

# Growth Management Fact Book

## 2022 Update

PREPARED BY



**ROBINSON & COLE** LLP  
ATTORNEYS AT LAW

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## **PREFACE**

This 2022 update of the Growth Management Fact Book has been prepared by Robinson & Cole LLP as consultant to NAR. As an updated resource in NAR's Smart Growth program, the Fact Book is intended to help REALTORS® at the state and local levels better understand and respond to growth management and sustainability initiatives in their communities.

The Fact Book supplements, but does not substitute for, the more focused assistance provided by NAR through its Land Use Initiative Program. Its purpose is to provide NAR's member associations with a basic framework and reference source for engaging their fellow citizens and local officials in a productive dialogue about how, when and where growth should take place in their communities.

Timothy C. Twardowski  
**Robinson & Cole LLP**  
August 2022

## SECTION 1: INTRODUCTION

This 2022 update of the *NAR Growth Management Fact Book* provides REALTORS® with an update of factual information and analyses concerning modern growth management (aka “Smart Growth”) initiatives and techniques. The publication of this *Fact Book* reflects NAR’s belief that REALTORS® must be able to engage with citizens, legislators, and government officials effectively on regulatory issues of importance to the real estate industry. The *Fact Book* is designed to keep REALTORS® well informed and help them develop well-reasoned policy positions on growth management-related issues at the national and local levels.

The introduction to the 2008 edition of the *Fact Book* observed that the Smart Growth movement that began in the 1990s had converged with two other movements – New Urbanism and Green Building – and that this convergence had profoundly influenced government land use and development policies, and the minds of the consuming public. Today, “sustainability” has become the overarching principle for the fundamental objectives of these three movements – quality and management of growth, compact urban form, and attention to the relationship of buildings and the public realm, and sustainable building design, construction, and land development. The implementation of these principles through government regulation and private sector initiatives has dramatically affected the marketplace in which REALTORS® work.

Even though the public discourse today on land use and development issues is more often framed in terms of “sustainability,” that discourse, at its core, concerns how best to “manage” and shape the “form” of real estate development to achieve desired outcomes concerning the *rate, amount, type, location, character,* and *quality* of growth that occurs. For this reason, the *Fact Book* continues the five-part structure which covers the basic objectives that growth management techniques seek to address. These are:

- Location, Density and Rate of Growth;
- Public Facilities and Infrastructure;
- Protection of Natural Resources and Environment;
- Preservation of Community Character; and
- Housing Production and Affordability

Each of these broad categories is followed by sections describing specific government regulatory techniques utilized to address the issues involved. The discussion of each growth management technique focuses on the following key questions and concerns that REALTORS® should have regarding these techniques:

- Purpose and Key Terms
- Effectiveness in Achieving Stated Purpose(s)
- Impact on Property Values
- Impact on Development Costs
- Impact on Amount and Patterns of Land Development
- Impact on Housing Affordability
- Recommended Talking Points: Pros and Cons
- Incentive-Based Alternatives

The discussion under each of these subsections has been updated, as appropriate to provide the most current factual information and theoretical reasoning, to help REALTORS® understand and assess the implications of using specific growth management techniques in their communities.

Also, following this Introduction, is a *Summary Chart* that summarizes for each technique the effectiveness of the technique, and its likely impact on property values, development costs, and on housing affordability. Providing this chart at the beginning of the *Fact Book* is intended to assist REALTORS® in obtaining a brief overview of each growth management technique, as further explained and evaluated in each of the *Fact Book* sections that follow.

A *Compendium of NAR Resources* available to REALTORS® is located at *Appendix A* to this book. In addition, key terms pertaining to each growth management technique are defined or explained in the context of the discussion. In order to assist the reader in locating and referencing these terms, they are **bolded** in the text and also listed in a *Glossary of Key Terms* located at *Appendix B*.

## SUMMARY CHART OF GROWTH MANAGEMENT TECHNIQUES

| TECHNIQUE   | How Effective in Achieving Stated Purpose(s)   | Impact on Property Values   | Impact on Development Costs   | Impact on Housing Affordability  |
|---|--|---|---|--|
| <b>Urban Growth Boundaries (UGBs)</b>                   | Moderately effective except in areas of diffuse population   | Increase values for properties within UGB compared to those outside   | May be reduced if densities inside UGB increase   | Increase housing prices  |
| <b>Growth Phasing</b>                                   | Generally effective when tied to CIP   | Increases values for properties in areas slated for growth  | Costs reduced if public facilities available at time of development                     | Increases housing prices unless preference given to affordable housing projects                      |
| <b>Rate of Growth Controls</b>                          | Effective in limiting actual growth rate but can cause development to “leap frog”                            | Growth controls limit land supply, driving up prices  | May increase costs to extent not tied to availability of public services and facilities | Increase housing prices unless preference given to affordable housing projects                       |
| <b>Moratorium</b>                                       | Generally effective in halting development   | Generally has the effect of downzoning property   | No direct effect  | Increases housing prices if purpose is to halt residential development                               |
| <b>Adequate Public Facilities (APF) and Concurrency</b> | Moderately effective but may divert growth to outlying areas   | Increase in areas where public facilities made available  | Complexity of permitting and timing delays likely to increase costs                     | Increase housing prices if APF does not allow supply to keep up with demand                          |
| <b>Impact Fees</b>                                      | Generally effective in apportioning infrastructure costs of development to those benefiting from development | May decrease price developer otherwise willing to pay for land, in effect, shifting cost to landowner; land not subject to impact fees may be more attractive and hence more valuable | May reduce costs to extent costs are fairer and more predictable                        | Increase the price of new and existing homes   |
| <b>Special Assessment District (SAD)</b>                | Generally effective because can be tailored to need  | May increase values to extent makes land developable  | No direct impact  | SAD assessment may reduce housing demand and lower housing prices                                    |
| <b>Tax Increment Financing (TIF)</b>                    | Generally effective in achieving purposes <i>within</i> TIF district   | Generally increases property values <i>within</i> TIF district. <i>Outside</i> TIF district, results can vary   | Generally will lower development costs  | Can negatively affect housing affordability unless TIF program requires affordable housing component |

## SUMMARY CHART OF GROWTH MANAGEMENT TECHNIQUES

| <b>TECHNIQUE</b>                             | <b>How Effective in Achieving Stated Purpose(s)</b>   | <b>Impact on Property Values</b>  | <b>Impact on Development Costs</b>  | <b>Impact on Housing Affordability</b>  |
|--|---|---|---|---|
| <b>Open Space Preservation Techniques</b>    | Clustering/TDR generally effective if market support; fees in-lieu less effective               | Can negatively impact values of properties restricted under TDR or by buffer standards                                  | Clustering can produce cost economies, but uncertainty created by process     | Reduced supply of land can cause higher prices unless offset by transfer of density elsewhere   |
| <b>Transferable Development Rights (TDR)</b> | Effective in certain jurisdictions but generally has had mixed results                          | TDR reduces value where downzoning is part of establishing TDR program  | Can increase costs where TDR program is based on discretionary review process | Depends how TDR program structured, e.g., if allows density bonuses for affordable housing  |
| <b>Cluster and Planned Unit Development</b>  | Generally effective   | Some evidence of higher appreciation rate than conventional subdivision, if open space protected as part of development | Lower costs because of reduction in costs of infrastructure                   | Design flexibility allows mix of housing types, including affordable housing  |
| <b>Sustainable Development Regulations</b>   | Because programs have only recently been adopted information regarding effectiveness is limited | Unless development costs are significantly increased by compliance with new standards impact should be negligible       | Will likely result in additional upfront costs                                | Additional upfront costs in short term will negatively affect housing affordability; in long term, greater operating efficiencies of more sustainable housing units should make those units more affordable |
| <b>Development Design Review</b>             | Depends upon extent to which based on careful study and clear standards                         | Generally positive effect   | Generally adds to development costs   | Increases cost of housing, unless affordable housing exempted from design review or included as part of community design  |
| <b>Neighborhood Conservation District</b>    | Generally effective   | Generally positive effect   | Can increase costs through review requirements                                | May help to conserve older housing stock  |

## SUMMARY CHART OF GROWTH MANAGEMENT TECHNIQUES

| <b>TECHNIQUE</b>                                 | <b>How Effective in Achieving Stated Purpose(s)</b>  | <b>Impact on Property Values</b>  | <b>Impact on Development Costs</b>   | <b>Impact on Housing Affordability</b>  |
|--|--|---|--|---|
| <b>Scenic District and Conservation Easement</b> | Generally effective  | Can be burdensome to individual property owners   | Increase costs to extent involve design review which can add uncertainty and complexity  | No direct effect, though by preserving amenities, they contribute to price stability or appreciation  |
| <b>Tree Preservation</b>                         | Mixed results  | May enhance property values to a certain extent, but may also infringe upon traditional property rights   | Prohibitions and limitations on tree clearing and best management practices, add to costs  | Generally adds to development costs which, if passed on to purchasers, will increase housing prices   |
| <b>Form-Based Codes</b>                          | Depends in large part on whether community has fully articulated its goals; codes are too new to judge effectiveness   | Will generally increase property values when applied to infill areas. Also, positive effect in greenfield areas if allow for more intense, mix-use development  | May add additional costs if developer must propose and fund creation of form-based code; development review process may also add additional costs compared to conventional land use regulations      | Generally positive if form-based code requires provision of different housing types   |
| <b>Mixed-Use Regulations</b>                     | Depends upon combination of (a) regulatory provisions designed to support and help Mixed-Use Development perform as intended; (b) the types of mechanisms used to implement Mixed-Use Regulations and (c) whether the Mixed-Use Regulations are mandatory or not | To the extent Mixed-Use Regulations allow for more intense use of land, property values should increase; however, if local market is not familiar with mixing of uses and design features, Mixed-Use Regulations could reduce property values | Because programming, design, the permitting timeline, and financing are different from conventional development, mixed use development is more complex and can result in increased development costs | By allowing land to be developed more intensely for residential use as part of a mixed use project, a resulting increase in housing units should improve overall housing affordability; however, if the increases in development costs are passed on to purchasers of new homes, housing affordability could be negatively impacted |

## SUMMARY CHART OF GROWTH MANAGEMENT TECHNIQUES

| TECHNIQUE                          | How Effective in Achieving Stated Purpose(s)  | Impact on Property Values   | Impact on Development Costs   | Impact on Housing Affordability   |
|------------------------------------|---|---|---|---|
| <b>Rental Restrictions</b>         | Generally effective in requiring landlords to maintain properties and where complaint-driven systems ineffective                                      | May increase property values if achieve code compliance; may decrease values to extent would-be buyers would pay less for home unable to be rented or if restrictions prevent rental option in face of foreclosure  | May not impact costs as much as what types of development occur; but could increase development costs to extent rentals could offset development costs but are prohibited by restrictions | By prohibiting or restricting rentals, the supply of affordable housing is reduced; rental registration and licensing costs are likely to be passed on to the renters, thereby increasing housing costs |
| <b>Vacant Property Regulations</b> | Difficult to measure because VPR requirements vary significantly; also, effectiveness depends, in part, on how well VPRs are implemented and enforced | No clear evidence that VPRs are an effective tool for protecting against the negative impact of vacant and abandoned properties on surrounding properties; also, high cost of complying with VPR may discourage investment in a community, depressing property values | The costs imposed by a VPR (registration fees, repair and maintenance costs, and noncompliance penalties) add to the cost of redeveloping a vacant building                               | Costs imposed by a VPR will increase the cost of housing units in a project if those costs are passed along to the consumer in the form of higher rental rates or sales prices.                         |
| <b>Inclusionary Zoning/Housing</b> | Effective when made mandatory; if voluntary, underlying density must be lower than bonus allowed  | No evidence that affordable housing projects reduce property values   | Increases development costs primarily as result of additional regulations implementing affordable housing program   | Provides affordable housing   |
| <b>Housing Linkage</b>             | Effectiveness depends upon strength and duration of market  | Lowers values of properties subject to linkage, as compared to those not subject to linkage   | Increase costs by requiring direct expenditures by developer  | Has been successful in generating funds for affordable housing  |



## SUMMARY CHART OF GROWTH MANAGEMENT TECHNIQUES

| <b>TECHNIQUE</b>                | <b>How Effective in Achieving Stated Purpose(s)</b>  | <b>Impact on Property Values</b>  | <b>Impact on Development Costs</b>   | <b>Impact on Housing Affordability</b>   |
|---------------------------------|--|---|--|--|
| <b>Accessory Dwelling Units</b> | Effectiveness depends, in part, on how many additional units are created by an ADU ordinance and whether ADU ordinance has standards that protect neighborhood character | Where there is demand for ADUs, an ADU ordinance can have a positive effect on property values; buyers in New Urbanist communities, which typically include ADUs, may pay a premium to live in such a community | Application fees, conditional use approval timeframes and architectural design requirements imposed by an ADU ordinance can increase development costs | ADUs can provide an additional source of affordable housing. But some ADUs may, in fact, be more expensive than other types of rental units available in a community |

# PART I: LOCATION, DENSITY AND RATE OF GROWTH

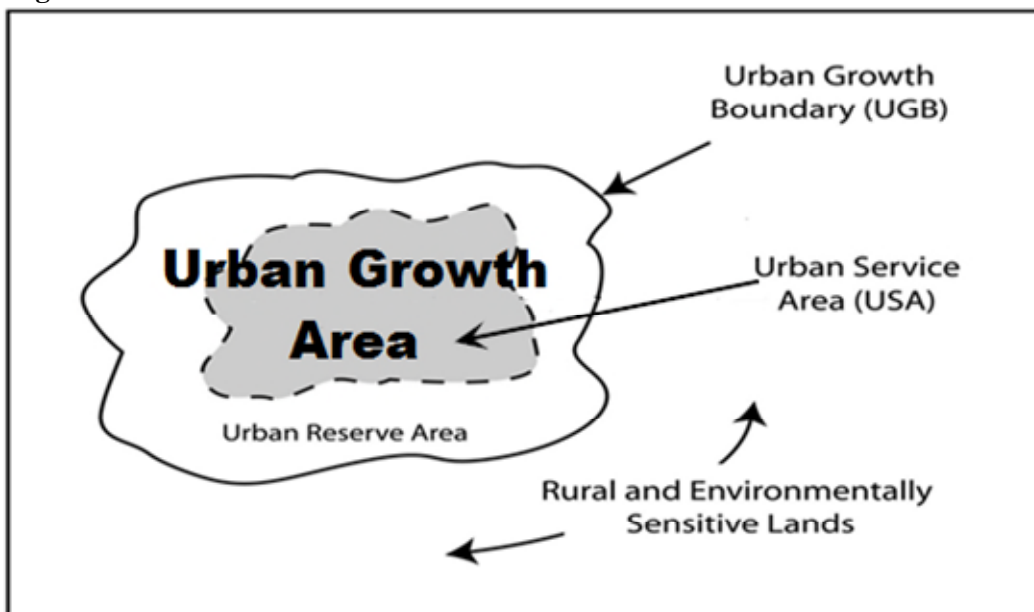
## SECTION 2: URBAN GROWTH BOUNDARIES (UGBs)

### 2.01 PURPOSE AND KEY TERMS

An **Urban Growth Boundary (UGB)** is a line drawn on a map to contain urban growth and separate it from rural and environmentally sensitive lands. It is the most direct technique for implementing urban containment policies as part of growth management or smart growth. From the planner's perspective, urban containment has two basic purposes:

1. To promote compact and contiguous development patterns that can be efficiently served by public services; and
2. To preserve open space, agricultural and environmentally sensitive areas that are not currently suitable for urban development.<sup>1</sup>

**Figure 2.1: Urban Growth Area**



The area within the UGB is referred to as the **Urban Growth Area**. By definition, it is the area in which urban growth is encouraged. It should be of sufficient size to allow development sufficient to accommodate the urban growth that is projected based upon population forecasts.<sup>2</sup> Within the UGB is also frequently established an **Urban Service Area (USA)** which is an area within, but not beyond which, urban services (e.g., roads, water, and sewer) will be provided. In theory, the USA should be extended in

<sup>1</sup> ARTHUR C. NELSON & JAMES V. DUNCAN, *GROWTH MANAGEMENT PRINCIPLES AND PRACTICES* at 73 (Planners Press: 1995).

<sup>2</sup> See Edward Sullivan, *Population Forecasting and Planning Authority*, 48 *URB. LAW.* 47 (2016); see also RATHKOPF'S *THE LAW OF ZONING AND PLANNING* § 36:29 (4th ed., June 2021 update) (stating: "Inside the UGB, the city must actively accommodate housing needs for residents at all income and rent levels.").

conjunction with planned public facilities set out in a Capital Improvements Program (CIP).<sup>3</sup> Another area outside the USA, but within the UGB, is the **Urban Reserve**. This is an area in which future development, including extension of services, is planned. In summary, the Urban Service Area and the Urban Reserve, taken together, make up the Urban Growth Area within the UGB. (See Figure 2.1 above.)

As an “urban containment technique,” the Urban Growth Boundary is, in effect, a strategy to manage space. Spatial management of land has not been part of the American land use planning tradition, although it has been a central element of land management programs in other countries such as Great Britain, where the British Green Belt Program has been in place for almost half a century.<sup>4</sup>

## **2.02 EFFECTIVENESS IN ACHIEVING STATED PURPOSE(S)**

When assessing the effectiveness of UGBs, it is important to distinguish between *local* urban growth boundaries and *regional* urban growth boundaries. When an individual local community draws a UGB within its own borders and constrains future development to within that boundary, and establishes rules and regulations within the UGB, the local UGB can result in higher density within the UGB and less expansive new growth within that community than would have occurred if no such UGB were adopted. Hence, viewed solely from the perspective of the local community, the UGB can be an effective tool for slowing and/or stopping growth outside of the UGB. However, few communities overtly apply slow growth regulations within the UGB. It is more common for there to be no express growth restrictions within the UGB.

However, considered at the metropolitan level, the effect of local UGBs will be to divert future growth to other communities in the same market area that may not have established a UGB or adopted other growth limiting measures. This will result in increased growth pressure on those communities. Also, data show that development within the UGB is costlier due to restrictions on the supply of land. These higher costs may tend to redirect buyers to less costly locations, if they are available. If a large number of communities within a region adopt local UGBs, the net result may be to divert future growth to more remote, less costly locations, thereby spreading out development into a pattern of “sprawl,” contrary to the basic purpose of an urban growth boundary.

Where the urban growth boundary is established on a *regional* basis, this usually requires the coordination of state, county, and local officials. Typically, such a boundary is drawn through the efforts of a Council of Governments (COG) or similar metropolitan body (such as in Portland, Oregon, where the body is specially elected) or by a body appointed by the state governor (as in the Twin Cities area of Minnesota) or with the oversight of an agency of the state government (as in New Jersey). The extent to which these *regional* UGBs are effective depends upon how stringently growth is restricted outside the UGB. In some places in Florida, for example, developers who are willing to pay for the necessary infrastructure can develop new projects outside the *regional* UGB (often referred to in Florida as the “Urban Area”), if they receive local planning commission approval. In Oregon, most development

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<sup>3</sup> See *Population Forecasting and Planning Authority*, 48 URB. LAW. at 75. Because the USA is made up of the combination of services to be made available in accordance with the CIP, its boundary is not necessarily uniform, and may vary depending upon the configuration of the particular service (e.g., water, sewer etc.) that is planned to be provided. The Figure is merely an illustration of the relationship of the Urban Service Area to the UGB.

<sup>4</sup> Daniel R. Mandelker, *Managing Space to Manage Growth*, 23 WILLIAM & MARY ENVIRONMENTAL LAW AND POLICY REVIEW 801 (1999).

outside the regional UGB is prohibited, even if developers are willing to pay the costs of the entire additional infrastructure required.<sup>5</sup>

The Washington State Growth Management Act (“GMA”) requires that the state’s most populated counties establish designated growth areas<sup>6</sup> designed to accommodate 20 years of projected growth.<sup>7</sup> In Washington’s fastest growing counties, between 2001 and 2011, the percentage of residential development in designated urban growth areas increased from 85% to 95%, leading some commentators to conclude that the GMA has been successful in curbing sprawl.<sup>8</sup>

There is an ongoing debate regarding the effectiveness of *regional* UGBs. This debate has been focused primarily on the experience of Portland, Oregon. While some have argued that the UGB in Portland has been effective in promoting compact development and preserving open space, agricultural, and environmentally sensitive areas, others assert that Portland’s growth patterns are indistinguishable from other metropolitan regions and that Portland’s UGB has mostly succeeded only in deflecting some suburban growth into neighboring Washington State.<sup>9</sup>

It is generally agreed that Urban Growth Boundaries or Urban Growth Areas are not very effective in rural or non-metropolitan areas that have a diffuse population and no real urban center. Because of the counterproductive results that can result from local UGBs, the American Planning Association recommends strongly against establishing local UGBs.<sup>10</sup>

## 2.03 IMPACT ON PROPERTY VALUES

The extent to which a UGB will affect property values depends upon how expansively the UGB is drawn. A very expansive UGB would have little or no effect on property values as it would only restrict development in places with little or no market demand for new housing. On the other hand, a UGB that is drawn to include only a small amount of vacant, developable land would be expected to impact property values.<sup>11</sup> In this case, property values *within* a UGB will increase because the UGB reduces or eliminates the potential for market competition between owners of land inside the UGB and those with property outside the UGB.<sup>12</sup> Property values far outside the UGB would be relatively unaffected as market forces do not support intensive development in such far-flung rural areas. The negative impact of UGBs on property values is felt in the zone between these two extremes where relatively more intensive

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<sup>5</sup> For an overview and history of Oregon’s state-wide UGB program, see Katherine H. Daniels, & Edward J. Sullivan, *Oregon’s 40-Year-Old Innovation*, PLANNING (Feb. 2013) (hereinafter “40-Year-Old Innovation”).

<sup>6</sup> “Under the statute, an urban growth area is one ‘within which urban growth shall be encouraged and outside of which growth can occur only if it is not urban in nature.’” American Planning Association, Stuart Meck, FAICP, Gen. Editor, *Growing Smart Legislative Guide Book (2002 Edition)*, Chapter 6 at 6-201 (quoting the GMA) (hereinafter “Growing Smart”).

<sup>7</sup> See Joseph W. Tovar, FAICP, *Climbing the Mountain Called ‘Growth Management*, PLANNING (Jan. 2015) <https://www.planning.org/planning/2015/jan/growthmanagement.htm>.

<sup>8</sup> *Id.*

<sup>9</sup> Jun Myung-Jin, *The Effects of Portland’s Urban Growth Boundary on Urban Development Patterns and Commuting*, 41 URBAN STUDIES 1333 (2004) (hereinafter Myung-Jin); see also RATHKOPF’S THE LAW OF ZONING AND PLANNING § 15:7 (4th ed., June 2021 update).

<sup>10</sup> *Growing Smart* at 6-201.

<sup>11</sup> See Marion Clawson, *Suburban Land Conversion in the United States: An Economic and Governmental Process* (published by John Hopkins Press for Resources for the Future: 1971).

<sup>12</sup> The extent of the impact of a UGB on housing prices has been studied closely in Oregon and Washington State. Although areas within UGBs in both states experienced significant increases in value, the UGB was only one of many factors that tended to increase housing and property values. *Growing Smart* at 6-201.

development would have been economically viable were it not for the UGB.<sup>13</sup> Some studies have suggested that the entire burden of UGBs falls on these in-between areas. In addition, to the extent that a UGB achieves the objective of more dense and better designed development, property values within the UGB will be higher due to perceived higher quality of development.<sup>14</sup>

It should be noted that land immediately adjacent to the UGB may sometimes experience an increase in value where a market develops for large, single family “ranchettes,” “martini farms,” or “hobby farms” on large lot acreages. These lots experience an increase in value because they provide their owners with the amenity of open space that has been created by means of the UGB. Such rural residential development on the fringe of a UGB may act as an impediment to future urbanization of these areas. In Oregon, these so-called rural “exception” lands exist in the form of one- to five-acre home site developments that compete with the urban land supply and create long-term impediments to the expansion of the boundary. These “exception” lands are those that are unsuitable for farming or forestry because of their small size or nearness to existing developments. Residents in this urban fringe area typically oppose boundary expansion to accommodate new development at higher densities. The result is that the UGB becomes politicized as these residents outside of the UGB voice their objections to any expansion of the UGB.<sup>15</sup>

UGB expansion is also susceptible to legal challenge by interested parties if the process followed to establish the new UGB does not conform to state or local regulatory criteria.<sup>16</sup> For example, in a 2018 case the Oregon Court of Appeal invalidated an amendment to Klamath Falls’ UGB on the ground that the city had failed to demonstrate that its 20-year need for commercial land could not be met in its existing urban growth boundary, as required by state law.<sup>17</sup>

## 2.04 IMPACT ON DEVELOPMENT COSTS

While UGBs may increase the price of land per acre, this cost increase may be offset by the higher density of development within the UGB. The increased price of land within the UGB and zoning regulations allowing greater density should lead to an increase in the density of urban development within the UGB. Generally speaking, infrastructure costs are lower per housing unit in higher density developments. Development costs may be further reduced if the development approval process within the UGB is streamlined.

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<sup>13</sup> Antonio M. Bento, Sofia F. Franco, & Daniel Kaffine, *The Efficiency and Distributional Impacts of Alternative Anti-Sprawl Policies*, 59 JOURNAL OF URBAN ECONOMICS 121 (2006).

<sup>14</sup> James A. Kushner, *Growth Management System Evaluation § Impact on Land and Housing Costs* 1 SUBDIVISION LAW AND GROWTH MGMT. § 4:5 (Impact on Land and Housing Costs) (2d ed., 2016 update) (*hereinafter* Kushner); See also A. NELSON, ET AL., THE LINK BETWEEN GROWTH MANAGEMENT AND HOUSING AFFORDABILITY: THE ACADEMIC EVIDENCE 29 (2002 Brookings Institution).

<sup>15</sup> 40-Year-Old Innovation at 3 (discussing opposition to inclusion in the UGB).

<sup>16</sup> In *Land Watch of Lane Cty. v. Lane Cty. City of Coburg*, 283 Or. App. 217 (2016), for example, the court reviewed and affirmed the State Land Use Board of Appeals’ (LUBA) decision requiring the City of Coburg and Lane County, Oregon to reevaluate their UGB expansion ordinance. The court affirmed LUBA’s determination that the city and county’s selection of land for UGB expansion did not meet state-specified criteria for prioritizing land for development.

<sup>17</sup> See *Department of Land Conservation and Development v. City of Klamath Falls and Badger Flats, LLP*, 290 Or. App. 495 (2018). See also *Housing Land Advocates v. Land Conservation and Development Commission, et al.*, 311 Or. App. 326 (2021) (involving a petition for judicial review of an order of the Land Conservation and Development Commission approving an expansion of the urban growth boundary because it failed to demonstrate that its estimated 20-year housing needs could reasonably be accommodated on land already inside the urban growth boundary, in accordance with state law).

## 2.05 IMPACT ON AMOUNT AND PATTERNS OF LAND DEVELOPMENT

The UGB, if adopted locally by many municipalities within a region, may have the effect of deflecting future growth to further out locations, thereby increasing sprawl and undermining the purpose of a UGB. Data show that development within the UGB is more costly and higher costs passed on to consumers may tend to redirect buyers to less costly locations, if such are available. By contrast, a *regional* UGB has the potential to minimize this “deflection” effect and reduce the potential for the “leap-frogging” of development to areas where land is cheaper. A truly regional UGB may be hard to achieve, however, as demonstrated in Portland, Oregon where the agency responsible for the UGB does not have jurisdiction to regulate Clark County, Washington. Some suggest that Portland’s neighborhood densities have increased since the 1960s and the adoption of the UGB.<sup>18</sup> Others note that because Clark County lies just across the Columbia River from Oregon, Portland’s UGB may merely divert suburban expansion to this county, which has experienced rapid growth.<sup>19</sup>

## 2.06 IMPACT ON HOUSING AFFORDABILITY

There is a substantial debate about the impact of UGBs on housing prices, much of it precipitated by the relatively rapid increase in housing prices in Portland during the 1990s.<sup>20</sup> Some concluded that the price increases were the result of the UGB’s supply constraining function.<sup>21</sup> But others interpreted the data as providing scant evidence that UGBs increase housing prices, instead finding that Portland’s housing price increases were caused by strong economic conditions, population growth, and other traditional housing market dynamics.<sup>22</sup> For example, a study of housing market data for Portland from 1975 to 2018 found no association between the expansion of Portland’s UGB and the mean single-family home price in the Portland metropolitan area; instead, the study concluded that housing prices were more responsive to market fundamentals such as changes in population, employment, income, and mortgage interest rates.<sup>23</sup>

While not denying the potential for UGBs to limit supply, advocates of this second interpretation pointed to measures undertaken in Portland to promote higher density and infill housing as having mitigated the

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<sup>18</sup> Virginia McConnell & Keith Wiley, *Infill Development: Perspectives and Evidence from Economics and Planning* at 4 (May 2010) (*hereinafter* McConnell & Wiley).

<sup>19</sup> See Myung-Jin; see also McConnell & Wiley at 4.

<sup>20</sup> See information and figures cited in Jim Robbins, “Oregon: Two Sides of the Anti-Sprawl Line,” *The New York Times* (April 22, 2001) (*hereinafter* Robbins).

<sup>21</sup> Samuel R. Staley, PhD., Jefferson G. Edgens, PhD., & Gerard C.S. Mildner, PhD., *A Line in the Land: Urban-growth Boundaries, Smart Growth, and Housing Affordability*, p. 6-7, (Policy Study No. 263, Nov. 1, 1999) available at <http://reason.org/files/c5ba9be86e1bda65352dcf0e87a46c5a.pdf> (*hereinafter* “*Line in the Land*”); William Fischel, “Comment on Anthony Down’s ‘Have Housing Prices Risen Faster in Portland Than Elsewhere?’” 13 *Housing Policy Debate* 43 (2002). See also an empirical study designed to measure the effect of the Knoxville, Tennessee UGB and Urban Growth Area (“UGA”) on housing prices, Seong-Hoon Cho, et al., *Urban Growth Boundary and Housing Prices: The Case of Knox County, Tennessee*, 38 *REVIEW OF REGIONAL STUDIES* 1, 2008 (*hereinafter* Cho et al.). The Knoxville UGA was designed to accommodate the City’s growth between 2001 and 2021. The Cho study concludes that, all other factors being equal, the value of housing within the UGA, after the implementation of the UGB, is generally higher than outside of the UGA.

<sup>22</sup> See Cho et al. (Interpretations of the empirical evidence are split as to whether the UGB has had any effect on housing prices in Portland, with some researchers concluding that market demand, not the boundary, has been the primary driver of housing prices, and others suggesting that the UGB has created an upward pressure on housing prices in Portland.) (citations omitted).

<sup>23</sup> Xiaodan Chen, *The Expansion of Urban Growth Boundary and its Impact on Housing Affordability in the Portland Metropolitan Area, Oregon*, Department of City and Regional Planning University of North Carolina at Chapel Hill (April 16, 2020).

land supply constraints imposed by the UGB.<sup>24</sup> For example, the Oregon Land Conservation and Development Commission adopted the so-called “Metropolitan Housing Rule” setting specific standards for housing density and housing mix and made the rule applicable to all local jurisdictions in the Portland Metropolitan Area. Specifically, the rule mandated that each of the Portland region’s 24 cities and 3 counties zone land for 6, 8, or 10 units of housing per acre depending on location. It also required that new construction in each jurisdiction contain an even split between multifamily or attached single-family units and single-family detached units.

In 1990, the Oregon Homebuilders Association and the 1000 Friends of Oregon analyzed data on housing projects approved in the Portland Metropolitan Area from 1985 through 1989. For each project, actual developed density was compared with the density that theoretically could have been achieved on the site under the local comprehensive plan. The research indicated that overall, housing projects achieved 79% of the density required by the Metropolitan Housing Rule, with single family developments averaging 66% of planned densities and multifamily projects reaching 90% of planned densities.<sup>25</sup>

Finally, because a *regional* UGB increases price pressure on land within the boundary and causes home values in inner city neighborhoods to rise, this can cause lower income households to be displaced as a result of higher rents, property taxes, or housing prices. These households may then be forced to move further away from jobs and public transit.<sup>26</sup>

## 2.07 RECOMMENDED TALKING POINTS: PROS AND CONS

### PROS:

- A *local* UGB, from the perspective of the community, allows it to constrain future development within a boundary and thereby control local growth.
- A *local* UGB, from the perspective of the community, can create higher density that results in a more compact community, at least in the short run.
- A *regional* UGB, if accompanied by stringent controls outside the UGB, can prevent developers from creating new subdivisions outside built up areas.
- A *regional* UGB can reduce the total amount of land needed to accommodate a given total regional population while preserving agricultural lands and environmentally sensitive lands around the periphery.
- A *regional* UGB can increase the average density of new development and reduce the average size of individual lots, resulting in lower infrastructure costs necessary to serve the population within the region.
- The increased land prices within the UGB, along with zoning regulations allowing greater density, result in an increase in the density of urban development within the UGB that, in turn, allows for a reduction in overall development costs.

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<sup>24</sup> See Kushner, at § 4:5; see also Justin Phillips and Eban Goodstein, “Growth Management and Housing Prices: The Case of Portland, Oregon,” 18 *Contemporary Economic Policy* 334 (2000). See Oregon Metro, *Urban Growth Report* (Dec. 2015), available <http://www.oregonmetro.gov/urban-growth-report>, which provides a 20-year forecast of Portland’s housing needs and employment growth.

<sup>25</sup> Charles A. Hales, *Higher Density + Certainty = Affordable Housing for Portland, Oregon* at 14, URBAN LAND (September 1991).

<sup>26</sup> See Robbins.

## CONS:

- A UGB is not effective in rural areas with diffused population and no real urban centers.
- A UGB will confer a market advantage on owners of property within the UGB, as opposed to owners of property outside the UGB.
- Properties outside a UGB can be expected to decrease in value because of the loss or deferral of their potential to be developed. Because those properties are not developable in the near future, the UGB has the effect of imposing unexpected losses on landowners.<sup>27</sup>
- The potential for a UGB to be expanded can be frustrated by the phenomenon experienced in some jurisdictions of large single family ranchettes, or hobby farms, being developed on the periphery of the UGB. This, in turn, leads to political opposition by the owners of these properties who do not want to see the expansion of the UGB allowing higher densities and thereby threaten their open space amenities.
- The increased land prices within the UGB can be expected to raise housing prices and therefore negatively impact housing affordability, except where the increased density allowed within the UGB may limit the degree to which housing prices rise.
- A *local* UGB will deflect future growth away from the community to other nearby communities. This will increase growth pressures on those nearby communities that do not adopt local urban growth boundaries.
- If a large number of communities adopt individual *local* UGBs within a region, the net result may be to deflect future growth to more remote locations, thereby increasing sprawl and defeating the purpose of an urban growth boundary.
- Because a *regional* UGB increases price pressure on land within the boundary, home values in inner-city neighborhoods can be expected to rise, causing poor households to be displaced from such areas because they cannot pay required taxes, and forcing them to move to areas where affordable housing may or may not be available.<sup>28</sup>

## 2.08 INCENTIVE-BASED ALTERNATIVES

The most logical incentive-based alternative to the use of urban growth boundaries to preserve agricultural and environmental sensitive lands is **transferable development rights (TDR)**. If studies and proper planning are done to identify and map areas of a community or region that are considered to contain prime farmland and/or environmentally sensitive resources, a TDR program can be effective in preserving such areas by providing landowners with an adequate incentive to retire their development rights in exchange for compensation, at close or equal to fair market value. From the property owner's perspective a *voluntary* TDR program is preferable to a mandatory program, since the latter typically

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<sup>27</sup> National Association of Industrial and Office Properties (NAIOP); National Growth Management Taskforce, *Growing to Greatness* (1999).

<sup>28</sup> *Id.* at 35.



involves a downzoning of property in order to encourage owners to transfer their development rights to receiving zones. TDR is addressed in Section 9 of this book.<sup>29</sup>

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<sup>29</sup>See *Line in the Land* at ii (discussing market-oriented alternatives to urban growth boundaries such as purchasing development rights).

## SECTION 3: GROWTH PHASING, RATE OF GROWTH SYSTEMS, AND MORATORIA

### 3.01 PURPOSE AND KEY TERMS

The growth management techniques of growth phasing, rate of growth controls, and moratoria all have one concern in common: The *timing* of when growth occurs. Under conventional zoning, so long as a use is permitted and meets code requirements, it can occur at any rate. The technique of **growth phasing** can be used to phase growth or to sequence the order in which areas of a community will develop. Growth phasing is typically tied to a community's desire to plan for investment in new public facilities such as sewer and water. The planning concept underlying growth phasing is relatively simple: Development is desirable if it occurs as an extension of an existing urban area accompanied by incremental expansion of existing public facilities. Stated differently, growth phasing is little more than translation of basic civil engineering principles into development controls designed to minimize the cost of public facilities.

The most well-known example of growth phasing is the program that was adopted in 1969 in Ramapo, New York. Under that program, the town adopted a 6-year capital budget for providing municipal facilities such as street, parks, and sewers. It also adopted a capital improvements program (CIP) that set out the location and sequence of capital improvements for the 12-year period following the completion of the first 6-year plan. Over this 18- year period, the town expected to become fully developed in accordance with its master plan. The regulations implementing this 18-year build-out utilized a special permit concept under which the issuance of a special permit for a subdivision depended upon the developer demonstrating the immediate availability to the proposed subdivision of five essential public improvements and services: (1) public sanitary sewer or approved substitutes; (2) drainage facilities; (3) improved public recreation facilities in schools; (4) roads; and (5) fire houses. No special permit would be issued unless the proposed residential development accumulated fifteen development points based upon values assigned to these specific categories of improvements under the ordinance.<sup>1</sup>

This development timing provision was applied in combination with Ramapo's traditional zoning ordinance based upon use districts, over 90% of which in the unincorporated area were zoned for residential use. Combined with the basic zoning district scheme, the effect of this timing provision was to postpone or phase the development of every vacant parcel in the town. This meant that development of a parcel could be delayed, in an extreme case, for up to 18 years. The ordinance establishing this type of growth phasing was upheld by the New York courts as a valid exercise of local zoning power under the delegated powers and permissible purposes provisions of the New York Town Law.<sup>2</sup>

Some entire states, most notably Florida and Washington, follow a Ramapo-type system which they call "concurrency." This is a requirement that certain items of public infrastructure must be available "concurrent" with the impacts of the development. In the absence of infrastructure adequacy, the development will be postponed until adequacy is achieved, unless the developer "voluntarily" elects to provide the needed infrastructure.<sup>3</sup>

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<sup>1</sup> Julian Conrad Juergensmeyer & Thomas E. Roberts, *Growth Management and Smart Growth Programs*, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW § 9:2 (3d ed., 2021 update) (*hereinafter* Juergensmeyer & Roberts); *see* Amendments to Town of Ramapo Building Zone Amended Ordinance of 1969 described in Landman, *No, Mr. Bosselman, the Town of Ramapo Cannot Pass a Law to Bind the Rights of the Whole World: A Reply (Part I)*, 10 TULSA L.J. 169 (1974).

<sup>2</sup> *See Golden v. Planning Bd.*, 334 N.Y.S. 2d 138 (1972).

<sup>3</sup> *See* Juergensmeyer & Roberts and the discussion of concurrency in Section 4 of this book.

**Rate-of-growth systems**, unlike growth phasing, are not always tied to a budget and plan for provision of public facilities. Rather, they tend to be adopted for the purpose of achieving locally desired rates of growth, with the availability of public facilities being a secondary consideration. Rate-of-growth systems come closer to outright growth *control*, as opposed to growth management, because they attempt to impose quantitative limits or quotas on residential and/or nonresidential development.

One of the earliest rate-of-growth programs was the so-called “Petaluma Plan” adopted in 1971 by the City of Petaluma, California. Under the Petaluma Plan, a “green belt” boundary was drawn around the city and residential growth and the extension of city services beyond that line was prohibited. This aspect, by itself, is similar to an **urban growth boundary**, discussed in Section 2 of this book. However, Petaluma combined this boundary with a Residential Development Control System in order to regulate the actual number of building permits issued. Under the Petaluma Plan, building permits were limited to a maximum 500 dwelling units per year for a 5-year period beginning in 1972. This figure was applied only to housing units in developments consisting of 5 units or more. The Residential Development Control System used a point system that gave preference to projects that conformed to the city’s general plan and that included low- and moderate-income housing units. The Petaluma Plan also provided that permits should be issued on an essentially equal basis between single-family dwellings and multifamily residential units, and also equally between the west and east sections of the city.

This rate-of-growth regulation was challenged by builders and land owners in federal court on constitutional grounds, namely, that it denied the right to travel to people whose ability to settle in Petaluma would be hindered by the limitations placed on the issuance of building permits, and that the city’s growth control policy violated due process and equal protection because of its alleged exclusionary purpose or effect. The federal court upheld the regulation as reasonable and did not reach the right to travel issue.<sup>4</sup> Rate-of-growth controls have subsequently been adopted in other jurisdictions.

A **moratorium** is a type of **interim zoning control** that either prohibits all development, or certain types of development, for a defined period of time. A moratorium is typically adopted by local government ordinance and, if adopted in good faith, is intended to provide a community with the time to conduct and review studies necessary for adopting or revising a land use plan and related regulations. Because such planning activities are time consuming, the moratorium allows for a “planning pause” during which land development activity is frozen or limited until permanent regulations implementing the plan can be adopted. If the objectives being sought and the duration of the moratorium are both “reasonable,” a moratorium is likely to be upheld.<sup>5</sup>

### **3.02 EFFECTIVENESS IN ACHIEVING STATED PURPOSE(S)**

**Growth Phasing.** The Ramapo, New York growth phasing program was not particularly effective in achieving its objectives. One of the problems with the program was that the town did not have control over two components of its public facilities and services program, namely, fire protection services and

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<sup>4</sup> See *Construction Indus. Ass’n of Sonoma County v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975) *cert. denied*, 424 U.S. 1934 (1976).

<sup>5</sup> See *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002) (note that the Supreme Court acknowledged that “[i]t may well be true that any moratorium that lasts for more than one year should be viewed with skepticism”). *Id.* See also *Peyote Canyon, LLC v. County of Benton*, No. 34600-5-III, 2017 WL 3189719 at \*1 (Wash. App. Div. 3 July 27, 2017) (upholding a moratorium on marijuana production because it was supported by sufficient facts establishing an emergency, namely the incompatibility of marijuana production in a residential zone).

sanitary sewer.<sup>6</sup> Consequently, when faced with a delay in the completion of the regional sewage collection system, the town decided to award an automatic 5 points to each development for sewer service, with the result that each project received one-third of the points that it needed for approval.<sup>7</sup> The program was ultimately repealed.<sup>8</sup> However, growth phasing is currently being used in various forms in other jurisdictions around the country. For example, every two years Montgomery County, Maryland uses an updated growth policy (AGP) as a guide for the planning board to implement the county's adequate public facilities ordinance (APFO).<sup>9</sup> The AGP includes: (1) the current level of service conditions for major public facilities; (2) an estimate of the service demands resulting from un-built, but approved, subdivisions; and (3) recommended growth capacity (residential and employment) ceilings for defined policy areas, based on alternative scenarios of future public facility growth. This growth phasing system is part of a larger and more complex growth management system that includes agricultural land preservation, functional and area master plans, and land development regulations.<sup>10</sup> Although Maryland has been recognized as an early leader in growth-phasing policy, implementation of Maryland's APFO policy has been criticized. One study concluded:

APFOs in Maryland are often poorly linked to capital improvement plans, and moratoria can last for indefinite periods of time. Further, the consequences of APFOs in Maryland are often unintended and their effects frequently contrary to the broader land use policies of the state. In many counties that employ APFOs, they have become the dominant planning tool rather than just one of many tools a county might use to manage its growth.<sup>11</sup>

San Jose, California has applied growth phasing controls for specific areas since the early 1970s and currently utilizes a residential development permit allocation system based on transportation capacity for the city's east side.<sup>12</sup> In 1977, Westminster, Colorado adopted a growth phasing system designed to address capacity constraints in the community's water and wastewater systems. These systems established the number of water and wastewater service commitments that were to be granted for each year for the next two and a half years before new capacity would be available. Service commitments were awarded competitively and were valid for up to two years. This system was re-adopted in 1980 and the criteria for awarding service commitments were revised to give greater emphasis to the design quality of projects.<sup>13</sup>

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<sup>6</sup> Hammer, Siler, George and Associates, *Impact on Ramapo Fiscal and Economic Conditions of the Town's Growth Control Ordinance* (Washington: Hammer, Siler, George and Associates 1977). This study was prepared for the National Association of Homebuilders (NAHB).

<sup>7</sup> *Id.*

<sup>8</sup> Stuart Meck & Rebecca Retzlaff, *The Emergence of Growth Management Planning in the United States: The Case of Golden v. Planning Board of Town of Ramapo and Its Aftermath*, 7 J. PLANNING HISTORY 113, 139 (May 2008).

<sup>9</sup> Note that school adequacy is considered annually, but most Growth Policy-related work is conducted every two years. Montgomery County Planning, *Final Draft 2007-2009 Growth Policy: Summary Staff Report*, [http://montgomeryplanning.org/research/growth\\_policy/growth\\_policy\\_2007\\_2009/documents/staffreportintrosection.pdf](http://montgomeryplanning.org/research/growth_policy/growth_policy_2007_2009/documents/staffreportintrosection.pdf).

<sup>10</sup> ARTHUR C. NELSON & JAMES B. DUNCAN, *GROWTH MANAGEMENT PRINCIPLES & PRACTICES* at 101 (Planners Press: 1995); see also Montgomery County Planning, *Toward Sustainable Growth for Montgomery County: A Growth Policy for the 21st Century* (available at: [http://montgomeryplanning.org/research/growth\\_policy/growth\\_policy\\_2007\\_2009/index.shtml](http://montgomeryplanning.org/research/growth_policy/growth_policy_2007_2009/index.shtml)).

<sup>11</sup> *Adequate Public Facilities Ordinances in Maryland: Inappropriate Use, Inconsistent Standards, Unintended Consequences* at 3-4 (Home Builders Association of Maryland & Maryland National Capital Building Industry Association, 2006). See also Calandrillo, Deliganis, & Woods, *When Private Property Rights Collide with Growth Management Legislation*, CORNELL REAL ESTATE REVIEW, 20-35 (2015) (noting ineffective implementation of Maryland's growth phasing system).

<sup>12</sup> *GROWTH MANAGEMENT PRINCIPLES & PRACTICES* at 102.

<sup>13</sup> *Id.* at 103-04.

Livermore, California enforces a growth phasing system adopted in 1987 known as the Housing Implementation Program (HIP) based on 3-year cycles of analysis and implementation. The factors taken into consideration in the preparing each new HIP are water, wastewater, air quality, traffic, parks and open space, schools, and emergency services. Projects having fewer than four units are exempt from the growth phasing program. Project-specific evaluation criteria such as street layout, open space, landscaping, architectural design, solar access, facility contributions, innovation, and adequate facilities are used to determine which projects will be approved.<sup>14</sup>

The Florida Keys are designated by the State Legislature as an Area of Critical State Concern where policies have been adopted to control growth based on the Florida Keys carrying capacity.<sup>15</sup> The carrying capacity is the lowest time required to safely evacuate the Florida Keys in the event of a hurricane, which is based on a 24-hour evacuation model. As a result, Monroe County, Florida (i.e., the Florida Keys) has implemented a Rate of Growth Ordinance in which both residential (ROGO) and nonresidential (NROGO) development are subject to a competitive permit allocation system where those applications with the highest scores are awarded building permits.<sup>16</sup> The competitive point system guides development toward areas with infrastructure and away from velocity zones and environmentally sensitive areas such as habitat for threatened or endangered species.<sup>17</sup>

To the extent that all of these growth phasing programs are effective in achieving their stated objectives, it appears that their success depends in significant part upon the degree of sophistication in their capital improvement programming, the use of growth phasing in the context of other growth management programs, and the avoidance of arbitrary point-award systems for features or facilities, emphasizing instead the specific characteristics of particular projects.

**Rate-of-Growth Systems.** The effectiveness of the Petaluma Plan, the purpose of which was to restrict growth for aesthetic reasons,<sup>18</sup> is not clear. The rapid growth that occurred between 1970 and 1972 that led to the adoption of the rate-of-growth program did not continue at that rate. In fact, in the majority of the years since 1972 the actual growth rate has been below the maximum permitted under the program.<sup>19</sup> The rate-of-growth program in Boulder, Colorado, which was also established in the 1970s, originally applied a three percent annual growth rate. That growth rate was subsequently reduced to two percent. While it appears that the rate-of-growth program was effective in limiting the actual growth rate in Boulder, its effect has been to cause “leap frog” development into surrounding communities. Demographic data and anecdotal evidence also indicate that the program has pushed families with children into nearby communities such as Longmont, Louisville, and Lafayette.<sup>20</sup> San Diego, California has also imposed annual limits on building permits through its zoning code. This rate-of-growth regulation appears to have been effective and has withstood legal challenge because it was found to be consistent with the city’s planning and other regulatory provisions.<sup>21</sup>

**Moratoria.** By definition, a moratorium, when adopted, achieves its immediate purpose of halting all development or limiting development to certain uses for a specific period of time. However, the true

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<sup>14</sup> *Id.* at 105.

<sup>15</sup> See ROGO/NROGO System (Monroe County, FL) (available online at <https://www.monroecounty-fl.gov/186/ROGONROGO-System>).

<sup>16</sup> *See id.*

<sup>17</sup> *See id.*

<sup>18</sup> *Construction Indus. Ass’n of Sonoma County v. City of Petaluma*, 522 F.2d 897, 909 (9th Cir. 1975).

<sup>19</sup> See KELLY, E. *MANAGING COMMUNITY GROWTH: POLICIES, TECHNIQUES AND IMPACTS* at 208-209 (Praeger, Westport 1993).

<sup>20</sup> Kelly at 54-59.

<sup>21</sup> See *Building Indus. Ass’n of San Diego v. Superior Court, County of San Diego*, 211 Cal. App. 3d 277, 259 Cal. Rptr. 325 (1989).

measure of its success depends upon what is accomplished in the planning process during that interim control period. A moratorium can rationally serve its purpose only if it is supported by a planning process that identifies and evaluates the community's needs and objectives and uses the time period when the moratorium is in effect to develop permanent regulatory mechanisms to address the desired objectives and policies. The defensibility of a moratorium from the judicial perspective depends on whether the interim controls were adopted in good faith and for a reasonably short period of time and whether the local government proceeded diligently in completing whatever study or analysis was deemed necessary in adopting permanent regulations.<sup>22</sup> It is also important that there be reasonable and beneficial economic uses possible during the period of the moratorium.<sup>23</sup>

### 3.03 IMPACT ON PROPERTY VALUES

**Growth Phasing.** The impact of a growth phasing program on property values depends, in large part, on how it is structured. For example, if the program attempts to set priorities for areas that will develop first, it can be expected that those areas will increase in property value by comparison with areas that have not received priority designation.<sup>24</sup> In this manner it would function similar to a short term urban growth boundary. If a growth phasing program seeks to phase growth throughout the entire community, whether or not particular parcels increase in value will depend upon their proximity to available public facilities or to facilities that are planned within a specific capital improvements program timeframe. To the extent that a growth phasing program results in developer assumption of certain infrastructure costs, property values would decline in proportion to the costs assumed.

**Rate-of-Growth Systems.** Because rate-of-growth systems are based less upon analysis of public facility availability, and more on locally desired rates of growth, they become growth *control* measures that tend to limit the available supply of land, thereby creating a shortage of buildable land and driving up land prices. When changes to a rate-of-growth system depend upon a political decision by the governing body, the rate of growth percentage or the numerical allocation system tends to become rigid and, similar to an urban growth boundary, can result in a constraint on supply versus demand, thereby leading to an overall increase in land prices. Of course, if the limit is higher than what the market demands, a rate-of-growth system would have no effect on property values.

