burns' entitlement to pollute is protected by a liability rule. Under a liability rule, Marge can force Mr. Burns to install the filter and pay damages equal to the cost of installing the filter—\$15.<sup>129</sup> Because the damage amount under a liability rule does not include the transaction costs, Marge will force Mr. Burns to install the filter. Thus, protecting Mr. Burns' entitlement with a liability rule facilitated an efficient exchange that transaction costs would have prevented under a property rule.<sup>130</sup>

Protecting zoning entitlements with a property rule means that a landowner cannot obtain the right to use his property in a manner prohibited by a zoning regulation unless the community sells the zoning entitlement to the landowner in a voluntary transaction—for example, granting a zoning variance or a rezoning.<sup>131</sup> Protecting a community's zoning entitlements with a liability rule means that a landowner can acquire the right to use his land in a manner prohibited by a zoning regulation if he pays an

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asymmetric, regardless of whether transaction costs are also low); Calabresi & Melamed, *supra* n. 110, 1106–1110 (arguing that property rules are more efficient when transaction costs are low, and that liability rules are more efficient when transaction costs are high); Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 Harv. L. Rev. 713, 715 (1996) (contending that property rules are the most efficient form of protection for possessory interests, and that liability rules are the most efficient form of protection for interests in not suffering from harmful externalities).

129. This assumes, however, that the court has perfect information about the cost of installing the filter. If the court did not have perfect information, it would have to spend time figuring out how much it would cost Mr. Burns to install the filter, and the time spent obtaining that information simply adds to the transaction costs. Ellig, *supra* n. 125, at 607.

130. The traditional view of property rules and liability rules, first advanced by Calabresi and Melamed, was that property rules are more efficient when transaction costs are low, and that liability rules are more efficient when transaction costs are high. Calabresi & Melamed, *supra* n. 110, at 1106–1110; Miceli, *supra* n. 108, at 179. However, this traditional view has been shown not to be applicable to all, or even many, exchanges. See e.g. Ayres & Balkin, *supra* n. 128, at 704 (arguing that “higher-order” liability rules, which allow for successive and reciprocal options to take, are more efficient than both property rules and normal liability rules); Ayres & Talley, *supra* n. 128, at 1037–1038 (asserting that liability rules are more efficient when information is asymmetric, regardless of whether transaction costs are also low); Kaplow & Shavell, *supra* n. 128, at 715 (contending that property rules are the most efficient form of protection for possessory interests, and that liability rules are the most efficient form of protection for interests in not suffering from harmful externalities).

131. Fischel, *supra* n. 44, at 22.

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objectively determined amount in damages.<sup>132</sup> States typically protect communities' zoning entitlements with a property rule.<sup>133</sup>

### B. The Price Is Wrong, Bob Barker

Communities adopt exclusionary zoning regulations because they do not have to bear the full cost of the regulations—that is, the price of the exclusionary zoning regulation is too low.<sup>134</sup> The “price” of an exclusionary zoning entitlement is its opportunity cost,<sup>135</sup> which is the value of the foregone alternative.<sup>136</sup> To a community, the opportunity cost of an exclusionary zoning entitlement is the revenue foregone by not selling its right to prohibit low-income housing to the developer.<sup>137</sup> The opportunity cost of an exclusionary zoning entitlement represents the private cost to the community of prohibiting low-income housing.<sup>138</sup> Because the goal of affordable housing policy should be to raise the price of adopting exclusionary zoning regulations, any policy must raise the opportunity cost of exclusionary zoning entitlements.<sup>139</sup> If the community is aware that it is foregoing the full amount of potential revenues when it adopts an exclusionary zoning regulation, then it is paying the full price for the exclusionary zoning regulation.<sup>140</sup> So raising the opportunity cost of an exclusionary zoning entitlement is simply a matter of making a community aware of

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132. See Fennell, *supra* n. 52, at 17 (noting that a landowner cannot pay for a nonconforming use without first obtaining permission from the community).

133. Fischel, *supra* n. 44, at 187–189.

134. Fischel, *supra* n. 26, at 39; Webster, *supra* n. 26, at 70.

135. See Coase, *supra* n. 123, at 43 (stating that it might be preferable to use the opportunity cost concept “to compare the total product yielded by alternative social arrangements”).

136. Mankiw, *supra* n. 28, at 832. For example, the opportunity cost of a person's decision to attend college for four years is the amount that he would have earned in the job market during those four years. *Id.* at 51.

137. See Richard A. Posner, *Economic Analysis of Law* 6 (7th ed., Aspen 2007) (stating that the opportunity cost is “the price at which the resources could have been sold to the next highest bidder”); Woerdman, *supra* n. 102, at 372 (noting that the opportunity cost of a good is the revenue foregone by not selling the good).

138. *Id.* at 372.

139. See Hannah Jacobs, *Searching for Balance in the Aftermath of the 2006 Takings Initiatives*, 116 Yale L.J. 1518, 1539 (2007) (observing that “governments determine whether they should ‘purchase’ (i.e., enact or enforce) a given regulation after investigating the ‘price’ of enacting or enforcing it (i.e., the amount that they and their constituents would pay) and the opportunity costs of not doing so”).

140. *Id.* at 1518.

the revenues it is foregoing when it adopts an exclusionary zoning regulation.<sup>141</sup>

A combination of property rule protection and “fiscal illusion” causes communities to underprice exclusionary zoning regulations. Fiscal illusion is a community’s practice of underestimating costs that do not require a budgetary outlay.<sup>142</sup> Fiscal illusion causes community officials to systematically overestimate the benefits of an action relative to its costs when the action does not require a budgetary outlay.<sup>143</sup> Exclusionary zoning regulations involve no budgetary costs, so communities fail to recognize the full opportunity cost of an exclusionary zoning regulation.<sup>144</sup> Moreover, because exclusionary zoning regulations are protected by a property rule, nothing forces communities to conduct anything beyond a cursory examination of the costs and benefits of adopting exclusionary zoning regulations.<sup>145</sup> When a community is deciding whether to adopt an exclusionary zoning regulation, fiscal illusion first leads the community to underestimate the cost of the zoning regulation, and then property rule protection for zoning regulations deters the community from re-examining its faulty decision.<sup>146</sup> Thus, to discourage communities from adopting exclusionary zoning regulation, we must translate the cost of adopting exclusionary zoning regulations into budgetary costs.<sup>147</sup>

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141. Posner, *supra* n. 137, at 6.

142. See Blume, Rubinfeld & Shapiro, *supra* n. 103, at 72 (developing the concept of fiscal illusion, in which “only dollar outlays are included as costs in its benefit-cost calculation”); see also Bell & Parchomovsky, *supra* n. 93, at 881–882 (discussing fiscal illusion in the context of takings); Serkin, *supra* n. 95, at 1634 (explaining that if no budgetary outlay is required, “the government could ignore the costs its actions impose on property owners”).

143. Bell & Parchomovsky, *supra* n. 93, at 882 (“[G]overnment actors suffering from fiscal illusion see most of the benefits engendered by uncompensated takings, but few of the costs.”); Ellickson, *supra* n. 93, at 458 (“When municipal officials do not charge for services, they have no clear evidence of how their constituents value public programs.”).

144. Blume, Daniel & Shapiro, *supra* n. 103, at 72; Serkin, *supra* n. 95, at 1634.

145. See Ayres & Talley, *supra* n. 128, at 1045 (noting that property rules do not give the entitlement-holder an incentive to reveal his preferences).

146. A landowner cannot simply force the community to repeal a zoning regulation by making a payment, but is instead relegated to beseeching the community to reconsider its own faulty decision, which it is unlikely to ever do. Fennell, *supra* n. 52, at 17.

147. Bell & Parchomovsky, *supra* n. 93, at 882; Ellickson, *supra* n. 93, at 458; Serkin, *supra* n. 95, at 1634.



### V. THE EXCLUSIONARY ZONING TAX

The Exclusionary Zoning Tax will raise the price of excluding low-income housing and thus will discourage communities from adopting exclusionary zoning regulations. Fewer exclusionary zoning regulations will lead to fewer restrictions on the supply of low-income housing,<sup>148</sup> which, in turn, will bring low-income housing prices back down from their artificially inflated level.<sup>149</sup> A tax on exclusionary zoning regulations then goes a long way toward solving the affordable housing crisis.

Under the Exclusionary Zoning Tax, a developer who wants to build low-income housing on a parcel of property where zoning regulations currently prohibit new low-income housing can submit an application for rezoning to the state. Once the state notifies the community of the developer's application, the community has 30 days to submit a bid. After the community submits its bid and the state notifies the developer of the bid, the developer must decide whether to match the community's bid—in effect, the community's bid serves as the price of the exclusionary zoning entitlement. If the developer matches the community's bid, the developer pays the community the amount of the bid, and the developer's application is automatically approved. If the developer chooses not to purchase the community's exclusionary zoning entitlement—because, for example, the bid amount is more than the developer is willing to pay—then the developer's application for rezoning is rejected. However, because the community has prohibited new low-income housing, the community must pay a tax in an amount equal to the bid. This tax is essentially a penalty for restricting the supply of low-income housing. Finally, the revenues from the Exclusionary Zoning Tax will be diverted into a state fund that will be used to subsidize impact fees for low-income housing developments—called the Impact Fee Fund.

To illustrate how the Exclusionary Zoning Tax would work, assume that Lisa, a developer, wants to build a 45-unit low-income apartment building on a parcel of property in Springfield,

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148. Green, Malpezzi & Mayo, *supra* n. 67, at 338; Quigley & Raphael, *supra* n. 14, at 205–206.

149. Glaeser, Gyourko & Saks, *supra* n. 72, at 22.

a wealthy suburban community with a zoning regulation prohibiting multifamily housing with over 20 units.

- *Scenario #1:* Lisa submits an application to build low-income housing in Springfield to the state. Twenty days later, Springfield submits a bid of \$100,000 to the state. Lisa pays the \$100,000, and her application for rezoning is approved.
- *Scenario #2:* Lisa submits an application to build low-income housing in Springfield to the state. Twenty days later, Springfield submits a bid of \$100,000 to the AHC. Lisa declines to match the \$100,000 bid, her application is denied, and Springfield has to pay \$100,000 in Exclusionary Zoning Taxes.
- *Scenario #3:* Lisa submits an application to build low-income housing in Springfield to the state. Springfield declines to submit a bid. Lisa's application is approved, and the state pays Springfield an impact fee for the 45-unit apartment building from the statewide Impact Fee Fund.

One of the main problems in devising an affordable housing policy to combat exclusionary zoning regulations is the difficulty of isolating exclusionary zoning regulations from other more benign zoning regulations.<sup>150</sup> A study of 443 communities in California identified 907 different types of zoning regulations that restricted residential development.<sup>151</sup> Some exclusionary zoning regulations are largely symbolic<sup>152</sup>—a community with nominally exclusionary zoning regulations may always grant rezonings for new low-income housing.<sup>153</sup> Moreover, lengthy regulatory delays

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150. See Quigley & Rosenthal, *supra* n. 25, at 72 (noting that “[t]he sheer variety of local land-use enactments makes it difficult to untangle the link between regulation and its economic effects”).

151. Madelyn Glickfield & Ned Levine, *Regional Growth . . . Local Reaction: The Enactment and Effects of Local Growth Control Management Measures in California* 7–10 (Lincoln Inst. of Land Policy 1992).

152. See e.g. Vicki Been, *Impact Fees and Housing Affordability*, 8 Cityscape 139, 146 (2005) (noting that communities “may use impact fees in an attempt to exclude people who do not share the same race, class, or other characteristics as the community’s existing (and preferred) demographic profile”).

153. Glickfield & Levine, *Regional Growth*, *supra* n. 151, at 16.

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in securing the necessary permits to build low-income housing often prohibit low-income housing because longer regulatory delays raise the cost of the project, which sometimes makes building low-income housing prohibitively expensive. To sidestep this problem, this Article defines an “exclusionary zoning regulation” in terms of its effect—that is, a zoning regulation that directly or indirectly prohibits new low-income housing.<sup>154</sup> This has the advantage of minimal interference with existing zoning regulations. The only zoning regulations that the Exclusionary Zoning Tax will eliminate are those that *actually* exclude low-income housing because the Exclusionary Zoning Tax is only triggered when a developer submits an application to build low-income housing on a parcel that currently prohibits low-income housing.<sup>155</sup> With the Exclusionary Zoning Tax, every exclusionary zoning regulation will become presumptively symbolic. Developers who want to build low-income housing can force a community to reveal whether its exclusionary zoning regulations are serious or merely symbolic.

Forcing a community to price its own Exclusionary Zoning Tax avoids having to estimate the effect that exclusionary zoning regulations have on other communities. More importantly, forcing a community to pay the amount of its own bid in taxes if the developer does not match the bid will force the community to reveal exactly how much it is willing to pay to exclude low-income housing.<sup>156</sup> A community cannot bid more than it is willing to pay to exclude low-income housing because if the developer does not match the community’s bid, the community must pay the amount of its own bid in taxes.<sup>157</sup> For example, suppose that Lisa, a developer, is willing to pay \$50,000 for the right to build low-income housing in Springfield, and that Springfield is also willing to pay \$50,000 for the right to exclude low-income housing. If Springfield submits a bid of \$100,000, then Lisa will not match the bid, and

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154. *Supra* Part I.

155. Robert Ellickson first argued in 1977 that communities should have to pay for the negative externalities that their exclusionary land-use regulations caused, though he favored civil liability rather than a Pigovian tax. *See* Ellickson, *supra* n. 93, at 437 (arguing that “someone should be entitled to recover the damages suffered by the consumers who refuse to buy because of monopoly [housing] prices”).

156. Bell & Parchomovsky, *supra* n. 93, at 891.

157. *Id.* at 892; Lee Anne Fennell, *Revealing Options*, 118 Harv. L. Rev. 1401, 1446–1468 (2005).

Springfield will be forced to pay \$50,000 more than it was willing to pay to exclude the low-income housing. Springfield does not know how much Lisa is willing to pay before it submits its bid, so Springfield cannot submit a bid that exceeds its true willingness to pay because it may end up having to pay the amount of its bid in taxes. Further, a community cannot bid less than it is willing to pay.<sup>158</sup> If Springfield submits a bid of \$25,000, then Lisa will match the bid, and Springfield will only receive \$25,000 for a right that it valued at \$50,000. This kind of self-assessed tax has proven remarkably effective at eliciting accurate subjective valuations.<sup>159</sup>

Finally, diverting the revenues from the Exclusionary Zoning Tax to the Impact Fee Fund will also help to increase the supply of low-income housing.<sup>160</sup> With sufficient revenues, the Impact Fee Fund will lower the cost of building low-income housing by the amount that the developer would otherwise have to pay in impact fees.<sup>161</sup> If the cost of building low-income housing, including a \$12,000 impact fee, is \$112,000, then the Impact Fee Fund will essentially lower the cost of building the low-income housing to \$100,000. Lowering the cost of building low-income housing can only serve to hasten the decline of low-income housing prices.<sup>162</sup>

## VI. CONCLUSION

Affordable housing has been a conspicuous and devastating problem for over 40 years. A close examination of the bottom of the housing market reveals that the task of making low-income housing more affordable is far less daunting than the scope of the affordable housing problem might suggest. The proliferation of exclusionary zoning regulations has constrained, and continues to constrain, the supply of low-income housing. Such supply restrictions drive up the price of low-income housing, leaving the im-

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158. Fennell, *supra* n. 157, at 1466–1468; Bell & Parchomovsky, *supra* n. 93, at 892.

159. See Fennell, *supra* n. 157, at 1411–1414 (discussing the success of call options in finance).

160. Vicki Been, *supra* n. 152, at 151 (noting that when developers are not able to pass the cost of impact fees onto consumers—which is generally the case with low-income housing—impact fees will restrict the supply of housing).

161. *Id.* at 150.

162. *Id.*

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pression that the housing market has simply left the poor behind. It is true that the current housing market has decoupled from the poor, but this trend is not irreversible. In fact, treating this trend as irreversible only makes the trend harder to reverse because the longer policymakers wait to address exclusionary zoning regulations, the more exclusionary zoning regulations will proliferate. Shifting the focus of affordable housing policy to exclusionary zoning regulations will cut off the affordable housing problem at its knees. Eliminating the restrictions on the supply of low-income housing can spark a virtuous cycle of increasing supply, falling housing costs, and improving quality. Affordable housing policy deserves a frank assessment and a fresh approach.

# Zoning as a Barrier to Multifamily Housing Development



**Gerrit Knaap, Stuart Meck, Terry Moore, and Robert Parker**



**American Planning Association**

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# Zoning as a Barrier to Multifamily Housing Development

GERRITT KNAAP, STUART MECK, FAICP, TERRY MOORE, FAICP, AND  
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## Foreword

We were pleased and honored to learn that this report, written originally as a final report for the U.S. Department of Housing and Urban Development, Lincoln Institute of Land Policy and the Fannie Mae Foundation, would be published as a Planning Advisory Service (PAS) report. Affordable housing ranks high on the list of planners' concerns, and zoning is probably the most common tool used by practicing planners. By publishing this research as a PAS Report, the American Planning Association has allowed us to talk to a broad audience with a potential interest.

While we think planners will find something of value, frequent readers of PAS Reports will recognize a difference in style between this report and most other publications by the Planning Advisory Service. Unlike most PAS Reports, this one offers little explicit guidance for improving planning practice. It offers instead an investigation of a broader policy question: Does zoning present a barrier to higher-density, multifamily housing development?

To address this question, our research:

- identified, using several criteria, six U.S. metropolitan areas as case-study areas;
- used Census and local GIS data to compute several indicators of zoning regulations and housing market performance for each of several jurisdictions in those six metropolitan areas;
- examined state statutes, regional and local plans and regulations in five jurisdictions in each metropolitan area to check our interpretation of the indicators and to gain additional evidence of regulatory barriers; and
- interviewed three to five land-use experts in each metropolitan area to get an independent assessment of our conclusions.

Among our conclusions:

- It is possible to use zoning and housing trend data to gain insights into the effects of zoning on high density, multifamily housing development.
- In some jurisdictions, zoning clearly appears to impede the development of high-density multifamily housing.
- No single indicator provides unambiguous evidence of regulatory barriers.

- Indicators of zoning and housing trends are often best expressed as ratios.
- High-density residential development is not always affordable, and low-density development is not always costly.
- Ample high-density and multifamily zoning is neither necessary nor sufficient to produce affordable housing.
- Regional collection and generalization of zoning data facilitates analysis of regulatory barriers.
- Oversight of local zoning by a regional agency appears to mitigate regulatory barriers.

We could, with only relatively uncontroversial normative assumptions, offer policy recommendations and offer lessons for planning practice. We don't. We do, however, offer recommendations for HUD, the primary sponsor of this research. We leave it to planners, though, to draw their own conclusions and lessons for local planning practice. Given the widely varying physical and institutional environments at the local level, and the highly contingent nature of many of our results, we suspect that the lessons planners draw may differ widely as they adapt them to their communities.

## Preface

This study furthers the efforts of the U.S. Department of Housing and Urban Development's Regulatory Barriers to Affordable Housing study series, which started with the 1991 report of the President's Commission on Regulatory Barriers to Affordable Housing (also known as the Kemp Commission), *"Not in my Backyard: Removing Barriers to Affordable Housing,"* and the 2005 update *"Why Not in Our Community: Removing Barriers to Affordable Housing."* As part of the Department's effort to document these regulatory barriers and identify effective approaches to overcoming them, it commissioned the study, published as this Planning Advisory Service Report from the American Planning Association's Research Department, by Professor Gerrit Knaap of the University of Maryland.

HUD initially focused on this issue—limiting multifamily housing through exclusionary zoning—because it is one of the most common and most pervasive barriers to affordable housing in America. The Kemp Commission identified exclusionary zoning practices as a key regulatory barrier in 1991. What had been lacking, however, was systematic, reliable empirical evidence to document these concerns.

This study has served a dual purpose. First, the study provides the documentary evidence that exclusionary zoning is in fact a significant barrier to higher-density, multifamily housing in major metropolitan areas throughout the United States. It has documented, in a multisite study, how communities, through restrictive zoning policies, limit the supply of multifamily housing, which is a major source of affordable housing in this country. Second, it piloted a GIS approach to analyze the impact of regulatory barriers on housing affordability. The use of this research tool may provide even more lasting benefit from the study because it can more clearly illuminate the impact of regulatory barriers on affordable housing and highlight what data are needed to produce more effective measure of how and where these barriers operate.

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## CHAPTER 1

# Background and Research Approach

Evidence from a variety of sources makes a compelling case that moderate- and low-income households in the United States have a problem in obtaining affordable housing. The causes of this problem are complex and controversial, but local government regulation is clearly among them.

This report does not attempt to address all the theoretical arguments and empirical details of the effects of regulations on the availability and price of different types of housing. It assumes a need for some regulation of housing and land markets (e.g., building codes, certain aspects of zoning and subdivision ordinances), and defines a regulatory barrier to certain housing types as a government requirement or process that significantly impedes the development or availability of that housing.

*Regulatory problems in housing markets take many forms, but zoning that excludes certain housing--usually based on type, size, or lot size--is perhaps the most pervasive.*

In 1991, the President's Advisory Commission on Regulatory Barriers to Affordable Housing (also known as the Kemp Commission, after U.S. Department of Housing and Urban Development Secretary Jack Kemp) found that various regulatory barriers can:

- directly raise development costs in such communities by as much as 20 to 35 percent;
- prevent the development of affordable housing in many suburban and other areas of high job growth, forcing lower-income households to live in locations far from job opportunities (a problem sometimes defined as "jobs-housing balance"); and
- restrict the full range of market rate and affordable housing options (e.g., higher-density housing, multifamily rental housing, accessory units, and manufactured homes).

Since 1991, several studies and journal articles have confirmed the nature of the problem and suggest it may be getting worse in particular metropolitan areas. A number of papers seem to bear out theoretical expectations. When local regulators effectively withdraw land from buildable supplies—whether under the rubric of "zoning," "growth management," or other regulation—the land factor and the finished product can become more costly. Caps on development, restrictive zoning limits on allowable densities, urban growth boundaries, and long permit-processing delays have all been associated with increased housing prices.

Regulatory problems in housing markets take many forms, but zoning that excludes certain housing--usually based on type, size, or lot size--is perhaps the most pervasive. Though anecdotal evidence of zoning as a regulatory barrier is common, systematic evidence of the practice is scarce for several reasons:

- Zoning is the purview of many dissimilar local governments, making the problem difficult to isolate.
- Until recently, comprehensive zoning data in GIS format were unavailable, making the problem difficult to measure.
- Zoning ordinances are complex, making the problem difficult to understand.
- Zoning is used for many different reasons, making the problem difficult to identify.

In part because zoning is the purview of local governments, systematic and empirically based studies analyzing the patterns of zoning at the metropolitan scale are few. Questions that need to be answered include:

- How much land is zoned for higher-density or multifamily housing?;
- How do zoning patterns vary across metropolitan areas?; and
- Is zoning a significant barrier to higher-density, multifamily housing in the United States.

The rapid development of Geographic Information Systems (GIS) data by local governments creates new opportunities for answering these questions. This study uses that data and attempts to:

- characterize visually and quantitatively the pattern of residential zoning in six metropolitan areas in the United States.

- characterize the regulatory environment in each study area, using information obtained from ordinances and statutes, key informants, and published materials.
- consider whether the evidence suggests zoning represents a barrier to higher-density, multifamily housing.

### OVERVIEW OF THE RESEARCH APPROACH

The research we present here examines whether zoning by local governments limits the development of multifamily and higher-density housing. The work is motivated by concerns that local governments use zoning to exclude affordable housing and potential occupants of that housing.

“Exclusionary” and “affordable” are value-laden terms, however, and difficult to define objectively. For this reason, we limit our evaluation to the effects of zoning on housing density and type. Because higher-density and multifamily housing are generally more affordable than low-density, single-family housing, zoning barriers to higher-density and multifamily housing are likely also barriers to housing affordability.

While there is a rough correlation between higher-density, multifamily housing and various definitions of “affordable housing,” the problems in assuming those terms are synonymous are several. Multifamily units come in several types (garden apartment, mid-rise, high-rise). They come in different sizes and have different types and quality of amenity. Their cost per square foot can be more expensive than the costs for single-family dwelling units. Nonetheless, we found no other, single measure of affordability better than unit type for which we could collect comparable data across metropolitan areas. If zoning is substantially restricting the development of multifamily dwelling units, it is a barrier to provision of affordable housing.

Our research does not consider other possible public policies that might represent a barrier to higher-density housing. It does not consider, for example, subdivision regulations or impact fees, the provision and cost of public services, building codes, and property taxes. It does not directly address consumer ability to pay. It focuses on zoning. Furthermore, it focuses on residential zoning, especially zoning for higher-density, multifamily use.

In addition, our research does not address any potential benefits of such barriers—such as protecting community character, lowering the cost of infrastructure, or minimizing traffic. Thus, we cannot draw conclusions, from this research alone, about whether such barriers increase or decrease social welfare. In other words, we are not evaluating the efficiency of zoning: whether its benefits exceed its costs. In this evaluation we look only at the barrier to the provision of affordable housing that zoning might create by limiting ability of the private market to build multifamily housing.

The research began with a review of the literature on exclusionary zoning, then evaluated data in six metropolitan study areas. For each study area, research included: 1) quantitative analysis of census and zoning data; 2) review and evaluation of local policies; and 3) interviews with local experts.

### ORGANIZATION OF THIS REPORT

The remainder of the research is presented in three chapters.

- Chapter 2 describes how we defined the research problem, the evaluation logic, data, methods, and limitations.
- Chapter 3 summarizes the results of our GIS and regulatory analysis, as well as the results of interviews from the six metropolitan study areas.
- Chapter 4 summarizes key findings of our research and discusses the implications of those findings.

*While there is a rough correlation between higher-density, multifamily housing and various definitions of “affordable housing,” the problems in assuming those terms are synonymous are several.*

This report also includes several appendices:

- Appendix A presents the results of our review of literature on exclusionary zoning.
- Appendix B describes the process we used to determine which study areas we would evaluate.
- Appendix C describes the methods and data sources for the GIS analysis.
- Appendix D describes the methods for completing the analysis of the state and regional regulatory context and the local comprehensive plans and zoning ordinances.
- Appendix E summarizes results of the review of public policy documents that guide development in the study areas.
- Appendix F presents the detailed results of GIS and quantitative analyses in the study areas.
- Appendix G presents the methodology and results of an additional analysis of interactions among zoning policies within the Portland, Oregon, study area.



## CHAPTER 2

**Research Methods**

**T**his chapter provides our framework for the analysis, describing the methods and data we used to address the research questions.

*While zoning policies restricting density (especially density in the form of multifamily housing) indicate that land-use regulations may be exclusionary, their presence does not always mean a municipality is using zoning as a tool to restrict the development of affordable housing.*

## RESEARCH QUESTIONS AND APPROACH

As housing prices in the United States have risen rapidly in recent years, concerns about regulatory barriers to affordable housing have risen to an all-time high. Although many reasons exist for the increase in housing prices, growing evidence suggests that local regulatory barriers to the creation of high-density, multifamily housing are a major contributing cause to price increases. Evidence further suggests that zoning is a common form of such regulatory barriers (see Appendix A). Zoning is a regulatory barrier when it is used to exclude from a community certain types, densities, or sizes of residential development. Such zoning can cause housing prices to rise, commuting distances to grow, and low-income residents to suffer disproportionately. Zoning ordinance provisions that serve as regulatory barriers include:

- restrictions on land zoned for multifamily use;
- restrictions on the number of bedrooms;
- restrictions on manufactured housing or mobile homes;
- minimum lot-size requirements;
- minimum lot-width requirements; and
- minimum building-size requirements.

The literature on regulatory barriers suggests that zoning often limits the construction of multifamily housing and lowers the density of single-family housing. By limiting the supply of smaller multifamily units and single-family units on small lots, both of which tend to be more affordable than their single family, large-lot counterparts, such zoning is often described as *exclusionary*.

While zoning policies restricting density (especially density in the form of multifamily housing) indicate that land-use regulations may be exclusionary, their presence does not always mean a municipality is using zoning as a tool to restrict the development of affordable housing. Most zoning policies are meant to achieve multiple objectives: for example, to preserve open space or agricultural land, to maintain community identity, or to meet future demand for the housing types that a community needs. Zoning codes with these objectives might reduce overall density and therefore might seem to indicate exclusionary motives, but they do not necessarily mean the community either lacks affordable housing or intends to restrict future development of affordable housing. In some communities, high-density, multifamily housing can be very expensive, while lower-density development can be relatively affordable.

Intentions are not measurable from standard data sets and difficult to discern from the language in a zoning ordinance. For this reason and as noted in our introduction, this PAS Report avoids using the term “exclusionary.” Housing affordability is also difficult to define, though it is reasonable to assume that, holding other things constant (e.g., locational amenities and construction materials) fewer materials and resources (including land) are needed to construct high-density, multifamily housing, making it a more affordable form of housing. Consequently, our study focuses on the restrictions affecting housing density and type that are embodied in local zoning ordinances and comprehensive plans, and examines specific restrictions in six study areas.

Because an examination of whether local governments use zoning to exclude affordable housing is fraught with methodological difficulties, the objective of our project is more limited: to document and examine, on

a pilot basis, how zoning patterns and processes vary within and across metropolitan areas and whether zoning impedes the development of high-density, multifamily housing in growing metropolitan areas. Specifically, the research explores the following hypotheses:

1. It is possible to use local GIS data, data visualization, and case study techniques to gain new insights about the effects of zoning in select metropolitan areas.
2. Based on the evidence obtained in select metropolitan areas, zoning represents a barrier to the construction of high-density, multifamily housing.

### EVALUATION METHODS

The research for this project began with a review of the literature on exclusionary housing, then focused on six metropolitan areas as study areas. For each study area, the primary sources of information were: 1) GIS and Census data; 2) state and local statutes, plans, and regulations; and 3) interviews with local experts. This section briefly describes the methods used for each of the research steps in this project.

#### Literature Review

The literature review provides the foundation for our research. In addition to providing background information regarding previous research, it helped narrow the focus of the research on regulations imposed on housing density and type. See Appendix A for the full review.

#### Study Area Evaluations

We conducted in-depth research in six metropolitan areas to test the three research questions articulated above in Chapter 1:

- How much land is zoned for high-density or multifamily housing?;
- How zoning patterns vary across metropolitan areas?; and
- Is zoning a significant barrier to high-density, multifamily housing in the United States.

We conducted both a GIS analysis (quantitative) and an analysis of the regulatory environment (qualitative) of each study area. The regulatory analysis covered the following sources:

- Zoning ordinances, subdivision regulations, and comprehensive plans
- Land use statutes for each pertinent state
- Reports, papers, and interviews with local experts

#### Selection of Study Areas

We employed a two-step study area selection process. First, we accumulated and reviewed Census data and previous research done on diverse sites using GIS data. Second, we interviewed representatives from 20 metropolitan areas to collect more information about the availability of GIS data and the likelihood of local cooperation. The quality and availability of metropolitan land data was the most significant factor in choosing our six case study sites from the 20 potential candidates. Ultimately, we chose:

1. Boston, Massachusetts;
2. Miami-Dade County, Florida;
3. Minneapolis-St Paul, Minnesota;

4. Portland, Oregon;
5. Sacramento, California; and
6. Washington, D.C.

### Indicator Analysis and Data Visualization

A primary objective of each case-study analysis was the characterization of residential zoning in major metropolitan areas. We used *indicator analysis* and *data visualization* to meet this objective.

By *indicator analysis*, we mean an analysis of how much land the government zoned for various types of residential uses and what conditions it imposed on each type of development. We focused primarily on land zoned for high-density, multifamily use, but data on land zoned for other types of uses (e.g., detached and attached single-family residential) was also important for data visualization and model estimation.

The following steps were taken to generate indicators of zoning constraints.

- Using GIS metadata and local zoning ordinances, we categorized zoning codes by the type of use they governed, specifically single-family, multifamily, mixed use, commercial, industrial, and public use/open space. This was necessary to allow for comparison across the study areas.
- Using GIS metadata and local zoning ordinances, we calculated the maximum allowed residential density. The highest allowed density was used; for example, if zoning allowed 1.0 to 5.0 dwelling units per acre, 5.0 was assumed to be the maximum residential density.
- We determined total residential acreage for each jurisdiction by adding up the acreage of all residentially zoned areas, except for agricultural residential areas. Residential area includes areas designated for mixed use.
- We totaled the number of housing units allowed by zoning provisions to show the maximum number of units a particular zone could accommodate.
- We categorized residential zones by their allowed maximum density. Most metro areas provided acreage in net acres (which do not include typically undevelopable land, such as streets and public right of ways), which allowed us to calculate the net densities. The Boston study area was the exception. The categories included: 1) very low density (equal to or less than one unit per acre); 2) low density (more than one but less than or equal to eight units per acre); 3) high density (more than eight units per acre); (4) mixed use; and (5) agricultural use. This process allowed a standard comparison across jurisdictions. We computed density without regard to designated use. In other words, most multifamily designations allowed densities that fell into the high-density category; some single-family uses, however, also fell into the high-density category.

We used the results of the analysis to create a set of indicators comparable across the study areas. The indicators incorporate the GIS zoning data and United States Census data from 1990 and 2000. Many of the most informative indicators are normalized by using ratios (e.g., the share of land zoned for high-density use; the ratio of new housing units to new households; and the number of housing units divided by the total residential acres).

In addition to this descriptive analysis, we used the GIS data to do *data visualization*. Data visualization represents data and the relationship among

variables. Such representation can often reveal relationships or provide insights that tabular and graphic representations cannot. Urban development and land-use regulatory data are particularly well suited for this kind of representation. To facilitate visualization, we used the GIS data to create two- and three-dimensional maps to represent densities, allowed use mix, and various other measures in each jurisdiction in the six study areas.

### Qualitative Analysis

To provide further insight into the results of the indicator analysis and data visualization processes, we undertook a regulatory analysis and conducted interviews with local representatives.

We prepared an analysis of the regulatory environment in each study area to better understand the issues behind the availability of land zoned for multifamily housing. The analysis describes:

- the overall state enabling structure affecting the local government;
- the adopted policies toward housing, particularly affordable housing as expressed in the comprehensive plan or various subplans;
- the types of zoning regulations that authorize multifamily housing;
- any special procedures that apply to multifamily housing (e.g., conditional uses); and
- other relevant policies and regulations.

To provide additional context for the quantitative analysis, we interviewed local representatives familiar with the study area's development codes and land-use regulations. These representatives included planners and local government officials, residential developers, home builders' association representatives, and nonprofit providers of affordable housing.

### Statistical Analysis and Simulation

We first conducted some simple statistical tests using the limited data available from the study jurisdictions. We examined correlations between measures of zoning restrictiveness and housing production, as well as prices and rents, and then used some simple equations to explore the impacts of zoning on housing production, prices, and rents.

We then used Metroscope, a regional-level simulation model that predicts where employment and housing are likely to locate, to supplement its analysis of the Portland, Oregon, study area. Appendix G describes the Metroscope model and presents results of two scenarios—one that predicts housing location choices with current zoning in place, and one that predicts housing location choices if certain jurisdictions increase zoned densities in the future.

### LIMITATIONS

The limitations of the study are related to scope, data, and research design.

#### Limitations Related to the Scope of the Study

This research does not consider all the possible public policies that might be exclusionary. It evaluates only zoning policies affecting residential uses. Furthermore, it addresses only a subset of factors *affecting* housing affordability (i.e., zoning policies) and does not *directly* address housing affordability (the price of housing, or consumer ability to pay). Specifically, this study excludes from consideration, among other things:

- Development impact fees, land dedications, fees in lieu of improvements
- Development permit allocation systems and permit caps (limitations on the number of residential building permits issued in a year)
- Adequate public facilities ordinances
- Development moratoria
- Building permits and building codes
- The procedures by which development permits are issued for multifamily housing and the duration of those procedures, except to identify those situations where multifamily development can be built only through a conditional use process or by special permit (i.e., not as of right anywhere in the local government's jurisdiction)
- Development standards applicable to multifamily housing (e.g., parking, paving, landscaping, setbacks)
- Subdivision procedures
- Financing
- Discriminatory motives by local governments (i.e., an animus toward certain races or socioeconomic groups, or the disabled)
- The process of zoning change

#### **LIMITATIONS RELATED TO DATA**

One set of limitations relates to the consistency and accuracy of data, which we gathered from each of six study areas. In five of the study areas (Portland, Boston, Sacramento, Minneapolis-St. Paul, and Miami), we gathered the data from a regional governmental body that compiles zoning and GIS data for its own purposes. In the other study area (Washington, D.C.), we gathered the data from each of the counties or cities within the study area because no region-level data were available. This introduced several limitations:

##### **Data Currency**

Data were more recent in some regions or cities than in others. Some jurisdictional or regional data more accurately represented land use patterns at the time of the study than others. Zoning code data, for example, was often tabulated together with Census data from 2000. Because the data sources were created at different times, comparing data across jurisdictions is difficult.

##### **Level of Detail**

While some jurisdictions or regions had detailed, parcel-level data available, others had data available only for much larger areas (blocks or zones). Additionally, some spatial data excluded roads and other typically undevelopable areas from calculations of area, while others did not. This difference between net and gross area makes comparing densities difficult.

##### **Density Generalization**

When we gathered local zoning code data rather than data from a regional government, we had to categorize the zoning codes of the local jurisdictions to a regional standard to complete the analysis. This generalization may not reflect the local densities as accurately as the original zoning.

### **Zoning or Comprehensive Plan Designation**

In Portland, Miami, Boston, and Washington, current GIS representations of local zoning codes were available. In Sacramento and Minneapolis-St. Paul, however, only future-land-use (comprehensive plan) designations were available. Future-use designations present limitations: (1) They are not legally binding and therefore might not be implemented as planned; and (2) They do not necessarily represent the land uses currently in existence because existing zoning designations may only be roughly consistent with future-land-use designations.

In general, these limitations complicate comparisons from one jurisdiction or region to another, but still allowed us to draw conclusions about land use patterns in the six study areas.

Data limitations specific to a study area's data are discussed in the Chapter 3 section, Study Area Evaluations.

### **LIMITATIONS OF RESEARCH DESIGN**

An underlying assumption of this research is that high-density and multi-family development are relatively more affordable. By extension, policies that limit dense development contribute to the problem of affordability and are potentially evidence of zoning barriers.

While these assumptions are defensible, restrictions on housing density and type are imperfect measures of barriers for a variety of reasons:

- In some communities, high-density housing is more expensive to own or rent than single-family development. In this study, these communities might appear to have an abundance of affordable housing and still have regulatory barriers in place.
- Regulatory barriers can be imposed through a variety of methods not captured in an analysis of zoning code and density. These barriers include: requirements for implementing zoning code provisions (e.g., requiring additional public process or other burdens for multifamily units); building codes with stricter requirements that add expense for multifamily developments; and other requirements. We discuss some of these issues in more detail in the section on limitations to the study scope.
- Other factors that have little to do with zoning can limit the availability of dense housing in a community. For instance, existing land-use patterns can limit the availability of parcels of sufficient size for multifamily developments, and high land costs can make the development of affordable housing unattractive to developers. In this study, communities with such limitations may appear to have zoning barriers in place because of a relative lack of multifamily units, when their public policies are not the cause of that disparity.

## CHAPTER 3

**Findings**

**T**his chapter presents the results of the quantitative and qualitative evaluations of six study areas, including statistical analyses and a simulation model analysis. The study areas, listed alphabetically, are:

- Boston, Massachusetts
- Miami-Dade County, Florida
- Minneapolis-St. Paul, Minnesota
- Portland, Oregon
- Sacramento, California
- Washington D.C.



Our study area evaluations are the core of this PAS Report. The purpose of the evaluations is to conduct a quantitative and qualitative analysis of zoning practices, housing production, and housing prices and rents. This chapter begins with an overview of the study evaluation methods and limitations, followed by in-depth analyses of each of the study areas and a summary of the findings from a statistical analysis of key indicators for housing price and density. These analyses include the presentation of:

1. selected metropolitan characteristics and policies,
2. results of GIS analysis of housing type and density,
3. results of interviews with key stakeholders, and
4. a qualitative analysis of the regulations that affect housing type and density in select jurisdictions in the six study areas.

Complete documentation of methods for the qualitative research can be found in Appendix D; documentation of quantitative methods can be found in Appendix E.

#### **OVERVIEW OF STUDY AREA EVALUATION METHODOLOGY**

To obtain new insights into potential barriers to multifamily and high-density development, we completed the following analyses.

##### **Analysis of Housing Stocks, Production, Prices, and Rents**

We used data from the U.S. Census Bureau to analyze levels and trends of growth in populations and housing units. Specifically, we collected 1990 and 2000 Census data on populations, households, the number of single-family and multifamily housing units, median house prices, and median contract rents for each jurisdiction in each of the six study areas.

##### **Analysis of Zoning Regulations**

From GIS metadata and local zoning ordinances, we conducted a quantitative analysis of current zoning relations. Specifically, for each jurisdiction with land-use authority in each study area, we computed a variety of indicators. These indicators include: acres of land zoned for single-family, multifamily, mixed-use, commercial, industrial, and public use-open space; acres of land zoned for low-density and high-density residential use; and the total density of land zoned for residential use.

##### **Key Stakeholder Interviews**

We followed this quantitative analysis with interviews of people familiar with the housing market and land-use regulations in each of the regions. Interviewees included housing developers, planning professionals, academics with expertise in housing and/or planning issues, affordable housing advocates, and regional government officials. Interviewees were asked to discuss the housing market and zoning practices in those jurisdictions where the quantitative analysis indicated that barriers to multifamily housing may exist.

##### **Regulatory Analysis**

We gathered zoning and development codes from several cities and counties within each region that the quantitative analysis and interviews had suggested might offer additional insights on barriers to multifamily housing. The regulatory analysis considers the allowed uses, densities, and required setbacks in both single-family and multifamily residential zones, development fees and processes, and, if available, buildable land inventories to seek evidence of zoning barriers.

## STUDY AREA SELECTION

We used a two-step study-area selection process. In step one, we accumulated and reviewed data from two sources:

- Census data about population, growth rates, and political divisions for the 50 largest metropolitan areas in the US.
- Previous research on GIS data for metropolitan areas, particularly from *Assessment of Regional GIS Capacity for Transportation and Land Use Planning* by the National Center for Smart Growth and Department of Urban and Regional Planning at the University of Illinois (available at [www.urban.uiuc.edu/metrogis/](http://www.urban.uiuc.edu/metrogis/)).

Based on this information, we identified 20 metropolitan areas as candidates for further consideration. This selection was based on the following criteria:

- We eliminated a few metropolitan areas because they were considered “unwieldy,” a term that was mutually understood to mean, in general, “too complicated to deal with.” The best example: New York–Newark–Edison, with 18 million people and approximately 25 counties.
- We chose metropolitan areas with the thought of creating a diverse sample based on size, geography, race, and governance structure. It was preferable that metropolitan areas not be all of similar size and from the same part of the country.

In step two, we interviewed representatives from each of the 20 metropolitan areas to collect more information about the availability of GIS data and the likelihood of local cooperation. Based largely on the quality and availability of metropolitan data the 20 metropolitan areas were reduced to six: Boston, Massachusetts; Miami-Dade County, Florida; Minneapolis-St. Paul, Minnesota; Portland, Oregon; Sacramento, California; and Washington D.C.

Once we settled on the six metropolitan areas, we collected GIS data from websites and local governments. After collecting data, we found great variability in the quality and character of data across the six metropolitan regions—and in most cases within the regions. Thus, for each of the study areas, we had to develop standard definitions and classifications to facilitate intra- and inter-regional comparisons. Some of the larger data-related issues include the following:

- For Washington D.C., Boston, Miami-Dade, and Portland, we were able to obtain zoning layers; for Sacramento and Minneapolis-St. Paul, we were able to obtain only future-land-use data.
- For all study area regions, except Miami and Boston, we were able to obtain parcel polygon data; parcel polygons were not available in Miami and Boston.
- For Portland, we were able to obtain a vacant land layer; for all the other jurisdictions, a reliable vacant land layer was not available.
- For Boston, Minneapolis-St. Paul, Portland, and Sacramento, we classified local zoning (or future-land-use) data into consistent categories for the entire metropolitan area; for Washington D.C., and Miami, we had to create our own general layer.
- For Washington D.C., Miami-Dade, Sacramento, and Portland, the number of jurisdictions with land-use authority were relatively small; therefore, we included every jurisdiction in the area with land-use authority in the analysis. In Boston and Minneapolis-St. Paul, however, the number

*One indicator cannot provide unambiguous evidence of regulatory barriers to multifamily development, but together with other indicators, it can serve to identify where barriers to high-density development may exist.*

of jurisdictions with land-use authority was large, and, therefore, we included only jurisdictions with populations larger than 25,000 in the analysis. This had the unfortunate but unavoidable effect of creating spatial discontinuities within these study areas.