**Moratoria.** Because moratoria impose bans on all or specific types of development, they virtually always have the effect of temporarily down-zoning property. The extent of value diminution would depend on the extent of the moratorium. This diminution of property value raises the issue of a *temporary taking*. The U.S. Supreme Court has ruled that when a regulation is found to have taken property, just compensation must be paid for the period of time which the regulation denied all use, even if the deprivation is temporary.<sup>25</sup> On the other hand, the U.S. Supreme Court has also ruled that the issue

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<sup>22</sup> See ROHAN, ZONING AND LAND USE CONTROLS § 22.02 [2] (LexisNexis Matthew Bender, 2016) (citing, *Bank of Camden v. Vill. of W. Dundee*, 2014 U.S. Dist. LEXIS 163857 (N.D. Ill. Nov. 21, 2014); *Berry v. Volunteers of Am., Inc.*, 182 So. 3d 1252, 1263, writ denied, 190 So. 3d 1193)). "It is settled that temporary moratoria imposed pending zoning decisions do not constitute takings requiring just compensation." *Berry*, 182 So. 3d. at 1263 (citing *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 337 (2002)).

<sup>23</sup> See ROBERT MELTZ, DWIGHT H. MERRIAM & RICHARD M. FRANK, THE TAKINGS ISSUE at 278 (Island Press: 1999). For a discussion of court cases that challenge the reasonableness of building moratoria, see Mark S. Dennison, *Zoning: Proof of Unreasonableness of Interim Zoning and Building Moratoria*, 32 AMERICAN JURISPRUDENCE PROOF OF FACTS 3D 485 (2017 update).

<sup>24</sup> James A. Kushner, *Growth Management System Evaluation, Impact on Land and Housing Costs*, 1 SUBDIVISION LAW AND GROWTH MGMT. § 4:5 (2d ed., 2021 update) (hereinafter "Kushner").

<sup>25</sup> *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

of whether a moratorium effectuates a taking should be analyzed using a multifactor balancing test that has generally granted broad latitude to local governments in adopting planning moratoria.<sup>26</sup>

### 3.04 IMPACT ON DEVELOPMENT COSTS

If a **growth phasing program** ensures that capital facilities are available at the time a development is approved, it will likely result in a reduction in the cost of new development compared to comparable development requiring private financing of the same infrastructure. This is the same likely result under an adequate public facilities program or concurrency.<sup>27</sup> Growth phasing may also make the planning of new subdivisions and receipt of approvals to build more predictable because of the linking of infrastructure with development approval. Because **rate-of-growth programs** are not necessarily tied to the availability of public facilities, the potential benefits of reduced cost for infrastructure and greater predictability are not present to the same degree. Because a **moratorium** effectively halts development, it does not have an immediate effect on development cost. However, if a moratorium continues beyond a short period of time, it can be expected that development costs, assuming normal inflation, would be greater at the point that development is ultimately allowed to go forward. When growth phasing results in developer assumption of infrastructure costs, development costs will be increased by the amount of those costs.

### 3.05 IMPACT ON AMOUNT AND PATTERNS OF LAND DEVELOPMENT

To the extent that a **growth phasing** program prefers development in one part of a community rather than another based on aesthetic reasons or to protect lands containing wetlands, steep slopes or other constraints to development, such a program may alter the potential amount and patterns of development. Because growth phasing is tied closely to the availability of public facilities, the pattern and amounts of development will follow the priorities and locations set out in the capital improvements program (CIP). For this reason, capital facilities such as highways and sewer lines have been termed “the growth shapers.”<sup>28</sup> **Rate-of-growth** systems also alter previous building patterns, although the shape of such patterns is not tied as closely to the availability of public facilities. For example, in Petaluma, the requirement that housing permits be evenly divided between single-family and multifamily units, presumably was in recognition that appropriate sites for these two different kinds of residential units were

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<sup>26</sup> See *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002). In *Tahoe-Sierra*, the Court made clear that temporary regulatory takings should be evaluated under the *Penn Central* balancing test. Heather G. Wight-Axling, *Will the Durational Element Endure? Only Time Will Tell: Temporary Regulatory Takings in the Court of Federal Claims and Federal Circuit After Tahoe-Sierra*, 45 Nat. Resources J. 201, 221 (2005). “Under the *Penn Central* test, three factors to be considered are: (1) ‘the economic impact of the regulation on the claimant,’ (2) ‘the extent to which the regulation has interfered with distinct investment-backed expectations,’ and (3) ‘the nature of the governmental action.’” CURTIN’S CALIFORNIA LAND USE AND PLANNING LAW at 302 (35th ed., 2016); see also Mark Baron, *Constitutional Protections for Mineral Interest Holders: Oil and Gas Regulation and the Takings Clause*, 61 RMMLF-INST 13-1, 13-25 (2015) (“Unlike outright bans on development, which may implicate categorical takings analysis, temporary prohibitions or moratoria are always analyzed under the *Penn Central* framework.”). “In at least two cases, however, courts have found a compensable taking where land values declined in response to moratoria.” Douglas W. Kmiec & Katherine Kmiec Turner, *Growth and Density Controls – Permit or Public Facility Moratoria*, 1 ZONING & PLAN. DESKBOOK § 5:28 (2d ed., 2019 update) (citing *Q.C. Const. Co., Inc. v. Gallo*, 649 F. Supp. 1331 (D.R.I. 1986), judgment aff’d, 836 F.2d 1340 (1st Cir. 1987) and *Washington Market Enterprises, Inc. v. City of Trenton*, 68 N.J. 107, 343 A.2d 408 (1975)).

<sup>27</sup> See Section 4 of this book for a discussion of adequate public facilities program and concurrency programs. See also Jill Skinner, *Adequate Public Facilities Ordinances: An Effective Land Use Tool for Local Governments in Georgia* (2013).

<sup>28</sup>Urban Systems Research & Engineering, Inc., *The Growth Shapers; The Land Use Impacts of Infrastructure Investments* (Council on Environmental Quality, Washington, 1976).

different. The resulting development patterns would not necessarily be the same as if the market were allowed to determine the location and timing of single family versus multifamily development. Whether a **moratorium** affects the amount and pattern of land development depends upon the results of any planning and regulatory decisions taken during the period of the moratorium. Because a moratorium typically results in decisions to downzone certain areas, or to change the priority of growth areas, it can be expected that the ultimate effect of the moratorium will be to change the amount and patterns of land development. Growth phasing systems that key on adequacy of infrastructure will tend to direct development to areas with adequacy, which may well be in more distant areas or even in adjoining jurisdictions. The unintended consequence would be encouragement of sprawl. Paradoxically, the expectation or fear of development moratoria in a community may actually foster anticipatory development that proceeds more rapidly and at higher or lower densities than would occur without the threat of development moratoria.<sup>29</sup>

### 3.06 IMPACT ON HOUSING AFFORDABILITY

To the extent that **growth phasing** programs and **rate-of-growth** systems drive up land prices or development costs, they also raise housing costs and negatively impact housing affordability. However, because these kinds of growth timing programs can be coupled with policies giving preference to affordable housing projects, such programs need not necessarily have a negative effect on the cost of housing.<sup>30</sup> Nevertheless, in the case of the Petaluma Plan the effect has been to significantly reduce the availability of affordable housing.<sup>31</sup> Also, it is generally acknowledged that permit allocation systems have a potentially exclusionary effect because such systems tend to encourage developers to build large, expensive houses in order to generate greater profits.<sup>32</sup> If a **moratorium** exempts previously approved or vested development proposals for residential housing, then, assuming no change in other factors affecting the affordability of housing, the moratorium, would not impact housing affordability because it would not change land supply. If, however, one of the purposes of the moratorium is to halt residential development, then the resulting constraint on land supply would increase land prices and correspondingly increase housing prices.

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<sup>29</sup> See Geoffrey K. Turnbull, "Development Moratoria," 13 *Journal of Housing Economics* 155 (2004).

<sup>30</sup> Kushner:

Through the use of a [development monitoring system], land use planners can monitor the supply of developable land and new and existing housing units and periodically adjust development regulations to ensure that the amount of developable land remains sufficient to satisfy the market demand for new development. Moreover, the inflationary control impact may also be mitigated by incorporating inclusionary initiatives into a given system.

See also David B. Shepherd, *Gentrification: Yes ... My Community Is Improving, but for Who?*, 22 *CARDOZO J.L. & GENDER* 557, 566 (2016) (advocating for adoption of growth slowing regulations in neighborhoods that are particularly susceptible to gentrification).

<sup>31</sup> See ZONING AND LAND USE CONTROLS §4.04[1].

<sup>32</sup> ARTHUR C. NELSON & JAMES B. DUNCAN, *GROWTH MANAGEMENT PRINCIPLES & PRACTICES* at 106 (Planners Press: 1995).



### 3.07 RECOMMENDED TALKING POINTS: PROS AND CONS

#### PROS:

- A *growth phasing* program enables the timing of development with the availability of capital facilities.
- A *growth phasing* program allows a community to tie capital facilities to areas of a community considered most suitable for development.
- A *rate-of-growth* system enables a community to decide upon its locally desired rate-of-growth.
- A *moratorium* gives a community time to do proper planning and obtain public participation in deciding upon policies and regulations to manage future growth.

#### CONS:

- A *growth phasing* program can result in increased land prices and development costs and can have an exclusionary effect.
- A *rate-of-growth* system can result in increased land prices and have the effect of excluding less wealthy residents from the community.
- *Rate-of-growth* controls adopted by individual communities can induce sprawl by causing “leap frog” development and increasing growth pressures on surrounding communities that have not enacted rate-of-growth controls.
- A *moratorium* typically results in the temporary downzoning of property and can, in certain instances, result in a temporary taking of property.

### 3.08 INCENTIVE-BASED ALTERNATIVES.

As an alternative to growth phasing programs, a **Special Assessment District (SAD)** that allows landowners within a district to decide how infrastructure needed for development is to be financed and constructed, has attributes that are less regulatory in nature and allow for cooperative efforts for mutual benefit. Special assessment districts are discussed in more detail in Section 6 of this book. To the extent that a community has identified certain land with characteristics such as wetlands or other constraints on development, it can adopt **transferable development rights (TDR)** as a market-based incentive program for owners to “retire” any development rights they may have in those lands and, in exchange for compensation, transfer those rights to lands more desirable for development. The TDR concept is discussed more fully in Section 9 of this book.

## PART II: PUBLIC FACILITIES AND INFRASTRUCTURE

### SECTION 4: ADEQUATE PUBLIC FACILITIES (APF) AND CONCURRENCY

#### 4.01 PURPOSE AND KEY TERMS

**Adequate Public Facilities (APF)** systems, also known in some places as **concurrency management** systems, tie or condition development approvals to the availability and adequacy of public facilities. Public facilities that typically are made subject to APF requirements include those relating to roads, sewer systems, schools, water supply and distribution systems, and fire protection.<sup>1</sup>

The financing of public infrastructure in this country has evolved. Traditionally, the states and the federal government funded much of the infrastructure needed. However, fiscal priorities have changed and the amount of funding available for public facilities has decreased. For example, federal grants for local water and wastewater systems have become loans. The net result has been to shift costs that had been borne by state or federal entities to local jurisdictions.

The reason a local government adopts an APF ordinance is to ensure that before new development occurs its public facilities will have sufficient capacity available to serve the development at a predetermined acceptable **level of service (LOS)** standards.<sup>2</sup> This technique is intended to guarantee that public facilities are either in place already or that they will be provided as impacts occur from new development. In that way, a county or municipality can be assured that new development will not place excessive additional loads on existing infrastructure until necessary capacity has been added to that infrastructure.<sup>3</sup> Unlike impact fees and in-kind exaction requirements, APF programs do not require that developers pay for public improvements, only that such improvements be made before or when development occurs. As a practical matter, though, in those instances where public funds are not available, growth may occur only if the developer pays for needed public facility improvements.<sup>4</sup>

APF is related to, but different from, **growth phasing** and **rate-of-growth** programs. All three techniques attempt to balance the timing and amount of development with the ability or willingness of a community to accommodate it. Growth phasing systems limit the total amount of new development that can be approved over the course of a year or other definite period of time, in an attempt to address some of the shortcomings of performance-based APF systems. Rate-of-growth systems have annual development caps similar to growth phasing systems, but are less closely linked to public facility constraints, and instead are typically adopted based on locally desired rates of growth rather than on an

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<sup>1</sup> *A Glossary of Zoning, Development, and Planning Terms* at 28, Planning Advisory Service Report Nos. 491/492 (American Planning Association 1999).

<sup>2</sup> GROWING SMART LEGISLATIVE GUIDEBOOK, Ch. 8, *Local Land Development Regulation* 8-157 (American Planning Association, 2002 Edition).

<sup>3</sup> National Association of Industrial and Office Properties National Growth Management Task Force, *Growing to Greatness: A Growth Management Manual* (NAIOP, 2000) at 25.

<sup>4</sup> Colorado Department of Local Affairs, *Colorado Growth Management Toolbox: Appendix to Smart Growth and Development Summit White Paper* (Prepared by Clarion Associates, January 1995), available at: <http://www.state.co.us/whifront.htm>. Clarion Associates of Colorado LLC. "Colorado Growth Management Toolbox, Smart Growth Development Whitepaper" (Governor's Smart Growth Summit, 1995).

analysis of facility availability.<sup>5</sup> Growth phasing and rate-of-growth programs are discussed in Section 3 of this book.

APF requirements include two main components: (1) an identification of the types of public facilities and related levels of service that are needed to permit new developments; and (2) a clear policy about when the public facilities must be in place relative to the impact of development.<sup>6</sup> Implementation of these requirements requires an ordinance and a map that together spell out the required existing or planned levels of service; coordination among planning agencies and service providers; a system designed to measure and monitor the levels of public services; and a permit process.<sup>7</sup>

## 4.02 EFFECTIVENESS IN ACHIEVING STATED PURPOSE(S)

While most communities that initially used APF or concurrency were located in Florida, Maryland, and Washington, the practice is now more widespread.<sup>8</sup> In Washington and Oregon, planning for adequate public facilities is a component of state requirements for comprehensive planning,<sup>9</sup> making adequate public facilities common in these states. New Hampshire has enacted statutory guidance for municipalities adopting APF ordinances and Vermont has legislation that essentially requires local governments to ensure new development does not burden existing facilities.<sup>10</sup> APF ordinances have also been adopted, without specific state authorizing or mandating legislation, in communities in several other states.<sup>11</sup>

Concurrency management has had the longest tenure in Florida. It was the policy foundation for Florida's Growth Management Act, adopted in 1985.<sup>12</sup> In January 1999, the Florida Transportation and Land Use Study Committee issued a report in which it identified "major shortcomings" in the state's implementation of this technique because of its focus on transportation capacity. Shortcomings identified were:

- The methods used to establish and measure levels of service were focused on automobile mobility, to the exclusion of other modes of travel;
- When development could not occur due to roadway deficiencies, property owners who could not develop may seek reductions in their tax assessments. As a consequence, the community's property tax base would be compromised;

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<sup>5</sup> James Duncan and Associates & Eric Damian Kelly, *Adequate Public Facilities Study: An Analysis of APF/Growth Management Systems*, Prepared for the Montgomery County Planning Department and the Maryland-National Park and Planning Commission (November 1991).

<sup>6</sup> Oregon Transportation and Growth Management Program, "Adequate Public Facilities Requirements," Chapter in *TGM Tools of the Trade* (ODOT/DLCD Transportation and Growth Management Program, 1995) (<http://www.lcd.state.or.us/issues/tgmweb/pub/tools.html>).

<sup>7</sup> *Id.*

<sup>8</sup> Mark S. White and Elisa L. Paster, "Creating Effective Land Use Regulations through Concurrency," 43 *Natural Resources Journal* 753 (2003).

<sup>9</sup> Patricia E. Salkin, 4 AM. LAW. ZONING § 34.13 (5th ed, May 2021).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*; see also Montana Transportation and Land Use, <http://www.mdt.mt.gov/research/toolkit/m1/pptools/gm/capfo.shtml> (pointing to ordinances in Bozeman and Whitefish), Maricopa Assn. of Governments, *Adequate Public Facilities Ordinances: Best Practices Paper #1*, May 1, 2001, <https://www.azmag.gov/Documents/pdf/cms.resource/Adequate-Public-Facilities.pdf>.

<sup>12</sup> Randall G. Holcombe, *The Rise and Fall of Growth Management in Florida*, in PROPERTY RIGHTS, ENTREPRENEURSHIP AND TRANSACTION COSTS at 234 (2014) (hereinafter "*The Rise and Fall of Growth Management in Florida*").

- The system can cause uncertainty for local governments in those cases where developers and their financiers become reluctant to undertake projects that would benefit the community but might not enable the community to meet its stated transportation requirements; and
- Transportation concurrency must be based on realistic and financially feasible capital improvement programs, but in some cases these programs do not maintain their feasibility over time.<sup>13</sup>

The Florida report did not draw firm conclusions about the effectiveness of the concurrency program because its investigation was largely based on anecdotal evidence. Rather, it made specific recommendations to the legislature for amendments to the state concurrency program statutes and rules. Legislation in 2005 re-invoked concurrency requirements for transportation and public schools, but with grossly inadequate funding to address the infrastructure backlog.

In 2009, the Florida legislature changed course, passing a bill that significantly changed the concurrency program, removing the requirements for many urban areas of the state (the so-called “transportation concurrency exception areas”).<sup>14</sup> This legislation was based on findings that the existing concurrency program had the unintended result of discouraging urban infill and redevelopment and that a change was needed to promote transportation alternatives.<sup>15</sup> Instead of requiring concurrency in these exception areas, the state established new mobility planning requirements, which direct local governments to adopt plans and strategies for funding and supporting alternative modes of transportation.<sup>16</sup> In addition to these changes, the legislation contains findings that criticize the current system as being too complex and inequitable, and that the current concurrency system is “complex, inequitable, lacks uniformity among jurisdictions, is too focused on roadways to the detriment of desired land use patterns and transportation alternatives, and frequently prevents the attainment of important growth management goals.”<sup>17</sup> In 2011, the Florida Legislature repealed the state requirement that all communities adopt and implement transportation, school, and parks and recreation facility concurrency programs.<sup>18</sup> Local governments may continue these concurrency programs if they meet new requirements, including proportionate share mitigation of transportation impacts.<sup>19</sup> Concurrency is still required for sanitary sewer, solid waste, drainage, and potable water.<sup>20</sup>

A 2006 study published by the National Center for Smart Growth Research and Education at the University of Maryland examined the implementation of Adequate Public Facilities Ordinances (APFOs)

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<sup>13</sup> Florida Transportation and Land Use Study Committee, “Get Concurrency Right,” Chapter 2 in *Final Report of the Florida Transportation and Land Use Study Committee* (Tallahassee, Florida: January 15, 1999). See also Ivonne Audirac, William O’Dell & Ann Shermyen, *Concurrency Management Systems in Florida, BEBR Monographs*, Issue No. 7 (Gainesville, Florida: University of Florida, Bureau of Economic and Business Research, March 1992).

<sup>14</sup> Thomas G. Pelham, *Transportation Concurrency, Mobility Fees, and Urban Sprawl in Florida*, 42/43 URB. LAW. 105 (2010/2011) (discussing 2009 Fla. Laws 96).

<sup>15</sup> *Id.* at 109-110.

<sup>16</sup> *Id.* at 110.

<sup>17</sup> 2009 Fla. Laws 96, § 13(1)(a).

<sup>18</sup> Cecelia Bonifay and Valerie Hubbard, *Community Planning Act Means Landmark Changes*, FLA. REAL ESTATE J., [http://akerman.com/documents/Bonifay.Hubbard\\_FREJ\\_CommunityPlanningActMeansLandmarkChange.PDF](http://akerman.com/documents/Bonifay.Hubbard_FREJ_CommunityPlanningActMeansLandmarkChange.PDF). For additional discussion of the changes to the growth management statute in Florida see *The Rise and Fall of Growth Management in Florida*.

<sup>19</sup> *Id.*

<sup>20</sup> Fla. Statutes. § 163.3180(1).

in Maryland.<sup>21</sup> The report identified the following significant problems in how these programs had been implemented in twelve Maryland counties:

- Many counties had made APFOs the predominant planning tool whereas they are intended to be one of many tools used to manage growth.
- APFOs were often poorly linked to capital improvement plans, which resulted in long moratoria on development.
- APFOs often had the unintended consequence of directing growth away from areas designated under the state's Smart Growth policies as appropriate areas for growth and toward areas not intended or appropriate for growth.

There is also potential for abuse by the local government in the implementation of APF programs. Citing several cases where the local government sought to leverage the APF system into a general revenue resource, one commentator argues that without proper legislative oversight to reduce system abuses, APF systems lose their effectiveness as a growth management tool.<sup>22</sup> When local governments require fee payments in exchange for a waiver of concurrency requirements, there is significant risk that the infrastructure needed to meet the concurrency requirements will never actually be built. In those cases, APF ceases to be a growth management tool and becomes a penalty for developers.<sup>23</sup>

#### **4.03 IMPACT ON PROPERTY VALUES**

Since they control the pace and location of development based on the availability of public facilities, APF regulations could have the effect of increasing property values in those areas where facilities are in place or designed to be in place in the near future.<sup>24</sup> Conversely, all else being equal, with the adoption of an APF system, one would expect property values to decline in those areas where no facilities are scheduled to be provided in the near future.

#### **4.04 IMPACT ON DEVELOPMENT COSTS**

APF is unlikely to impact “hard” development costs such as material and labor, except to the extent that a developer provides the facilities required under the APF system as a way to accelerate its ability to develop its property. However, because it delays development in areas lacking the necessary public facilities, APF would be expected to increase “soft” development costs, specifically carrying costs in those areas. APF systems tend to be complex and involve additional permitting. Complexity and additional permitting programs will raise the cost of compliance for developers. Additionally, APF or concurrency requirements often result in developers assuming heretofore public infrastructure costs, thereby increasing development costs.

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<sup>21</sup> *Adequate Public Facilities Ordinances in Maryland: Inappropriate Use: Inconsistent Standards and Unintended Consequences* at 20 (The National Center for Smart Growth Research and Education, University of Maryland, 2006).

<sup>22</sup> Andrew Balashov, *Keeping a Foot in Each Camp: Adequate Public Facilities Ordinances as Both a Concurrency Tool and Means of Generating Revenue*, 3 U. BALT. J. LAND & DEV. 181, 197-202 (Spring 2014) (citing *Allied Land Co. v. Bd. of Supervisors of Loudoun Cty.*, 2001 WL 1398456 (Cir. Ct. of Va. Sept. 25, 2011); *Halle Development, Inc. v. Anne Arundel Cty.*, 808 A.2d 1280 (2002); *Lanvale Properties, LLC v. Cty. of Cabarrus*, 731 S.E.2d 800 (2012)).

<sup>23</sup> *Id.* at 199-202.

<sup>24</sup> See A.C. Nelson, J.E. Frank & J.C. Nicholas, *Positive Influence of Impact-Fees in Urban Planning and Development*, JOURNAL OF URBAN PLANNING AND DEVELOPMENT, Vol. 118, No. 2 (1993).

#### 4.05 IMPACT ON AMOUNT AND PATTERNS OF LAND DEVELOPMENT

Because the purpose of APF is to affect the amount and location of land available for development based on the availability of the necessary infrastructure, it directly impacts the amount and patterns of development. Development will be directed toward those areas with adequate infrastructure regardless of where those areas may be. APF can also affect the allowable density of development. APFOs that are too strict can substantially reduce the number of housing units developed in the community with the APFO, often causing that growth to be redirected into areas even less equipped to deal with growth.<sup>25</sup> In the case of Florida, some commentators have identified the focus of APFOs on obtaining particular levels of service for automobile traffic as having encouraged “sprawl” and worked against other policies targeted at fostering more compact, walkable communities.<sup>26</sup> Transportation concurrency exception areas (TCEA) were created to help promote infill development by exempting development in certain areas from some or all of the transportation concurrency requirements.<sup>27</sup> A study of the effectiveness of TCEA in Miami-Dade County in reducing housing construction on the urban fringe and encouraging infill development found that a portion of the increase in housing construction within the TCEA could be attributed to the removal of concurrency requirements, but concluded that TCEA was not effective at promoting urban infill and that sprawling development at the urban fringe continued.<sup>28</sup> Although the effects of the TCEA policy appeared to be effective in attracting some high-density residential development, overall the lack of intergovernmental coordination in implementing the TCEA has undermined its effectiveness in promoting infill development.<sup>29</sup>

Bellingham, Washington developed an innovative approach to combating the unintended consequences of its transportation concurrency requirements which made desirable infill development extremely difficult to achieve because of the automobile-oriented LOS.<sup>30</sup> The city developed a new LOS called “Person Trips Available by Concurrency Service Area,” which is based on arterial and transit capacity for mechanized transportation modes and on completeness of pedestrian, bicycle, and trail networks. The city is divided into fifteen Concurrency Service Areas based on land use patterns and available transportation facilities. Each area is assigned one of three “Types”: Type 1 areas are Urban Villages with adopted Master Plans with high percentages of pedestrian, bicycle, and transit facilities; Type 2 areas are other areas with moderate amounts of pedestrian, bicycle, and transit facilities; Type 3 areas are located at the edge of the City and have high automobile dependency. The relative importance of different transportation mode within the type is also weighted. For example, automobile capacity is de-emphasized and transit capacity is emphasized in downtown area areas. This approach more accurately describes capacity across transportation modes and in different areas of the city. It encourages infill development in the urban core because new development does not have to make the same road improvements it would have had to make under the old system. It also restricts additional development in

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<sup>25</sup> Antonio M. Bento, “The Effects of Moratoria on Residential Development: Evidence from Harford, Howard, and Montgomery Counties,” National Center for Smart Growth: University of Maryland (February 2006).

<sup>26</sup> Ruth L. Steiner, *Florida’s Transportation Concurrency: Are The Current Tools Adequate To Meet The Need For Coordinated Land Use And Transportation Planning?*, 12 UNIV. OF FLORIDA JOURNAL OF LAW AND PUBLIC POLICY 269, 288-290 (2001); Thomas G. Pelham, *Transportation Concurrency, Mobility Fees, and Urban Sprawl in Florida*, 42/43 *URB. LAW.* 105 (2010/2011).

<sup>27</sup> See also *The Rise and Fall of Growth Management in Florida* at 237-39.

<sup>28</sup> Jeongseob Kim, Ruther L. Steiner, & Yizhao Yang, *The Evolution of Transportation Concurrency and Urban Development Pattern in Miami-Dade County, Florida*, 50 *URBAN AFFAIRS REVIEW* 672, 693-95 (2014).

<sup>29</sup> *Id.*

<sup>30</sup> Chris Comeau, *Moving Beyond the Automobile: Multimodal Transportation Planning in Bellingham, Washington*, *PRACTICING PLANNER* (Vol. 7, No. 3, Sept. 2009).

the outlying areas that do not have corresponding improvements to transportation modes other than automobile.

#### **4.06 IMPACT ON HOUSING AFFORDABILITY**

Depending on how such a system is implemented, housing costs may be affected by development delays resulting from the APF system. If infrastructure development does not allow housing development to keep pace with demand, housing prices may be driven higher by shortages in the supply of buildable sites. Furthermore, direct costs of the APF system on developers and builders will be either passed on to homebuyers, thereby raising housing costs, or absorbed by builders and developers as lower profits, decreasing the builder's incentive to build new housing. If APF compliance reduces anticipated profits to less than an acceptable minimum, developers will not build, and the result will be a growing scarcity in the number of housing units in a community. Such scarcity will tend to increase prices, thus making housing less affordable.<sup>31</sup>

A study of impacts to single-family home prices in a suburban North Carolina county found that in a robust real estate market, like the one seen in Cabarrus County between 2002 and 2006, an announced increase in fees to be collected pursuant to the APF ordinance resulted in an approximately 2.3% increase in housing prices for existing homes within 30 months after the announcement.<sup>32</sup> The study also found that this effect was not seen in new construction, which may have been the result of a perception by homebuyers that existing homeowners would see a benefit from the fees in terms of new infrastructure without having to financially contribute, for example, to the construction of new public schools.<sup>33</sup> The author concluded that more research is needed to better understand the outcomes seen in this study.<sup>34</sup>

#### **4.07 RECOMMENDED TALKING POINTS: PROS AND CONS**

##### PROS:

- An APF ordinance allows control over the timing of development and clarifies the local government's role in providing public infrastructure.<sup>35</sup>
- An APF ordinance can help direct growth to suitable areas where there is a capacity for growth and thereby contribute to the fiscal stability of the government as well as support the revitalization of urban areas where existing facilities have the ability to absorb growth.<sup>36</sup>
- APF policy can act to prevent leapfrog development patterns and the associated costs of infrastructure extensions in this type of pattern.<sup>37</sup>

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<sup>31</sup> See *Adequate Public Facilities Ordinances in Maryland: Inappropriate Use: Inconsistent Standards and Unintended Consequences* at 20 (The National Center for Smart Growth Research and Education, University of Maryland, 2006).

<sup>32</sup> Dustin C. Read, *The Impact of an Adequate Public Facilities Ordinance on the Sale Price of Single-Family Housing in Cabarrus County, North Carolina*, 42 HOUSING & SOCIETY 148-61, 157 (2015).

<sup>33</sup> *Id.* at 158.

<sup>34</sup> *Id.*

<sup>35</sup> GROWING SMART LEGISLATIVE GUIDEBOOK, Ch. 8, *Local Land Development Regulation* 8-157 (American Planning Association, 2002 Edition).

<sup>36</sup> Maryland Office of Planning, *Managing Maryland's Growth: Models and Guidelines – Adequate Public Facilities* (1996).

<sup>37</sup> GROWING SMART LEGISLATIVE GUIDEBOOK, Ch. 8, *Local Land Development Regulation* 8-157 (American Planning Association, 2002 Edition). Colorado Department of Local Affairs, *Colorado Growth Management*

## CONS:

- APF can be used as a no-growth measure when “acceptable” levels of adequacy are set above current levels, which works to automatically put a brake on future development until the condition is improved.<sup>38</sup>
- APF can have the unintended effect of promoting land use patterns that are inconsistent with adopted growth plans.
- APF works best with a volume of development that far exceeds the ability of the local government to keep up with the demand for public facilities; otherwise the complexity and administrative costs of enacting and maintaining such a program are not justifiable.<sup>39</sup>
- An APF system creates a certain amount of bias in favor of larger projects that are more able to marshal resources and control development timing.<sup>40</sup>
- APF requires local governments to raise funds for new public facilities before the growth occurs, which means that initial funding must either come from bond financing or tax revenues from existing development. If a local government cannot, or will not, raise funds this way, new public facilities to accommodate growth may never be constructed.<sup>41</sup>

## 4.08 INCENTIVE-BASED ALTERNATIVES

There are alternatives to an APF system that will allow development to proceed in accordance with market conditions, while addressing the government’s concern that necessary facilities are available for that development. These alternatives are market-based to the extent that they provide the ability for the developer to determine whether the market warrants private investment in the necessary infrastructure or whether it is preferable to wait for public investment to occur.

For example, if state law enables local government to allow private sector control over infrastructure development, a **Special Assessment District (SAD)** may be a viable alternative to APF. In a Special Assessment District, the landowners within the district decide how infrastructure needed for development is to be financed and constructed. Special Assessment Districts are discussed in Section 6 of this book.

Another alternative is for the local government to allow developers to actually construct the needed infrastructure in those cases where the government has not scheduled the public facility improvements needed for development to proceed, and to recover the expenditures that are made in excess of their proportionate share, through a reimbursement or “recapture” agreement with other property owners whose subsequent developments will benefit from the improvements. This is a practical approach only where the return on the investment in the infrastructure makes financial sense for the developer.

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*Toolbox: Appendix to Smart Growth and Development Summit White Paper* (Prepared by Clarion Associates, January 1995). *Colorado Growth Management Toolbox, Smart Growth Development Whitepaper*, (Prepared by Clarion Associates of Colorado LLC for Governor’s Smart Growth Summit, 1995).

<sup>38</sup> GROWING SMART LEGISLATIVE GUIDEBOOK, Ch. 8, *Local Land Development Regulation 8-157* (American Planning Association, 2002 Edition) (citing DOUGLAS R. PORTER, *MANAGING GROWTH IN AMERICA’S COMMUNITIES* at 130 (Island Press, 1997)).

<sup>39</sup> Maryland Office of Planning, *Managing Maryland’s Growth: Models and Guidelines – Adequate Public Facilities* (1996).

<sup>40</sup> Colorado Department of Local Affairs, *Colorado Growth Management Toolbox: Appendix to Smart Growth and Development Summit White Paper* (Prepared by Clarion Associates, January 1995).

<sup>41</sup> *Growing to Greatness: A Growth Management Manual* at 25.



**Tax Increment Financing (TIF)** is a public-private development tool that enables local authorities to finance needed public improvements, including infrastructure improvements, using property tax proceeds from property value appreciation resulting from development within a designated geographic area. The traditional purpose of TIF has been to provide the legal framework for municipalities or counties to channel the increased taxes that flow from improvements within the TIF district to pay for the costs of land assembly and infrastructure improvements such as water and sewer lines, streets, sidewalks and lighting. It is typically used where it is determined by the local government that “but for” the cost of infrastructure improvements needed to support development, the private market would undertake desired development. The local government’s willingness to designate a TIF district and issue bonds to pay for the cost of these improvements and pay off the bonds with the increased tax revenue from the TIF district acts as the incentive for developers to undertake the desired development. TIF is discussed in Section 7 of this book.

## SECTION 5: IMPACT FEES, PROFFERS, AND TAP FEES

### 5.01 PURPOSE AND KEY TERMS

A **development impact fee** is a form of **exaction** that is assessed by local government upon new development in order to cover the capital cost of primarily off-site infrastructure (capital facilities) necessary to serve the new development. Simply put, “exactions” or “developer exactions” are conditions to development approval. Exactions may take the form of mandatory dedications of land for roads, schools, or parks as a condition to plat approval; fees in lieu of mandatory dedication; water or sewer connection fees; and development impact fees.<sup>1</sup> Impact fees are most commonly used to expand roads and utility services.<sup>2</sup>

Impact fees were conceived as a mechanism to offset the cost of growth resulting from the need for large-scale public improvements located off-site of new developments. These fees were also intended to address the developer’s need for more predictable development costs as compared to negotiated developer contributions. An impact fee is a type of exaction that is:

1. in the form of a predetermined money payment;
2. imposed as a condition to the issuance of some type of building permit;
3. imposed pursuant to local government powers to regulate new growth and development and provide for adequate public facilities and services;
4. levied to fund large-scale, off-site public facilities and services necessary to serve new development; and
5. in an amount that bears some reasonable proportion to the need for the public facilities generated by new development.<sup>3</sup>

In other words, impact fees are designed to require that each development pay its proportionate share of the cost of providing off-site public services and facilities generated by new development. The purpose of an impact fee is to have those persons who benefit from specific new developments pay their proportionate share of the costs associated with those developments.<sup>4</sup> Impact fees that are not proportionate to the development’s burden on, or need for, public facilities or services run the risk of being invalidated as illegal taxes.<sup>5</sup> These fees may be calculated based on number of residents or bedrooms in each dwelling unit, the square footage of a building, the linear footage of the front property line, a flat fee per building lot, or other objective basis.<sup>6</sup> Many states have enabling legislation for impact

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<sup>1</sup> See *Town of Londonderry v. Mesiti Development, Inc.*, 168 N.H. 377, 381 (2015) (observing that impact fees are “functionally the same as the developer exactions traditionally made as part of the subdivision or site review process”).

<sup>2</sup> Gregory S. Burge & Keith R. Ihlanfeldt, *Promoting Sustainable Land Development Patterns Through Impact Fee Programs*, 15 CITYSCAPE 83, 98 (2013).

<sup>3</sup> Blaesser & Kentopp, *Impact Fees: The Second Generation*, 38 JOURNAL OF URBAN AND CONTEMPORARY LAW 401 (1990).

<sup>4</sup> ARTHUR C. NELSON, ET AL., *IMPACT FEES: PRINCIPLES AND PRACTICE OF PROPORTIONATE-SHARE DEVELOPMENT FEES* at 129 (2009) (hereinafter, Nelson, *IMPACT FEES*); see also Bauman, Gus & William H. Ethier, *Development Exactions and Impact Fees: A Survey of American Practices*, 50 LAW AND CONTEMPORARY PROBLEMS 51, 62 (1987).

<sup>5</sup> ARDEN H. RATHKOPF, DAREN A. RATHKOPF, AND EDWARD H. ZIEGLER, JR., 3 RATHKOPF’S THE LAW OF ZONING AND PLANNING § 60:33 (Exactions and Impact Fees) (4th ed., June 2021 Update) (hereafter “RATHKOPF”).

<sup>6</sup> NATIONAL ASSOCIATION OF HOME BUILDERS, *IMPACT FEE HANDBOOK* (2016).

fees, which typically specify the types of facilities that are eligible for impact fees, or other statutory provisions that reflect the state’s judicial standards governing impact fees.<sup>7</sup> Other states have declined to adopt enabling legislation, opting instead to allow local jurisdictions to pursue special enabling legislation from the state legislature to assess impact fees.<sup>8</sup>

The rationale for impact fees is that the proponent of new development should incur the cost of capital improvements needed to serve the new development, rather than having the cost paid by the public at large through taxes or assumed by the users of the service through user fees.<sup>9</sup> Impact fees also give a local government revenue up front to make necessary public infrastructure improvements for a specific development without having to rely on funds from future tax revenue or debt instruments such as bonds. Impact fees may only be used to pay for the provision of new facilities and the expansion of existing facilities that are made necessary by the development project. These may include roads, schools, parks and recreation facilities, sewer (storm and sanitary) and water utilities, solid waste, fire/EMS, police, and library services. Some impact fee systems allow local government to recoup a portion of the capital costs of previously built systems having excess capacity that will be devoted to the new development.<sup>10</sup> But, as a general rule, impact fees may not be used to pay for the maintenance of existing facilities or to cover operating expenses.<sup>11</sup> A properly designed impact fee system fairly accounts for the infrastructure costs incurred by the local government in order to serve a new development, and shifts those costs to that new development.

Payment of impact fees may be required at the time of development approval, at the building permit stage, or upon issuance of the certificate of occupancy. The timing of the required payment can have a significant impact on the financial feasibility of a development.<sup>12</sup> Impact fees that must be paid at the beginning of a project (e.g., upon the issuance of a building permit) are more likely to have a financial impact on a project than impact fees that are due toward the end of the development process (e.g., at issuance of a certificate of occupancy) when the developer is more likely to have an income stream from tenants or buyers of the project. In some cases, impact fees may be deferred to a later stage of the development process in order to avoid the significant upfront cost.<sup>13</sup> Impact fee enabling statutes often

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<sup>7</sup> RATHKOPF § 90:43; Gregory S. Burge, University of Oklahoma, *How Development Impact Fees Can Finance Essential Public Facilities in Growing Local Economies* (Sept. 2013) (stating: “Roughly 30 states have enacted legislation allowing impact fee programs, and they are protected by legal precedents in a handful of other states.”).

<sup>8</sup> See, e.g., *Quality Built Homes, Inc. v. Town of Carthage*, 789 S.E.2d 454 (N.C. 2016) (noting that the General Assembly passed special legislation authorizing Rolesville, Pittsboro, and Chapel Hill to assess impact fees).

<sup>9</sup> See *Town of Londonderry v. Mesiti Development, Inc.*, 168 N.H. 377, 381 (2015) (stating: “Impact fees are charges assessed by a municipality to shift the cost for capital improvements necessitated by a development to the developer and new residents.”); see also *K.L.N. Construction Company, Inc. v. Town of Pelham*, 167 N.H. 180 (2014).

<sup>10</sup> NELSON, ARTHUR C. & JAMES B. DUNCAN, *GROWTH MANAGEMENT PRINCIPLES & PRACTICES* at 123 (APA, 1995).

<sup>11</sup> *GROWING SMART LEGISLATIVE GUIDEBOOK* at 8-132 (APA: March 2, 2000). Note, however, that some municipalities are exploring ways to use impact fees to cover the costs of infrastructure operation and maintenance of existing facilities, such as in Lake Oswego, Oregon, which has adopted a “street maintenance fee.” Nelson, *IMPACT FEES* at 334-36.

<sup>12</sup> See Adam Millsap, et al, *Assessing the Effects of Local Impact Fees and Land-use Regulations on Workforce Housing in Florida* (The Jason Madison Institute, January 4, 2019) (stating that impact fees and assessments should be calculated and locked into place at the beginning of the permitting process in order to avoid uncertainty when there is a significant lag in time between application dates and the date the building permit issues).

<sup>13</sup> See Shane Phillips, *Reducing Development Costs with Impact Fee Deferral*, Lewis Center for Regional Policy Studies at UCLA (Jan. 27, 2021) (discussing options for deferring impact fee payments until the certificate of occupancy is issued with an inflation adjustment; until the certificate of occupancy is issued with an inflation adjustment plus the posting of security, such as a bond; or a transfer, refinance or some specified later date, which could presumably eliminate the developer’s financing costs because they’d pay the impact fees with project revenue rather than equity or debt).

require that a refund be granted to a developer if the fees paid in connection with a development are not used for the intended purpose within a set timeframe. For example, New Hampshire's impact fee statute requires municipalities to refund impact fees that are not applied within six years after collection.<sup>14</sup>

As a result of the U.S. Supreme Court's decisions in the *Nollan* and the *Dolan* cases,<sup>15</sup> there has developed a constitutional test for exactions frequently referred to as the *Dual Nexus Test*. As illustrated in Figure 5-1 on the following page, the Supreme Court said in *Nollan* that a development condition or impact fee must have an *essential nexus* to some legitimate governmental purpose in order to satisfy the first prong or first nexus. If the stated purpose is not really a legitimate governmental purpose, then the Supreme Court has said that lack of a substantial relationship between the exaction and a legitimate state interest may constitute a taking of property.

The second prong, or the second nexus, as illustrated in Figure 5-1, is that there must be a "*rough proportionality*" between the exaction or impact fee and the impact of, or need created by, the proposed development. As articulated by the Supreme Court in *Dolan* decision, the second prong means that local government, not the developer, has the burden of substantiating the purpose and the amount of the impact fee. The connection between development impact and fee amount need not be mathematically precise, but a court must be able to determine whether there is a methodology behind it and if that methodology supports the condition imposed upon the development.

Note that litigation over impact fees generated its own constitutional test long before *Nollan* and *Dolan* shaped American land use and takings jurisprudence. Much of the impact fee litigation was in the state of Florida and resulted in what is called the *Dual Rational Nexus Test*. There are two prongs to this test. The first prong requires that there be an identified "nexus" (connection) between the new development and the need for the improvements for which a fee is imposed. In order to satisfy the first prong, the nexus between the new development and the identified need for the improvements must be substantial, rationally linked, and direct. The second prong requires that the development that has been assessed the cost (fee) must receive a substantial benefit from the improvements constructed with a fee. This is the constitutional test that was followed in the majority of the states in which impact fees were legally authorized. In 2013, in the *Koontz* case, the U.S. Supreme Court made clear that the *Nollan/Dolan* Dual Nexus Test applies to monetary exactions, which some commentators have interpreted to include legislatively adopted impact fees.<sup>16</sup> *Nollan*, *Dolan*, and *Koontz*, together, now articulate the federal constitutional standard that applies to all exactions, including impact fees, that are imposed in the states.

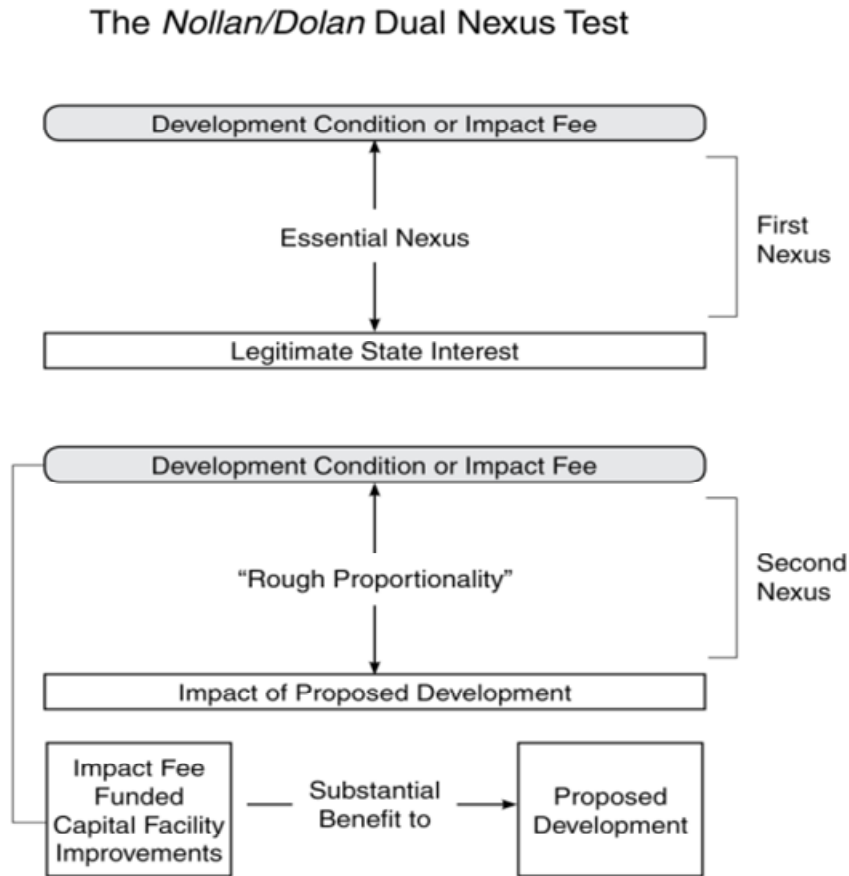
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<sup>14</sup> See *Town of Londonderry v. Mesiti Development, Inc.*, 168 N.H. 377, 381 (2015) (citing RSA 674:21, V(e)).

<sup>15</sup> *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

<sup>16</sup> *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2599 (2013) (stating that "the government's demand for property from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan* even when the government denies the permit and even when its demand is for money"). See David L. Callies, FAICP, *Koontz Redux: Where We Are and What's Left*, 65 PLANNING & ENVIRONMENTAL LAW No. 10 (Oct. 2013) (noting that *Koontz* left unresolved the question whether *Nollan* and *Dolan* apply to legislatively adopted development conditions); see also BRIAN W. BLAESSER, DISCRETIONARY LAND USE CONTROLS: AVOIDING INVITATIONS TO ABUSE OF DISCRETION § 1:39 (Thomson-Reuters 2020) (discussing the application of *Nollan* and *Dolan* to legislatively adopted development exactions); see also James A. Kushner, SUBDIVISION LAW & GROWTH MANAGEMENT § 6:32 (May 2021 Update) (discussing that the Court in *Koontz* extended *Dolan* to reach all permit conditions, including those requiring the expenditure of funds and presumably the payment of utility connection fees).

**Figure 5-1: Diagram of Dual Nexus Test**



As indicated at the bottom of Figure 5-1, the capital facility improvements funded with the impact fee must substantially benefit the proposed development. This concept has always been embedded in modern impact fee systems and is consistent with impact fee case law as it developed at the state level before *Dolan*, now called the “rough proportionality” test. In other words, it is not enough to demonstrate some connection between a fee and the kind of need that a development is creating. It is also necessary to show that the fee payer, the developer, will receive benefit from that improvement. The discipline of making sure that the fee payer actually receives the benefit of the fee is critically important in an impact fee program. This is typically done by establishing zones and requiring that fees paid for development within a zone are spent for improvements in the same zone.<sup>17</sup>

Unlike impact fees, which are mandatory, a **proffer** is an offer voluntarily made by a landowner or developer to perform an act or to donate money, land, or services designed to address an impact arising from a proposed rezoning.<sup>18</sup> Like impact fees, the relative economic burden of proffers will be shared

<sup>17</sup> For further discussion of the constitutional test for legislatively adopted exactions such as impact fees, see BRIAN W. BLAESSER, DISCRETIONARY LAND USE CONTROLS: AVOIDING INVITATIONS TO ABUSE OF DISCRETION § 1:37 (Thomson-Reuters 2020). See also Michael B. Kent, Jr., *Theoretical Tension and Doctrinal Discord: Analyzing Development Impact Fees as Takings* 51 WM. & MARY L. REV. 1833 (2010).

<sup>18</sup> ALBEMARLE COUNTY LAND USE LAW HANDBOOK, Ch. 11, Conditional Zoning: Proffers at 11-1 (Feb. 2018) (citing Robin, *Zoning & Subdivision Law in Virginia, a Handbook*, 71-72 (2nd ed.)); see also Edward A. Mullen &

between developers and buyers or tenants, depending on market factors. However, the key difference between proffers and impact fees is that impact fees are imposed on all development in a given area, whereas proffer conditions are only imposed on those developments that seek rezoning.<sup>19</sup> Proffers must also be reasonably related to the rezoning. Under Virginia’s Proffer Reform Act, for example, a proffer is “unreasonable” unless it addresses an impact that is “specifically attributable” to the proposed development and use.<sup>20</sup>

New development may also be required to pay a **tap fee**, also known as a “tap-in charge” or “connection fee,” a one-time assessment for connecting to the public water or sewer system.<sup>21</sup> Tap fees are imposed for the purpose of financing the costs associated with the construction of such systems and generally are assessed according to the size of the pipe connection and may vary depending on whether the service is for a residential or nonresidential use. The larger the pipe size connection, the higher the tap fee will generally be. To equalize the burden of the cost of constructing an adequate water or sewer system between present and new users of the system, tap fees must bear a reasonable relationship to the actual cost of providing the service to the property charged.<sup>22</sup>

## 5.02 EFFECTIVENESS IN ACHIEVING STATED PURPOSE(S)

As applied in some jurisdictions, impact fees have been seen as a “pro-growth tool because of their ability to defuse rising no-growth sentiments, ensure adequate infrastructure capacity, and facilitate development approval.”<sup>23</sup> Impact fees can add speed and predictability to the development process, can be more equitable than a negotiated exaction or proffer process, and are considered likely to generate more revenue.<sup>24</sup> Impact fees are seen as more equitable than other means of financing infrastructure improvements because they impose the financial burden of a particular infrastructure development on those who benefit from it the most. An impact fee system is only efficient, however, when the fees are roughly equal to the public expenses they are supposed to cover. On the other hand, when set too high, impact fees can suppress new development, which will cause the cost to rent or purchase existing housing to increase.<sup>25</sup>

Historically, impact fees and other types of exactions were most prevalent in high growth states like California and Florida that are burdened with highly restricted tax systems. Their use spread considerably, however, with a 2019 survey indicating that 270 jurisdictions nationwide are charging some form of impact fees.<sup>26</sup> In part, this seems to be because such fees have been perceived to be more politically acceptable than other potential revenue sources.<sup>27</sup> In addition, a 2008 study examining impact

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Michael A. Banzhaf, *Virginia’s Proffer System and the Proffer Reform Act of 2016*, Richmond Public Interest Law Review Vol. 20, Issue. 3 (April 20, 2017).

<sup>19</sup> *Id.* (discussing Virginia’s Proffer Reform Act of 2016).

<sup>20</sup> *See id.* *See also* David McAuley, *Virginia just passed a law that removes a barrier to building more housing*, Greater Washington (March 20, 2019) (available at <https://ggwash.org/view/71307/virginia-general-assembly-fixes-the-reform-on-residential-proffers>) (observing that Virginia reformed the Proffer Reform Act in 2019 to remove the immediacy for legal action if an “unreasonable” proffer was requested, to encourage the negotiation of proffers but it remains to be seen if the 2019 amendments will promote proffers in Virginia).

<sup>21</sup> James A. Kushner, *SUBDIVISION LAW & GROWTH MANAGEMENT* § 6:32 (May 2021 Update).

<sup>22</sup> *Id.*

<sup>23</sup> Nelson and Duncan at 123.

<sup>24</sup> *Id.*

<sup>25</sup> Jack Estill, Benjamin Powell & Edward Stringham, *Taxing Development: The Law and Economics of Traffic Impact Fees*, 16 BOSTON UNIVERSITY PUBLIC INTEREST LAW JOURNAL 1, 14 (2006).

<sup>26</sup> *See* 2019 NATIONAL IMPACT FEE SURVEY at 1, <http://www.impactfees.com/publications%20pdf/2019survey.pdf>.

<sup>27</sup> Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Fees*, 59 S.M.U. L. REV. 177, 208-209 (2006).

fees noted that utility-based impact fees had increased at a rate that is nearly twice the rate of inflation, while non-utility-based impact fees increased even more significantly.<sup>28</sup>

Communities sometimes reduce or eliminate impact fees in order to encourage new development and to reflect lower costs of land and construction.<sup>29</sup> With development slowing, and even coming to a halt, in many communities during the housing crisis that began in 2008, previously planned development, and therefore the developments' associated impacts, did not occur, obviating the need for greater impact fees.<sup>30</sup> Nationwide surveys of impact fees found that from 2008 to 2012, and again from 2012 to 2015, impact fee amounts declined in most parts of the country.<sup>31</sup> In addition, some jurisdictions eliminated or suspended impact fees, a common trend in Florida beginning in 2008 following the collapse of the housing market.<sup>32</sup> One example is Lee County, Florida, which in 2013 temporarily reduced its impact fees "in an effort to stimulate economic development and the pursuit of construction activity."<sup>33</sup> However, the improvement of the Florida housing market between 2012 and 2015 led to some stabilization in the amount of impact fees collected, with a less than 1% change in fees collected in the 2012-2015 period compared to the -6% change reflected in the 2008-2012 survey.<sup>34</sup>

### 5.03 IMPACT ON PROPERTY VALUES

The effect impact fees have on property values will depend on the nature and extent of the local impact fee system and the particular nature of the local market for land. In general, the imposition of impact fees may decrease the price a developer would otherwise be willing to pay for raw land in an area subject to the impact fee because the impact fee will increase the cost of development.<sup>35</sup> This would have the effect of shifting the cost of the impact fee back to the landowner. Conversely, imposing impact fees in some areas may make land in other areas not subject to the fee more attractive for development and hence more valuable. This would have the effect of suppressing development in the impact fee area until prices rise enough in those areas without impact fees to restore relative price and cost equilibrium between impact fee and non-impact fee areas.

### 5.04 IMPACT ON DEVELOPMENT COSTS

Various studies have examined the effect of **impact fees** on development and other costs in Illinois,<sup>36</sup> California,<sup>37</sup> Texas,<sup>38</sup> and Colorado.<sup>39</sup> These studies conclude that impact fees increase the cost of

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<sup>28</sup> Nelson, IMPACT FEES at 24.

<sup>29</sup> *Id.*

<sup>30</sup> See, e.g., Case Study of Shasta/Tehama Regional Impact Fee Program, CA:

[http://www.mdt.mt.gov/research/toolkit/ml/casestudies/redding\\_ca.shtml](http://www.mdt.mt.gov/research/toolkit/ml/casestudies/redding_ca.shtml).

<sup>31</sup> See 2015 National Impact Fee Survey at 6,

<http://www.growthandinfrastructure.org/resources/files/2015survey.pdf>, see also 2012 National Impact Fee Survey at 6, [http://www.impactfees.com/publications%20pdf/2012\\_survey.pdf](http://www.impactfees.com/publications%20pdf/2012_survey.pdf). The 2019 National Impact Fee Survey did not identify a trend in impact fee amounts.

<sup>32</sup> See 2012 National Impact Fee Survey at 6

<sup>33</sup> See Lee County (FL) Ord. No. 13-06 (5th recital).

<sup>34</sup> 2015 National Impact Fee Survey at 6.

<sup>35</sup> Rosenberg at 214.

<sup>36</sup> Baden, Bret M., Don L. Coursey & Jeannine M. Kannegiesser, *Effects of Impact Fees on the Suburban Chicago Housing Market*, Heartland Institute Policy Study No. 93 (November 19, 1999).

<sup>37</sup> Dresch, Maria & Steven M. Sheffrin, *Who Pays for Development Fees and Exactions?* (Public Policy Institute of America, 1997).

<sup>38</sup> Jennifer Evans-Cowley, et al, *The Effect of Development Impact Fees on Housing Values*, 18 JOURNAL OF HOUSING RESEARCH 173 (2009); Jennifer Evans-Cowley, Fred Forgey & Ronald Rutherford, *The Effects of Development Impact Fees on Land Values*, GROWTH AND CHANGE, VOL. 36 NO.1 (2005).

housing, primarily because they result in higher development costs. According to a national survey of impact fees, in 2019 the average impact fee amount for a single-family home was \$13,627.<sup>40</sup> Among the states, California had by far the highest average impact fee amount at \$37,471, followed by Oregon (\$21,911), Maryland (\$17,085), and Montana (\$16,983).<sup>41</sup> Based on these studies, one should expect land development costs to rise in those jurisdictions in which impact fees are imposed, even where they are imposed fairly and consistently.

Another relevant factor is who ultimately bears the increase in development costs. While the fees are imposed directly on developers, research suggests that developers bear little of the actual burden in a competitive housing construction market, opting instead to pass the higher costs along to the homebuyer in the form of higher sales prices. While some of these costs may be shifted “backwards” from the developer to the owners of undeveloped land, new home purchasers likely bear most of the additional costs through higher housing prices.<sup>42</sup> This dynamic will vary depending on the particular community. In jurisdictions that are growing and are desirable places to live, any increase in development costs can be more easily passed on to consumers. Growth and desirability will tend to introduce a degree of inelasticity in the demand for housing, especially new construction, and this inelasticity allows costs to be shifted forward to consumers.<sup>43</sup> If impact fees are imposed in distressed, non-growing or less desirable areas, however, there is greater risk that builders and developers will not be able to recover the increased cost and will have to absorb the fees or simply choose not to develop.<sup>44</sup>

**Proffers** also can have a significant impact on development costs. Like impact fees, the relative economic burden of proffers will be shared between developers and buyers or tenants, depending on market factors. To the extent that market dynamics allow developers to pass the cost of proffers on to buyers, the cost of new housing will increase. In an area where the market is insensitive to price changes, the cost is most likely to be passed on to buyers. In an area that is insensitive to price changes but has barriers to entry (e.g., a shortage of developable land), the developer can pass the cost along to buyers but may choose to produce a more upscale product to attract buyers who are better able to absorb the cost, which may impact housing affordability. In areas where the market is more price sensitive, builders and developers are likely to bear some or all of the cost of the proffer, which will reduce the profit margin they can expect from a given type of development. In response, some developers may choose to avoid the proffer system altogether and only develop projects permitted by right, without any conditional rezoning.

To the extent that impact fees are a more predictable and fairer system of imposing infrastructure capital costs and securing development approvals, costs associated with development uncertainty may be reduced as compared with alternatives that operate on a project-by-project basis such as proffers or ad hoc exactions. Additionally, a “one stop” impact fee system can greatly reduce the time involved with permitting as well as compliance costs. If the alternative is additional reliance on regulatory adequate public facility (APF) programs, impact fees will tend to have less effect on costs and prices. If the alternative is broad based taxation, impact fees will have greater effects on costs and prices.

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<sup>39</sup> Larry D. Singell & Jane H. Lillydahl, *An Empirical Examination of the Effects of Impact Fees on the Housing Markets*, 66 LAND ECON. 82, 89 (1990).

<sup>40</sup> See 2019 National Impact Fee Survey at Table p.4.

<sup>41</sup> See *id.*

<sup>42</sup> Rosenberg at 214.

<sup>43</sup> Hayley Raetz, et al, *Residential Impact Fees in California: Current Practices and Policy Considerations to Improve Implementation of Fees Governed by the Mitigation Fee Act* (Turner Center for Housing Innovation at UC Berkeley, Aug. 5, 2019).

<sup>44</sup> *Who Pays for Development Fees and Exactions?* at 75.



## 5.05 IMPACT ON AMOUNT AND PATTERNS OF LAND DEVELOPMENT

Because impact fees increase development costs, they would be expected to have an effect on where and how land is developed. For example, all else being equal, if impact fees are imposed in one jurisdiction but not in a neighboring jurisdiction, one would expect the jurisdiction without the fees to experience more development, since developers will tend to favor jurisdictions with lower fees or no fees. Of course, all else is not always equal, and if the jurisdiction without impact fees instead imposes other less predictable forms of exactions, or compensates for a lack of sufficient infrastructure by denying or scaling back development proposals, a developer may view the impact fee as the “lesser evil.” Some studies have suggested that a system of transparent and well-calibrated impact fees may increase development by fostering greater certainty in the permitting process and creating a monetary incentive for local governments to approve new projects.<sup>45</sup> It has also been suggested that impact fees could mitigate urban sprawl if the impact fees are implemented in a zone-based form, in which the fees are highest near the urban fringe and lower in the interior, developed areas that have adequate facilities.<sup>46</sup> As a practical matter, however, some local governments do not adopt transparent and equitable impact fees, but rather set them higher to strategically position themselves in bargaining with developers seeking approvals.<sup>47</sup>

A study of impact fees in 64 Florida counties concluded that different types of impact fees can have different impacts on home construction rates. In particular, the study found that impact fees that fund “highly visible and valued amenities,” such as parks, are likely to increase housing prices to the extent that such amenities benefit both existing and new housing.<sup>48</sup> On the other hand, the study found that school impact fees caused an increase in the price of existing housing, but had no effect on new housing. The “price effect” of a school impact fee most likely represents a situation in which owners of existing homes significantly benefit from the impact fee (e.g., if the impact fee funds middle and high schools), while new home owners are either unaware of the fee or assume that broad-based revenue sources such as property taxes fund schools.<sup>49</sup>

## 5.06 IMPACT ON HOUSING AFFORDABILITY

To the extent that imposing impact fees serves to increase the market price for new construction, prices may also rise for existing development or for new development in areas not subject to the impact fee.<sup>50</sup> New and existing homes are in competition. When the cost of new construction rises, existing homes become increasingly preferred. As demand shifts away from new to existing homes, the prices of existing homes will be bid up until relative equilibrium is re-established. Results of an empirical study in Illinois show that impact fees increase the price of both new and existing homes.<sup>51</sup> Thus, they have a direct negative effect on housing affordability. At an extreme, impact fees could be set so high that more affordable housing development becomes unprofitable (and thus not built), while more expensive housing developments could still be profitable.<sup>52</sup> When considering the effect of impact fees, it is important to remember that developers must often finance and carry these costs for long periods of time. Thus, studies

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<sup>45</sup> Gregory Burge & Keith Ihlanfeldt, *Impact Fees and Single-Family Home Construction*, 60 JOURNAL OF URBAN ECONOMICS 284 (2006); see also Shishir Mathur, *Do All Impact Fees Affect Housing Prices the Same?*, JOURNAL OF PLANNING EDUCATION AND RESEARCH, 33(4), 442-455 (2013).

<sup>46</sup> Gregory S. Burge, University of Oklahoma, *How Development Impact Fees Can Finance Essential Public Facilities in Growing Local Economies* (Sept. 2013).

<sup>47</sup> Emil Malizia, *Best and Worst Methods of Calculating Impact Fees*, 88 PUBLIC MANAGEMENT 23 (2006).

<sup>48</sup> Shishir Mathur, *Do All Impact Fees Affect Housing Prices the Same?*, JOURNAL OF PLANNING EDUCATION AND RESEARCH, 44(2), 452-53 (2013).

<sup>49</sup> *Id.* at 453.

<sup>50</sup> *Growing to Greatness* at 39 (NAIOP National Growth Management Task Force, 1999).

<sup>51</sup> Baden at 46.

<sup>52</sup> GROWING SMART LEGISLATIVE GUIDEBOOK at 8-133.

have shown that each dollar assessed as an impact fee increases housing prices by between \$1.66 and \$1.88.<sup>53</sup>

The type of impact fee may correlate with its impact on the costs of the existing surrounding housing stock. The more visible and valued the resulting infrastructure is, the stronger the impact may be on housing costs. For example, public parks are highly visible and valued resources in a neighborhood and funding the construction of a new park may have stronger upward pressure on local housing prices than funding basic services like fire and police protection that are generally taken for granted.<sup>54</sup>

In addition, research has examined the common practice of calculating flat-fee impact fees on a “dwelling unit” basis.<sup>55</sup> This practice may have a disproportionate impact on affordable housing, by saddling smaller homes with the same fee as for larger homes.<sup>56</sup> By contrast, impact fees that are calculated based on the square footage of the dwelling unit, or by the anticipated number of occupants, may be more equitable and consistent with affordable housing goals and policies.<sup>57</sup> Some local governments have enacted impact fee programs designed to minimize, if not totally eliminate, the disproportionate effect of impact fees on affordable housing by waiving, deferring, or paying the impact fee for affordable projects.<sup>58</sup> The effects of impact fees have been shown to vary based on the quality of housing on which they are imposed. The impacts of fees on higher-quality housing have been shown to be more pronounced than the impact of the same fees on lower quality housing, but this is due, in part, to the waivers provided to some affordable housing developments.<sup>59</sup> Impact fees can have a larger effect on the feasibility of accessory dwelling unit, which are generally seen as an affordable housing option, because they are typically built by homeowners rather than large-scale developers and at a much lower cost than single-family homes.<sup>60</sup>

## 5.07 RECOMMENDED TALKING POINTS: PROS AND CONS

There are a number of advantages to well-devised impact fee programs and a number of disadvantages, particularly to those that are not well designed.

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<sup>53</sup> Shishir Mathur, Paul Waddell & Hilda Blanco, *The Effect of Impact Fees on the Price of New Single-family Housing*, 41 URBAN STUDIES 1303 (2004).

<sup>54</sup> Shishir Mathur, *Do All Impact Fees Affect Housing Prices the Same?*, JOURNAL OF PLANNING EDUCATION AND RESEARCH at 446 (2013).

<sup>55</sup> U.S. Department of Housing and Urban Development, Newport Partners, LLC & Virginia Polytechnic Institute and State University, *Impact Fees and Housing Affordability: A Guide for Practitioners* (June 2008); Arthur C. Nelson, et al., A GUIDE TO IMPACT FEES AND HOUSING AFFORDABILITY (2008) (hereinafter “NELSON: HOUSING AFFORDABILITY”).

<sup>56</sup> *Id.* at 3-4.

<sup>57</sup> *Id.* at 4. See also Adam Millsap, et al, *Assessing the Effects of Local Impact Fees and Land-use Regulations on Workforce Housing in Florida* (The Jason Madison Institute, January 4, 2019), advocating for impact fees that are linked to the size of the housing unit or housing type because fees that exceed the value of the public service benefit will discourage development.

<sup>58</sup> *Id.*

<sup>59</sup> Shishir Mathur, *Do All Impact Fees Affect Housing Prices the Same?*, JOURNAL OF PLANNING EDUCATION AND RESEARCH at 452 (2013).

<sup>60</sup> Hayley Raetz, et al, *Residential Impact Fees in California: Current Practices and Policy Considerations to Improve Implementation of Fees Governed by the Mitigation Fee Act* (Turner Center for Housing Innovation at UC Berkeley, Aug. 5, 2019).

PROS:

- Impact fees, proffers, and tap fees help communities pay for the infrastructure required to support new development projects, without forcing elected officials to levy new taxes on the public as a whole.
- Impact fees and proffers create a situation where new development arguably “pays its own way.”
- A well-devised impact fee system can add speed and predictability to the development process, as compared to negotiated exactions.<sup>61</sup>
- Properly created and applied, impact fee systems can attribute specific costs to specific developments in a rational and predictable manner.

CONS:

- An impact fees, proffers, and tap fees can increase the cost of new development, especially for residential projects, and consequently may reduce the number of projects that are economically feasible.
- The increased costs resulting from an impact fee or proffer may make it harder for low- and moderate-income households to afford to purchase residential units in new developments. Impact fees can also result in higher prices for existing homes, thus making all homes less affordable.
- Impact fees and proffers may be favored by local officials and existing residents who see them as a mechanism for keeping their own taxes low by passing on government expenses to new residents who do not yet have a voice in the community.<sup>62</sup>
- Impact fees can result in “double taxation” for buyers of new houses. In many cases, those who are forced to pay impact fees to secure their building permits pay not only for their new public facilities, but also for facilities serving existing residences and businesses. The reason is that, in addition to incurring impact fees as a cost of their new housing, these residents also pay regular taxes at sufficient levels to pay for the same or other facilities used by existing residents that are financed through general revenues.<sup>63</sup>
- Impact fees are an unstable source of funding since they depend directly on new housing starts. The same is true of proffers, albeit to an even greater degree because they must be voluntarily made by the developer.

## 5.08 INCENTIVE-BASED ALTERNATIVES

Incentive zoning, which allows developers to build structures that are larger than what current zoning regulations permit in exchange for providing public amenities such as pedestrian plazas, affordable housing, or public improvements, is a technique that communities can use to induce private developers to

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<sup>61</sup> Nelson and Duncan at 123.

<sup>62</sup> *Id.* at 122.

<sup>63</sup> South Carolina Policy Council, *Assessment of Impact Fees as Means of Financing Government Infrastructure* (1997).

finance public improvements.<sup>64</sup> The only other non-impact fee “incentives” to induce private developers to finance public improvements are those that government might provide in the form of (a) an agreement to lower and fix property taxes for the period of time during which the project is being constructed (i.e., before revenue is generated by the project); or (b) donation of government-owned land or a grant of easement across government land in order to enable a critical means of access to the project.

Impact fees themselves can also be utilized to create incentives to encourage development to locate in areas with facilities that are less costly to serve. For example, San Diego is a jurisdiction that encourages growth through the use of lower impact fees in areas already well-served with public facilities, and discourages growth through the use of higher impact fees in areas lacking infrastructure.<sup>65</sup>

The other alternatives to impact fees are not incentives to spur private development, but are other methods of financing public facilities. These alternative financing options include: (1) general taxes, particularly property taxes; (2) dedicated taxes, such as a gasoline tax where revenues are used exclusively to fund roadway improvements; (3) special assessment districts; and (4) user fees, such as water or wastewater connection fees and subsequent charges by volume of use.<sup>66</sup>

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<sup>64</sup> See Samantha Peikoff Adler, *Penn Central 2.0: The Takings Implications of Printing Air Rights*, 2015 COLUM. BUS. L. REV. 1120, 1133; Steven J. Eagle, *Koontz in the Mansion and the Gatehouse*, 46 URB. LAW. 1 (Winter 2014) (describing incentive zoning as the process by which “cities grant private real estate developers the legal right to disregard zoning restrictions in return for their voluntary agreement to provide urban design features”).

<sup>65</sup> Nelson and Duncan at 123.

<sup>66</sup> *Impact Fees & Housing Affordability: A Guide for Practitioners* at 20 (U.S. Dept. Housing & Urban Development, June 2008).

## SECTION 6: SPECIAL ASSESSMENT DISTRICTS (SADs)

### 6.01 PURPOSE AND KEY TERMS

A **Special Assessment District (SAD)** is a sub-area of a community designated by ordinance or similar government action to assess some type of a tax for the construction or installation of public facilities that directly benefit the property owners within that district.<sup>1</sup> Also known in various states as **Local Improvement Districts, Special Benefit Districts, or Benefit Assessment Districts**, SADs are a means of paying for improvements over a period of time through proportionate assessments on benefiting properties.<sup>2</sup> SADs have been used to pay for water and sewer services, roads, parks, utility improvements, and investments in public transit.<sup>3</sup> A Special Assessment District is distinguishable from Tax Increment Financing (TIF), discussed in Section 7 of this book, which typically requires a finding of blight.<sup>4</sup>

A “special assessment” is a dedicated tax on real property used to defray all or part of the cost of a public improvement. The assessment is apportioned according to the estimated benefit that will accrue to each property.<sup>5</sup> This apportionment based on the projected benefit to the individual property is usually cited as the distinctive feature of a special assessment.<sup>6</sup> This feature distinguishes SADs from property (or “ad valorem”) taxes levied for the purpose of collecting general revenues that permit the local government to fund a variety of programs and projects throughout the locality.<sup>7</sup>

A Special Assessment District is distinguishable from a Special District. A Special District is a limited-purpose unit of local government created to carry out a specific function, such as the provision of sewer or storm drainage facilities.<sup>8</sup> A Special District is accorded full power to provide the service for which it is created and, as such, is typically authorized to tax, impose special assessments, issue bonds, and to enter into contracts for service. A Special Assessment District, on the other hand, is generally not

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<sup>1</sup> See definition of “Special Benefit District” in *A Glossary of Zoning, Development, and Planning Terms*, Planning Advisory Service Report Nos. 491/492 at 213 (American Planning Association 1999).

<sup>2</sup> Municipal Research and Services Center (MRSC) of Washington, Local Improvement Districts (<https://mrsc.org/Home/Explore-Topics/Public-Works/Finance/Local-Improvement-Districts.aspx#whatlid>).

<sup>3</sup> DOUGLAS W. KMIEC & KATHERINE KMIEC TURNER, 2 ZONING & PLANNING DESKBOOK § 13:6, *Benefit Assessment Districts* (2d ed. 2019) (hereinafter “*Benefit Assessment Districts*”).

<sup>4</sup> Rachel MacCleery & Casey Peterson, Using Special Assessments to Fund Transit Investments, URBANLAND (Oct. 2012) (<http://urbanland.uli.org/infrastructure-transit/using-special-assessments-to-fund-transit-investments/>).

<sup>5</sup> See, e.g., *Golden Hill Neighborhood Assn, Inc. v. City of San Diego*, 199 Cal.App.4th 416 (2011) (San Diego SAD invalid because the city failed to show that assessments on its park and open space parcels were proportional to benefits conferred on the parcels, and the engineer’s report’s conclusion that assessment district conferred no benefit on general public was unfounded).

<sup>6</sup> See *Carman v. Village of Northport*, 2 WL 3101839 (Mich. App. 2012) (denying petitioner’s claim that special assessment for sewer system was improper and finding that the special assessment conferred a benefit onto petitioner’s property and not to the community as a whole); but cf. *110 Wyman, LLC v. City of Minneapolis*, 861 N.W.2d 358 (Minn. Ct. App. 2015) (upholding charges imposed on property owners in special services district in city’s downtown based on statutory “reasonably related” standard rather than the common law “special benefit” standard) and *DeVilbiss v. Matanuska-Susitna Borough*, 356 P.3d 290 (Alaska 2015) (upholding road service tax over challenge that property owner did not use the roads financed by the assessment on the grounds that Alaska law does not require receipt of a special benefit for an assessment to be valid).

<sup>7</sup> National Association of Home Builders, “Stage III: Assess Financial Resources,” an excerpt from *Building Together: Investing in Community Infrastructure* (1990), produced jointly by the National Association of Home Builders, the National Association of Counties, The Urban Land Institute, the Lincoln Institute of Land Policy and the Government Finance Officers Association.

<sup>8</sup> *Id.*

independent of the government that creates it. It is a designation for a cluster of properties that are subject to a special assessment for the purpose providing a specific benefit.<sup>9</sup> It is common to distinguish between the types of districts, with a Special District characterized as “independent,” meaning independent from the local government, and a Special Assessment District characterized as being “dependent,” meaning that it is dependent on the local government.

Despite those differences between a Special Assessment District and a Special District, the two are similar in effect. They are discussed in this section interchangeably for purposes of evaluating their effectiveness at financing public improvements, since both mechanisms provide local governments with a means of separately financing improvements within a limited geographic area.<sup>10</sup>

Finally, a Special Assessment District or a Special District, in this context, should not be confused with a “Special Zoning District,” which is a name given to districts created by municipalities under the zoning powers to implement flexible site-specific development regulations. These types of regulatory districts are variously referred to as “Special Design Districts,” “Special Area Protection Districts,” “Special Purpose Development Districts,” “Special Development Review Districts,” and “Special Mixed Use Districts.”<sup>11</sup>

## **6.02 EFFECTIVENESS IN ACHIEVING STATED PURPOSE(S)**

The principle behind a Special Assessment District is straightforward: if a segment of the community desires to have infrastructure beyond that provided by the local government, it should foot the bill. For example, a Special Assessment District may be created to provide a centralized water system to replace individual wells. These districts allow local control over spending because the money can only be used for specific projects, so they are generally well-suited to meet their designed purpose. They also are an available source of revenue for tax constrained areas, such as California, after Proposition 13, where communities may be unable to provide basic infrastructure improvements out of general tax revenues.

SADs and Special Districts are authorized in all 50 states, either through state enabling legislation or state constitutions,<sup>12</sup> and go by various names, such as Municipal Utility District (Texas), Community Development District (Florida), and Mello-Roos District (California). The 2017 Census of Governments reports that there were 38,542 independent special districts that were active in the United States, noting between 2012 and 2017 more than 1,500 special districts were added while approximately 1,260 special districts were removed and are no longer operating.<sup>13</sup>

Although SADs vary in their details, they have a number of principles in common:

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<sup>9</sup> *Id.*

<sup>10</sup> See generally *Benefit Assessment Districts*; see also DOUGLAS PORTER, ET AL., SPECIAL DISTRICTS: A USEFUL TECHNIQUE FOR FINANCING INFRASTRUCTURE at v (Urban Land Institute, 1996).

<sup>11</sup> See, e.g., Edward H. Ziegler, Jr., “Shaping Megalopolis: The Transformation of Euclidean Zoning by Special Zoning Districts and Site-Specific Development Review Techniques,” Chapter 3 in ZONING AND PLANNING LAW HANDBOOK (Clark Boardman Callaghan, 1993).

<sup>12</sup> DOUGLAS W. KMIEC & KATHERINE KMIEC TURNER, 2 ZONING & PLANNING DESKBOOK § 13:6, *Benefit Assessment Districts* (2d ed. 2019); AASHTO Center for Excellence in Project Finance & U.S. Department of Transportation: Special Assessment Districts (2011).

<sup>13</sup> *From Municipalities to Special Districts, Official Count of Every Type of Local Government in 2017 Census of Governments*, (Oct. 29, 2019). The Urban Land Institute has noted that no census has been taken of dependent Special Districts, which, it concluded, must number in the tens of thousands and which also provide important services. PORTER at 1.

- The use of a special assessment enables a group of property owners to pay for a public facility that specially benefits them. Because individuals will not necessarily agree on the value of the project, the process for establishing a district also includes a process for considering objections to its establishment from among those to be charged.
- The assessed cost is distributed among many property owners according to the proportionate benefits to each owner's land.<sup>14</sup>
- Standards for the public facilities are established by the governmental unit responsible for their future operation and maintenance. Each project is usually part of a larger system that must be functionally adequate for the entire community.
- The facility is built in accordance with a final, permanent standard. Property owners are not easily persuaded that a new special benefit is received from reconstruction of a project that is already in place.
- A developer may be granted the privilege of special assessment financing for facilities that the developer would otherwise pay for directly. Using the lower interest rate on municipal borrowing reduces the developer's cost. Some units of government either do not allow, or place limits on, this use of special assessment.
- State enabling legislation typically establishes when, where, how and by whom a Special Assessment District can be formed and administered. Generally, the establishment of an SAD is subject to a vote of affected property owners.<sup>15</sup>

The procedures under which a Special Assessment District is established and administered are usually very detailed and must be followed carefully in order for the district to survive challenge.<sup>16</sup>

A study of the experience of four cities with using SADs to fund the construction, operation, or maintenance of public transportation infrastructure evaluated the tool's usefulness in funding transit.<sup>17</sup> It

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<sup>14</sup> See Shishir Mathur, *Funding Public Transportation Through Special Assessment Districts: Addressing the Equity Concerns*, 20 PUB. WORKS MGMT. & POL'Y 127-145 (2015) for discussion of the equity implications of various assessment methodologies, as studied through case studies from Portland, Oregon, Seattle, Washington, and New York City.

<sup>15</sup> Bureau of Governmental Research and Service, School of Community Service and Public Affairs, University of Oregon, *Financing Local Improvements by Special Assessment*, BGRS No. 82-1 at 4 (January 1982); see, e.g., Public Act 287 of 2011 § MCL 117.5i (Michigan law that allows for the creation of SADs for select services in any city with a population of at least 600,000 residents, contingent upon supporting petition signatures from residents who own at least 51 percent of the land); see Bloomfield Township, Special Assessment Districts, <http://www.bloomfieldtp.org/Services/EES/Engineering/SpecialAssessmentDistricts.asp>.

<sup>16</sup> See, e.g., *Crane v. Director of Assessing for Charter Twp. of West Bloomfield*, 2012 WL 1367692 (Mich. App. 2012) (special assessment invalid because a petition signed by two-thirds of lake freeholders was required to initiate the canal dredging project, and respondents admitted at the pleading stage that no such petition was submitted). See also *Clarke v. City of Franklin*, No. M2020-00662-COA-R3-CV, slip op. at \*11 (Tenn. Ct. App. Feb. 2021). As an example of procedures for creating and utilizing a SAD, see the Special Assessment Procedures for Burleigh County, North Dakota: Burleigh County, North Dakota, Special Assessment Procedures (revised Mar. 18, 2013), <http://www.burleighco.com/departments/auditor/special-assessment-procedures/>. To see how California's Proposition 218 affects assessment district procedures, see "Special Assessments," Chapter 3 in *A Planners Guide to Financing Public Improvements* (California Governor's Office of Planning and Research, June 1997) (<http://ceres.ca.gov/planning/financing>).

<sup>17</sup> Shishir Mathur, *Special Assessment District's Ability to Fund Transit: Lessons from Project-Level Analysis*, TRANSP. RES. RECORD: J. TRANSP. RES. BD. 103-110 (2014).

concluded that SADs can generate significant sums to be used for transit construction and that the revenue generated over time is highly stable, even when collected incrementally over long periods.<sup>18</sup>

In 1981, Burlington, Vermont, created a redevelopment district to bolster its downtown, the Church Street Marketplace. Administered by a city agency and funded by a special assessment based on a combination of frontage on Church Street and overall building square footage, the district is considered a success. During its first five years, the assessment basis was considered equitable, but as adjacent areas of downtown rebounded, equity issues surfaced. For example, property on streets perpendicular to Church Street paid no fees, but arguably benefited from spillover success. These and other issues caused the city to periodically reexamine the boundaries and management of the SAD.<sup>19</sup>

A report by the Planning and Conservation League of California credited benefit assessment districts with enhancing the state's quality of life by providing residents with necessary police, fire, public transportation, roads, flood control, sewer lines, libraries, parks, open space, and economic development efforts.<sup>20</sup> The use of this technique generated \$304 million in revenue in 1992-93, up from \$28 million only 15 years earlier.<sup>21</sup> However, since the 1996 passage of Proposition 218, an amendment to the California Constitution, California courts have struck down special assessments aimed at open space acquisition and public park improvement and maintenance, finding that the assessments did not confer any special benefit on affected parcels that were different from the general benefits conferred to the public at large.<sup>22</sup>

The District of Columbia has received recognition for using a Special Assessment District to fund the cost of constructing a new Metrorail station on New York Avenue. A special assessment levied against commercial properties within 2,500 feet of the entrances to the new station is expected to generate about \$25 million of the \$84 million originally budgeted to build the station. A Special Assessment District was seen as an equitable tool for financing the station given the increases in property values that would accrue because of proximity to the new Metrorail station.<sup>23</sup> Bonds backed by future special assessment revenues were issued to fund construction, and some landowners even donated land to assist in making this infrastructure development a reality.<sup>24</sup>

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<sup>18</sup> *Id.* at 107-08. The study also offers recommendations for designing SADs to fund transit. First, it recommends capturing as large a portion of the value increase created by the transit infrastructure as is politically possible, but recognizes that property owner opposition can derail the proposal. Second, it recommends minimizing the number and type of properties exempt from the assessments but recognizes that strategic exemptions may be necessary. Third, it recommends that mechanisms be in place to ensure full payment of fees, even though the fees may be paid over time. Lastly, the study recommends basing the fee on a metric that is likely to be stable (or at least not decline over time) so that revenues are not destabilized in a real estate market downturn. *Id.* at 109.

<sup>19</sup> "Church Street Marketplace, Burlington, Vermont," *Urban Land Institute Development Case Study No. C016013* (1986).

<sup>20</sup> J.K. Knox, *Benefit Assessment Districts: Enhancing the Quality of Life in California*, PLANNING AND CONSERVATION LEAGUE FOUNDATION (1996).

<sup>21</sup> *Id.*

<sup>22</sup> *Silicon Valley Taxpayers Ass'n, Inc. v. Santa Clara County Open Space Authority*, 44 Cal. 4th 431 (2008) (invalidating special assessment for open space acquisition); *Beutz v. County of Riverside*, 184 Cal. App. 4th 1516 (4th Dist. 2010) (invalidating special assessment for public park landscape refurbishment and maintenance).

<sup>23</sup> Lisle R. Baker, "Using Special Assessments as a Tool for Smart Growth: Louisville's New Metro Government as a Potential Example," 45 BRANDEIS LAW JOURNAL 1, 47-48 (2006); *see also* New York Avenue-Florida Avenue-Galludet University Metro Station: A Case Study, [http://www.transportation-finance.org/pdf/funding\\_financing/funding/local\\_funding/New\\_York\\_Avenue\\_Case\\_Study.pdf](http://www.transportation-finance.org/pdf/funding_financing/funding/local_funding/New_York_Avenue_Case_Study.pdf).

<sup>24</sup> The National Council of Public-Private Partnerships, *New York Avenue Metro Station (Transportation Infrastructure): 2006 NCPPP Infrastructure Award Winner* (<http://ncppp.org/cases/nystation.shtml>).



A Special Assessment District was also used in Virginia to extend the District of Columbia's metro system to Tysons Corner, a sprawling retail and employment center.<sup>25</sup> In 2004, commercial and industrial property owners agreed to establish a Special Assessment District to fund up to \$1 billion of the total \$2.6 billion needed for this metro system extension.<sup>26</sup> The transit investment was part of the community's effort to make Tysons Corner a higher density, walkable neighborhood and to accommodate the area's projected population growth, which the County of Fairfax projects will be home to up to 100,000 residents and 200,000 jobs by 2050.<sup>27</sup> This SAD was projected to generate up to \$400 million from a tax of 22 cents per \$100 of assessed value on the transit corridor's commercial and industrial properties.<sup>28</sup>

### **6.03 IMPACT ON PROPERTY VALUES**

If the SAD assessment truly reflects the benefit accruing to the property from the infrastructure provided, one would expect there to be little positive or negative impact on property values from the creation and implementation of the SAD. To the extent that the use of a Special Assessment District makes it possible to develop property that it would not otherwise be feasible to develop to the same extent, the SAD may increase property values within the district, all else being equal. Shifting costs to new development will tend to decrease property values, but making infrastructure available will tend to increase property values.

### **6.04 IMPACT ON DEVELOPMENT COSTS**

SADs should have no direct impact on development costs, except to the extent that they make possible the provision of necessary infrastructure with the cost shifted to future owners. Such costs would otherwise have to be brought to the site at the developer's expense. Where tax exempt bonds are issued, development costs would be lower, first by shifting some of the costs forward to future property owners, and second, by lower interest rates.

### **6.05 IMPACT ON AMOUNT AND PATTERNS OF LAND DEVELOPMENT**

SADs can make it possible to provide infrastructure and services to areas that might not otherwise receive public investment, thereby potentially opening new areas to growth or allowing faster growth in developing areas.

### **6.06 IMPACT ON HOUSING AFFORDABILITY**

The amount of the special assessment will be assumed by homeowners in the district as an increased cost of housing. The effect on housing prices is more difficult to predict. Depending on market factors, the effect of this additional assessment, all else being equal, may be to reduce housing demand and consequently prevent higher housing prices in the affected area. However, in places where SADs are not common, consumers are frequently unaware of the existence of any obligation to pay SAD charges, despite disclosure requirements, and do not show market resistance to such districts. In places where SADs are common, consumers are aware of the districts, and their costs are factored into the price consumers are willing to pay. This market resistance tends to capitalize future SAD charges as lower prices, which will tend to be borne by owners, builders, and developers. However, a study of single-

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<sup>25</sup> Rachel MacCleery & Casey Peterson, *Using Special Assessments to Fund Transit Investments*, URBANLAND (Oct. 2012), <http://urbanland.uli.org/infrastructure-transit/using-special-assessments-to-fund-transit-investments/>.

<sup>26</sup> *Id.*; Chrissy Mancini Nichols, *Value Capture Case Studies: Washington, DC Metro expansion to Dulles Airport*, Metropolitan Planning Council (April 12, 2012), <http://www.metroplanning.org/news/article/6384>.

<sup>27</sup> Fairfax County, VA Official Website (<https://www.fairfaxcounty.gov/tysons/>).

<sup>28</sup> Rachel MacCleery & Casey Peterson, *Using Special Assessments to Fund Transit Investments*, URBANLAND (Oct. 2012), <http://urbanland.uli.org/infrastructure-transit/using-special-assessments-to-fund-transit-investments/>.

family sales occurring between 2002 and 2004 in the Denver metropolitan area found that only about half of the future tax liability due under a special assessment is capitalized into the house price.<sup>29</sup> Measured in years rather than rate, the study estimated that homebuyers capitalized between 7.4 and 8.1 years, out of 19 years, of tax liability due to assessments into the purchase price of a home.<sup>30</sup> This finding suggests that homeowners are, overall, paying more for homes subject to a special district assessment. That is, homeowners are unable, or unwilling, to fully capitalize the cost of these future payments into housing prices, and, therefore, bear more of the infrastructure cost burdens than developers.

## 6.07 RECOMMENDED TALKING POINTS: PROS AND CONS

### PROS:

- SADs can provide important services in areas where local governments have limited financial and/or administrative capabilities.<sup>31</sup>
- The creation of SADs offers the government an opportunity to avoid increases in general property taxes, thereby avoiding public controversy<sup>32</sup> or legal constraints on the ability to raise tax levies.
- SADs can lower development costs through use of tax exempt bonds.
- Because of their narrow focus, SADs allow greater control over spending for specific infrastructure projects than general fund revenues.
- If the purpose of the assessment is properly described and attainable, and the assessment itself is competently administered, all in the district should proportionately share the burden of the tax and all should proportionately benefit from the eventually-constructed improvement.
- SADs are more transparent and easily understood than impact fees and, because the costs of infrastructure funded with SADs can be repaid annually, there is less impact on construction costs and the initial sales price of a home (if the developer is able to pass costs along to the consumer) than with impact fees.<sup>33</sup>

### CONS:

- Where there is a belief that the ability to construct new infrastructure is constrained by a city bureaucracy that wastes tax revenue, SADs, one argument goes, simply enable this dysfunctional system to consume dollars while producing less and less.<sup>34</sup>
- To the extent that infrastructure and amenities serving new developments in the district are spread equally among all properties in the district, the system is unfair to existing users in that they are excluded from receipt of new infrastructure or amenities.

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<sup>29</sup> Stephen B. Billings & Thomas G. Thibodeau, *Financing Residential Development with Special Districts*, 41 REAL ESTATE ECONOMICS, 131-163 (2013).

<sup>30</sup> *Id.* Nineteen years was the average remaining term for the bonds studied.

<sup>31</sup> PORTER at 41.

<sup>32</sup> *Id.*

<sup>33</sup> National Association of Home Builders, *An Overview of Special Purpose Taxing Districts* (Sept. 2014), <https://www.nahb.org/en/research/~media/2B48470239CA435E816317B5FEC6344D.ashx>.

<sup>34</sup> Lisa D. Ross, "Special Tax Districts Are a Tough Sell: They Can Work If They Are Fair and Have A Well-Defined Purpose," *San Diego Union Tribune* (July 27, 1995).

- When the assessments are limited to new developments, it may take decades for enough funds to accumulate and to construct desired amenities.
- Where fiscal oversight and control is inadequate, funds generated by the special assessment can be spent elsewhere.<sup>35</sup>
- Mismanagement and lack of accountability may be concerns where special districts are created and managed by developers.<sup>36</sup>

## **6.08 INCENTIVE – BASED ALTERNATIVES**

As in the case of impact fees, incentive-based alternatives to SADs to induce private developers to finance public improvements are those that government might provide in the form of (a) an agreement to lower and fix property taxes for the period of time during which the project is being constructed (i.e., before revenue is generated by the project), if that is permitted by state law; or (b) donation of government-owned land or a grant of easement across government land in order to enable a critical means of access to the project.

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<sup>35</sup> *Id.* (discussing Carmel Valley (CA) Community Park FBA funds being spent by the city on a highway).

<sup>36</sup> Gina Scutelnicu & Sukumar Ganapati, *Community Development Districts: An Innovative Institutional Framework for Financing and Managing Infrastructure in Florida?* 26 *ECON. DEV. Q.* 361-372 (2012).

## SECTION 7: TAX INCREMENT FINANCING

### 7.01 PURPOSE AND KEY TERMS

**Tax Increment Financing (TIF)** is a development tool that enables local authorities to finance public improvements, including infrastructure improvements, to stimulate redevelopment and in some cases new development, using property tax proceeds from property value appreciation within a specified geographic area.<sup>1</sup> The traditional purpose of TIF was to provide the legal framework for municipalities or counties to channel the increased taxes that flow from improvements to pay for the costs of land assembly and infrastructure improvements such as water and sewer lines, streets, sidewalks, and lighting. As discussed in more detail below, local governments use property tax increases in the TIF district attributable to redevelopment to pay for designated economic development expenses that are initially financed through so-called TIF bonds.

TIF was originally designed and justified as a local method of self-financing the redevelopment of blighted urban areas. Now, the use of TIF to raise project finance monies has expanded into other areas.<sup>2</sup> TIF bond proceeds commonly finance projects in non-blighted as well as blighted areas, and for a variety of purposes associated with redevelopment, development, or related physical infrastructure improvements, such as elementary and secondary educational facilities, roads, bridges, parking facilities, recreational facilities, water and wastewater facilities, and electrical power plants. TIF has also been used to finance a wide variety of successful commercial and industrial projects. In addition, TIF projects have been a means through which to create affordable housing, assist in the revitalization of low-income and moderate-income neighborhoods, and tackle modern, technical redevelopment problems such as the redevelopment of contaminated sites such as brownfields. TIF is also being used to provide infrastructure financing to encourage mixed use and New Urbanism-style developments in places such as Denver, Colorado and Virginia Beach, Virginia.<sup>3</sup> However, TIF cannot be used for everything. A 2015 Indiana Court of Appeals decision held that, although TIF funds could be used to finance improvements to two parks, the funds could not be used to pay for ongoing maintenance of the redeveloped properties after redevelopment was completed.<sup>4</sup> A study of TIF adoption in Michigan found that cities with growing populations and rising property values are more likely to adopt a TIF plan than “shrinking cities,” largely because TIF provides a tool for financing the infrastructure required by growth.<sup>5</sup> As of 2015, all states

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<sup>1</sup> Bridget Fisher, Flávia Leite & Lina Moe, *What is Tax Increment Financing (TIF)?*, SCHWARTZ CENTER FOR ECON. POL'Y ANALYSIS: INSIGHTS BLOG (July 9, 2020), (available at <https://www.economicpolicyresearch.org/insights-blog/what-is-tax-increment-financing-tif>).

<sup>2</sup> Pamela VanFossen, *Tax Increment Financing in Pennsylvania: The Effect of Mazur v. Trinity Area School District on Determinations of Blight*, 19 WIDENER L.J. 749 (2010).

<sup>3</sup> TAX INCREMENT FINANCING, prepared for the National Association of Realtors® by Robinson & Cole LLP and Craig L. Johnson [hereinafter NAR TAX INCREMENT FINANCING], Part I, 1 (2002); *TIF Across America – 5 Case Studies* (Council for Development Finance Agencies) (hereinafter “*TIF Across America*”) (available online at [https://www.cdfa.net/cdfa/cdfaweb.nsf/ord/1e770facd909bce088257936005efa5e/\\$file/the%20diversity%20of%20ti f.pdf](https://www.cdfa.net/cdfa/cdfaweb.nsf/ord/1e770facd909bce088257936005efa5e/$file/the%20diversity%20of%20ti f.pdf)).

<sup>4</sup> *Redevelopment Commission of the Town of Munster, Indiana v. Indiana State Board of Accounts*, 28 N.E.3d 272 (Ind. App. 2015) (affirming lower court decision granting summary judgment to defendant State Board of Accounts in its interpretation of Indiana statutes to disallow use of TIF for maintenance of a TIF financed redevelopment project).

<sup>5</sup> Richard Briffault, *The Most Popular Tool: Tax Increment Financing and the Political Economy of Local Government*, 77 U. CHI. L. REV. 65 (Winter 2010).

except Arizona had enacted legislation authorizing TIF projects,<sup>6</sup> and TIF programs are currently in effect in approximately 47 states.<sup>7</sup>

TIF programs are implemented through the creation of discrete geographic areas called **tax increment districts** or **TIF districts**. TIF districts commonly share boundaries with the enabling government, usually a city, or the TIF district may be a smaller part of a city, such as a section of the downtown area or an industrial park within the city. The boundaries of a TIF district are typically created by the local redevelopment authority.<sup>8</sup>

TIF projects are financed through the issuance of debt. The most common source of debt financing for up-front capital expenses comes from the sale of **TIF bonds**, which act like revenue bonds in the sense that principal and interest payments are generally funded with project revenues. The proceeds from the sale of the TIF bonds are used to finance the capital improvements within the TIF district. Unlike traditional **general obligation bonds** (bonds secured by the pledge of the municipality's full faith, credit, and taxing power), TIF bonds in most states are not subject to municipal debt limits or public referendum requirements. Therefore, local officials have more discretion to sell TIF bonds than they do general obligation bonds, which provides the municipality with more debt capacity to finance infrastructure improvements.<sup>9</sup>

TIF bonds are repaid with the **tax increment** derived from new development within the TIF district. As the financed improvements are constructed and as new development occurs within the TIF district, the **assessed valuation (AV)** of the parcels in the TIF district is expected to increase, generating higher total tax revenues. The tax increment is the difference between the tax revenue on the AV of all property in the TIF district at the base year determined at the beginning of a project (**Base AV**) and the tax revenue derived from the (higher) assessed values of all property in the TIF district in subsequent years (**Incremental AV**). The tax revenue generated by the Base AV continues to be paid into the general local government revenue pool, and the tax increment is used to make payments on the TIF bonds. At the time when the TIF district is terminated, the Incremental AV reverts back to the general revenue pool (**New Post-Project AV**).<sup>10</sup> The following chart illustrates AV over the life of a TIF project.

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<sup>6</sup> See *2015 Tax Increment Finance State-By-State Report* (Council of Development Finance Agencies, 2015) (available at <https://www.cdfa.net/cdfa/cdfaweb.nsf/ordredirect.html?open&id=201601-TIF-State-By-State.html>); see also *TIF State-By-State Map* (Council of Development Finance Agencies) (available at <https://www.cdfa.net/cdfa/tifmap.nsf/index.html?open&state=AZ>).

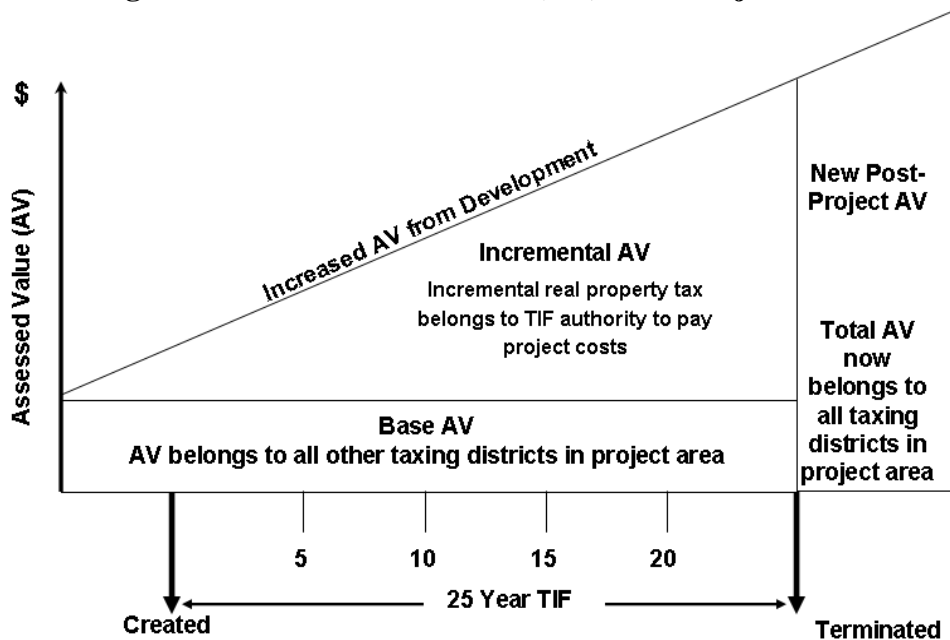
<sup>7</sup> David Merriman, *Policy Focus Report: Improving Tax Increment Financing (TIF) for Economic Development*, LINCOLN INST. OF LAND POL'Y, at 26-30 (September 2018) (hereinafter "*TIF for Economic Development*").

<sup>8</sup> NAR TAX INCREMENT FINANCING, Part I at 5.

<sup>9</sup> *Id.* at 4.

<sup>10</sup> *Id.* at 5.

**Figure 7-1: TIF Assessed Value (AV) Over Project Life<sup>11</sup>**



The key steps in the TIF process are as follows:

- **Initiation.** A TIF project is typically initiated by the local government, but may also be initiated by a private firm or non-profit agency.
- **Needs Assessment.** Because TIF is authorized by state statute and involves the government’s taxing and spending powers, TIF must be used for a legitimate public purpose.<sup>12</sup> Additionally, the proposed TIF program must meet various statutory requirements.<sup>13</sup> For example, most states require the local government to make a blight finding, which is a determination that the TIF district meets the statutory definition of “blight.”<sup>14</sup> Several statutes also require that the proposed redevelopment project satisfy what is known as the “*but for*” test.<sup>15</sup> This test is intended to ensure that TIF is only used in cases where the desired redevelopment would not occur in the absence of the governmental assistance.<sup>16</sup>

<sup>11</sup> Source: NAR TAX INCREMENT FINANCING.

<sup>12</sup> See, e.g., *Haugland v. City of Bismarck*, 818 N.W.2d 660, 673-77 (N.D. 2012) (where plaintiff challenged the city’s implementation of an urban renewal plan and use of TIF to fund renewal projects in its renewal area, holding that the statutory provisions authorizing TIF were constitutional and served a valid public purpose).

<sup>13</sup> Arden H. Rathkopf, Daren A. Rathkopf, & Edward H. Ziegler, Jr., 2 RATHKOPF’S THE LAW OF ZONING AND PLANNING § 15:59 (4th ed. 2013).

<sup>14</sup> Pamela VanFossen, *Tax Increment Financing in Pennsylvania: The Effect of Mazur v. Trinity Area School District on Determinations of Blight*, 19 WIDENER L.J. 749 (2010). See also *2015 Tax Increment Finance State-By-State Report*, Figure 1. Blight Requirements by State (Council of Development Finance Agencies, 2015) (reporting “that a little over half of TIF enabling statutes list blight as a requirement” for TIF district or project creation).

<sup>15</sup> See Bridget Fisher, Flávia Leite & Lina Moe, *What is Tax Increment Financing (TIF)?*, SCHWARTZ CENTER FOR ECON. POL’Y ANALYSIS: INSIGHTS BLOG (July 9, 2020) (stating that the “but for” test is a prerequisite in 18 states).