- In every jurisdiction, the zoning data captured the most recent—often the current—zoning regulations. The census data on housing stocks, prices, and incomes come from the 1990 and 2000 decennial Census. Thus, any analysis of the effect of zoning regulations on housing prices, rents, and rates of production requires the strong assumption that existing zoning regulations offer a reasonable depiction of the regulatory environment over the previous decade and a half.
- To focus on questions regarding barriers to high-density, multifamily housing, the analysis largely excluded rural areas. For this reason, the analysis focused on municipalities in the Portland, Miami-Dade, Sacramento, Boston, and Minneapolis-St. Paul study areas. In the Washington, D.C., study area, however, most suburban development takes place in unincorporated counties; thus, in this study area, the analysis included the urban (as defined by the Census) parts of unincorporated counties, as well as incorporated areas.
- In part for the reasons described above, the size of jurisdictions in the respective study areas varied extensively. In large jurisdictions with areas designated for both low- and high-density uses, the jurisdiction appeared to have a moderate overall density. In small jurisdictions with largely low- or high-density uses, however, overall zoned densities varied more extremely—even if the underlying development pattern was the same in both circumstances.
- In small jurisdictions, measurement errors can be more pronounced. A sliver in a zoning polygon, for example, can lead to large measurement errors of zoned density in smaller jurisdictions. Large measurement errors in census data on populations, households, and housing units are also common for smaller jurisdictions.

Because of these and other limitations (described in Chapter 2 and Appendix C), all measures reported here are considered “indicators.” In other words, while the measures we report provide a basis for comparison, they suffer from a variety of measurement errors. Further, one indicator cannot provide unambiguous evidence of regulatory barriers to multifamily development, but together with other indicators, it can serve to identify where barriers to high-density development may exist. Furthermore, the most reliable indicators are constructed as ratios (e.g., percent of land zoned for high-density development, allowed density per acre, price per unit, or the change in income divided by change in price). Such ratios not only serve to normalize the measure by some common denominator, but also help to offset measurement errors in both the numerator and denominator. Finally, while the census data we collected for each of the six study areas are relatively uniform, the precision and definitions of GIS data vary extensively between study areas. For this reason, comparisons within study areas are more reliable than comparisons across study areas.

#### INDICATORS USED IN THE STUDY AREA EVALUATIONS

Table 3-1 shows some of the indicators computed for each of the study areas. You will find these indicators described in detail for each study area and all of the jurisdictions within each study area in Appendix F. Appendix F also contains visual representations of the data (two- and three-dimensional maps).

TABLE 3-1. INDICATORS OF ZONING, DENSITY, AND HOUSING MIX, 1900 AND 2000

	Boston	Miami	Minneapolis	Portland	Sacramento	Washington
<b>Housing Price</b>						
Average Median Value of Owner-Occ. Units (2000)	249,824	241,903	150,267	184,625	150,677	207,261
Change in Average Median Value of Owner-Occ. Units (1990-2000)	56,154	92,107	52,841	102,375	27,809	25,698
Average Median Rent for Units (2000)	774	705	707	648	581	868
Change in Average Median Rent for Units (1990-2000)	165	181	193	243	143	179
Average Median Household Income (2000)	58,194	46,177	60,420	52,585	45,284	68,402
Change in Average Median Household Income (1990-2000)	16,276	8,229	18,109	17,834	14,773	18,252
Average Median Value of Units / Average Median Household Income (2000)	4.29	5.24	2.49	3.51	3.33	3.03
Change in Average Median Value of Units / Change in Average Median Household Income (1990-2000)	3.45	11.19	2.92	5.74	1.88	1.41
Median Contract Rent for Specified Units / Monthly Median Household Income (2000)	0.17	0.18	0.14	0.14	0.17	0.16
Change in Median Contract Rent for Specified Units / Change in Monthly Median Household Income (1990-2000)	0.16	0.19	0.13	0.15	0.15	0.15
<b>Housing Production</b>						
Total Housing Units (2000)	914,991	471,557	728,567	440,847	403,290	1,484,606
Total Households (2000)	882,088	411,324	709,689	415,298	384,044	1,431,243
Tot Multi-Family Housing Units (2000)	567,406	270,175	247,567	157,446	114,699	464,479
Change in Housing Units (1990-2000)	35,845	44,383	72,767	103,551	65,539	326,785
Change in Households (1990-2000)	57,223	36,096	89,799	95,659	64,103	319,069
Change in Multi-Family Housing Units (1990-2000)	13,660	20,896	4,132	43,875	13,018	78,306
Change in Housing Units / Change in Total Households	0.63	1.23	0.81	1.08	1.02	1.02
Change in Multi-Family Housing Units / Change in Total Housing Units	0.38	0.47	0.06	0.42	0.20	0.24
<b>Zoning - Acres</b>						
Total Residential Acres / Total Households	0.27	0.15	0.30	0.23	0.27	0.49
Total Residential Acres / Total Acres	0.73	0.57	0.57	0.63	0.49	0.41
High Density Acres / Total Residential Acres	0.39	0.60	0.07	0.23	0.15	0.06
Low Density Acres / Total Residential Acres	0.54	0.33	0.79	0.69	0.57	0.75
Very Low Density Acres / Total Residential Acres	0.07	0.07	0.14	0.02	0.27	0.12
<b>Zoning - Units</b>						
Total Zoned Housing Units / Total Existing Housing Units	1.50	1.90	1.54	2.16	1.97	3.01
High Density Zoned Housing Units / Total Zoned Housing Units	0.78	0.84	0.24	0.48	0.37	0.25
Low Density Zoned Housing Units / Total Zoned Housing Units	0.21	0.12	0.73	0.38	0.61	0.55
Mixed Use Zoned Housing Units / Total Zoned Housing Units	*	0.03	0.01	0.14	*	0.19
Very Low Density Zoned Housing Units / Total Zoned Housing Units	0.01	0.004	0.01	0.002	0.02	0.02
<b>Zoning - Density</b>						
Total Zoned Housing Units / Total Residential Acres	5.83	14.87	5.23	10.07	7.51	4.77
High Density Units / High Density Acres	11.79	20.61	17.78	21.01	18.20	18.46
Low Density Units / Low Density Acres	2.24	5.82	4.88	5.55	8.00	3.52
Mixed Use Units / Mixed Use Acres	*	45.45	17.02	22.06	*	13.71
Very Low Density Units / Very Low Density Acres	0.54	0.97	0.35	1.00	0.57	0.87

Source: National Center for Smart Growth analysis of U.S. Census data from 1990 and 2000, and study area GIS databases. Please see Appendix F for a complete list of data sources used, and for a full description of these indicators.

Note: The data in this table include only the jurisdictions included in the study area evaluations; they do not represent data for entire metropolitan areas.

Table 3-1 presents the five sets of indicators for each of the study areas. We computed these indicators using data from the U.S. Census and from GIS data collected at the local level for each jurisdiction in each study area; the aggregate of jurisdictions in each study area is presented in Table 3-1. The table does not present data for entire metropolitan areas.

The first set of indicators measure levels and changes in housing prices, housing rents, and household incomes. All measures are unadjusted for inflation but are readily comparable across study areas. Housing affordability is captured by the ratio of housing prices and rents to incomes. Detailed

*Our intent is to analyze the problem in a new and direct way, illustrating how various indicators can be used to identify and monitor potential barriers, and create the foundation for a regional, state, and federal policy response.*

analysis of housing affordability is beyond the scope of this report; but for this study, evidence of barriers to multifamily, high-density housing is of greatest interest in jurisdictions where housing is least affordable.

The second set of indicators provides information on existing housing stocks in 2000, housing production rates from 1990 to 2000, and relative shares of single- and multifamily units. Barriers to high-density, multifamily housing can exist in any community; but for this study, barriers to multifamily development are of greatest interest in growing communities. Furthermore, because the size and definitions of each of the study areas vary, the most useful indicators are ratios that reveal, for example, the growth of the housing stock relative to growth in population; the multifamily share of existing housing units; and growth in multifamily housing units relative to growth in total housing units. Of particular interest, for example, are jurisdictions where the rate of housing development is high, but the existing proportion and growth in the proportion of multifamily housing is low.

The third set of indicators characterizes existing zoning regulations measured in acres. Again, because the size of jurisdictions varies extensively, the most revealing indicators are expressed as ratios. Total zoned residential acres divided by total population, for example, captures the total acres zoned for residential use for each resident. Zoned residential acres divided by total acres represents the share of land zoned for residential use. Acres zoned for high-density use divided by total acres zoned for residential use captures the share of residential land zoned for high-density use. These indicators offer quantitative measures of the relative extent to which barriers to multifamily, high-density development could be the result of low proportions of *land* zoned for such use.

The fourth set of indicators characterizes existing zoning regulations measured in housing units. Zoned housing units are measured as acres zoned for residential use times the maximum allowed units per acre. Once again, ratios are most telling. Capacity for new housing development, for example, is captured by the ratio of housing units allowed by zoning relative to existing housing units. Regulatory capacity for high-density housing is captured by the ratio of housing units zoned for high-density development relative to total housing units allowed by zoning. These indicators offer quantitative measures of the extent to which barriers to multifamily, high-density housing could be the result of low proportions of *units* zoned for such use.

The fifth set of indicators characterizes existing zoning regulation measured in density for land in all density categories and for land in specific density categories. These indicators of density offer quantitative measures of the extent to which high-density, multifamily development could be the result of constraints on development *density*.

The section that follows describes the indicators for each jurisdiction in each study area. Our intent in presenting these indicators is not to identify specific jurisdictions where zoning represents a potential barrier to high-density, multifamily housing. Instead, our intent is to analyze the problem in a new and direct way, illustrating how various indicators can be used to identify and monitor potential barriers, and create the foundation for a regional, state, and federal policy response.

#### OVERVIEW OF STUDY AREA EVALUATIONS

This chapter does not present detailed information about all of the indicators in Table 3-1, but focuses on a few key indicators. Detailed information about all the indicators is presented in Appendix F. This section identifies jurisdictions that, relative to the rest of their study area, have:

- high median home prices;
- a low percentage of multifamily units relative to the total of units in the jurisdiction;



- low average zoned density (measured as total zoned units per zoned residential acre); and
- few acres of land zoned for high-density use.

This section also summarizes the qualitative research conducted as part of this research: regulatory analyses and key stakeholder interviews. You will find the complete results of the qualitative research in Appendix E.

These indicators are used to address the following questions:

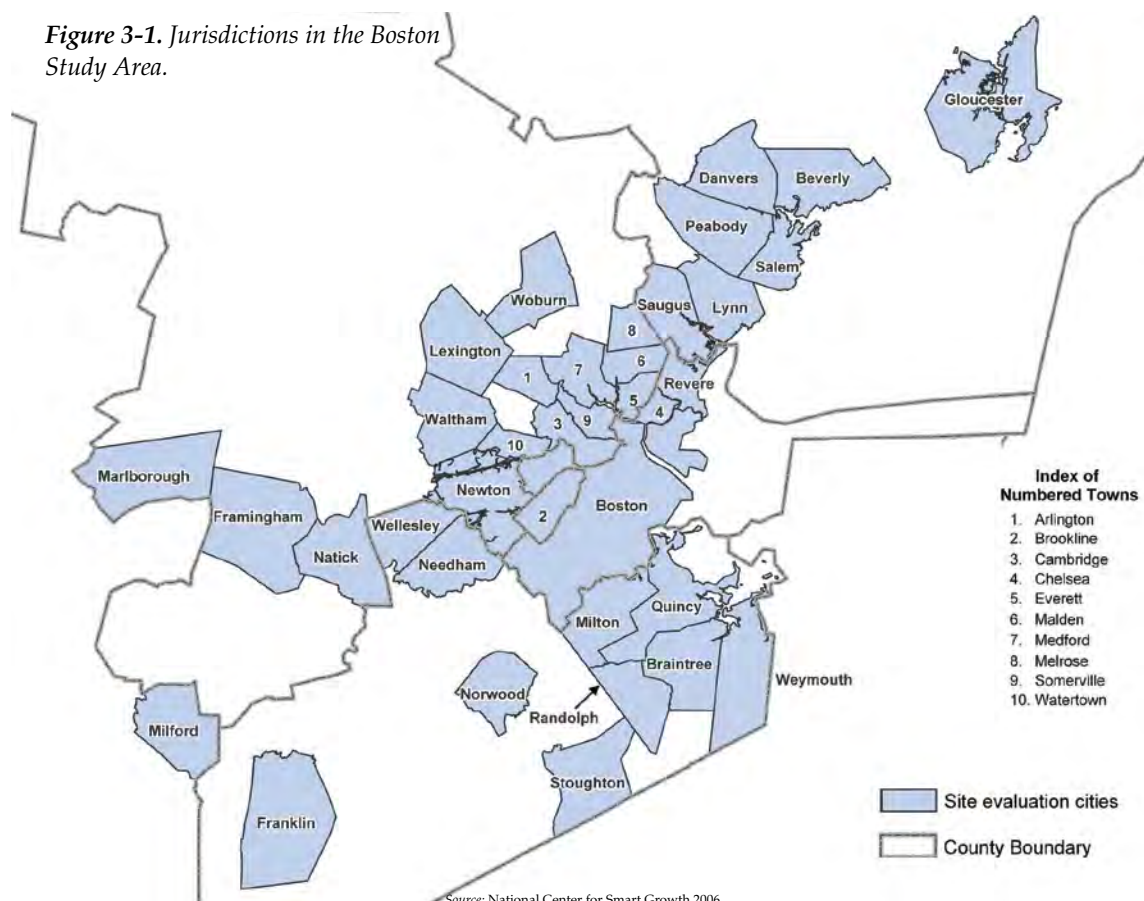
- In which jurisdictions is housing least affordable?
- In which jurisdictions is multifamily development least common?
- In which jurisdictions is there little land zoned for high-density, multifamily use?
- In which jurisdictions are the density constraints imposed by zoning most restrictive?

### BOSTON, MASSACHUSETTS

The Boston study area is located in the Northeast region at the northern end of the urban eastern seaboard and includes parts of five counties: Essex, Middlesex, Norfolk, Suffolk, and Worcester. Overall, the Boston study area is densely developed with high housing prices, high rents, and a relatively high share of multifamily units. Growth in housing prices and rents was in the middle range of the six study areas, but the share of new multifamily housing units fell significantly during the period 1990 to 2000 when compared with historic levels.

Figure 3-1 shows the jurisdictions included in the Boston study area. Because of the large number of jurisdictions in the Boston metropolitan area, jurisdictions

*Figure 3-1. Jurisdictions in the Boston Study Area.*



### KEY INDICATORS: BOSTON

*Jurisdictions with the highest median home price:*

- Brookline (\$599,500)
- Wellesley (\$548,100)
- Newton (\$438,400)
- Lexington (\$417,400)

*Jurisdictions with the lowest percentage of multifamily:*

- Wellesley (14 percent)
- Lexington (16 percent)
- Milton (19 percent)
- Franklin (24 percent)

*Jurisdictions with the lowest average zoned density (zoned units/acre):*

- Franklin (1.25)
- Stoughton (1.35)
- Danvers (2.24)
- Milford (2.52)

*Jurisdictions with the fewest residential acres zones for high-density residential use:*

- Braintree, Salem, and Stoughton (0 percent)
- Lexington and Danvers (1 percent)
- Saugus (2 percent)

included in the analysis are limited to those with populations greater than 25,000. Using this criterion keeps the analysis focused on jurisdictions of significant size but eliminates small and perhaps rapidly growing jurisdictions where barriers to multifamily housing could well exist.

The region grew about 4 percent in population between 1990 and 2000, though growth rates in some of the cities in the region were substantially higher than in the region as a whole. Jurisdictions that added more than 5,000 residents include the central city of Boston, the inner-city suburbs of Cambridge and Chelsea, and the more suburban Franklin and Lynn.

### Regulatory Context

Cities and towns in Massachusetts have primary authority for planning and regulatory control of land use and development; there is no single state planning agency. Cities and towns with populations greater than 10,000 must establish planning boards, which are empowered to undertake studies of and to prepare plans for the resources, possibilities, and needs of the municipality. These boards are required to prepare a master plan that may serve as a basis for decision making regarding the long-term physical development of the municipality.

Most cities or towns are members of regional planning commissions, which develop comprehensive plans for their regions and assist the local planning boards of the cities and towns in their areas. The regional planning commission for the Boston Metropolitan area is the Metropolitan Area Planning Council (MAPC). MAPC is responsible for the preparation of the regional plan for the 101 cities and towns under its jurisdiction. Its plan is the MetroPlan, revised in 2005. Housing is included as one of the plan elements; the stated housing goal is to provide a variety of housing opportunities.

A new law, the Smart Growth and Housing Production Act, creates incentives to produce affordable housing. To participate in the voluntary plan, municipalities agree to create special "smart-growth" zoning districts close to transportation nodes, town centers, or vacant retail and commercial sites where housing can be built on less costly lots. The law requires that at least 20 percent of residential units in projects with more than 12 units are affordable and provides mechanisms to ensure that at least 20 percent of the total residential units built in the districts are affordable. Participating jurisdictions are eligible for some incentives to build affordable housing.

### Key Indicators

As for every study area, the indicators for the Boston study area were derived from data from the U.S. Census Bureau and from local GIS sources. Because the jurisdictions in the Boston area were limited to those with populations greater than 25,000, the Census data provide reasonably accurate information for every jurisdiction (i.e., problems of sample size are relatively minor). The GIS zoning data obtained from MassGIS are of reasonably high quality, but the generalization of local ordinances is coarse and masks some important distinctions in density. The data also do not include a mixed-use category.

**Housing prices and rents.** Housing prices and rents in the Boston study area rose significantly in the 1990s, and, by 2000, were relatively high. Housing values increased in every jurisdiction between 1990 and 2000. Arlington, Milton, Cambridge, Lexington, Newton, Wellesley, and Brookline all had 2000 median home prices more than 30 percent above the regional median home price.

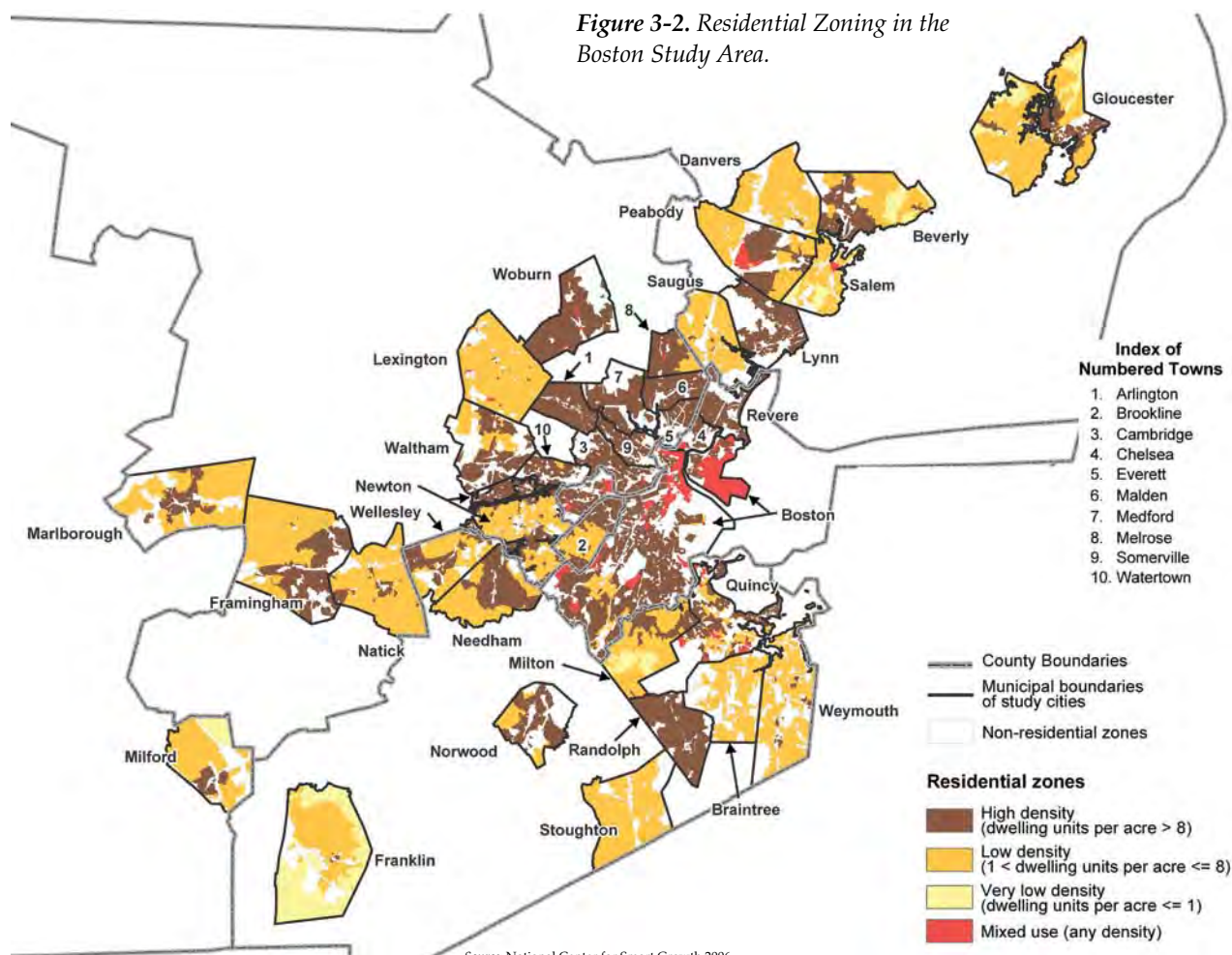
Over the 1990-2000 period, home values increased faster than incomes in almost all Boston-area jurisdictions. In Brookline, Cambridge, Lexington, Needham, Newton, Watertown, and Wellesley, home values rose more than four times faster than incomes.

In 2000, average rents were highest in Newton, Needham, Lexington, and Brookline. With the exception of Newton, rents rose most rapidly from 1990 to 2000 in the same jurisdictions.

**Housing production and mix.** Compared with the other study areas, Boston's housing stock grew slowly over the 1990s, increasing just 4.5 percent. The housing stock grew 40 percent slower than did population (measured in households). Moreover, much of what new development occurred was not high-density development. While, in 2000, about 62 percent of all housing units were multifamily, between 1990 and 2000 only about 32 percent of the new housing units built were multifamily.

Several inner suburbs lost population, but nearly all jurisdictions gained housing units. Most jurisdictions gained multifamily units between 1990 and 2000, but in most jurisdictions the share of multifamily units declined from 1990 to 2000; 11 jurisdictions lost multifamily housing units over this period. Cities with low or negative multifamily proportions of multifamily housing units include Beverly, Franklin, Lexington, Milton, Gloucester, Malden, Medford, Milford, Natick, Norwood, Peabody, Randolph, Saugus, Wellesley, and Weymouth.

**Zoned density and mix.** Much of the residential land in the Boston metropolitan area is zoned for single-family use but at moderately high densities. Sizable proportions of land in many jurisdictions fall into the MassGIS category R5, which designates single-family use up to 8.7 units per acre. Because the generalization rules used in this study places land zoned for greater than





eight units per acre in the high-density category, much of the single-family-zoned land in the Boston area is classified as zoned for high-density.

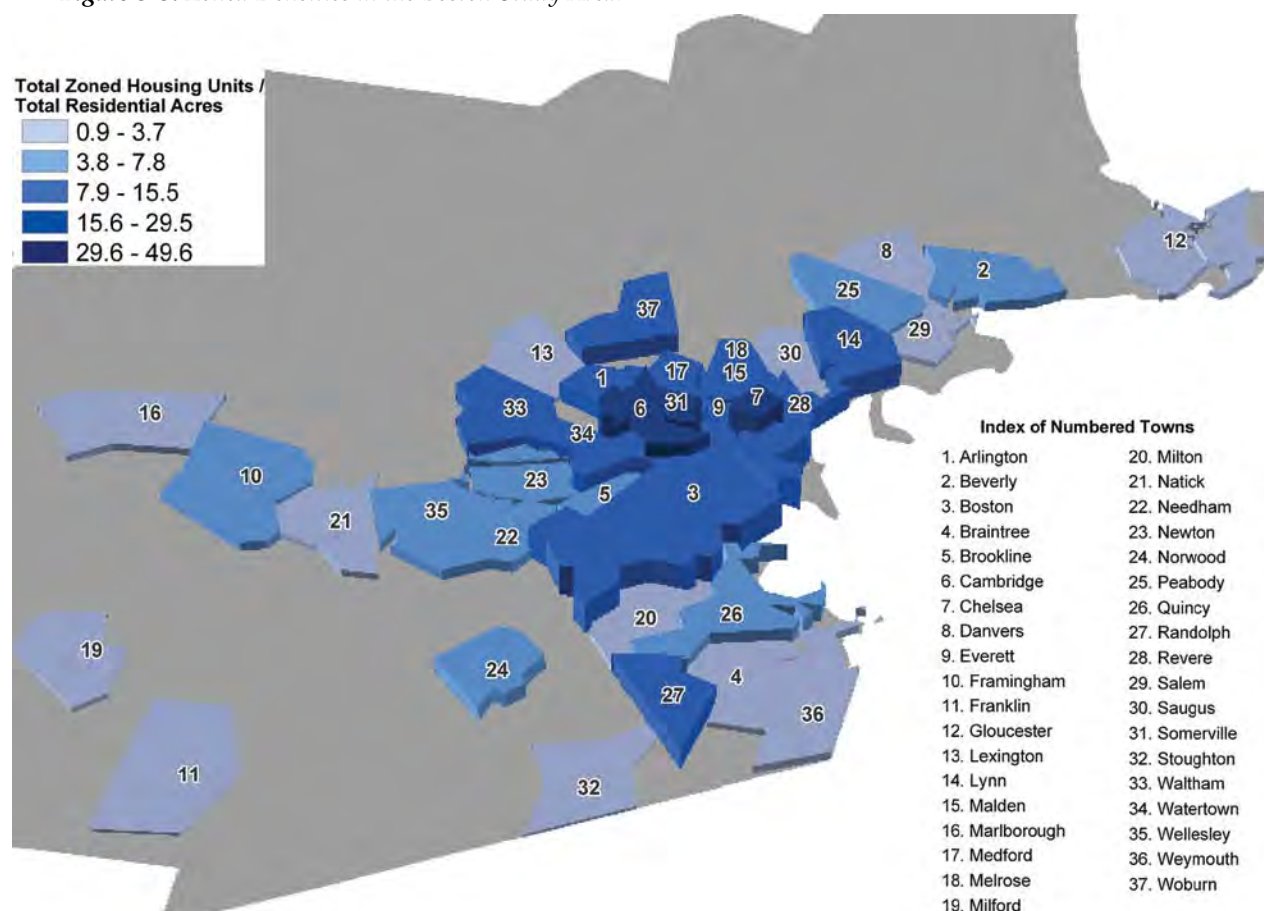
Even with this generous definition, however, several jurisdictions have little or no land zoned for high-density *uses*. Jurisdictions with less than 10 percent of residential land zoned for high-density include Braintree, Danvers, Franklin, Lexington, Natick, Salem, Saugus, Stoughton, and Weymouth. Jurisdictions with less than 10 percent of all units zoned for high-density include Braintree, Danvers, Franklin, Lexington, Salem, and Stoughton.

For an old, eastern city, the overall zoned density in the study area is relatively low, at just under six units per acre. Jurisdictions zoned for less than three units per acre include Braintree, Danvers, Franklin, Gloucester, Lexington, Milford, Milton, Natick, Salem, Saugus, and Stoughton.

### Data Visualization

Additional insights on intrametropolitan patterns of zoning and housing prices are available by examining Figures 3-2, 3-3, and 3-4. As shown in Figure 3-2, the overall pattern of zoning in the Boston study area largely follows the pattern predicted by urban economic theory. High-density, mixed-use zones (shaded in red) are located in the center of the metropolitan area; these are surrounded by high-density residential uses (shaded in brown), and these are surrounded by low-density residential zones (shaded in orange). Because the high-density zones in Figure 3-2, however, include all residential zones greater than eight units per acres, Figure 3-2 masks some of the differences in densities between jurisdictions and perhaps overstates allowable densities.

Figure 3-3. Zoned Densities in the Boston Study Area.



Source: National Center for Smart Growth 2006.

Figure 3-3 offers additional information on zoning patterns in the Boston study area. In Figure 3-3, increasing densities are illustrated in increasing heights and darker shades of blue. As shown, Cambridge, Chelsea, and Somerville are jurisdictions with high overall residential densities. All the other jurisdictions have residential densities less than 15.5 units per acre (most of these densities fall below 10 units per acre).

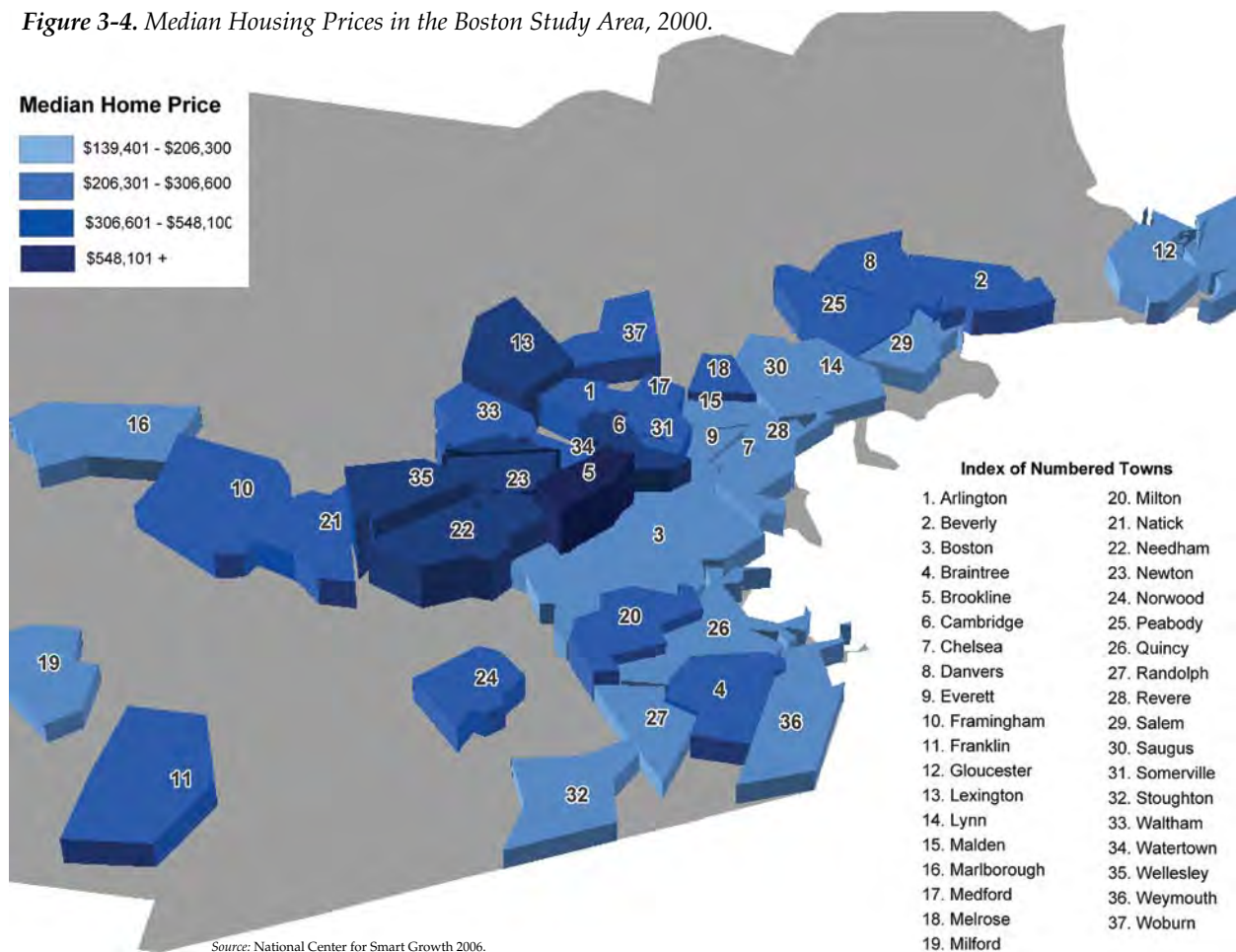
Figure 3-4 illustrates the pattern of housing prices in the study area. As shown, Brookline has the highest median housing prices (greater than \$599,000); Wellesley and Lexington have housing prices between \$306,000 and \$548,000; and Needham, Newton, and Cambridge have housing prices between \$206,000 and \$306,000. Contrasting Figure 3-4 with Figure 3-3 reveals that many of the highest-priced communities have among the lowest zoned densities. This combination of high prices and low zoned densities does not provide prima facie evidence that zoning represents a barrier to multifamily, high-density development in these communities. But it does suggest these communities might be a good place to look for such barriers.

### Key Stakeholder Interviews

To gain a local perspective on the data analysis, we interviewed four people familiar with the public policy and development practices surrounding multifamily housing in the Boston metropolitan area.

Interviewees include a program manager with a nonprofit research foundation who is completing a study of zoning bylaws in the Boston area, a Ph.D. student at the Kennedy School of Government at Harvard University, a

*Figure 3-4. Median Housing Prices in the Boston Study Area, 2000.*



vice president of a local bank who is also an official with the Home Builders Association of Massachusetts, and a home builder.

In general, those interviewed agreed a severe housing affordability problem exists in the Boston area and the lack of land zoned for multifamily housing, coupled with the practice of requiring that all multifamily developments be approved by special permit rather than as of right, contributed to a shortage of multifamily housing. The Ph.D. student had evaluated 187 zoning bylaws in the Boston area. She found that 103 towns allowed multifamily residences by special permit or flexible development for cluster development.

Nonetheless, those interviewed also suggested that land development regulation in Massachusetts is complex; lack of land and special permitting requirements are only part of the problem. As one interviewee commented, "It's pretty clear that in some communities the land-use regulations are restricting new housing growth. It's not clear which regulations are really the binding constraints." Another interviewee observed that Massachusetts is a strong home rule state, "which means each community has its own set of zoning, subdivision, wetland, and septic regulations. We're a disaster. You have the state wetlands act overridden by local governments, and local boards of health overriding the [Massachusetts] Department of Environmental Protection [on wastewater protection.]" A third observed: "I think there is explicit snob zoning—large lots for single-family residences, very limited multifamily." The interviewee pointed to "non-science-based regulations on wetland, septic systems, and subdivision regulations in terms of road construction." Together, he said, these constituted "a series of regulations to discourage and prohibit housing production."

Interviewees reported that the problem is more severe in smaller towns—those with populations less than 25,000 (and excluded from the Massachusetts zoning database sample). The builder-developer pointed to the following towns that have severe barriers to multifamily housing: Georgetown, Topsfield, Boxford, Wenham, Hamilton, Norwell, and Bridgewater.

### **Regulatory Analysis**

This analysis looked at planning policies and regulations affecting availability of multifamily housing in the Towns of Framingham, Lexington, Milton, Wellesley, and Weymouth, Massachusetts, outside of Boston. All towns are 25,000 or greater in population.

Four of these five towns had regulations that posed significant barriers to the development of multifamily housing; indeed, they were the most severe restrictions we found among all the communities in the six regions we studied.

While Framingham allowed multifamily housing in the 1970s, it now prohibits it entirely, although it does have a specialized permitting procedure to build "affordable housing."

Lexington does not allow multifamily housing as of right, only by special permit, and its zoning code contains no minimum lot area per dwelling unit for multifamily housing. Its land-use plan contains no density standard that would allow a benchmark for the determination of appropriate residential-use districts.

The Milton Zoning Bylaws do not allow multifamily housing as of right in any district. In fact, the term "multifamily" or "apartment" is not defined in the bylaws. Attached dwelling units may be constructed, but only by a special use permit granted by the planning board under an "attached cluster development" provision in the bylaws and only in a "Residence E" District.

Even though Wellesley has some vacant land available for multifamily housing development in a "General Residence" district, multifamily hous-

ing cannot be built there, and there is scant other vacant land on which multifamily housing could be constructed. Indeed, the zoning bylaws favor townhouses over multifamily housing.

Only Weymouth appears to have progressive policies and corresponding regulations regarding multifamily housing.

Massachusetts has a special law, Chapter 40B, that allows an appeal of a denial of a comprehensive permit for affordable housing projects or in cases in which the imposition of conditions on such permits is “unreasonable.” The law sets a statewide 10 percent of a jurisdiction’s housing must be affordable. Despite their restrictive development regulations, two of the five communities reviewed here exceeded that standard as of November 2005: Framingham with 10.2 percent, and Lexington, with 11.3% percent Massachusetts Department of Housing and Community Development, *Chapter 40B Subsidized Housing Inventory*, [www.mass.gov/dhcd/Toolkit/shi.pdf](http://www.mass.gov/dhcd/Toolkit/shi.pdf) (accessed December 12, 2005).

### Summary

The Boston metropolitan area has one of the most severe housing affordability problems in the nation. This problem arises from tightly controlled local land markets that do not accommodate housing stock growth even when the regional economy is booming. The effect is to bid up the cost of both new and existing housing.

In the study area, zoned density varies widely, from 1.28 units per acre in the least densely zoned jurisdiction to 24.32 units in the most densely zoned jurisdiction. Boston itself is dense but has high housing prices and a consistently high share of multifamily housing; Cambridge follows the same pattern. Other local governments are small and practice zoning with limited state and no regional oversight. Communities with little or no land zoned for high-density and multifamily housing tend to have the highest housing prices. The qualitative analysis revealed that some of the communities with low densities and high prices appear to have land-use policies in place that impede the development of multifamily housing. If multifamily housing is allowed at all, it is only allowed through a discretionary permitting procedure, such as a conditional use permit, and not as of right through predevelopment zoning of land for multifamily uses.

The Commonwealth of Massachusetts’s response to local zoning practices has been to establish a state-level housing appeals board with the authority to overturn local decisions that reject affordable housing projects or impose conditions on them that make them economically infeasible. While this law, Chapter 40B, has had some success in getting otherwise intractable local governments to approve affordable projects, it does not address the larger issue of increasing the supply of *all* housing, in particular, multifamily housing, whether or not it is for low- and moderate-income households, in response to regional changes in demand. Until housing policies address the issue at this level, the Boston area will continue to have among the most expensive housing in the nation.

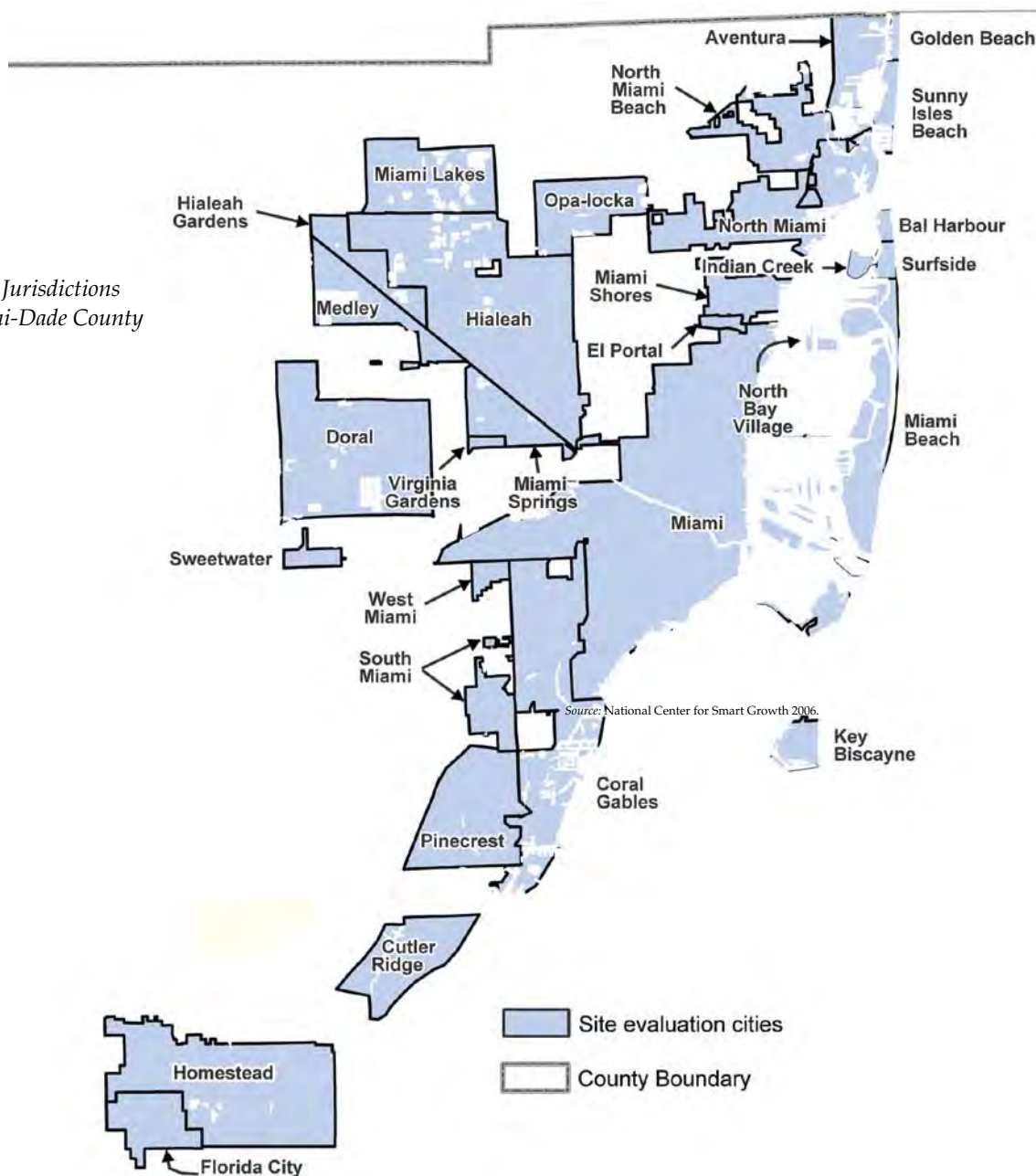
### MIAMI-DADE COUNTY, FLORIDA

The Miami-Dade study area lies at the southeastern-most tip of the nation, and its development patterns are shaped by its warm climate and coastal amenities. The housing market is strongly influenced by the demand for vacation homes, especially for retirees. As a result, housing prices in the study area rose rapidly from 1990 to 2000 and were high in 2000 relative to other study areas. Rents in 2000 and increase in rents between 1990 and 2000 were in the middle range of the study areas. Compared to the other study areas, median incomes in 2000 were low; incomes also increased the least from 1990 to 2000.



The study area is presented in Figure 3-5. As shown, it includes every city in the county with land-use authority but excludes unincorporated Dade County. Jurisdictions vary significantly in size; many are quite small. Several of the southern most jurisdictions were significantly affected by Hurricane Andrew, especially Homestead.

*Figure 3-5. Jurisdictions in the Miami-Dade County Study Area.*



The study area grew in population by about 8 percent from 1990 to 2000, but growth rates vary considerably by jurisdiction. Miami, the central city, grew slowly, but many older and smaller jurisdictions lost population. Like most other metropolitan areas, the most rapid growth is occurring in municipalities located at the urban fringe. Most of the population growth from 1990 to 2000 occurred in Aventura, Doral, Hialeah, Hialeah Gardens, Miami Lakes, and North Miami, all located at the urban edge.

### Regulatory Context

Florida's integrated planning and growth management system includes plans and regulations at three levels of government. The State Comprehensive Plan provides policy direction for all government levels. State agencies must adopt agency plans to implement pertinent portions of the State Comprehensive Plan. At the regional level, each regional planning council must adopt a regional plan consistent with the State Comprehensive Plan but shaped by the circumstances and conditions of the region. At the local level, each county and municipality must adopt a local comprehensive plan consistent with the state and regional plans. The state government reviews local plans for compliance with statutory criteria and administration rules.

A regional planning council (RPC) exists in each of the comprehensive planning districts of the state. Regional planning councils are also recognized as having the capacity to offer technical assistance to local governments and to meet other needs of the communities in each region.

An RPC is responsible for preparing a strategic regional policy plan. The strategic regional policy plan is required to address five subject areas: affordable housing, economic development, emergency preparedness, natural resources of regional significance, and regional transportation. Regional plans must be consistent with the state plan. Upon adoption, the strategic regional policy plan shall provide the basis for regional review of developments of regional impact, regional review of federally assisted projects, and other regional comment functions. Adoption of regional plans is by two-thirds vote of the council's governing board (Florida Statutes, Sections 186.501 et seq.).

### Key Indicators

Jurisdictions in the study area vary greatly in size; many are quite small. For these jurisdictions, the census data are subject to considerable measurement error, especially for data series estimated using sampling procedures. Furthermore, because the jurisdictions are small, the jurisdiction-level indicator values vary extensively because they capture small-area differences in population and housing patterns. The zoning data were obtained from Miami-Dade County and generalized into density categories.

**Housing prices and rent.** Median housing values in the Miami-Dade study area are high and rose rapidly from 1990 to 2000. Housing values increased in every jurisdiction in the study area except Miami Beach. Miami Beach, Coral Gables, Pinecrest, Key Biscayne, Bal Harbour Village, Golden Beach, and Indian Creek all have 2000 median home prices that are more than double the regional median.

Although housing values vary extensively, they have increased faster than incomes in every jurisdiction in the study area except Miami Beach. As a ratio of home value to income, housing units are least affordable in Bal Harbour Village, Indian Creek, Miami Beach, and Sunny Isles Beach. In Key Biscayne, Sunny Isles Beach, Miami, and Bal Harbour Village, home values rose more than 10 times faster than incomes between 1990 and 2000.

Average rents vary dramatically among jurisdictions and are highest in Aventura, Bal Harbour Village, Golden Beach, and Key Biscayne. Except in Doral, where rents fell, and in Key Biscayne, where rents rose by three times the average for the study area, changes in rents between 1990 and 2000 did not vary extensively.

**Housing production and mix.** Several jurisdictions in the study area lost housing units between 1990 and 2000. Some lost significant multifamily housing stock during this same period. Miami Beach lost 1,227 units, North Miami lost 950, and Opa-locka lost 327.