<sup>16</sup> See *Tax-Increment Financing: The Need for Increased Transparency and Accountability in Local Economic Development Subsidies* at 7 (U.S. PIRG Education Fund, Fall 2011) (hereinafter “*The Need for Accountability*”); see also Bridget Fisher, Flávia Leite & Lina Moe, *What is Tax Increment Financing (TIF)?*, SCHWARTZ CENTER FOR ECON. POL’Y ANALYSIS: INSIGHTS BLOG (July 9, 2020) (stating “‘But-for’ laws require a TIF be used only for development that would not happen ‘but for’ the TIF. The underlying assumption is that if this condition is met,

- **Redevelopment Plan Formation.** In this stage, a detailed redevelopment plan is created. The plan describes the objectives of the program, formalizes the community purposes for which TIF may be used, creates a timetable, and forms the written basis for communicating these matters to stakeholders. Often, this plan must align with the general plan for the community. During this stage, the boundaries of the TIF district are determined. The relevant state statute may limit the size of a specific TIF district or the total aggregate area of all TIF districts in a particular municipality. Additionally, public-private partnerships are created, and development agreements are entered into in order to facilitate the implementation of the redevelopment plan.
- **Plan Adoption.** During this stage, the redevelopment plan is presented to key stakeholders and the public in order to obtain buy-in and any necessary approvals. Most TIF statutes provide procedures allowing the public to review and comment upon proposed TIF district boundaries or redevelopment plan. Typically, notice and public hearings are held. As TIF programs may divert taxes from other overlapping taxing districts such as school and fire districts, some state statutes require that these districts approve the redevelopment plan prior to its implementation.
- **Implementation and Evaluation.** During implementation the government must generally oversee the construction process and manage the finances of the redevelopment authority and TIF district. Additionally, TIF statutes often require local governments to provide annual reports to state actors to keep them informed about the status of TIF projects.
- **Plan Termination.** The final stage is termination of the TIF district. Typically, a TIF enabling statute specifies a distinct period of time within which the objectives of the TIF district must be satisfied. This period is generally twenty to thirty years provided that the debt has been repaid.<sup>17</sup>

In addition to traditional property tax-based TIF programs, some states have authorized TIF programs based on sales tax or income tax increments.<sup>18</sup> Louisiana’s Sales Tax Increment Financing (STIF) program, for example, allows municipalities to use the increased or additional sales tax revenue from a STIF district to finance economic development within that district.<sup>19</sup> Maine provides for Income Tax Increment Financing (ITIF) programs in which the incremental income tax revenues paid by employees employed within the ITIF district are used to pay debt service bonds issued for redevelopment.<sup>20</sup> New Jersey allows TIF programs to use 19 different sources of state and local revenue.<sup>21</sup>

## 7.02 EFFECTIVENESS IN ACHIEVING STATED PURPOSE(S)

TIF proponents argue that the incentives provided through TIF are effective in attracting firms to locate or expand their businesses in a TIF district, resulting in increased economic activities, more jobs, lower unemployment, higher wages, greater property values, more tax revenues, and the revitalization of blighted areas.<sup>22</sup> Opponents of TIF argue that TIF programs are ineffective and inefficient because the

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property tax increments can be attributed to the TIF-related investment, rather than from other sources such as inflation or regional growth.”).

<sup>17</sup> NAR TAX INCREMENT FINANCING at 7-13, 1-5.

<sup>18</sup> Lauren Ashley Smith, *Alternatives to Property Tax Increment Finance Programs: Sales, Income, and Nonproperty Tax Increment Financing*, 41 URBAN LAWYER 705 (Fall 2009).

<sup>19</sup> *See id.*

<sup>20</sup> *See id.*

<sup>21</sup> *The Need for Accountability* at 6-7.

<sup>22</sup> Joyce Y. Man, *Introduction in TAX INCREMENT FINANCING AND ECONOMIC DEVELOPMENT, USES, STRUCTURES AND IMPACT* at 3 (2001) (hereinafter “TAX INCREMENT FINANCING”).



incentives provided by state and local governments only account for a small portion of a firm's production cost so that TIF programs are unlikely to affect business location choices or expansion decisions.<sup>23</sup> The effectiveness of a TIF program as a catalyst for economic development can be measured both *within* the TIF district, and on a *community-wide* basis.

**Within TIF District.** A study that examined the data on actual usage of TIF dollars in Chicago concluded that on average the economic development activity generated in TIF districts did not exceed what would have occurred without the TIF funding.<sup>24</sup> This study also examined whether the TIF designation alone acts as a catalyst for private investment beyond what would have otherwise occurred, and concluded that it does not.<sup>25</sup> Another study that examined TIF districts in Indiana found that, although TIFs are associated with small increases in AV, they had a negative impact on traditional economic development measures, such as employment, business establishments, and sales tax revenues.<sup>26</sup>

In general, the effectiveness of a TIF program on AV may be limited if the redevelopment is delayed due to unforeseen environmental remediation issues or because the developer is unable to complete the redevelopment project. Effectiveness may also be limited if the new development within the TIF district fails to generate sufficient incremental revenue to pay off the bond indebtedness. This shortfall may occur because the projected level of development may not be reached or may be reached with significant delay, assessed property values in the TIF district may decline, or project costs may be significantly higher than anticipated.<sup>27</sup> Such a shortfall was realized by a number of TIF districts in Vermont.<sup>28</sup> A study found that while the TIF districts experienced tax property value growth, the increase in property value did not result in an increase in incremental tax revenues needed to support the debt associated with the TIF district.<sup>29</sup>

**Community-Wide Basis.** There is considerable debate about TIF's effectiveness to spur economic development on a *community-wide* level. Several studies have concluded that TIF is not effective at achieving its goal of increasing economic growth on a community-wide level. One empirical study of TIF use in the Chicago metropolitan area concluded that the equalized assessed value (EAV) (defined as the value of the property upon which the tax rate is calculated after deducting all applicable exceptions, of non-TIF areas of municipalities that use TIF), grew more slowly than the EAV of similar municipalities that do use TIF. This suggests that the higher EAV growth rate in the TIF district trades off with lower EAV growth rates elsewhere in the community.<sup>30</sup> The same study found that establishment of a commercial TIF district reduced both commercial and residential EAV growth in non-TIF areas of the community.<sup>31</sup> A subsequent study revealed that the overall economy of municipalities that adopt TIF

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<sup>23</sup> *Id.* at 4-5.

<sup>24</sup> T. William Lester, *Does Chicago's Tax Increment Financing (TIF) Programme Pass the 'But-for' Test? Job Creation and Economic Development Impacts Using Time-series Data*, 51 URBAN STUDIES 655 (2014).

<sup>25</sup> *Id.*

<sup>26</sup> Michael J. Hicks; Dagny Faulk, & Pam Quirin, *Some Economic Effects of Tax Increment Financing in Indiana*, Ball State University Center for Business and Economic Research, Policy Brief Jan. 28, 2015.

<sup>27</sup> New York City Independent Budget Office, *Learning From Experience: A Primer on Tax Increment Financing* (2002) (hereinafter "*Learning from Experience*") (available online at <http://www.ibo.nyc.ny.us/iboreports/TIF-Sept2002.pdf>).

<sup>28</sup> Graham Campbell, Joyce Manchester & Mark Perrault, *An Examination of the State of Vermont Tax Increment Financing Program*, Vermont Legislative Joint Fiscal Office (Jan. 24, 2018) (available online at: <https://ljfo.vermont.gov/assets/docs/reports/79f1f110da/Final-TIF-Report-January-24-2018.pdf>).

<sup>29</sup> *Id.* at 45-47. The study also found that TIF districts in Vermont received less than half of the total projected private investment. *Id.* at 47.

<sup>30</sup> Richard F. Dye & David F. Merriman, *The Effects of Tax Increment Financing on Land Use* at 58, in THE PROPERTY TAX, LAND USE, AND LAND REGULATION (2003) (hereinafter "THE PROPERTY TAX").

<sup>31</sup> *Id.*



grow more slowly after adoption than the economies of those that do not because TIF inefficiently allocates governmental and private resources from non-TIF areas of the community to TIF areas of the community.<sup>32</sup>

TIF may also have negative spillover costs to taxpayers outside the TIF district.<sup>33</sup> Municipal service requirements such as police, fire, sanitation, education and transportation, will most likely rise as development occurs within a TIF district. If regular property taxes paid by persons within the district cannot cover the cost of services provided for the district, taxpayers outside the district must make up the difference. The larger the TIF district, the greater the impact on the surrounding community. For example, a study of TIF programs in Johnson County, Iowa concluded that county and school taxpayers had been subsidizing a shortfall of \$5 million of school district funds that were diverted as a result of municipal TIF programs.<sup>34</sup> Such concerns may be addressed by making certain revenue sources, such as school property taxes or school districts, off-limits from TIF programs, or requiring a school district's consent to the creation of a TIF district.<sup>35</sup> Also, pledging less than all of the tax increment can yield revenues to pay for increased service demands.

**Transparency and Accountability.** TIF programs may lack transparency and accountability, which can lead to TIF revenue not being spent on legitimate public purposes. In 2011, California enacted legislation that dissolved the state's redevelopment agencies, which had been misusing TIF programs and revenue beyond their original intent, and had actually diverted tax revenues from other entities, including schools.<sup>36</sup> In addition, not all of the revenue earned by the TIF program may actually be attributable to the redevelopment. For example, it has been estimated that only half of the revenue earned by California redevelopment agencies from TIF was attributable to the redevelopment.<sup>37</sup> In response to the lack of transparency and abuse of its TIF programs, in 2015 California adopted legislation limiting the authority of local governments to create TIF districts to very limited circumstances (e.g., by restricting TIF districts to low-income or high-crime areas) and requiring extensive reporting and transparency provisions.<sup>38</sup>

Similar charges of abuse were raised in Nebraska, where the required "but-for" test was not seriously considered when many TIF districts were created.<sup>39</sup> Between 2012 and 2016, twelve legislative bills and four constitutional amendments were proposed in an effort to limit the use of TIF in Nebraska.<sup>40</sup> In Chicago, critics of the use of city's TIF program alleged that the city's relaxed "blight" standards allowed the city to use TIF to finance projects in areas that would not typically be categorized as blighted.<sup>41</sup>

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<sup>32</sup> Richard F. Dye, *The Effects of Tax Increment Financing on Economic Development*, 47 J. OF URB. ECON. 326 (2000).

<sup>33</sup> *Learning from Experience* at 4.

<sup>34</sup> Peter S. Fisher, Iowa Fiscal Partnership, *Tax Increment Financing: A Case Study of Johnson County*, at 1 & Executive Summary at 1 (2011).

<sup>35</sup> *See The Need for Accountability* at 7.

<sup>36</sup> *California Redevelopment Assn. v. Matosantos*, 53 Cal. 4th 231, 241, 247 (2011).

<sup>37</sup> Peter Detwiler, *Broken Promises: The End of California Redevelopment*, 64 PLANNING & ENVTL. L. 3 (June 2012).

<sup>38</sup> *TIF for Economic Development* at 43.

<sup>39</sup> Colten C. Venteicher, *TIF in Nebraska: Is the Community Redevelopment Law Broken or are Proponents of Reform Merely Playing a Broken Record on Repeat?* 49 CREIGHTON L. REV. 651, 668-70 (2016).

<sup>40</sup> *Id.* at 680-81.

<sup>41</sup> Twyla Blackmond Larnell & Davia Cox Downey, *Tax Increment Financing in Chicago: The Perplexing Relationship Between Blight, Race, and Property Values*, 33 ECON. DEV. Q. 316, 317-18 (2019).

Because municipalities are able to realize revenue from projects in a TIF district only if the property value rises, they may be incentivized to create TIFs in areas that are already beginning to improve their blighted status ahead of any TIF designation.<sup>42</sup>

### 7.03 IMPACT ON PROPERTY VALUES

TIF's impact on property values can also be measured *within* the TIF district and on a *community-wide* basis. However, it can be difficult to measure how much of an increase in property values is attributable to the TIF redevelopment.<sup>43</sup>

**Within TIF District.** Logically, it would seem that TIF programs would increase the property values for properties within the TIF district if the TIF results in new development. Empirical studies have found that TIF programs do stimulate property value growth within the TIF district.<sup>44</sup> However, other studies have found differing impacts of TIF expenditures on AV. One study of property value growth in Chicago's TIF districts from 2002 to 2012 examined the effect of various types of expenditures on AV growth in an attempt to determine whether TIF expenditures compel growth in property value or simply capture growth that would have occurred anyway.<sup>45</sup> This study concluded that TIF expenditures considered as a whole do not appear to have a consistent positive or negative relationship with appreciation in AV.<sup>46</sup> However, when examined by expenditure type, the study found that certain expenditures are capitalized into AV whereas other types of expenditures can reduce AV. Expenditures classified by Chicago as "Commercial Development" and "Residential Development," which included funding provided to developers through redevelopment agreements, were positively correlated with short-term AV growth, but the expenditures for infrastructure negatively correlated with AV in the TIF districts.<sup>47</sup> The authors of the Chicago study attributed the negative correlation to the fact that infrastructure and capital facilities improvements may not be capitalized quickly into property values because the impact is indirect and also to the fact that areas in need of basic infrastructure investment may have other challenges that hold back increases in assessed values.<sup>48</sup>

**Community-Wide Basis.** It is not unreasonable to expect that TIF programs would have positive spillover effects on property values of property located outside the TIF district. New development within the TIF district should increase the attractiveness of the area surrounding the district and may increase the value of nearby properties as well. However, empirical research on TIF's impact on property values outside of the TIF district has yielded conflicting results and no clear consensus has been reached by economists.

Some studies have found that TIF programs increase property values on a community-wide level. For example, a survey of 300 randomly selected municipalities found that cities that use TIF programs experienced an increase in property values both within the TIF district and the surrounding community.<sup>49</sup>

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<sup>42</sup> *Land Matters: Let's Talk TIF*, LINCOLN INST. OF LAND POL'Y (May 28, 2019).

<sup>43</sup> See Peter Detwiler, *Broken Promises: The End of California Redevelopment*, 64 PLANNING & ENVTL. L. 3 (June 2012).

<sup>44</sup> Brent C. Smith, *The Impact of Tax Increment Finance Districts on Localized Real Estate: Evidence from Chicago's Multifamily Markets*, J. OF HOUS. ECON. 35 (2006); Joyce Y. Man, *Effects of Tax Increment Financing on Economic Development* in TAX INCREMENT FINANCING at 104.

<sup>45</sup> Kevin Kane & Rachel Weber, *Municipal Investment and Property Value Appreciation in Chicago's Tax Increment Financing District*, 36 JOURNAL OF PLANNING EDUC. AND RES. 2, 167-181 (2016).

<sup>46</sup> *Id.* at 178.

<sup>47</sup> *Id.* at 172-73, 178.

<sup>48</sup> *Id.* at 178.

<sup>49</sup> Joyce Y. Man, *Effects of Tax Increment Financing on Economic Development* in TAX INCREMENT FINANCING at 103.

Another study found a correlation between the adoption of TIF programs by cities in Michigan and the growth of property values in those cities.<sup>50</sup> These studies have found that communities that adopt TIF programs generally experience greater property values than non-TIF adopting communities.<sup>51</sup> A study of TIF programs in Indiana found that TIF increased the median owner-occupied housing value by 11.4% in cities that have utilized TIF relative to what it would have been without the program. This is equivalent to approximately a \$4,900 increase in the median value of owner-occupied housing in the entire community.<sup>52</sup> The study concluded that the infrastructure investment and improvements in a targeted area financed through TIF had a substantial positive spillover effect on the host community's real estate market.<sup>53</sup>

In contrast, other studies have found that TIF programs do not increase property values outside of the TIF district. One study of TIF programs and property values in the Chicago metro area found that TIF actually reduced assessed property value growth rates in the municipality as a whole, and that municipalities that elected to adopt TIF stimulated the growth of economically declining areas at the expense of non-targeted areas.<sup>54</sup>

#### **7.04 IMPACT ON DEVELOPMENT COSTS**

Generally, TIF programs should be expected to lower development costs in two ways. First, TIF programs enable municipalities to finance the construction of or improvement of infrastructure related to TIF developments. These construction costs might otherwise be imposed on a private developer.<sup>55</sup> Second, if authorized by a state's TIF enabling legislation, a municipality can utilize its power of eminent domain to condemn property in order to assemble land parcels for private development, thereby reducing a developer's land acquisition costs.

#### **7.05 IMPACT ON AMOUNT AND PATTERNS OF LAND DEVELOPMENT**

TIF programs should impact the pattern of land use in a community by encouraging development or redevelopment within the area defined by the TIF district. Thus, it would be expected that a developer would be more likely to develop property within a TIF district than in another area of the community. All else being equal, TIF may affect land use patterns by encouraging development or redevelopment of one area of a city over development in another area of the city. The establishment of TIF districts across a community, therefore, may have significant consequences for residents. One analysis of Chicago TIF districts found that TIF dollars disproportionately were spent in wards where the population was mostly white over wards that were predominately black or Hispanic.<sup>56</sup> Given the analyses described above, this allocation could have significant negative consequences for minority communities.

Additionally, as the purposes for which TIF may be used continue to expand, it has become a tool to advance a community's land use policy objectives. For example, TIF programs have successfully

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<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 104.

<sup>53</sup> *Id.*

<sup>54</sup> Richard F. Dye & David F. Merriman, *The Effects of Tax Increment Financing on Economic Development*, WORKING PAPER #75 (Institute of Government and Public Affairs, University of Illinois, Chicago, 1999) (cited in TAX INCREMENT FINANCING at 105).

<sup>55</sup> See National Association of Home Builders, *Tax Increment Financing in School Infrastructure Funding Alternatives* (discussing the use of TIF to fund construction and renovation of public schools in Huntsville, Alabama as the only feasible alternative to raising property taxes or imposing impact fees on new development).

<sup>56</sup> Jared F. Knight, *Is Tax Increment Financing Racist? Chicago's Racially Disparate TIF Spending*, 101 IOWA L. REV. 1681 (2016).

provided public infrastructure necessary to support a New Urbanism development in the downtown area of Virginia Beach, Virginia, redevelop a brownfield area in Milwaukee, Wisconsin, and facilitate the development of a public light rail system in Houston, Texas.<sup>57</sup>

## 7.06 IMPACT ON HOUSING AFFORDABILITY

Generally, if TIF programs have a positive effect on values of properties within the TIF district, it would be reasonable to expect that TIF programs would negatively affect housing affordability in that district. As the price of land within the district increases, the cost of redevelopment would also increase. These increased costs tend to be passed on to potential buyers and tenants in the form of higher sale prices and rents. Additionally, if the property values increase significantly, the increased values may deter some developers from building in the area. These impacts may affect areas beyond the boundaries of the TIF district if the TIF project increased the value of property located outside the TIF district.

However, TIF programs have also been used to increase the number of affordable homes in a community. A program in Austin, Texas, similar to a TIF program, protects affordable housing in its downtown area, which is quickly gentrifying, by allowing the city to create homestead preservation districts. As occurs in a TIF program, a Base AV is established for the district based on the property tax revenue for that district and any revenue from taxes on Incremental AV goes toward preserving affordable housing within the district.<sup>58</sup> Maine has also adopted a similar program entitled Affordable House Tax Increment Financing (AHTIF).<sup>59</sup> Under the program, municipalities can designate up to two percent (2%) of their land as an AHTIF district. A Base AV is established for the district and any revenue from taxes on Incremental AV is used to construct affordable housing within the district.<sup>60</sup>

## 7.07 RECOMMENDED TALKING POINTS: PROS AND CONS

### PROS:

- TIF may effectively increase property values within a TIF district and may have positive spillover effects in areas of a community outside the TIF district.
- TIF provides local governments with a means to intervene in the real estate market and offer tax and other incentives to encourage the redevelopment of areas by private entities which “but for” the use of TIF would not undertake the desired redevelopment.
- TIF debt typically does not count against a municipality’s debt limit, nor is the municipality responsible for repayment from other sources.
- TIF is a self-financing mechanism and does not require direct public investment or an increase in the existing tax burdens on residents because the proceeds of TIF bonds are used to finance the capital improvements and the debt is repaid with the Incremental AV from the TIF district.

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<sup>57</sup> See *TIF Across America*.

<sup>58</sup> See *Use of Tax Increment Reinvestment Zones for Affordable Housing*, Austin (TX) Housing & Planning Council Committee (January 23, 2018) (<https://www.austintexas.gov/edims/document.cfm?id=292033>).

<sup>59</sup> For further information on Maine’s AHTIF program, see the Maine State Housing Authority’s Affordable Housing Tax Increment Financing webpage at <https://www.mainehousing.org/programs-services/housing-development/developmentdetails/affordable-housing-tax-increment-financing-program>.

<sup>60</sup> *Id.*

- TIF programs are flexible. They can be used in combination with other types of redevelopment programs, can be initiated at any time, and can be used to encourage the redevelopment of an area that meets certain broadly defined standards.
- TIF programs can also be an effective means by which a community’s land use and policy goals may be obtained such as the creation of New Urbanism developments, the redevelopment of brownfields, and the development of public transportation systems.
- TIF may provide a means to protect housing affordability if structured so that any tax revenue from Incremental AV goes toward preserving affordable housing within the district.

CONS:

- TIF may not improve economic growth in the community as a whole because development in a TIF district may replace development that would have otherwise occurred elsewhere in the community.<sup>61</sup>
- TIF may have negative spillover costs to taxpayers outside the TIF district because the new development within the TIF may increase the cost of public services beyond the Benefit Assessment Districts forcing taxpayers located outside of the TIF district to cover the increased costs.
- TIF programs tend to be complicated and costly to operate.
- TIF programs may not generate enough revenue to cover the obligation to replay the bond sold to finance the infrastructure improvements.
- TIF may negatively affect housing affordability within a TIF district if the resulting TIF-related improvements increase land values, making development of affordable housing costlier, and no provision is made within the TIF program for preserving or creating affordable housing.
- TIF programs can lack transparency and accountability, which can lead to favoritism, the diversion of revenue from other entities, or to development where it is least needed.<sup>62</sup>
- TIF commits future tax revenues to debt service rather than to general revenues.

## 7.08 INCENTIVE-BASED ALTERNATIVES

TIF is an incentive-based mechanism by which local governments and the private sector can partner together to achieve redevelopment objectives. By issuing TIF bonds to cover the cost of needed capital improvements within a TIF district, local government as the “public partner” provides the incentive in the form of reduced development costs for the private sector to undertake the redevelopment of a targeted area.

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<sup>61</sup> *TIF for Economic Development* at 57; see also Anthony DeRiso, *Success and the Problem of Too Much TIF*, 16 N.Y.U. J. L. & BUS. 503, 533 (Spring 2020).

<sup>62</sup> *The Need for Accountability* at 1-2 & 13-14; *TIF for Economic Development* at 57.

## PART III: PROTECTION OF NATURAL RESOURCES AND ENVIRONMENT

### SECTION 8: OPEN SPACE PRESERVATION TECHNIQUES

#### 8.01 PURPOSE AND KEY TERMS

Open space tracts are valued for their scenic attributes, for recreational and social benefits, as wildlife habitat and ecological preserves, as a means of protecting the public against risks posed by development in unsafe areas such as steep slopes and floodplains, for the protection of water supplies and wetland areas, and as a way of preserving a rural “character” and creating “buffers” between developed areas. The potential economic benefits of open space are also widely recognized, including attracting tourists, businesses, and jobs to a community; reducing public infrastructure costs; and improving property values.

There are a variety of mechanisms by which governments can attempt to protect open space from development, ranging from market-based techniques such as open space acquisition programs, development rights purchases, and transfer of development rights; to flexible development design techniques such as cluster subdivisions and conservation limited development; to developer exactions requiring the dedication of parkland or payment into an open space fund; to restrictive regulations such as large lot zoning and sensitive habitat/resource buffer zones. Regulatory mechanisms may also include conservation/open space plans, open space zoning districts, and current use taxation valuation strategies.

Many state and local governments have undertaken open space purchase programs by which parcels of land identified as valuable for open space are acquired with public funds. Properties acquired under such programs may be purchased in fee after which the purchasing entity owns the property outright. Fee purchase is commonly used to acquire land for parks, where it is desirable for the public entity to have both ownership and control of the property.

Alternatively, a local or state government may acquire a conservation easement, scenic easement, or similar development restriction under a **Purchase of Development Rights (PDR)** program.<sup>1</sup> Under these programs, the right to develop the property is sold to the local government or to a land trust, while ownership, and usually the responsibility for operating and maintaining the property, remains with the fee owner, who may make whatever use of the property is not prohibited by the easement or restriction. PDRs are often used in the context of agricultural land, where they are sometimes called “Purchase of Agricultural Conservation Easement” programs.<sup>2</sup> Development or other use restrictions may be imposed through a *purchase and sale* or *purchase and leaseback* arrangement whereby restrictions are imposed through conditions placed on the disposition of land acquired by a public entity for resale or lease.

Site planning techniques such as **cluster development** can be used to set aside tracts of open space within a development plan, while consolidating buildings and infrastructure on only a portion of the site. Under such techniques, a property slated for development is evaluated to identify the most desirable areas for preservation, such as wetlands, land bordering a waterbody, or an area that provides a scenic viewshed. The development is then designed to protect the areas of interest from development impacts. These techniques can be imposed through subdivision or zoning law as mandatory requirements, or can be

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<sup>1</sup> Purchase of Development Rights programs are further discussed in Section 9 of this book.

<sup>2</sup> Purchase of Agricultural Conservation Easement programs are further discussed in Section 10 of this book.

offered to landowners as an option under such laws, either with or without density bonuses or other incentives to encourage their use.<sup>3</sup>

“Conservation limited development” is a type of cluster development in which a large portion of the land is preserved for conservation, while allowing a portion of the land to be developed at a significantly lower level than the applicable development regulations would allow. This is distinguished from a conservation subdivision development, which usually maximizes the amount of development density or intensity permitted under the applicable regulations.<sup>4</sup>

Low density regulation in the form of **large lot zoning** is often used in developing suburban and rural jurisdictions to minimize development densities. Large lot zoning establishes large minimum lot size requirements where preservation of rural character, agriculture, forestry, or environmentally sensitive areas is a goal.<sup>5</sup> This zoning technique is often used in an attempt to preserve rural character by ensuring that development lots include large open areas. Zoning and non-zoning environmental regulations may establish “no build” buffer areas within which development is prohibited for environmental protection or public safety reasons. These buffer areas may include floodplains, land in and adjacent to wetlands and water bodies, land on steep slopes, sensitive habitat areas, and other protected or difficult terrain.

An **open space zoning district** or **open space overlay** can also be used to protect natural open space and recreational lands. The Open Space District established by Salt Lake City, Utah, the stated purpose of which is to “preserve and enhance public and private open space, natural areas, and improved park and recreational areas,” is one example of this approach.<sup>6</sup>

**Transferable Development Rights (TDR)** is a technique by which property owners within a “sending” area that the jurisdiction wants to protect from development are allowed to sell development rights to third parties.<sup>7</sup> The development rights can be used to increase permissible development densities on other properties within a “receiving” area. The receiving area is one in which development is encouraged.

Some jurisdictions use **exactions** imposed on development approvals as a way of ensuring that open space is set aside. These exactions can take the form of requiring the dedication of land within a development for open space purposes such as parkland.<sup>8</sup> They may also be imposed as **fees in lieu** by which the jurisdiction collects a financial payment for deposit into a fund dedicated to the purchase of open space elsewhere in the community.

Some states have adopted legislation authorizing local governments to create special assessment districts for the purpose of creating parks or preserving open space.<sup>9</sup> Generally referred to as **open space districts**, these special assessment districts finance park or open space improvements through a special property tax assessment levied on property owners within the district that directly benefit from the improvements.<sup>10</sup>

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<sup>3</sup> Cluster development is further discussed in Section 11 of this book.

<sup>4</sup> Wayne Feiden, *Conservation Limited Development for Local Governments*, American Planning Association – PAS Memo (March-April 2019).

<sup>5</sup> See Large Lot Zoning, Vermont Natural Resources Council, Community Planning Toolbox, available online at <https://vnrc.org/community-planning-toolbox/tools/large-lot-zoning/>.

<sup>6</sup> See Salt Lake City (UT) Zoning Code § 21A.32.100 (OS Open Space District).

<sup>7</sup> Transferable Development Rights programs are further discussed in Section 9 of this book.

<sup>8</sup> See Jessica Owley, *The Enforceability of Exacted Conservation Easements*, 36 VT. L. REV. 261, 268 (Winter 2011)

<sup>9</sup> Janice C. Griffith, *Green Infrastructure: The Imperative of Open Space Preservation*, 42/43 URBAN LAWYER 259 (Fall/Winter 2011). Special Assessment Districts in general are discussed in Section 6 of this book.

<sup>10</sup> See *id.*

**Current use taxation** is a property tax incentive that allows owners of agricultural and forestry land to have their land appraised at its current use value rather than its fair market value, resulting in significant property tax savings to the landowner. While enrolled, the land cannot be developed and, instead, must remain agricultural or forest land.<sup>11</sup>

## 8.02 EFFECTIVENESS IN ACHIEVING STATED PURPOSE(S)

### Purchase of Land in Fee or Purchase of Development Rights

The effectiveness of programs for the purchase of land or development rights in land depends upon how well the program does at identifying its priority sites for acquisition and focusing its expenditures on those priority sites. Some commentators recommend that communities establish eligibility and scoring criteria for ranking properties.<sup>12</sup> For example, a PDR program aimed at protecting farmland might score properties on the basis of its agricultural activity, development pressure, contribution to the local agricultural industry, and compatibility of adjacent land to long-term agricultural use.<sup>13</sup> PDR programs are sometimes constrained by the limited funding (e.g., tax levies, grants, and public donations) made available for open space purchases, and the need to identify and plan for the most effective use of these financial resources.<sup>14</sup> New Jersey's Garden State Preservation Trust authorizes the expenditure of funds for the purposes of "acquisition and development of lands," but funding for the purchase of development rights on farmland is more limited.<sup>15</sup> Acquisition of a tract of land, or the development rights to such land, is generally thought to be the most effective way to ensure that the land is set aside for open space purposes forever. Although it is possible in theory that the government entity could resell the property or the easement rights, it would be unlikely to do so except under the most unusual circumstances.<sup>16</sup>

### Cluster Development

Cluster development can be very effective in preserving contiguous open space within a development site. One example is the 13,522 acre Galisteo Basin Preserve, a conservation development located southeast of Santa Fe, New Mexico.<sup>17</sup> By clustering the planned 1,015 residential units into four conservation neighborhoods plus a mixed use village, 96% of the land in the Galisteo Basin Preserve will be permanently preserved as open space.<sup>18</sup> Another example is the Jackson Meadow conservation community located west of St. Croix, Minnesota, a 145-acre development in which 70% of the site is preserved as open space.<sup>19</sup> Cluster development allows the property owner to achieve the economic return from development while preserving the agriculture or open space, at no cost to the public.<sup>20</sup> However, cluster development generally is not effective at transferring growth away from preservation

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<sup>11</sup> See Current Use Taxation, Vermont Natural Resources Council, Community Planning Toolbox, available online at <https://vnrc.org/community-planning-toolbox/tools/current-use-taxation/> (hereinafter "VT Planning Toolbox").

<sup>12</sup> Gayle Miller & Douglas Krieger, *Purchase of Development Rights: Preserving Farmland and Open Space*, PLANNING COMMISSIONERS JOURNAL No. 53 (Winter 2004).

<sup>13</sup> *Id.*

<sup>14</sup> Robert Liberty, *Stopping Low-Density Rural Residential Sprawl*, 15 VT. J. ENVTL. L. 124, 131 (Fall 2013).

<sup>15</sup> Anika Singh, *Implementing Planned Development: The Case of New Jersey*, 30 N.Y.U. REV. L. & SOC. CHANGE 151, 181 (2005).

<sup>16</sup> RICK PRUETZ, *SAVED BY DEVELOPMENT* at 69-70 (Arje Press, 1997).

<sup>17</sup> Edward T. McMahon, *CONSERVATION COMMUNITIES: CREATING VALUE WITH NATURE, OPEN SPACE, AND AGRICULTURE* at 134-147 (2010 Urban Land Institute).

<sup>18</sup> *See id.*

<sup>19</sup> *See id.* at 174-183.

<sup>20</sup> *See generally id.* at Ch. 2.



areas, because it is restricted to redistributing development within a single development site.<sup>21</sup> Additionally, if not implemented with a comprehensive open space plan, these conservation subdivisions can chop up the landscape and miss an opportunity to develop a broader system of farms, forests, and key habitats.<sup>22</sup>

### **Large Lot Zoning and No-Build Buffers**

Restricting development density through the imposition of large lot or low density zoning can be effective in preserving tracts of open space and protecting environmental resources. How effective this approach is depends in large part on how agriculture or environmental resources are viewed. Dividing a working farm or ranch into a number of 5-acre to 10-acre lots may preserve the aura of rural lands, but certainly not the function. Additionally, reserving extensive areas for large lot zoning is often criticized as being one of the principal causes of urban “sprawl” in growing areas.<sup>23</sup> Non-contiguous or “leapfrog” development can result if growth pressures create demand for development beyond the city limits, but density limits prevent that demand from being met in contiguous areas. Likewise, no-build buffers along waterbodies or in areas with other natural features can be very effective in preventing the encroachment of development and its impacts on the resource to be protected, but raise significant property rights concerns.

### **Transfer of Development Rights (TDR)**

A TDR program can be an effective means of preserving open space in circumstances where there is a viable market for the development rights created.<sup>24</sup> For example, from its establishment in 1985 through 2014, the TDR program in the Pinelands area of New Jersey preserved more than 16,000 acres of agricultural and environmentally sensitive land through a total of 11,117 individual density transfers.<sup>25</sup> The market for purchase of development rights in that case is aided by allowing development rights to be used in the sending area at a 4:1 ratio (i.e., four units created for every one unit given up in the sending area) and through the use of a publicly funded development rights “bank” to purchase and hold development rights for resale. Montgomery County, Maryland has had a TDR program for more than forty years, and its program is often cited as being among the most successful examples of this technique.<sup>26</sup> According to a report by the Maryland TDR Committee, as of 2016 the Montgomery County TDR program had preserved 52,052 acres through the sale of TDRs.<sup>27</sup>

In theory, a TDR program can be effective in setting aside preserved open space in sending areas even if the program is a “voluntary” one in which the transfer of development rights is not coerced by the application of drastic development restrictions, but rather the TDR is offered as an option to sending area property owners who otherwise would be free to develop their property at reasonable densities. For example, the Long Island Pine Barrens of New York, which is frequently cited as a TDR program that has

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<sup>21</sup> See 2 PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS, Ch. 12, Cluster Zoning and PUDs, § 12.01[4][b] (2021); see also SAVED BY DEVELOPMENT at 78.

<sup>22</sup> See VT Planning Toolbox.

<sup>23</sup> Mark W. Cordes, *Agricultural Zoning: Impacts and Future Directions*, 22 N. ILL. U. L. REV. 419, 440 (Summer 2002).

<sup>24</sup> See Smart Preservation: TDR updates (2020) (available online at: <https://smartpreservation.net/tdr-updates/>).

<sup>25</sup> Lucy Triedman, et al, *A Study on the Feasibility of a Transfer of Development Rights Program in Lewiston, Maine*, Bates College Community Engaged Research Reports, Paper 17 (2014).

<sup>26</sup> Li Fang, *Land Preservation Under the Transfer of Development Rights Program: A Study of Montgomery County (MD)*, 87 J. AMERICAN PLANNING ASSOC. 228, 230 (2021).

<sup>27</sup> *Id.*

been relatively successful, is voluntary in that sending area properties were not downzoned.<sup>28</sup> The Long Island Pine Barrens TDR program is authorized in state legislation that is specific to the Pine Barrens.<sup>29</sup> Recognizing the success of this TDR program, the New York legislature enacted similar TDR enabling legislation to more broadly authorize the implementation of TDR programs at the local level by cities, villages, and towns.<sup>30</sup> However, the Pinelands program, like many TDR programs described as being successful, is premised in part on strict growth controls in the sending area that strongly encourage the sale of development rights for use elsewhere. In a survey of twenty publications that listed factors thought to be responsible for making TDR programs successful, the third and fourth most frequently cited factors were: “strict sending-area development regulations” and “few or no alternatives to TDR for achieving additional development.”<sup>31</sup>

### **Exactions or Fees in Lieu**

Fees and dedication requirements are limited in their effectiveness at preserving open space because they are necessarily tied to development approval. They are therefore limited in scope to what is reasonably necessary to offset the impacts of a development and are limited in extent to an amount that is roughly proportional to the development’s impact.<sup>32</sup> Many states have dedication requirements calling for the set-aside of park land within a subdivision, and some jurisdictions have adopted requirements allowing payment of a fee in lieu of such dedication that could be used to purchase recreational land within proximity to the development. For example, the Pennsylvania Municipalities Planning Code authorizes municipalities to require the dedication of land or fees for park and recreation purposes so long as they: (1) are used to provide park or recreational facilities accessible to the development; and (2) bear a “reasonable relationship” to the use of the park and recreational facilities by future inhabitants of the development or subdivision.<sup>33</sup> By contrast, the Massachusetts subdivision control law prohibits local planning boards from conditioning a subdivision approval on the dedication of land to public use or conveyance to the town, without just compensation.<sup>34</sup>

## **8.03 IMPACT ON PROPERTY VALUES**

It is logical to think that programs for the preservation of open space can lead to higher property values for properties that abut open space. Studies have shown that preserved open space adjacent to residential areas improves property values and attracts homebuyers. For example, a study in Riverside County and San Bernardino County, California, found that proximity to open space has a positive and statistically significant influence on the value of residential real estate.<sup>35</sup> Data from Amherst and Concord, Massachusetts, show that cluster development properties appreciate faster than residential properties with

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<sup>28</sup> See Christopher Rizzo, *Five Innovative Ideas for Funding Parks and Open Space*, 13 No. 1 NEW YORK ZONING LAW & PRACTICE REPORT 1, 8 (July/August 2012).

<sup>29</sup> See *id.* at 8 (citing the 1993 Long Island Pine Barrens Protection Act).

<sup>30</sup> See, e.g., N.Y. Gen. City Law 20-f; N.Y. Village Law § 7-701; and N.Y. Town Law, § 261(a).

<sup>31</sup> See ARTHUR C. NELSON, RICK PRUETZ, & DOUG WOODRUFF, *THE TDR HANDBOOK: DESIGNING AND IMPLEMENTING TRANSFER OF DEVELOPMENT RIGHTS PROGRAMS* at 232-33 (Island Press, American Bar Association) (2012) (hereinafter “THE TDR HANDBOOK”); see also Rick Pruetz & Noah Standridge, *What Makes Transfer of Development Rights Work?: Success Factors from Research and Practice*, 75 JOURNAL OF THE AMERICAN PLANNING ASSOCIATION 78-87 (2008).

<sup>32</sup> Michael B. Kent, Jr. *Land Use Exactions, Anti-Evasion, and Koontz v. St. Johns River Water Management District* (Feb. 2015).

<sup>33</sup> *In re Appeal of Gibraltar Rock, Inc.*, 2013 WL 5614244 (Pa. Cmwlth.) (citing 53 P.S. § 10503(11)).

<sup>34</sup> See *Collings v. Planning Board of Stowe*, 79 Mass. App. Ct. 447, 451 (2011).

<sup>35</sup> Linda Fernandez, Monobina Mukherjee & Thomas Scott, *The effect of conservation policy and varied open space on residential property values: A dynamic hedonic analysis*, LAND USE POLICY, 73, 480-487 (2018).

larger private yards but no protected open space.<sup>36</sup> A study from Boulder, Colorado, showed that proximity to the city's greenbelt was correlated to residential property prices.<sup>37</sup> Another study found that for every \$1,000 per household of open space spending as a result of municipal open space conservation spending referendums, average housing prices increased by about one percent.<sup>38</sup> Where open space is created through techniques that do not preserve development rights, however, the affected owners will suffer a loss in property value. For example, downzoning will reduce the development value of affected properties, even as it may increase the comparative value of other properties in the market area that have not been downzoned, or where development has already taken place. Properties that are encumbered by "no build" buffers and similar environmental requirements can be significantly diminished in value.

**TDR** depends on the manipulation of property values in order to encourage the transfer of rights from "sending" to "receiving" areas. Requirements that a developer donate open space or pay into a fund for open space purchases reduces the value of that property from what it would be worth if the property could be developed in its entirety or if no payment must be made. An "enhanced transfer ratio" (i.e., a ratio that exceeds 1:1) can be used mitigate this reduction in the value of property in sending areas, and to reward developers that choose to avail themselves of this option.<sup>39</sup> One court in Florida has held that even though TDRs are not "real property," they do have real value when attached to a site, with some caveats.<sup>40</sup>

The effect of **cluster development** requirements on property values will depend on whether the market values such development as highly as more traditional forms of project design, or whether the jurisdiction incorporates an incentive provision that allows higher density, and hence more developer profit, for clustered projects. A comparison of conservation developments versus conventional developments in Rhode Island found that conservation development lots sold for 12-16% more and sold in half the time when compared to conventional subdivisions.<sup>41</sup>

## 8.04 IMPACT ON DEVELOPMENT COSTS

**TDR** or **cluster development** programs involving discretionary approvals, and negotiations over open space dedication requirements or fee in lieu payments, can increase developer transaction costs, including carrying costs associated with the time it takes to get development approvals and uncertainty over project outcome.<sup>42</sup> TDR transaction costs can include time-consuming negotiations over price and the preparation of development right purchase and sale agreements, and closing costs associated with the TDR purchase.<sup>43</sup> On the other hand, cluster development options can result in development cost

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<sup>36</sup> Jeff Lacy, *An Examination of Market Appreciation for Clustered Housing with Permanent Open Space* (1990).

<sup>37</sup> Mark R. Correll, et al., *The Effects of Greenbelts on Residential Property Values: Some Findings on the Political Economy of Open Space*, 54 *LAND ECONOMICS* 207-217 (May 1978).

<sup>38</sup> Lang, Corey, *Assessing the efficiency of local open space provision*, *JOURNAL OF PUBLIC ECONOMICS*, 158, 12-24 (2018).

<sup>39</sup> Lucy Friedman, et al., *A Study on the Feasibility of a Transfer of Development Rights Program in Lewiston, Maine*, Bates College Community Engaged Research Reports, Paper 17 (2014). See also Evangeline Linkous, *Transfer of Development Rights in Theory and in Practice: The Restructuring of TDR to Incentivize Development*, 51 *LAND USE POLICY*, 162-171 (2016).

<sup>40</sup> *Wilkinson v. St. Jude Harbors Inc.*, 570 So. 2d, 1332 (1990).

<sup>41</sup> Raymon Mohamed, *The Economics of Conservation Subdivisions: Price Premiums, Improvement Costs and Absorption Rates*, 41 *URBAN AFFAIRS REVIEW* 376-399 (January 2006).

<sup>42</sup> See *THE TDR HANDBOOK* at xvi, 11.

<sup>43</sup> See Ari D. Bruening, *The TDR Siren Song: The Problems with Transferable Development Rights Programs and How to Fix Them*, 23 *J. LAND USE & ENVTL. L.* 423 (Spring 2008).

economies, including reduced infrastructure costs.<sup>44</sup> Likewise, increased densities allowed for projects incorporating TDR can potentially reduce the hard costs of development on a per unit basis.<sup>45</sup>

## **8.05 IMPACT ON AMOUNT AND PATTERNS OF LAND DEVELOPMENT**

Each of the techniques discussed in this section is intended to affect the patterns of development by resulting in the reservation of large tracts of undeveloped land. With TDR, development density is transferred from one property to another, while with cluster development, density is transferred from one part of a parcel to another. TDR, in effect, is clustering across different properties. Downzoning to large lot size requirements decreases the potential development density in the downzoned area, which may or may not be offset or balanced in other parts of the jurisdiction or market area with increased density. Low density zoning can be a contributing factor to non-contiguous development, as growth that cannot be accommodated in more urban areas, either for reasons of land supply, cost, or market preference reasons, is forced to “leapfrog” over restricted areas to less restrictive jurisdictions beyond. No-build buffers and similar techniques keep development a specified distance away from the protected resources, and can reduce the total amount of development that takes place in proximity to the resource area. With PDR, land is removed from the development market altogether. Taking property out of the development market through the use of PDR can also interrupt logical growth corridors if planning considerations are not incorporated into the identification of target properties for purchase.

## **8.06 IMPACT ON HOUSING AFFORDABILITY**

Open space preservation strategies may result in upward pressure on housing prices to the extent that growth in the relevant market area cannot be or is not accommodated at other locations, for example, because there is an inadequate supply of land that is zoned, available, and desirable for development. Downzoning and purchase of development rights programs can have the effect of reducing the supply of available, developable land, thereby making the remaining developable land more expensive and existing housing stock more valuable. To the extent that the effect of downzoning or development rights purchases are offset by allowing the reduced density to be transferred elsewhere through a TDR program, an increase in allowable density in the receiving area may result in increased housing stock in those areas and consequently more affordable housing prices, all else being equal.<sup>46</sup> However, land economics is complicated and affected by many variables, including market demand. Development cost economies and reduced infrastructure costs can translate into more affordable housing in cluster developments, depending on market conditions. The cost of a development exaction or fee-in-lieu will be passed more or less directly to the purchaser of the housing or absorbed by builders and developers, depending upon the nature of the local housing market.

## **8.07 RECOMMENDED TALKING POINTS: PROS AND CONS**

### **PROS:**

- Open space preservation techniques provide a way to protect desirable community assets from the negative impacts of development.
- Proximity to preserved open space can increase the value of developed or developable land.

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<sup>44</sup> John R. Nolon & Jessica Bacher, *Zoning and Land Use Planning*, 36 REAL ESTATE LAW JOURNAL 73, 85 (Summer 2007).

<sup>45</sup> *See id.*

<sup>46</sup> RATHKOPF'S THE LAW OF ZONING AND PLANNING, Ch. 15, Growth Management, § 15.16 (2015, updated through June 2021).

- Techniques such as voluntary TDR programs and PDR can result in the payment of fair market value to property owners for the loss of development rights and are preferable to regulatory programs from a property rights standpoint.

CONS:

- Techniques such as downzoning, no-build buffers, and open space zoning districts have significant implications for property rights.
- PDR and low density zoning can lead to “leapfrog” and sprawl development depending upon how they are implemented.
- It is difficult to design an effective TDR program; they can be expensive and complex to administer, and not all programs are successful in creating a market for development.

## **8.08 INCENTIVE BASED ALTERNATIVES**

Voluntary TDR programs, discussed in more detail in Section 9 of this book, provide an incentive for the preservation of open space by offering the property owner the ability to sell development rights for a desirable return. Such a program can be designed so that selling the development rights may be even more profitable than developing the property would have been. Mandatory TDR programs, which follow downzoning of the affected property, are not really an incentive-based alternative for preserving open space, because the property owner is left with no other choice after the downzoning but to sell the development rights if the owner wants to realize value from its property.

PDR can also be seen as providing an incentive to preserve open space, because it typically results from an arms-length transaction by which the rights are acquired for fair value, providing the property owner with the ability to obtain an immediate return on investment, rather than await what may be speculative future development.

In some jurisdictions, as an incentive to developers, cluster subdivision regulations provide a “density bonus” which allows more units to be built on a parcel of a given size under a cluster configuration that preserves more open space than would be possible if the parcel were developed using standard subdivision design.

Current use taxation is a property tax incentive that allows owners of agricultural and forestry land to have their land appraised at its current use value rather than its fair market value, resulting in significant property tax savings to the landowner. While enrolled, the land cannot be developed and, instead, must remain agricultural or forest land.

## SECTION 9: TRANSFERABLE DEVELOPMENT RIGHTS

### 9.01 PURPOSE AND KEY TERMS

**Transferable Development Rights** or “**TDR**” is based on the legal concept that ownership of real property, in actuality, is ownership of a combination of rights that pertain to that property. For that reason, ownership of real property is frequently analogized to owning a “bundle of sticks.” Each stick in the bundle represents one of the rights of ownership, such as the right to possess, the right to exclude others from one’s property, and, of course, the right to make productive use of one’s property, usually understood as the right to develop, or **development right**. Ownership of the *entire* “bundle” of rights is known as ownership in **fee simple absolute**. However, because each property “right” is a separate “stick” in the bundle, each such right can be conveyed to another person or entity. One way that a property right may be conveyed separately without conveying the entire fee simple interest in property is to grant certain rights in the form of an **easement**. An easement is frequently the instrument used when a property owner grants the right to use a road that runs across his or her property to an adjacent property owner.

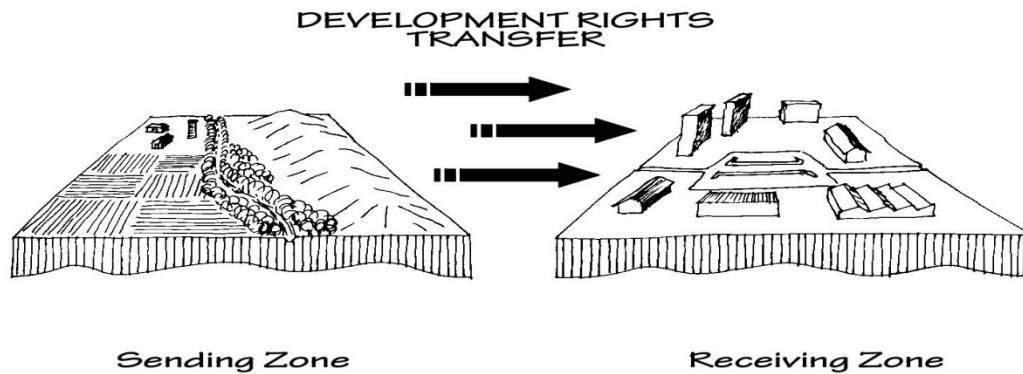
TDR is a market-based tool intended to discourage development of property within a designated “sending area.” The “sending area” contains attributes that the community wants to protect from development such as valuable environmental resources, wildlife habitat, large tracts of open space, farmland, or historic landmarks.<sup>1</sup> Under a TDR program, a property owner in the “sending area” can agree to restrict development on its property by entering into a conservation easement or similar deed restriction that is noted on the land records and encumbers the property forever. A **conservation easement** means that the property owner records a **covenant** against the property that prohibits the disturbance of natural resource areas identified on the property. Typically, the conservation rights are granted to a third party such as a nonprofit organization that is given the right under the terms of the conservation easement to enforce the restrictions against use and disturbance of the natural resource areas. In effect, the conservation easement “extinguishes” the right to develop the natural resource areas of the property, usually in perpetuity. Conservation easements are discussed in Section 15 of this book.

In exchange for this restriction, the property owner receives one or more **development rights**. These “transferable development rights,” can be sold to a property owner in a designated “receiving area” who wants to build more than would otherwise be allowed by the development regulations applicable in the “receiving area.” The “receiving area” is a designated district where denser development is appropriate and encouraged. The “receiving area” should be desirable for development from a market perspective, and the necessary infrastructure should be available.<sup>2</sup> Typically the use of TDRs in the “receiving area” is based on a “density bonus” by which the TDRs can be used to create, for example, up to 20% more dwelling units on a particular property than would be allowed under the established base zoning. The premise of such programs is that the purchase price for the TDR compensates the seller for the development rights relinquished.

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<sup>1</sup> See *Johnson v. Arlington County*, 794 S.E.2d 389, 390 (Va. 2016) (stating: “TDRs provide a tool for a locality to direct new growth away from environmentally sensitive areas, historic, agricultural, or open space areas.”).

<sup>2</sup> See generally ARTHUR C. NELSON, RICK PRUETZ, & DOUG WOODRUFF, *THE TDR HANDBOOK: DESIGNING AND IMPLEMENTING TRANSFER OF DEVELOPMENT RIGHTS PROGRAMS*, Ch. 9, Designing Receiving Areas (Island Press, 2012) (hereinafter “THE TDR HANDBOOK”); Peter J. Pizor, *Making TDR Work*, *APA JOURNAL* at 210 (Spring 1986).