#### KEY INDICATORS: MIAMI-DADE COUNTY

*Jurisdictions with the highest median home price:*

- Indian Creek (\$1 million +)
- Golden Beach (\$739,300)
- Bal Harbour Village (\$664,300)
- Key Biscayne (\$615,500)

*Jurisdictions with the lowest percentage of multifamily units:*

- Golden Beach and Indian Creek (0 percent)
- Miami Shores (12 percent)
- El Portal and Medley (15 percent)

*Jurisdictions with the lowest average zoned density (zoned units/residential acre):*

- Pinecrest (2.06)
- Miami Shores (3.37)
- Cutler Ridge (5.43)

*Jurisdictions with the lowest percentage of residential acres zoned for high-density use:*

- Miami Shores (1 percent)
- Pinecrest (3 percent)
- Cutler Ridge and El Portal (11 percent)

For many communities, multifamily units made up a significant share of total new housing units. In Bal Harbour Village, Homestead, North Bay Village, Sunny Isles Beach, Virginia Gardens, and West Miami, every net housing unit added from 1990 to 2000 was multifamily.

Other communities gained multifamily units, but as a share of total new housing units, very few were multifamily. For every 100 new housing units in Coral Gables, Hialeah Gardens, and Miami Lakes, 30 or fewer were multifamily, a ratio substantially lower than the region as a whole.

**Zoned density and mix.** In the southern portion of the study area, most of the land is zoned for single-family residential use. In the northern portion, the zoning is more varied with multifamily, commercial, and single-family zones interspersed. Mixed-use and multifamily zones are concentrated along transportation corridors. Very little land within incorporated cities is zoned for agricultural use. The concentration of housing units per acre is highest along the coast and in the City of Miami.

In several jurisdictions—El Portal, Golden Beach, Pinecrest, and Surfside—more than 90 percent of total land area is zoned for residential use. Of these communities, only Pinecrest has a very low percentage of its residential land zoned for high-density housing uses. In contrast, all of Golden Beach’s residential land is zoned for high-density housing uses. While Golden Beach has no multifamily units, all of its single-family development is greater than eight units per acre, which is the criterion in this study for “high density,” and therefore it is classified as high density.

Throughout the study area, 61 percent of residential acres are zoned for high-density use. Cutler Ridge, El Portal, Miami Shores, Pinecrest, and Surfside have less than 15 percent of residential land area zoned for high-density use; Miami Shores and Pinecrest have almost none.

Regionally, total zoned residential density varies from 2.1 units per acre in Pinecrest to 49.6 units per acre in Sunny Isles Beach. Miami Shores and Pinecrest are zoned for the lowest overall densities.

### Data Visualization

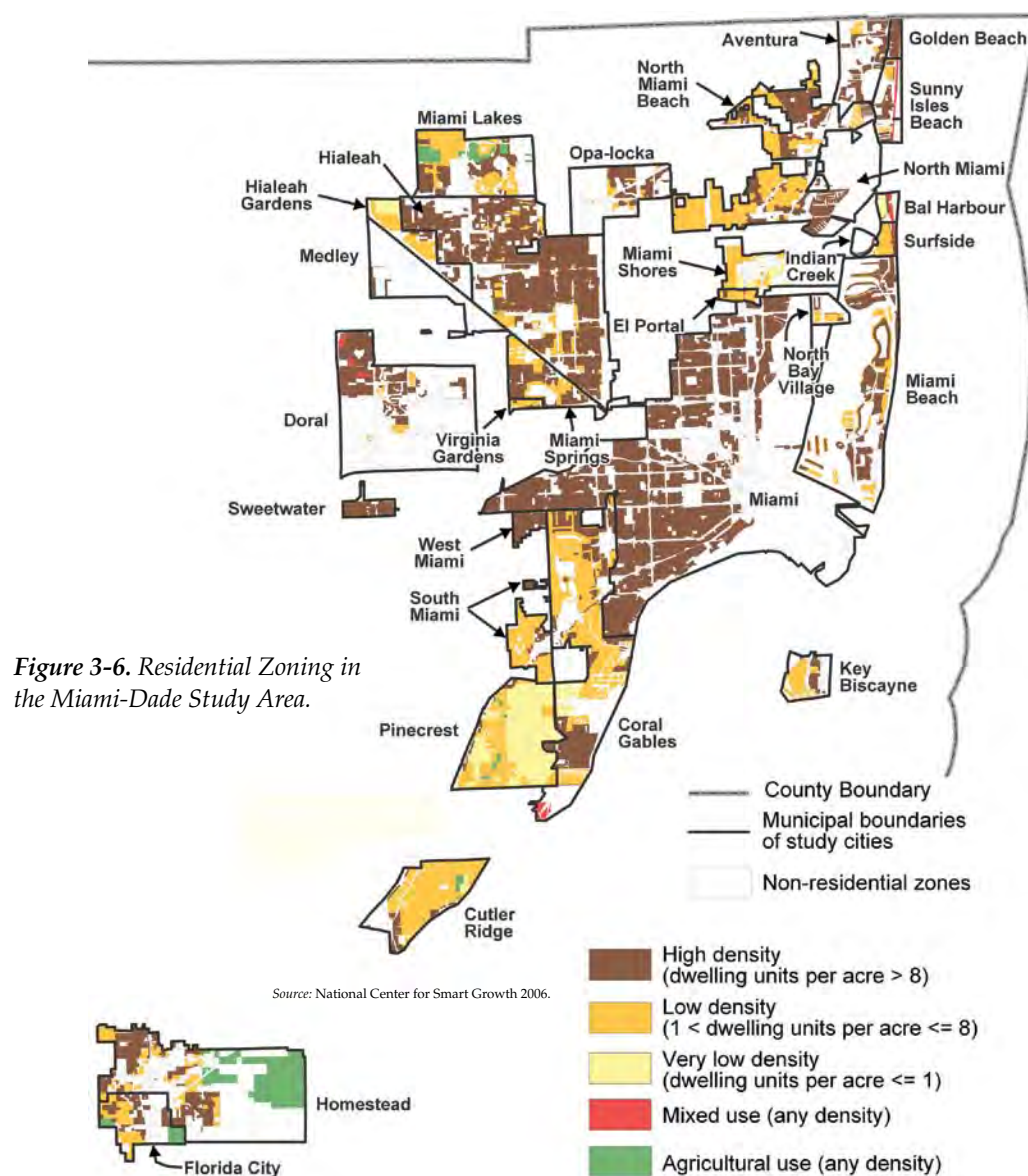
Intrametropolitan patterns of zoning and housing prices are illustrated in Figures 3-6, 3-7, and 3-8. As shown in Figure 3-6, much of the Miami-Dade study area is zoned for high-density use. Most of Miami is zoned for high-density use, as are much of several suburban jurisdictions. As in other metropolitan areas, low-density zones are more common in the urban fringe than in central locations.

Figure 3-7 offers additional information on zoning patterns in the Miami-Dade study area. Overall zoned densities tend to fall with distance from the Atlantic shore, but with notable exceptions. Surfside, North Miami, and Coral Gables are shoreline communities with low overall zoned densities.

Figure 3-8 illustrates the pattern of housing prices in the study area. With the exception of the city of Miami, the highest housing prices are found along the Atlantic shore with very high prices in Indian Creek, Golden Beach, Key Biscayne, and Bal Harbour and high prices in Coral Gables and Pinecrest. But as shown in Figure 3-7, many of these high priced communities have among the lowest zoned densities. Zoned densities in Coral Gables and Pinecrest are particularly low given the high prices in these communities.

### Key Stakeholder Interviews

We interviewed five people familiar with the public policy and development practices affecting multifamily housing development in the Miami-Dade metropolitan area. The purpose of the interviews was to gain a local perspective on the data analysis conducted as part of the case study of the region.



Interviewees included a senior planner at the South Florida Regional Planning Council, the vice president of a development company that specializes in residential development, the director of the area housing finance authority, the director of a center for urban studies at Florida Atlantic University, and a representative of the county administrator for one of the counties in the region.

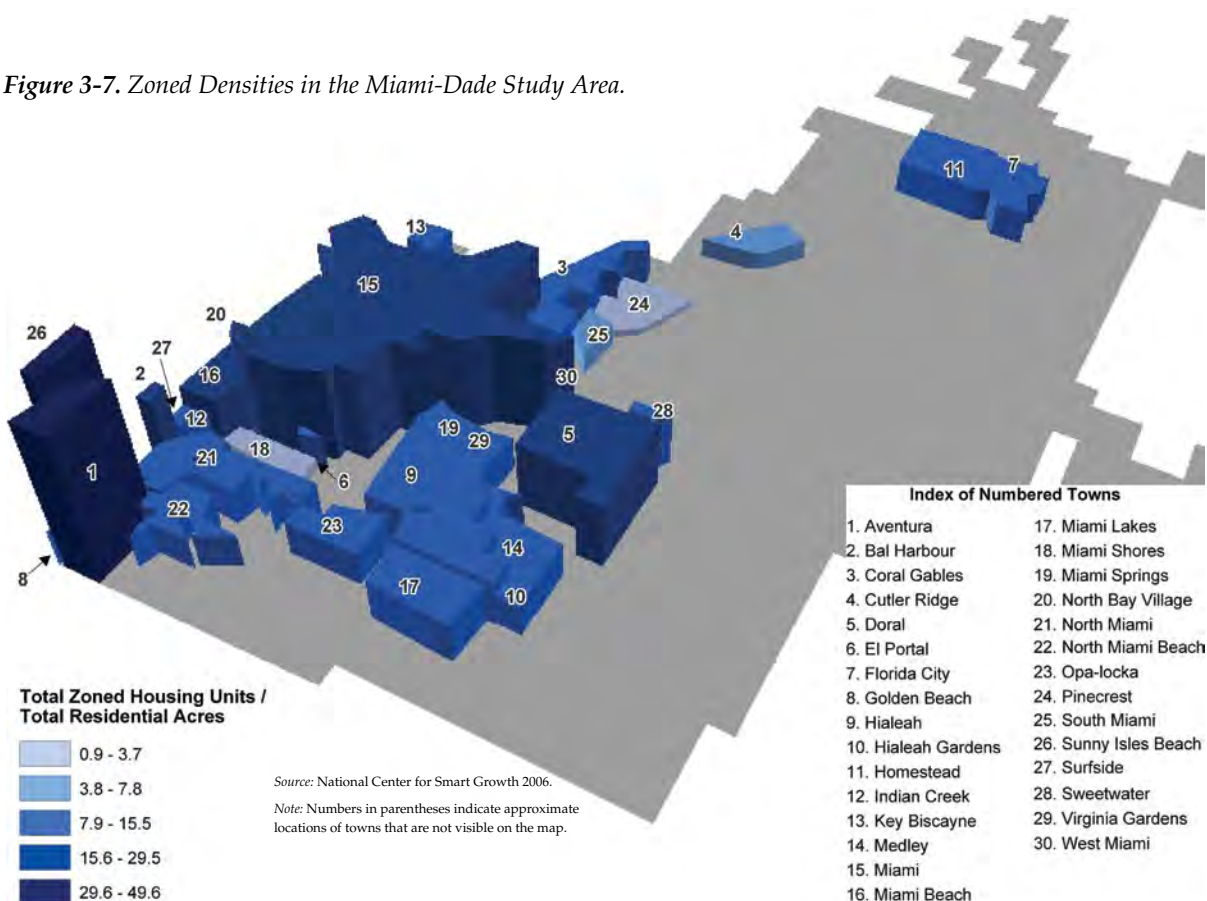
Interviewees had mixed opinions about the impact of zoning on the development of multifamily housing in the region. Most felt the zoning in place in Miami-Dade contributes to a lack of adequate affordable housing and of multifamily housing, but also thought zoning alone does not drive the low-density land-use patterns.

Interviewees pointed to the following additional factors as influences on multifamily housing development.

**Existing development patterns and land availability.** All five interviewees described the combined effect of constrained land supply (the urban area is hemmed in on the west by the Everglades and the east by the Atlantic Ocean) and existing low-density development as a major impediment to building new multifamily housing units. Very few undeveloped areas are



Figure 3-7. Zoned Densities in the Miami-Dade Study Area.



available, and redevelopment is complicated by the need to remove existing single-family developments and assemble parcels.

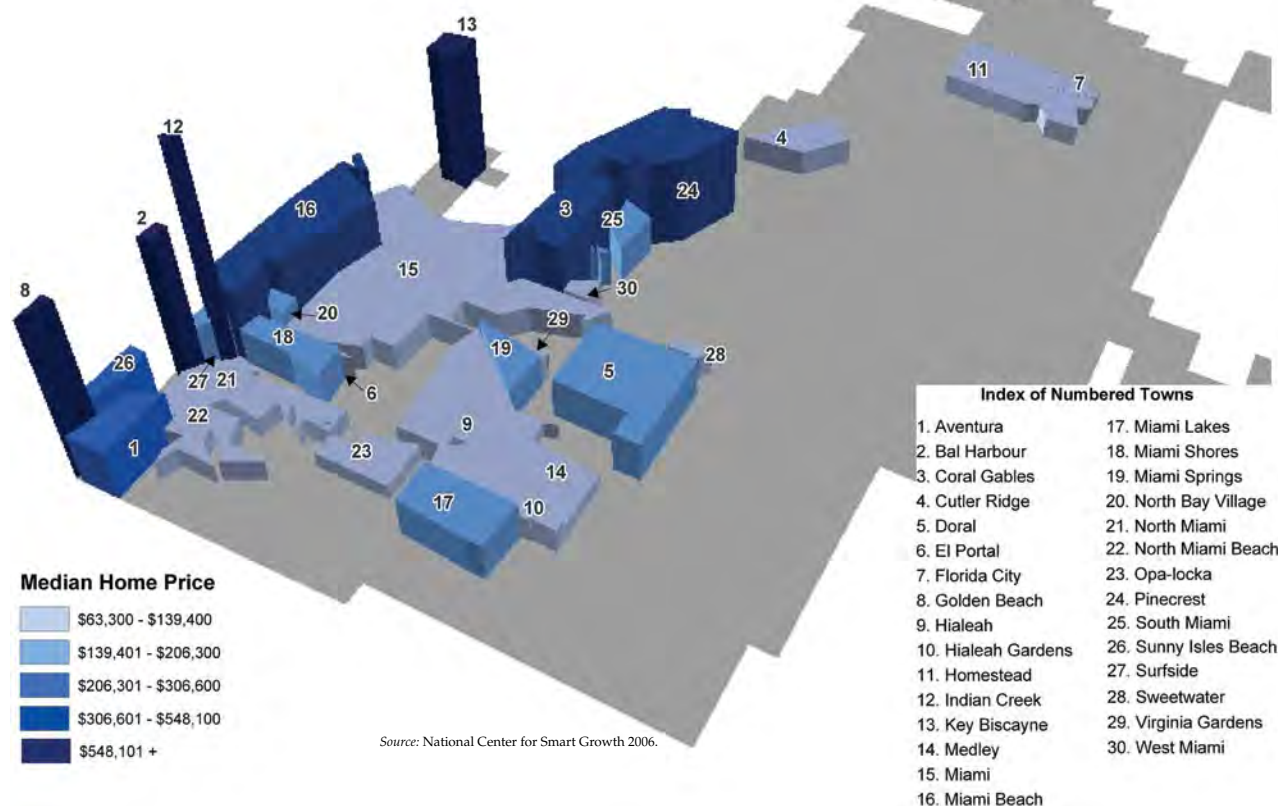
**Market forces.** The Miami-Dade area has experienced rapid growth over the past decade, driving up the price of land and housing faster than incomes have increased. One interviewee estimated that 60 percent to 70 percent of all new development in the area is spurred by speculation from investors, which has resulted in a shortage of affordable housing, rather than a lack of multifamily units or low-density zoning. In some very desirable locations, even the multifamily units are very expensive.

**Community resistance to density.** In many communities, new multifamily development is met with resistance from current residents interested in protecting their neighborhoods from what they view as an overflow of urban development from the Miami-Dade County area. As one interviewee described, "People fear density. In the few cases where there is an opportunity for land-use patterns to shift toward higher density, the community fights it."

**Building costs.** Because of the existing land-use patterns, developing new multifamily housing often means removing existing buildings and/or remediating properties, which add to the cost of development. Additionally, since Hurricane Andrew, stricter codes for hurricane mitigation have led to additional building costs.

**Infrastructure availability.** Some communities were originally developed as very low-density residential areas and are dependent on septic tanks and wells. In these communities, developing multifamily units is simply not possible. Parkland and Southwest Ranches are two communities in this

Figure 3-8. Median Housing Prices in the Miami-Dade Study Area, 2000.



category, and both were mentioned by several interviewees as places where it is very difficult to build multifamily housing. In other communities (e.g., Opa-locka), older sewer and water infrastructure is underperforming and could not support higher density.

Several interviewees said zoning is an important tool for changing future land-use patterns, but noted the current zoning is primarily single-use, Euclidian zoning that separates uses and contributes to difficulties when attempting to increase densities throughout the region. One interviewee specifically cited a Florida planning requirement that cities not exceed “available densities” within their boundaries. Some cities in the region have already met this limit and cannot develop to higher densities.

Several respondents also pointed out that low density is not necessarily associated with a lack of affordable housing in the region. Several communities, including Opa-locka and Cutler Ridge, are low-income communities developed with single-family units. At the same time, many of the newer multifamily units would not be considered affordable.

### Regulatory Analysis

Our analysis considered planning policies and regulations affecting the availability of multifamily housing in El Portal, Golden Beach, Medley, Miami Shores, and Pinecrest in Miami-Dade County, Florida.

Of the five municipalities analyzed, three of them have policies and regulations that pose substantial barriers to multifamily housing, while a fourth has a possible interlocking set of barriers. El Portal, Golden Beach, and Medley simply do not allow multifamily residences, either as permitted or condi-

tional uses. Miami Shores does permit multifamily uses, and the number of units is regulated by floor area ratios and a standard that links lot area per dwelling unit to the number of rooms in the multifamily unit.

Pinecrest's density range for multifamily units is a liberal one, from 12.9 to 50 dwelling units per net acre, but it has very limited land, less than 1 percent of its total residential acreage, devoted to multifamily residences. Of the 102 acres of vacant residential land in 1996, the year the comprehensive plan was being prepared, 91 acres were proposed for single-family residences and the remainder, 11 acres, for multifamily residences at 23.5 dwelling units per net acre.

To some degree, this lopsided allocation must be balanced against the relative surplus of affordable housing in the community, as identified in the 1999 comprehensive plan. Nonetheless, the limited amount of land for multifamily uses and the nature of the zoning regulations, which require a site plan review for all uses, do serve as potential barriers to multifamily housing development.

### Summary

Overall, zoning in the Miami-Dade study area is less of a barrier to high-density, multifamily housing than in the other five study areas of this research. For the entire study area, the high-density share of zoned housing units, the share of land zoned for high-density residences, and the aggregate zoned density are the highest of all the study areas. But within the study area, zoning patterns and housing prices vary extensively. Jurisdictions along the beach—Miami Beach, Bal Harbour, Indian Creek, and Golden Beach—have some of the highest prices in the region, but not the highest zoned densities. Further, Coral Gables and Pinecrest, located on the southern edge of the City of Miami, have very high housing prices and very low zoned densities. The case study analyses suggest this is not unintentional. In the past, the demand for higher-density housing in this part of the metropolitan area may have been weak; now, however, it seems quite likely that zoning limits the construction of high-density housing in these jurisdictions.

Since the 1930s, the Miami metropolitan economy has been dominated by tourism, expensive vacation homes, and retirement villages; at the same time, the region has seen growing numbers of poor immigrants and hurricane refugees. As a result, housing prices are generally high and rapidly rising, and resident median incomes are low.

The regulatory and institutional environment of Miami-Dade County is intricate but orderly. The state requires local governments to plan and zone. Zoning must be consistent with comprehensive plans. Plans must include a housing element. Local plans must be consistent with regional plans and regional plans must be consistent with the state plan. Under state law, local governments must impose concurrency regulations, which require that infrastructure must be in place before development is allowed. As in Maryland, concurrency requirements (called *adequate public facility ordinances* in Maryland) often impose regulatory barriers even when zoning does not.

Zoning in Miami-Dade County often changes when land is developed and annexed to a city. In the past, development and annexation reduced the influence of zoning at the urban-rural fringe. As Dade County has tightened its regulatory controls and maintained its longstanding urban development boundary, its zoning has grown in significance, especially in constraining the overall supply of developable land.

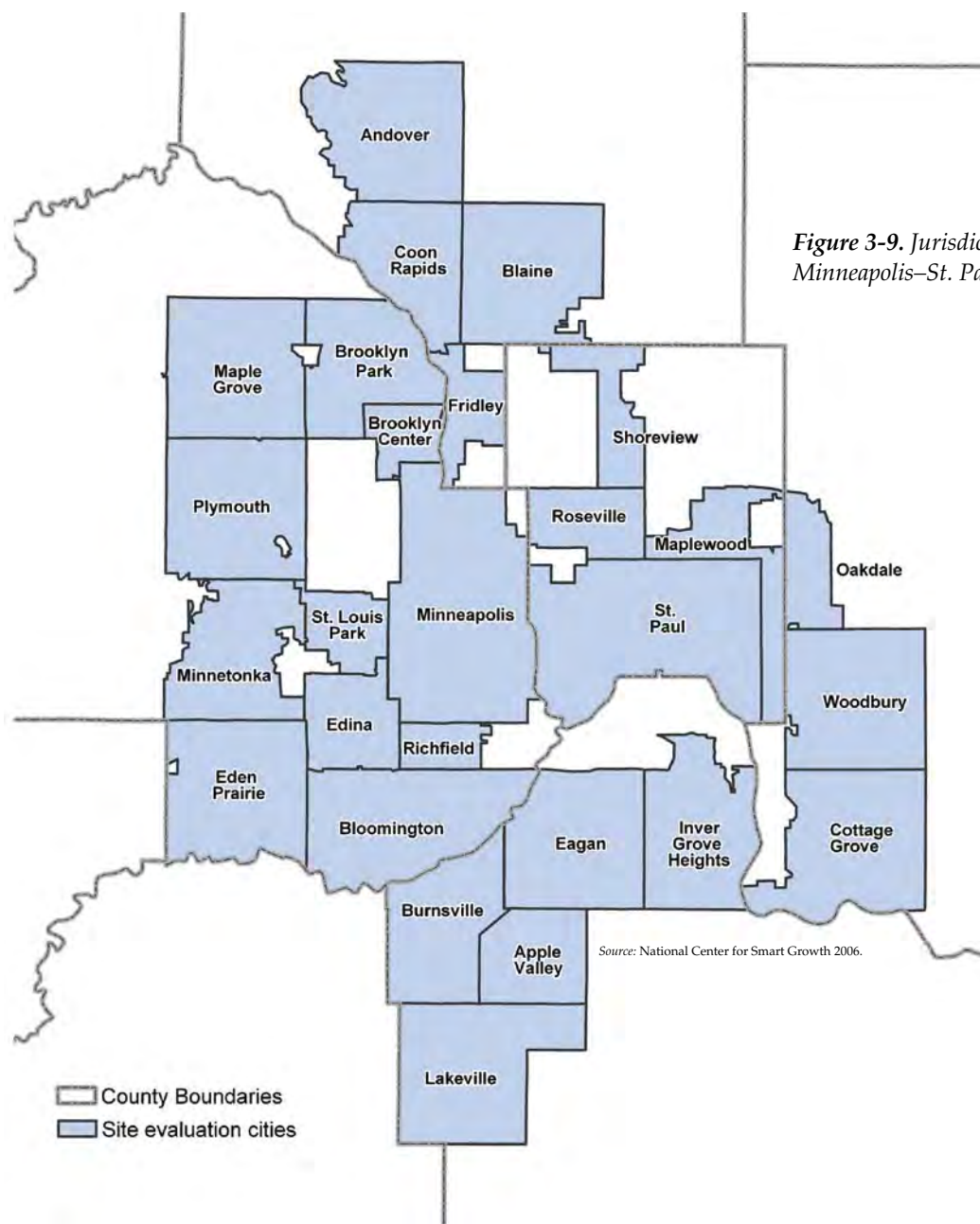
Still, from a metropolitan perspective, overall densities are high and, with the exceptions noted above, densities are high where prices are high. The Miami-Dade region thus offers evidence that, at the metropolitan scale, zoning often follows the market and high zoned or actual densities are no certain prescription for housing affordability.

### MINNEAPOLIS-ST. PAUL, MINNESOTA

Minneapolis-St. Paul is located at the northern edge of the slow-growing upper midwest. The density of development and the share of multifamily housing are both low. Housing prices were relatively low in 2000 and grew at a moderate rate from 1990 to 2000. Rents, however, were moderately high and rapidly rising. Median incomes in 2000 were the highest of all the study areas as was in the increase in incomes from 1990 to 2000.

Figure 3-9 provides a map of the Minneapolis-St. Paul study area. The study area includes the 27 cities in the region with populations greater than 25,000. As a result, the jurisdictions in the study area are relatively large in population and, because of their low densities, are also relatively large in area.

Despite its regional location, the study area grew 10 percent from 1990 to 2000. The central cities of Minneapolis and St. Paul both grew by nearly 15,000 residents. Other jurisdictions that grew by similar amounts or more





include Eagan, Eden Prairie, Lakeville, Plymouth, and Woodbury, all located at the urban fringe.

### Regulatory Context

Counties and municipalities have the power to plan and zone. In the Twin Cities area, the Metropolitan Council oversees local planning and reviews local plans against its own plans. The Minnesota Environmental Quality Board serves, in part, as the state planning agency and has some regulatory role in the designation of areas of critical concern.

The Metropolitan Council, the planning entity for the seven-county Minneapolis-St. Paul (Twin Cities) region, is an appointed body. It is required to prepare a development guide, the “Blueprint.” The development guide must “consist of a compilation of policy statements, goals, standards, programs and maps prescribing guides for the orderly and economical development, public and private, of the metropolitan area” (provisions are contained in Minnesota Statutes Annotated, Sections 473.123 et seq.).

Among the components required in a local comprehensive plan is a land-use plan. That land-use plan shall also include a housing element containing standards, plans and programs for providing adequate housing opportunities to meet existing and projected local and regional housing needs, including but not limited to the use of official controls and land-use planning to promote the availability of land for the development of low- and moderate-income housing (Minnesota Statutes Annotated, Section 473.859). The Council shall review and comment on the apparent consistency of the comprehensive plans and capital improvement programs with the adopted plans of the Council. The Council may require a local governmental unit to modify any comprehensive plan or part thereof if, upon the adoption of findings and a resolution, the Council concludes the plan is more likely than not to have a substantial impact on or contain a substantial departure from the Council’s metropolitan system plans.

### Key Indicators

Our study of the jurisdictions in the Minneapolis-St. Paul study area was limited to those that are relatively large and, hence, relatively the same size in area. As a result, Census data provide an accurate portrayal of existing housing stocks and trends. The GIS data were obtained from the Metropolitan Council and provide information about planned land use, not zoning. Whether this represents a limitation or advantage for analyzing barriers to multifamily, high-density development is unclear. While existing zoning is perhaps a better representation of current regulatory constraints, planned land use provides a better representation of jurisdictional intentions, especially in cases where zoning is easily changed. It is also important to note that the Metropolitan Council’s generalization of local comprehensive plan designations are coarse; they include only six residential categories and no mixed use.

**Housing prices and rents.** Housing prices in the study area are relatively low and affordable, at only 2.5 times median incomes. Housing values increased in every jurisdiction during the 1990 to 2000 period. Minnetonka, Plymouth, Eden Prairie, and Edina all had 2000 median home prices more than 30 percent above the regional median home price.

From 1990 to 2000, housing values increased faster than incomes in every jurisdiction. As a ratio of change in median home value over the change in median household income, homes became more expensive in every jurisdiction. This trend was strongest in Edina and St. Paul. In these cities, home values rose more than four times faster than incomes from 1990 to 2000.

Median rents were highest in 2000 in Woodbury. Rents in Woodbury were more than 30 percent above the regional median rent. Rents in all other jurisdictions fell within 30 percent of the study area median.

**Housing production and mix.** Housing units in the study area grew by approximately 10 percent between 1990 and 2000, but the share of multifamily units developed over the same period was just more than 5 percent. Four jurisdictions (Minneapolis, St. Paul, Richfield, and Brooklyn Center) lost housing units, and Minneapolis, St. Paul, Richfield, and Shoreview lost multifamily housing units. Jurisdictions that gained more than 5,000 housing units include Eagan, Eden Prairie, Lakeville, Plymouth, and Woodbury, which gained more than 10,000.

Most jurisdictions gained both total and multifamily housing units; for many, however, the multifamily share was quite low. For Andover, Eden Prairie, Fridley, Lakeville, Maple Grove, and Woodbury, the multifamily share of units built from 1990 to 2000 was less than 10 percent.

**Planned density and mix.** As in other study areas, most of the region's land is zoned for single-family residential use at low density. Only three jurisdictions have 15 or more percent of residential land zoned for high-density use: Richfield, St. Louis Park, and St. Paul. In Andover, Blaine, and Woodbury, less than 3 percent is so designated, though because multifamily land is so scarce in this study area, this does little to distinguish these jurisdictions from all the others. Not surprisingly, the share of units zoned for high-density development in most other jurisdictions is also low. St. Paul has the highest share at 52 percent; the corresponding share for Andover, Blaine, Maple Grove, and Woodbury is 10 percent or less.

### Data Visualization

Patterns of planned land use and housing prices for the Minneapolis-St. Paul study area are illustrated in Figures 3-10, 3-11, and 3-12. As shown in Figure 3-10, most of the study area is planned for low- and very-low-density residential use. A significant area is planned for high-density use in central St. Paul, but smaller areas planned for high-density use are dispersed throughout the metropolitan area. Land planned for mixed use is uncommon in all jurisdictions except Minnetonka.

Overall planned densities are illustrated in Figure 3-11. As shown, the pattern of planned density follows the pattern predicted by urban economics: planned densities are highest in the central cities and fall systematically with distance. The jurisdictions with the lowest planned densities lie at the urban fringe.

Figure 3-12 illustrates the pattern of housing prices in the study area. As shown, housing prices overall are generally low and evenly distributed. Only Edina lies in the highest price category. Although these images present only a cursory view of housing prices and planned densities, they offer little evidence of barriers to high-density, multifamily housing by any particular jurisdiction in the study area.

### Key Stakeholder Interviews

We interviewed four people familiar with the public policy and development practices affecting multifamily housing development in the Twin Cities metropolitan area. Interviewees included a planning faculty member at the University of Minnesota, a fellow at the University of Minnesota Humphrey Institute, a state representative and attorney, and a director of research at a local foundation who is also a planner.

The interviews elicited mixed responses about the status of multifamily housing. In general, those interviewed agreed rapidly growing, high-income

### KEY INDICATORS: MINNEAPOLIS-ST. PAUL

*Jurisdictions with the highest median home price:*

- Edina (\$248,500)
- Eden Prairie (\$198,300)
- Plymouth (\$197,600)
- Woodbury (\$174,300)

*Jurisdictions with the lowest percentage of multifamily units:*

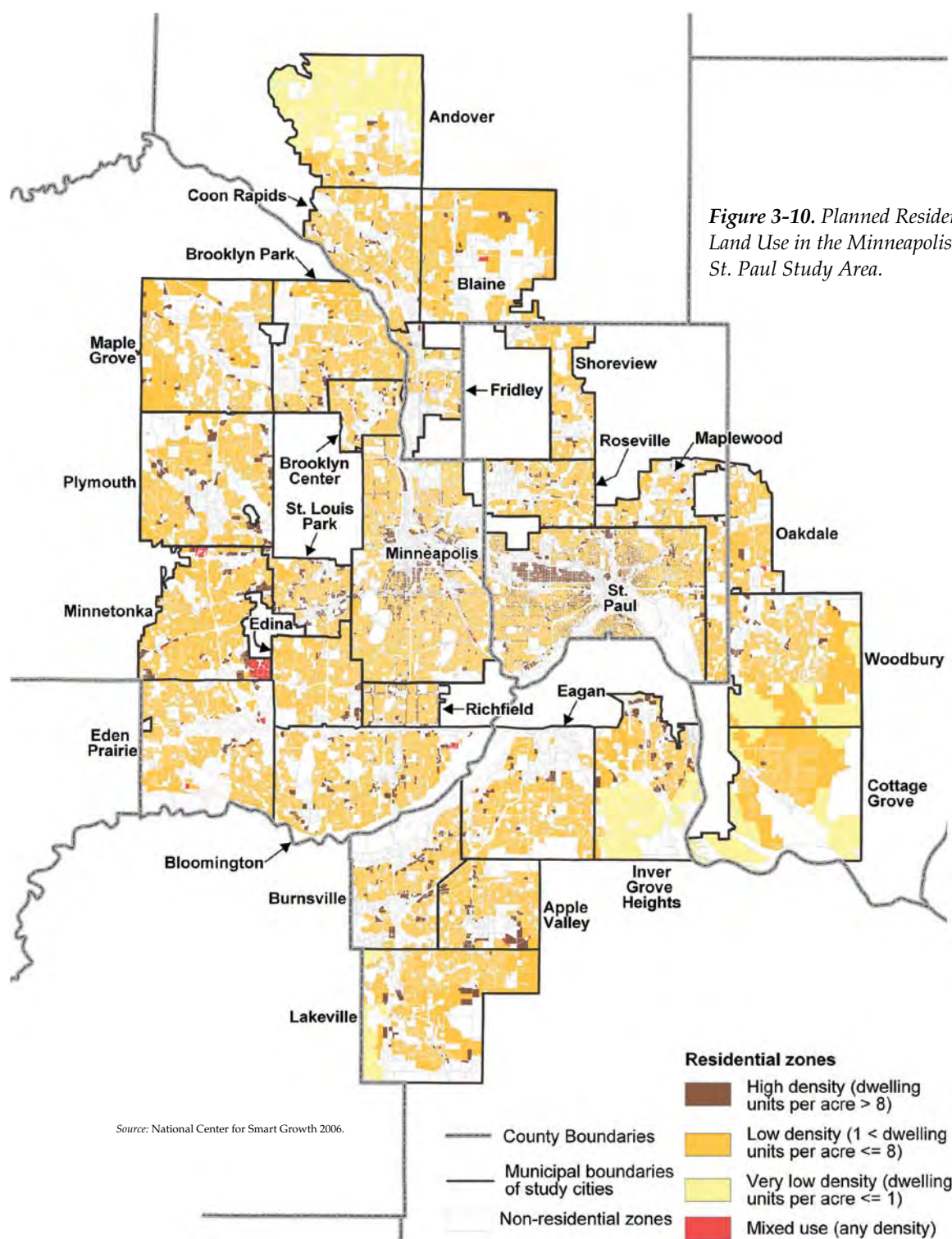
- Andover (3 percent)
- Lakeville (6 percent)
- Cottage Grove (7 percent)
- Bloomington and Maple Grove (8 percent)

*Jurisdictions with the lowest average zoned density (zoned units/residential acre):*

- Andover (1.22)
- Cottage Grove (2.55)
- Inver Grove Heights (2.79)
- Woodbury (3.2)

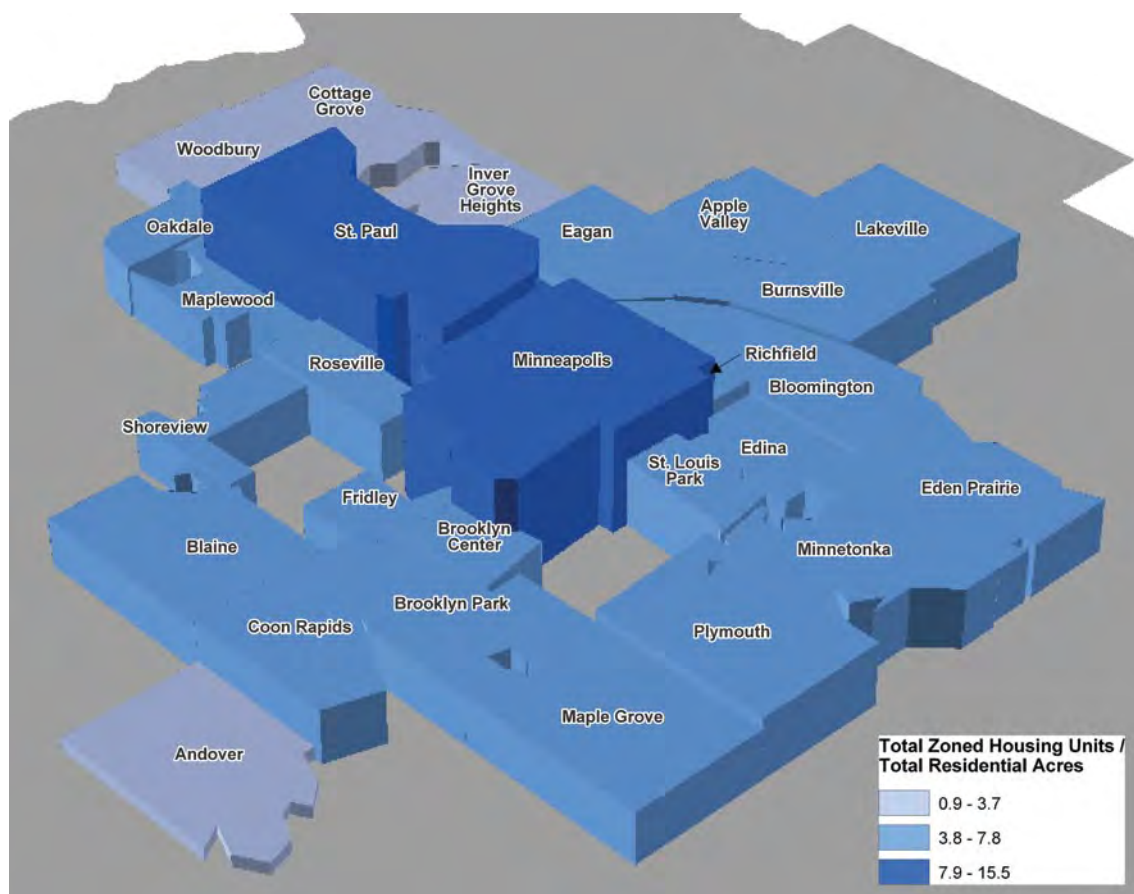
*Jurisdictions with the lowest percentage of residential acres zoned for high-density use:*

- Cottage Grove (1 percent)
- Andover (1 percent)
- Blaine (2 percent)
- Eden Prairie and Woodbury (3 percent)



communities were the most difficult in which to build multifamily housing and a growing affordability problem exists. One interviewee believed not a lot of land is zoned multifamily and large-lot zoning also poses a problem. The interviewee pointed to “very white collar communities on the I-494 corridor” and on “the eastern side of the metropolitan area” as areas where multifamily development might be limited.





Source: National Center for Smart Growth 2006.

Another interviewee stressed that “attitudes are changing” toward multifamily housing, and that townhomes (albeit expensive units) are a robust part of that market. “Almost 40 percent of housing units are townhomes. The townhome market is strong and communities are responding.” The problem is not land-use regulations per se, she said, but “the lack of tools to put affordable housing packages together.”

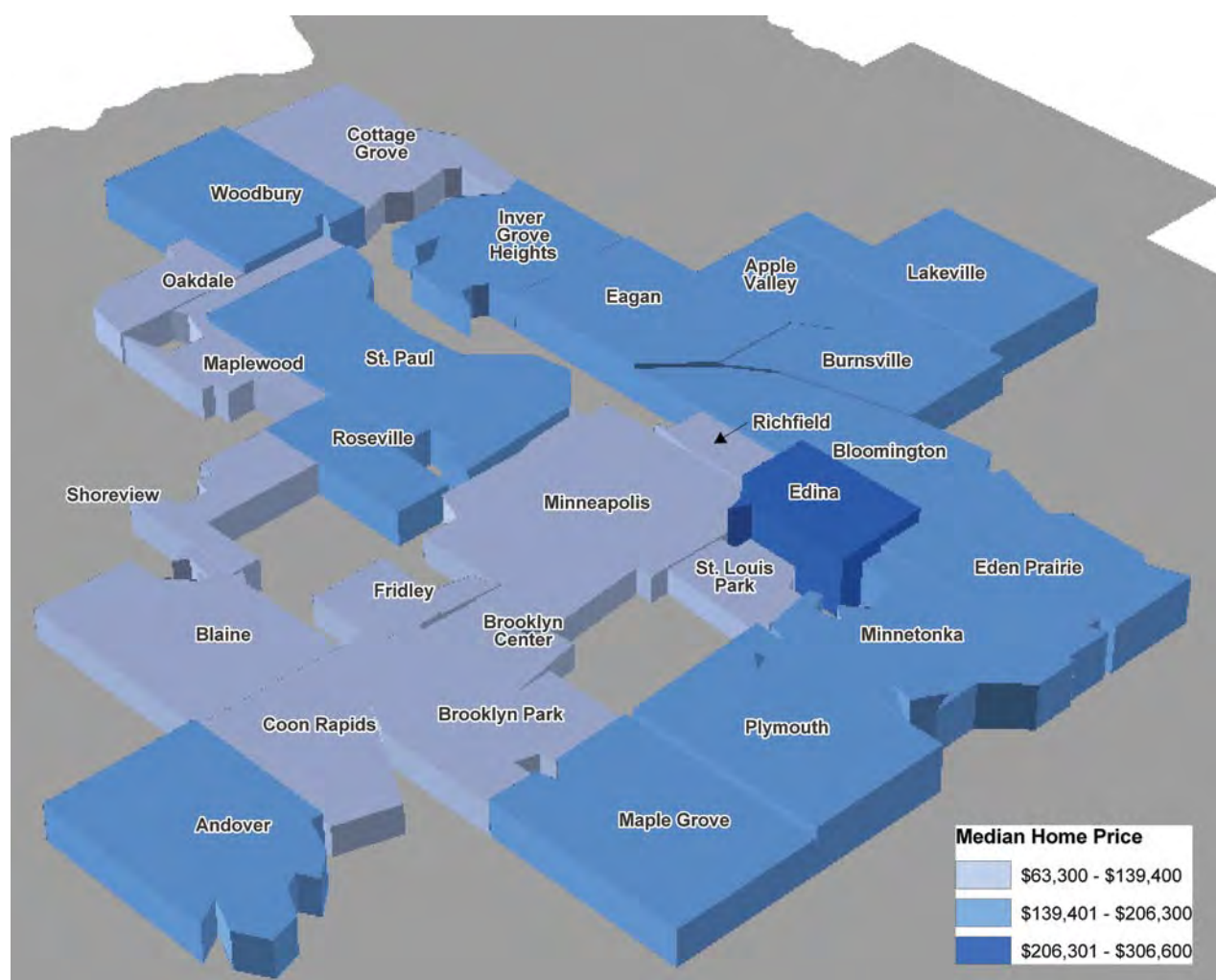
### Regulatory Analysis

Our analysis looked at planning policies and regulations affecting availability of multifamily housing in the Cities of Andover, Cottage Grove, Eagan, Eden Prairie, and Woodbury in the Twin Cities region in Minnesota. All five of the communities permitted multifamily housing. Andover’s comprehensive plan anticipated the need for multifamily housing and the zoning code allows it in two districts, although at the lower end of the typical density range for multifamily units (13 dwelling units per net acre or less). Cottage Grove’s comprehensive plan allocates 232 acres for multifamily housing. Its R-6 High-density Residential District allows up to 16 dwelling units (including apartments) per gross acre.

Eagan’s comprehensive plan’s housing plan (2001) essentially stresses the development of detached housing and high-end multifamily housing, mainly because approximately 47 percent of the housing stock as of 1998 was multifamily compared to the Metropolitan Council’s benchmark of 38 percent non-single-family housing. The Eagan Zoning Code allows townhouse development in the R-3 Townhomes District at 7.26 dwelling units per net acre (6,000 square feet per unit). Multifamily dwellings (four or more dwelling units per structure) are permitted in the R-4 Multiple District under

**Figure 3-11.** *Planned Densities in the Minneapolis-St. Paul Study Area.*





Source: National Center for Smart Growth 2006.

**Figure 3-12.** Median Housing Prices in the Minneapolis-St. Paul Study Area, 2000.

a standard requiring 5,000 square feet for the first six multifamily units and 2,750 square feet per multifamily unit thereafter.

Thus, for the first acre, the density would be 10.9 dwelling units per acre, and 15.8 dwelling units per net acre for the next acre. Eden Prairie's Land Use Guide Plan (2003) map shows both medium density (2.5 to 10 dwelling units per net acre) and high-density (10 to 40 units per acre) areas. Eden Prairie's zoning code permits multifamily residences in two districts, although at lower densities than shown in the Land Use Guide Plan: (1) RM 6.5, which permits a gross density of 6.7 dwelling units per acre; based on the requirement of 6,500 square feet per dwelling [DITTO] unit; and (2) RM 2.5, which permits a gross density of 17.5 dwelling units per acre, based on the requirement of 2,500 square feet per dwelling [DITTO] unit. Finally, Woodbury's comprehensive plan acknowledges the demand for multifamily residences. Woodbury's zoning code allows multifamily dwelling units in the R-4 Urban Residential District but only as planned unit developments, not as of right. The densities must be consistent with densities contained in the comprehensive plan, which can range between 3.5 and 15 units per net acre.

### Summary

Housing in the Minneapolis-St. Paul study area is relatively inexpensive and is developed at low densities. Although zoned densities and multifamily construction rates are low, this study area revealed little evidence that

zoning represents a significant barrier to multifamily development. Data limitations might partially explain this finding; zoning data for the entire metropolitan area were not available.