Transferable development rights can be viewed as a form of regulation for which no compensation is due (i.e., an exercise of the police power), or as a means to provide compensation for the taking of a property owner’s development rights. Under the police power view, a landowner does not suffer a taking because the right to develop and use the land is not taken, but is merely transferred from one parcel to another.<sup>3</sup> By contrast, the compensation view of TDR takes the position that TDR has nothing to do with the use or development of the land to which they are attached,<sup>4</sup> but ostensibly provides compensation to the property owner for the loss of development rights. From a private property rights perspective, the compensation rationale for TDR is the correct one, in particular where the local government downzones property (zoning to lower densities) in the “sending area” in order to create a viable market for TDR transfers.

Programs incorporating the TDR concept come in various forms, but typically are either categorized as mandatory or voluntary. In the former case, the TDR is established in conjunction with new regulations restricting development and is construed as a way to compensate for reductions in the market value of the newly regulated “sending area” property. In these cases, the TDR program offers a way for communities to address questions of equity and fairness that arise when downzoning and other restrictive regulations are imposed to drastically restrict development on private property without accounting for the financial loss to affected landowners. TDR can make it politically possible for a community to impose significant regulatory restrictions on development because TDR is seen as a compensatory mechanism that offsets the economic impact of the restriction.<sup>5</sup> This is true, even though it is an open legal question whether it is constitutionally permissible to use TDR to provide “just compensation” for a regulatory “taking” of property.<sup>6</sup> Such programs, premised on drastic regulatory restrictions on development of the “sending areas,” are referred to as mandatory TDR programs, because the property owner’s ability to develop its

<sup>3</sup> See GROWING SMART LEGISLATIVE GUIDEBOOK at 9-37 (2002 ed., APA).

<sup>4</sup> See *Suitum v. Tahoe Regional Planning Agency*, 117 S. Ct 1659 (1997) (J. Scalia, concurring). The case is widely seen as weakening the position of governments relying on TDR as the sole means of protection against takings claims. However, some claim that the case heard by Supreme Court might have been deemed a ‘just compensation’ if Lake Tahoe had some sort of TDR bank in place, whereby the owner could have quickly and easily sold TDRs at a fair minimum price without having to enter the marketplace.

<sup>5</sup> See Alexis Leventhal, *Preserving Miami: An Evaluation of Miami’s Transferable Development Rights Program*, 24 U. FLA. J.L. & PUB. POL’Y 271, 273 (Aug. 2013); see also Joseph L. Sax, *Land Use Regulation: Time to Think About Fairness*, 50 NAT. RESOURCES J. 455, 468 (Spring 2010); RICK PRUETZ, *SAVED BY DEVELOPMENT* at 48-49 (Arje Press 1997).

<sup>6</sup> *Suitum v. Tahoe Regional Planning Agency*, 117 S. Ct 1659 (1997) (*Suitum* was decided on ripeness grounds and did not decide whether TDRs can provide just compensation for a regulatory taking of property); see also THE TDR HANDBOOK at 96-103; Trevor D. Vincent, *Exploiting Ambiguity in the Supreme Court: Cutting Through the Fifth Amendment with Transferable Development Rights*, 58 WM. & MARY L. REV. 285, 299 (Oct. 2016) (stating that “TDR’s relationship to just compensation is complicated given that a TDR’s value is inherently speculative”).

property has been constrained and the *only* way to recover development value is to sell development rights for use elsewhere.

In the latter case, a TDR mechanism is established without an accompanying downzoning, using a more purely market-focused incentive for property owners to forego the development of “sending areas.” Often, in such cases, a TDR will be “worth” more or equate to more development in the “receiving area” than has been given up in the “sending area.” For example, a “sending area” property that could have been developed with ten single-family houses might, when voluntarily placed under permanent conservation restriction, be entitled to a TDR that can be used to build twenty houses on a “receiving area” property. Such a program would be described as having a “transfer ratio” of 2 to 1.<sup>7</sup> Such “voluntary” TDR programs are less vulnerable to challenge under constitutional due process and regulatory takings theories.<sup>8</sup> Under Pennsylvania law, TDR use must be voluntary and a municipal zoning ordinance cannot mandate that a landowner or developer use TDRs, but it can make the TDR option very attractive.<sup>9</sup>

Under either type of TDR program, ideally, all parties gain. The seller of the development rights receives fair financial value for the foregone rights and the development rights purchaser ends up enhancing the value of its development project by more than the cost of the additional development rights. The community also benefits by gaining the permanent protection of land that has high environmental, historic, or open space value, at little or no direct cost, while directing additional development to an area more suited for it. When successful, TDR “offers a way for communities to achieve their land use goals without having to find the money for acquisition.”<sup>10</sup> Through a pure “property rights” lens, a TDR program may be viewed more cynically—as essentially confiscating property from “sending area” owners by imposing severe restrictions on development intended to coerce the transfer of development rights, and by exacting from “receiving area” property owners the purchase of these development rights.<sup>11</sup>

While environmental, farmland, or historic protection in some form is the predominant purpose for most TDR programs, the technique is robust enough that it can be applied to a wide variety of purposes.<sup>12</sup> For example, some jurisdictions have used TDR to discourage development of existing lots in antiquated subdivisions that would be difficult to build-out under current standards.<sup>13</sup> The ability to sell a development right gives the lot owner some economic value for its property and presumably alleviates the incentive or pressure to develop the lot. TDR is also used to mitigate the economic impact of restrictions intended to protect scenic views of Big Sur in Monterey County, California.<sup>14</sup> TDR is used in some jurisdictions as an incentive to move development away from areas with significant infrastructure limitations.<sup>15</sup> Seattle uses TDR to help protect low-income housing and performing arts centers from

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<sup>7</sup> THE TDR HANDBOOK at 286. Transfer ratios greater than 1:1 can be found in “mandatory” TDR programs, too.

<sup>8</sup> Jennifer Frankel, *Past, Present and Future Constitutional Challenges to Transferable Development Rights*, 74 WASH L. REV. 825, 841 (1999).

<sup>9</sup> See the Pennsylvania Land Trust Association, *Transfer of Development Rights* (Updated 2019), available at <https://conservationtools.org/guides/12>.

<sup>10</sup> SAVED BY DEVELOPMENT at 1.

<sup>11</sup> Andrew J. Miller, *Transferable Development Rights in the Constitutional Landscape: Has Penn Central Failed to Weather the Storm?*, 39 NATURAL RESOURCES JOURNAL 459, 471 (1999).

<sup>12</sup> See RATHKOPF’S THE LAW OF ZONING AND PLANNING § 59:2 (4th ed., June 2021 Update) (noting that TDR programs “have been enacted in downtown business districts to promote the flexible and efficient use of land in the urban redevelopment process; to promote historic preservation; to preserve agricultural lands; to preserve open space and scenic areas; to preserve sensitive ecological areas; and to secure the provision of public amenities and low income housing.”) (citations omitted).

<sup>13</sup> SAVED BY DEVELOPMENT at 29.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 27.



redevelopment.<sup>16</sup> The latter is a type of “targeted” TDR, which is used for urban preservation of desired existing uses that are threatened with redevelopment. For example, marinas have waterfront locations that are often desirable for high-end condominium or rental residences. With targeted TDR, there are sending sites, not a sending district.<sup>17</sup>

## 9.02 EFFECTIVENESS IN ACHIEVING STATED PURPOSE(S)

TDR programs have existed in this country since 1968, when New York City adopted its Landmark Preservation Law, which incorporated the concept of allowing development density to be transferred from a lot containing an historic structure to an adjacent parcel.<sup>18</sup> Such programs have mushroomed, with programs around the country providing TDRs to owners of landmarked historical buildings, open space, farm land, and a variety of other targets for preservation.<sup>19</sup> The pace of new TDR proposals seems to have accelerated as communities have become increasingly concerned about growth and community character issues. A 2020 analysis of TDR programs identified 247 local governments with TDR programs and 35 states, plus the District of Columbia, that had adopted TDR enabling legislation.<sup>20</sup> Montgomery County, Maryland, has had a TDR program for more than forty years, and its program is often cited as being among the most successful examples of this technique. Since its inception in 1980, Montgomery County has protected over 50,000 acres of farmland and open space through the sale of TDRs, which constitutes approximately 72% of all farmland protected by easements in the county.<sup>21</sup> As of 2020, the New Jersey Pinelands TDR program has resulted in the removing of a total of 6,324 development rights from sending properties, protecting 55,391 acres of ecologically sensitive and agricultural lands.<sup>22</sup>

Many local TDR programs were established under home rule authority without the benefit of statewide enabling legislation, or under statewide legislation that offered little specific guidance on program development. Some of these are generally viewed as being successful. However, well-drafted state enabling legislation can increase the likelihood that a local TDR program will be successful. For example, the Long Island Pine Barrens of New York is frequently cited as a TDR program that has been relatively successful.<sup>23</sup> The Pine Barrens program is voluntary in that “sending area” properties were not downzoned. The Long Island Pine Barrens TDR program is authorized in state legislation that is specific to the Pine Barrens.<sup>24</sup> Recognizing the success of this TDR program, the New York legislature enacted similar TDR enabling legislation to more broadly authorize the implementation of TDR programs at the local level by cities, villages, and towns.<sup>25</sup> In Rhode Island, municipalities are authorized to establish “a

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<sup>16</sup> Frankel at 833.

<sup>17</sup> Lane Kendig, *The Market Factors that Make Transferable Development Rights Work*, ZONING PRACTICE (American Planning Association, January 2021).

<sup>18</sup> See *SAVED BY DEVELOPMENT* at 9; see also *A Survey of Transferable Development Rights in New York City*, NYC Dept. Planning (Feb. 2015).

<sup>19</sup> Roderick M. Hills, Jr. & David Schleicher, *Building Coalitions Out of Thin Air: Transferable Development Rights and “Constituency Effects,”* 12 JOURNAL OF LEGAL ANALYSIS 79–135 (2020).

<sup>20</sup> *Id.* at 90-92.

<sup>21</sup> Jeremy V. Criss, *Montgomery County’s Transferrable Development Rights Program in the Agricultural Reserve* at 12 (Montgomery County, MD, June 2013).

<sup>22</sup> New Jersey Pinelands Commission, *New Jersey Pinelands Development Credit Program*, update of facts (Revised September 2020), available at: <https://www.nj.gov/pinelands/infor/fact/PDCfacts.pdf>.

<sup>23</sup> See Christopher Rizzo, *Five Innovative Ideas for Funding Parks and Open Space*, 13 No. 1 NEW YORK ZONING LAW & PRACTICE REPORT 1, 8 (July/August 2012) (stating that “at least 1,843 acres have been protected through the TDR program); see also Triedbaum et al, *A Study of the Feasibility of a Transfer of Development Rights Program in Lewiston, Maine*, BATES COLLEGE SCARAB at 18 (Fall 2014).

<sup>24</sup> See Rizzo at 8 (citing the 1993 Long Island Pine Barrens Protection Act).

<sup>25</sup> See, e.g., N.Y. Gen. City Law 20-f; N.Y. Village Law § 7-701; N.Y. Town Law, § 261(a).

system for transfer of development rights within or between zoning districts designated in the zoning ordinance.”<sup>26</sup> In addition to this statewide enabling legislation, special enabling legislation authorizes TDR programs in the Towns of North Kingstown and Exeter.<sup>27</sup> In 1994, zoning code changes were adopted for downtown Providence that included the use of TDR to preserve historic landmarks.<sup>28</sup>

Ensuring that there is a market for the purchase of transferable development rights is one of the most difficult aspects of developing and maintaining a workable TDR system. This requires careful market analysis for the designation of appropriate “receiving areas.” Indeed, not all TDR programs are successful in providing adequate incentives for a substantial number of development rights transfers to take place. Miami, Florida’s TDR program, which allows the transfer of increased square footage rather than additional development density, has been criticized for not creating enough incentives for landowner or developer participation.<sup>29</sup> Transfers will only occur where the jurisdiction is successful in creating a market for development rights.<sup>30</sup> A 2007 study noted that for any TDR program to be successful, “there must be a healthy supply of land and demand for development rights, interested parties must be able to meet in the TDR ‘marketplace,’ and trades must be made at some mutually agreed-upon price.”<sup>31</sup> TDR programs are vulnerable to supply and demand pressures. Program planners must address supply-side issues by ensuring a sufficient supply of sending sites is available to serve as “stockyards for the program.”<sup>32</sup> The number and type of TDRs produced by sending sites must be carefully calculated and matched with the calculated demand created by the receiving sites.<sup>33</sup> To maintain an effective TDR program, governments should be prepared to continually monitor the TDR marketplace and make adjustments to reflect changing supply and demand factors.<sup>34</sup>

TDR programs must also maintain fair prices for TDRs in order to ensure a steady demand for the commodity. Governments considering TDR programs must also consider the impact that their existing land use laws will have on TDR supply and demand. Where zoning regulations are overly permissive, demand for TDR will likely suffer as developers decline to pay for additional density.<sup>35</sup> For example, a study of TDR programs in Lee County, Florida found that there was little demand for TDR, in part because the zoning in receiving areas permitted sufficient density to meet market demand without the

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<sup>26</sup> R.I. Gen. Laws §§ 45-24-33(b)(2).

<sup>27</sup> RHODE ISLAND TRANSFER OF DEVELOPMENT RIGHTS MANUAL at 13 (Feb. 2015) (citing R.I. Gen. Laws §§ 45-24-46.2, 45-24-46.3). *See id.*

<sup>28</sup> Smart Preservation, edited by Rick Pruetz, FAICP, available online at: <https://smartpreservation.net/providence-rhode-island/>.

<sup>29</sup> *See* Leventhal at 286 (noting that Miami’s TRD program had not generated a single TDR transaction).

<sup>30</sup> SAVED BY DEVELOPMENT at 50.

<sup>31</sup> MARGARET WALLS & VIRGINIA MCCONNELL, TRANSFER OF DEVELOPMENT RIGHTS IN U.S. COMMUNITIES: EVALUATING PROGRAM DESIGN, IMPLEMENTATION, AND OUTCOMES at 124 (2007 Resources for the Future); *see also* Edwin H.W. Chan, *Developing a framework to appraise the critical success factors of transfer development rights (TDR) for built heritage conservation*, 46 HABITAT INTERNATIONAL 35 (April 2015) (stating that “market incentive is considered the most directive and effective means of ensuring that a TDR project is successfully implemented”).

<sup>32</sup> Keith Aoki, Kim Briscoe & Ben Hovland, *Transferable Development Rights as a Path out of Deadlock*, 20 J. ENVTL. L. & LITIG. 273, 314 (2005).

<sup>33</sup> *Id.* at 315.

<sup>34</sup> *See* Ari D. Bruening, *The TDR Siren Song: The Problems with Transferable Development Rights Programs and How to Fix Them*, 23 J. LAND USE & ENVTL. L. 423, 428 (Spring 2008) (hereinafter “*TDR Siren Song*”).

<sup>35</sup> Rick Pruetz & Noah Standridge, *What Makes Transfer of Development Rights Work?: Success Factors From Research and Practice*, 75 J. AM. PLAN. ASS’N 78, 83 (Winter 2009). *See also* Aoki, Briscoe & Hovland, 20 J. ENVTL. L. & LITIG. at 315; Triedbaum et al, *A Study of the Feasibility of a Transfer of Development Rights Program in Lewiston, Maine*, BATES COLLEGE SCARAB at 18 (Fall 2014).

need for additional density provided by TDR.<sup>36</sup> Indeed, many programs die of their own restrictiveness, generating few actual transfers. Others only “succeed” because city or state buys TDRs itself, or increases interest in them by downzoning potential recipient lots (and thus restricting development further).<sup>37</sup> Sometimes, the market simply cannot absorb the supply of TDRs.<sup>38</sup>

A 2021 article by the American Planning Association differentiates between targeted TDR programs and rural TDR programs. Rural TDR programs that are used for growth management and rural preservation have been used far more frequently, but have seen many failures born of market realities. Meanwhile, targeted TDR (e.g., to protect a single building) is not as widely used, but has been more successful.<sup>39</sup>

In a 2016 report on TDR programs in Maryland observed that outside factors can have a significant impact on the demand for TDR:

Sometimes soft demand occurs because what the market wants is not available through TDRs; sometimes it is due to the lack of infrastructure, especially a lack of sewer and/or water service, which precludes development at higher densities. Demand for TDRs may be lessened because TDR acquisition costs, in conjunction with other development-related costs and fees, discourage developers, for example, transfer and recordation taxes, impact fees, costs for sprinkler systems and best available technology for septic systems, and/or sewer/water fees.<sup>40</sup>

Finding one or more suitable receiving areas is another challenge in designing a successful TDR program. Some municipalities cannot overcome local opposition, which usually comes from residents adjoining potential receiving areas and is typically based on a belief (whether factual or not) that TDR will result in more new development than otherwise would have occurred. Some residents fear that increased development will worsen traffic, raise property taxes, reduce property values, or diminish quality of life.<sup>41</sup>

The transaction costs often associated with TDR transactions—including time-consuming negotiations over price, preparation of development rights purchase and sale agreements, and closing costs associated with the development rights purchase—may be substantial enough to discourage developers from participating in a TDR program.<sup>42</sup> Transaction costs of the Montgomery County TDR program have been found to be approximately 20%.<sup>43</sup> TDR “banks,” in which a governmental or quasi-governmental agency buys and aggregates development rights from “sending area” properties and sells them for use on receiving area properties, can help minimize transaction costs by setting minimum purchase prices to

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<sup>36</sup> See James C. Nicholas, *Lee County TDRs: Existing Programs, An Expanded Program, and a TDR Bank* at 13 (November 2013).

<sup>37</sup> Hills & Schleicher at 81.

<sup>38</sup> Kendig at 7.

<sup>39</sup> Kendig at 2. In this article, Kendig provides six alternatives to the traditional rural TDR program, several of which retain the existing zoning. Others change the existing zoning, either making “clustering” the only development option or downzoning all unincorporated areas outside of designated municipal growth areas.

<sup>40</sup> TRANSFER OF DEVELOPMENT RIGHTS COMMITTEE REPORT, Maryland Dept. of Planning (April 2016).

<sup>41</sup> See the Pennsylvania Land Trust Association, *Transfer of Development Rights* (Updated 2019), available at: <https://conservationtools.org/guides/12>.

<sup>42</sup> See *TDR Siren Song* at 429; see also THE TDR HANDBOOK at 120 (stating: “The greater the administrative or public ‘hassle’ that confronts a prospective buyer or seller of rights, the less economic value the rights have and the less effective the program will be.”).

<sup>43</sup> Shahab, S., Clinch, J. P., & O’Neill, E., *Estimates of transaction costs in transfer of development rights programs*, 84 JOURNAL OF THE AMERICAN PLANNING ASSOCIATION 61–75 (2018).

resolve valuation problems.<sup>44</sup> TDR banks can also help to overcome market timing gap issues by providing a ready purchaser for development rights during economic downturns, and a source of development rights available for purchase when the real estate market has recovered.<sup>45</sup> This can help to stabilize the value of TDRs. A 2013 study of San Francisco’s TDR program observed that:

A TDR bank can serve as a clearinghouse that connects buyers and sellers, creating a pool of TDR to assure availability of TDR when needed, offer TDR at a set price, provide financing to acquire TDR, use the proceeds from TDR sales to purchase additional TDR, and provide sales price information. By providing a single point of contact, a TDR bank can streamline the process for TDR buyers and sellers.<sup>46</sup>

Local TDR banks, however, can face a range of complex issues, such as funding and appraisal issues, which are outside the realm of expertise of many local government officials and staff. These complexities can be viewed as disadvantages to having a TDR bank as part of a local TDR program.

### **9.03 IMPACT ON PROPERTY VALUES**

Depending upon how they are implemented, TDR programs can have significant impacts on property values in both the sending and receiving areas. Indeed, the entire premise of a viable TDR program is that transfers will take place only if both the “sending area” property owner and the “receiving area” property owner will benefit from the transaction. TDR programs “use zoning restrictions to create a contrived market for development rights.”<sup>47</sup> Put another way, the TDR process relies upon the manipulation of land values through regulation as the premise to a workable scheme.

As noted above, in some jurisdictions a TDR program is a component of a downzoning scheme for the “sending area” that would tend to reduce the development value of property and create an incentive to turn to TDR for compensation. Typically, downzoning lowers the value of property, while development or redevelopment offers a much higher value.<sup>48</sup> Frequently the “downzoning” is achieved by refusing to rezone properties to more intensive uses without the use of TDRs. TDR can enhance both the political prospects and the legal justification for extreme low density zoning such as agricultural preservation and conservation zoning districts. Under the ideal circumstances of a well-conceived and implemented TDR program, with sufficient demand for the development rights created in the “sending area,” payments to property owners for development rights will offset the development value lost through the downzoning. But where a mandatory TDR program is premised on downzoning and there is not enough demand to purchase all the development rights created, there will be property owners who may suffer an economic loss.

In addition, under nearly all TDR programs, the value of the TDRs are supported by density bonuses that permit additional development at a “receiving area” site. But the effectiveness of these density bonuses is premised on keeping “low baseline density limits in receiving areas, to ensure that these limits can only

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<sup>44</sup> See *TDR Siren Song* at 429; see also Trevor D. Vincent, *Exploiting Ambiguity in the Supreme Court: Cutting Through the Fifth Amendment with Transferable Development Rights*, 58 WM. & MARY L. REV. 285, 299 (Oct. 2016) (stating that one of the basic functions of a TDR bank is to serve “as a market regulator, ensuring equitable pricing for TDRs”).

<sup>45</sup> See THE TDR HANDBOOK at 230; see also Frankel at 829; *Making TDR Work* at 207.

<sup>46</sup> *TDR Study: San Francisco’s Transfer of Development Rights Program* at VI-2 (Prepared for San Francisco Planning Department by Seifel Consulting, Inc. and C.H. Elliott & Associates, June 2013).

<sup>47</sup> Miller at 471-472.

<sup>48</sup> Kendig at 2.

be exceeded by TDR and to encourage higher density development.”<sup>49</sup> San Francisco, for example, used downzoning when it reduced the baseline FAR of its entire downtown district, making TDR the only means by which developers could achieve bonus density.<sup>50</sup> In addition, demand for TDR is encouraged by downzoning “receiving area” properties or by adopting a policy forbidding upzoning (zoning to higher densities). Analyzed from a post-downzoning viewpoint, the ability to use TDRs presumably makes the property more valuable than it would be under the same regulatory constraints, without the ability to increase density. Indeed, a developer will not purchase development rights unless the price of the rights is less than the value of the additional density that the rights authorize, so that the added development is profitable.<sup>51</sup>

But looked at from the perspective of the property owner prior to a TDR accommodating downzoning, the analysis reaches a different result. If a property owner were entitled to build at a density, say, of eight units per acre, its property would presumably be worth more, all else being equal, than if the owner is entitled to build at a density of only four units per acre and had to purchase the right to the additional four units because the property had been downzoned or kept at an artificially low zoning density. In cases where receiving-area property is downzoned as a way to create demand for development rights transfers, the need to use TDR to restore allowable development density seems little different than imposing an exaction on a “receiving area” developer. This exaction is used to pay for development rights ceded by the “sending area” property owner, and the need to pay the exaction to achieve the desired development density makes the receiving area property less valuable than it would be if it were not necessary to purchase development rights. Where receiving area properties will not be upzoned without TDR, the effect on property value would depend on how the land market valued those properties. If the market expected upzoning of the receiving area, the TDR requirements would reduce market prices for land. Alternatively, if the market did not expect upzonings, then TDR could increase land values.

#### **9.04 IMPACT ON DEVELOPMENT COSTS**

The complexity of TDR programs can increase transaction costs associated with development involving TDRs. In particular, those TDR programs that incorporate a discretionary approval process for the use of TDRs in a development can result in delays, uncertainty of success, and the imposition of costly conditions of approval that might not be imposed on a “by right” project.<sup>52</sup> The flip side of this concern is that programs that are too intricate and time-consuming will be avoided by developers, who will prefer to develop in areas or at densities that do not involve such complications.<sup>53</sup> For this reason, the authors of *The TDR Handbook* urge that a “community should exert strong efforts to keep its TDR program simple and resist efforts to add requirements that could constitute a fundamental threat to the program’s viability.”<sup>54</sup> On the other hand, depending on the nature of the site and the development design, the increased development density allowed in receiving areas with the use of TDRs may result in lower per-unit development costs, as compared with development at base densities. This is particularly true where a density limitation makes development of a parcel economically infeasible. A TDR program can reduce development costs by enabling a developer to purchase TDR rights for that parcel rather than spending significant time and resources pursuing a zoning amendment to permit greater density.<sup>55</sup>

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<sup>49</sup> SAVED BY DEVELOPMENT at 56.

<sup>50</sup> William Cross, *TDR for Music Row: Case Studies, Implications, and Considerations* at 43 (Metro Nashville/Davidson County Planning Department) August 2017).

<sup>51</sup> *Making TDR Work* at 209.

<sup>52</sup> SAVED BY DEVELOPMENT at 58-59.

<sup>53</sup> *Making TDR Work* at 210.

<sup>54</sup> THE TDR HANDBOOK at 120.

<sup>55</sup> See Daniel J. Pasquale, *A Pragmatic Proposition: Regionally Planned Coastal TDRs in Light of Rising Seas*, 48 URB. LAW. 179, 187 (Winter 2016).

## 9.05 IMPACT ON AMOUNT AND PATTERNS OF LAND DEVELOPMENT

TDR is a mechanism intended to alter the patterns of land development by redirecting development from “sending areas” to “receiving areas.” For example, a TDR program can be used to shift development density toward areas where infrastructure (e.g., public water and sewer) already exists or that are targeted for future infrastructure expansion, such as locally designated growth centers near transit hubs or downtown centers<sup>56</sup> or away from coastal areas.<sup>57</sup> In King County, Washington, since 1998 more than 144,500 acres have been protected from development through the county’s TDR program, including the transfer of more than 2,800 potential dwelling units out of the county’s rural landscape and into its urban areas.<sup>58</sup>

Whether a TDR program affects the amount of overall land development depends on a variety of factors. These include the nature of local land markets in sending and receiving areas; the design and effectiveness of the TDR program, including the transfer ratio; the permissible density bonus within the receiving area, and the extent to which base densities in the receiving area are set at artificially low levels to encourage development rights transfers. For example, if base densities are reduced in receiving areas as part of a TDR program, and there is not an effective market for transfer of development rights, development in the receiving area may be constrained below what would otherwise have taken place without the downzoning. In contrast to “purchase of development right” (PDR) programs, TDRs shift development to different locations within a community without necessarily reducing the total amount of development allowed.<sup>59</sup>

One aspect of TDR being studied more closely is the pattern of development occurring in the “sending area” over time. A 2021 study found that Montgomery County, Maryland’s TDR program was successful in preserving agricultural and forest land, but also observed that scattered development patterns had emerged in the TDR “sending area.”<sup>60</sup> Because the program allows for parcels in the “sending area” to retain at least some development rights, landowners are able to build at a density that the zoning allows for, which can lead to a conversion of agricultural land and forest into low-density residential usage and large-lot subdivisions. Programs that effectively terminate all development rights on the sending parcels (either through the TDR program or through a separate but related program, such as Montgomery County, Maryland’s Building Lot Termination Program)<sup>61</sup> result in less development and less fragmented development patterns. Another example is Calvert County, Maryland, which laces an entire parcel under easement, even if only part of its associated development rights is sold, which reduces incentive to retain any development rights.<sup>62</sup>

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<sup>56</sup> *Suffolk County Transfer of Development Rights (TDR) Study*, Suffolk County Dept. Economic Development & Planning (May 2014).

<sup>57</sup> See Daniel J. Pasquale, *A Pragmatic Proposition: Regionally Planned Coastal TDRs in Light of Rising Seas*, 48 URB. LAW. at 187.

<sup>58</sup> See King County, WA, Transfer of Development Rights program, available at:

<https://kingcounty.gov/services/environment/stewardship/sustainable-building/transfer-development-rights.aspx>.

<sup>59</sup> WALLS & MCCONNELL at 123.

<sup>60</sup> Fang at 233-237

<sup>61</sup> See Montgomery County (MD) Planning: Building Lot Termination Program

(<https://montgomeryplanning.org/planning/agricultural-reserve/building-lot-termination/>).

<sup>62</sup> Fang at 237.

## 9.06 IMPACT ON HOUSING AFFORDABILITY

Whether a TDR program has any effect on housing affordability, and what that effect is, depends on the design of the TDR program and the nature of the applicable housing market. Depending on market factors, one could foresee a TDR program resulting in localized increases in housing prices within “sending areas” as it discourages development in that area and land or housing supply becomes insufficient to meet demand. Similarly, a TDR program, to the extent that it results in greater development density than would otherwise be possible in “receiving” areas, may lead to increased housing stock in those areas and consequently more affordable housing prices in that area. Some TDR programs have been shown to effectively align pro-growth coalitions or reduce opposition for rezoning of land that otherwise may be politically impossible without TDRs.<sup>63</sup> This can reasonably be expected to provide additional housing or density that results in more affordable housing prices in those areas. Some TDR programs allow greater density bonuses for projects that include housing units satisfying standards for “affordability,” while others, such as Seattle’s, use TDR expressly to preserve housing for low income residents. Depending on market factors, a developer who is able to reduce per unit development costs by taking advantage of TDR to construct denser projects in receiving areas may be able to sell housing for less than comparable developments at lower density. Conversely, increased administrative costs associated with navigating a complicated, multi-step TDR process may drive development costs up and create upward pressure on housing costs.

## 9.07 RECOMMENDED TALKING POINTS: PROS AND CONS

### PROS:

- A well-designed TDR program can be a way to help preserve farmland, forestland, historic properties, and other valued resources, while also protecting property rights.
- The ability to transfer development rights for value can offset development value lost through a downzoning or other restriction on “sending area” properties.

### CONS:

- It is difficult to design an effective TDR program; they can be expensive and complex to administer, and not all programs are successful in creating a market for the transfer of development rights and the purchase of those rights within a designated receiving area.
- TDR programs may employ downzoning or similar restrictions in both “sending areas” and “receiving areas” to generate demand for the use of development rights.
- A TDR program may result in fragmented preservation of open space or farmland in the “sending area” with scattered low-density development, and may unintentionally lead to “leapfrog” development.

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<sup>63</sup> WALLS & MCCONNELL at 119-126.



## 9.08 INCENTIVE-BASED ALTERNATIVES

As voluntary TDR program provides an incentive for the protection of desirable environmental, historic, or other resources in the “sending area” by offering the property owner the ability to sell development rights for a desirable return. Such a program can be designed so that selling the development rights may be even more profitable than developing the property would have been. Similarly, under a TDR program, development in a receiving area is allowed at densities that are higher than allowed under otherwise applicable development regulations in order to provide transferable development rights with value and encourage/incentivize receiving area property owners and developers to participate in the program. A variety of jurisdictions using TDR have incorporated additional incentives to make TDRs more attractive for developers. For example, Pacifica, California, exempts projects using TDR from parkland dedication requirements, capital improvement fees, and traffic impact mitigation fees.<sup>64</sup> St. Mary’s County, Maryland, allows reductions in the required open space ratio and landscape ratio requirements. The TDR program in Warwick Township, Pennsylvania offers a similar incentive, allowing developers to exceed the lot coverage limitation in its industrial receiving zone by acquiring bonus lot coverage at the rate of 4,000 square feet per TDR up to a maximum of 70% lot coverage.<sup>65</sup> Sunderland, Massachusetts, relieves receiving site developments from minimum lot size and frontage requirements.<sup>66</sup> At least in theory, providing incentives for participation by “receiving area” property owners has the effect of creating or enhancing the market for transferable rights, thereby encouraging greater participation by “sending area” property owners and furthering the primary goal of protecting the “sending area” from development.

It is also possible to provide an additional incentive for “sending area” property owners to place their properties under development restrictions by allowing transfer ratios greater than 1:1. Encouraging the use of TDRs through this type of a “carrot” approach is vastly preferable from a property rights standpoint to the “stick” approach of using drastic development restrictions to force property owners to turn to TDRs as the only practical way to obtain value from their property. Also, providing for residual uses on the “sending area” properties, will tend to reduce the costs of TDR to property owners while encouraging the transfer. Mandatory TDR programs that follow downzoning of the affected property are not really an incentive-based alternative for preserving open space because the property owner is left with no other choice after the downzoning but to sell the development rights if it wants to realize value from its property.

Residential density transfer (RDT) is a variation on the traditional TDR concept. The RDT approach differs from the TDR concept in that no “sending areas” are created and no development rights are actually transferred. Instead, receiving areas are designated and developers wanting to exceed the base density are required to submit two appraisals for the site’s land value—one that assumes development at the base density, and another that assumes development with RDT bonus density. The increase in value between the two appraisals is attributed to the density bonus and the developer is required to pay a set percentage of that increase.<sup>67</sup>

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<sup>64</sup> SAVED BY DEVELOPMENT at 63.

<sup>65</sup> THE TDR HANDBOOK at 237.

<sup>66</sup> SAVED BY DEVELOPMENT at 64.

<sup>67</sup> See THE TDR HANDBOOK at 239.



## SECTION 10: FARMLAND PROTECTION TECHNIQUES

### 10.01 PURPOSE AND KEY TERMS

**Farmland protection techniques** are intended to slow the conversion of productive agricultural land to residential and commercial uses. The American Farmland Trust (“AFT”), an organization that is influential in encouraging farmland protection efforts nationally, asserts, broadly, that “[e]conomic opportunity, environmental protection, community infrastructure and quality of life are among the most compelling reasons to save farmland.”<sup>1</sup> Saving farmland is perceived as critical to ensuring continued American advantage in world food markets and ensuring “food security” – that is, the ability of America to put food on the table of its citizens at reasonable prices.<sup>2</sup> From the standpoint of environmental protection, saving farmland is desirable because “well-managed farmland protects soil and water resources and can prevent flooding. It absorbs and filters wastewater and provides groundwater recharge.”<sup>3</sup> Proponents also point to the role that privately owned farm and ranch lands have in sustaining wildlife populations, and note that energy crops have the potential to replace reliance on fossil fuels.<sup>4</sup>

With respect to “community infrastructure,” AFT notes that people increasingly “view natural resources, including agricultural land, as vital for the well-being of our communities, rather than as ‘free’ material to be disposed of at will.”<sup>5</sup> From that perspective, the role played by agriculture in local economies, including secondary markets such as food processing and tourism, provides a reason to defend against farmland conversion. Additionally, AFT cites studies showing that tax revenue from farmland more than pays for the municipal services it requires.<sup>6</sup> Finally, and probably most compellingly for many people concerned with the loss of agricultural land in their own communities, “farm and ranch land maintains scenic, cultural and historic landscapes” that “create identifiable and unique community character and add to our quality of life.”<sup>7</sup> Farmland also plays an integral role in our national heritage as an agrarian population.<sup>8</sup>

There are a variety of tools used by state and local governments to protect farmland. Some of the most common are discussed here.

- **Agricultural Protection Zoning (APZ)** refers to the designation by a county or municipality of zones in which agriculture is the exclusive or principal allowed use, and in which uses that could be incompatible with farming, including non-farm residential developments, are prohibited.<sup>9</sup> These zones typically require much larger lot sizes or allow much lower development densities than other zones.<sup>10</sup> APZ ordinances in some jurisdictions place limitations on the ability to subdivide agricultural parcels, often with an exemption for agricultural worker housing or family

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<sup>1</sup> SAVING AMERICAN FARMLAND: WHAT WORKS at 3 (American Farmland Trust, 1997) (hereinafter “SAVING AMERICAN FARMLAND”).

<sup>2</sup> SAVING AMERICAN FARMLAND at 5-6.

<sup>3</sup> SAVING AMERICAN FARMLAND at 7.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> SAVING AMERICAN FARMLAND at 7-8.

<sup>7</sup> SAVING AMERICAN FARMLAND at 8.

<sup>8</sup> SAVING AMERICAN FARMLAND at 9.

<sup>9</sup> See SAVING AMERICAN FARMLAND at 49.

<sup>10</sup> See Lara DuMond Guercio, *Local and Watershed Land Use Controls: A Turning Point for Agriculture and Water Quality*, 62 PLANNING & ENVIRONMENTAL LAW 3 (February 2010). See also Robert E. Coughlin, *Formulating and Evaluating Agricultural Zoning Programs*, 57 APA JOURNAL 183 (Spring 1991); ARTHUR C. NELSON & JAMES B. DUNCAN, *GROWTH MANAGEMENT PRINCIPLES & PRACTICES* at 52 (Planners Press, 1995).

members of the farmer.<sup>11</sup> APZ provisions may also make it more difficult than usual to rezone land from the agricultural protection zone to a classification in which development is allowed.<sup>12</sup> APZ ordinances may include provisions addressing the conflict between farming and non-farming uses, including enhanced setbacks, site design review of non-farming development, required buffers, or mechanisms designed to protect farmers against nuisance claims.<sup>13</sup> Ideally, the designation of Agricultural Protection Zones is based on consideration of soil quality as well as other factors concerning the location, character, and current use of the land.<sup>14</sup> APZ has a number of purposes, including protecting areas with prime agricultural soils from development, protecting against conflicts between farming and non-farm land uses, and maintaining a “critical mass” of agricultural land in a jurisdiction. APZ is also used to forestall land speculation by non-farmers, to “promote orderly growth,” and as a means of preserving open space and scenic landscapes.<sup>15</sup>

- **Purchase of Agricultural Conservation Easement**, also known as **Purchase of Development Rights (PDR)**, is a program by which a state or local government pays a farmer for the development rights in a parcel of agricultural land.<sup>16</sup> This occurs through the imposition of a **conservation easement** that “runs with the land,” either permanently or for a specified period of time. Depending on local real estate laws, in some states the government purchases a **covenant** against development of the burdened parcel.<sup>17</sup> Such restrictions are sometimes called **Agricultural Preservation Restrictions (APR)**. The price paid for the easement is generally, but not always, set by an appraisal.<sup>18</sup> Funds for the purchase of development rights may come from general appropriations, or from specific revenue sources including property taxes, specialized taxes, such as a tax on real estate transfers, or bonding. The several purposes of a PDR program for acquiring easements on agricultural land include retaining land in farming use, and providing an infusion of capital that can help maintain the economic viability of the farm or ranch.<sup>19</sup> PDR is further discussed in Section 8 of this book.
- **Transfer of Development Rights (TDR)** programs are another mechanism that is sometimes used to preserve farmland by creating a private market for development rights on agricultural properties. The definition and purpose of TDR is discussed in Section 9 of this book and is not further addressed here.
- **Mitigation Ordinances and Policies** require the permanent set-aside of agricultural land as a condition of allowing the conversion of agricultural land to other uses. One example of this technique is an ordinance that requires developers to permanently protect an acre or more of farmland through a conservation easement or other mechanism for every acre that is converted to other uses. Developers may also pay a fee in lieu of the land set-aside. An alternative approach is to require “no net loss of farmland” on a jurisdictional basis.<sup>20</sup> These types of provisions are less common and of more recent vintage than the other mechanisms discussed above.

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<sup>11</sup> See SAVING AMERICAN FARMLAND at 61.

<sup>12</sup> SAVING AMERICAN FARMLAND at 65-66.

<sup>13</sup> See SAVING AMERICAN FARMLAND at 62-63.

<sup>14</sup> SAVING AMERICAN FARMLAND at 49, 56-57.

<sup>15</sup> See SAVING AMERICAN FARMLAND at 50.

<sup>16</sup> SAVING AMERICAN FARMLAND at 83; see also ROHAN, ZONING AND LAND USE CONTROL § 56.04[2] (hereinafter “ROHAN”).

<sup>17</sup> SAVING AMERICAN FARMLAND at 83.

<sup>18</sup> SAVING AMERICAN FARMLAND at 98-99.

<sup>19</sup> SAVING AMERICAN FARMLAND at 83.

<sup>20</sup> SAVING AMERICAN FARMLAND at 33.

- **Right-to-Farm (RTF) Legislation** is intended to strengthen a farmer’s legal defense against private nuisance claims brought by neighboring property owners, and to protect farmers from local regulations that would constrain farming practices.<sup>21</sup> These provisions may be imposed at the state or local levels.<sup>22</sup> There are two broad types of nuisance protection that state statutes provide. About half of the states have codified the “*coming to the nuisance*” defense so that farmers who have been in operation before an area is developed residentially generally cannot be forced to curtail operations because the new neighbors complain about odors, noises, or other impacts. An example of this approach is Florida’s Right to Farm Act, which protects commercial agricultural and farming operations from nuisance claims if they have been in operation for more than one year and were not a nuisance at the time they began.<sup>23</sup>

The second type of nuisance protection insulates farmers from lawsuits challenging the effects of their operations so long as they are operating using “*generally accepted agricultural and management practices*” in accordance with applicable regulations. Michigan’s Right to Farm Act, for example, states, in relevant part: “A farm or farm operation shall not be found to be a public or private nuisance if the farm or farm operation alleged to be a nuisance conforms to generally accepted agricultural and management practices according to policy determined by the Michigan commission of agriculture.”<sup>24</sup> Many states also protect farmers by expressly preempting local governments from adopting any ordinance or zoning restriction that would adversely affect agricultural operations.<sup>25</sup> Arkansas’ RTF statute, for example, provides that any local ordinance that has the effect of making any agricultural operation or facility a nuisance is “void and shall have no force or effect.”<sup>26</sup>

- **Smart Solar Siting Policies** are intended to strike a balance between the development of solar facilities and the preservation of farmland. Solar facilities provide farmers with an opportunity to earn additional income from their land, but can also impact agricultural production to the extent that farmland is converted to solar development.<sup>27</sup> In several states, including New York, New Jersey, North Carolina, Minnesota, and Massachusetts, tax penalties are imposed when land under agricultural tax assessments are converted to nonagricultural uses.<sup>28</sup> In New York, for example, an owner deciding to convert covered land to a nonagricultural use (including large-scale solar) must pay a tax penalty based on the difference between the use and market value for the previous five tax years, including interest.<sup>29</sup> Some states (e.g., New Jersey, Massachusetts, and Connecticut) also require additional review and/or permit requirements on solar facilities on

<sup>21</sup> See Nicholas Buttino, *An Empirical Analysis of Agricultural Preservation Statutes in New York, Nebraska, and Minnesota*, 39 B.C. ENVTL. AFF. L. REV. 99, 103 (2012); see also SAVING AMERICAN FARMLAND at 169, 174-175; Cordon M. Smart, *The “Right to Commit Nuisance” in North Carolina: Historical Analysis of the Right-to-Farm Act*, 94 N.C. L. REV. 2097, 2099-2103 (Sept. 2016).

<sup>22</sup> The National Agricultural Law Center maintains an online compilation of the right to farm statutes adopted by all fifty states and the District of Columbia. See *State’s Right-to-Farm Statutes*, NATIONAL AGRICULTURAL LAW CENTER, <http://nationalaglawcenter.org/state-compilations/right-to-farm/>.

<sup>23</sup> See Sidney F. Anabacher & Michael T. Olexa, *Florida Nuisance Law and Urban Agriculture*, 89 FLA. B.J. 28, 30 (Jan. 2015) (citing Fla. Stat. § 323.14(2)).

<sup>24</sup> Mich. Comp. Laws § 286.473(1).

<sup>25</sup> See Rusty Rumley, *A Comparison of the General Provisions Found in Right-to-Farm Statutes*, 12 VT. J. ENVTL. L. 327, 342 (2011); see also Vanessa Zborek, “Yes in Your Backyard!”: *Model Legislative Efforts to Prevent Communities from Excluding CAFOS*, 5 WAKE FOREST J. LAW & POLICY 147, 167-68 (April 2015).

<sup>26</sup> *Id.* at 342-43.

<sup>27</sup> American Farmland Trust *Smart Solar Siting*, <https://farmlandinfo.org/smart-solar-siting/>

<sup>28</sup> Travis Grout & Jennifer Ifft, *Approaches to Balancing Solar Expansion and Farmland Preservation: A Comparison Across Selected States* at 6 (May 2018) (hereinafter “Grout & Ifft”).

<sup>29</sup> See *id.*

covered farmland in order to make farmland less attractive to development relative to lower-impact sites.<sup>30</sup> On the other hand, some states offer positive incentives, such as energy credits or tax benefits, to encourage the development of solar facilities on non-prime farmland or colocation on productive farmland.<sup>31</sup> Massachusetts, for example, incentivizes solar development on preferred lands, particularly contaminated lands, landfills, and other brownfields by providing direct state support in the form of grants, loans, insurance, and tax incentives.<sup>32</sup>

## 10.02 EFFECTIVENESS IN ACHIEVING STATED PURPOSE(S)

In the 2020 study *Farms Under Threat: The State of the States*, a spatial mapping analyses of agricultural land conversion done by the AFT found that from 2001-2016, about 11 million acres of farmland or ranchland in the United States were converted to urban and highly developed land use (4.1 million acres) or low-density residential land use (nearly 7 million acres).<sup>33</sup> An assessment of how all 50 states have, or have not, responded to the leading threats to agricultural land found that the twelve leading states implemented a mix of approaches and linked their programs to enhance effectiveness.<sup>34</sup> In particular, the study concluded that:

States with multiple policies received the highest combined scores. The leaders all used at least four approaches and have effective planning and funded PACE programs. Adopting more than one policy is effective because different programs achieve different outcomes, and the strengths of one approach can offset the shortcomings of another.<sup>35</sup>

Other studies have also found that farmland protection techniques are most effective in achieving their purpose of preventing the conversion of farmland to urban development when used in combination with one another.<sup>36</sup>

### Agriculture Protection Zoning (APZ)

According to the AFT, APZ “is the only farmland protection technique that can prevent development of large tracts at low public cost.”<sup>37</sup> APZ reportedly has been successful in maintaining the agricultural land base in predominantly rural areas of the Midwest and West where farmland protection measures were enacted before significant development pressures and where land prices therefore reflected the value for farming so that residents did not perceive a significant economic burden from the regulation. AFT reports that farmers in those areas support APZ because “most have no desire to sell land for development, and they see zoning as a means of preventing any of their neighbors from doing so.”<sup>38</sup> A ten-year study in one Pennsylvania jurisdiction found that the adoption of APZ shifted the pattern of land sales for development from the agricultural district to land outside the agricultural district. The study concluded that “the adoption of agricultural zoning significantly reduced the flow of land in the agricultural district from

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<sup>30</sup> *Id.* at 7.

<sup>31</sup> *Id.* at 8-9.

<sup>32</sup> *See id.* at 9.

<sup>33</sup> *See Farms Under Threat: The State of the States* (American Farmland Trust, May 2020) (available online at <https://farmlandinfo.org/publications/farms-under-threat-the-state-of-the-states/>).

<sup>34</sup> *See id.* at 35.

<sup>35</sup> *Id.*

<sup>36</sup> SAVING AMERICAN FARMLAND at 39. *See also* CALDWELL, HILTS & WILTON, FARMLAND PRESERVATION: LAND FOR FUTURE GENERATIONS at 198 (University of Manitoba Press; 2nd edition, 2017).

<sup>37</sup> SAVING AMERICAN FARMLAND at 71.

<sup>38</sup> *Id.*

owners who generally intend to keep it in rural use to owners whose ultimate intention is development.”<sup>39</sup> The study also observed that would-be developers clearly considered the agricultural zoning to be relatively permanent.<sup>40</sup> A frequent criticism of agricultural zoning as a farmland protection tool is that zoning can be easy to change, so that APZ is a “temporary fix” and land zoned for agriculture can be rezoned for development given sufficient economic or political pressure.<sup>41</sup>

AFT states that in rapidly growing communities, “APZ alone cannot address the economic challenges that farmers face.”<sup>42</sup> APZ has been more successful in those areas where it is combined with a PDR or TDR program in order to protect farmland from development until funds are available for the purchase of development rights.<sup>43</sup> AFT cites a conversion rate of only 3,100 acres of farmland per year during the 1987-1994 time period in the state of Oregon where all 36 counties had enacted APZ as part of the state’s growth management program.<sup>44</sup> In a national survey of farmers and ranchers, APZ was preferred (58%) over the purchase of agricultural conservation easements (PACE) (16%) as a mechanism for avoiding the conflicts between non-farmers and agricultural uses that result when homes are built in agricultural areas.<sup>45</sup> Area-based or density-based APZ can be more effective in preserving farmland because it allows development on smaller lots, providing more flexibility in site planning and potentially allowing dwellings to be placed where they cause the least intrusion on the active farming use, and where soils are the least conducive to agriculture.<sup>46</sup> By contrast, farm advocates caution that residential/agricultural zoning that results in “large lot” requirements of one to five acres does little to protect commercial agriculture and, in fact, often hastens its decline by increasing land consumption for non-farming purposes.<sup>47</sup>

One author observes that “[t]he fundamental concern about the effectiveness of agricultural zoning is the inherent impermanence of any system based on political choice.”<sup>48</sup> Loudon County, Virginia, is the classic example of this. The author points out that the effectiveness of APZ is also undermined by the opportunities to change zoning restrictions through variances and rezonings.<sup>49</sup>

In urban areas, APZ may result in the creation of non-agricultural “ranchettes” or “estates.” For example, in western Marin County, California, where the minimum lot size requirement for the APZ is 60-acres, wealthy San Franciscans built country houses on 60-acre lots.<sup>50</sup> Such developments fragment agricultural land, tend to bid up land prices, and defeat one of the principal purposes of farmland protection measures, which is to maintain a viable agricultural community.<sup>51</sup> Oregon’s zoning approach to preserving farmland has also been criticized as leading to the creation of thousands of “hobby farms” on parcels too small to be viable for commercial agriculture, yet competing with commercial farmers for the land base.<sup>52</sup>

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<sup>39</sup> *Formulating and Evaluating Agricultural Zoning Programs* at 190-91.

<sup>40</sup> *Id.* at 191.

<sup>41</sup> See SAVING AMERICAN FARMLAND at 52.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 69.

<sup>44</sup> *Id.* at 52.

<sup>45</sup> *Owners’ Attitudes Towards Regulation of Agricultural Land* (American Farmland Trust, May 1998).

<sup>46</sup> Coughlin at 184.

<sup>47</sup> SAVING AMERICAN FARMLAND at 49.

<sup>48</sup> Mark W. Cordes, *Agricultural Zoning: Impacts and Future Directions*, 22 N. ILL. U. L. REV. 419, 446 (Summer 2002).

<sup>49</sup> Cordes, 22 N. ILL. U. L. REV. at 440.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> Thomas L. Daniels, *The Purchase of Development Rights Preserving Agricultural Land and Open Space*, APA JOURNAL 421, 428 (Autumn 1991). See also Dennis Canty, Alex Martinsons, & Anshika Kumar, *Losing Ground: Farmland Protection in the Puget Sound Region* at 18 (American Farmland Trust, Jan. 2012) (hereinafter “*Losing*”).