Total planned residential density varies from 1.22 units per acre in Andover to 11.85 units per acre in St. Paul. Cottage Grove and Inver Grove join Andover as the three communities with the lowest housing units per acre. The cities with the highest median housing values also have among the lowest percentages of multifamily units. Two exceptions are Edina and St. Paul. Both of these communities have high median home prices and are high density.

Along with the Portland area, the Minneapolis-St. Paul region is one of few where local housing plans are subject to a review by a regional planning agency, in this case the Metropolitan Council. The Council's jurisdiction extends over the seven-county area. An apparent consequence of that oversight is that, at least for the sample of five cities whose plans and development regulations were reviewed in this study, local governments recognize the need for multifamily housing and allow it in varying degrees. In the Twin Cities area, those interviewed said attitudes toward townhouse development were changing and the area was experiencing an increase in their numbers.

### **PORTLAND, OREGON**

The Portland study area lies at the confluence of the Willamette and Columbia River, on the border between Oregon and Washington, and includes every municipality in Washington, Multnomah, and Clackamas counties within Portland's urban growth boundary (UGB). In 2000, the region had moderately high housing prices as a result of rapid price escalation from 1990 to 2000. Rents exhibited a similar pattern. Despite high zoned densities, the existing density of development is moderate.

The study area, depicted in Figure 3-13, includes every incorporated city within the UGB but excludes unincorporated areas. The study area grew in population by 250,000 from 1990 to 2000 to reach a total population of 1.1 million. Jurisdictions vary widely in size, and all but the very smallest gained population. Jurisdictions that gained more than 20,000 residents between 1990 and 2000 include Beaverton, Gresham, Hillsboro and the central city of Portland.

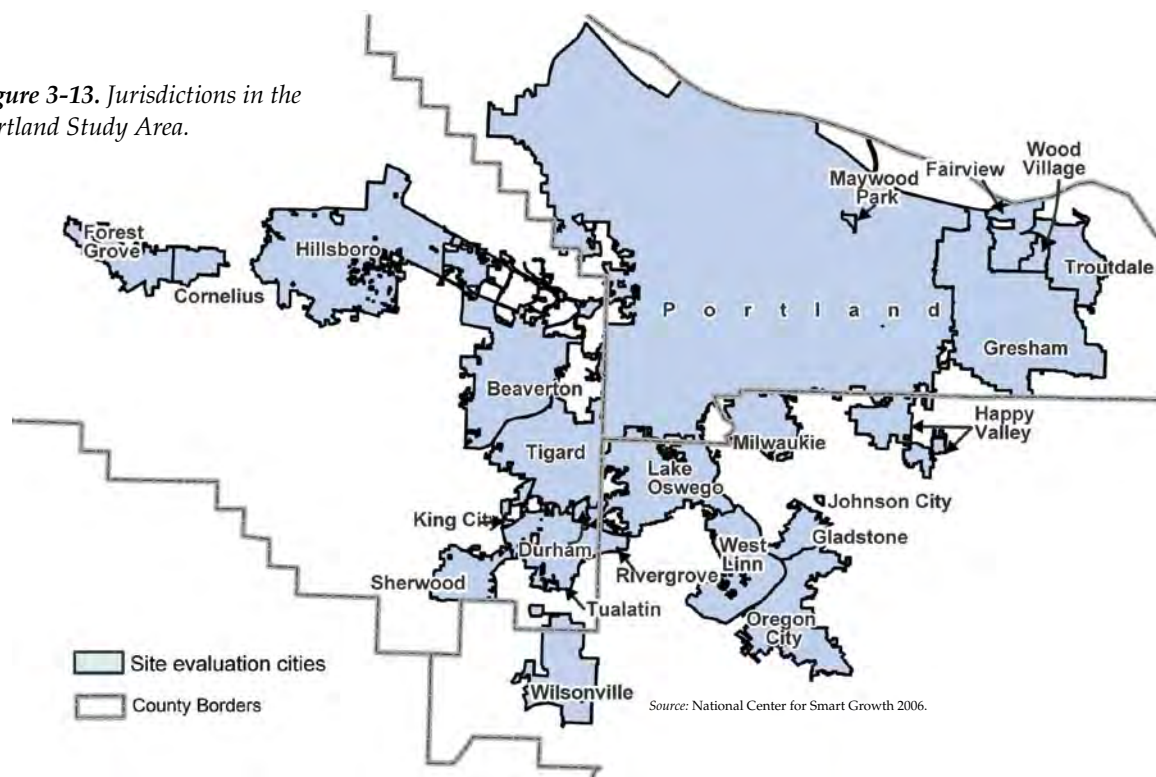
### **Regulatory Context**

Oregon's planning program has been in place for more than 30 years. Development is regulated at the state level and is coordinated by a state agency, the Department of Land Conservation and Development (DLCD). DLCD prepares the goals and guidelines for local government to follow as they undertake planning activities. These goals cover a variety of topics, including citizen participation, urbanization, forestry, housing, recreation, and agriculture.

Each county and city in Oregon must develop, adopt, and amend comprehensive plans that comply with state land use goals (Oregon Revised Statutes, Section 197.250, 255). The urban growth boundary (UGB), intended to identify and separate urbanizable land from rural land and to ensure compact development, is a critical component of the land use planning system. DLCD's urbanization goal requires all Oregon cities to define, adopt, and plan urban development within UGBs (Oregon Administrative Rules 660-015-0000(14)).

Metro, a regional planning agency with an elected council, oversees regional land-use issues in the Portland region. Key to the purposes of this study is the Metropolitan Housing Rule (Oregon Administrative Rules 660-007)

*Figure 3-13. Jurisdictions in the Portland Study Area.*



for the Portland Region. It requires cities and counties within the regional UGB to meet regional standards for density and housing mix. Jurisdictions other than small developed cities must either designate sufficient buildable land to provide the opportunity for at least 50 percent of new residential units to be multifamily housing or justify an alternative percentage based on changing circumstances (Oregon Administrative Rules 660-007-0030 through 660-007-0037; 660-007-0045).

The Metropolitan Housing Rule also requires cities to develop overall target densities that vary depending on the size and growth rate of the jurisdiction.

#### **Key Indicators**

Because the jurisdictions in the Portland study area vary widely in size, small sample measurement error is possible in the Census data for the very small jurisdictions. The GIS data were obtained from Portland Metro, the regional government for the Portland metropolitan area. Without doubt, Metro's Regional Land Information System offers the best data on zoning, planned designation, and existing development patterns available for any metropolitan area in the country. Although generalized into regionwide categories, Metro's zoning data are highly detailed and precise.

**Housing prices and rents.** Housing prices are relatively high in the Portland study area and increased in every jurisdiction in the study area between 1990 and 2000. Durham, Happy Valley, Lake Oswego, and West Linn all have 2000 median home prices more than 30 percent above the regional median. Housing values increased faster than incomes in every jurisdiction in the study area. As a ratio of housing value to income, housing is least affordable in Durham, Fairview, Lake Oswego, and Wilsonville. In these communities, housing values have risen more than four times faster than incomes between 1990 and 2000.

Average rents vary less than prices among jurisdictions but are highest in Rivergrove, West Linn and Lake Oswego. Rents in Rivergrove are substantially higher than regional averages. Rents have risen somewhat faster than income between 1990 and 2000, but rents remain closer to affordable in most communities.

**Housing production and mix.** The housing stock in the Portland metropolitan area grew by almost 24 percent from 1990 to 2000. In 2000, the share of multifamily housing units was 36 percent; from 1990 to 2000, the multifamily share of new housing units was 43 percent. Portland was the only study area for which the multifamily share of housing increased over the 1990s. Almost all of the jurisdictions in the study area gained housing units between 1990 and 2000; some, however, did not gain or even lost multifamily housing stock over the same period. Happy Valley, Maywood Park, Rivergrove, and Wood Village fall into the latter category.

Other communities gained multifamily units, but as a share of their total new housing units, very few were multifamily. For every 100 new housing units in Cornelius, Lake Oswego, Sherwood, Troutdale, or West Linn, fewer than 30 were multifamily units, a substantially lower ratio than in the study area as a whole but a substantially larger share than jurisdictions in most other study areas.

Some jurisdictions on the edges of the study area—Wilsonville, Forest Grove, Beaverton—have relatively high percentages of multifamily homes, while others—Troutdale, Happy Valley, Lake Oswego, West Linn—have relatively low percentages of multifamily units.

**Zoned density and mix.** As in other study areas, most of the land in the Portland study area is zoned for single-family residential use. Mixed-use and multifamily zones are concentrated along transportation corridors. Durham, Happy Valley, Maywood Park, and River Grove have less than 10 percent of residential land zoned for high-density use.

The share of units zoned for high-density use exhibits a similar pattern. Happy Valley, Maywood Park, and River Grove have less than 5 percent of housing units zoned for high-density use. Because zoned densities in high-density zones are relatively high, however, every other jurisdiction has nearly or more than 30 percent of all units zoned for high-density use. The study area average is 48 percent.

Total zoned residential density varies from 2.5 units per acre in Happy Valley to 19.9 units per acre in Johnson City. Besides Happy Valley, however, only Durham and River Grove are zoned for less than five units per acre. The study area average, highest among the six, is slightly more than 10 units per acre.

### Data Visualization

Patterns of planned land use and housing prices for the Portland study area are illustrated in Figures 3-14, 3-15, and 3-16. As shown in Figure 3-14, land zoned for high-density residential use is dispersed widely throughout the metropolitan area from the urban core to the urban fringe. Mixed uses are almost as widely dispersed.

The effects of this wide dispersion of high-density zones on the overall planned densities are illustrated in Figure 3-15. As shown, overall zoned densities are relatively, and almost uniformly, high. Jurisdictions with the lowest zoned densities lie in the southeast quadrant of the metropolitan area. Happy Valley stands out in this regard.

The pattern of housing prices, illustrated in Figure 3-16, is a remarkable reflection of the zoned densities in Figure 3-15. Housing prices are highest in the southeast quadrant of the metropolitan area. Lake Oswego and West

### KEY INDICATORS: PORTLAND

*Jurisdictions with the highest median home price:*

- Happy Valley (\$306,600)
- Lake Oswego (\$296,200)
- Durham (\$248,300)
- West Linn (\$246,500)

*Jurisdictions with the lowest percentage of multifamily units:*

- Happy Valley and River Grove (0 percent)
- Johnson City and Maywood
- Park (2 percent)
- Cornelius and Sherwood (17 percent)

*Jurisdictions with the lowest average zoned density (zoned units/residential acre):*

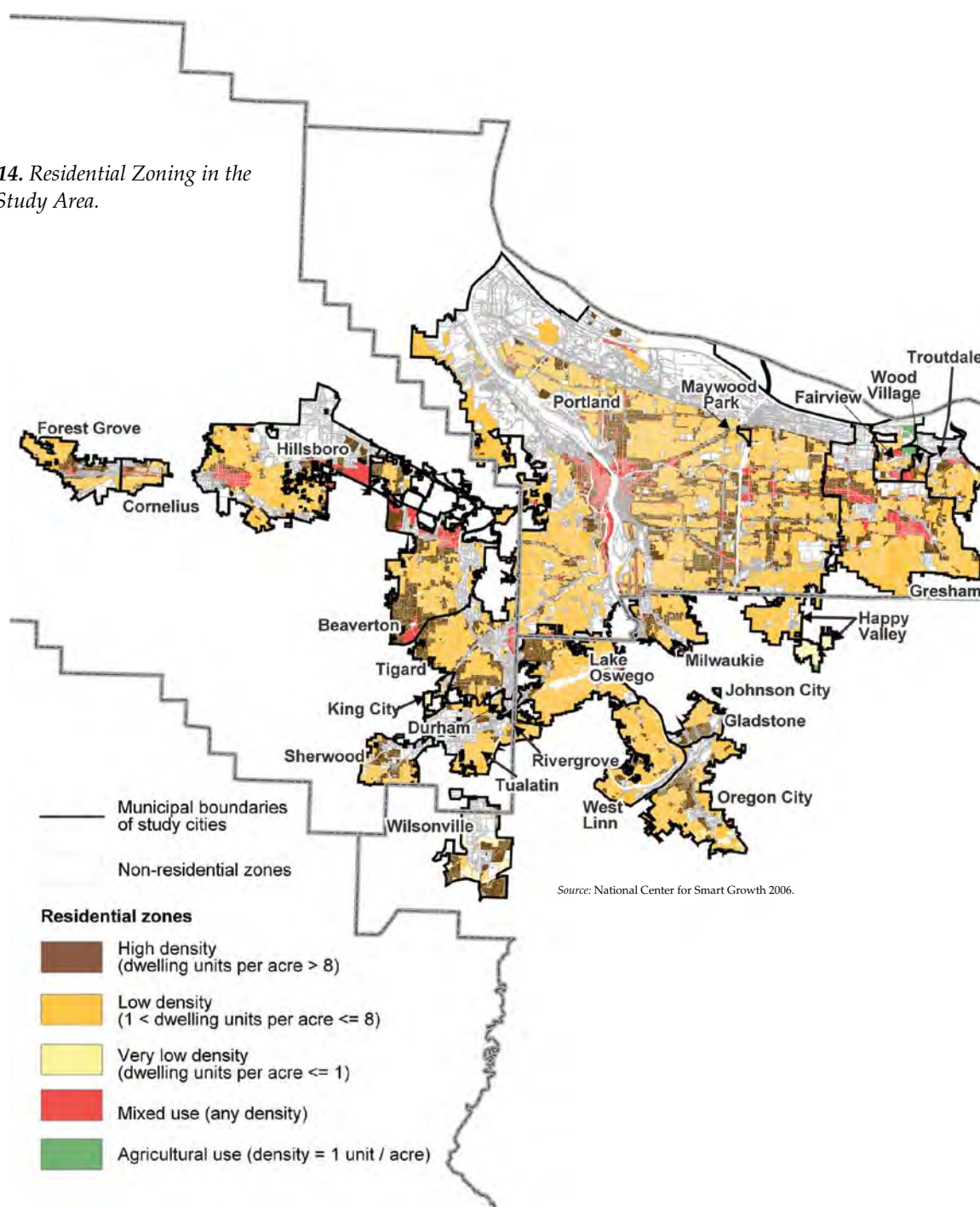
- Durham (1.05)
- Maywood Park (1.21)
- King City (1.22)
- Tualatin (1.29)

*Jurisdictions with the lowest percentage of residential acres zoned for high-density use:*

- Happy Valley (0 percent)
- Maywood Park and
- Rivergrove (1 percent)
- Durham (9 percent)
- West Linn (10 percent)



**Figure 3-14.** Residential Zoning in the Portland Study Area.



Linn have high prices and low densities, though both have areas zoned for high-density use. Happy Valley has the highest prices, the lowest overall density, and no land zoned for high-density use.

#### Key Stakeholder Interviews

We interviewed six people familiar with the public policy and development practices affecting multifamily housing development in the Portland metropolitan area. The purpose of the interviews was to gain a local perspective on the data analysis conducted as part of the case study of the study area.

Interviewees included a representative from the regional home builder's association, the executive of a policy institute focused on urban develop-

ment issues, the executive director of a nonprofit community development corporation, a developer, an attorney with 1000 Friends of Oregon (an advocacy organization dedicated to land-use issues), and a project manager from Metro, the area's regional government.

The interviewees agreed that housing affordability is a problem in the Portland metropolitan area but had mixed opinions about the impact of zoning on the development of multifamily and affordable housing in the region. In general, those interviewees directly involved in development activities felt that zoning and land-use controls (especially the UGB) constrain land supply, causing increases in land costs and limiting the affordability of new housing. At the same time, some interviewees recognized that zoning laws have improved the livability of the region and made it more attractive as a location for new development.

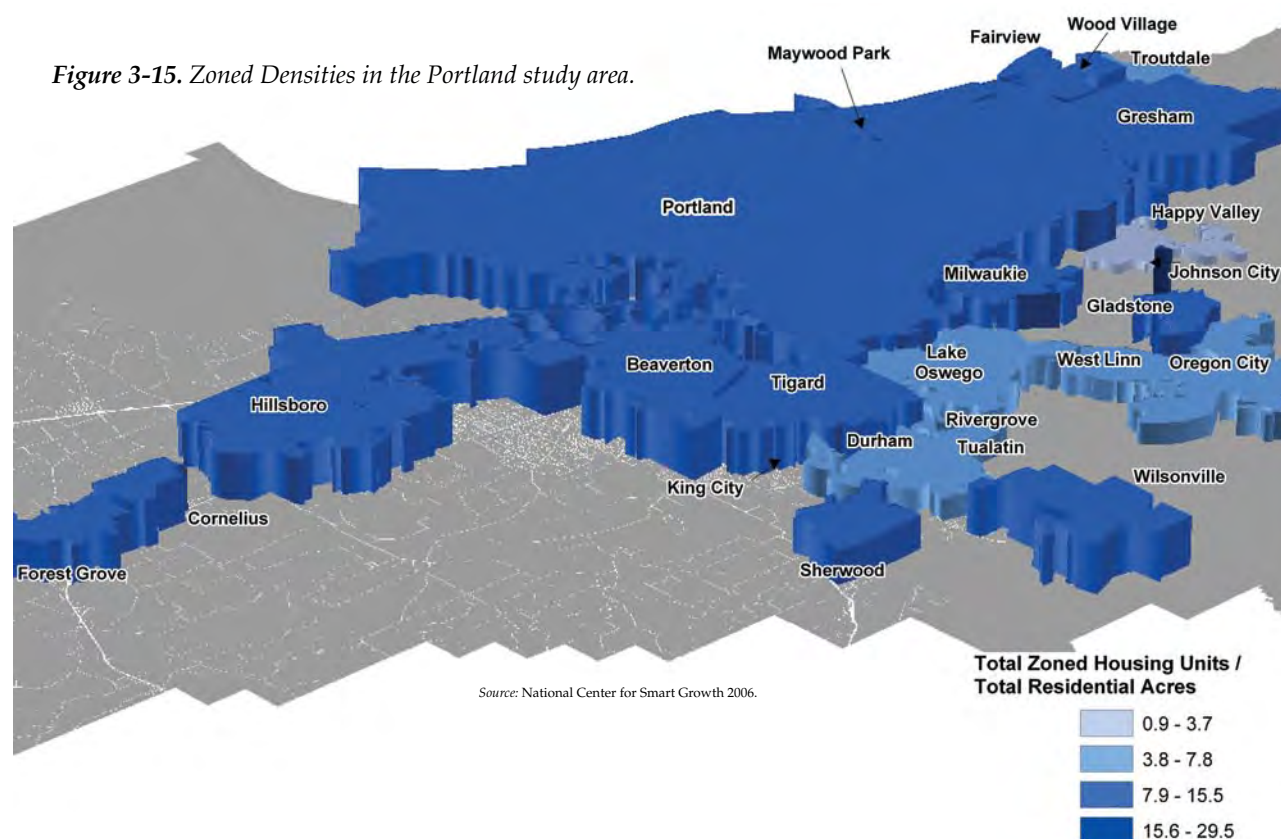
Interviewees described a number of ways that zoning and other regulations contribute to the problem of affordability in the region:

"In some communities, the problem is caused by intentional zoning decisions. Some public officials are even willing to say that they are intentionally excluding lower-value housing stock to protect property values. Sometimes, they place high impact fees on multifamily development as an additional impediment."

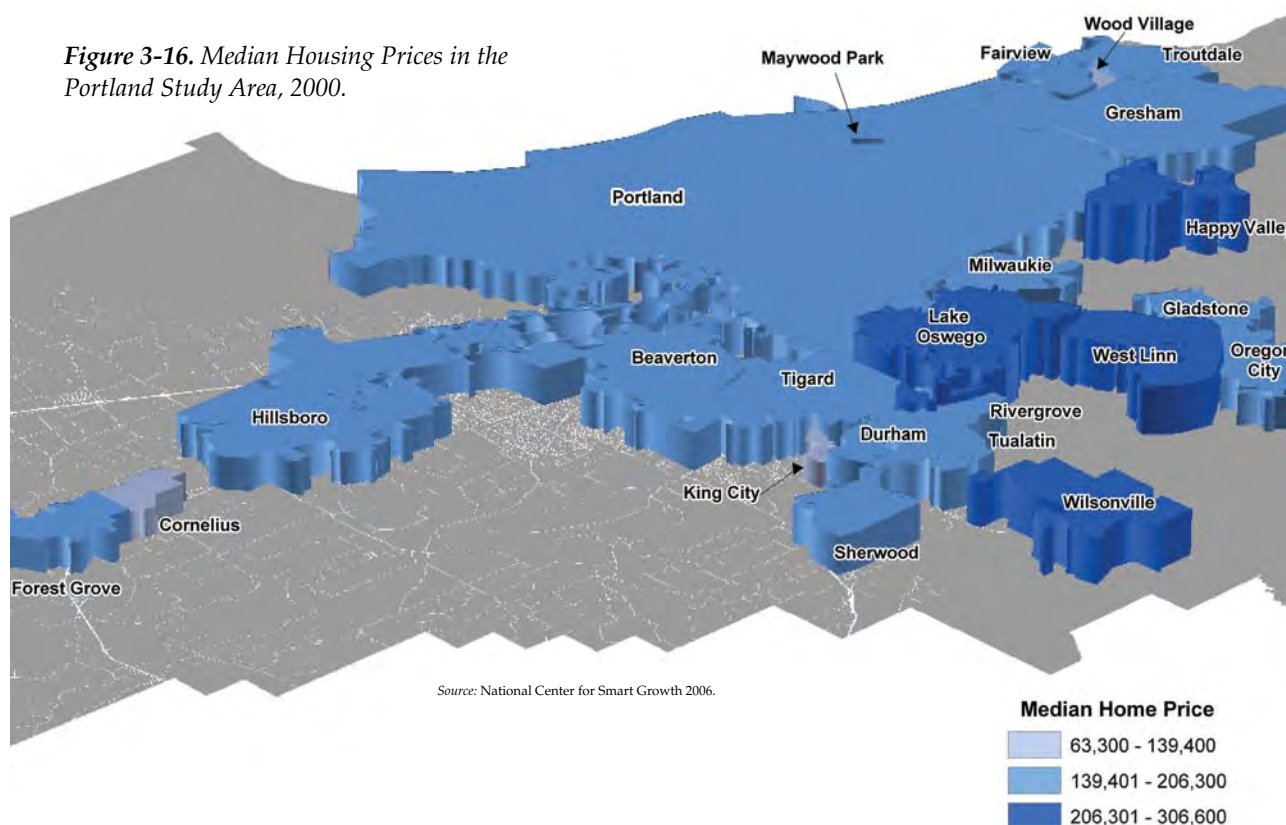
"The Urban Growth Boundary and rural downzoning have put much of the land available for housing development off-limits. This has created an 'urban cartel' of landowners who control all of the developable land and drive up the costs for everyone."

While most felt that the zoning in place in Portland contributes to a lack of adequate affordable housing in some way, all agreed that zoning alone does not drive the low-density land-use patterns. Interviewees pointed to the following additional factors:

Figure 3-15. Zoned Densities in the Portland study area.



**Figure 3-16.** Median Housing Prices in the Portland Study Area, 2000.



**Land cost.** Whether it is caused by the constrained land supply resulting from the implementation of land-use policies or the increased demand resulting from the desirability of the region as an urban area, the price of land has increased quickly over the last decade. This adds to construction costs, making it more difficult to build affordable units and discouraging developers interested in building a for-rent product.

**Building costs.** High-density development (especially development higher than three stories) is more expensive because of the more complex building materials and designs required to meet building code.

**Speculation in the housing market.** Home values have been increasing so rapidly that purchasing property has become an attractive investment option. This increases competition for units on the market and drives up the price.

**NIMBY-ism.** In some communities (especially affluent ones), the fear that multifamily housing will drive down the value of existing single-family housing leads to community opposition to dense development. Developments face an additional obstacle when community members have had poor experiences with the management of apartment complexes in the past.

**Lack of resources.** Though a regional task force has identified housing affordability as a serious problem, efforts to address the issue have been piecemeal. The region has not worked to provide incentives to developers interested in building for-rent multifamily units or to subsidize affordable unit development.

**Existing land-use patterns.** In many communities, the established patterns of residential development make parcel assemblage for larger multifamily developments difficult. Additionally, existing patterns would necessitate the removal of existing single-family homes to build denser housing options. This adds to the cost and discourages many developers.



Despite these caveats, some interviewees mentioned some specific cities where they felt that zoning regulations might be in place that limit the development of new multifamily or affordable housing units. These communities included Happy Valley, West Linn, and Lake Oswego.

It is important to note that no interviewee said he or she was certain that exclusionary zoning policies were in place in any of these communities, but that, based on their knowledge of the political climate and existing development patterns, some possibility existed that regulations might discourage new multifamily or affordable developments.

### Regulatory Analysis

This analysis looked at planning policies and regulations affecting availability of multifamily housing in Happy Valley, Milwaukie, Lake Oswego, Tualatin, and West Linn, Oregon, in the Portland study area. In this region, by virtue of a state administrative rule, the Metropolitan Housing Rule, communities must meet certain housing density minimums. Happy Valley, for example, must provide for an overall density of six or more dwelling units per net buildable acre. Milwaukie, Tualatin, and West Linn must provide for an overall density of eight or more dwelling units per net buildable acre. Finally, Lake Oswego must provide for an overall density of 10 or more dwelling units per net buildable acre. Collectively, the plans and regulations of these communities appear to be providing opportunities for multifamily housing.

### Summary

The Portland study area is growing quickly; with that growth has come relatively rapid increases in housing prices and rents as well as increased density in many of the region's jurisdictions. Planning and zoning in the Portland region are more closely monitored than in our other study areas. All local governments devise and enact zoning codes that must comply with both regional and state requirements and plans. These requirements include density and housing mix targets that encourage the development of multifamily housing. Metro, the area's regional government, requires zoning in the urbanized areas to facilitate a 50 percent multifamily/single-family housing split.

As is true in our other study regions, some variation exists among study area jurisdictions as regards the amount of land zoned for high-density use. High-density land is primarily located along major arterials throughout the region. This pattern is consistent with Metro's regional plan (the 2040 Plan) for growth. On the whole, however, most of the jurisdictions in the region appear to have adequate land zoned for multifamily development and use zoning as a tool for enforcing their multifamily development goals.

Overall, the ratio of zoned housing units to built housing units is high, while, relative to the other study areas, zoned density is about average, suggesting that increased built density is possible within the existing zoning code. Portland's high-density zoned land has the highest number of units zoned per acre of any of the regions.

Home prices also vary among study area jurisdictions, but with some exceptions, the jurisdictions with the highest median home values also have among the lowest percentages of multifamily units. Happy Valley, Lake Oswego, and Durham fall into this category, with home prices well above the median for the region, very few existing multifamily units, and a relatively low percentage of land zoned for multifamily development.

At the same time, some communities with relatively high amounts of land zoned for high-density housing are also among the most expensive. Beaverton, for example, has about 40 percent of its residential acres zoned



for high-density development, a higher percentage than all but one other jurisdiction in the study area. By Census measures, 49 percent of the city's housing units are multifamily units. Beaverton's home prices, however, are among the highest in the region.

In summary, Oregon's state policy framework makes it more difficult for jurisdictions to use zoning to intentionally limit multifamily development and zoning in the Portland study area. The effects that Portland's urban growth boundary may have on housing prices notwithstanding, zoning does more to encourage the development of multifamily housing units than to impede it.

### **SACRAMENTO, CALIFORNIA**

The Sacramento study area is located east of San Francisco in central California. Because it is located at some distance from the Pacific coast, Sacramento has not experienced the high rates of growth and increases in housing prices prevalent in other parts of California. As a result, the overall density of development is low, with a correspondingly low share of multifamily units.

Figure 3-17 provides a map of the Sacramento study area. We limited jurisdictions in the study area to 22 incorporated cities in Eldorado, Placer, Sacramento, Sutter, Yolo, and Yuba counties. The study area does not include unincorporated areas. Because of the municipal boundaries, the study area is highly fragmented and excludes significant inner-city locations. As in Minneapolis-St. Paul, the GIS data for this study area capture planned land-use designations, not zoning. Also like the data for Minneapolis-St. Paul, the density designations are coarse, and include only six residential categories.

The population of the study area grew by almost 200,000 residents from 1990 to 2000, to reach a population greater than 1 million. Several jurisdictions, however, lost population, including Citrus Heights, which lost more than 22,000 residents. Other jurisdictions grew by sizable numbers; Elk Grove, Folsom, Roseville, and Sacramento gained more than 20,000 residents; 17 cities grew by over 10 percent over the same period.

### **Regulatory Context**

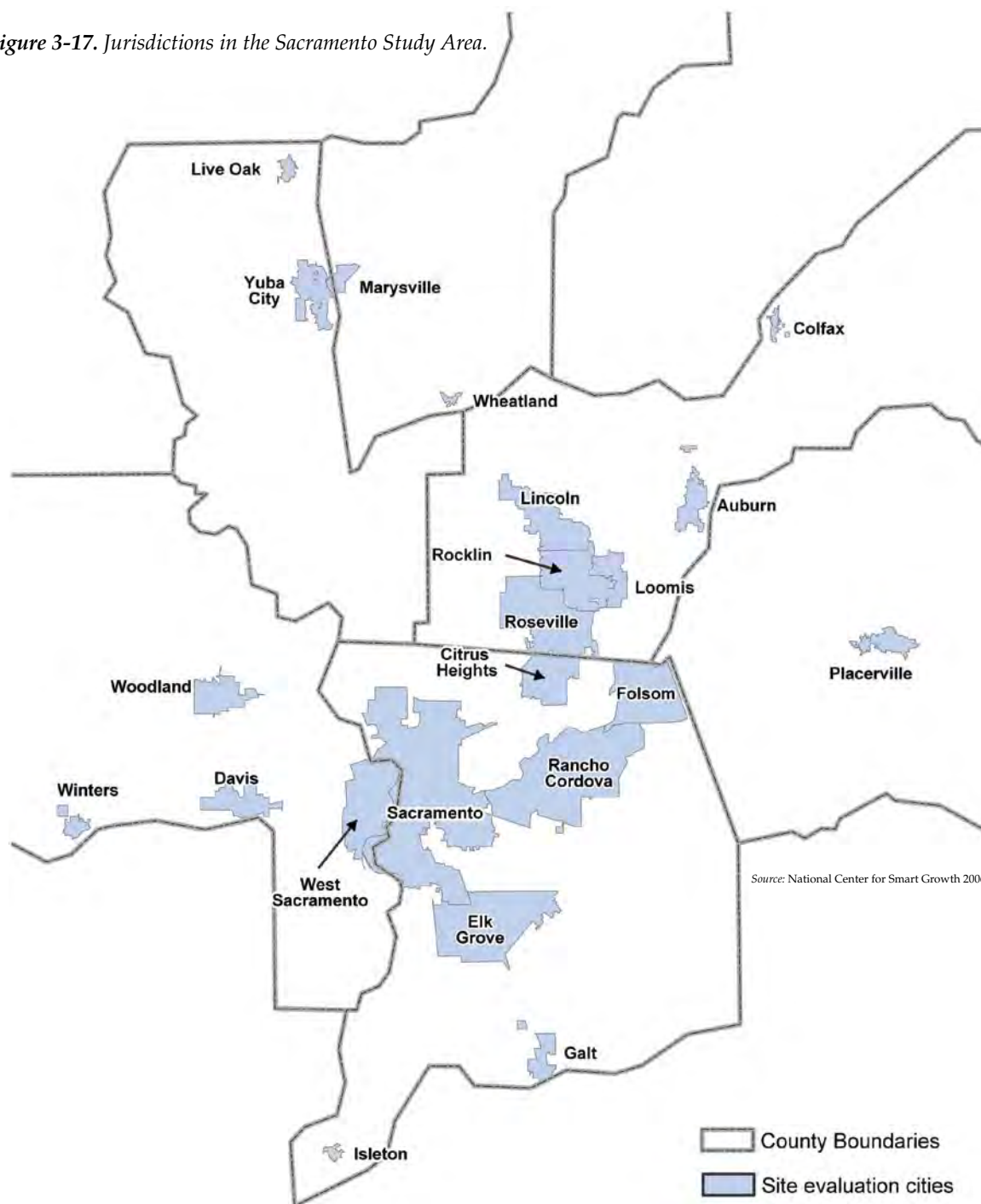
California has no overall state planning system in which local plans and regulations are reviewed by a state planning agency or commission, nor must communities advance or comply with state goals and objectives.

The California Government Code, however, does contain detailed requirements for the housing element of local plans, which must include six parts: review of the previous housing element; existing and projected needs assessment; resource inventory; identification of governmental and nongovernmental constraints on housing; quantified housing objectives; and housing programs (California Government code Section 65583). Under the statute, the primary factor in the local government's housing needs assessment must be the allocation of regional housing needs prepared by regional councils of governments (COGs) under state supervision.

To establish this allocation, the California Department of Housing and Community Development (HCD) determines each COG's share of state housing needs for four income categories (very-low, low-moderate, moderate, and above-moderate), thus covering the entire spectrum of housing need. Based on data provided by HCD relative to the statewide need for housing, each COG must then determine the existing and projected need for its region; the COG must determine, with HCD's advice, each city's or county's share.

Local governments must then include the COG's share of regional housing need in their individual housing plans. The statutes require the local

Figure 3-17. Jurisdictions in the Sacramento Study Area.



government's housing element to identify specific sites to accommodate housing needs for all household income levels and to "provide for sufficient sites with zoning that permits owner-occupied and rental multifamily residential use by right, including density and development standards that could accommodate and facilitate the feasibility of housing for very-low- and low-income households" (Section 65583(c)(1)).

Local governments must revise the housing elements at least every five years. HCD has the authority to review draft and adopted local housing elements or amendments to determine whether they "substantially comply" with the statute prior to their adoption by the governmental unit. HCD

### KEY INDICATORS: SACRAMENTO

*Jurisdictions with the highest median home price:*

- Davis (\$238,500)
- Folsom (\$228,700)
- Auburn (\$214,900)
- Rocklin (\$213,100)

*Jurisdictions with the lowest percentage of multifamily units:*

- Loomis (3 percent)
- Elk Grove (5 percent)
- Galt (11 percent)
- Live Oak and Winters (13 percent)

*Jurisdictions with the lowest average zoned density (zoned units/residential acre):*

- Colfax (0.95)
- Loomis (1.80)
- Placerville (3.41)
- Lincoln (3.62)

*Jurisdictions with the lowest percentage of residential acres zoned for high-density use:*

- Colfax, Wheatland, and Loomis (0 percent)
- Elk Grove (4 percent)
- Live Oak (6 percent)
- Rocklin (8 percent) ■

submits written comments identifying any provisions that would need to be revised or issues that would need to be addressed in order to comply with the state housing element law. Alternatively, the local government may adopt the draft element or amendment without changes, provided that the legislative body includes in its adopting resolution findings of why it believes the element or amendment “substantially complies” with the statute, despite HCD’s findings. Upon adoption, the local government must then send a copy of the element or amendment to HCD for a final review.

### Key Indicators

Because jurisdictions included in the study area were limited to incorporated areas, the Census data for some jurisdictions suffer from small-area measurement error. The GIS data represent planned land use rather than zoning and do not include mixed use. Both sources of data could result in relatively imprecise indicators.

**Housing prices and rents.** Housing prices in the Sacramento study area are relatively low and in 2000 represented only 3.3 times median household incomes. As in other study areas, however, housing prices rose quickly from 1990 to 2000 and generally outpaced increases in income. In general, the cities on the edges of the Sacramento Region have higher home values than the cities near the city center. Auburn, Davis, and Rocklin had median housing prices greater than \$200,000 in 2000. Housing prices rose by nearly \$50,000 in Auburn and Davis from 1990 to 2000.

Median rents were highest and rapidly rising in roughly the same cities where median home prices were high. Median rents were also high in Roseville and Loomis, however, and rose rapidly in Winters as well.

**Housing production and mix.** The study area added 65,000 housing units from 1990 to 2000, about 2 percent more than it added households. In 2000, multifamily units comprised approximately 28.2 percent of housing units; but of the housing units built from 1990 to 2000, the multifamily share fell to 20 percent. The 2000 share of multifamily housing units for Elk Grove and Loomis was less than 5 percent.

During the 1990-2000 period, four jurisdictions (Galt, Isleton, Colfax, and Placerville) lost housing units, and six jurisdictions (Citrus Heights, Marysville, Loomis, Live Oak, Colfax, and Winters) lost multifamily housing units. The remaining 16 jurisdictions gained multifamily housing from 1990 to 2000. Of the jurisdictions that gained both total and multifamily units from 1990 to 2000, the percentage of multifamily units for Auburn, Elk Grove, Galt, Woodland, and Yuba City was less than 10 percent.

**Planned density and mix.** Most residential land in the study area is planned for low-density use. The proportion of residential land planned for low-density use ranges between 0 percent in West Sacramento (meaning simply that there are no plans for low-density residential uses) to 98 percent in Wheatland. Colfax, Loomis, and Wheatland have no land planned for high-density use.

The share of high-density units for Colfax, Loomis, and Wheatland, of course is also zero. The density of land in high-density categories, however, is high for most jurisdictions, thus the share of units in high-density categories is much higher than the share of land in high-density land in most jurisdictions.

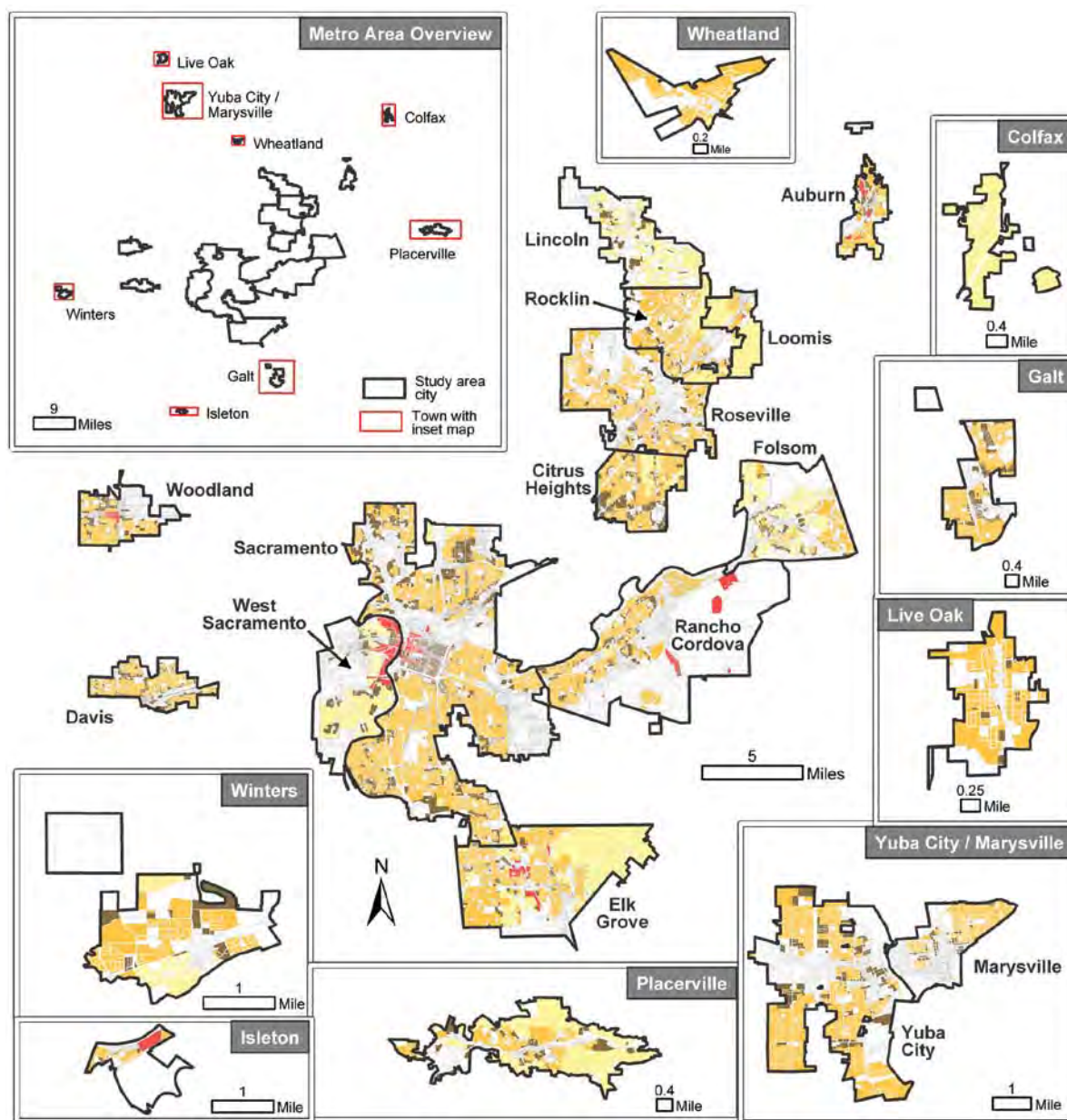
Because the density of development allowed in high-density categories in most jurisdictions is relatively high, the overall density planned for the study area falls in the middle range of the six study areas. Still, the density planned for Colfax is less than one unit per acre, and the planned density for Elk Grove, Lincoln, Loomis, Placerville, and West Sacramento is less than five units per acre. In other words, a few communities have very low density, which brings the average down.

### Data Visualization

Patterns of planned land use and housing prices for the Sacramento study area are illustrated in Figures 3-18, 3-19, and 3-20. As shown in Figure 3-18, most of the study area is planned for low- and very-low-density residential use. Sizable areas are planned for high-density use in Sacramento, but smaller high-density areas are dispersed throughout the metropolitan area. Areas planned for mixed use are uncommon but are dispersed throughout the metropolitan area.

Overall planned densities are illustrated in Figure 3-19. As shown, overall planned densities are relatively low and very low in the fringe communities of Lincoln, Loomis, Folsom, Colfax, El Dorado, and West Sacramento. There

*Figure 3-18. Planned Residential Land Use in the Sacramento Study Area.*



Source: National Center for Smart Growth 2006.



is no obvious pattern or systematic variation, perhaps in part because much of the metropolitan area is excluded from the analysis.

**Figure 3-19.** *Planned Residential Densities in the Sacramento Study Area.*

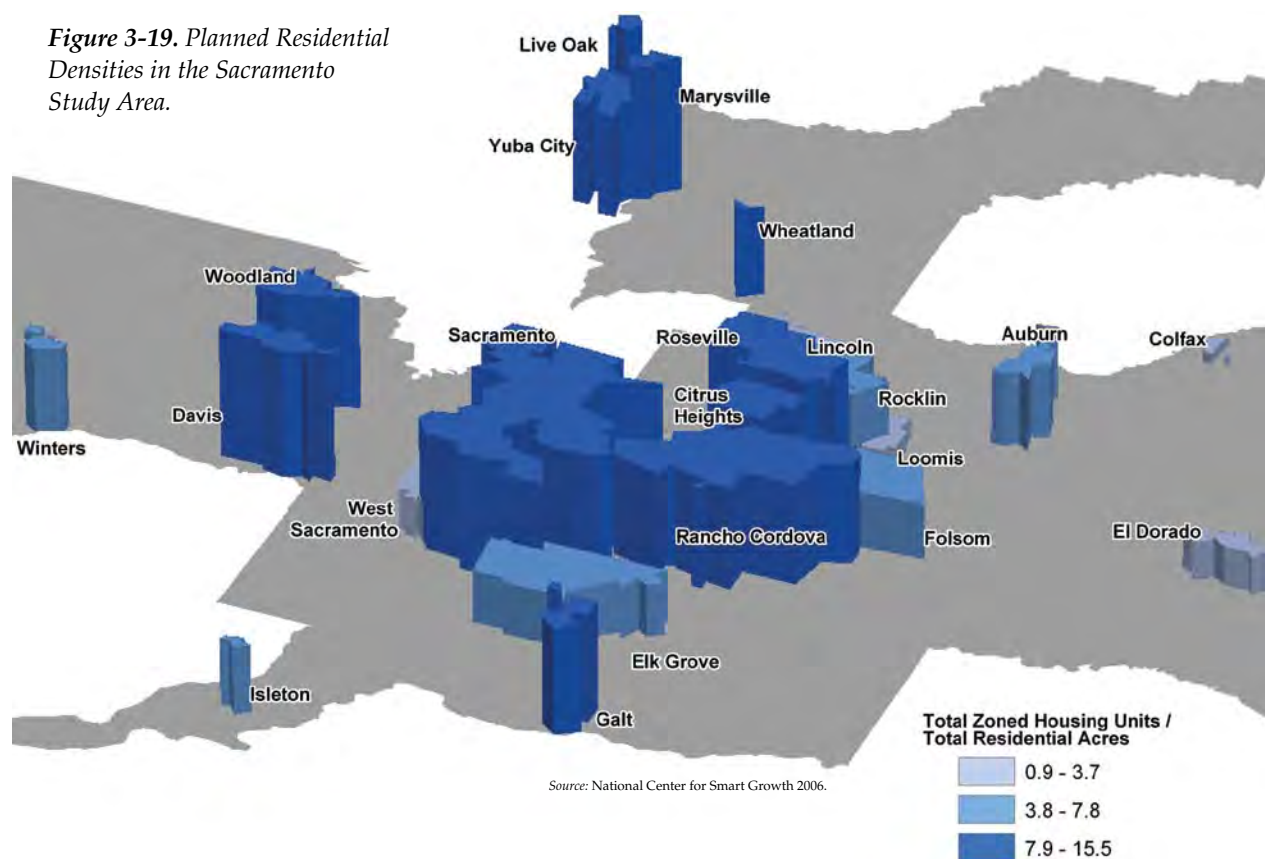


Figure 3-20 illustrates the pattern of housing prices in the study area. As shown, housing prices overall are generally low and fairly evenly distributed. The highest median home prices are in Davis, Loomis, Lincoln, Rocklin, and Auburn. Davis is a community with high prices and high densities; Colfax, Lincoln, Folsom, and Rocklin have both high prices and low zoned densities.

### Key Stakeholder Interviews

We interviewed five people familiar with the public policy and development practices affecting multifamily and affordable housing development in the Sacramento metropolitan area. Interviewees included the executive director of a nonprofit affordable housing advocacy group, a department director and a principle planner from Sacramento County Housing and Redevelopment Agency, a planner from SACOG, and the director of a nonprofit affordable housing development agency.

All of the interviewees agreed that zoning and land-use controls do contribute to the problem of housing affordability in the Sacramento area. Community opposition has led public officials in some communities to favor single-family, low-density zoning. Development standards also contribute to the problem. For example, in the unincorporated county, large setbacks from single-family zones are required even for two-story multifamily developments, and at least one parking space must be built per unit, making it difficult to find a site suitable for multifamily projects. Additionally, navigating the land-use system adds to the costs of development and the amount of time it takes to complete projects. Service development charges also can be a barrier to the creation of affordable developments.

At the same time, land-use controls are an important part of the solution to the affordability crisis. Regulation is an important tool for changing land-use patterns and encouraging the development of multifamily or affordable units. For example, Sacramento has recently passed an inclusionary zoning ordinance that requires multifamily developers to include a certain percentage of affordable units in new development. Additionally, the state requires that communities zone enough multifamily land to meet the expected demand for affordable housing. Several communities in the Sacramento area have been involved in litigation because they do not have enough land zoned for multifamily development to meet state regulations.

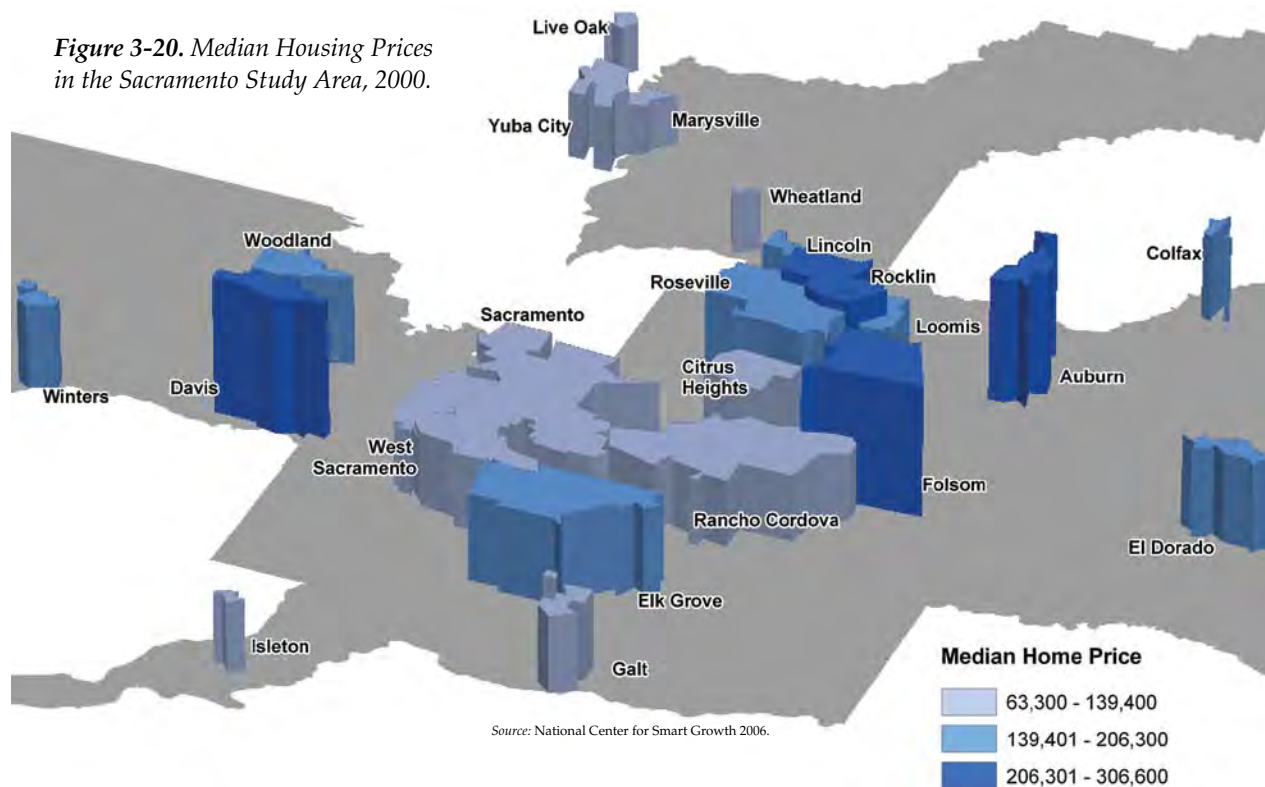
Zoning and land-use controls alone do not explain the housing affordability problem in the Sacramento area. Interviewees pointed to the following additional factors:

**Spill-over from the Bay Area market.** Housing affordability is an even larger problem in the Bay Area than in Sacramento. Some people are choosing to commute from the Sacramento area to the Bay Area because they cannot afford homes in the Bay Area or are selling their homes in the Bay Area to purchase investment homes in Sacramento. This is fueling speculative investment and driving up the housing costs in the region.

**Condo conversions.** Because there are not enough affordable for-sale units available, many for-rent apartment complexes have been converted to condominiums. This reduces the availability of affordable for-rent units throughout the region.

**Community opposition.** Some communities have older apartments that have not been well-maintained or monitored. Because people in these communities have had poor experiences with multifamily housing in the past, they are reluctant to see additional multifamily developments. And many property owners and local government representatives believe that affordable or multifamily units negatively impact property values.

*Figure 3-20. Median Housing Prices in the Sacramento Study Area, 2000.*



**Opposition from the development community.** Some in the building industry believe that community preference is for single-family homes and are unwilling to take a risk of building denser housing.

**Availability of resources to subsidize affordable development.** There are some state tax credits available for multifamily housing, but they are very competitive. Section 8 money has been overcommitted.

**Investment and speculation.** Home values have been increasing so rapidly that purchasing property has become an attractive investment option.

### Regulatory Analysis

This analysis looked at planning policies and regulations affecting availability of multifamily housing in Sacramento, Elk Grove, Davis, West Sacramento, and Woodland, California, as part of the Sacramento Region. All five of the communities below have housing elements that reflected fair-share allocations established by the SCOG's Regional Housing Needs Plan. Only West Sacramento did not have a recent (since 2000) inventory of vacant land zoned for multifamily zoning. Densities ranged widely, reaching as high as 82.5 dwelling units per net acre in Sacramento. All communities offered density bonuses for provision of affordable housing. On the basis of this analysis, it can be concluded these communities have, at least in writing, a policy and corresponding regulatory framework to support multifamily housing.

### Summary

Densities and housing prices in the Sacramento study area are relatively low, and the multifamily share of housing units is the lowest of all of the study areas. Although some Sacramento-area jurisdictions have little land designated for high-density development, the region offers weak evidence that zoning serves as a barrier to multifamily development. As with the Minneapolis–St. Paul study area, this weak evidence could result from a lack of zoning data for the entire metropolitan area.

The share of residential land planned for high-density housing by jurisdictions in the Sacramento metropolitan area ranges from zero to 20 percent. Some of the cities with the highest median home values also have among the lowest percentages of existing multifamily units. Furthermore, the comprehensive plan designations vary among the jurisdictions in the region. Some have large portions of land designated for higher-density housing, while others have little or no land planned to accommodate multifamily dwelling units. Some of these same communities have also planned to have relatively low amounts of high-density residential land available in the future.

By state law, local governments must have housing elements in their comprehensive plans that address affordable housing and explain how the jurisdiction will meet its share of regional housing need. And, although the Sacramento Area Association of Governments has no statutory review responsibilities, it is leading a regional planning effort that would raise densities considerably.

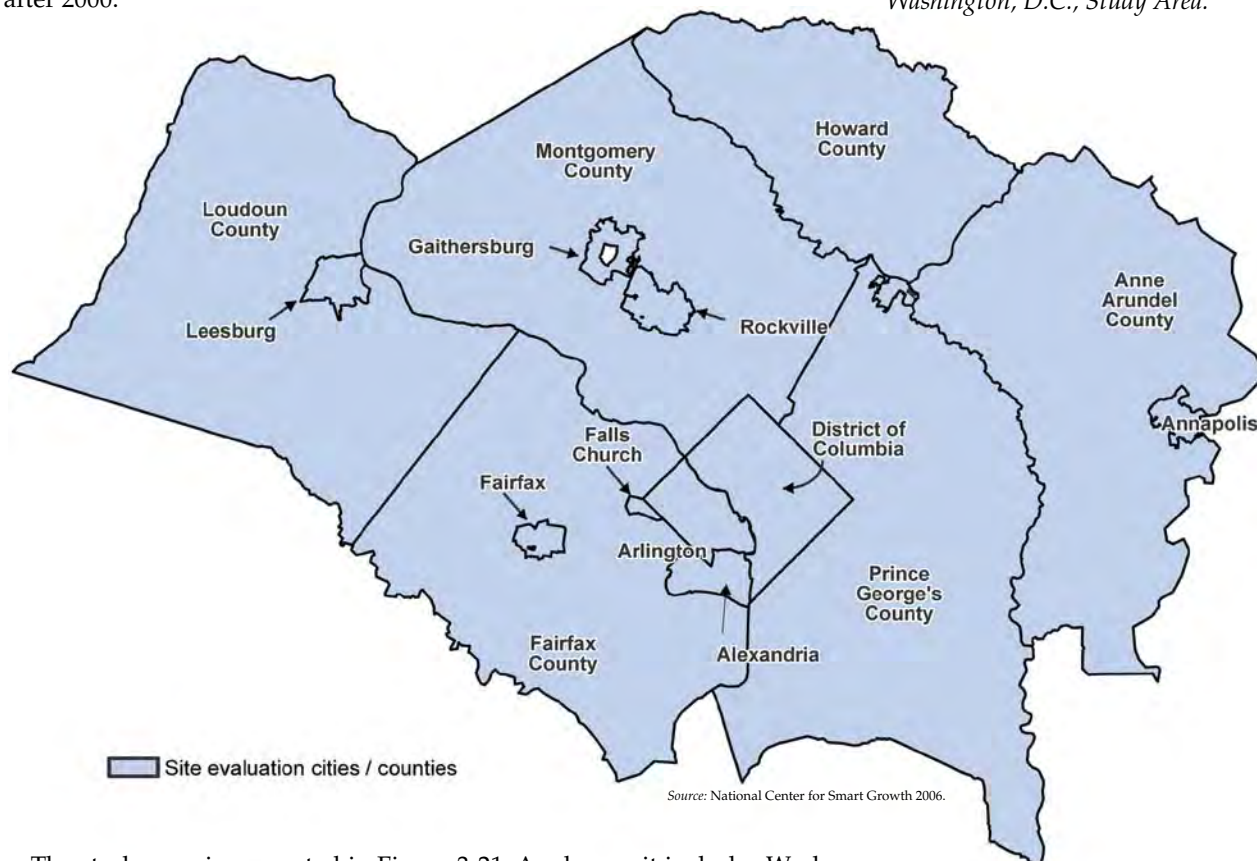
Local stakeholders interviewed in the region acknowledged that zoning presents an impediment to affordable housing in the Sacramento area, but argued that zoning is also an important part of the solution. Several interviewees pointed to inclusionary zoning codes, which require the inclusion of affordable units in new developments, as an important tool for combating the affordability crisis that has accompanied rising housing costs. At the same time, other factors, such as community and developer opposition and condominium conversions, also contribute to the problem of affordability.

### WASHINGTON, D.C.

The Washington, D.C., study area lies in the mid-Atlantic region at the southernmost end of the urban eastern seaboard. Parts of the region are old, built well before the advent of zoning in the 1920s; other parts are new and carefully planned and regulated, including the new towns of Greenbelt and Columbia, Maryland. Like many other urban areas on the eastern seaboard, the central city of Washington, D.C., continues to lose population as the region continues to grow.

Median housing prices in the Washington study area are in the midrange of the six study areas, though median rents and median incomes are the highest of the six. From 1990 to 2000, median housing prices and median rents did not rise as rapidly as in most study areas. This probably changed after 2000.

*Figure 3-21. Jurisdictions in the Washington, D.C., Study Area.*



The study area is presented in Figure 3-21. As shown, it includes Washington D.C., and all of the cities and counties that surround Washington for which zoning data were available. Unlike other parts of the country, counties are the dominant form of local government in the region. Much of the land in the region, therefore, is regulated by county zoning.

Although the region is growing rapidly, growth rates vary considerably. Loudoun County, Virginia, for example, nearly doubled its 1990 population in a decade, from 86,129 in 1990 to 169,599 in 2000. Other areas, largely built out, grew slower than the region as a whole. None except Washington lost population. The fastest-growing cities and counties—Gaithersburg, Howard County, Leesburg, and Loudoun County—are all located at the urban fringe at considerable distances from employment centers.

### Regulatory Context

**Maryland.** Maryland has a state-level planning agency, the Maryland Department of Planning (MDP). MDP provides data, research assistance, and policy



development and implementation support for local governments, communities, businesses, and organizations. MDP also provides technical assistance, local program review, and planning design services for Maryland's counties and municipalities (as provided for in Maryland Code, Section 5-201 et seq.).

This department has an Office of Smart Growth that works directly with local governments, businesses, and organizations to coordinate the implementation of proven planning strategies (as provided for in Maryland Code, Section 9-1401 et seq.). The office is responsible for administering the state's 1997 Smart Growth Act (Maryland Code Annotated, Section 5-B-01 et seq.), aimed at directing new development into "priority funding areas." Under the statute, state funding of certain growth-related projects is prohibited outside of these priority areas, which include the state's 154 municipalities, land within the Baltimore and Washington Beltways, 31 enterprise zones, and the locally designated growth areas.

The region includes the Metropolitan Washington Council of Governments (WCOG), which is the designated Metropolitan Planning Organizations for transportation planning purposes. WCOG has a housing program and has adopted a regional affordable housing policy (WCOG 2005).

As specified by the state code, Article 66B, Section 4.01 et seq., the power to plan and zone is held by local governments, either counties or municipalities. Section 4.01 specifically authorizes a county or municipal corporation to create a planning and zoning commission that can compose and implement a plan. Unlike many other states, Maryland has few municipalities, and the majority of urban development takes place in parts of the unincorporated counties. Thus, also unlike in many other states, counties play a major role in the urban development process and county zoning is potentially very influential.

**Virginia.** In contrast to Maryland, Virginia does not have a state planning department or office. Counties and cities have the power to plan and control land use, and, of interest to this research, local comprehensive plans must address affordable housing issues.

The Virginia Area Development Act, known as the "Regional Cooperation Act" (Code of Virginia, Sections 15.1-1400 et seq.), implements regional planning efforts within the state. According to state code, Section 15.1-1406. A., planning district commissions (regional planning commissions) must prepare a regional strategic plan to guide the district and the municipalities within the district. The plan must include regional goals and objectives, strategies to meet them, and methods of measuring progress toward the goals and objectives, some of which must address housing development.

Local planning may occur at the county or municipal level. The governing body of any county or municipality may classify the territory under its jurisdiction in zoning districts; it then has the authority to regulate land use and development. Like Maryland, Virginia has few municipalities and, especially in the Washington metropolitan area, considerable development takes place in the unincorporated counties and under the constraints of county zoning.

### **Key Indicators**

Jurisdictions in the Washington region are relatively large. As a result, Census data generally do not suffer from small-area measurement error, but small-area differences in housing and population changes are masked in jurisdiction wide totals or averages. Unlike all the other study areas, the GIS zoning data for this region were not obtained from a regional agency but instead from the individual cities and counties. This was possible because the number of jurisdictions with land-use authority is small and because we had obtained much of the data for previous projects. The use of local data reduces the loss of precision that occurs through regional generalization, but it increases the potential for misinterpretation of local definitions.

Because counties control most of the land use in the region, most of the jurisdictions in the region include both urban and rural land. To facilitate comparison with the jurisdictions in the other study areas, the analysis of zoning in the Washington region is limited to the urban regions (Census defined) of the counties. While this limitation facilitates inter-study-area comparison, this focus on urban areas masks the potential impact of rural zoning on housing prices and rents, and limits the analysis to small portions of the county. This is especially true for Loudoun County.

**Housing prices and rents.** Compared to other study areas, housing prices in the Washington, D.C., study area in 2000 were moderately high but rents were the highest of all. Housing values increased in every jurisdiction between 1990 and 2000. Alexandria, Arlington County, and Falls Church all had 2000 median home prices that are more than 30 percent above the regional median.

Housing values have increased faster than incomes in every jurisdiction in the study area. As a ratio of housing value to income, housing is least affordable in Alexandria, Annapolis, Arlington County, Falls Church, and Montgomery County. Average rents vary less among the jurisdictions in the study area, but are highest in Rockville, Fairfax County, and Falls Church. Rents have risen somewhat faster than income between 1990 and 2000.

**Housing production and mix.** Every jurisdiction in the study area gained housing units between 1990 and 2000. Fairfax County, the most populous jurisdiction in the region, gained the most, while Loudoun County, the most exurban jurisdiction, experienced the greatest percent increase. Anne Arundel, Howard, Montgomery, and Prince George's counties also added more than 20,000 housing units, though only Prince George's County gained more housing units than households.

Multifamily units are concentrated in Washington, D.C., Arlington County, and Alexandria, the only jurisdictions where multifamily housing units represent more than half of the housing stock. Between 1990 and 2000, Fairfax and Montgomery counties added large numbers of multifamily units while Annapolis and Fairfax City both lost multifamily housing stock. Other communities gained multifamily units, but as a share of total new housing units, very few were multifamily. For every 100 new housing units in Loudoun County, Leesburg, Prince George's County, Howard County, and Falls Church, fewer than 20 were multifamily units.

**Zoned density and mix.** In the entire study area, only 7 percent of the land is zoned for high-density use. Most counties have less than 10 percent of their land zoned for high-density use; the amount of land zoned for high-density use in Anne Arundel, Fairfax, Howard, Loudoun, Montgomery counties is less than 5 percent. For the entire region, the share of units zoned for high-density development is only 25 percent. In Howard, Loudoun, and Montgomery counties, the share is less than 20 percent.

Because the share of land zoned for high-density housing is low, overall zoned density is low—less than five units per acre. Jurisdictions zoned for less than four units per acre include Fairfax, Howard, and Loudoun counties.

### Data Visualization

Additional insights on zoning patterns and housing prices for the Washington study area are available in Figures 3-22, 3-23, and 3-24. As shown in Figure 3-22, areas zoned for high-density are highly concentrated in Washington D.C., Arlington, and Alexandria, and in isolated areas in Prince Georges County. Mixed use zones are somewhat more dispersed with some relatively large areas zoned for mixed use in Montgomery, Howard, Prince Georges, and the urban portions of Loudoun Counties.

#### KEY INDICATORS: WASHINGTON, D.C.

*Jurisdictions with the highest median home price:*

- Falls Church, Virginia (\$277,100)
- Arlington County, Virginia (\$262,400)
- Alexandria, Virginia (\$252,800)

*Jurisdictions with the lowest percentage of multifamily units:*

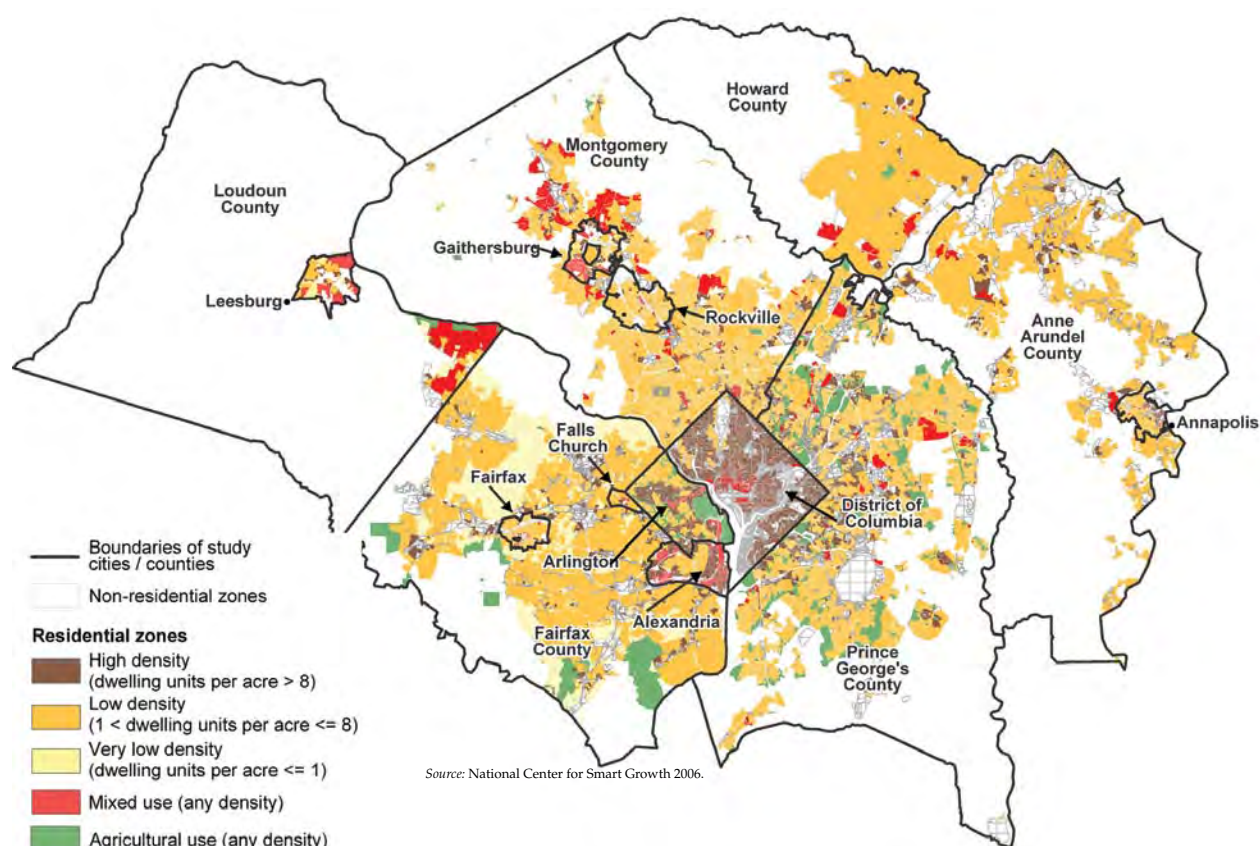
- Loomis (3 percent)
- Elk Grove (5 percent)
- Galt (11 percent)
- Live Oak and Winters (13 percent)

*Jurisdictions with the lowest average zoned density (zoned units/residential acre):*

- Colfax (0.95)
- Loomis (1.80)
- Placerville (3.41)
- Lincoln (3.62)

*Jurisdictions with the lowest percentage of residential acres zoned for high-density use:*

- Colfax, Wheatland, and Loomis (0 percent)
- Elk Grove (4 percent)
- Live Oak (6 percent)
- Rocklin (8 percent)



**Figure 3-22.** Residential Zoning in the Washington, D.C., Study Area.

The stark decline in zoned density is even more apparent in Figure 3-23. As shown, the overall zoned densities of Washington, D.C., Alexandria, Arlington, and Gaithersburg clearly stand out from the relatively low overall residential densities in the surrounding counties.

Figure 3-24 illustrates the pattern of housing prices in the study area. As shown, Fairfax and Montgomery Counties—both of which have low overall zoned densities—have the highest median housing prices. Again, the contrasts illustrated by Figures 3-23 and 3-24 do not provide prima facie evidence that zoning represents a barrier to multifamily or high-density development in these communities, but they do provide insights about good places to look.

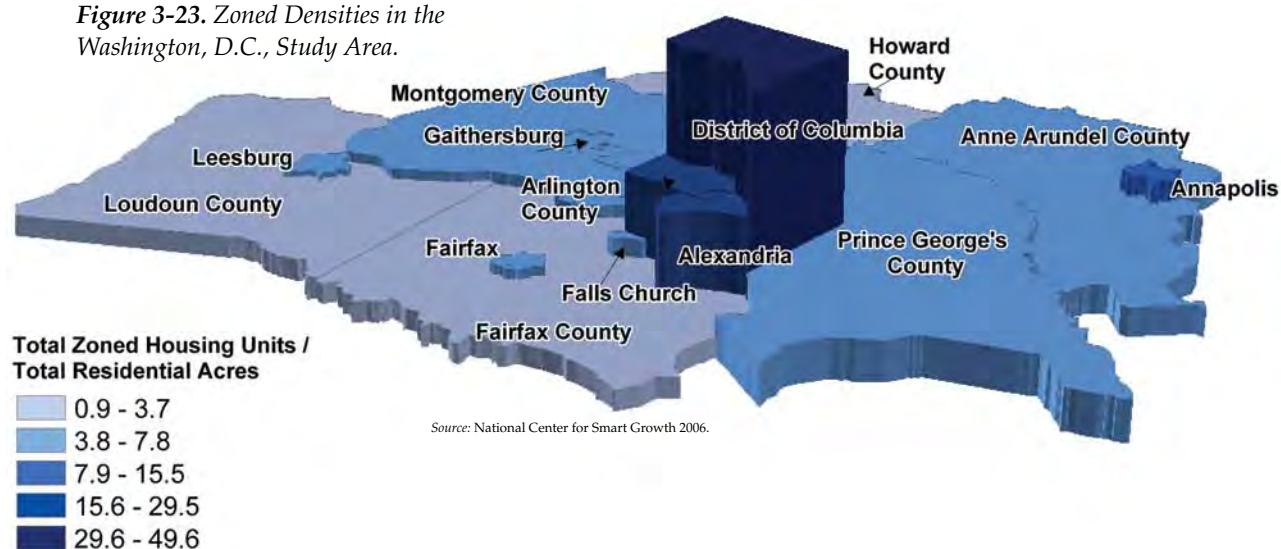
### Key Stakeholder Interviews

We interviewed three people familiar with the public policy and development practices affecting multifamily housing development in the Washington, D.C., metropolitan area. Interviewees included a senior planner from Annapolis, an upper management representative from the Maryland Department of Planning, and a long-range planner with Montgomery County.

The interviewees agreed that housing affordability is a problem in the metropolitan area but had mixed opinions zoning's effect on the development of multifamily and affordable housing in the region. Many residents and some public leaders believe that increased density leads to an increased strain on public resources; some communities may actively seek to reduce the amount of higher-density housing for this reason. One way that communities do this is through adding development or impact fees to multifamily developments, or by adding complexity to the development review process. Rather than excluding denser development, some communities have intentionally recruited luxury housing as a means of economic development for the community.



*Figure 3-23. Zoned Densities in the Washington, D.C., Study Area.*

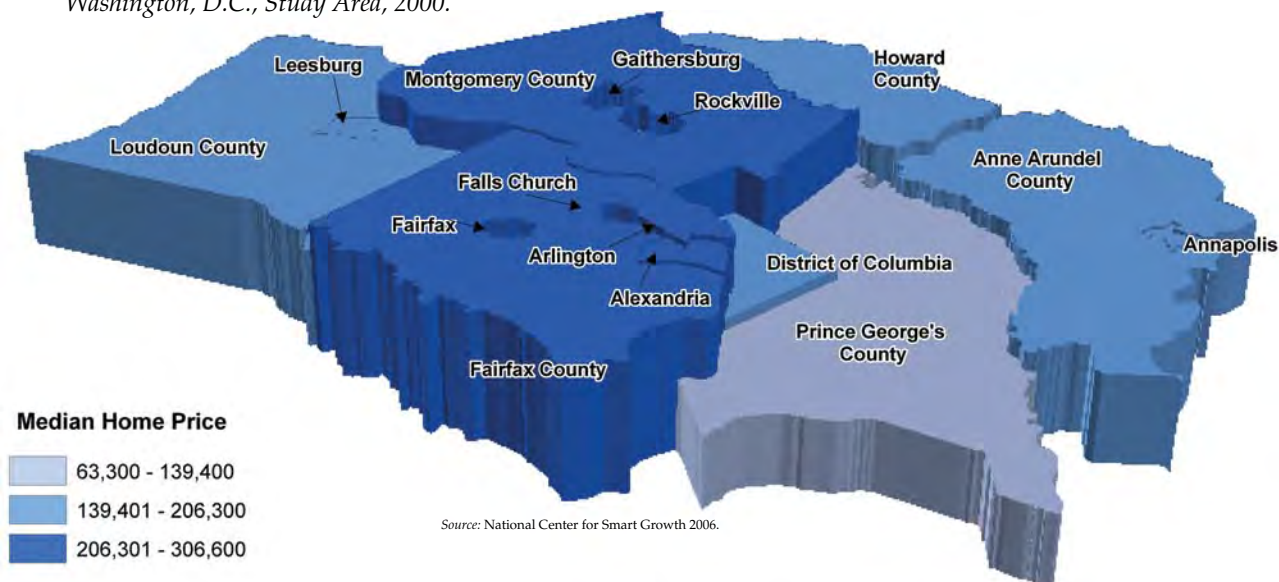


While most felt that the zoning in place in the D.C. metro area contributes to a lack of adequate affordable housing in some way, all agreed that zoning alone does not drive the low-density land-use patterns. Interviewees pointed to the following additional factors.

**Perception of housing scarcity.** The interest rates for mortgages have decreased in recent years, encouraging people to enter the housing market who might not otherwise have done so. Media attention leads people to believe there is a lack of available housing units for purchase, and many are buying whatever they can find as quickly as they can. This increased demand leads to increased prices.

**Speculation in the housing market.** Compounding this perceived lack of supply is an increase in speculative purchasing of homes. Because home values have been increasing so rapidly, purchasing property has become an attractive investment option. This increases competition for units on the market and further drives up the price.

*Figure 3-24. Housing Prices in the Washington, D.C., Study Area, 2000.*



**Goal of protecting rural areas.** Especially in unincorporated areas, many land-use regulations have been implemented to protect farmland and to constrain urban growth. These policies do contribute to lower density development but do not have the intention of reducing the availability of affordable housing. One interviewee stated that Loudon County, for example, is very interested in preserving rural areas, and that, to accomplish both that goal and the goal of providing housing, they zoned land for low-density development.

**Lack of public services.** Many areas do not have the sewage or water capacity to allow for higher-density development. This is especially true in unincorporated areas where the cost of extending urban services is prohibitively expensive. At least one interviewee noted, however, that some local governments may choose not to increase services to certain areas to ensure that lower-density development patterns are maintained.

**NIMBY-ism.** In some communities (especially affluent ones), the fear that multifamily housing will drive down the value of existing single-family housing leads to community opposition to dense development. Developments face an additional obstacle when community members have had poor experiences with the management of apartment complexes in the past.

Despite these caveats, some interviewees mentioned some specific jurisdictions where they felt that zoning regulations may limit the development of new multifamily or affordable housing units. These communities included Anne Arundel, Loudoun, and Howard Counties.

Interviewees also mentioned, however, that many of these communities may have zoning in place that limits multifamily development for reasons other than excluding affordable housing: most notably, some areas do not have urban services available (especially sewer), and there is an interest in preserving open space and rural development in unincorporated areas. Further, Montgomery County, which does have relatively low-density development, has a nationally recognized program of inclusionary zoning that promotes the inclusion of affordable units in planned developments. Low-density development there is not necessarily associated with a lack of affordable housing.

### Regulatory analysis

The planning policies and land-use regulations of the five jurisdictions we studied in the D.C. area support the location and construction of multifamily housing at appropriate density ranges. In the case of Howard County, however, the lack of specified densities in the general plan for the county may pose a problem in future rezonings, since the plan does not provide clear guidance about the location of future multifamily development. All of the jurisdictions address affordable housing in some way in their plans and land-use regulations; of the group, Fairfax County has the strongest provisions.

### Summary

The Washington, D.C., metropolitan area is a large, diverse, and, in recent years, rapidly growing area. The study area includes several of the richest and fastest-growing counties in the country and one of the poorest and most challenged central cities. Even so, housing affordability measures for metropolitan Washington are consistently among the lowest in the nation, overall densities are relatively low, and housing production rates, especially multifamily housing production rates, are low relative to population growth.

The regulatory and institutional context of the study area is complicated. In addition to two states and a federal district, the region includes a Council

of Government and an MPO, the National Park and Planning Commission for the Washington suburbs in Maryland, seven counties, and many municipalities. All seven counties but only nine municipalities are examined in detail here.

Much is often made of the difference in regulatory environments between the Dillon Rule State of Virginia and the Smart Growth State of Maryland, but the regulatory environments in the rich, rapidly growing urban counties of Virginia and Maryland are probably more similar to each other than they are with poorer, slow-growing counties in the same state. When it comes to land-use policies, WashCOG is largely irrelevant. Though municipalities in both Maryland and Virginia have zoning authority, counties in both states are the dominant form of government, have extensive zoning authority, and do not hesitate to use it. Thus, zoning by counties is a pervasive and influential across the study area, though the influence of zoning is complicated in Maryland by interactions with other state and local land-use tools.

Because counties play such a major role in land-use governance in the study area and because annexation is relatively rare, perhaps the most significant use of zoning in the region is to identify developable land. Because of the strength of the Washington, D.C., economy, urban development is financially viable in almost the entire region. Zoned densities in the rural tier, rural reserve, agricultural preserve, or outside the priority funding area, however, range from 1 to .02 units per acre. It is difficult to ascertain the extent to which rural zoning in the aggregate affects housing prices or whether development is deflected toward the central city or the distant exurbs. But for better or for worse, there is little doubt that densities would be much higher in the rural tiers of Montgomery, Fairfax, Alexandria, Howard, Prince Georges', and Anne Arundel counties if zoning would permit higher densities.

Zoning in urban areas varies in density from 3.11 in Howard County to 15.87 in Arlington County. Based on measures of net total density, total land zoned for high-density development, and existing multifamily share, it appears as though high-density, multifamily development is less welcome in Howard and Loudoun counties than in other parts of the metropolitan area, though these are suburban counties where the demand for high-density housing may be low. There is little doubt, however, that development pressures on zoning constraints are greater in the affluent and growing counties than in the poorer, slow-growing counties of Prince George's and the central city of Washington, D.C. In the affluent counties, even in areas zoned for high-density or mixed use, high-density development is often prevented or prolonged by other regulatory instruments, procedural delays, and community opposition. In Maryland, anecdotes abound about projects approved only for densities far below that allowed by zoning. That said, regardless of zoning, a high-density and high-quality development would be welcome almost anywhere in Washington, D.C., yet encounter significant formal and informal opposition in Montgomery County.

In sum, it is relatively clear that zoning is a powerful and influential instrument in the Washington, D.C., metropolitan area. Low-density zoning in the rural areas of Virginia and Maryland clearly keep densities in these areas below their market-determined levels. The merits of such policies we do not address here. Further, evidence exists that zoned densities, on average, are exceptionally low in some jurisdictions and in some parts of many jurisdictions. In these locations, it is clear zoning represents a barrier to high-density development. Dillon's rule and an anti-regulatory culture impose constraints on the ability of local governments to use zoning as a regulatory barrier in Virginia; there are few such constraints in Maryland.

### STATISTICAL ANALYSIS

To provide an overall assessment of the relationship between zoning and housing development, housing prices and rents, we conducted some simple statistical analyses. These analyses involved the computation of correlation coefficients between key variables and the estimation of regression equations using data from all of the study sites. As with nearly all statistical analyses, statistically significant relationships do not reveal cause and effect, but do provide insights about the nature of relationships between critical variables. The key relationships explored were those between residential zoning and housing construction and between housing construction and housing prices and rents.

Statistical analysis began with an examination of bivariate correlations between several key variables. The results are presented in Table 3-2.

TABLE 3-2. STATISTICAL ANALYSIS RESULTS, BIVARIATE CORRELATIONS

		Change in Housing Units (1990-2000)	Change in Median Household Value (1990-2000)	Change in Multifamily Housing Units (1990-2000)	Change in Median Contract Rent (1990-2000)
Change in Housing Units (1990-2000)	Pearson Correlation	1	-0.091	0.867	-0.010
	Sig. (2-tailed)		0.266	0.000	0.908
	N	150	150	150	150
Change in Median Household Value (1990-2000)	Pearson Correlation	-0.091	1	0.001	0.571
	Sig. (2-tailed)	0.266		0.993	0.000
	N	150	150	150	150
Change in Multifamily Housing Units (1990-2000)	Pearson Correlation	0.867	0.001	1	0.042
	Sig. (2-tailed)	0.000	0.993		0.609
	N	150	150	150	150
Change in Median Contract Rent (1990-2000)	Pearson Correlation	-0.010	0.571	0.042	1
	Sig. (2-tailed)	0.908	0.000	0.609	
	N	150	150	150	150
Housing Units in 1990	Pearson Correlation	0.725	-0.107	0.633	-0.076
	Sig. (2-tailed)	0.000	0.192	0.000	0.355
	N	150	150	150	150
Multifamily Housing Units in 1990	Pearson Correlation	0.394	-0.070	0.367	-0.039
	Sig. (2-tailed)	0.000	0.397	0.000	0.634
	N	150	150	150	150
Zoned Housing Units	Pearson Correlation	0.776	-0.059	0.651	-0.085
	Sig. (2-tailed)	0.000	0.473	0.000	0.300
	N	150	150	150	150
Zoned High-density Housing Units	Pearson Correlation	0.405	0.081	0.418	-0.065
	Sig. (2-tailed)	0.000	0.327	0.000	0.430
	N	150	150	150	150

Source: National Center for Smart Growth 2005.

As shown, *change in housing units* (1990-2000) is significantly correlated with several other indicator values. Not surprisingly, *change in housing units* is significantly positively related with *housing units* (1990), *multifamily housing units* (1990), and *change in multifamily housing units* (1990-2000). More interestingly, *change in housing units* (1990-2000) is significantly correlated with *zoned housing units*. This suggests that jurisdictions with more zoned development capacity realized greater growth in housing units between 1990 and 2000.

As also shown in Table 3-2, *change in multifamily housing units* is significantly positively related with *housing units* (1990), *multifamily housing units* (1990), and *change in housing units* (1990-2000). Furthermore, *change in multifamily housing units* (1990-2000) is significantly correlated with *zoned high-density housing units*. This suggests that jurisdictions with more land zoned for high-density development realized greater growth in multifamily housing units between 1990 and 2000.

As also shown in Table 3-2, *change in median housing value* and *change in median rents* are not significantly correlated with any of the variables correlated with changes in housing units.

To explore these relationships further, we estimated several regression equations. Two of these equations are presented below.

Equation 1 reveals that *change in housing units* is negatively related to *housing units* (1990), positively related to *change in population* (1990-2000), *change in median housing value* (1990-2000), and not related to *change in median household income* (1990-2000). Furthermore, *change in housing units* is positively related to *zoned housing units*, holding other things constant. There

Equation 1: Change in Housing Units (1990-2000)	Equation 2: Change in Multifamily Housing Units (1990-2000)
-176.27	774.61
-.07** (Housing Units 1990)	-.03** (Housing Units 1990)
+.35** (Change in Population 1990-2000)	+.10** (Change in Population 1990-2000)
+.01** (Change in Median Housing Value 1990-2000)	+.01 (Change in Median Contract Rent 1990-2000)
-.01 (Change in Median Household Income)	-.03 (Change in Median Household Income 1990-2000)
+.04** (Zoned Housing Units)	+.02** (Multifamily Zoned Housing Units)
- 376 (Miami)	- 605 (Miami)
+549 (Boston)	-638 (Boston)
+148 (Sacramento)	-1027** (Sacramento)
+114 (Minneapolis)	-1260** (Minneapolis)
+1210 (Washington D.C.)	-1138 (Washington D.C.)
R <sup>2</sup> = .97	R <sup>2</sup> = .73

\*\* Significant at the 99 percent level.

Caption???????????

Figure 3-25. Regression  
Equations No. 1 and No. 2.

were no significant differences in housing production between study areas after controlling for the above variables.

Equation 2 reveals that *change in multifamily housing units* is positively related to *housing units* (1990), to *change in population* (1990-2000), not related to *change in median contract rents* (1990-2000) and *change in median household income* (1990-2000). Furthermore, *change in multifamily housing units* (1990-2000) is positively related to *zoned high-density housing units*, holding other things constant. After controlling for the above variables, *change in multifamily housing units* was lower in Sacramento and Minneapolis than in Portland.

It is important again to note several limitations of these results. First, the zoning indicators measure zoning capacity near the end of the period over which growth is measured, not the beginning. Further, zoned capacity includes both capacity on vacant land and capacity on developed land. Finally, correlation does not imply causation. Jurisdictions that zone more land for residential use in general and for high-density development in particular may not realize greater increases in housing and multifamily housing, respectively. But it is more likely that high levels of zoning capacity cause increases in housing stocks than for large increases in housing stocks to cause increases in zoning capacity.

These findings thus suggest that zoning does influence the growth of housing stock in general and the growth of multifamily housing stock in particular. The results do not indicate that an increase in housing stock lowers housing prices or that an increase in multifamily housing stock lower rents.

### SIMULATION EXERCISE: METROSCOPE

MetroScope is a regional-level forecast model used by Metro (the regional planning agency of Portland, Oregon) to predict where employment and housing are likely to locate. With the assistance of Metro staff, this study used MetroScope to provide a look at the connection between zoning and future housing development patterns on a regional level.

Appendix G describes the MetroScope model and presents the results that the model generated. This subsection briefly describes the MetroScope model, the two model runs, and the implications of the results for this study.



MetroScope's main purpose is to predict where employment and housing are more likely to locate within the Portland-Vancouver Metropolitan Statistical Area (MSA), given land supply and capacity, market demand factors, and the expected amount of growth in population and jobs. Supply is calculated from estimates of vacant land and land that could support infill or redevelopment. Local zoning is overlaid on this supply of available land to determine the land's capacity for accommodating expected housing or employment growth.

In this study, we were primarily concerned with the land's capacity to accommodate new housing. MetroScope assumes that households in the Portland-Vancouver MSA will make housing location choices that meet their desires and are affordable for their household income levels. Housing market demand is predicted based on the following factors:

- The location and amount of housing capacity, by type of housing
- Household characteristics (income, household size, etc.)
- Proximity to employment centers
- Relative prices of housing units

The model also adjusts for construction costs, tenure choice, housing type choices, and utility preferences.

This study used the MetroScope model to simulate two scenarios using real data for the Portland-Vancouver MSA:

- **Scenario 1: Baseline.** This baseline scenario uses the residential capacities, based on local plans currently in place, in jurisdictions throughout the region to determine where residential growth is likely to occur.
- **Scenario 2: Increased density.** In this scenario, the residential densities are significantly increased in several jurisdictions: Happy Valley, Milwaukie, Lake Oswego, Tualatin, and West Linn.

The MetroScope results (i.e., the comparison of the results of Scenario 1 and Scenario 2) illustrate that housing demand and supply forces act within a regional market. Changes in the demand for and supply of single-family, high-cost housing in more exclusive communities will result in changes in the demand for and supply of housing units of all types in other jurisdictions in the region.

The MetroScope model runs also illustrate which jurisdictions have an incentive to enact policy barriers to the development of higher-density housing units. Given the parameters of the model run, it predicts a market pattern that is potentially counterintuitive: poorer or middle-income communities have a greater incentive to adopt barriers to multifamily development than do communities with more expensive housing options. The reasons:

- Without intervention, lower-income areas typically get housing for lower-income residents. When these communities restrict the amount of land available for higher-density development or increase the land available for lower-density development, they are positioned to capture any higher-end development that might spill over from neighboring communities.
- At the same time, upper-income areas will continue to see development that caters to an upper-income demographic, even if that development is higher-density development.

Simply put: poorer and middle-income communities have more to gain from enacting exclusionary policies than upper-income communities have to lose from allowing denser development.

Within the context of this report, the MetroScope model runs support the point that the effects of jurisdictional zoning decisions on local and regional housing markets are rarely straightforward. Higher-priced communities may enact exclusionary zoning policies that have the effect of increasing more expensive high-density development in neighboring communities, while communities with a less expensive housing stock may increase the overall value of their housing stock by limiting the amount of higher-density development they allow.

## CHAPTER 4

**Conclusions**

**T**he objective of this study was to examine, on a pilot basis, whether zoning impedes the development of higher-density, multifamily housing in growing metropolitan areas. The research produced a variety of development and regulatory indicators in an attempt to identify evidence of regulatory barriers to the development of new multifamily housing. The presumption that motivates the analysis is that multifamily represents the most affordable type of housing. That presumption was not, however, evaluated in the study.

This chapter reviews the results of the analysis and discusses their implications for the key research questions.