In a national survey of all counties and some municipalities, AFT identified 24 states with local jurisdictions that had adopted APZ zoning.<sup>53</sup> In particular, AFT found a concentration of APZ ordinances in Wisconsin and Pennsylvania, accounting at that time for 75% of the jurisdictions surveyed having APZ zoning.<sup>54</sup> In Pennsylvania, APZ was first introduced in 1973, and by 1993, 93 municipalities had adopted APZ, covering 725,000 acres, or about 10% of the state's farmland.<sup>55</sup> By 2011, in Berks County and Lancaster County alone, 65 municipalities had adopted APZ Districts, protecting more than 482,000 acres of farmland.<sup>56</sup>

### **Purchase of Development Rights (PDR) Programs**

Programs such as PDR, that involve the **purchase of development rights**<sup>57</sup> are considered to be successful in accomplishing the set aside of farmland, and are thought to be popular with farmers and with the community at large.<sup>58</sup> More than 3,027,064 acres of farmland were protected through state PDR programs as of January 2019.<sup>59</sup> Such programs are also considered to be more advantageous than regulatory measures because they provide a more permanent form of protection for farmland. The principal criticisms of PDR programs as a tool for protecting farmland are their cost and the resulting slow pace of acquisitions.<sup>60</sup>

PDR programs can obtain funding from a variety of revenue sources, including property taxes, transfer taxes, bonds, appropriations of general revenues, and private contributions.<sup>61</sup> However, the AFT reports that state and local programs had enough funding to purchase from only one out of every seven landowners wanting to sell easements in 1995.<sup>62</sup> Because limited funds are available to acquire land, the ability of these programs to preserve contiguous agricultural area is constrained. It is critical for jurisdictions to target farms for preservation in a strategic manner in order to meet program goals. Some commentators recommend that communities collaborate with stakeholders to determine what is most important in protecting agriculture within the community (e.g., protecting lands that are actually in production and lands with prime soils)<sup>63</sup> and establish eligibility and scoring criteria for ranking

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*Ground*") (observing that, in a survey of county APZ programs in the state of Washington, the most common loopholes are "intermingling farmland and rural estates, allowing a wide range of non-farm uses in ag zones, and allowing farmland to be divided into lots that are too small to farm productively").

<sup>53</sup> SAVING AMERICAN FARMLAND at 40.

<sup>54</sup> SAVING AMERICAN FARMLAND at 51.

<sup>55</sup> Agricultural Protection Zoning (WeConservePA, 2011) (available online at <https://conservationtools.org/guides/67-Agricultural-Protection-Zoning>).

<sup>56</sup> *Id.*

<sup>57</sup> For further discussion of transferable development rights (TDR) programs, see Section 9 of this book.

<sup>58</sup> SAVING AMERICAN FARMLAND at 107.

<sup>59</sup> *Fact Sheet - Status of State PACE Programs*, American Farmland Trust – Farmland Information Center (2019).

<sup>60</sup> *See Purchase of Agricultural Conservation Easements*, American Farmland Trust – Farmland Information Center (September 2013); *see also* PLANNING FOR AGRICULTURE IN NEW YORK: A TOOLKIT FOR TOWNS AND COUNTIES at 50 (American Farmland Trust 2011).

<sup>61</sup> *See Fact Sheet - Status of Local PACE Programs*, American Farmland Trust – Farmland Information Center (October 2016) (identifying funding sources used by local PACE programs nationwide).

<sup>62</sup> SAVING AMERICAN FARMLAND at 88. *See also Agricultural Mitigation Case Studies: Program Summaries and Stakeholder Perspectives from Seven Western Communities*, Land Use & Natural Resources Clinic, Univ. Montana School of Law (Spring 2015) (noting that many communities have more farmers volunteering to conserve land than the PDR market can accommodate, resulting in waiting lists).

<sup>63</sup> *See also Agricultural Mitigation Case Studies: Program Summaries and Stakeholder Perspectives from Seven Western Communities*, Land Use & Natural Resources Clinic, Univ. Montana School of Law (Spring 2015).

properties.<sup>64</sup> For example, a PDR program aimed at protecting farmland might score properties on the basis of its agricultural activity, development pressure, contribution to the local agricultural industry, and compatibility of adjacent land to long-term agricultural use.<sup>65</sup>

Federal funding for the purchase of agricultural easements is available through the Agricultural Conservation Easement Program – Agricultural Land Easements (ACEP-ALE). Initially enacted under the Federal Agriculture Improvement and Reform Act of 1996, and later modified by the 2008 Farm Bill, the 2014 Farm Bill, and the 2018 Farm Bill, ACEP-ALE is a voluntary federal conservation program that provides matching funds to eligible entities to purchase conservation easements on farm and ranch lands.<sup>66</sup> Eligible entities include state and local governments, Indian tribes, and certain non-governmental organizations formed for conservation purposes. According to the AFT, more than \$1,821,727,274 in matching funds had been allocated under ACEP-ALE by the end of 2019.<sup>67</sup>

Because PDR programs are voluntary, a low rate of participation can result in protection of land in scattered parcels that is not conducive to protecting farms from non-compatible abutters or preserving a critical mass of farm enterprise.<sup>68</sup> Isolated islands of preserved land can actually attract development to abutting parcels because of the proximity of the permanently preserved open space.<sup>69</sup> Forsyth County, North Carolina, for example, sold back an agricultural preservation easement on a farm that had become surrounded by housing development, making it impossible for the farmer to lease enough additional land to maintain a viable operation.<sup>70</sup> Depending on the terms of the restriction, PDR properties are sometimes also purchased by wealthy individuals who desire an estate property but do not intend to keep it in active agricultural use—the arguable effect is that they have had their land purchase subsidized by public funds.<sup>71</sup>

At least 98 independently funded local PDR programs in 20 states had acquired funding and/or easements as of January 2020, according to an AFT survey.<sup>72</sup> As of January 2020, 28 states had state-level programs, and some states have been very aggressive with their purchase programs. For example, as of January 2020, New Jersey had spent \$1,137,731,430 to preserve 236,571 acres of farmland through the New Jersey Farmland Preservation Program.<sup>73</sup> From 1996 to 2016, the State of New York helped to preserve a total of 232 farms covering 59,165 acres through its Farmland Protection Implementation Grant Program, which provides funding for local PDR programs.<sup>74</sup> In addition to local and state governments, non-profit organizations also operate PDR programs focused on preserving agricultural

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<sup>64</sup> Gayle Miller & Douglas Krieger, *Purchase of Development Rights: Preserving Farmland and Open Space*, PLANNING COMMISSIONERS JOURNAL No. 53 (Winter 2004).

<sup>65</sup> *Id.*

<sup>66</sup> *Fact Sheet – Agricultural Conservation Easement Program – Agricultural Land Easements*, American Farmland Trust – Farmland Information Center (January 2020). See also *Regulatory Impact Analysis for the Agricultural Conservation Easement Program* (USDA, January 2021).

<sup>67</sup> See *id.*

<sup>68</sup> Anna Vinson, *Re-Allocating the Conservation Easements Landscape: Conservation Easements and Regulation Working in Concert*, 18 FORDHAM ENVTL. L. REV. 273, 278 (Spring 2007).

<sup>69</sup> Daniels at 424.

<sup>70</sup> SAVING AMERICAN FARMLAND at 106.

<sup>71</sup> SAVING AMERICAN FARMLAND at 88-89.

<sup>72</sup> *Fact Sheet - Status of Local PACE Programs*, American Farmland Trust – Farmland Information Center (January 2020).

<sup>73</sup> *Fact Sheet - Status of State PACE Programs*, American Farmland Trust – Farmland Information Center (January 2020).

<sup>74</sup> *Cultivate New York: An Agenda to Protect Farmland for Growing Food and the Economy* (American Farmland Trust, January 2016).

property, and very often these non-profit groups partner with governmental entities in acquiring development restrictions on such properties.

### **Transferable Development Rights (TDR) Programs<sup>75</sup>**

In *Saving American Farmland*, the AFT observed that TDR had long been promoted as a cost-effective alternative to PDR programs, but had failed to live up to its promise as a mechanism for the protection of farmland.<sup>76</sup> The authors noted that over a 20-year period, state and local governments had protected more than 490,000 acres of farmland through PDR, compared to only 55,000 acres protected through TDR programs.<sup>77</sup> A number of reasons are given for TDR falling short, including the reluctance of some jurisdictions to implement a TDR program because of uncertain legal authority and lack of political support. The major reason given, though, is the difficulty of creating a market for development rights.<sup>78</sup> In particular, TDR will not be successful in a “no growth” environment, because the mechanism relies on growth in the “receiving zones” for the success of the program. For example, Calvert County, Maryland, reportedly implemented a growth management program that depressed the market for development rights so that few transfers occurred.<sup>79</sup>

The other point made by observers of TDR programs is that even those that are successful take a considerable amount of time to get to that point. Montgomery County, Maryland, established an 89,000 acre “agricultural reserve” as a TDR sending area in 1980. Transactions began in 1983 after receiving areas were designated. But it took until 1997 before the supply of development rights in the sending area fell below the county’s capacity to use development rights in the receiving area – the point at which the market for transferable rights theoretically can provide compensation to sending zone landowners for their foregone development potential.<sup>80</sup> An AFT Fact Sheet identified 99 TDR programs established for the protection of farmland and notes that since 1980, Montgomery County, Maryland, has protected 51,489 acres of farmland using TDR.<sup>81</sup>

### **Mitigation Ordinances and Policies**

AFT reports on two local Mitigation Ordinances and Policies: (1) a Davis, California, ordinance that requires developers to permanently protect one acre of farmland for every acre that is converted to another use; and (2) a “no net loss of farmland” policy in King County, Washington’s comprehensive plan.<sup>82</sup> Two states, Vermont and California, have adopted comprehensive land-planning procedures that allow for the development of certain agricultural lands in exchange for off-site mitigation through conservation easements or transfer of development rights.<sup>83</sup> Since 1987, the Vermont Farmland Conservation Program has conserved more than 164,000 acres of agricultural land on 765 farms with

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<sup>75</sup> For further discussion of transferable development rights (TDR) programs, see Section 9 of this book.

<sup>76</sup> See *SAVING AMERICAN FARMLAND* at 138.

<sup>77</sup> See *id.*

<sup>78</sup> See, e.g., Rick Pruetz & Noah Standridge, *What Makes Transfer of Development Rights Work?: Success Factors From Research and Practice*, 75 J. AM. PLAN. ASS’N 78, 83 (Winter 2009); see also Ari D. Bruening, *The TDR Siren Song: The Problems with Transferable Development Rights Programs and How to Fix Them*, 23 J. LAND USE & ENVTL. L. 423 (Spring 2008).

<sup>79</sup> *SAVING AMERICAN FARMLAND* at 138-139.

<sup>80</sup> *SAVING AMERICAN FARMLAND* at 135.

<sup>81</sup> *Fact Sheet - Transfer of Development Rights*, American Farmland Trust – Farmland Information Center (April 2008).

<sup>82</sup> *SAVING AMERICAN FARMLAND* at 33.

<sup>83</sup> Elisa Paster, *Preservation of Agricultural Lands Through Land Use Planning Tools and Techniques*, 44 NAT. RESOURCES J. 283 (Winter 2004).



Vermont Housing & Conservation Board funds matched with federal funds provided through the Natural Resources Conservation Service.<sup>84</sup>

### **Right-to-Farm**

All fifty states have some form of nuisance protection for farm operations, and a number of counties and municipalities also have adopted local ordinances to supplement state law protections for farmers.<sup>85</sup> AFT concludes that “right to farm laws often seem to promise more than they deliver,” but remain very popular with farmers.<sup>86</sup> RTF laws are effective when metropolitan areas begin to encroach upon outlying farm communities because they cause urbanites seeking a more rural lifestyle to reconsider their decision where the impacts of farming activity (e.g., animal waste, odors, airborne pollution, and roosters crowing at the crack of dawn) would intrude upon their “rural tranquility.”<sup>87</sup> However these laws have come under attack when applied to protect large scale animal feeding operations or corporate agriculture that may be less accountable to the local community.<sup>88</sup> RTF laws have also been used to protect recycled paper mills and farmers renting farms for events from nuisance claims.<sup>89</sup> AFT quotes the former director of the University of Iowa Agricultural Law Center as viewing “Iowa’s right-to-farm laws as a threat to rural ‘neighborliness.’”<sup>90</sup> Right to farm laws do not protect against the conversion of farmland for development, but do provide support to the agricultural community in the form of protection against nuisance litigation.

### **Smart Solar Siting**

Because the ideal tract of land for solar development (flat, dry, unshaded, and close to transmission infrastructure and customers) shares many characteristics associated with farmland, conflicts between farmland protection and the transition to renewable energy are inevitable.<sup>91</sup> The imposition of penalties on the conversion of agricultural land to solar development can be a barrier to investment, but in some cases the only apply to utility-scale solar facilities and therefore do not prevent the small-scale conversion of farmland to solar facilities.<sup>92</sup> Increased review or permitting requirements appear to be more effective at protecting farmland. A 2017 survey of farmers with land in Massachusetts’ Agricultural Preservation Restriction (APR) Program, which requires the Department of Agricultural Resources to approve new solar facilities on land benefiting from current use taxation, “suggests that permits are denied or too difficult to obtain to make ground-mounted solar practical, even on unproductive land or for collocated facilities.”<sup>93</sup>

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<sup>84</sup> *Farmland Conservation*, Vermont Housing & Conservation Board (available online at <https://vhcb.org/our-programs/conservation/farmland-conservation>).

<sup>85</sup> See Rusty Rumley, *A Comparison of the General Provisions Found in Right-to-Farm Statutes*, 12 VT. J. ENVTL. L. 327, 328 (2011). See also SAVING AMERICAN FARMLAND at 169; ROHAN § 56.03[2][a].

<sup>86</sup> SAVING AMERICAN FARMLAND at 184-85.

<sup>87</sup> Paster at 299-300.

<sup>88</sup> SAVING AMERICAN FARMLAND at 186.

<sup>89</sup> *Georgia Pacific Consumer Prods. V. Ratner*, 345 Ga. App. 434 (2018). See also *Jefferson County v. Wilmoth Family Properties, LLC*, Slip Copy (2021).

<sup>90</sup> *Id.*

<sup>91</sup> Grout & Ifft at 3.

<sup>92</sup> *Id.* at 6.

<sup>93</sup> *Id.* at 7.

### 10.03 IMPACT ON PROPERTY VALUES

Typically land markets treat farmland as a reserve for future development. In most instances, agricultural zoning is considered to be temporary or a “holding zone.” **APZ** can have a significant negative impact on property values within the agricultural zone, if the ability to develop land is constrained by large minimum lot sizes and restrictions on use.<sup>94</sup> Critics also argue that large-lot zoning has proven to be a way to create exclusive residential neighborhoods where landowners who can afford the price of land are able to build “estates” on ten acres or more of land, thus defeating the original intent of farmland protection.<sup>95</sup> Farmers may oppose **APZ** on those grounds, making it difficult to pass such provisions in rural jurisdictions.<sup>96</sup> Depending upon market factors, one would expect the institution of **APZ** to increase property values in areas not subject to such restrictive zoning, if development is redirected to those areas.

**PDR** programs should have no net impact on the values of affected properties, provided that the price paid for the restriction reflects fair market value. However, some critics of **PDR** programs claim that “grantors may receive ‘double compensation’ for the easement when the easement confers financial rewards and results in an increase in land value.”<sup>97</sup> Some programs use other mechanisms, such as point systems, to determine the price that will be paid for an agricultural easement.<sup>98</sup> One would also not expect an agricultural easement purchase program to have an effect on the value of property not placed in the program, although neighboring properties may increase in value where open space and environmental benefits are realized through a conservation easement placed on adjacent property.<sup>99</sup> However, to the extent that **PDR** programs are used as a strategic means of placing obstacles to development on other property, they could certainly have a negative effect on some property values. For example, the Montgomery County, Maryland, **PDR** program reportedly prefers and pays higher prices for farms located within one quarter mile of its urban growth boundary as a means of erecting “a legal and economic barrier to possible water and sewer extensions” to more outlying properties.<sup>100</sup> There is also an indication that if such preserved farms are removed from active agricultural use, the value of land surrounding such “estate” settings may increase.<sup>101</sup>

The extent to which **TDR** programs will impact property values depends on how they are implemented. Properties that have **TDRs** attached will sell for the underlying value of the land plus the value for the **TDR**. Theoretically, **TDR** compensates property owners for restrictions on their ability to develop land. However, if the market for development rights is depressed or non-existent, the **TDR** does not represent a viable option for recovering any lost development value. The success of a **TDR** program will depend on the market for the units constructed with the **TDRs** and that value, in turn, depends on there being meaningful development options in receiving areas.<sup>102</sup>

**Right-to-Farm Legislation** is considered by some to be an impairment of property rights of non-farmers because it constrains their ability to sue for damages caused by the effects of abutting farm operations on their property values. In a 1998 decision, the Iowa Supreme Court found that a right-to-farm law making farmers immune from nuisance suits effected an unconstitutional taking of property by effectively giving

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<sup>94</sup> Mark W. Cordes, *Fairness and Farmland Preservation: A Response to Professor Richardson*, 20 J. LAND USE & ENVTL. L. 371, 374 (Spring 2005); *see also* Cordes, 22 N. ILL. U. L. REV. at 435.

<sup>95</sup> *See* ROHAN § 56.02[1].

<sup>96</sup> SAVING AMERICAN FARMLAND at 50.

<sup>97</sup> Vinson at 280.

<sup>98</sup> SAVING AMERICAN FARMLAND at 98-100.

<sup>99</sup> Vinson at 281.

<sup>100</sup> SAVING AMERICAN FARMLAND at 92.

<sup>101</sup> SAVING AMERICAN FARMLAND at 230.

<sup>102</sup> Paster at 307.

farmers an easement over the property of others to conduct activity (noise, noxious odors) that would be considered a nuisance in the absence of the legislation.<sup>103</sup> In contrast, other courts have ruled that a challenged RTF law did not amount to a taking because it did not deprive the abutting property owners of all or substantially all economic or productive use of their land.<sup>104</sup> Some farmers, who may be equally as affected as their non-farming neighbors by a noxious agricultural operation nearby, also feel that right-to-farm laws act to take their property rights.<sup>105</sup>

#### **10.04 IMPACT ON DEVELOPMENT COSTS**

**Mitigation requirements** will increase development costs on lands converted from agriculture by causing the developer of those protected agricultural lands to commit to forego development rights on other land as a condition of development approval. The large lot sizes or low development densities that are typically required under **APZ** ordinances would be expected to increase the cost of development in those zones, and APZ ordinances may also include extraordinary setbacks and design requirements that could make development more costly. The complexity associated with some **TDR** programs can increase transaction costs associated with development involving TDRs.<sup>106</sup> The other farmland protection techniques discussed above would not necessarily be expected to have an impact on development costs. It would be expected that any higher development costs would be shifted back to the property owner through a reduction in the price a developer is willing to pay for the affected land.

#### **10.05 IMPACT ON AMOUNT AND PATTERNS OF LAND DEVELOPMENT**

**APZ, PDR, and TDR** as farmland protection techniques are specifically designed to limit the amount of development that takes place in land designated for agricultural use. Many urbanizing jurisdictions use these techniques in conjunction with other growth management techniques in implementing urban growth boundaries or directing growth away from farmlands and towards other areas. As discussed above, APZ has been shown to be effective in altering development patterns where the zoning was perceived as being relatively difficult to change. When adopted as part of a broader growth management plan, APZ is likely to direct development pressure towards more compact and dense housing development located closer to existing urban or suburban areas.<sup>107</sup> For example, the Farmland Protection Plan adopted by the Town of Milton, New York, recommended that the town reduce the permitted density in agricultural areas while increasing the allowable density around the existing town center.<sup>108</sup> The plan also urged the town to consider adopting a TDR program in conjunction with this “focused growth” strategy as a means of offsetting the proposed decrease in development density in agricultural land.<sup>109</sup>

Evidence also exists that some types of large-lot zoning result in increased sprawl by scattering development further from existing farmland.<sup>110</sup> An assessment of farmland protection efforts in Pennsylvania and Maryland notes that the standard measure of farmland protection success typically has been the number of acres preserved, which does not indicate whether farmland is being preserved in large

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<sup>103</sup> *Bormann v. Board of Supervisors in and for Kossoth County*, 584 N.W. 2d 309 (Iowa 1998) *cert denied*, 119 S. Ct. 1096 (1999).

<sup>104</sup> *See Himsel v. Himsel*, 122 N.E.3d 935, 947 (Ind. Ct. App. 2019).

<sup>105</sup> SAVING AMERICAN FARMLAND at 185.

<sup>106</sup> RICK PRUETZ, SAVED BY DEVELOPMENT at 58-59 (Arje Press, 1997).

<sup>107</sup> Cordes, 22 N. ILL. U. L. REV. at 440.

<sup>108</sup> *See Town of Milton (NY) Farmland Preservation Plan* at 29 (Behand Planning and Design, Feb. 2016).

<sup>109</sup> *See id.*

<sup>110</sup> Cordes, 22 N. ILL. U. L. REV. at 440.

contiguous blocks or in a scattered pattern.<sup>111</sup> Because scattered preserved farms are more vulnerable to adjacent non-farm development, the author recommends that counties, states, and land trusts conduct periodic GIS analyses to determine the extent to which their preservation efforts are creating large contiguous blocks of preserved farmland as opposed to scattered “islands” of preservation.<sup>112</sup>

## 10.06 IMPACT ON HOUSING AFFORDABILITY

To the extent that **APZ** or **PDR** limits the availability of land for residential development to levels below that needed to keep up with the demand for new housing, there is likely to be upward pressure on land costs and consequently housing prices.<sup>113</sup> This may be avoided by the community maintaining an adequate supply of appropriately zoned land for development.

## 10.07 RECOMMENDED TALKING POINTS: PROS AND CONS

### PROS:

- The farmland protection techniques described above can be successful in protecting agricultural lands from development, particularly when they are used in combination with one another.
- PDR in combination with APZ is thought to be particularly effective at protecting agricultural land from development pressures.<sup>114</sup>

### CONS:

- The effectiveness of farmland protection techniques at protecting farmland can have negative consequences from the standpoint of real estate interests. APZ, in particular, can result in drastic reduction in property values. Farmers themselves sometimes oppose APZ on that ground.<sup>115</sup>
- Placing permanent development restrictions on land currently used for agriculture through PDR or TDR can have unintended consequences for a region’s future development, if protected parcels are selected indiscriminately or, worse, used to block logical growth corridors.
- Large-lot zoning for the purpose of agricultural land preservation can promote sprawl by scattering development further from existing farmland.

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<sup>111</sup> Thomas L. Daniels, *Assessing the Performance of Farmland Preservation in America’s Farmland Preservation Heartland: A Policy Review*, 33 SOCIETY & NAT. RESOURCES 758, 765 (2020).

<sup>112</sup> *Id.*

<sup>113</sup> Cordes, 22 N. ILL. U. L. REV. at 442.

<sup>114</sup> See *Losing Ground* at 23 (stating: “Ideally, PDR will be used in combination with zoning to achieve both broad and deep results.”).

<sup>115</sup> SAVING AMERICAN FARMLAND at 50; Daniels at 421.

## 10.08 INCENTIVE-BASED ALTERNATIVES

PDR is an incentive based mechanism for protecting farmland in that it pays a property owner fair market development value to retain its land in agricultural use. Properly designed and implemented, TDR also can be an incentive-based mechanism. Other incentive-based mechanisms for the preservation of farmland include differential tax assessment for farmland so that it is taxed at the agricultural value of the land rather than the value of its “highest and best use,”<sup>116</sup> and “circuit-breaker” tax programs by which farmers receive tax credits that are often based on farm income and the state reimburses the local taxing authority for the lost revenue.<sup>117</sup> Vermont’s Land Use Value Appraisal Program, for example, taxes property based on its current use as agricultural or forest land, rather than its market-based development potential.<sup>118</sup> Agricultural district laws in many states allow farmers to receive various benefits by voluntarily forming areas within which commercial agriculture is protected and encouraged. Right-to-farm laws protect farmers from lawsuits based on impacts from farming operations as an incentive to remain in the farming business.

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<sup>116</sup> *Losing Ground* at 25.

<sup>117</sup> SAVING AMERICAN FARMLAND at 34-39.

<sup>118</sup> See Todd W. Daloz, *Farm Preservation: A Vermont Land-Use Perspective*, 12 VT. J. ENVTL. L. 427, 439 (2011) (citing Vt. Stat. Ann. tit. 32, §§ 3751-3776 (2008)).

## SECTION 11: CLUSTER ZONING AND PLANNED UNIT DEVELOPMENT

### 11.01 PURPOSE AND KEY TERMS

**Cluster zoning** and **planned unit development (PUD)** came into use during the 1960s as alternatives to traditional zoning. Traditional zoning treats each parcel of land in a community as a distinct unit, regardless of its size, based on the assumption that a different owner or builder will develop each parcel. That approach has the disadvantage of being too rigid and cumbersome when applied to large parcels of land, and in large-scale development it tends to discourage creativity and flexibility.<sup>1</sup>

Cluster zoning applies the concept of concentrating development on smaller lots in order to preserve larger open spaces.<sup>2</sup> It is defined as:

an innovative land use control device for grouping or “**clustering**” buildings to increase densities on some portions of the development area in order to open the remaining area to recreational or other purposes.<sup>3</sup>

It is also called “**open space**” or “**density**” zoning.<sup>4</sup>

Cluster zoning is designed to meet the need for community development while providing specific plans for the retention of open spaces and preservation of natural beauty. In residential development, it can make large open tracts of land available for use as either improved or undeveloped open space to replace the small private yard of traditional zoning, while keeping the overall population density of the development at the same level as traditional zoning.<sup>5</sup> Thus, cluster development groups residences to increase dwelling densities on specific portions of a development and leaves other portions free of dwellings.<sup>6</sup>

Although PUD and cluster development are similar, they are not identical. Cluster development is often an essential element of the broader concept of a PUD.<sup>7</sup> The simplest form of PUD, which may be termed a **cluster zoning** or **density transfer PUD**, maintains the overall density of a development, for example, by allowing an increase in the density of the housing in one part of the PUD in return for setting aside open space elsewhere in the development.<sup>8</sup>

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<sup>1</sup> 2 PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS, Ch. 12, Cluster Zoning and PUDs, §§ 12.01[1], 12.03[1] (Matthew Bender & Company, Inc. 2021) (hereinafter “ROHAN”).

<sup>2</sup> ROHAN § 12.01[3][a]; *see also* 2 AMERICAN LAND PLANNING LAW, Ch. 48 (Cluster Zoning) § 48.5 (Rev. ed. 2021).

<sup>3</sup> ROHAN § 12.01[3][a]; *see also* DONALD G. HAGMAN & JULIAN CONRAD JUERGENSMEYER, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW § 7.15 (2d ed. 1986) (hereinafter “HAGMAN & JUERGENSMEYER”) (defining cluster development as “a device for grouping dwellings to increase dwelling densities on some portions of the development area in order to have other portions free of buildings”).

<sup>4</sup> ROHAN § 12.01[3][a].

<sup>5</sup> ROHAN § 12.01[3][b].

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> DANIEL R. MANDELKER, LAND USE LAW § 9.25 (Matthew Bender & Company, Inc. 2021) (hereinafter “MANDELKER”).

PUDs have several purposes. They allow the flexible development of large parcels of land as a single unit with a mixture of buildings and land uses.<sup>9</sup> They accomplish these purposes by using varying lot sizes and integrating different structures and uses in ways that would be considered incompatible under traditional zoning principles.<sup>10</sup> The ability to mix structures with varying bulks and uses allows the developer to use aesthetics or site conditions, rather than a zoning map, as a basis for arranging areas of common open space and recreational facilities with different building types or land uses.<sup>11</sup> PUDs may also be viewed as a planning tool that allows planning policy considerations to be applied to a specific property proposed for development as a single entity with a mix of uses.<sup>12</sup>

The PUD combines elements of cluster zoning and subdivision platting,<sup>13</sup> and PUD regulations incorporate elements of zoning and subdivision controls.<sup>14</sup> Like a zoning ordinance, PUD regulations control land use, density, and site development. A PUD can also incorporate innovative planning techniques, such as form-based codes,<sup>15</sup> that do not exist under the applicable zoning regulations.<sup>16</sup> They also may include internal design and thoroughfare requirements, such as those contained in subdivision ordinances.<sup>17</sup>

A PUD has been defined in formal terms as:

an area of land, controlled by a landowner, to be developed as a single entity for a number of dwelling units, and commercial and industrial uses, if any, the plan for which does not correspond in lot size, bulk, or type of dwelling or commercial or industrial use, density, lot coverage and required open space to the regulations established in any one or more districts created, from time to time, under the provisions of a municipal zoning ordinance enacted pursuant to the conventional zoning enabling act of the state.<sup>18</sup>

Another way of expressing this concept is that a PUD is a mixed use development that is approved as an *integral unit* based on a plan for the overall development rather than through the application of typical use and dimensional regulations to individual parts of the development. One of the basic premises of the PUD is that planning is best done at the “community” or “neighborhood” level, rather than at the individual lot level. This results in applying prevailing density regulations to the project and parcel of

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<sup>9</sup> See *Kenwood Gardens Condos., Inc. v. Whalen Props., LLC*, 449 Md. 313, 326 (2015) (stating that a “PUD is a planning tool employed to allow increased flexibility in the land development process”).

<sup>10</sup> See, e.g., *Friends of McMillan Park v. District of Columbia Zoning Com’n*, 149 A.3d 1027 (D.C. Ct. App. 2016) (noting that the PUD process allows local zoning commission to “grant exceptions to otherwise applicable zoning regulations”).

<sup>11</sup> ROHAN § 12.01[4][b][ii].

<sup>12</sup> See *Kenwood Gardens Condos., Inc. v. Whalen Props., LLC*, 449 Md. 313, 327 (2015).

<sup>13</sup> HAGMAN & JUERGENSMEYER § 7.15.

<sup>14</sup> MANDELKER § 9.26.

<sup>15</sup> For a discussion of form-based codes, see Section 17 of this book.

<sup>16</sup> See Mary Madden & Joel Russell, *An Introduction to Form-Based Codes: The Emergence of Form-Based Codes*, PLANNERS WEB (Dec. 5, 2014) (noting that the “earliest modern form-based codes were developed by adapting the PUD process). See also Colton Wayne Sanders, *A Study of Regulation and Placemaking in Austin, Texas: Analysis of the Grove at Shoal Creek PUD Proposal* (Univ. Texas at Austin, August 2016) (discussing a proposal to incorporate form-based code into a 76-acre PUD in Austin, Texas).

<sup>17</sup> MANDELKER § 9.27.

<sup>18</sup> HAGMAN & JUERGENSMEYER § 7.15 (citing U.S. Advisory Commission on Intergovernmental Relations, ACIR State Legislative Program, 1970 Cumulative Supp. 31-36-11 at 5 (1969)).

land as a whole, rather than to each lot and component of the project.<sup>19</sup> In other words, a PUD allows “**density zoning**,” a concept that has been defined as follows:

This is “organic zoning for planned residential developments,” a new style of ordinance listing the large-scale development as a normal, permitted use, with its own standards just as traditional “Lot Zoning” established standards for the single building on the single lot. Density zoning is an outgrowth of planned unit development obtainable on a conditional use permit basis, but is distinguishable from it in that it treats large-scale developments as the normal thing, while the planned unit development obtainable on a conditional use permit basis considers them as exceptions requiring special handling.<sup>20</sup>

Without PUD, traditional zoning of a large scale planned development could require two or more zoning districts if the development includes a mix of uses, such as single-family and multi-family dwellings, or even ancillary commercial or service uses. This would make it impossible to implement a coordinated set of land use controls for the development.<sup>21</sup>

PUD regulations provide standards for the approval of a PUD plan in an administrative review process. A unit of local government can approve a PUD plan as an integrated set of land use controls that apply to an entire development. Unlike traditionally zoned areas, PUDs are not divided into districts—instead, conditions may vary from parcel to parcel.<sup>22</sup> Because the development is planned and reviewed in its entirety, a developer can achieve better site planning by varying lot sizes, setbacks, and other site development requirements.<sup>23</sup> In that regard, the PUD process can enable a landowner or developer to negotiate these and other aspects of the development with the municipality.<sup>24</sup> For example, the preservation of open space and natural areas in one part of a PUD development might be offset by higher densities in another part.<sup>25</sup> However, providing open space is not necessarily the primary objective, particularly in non-residential PUDs.<sup>26</sup> As an alternative to traditional zoning, a PUD’s primary advantage is its ability to provide for a mixture of uses. Depending upon whether there is a minimum or maximum acreage size for a PUD, it potentially can allow the development of an entire neighborhood or even town based upon a single approved plan.<sup>27</sup>

The PUD represented an early attempt—preceding approaches such as concurrency and adequacy of public facilities—to address the timing dimension of development.<sup>28</sup> Traditional zoning was historically unable to control development to keep pace with the growth of public facilities and services and to

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<sup>19</sup> RATHKOPF’S THE LAW OF ZONING AND PLANNING § 88.1 (4th ed., Thomson Reuters, June 2021 Update) (hereinafter “RATHKOPF”).

<sup>20</sup> ROHAN § 12.01[3][a], fn. 13 (internal citations omitted).

<sup>21</sup> MANDELKER § 9.25.

<sup>22</sup> HAGMAN & JUERGENSMEYER § 7.16, at 222-23.

<sup>23</sup> See *Kenwood Gardens Condos., Inc. v. Whalen Props., LLC*, 449 Md. 313, 326 (2015) (“The PUD concept has freed the developer from the inherent limitations of the lot-by-lot approach and thereby promoted the creation of well-planned communities.”) (citations omitted).

<sup>24</sup> See *Brookview Props., LLC v. Plainfield Plan Comm’n*, 2014 Ind. App. LEXIS 372 (noting that the PUD at issue contained a set of “commitments” that were negotiated and agreed to by the developer and the town).

<sup>25</sup> MANDELKER § 9.25.

<sup>26</sup> See RATHKOPF § 88.1 (stating that the “dominant, most frequently cited objective of PUD is flexibility”).

<sup>27</sup> HAGMAN & JUERGENSMEYER § 7.15.

<sup>28</sup> For a discussion of adequate public facilities and concurrency requirements, see Section 4 of this book.



restrict development from certain areas until others were built out. The site plan review process of PUD strengthened the control of local government over the pace and sequence of development.<sup>29</sup>

Property within a PUD usually is sold by the developer on either a common ownership basis or to individual owners in fee, subject to restrictive covenants on each owner's use of the land. These ownership forms are frequently mixed within a PUD. The owners are subsequently required to pay collectively for the maintenance of the PUD's common areas, such as recreational areas and, potentially, roads.

PUDs are generally established through a discretionary review and the authority to enact PUD ordinances can vary based on zoning enabling acts.<sup>30</sup> While some PUDs are planned and approved all at one time, others involve phasing. A phased PUD typically involves the approval of a conceptual plan for the entire property, showing overall circulation patterns, general locations and intensities of land uses, and a phasing plan for the project.<sup>31</sup> The developer then submits, and the local government reviews, more detailed development plans for each phase of the project, maintaining consistency with the overall PUD plan but filling in the details.<sup>32</sup>

## 11.02 EFFECTIVENESS IN ACHIEVING STATED PURPOSE(S)

The stated purpose of cluster development is straightforward. Clustering allows the grouping of buildings at higher densities on some portions of a development in order to keep the other portions clear of buildings. Cluster development results in the setting aside of land in its natural state, open space, or recreational areas wherever it is employed.

Cluster development forms the basis of the related technique known as **conservation subdivisions**. Conservation subdivisions use cluster development for the primary purpose of environmental protection by explicitly linking the built environment to the carrying capacity of the underlying land. Buildings and roads are placed at the locations on a parcel that are best suited to handle them, so the remaining areas can be preserved in their natural state. An example of this type of development is the 13,522 acre Galisteo Basin Preserve, a conservation development located southeast of Santa Fe, Mexico.<sup>33</sup> By clustering the planned 1,015 residential units into four conservation neighborhoods plus a mixed-use village, 96% of the land in the Galisteo Basin Preserve will be permanently preserved as open space.<sup>34</sup> Another example is the Jackson Meadow conservation community located west of St. Croix, Minnesota, a 145-acre development in which 60 residential lots are clustered on just 40 acres.<sup>35</sup>

When conventional cluster regulations limit the number of dwelling units to no more than what would otherwise be permitted in a standard subdivision, as is typical, developers have little incentive to use them. This is particularly the case when houses in cluster subdivisions sell for less than houses in

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<sup>29</sup> Fred P. Bosselman, "Alternatives to Urban Sprawl: Legal Guidelines for Government Action" at 233-34 (1968), cited in George Sternlieb, et al., *Planned Unit Development: Theoretical Origins, Evolutionary Framework* 33-34 (1972).

<sup>30</sup> Daniel R. Mandelker, *New Perspectives on Planned Unit Developments*, 52 REAL PROPERTY, TRUST AND ESTATE LAW JOURNAL 229 (American Bar Association, Fall 2017); see also Daniel R. Mandelker, *Making PUDs Work for You*, JOURNAL OF THE AMERICAN PLANNING ASSOCIATION (October 2018); and RATHKOPF § 88.2.

<sup>31</sup> See ROHAN § 12.01[4][a][i].

<sup>32</sup> See *id.*

<sup>33</sup> Edward T. McMahon, CONSERVATION COMMUNITIES: CREATING VALUE WITH NATURE, OPEN SPACE, AND AGRICULTURE at 134-147 (2010 Urban Land Institute) (hereinafter "CONSERVATION COMMUNITIES").

<sup>34</sup> See *id.*

<sup>35</sup> See *id.* at 174-183.

standard subdivisions. Consequently, many developers would prefer to build larger single-family homes in standard subdivisions, limiting the availability of choices in the stock of housing.

In light of those shortcomings and in an effort to increase the diversity of its housing stock, the Town of Lexington, Massachusetts enacted an “impact-incentive” cluster regulation. Essentially a form of performance zoning, Lexington’s regulation relates maximum allowed development to the development’s impacts, rather than its density as measured by dwelling units per unit of area. The total density of the development under the impact-incentive regulation may exceed the density available in a standard subdivision. In Lexington, smaller housing units with fewer bedrooms had lower impacts on traffic generation, occupancy, school-age children, site coverage, and impervious surface than larger single-family houses. Therefore, the regulation permits developers to build more smaller houses in an “impact incentive” development than the number of larger houses that would be allowed in a standard subdivision on the same parcel. Moreover, the regulation includes bonus provisions that permit more development when such development offers significant public benefits, such as historic preservation, provision of extraordinary amounts of open space, rental housing, affordable housing, and housing oriented to age groups that are not adequately served by standard subdivision housing. Lexington’s impact-incentive development is available by special permit with site plan review.<sup>36</sup>

### **11.03 IMPACT ON PROPERTY VALUES**

Data from Amherst and Concord, Massachusetts, show a higher appreciation rate for cluster development with open space than for residential properties with larger private yards but no protected open space.<sup>37</sup> A 2006 study of real estate transactions in the town of South Kingstown, Rhode Island, found that developed lots in conservation subdivisions carried additional value of 12% to 16% per acre and sold in about half the time compared to lots in conventional subdivisions.<sup>38</sup> The value of the open space tends to be capitalized into the value of the adjoining parcels.

The requirement of a fixed amount of open space in every cluster development or PUD may not bring added value to the parcel or to individual lots within the development where such developments are located near existing parks or community centers, or are located on parcels lacking in significant aesthetic or recreational value.<sup>39</sup>

### **11.04 IMPACT ON DEVELOPMENT COSTS**

Both a developer and a community can realize economic savings from the use of clustering. Compared to a conventional subdivision of equivalent property, a clustering plan can yield more open space and requires less infrastructure, including shorter and narrower streets, fewer sidewalks, curbs, and gutters, and less underground piping for water and sewers.<sup>40</sup> A case study that compared the impacts of a

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<sup>36</sup> Erica Levine Powers & Robert A. Bowyer, *Diversification of Housing Supply to Accommodate Smaller Households: Can Single and Multiple Households Exist in Suburban Settings?*, ZONING & PLANNING L. REP. at 81-92 (Nov. 2000).

<sup>37</sup> Jeff Lacy, *An Examination of Market Appreciation for Clustered Housing with Permanent Open Space* (1990).

<sup>38</sup> See Rayman Mohamed, *The Economics of Conservation Subdivisions: Price Premiums, Improvement Costs, and Absorption Rates*, 41 URBAN AFFAIRS REVIEW 376, 389-93 (January 2006) (hereinafter “*The Economics of Conservation Subdivisions*”).

<sup>39</sup> *Fees, Infrastructure Costs, and Density ... Their Impact Upon the Twin Cities Regional Growth Strategy & Life-Cycle Housing Goals*, at 16 (Builders Association of the Twin Cities & Center for Energy and Environment, 2000) (hereinafter “*Fees, Infrastructure Costs, and Density*”).

<sup>40</sup> See CONSERVATION COMMUNITIES at 31; see also John R. Nolon & Jessica Bacher, *Zoning and Land Use Planning*, 36 REAL ESTATE LAW JOURNAL 73, 85 (Summer 2007).

conventional subdivision containing 150 single-family detached houses on one acre lots with a medium density, mixed housing PUD containing 150 units found that the PUD development scenario resulted in 90% fewer acres being developed and 68% less new roadway being constructed.<sup>41</sup> Another model clustering plan yielded five times more open space, reduced the length of necessary streets by 10 percent, and reduced the total length of required sewer lines by 25 percent.<sup>42</sup> To illustrate these potential cost savings, the South Kingstown, Rhode Island, study found that lots in conservation subdivisions cost \$7,400 less to produce than lots in conventional subdivisions.<sup>43</sup> If a PUD ordinance allows developers to build at higher overall densities, development costs can be spread over a larger number of units.<sup>44</sup>

Although PUD can make use of clustering, it also can introduce a new element of cost. Because PUDs frequently include commonly owned facilities and space, complicated restrictions and covenants are necessary to manage the facilities and space. Indeed, the elaborate negative and affirmative restrictions, covenants, conditions, and easements are typically so extensive that an association or corporation must be established to administer the provisions.<sup>45</sup> Preparing the property interests and establishing the association or corporation add to the initial development costs, and operating the association or corporation creates an ongoing cost for the residents of PUDs. Further, the process to establish a PUD can be “length and cost prohibitive in some cases.”<sup>46</sup>

## 11.05 IMPACT ON AMOUNT AND PATTERNS OF LAND DEVELOPMENT

Cluster development and PUD do not necessarily alter the total amount of land developed, but rather affect the pattern in which it is developed. As discussed earlier, clustering increases building density in some areas of a development in order to make it possible to keep other areas open. With cluster development, an entire community can be built within a single zone, and density requirements regulate the relationship between residences and open areas to achieve a desirable balance.<sup>47</sup> However, oversight by the municipality is necessary to ensure that open space provided by developers in cluster arrangements is not unusable for any purpose.<sup>48</sup> For example, if all the area set aside as open space is swampland, it would not be very usable for active recreation. On the other hand, the cluster principle is admirably adapted for keeping open such areas as rocky outcrop, floodplains, and stream banks.<sup>49</sup> In a study of cluster zoning cases in Loudoun County, Virginia, the Loudoun County Preservation and Conservation Coalition determined that cluster development was less protective of farmland than rural hamlet zoning and that preserved land was not farmable.<sup>50</sup>

PUD has a broader range of impact on patterns of land development. It can fulfill the need for well-designed communities by improving population distribution and the range of housing options because it allows greater density in some areas of a development in return for greater open space elsewhere on the

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<sup>41</sup> *Evaluating the Fiscal Impacts of Development: Part II – Case Studies* at 54-59 (New Hampshire Office of Energy and Planning, June 2012) (Case Study #9 – Town of Weare).

<sup>42</sup> ROHAN § 12.01[4][b][iii] (citing *How Will America Grow?*, Citizens Advisory Committee on Environmental Quality 15 (Apr. 1976)).

<sup>43</sup> See *The Economics of Conservation Subdivisions* at 393.

<sup>44</sup> Municipal Research & Services Center, *Affordable Housing Techniques, Report No. 22* (Mar. 1992), available at <https://web.archive.org/web/20140406185548/http://www.mrsc.org/publications/textaht.aspx> (hereinafter “*Affordable Housing Techniques*”).

<sup>45</sup> HAGMAN & JUERGENSMEYER § 7.19.

<sup>46</sup> Susan Riggs, AICP, *Planned Unit Development Relaxation Report*: Bozeman, Montana (Dec. 2020).

<sup>47</sup> ROHAN § 12.01[4][b][i].

<sup>48</sup> NORMAN WILLIAMS, JR. & JOHN M. TAYLOR, 2 *AMERICAN LAND PLANNING LAW* § 48.5 (Thompson Reuters, July 2021 Update).

<sup>49</sup> See *id.*

<sup>50</sup> Loudoun County Preservation and Conservation Coalition, *Case Study: Cluster Subdivisions*, August 2019.

parcel.<sup>51</sup> The developer of a PUD can improve the land as an integral unit, with considerable flexibility, instead of being forced to build on a lot-by-lot basis with required setback and yard limitations. PUD also provides flexibility in the arrangement of uses, enabling land to be developed as a whole, rather than on a lot-by-lot basis, in an effort to apply more flexible land use controls and to permit diversification in the use of buildings and other site qualities.<sup>52</sup> Design flexibility permits the concentration of buildings on the portions of a site that are most suitable for building, resulting in a more environmentally sensitive development that preserves open space and natural features.<sup>53</sup>

Other impacts of PUD are more incidental to its basic nature. It can be used to overcome topographical problems. It allows a developer to capitalize on a region's unique characteristics and to sustain transition zones or uses.<sup>54</sup> When used to its fullest potential, the planned unit development can fulfill a variety of needs for the developer, the occupants of the PUD, and the community as a whole:

The ultimate goal of planned unit development is achieved when an entire self-contained community is permitted to be built within a zoning district, with the rules of density controlling not only the relation of private dwellings to open space, but also the relation of homes to commercial establishments and quasi-commercial establishments.<sup>55</sup>

## 11.06 IMPACT ON HOUSING AFFORDABILITY

Developments, including PUDs, that incorporate clustering have available a flexible land use concept for providing low- and moderate-income housing. The concept can combine higher density development with more traditional suburban aesthetics.<sup>56</sup> The most effective features of cluster development and PUD for encouraging affordable housing are the development cost economies that can be achieved through the clustering of buildings and the related savings in site development costs for items such as streets, sidewalks and utility lines. Reducing the amount of required infrastructure also helps reduce the costs of maintaining it.<sup>57</sup> Some jurisdictions allow for the provision of one or more affordable housing units, in addition to the number of market rate units allowed by the base zoning density, as an "incentive" for using a cluster rather than standard subdivision design.<sup>58</sup> The Maine legislature, for example, has expressly authorized municipalities to use cluster zoning and has encouraged them to use cluster zoning in conjunction with the development of affordable housing.<sup>59</sup>

On the other hand, developments in which land is set aside as open space other than a homeowner's backyard or a public park or recreational area require the creation of a homeowner's association to maintain the open space. Requiring entry-level homebuyers to pay a fee for the work of such an association adds a financial burden on those who are least able to pay for it.<sup>60</sup>

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<sup>51</sup> MANDELKER § 9.25; ROHAN § 12.01[4][b][iv].

<sup>52</sup> ROHAN § 12.01[4][b][ii].

<sup>53</sup> *Affordable Housing Techniques*.

<sup>54</sup> ROHAN § 12.01[1].

<sup>55</sup> RATHKOPF § 88.1 (quoting *Cheney v. Village 2 at New Hope, Inc.*, 429 Pa. 626, 241 A.2d 81 (1968)).

<sup>56</sup> ROHAN § 12.01[4][b][iv].

<sup>57</sup> *Affordable Housing Techniques*.

<sup>58</sup> Nolon & Bacher, 36 REAL ESTATE LAW JOURNAL at 85.

<sup>59</sup> Nolon & Bacher, 36 REAL ESTATE LAW JOURNAL at 92-93.

<sup>60</sup> *Fees, Infrastructure Costs, and Density*.

## 11.07 RECOMMENDED TALKING POINTS: PROS AND CONS

### PROS:

- PUDs allow a mixture of land use and building types within a single development.
- Both PUDs and cluster developments afford the flexibility to develop land as an integral unit.
- Both techniques provide a mechanism for preserving open space and natural areas.
- Cluster developments can result in developer savings on infrastructure costs.
- Open space preserved through these techniques can increase the value of adjacent property.

### CONS:

- PUDs and cluster developments may require a homeowners' association, with creation and maintenance costs, and with responsibility for open space and other common areas.
- Both techniques require greater attention to a development's planning and design, including discretionary reviews by municipal planning staffs, planning commissions, and legislative bodies, which can increase uncertainty in the development approval process.<sup>61</sup>

## 11.08 INCENTIVE-BASED ALTERNATIVES

In situations where cluster development is mandatory, as with conservation subdivisions, for example, a program for the **purchase of development rights (PDR)**<sup>62</sup> or for **transfer of development rights (TDR)**<sup>63</sup> offers an incentive-based alternative to the preservation of open space. Typically, however, PUD is not mandatory under land use regulations. Also, because the PUD has the potential to allow for a comprehensive approach to site plan issues and development impacts, individual incentive-based alternatives do not provide the comprehensiveness of PUD. Performance-based zoning and ordinances that allow for neo-traditional development probably represent the closest alternatives, whether regulatory or incentive-based, to PUD.

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<sup>61</sup> *Affordable Housing Techniques.*

<sup>62</sup> *See Sections 8 and 10 of this book.*

<sup>63</sup> *See Section 9 of this book.*

## SECTION 12: SUSTAINABLE DEVELOPMENT REQUIREMENTS

### 12.01 PURPOSE AND KEY TERMS

Building design and construction are major factors affecting energy consumption and environmental resources in the United States and globally. According to the U.S. Energy Information Administration, the residential and commercial buildings accounted for about 22% and 18% respectively—40% combined—of total U.S. energy consumption in 2020.<sup>1</sup> Buildings also account for a similar proportion of greenhouse gas emissions in the United States.<sup>2</sup>

#### Defining Sustainability, Sustainable Development, and Green Building

The most widely referenced general definition of “Sustainability” comes from a report of the United Nations World Commission on Environment and Development, which spoke in broad terms of sustainable global economic development as development that “meets the needs of the present without compromising the ability of future generations to meet their own needs.”<sup>3</sup>

The United Nations’ 2005 World Summit gave more definition to this broad concept, referring to three components of “Sustainable Development”—**economic development, social development, and environmental protection**—and declaring them to be “interdependent and mutually reinforcing pillars.”<sup>4</sup> It also declared that:

Poverty eradication, changing unsustainable patterns of production and consumption and protecting and managing the natural resource base of economic and social development are overarching objectives of and essential requirements for sustainable development.<sup>5</sup>

Within this broader context of intersecting economic, social, and environmental considerations, “green building” focuses on environmental protection and a healthy environment for humans. The U.S. Environmental Protection Agency (EPA) defines “green building” as:

the practice of creating structures and using processes that are environmentally responsible and resource-efficient throughout a building’s life-cycle from siting to design, construction, operation, maintenance, renovation and deconstruction.<sup>6</sup>

As used in this section, “Sustainable Development” includes the construction of buildings that utilize design and construction practices to reduce or eliminate negative impacts on the environment, and real estate development that incorporates such buildings into the surrounding area through the use of smart growth/ New Urbanist principles of urban design and connectivity.

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<sup>1</sup> See U.S. Energy Information Administration, How much energy is consumed in U.S. buildings? (last updated May 3, 2021) (available online at <https://www.eia.gov/tools/faqs/faq.php?id=86&t=1>).

<sup>2</sup> See Alliance to Save Energy (available online at <https://www.ase.org/categories/buildings>).

<sup>3</sup> *Report of the United Nations World Commission on Environment and Development: Our Common Future*, 20 March 1987, (available at: <https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf>) (hereinafter *Our Common Future*).

<sup>4</sup> United Nations General Assembly, *2005 World Summit Outcome* at 12 (Sept. 15, 2005).

<sup>5</sup> *Id.*

<sup>6</sup> EPA – Green Building, Basic Information (available online at <https://archive.epa.gov/greenbuilding/web/html/about.html>).

## The Emergence of Rating Systems

Concern over the environmental impact of conventional methods of building design and construction first began to surface with the global environmental movement in the late 1960s and 1970s.<sup>7</sup> Principally, this was a reaction to multiple worldwide energy shocks and the advent of several interrelated modern building technologies that came online in the post-war period, chief among them air conditioning, low-wattage fluorescent lighting, cheap structural steel, and reflective glass. These new technologies made it possible to construct the iconic International Style “glass box” commercial building along with the production of housing in the fast-growing U.S. Sunbelt and in other previously difficult to develop areas. The result was development divorced from local climate conditions and traditional building patterns and reliant on cheap energy-based inputs to make it workable, all at a level of dispersal and scale that was unprecedented.<sup>8</sup> As the environmental impacts of these emerging building construction and development practices became apparent and it became increasingly clear that they were not economically and environmentally sustainable over the long term, the stage was set for a new approach. In the mid-1980s, the report *Our Common Future* promulgated the first widely accepted definition of the new approach called “Sustainable Development.”