### KEY FINDINGS FROM THE STUDY-AREA EVALUATIONS

Because the study areas varied widely in regulatory frameworks, data quality and development patterns, each provided unique insights. For example:

- In the Boston study area, where housing prices and rents are high and rising, there was clear evidence of barriers to multifamily housing. Although a significant share of the existing housing stock is multifamily, many communities have little or no land zoned for multifamily use, and multifamily housing starts have fallen precipitously. Analyses of local zoning codes and regulations also support the conclusion that there exist regulatory barriers to multifamily development.
- In the Miami study area, housing prices are high and incomes are low. But in much of the study area, the overall density of development is high, and many communities have significant land zoned for higher-density use. In many higher-density jurisdictions, housing prices and rents are also high. This makes clear that higher-density communities are not necessarily affordable communities.
- In the Minneapolis-St. Paul study area, housing is relatively affordable and development densities are low. Land planned for higher-density development is scarce, but spread relatively evenly throughout the metropolitan area. Little evidence of barriers is present in local zoning ordinances and plans. The results suggest that oversight by the Metropolitan Council might have mitigating effects.
- In the Portland study area, housing prices and rents rose rapidly over the last decade. But despite increasing scarcity of developable land, significant quantities of land are zoned for multifamily use throughout the metropolitan area, and housing and rents remain below many other metropolitan areas. The results suggest that oversight of zoning by a regional government not only fosters the creation of high quality GIS data, but mitigates barriers to the development multifamily units.
- In the Sacramento study area, prices and rents are relatively low, as are development densities. Although zoning data were not available, data on planned land use portend a significant increase in future densities. It is not clear that data on planned land use is well suited for analyzing barriers to multifamily housing, but it is clear that low-density communities are not necessarily unaffordable communities.
- In the Washington, D.C., study area, large, low-density suburban counties surround a relatively dense central city. Many of these counties have both significant amounts of land zoned for higher-density use and affirmative affordable housing programs. But housing production, especially higher-density housing production, remains sluggish. The results suggest zoning is not the only barrier to affordable housing.

### EVIDENCE ON KEY RESEARCH QUESTIONS

The principle purpose of this research is to address two hypotheses:

1. It is possible to use local GIS data, data visualization, and case study techniques to gain new insights on the effects of zoning in select metropolitan areas.
2. Based on the evidence obtained in select metropolitan areas, zoning can impose a barrier to the construction of higher-density multifamily housing

The evidence regarding Hypothesis 1 is mixed. An underlying motivation for this study was the following presumption: with GIS data on local

zoning regulations, it would be easy to identify where zoning was a barrier to higher-density or multifamily housing. In practice, it is not that simple. While the display and analysis of GIS and census data helped gain insights on inter- and intra-metropolitan zoning patterns, it was not generally possible to identify the unique impacts of zoning or precisely where and when zoning imposed regulatory barriers. The reasons are multiple:

- Comprehensive GIS zoning data are not available for most metropolitan areas and collecting and compiling them from the various jurisdictions is an arduous and costly process. Even in metropolitan areas where such data are available, the data are often incomplete and poorly suited for comparative analysis. Portland is a stark exception.
- Even where the zoning data are relatively good, identification of the effects of zoning is limited by the lack of data on vacant land, public infrastructure, and other environmental and regulatory constraints on development capacity.
- In several study areas, jurisdictions with high percentages of multifamily units have high median home prices and rents. This suggests that higher-density communities are not always affordable communities.
- In several study areas, jurisdictions with low percentages of multifamily units also have low housing prices and rents. This suggests that low-density communities are not always unaffordable communities.
- The GIS and statistical analysis was adequate for identifying broadly where housing, including multifamily housing, is allowed and built. It was less effective in isolating the reasons for those patterns or the effects of zoning on development patterns.
- When the GIS data were of high quality, and when the data were carefully analyzed from a variety of perspectives, however, it was not difficult to identify where zoning represents a likely barrier to multifamily or higher-density development.

*While the display and analysis of GIS and census data helped gain insights on inter- and intra-metropolitan zoning patterns, it was not generally possible to identify the unique impacts of zoning or precisely where and when zoning imposed regulatory barriers.*

The evidence regarding Hypothesis 2 is more compelling. The evidence suggests that zoning indeed can serve as a barrier to higher-density multifamily housing. The evidence comes from both quantitative and qualitative analysis.

The statistical analysis suggests a relationship between zoned capacity and housing production, and between higher-density zoning and multifamily housing production. In other words, jurisdictions with more land zoned for residential development had more residential development; and jurisdictions with more land zoned for multifamily development had more multifamily development.

The regulatory analysis found evidence of specific policies in some jurisdictions that directly limit the amount of multifamily housing development. These jurisdictions generally had higher incomes, higher housing prices, lower densities, and fewer multifamily housing units than their neighbors.

Nonetheless, many factors beyond zoning can limit the quantity of multifamily housing stock. These include market conditions, land availability and parcelization, the provision of public services, other planning goals (e.g., protecting open space or rural areas), and existing land-use patterns. Zoning is just one among many factors that can affect the availability of denser forms of housing.

Overall, the results offer compelling evidence that regulatory barriers can impede the development of higher-density multifamily housing. Analysis

*Stakeholder interviews, however, underscored the finding that zoning alone does not cause—nor can it solve—the problem of affordable housing.*

of GIS data suggests that local regulations can affect housing development patterns and demonstrate that some local governments have little or no land zoned for multifamily use. Qualitative analysis of local land-use regulations in several jurisdictions provides corroborating evidence that regulatory barriers exist.

Jurisdictions identified as having barriers to multifamily development were frequently less dense and often more expensive than their neighbors. Stakeholder interviews, however, underscored the finding that zoning alone does not cause—nor can it solve—the problem of affordable housing. Multifamily housing is not always cheap, and single-family housing is not always expensive. Multifamily zoning is thus neither necessary nor sufficient as a policy response to the problem of housing affordability.

#### **DATA LIMITATIONS AND IMPLICATIONS FOR FUTURE RESEARCH**

The concern about zoning barriers and their impacts on the production of affordable housing is decades old. Many studies of potential exclusionary housing practices have been completed, but many have been case studies of a single jurisdiction based on anecdotal evidence, while others have been statistical analyses of the relationships between regulatory barriers and housing prices. None have used local GIS data to analyze zoning regulations at a regional scale.

Those facts were among the motivations for this research project. Moreover, data in general, and GIS data in particular, has expanded and improved considerably in the last 10 years. That fact suggested that relevant, accurate, and comparable data about variables related to housing affordability and potential regulatory barriers could be assembled for several metropolitan areas across the country. Not only would that allow a broader assessment of potential regulatory barriers, but it would establish protocols for broader and better assessments and policy responses in the future.

This research concluded that those hopes must yet remain tempered. Despite extensive GIS data in metropolitan areas, both the quality of data (for the variables of interest to the issues evaluated in this study) and the comparability of data within and across metropolitan areas make the kind of evaluation attempted here complicated and expensive. There are two fundamental problems: data availability and data interpretation.

#### **Data Availability**

As documented in this report, a key criterion for selecting study areas was the availability of high-quality, metropolitan-wide GIS data. That criterion screened out most of the metropolitan areas in the U.S. Many of the remaining, selected regions were known nationally as having state-of-the-art GIS, land-use planning, and transportation planning programs.

The expectation was that the research would start with well-documented data dictionaries and then clarify definitions and occasional idiosyncrasies with local planners and GIS analysts. As is evident in the description of methodology in Appendix C, even among jurisdictions with advanced GIS capabilities, data were inconsistent among jurisdictions and therefore difficult to analyze.

Given these facts, it was essential to corroborate the conclusions drawn by analysis of local GIS data with standard, qualitative case study methods: reviewing local plans and talking with local experts. The GIS analysis provided suggestions about where to look for regulatory barriers, but case study analysis was necessary to see if those suggestions were good ones.

Thus, a disappointing but not insignificant conclusion of this research is that national-level research based on existing metropolitan-wide GIS data is still problematic, time consuming, and potentially misleading.

### Data Interpretation

One of our conclusions is many parts of the country have zoning barriers to the development of higher-density, multifamily housing. The evidence came from analyses of GIS data, data visualization, case study research of local ordinances, statistical analysis, and simulation modeling. But this finding is not new. It has been known for quite some time that zoning can in some cases, and perhaps in general, impose barriers to multifamily housing development. But mere evidence of a problem does not present an appropriate policy response. An effective policy response requires, at a minimum: (1) the ability to identify when and where the problem exists, and (2) the necessary data and information to craft an appropriate remedy.

In a simple world, for example, zoning barriers to multifamily housing exist only where insufficient land is zoned for multifamily use. In such a world, the problem can be identified by measuring the amount of land zoned for multifamily use, comparing it to some carefully chosen standard, and imposing on local governments state or federal regulations requiring them to meet those standards. But the world is not that simple.

The research here revealed that jurisdictions with little land zoned for multifamily use can have high or low housing prices and rents, high or low proportions of existing multifamily housing, and high or low rates of single- and multifamily housing production. Thus, whether communities with little land zoned for multifamily use have imposed barriers to affordable housing is unclear. Our research suggests it is necessary to examine a variety of indicators, housing production rates, and housing prices and rents to get a complete picture. Moreover, good data and careful examination of those data are critical to understanding the complete housing market.

The Department of Housing and Urban Development (HUD) is in the process of determining whether and how to create a national database for “regulatory barriers. The current suggestion is to create that database in part from standardized secondary sources and in part from standardized primary data collection (a formal survey instrument for local planners). The research from this project cannot confirm the appropriateness of that strategy, but such a database may reduce the problem of trying to compile and make comparable data from locally generated sources. Such a survey will still, of course, rely on local data, but it may produce more comparable data via the administration of a standard, national-level, survey. A countervailing consideration comes from another study now underway at HUD to look nationally at zoning and subdivision ordinances. That study illustrates the tremendous cost of getting consistent data from local jurisdictions across the country. Unless jurisdictions are required to submit those data (e.g., with federal funding contingent on providing the data), it will likely not be delivered in a timely or consistent manner.

That said, there is no substitute for good data at the local level for analyzing complicated problems like the connection between affordable housing and local zoning. Surveys yield interpretations and perceptions, not facts. The quality of data in the Portland study area, especially coupled with the results of the Metroscope model, identified a jurisdiction where zoning almost certainly represents a barrier to multifamily housing. It is doubtful a survey could have produced the same results.

### RECOMMENDATIONS

As the first attempt to analyze the effects of zoning on multifamily housing development at a national scale, using local zoning data, this study encountered significant limitations but provided important new insights. These limitations and insights lead to the following recommendations.

*Our research suggests it is necessary to examine a variety of indicators, housing production rates, and housing prices and rents to get a complete picture. Moreover, good data and careful examination of those data are critical to understanding the complete housing market.*



- ***Support the Regional Collection and Integration of Land Use Regulatory Data***  
Few metropolitan areas have acquired and maintained comprehensive data on zoning, plan designations, and other regulatory constraints. Yet, when such data are collected, integrated, and generalized, much better information about regulatory barriers to affordable housing becomes available. Significant advances in transportation planning have been made possible by the development of the Census Transportation Planning Package and the creation of Metropolitan Planning Organizations. Regional collection of land-use and regulatory data would surely result in complementary advances in land and housing policy analysis.
- ***Encourage state and regional governments to provide oversight of local land-use policies.*** Although the evidence is limited, it appears as though state and regional oversight can serve to reduce barriers to multifamily housing development. The Oregon system, with explicit density targets for jurisdictions in the Portland metropolitan area, appears most effective. But regional oversight by the Metropolitan Council of Minneapolis-St. Paul and the metropolitan planning efforts led by the Sacramento Association of Governments appear to mitigate regulatory barriers at the local level. Fair-share remedies (like those in Massachusetts) appear to be less effective.
- ***Focus state and regional oversight policies on quantitative performance measures.*** Zoning is only one barrier to multifamily housing development; many others clearly affect the market for affordable housing. Furthermore, local governments are fully capable of developing new barriers if existing forms are curtailed or removed. Thus, continuous monitoring of housing prices, rents, starts, household incomes, and housing affordability measures need to be used to inform policy. For the purpose of accountability and comparability, this is best done at the regional level.
- ***Continue to develop better measures of zoning barriers and support additional research on the effects of barriers on housing markets.*** With the limited time and data available for this study, significant advances were made toward the measurement of zoning barriers and their effects on multifamily housing development. But much greater advances are now possible through additional research. Such research should focus on developing better measures of development capacity on vacant and infill land, better predictive models of market-determined development patterns, and a better understanding of how housing markets respond to regulatory change.

Mounting evidence shows zoning is a barrier to affordable housing production in some communities. This study adds to that body of evidence. That said, the critical question now is not *whether* regulatory barriers to affordable housing exist in some communities, but whether it is possible to *identify* such communities and craft an appropriate policy response. The results of this study suggest the collection and integration of quality land-use and regulatory data at the regional level helps in such identification; with persistence, this information may lead to the discovery of an appropriate policy response.



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# Building by Right: Social Equity Implications of Transitioning to Form-Based Code

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# Building by Right: Social Equity Implications of Transitioning to Form-Based Code

*Daniela A. Tagtachian, Natalie N. Barefoot,  
and Adrienne L. Harreveld*

Part I: Introduction

Part II: Form Based Codes and New Urbanism

Part III: Case Studies

A. City of Miami, Florida: Miami21

B. Downtown Nashville, Tennessee: Urban Overlay

C. Unincorporated Miami-Dade County, Florida: Urban Center  
Districts

D. Gulfport, Mississippi: Optional Overlay

Part IV: Legal Responses

Part V: Conclusion

## I. Introduction

Zoning, whether with intent or by effect, has played a role in promoting municipal inequity<sup>1</sup> and perpetuating segregation.<sup>2</sup> The recent trend

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1. See, e.g., Elliott Anne Rigsby, *Understanding Exclusionary Zoning and Its Impact on Concentrated Poverty*, THE CENTURY FOUNDATION (June 23, 2016), <https://tcf.org/content/facts/understanding-exclusionary-zoning-impact-concentrated-poverty>.

2. Sacoby Wilson, Malo Hutson & Mahasin Mujahid, *How Planning and Zoning Contribute to Inequitable Development, Neighborhood Health, and Environmental Justice*, 1 ENVTL. JUST. 211, 212 (2008), [www.ced.berkeley.edu/downloads/pubs/faculty/hutson\\_2008\\_envron-health.pdf](http://www.ced.berkeley.edu/downloads/pubs/faculty/hutson_2008_envron-health.pdf). That municipalities are allowed to design their own zoning ordinances facilitates municipalities implementing planning and zoning standards and regulations, that address the desires of privileged populations and neglect the needs of disadvantaged populations. *Id.* Further, “[D]iscriminatory planning and exclusionary

of municipalities to transition their zoning frameworks from traditional codes to form-based codes<sup>3</sup> has occurred with a sight to address urban concerns such as access to public transit and limiting urban sprawl, but has not focused on alleviating municipal equity concerns or even ensuring the implementation of the codes do not exacerbate existing inequities. Form-based codes<sup>4</sup> currently affect almost fourteen percent of the U.S. population<sup>5</sup> and provide an opportunity to create communities truly reflective of the democratic principles of equality, inclusion, and justice.<sup>6</sup> However this aspiration can only be achieved if policies and practices that disproportionately harm or increase the likelihood of harm to vulnerable communities are contemplated and addressed. This article identifies through case studies the extent of community involvement in the decision-making process surrounding form-based codes and their potential discriminatory impact. Additionally, this article provides mechanisms to address these social equity issues that can be tailored to each community's unique experiences and needs. This article is not a critique of the merits of form-based codes as a regulatory tool for land development, but rather its purpose is to shed light on two aspects of implementation common to form-based codes across the country, the limited extent to which low-income minority communities are able to meaningfully participate in the decision-making

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zoning contribute to unequal development within metropolitan areas. . . . This results in segregated communities along the lines of race and class and the creation of an urban underclass that is denied access to mainstream opportunities." *Id.* (internal citations omitted).

3. The vast majority (eighty-eight percent) of all form-based codes in the United States have been adopted after 2003, with the highest frequency of adoptions occurring between 2008 and 2010. See Hazel Borys & Emily Talen, *February 2017 Case Studies*, PLACEMAKERS, [http://www.placemakers.com/wp-content/uploads/2012/08/CodesStudy\\_Feb-2017.htm](http://www.placemakers.com/wp-content/uploads/2012/08/CodesStudy_Feb-2017.htm) (last visited Mar. 30, 2019).

4. Form-based codes are a type of zoning regulation that use aesthetic form rather than land uses as the organizing criteria for land development and, as such, encourage mixed-use development. In an interview with Public Square, Victor Dover, urban designer and the principal of Dover, Kohl & Partners Town Planning, explained: "A form-based code is organized around the type of place you're trying to create rather than land usage. Conventional zoning will have sections and subsections devoted to land uses, like residential, industrial or commercial, but form-based codes recognize that healthy cities are, first of all, mixed-use places and they depend on things that have more to do with physical design than land use, like the building-to-street relationship." Robert Steuteville, *Great Idea: Form-Based Codes*, PUBLIC SQUARE (May 10, 2017), <https://www.cnu.org/publicsquare/2017/05/10/great-idea-form-based-codes>.

5. *February 2017 Case Studies*, *supra* note 3 ("The population percentage is calculated at the time of adoption and therefore does not include any densification over time.").

6. "The political, legal, and moral equality of every citizen is a fundamental value of democracy. These aspects of equality are summarized in the idea that there can be no second-class citizens in democracy." CENTER FOR CIVIC EDUCATION, ELEMENTS OF DEMOCRACY: THE FUNDAMENTAL PRINCIPLES, CONCEPTS, SOCIAL FOUNDATIONS, AND PROCESSES OF DEMOCRACY 18 (2007).

process and the increased likelihood of displacement of these same communities, and to propose mechanisms that will strengthen form-based codes by addressing or decreasing the likelihood of these inequitable effects.

Form-based codes are touted as one of the only viable ways to combat the nationwide affordable housing<sup>7</sup> and environmental crises<sup>8</sup> perpetuated by urban sprawl.<sup>9</sup> Form-based codes are a type of zoning regulation that streamline the approval process for mixed-use development in cities; encourage higher density<sup>10</sup> and walkability;<sup>11</sup> and use aesthetic form

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7. Danielle Arigoni et al., *Affordable Housing and Smart Growth: Making the Connection*, Smart Growth Network Subgroup on Affordable Housing 18–21 (2001), available at [https://www.uc.edu/cdc/urban\\_database/housing/affordable\\_housing\\_and\\_smart\\_growth-making\\_the\\_connection.pdf](https://www.uc.edu/cdc/urban_database/housing/affordable_housing_and_smart_growth-making_the_connection.pdf) (last visited Mar. 30, 2019). For general information on the current affordable housing crisis, see J. Ronald Terwilliger, *Solving the Affordable Housing Crisis: The Key to Unleashing America's Potential*, 26 J. Affordable Hous. & Cmty. Dev. L. 255 (2017) (In 2016, “nearly twenty-one million families paid rents considered unaffordable under federal standards. . . . Approximately eleven million of these households were ‘severely’ cost-burdened, spending in excess of fifty percent of their incomes on housing alone” (emphasis added)); see also Harvard Joint Center for Housing Studies, *America’s Rental Housing 2017*, at 26 (Dec. 2017), available at <https://www.jchs.harvard.edu/research-areas/reports/americas-rental-housing-2017> (last visited Mar. 30, 2019).

8. U.S. EPA, ABOUT SMART GROWTH, <https://www.epa.gov/smartgrowth/about-smart-growth#benefits> (last visited Mar. 30, 2019) (“Development guided by smart growth principles can minimize air and water pollution, reduce greenhouse gas emissions, encourage cleanup and reuse of contaminated properties, and preserve natural lands. . . . Smart growth practices can lessen the environmental impacts of development with techniques that include encouraging compact development, reducing impervious surfaces, safeguarding environmentally sensitive areas, mixing land uses (e.g., homes, offices, and shops), promoting public transit, and improving pedestrian and bicycle amenities.”).

9. Anne Maurer, *Smart Growth Principles and the Fair Housing Act: An Examination of the Loudoun County Revised General Plan*, 13 J. AFFORDABLE HOUS. & CMty. DEV. L. 239, 241 (2004) (“The danger that it [urban sprawl] poses to the environment is particularly daunting, for [v]irtually every environmental problem—from air and water pollution to the destruction of wetlands and wildlife habitat, from global climate change to overflowing landfills—has been linked to the land consumption and pollution that result from current land use and transportation patterns.” (citing Oliver A. Pollard, III, *Smart Growth: The Promise, Politics, and Potential Pitfalls of Emerging Growth Management Strategies*, 19 VA. ENVTL. L.J. 247, 267–68 (2000))).

10. *The Charter of the New Urbanism*, CONGRESS FOR THE NEW URBANISM, <https://www.cnu.org/who-we-are/charter-new-urbanism> (last visited Mar. 30, 2019) (“Appropriate building densities and land uses should be within walking distance of transit stops, permitting public transit to become a viable alternative to the automobile.”).

11. *Id.* (“The physical organization of the region should be supported by a framework of transportation alternatives. Transit, pedestrian, and bicycle systems should maximize access and mobility throughout the region while reducing dependence upon the automobile.”).

rather than land use as the organizing criteria.<sup>12</sup> These codes are quite different from traditional or Euclidian zoning, the mainstay of zoning laws that for generations have divided land into zones with a specific regulatory character focused on the primary use (i.e., residential, commercial, industrial, agricultural),<sup>13</sup> and contributed to the creation of the urban sprawl that form-based codes seek to alleviate.<sup>14</sup> The shift from Euclidian to form-based code often requires a complete overhaul of municipalities' zoning regulations. Importantly, this overhaul can often occur in a single legislative action.<sup>15</sup>

Once a form-based code gets adopted, typically large areas are up-zoned—rezoned to increase intensity and/or density—in order to modify the urban design and to allow for mixed-use developments. Rezoning is a necessary component to transitioning to form-based code because it is the only way to implement the new urban planning and design vision in a traditionally zoned municipality. As traditional zoning separates land uses, this rezoning frequently consists of up-zoning to increase density and development often around mass-transit options. The areas that are up-zoned by form-based codes are often located where low-income minority communities that have been historically disenfranchised and discriminated against reside.<sup>16</sup>

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12. "Form-based codes, pioneered in the 1980s, still address land use—keeping incompatible uses apart—but focus more attention on those physical aspects of private buildings that impact the quality of the public realm. . . . They also replace our current dangerous street standards with designs that encourage walking and biking." Jeff Peck, *A Step-by-Step Guide for Fixing Badly Planned Cities*, CITY LAB (Oct. 9, 2018), <https://www.citylab.com/design/2018/10/5-rules-designing-better-more-walkable-cities/569914> (last visited Mar. 30, 2019).

13. JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW § 4.2, at 80 (1998) (cited in *Black's Law Dictionary* under "Euclidean zoning").

14. Jason T. Burdette, Form-Based Codes: A Cure for the Cancer Called Euclidean Zoning? (2004) (unpublished Major Paper in support of Master of Urban and Regional Planning, Virginia Polytechnic Institute and State University, available at <https://pdfs.semanticscholar.org/d9a1/5fd1e4e64173b337a6cf4afacc9aaa2b51fd.pdf>).

15. See, for example, the creation of the Goulds Urban Center District, which significantly modified the zoning of a historically Black community in unincorporated Miami-Dade County through a single legislative act, discussed *infra* Sections III.C, V.

16. See, for example, Columbia Pike, a historically Black and Brown neighborhood in Arlington, Virginia, to the south of Arlington Boulevard (U.S. Route 50) which adopted a form-based code for commercial centers in 2003. According to Arlington County, "Arlington was one of the first jurisdictions in the nation to apply Form Based Codes to revitalize an existing, older community" and the form-based code is being used "to encourage mixed-use development and to foster a walkable, lively 'Main Street' atmosphere." Arlington County Gov't, PROJECTS & PLANNING: COLUMBIA PIKE FORM BASED CODE—COMMERCIAL CENTERS, <https://projects.arlingtonva.us/neighborhoods/commercial-form-based-code> (last visited Mar. 16, 2019). In an interview with Public Square, Victor Dover, urban designer and the principal of Dover, Kohl & Partners Town



Cities typically invest substantial time and resources to engage stakeholders (including developers and community members) *at the onset* of the process of transitioning to form-based codes. However, once executed, there exists limited opportunity for the meaningful participation of vulnerable communities and fewer avenues to ensure these communities are not disparately impacted. These issues can be addressed by providing for meaningful participation in project development and approvals after up-zoning has occurred and by implementing anti-displacement strategies to protect historically disenfranchised communities. Without additional

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Planning responded to the question “Are you finding that elected officials, developers, planning staff, and citizens are becoming more accepting of the idea of code reform in the direction that New Urbanists are talking about?” by stating:

I have seen examples where they find their way through that thicket and one worthy example is Columbia Pike in Arlington, Virginia. It’s a corridor, already difficult to deal with as Geoff [Dyer, director of design and interim CEO at the City of Lafayette Downtown Development Authority] has mentioned, and a form-based code was adopted for the place. *Unlike the northern side of Arlington, it had seen very little reinvestment for 25 or 30 years. The only new things built during that period were fast food restaurants and car dealerships, mainly because of the so-called “The Arlington Way” in which developers willingly subjected themselves to years of endless hearings, negotiations and proffers of various kinds of community benefits before they could get permission to build anything. They replaced that arduous process with the form-based code and development began immediately.* Developers had a pent up desire to make Columbia Pike more than it was but they weren’t able to get at it because the zoning and *tradition of decision-making stood in the way.* Once that changed with a form-based code, they reinvested hundreds of millions of dollars in the corridor.

Steuteville, *supra* note 4 (emphasis added). Surprisingly, there is no mention of the racial history of the north-south divide and its relationship to the lack of prior investment in the area. As a Jim Crow neighborhood, Columbia Pike was comprised of the county’s Black residents throughout the early twentieth century, and then after Jim Crow laws were abolished and the Fair Housing Act was adopted, “waves of Latino, Asian, and Middle Eastern immigrants” moved into the area due to the availability of affordable housing. G. Stephen Thurston, *Are There Two Arlingtons? Understanding the History Behind Arlington’s North-South Divide and How It’s Shaping Present-Day Perceptions and Realities*, ARLINGTON MAG. (Apr. 27, 2015), <https://www.arlingtonmagazine.com/are-there-two-arlingtons>. Meanwhile, north of Arlington Boulevard remained almost exclusively White and comprised of professionals and “old money.” *Id.* In 2013, Bailey Garfield, a local business owner, expressed his “worr[y] about his future in what is one of the last affordable parts of Arlington.” Patricia Sullivan, *Entrepreneurs and Residents Along Columbia Pike Wait to See What Redevelopment Brings*, WASH. POST (July 23, 2013), [https://www.washingtonpost.com/local/businesses-watch-and-wait-for-columbia-pikes-future/2013/07/27/2dc9ee4c-cc8b-11e2-8845-d970ccb04497\\_story.html?utm\\_term=.d8fd38d5d444](https://www.washingtonpost.com/local/businesses-watch-and-wait-for-columbia-pikes-future/2013/07/27/2dc9ee4c-cc8b-11e2-8845-d970ccb04497_story.html?utm_term=.d8fd38d5d444). He commented that the new luxury apartment buildings on Columbia Pike “have brought people with more disposable income” and his “biggest worry is escalating property values.” *Id.* Moreover, although further developments, including a streetcar and Metro stop, are expected, “the piecemeal development [as of 2013] has unleashed a wave of gentrification that worries longtime residents.” *Id.*



protections to the affected communities, the mass up-zoning and consequent development may occur without significant or meaningful public participation opportunities because form-based codes allow developments to be built as a matter of right,<sup>17</sup> and thereby remove the little leverage that is afforded to communities through notice and public hearing requirements if the up-zoning were requested in traditional zoning. This process is concerning because, across the country, a consistent consequence of the implementation of form-based codes is the increased likelihood of displacement of minority communities coupled with fewer opportunities in the administrative process to voice their concerns.

This article addresses the impacts of form-based codes on communities' abilities to participate meaningfully in the development activities in the places where they live. Following the Introduction in Part I, Part II provides background on form-based codes and the differences between form-based and Euclidian (traditional) zoning. Part III analyzes four areas in the South that have adopted different types of form-based code: the City of Miami (SmartCode), Nashville (Urban Overlay Districts), Unincorporated Miami-Dade County (Urban Center Districts) and Gulfport Mississippi (Optional Overlay). These four municipalities represent a sample of the various methods for implementing form-based code throughout the nation. This section examines the impacts of the implementation of form-based codes on the rates of development in these areas, the resulting demographic shifts, community involvement, and community responses to the implementation of form-based codes. Part IV discusses using the Fair Housing Act as a potential legal challenge to the effects of form-based codes and potential policy solutions to increase the likelihood of meaningful community participation and to decrease the likelihood of displacement.

## II. Form Based Code and New Urbanism

Zoning became prevalent in the United States after the Standard State Zoning Enabling Act (developed in 1921).<sup>18</sup> This act was passed, in part, as a reaction to the air pollution caused by the industrial revolution and the unsuitable and dangerous living conditions that it created for residential neighborhoods adjacent to factories.<sup>19</sup> Zoning was legitimized shortly

17. For example, see Miami21 definitions section: "By Right: A use allowed pursuant to zoning review and approval of a Building Permit or issuance of a Certificate of Use under Article 7, Section 7.1.2.1. Permitted Uses." In practice, this term means that if a developer is seeking to build in compliance with the code, the development will get approved administratively. See MIAMI, FLA., MIAMI 21 FINAL CODE art. 1, § 1.2 (Jan. 31, 2018), available at [http://www.miami21.org/PDFs/Amended\\_Codes/Miami\\_21\\_Volume\\_1.pdf](http://www.miami21.org/PDFs/Amended_Codes/Miami_21_Volume_1.pdf).

18. *Standard State Zoning Enabling Act and Standard City Planning Enabling Act*, AM. PLANNING ASSOC., <https://www.planning.org/growingsmart/enablingacts.htm> (last visited Mar. 30, 2019).

19. In the 1926 case of *Village of Euclid, Ohio v. Amber Realty Co.*, the Supreme Court described the conditions as follows:

thereafter in 1926, in the U.S. Supreme Court's ruling in *Village of Euclid, Ohio v. Amber Realty Co.*<sup>20</sup> Throughout the twentieth century, traditional (or Euclidean) zoning became widely popularized. Twenty years after *Euclid*, eighty-five percent of communities throughout the country had adopted traditional zoning regulations.<sup>21</sup> The ubiquity of Euclidean zoning along with other federal, state, and local policies increased rates of urban sprawl.<sup>22</sup>

Separating land by use meant that workplaces, recreational spaces (i.e., bars, restaurants, etc.), and residences were not located in the same zones. Because of the dearth of public transportation options available in most cities, the separation of uses created a dependence on automobiles to travel between these spaces. Such automobile dependence required an

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Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed . . . which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. . . .

[T]he exclusion of buildings devoted to business, trade, etc., from residential districts, bears a rational relation to the health and safety of the community. Some of the grounds for this conclusion are . . . aiding the health and safety of the community by excluding from residential areas the confusion and danger of fire, contagion and disorder which in greater or less degree attach to the location of stores, shops, and factories.

272 U.S. at 386–87, 391. “Operating from the premise that everything has its place, [Euclidean] zoning is the comprehensive division of a city into different use zones.” JUERGENSMEYER & ROBERTS, *supra* note 13, § 4.2, at 80 (cited in *Black’s Law Dictionary* under “Euclidean zoning”).

20. *Village of Euclid, Ohio*, 272 U.S. at 396. There, Ambler Realty alleged that the village of Euclid’s zoning regulations were an unconstitutional use of police power, but the Court found that this use of the state’s police power was necessary as cities tried to meet the challenges of a growing and increasingly industrialized society. *Id.*

21. See, e.g., Burdette, *supra* note 14.

22. David Rusk studied 213 urbanized areas and found that, between 1960 and 1990, populations increased from 95 million to 140 million (47%), while urbanized land increased from 25,000 square miles to 51,000 square miles (107%). *Debate on Theories of David Rusk*, 2 *The Regionalist* (Fall 1997). By the end of that time period, density per square mile decreased by 28%. *Id.* Data collected by the U.S. Department of Housing and Urban Development for its State of the Cities 2000 report (1994–1997 time period) show a continuation of this trend that urban areas are expanding at about twice the rate that the population is growing. U.S. DEPARTMENT OF HOUSING & URBAN DEVELOPMENT, *THE STATE OF THE CITIES 2000*, at 63 (2000), <https://archives.hud.gov/reports/socrpt.pdf>; see also SIERRA CLUB, *STOP SPRAWL: NEW RESEARCH ON POPULATION, SUBURBAN SPRAWL AND SMART GROWTH*, <https://vault.sierraclub.org/sprawl/population/whitepaper.asp> (last visited Mar. 30, 2019) (“It is important to remember that if there are multiple causes of sprawl, then their impact is multiplied together, so that if population increases by 50%, and density decreases by 50%, land consumed will increase not by 100%, but by 300%. So poor land use makes the impact of population growth worse, and vice-versa.”).

investment in roads and highways, rather than public transportation. This choice led to negative environmental consequences and segregated residential spaces. Urban sprawl grew rapidly throughout the country with development consuming an average of two acres of American farmland per minute between 1922 and 1997<sup>23</sup> and increasing the number of miles driven per capita by seventy-two percent between 1969 and 1990.<sup>24</sup>

As a way to address some of the negative consequences of urban sprawl, the New Urbanists formed as a movement of planners, architects, activists, developers, and environmental activists seeking to address “disinvestment in central cities, the spread of placeless sprawl, increasing separation by race and income, environmental deterioration, loss of agricultural lands and wilderness, and the erosion of society’s built heritage as one interrelated community-building challenge.”<sup>25</sup> A key tool New Urbanists developed to address these challenges was form-based codes.<sup>26</sup> Rather than zoning areas by use, form-based codes organize areas into “transect zones,” in which each zone is distinguished by the allowable amount of intensity and density as part of a transition from rural to urban.<sup>27</sup> In addition to local zoning reforms, New Urbanists seek buy-in from the federal government in promoting sustainable, mixed-use, affordable housing.<sup>28</sup>

In 2003, the global planning and development firm, Duany Plater-Zyberk & Company (one of the founders of New Urbanism), developed SmartCode,<sup>29</sup> a model based on the six “prototypical American rural-to-urban . . . Transect Zones, or T-zones, for application on zoning maps.”<sup>30</sup> SmartCode outlines six ideal transect zones,<sup>31</sup> including the natural zone, rural zone, suburban zone, general urban zone, urban center zone, and

23. Elizabeth Becker, *2 Acres of Farmland Lost Per Minute, Study Says*, N.Y. TIMES (Oct. 4, 2002), <https://www.nytimes.com/2002/10/04/us/2-farm-acres-lost-per-minute-study-says.html>.

24. Maurer, *supra* note 9, at 241 n.31 (2004) (citing David J. Cieslewicz, *The Environmental Impacts of Sprawl*, in URBAN SPRAWL: CAUSES, CONSEQUENCES & POLICY RESPONSES 26 (Gregory D. Squires ed., 2002)).

25. *The Charter of the New Urbanism*, *supra* note 10.

26. Peck, *supra* note 12.

27. *Tools*, CONGRESS FOR THE NEW URBANISM, <https://www.cnu.org/resources/tools> (last visited Mar. 30, 2019).

28. *The Charter of the New Urbanism*, *supra* note 10.

29. See *The Transect*, CENTER FOR APPLIED TRANSECT STUDIES, <https://transect.org/transect.html> (last visited Mar. 28, 2019).

30. See *id.*

31. “The T-zones are intended to be balanced within a neighborhood structure based on pedestrian sheds (walksheds), so that even T-3 residents may walk to different habitats, such as a main street, civic space, or agrarian land.” *Id.*

urban core.<sup>32</sup> Each zone increases in intensity and density.<sup>33</sup> An increase in intensity and/or density is otherwise known as up-zoning. Many cities adopt these recommended transect zones when transitioning to form-based code.<sup>34</sup>

Since its origins in the 1980s, a total of 387 form-based codes have been adopted throughout the United States, and over 300 more are in progress. As of February 2017, there were a total of 45,162,192 people and 107,966,143 acres of land affected, where the SmartCode had been adopted (14,068,221 people/93,059,407 acres), the SmartCode was in process (4,125,038 people/3,522,248 acres), the Transect Form-Based Codes had been adopted (9,385,163 people/7,016,683 acres), other types of Form-Based Codes had been adopted (17,320,510 people/4,300,639 acres), or discussions on SmartCodes or Form-Based Codes had occurred (1,071,260 people/71,051 acres).<sup>35</sup> Many of these revisions reflect the design principles outlined in SmartCode.<sup>36</sup> The codes are typically adopted as a city ordinance, usually after stakeholders<sup>37</sup> have given input in a public forum, such as a charrette.<sup>38</sup>

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32. Thomas Comitta Associates, Inc., *The Smart Growth Transect for Community and Economic Development*, SMART GROWTH PARTNERSHIP OF WESTMORELAND COUNTY (Sept. 9, 2010), [http://www.smartgrowthpa.org/files/comitta\\_sgpwc\\_11%20x%2017%20page.pdf](http://www.smartgrowthpa.org/files/comitta_sgpwc_11%20x%2017%20page.pdf).

33. "Intensity" represents the amount of gross built area in a given land area, and "density" refers to the number of units in a given land area. Ann Forsyth, *Measuring Density: Working Definitions for Residential Density and Building Intensity* (Design Brief No. 8), DESIGN CENTER FOR AMERICAN URBAN LANDSCAPE (Nov. 2003), <http://annforsyth.net/wp-content/uploads/2018/05/db9.pdf>.

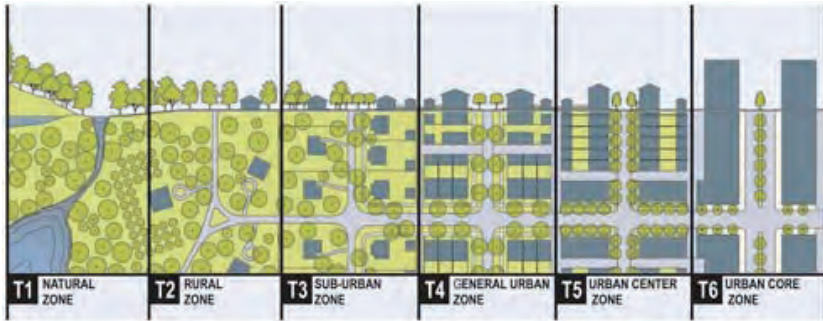
34. See *The Transect*, *supra* note 29; see also SMARTCODE VERSION 9.2, available at <https://transect.org/codes.html> (last visited Mar. 28, 2019).

35. *February 2017 Case Studies*, *supra* note 3 ("The population percentage is calculated at the time of adoption and therefore does not include any densification over time.").

36. See *id.*

37. Stakeholders usually include developers, community members, community leaders, and government officials.

38. Mary Madden & Joel Russell, *How Form-Based Codes Are Written*, PLANNERSWEB (Dec. 5, 2014), <http://plannersweb.com/2014/12/fbc4> ("Developing [the] community vision must be done early in the process, with the active involvement of those affected. One of the best models for how to do this is the community 'charrette,' which is a multi-day open public process with multiple feedback loops for the public to interact with a variety of professionals with complementary expertise in planning, urban design, architecture, transportation, law, public safety, real estate economics, and public administration. The range of professionals involved is typically determined based on the specific context and issues likely to be addressed during the community planning process. . . . A charrette process typically culminates in a place-specific 'vision plan,' which is a heavily illustrated physical plan showing the results of the discussions held at the charrette, embodying the best thinking of the involved professionals and public working together. It is much more than a policy document, showing very specifically how the public realm should be shaped, as well as the nature, location, and character of public spaces and the relationships between buildings and the streets they frame.").



SmartCode Transect Zones

Once form-based codes are adopted, cities have administrative authority to approve or reject building proposals based on whether they fit into the described specifications of that transect zone.<sup>39</sup> In other words, if a proposed building fits into the prescribed aesthetic standards for an area, the proposal will be approved administratively by staff within the city or county's zoning department.<sup>40</sup> Because form-based codes incorporate fewer land-use regulations and embed mass up-zoning into the code, they offer an opportunity for a wide variety of significant land use developments to be approved through the administrative process alone.<sup>41</sup> In contrast, traditional zoning regulates intensity, density, *and* use. And developments that fall outside of these zoning and planning code specifications require a discretionary approval by elected or appointed officials that includes

39. Jim Little, *Pensacola Form-Based Code Proposal in Limbo After Failing to Pass CRA*, PENSACOLA NEWS J. (Oct. 12, 2018), <https://www.pnj.com/story/news/2018/10/12/pensacola-form-based-code-proposal-limbo-after-failing-pass-cra/1602388002> ("Form Based Code is a regulation, not just a guideline, adopted into city law. This type of development code provides predictable results by using physical form, rather than separation of land uses, as the principle for the code. So the developer can build a structure that meets the code, but the public no longer has much of a say in it or a way to tweak it before it's built."); Jacob Ogles, *Groups Begin Scrutinizing Sarasota Code*, SRQ DAILY (Oct. 8, 2018), <https://www.srqmagazine.com/srq-daily/2018-10-08/9293> ("Kate Lowman, a founding member of STOP!, said her great concern right now revolves around process. The Downtown plan implemented an administrative review process for certain projects meeting code requirements to be approved without public hearings. . . . I have reviewed some aspects of the development approval process, and I can see that we will be losing even more public hearings," she says. . . . Unfortunately it looks like this will take us in the wrong direction.").

40. See, e.g., MIAMI-DADE COUNTY, FLA. CODE OF ORDINANCES § 33-284.88 (Jan. 22, 2019). Administrative approval means applications for new developments are reviewed by county officials who are tasked with reviewing applications to check for compliance with the County Code. *Id.*; see also Miami, Fla., Miami21 Final Code, *supra* note 17, art. 7, § 7.1.2.1.

41. Ogles, *supra* note 39.

public notice and hearing. Consequently, community members in areas that have adopted form-based codes have expressed concerns with their potential displacement due to up-zoning and the lack of involvement in the decision-making process because of the wide-sweeping administrative authority given to cities to make decisions on how neighborhoods should look and feel without meaningful community input.<sup>42</sup>

It is important to note that up-zoning is a tool and, as such, can result in displacement or in furtherance of affordable housing.<sup>43</sup> While the increase in density can be used to create more affordable housing units, density alone is not enough.<sup>44</sup> Policies also must be implemented to promote affordable housing development.<sup>45</sup> In fact, up-zoning by itself has

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42. Some concerned citizens have referred to the process as “aesthetic authoritarianism by a few unelected elitists.” Charles Gallanter, *Form-Based Code: Aesthetic Authoritarianism*, NEWS & CITIZEN (Aug. 9, 2018), [https://www.stowetoday.com/news\\_and\\_citizen/opinion/letters\\_to\\_the\\_editor/form-based-code-aesthetic-authoritarianism/article\\_f8165b92-9bf5-11e8-8124-8bfa846fd10e.html](https://www.stowetoday.com/news_and_citizen/opinion/letters_to_the_editor/form-based-code-aesthetic-authoritarianism/article_f8165b92-9bf5-11e8-8124-8bfa846fd10e.html) (last visited Mar. 13, 2019). Others are thankful when the code is not adopted because community concerns were not incorporated in the process:

“I’m so relieved,” said Nancy Cypser, trustee of the Woodland Civic Association in East Farmingdale, in response to a decision not to implement form-based code. Cypser said Monday that the consulting firm hired to use the past reports and come up with the “form-based code”—a type of zoning focused on aesthetics and an overall vision of a community—had not incorporated the negative feedback on building height and density from community meetings held in early 2017.

Denise Bonilla, *Babylon Town Abandons Plan to Rezone 109 Acres in East Farmingdale*, NEWSDAY (Oct. 9, 2018), <https://www.newsday.com/long-island/suffolk/east-farmingdale-rezoning-1.21725474>.

43. Randy Shaw, NYC’s ‘Progressive’ Mayor Bill de Blasio Promotes Gentrification, Displacement, BEYOND CHRON. (Sept. 7, 2017), <http://beyondchron.org/nycs-progressive-de-blasio-promotes-gentrification-displacement>.

44. “Increased density is touted as one solution to create more affordable units; yet, while the apartment building boom of recent years has added thousands of new units [in Minneapolis], most are pricey market-rate rentals. Minneapolis has lost approximately 15,000 affordable units since 2000, according to city planners [with the irony being that] [m]ost of those units still exist, but are no longer considered affordable.” Burl Gilyard, *Do the Economics of Density Really Create Affordable Housing?*, TWIN CITIES BUS. (Sept. 28, 2018), <http://tcbmag.com/news/articles/2018/october/do-the-economics-of-density-really-create-affordable-housing> (last visited Mar. 30, 2019).

45. See Aline Reynolds, *So You Want to Change Zoning to Allow for More Housing?*, NEXT CITY (Sept. 27, 2018), <https://nextcity.org/daily/entry/so-you-want-to-change-zoning-to-allow-for-more-housing> (last visited Mar. 30, 2019). Nora Liu, the northwest regional manager for the Government Alliance on Race and Equity, states: “If an area is rezoned, it needs to be done with parallel strategies to strengthen communities, so that people in the communities can thrive in place.” *Id.*; see also *Have We Zoned Great, Walkable Places out of Existence?*, FORM-BASED CODES INSTITUTE BLOG (Nov. 9, 2018), <https://formbasedcodes.org/blog/zoned-great-walkable-places-existence> (last visited Mar. 30, 2019) (“Form-based codes often result in an increase in property values, because the kinds of places



caused mass displacement,<sup>46</sup> and form-based codes have resulted in “displacement [of the poor] to outer fringe[s],” “increased gentrification,” and greater “social/economic segregation.”<sup>47</sup> This occurs because, in addition to the loss of community, when people are forced to move because they are priced-out, they are likely to move to areas that are more segregated, and, as such, they are likely to also receive less or worse municipal services and be further away from job markets and public transport.

Much of the scholarship regarding form-based codes explores its merits as an alternative to Euclidean zoning.<sup>48</sup> However, little has been written on their functional impact to communities and on citizens’ abilities to participate meaningfully in how their city is developed. The following case studies will examine that impact and the associated demographic trends.

### III. Case Studies

By transitioning to form-based code, a municipality in a single legislative action can recharacterize the use of each parcel of land located within the area that adopted the new code and, in some areas, up-zone the density and intensity permitted. The following four case studies examine areas throughout the South that have implemented form-based codes in different ways. Miami21 closely follows the principles outlined in SmartCode.<sup>49</sup> Nashville has adopted its own form-based code for its downtown and created an Urban Design Overlay that can be applied to preexisting zoning districts.<sup>50</sup> Unincorporated Miami-Dade County has created its own form-based code that applies to specific neighborhoods rather than zoning districts.<sup>51</sup> Gulfport follows SmartCode,<sup>52</sup> with the city making the code mandatory for certain areas of the city and available as an optional

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they create are both in demand and scarce. It is up to policymakers to decide how to mitigate these market forces so existing businesses and residents can remain in place as communities grow.”).

46. Renae Widdison, Jen Becker & Elena Conte, *Flawed Findings: How NYC’s Approach to Measuring Displacement Risk Fails Communities*, PRATT CENTER FOR COMMUNITY DEVELOPMENT (2018), [https://prattcenter.net/sites/default/files/flawed\\_findings\\_full\\_report\\_final.pdf](https://prattcenter.net/sites/default/files/flawed_findings_full_report_final.pdf) (last visited Mar. 13, 2019). This report concluded that New York approves major developments and up-zoning without considering the social consequences, including the displacement of residents. *Id.*

47. Kim Rolla & William M. Harris, Sr., *Zoning and Land Use: Charlottesville Community Discussion Related to Planning Futures and Citizen Impacts*, LEGAL AID JUSTICE CENTER (2017), <http://www.justice4all.org/wp-content/uploads/2017/02/Gentrification-Zoning-and-FBC.pdf> (last visited Mar. 13, 2019) (discussing the disadvantages of form-based codes on the poor).

48. Hank Savitch, *Dreams and Realities: Coping with Urban Sprawl*, 19 VA. ENVTL. L.J. 333 (2000); Burdette, *supra* note 14; Maurer, *supra* note 9.

49. See February 2017 Case Studies, *supra* note 3.

50. *Id.*

51. See discussion *infra* Section III.C.

52. See February 2017 Case Studies, *supra* note 3.



overlay in other parts. These case studies do not represent the complete set of the ways form-based code can be adopted, but they illustrate some of the variations and the associated effects on participatory mechanisms and displacement.

*A. Miami, Florida: Miami21*

i. The Code and Its Adoption

Miami21 is currently heralded as the magnum opus of form-based codes.<sup>53</sup> Using the principles outlined in SmartCode, the sprawling City of Miami implemented form-based code in 2009 throughout the entire city.<sup>54</sup> Prior to the adoption of Miami21, zoning in Miami was considered to be a “hodge-podge” of incompatible buildings and uses,<sup>55</sup> and Miami21 was viewed as much needed reform that would make Miami’s aesthetic more consistent and predictable.<sup>56</sup>

Beginning in 2005, the city held “60 formal public hearings on the new code, in addition to another 500 meetings with residents and other stakeholders—ranging from events with hundreds of attendees in large downtown convention halls to intimate sit-downs in residents’ living rooms.”<sup>57</sup> In these conversations, developers and city officials often cited the opportunities that Miami21 would provide for affordable housing developments.<sup>58</sup> Ultimately, Miami21 was approved in 2009 at the end of Mayor Manny Diaz’s term.<sup>59</sup>

Although Miami21 was approved in 2009, the economic crash resulted in a dramatic halt of property development, diverting attention away from zoning laws.<sup>60</sup> It was not until about 2013 that developers had sufficient

53. *Miami21*, FORM-BASED CODES INSTITUTE, <http://formbasedcodes.org/codes/miami-21> (last visited Jan. 23, 2019); Press Release: City of Miami Receives National Award for Pioneering Zoning Reform, City of Miami Planning & Zoning Department (Jan. 11, 2011), [http://www.miami21.org/Media\\_01112011.asp](http://www.miami21.org/Media_01112011.asp).

54. MIAMI, FLA., MIAMI 21 FINAL CODE, *supra* note 17.

55. *Miami’s Zoning History*, City of Miami Planning & Zoning Dep’t, Miami21: Your City, Your Plan, [http://www.miami21.org/Miami\\_Zoning\\_History.asp](http://www.miami21.org/Miami_Zoning_History.asp) (last visited Feb. 1, 2019).

56. Miami 21, DPZ & Co., <https://www.dpz.com/Projects/0425> (last visited Mar. 30, 2019).

57. *Miami21 Public Meetings*, City of Miami Planning & Zoning Dep’t, Miami21: Your City, Your Plan, [http://www.miami21.org/Public\\_Meetings\\_ZoningCode.asp](http://www.miami21.org/Public_Meetings_ZoningCode.asp) (last visited Feb. 1, 2019). Notably, many of these meetings were in Spanish. *Id.*

58. *Planning Report: Plan Would Reward Developers That Build Affordable Housing in Miami*, City of Miami Planning & Zoning Dep’t, Miami21 : Your City, Your Plan (Aug. 7, 2007), [http://www.miami21.org/Media\\_070817.asp](http://www.miami21.org/Media_070817.asp) (last visited Mar. 14, 2019).

59. Zach Patton, *The Miami Method for Zoning: Consistency over Chaos*, *Governing* (May 2016), <http://www.governing.com/topics/urban/gov-miami-zoning-laws.html>.

60. *Id.* After Miami21 was approved on October 22, 2009, “came the Great Recession. Ironically, it may have been the best thing that could have happened to Miami 21. Development in South Florida ground to a halt, and city leaders were overwhelmed by

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Miami21 is also unique because it leaves a special carve-out for something known as Special Area Plans, which do not conform with form-based codes or any code at all.<sup>64</sup> The official purpose of a Special Area Plan (SAP) is to “encourage the assembly and master planning of parcels” that are greater than nine acres and to promote “greater integration of public improvements and infrastructure” and to “provide high quality design elements” by incentivizing developers to utilize more than nine acres of land with very little to no zoning regulations.<sup>65</sup> In a *quid pro quo*, the government forgoes its normal zoning laws in exchange for a developer’s investment in the development of land within the city limits. While SAPs are not form-based codes, they are relevant because, similar to the process that follows once up-zoning gets adopted as part of a transition to form-based code, when an SAP is approved through a legislative process at the city level, no more opportunity exists for public input on developments or zoning changes within the SAP. The city has made that trade-off on behalf of residents with the hopes that development will be beneficial to the community that is directly affected,<sup>66</sup> but residents have expressed concerns over the lack of community input in the process.<sup>67</sup> SAPs have led to large scale luxury developments in affluent areas, like Brickell City Centre.<sup>68</sup> However, it has also led developers to seek out SAPs in minority neighborhoods abutting the Downtown Miami area to take advantage of the lack of regulatory control, such as the proposed Magic City SAP and the proposed Eastside Ridge SAP in Little Haiti.<sup>69</sup> The mass up-zoning that typically accompanies an SAP being granted has the potential to displace long term low-income residents.<sup>70</sup>

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64. *Id.* art. 3, § 3.9.1.

65. *Id.*

66. Although critics of SAPs have raised concerns regarding the lack of community involvement in the SAP process, City of Miami Planning & Zoning Director Francisco Garcia “insist[ed] that community input is a central tenant of SAPs.” David Smiley & Andres Viglucci, *Redesigning Miami, 9 Acres at a Time*, MIAMI HERALD (Jan. 13, 2017), <https://www.miamiherald.com/news/local/community/miami-dade/article126501109.html>. Additionally, in response to concerns regarding how SAPs affect local communities, Miami 21 designers “note[d] that developers, even without SAPs, could always pursue up-zoning without providing anything in return to the community.” *Id.*

67. For example, in response to the SAPs being proposed in Little Haiti, Marleine Bastien, a local Haitian-American activist said: “The more we learn about these mammoth projects, the more concerned we are . . . What we resent is for us to be brought in at the 11th hour when everything is cooked and ready to eat, and we get the crumbs.” *Id.*

68. *About Us*, BRICKELL CITY CENTER, <https://www.brickellcitycentre.com/about-us/overview> (last visited Feb. 1, 2019).

69. Brian Bandell, *Developer Seeks Approval for 5.4m Sq. Foot Project in Miami’s Little Haiti*, SOUTH FLA. BUS. J. (June 19, 2018), <https://www.bizjournals.com/southflorida/news/2018/06/19/developer-seeks-approval-for-5-4m-square-foot.html>.

70. In response to the proposed Eastridge SAP in Little Haiti, Elie Philippe, a local resident stated “I’m afraid we’re going to lose all the Haitians in Little Haiti. Like, Little

Given the increase in rates of developments being built as a matter of right (in compliance with Miami21), the carve-outs where no notice or hearing is required, and the sharp reduction in the amount of public hearings held since form-based code was implemented (discussed *infra*), Miami21 seems to have curtailed traditional avenues for public participation in the zoning process.

## ii. Effects and Implementation

Rather than alleviate a chronic housing shortage for vulnerable communities with affordable housing developments, the up-zoning has brought an influx of high-rise luxury buildings,<sup>71</sup> which many fear will displace long-term residents, primarily low-income communities of color. Development is commonplace in the City of Miami. City of Miami Planning and Zoning Director Francisco Garcia, one of the authors of Miami21, explained, "In Miami, I don't think there is any area that is not undergoing some degree of change or redevelopment, or thinking about redevelopment. . . . This is our world today here in Miami."<sup>72</sup> From 2000 to 2016, downtown Miami saw a 150% population increase<sup>73</sup> and, from 2010 to 2018, downtown Miami saw a 38.1% population increase.<sup>74</sup> Since development in the area started with luxury condominiums, many of the new units in downtown Miami have effectively priced out a large segment of the population.<sup>75</sup> As of March 2018, there were more than 500 luxury condominiums, with an asking price of over \$1 million USD, formally listed for sale in the greater downtown Miami area.<sup>76</sup> Recently, there has been more studio apartment development,<sup>77</sup> meaning fewer families are able to access units in the area. In fact, Miami-Dade County's housing market is one of the country's least

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Haiti is going to become a place where they have Haitian things, but no Haitian people." Laura Rodriguez & Brandon Lopez, *Mega Developer Wants to Build in Little Haiti*, NBC MIAMI (June 20, 2019), <https://www.nbcmiami.com/news/local/Mega-Developer-Wants-to-Build-in-Little-Haiti-486087901.html>.

71. Natalie Delgadillo, *Downtown as a Template for Miami's Future*, CITY LAB (Oct. 23, 2016), <https://www.citylab.com/transportation/2016/10/downtown-miami-future-walkability-development>.

72. Smiley & Viglucci, *supra* note 66.

73. Delgadillo, *supra* note 71.

74. 2018 Greater Downtown Miami Demographics Report, MIAMI DOWNTOWN DEVELOPMENT AUTHORITY at 2, [http://www.miamidda.com/wp-content/uploads/MDDA\\_DemoPopReport\\_05072018.pdf](http://www.miamidda.com/wp-content/uploads/MDDA_DemoPopReport_05072018.pdf).

75. Delgadillo, *supra* note 71.

76. *Nearly 78 Months of Luxury Condo Supply Listed for Sale in Greater Downtown Miami*, CRANESPOTTERS.COM (Mar. 6, 2018), <https://cranespotters.com/PreconstructionNews/Details/40309?pagename=Nearly%2078%20Months%20Of%20Luxury%20Condo%20Supply%20Listed%20For%20Sale%20In%20Greater%20Downtown%20Miami>.

77. Rene Rodriguez, *How Small Can You Go? These New Miami Apartments Want You to Downsize and Live Large*, MIAMI HERALD (Apr. 23, 2013), <https://www.miamiherald.com/news/business/real-estate-news/article208563364.html>.

affordable, and recent studies have shown that the City of Miami is one of the hardest cities for renting, and it takes “much-higher-than-average incomes to afford a place in the downtown corridor.”<sup>78</sup>

### c. Public Participation and Community Response

In addition to the increased likelihood of displacement of communities of color, concerns exist related to what mechanisms are in place for citizens to voice their complaints under Miami21. For example, since Coconut Grove was annexed to the City of Miami in 1925, it is subject to the changes that were made when the City of Miami adopted Miami21.<sup>79</sup> The proposal for a large development in the West Grove community of Coconut Grove, one of the oldest neighborhoods in the City of Miami, exemplifies Miami21’s effect on notice to the community and potential for community input. This former Jim Crow neighborhood is comprised mainly of African-American and Afro-Bahamian communities.<sup>80</sup> In November 2018, the West Grove community read in a local newspaper article that a Chicago developer had signed a \$25 million contract to purchase some fifteen lots along Grand Avenue, the main street in the heart of the historic, low-income Black neighborhood.<sup>81</sup> The plan, as presented, was to build “a hotel, offices, a micro-unit apartment house, a mix of affordable and ‘deluxe’ rental apartments and shops,” and a roof of one of the buildings “would be designed to accommodate drones capable of ferrying people.”<sup>82</sup> The buildings were to be five stories tall, the maximum height permitted by Miami21 for the area.<sup>83</sup> According to information shared at a community meeting in the West Grove, the closing for the acquisition of land was set to occur in mid-February 2019,<sup>84</sup> but did not take place as planned.

The West Grove community found out about this potential three-city-block development that would displace at least seventy families through

78. Nancy Dahlberg, *Millennials Migrate to Downtown Miami in Droves and Business Follow*, MIAMI HERALD (Sept. 27, 2016), <https://www.miamiherald.com/news/business/article104311866.html>.

79. Grant Livingston, *The Annexation of the City of Coconut Grove*, 60 TEQUESTA: J. HIST. ASS’N S. FLA. 32 (2000).

80. Roshan Nebhrajani, *The Early Bahamian History of Coconut Grove*, NEW TROPIC (May 9, 2016). The West Grove, marked as “D9” with a circle, on a 1937 redlining map of Greater Miami by the Home Owners’ Loan Corporation is designated as “hazardous.” *Mapping Inequality Redlining in New Deal America*, UNIV. OF RICHMOND DIGITAL SCHOLARSHIP LAB, <https://dsl.richmond.edu/panorama/redlining/#loc=12/25.8080/-80.2085&opacity=0.8&city=miami-fl> (last visited Mar. 30, 2019).

81. Andres Viglucci, *Will This Plan Save the West Grove? A Developer Has Big Plans for Grand Avenue*, MIAMI HERALD (Nov. 26, 2018), <https://www.miamiherald.com/news/local/community/miami-dade/coconut-grove/article222032010.html>.

82. *Id.*

83. *Id.*

84. Commissioner Ken Russell, Coconut Grove Ministerial Alliance Monthly Community Meeting, Community Remarks (Dec. 1, 2018) (notes on file with authors).

the article in *The Miami Herald*.<sup>85</sup> As soon as they saw the news, they began calling City Commissioner Ken Russell to find out why they had not been notified of the impending development. They also wanted to confirm that the community would get an opportunity to negotiate a community benefits agreement guaranteeing affordable housing units and establishing a local hiring preference for the anticipated retail stores.<sup>86</sup>

At a community meeting on December 1, 2018, Commissioner Ken Russell explained that, although the sale had not gone through yet, if the developers proceeded to buy the properties and build in compliance with Miami21, they would be building “as a matter of right,” and, as such, the City of Miami did “not have a seat at the table” regarding the development, and thus could not negotiate for a community benefits agreement.<sup>87</sup> As of mid-March 2019, the community has not received additional information about any future development plans.<sup>88</sup> Accordingly, it is possible the sale was not successful and the prior owners remain in possession of these properties.

When up-zoning gets imbedded into the zoning code, as was the case with the properties on Grand Avenue, the community loses the leverage that they would have had if the developer needed to get a discretionary land use permit in order to build. Without this leverage, it is very difficult for the community to negotiate with the developers for community benefits because the developer does not need the community’s support to build in accordance with the code.

### *B. Downtown Nashville, Tennessee: Urban Overlay*

#### *i. The Code and Its Adoption*

Nashville did not adopt SmartCode for the entire city. Instead, in 2015, Nashville adopted its form-based code as an “urban overlay” to the existing zoning code in Downtown Nashville only.<sup>89</sup> However, this urban overlay uses the transect model and applies six different transect zones to the Downtown Nashville area.<sup>90</sup>

85. *Id.*

86. *Id.* For general information on community benefits agreements, see *Community Benefits 101*, PARTNERSHIP FOR WORKING FAMILIES, <http://www.forworkingfamilies.org/page/community-benefits-101> (last visited Mar. 30, 2019).

87. See Commissioner Russell, *supra* note 84.

88. St. Paul Community Development Corporation Housing Committee meeting (Mar. 11, 2019) (notes on file with authors).

89. *What Is an Urban Design Overlay?* METRO. GOV’T OF NASHVILLE & DAVIDSON COUNTY, TENN., <https://www.nashville.gov/Planning-Department/Rezoning-Subdivision/Urban-Design-Overlay.aspx> (last visited Mar. 28, 2019).

90. *Nashville Next: A General Plan for Nashville and Davidson County, Volume III: Community Plans*, METRO. PLANNING COMM’N OF NASHVILLE & DAVIDSON COUNTY, TENN. (amended Aug. 24, 2017), [https://www.nashville.gov/Portals/0/SiteContent/Planning/docs/CommPlans2017/next-vol3-Downtown\\_Amended2017.pdf](https://www.nashville.gov/Portals/0/SiteContent/Planning/docs/CommPlans2017/next-vol3-Downtown_Amended2017.pdf).

The Metropolitan Planning Commission of Nashville and Davidson County adopted NashvilleNext after “holding over 420 public meetings . . . engaging over 18,500 participants in providing public input to the general plan.”<sup>91</sup> NashvilleNext outlined the city’s plan for growth over the next twenty-five years, expanding on some of the form-based codes the city had adopted as early as 2005.

The city considered NashvilleNext as a way to articulate a vision for Nashville’s growth that can be adopted into the code, one neighborhood at a time.<sup>92</sup> Thus, NashvilleNext is viewed as a series of recommendations for Nashville’s growth that developers and government officials can choose to opt into, but that is not legally enforceable.

Nashville’s approach to zoning combines “Specific Plan Districts” or “SP,” zoning, which “refers to a new type of form-based zoning district, not an overlay, which is not subject to the traditional zoning districts’ development standards.”<sup>93</sup> Along with the Specific Plan Districts, Nashville utilizes overlays, including the Urban Design Overlay, the Institutional Overlay, and the Contextual Overlay District.<sup>94</sup> The Urban Design Overlay (UDO) “defines a specific area and sets design standards for its development” and is form-based, rather than traditional zoning.<sup>95</sup>

Effectively this scheme means that only certain districts of Nashville are actually form-based.<sup>96</sup> For an area or neighborhood to adopt a UDO (i.e., a form-based code), “a council member can request that Metro Planning create a UDO,” or a developer can make an application.<sup>97</sup> Nashville prioritizes UDO requests that are linked to a Detailed Neighborhood Design Plan (“DNBP, because the UDO will translate the community’s vision of the future articulated in the DNBP “from planning policy into zoning code with regulatory power.”<sup>98</sup>

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91. *Id.* at 3.

92. *Id.*

93. *Zoning & Subdivision*, Planning Dep’t, METRO. GOV’T OF NASHVILLE & DAVIDSON COUNTY, TENN., <https://www.nashville.gov/Planning-Department/Rezoning-Subdivision.aspx> (last visited Mar. 28, 2019).

94. *Id.* While an Urban Design Overlay is more reflective of zoning that would be seen in a T5 or T6 zone under SmartCode, a Contextual Overlay District applies design standards to “reinforce established . . . character of residential development in a particular area” *Contextual Overlays*, METRO. GOV’T OF NASHVILLE & DAVIDSON COUNTY, TENN., <https://www.nashville.gov/Planning-Department/Rezoning-Subdivision/Contextual-Overlays.aspx> (last visited Mar. 28, 2019); Institutional overlays apply to colleges and universities in the Nashville Area, *Institutional Overlays*, METRO. GOV’T OF NASHVILLE & DAVIDSON COUNTY, TENN., *supra*.

95. *Id.*

96. *Nashville Next: A General Plan*, *supra* note 90.

97. *What Is an Urban Design Overlay?*, *supra* note 89.

98. *Id.*



Since a UDO request is a zone change, it must follow the zone change procedure which includes:

- Submission to Metro Planning for review,
- Review and recommendation by Metro Planning staff,
- Public hearing at Metro Planning Commission,
- Metro Planning Commission recommendation to Metro Council,
- Three readings (including public hearing on second reading) at Metro Council, and
- Metro Council approval of the UDO.<sup>99</sup>

However, it is not a requirement that developers applying for a UDO follow any of the recommendations outlined in the DNDP.<sup>100</sup> Requesting a variance within a UDO requires the same procedure.<sup>101</sup> This means that even though community stakeholders articulated a plan for their neighborhood, a developer can request a zoning change that does not actually reflect a DNDP.<sup>102</sup> Although the process is the same under form-based code, because the area has been up-zoned and multiple uses are permitted, developers do not have to request as many variances, presumably because the desired building already fits within the specifications of the code.

This process represents an opportunity for the community to be involved in the design process in a non-enforceable way.<sup>103</sup> The DNDPs as well as Community Plans which involved community input, outline a vision for a neighborhood that reflects the particular character, landmarks, and needs

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99. *Id.*

100. *Id.* “Metro Planning prioritizes UDOs that are linked to DNDPs, because the DNDP process involves the community in envisioning its future.” However, the link is not required. *Id.*; see also *The Rezoning Process in Nashville/Davidson County*, METRO. GOV’T OF NASHVILLE & DAVIDSON COUNTY, TENN., <https://www.nashville.gov/Portals/0/SiteContent/Planning/docs/zoning/ZoningProcessChart.pdf> (last visited Mar. 28, 2019).

101. *Id.*

102. *Id.*; Nashville also has “Community Plans” that are memorialized in Nashville Next and are opportunities for community members and stakeholders to gather to outline their plans and visions for their neighborhood or community, these plans can be codified by going through the zoning change process, including requesting a UDO, see *Community Plans*, METRO. GOV’T OF NASHVILLE & DAVIDSON COUNTY, TENN., <https://www.nashville.gov/Planning-Department/Community-Planning-Design/Community-Plans.aspx> (last visited Mar. 28, 2019).

103. *What Is an Urban Design Overlay?*, *supra* note 89; see also *Community Plans*, *supra* note 102, for alternative ways for community members to get involved in the neighborhood planning process. However, it is important to note that neither Community Plans nor DNDPs are directly tied to developing the zoning code. Zoning changes still require the standard legislative process to be adopted. DNDPs and Community Plans are unenforceable on their own.

of a neighborhood, but does not actually create enforceable code. As Nashville's Metro Planning outlines on its website that it "prioritizes" UDOs "linked to DNDPs" (i.e., codes that reflect the design principles and zoning suggestions drawn up in the DNDP), it does not require, but bends toward design concepts that incorporate community input.<sup>104</sup>

## ii. Effects and Implementation

Downtown Nashville, which has been the epicenter of form-based code and development in Nashville, has not always been a residential area characterized by economic growth.<sup>105</sup> Traditionally, mostly Blacks lived in Downtown Nashville. And during the Jim Crow period, all of the downtown area was redlined, meaning federal mortgage lenders would not provide home loans in the area.<sup>106</sup>

Much of the downtown area's development now has been comprised of luxury condos, hotels, and office space.<sup>107</sup> The most notable construction has been the sixteen-acre Nashville Yard development, which will serve as a future home to Amazon.<sup>108</sup> Of the over 3,000 rental units and condos that have been built in Downtown Nashville, only fifty-four (less than two percent) are deemed affordable for "median income" families.<sup>109</sup> There are about 100 times as many hotel rooms that have been built as compared to affordable rental units.<sup>110</sup> According to Rick Bernhardt, the former director of the Metropolitan Planning Commission of Nashville and Davidson County, areas of Nashville under form-based zoning increased 113% in taxable property value from 2005 to 2013, compared with just 33% countywide.<sup>111</sup>

Two-thirds of the people living in Downtown Nashville are white-collar workers, representing a significant shift from the demographics of

104. *Id.*

105. Garrett Harper, *Economic Development*, NASHVILLE AREA CHAMBER OF COMMERCE (Mar. 2013), <https://www.nashville.gov/Portals/0/SiteContent/Planning/docs/NashvilleNext/ECD%20background%20reportforonline%20posting.pdf>.

106. Robert K. Nelson, LaDale Winling, Richard Marciano, Nathan Connolly, et al., *Mapping Inequality*, AMERICAN PANORAMA, Robert K. Nelson & Edward L. Ayers ed.), <https://dsl.richmond.edu/panorama/redlining/#loc=4/36.71/-96.93&opacity=0.8> (last visited Mar. 28, 2019).

107. Development Tracker, NASHVILLE PLANNING DEPARTMENT, <https://maps.nashville.gov/DevelopmentTracker> (last visited Mar. 28, 2019).

108. Sandy Mazza, *3 Things to Know About Amazon's Future Home: Nashville Yards*, TENNESSEAN (Nov. 14, 2018), <https://www.tennessean.com/story/money/2018/11/14/nashville-yards-amazon-downtown-development/1990369002> (last visited Mar. 13, 2019).

109. Development Tracker, *supra* note 107.

110. *Id.*

111. Sean Tubes, *Planner Describes How "Form-Based" Zoning Changed Nashville*, CHARLOTTESVILLE TOMORROW (Sept. 21, 2016), <https://www.cvilletomorrow.org/articles/nashville-planner-on-form-based-zoning>.

Downtown Nashville in the 1990s and early 2000s.<sup>112</sup> The pockets of Downtown Nashville where luxury residences have been developed are now White, but the area as a whole remains mostly Black, with White residents living in the suburbs. Notably, despite twenty-one buildings developed in 2018 in Downtown Nashville that had an investment amount of over \$2.5 million USD<sup>113</sup> (including an office building, eleven hotels, three apartment complexes with over one hundred units, building expansions, a storage facility, and a museum), there were *zero* public hearings related to new developments in Downtown Nashville in all of 2018.<sup>114</sup>

### C. Unincorporated Miami-Dade County, Florida: Urban Center Districts

#### i. The Code and Its Adoption

Urban Center and Urban Area Districts (UCDs)<sup>115</sup> are uniquely zoned areas throughout unincorporated Miami-Dade County situated near transit corridors.<sup>116</sup> UCDs are form-based codes that follow the transect model outlined in SmartCode, with some variations to conform to the natural landscape and existing infrastructure.<sup>117</sup> UCDs were chosen as part of a directive of the county's Comprehensive Development Master Plan<sup>118</sup> (CDMP) to pro-

112. See Harper, *supra* note 105; *Downtown Nashville Demographics*, POINT2HOMES, <https://www.point2homes.com/us/Neighborhood/TN/Downtown-Nashville-demographics.html> (last visited Mar. 30, 2019).

113. Development Tour, DOWNTOWN NASHVILLE PARTNERSHIP, <https://www.nashvilledowntown.com/business/development-map> (last visited Jan. 30, 2019).

114. *Id.*

115. There are currently thirteen UCDs: Downtown Kendall (adopted 1999), Naranja Community Urban Center District (adopted 2006), Cutler Ridge Metropolitan Urban Center District (adopted 2006), Goulds Community Urban Center District (adopted 2006), Ojus Urban Area District (adopted 2006), Perrine Community Urban Center District (adopted 2006), Princeton Community Urban Center District (adopted 2006), Leisure City Community Urban Center District (adopted 2007), Model City Urban Center District (adopted 2010), North Central Urban Area District (adopted 2011), Bird Road Corridor Urban Area District (adopted 2013), Palmer Lake Metropolitan Urban Center District (adopted 2013), and Country Club Urban Center District (adopted 2014). MIAMI-DADE COUNTY, FLA. CODE OF ORDINANCES ch. 33, arts. XXXIII(I)–(V) (Jan. 22, 2019); see also *Zoning Districts*, Regulatory & Economic Resources, MIAMIDADE.GOV, <http://www.miamidade.gov/zoning/districts.asp> (last visited Mar. 30, 2019).

116. Urban Centers, *Land Use Element of Comprehensive Development Master Plan*, MIAMI-DADE COUNTY, I-46 (2008), available at <http://www.miamidade.gov/planning/cdmp/plan/cdmp-land-use-element.pdf>.

117. MIAMI-DADE COUNTY, FLA. CODE OF ORDINANCES ch. 33, art. XXXIII(K) (Jan. 22, 2019); see also Standard Urban Center District Regulations, Miami-Dade, FLA. CODE, ch. 33, art. XXXIII(K) (revised Mar. 2019), <https://www.miamidade.gov/zoning/library/reports/standard-urban.pdf>.

118. DEP'T OF REGULATORY & ECON. RES., at I-45 to I-48, <https://www.miamidade.gov/planning/library/reports/planning-documents/cdmp/land-use.pdf> (last visited Mar. 30, 2019).

mote urban centers in places where mass transit, roadways, and highways are highly accessible.<sup>119</sup> They are “designated by the county’s Comprehensive Plan to develop over time into multi-use districts characterized by high quality urban design.”<sup>120</sup>

With the County’s adoption of Article XXXIII(K) of Chapter 33 of the Miami-Dade Code in July 2005, the County transitioned from zoning UCDs with traditional (Euclidean) zoning maps to zoning these areas using form-based code.<sup>121</sup> The master plans for the various UCDs use form-based codes and are regulated by the subchapters of Article 33 of the Miami-Dade County Code.<sup>122</sup> As part of the change to form-based code, the areas of unincorporated Miami-Dade County that are now designated as UCDs were rezoned from individual parcels of land zoned by specific, demarcated uses, such as RU-1—Single-Family Residential District, to larger, contiguous areas of land with broad use categories, such as Core.<sup>123</sup>

Inside UCDs, areas are labeled as “Core,” “Center,” or “Edge” sub-districts.<sup>124</sup> These sub-districts regulate the allowable intensity and density.<sup>125</sup> Mixed-use developments are encouraged in the core and center sub-districts, while edge sub-districts have largely been reserved for residential development.<sup>126</sup>

Section 33-284.88 of the Miami-Dade Code states that all developments in UCDs, besides single-family homes and duplexes, “shall be processed and approved administratively.”<sup>127</sup> After an applicant submits a proposal, it will be reviewed by the Department of Regulatory and Economic

119. *Id.*; MIAMI-DADE COUNTY, FLA. CODE OF ORDINANCES § 33-284.81 (Jan. 22, 2019).

120. Standard Urban Center District Regulations, *supra* note 117 (“About This Document” reference).

121. *Id.* The City of Miami also transitioned to form-based code in 2009 with the adoption of Miami21. *Project Vision*, MIAMI 21, <http://www.miami21.org>, (last visited Mar. 30, 2019); *see also supra* Section III.B.a. UCDs and the City of Miami are currently the only areas of Miami-Dade County that utilize form-based code.

122. MIAMI-DADE COUNTY, FLA. CODE OF ORDINANCES ch. 33, art. XXXIII(I)–(V).

123. *See, e.g.*, Hearing No. 14-7-CC-1 (13-92) regarding Zoning Application Case No. Z2013000092/N (*Bird Road Corridor Urban Area District*), BD. COUNTY COMMISSIONERS, [http://pzimage.miamidade.gov/images/new\\_documents/Z2013000092/N.pdf](http://pzimage.miamidade.gov/images/new_documents/Z2013000092/N.pdf) (last visited Mar. 30, 2019) (representing the prior zoning categories of the area); *see also* Bird Road Corridor Urban Area District, Miami Dade, FLA. CODE, ch. 33, art. XXXIII(U), <https://www.miamidade.gov/planning/library/ordinances/bird-corridor-district-regulations.pdf> (last visited Mar. 30, 2019) (describing the new zoning guidelines).

124. *See* MIAMI-DADE COUNTY, FLA. CODE OF ORDINANCES § 33-284.81 (describing the standard purpose and applicability of Urban Center District Regulations).

125. *See* discussion *supra* note 33 (defining “intensity” and “density”).

126. Standard Urban Center District Regulations, *supra* note 117, at 1.

127. MIAMI-DADE COUNTY, FLA. CODE OF ORDINANCES § 33-284.88. Administrative approval means applications for new developments are reviewed by county officials who are tasked with reviewing applications to check for compliance with the County Code. *Id.* Because of their low-density and low overall impact, single-family homes and duplexes

Resources, which will issue a decision in twenty-one days.<sup>128</sup> Other departments such as the Department of Public Works and Waste Management, Miami-Dade Fire Rescue Department, and the Miami-Dade County School Board to assess potential impacts on infrastructure and services, in which case mitigation measures may be requested.<sup>129</sup> Besides these administrative review procedures, developments that are consistent with the UCD zoning plan are not required to provide notice to residents or be subject to any public hearing.<sup>130</sup> However, any developments that are inconsistent with the area's transect description are subject to the same procedures, including notice and hearing, that a request for a map variance would require in an area outside a UCD that does not follow form-based code.<sup>131</sup>

## ii. Effects and Implementation

Similar to the other municipalities that have transitioned to form-based zoning, re-characterizing areas in unincorporated Miami-Dade County as urban mixed-used spaces with higher density, intensity, and floor-heights has the potential to displace the long-time residents of these areas.<sup>132</sup> Areas that are zoned as high-density and mixed-use with proximity to mass transit are very attractive to developers, especially as the population of Miami-Dade County continues to grow.

Only one UCD, Model City, includes a mandatory inclusionary zoning provision.<sup>133</sup> This requires all developments with more than four residential units to provide a minimum of either 12.5 percent workforce housing or ten percent as affordable housing.<sup>134</sup> In UCDs without mandatory inclusionary zoning provisions, and/or other similar legislative protections, zoning changes make it possible for developers to build large-scale residential complexes without any affordable units.

Moreover, there is also the potential for significant displacement even where mandatory inclusionary zoning provisions exist, because of the

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that are in compliance with the Code do not have to see administrative approval before construction. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* Applications and the departments' responses are available at Miami Dade Zoning, MIAMI-DADE COUNTY, [https://energov.miamidade.gov/EnerGov\\_Prod/SelfService#/search](https://energov.miamidade.gov/EnerGov_Prod/SelfService#/search) (last visited Mar. 30, 2019).

131. See generally MIAMI-DADE COUNTY, FLA. CODE OF ORDINANCES, ch. 33.

132. For more information on displacement of historically Black communities in other parts of the County, see David Smiley, *Evictions, Profit, and Slum: The Slow Fade of Grand Avenue*, MIAMI HERALD (Dec. 2, 2016), <http://www.miamiherald.com/news/local/community/miami-dade/article118514978.html>; Andres Viglucci, *There's a Bit of Wynwood Developers Haven't Touched: Will They Gentrify That Too?*, MIAMI HERALD (Nov. 17, 2017), <http://www.miamiherald.com/news/local/community/miami-dade/midtown/article185212378.html>.

133. MIAMI-DADE COUNTY, FLA. CODE OF ORDINANCES § 33-284.99.42(c)(1).

134. *Id.*

inadequacy of these provisions. For example, the Model City UCD requirement of 12.5 percent workforce or ten percent affordable housing,<sup>135</sup> does not guarantee enough affordable housing units for all low-income residents currently living in the Model City UCD where there is a poverty rate of 42.9 percent.<sup>136</sup> Additionally, an affordable housing unit is defined as a household “whose income range is up to 80 percent of the most recent median family income for the County,”<sup>137</sup> a figure which is out of reach for the “estimated 75.6 percent of households [in Liberty City that] have annual incomes of less than \$40,000, and [even more out of reach for the] 46.2 percent of households [that] earn less than \$20,000 annually, far below the County’s median household income of \$43,099.”<sup>138</sup>

### iii. Public Participation and Community Response

Although not mandated by statute, residents in UCDs were asked to participate in a process called “charrettes,” which ultimately led to the design of UCDs.<sup>139</sup> Charrettes were a series of stakeholder meetings where residents and other stakeholders,<sup>140</sup> including developers, could outline

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135. *Id.*

136. *Id.*; Edward Murray, *Liberty City: Economic Analysis and Opportunities Report*, South Florida Housing Consortium 27 (Feb. 2, 2017), available at [https://civic.miami.edu/\\_assets/pdf/housing-initiatives/housing-reports/Liberty-City-Economic-Analysis-and-Opportunities-Report-2017-2-2-Final.pdf](https://civic.miami.edu/_assets/pdf/housing-initiatives/housing-reports/Liberty-City-Economic-Analysis-and-Opportunities-Report-2017-2-2-Final.pdf). Model City is another name for Liberty City.

137. MIAMI-DADE COUNTY, FLA. CODE OF ORDINANCES § 33-284.99.42 (“‘Affordable housing unit’ means a dwelling unit, the sale, rental, or pricing of which is restricted to households whose income range is up to 80 percent of the most recent median family income for the County reported by the U.S. HUD and maintained by the Department of Planning and Zoning.”).

138. See Murray, *supra* note 136, at 27 (“Significantly, the poverty rate in Liberty City is 42.9 percent, which is more than double the overall poverty rate (20.5 percent) for Miami-Dade County.”).

139. Miami-Dade County Dep’t of Planning & Zoning, *Charrette Area Plans Urban Centers*, S. FLA. REG’L PLANNING COUNCIL, <http://www.sfrpc.com/ftp/pub/watershed/12Jan06%20Exhibit%20C.pdf> (last visited Mar. 30, 2019).

140. Charrettes invite stakeholders, such as developers, and community members, to participate in the planning process. To see who participated in some charrettes and what was discussed, see *Model City/Brownsville Charrette Area Plan Report Executive Summary*, Miami-Dade County Dep’t of Planning & Zoning, Community Planning Section (Sept. 2003), <https://www.miamidade.gov/zoning/library/reports/model-city-executive-summary.pdf> (last visited Mar. 30, 2019); *Goulds Community Urban Center, Citizens’ Master Plan Final Report*, Miami-Dade County Dep’t of Planning & Zoning (July 23, 2003), <http://miamidadetpo.org/library/studies/goulds-community-urban-center-citizens-master-plan-final-report-2003-07.pdf>; *Goulds Charrette Area Plan Report Executive Summary*, Miami Dade County Dep’t of Planning & Zoning, Community Planning Section (2003), <https://www.miamidade.gov/zoning/library/reports/goulds-executive-summary.pdf>; *Perrine Charrette Area Plan Report Executive Summary*, Miami-Dade County Dep’t of Planning & Zoning, Community Planning Section (Jan. 2003),

initiatives and the types of development that they wanted in the community.<sup>141</sup> However, the Code does not require these initiatives to be followed, and the County does not have a system in place to enforce the designs and recommendations that the stakeholders produced at these meetings for the UCDs; they rather are used to “develop the community’s vision for its growth and future development.”<sup>142</sup> Each enforceable ordinance adopted the zoning and land-use descriptions created through the charrettes, but, with the exception of Model City that included a mandatory inclusionary zoning provision, the social benefits discussed at the charrettes were not included.<sup>143</sup> Notably, the Model City/Brownsville Charrette was led by the Model City Office of Community and Economic Development (OCED) Community Advisory Committee, which adopted the following process:

The study itself has been funded with HUD CDBG funds and was intended to develop a coordinated Area Plan for Model City/Brownsville’s revitalization. OCED will then be able to concentrate improvement efforts in those areas by *providing the community development programs that will benefit the residents. . . .*

. . . .

*. . . Once a Charrette Area Plan is accepted by the local community, it is presented to the Community Council, Planning Advisory Board and finally to the Board of County Commissioners for acceptance of the report and to direct County staff to prepare the necessary code amendments to implement the*

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<https://www.miamidade.gov/zoning/library/reports/perrine-executive-summary.pdf> (last visited Mar. 30, 2019); *North Central Charrette Area Plan Report Executive Summary*, Miami-Dade County Dep’t of Planning & Zoning, Community Planning Section (Sept. 2003), <https://www.miamidade.gov/zoning/library/reports/north-central-executive-summary.pdf>.

141. Charrette Master Plans are detailed documents for each UCD that include renderings and development proposals. *See, e.g., supra* note 140.

142. *Small Area Studies*, Miami-Dade Dep’t of Regulatory & Econ. Resources, <https://www.miamidade.gov/zoning/small-area-studies.asp> (last visited Mar. 30, 2019).

143. *See, e.g., North Central Charrette Area Plan Report Executive Summary, supra* note 140. North Central’s charrette discussed the inclusion of affordable housing; however, Model City is the only UCD with a mandatory inclusionary zoning provision. Even in Model City, where the County staff prepared the necessary Code amendments for the creation of UCDs, the UCD Code, on the whole, did not address the implementation of citizen requests from the charrette such as “improv[ing] the public infrastructure: landscaping, parks, schools, sidewalks, street lights, water and sewer service.” *Model City/Brownsville Charrette Area Plan Report Executive Summary, supra* note 140. To view examples of charrette reports and corresponding regulations, see *Small Area Plans & Ordinances*, Miami-Dade Dep’t of Regulatory & Econ. Resources, <https://www.miamidade.gov/zoning/small-area-plans.asp> (last visited Mar. 30, 2019).



recommendations that require legislative action as well as finalize the Area Planning Process.<sup>144</sup>

A comparison between the level of community participation in Model City (which required the charrette area plan to be accepted by the community) to the more traditional charrette process, such as the North Central Charrette, is a good example of the varying degrees of community involvement in charrettes. Over the course of a week in North Central, public meetings were held in which:

the design team set up its studio in a wood shop at Turner Tech and was open to the public all week. A presentation of work in progress was held on Friday, May 10th. *Residents*, property and business owners as well as North Dade Chamber of Commerce, County staff and elected officials *were present*.  
...

... A series of presentations by County Staff were held and during that time further *citizen and professional input was taken into account*.<sup>145</sup>

The invitation to be present to comment on a presentation is not a substitute for the meaningful involvement of community members in the decision-making process of what is going to happen in or to their community.

The lack of meaningful community involvement is even more concerning considering the demographics and historical racial makeup of the various UCDs. Below is a map of the areas zoned as “Negro Housing Areas” in Miami-Dade County in 1951<sup>146</sup> and a map of the UCDs throughout Miami-Dade,<sup>147</sup> which closely mirrors the “Negro Housing Areas” of the 1950s. Note that both maps identify the following neighborhoods: Ojus, Model City (Liberty City), Perrine, Goulds, Princeton, Naranja, and Leisure City (Modello).

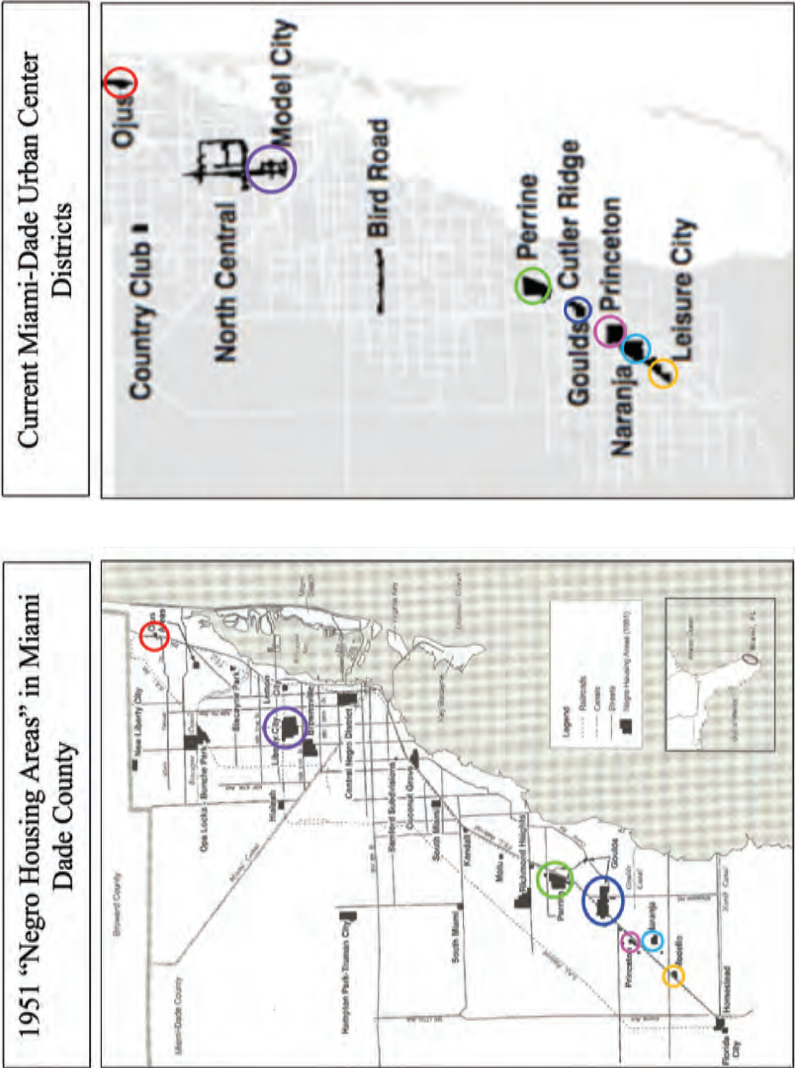
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144. *Model City/Brownsville Charrette Area Plan Report Executive Summary*, *supra* note 140 (emphasis added).