Even with more stable energy prices in the 1980s and 1990s, Sustainable Development continued to gather momentum as the scope of environmental worries widened and global climate change attributed to the release and atmospheric retention of greenhouse gases from carbon-based energy sources became a major concern. Further progress was made at the 1992 United Nations Conference on Environment and Development held in Rio de Janeiro. Following the Rio Summit, rating systems began to appear as the design and construction professions and public sector partners in developed countries in western Europe and the United States sought methods of measuring progress toward the goal of Sustainable Development. Examples of such systems internationally include BREEAM<sup>9</sup> from Great Britain, and Building Environmental Performance Assessment Criteria (BEPAC) from British Columbia, Canada, the first building rating system in North America.<sup>10</sup> Regional and local variants of note that have appeared in the last couple of decades include the Austin Energy Green Building System,<sup>11</sup> Built Green Colorado, and Green Built Texas (GBT) (based on Green Built North Texas). Four major rating systems available in the U.S. today are:

- *LEED Rating System*: The Leadership in Energy and Environmental Design or “LEED” system was developed by the U.S. Green Building Council (“USGBC”), which was formed in 1993 with the express goal of creating a new design and construction sustainability rating system. The system is intended to provide an aggressive but achievable leadership benchmark to encourage building design and construction practices that are more energy-efficient and protective of the environment than industry norms.<sup>12</sup> LEED is currently the most popular of the major rating systems. As of 2016, USGBC had more than 13,000 members in all fifty states and in more than 150 countries and territories.<sup>13</sup> It is discussed in more detail below.

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<sup>7</sup> *Id.*; see also Building Design & Construction, *White Paper on Sustainability: A Report on the Green Building Movement*, at 4 (November 2003) (hereinafter *Sustainability White Paper*).

<sup>8</sup> *Id.*

<sup>9</sup> Building Research Establishment (BRE) Environmental Assessment Method, <http://www.breeam.org/>

<sup>10</sup> Marshall Leslie, *History of Green Building Rating Systems in Canada* (2008).

<sup>11</sup> See <http://austinenergy.com/wps/portal/aegb/home/>. In 1992 Austin became the first jurisdiction to pass green building legislation. See Greg Franklin, *Baltimore City's Green Building Standards, Building Towards an Uncertain Future*, 4 U. BALT. J. LAND & DEV. 85, 89 (2014).

<sup>12</sup> *Sustainability White Paper* at 7.

<sup>13</sup> Patrick Kain, *Improving Green Building: Comparing LEED Certification to the FDA and Its Private, Third-Party Ratings Approach*, 5 AM. U. BUS. L. REV. 291, 295 (2016).

- *Green Globes*: Developed by the Green Building Initiative (“GBI”) and launched in the U.S. in 2004, the Green Globes Building Certification system was initially developed in Canada and is based on the British BREEAM system. GBI is a consortium of organizations led by the Building Owners and Managers Association. Green Globes is based on online questionnaires in categories including: project management; policies and practices; site; energy; water; resources, building materials, and solid waste; emissions and effluents; and indoor environment. Assessments must be verified by a third party to receive a Green Globes rating, which range from one to four Globes based on the number of total points achieved. Green Globes has been designated as a standards developer by the American National Standards Institute (“ANSI.” In 2010, GBI completed the ANSI process to adopt ANSI/GBI 01-2010: Green Building Assessment Protocol for Commercial Buildings.<sup>14</sup>
- *ENERGY STAR*: Developed by the U.S. Environmental Protection Agency and the Department of Energy, this program focuses principally on energy efficiency. Projects that perform in the top 25 percent of U.S. buildings are eligible to earn an ENERGY STAR label.<sup>15</sup> Once construction is completed and the building has operated long enough to accumulate one year of utility data, the owner can go online to ENERGY STAR’s Portfolio Manager,<sup>16</sup> submit the required data and, if the energy performance meets requirements, apply for an ENERGY STAR label. Commissioning and other consulting fees may be incurred. As will be discussed in this section, ENERGY STAR has been adapted to local conditions in a multiplicity of jurisdictions.
- *NAHB Green Scoring Tool and Green Building Certification*: First published in 2005, the National Association of Homebuilders Model Green Home Building Guidelines were written by a group of builders, researchers, environmental experts, and designers to provide guidance for builders engaged or interested in green building products and practices for residential design, development, and construction. The Guidelines were also written to serve as a “baseline” so that NAHB members could easily develop local green building programs. NAHB’s existing Green Scoring Tool and Green Building Certification programs are based on the Guidelines. In 2007, NAHB, in conjunction with the International Code Council (ICC), developed the ICC 700 National Green Building Standard™ for single- and multi-family homes, residential remodeling projects, and site development projects. The rating system received approval from the American National Standards Institute (ANSI). The NAHB Research Center provides certification of projects at four threshold levels: Bronze, Silver, Gold, and Emerald.

## **The LEED Rating System**

LEED® is the most commonly used and referenced rating system for Sustainable Development in the United States. The LEED Green Building System for new construction (or “LEED-NC”) appeared in its initial pilot format in 1998. LEED-NC 1.0 – the first “live” version – was released in 2000.

LEED-NC and all of the subsequent LEED products focusing on ratings for construction and renovation of individual buildings follow the same basic pattern. Projects seeking the LEED stamp of approval are registered with USGBC for certification. These projects are then rated by USGBC on a points-based

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<sup>14</sup> GBI, *A Brief History of GBI and Green Globes®*, <https://www.thegbi.org/about-gbi/>.

<sup>15</sup> See Karen Palmer & Margaret Walls, *Can Benchmarking and Disclosure Laws Provide Incentives for Energy Efficiency Improvements in Buildings?* at 8 (March 2015) (available online at: <https://media.rff.org/archive/files/sharepoint/WorkImages/Download/RFF-DP-15-09.pdf>).

<sup>16</sup> Industrial and manufacturing buildings need to enter data into a plan “energy performance indicator” as opposed to Portfolio Manager.



system that covers various categories. For example, under LEED v4.1<sup>17</sup> for Building Design & Construction (updated from LEED v4), the nine categories of credits are:

- Integrative Process;
- Location and Transportation;
- Sustainable Sites;
- Water Efficiency;
- Energy and Atmosphere;
- Materials and Resources;
- Indoor Environmental Quality; and
- Innovation and Regional Priority.<sup>18</sup>

Example design elements or strategies that may be employed to make a building “greener” and earn points under these various categories include:

| LEED Rating Categories              | Examples   |
|-------------------------------------|--|
| <b>Sustainable Sites</b>            | Erosion, sediment, and stormwater runoff control   |
|                                     | Access to public transportation  |
|                                     | Reduced parking or installation of electric vehicle infrastructure, providing no off-street parking, providing carshare parking, or unbundling parking |
| <b>Water Efficiency</b>             | Water-efficient landscaping  |
|                                     | Water-efficient (low-flow) fixtures  |
| <b>Energy and Atmosphere</b>        | Passive or active solar heating and cooling  |
|                                     | Solar energy, wind power, hydropower, or other renewable energy  |
| <b>Materials and Resources</b>      | Recycled-content building materials  |
|                                     | Reduced construction waste   |
| <b>Indoor Environmental Quality</b> | Daylighting  |
|                                     | Low-emitting paints, carpets, sealants, or other materials   |

The LEED rating systems are point-based systems. Each category contains a specific number of credits and each credit carries one or more possible points. In addition, each category contains one or more prerequisites, which must be met in order to achieve any level of certification. The LEED-NC rating system, and the majority of other rating systems in the LEED “suite,” are based on a 100-point system for the major categories, with 10 additional points being available for Innovation in Design and Regional Priority Credits. A project that earns enough points (40-49) can become “LEED Certified,” and projects that go further can achieve ratings of Silver (50-59 points earned), Gold (60-79 points), or Platinum (80 or more points).<sup>19</sup>

<sup>17</sup> In April 2019 the USGBC adopted LEED v4.1. See Sarah Stanley, *U.S. Green Building Council Launches LEED v4.1 for City, Community and Residential Projects* (April 2, 2019).

<sup>18</sup> See USGBC, LEED v4 to LEED v4.1 Credit Changes (Building Design + Construction), <https://www.usgbc.org/sites/default/files/CreditMappingBDC.pdf>.

<sup>19</sup> Brendan Owens, et al, *LEED v4, Impact Category and Point Allocation Development Process*, at 3, <https://www.usgbc.org/resources/leed-v4-impact-category-and-point-allocation-process-overview>; see also *LEED v4.1 BD+C Scorecard*, <https://www.usgbc.org/resources/leed-v41-bdc-scorecard>.

The growth in the LEED program and the spread of the Sustainable Development concept in the years since the LEED-NC pilot program debuted has been remarkable. There are now eight major categories of LEED rating systems, and each system includes multiple sub-rating systems:

- **LEED for Building Design and Construction (LEED-BD+C)** – applies to new construction, or major renovations. Categories within LEED-BD+C include core and shell development, schools, retail, healthcare, data centers, hospitality, warehouses and distribution centers;
- **LEED for Interior Design and Construction (LEED-ID+C)** – applies to complete interior fit-outs. Categories within LEED-ID+C include of commercial, retail, and hospitality projects;
- **LEED for Buildings Operations and Maintenance (LEED-O+M)** – applies to existing buildings that have been fully operational for at least one year. Categories within LEED-O+M include data centers, warehouses and distribution centers, hospitality, schools, and retail;
- **LEED for Neighborhood Development (LEED-ND)** – applies to planning or construction of development or redevelopment projects, including residential, nonresidential, and mixed-use projects, either completed or in conceptual planning or master planning phases, or under construction;
- **LEED for Homes** – Applies to single family homes, low-rise multi-family (one to three stories) or mid-rise multi-family (four to six stories);
- **LEED for Cities and Communities** – These are city-wide standards that can measure and manage a city’s water consumption, energy use, waste, transportation and human experience;
- **LEED Recertification** – This category applies to all occupied and in-use projects that have previously achieved certification under LEED;
- **LEED Zero** – This category is for projects with net zero goals in carbon and/or resources.<sup>20</sup>

## Sustainable Development Market Penetration

In September 2021, the USGBC announced that it had reached the following LEED milestones:

- More than one billion square feet of recertified LEED space;
- Nearly 24 billion square feet LEED registered and certified;
- 110,000 projects participating in LEED; and
- More than 610 million square feet of LEED certified residential space.<sup>21</sup>

USGBC reports that there are several factors driving the dramatic green building market growth, including mandates and policies and even the recent economic recession, which resulted in green construction increasing in both absolute dollars and as a percentage of overall construction activity.

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<sup>20</sup> Forestell, Kevin, *LEED Certification Levels Explained*, <https://dozr.com/blog/leed-certification-levels> (November 18, 2020); see also USGBC, *A LEED For Every Project*, <https://www.usgbc.org/leed>.

<sup>21</sup> Deisy Verdinez, *More than One Billion Square Feet of Green Building Space Recertified under LEED* (USGBC, Sept. 21, 2021) (available online at <https://www.usgbc.org/articles/more-one-billion-square-feet-green-building-space-recertified-under-leed>).

The demand for sustainable, green design and building features appears to be substantial and poised for even greater growth. According to a survey of home builders and remodelers done on behalf of the National Association of Home Builders (NAHB), in 2018 more than one-third of single-family builders reported building more than 50% of their homes green, including 21% who reported doing 90% or more of their projects green.<sup>22</sup> A similar study projects that the availability and affordability of green products will continue to drive growth in the single-family green building trend, with 44% of builders expecting to build more than 60% of their home projects green by 2022.<sup>23</sup> The study’s recent findings reinforce this continued growth, with new homeowner feedback showing a desire and expectation that new homes be high-performing, particularly when it comes to energy conservation. Most builders recognize that they need to be at least conversant in green to stay competitive.<sup>24</sup>

### General Benefits of Sustainable Development

According to the U.S. Environmental Protection Agency (EPA), in 2016 buildings in the United States accounted for:

- 39 percent of total energy use;
- 12 percent of the total water consumption;
- 68 percent of total electricity consumption; and
- 38 percent of the carbon dioxide emissions.<sup>25</sup>

Looking strictly at energy/environmental impacts, one study estimated that LEED-certified buildings provided substantial benefits over conventional construction:<sup>26</sup>

| LEED Rating | Anticipated Energy/Environmental Impact (Energy, Water, Land Improvements, etc.) |
|-------------|--|
| Certified   | 30% improvement  |
| Silver      | 40% improvement  |
| Gold        | 50% improvement  |
| Platinum    | 70%+ improvement   |

At a broader level, the EPA touts the following benefits of sustainable or “green” building design and construction:<sup>27</sup>

#### *Environmental Benefits*

- Enhances and protects biodiversity and ecosystems

<sup>22</sup> SmartMarket Brief: Green Single Family and Multifamily Homes 2020 (Dodge Data & Analytics, 2020, Sponsored by NAHB) (<https://www.nahb.org/-/media/NAHB/advocacy/docs/industry-issues/sustainability/green-homes-smart-market-brief-2020.pdf>).

<sup>23</sup> Laquidara-Carr, *Green Home Building Takes Hold for Single and Multifamily Markets*, <https://www.construction.com/dodge-newsletters/green-home-building-takes-hold-for-single-and-multifamily-markets>.

<sup>24</sup> *Id.*

<sup>25</sup> Green Building, “Why Build Green?” (EPA, 2016) <https://archive.epa.gov/greenbuilding/web/html/whybuild.html> (hereinafter, Why Build Green).

<sup>26</sup> *Sustainability White Paper* at 8.

<sup>27</sup> Why Build Green.

- Improves air and water quality
- Reduces waste streams
- Conserves and restores natural resources

#### *Economic Benefits*

- Reduces operating costs
- Creates, expands, and shapes markets for green products and services
- Improves occupant productivity
- Optimizes life-cycle economic performance

#### *Social Benefits*

- Enhances occupant comfort and health
- Heightens aesthetic qualities
- Minimizes strain on local infrastructure
- Improves overall quality of life

These benefits have been proven through various studies, including several economic and environmental performance studies.<sup>28</sup> For example, a Department of Energy review of 22 LEED certified buildings managed by the General Services Administration found that CO<sub>2</sub> emissions were 34% lower, energy and water consumption were reduced by 25% and 11% respectively, and more than 80 million tons of waste was diverted from landfills.<sup>29</sup> Green buildings also reduce day-to-day costs year-over-year, with LEED buildings reportedly having almost 20% lower maintenance costs than typical commercial buildings, and green building retrofits typically decreasing operation costs by almost 10% in just one year.<sup>30</sup>

Since residential and commercial buildings account for approximately 37% of all greenhouse gases, green buildings are increasingly seen as a means to help address climate change, in terms of both mitigation and adaptation.<sup>31</sup> LEED v4.1 recognizes the link between green building and climate mitigation by incorporating greenhouse gas (GHG) emissions as a metric for building energy performance.<sup>32</sup> One Berkeley University study found that “by building to the LEED system, buildings contributed 50 percent fewer GHGs than conventionally constructed buildings due to water consumption, 48 percent fewer GHGs due to solid waste, and 5 percent fewer GHGs due to transportation.”<sup>33</sup>

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<sup>28</sup> See USGBC, *Green Building Facts*.

<sup>29</sup> Benefits of Green Building, USGBC Press Release <https://www.usgbc.org/press/benefits-of-green-building>

<sup>30</sup> *Id.*

<sup>31</sup> Larissa Larsen et. al., *Green Building and Climate Resilience: Understanding Impacts and Preparing for Changing Conditions*, Univ. Michigan and USGBC, pp. 1, 8 (2011), <http://www.usgbc.org/sites/default/files/GreenBuildingClimResil.pdf>; see also Nora Knox, *Green Building and Climate Change*, USGBC (March 4, 2015); <http://www.usgbc.org/articles/green-building-and-climate-change>; Sarah J. Adams-Schoen, *Sink or Swim: In Search of a Model for Coastal City Climate Resilience*, 40 COLUM. J. ENVTL. L. 433 (2015); Megan M. Susman, *Using Smart Growth to Adapt to Climate Change*, ZONING PRACTICE (Feb. 2017).

<sup>32</sup> USGBC, *LEED v4.1 Building Design and Construction, Getting Started Guide for Beta Participants* (April 2021).

<sup>33</sup> *Id.*

## 12.02 EFFECTIVENESS IN ACHIEVING STATED PURPOSE(S)

Despite the reports and statistics noted above, the LEED rating system has been criticized by some as not actually resulting in more energy efficient buildings, at least in certain locations.<sup>34</sup> Nevertheless, with the advent of the full suite of LEED rating system products and their incorporation into discussions of “best practices” in the design and construction industry, local governments have begun to tie development approvals to buildings achieving certification based on one or more of these products or on the concept of Sustainable Development or “Green Building” generally.<sup>35</sup> “According to the United States Green Building Council, as of October 21, 2010, 442 localities had adopted some form of green building legislation, ordinance, resolution or policy.”<sup>36</sup> In response to growing concerns regarding climate change, there has been a significant rise in local regulations—generally in the form of building code requirements or legislation incorporating LEED or an alternative Sustainable Development rating system.<sup>37</sup> This rise in popularity as a *regulatory* tool is all the more dramatic when one recalls that LEED was intended as an aspirational *leadership* standard, and not as a mandated baseline for all projects. This subsection reviews the stated purposes, operative provisions, and effectiveness of the reported mandatory<sup>38</sup> sustainable development programs currently adopted in the U.S.:

**Babylon, New York:** Babylon, a township of over 200,000 residents on New York’s Long Island, adopted both residential and commercial building Sustainable Development requirements in 2006:

### Residential Buildings:

*Purposes:* The ordinance states that it is intended to protect the general health, safety, and welfare of town residents by requiring that single-family dwellings “achieve minimum energy conservation performance, as verified through diagnostic testing conducted by independent, certified professional raters, thus ensuring that the dwellings will use considerably less energy than if built to prevailing building standards. Compliance with this section shall be required in addition to compliance with current standards outlined in the Energy Conservation Construction Code of the State of New York (the Energy Code).”<sup>39</sup>

*Provisions:* All new single-family dwellings must be built to achieve minimum energy conservation performance by achieving a rating of 70 or less on the Home Energy Rating System (HERS) Index as defined in the 2006 Mortgage Industry National Home Energy Rating System Standards promulgated by the Residential Energy Services Network (RESNET). Dwellings must also include a tamper-resistant,

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<sup>34</sup> See, e.g., Anastasia Swearingen, *Mis-LEED-ing Green Buildings*, USA TODAY (Mar. 12, 2014), <http://www.usatoday.com/story/opinion/2014/03/09/environment-carbon-climate-change-pollution-column/6027923/>; Sarah Hurtubise, *DC’s Green-Approved Buildings Using More Energy*, DAILY CALLER (Mar. 2, 2014), <http://dailycaller.com/2014/03/02/report-dcs-green-approved-buildings-using-more-energy/> (discussing recent report by the Environmental Policy Alliance suggesting that Washington, DC’s certified green buildings are using more energy than non-certified buildings).

<sup>35</sup> Jerry Yudelson, *GREEN BUILDING A TO Z: UNDERSTANDING THE LANGUAGE OF GREEN BUILDING* at 92 (New Society Publishers 2007) (hereinafter *GREEN BUILDING A TO Z*).

<sup>36</sup> JOHN J. DELANEY, *HANDLING THE LAND USE CASE* § 42:5, n.2 (3d ed. 2017) (hereinafter, Delaney); see also Ngai Pindell, Leg. Guide to Affordable Housing Dev. § 2.IV, *Environmental Planning and Review of Affordable Housing Development*, at p. 5 n.155 (2011).

<sup>37</sup> See Delaney § 42:5.

<sup>38</sup> For a review of voluntary green building programs, see Marisa Romero, *A Review of Municipal Ordinances for Sustainable Development* (Submitted to Univ. Florida School of Natural Resources & Environment, Program for Resource Efficient Communities) at 48-49, available at [http://www.myfloridagreenbuilding.info/pdf/review\\_municipal\\_ord.pdf](http://www.myfloridagreenbuilding.info/pdf/review_municipal_ord.pdf) (2006).

<sup>39</sup> Babylon (NY) Town Code, Chapter 89, Section 79 (2011).

automatically controlled mechanical ventilation system and comply with combustion safety testing standards.<sup>40</sup>

### Commercial Buildings:

*Purposes:* The ordinance states that it is intended to provide owners and occupants of covered buildings with “the economic benefits of energy and water savings, good indoor quality, and healthy, pleasant and productive surroundings.” A further intent is described as benefiting “the community by having buildings constructed that are resource-efficient and conserve energy.”<sup>41</sup>

*Provisions:* LEED certification is required for any new construction of commercial buildings, office buildings, industrial buildings, and multi-family residences (unrestricted or senior citizen) of 4,000 or more square feet.<sup>42</sup> The regulation, adopted as part of the Town’s Building Construction Code, expressly adopts LEED-NC, Version 2.2, and “further, automatically adopts any future versions promulgated by the USGBC.”<sup>43</sup> However, a project proponent subject to the requirement can submit “the local variant of a green building project checklist acceptable to the [Town] Commissioner of Planning and Development or his/her designee.”<sup>44</sup> A fee of \$0.03 per square foot of the project (up to a maximum of \$15,000) is required for the Town’s Green Building Fund. Upon achieving LEED-certified status, the proponent is refunded the amount of this fee.<sup>45</sup>

*Effectiveness:* The USGBC’s project database indicates that there are five LEED-certified projects in the Town, with four other projects having registered for certification.<sup>46</sup> It is notable that, subsequent to the adoption of the ordinance, the Town, with the assistance of ICLEI, performed an assessment of greenhouse gas emissions and determined that the existing buildings in the Town were the largest source of emissions.<sup>47</sup> The Town subsequently created a retrofit financing program to target the reduction of greenhouse gas from existing buildings, including single family homes.<sup>48</sup> By April 2009, 98 homes had been retrofitted or were lined up to be retrofitted, resulting in a 30% reduction in air flow, an estimated reduction of 5-10 pounds of daily carbon emissions per home, and average homeowner savings of about \$984 annually.<sup>49</sup> The program has since celebrated the completion of its 600th home, reaching 1% of all single-family homes in Babylon.<sup>50</sup>

**Boston, Massachusetts:** In January 2007, Boston inserted Article 37 “Green Buildings” into its zoning ordinance, becoming the first major U.S. city to amend its zoning code to incorporate a green building program.<sup>51</sup>

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<sup>40</sup> *Id.* § 89-79(A)-(C).

<sup>41</sup> *Id.* § 89-83.

<sup>42</sup> *Id.* § 89-85.

<sup>43</sup> *Id.* § 89-84.

<sup>44</sup> *Id.* § 89-86(A).

<sup>45</sup> *Id.* § 89-86(B).

<sup>46</sup> USGBC’s searchable LEED project database is available at <http://www.usgbc.org/projects?clearsmarf=true>.

<sup>47</sup> ICLEI Local Governments for Sustainability, *Municipal Clean Energy Toolkit – Case Study: Long Island Green Homes Program in Babylon, New York*.

<sup>48</sup> *Id.*; see also Long Island Green Homes program at <http://ligreenhomes.com>.

<sup>49</sup> ICLEI, *Long Island Green Homes Program in Babylon, New York*, [https://seors.unfccc.int/applications/seors/attachments/get\\_attachment?code=4HQ7FP9M1TM9B8I5H9JVS8NN70P6RZ1U](https://seors.unfccc.int/applications/seors/attachments/get_attachment?code=4HQ7FP9M1TM9B8I5H9JVS8NN70P6RZ1U).

<sup>50</sup> Long Island Green Homes Program Update, [https://ligreenhomes.com/blog/item/ligh\\_hits\\_1.html](https://ligreenhomes.com/blog/item/ligh_hits_1.html).

<sup>51</sup> See Boston Zoning Code, Article 37 available at [https://library.municode.com/ma/boston/codes/redevelopment\\_authority?nodeId=ART37GRBU](https://library.municode.com/ma/boston/codes/redevelopment_authority?nodeId=ART37GRBU).

*Stated Purposes:* The stated purpose of Boston’s Green Buildings Code is “to ensure that major building projects are planned, designed, constructed, and managed to minimize adverse environmental impacts; to conserve natural resources; to promote sustainable development; and to enhance the quality of life in Boston.”

*Key Provisions:* Starting in January 2007, new developments or major renovation projects subject to Large Project Review under Article 80B of the Boston Zoning Code – which generally applies to projects constructing or adding 50,000 square feet or more of gross floor area or rehabilitating/renovating 100,000 square feet or more of gross floor area – are required to demonstrate green building compliance.<sup>52</sup> Compliance is based on a project’s being “LEED Certifiable” (i.e., reaching at least the “LEED Certified” level) under “the LEED building rating system most appropriate” for the proposed project,<sup>53</sup> but does not require that the buildings actually become LEED-certified.<sup>54</sup> Up to four of the required credits may be obtained by fulfilling specially designated Boston Green Building Credits in four categories:

- Modern Grid: Use of distributed generation/combined heat and power in areas determined to have power capacity distribution load constraints.
- Historic Preservation: Historic renovation of an existing structure.
- Groundwater Recharge: Proposed projects in areas subject to the City’s existing Groundwater Conservation Overlay District can earn this credit by providing 50% more recharge than required by the provisions of that district. Proposed projects in areas outside of the overlay district can earn this credit by capturing not less than one inch of rainwater across the entire site area covered by the proposed project.
- Modern Mobility: Principally, implementation of transportation demand management (TDM) measures including such actions as transit system pass subsidies, reduced parking ratios or parking cash out programs, on-site bicycle storage and showers, preferential parking for carpools and alternative fuel/low emission vehicles, and on-site car rental services. These measures are presented as menu options depending on the uses of the proposed project (residential, educational/medical institutions, office/retail, hotels, and mixed use projects).<sup>55</sup>

*Effectiveness:* During the initial roll out of the program, the City’s review agency, the Boston Redevelopment Authority (the “BRA”), found it necessary to conduct significant staff training to allow for adequate processing of the applications. Since then, however, the program has been generally well integrated into the City’s project review. Applicants submit documentation during the review on how projects will meet the standards. Developers and architects report that the program has been effective and well-received, and some LEED accredited architects believe that program requirements in conjunction with other regulatory requirements, provide sufficient incentives to convince developers to pursue LEED certification.<sup>56</sup>

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<sup>52</sup> Boston Zoning Code, Article 37.

<sup>53</sup> *Id.* §§ 37-2.4, 37-4.

<sup>54</sup> Sandy J. Beauregard, *Greening the Building Code: an Analysis of Large Project Review under Boston Zoning Code Articles 37 and 80*, at p. v (2013).

<sup>55</sup> *Id.* at Appendix A.

<sup>56</sup> Sandy J. Beauregard, *Greening the Building Code: An Analysis of Large Project Review under Boston Zoning Code Articles 37 and 80*, at 47-50, 72 (2013).



**Dallas, Texas:** Dallas' green building program is administered through Chapter 52 of the Dallas City Code.<sup>57</sup> Dallas also adopted a 2015 Green Building Ordinance, effective March 1, 2017, which provides green building standards for both new residential and commercial buildings.<sup>58</sup> The 2015 update adopted certain changes to the 2015 Edition of the International Green Construction Code.<sup>59</sup>

*Stated Purpose:* The stated purposes of Dallas's green building program are "to reduce the use of natural resources, create healthier and more sustainable living environments, and minimize the negative environmental impacts of development in Dallas and the North Texas region."<sup>60</sup>

*Key Provisions:* The citywide green building program requires that any proposed project must:

- Comply with the minimum requirements of the Dallas Green Construction Code;
- Be LEED-certifiable;
- Be Green Built Texas-certifiable; or
- Be certifiable under an equivalent green building standard.<sup>61</sup>

*Effectiveness:* USGBC has reported that through its Green Building Program, Dallas has 892 projects that are LEED-certified or seeking certification.<sup>62</sup> As of September 1, 2011, the City began to accept third party plan review and inspection results for the program. The use of a third party certifier is one way in which a local government can ensure that a proper review is provided without relying on additional staff. However, this approach results in additional costs for property owners and can lead to issues of uniformity in assessments.

**Washington, D.C.:** The D.C. Council's Green Building Act of 2006 committed the City to a gradual phase-in of green building requirements over a five-year period. Since January 2012, all new private development projects 50,000 square feet or larger have been required to meet LEED certification at the "Certified" level or higher.<sup>63</sup>

*Stated Purpose:* The stated purpose of the District's Green Building Act is to "establish high-performance building standards that require the planning, design, construction, operation and maintenance of building projects to establish a green building incentives program that includes an expedited construction documents review program."<sup>64</sup>

*Key Provisions:* In the initial period, from October 1, 2007, only publicly-owned and -financed buildings and tenant improvements (both residential and non-residential) in excess of 10,000 square feet were

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<sup>57</sup> Dallas City Code, Chapter 52, subchapter 10, available at [https://dallascityhall.com/departments/sustainabledevelopment/buildinginspection/DCH%20documents/pdf/BI\\_Chapter%2052\\_Amendments\\_03-01-2017.pdf](https://dallascityhall.com/departments/sustainabledevelopment/buildinginspection/DCH%20documents/pdf/BI_Chapter%2052_Amendments_03-01-2017.pdf).

<sup>58</sup> City of Dallas, Building Inspection, Sustainable Development and Construction, Green Building, <http://dallascityhall.com/departments/sustainabledevelopment/buildinginspection/pages/greenBuilding.aspx>.

<sup>59</sup> Dallas Ordinance Number 30327 (Dec. 19, 2016), [http://dallascityhall.com/departments/sustainabledevelopment/buildinginspection/DCH%20documents/pdf/BI\\_2015%20Dallas%20Green%20Construction%20Code.pdf](http://dallascityhall.com/departments/sustainabledevelopment/buildinginspection/DCH%20documents/pdf/BI_2015%20Dallas%20Green%20Construction%20Code.pdf). Ordinance Number 30327 amended Dallas City Code, Chapter 61.

<sup>60</sup> Dallas City Code § 1001.1.

<sup>61</sup> Dallas City Code § 1001.3.2.

<sup>62</sup> Brandon Baker, Dallas Strengthens Green Building Code, *EcoWatch* (Oct. 2013).

<sup>63</sup> District of Columbia, Department of Energy & Environment (Oct. 11, 2011) <https://doe.dc.gov/publication/green-building-act-2006>.

<sup>64</sup> District of Columbia Green Building Act of 2006, Preamble.



required to meet either ENERGY STAR, LEED (at the silver level), or Green Communities 2006 standards.<sup>65</sup> Starting on January 1, 2009, all new construction or substantial improvements for non-residential privately owned projects of 50,000 or more square feet in gross floor area were required to submit a green building checklist, and be required to meet LEED-NC 2.2 or LEED-CS 2.0 certification standards within two years of issuance of a certificate of occupancy.<sup>66</sup> Finally, starting on January 1, 2012, all such structures are required to meet the minimum LEED standards upon building permit application submittal.<sup>67</sup> The statute is fairly unique in its requirement, in effect as of January 1, 2012, that performance bonds be submitted by all covered projects in order to secure the certification requirement. The amount of the bonds will be based on a percentage of project cost: 2% of total cost for projects up to 150,000 square feet of gross floor area; 3% for projects from 150,001 to 250,000 square feet of gross floor area; and 4% for projects of greater than 250,000 square feet of gross floor area, up to a maximum bond amount of \$3 million. If the project covered by the bond fails to meet its certification requirements, the bond is forfeited to the District and paid into a new Green Building Fund to be used to provide incentives for new green buildings.<sup>68</sup>

*Effectiveness:* While the most significant aspect of the Act did not go into effect until January 1, 2012, one commentator raised concerns that the LEED mandate contains too many deficiencies to be implemented properly.<sup>69</sup> The primary concern was that the Act's requirements are better suited for implementation through building code adoption, as opposed to a LEED mandate.<sup>70</sup> The Act set a goal of all new buildings being zero net carbon by 2030; as of 2019 the District had reduced overall emissions of greenhouse gases by 27 percent.<sup>71</sup>

**California:** California was the first state to adopt a mandatory state-wide green building code.<sup>72</sup> Part 11 of the Title 24 Building Standards Code is the California Green Building Standards Code, also known as the CALGreen Code.<sup>73</sup> A local government may adopt a modified version of the CALGreen Code, but its code may not be less restrictive than the state standard.<sup>74</sup>

*Stated Purpose:* The CALGreen Code was “developed to (1) reduce GHG from buildings; (2) promote environmentally responsible, cost-effective, healthier places to live and work; and (3) implementing goals and directives of the governor.”<sup>75</sup> California has had mandatory greenhouse gas reduction targets since passage of the Global Warming Solutions Act of 2006.<sup>76</sup>

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<sup>65</sup> *Id.* at Section 3.

<sup>66</sup> *Id.* § 4(a).

<sup>67</sup> *Id.* § 4(b)(2).

<sup>68</sup> *Id.* § 6.

<sup>69</sup> Chris Cheatham, *Why the D.C. Green Building Act is Fundamentally Flawed and a Solution*, Green Building Law Update, August 19, 2011, available at: <http://www.greenbuildinglawupdate.com/2011/08/articles/codes-and-regulations/why-the-d-c-green-building-act-is-fundamentally-flawed-and-a-solution/>.

<sup>70</sup> *Id.*

<sup>71</sup> District of Columbia, Department of Energy & Environment, Green Building Report (last updated 2019), available at <https://doee.dc.gov/publication/green-building-reports>; see also Sarah Hurtubise, DC's Green-Approved Buildings Using More Energy, DAILY CALLER (Mar. 2, 2014), <http://dailycaller.com/2014/03/02/report-dcs-green-approved-buildings-using-more-energy/>.

<sup>72</sup> California Building Standards Commission, <http://www.bsc.ca.gov/>.

<sup>73</sup> *Id.*

<sup>74</sup> California Building Standards Commission, Guide for Local Amendments of Building Standards (2019 update), <https://www.dgs.ca.gov/BSC/Codes/Local-Amendments-to-Building-Standards---Ordinances>.

<sup>75</sup> California Building Standards Commission, Guide to the 2019 California Green Building Standards Code (Nonresidential), <https://codes.iccsafe.org/content/GCGBSCNR2019/guide-to-the-2019-california-green-building-standards-code-includes-verification-guidelines-nonresidential>.

<sup>76</sup> *Id.*

*Key Provisions:* CALGreen is updated every three years. As a result of the 2019 update, the following mandatory measures apply to all new residential buildings (high rise, low rise, hotels and motels): mandatory green building standards for additions or alterations; storm water detention standards, grading and paving requirements, electric vehicle supply equipment in new construction (including one and two-family dwellings), water conservation measures, and construction waste reduction.<sup>77</sup> New mandatory standards for nonresidential buildings range from light pollution reduction to prescriptive standards for indoor and outdoor water use.<sup>78</sup>

*Effectiveness:* The scale of CALGreen is larger than any other effort to adopt mandatory green building practices—California is comprised of 540 local jurisdictions and is the world’s eighth largest economy.<sup>79</sup> A group of “LEED User Peer Reviewers” released a paper in 2015 that assessed CALGreen’s effectiveness and provided suggestions for improvement.<sup>80</sup> The report concluded that CALGreen “has been successful in expanding the opportunity and demand for green building products, services, manufacturing and associated industries.”<sup>81</sup> The report’s suggestions for improvement include expanding education and outreach, increasing code clarity and increased funding for enforcement.<sup>82</sup> No studies addressing the anticipated growth of green buildings in California without CALGreen compared to current production levels are currently available.

### **Challenges to Sustainable Development Requirements**

There have been at least two cases in which industry groups have challenged a government’s imposition of sustainable development requirements. Both involved challenges to the extent of a local government’s authority to regulate energy efficiency in the face of federally mandated efficiency standards established by the Energy Policy and Conservation Act of 1975 (EPCA) for furnaces, water heaters, and other building systems. One trial court decision found that Albuquerque’s Energy Conservation Code was partially preempted, while the second decision, later upheld by the Ninth Circuit, did not find any preemption.<sup>83</sup> Also, some commentators have argued that municipal legislation that explicitly incorporates third party standards such as LEED into building or zoning codes, may be subject to challenge as an improper delegation of legislative power to a non-legislative entity.<sup>84</sup>

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<sup>77</sup> CalGreen, Chapter 4; California Housing and Community Development, Residential Mandatory Measures Effective July 2019, <https://codes.iccsafe.org/content/CAGBSC2019/chapter-4-residential-mandatory-measures>.

<sup>78</sup> *Id.*

<sup>79</sup> USGBC, Jeremy Sigmon, *New expert report finds barriers and opportunity for green building and codes in California* (April 9, 2015), <http://www.usgbc.org/articles/new-expert-report-finds-barriers-and-opportunity-green-building-and-codes-california>.

<sup>80</sup> See *Green Codes for California - 2015 Report from CALGreen and LEED User Group*, available at <http://www.usgbc.org/sites/default/files/Green%20Codes%20for%20California%20-%202015%20Report%20from%20CALGreen%20and%20LEED%20User%20Group.pdf>.

<sup>81</sup> *Id.* at 8.

<sup>82</sup> *Id.* at 9.

<sup>83</sup> See *Air Conditioning, Heating, and Refrigeration Inst. v. City of Albuquerque*, 2008 U.S. Dist. LEXIS 106706 (D.N.M. 2008) (granting a preliminary injunction, finding that certain requirements in the City of Albuquerque’s ordinance were preempted by the federal law); see also *Air Conditioning, Heating and Refrigeration Inst. v. City of Albuquerque* (“Albuquerque II”), 835 F. Supp. 2d 1133, 1134 (D.N.M. 2010) (granting in part plaintiff’s renewed motion in support of partial summary judgment). See also Delaney, § 42:5; Jeffrey Pike, *A Tale of Two Codes: The Influence of Albuquerque and Washington on Green Building*, 41 B.C. ENVTL. AFF. L. REV. 201 (2014); Shapiro, Sheri, *Code Green: Is ‘Greening’ the Building Code the Best Approach to Create a Sustainable Built Environment?* PLANNING & ENVIRONMENTAL LAW, 63.6 (2011).

<sup>84</sup> BRIAN W. BLAESSER, DISCRETIONARY LAND USE CONTROLS: AVOIDING INVITATIONS TO ABUSE OF DISCRETION, Chapter 8 (August 2020 Update); Patrick Kain, *Improving Green Building: Comparing LEED Certification to the FDA and Its Private, Third-Party Ratings Approach*, 5 AM. U. BUS. L. REV. 291, 303-305 (2016); Edward Teyber,

### 12.03 IMPACT ON PROPERTY VALUES

It is reasonable to expect that the impact of mandatory sustainable design and construction standards on property values will be determined in large part by the impact that these new standards have on development costs. In general, if satisfaction of green building standards significantly increases development costs, property values may be affected at least in the short run. However, if development costs are not appreciably increased as a result of compliance with the new standards, then the impact on property values would likely be negligible. In the long run, when buildings begin to realize energy savings, the impact should even be positive if commercial and residential end users place a premium on sustainable sites and buildings. This is discussed in more detail in the next subsection.

### 12.04 IMPACT ON DEVELOPMENT COSTS

The question of the impact of sustainable design and construction practices and inputs on development costs has been at the heart of the debate over Sustainable Development since its inception. Increased development costs resulting from sustainable design and construction standards typically stem from four sources:

- Sustainable or green project elements such as renewable energy sources, sustainable building materials, and water conserving fixtures;
- Certification fees paid to the project rating system’s administrators and documentation costs related to the submittals required to obtain certification;
- Costs of “commissioning” the sustainable building in order to “shake the building out” and demonstrate compliance with the applicable rating system’s performance measures;<sup>85</sup> and
- “Learning curve” costs that may be expressed as premiums or cost overruns by contractors and other consultants unfamiliar with Sustainable Development techniques and practices.<sup>86</sup>

If “green” features and transactional costs are viewed as a costly up-front add-on with no bottom-line benefits or bottom-line benefits that accrue only after several years of operation, the path to acceptance becomes that much harder, regardless of the environmental benefits. On the other hand, if there is little additional up-front cost and green features can be included for little or no premium, acceptance is likely to be faster and wider. In 2004, USGBC retained the construction consulting firm of Davis Langdon to provide analysis of available data on this subject. Both the initial Davis Langdon report, entitled “Examining the Cost of Green,”<sup>87</sup> and the 2007 follow-on study entitled “Cost of Green Revisited: Reexamining the Feasibility and Cost Impact of Sustainable Design in Light of the Increased Market Adoption”<sup>88</sup> concluded that the bottom-line additional development cost of “green” features for a building seeking LEED certification was negligible. As described in *Cost of Green Revisited*:

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*Incorporating Third Party Green Building Rating Systems into Municipal Building and Zoning Codes*, 31 PACE ENVTL. L. REV. 832, 844 (2014).

<sup>85</sup> Such “commissioning” is a required part of all of the LEED certification programs. See Peter C. D’Antonio, *Costs and Benefits of Commissioning LEED-NC Buildings* (National Conference on Building Commissioning: May 2007) (hereinafter *LEED-NC Commissioning Study*) at 11.

<sup>86</sup> GREEN BUILDING A TO Z at 49, 54-56.

<sup>87</sup> Davis Langdon, *Examining the Cost of Green* (October 2004).

<sup>88</sup> Davis Langdon, *Cost of Green Revisited: Reexamining the Feasibility and Cost Impact of Sustainable Design in the Light of Increased Market Adoption* (July 2007) (hereinafter *Reexamining Cost of Green*).

[t]here is no significant difference in average costs for green buildings as compared to non-green buildings. Many project teams are building green buildings with little or no added cost, and with budgets well within the cost range of non-green buildings with similar programs.<sup>89</sup>

With regard to “learning curve” costs, the study found that, “in many areas of the country, the contracting community has embraced sustainable design, and no longer sees sustainable design requirements as additional burdens to be priced in their bids.”<sup>90</sup> A 2013 study by the World Green Building Council concluded that green building does not necessarily cost more, and any cost premium is usually lower than that perceived by the development community and is easily recouped in energy savings.<sup>91</sup> One study of 33 LEED-rated projects in the United States found that an upfront investment of 2% or more in green building yields savings of over ten times the initial investment, based on a 20-year life cycle.<sup>92</sup> The World Green Building Council also reported that green building generally improves marketability and more easily attracts tenants and buyers.<sup>93</sup>

However, the *LEED-NC Commissioning Study*, which reviewed data from LEED-certified projects in Colorado, found that the overall cost premium for LEED-NC certification ranged from 1% to 6% of construction costs.<sup>94</sup> Within that total cost premium, the study also found that soft costs, including LEED registration and certification, documentation, and commissioning, average about 0.8% of construction costs, or approximately \$1.00 per square foot.<sup>95</sup> These findings are in line with the costs reported in the book *Green Building A to Z*.<sup>96</sup> Both the *LEED-NC Commissioning Study* and *Green Building A to Z* observe that these costs are actually relatively minor compared to the benefits that result from the additional information and focus on efficient performance that results from commissioning: *Green Building A to Z* reports an energy savings increase of 10% to 15% from commissioning, while *LEED-NC Commissioning Study* references studies that have found the median recovery for commissioning costs to be less than five years.<sup>97</sup>

Alternative rating systems such as Green Globes tout the lower certification fees and documentation costs of their systems, but they appear not to account for the efficiency benefits that commissioning is reported to provide.<sup>98</sup>

## 12.05 IMPACT ON AMOUNT AND PATTERNS OF LAND DEVELOPMENT

By themselves, mandatory Sustainable Development standards should have relatively little impact on the amount and patterns of land development, except to the extent that additional land-use regulations generally add costs to the development process and may cause developers to seek development sites in jurisdictions that do not impose such restrictions. This could result in more dispersal of development

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<sup>89</sup> *Id.* at 3.

<sup>90</sup> *Id.*

<sup>91</sup> World Green Building Council, *The Business Case for Green Building*, at p. 8-9 (2013), available at [https://web.archive.org/web/20170110142646/http://www.worldgbc.org/files/1513/6608/0674/Business\\_Case\\_For\\_Green\\_Building\\_Report\\_WEB\\_2013-04-11.pdf](https://web.archive.org/web/20170110142646/http://www.worldgbc.org/files/1513/6608/0674/Business_Case_For_Green_Building_Report_WEB_2013-04-11.pdf).

<sup>92</sup> *Id.* at 56.

<sup>93</sup> *Id.* at 8.

<sup>94</sup> *LEED-NC Commissioning Study* at 4.

<sup>95</sup> *Id.*

<sup>96</sup> GREEN BUILDING A TO Z at 49.

<sup>97</sup> *Id.*; *LEED-NC Commissioning Study* at 5.

<sup>98</sup> See *Why Green Globes Is Better*; see also Auden Schendler and Randy Udall, *LEED Is Broken; Let's Fix It* (Grist, Environmental News and Commentary: October 26, 2005).

depending on the location of the jurisdiction imposing the new requirement and the availability of developable land in the region that is not subject to such requirements.

## **12.06 IMPACT ON HOUSING AFFORDABILITY**

Considering the mixed data available on increased development costs resulting from Sustainable Development requirements and transaction costs, mandatory sustainable development standards may or may not have a significant impact on housing affordability. If development costs are increased on a particular residential project, the additional costs could substantially impact the level of affordability that can be offered for residential units. Unless there is a rapid escalation of energy costs, the greater operating efficiencies of more sustainable housing units may make such units more affordable over the long run by reducing costs of ownership or building operations, in the case of rental projects.<sup>99</sup> This could lead to a greater capacity to finance acquisition costs among homebuyers and bring more homes within reach of more buyers.

## **12.07 RECOMMENDED TALKING POINTS: PROS AND CONS**

### **PROS:**

- Sustainable Development and green building standards provide the means for the design, construction, and development industries to address global climate change.
- Life cycle analysis of the costs of building ownership and operation over the long term shows that more sustainable, greener, more energy-efficient buildings are less expensive to own and operate than conventional buildings, particularly as energy costs continue to escalate.
- Sustainable Development encourages fulfillment of market demand for sustainable and green living environments, which are desired by a growing segment of the home-buying population.

### **CONS:**

- Incorporation of Sustainable Development elements and compliance with certification requirements can increase up-front development costs.
- Development consultants and contractors may require a premium to address unfamiliar green building requirements, and inexperienced project team members may experience a relatively steep learning curve.
- Green building standards that are imposed by local governments through discretionary review processes can add to development costs unless local governments provide expedited permitting processes for Sustainable Development projects.
- Municipal legislation that explicitly incorporates third party standards such as LEED into building or zoning codes may be subject to challenge as an improper delegation of legislative power to a non-legislative entity.

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<sup>99</sup> Ngai Pindell, Leg. Guide to Affordable Housing Dev. § 2.IV, *Environmental Planning and Review of Affordable Housing Development* at 2 (2011); Dan Schemer, "Green Building Adds to Affordability," *Portland Tribune* (Mar. 13, 2007).

## 12.08 INCENTIVE-BASED ALTERNATIVES

Governmental actors at the federal, state, and local levels have been trying for several years to promote Sustainable Development through a wide range of incentives, including grants, development bonuses, expedited permitting, permit and impact fee waivers and reimbursements, and tax credits and abatements.

### The Federal Role in Sustainable Development

The federal government encourages Sustainable Development policies in the management of existing buildings and facilities and the construction of new buildings and facilities by various federal departments, agencies, and offices.<sup>100</sup> In addition to this early-adopter role, the Department of Energy and the Environmental Protection Agency have also collaborated on the creation and expansion of the ENERGY STAR rating system for new commercial and residential buildings and building products, which is one of the more widely used Sustainable Development rating systems in the U.S.<sup>101</sup> As described elsewhere in this section, ENERGY STAR has also spawned widespread local adaptations. The federal Energy Policy Act of 2005<sup>102</sup> allocated \$1.3 billion for a wide range of tax code-related incentives for Sustainable Development in the following areas:

- Energy efficient commercial buildings deduction;
- Credit for construction of new energy efficient homes;
- Credit for certain non-business energy property;
- Credit for energy efficient appliances;
- Credit for residential energy efficient property;
- Credit for business installation of qualified fuel cells and stationary microturbine power plants; and
- Business solar investment tax credit.<sup>103</sup>

### State and Local Incentives for Sustainable Development

State and local incentives for Sustainable Development include the full range of possible incentives, including the following examples.

- *Expedited Permitting – San Diego County, California:* The County of San Diego has a Green Building Incentive Program that offers incentives of reduced plan check turnaround time, saving approximately 7-10 days on a project timeline, and a 7.5% reduction in plan check and building permit fees. Projects must comply with one of four measures pertaining to water conservation, energy conservation, and natural resource conservation.<sup>104</sup>
- *Property Tax Credits – Howard County, Maryland:* Howard County offers tax credits to offset County property taxes for certain buildings. Credits are available for up to five years for projects achieving at least LEED Silver certification, with the credit level increasing based on the level of

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<sup>100</sup> *Federal Green Building Report* at Section V.

<sup>101</sup> See [www.energystar.gov](http://www.energystar.gov) for a full description of the range of rating products available under the ENERGY Star label.

<sup>102</sup> P.L. 109-58.

<sup>103</sup> USGBC, Analysis of the Conservation and Energy Efficiency Tax Provisions in the Energy Policy Act of 2005, October 28, 2005.

<sup>104</sup> San Diego County, California, Green Building Incentive Program, <https://www.sandiegocounty.gov/content/sdc/pds/bldg/green.html>.

certification: 25% for Silver, 50% for Gold, and 75% for Platinum. Similar credits are provided for LEED-EB for a period of three years.<sup>105</sup>

- *State Tax Credits - New Mexico*: The Sustainable Building Tax Credit applies to projects achieving Silver or higher on LEED-NC, LEED-EB, LEED-CS, or LEED-CI. The credit increases commensurate with the level of LEED certification achieved. Residential projects may be eligible for the credit by attaining a HERS rating of 60 or lower, or by designing to meet LEED-H or a specific New Mexico standard. A 2021 update expanded the benefits of tax credits to affordable housing and to LEED Zero certifications and extended the program through 2030. It also increased the total tax credit cap to \$7.15 million, up from the previous \$5 million cap set in 2015.<sup>106</sup>
- *Density Bonus – Seattle, Washington* (Density Bonus and other): Seattle offers a number of permitting incentives for green buildings, such as expedited permitting review, height and floor area incentives, and sustainable technology review and guidance.<sup>107</sup>
- *Permit Fee Waiver – North Carolina*: Cities and counties in North Carolina are granted authority to encourage green building practices by reducing or partially rebating permit fees. The City of Asheville, for example, waives fees for building permits and plan reviews for certain renewable energy technologies and green building certifications for homes and mixed-use commercial buildings.<sup>108</sup>

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<sup>105</sup> In addition to tax incentives, Howard County requires that newly constructed buildings over 50,000 square feet be LEED certified, although limited waivers are available, and applies green building standards to new government buildings greater than 10,000 square feet. Greg Franklin, *Baltimore City's Green Building Standards, Building Towards an Uncertain Future*, 4 U. BAL. J. LAND & DEV. 85, 89 (2014).

<sup>106</sup> See “New Mexico becomes the first state to incentivize LEED Zero, available at <https://www.usgbc.org/articles/new-mexico-becomes-first-state-incentivize-leed-zero>.

<sup>107</sup> Seattle Department of Construction & Inspections, Green Building Permit Incentives, <http://www.seattle.gov/sdci/permits/green-building>.

<sup>108</sup> See City of Asheville - Building Permit Fee Waiver at <https://programs.dsireusa.org/system/program/detail/2748>.