145. *North Central Charrette Area Plan Report Executive Summary*, *supra* note 140 (emphasis added).

146. N.D.B. CONNOLLY, *A WORLD MORE CONCRETE: REAL ESTATE AND THE REMAKING OF JIM CROW SOUTH FLORIDA* 187 (2016) (map by Gordie Thompson).

147. Standard Urban Center District Regulations, *supra* note 117.



Current Miami-Dade Urban Center Districts

1951 "Negro Housing Areas" in Miami- Dade County

The demographics of UCDs, especially those with Jim Crow legacies, are typically poorer and contain a higher percentage of people of color.

### UCD Demographics<sup>148</sup>

UCD	Per Capita Income	Median Household Income	% Black	% Hispanic*	% White	% Below Poverty Line
Ojus	\$32,169	\$43,420	7%	46%	43%	15.1%
Model City (Liberty City)	\$11,076 <sup>149</sup>	\$26,600	84%	14%	1%	45.1%
Perrine	\$10,380	\$26,977	84%	14%	3%	40.7%
Goulds	\$11,477	\$29,333	49%	43%	5%	40.7%
Princeton	\$17,797	\$49,725	20%	64%	14%	24.8%
Naranja	\$11,612	\$29,149	35%	53%	7%	37.9%
Leisure City (Modello)	\$12,891	\$34,428	19%	73%	6%	35%

\*Hispanic includes respondents of any race. Other categories are non-Hispanic.

148. All numbers are estimates. *Leisure City, FL*, CENSUS REP., <https://censusreporter.org/profiles/16000US1239950-leisure-city-fl> (last visited Feb. 1, 2019); *Naranja, FL*, CENSUS REP., <https://censusreporter.org/profiles/16000US1247700-naranja-fl> (last visited Feb. 1, 2019); *Princeton, FL*, CENSUS REP., <https://censusreporter.org/profiles/16000US1258975-princeton-fl> (last visited Feb. 1, 2019); *Goulds, FL*, CENSUS REP., <https://censusreporter.org/profiles/16000US1226950-goulds-fl> (last visited Feb. 1, 2019); *West Perrine, FL*, CENSUS REP., <https://censusreporter.org/profiles/16000US1276700-west-perrine-fl> (last visited Feb. 1, 2019) (indicating that the Perrine UCD is located in the West Perrine area); *Ojus, FL*, CENSUS REPORTER, <https://censusreporter.org/profiles/16000US1251125-ojus-fl> (last visited Feb. 1, 2019); *Household Income in Liberty City, Miami, FL*, STATISTICAL ATLAS, <https://statisticalatlas.com/neighborhood/Florida/Miami/Liberty-City/Household-Income> (last visited Feb. 1, 2019).

149. Per capita income was calculated using the individual census tracts for the bounded area of Liberty City. *Liberty City Neighborhood in Miami, Florida (FL)*, 33127, 33142, 33147, 33150 *Detailed Profile*, City-Data.com, <http://www.city-data.com/neighborhood/Liberty-City-Miami-FL.html> (last visited Feb. 1, 2019).

### Miami-Dade County Demographics<sup>150</sup>

County	Per Capita Income	Median Household Income	% Black	% Hispanic*	% White	% Below Poverty Line
Miami-Dade County	\$24,515	\$44,224	18.5%	67.7%	13.8%	18.2%

\*Hispanic includes respondents of any race. Other categories are non-Hispanic.

Community concern regarding the UCD development process is captured by an incident in Ojus, one of the northernmost UCDs. In 2014, a 400-unit luxury condo apartment complex was approved administratively, and, because it complied with the zoning parameters in the Ojus Core sub-district, residents were not notified of the building's proposal, approval, and construction.<sup>151</sup> No public hearing took place for residents to express their concerns about the building.<sup>152</sup>

Among other concerns, residents were worried, for example, about changes in traffic patterns because of the size of the construction project and the access points to enter the street from the building's parking garage.<sup>153</sup> In response, Eric Silva, the County's Senior Zoning Chief, said the current Zoning Code does not say where the developer can or cannot put the access points, and moreover, Silva added that "residents were under the impression that the County could not give a developer site plan approval without consulting with them first."<sup>154</sup> Silva explained that "the Ojus Urban Area Zoning District . . . only required an administrative review" of plans submitted by developers.<sup>155</sup> He further stressed that "[i]t doesn't need to go to a board for approval. There were no variances; they met the code, so we approved it."<sup>156</sup> In other words, the whole development project from start to finish was only subject to administrative review, which did not require community participation.

150. All numbers are estimates. *Quick Facts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/miamidadecountyflorida/POP060210> (last visited Feb. 1, 2019).

151. Jeffrey Pierre, *Ojus Residents Voice Concerns About a Proposed 400-Unit Luxury Complex*, MIAMI HERALD (Nov. 10, 2014), <http://www.miamiherald.com/news/local/community/miami-dade/aventura/article3727534.html> (last visited Mar. 30, 2019).

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

### D. Gulfport, Mississippi: Optional Overlay

#### i. The Code and Its Adoption

Gulfport, Mississippi, has instituted what is known as an optional overlay of form-based code.<sup>157</sup> In the wake of Hurricane Katrina (“Katrina”), Gulfport was left with massive amounts of destruction.<sup>158</sup> This destruction also provided the city an opportunity to reconceptualize how it could grow and build in the wake of the disaster.<sup>159</sup> As part of its Comprehensive Plan and in conformity with state law,<sup>160</sup> in February 2007, Gulfport adopted a city-wide SmartCode.<sup>161</sup> Unlike Miami and Nashville, the Gulfport “Code is an option for development of Communities and Neighborhoods in the City of Gulfport, Mississippi, and may, by proper planning process, be made mandatory in certain districts of the City.”<sup>162</sup> Similar to Miami21, for areas in Gulfport zoned with the optional SmartCode overlay, “[a] proposal for a building or community plan that complies with this Code[,] may thereby be processed administratively, without public hearing.”<sup>163</sup>

The optional overlay model in Gulfport follows the specifications of transects outlined in SmartCode.<sup>164</sup> For example, the T6 zone (i.e., the urban core) is zoned for Downtown Gulfport. Prior to passing the ordinance, Gulfport described its vision for this zone as follows:

[The] Code [for the Urban Core] is intended to encourage the area to also become richly mixed use, with specialty retail, offices, and residential in mixed use buildings, and a wide variety of quality restaurants. Buildings

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157. *February 2017 Case Studies*, *supra* note 3. An optional overlay is different from the overlays seen in Nashville. In Nashville, the city can mandate a new zoning code in a particular area. In Gulfport, developers can choose to opt-in to the form-based overlay zoning code, or they can choose to be governed by the underlying traditional zoning code.

158. *Redevelopment Master Plan Charrette Book*, Gulfport, Mississippi, MISS. RENEWAL FORUM (Oct. 31, 2005), [http://www.mississippirenewal.com/documents/Rep\\_Gulfport.pdf](http://www.mississippirenewal.com/documents/Rep_Gulfport.pdf).

159. *Id.*

160. MISS. CODE ANN. §§ 17-1-1 to 17-1-27 (West 2019); CITY OF GULFPORT, MISS., CODE OF ORDINANCES, App. D, art. 1, § 1.1 (adopted Feb. 3, 2007); *see also Codes*, Mississippi Renewal Forum, [http://www.mississippirenewal.com/documents/Rep\\_Codes.pdf](http://www.mississippirenewal.com/documents/Rep_Codes.pdf) (last visited Mar. 29, 2019).

161. CITY OF GULFPORT, MISS., CODE OF ORDINANCES, App. D—SmartCode (adopted Feb. 3, 2007); *Transect-Based Regulating Plans*, CENTER FOR APPLIED TRANSECT STUDIES, [https://transect.org/regulating\\_img.html](https://transect.org/regulating_img.html) (last visited Mar. 29, 2019); *see also Codes That Support Smart Growth Development*, U.S. EPA, <https://www.epa.gov/smartgrowth/codes-support-smart-growth-development> (last visited Mar. 29, 2019).

162. CITY OF GULFPORT, MISS., CODE OF ORDINANCES, App. D, art. 1, § 1.3.3 (adopted Feb. 3, 2007).

163. *Id.* App. D, art. 7.

164. *Id.* App. D, art. 6.

are generally of large-scale, with mixed-use condominium buildings from 8 to 18 stories, and set close to street frontages.<sup>165</sup>

In this area, developers can receive density bonuses if they provide a certain number of affordable units.<sup>166</sup>

## ii. Effects and Implementation

Gulfport neighborhoods Soria City, North Gulfport, and Turkey Creek which have majority Black populations represent a disproportionate concentration of Black residents in the Gulfport-Biloxi area where Blacks comprise less than 30% of the population.<sup>167</sup> These geographic concentrations were rooted in history, since the East-West railroad created a racial divide and Turkey Creek was a swamp land acquisition that was once promised to freed slaves.<sup>168</sup>

These neighborhoods, which still represent the highest concentration of Blacks in the area, have historically been subject to the tumultuous economic history of Gulfport and bore the brunt of the environmental impacts of Katrina. Black residents historically congregated around the boat-building, fishing, and seafood industries, and have remained there despite the crash of these industries in the late 1970s and a failure to recover.<sup>169</sup> In addition to economic disaster, the most heavily concentrated Black census tracts in Gulfport faced the highest surge elevations of 16 to 22 feet due to Katrina.<sup>170</sup>

After Katrina devastated these neighborhoods, the city was presented with a choice in how these neighborhoods could be redeveloped. Rather than recognizing the devastating impacts of both the economy and Katrina on these areas, the City of Gulfport characterized the area as a “blank slate” ripe for high-end, luxury development,<sup>171</sup> and it became an epicenter of up-zoning. To invite developers to Gulfport, the City of Gulfport published the following description in 2010 on its website:

Like the artist with the blank canvas or an explorer who steps foot in a brand new land—as residents of Gulfport, Mississippi, we eagerly await the authors who will write the future chapters of our beloved hometown. . . . From the fury of Mother Nature comes the opportunity to re-define our city as a progressive new enterprise of hope and prosperity. When you bring

165. *Codes*, MISS. RENEWAL FORUM, at 15, [http://www.mississippirenewal.com/documents/Rep\\_Codes.pdf](http://www.mississippirenewal.com/documents/Rep_Codes.pdf) (last visited Mar. 29, 2019).

166. CITY OF GULFPORT, MISS., CODE OF ORDINANCES, App. D, §§ 1.6–1.7, 5.9 (adopted Feb. 3, 2007).

167. Kate Driscoll Derickson, *The Racial Politics of Neoliberal Regulation in Post-Katrina Mississippi*, 104 ANNALS ASS'N AM. GEOGRAPHERS 889, 892 (2014).

168. *Id.*

169. *Id.* at 891.

170. *Id.* at 893.

171. *Id.* at 889–93.

your vision to the shores of Gulfport, you will take your place among the other captains and watch your own ship come in.<sup>172</sup>

Geographer Kate Driscoll Derickson argues:

In the same way that the racialized concept of blight justified and created opportunities for new forms of urban development under the guise of urban renewal in the postwar era (internal citation omitted), the highly racialized and impoverished nature of these neighborhoods worked to justify and enable the narrative that the storm had rendered them blank slates and, in so doing, created new opportunities for intensifying and further accomplishing the vision of the city promoted by regional boosters.<sup>173</sup>

The development in Gulfport has been focused on inventing a flourishing tourism industry rather than ensuring municipal equity and creating housing or opportunities for poor,<sup>174</sup> long-term residents.<sup>175</sup> This focus has paved the way for the development of an aquarium, casino, and hotels, geared toward the tourism industry.<sup>176</sup> Characterizing a disenfranchised, historically Black area of Gulfport as a “blank slate” signals just how tangential the city sees the residents’ role in the public input and participation process.

### iii. Public Participation and Community Response

Andrés Duany, who was also largely responsible for Miami21 and other form-based codes throughout the country, organized in 2005 what was known as a redevelopment charrette.<sup>177</sup> Rather than engaging community members, the week-long charrette brought together “over 200 hundred

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172. Kate Derickson, *After Hurricane Katrina, Devastated Black Neighborhoods Created an “Opportunity” for Redevelopment That Focused on Gentrification*, LSE US CENTRE BLOG (July 7, 2014), [blogs.lse.ac.uk/usappblog/2014/07/07/after-hurricane-katrina-devastated-black-neighborhoods-created-an-opportunity-for-redevelopment-that-focused-on-gentrification](https://blogs.lse.ac.uk/usappblog/2014/07/07/after-hurricane-katrina-devastated-black-neighborhoods-created-an-opportunity-for-redevelopment-that-focused-on-gentrification).

173. Derickson, *supra* note 167, at 893.

174. *Id.* at 892 (“Prior to Katrina, in Harrison County, which includes both Gulfport and Biloxi, 27% of the African American population lived in poverty, whereas only 10% of the white population were poor (U.S. Census Bureau 2000). Median household income for white families was \$38,353 in 2000, compared with \$29,394 for African American families (U.S. Census Bureau 2000). Data from the 2010 census show an even starker divide, with median household income for whites increasing at a rate of 33% since 2000 (to \$50,903), with African American household income increasing at a rate of just 3.6% (to \$31,013; U.S. Census Bureau 2010). Further, neighborhoods associated with low-income and poverty status are also the historic centers of African American life in the region.”).

175. Caray Grace, *Regional Convention and Visitors Bureau Aims to Promote Tourism Along the Coast*, WLOX NEWS (Aug. 25, 2015), <http://www.wlox.com/story/29879014/gulfport-cvb-aims-to-promote-tourism-along-the-coast>.

176. Jonathan Brannan, *Downtown Gulfport Seeing a Development Boom*, WLOX NEWS (Apr. 3, 2018), <http://www.wlox.com/story/37871346/downtown-gulfport-seeing-a-development-boom>.

177. *Redevelopment Master Plan Charrette Book, Gulfport, Mississippi*, *supra* note 158, at 3.



professionals from around the world” and resulted in “redevelopment plans for 11 distinct communities along the Mississippi Gulf Coast.”<sup>178</sup> However, the resulting code and developments demonstrate that low-income, long-term residents’ interests were not valued. Ultimately, the Governor of Mississippi diverted \$600 million of the grant money received from HUD intended to aid in the development of housing, particularly for low-income Mississippians, to redevelop the state port of Gulfport.<sup>179</sup> The Governor of Mississippi also received “a series of waivers for the low-income requirement attached to most funding from the HUD.”<sup>180</sup>

The SmartCode becomes operational in Gulfport at the option of a community where a Community Plan is developed and adopted and “may, by proper planning process, be made mandatory in certain districts of the City.”<sup>181</sup> In areas that have adopted form-based code, the Consolidated Review Committee (“CRC”) approves or denies applications for development after “a minimum evaluation from all applicable regulatory authorities within the City and consensus of “several members of the Committee, including the Community Representative, that the “application complies with the requirements of this Code and of the relevant Official Community Plans.”<sup>182</sup> The Gulfport CRC is unique in that it allows community members to sit on the CRC.<sup>183</sup> Residents in any of these opt-in areas may petition the mayor and city council for representation on the CRC.<sup>184</sup> If petitioned, “the Council member or members representing the ward or wards containing the Community Planning Area shall nominate a resident of the Community Planning Area to act as Community Representative for that Community Planning Area to the CRC, with approval by the Mayor and City Council.”<sup>185</sup> Additionally, “an accurate log of applications submitted for CRC review or hearing shall be made available for routine inspection by the public, and shall include the applicant, subject site, date, and type of review or hearing.”<sup>186</sup>

#### IV. Possible Legal Responses

Transitioning to form-based codes can have inequitable consequences on vulnerable communities. Municipalities, for the most part, are neither considering nor addressing social equity issues at the outset. For example, the Form-Based Codes Institute has provided “best practices of form-based

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178. *Id.*

179. Derickson, *supra* note 167, at 897.

180. *Id.*

181. CITY OF GULFPORT, MISS., CODE OF ORDINANCES, App. D, § 1.3.3 (adopted Feb. 3, 2007).

182. *Id.* § 1.4.3.

183. *Id.* § 1.4.3 (b), (d).

184. *Id.*

185. *Id.* § 1.4.3(d)

186. *Id.* § 1.4.8.

coding” to determine if a development regulation is a well-crafted form-based code.<sup>187</sup> According to the Institute, the three main questions used to evaluate whether the form-based code fits within the “best practices” guidelines are: (1) “Is the code enforceable?”; (2) “Is the code easy to use?”; and (3) “Will the code produce functional and vital urbanism?”<sup>188</sup> Notably, ensuring social equity is not even tangentially mentioned as a best practice. Nor is the protection of vulnerable populations from adverse consequences caused by the implementation of the code.<sup>189</sup> This is not to say that a social equity analysis is performed in municipalities that follow traditional zoning. Unfortunately, this analysis is hardly ever carried out in zoning decisions.

Consequently, such policies must be challenged, or, at a minimum, protections must be implemented to ensure that these communities are not forced to bear the burden of the code, while the rest of society reaps the benefits. Importantly, although many similarities exist among the form-based codes adopted across the nation, each area has its own history with its own communities, demographics, needs, and desires. Accordingly, there is no one-size-fits-all solution, including in what are appropriate public notice and hearing procedures. Below we explore possible legal challenges and policy solutions are explored that, having been tailored to the unique context, can combat potential inequities brought about through the transition to form-based codes.

#### A. Possible Legal Challenges

The potential legal challenges that are often cited in scholarly articles discussing form-based codes focus on the enforceability of aspects of the code.<sup>190</sup> The four challenges typically addressed are (1) constitutional concerns regarding substantive due process, specifically design code being void for vagueness if it requires a subjective interpretation by the permitting authority;<sup>191</sup> (2) constitutional concerns regarding the potential violation of property owners’ First Amendment right to freedom of speech if the regulations are so detailed that they rise to the level of a restraint

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187. *Identifying & Evaluating Form-Based Codes*, FORM-BASED CODES INST., <https://formbasedcodes.org/identifying-evaluating> (last visited, Jan. 31. 2019).

188. *Id.*

189. *Id.*

190. Robert J. Sitkowski & Joel Russel, 8 NY ZONING L. & PRAC. REP. 7–8 (Nov./Dec. 2007), available at [https://law.pace.edu/sites/default/files/LULC/Conference\\_2013/Applying%20Form%20Based%20Codes%20in%20the%20Real%20World%20-%20Full.pdf](https://law.pace.edu/sites/default/files/LULC/Conference_2013/Applying%20Form%20Based%20Codes%20in%20the%20Real%20World%20-%20Full.pdf); Mark White, *Form Based Codes: Practice & Legal Considerations*, INST. ON PLANNING, ZONING & EMINENT DOMAIN (Nov. 18, 2009), [http://www.planningandlaw.com/uploads/SMW\\_Paper-Presentation.pdf](http://www.planningandlaw.com/uploads/SMW_Paper-Presentation.pdf); Elizabeth Garvin & Dawn Jourdan, *Through the Looking Glass: Analyzing the Potential Legal Challenges to Form-Based Codes*, 23 J. LAND USE & ENVIRON. LAW 415–20 (2008).

191. This concern is often tied to the general statements that are included in the code regarding design, compatibility, and appearance.

on expression; (3) preemption by controlling state law, for example, some states prohibit aesthetics-based zoning, *viz.* zoning that is principally designed to promote aesthetics; and (4) equal protection and due process concerns regarding “spot zoning.”<sup>192</sup>

Notably, the legal challenges discussed in the literature regarding form-based codes do not address challenging the municipality for the potential discriminatory effects brought about by the code. The Fair Housing Act may provide an avenue for legal recourse regarding such discriminatory effects.<sup>193</sup> Under the Fair Housing Act,<sup>194</sup> affected parties may challenge a practice or policy that “has a discriminatory effect where it actually or predictably results in [1] a disparate impact on a group of persons [2] or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin.”<sup>195</sup>

Under the 2013 HUD regulation on disparate impact, a three-step burden-shifting analysis is used to determine liability under disparate-impact claims and segregative-effect claims.<sup>196</sup> The first step requires the plaintiff to establish a *prima facie* case that the challenged policy “caused or predictably will cause a discriminatory effect.”<sup>197</sup> To do so, a plaintiff must show that (1) the defendant used a “practice or policy” in making housing-related decisions; (2) a class of persons protected by the FHA was harmed by this policy more than others; and (3) this harm was actually caused by defendant’s policy. If the plaintiff satisfies the requirements of the first step, the burden then shifts to the defendant, who is given the opportunity to prove that its challenged policy is “necessary to achieve one or more substantial, legitimate, nondiscriminatory interests.”<sup>198</sup> To be legally sufficient, the “justification must be supported by evidence and may not be hypothetical or speculative.”<sup>199</sup> Finally, if the defendant satisfies this burden, the

192. See sources cited *supra* note 190. Some courts have held it to be problematic if the form-based code weaves a new use into single-use areas because certain tracts of land would be permitted for one use, but similarly situated parcels would not.

193. 24 C.F.R. § 100.500; see also Anthony V. Alfieri, *Black, Poor, and Gone: Civil Rights Law’s Inner-City Crisis*, 54 HARV. C.R.-C.L. L. REV. (forthcoming 2019).

194. 24 C.F.R. § 100.500; see also Robert G. Schwemm & Calvin Bradford, *Proving Disparate Impact in Fair Housing Cases After Inclusive Communities*, 19 N.Y.U. J. LEGIS. & PUB. POL’Y 685 (2016); see also Robert G. Schwemm, *Segregative-Effect Claims Under the Fair Housing Act*, 20 N.Y.U. J. LEGIS. & PUB. POL’Y 709 (2017).

195. 24 C.F.R. § 100.500.

196. *Id.*; see Schwemm, *Segregative-Effect Claims Under the Fair Housing Act*, *supra* note 194, at 712.

197. Schwemm & Bradford, *Proving Disparate Impact in Fair Housing Cases*, *supra* note 194, at 693.

198. 24 C.F.R. § 100.500(b).

199. *Id.*

plaintiff may still prevail by proving that the defendant's interest "could be served by another practice with a less discriminatory effect."<sup>200</sup>

Discriminatory-effect claims are data-driven, and the type of claim depends on the facts relevant to the specific municipality regarding the harm suffered by protected classes. In the present case, a plaintiff could make a *prima facie* disparate-impact claim in three different ways. First, by comparing the various racial demographics of the people impacted by up-zoning (especially in the areas with the highest intensity and density) and their displacement (and, in some instances, being priced-out of the entire municipality). Second, such a claim could be shown by demonstrating that evictions or demolitions (caused by up-zoning) have disproportionately affected certain protected classes. Third, a segregative effect claim could be supported by data demonstrating that people from somewhat integrated neighborhoods (for example, a neighborhood that is 70% Black, 25% White, and 5% other), and are being displaced and forced to live in areas with higher rates of segregation (for example, a neighborhood that is 95% Black, 3% White, 2% other).

If the court found that the plaintiff had met its burden in proving a *prima facie* disparate impact case, the municipality could try to demonstrate that the adopted form-based code is necessary "to achieve one or more substantial, legitimate, nondiscriminatory interests."<sup>201</sup> The analysis to determine whether a challenged policy is necessary to achieve such an interest is "very fact intensive" and "must be determined on a case by case basis."<sup>202</sup> That said, ensuring the safety of residents<sup>203</sup> and implementing occupancy limits, whether to preserve property values<sup>204</sup> or a business necessity,<sup>205</sup> have been held to be legitimate interests. However, a business justification of preventing damage to the apartments, reducing ongoing maintenance, and preserving the eventual resale costs for a two-person occupancy limit (which had a disproportionate effect on families with children), was not held to be a legitimate, non-discriminatory policy.<sup>206</sup>

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200. 24 C.F.R. § 100.500(c).

201. 24 C.F.R. § 100.500(c)(2).

202. Schwemm, *Proving Disparate Impact in Fair Housing Cases*, *supra* note 194, at 696 n.49 (citing Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11,470–11,471).

203. See *United States v. Hillhaven Corp.*, 960 F. Supp. 259, 263 (D. Utah 1997).

204. See *Pfaff v. U.S. Dep't of Hous. & Urban Dev.*, 88 F.3d 739 (9th Cir. 1996).

205. See *Mountain Side Mobile Estates P'ship v. Sec'y of Hous. & Urban Dev.*, 56 F.3d 1243 (10th Cir. 1995); see also *United States v. Weiss*, 847 F. Supp. 819 (D. Nev. 1994).

206. *Fair Hous. Council of Orange Cty., Inc. v. Ayres*, 855 F. Supp. 315, 319–20 (C.D. Cal. 1994). Another example of a business justification not rebutting a *prima facie* disparate impact case was a housing authority's justifications for vacating and demolishing a low-income housing apartment complex. The housing authority justified its actions because of "a need for low income housing density reduction, a need to eliminate a housing design that contributed to a concentration of criminal activity and drug use, and a lack of

If the municipality meets its burden, then the plaintiff has the opportunity to prove that the municipality could have adopted policies that served its stated legitimate interests but that cause less discriminatory effects on the protected classes.<sup>207</sup> Such examples could include implementing legislation that increases the likelihood of meaningful community participation by, for example, requiring large projects or developments in certain neighborhoods be approved by community boards or requiring developers to adopt community benefits agreements for projects in certain areas. Additionally, policies can be adopted to decrease the likelihood of displacement of protected classes, by, for example, implementing mandatory inclusionary zoning, adopting just-cause eviction regulations, or requiring developers to assess and mitigate the potential displacement risk of their development (such a tool would be similar to an environmental impact assessment, but would be applied to displacement and designed to ensure compliance with the Fair Housing Act instead of mitigating the harm to the environment and ensuring compliance with the relevant environmental statutes).

If the municipalities have not adopted policies to mitigate the potential disparate impact or segregative effect on minority communities, it is possible that they will not be able to demonstrate they could not achieve their purpose in a less discriminatory way. Thus, municipalities that have enacted form-based codes with disproportionate adverse effects on minorities may be found to be in violation of the Fair Housing Act.

### *B. Potential Policy Solutions*

Several legislative initiatives could provide tools to increase the likelihood of meaningful community participation and to decrease the likelihood of displacement of low-income minority residents. Such initiatives include community involvement in the approval process for developments, mandated community benefits agreements, mandatory inclusionary zoning, just cause evictions, moratoriums on development, and the requirement to assess and mitigate the potential displacement risk of new developments.

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funding to make improvements, [which were found to be] pretextual because they were unsupported by evidence" and thus not legitimate, non-discriminatory policy objectives. *Charleston Hous. Auth. v. U.S. Dep't of Agric.*, 419 F.3d 729, 741 (8th Cir. 2005).

207. *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015) (holding disparate impact liability available under the Fair Housing Act). Prior to *Inclusive Communities* and the 2013 HUD regulation on disparate impact, some courts placed the burden on the defendant, instead of the plaintiff. For example, the Court in *Ayres* noted that, even if the defendant had shown evidence to support their proposed justification, the defendant would have to show "the occupancy restriction is the least restrictive means to achieve defendant's purpose." *Fair Hous. Council*, 855 F. Supp. at 320.

### i. Meaningful Community Participation

As discussed, the opportunity for community input prior to the enactment of the form-based code (e.g., through charrettes), is not sufficient to safeguard meaningful community participation in the decision-making process, especially participation of low-income communities of color. For example, charrettes address a variety of issues from up-zoning to reviewing and providing feedback on design options. Regardless of how thorough and inclusive those processes are, the anticipated and unanticipated consequences of changing the character of entire neighborhoods with a single legislative action need to be checked both in the short term, to ensure the immediate concerns from communities are addressed, and the long term, to ensure the changing needs of communities are being addressed by the code, even years after it has been adopted.

Along the lines of the Gulfport case study, one of the options to ensure meaningful community participation is to add a provision that approval of a community board is necessary for developments of a certain size or scale city-wide in minority neighborhoods, low-income minority neighborhoods, or former Jim Crow neighborhoods. This type of arrangement would allow the community to be in a position to participate in the analysis to determine that a proposal complies with applicable planning and zoning requirements, to propose changes to a development proposal that would reduce negative impacts on the community, and/or to negotiate a community benefits agreement with a developer.

A second option to ensure meaningful community participation is through an ordinance requiring community benefits agreements.<sup>208</sup> These agreements can be tailored to the community's needs and include provisions for, among other things, affordable housing, local hiring preferences, community centers, green spaces, health services, relocation assistance, job training, living wage programs, and, after-school care programs. It is unlikely for these types of agreements to develop organically in areas with form-based codes because of the removal of the community's leverage to negotiate with the developers when they build as a matter of right due to the administrative approval process after the initial up-zoning is imbedded in the code. By passing an ordinance mandating the use of community benefits agreements, the municipality can give this leverage back and enable the community to avoid or mitigate negative impacts.

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208. A community benefits agreement is a binding agreement entered into between the developer of a land project and either the municipality or community organizations, or both, with the goal of providing benefits tailored to the community's needs. For general information on community benefits agreements, see *Community Benefits* 101, *supra* note 86.

In November 2016, Detroit, Michigan,<sup>209</sup> became the first city to pass a city-wide community benefits ordinance.<sup>210</sup> Under this ordinance, all development projects are required to involve community representation and negotiation in the development process.<sup>211</sup> Although a municipal-wide ordinance would safeguard more vulnerable residents, a requirement for community benefits agreements could also be limited to a smaller area, such as census tracts with a certain percentage of minority residents, census tracts with a certain percentage of low-income residents, census tracts that are on high ground (especially relevant in areas that are likely to be severely affected by sea-level rise), or former Jim Crow neighborhoods.

## ii. Anti-Displacement Initiatives

As explained in Part II, transitioning to form-based code practically requires mass up-zoning, which facilitates rapid development since many development projects only require administrative approvals. Rapid development in low-income areas often results in residents being priced out and displaced, otherwise known as gentrification. Anti-displacement initiatives are one way that municipalities can counteract the increased risk of displacement, particularly for vulnerable low-income minority communities.<sup>212</sup>

When designing these policies, it is important to note that although both low-income homeowners and low-income renters are at increased risk of displacement, the strategies necessary to protect these two types of residents differ. Low-income homeowners located in form-based locations that

209. Although Detroit has not adopted form-based code citywide, the city is in the process of adopting a form-based code for Brush Park. See *Detroit Brush Park Plan and Form-Based Code*, UTILE DESIGN (Jan. 2018), <https://www.utiledesign.com/work/detroit-brush-park-form-based-code>; see also *Development Guidelines*, BRUSH PARK COMMUNITY DEV'T CORP., <http://www.brushparkcdc.org/guidelines> (last visited Jan. 31, 2019). Further, form-based codes may be considered for other areas as well, since the city is in the process of updating the zoning ordinance to “[p]repare a form-based code overlay district or chapter” and “[e]xplore new zoning concepts . . . including allowing a greater mix of compatible land uses, expanding missing housing types, etc.” See *City of Detroit Seeks Zoning Ordinance Update*, FORM-BASED CODES INST. (Mar. 21, 2018), <https://formbasedcodes.org/rfps/city-detroit-seeks-zoning-ordinance-update>.

210. Christine Ferretti, *Prop B Wins, Prop A Fails in Detroit Community Benefits*, DETROIT NEWS (Nov. 9, 2016), <https://www.detroitnews.com/story/news/politics/elections/2016/11/08/detroit-community-benefits-results/93507310>.

211. *Id.*

212. For anti-displacement strategies and policy tools, see *All-In Policies Toolkit*, POLICYLINK, <http://allincities.org/toolkit> (last visited Mar. 14, 2019); see also Kalima Rose & Teddy Kÿ-Nam Miller, *Healthy Communities of Opportunity: An Equity Blueprint to Address America's Housing Challenges*, POLICYLINK (2016), [https://www.policylink.org/sites/default/files/HCO\\_Web\\_Only.pdf](https://www.policylink.org/sites/default/files/HCO_Web_Only.pdf). For additional anti-displacement policies, see NAT'L COALITION FOR ASIAN PACIFIC AMERICAN COMMUNITY DEVELOPMENT & COUNCIL FOR NATIVE HAWAIIAN ADVANCEMENT, *ASIAN AMERICAN & PACIFIC ISLANDER ANTI-DISPLACEMENT STRATEGIES* (Aug. 2017), [http://www.nationalcapacd.org/wp-content/uploads/2017/08/anti\\_displacement\\_strategies\\_report.pdf](http://www.nationalcapacd.org/wp-content/uploads/2017/08/anti_displacement_strategies_report.pdf).



have been up-zoned may find themselves at risk of losing their homes. Such homeowners are subject to over-enforcement of the housing code due to over-reporting of violations by speculators/developers or by new residents that have moved into the area.<sup>213</sup> When a residence is found to be in violation of the housing code, the municipality fines the property owner. This fine typically accrues daily and can reach large amounts in a relatively short period of time, at which point the city may place a lien on the property until the fine is paid. Since low-income homeowners are often unable to pay these fines, they are forced to sell their home and, in fact, may not recover a fair value of the house because of the liens placed on the property. To avoid this possibility, a municipality can allocate funds for qualifying homeowners to help repair their homes so that they are in compliance with the housing code. Additionally, the municipality may adopt a mitigation policy to assist with the reduction or elimination of liens for low-income homeowners.

Low-income tenants face different issues. They tend to be the first to get displaced because they have limited protections; they can be evicted, their landlord could decide to not renew their lease agreement, or the landlord can let the residence fall into disrepair and eventually the residence will be condemned, forcing all the tenants to leave.<sup>214</sup>

As a “city of foreign buyers, absentee landlords, and speculative real estate transactions,”<sup>215</sup> many landlords may not prioritize keeping the community together over meeting their profit targets. The West Grove is an example where “the land is mostly owned by absentee landlords, who

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213. For example, low-income homeowners in the West Grove have expressed such concerns to the University of Miami’s School of Law Environmental Justice Clinic during Coconut Grove Ministerial Alliance meetings in mid-2018. (These documents are on file with authors.)

214. Such was the case with South Winds, an apartment complex located in the West Grove with affordable housing units. The landlord allowed the building to fall into disrepair, and the tenants were evicted when the building was condemned and later demolished. Community Meeting of Tenants and the University of Miami Environmental Justice Clinic at South Winds (Sept. 29, 2016) (notes on file with the authors).

215. *A New Path to Affordable Housing Is Coming to Miami*, NEW TROPIC (May 10, 2016), <https://thenewtropic.com/community-land-trust/> (“When [community land trusts] work[], units stay affordable pretty much forever because they can only be sold to other low-income qualifying home buyers at a rate set before the property values start spiraling. Rates of gentrification slow because residents have a place they can afford long-term. Struggling neighborhoods stabilize because they have residents with a sense of ownership that prompts them to invest in the community. In [the City of Miami] of foreign buyers, absentee landlords, and speculative real estate transactions, that’s an unusual degree of longevity—the kind of longevity that created culturally rich neighborhoods like Little Havana and Little Haiti, which are struggling to hold together today.”).

have done little to improve properties.”<sup>216</sup> Increased density and intensity provide more incentive for owners to sell the land to someone who would redevelop or demolish the current structure and build a more profitable development. Given that the majority of municipalities do not have mandatory inclusionary zoning or a requirement for developers to build affordable housing units, tenants are likely to be priced-out of the area and forced to move, often to areas that are further away from their community and municipal resources, including job markets and public transit.

Mandatory inclusionary zoning and just-cause eviction ordinances are two policy initiatives that may help protect low-income renters. Mandatory inclusionary zoning requires that a certain percentage of units in new developments be affordable.<sup>217</sup> Similar to the options for community benefits agreements, mandatory inclusionary zoning can be adopted across a municipality or in targeted areas that most need affordable housing. Mandatory inclusionary zoning may also be expanded to the commercial side, requiring developers to retain a certain percentage or amount of locally owned businesses. Under just cause eviction ordinances, renters can only be evicted for causes that are stipulated in the ordinance, and, thus, renters are protected from landlords unfairly evicting tenants simply because they want to make a profit while the housing market rises.<sup>218</sup>

In addition to advancing policies that are specifically designed to slow displacement, municipalities can also adopt interim controls to slow development while the municipality examines the potential impacts and decides on the best course of action.<sup>219</sup> For example, in 2008, the San Francisco Planning Department adopted measures to specifically address high-risk neighborhoods.<sup>220</sup> One of those neighborhoods was the Mission District, a Hispanic-majority neighborhood where a rise in medium-to-large scale

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216. Jenny Staletovich & Patricia Borns, *West Grove: The Miami Neighborhood That Time Forgot*, MIAAMI HERALD (Feb. 26, 2014), <https://www.miamiherald.com/news/local/in-depth/article1948901.html> (last visited Mar. 14, 2019).

217. See *Inclusionary Zoning*, All-In Cities Policy Toolkit, POLICYLINK, <http://allincities.org/toolkit> (last visited Jan. 31, 2019) (follow “Housing/anti-displacement,” then select “Inclusionary Zoning” under policy tools).

218. See *Just Cause*, All-In Cities Policy Toolkit, POLICYLINK, <http://allincities.org/toolkit> (last visited Jan. 31, 2019) (follow “Housing/anti-displacement,” then select “Just cause” under policy tools).

219. JULIAN CONRAD JUERGENSEMEYER ET AL., *LAND USE PLANNING AND DEVELOPMENT REGULATION LAW* § 9.6, Moratoria and Interim Controls (3d ed. West 2018).

220. *Interim Controls*, CITY & COUNTY OF SAN FRANCISCO PLANNING DEP’T, <http://sf-planning.org/interim-controls> (last visited Jan. 31, 2019); see also Mission 2015 Interim Controls, SAN FRANCISCO PLANNING DEP’T (July 9, 2015), [http://default.sfplanning.org/Citywide/Mission2020/mission2020\\_Mission2015\\_InterimControls-070915\\_FINAL.pdf](http://default.sfplanning.org/Citywide/Mission2020/mission2020_Mission2015_InterimControls-070915_FINAL.pdf) (last visited Mar. 14, 2019).

development had driven up the costs of living for residents.<sup>221</sup> San Francisco adopted an interim policy resolution in 2015 specific to the Mission District. Although it did not halt development, it introduced a higher level of scrutiny to approve developments.<sup>222</sup> These efforts culminated in the Mission Action Plan 2020, which was approved by the San Francisco Planning Department in March 2017.<sup>223</sup> In addition to the inclusion of a social impact evaluation requirement, the plan made permanent the development restrictions that the interim controls had placed in effect temporarily.<sup>224</sup>

Instead of interim controls, cities can adopt temporary moratoriums to halt development, while the municipality assesses the impacts of development.<sup>225</sup> For example, in 2007, the city council in Providence, Rhode Island, approved a twelve-month moratorium for their Fox Point neighborhood.<sup>226</sup> The relocation of I-95 had opened up an area of desirable waterfront property in an otherwise historically low-income area. Recognizing that this neighborhood had already experienced substantial displacement due to the construction of the I-95, the city deemed the twelve-month halt on all construction would be an essential time to “step back and look at what we’re doing.”<sup>227</sup>

Municipalities can also expand policies that require developers to mitigate the harm caused by their developments through displacement assessments. Although this policy proposal has not been implemented,<sup>228</sup> it could operate like the requirements of an environmental impact assess-

221. Laura Wenus, *Planning Puts Brakes on SF Mission Development*, MISSION LOCAL (Jan. 15, 2016), <https://missionlocal.org/2016/01/planning-puts-brakes-on-sf-mission-development>.

222. *Executive Summary Mission 2015 Interim Controls*, S.F. PLANNING DEP’T (Aug. 6, 2015), [http://commissions.sfplanning.org/cpcpackets/2015-000988CWP\\_08-06-15.pdf](http://commissions.sfplanning.org/cpcpackets/2015-000988CWP_08-06-15.pdf). Under the interim controls, the larger the project, the higher the requirement for affordable housing units; however, projects that contained 100% affordable housing units and projects that met the targets for the production of low-income housing were exempt from the interim controls. *Id.*

223. *Mission Action Plan 2020, Annual Status Report*, S.F. PLANNING DEP’T (Oct. 2018), [http://default.sfplanning.org/Citywide/Mission2020/MAP2020\\_Status\\_Report\\_2018.pdf](http://default.sfplanning.org/Citywide/Mission2020/MAP2020_Status_Report_2018.pdf).

224. J. K. Dineen, *The Bar May Be Raised Even Higher for New Housing in the Mission*, S.F. CHRON. (Jan. 14, 2016), <https://www.sfchronicle.com/bayarea/article/The-bar-may-be-raised-even-higher-for-new-housing-6757376.php>.

225. See JUERGENSMEYER ET AL., *supra* note 219.

226. Sara Molinaro, *City Council Approves Yearlong Development Moratorium in Fox Point*, BROWN DAILY HERALD (July 16, 2007), <http://www.browndailyherald.com/2007/07/16/city-council-approves-yearlong-development-moratorium-in-fox-point>.

227. *Id.*

228. The City of Portland’s Bureau of Planning and Sustainability has developed a Vulnerability Risk Assessment tool to “identify census tracts within the City of Portland that have higher-than-citywide average populations with characteristics that make resisting displacement more difficult: they are renters rather than homeowners, belong to communities of color, lack college degrees, and have lower incomes.” 2012

ment<sup>229</sup> or a social impact assessment.<sup>230</sup> Accordingly, a displacement assessment<sup>231</sup> would require the developer to undertake a study to identify who is likely to be displaced by the proposed development. This analysis should include whether those that are likely to be displaced belong to a protected class and, if so, whether they are being disproportionately adversely impacted in comparison to non-protected classes. Additionally, developers should analyze whether those that are at risk of displacement are likely to move to a more segregated area (by, for example, being priced out of less segregated areas), if displaced. Then, for the development to be approved, the developer would be required to provide a mitigation plan to minimize the displacement impact and the potential fair-housing concerns. This displacement assessment could be required of all developments in a municipality or could be limited to census tracts, with higher percentages of minority residents, low-income residents, or low-income minority residents on high ground that may be subject to climate gentrification.

## V. Conclusion

Zoning laws were forged in an effort to enhance the well-being of society. When determining a policy's impact, it is good practice to consider its effect on the most vulnerable members of the population that the policy will affect. As part of this analysis, when evaluating zoning policies, it is important to ensure that the goal is not merely to benefit a particular geographic area, but to enhance the well-being of the community that lives there, as well as society-at-large. Benefiting the area and the people may sound like the same goal, but ensuring each objective is met requires a different analysis. Unfortunately, the betterment of a geographic space has often been achieved by sacrificing the welfare of the people that live there by displacing them.

Form-based zoning may be the solution that city planners have been looking for to address urban sprawl and environmental concerns and to promote walkability and beautiful streetscapes. However, the implementation of this livable city should benefit all and not come at the expense of the most at-risk members of society. Urban renewal can and should be implemented to increase the well-being of all of society, which includes

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*Vulnerability Analysis of Gentrification and Displacement Study*, CITY OF PORTLAND'S BUREAU OF PLANNING & SUSTAINABILITY, <https://www.portlandoregon.gov/bps/66107>.

229. U.S. EPA, ENVIRONMENTAL IMPACT ASSESSMENT, <http://www.epa.ie/monitoring/assessment/assessment/eia> (last visited Jan. 9, 2018).

230. Ana Maria Esteves & Frank Vanclay, *Social Impact Assessment*, INTERNATIONAL ASSOCIATION FOR IMPACT ASSESSMENT, <http://www.iaia.org/wiki-details.php?ID=23> (last visited Jan. 9, 2019).

231. Tim Iglesias, *Housing Impact Assessments: Opening New Doors for State Housing Regulation*, 82 OR. L. REV. 433 (2003) (laying out the framework for a housing impact assessment regime that is prepared by local government).

the communities that have been historically discriminated against and that have limited political clout—in short, vulnerable communities.

While transitioning to form-based code, we must ensure that we listen to the concerns of the communities that are directly affected by zoning changes and act on them to make sure principles of equality and inclusion are furthered. The exclusion of vulnerable communities from the decision-making process and the lack of understanding regarding public notice requirements for developments in form-based code are evidenced by resident Phillip Murray in the Goulds UCD. He voiced concerns over the administrative approval of Karis Village, an eighty-eight-unit, low-income housing development that primarily serves homeless veterans.<sup>232</sup> The Goulds UCD was adopted in 2006, and Karis Village's site plan was approved in 2016.<sup>233</sup> In 2017, Murray questioned: "[H]ow can an apartment complex (Karis Village) be constructed with little or no community input? . . . [H]ow does Goulds benefit from this project?"<sup>234</sup> If municipalities transitioning to form-based codes incorporate more robust and continuous participation mechanisms and proactively address displacement impacts, these questions may no longer arise.

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232. Phillip Murray, Jr., *Letters to the Editor, Low-Cost Housing*, MIAMI HERALD (Apr. 16, 2017), <https://www.miamiherald.com/opinion/letters-to-the-editor/article144950014.html>. Note that Karis Village was completed in 2018. *Karis Village—Miami, Florida*, GREEN MILLS GROUP, <https://www.greenmillsgroup.com/project/karis-village-miami-dade-county-florida> (last visited Mar. 30, 2019).

233. MIAMI-DADE COUNTY, FLA. CODE OF ORDINANCES, ch. 33, art. XXXIII(L); Letter from Nathan Kogon, Assistant Director of Dev. Serv. Div., Dep't of Regulatory & Econ. Research, to Jorge Navarro, Karis Village site plan development applicant regarding Approval of Administrative Site Plan Review for Karis Village (Sept. 2, 2016), [http://pzimaging.miamidade.gov/images/new\\_documents/A2016000015/DAL.pdf](http://pzimaging.miamidade.gov/images/new_documents/A2016000015/DAL.pdf).

234. See Murray, Jr., *supra* note 232.