## SECTION 13: TREE PRESERVATION

### 13.01 PURPOSE AND KEY TERMS

Communities adopt **tree preservation ordinances** and regulations in an effort to protect trees for their environmental, aesthetic, and economic benefits.

Among the main environmental purposes asserted for tree preservation efforts are: (1) protection against soil erosion through soil stabilization and the creation of wind breaks; (2) stabilization of steep slopes and a reduction in water pollution; (3) enhancement of air quality; (4) energy conservation through the cooling effects of tree canopy shade; (5) water conservation through reducing evaporation and stormwater runoff; (6) serving as a buffer to reduce noise or visual intrusion; (7) maintenance of woodland and wetland wildlife habitat, biodiversity, and ecology; (8) reduction of the urban “heat island” effect through increased shading, and other benefits related to heat resiliency; and (9) capture of carbon dioxide (CO<sub>2</sub>) (carbon sequestration) in furtherance of community-based climate change adaptation goals.<sup>1</sup>

Among the aesthetic and societal benefits that trees are said to provide are a “scale” and “sense of place.”<sup>2</sup> Trees are said to “foster psychological well-being”<sup>3</sup> and to help make an area “pedestrian friendly.”<sup>4</sup> Trees are protected to evoke community character traditions like an association with a particular historic event or period, or a rural cultural heritage.<sup>5</sup> Advocates of tree preservation in urban settings highlight the aesthetic value of trees in public parks and other public spaces, their influence on improving social connections, and their ability to help create more walkable communities.<sup>6</sup>

Tree preservation proponents cite economic studies showing that people are willing to pay more for treed lots than for ones that have been cleared, and, conversely, assert that clearing trees impairs the stability of

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<sup>1</sup> See CHRISTOPHER J. DUERKSEN & SUZANNE RICHMAN, TREE CONSERVATION ORDINANCES: LAND-USE REGULATIONS GO GREEN, at 10-15; 36, 40 (APA 1993)(“Duerksen/Richman”); Arbor Day Foundation, *The Power of Trees*, available at <https://www.arborday.org/trees/index-benefits.cfm>; Brabec, at 99 in Duerksen/Richman; Thomas Hayden, *Hot Ways to Cool Down our Cities*, CITY TREES, Vol. 36, No. 6, November/December 2000; Rebecca Marx & Jorge Morales-Burnett, *Centering Equity to Address Extreme Heat*, Urban Institute, February 2022, at 18-19; E. Gregory McPherson, et al., *Benefit-Cost Analysis of Modesto’s Municipal Urban Forest*, 25 JOURNAL OF ARBORICULTURE, 235, September 1999; Michael F. Galvin, Becky Wilson, & Marian Honecny, *Maryland’s Forest Conservation Act: A Process for Urban Greenspace Protection During the Development Process*, 26 JOURNAL OF ARBORICULTURE 275 (September 2000); *Planning the Urban Forest*, PAS REPORT #555 (American Planning Association, 2009); New Orleans Tree Preservation Study (last revised October 10, 2020) (stating: “A medium size deciduous tree with leaves can reduce the heat going into a house by up to 80%. This can lower the energy consumption for the household, which translates both to decreased energy bills and decreased demand for the production of electricity at power plants.”).

<sup>2</sup> Duerksen/Richman at 9-10.

<sup>3</sup> McPherson et al. at 235. See also Nancy Templeton & David Rouse, *The Role of Tree Preservation Ordinances in Green Infrastructure*, ZONING PRACTICE, September 2012: (“[One] study concluded that residents with views of trees and greenery from their homes experienced more social interaction with neighbors and less aggressive behavior toward their partners or children.”) (“Templeton & Rouse”).

<sup>4</sup> Richard P. Thompson & James J. Ahern, *The State of Urban and Community Forestry in California*, Urban Forest Ecosystems Institute, California Polytechnic State University San Luis Obispo, Technical Report No. 9, March 2000 at 10.

<sup>5</sup> See Duerksen/Richman at 40.

<sup>6</sup> See, e.g., Arbor Day Foundation, *The Power of Trees*; see also US Forest Service, *Urban and Community Forestry*, <https://www.fs.usda.gov/managing-land/urban-forests/ucf>.



property values.<sup>7</sup> Other economic benefits attributed to tree preservation in the development process are a reduction in the cost of providing landscaping and stormwater detention and mitigation.<sup>8</sup> At a larger scale, attention to tree preservation is said to enhance an area’s “quality of life” and “image” as part of an overall economic development strategy.<sup>9</sup> Studies show the economic value of private and public urban forestry activity in the United States is in the billions of dollars.<sup>10</sup>

With such a wide range of benefits attributed to tree protection, it is perhaps not surprising that tree preservation regulations themselves vary widely in scope and applicability. A common early form of tree protection laws, still in effect in many communities, focused on protecting against and compensating for the removal of public trees, such as those within street rights-of-way or on parkland.<sup>11</sup> Subsequently, communities shifted their attention to trees located on private property.<sup>12</sup> Some of these communities focus their tree protection regulations only on larger trees or trees of a particular species or “specimen” trees.<sup>13</sup> Boston’s Tree Canopy Protection Ordinance, for example, requires owners to obtain a tree permit before removing any “Significant Tree” from private property.<sup>14</sup> Others aim to preserve tracts of woodland or largely forested areas by regulating the percentage of tree canopy that must be preserved on a private development site, with percentages ranging from 15% in some jurisdictions to as high as 70% in others.<sup>15</sup> Some communities now include urban tree canopy protection and tree planting measures as part of their climate change adaptation goals.<sup>16</sup>

Many of these regulations impose costly and time-consuming permit application requirements, such as a comprehensive inventory of vegetation existing on a development site.<sup>17</sup> Some regulations govern ongoing maintenance of trees, including restrictions on pruning privately-owned trees, and limitations on the use of vehicles or other activities near trees targeted for protection.<sup>18</sup> Tree protection regulations vary in their geographic scope, as well: some apply throughout a jurisdiction, while others apply only in

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<sup>7</sup> Duerksen/Richman at 15; McPherson et al. at 239; Jon C. Cooper, *Legislation to Protect and Replace Trees on Private Land: Ordinances in Westchester County, New York*, 22 JOURNAL OF ARBORICULTURE 270, 273 (1996).

<sup>8</sup> Templeton & Rouse.

<sup>9</sup> Duerksen/Richman at 15-16.

<sup>10</sup> *The Economic Footprint and Quality-of-Life Benefits of Urban Forestry in the United States*, prepared by the Bureau of Business Research, Department of Economics, College of Business, University of Nebraska – Lincoln (June 28, 2021).

<sup>11</sup> See e.g., Massachusetts Scenic Roads Act, General Laws c. 40, sec. 15C.

<sup>12</sup> See Duerksen/Richman at 3.

<sup>13</sup> See, e.g., Duerksen/Richman at 7; James D. Brown, *Biophilic Laws: Planning for Cities with Nature*, 34 VA. ENVTL. L. J. 52 (2016) (discussing Portland, Oregon’s revised tree protection ordinance which requires one-third of trees 12 inches or larger in diameter at breast height and all trees, of certain desired species, that are at least 6 inches, but less than 12 inches, be preserved in new developments).

<sup>14</sup> “An Ordinance Establishing Protections for the City of Boston Tree Canopy” (2021), available at <https://www.boston.gov/sites/default/files/file/2021/08/0858.PDF>.

<sup>15</sup> Duerksen/Richman at 38-41.

<sup>16</sup> See, e.g., Boston’s Ordinance Establishing Protections for the City of Boston Tree Canopy, available at <https://www.boston.gov/sites/default/files/file/2021/08/0858.PDF> and Phoenix’s Tree and Shade Master Plan, available at

[https://www.phoenix.gov/parkssite/Documents/PKS\\_Forestry/PKS\\_Forestry\\_Tree\\_and\\_Shade\\_Master\\_Plan.pdf](https://www.phoenix.gov/parkssite/Documents/PKS_Forestry/PKS_Forestry_Tree_and_Shade_Master_Plan.pdf)

<sup>17</sup> *Id.*

<sup>18</sup> Brown (discussing detailed tree protection regulations in Portland, Oregon and Austin, Texas, such as protection of the critical root zone and crown impacts); see also 7 ROHAN: ZONING AND LAND USE CONTROLS, § 42.07 (1)(a) (updated 2021) (discussing Alachua County, Florida’s regulations on quality standards for plant materials and plan sizes, detailed specifications for installation and required irrigation and long-term maintenance).

specific areas, such as along designated rivers or roadways, or particular zoning districts.<sup>19</sup> A number of tree ordinances also require tree maintenance to be performed by a certified forester or arborist.<sup>20</sup>

Many tree conservation ordinances require mitigation for trees removed from a site. This may take the form of on-site replanting of several smaller trees for each large tree removed, or requiring payment into a fund for planting elsewhere in the jurisdiction, typically on public land.<sup>21</sup> Some jurisdictions, such as the state of Maryland, impose an affirmative obligation of “afforestation” or the planting of trees on development sites falling below a certain ratio of tree-coverage to lot area—regardless of whether the developer is responsible for the shortfall of trees, or whether it purchased the site in that condition.<sup>22</sup>

It is helpful to an understanding of tree protection regulations to be aware of the meaning of terms that are frequently used in such provisions:

- **Afforestation, or Reforestation** is the conversion of open land into forest and refers to the requirement that open land be planted with trees to increase vegetative cover.<sup>23</sup> Generally, afforestation involves planting or adding of trees in an area where there was never a forest or in an area that had not recently been covered with forest, while reforestation involves planting trees or allowing trees to regrow on land that had recently been covered with forest.
- **Canopy** or “**crown**” is the above-ground parts of a tree consisting of the branches, stems, buds, fruits, and leaves.<sup>24</sup>
- **DBH** refers to a tree trunk’s “diameter at breast height,” which is typically measured at four and a half feet above the ground.<sup>25</sup>
- **Dripline** is (an imaginary) vertical line extending from the outermost edge of a tree canopy to the ground.<sup>26</sup>
- **Specimen Tree, or Significant Tree** are two of several terms used to denote trees of a particular size or species that are the subject of special protection under a tree protection regulation. One source cites the definition from Montgomery County, Maryland: “[I]ndividual trees which are healthy which have a DBH of 24 inches or greater, or which otherwise are noteworthy because of species, age, size, or other exceptional quality, such as uniqueness, rarity or status as a landmark or species specimen.”<sup>27</sup> In Boston, a “Significant Tree” is any living tree that is not an “invasive plant” and is 8 inches or more in DBH.

## 13.02 EFFECTIVENESS IN ACHIEVING STATED PURPOSE(S)

The wide range of approaches to tree preservation regulations makes it difficult to draw generalizations

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<sup>19</sup> See Duerksen/Richman at 7; Cooper.

<sup>20</sup> Ruthmarie Shea, *Whose Tree is it Anyway? A Case of First Impression*, 77 U. DET. MERCY L. REV. 579 (2000).

<sup>21,21</sup> Tree and Vegetation Protection, 2 RATHKOPF’S THE LAW OF ZONING AND PLANNING § 20:60 (4th ed., update Nov. 2021) (“RATHKOPF”); Duerksen/Richman at 29.

<sup>22</sup> Galvin et al.; Md. Code Ann. Natural Resources, Title 5, Subtitle 16.

<sup>23</sup> Duerksen/Richman at 46.

<sup>24</sup> Duerksen/Richman at 105 – Appendix C (Selected Sample Definitions).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Duerksen/Richman at 36.

about how effective such measures are at achieving their intended purposes. One study of California jurisdictions found that the most effective ordinances were those that required tree planting in new commercial and residential development (thought to be effective by more than two-thirds of respondents), while those directed at abating tree hazards or otherwise protecting trees on private property not undergoing development were less effective, and those directed at protecting forest during development were thought to be the least effective of all.<sup>28</sup> Many communities have found that tree preservation ordinances are an effective way to protect existing trees and help to replant trees in areas where trees have been previously been removed.<sup>29</sup> In one study investigating the success of tree preservation during residential construction, an overall preservation rate of nearly 75% indicated that a comprehensive tree preservation ordinance can successfully protect tree and soil health during and after residential development occurs.<sup>30</sup> An 2020 assessment found that Boston’s tree canopy remained relatively stable between 2014 and 2019 and that the city’s investments in the planting, care, and maintenance of its street trees added 23 acres of new tree canopy within its rights-of-way.<sup>31</sup> Despite having success at the local level, the effectiveness of tree preservation and afforestation/reforestation legislation on a national level remains a tall order, as escalating urbanization and impervious surface coverage results in an annual loss of 36 million trees in the United States.<sup>32</sup>

In general, the success of a tree protection ordinance is largely dependent upon the willingness of the community to enforce the ordinances, and the extent to which the particular requirements are tailored to local characteristics.<sup>33</sup> A survey of tree protection ordinances in California found that barely half of the jurisdictions surveyed thought their ordinances were adequately enforced.<sup>34</sup> Regulations that are adopted without regard for the particular ecological, climatic, topographic, and other characteristics of the jurisdiction are also unlikely to be successful. For that reason, local governments should be discouraged from “borrowing” regulations from dissimilar jurisdictions.<sup>35</sup>

Similarly, requirements should be developed with a mind toward precisely what the jurisdiction is seeking to protect, taking care not to be over or under-inclusive. For example, while many tree ordinances use trunk size as a criterion for deciding whether a particular tree is subject to regulation, a uniform trunk size is not always an appropriate reference point across all species. An ordinance that protects trees one foot in diameter will cover a large number of oak trees, but very few dogwoods, even though the latter may be a species of greater concern to local planners. Simply lowering the size threshold will likely encompass even more oaks, even as it picks up a few dogwoods. Mt. Pleasant, New York, is an example of a community that has adopted size criteria that depend on the species of tree.<sup>36</sup> Tampa, Florida, is cited as

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<sup>28</sup> Thompson at 29.

<sup>29</sup> *Id.*

<sup>30</sup> Kaitlyn Pike et al., *Tree preservation during construction: An evaluation of a comprehensive municipal tree ordinance*, URBAN FORESTRY & URBAN GREENING, Volume 57 (2021).

<sup>31</sup> Tree Canopy Assessment, City of Boston, MA (September 2020) available at [https://www.boston.gov/sites/default/files/file/2020/09/Change-assessment\\_w\\_MJW-letter.pdf](https://www.boston.gov/sites/default/files/file/2020/09/Change-assessment_w_MJW-letter.pdf).

<sup>32</sup> David J. Nowak & Eric J. Greenfield. *Declining urban and community tree cover in the United States*, URBAN FORESTRY AND URBAN GREENING 32: 32-55 (2018).

<sup>33</sup> *Id.*; Thomas O. Rainey, IV, *Protecting Things That Cannot Protect Themselves: Why Georgia Must Extend Protections to its Living Natural Assets*, 5 J. MARSHALL L.J. 181, 208 (2011); see also Tenley M. Conway & Elizabeth Bang, *Willing Partners? Residential Support for Municipal Urban Forestry Policies*, 13 URBAN FORESTRY & URBAN GREENING 234-243 (2014) (discussing resident attitudes toward tree canopy cover as an important factor in compliance with tree removal policies, and, therefore their effectiveness).

<sup>34</sup> Thompson et. al. at 29.

<sup>35</sup> Duerksen/Richman at 7, 35, 50; see also Shea, *Whose Tree Is It Anyway?* (discussing The National Arbor Day Foundation’s Tree City USA program model ordinance that is being replicated in ordinances across Michigan).

<sup>36</sup> See Mt. Pleasant, NY City Code, Ch. 201 (Trees); see also Cooper at 274.

an example of a community that uses a point system to target trees with desirable characteristics depending on species.<sup>37</sup>

The better regulations provide planning staff with specific guidance as to what areas to preserve while at the same time leaving discretion and flexibility to work with the developer to achieve community goals in the context of particular site constraints. A flaw identified in some ordinances is that they provide insufficient guidance to planning staff and developers concerning what vegetation should be retained. Without guidance, the development review process may not result in preserving vegetation of a type and at locations that are important to the purposes of the ordinance. Ordinances lacking sufficient guidance are subject to legal challenge and are seen as being neither fair nor effective.<sup>38</sup>

A further consideration regarding the effectiveness of a tree preservation ordinance is the extent of administrative burden that it places on the local jurisdiction. Where tree removal is controlled on all parcels, no matter how small, the administrative burden on local government may reduce the overall benefits from protection and the burden on the regulated public may be politically difficult to enforce.<sup>39</sup> A comparative study of Charlotte, North Carolina and San Antonio, Texas found that the effectiveness of urban tree preservation regulations depends, in part, on the adequacy of civic and administrative resources, including the level of funding availability of expert tree management personnel.<sup>40</sup> Many ordinances also exempt single residential lots or small-scale development and specific uses such as agricultural, forestry, and recreational uses.<sup>41</sup> A study of the tree protection ordinances adopted by sixty communities in Texas found that exemptions for private property or single-family or owner-occupied single-family development weaken an ordinance's ability to preserve and protect trees and can result in established urban forests and forested land within a city's jurisdictional boundaries being diminished even under a tree protection ordinance.<sup>42</sup> Another study found that local governments could benefit from more coordination around their greening efforts. For example, while increasing the tree canopy can have both hydrological and cooling benefits, in many jurisdictions different departments are charged with forestry and stormwater management responsibilities.<sup>43</sup>

Several jurisdictions have gained attention for their particular approaches to tree preservation. In the first fifteen years after its adoption, Maryland's Forest Conservation Act prompted the review of 199,925 acres of forest on projects scheduled for development.<sup>44</sup> Of that total, 120,638 acres of forestland were retained, 71,885 acres were cleared, and 21,461 acres were planted with new forest, meaning more than twice as many acres of forest were protected or planted than were cleared.<sup>45</sup> The New Jersey Pinelands

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<sup>37</sup> See Tampa, FL, Zoning and Land Development Code § 27-284.4.1 (Tree mitigation calculations); see also Duerksen/Richman at 39.

<sup>38</sup> Duerksen/Richman at 41.

<sup>39</sup> Duerksen/Richman at 46; see also Donna London & Eileen Duffy, *Status of Tree Ordinances in South Carolina*, The Strom Thurmond Institute of Government and Public Affairs, Clemson University, Clemson, South Carolina (Oct. 2003), available at [https://tigerprints.clemson.edu/cgi/viewcontent.cgi?article=1182&context=sti\\_pubs](https://tigerprints.clemson.edu/cgi/viewcontent.cgi?article=1182&context=sti_pubs) (discussing issues surrounding the effectiveness of various tree protection ordinances in South Carolina).

<sup>40</sup> Romero, F.S., *Logic and Effectiveness of Urban Tree Preservation: A Comparative Case Study of Charlotte and San Antonio*, STATE AND LOCAL GOVERNMENT REVIEW, 53(2):142-158 (2021).

<sup>41</sup> Duerksen/Richman at 46.

<sup>42</sup> Brendan L. Lavy & Ronald R. Hagelman, *Protecting the Urban Forest: Variations in Standards and Sustainability Dimensions of Municipal Tree Preservation Ordinances*, URBAN FORESTRY & URBAN GREENING § 5.1 (August 2019).

<sup>43</sup> Martha Fedorowicz et al., *Leveraging the Built Environment for Health Equity*, URBAN INSTITUTE (2020).

<sup>44</sup> Forest Conservation Act, Maryland Department of Natural Resources, available at <https://dnr.maryland.gov/forests/Pages/programapps/newfca.aspx>. The Forest Conservation Act is located at Sections 5-1601 to 5-1613 of the Maryland Code.

<sup>45</sup> See *id.*

Protection Act requires all local governments within the district to enact ordinances that address vegetation protection during land clearance.<sup>46</sup> Lake County, Illinois, is known for its requirement that a minimum of 70% of mature woodlands and a minimum of 50% of young woodland areas on a site be protected from development, as a general matter.<sup>47</sup> Thousand Oaks, California requires a permit for any pruning of live oak trees that exceed 2 inches in diameter when measured at a point 4.5 feet above the tree's natural grade.<sup>48</sup>

### 13.03 IMPACT ON PROPERTY VALUES

Proponents of tree preservation requirements defend them on economic grounds with the observation that trees can add considerable financial value to a property.<sup>49</sup> Indeed, a large specimen tree has been said to be worth thousands of dollars.<sup>50</sup> One Georgia study is cited as finding, based on comparable sales, that each large front yard tree created an increase in sales price on the order of \$500.<sup>51</sup> Another study of 4,800 parcels surrounding a nature reserve in urbanized Riverside County, California, found that a decrease of 10% in distance to the nearest oak stands and to the edge of the permanent open space land resulted in an increase of \$4 million in total home value and an increase of \$16 million in total land value in the community.<sup>52</sup> A tree preservation study by the City of New Orleans found that trees can add 13% to 21% to the value of a typical home by increasing curb appeal. However, any financial benefit that trees may provide to property values are not always equally shared. In New Orleans, the tree canopy, and benefits offered by it, have been found not to be spread equitably across the city, with greater numbers of trees are found concentrated in few neighborhoods.<sup>53</sup>

Whether tree preservation ordinances themselves enhance property values, however, is open to question. Ordinarily, one would expect restrictive regulations to have a negative effect on property value in that they increase the cost of developing land and limit the extent to which the property can be used for development purposes, thereby making the land less valuable in the market. At the extreme, such ordinances can be viewed as downgrading the ownership interest in private property by confiscating the traditional property right to cut timber.<sup>54</sup> Prohibitions on the removal of specimen or significant trees, could, at an extreme, have a drastic negative effect on property value by rendering it impossible, as a

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<sup>46</sup> Duerksen/Richman at 3.

<sup>47</sup> See Lake County, IL, Natural Resource Protection Standards § 151.071(I), available at [https://codelibrary.amlegal.com/codes/lakecountyl/il/latest/lakecounty\\_il/0-0-0-25432](https://codelibrary.amlegal.com/codes/lakecountyl/il/latest/lakecounty_il/0-0-0-25432); see also Duerksen/Richman at 40-41.

<sup>48</sup> See Thousand Oaks, CA, Oak Tree Preservation and Protection Ordinance § 9-4.4204, [https://codelibrary.amlegal.com/codes/thousandoaks/latest/thousandoaks\\_ca/0-0-0-33109](https://codelibrary.amlegal.com/codes/thousandoaks/latest/thousandoaks_ca/0-0-0-33109); see also Duerksen/Richman at 44.

<sup>49</sup> See New Orleans Tree Preservation Study (October 10, 2020), available at: <https://www.nola.gov/nola/media/City-Planning/Applications/Tree-Preservation-Study-Final.pdf>; see also City of Crystal Lake, Illinois, *Tree Preservation*, available at <https://www.crystallake.org/our-community/green-initiatives/tree-preservation> (concluding that tree preservation increases property values by 15%).

<sup>50</sup> Templeton & Rouse (“There is even a National Tree Benefit Calculator based on a street tree assessment tool called STREETS in the U.S. Forest Service’s “i-Tree” software suite. This calculator measures the economic and ecological benefits of individual trees.”).

<sup>51</sup> McPherson et al. at 239. For additional tree preservation examples, see David C. Rouse & Ignacio F. Bunster-Ossa, *Green Infrastructure: A Landscape Approach*, APA Planning Advisory Service (2013).

<sup>52</sup> Duerksen, et al. at 2.

<sup>53</sup> New Orleans Tree Preservation Study.

<sup>54</sup> BRIAN W. BLAESSER, DISCRETIONARY LAND USE CONTROLS: AVOIDING INVITATIONS TO ABUSE OF DISCRETION §1:31 (Thomson-Reuters: August 2021 update).

practical matter, to develop a property containing such features. In such a case, the landowner would need to evaluate its prospects for making a regulatory taking claim against the jurisdiction.<sup>55</sup>

The Georgia Supreme Court examined this issue in a case in which a property owner and Homebuilders Association challenged a tree preservation ordinance alleging that the ordinance on its face was an unconstitutional taking of their property.<sup>56</sup> The court found that because the ordinance merely “regulates the way in which new and existing trees must be managed during the development process,” and does not destroy owners’ ability to develop their property, the owners were not deprived of all economically viable use of their land.<sup>57</sup> A dissenting opinion argued that the ordinance should be reviewable under the regulatory takings test for discretionary exactions as articulated by the U.S. Supreme Court in the *Dolan* case.<sup>58</sup> The *Dolan* test is divided into two parts: First, the court must determine whether an *essential nexus* exists between a legitimate state interest and the permit condition of the ordinance. Second, “there must be an individualized determination that the required exaction is roughly proportional to the nature and extent of the impact of the proposed development.”<sup>59</sup>

The dissenting opinion argued that the ordinance failed the first prong of the *Dolan* test because the mandatory reforestation provision of the ordinance, which required developers to plant trees in areas where there were no trees previously, was not supported by environmental documentation.<sup>60</sup> It also argued that the ordinance failed the second prong because the ordinance imposed an exaction which was not “roughly proportional” to the impact of the development nor did it provide an opportunity for an individualized determination.<sup>61</sup> The ordinance in question did not have different requirements based on the type of development or the area in which the development would occur.<sup>62</sup> These problems were compounded by the ordinance’s lack of standards to guide its implementation.<sup>63</sup> This dissent provides an insightful analysis as to why and how the *Dolan* two-part test for exactions could be used to challenge a tree preservation ordinance *as applied* to a particular property owner or developer.

In New Jersey, the Supreme Court rejected a challenge brought by the New Jersey Shore Builders Association to the Township of Jackson’s tree removal ordinance.<sup>64</sup> The trial court found that the ordinance, which required property owners to replace any tree removed from a property with another tree or pay into a mitigation fund that would plant trees and shrubs on public property, failed to meet the “essential nexus test” because the payment of money toward planting trees on public property did not advance the goal of mitigating the hazards created by tree removal on specific properties.<sup>65</sup> The New Jersey Supreme Court overturned the lower court decision (in part) and upheld the tree removal ordinance on the ground that the ordinance did not regulate the “use of land” and therefore did not need to meet the standards of the state Municipal Land Use Law.<sup>66</sup> Instead, it merely had to meet a “rational basis” test to be valid under the town’s general police power.<sup>67</sup> The court found that the Association failed to meet its

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<sup>55</sup> *Id.*

<sup>56</sup> *Greater Atlanta Homebuilders Association v. DeKalb County*, 588 S.E.2d 694 (Ga. 2003).

<sup>57</sup> *Greater Atlanta*, 588 S.E.2d at 698.

<sup>58</sup> *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

<sup>59</sup> *Id.* at 386-391.

<sup>60</sup> *Greater Atlanta*, 588 S.E.2d at 702 (J. Carley, dissenting).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 702-03

<sup>64</sup> *New Jersey Shore Builders Ass'n v. Township of Jackson*, 970 A.2d 992 (N.J. 2009).

<sup>65</sup> *New Jersey Shore Builders Ass'n*, 970 A.2d at 1000.

<sup>66</sup> *New Jersey Shore Builders Ass'n*, 970 A.2d at 1002.

<sup>67</sup> *Id.*



burden to overcome the ordinance’s presumption of validity, cleverly observing that the Association, in challenging the ordinance, “cannot see the forest for the trees.”<sup>68</sup>

In cases where municipalities require a cash payment in lieu of tree preservation requirements, like the Township of Jackson in the *New Jersey Shore Builders* case, applicants may also consider whether the requested payment constitutes an unconstitutional exaction.<sup>69</sup> The Supreme Court, in *Koontz*,<sup>70</sup> confirmed that the *Nollan/Dolan* Dual Nexus Test applies not only to required dedications of land but also to monetary exactions.<sup>71</sup> No U.S. Supreme Court decision has directly addressed whether the *Nollan/Dolan* Dual Nexus Test applies to a *legislatively* imposed exaction—e.g., an ordinance requiring property owners to provide tree canopy cover or pay fees in lieu of doing so. However, there is no logical basis for distinguishing exactions imposed legislatively from those imposed quasi-judicially.<sup>72</sup> Further, the cases cited by the U.S. Supreme Court to support its decision in *Koontz* deal with legislatively adopted exactions, suggesting that the holding applies to ordinances mandating exactions as well as to *ad hoc* requirements.<sup>73</sup> Although the New Jersey Supreme Court did not evaluate the Township of Jackson ordinance under *Nollan*, *Dolan*, and *Koontz*, it can be expected that an unconstitutional exaction claim will be brought in similar cases in the future.

### 13.04 IMPACT ON DEVELOPMENT COSTS

Some common tree preservation regulations can result in higher development costs. Requirements for reforestation or afforestation impose a costly burden on a developer to take affirmative steps to remedy a situation that it did not even create, by planting trees to increase forest cover. Likewise, requirements to replace removed trees, either on or off-site, can add to development costs.<sup>74</sup> One study of California municipalities and counties found that developers paid for and planted 90% of the trees added to the urban landscape in 1997, and that this percentage represented an increase from 75% ten years earlier.<sup>75</sup>

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<sup>68</sup> *New Jersey Shore Builders Ass’n*, 970 A.2d at 1005.

<sup>69</sup> In addition to the discussion that follows, see *Mira Mar Development Corp. v. City of Coppell*, 421 S.W.3d 74, 95 (Tex. App. 2013). In *Mira Mar*, a Texas appellate court, reversing the trial court’s judgment in part and rendering judgment in part, found that “the City did not raise a genuine issue of material fact that any amount of tree retribution fees would be roughly proportional.” In this case, the City of Coppell, Texas required preservation of all trees with a trunk diameter greater than 6 inches. Developers had to pay \$100 per inch of trunk diameter of such trees removed, minus a credit for each tree planted and trees preserved on the property. Although the court found that the purpose of the ordinance promotes a legitimate public interest and the City’s reforestation program bears an essential nexus to the substantial advancement of those interests, “the summary judgment evidence does not explain how the removal of trees on appellant’s private property created such a need that did not exist before the trees were removed.” *Id.* at 96.

<sup>70</sup> *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013).

<sup>71</sup> *Id.*

<sup>72</sup> Justice Clarence Thomas has agreed with this position. Although in a dissenting opinion, rather than a Court holding, he stated: “The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.” *Parking Ass’n of Georgia, Inc. v. City of Atlanta*, 515 U.S. 1116 (1995)).

<sup>73</sup> Blaesser at § 1:41. Some commentators disagree with this analysis. See Glen C. Hansen, *The U.S. Supreme Court’s Nollan/Dolan Jurisprudence is Catching Up with The California Supreme Court in Ehrlich v. Culver City*, Abbot & Kindermann Land Use Law Blog (Jul. 9, 2013), available at <http://blog.aklandlaw.com/2013/07/articles/exactions-impact-fees-service-charges/the-us-supreme-courts-nollandolan-jurisprudence-is-catching-up-with-the-california-supreme-court-in-ehrllich-v-culver-city/>.

<sup>74</sup> One study found that complying with tree preservation requirements increased development costs by 5.5%. Kathleen L. Wolf, *City Trees and Property Values*, 16 ARBORIST NEWS 35 (Aug. 2007).

<sup>75</sup> Thompson et al. at 10.

Viewed purely from a development cost perspective, any prohibition or limitation on tree removal or clearing, and even requirements for best management practices to avoid damaging trees during construction, can prevent a developer from undertaking the lowest cost methods of development, for example by making it more difficult to bring in large construction equipment or constraining site design.

Many modern tree preservation ordinances mandate detailed tree surveys encompassing every part of even a large development parcel. Typically, these surveys must be completed and certified by a qualified professional. Such efforts can add considerably to the “soft” costs of development. The additional time it takes to complete the review and approval process is another source of increased “soft” costs associated with some tree preservation ordinances.

### **13.05 IMPACT ON AMOUNT AND PATTERNS OF LAND DEVELOPMENT**

Tree preservation ordinances impact the amount and patterns of land development by limiting the extent to which a developer can remove trees from a property to accommodate new buildings and paved surfaces. Plan review provisions can have the effect of reconfiguring, and reducing the size of, a development on a site to avoid specimen or significant trees or forested areas. Ordinances that require a certain percentage of tree canopy to be retained, or that require reforestation or afforestation or replacement planting on site, function as density restrictions that can serve to increase the size of the parcel that is required for any particular magnitude of development (to the extent that development density is not already limited by zoning or other land use regulatory provisions).

### **13.06 IMPACT ON HOUSING AFFORDABILITY**

Tree preservation, or reforestation/afforestation requirements will generally increase development costs, and those increased costs will be passed on to the purchaser to a greater or lesser extent depending on the structure of the local housing market, thereby affecting the affordability of housing. Despite the potential for negative impacts on individual property rights discussed above, one of the main purposes cited by communities that impose tree preservation requirements is the preservation of, and benefit to, property values across the community as a whole. All else being equal, neighborhoods or jurisdictions in which trees are preserved and planted will tend to be environmentally healthier, more aesthetically pleasing, and desirable and consequently support higher housing prices than equivalent neighborhoods lacking trees. In regions where attitudes towards tree preservation vary from jurisdiction to jurisdiction, these market effects may make it more difficult to provide affordable housing in communities with strict mandates concerning trees, without the use of other regulatory techniques such as density bonuses or inclusionary zoning to counteract these market effects.

### **13.07 RECOMMENDED TALKING POINTS: PROS AND CONS**

#### **PROS:**

- Proponents of tree preservation ordinances have identified a number of environmental, aesthetic, and economic benefits to maintaining tree cover on public and private property, many of which accrue to society as a whole (e.g., carbon sequestration, clean air) rather than to a particular property owner.
- Even to an individual property owner, tree ordinances can have significant beneficial effects. For example, one’s property value may be enhanced if one’s neighbors are prevented from clear-cutting their lots.



CONS:

- Ordinances that impose extensive restrictions on removing trees on private properties represent a significant intrusion into what is traditionally considered to be a core attribute of private property ownership.
- Tree preservation ordinances can complicate and add cost and time to the development process.

### 13.08 INCENTIVE-BASED ALTERNATIVES

Commentators and communities have been creative in seeking to alleviate the burden imposed by tree preservation regulations. *Development rights credits*, which are a form of transferable development rights (TDR), have been suggested as a means of alleviating hardship that could result from the imposition of tree preservation requirements in a way that reduces or eliminates development potential. Special property tax status for land set aside as a result of a tree preservation mandate is another suggested way to alleviate the fiscal burden on a property owner that is prevented from developing a portion of its property.<sup>76</sup>

It is also possible to devise a tree preservation ordinance that has incentive-based provisions built into it. The most common incentive approach is to reward the preservation of existing tree cover within new developments by reducing landscaping requirements on a proportional or higher basis.<sup>77</sup> Another approach taken by some jurisdictions is to provide development bonuses, including increased densities and building heights and reduced setbacks, reduced parking landscaping requirements, and providing credits toward compliance with stormwater programs, when the applicant is able to present a plan that preserves more trees than the ordinance would require.<sup>78</sup>

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<sup>76</sup> Duerksen/Richman at 27, 62.

<sup>77</sup> Duerksen/Richman at 61; *see also* RATHKOPF § 20:76.

<sup>78</sup> Duerksen/Richman at 62; *see also* RATHKOPF § 20:76.

# PART IV: PRESERVATION OF COMMUNITY CHARACTER

## SECTION 14: NEIGHBORHOOD CONSERVATION DISTRICTS

### 14.01 PURPOSE AND KEY TERMS

Two solutions for sprawl—infill development and development within existing urban areas—often create unintended and unwanted impacts on the character of existing neighborhoods. Increased densities and bulk, incompatible uses, and the introduction of contextually inappropriate architecture can contribute to a decline in neighborhood character, loss of a “sense of place,” as well as the loss of historic structures. In an effort to preserve those qualities, local governments across the country have enacted **neighborhood conservation districts (NCDs)**.

An NCD is a technique, typically enacted through local adoption of a zoning overlay,<sup>1</sup> that has been in use since the mid-1970s, when Boston established a Landmarks Commission.<sup>2</sup> NCDs became prominent in the late 1980s in response to the economic boom and the National Historic Preservation Act prompted by the expansion of local government preservation activities.<sup>3</sup> Its purpose is primarily to preserve neighborhood character, as defined by the neighborhood’s historic, architectural, or aesthetic features,<sup>4</sup> or by the nature of its use (e.g., residential); and sometimes to act as a catalyst for rehabilitation.<sup>5</sup> An oft-cited definition of this technique, provided by Robert E. Stipe, Professor Emeritus of Design at North Carolina State University, encompasses the effect on neighborhood identity of all aspects of the built environment, not just the architecture:

A conservation area possesses form, character, and visual qualities derived from arrangements or combinations of topography, vegetation, space, scenic vistas, architecture, appurtenant features, or places of natural or cultural significance, that create an image of stability, comfort, local identity, and livable atmosphere.<sup>6</sup>

An NCD is often used when a neighborhood wants some of the protections offered by an historic district, but either does not meet the thresholds for historic designation or does not want to control the aesthetics of a neighborhood to the extent of an historic district designation.<sup>7</sup> The City of Indianapolis Historic Preservation Commission describes the difference between a neighborhood conservation district and a historic district as follows:

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<sup>1</sup> See William A. Fischel, *Neighborhood Conservation Districts: The New Belt and Suspenders of Municipal Zoning*, 78 BROOKLYN L. REV. 339, 348 (Winter 2013) (hereinafter “Fischel”).

<sup>2</sup> Mark S. Dennison, *Conservation Districts: Latest Zoning Tool to Preserve Neighborhood Character*, ZONING NEWS at 1 (Nov. 1992) (hereinafter “Dennison”).

<sup>3</sup> Elizabeth Tisher, *Historic Housing for All: Historic Preservation as the New Inclusionary Zoning*, 41 VERMONT L. REV. 603 (Spring 2017) (stating that Cambridge, Massachusetts created the first neighborhood conservation district in 1983 and that currently it is estimated that there are 165 neighborhood conservation districts in 35 states).

<sup>4</sup> Anika Singh Lemar, *Zoning as Taxidermy: Neighborhood Conservation Districts and the Regulation of Aesthetics*, 90 INDIANA L.J. 1525 (2015).

<sup>5</sup> Marya Morris, *Innovative Tools for Historic Preservation*, Chicago: 1992 American Planning Association, Planners Advisory Service (PAS) Report No. 438, p. 13 (hereinafter “Morris”).

<sup>6</sup> Robert E. Stipe, “Conservation Areas: A New Approach to an Old Problem” in *Issues Paper: Conservation Districts* distributed by the National Park Service Cultural Resources Partnership Notes, p. 2 (available online at <https://www.okhistory.org/shpo/docs/13a.pdf> (hereinafter “Stipe”).

<sup>7</sup> Dorothy Nachman, *Neighborhood Conservation Districts: A New Planning Tool Demands the Evolution of the Covenant against Encumbrances*, 41 N.C. CENT. L. REV. 1 (2018-19).

Conservation districts are areas that may have experienced significant change over time or might be ineligible for the National Register [of Historic Places], but still represent a key component of local history. The purpose of a conservation district is to preserve and protect the historic character of the neighborhood.... In conservation districts, fewer things are subject to design review, and the design guidelines are less restrictive than in local historic districts.<sup>8</sup>

Professor Stipe argued that, ideally, neighborhood conservation districts should be non-regulatory in nature.<sup>9</sup> In practice, however, most conservation districts are regulatory, following either a “historic preservation” or a “neighborhood planning” model.<sup>10</sup> The historic preservation model is used primarily for neighborhoods with a concentration of older structures of a distinct architectural style or a particular time period that do not qualify or have sufficient support for historic district protections. The NCD is put in place to protect the physical assets of the neighborhood by regulating the changes allowed to the neighborhood that could impact the neighborhood’s aesthetic.<sup>11</sup> This model may involve some level of architectural design review for new construction or changes to existing buildings in the neighborhood.

The neighborhood conservation district based on a “neighborhood planning” model utilizes neighborhood-level planning that includes such concerns as transportation, public safety and public services, as well as preservation. This approach is often designed to prevent wholesale demolition of properties, encourage specific types of use, or maintain a certain scale of new construction.<sup>12</sup> It typically does not include design review, relying instead on dimensional zoning regulations such as lot size, lot coverage, and setbacks, consistent with a neighborhood’s built form.<sup>13</sup> Both models can include regulations addressing streetscapes, transportation, tree preservation, and affordable housing.

Where the focus is historic preservation, the overlap between a “conservation” and a “historic” district can be confusing and the distinctions are often blurred.<sup>14</sup> Indeed, some argue that “[t]he distinctions between preservation-based and planning-based conservation districts are becoming less apparent as communities look for and develop solutions that respond to the specific needs of individual neighborhoods.”<sup>15</sup>

Generally, three types of neighborhoods, or “conservation areas,” have been identified as appropriate for designation as a neighborhood conservation district:

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<sup>8</sup> “The Difference Between Districts,” Indianapolis Historic Preservation Commission (October 2003).

<sup>9</sup> Stipe at 4.

<sup>10</sup> Carole Zellie, “A Consideration of Conservation Districts and Preservation Planning, Notes from St. Paul, Minnesota,” distributed by the National Park Service, Cultural Resources Partnership Notes (available online at <https://www.okhistory.org/shpo/docs/13a.pdf>).

<sup>11</sup> Amelie Bailey, “Evaluation of the Neighborhood Conservation District Overlay in the Northside Neighborhood of Chapel Hill, NC (Masters Project),” University of North Carolina – Chapel Hill, Department of City and Regional Planning (May 1, 2019).

<sup>12</sup> “Neighborhood Conservation Districts: Planning and Administrative Practices,” Prepared for City of Detroit by the National Trust for Historic Preservation, December 7, 2018, available at: <https://forum.savingplaces.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=28a35100-3d70-88ba-0620-c30ae9b366b9&forceDialog=0>.

<sup>13</sup> Adam Lovelady, *Broadened Notions of Historic Preservation and the Role of Neighborhood Conservation Districts*, 40 THE URBAN LAWYER 155 (Winter 2008) (hereinafter “Lovelady”).

<sup>14</sup> Morris at 17. See also BRIAN W. BLAESSER, DISCRETIONARY LAND USE CONTROLS: AVOIDING INVITATIONS TO ABUSE OF DISCRETION at 551 (Thomson: Reuters 2021 update).

<sup>15</sup> Julia Miller, *Protecting Older Neighborhoods Through Conservation District Programs* at 5 (National Trust for Historic Preservation: 2004).

1. Areas surrounding or bordering an existing or proposed local historic district, providing a “buffer” or “transitional” area of protection;
2. “Pre-natal” historic districts that cannot meet the 50-year rule or otherwise lack sufficient character or support for such designation; and
3. Areas of social or economic value, for example utility for affordable housing, with no “historic” status.<sup>16</sup>

The scope of review in an NCD varies according to the purpose and the administering agency. Districts with a historic preservation goal tend to mimic the historic district “certificate of appropriateness” model.<sup>17</sup> Districts administered by planning and zoning commissions, whose purpose is broader than historic preservation, consider uses, aesthetics, neighborhood character, and property values.<sup>18</sup> Elements of the built environment that are regulated because they contribute to neighborhood identity include lot frontage, lot size, building entrances, building height, and building placement on a lot. Building design elements of concern include roof shape, proportion and rhythm of openings, building materials, textures, and color.<sup>19</sup> Districts vary in the extent to which they regulate alterations, demolitions, and new construction. Nashville, Tennessee, for example, has created several historic preservation overlay districts, including Historic Preservation (HP) districts and Neighborhood Conservation Zoning (NC) districts.<sup>20</sup> In HP Districts, no structure may be constructed, altered, repaired, relocated, or demolished unless the proposed project complies with the HP District regulations.<sup>21</sup> By contrast, alterations and repairs are not regulated in Nashville’s more permissive NC Districts.<sup>22</sup>

NCDs that follow the “neighborhood planning” model typically implement neighborhood plans, which are often a prerequisite to adoption of the district.<sup>23</sup> Effective plans will incorporate neighborhood history, land use inventory, description of housing stock, inventory of the character of the built environment, capital improvement needs, commercial development or revitalization activities, and an architectural survey of the area’s architectural and urban design elements and patterns that distinguish the neighborhood.<sup>24</sup>

The following are some key terms in understanding the neighborhood conservation technique:

- **Design review** is the regulatory mechanism for controlling change to the built environment, whether the district regulates new construction only, or includes review of alterations and other exterior improvements. (*See Section 13*)
- **Overlay district** is a means of adding or “overlying” regulations over an existing zoning district, adding provisions that supersede the underlying zoning standards or

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<sup>16</sup> Stipe at 4.

<sup>17</sup> MALACHI REID PEACOCK, NEIGHBORHOOD CONSERVATION DISTRICTS AND THEIR RELEVANCE TO HISTORIC PRESERVATION IN THE 21ST CENTURY (2009).

<sup>18</sup> Dennison at 2.

<sup>19</sup> Dennison at 3.

<sup>20</sup> Lovelady at 147, 158.

<sup>21</sup> *See id.* at 159.

<sup>22</sup> *See id.*

<sup>23</sup> Zellie at 9.

<sup>24</sup> Morris at 19.

procedures if inconsistent. Neighborhood conservation districts typically are implemented using this zoning technique.<sup>25</sup>

- **Downzoning** is often undertaken in the form of a reduction in the allowed density, height, floor area ratio (FAR), or other standards of existing zoning regulations that may exceed what is actually present in a particular neighborhood.
- **Contextualism** refers to conformity with the overriding theme in many districts. But that is balanced by a desire for new buildings to meld with the old rather than imitate. As noted in Nashville’s guidelines for new construction, “new buildings should not imitate past architectural styles ... it is usually impractical to imitate the architecture of the past ... it creates ‘pseudo-old’ buildings.... New buildings should continue this tradition [of reflecting change in building tastes and technology over the years] while complementing and being compatible with other buildings in the area.”<sup>26</sup>
- **Downtown and Corridor Plans** are plans that rely heavily on the use of design guidelines and, sometimes, incentives to achieve renovation of older downtowns or commercial corridors. Some examples include the Downtown Raleigh Plan for Raleigh, North Carolina;<sup>27</sup> and “The Eastern Corridor” plan created by San Antonio, Texas to address issues and opportunities related to transportation, land use, and quality of life.<sup>28</sup>
- **Special Zoning/Design Districts** are “tailored” zoning districts created to meet the needs of an existing area (as opposed to setting parameters for future build-out). They are an emerging trend related to NCDs.<sup>29</sup> Examples are New York’s “Special Midtown District”<sup>30</sup> and Chicago’s “Planned Manufacturing Districts.”<sup>31</sup>

Preserving “community character” and “livability” through control of an area’s design aspects has been referred to as “the ‘soft’ side of growth management.”<sup>32</sup> NCDs, like other design-oriented community character techniques, are not stand-alone, and must be closely interrelated with other growth management efforts in order to be effective.<sup>33</sup> Also, they depend on a strong development market for their efficacy: “Fine points of project and building design are significant only if and when development takes place. Even historic preservation is dependent on attracting profitable uses for old buildings and neighborhoods.”<sup>34</sup>

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<sup>25</sup> See Fischel at 339, 348.

<sup>26</sup> Quoted in Morris at 22.

<sup>27</sup> See Downtown Plan: The Next 10 Years (Raleigh, NC) at

<https://cityofraleigh0drupal.blob.core.usgovcloudapi.net/drupal-prod/COR22/DowntownPlan.pdf>.

<sup>28</sup> The East Corridor: IH 10 East Perimeter Plan Update, San Antonio, TX, available at [https://www.sanantonio.gov/Portals/0/Files/Planning/NPUD/IH10\\_East\\_2008.pdf](https://www.sanantonio.gov/Portals/0/Files/Planning/NPUD/IH10_East_2008.pdf).

<sup>29</sup> *Id.* at 165.

<sup>30</sup> City of New York, Special Midtown District, available at <https://zr.planning.nyc.gov/index.php/article-viii/chapter-1>.

<sup>31</sup> City of Chicago, Planning Manufacturing Districts, available at <https://secondcityzoning.org/zone/pmd/>.

<sup>32</sup> Porter at 173.

<sup>33</sup> Max Abraham Yeston, Neighborhood Conservation Districts: An Assessment of Typologies, Effectiveness, and Community Response at 7 (May 2014) (hereinafter “Yeston”).

<sup>34</sup> *Id.*

## 14.02 EFFECTIVENESS IN ACHIEVING STATED PURPOSE(S)

Neighborhood conservation districts are considered by planners who work with them to be effective in achieving their purposes. A 1992 survey of 18 such districts conducted for St. Paul, Minnesota concluded that:

architectural and historic preservation oriented districts with limited design review can be a useful supplement to the traditional historic district. They function best ... when applied to areas with a history of good maintenance and little exterior change and/or where residents are strongly opposed to full-fledged design review. In areas where there is a pattern of low maintenance and unsympathetic exterior alterations, conservation districts with limited design review are less effective at preserving neighborhood character.<sup>24</sup>

A 2009 study concluded that neighborhood conservation may be most appropriate in historic or established neighborhoods where home maintenance is already high and little rehab work is needed.<sup>35</sup>

Neighborhood conservation districts are usually created in response to a petition or request by a neighborhood group and the residents of the proposed district are involved in the planning process and the development of the applicable regulations.<sup>36</sup> In the Town of Chapel Hill, North Carolina, for example, initiation of a neighborhood conservation district requires the submission of a petition by the owners of at least 51% of the land area in the proposed district.<sup>37</sup> As a result, the district boundaries can be drawn to encompass areas with similar characteristics while excluding incompatible areas, and the regulations can be tailored to protect specific or unique characteristics, features, activities, or themes identified by the residents. Under the Neighborhood Conservation Districts bylaw adopted in 2016 by the Town of Lexington, Massachusetts, the boundaries of a neighborhood conservation district must be drawn to encompass an area in which at least two-thirds of affected properties support the designation.<sup>38</sup> The boundaries of an NCD can be redrawn over time as resident support changes.<sup>39</sup>

Generally speaking, neighborhood conservation district regulations may address historic or aesthetic qualities. However, they are also used successfully to guide the design of new infill development, to protect existing development patterns, to encourage the redevelopment of transitional or fractured neighborhoods, and to recapture the design elements that are viewed as having produced lively, thriving mixed use neighborhoods prior to zoning.<sup>40</sup> This type of “contextual” regulation can be used to maintain a low-density pattern of development with lower building heights and lot coverage limitations based on the existing buildings. These measures can eliminate the incentive for tearing down existing homes by limiting any new development to the established pattern.<sup>41</sup>

The Lockeland Springs – East End Neighborhood Conservation District of Nashville has been cited as an example of a neighborhood with consecutive waves of architectural styles (turn of the century bungalows, 1950s urban renewal, and 1980s duplexes) that in the late 1980s was moving toward “demolition by

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<sup>24</sup> Zellie at 15.

<sup>35</sup> Peacock at 13.

<sup>36</sup> See Fischel at 339, 348 (noting that neighborhood conservation districts “are usually established as the result of neighborhood activism”).

<sup>37</sup> Chapel Hill Land Use Management Ordinance § 3.6.5 (Neighborhood Conservation Districts).

<sup>38</sup> Town of Lexington, Massachusetts, Frequently Asked Questions Proposed Lexington Neighborhood Conservation District Enabling Law (2015).

<sup>39</sup> See *id.*

<sup>40</sup> Yeston at 9.

<sup>41</sup> Adrian Scott Fine & Jim Lindberg, “Taming the Teardown Trend,” *Forum News* (July/Aug. 2002).

neglect.” The city adopted an overlay conservation district guided by the theme of contextualism: “that is, new buildings must meld with the old. They may stand out for their uniqueness, but not for their newness.”<sup>42</sup> The overlay district is credited with having stabilized property values and minimized incompatible infill development.<sup>43</sup> A 2019 study found that over the previous fifteen years, property values in historic preservation districts and neighborhood conservation districts in Nashville outperformed the rest of the city.<sup>44</sup>

Examples of other jurisdictions that have adopted neighborhood conservation districts are:

- Raleigh, North Carolina, where a neighborhood conservation overlay district is tied to a neighborhood plan, and controls “built environmental characteristics.” The overlay district may apply only to areas of 15 contiguous acres or more that are 75% developed, and where development began at least 25 years prior to adoption of the overlay zone.<sup>45</sup> The development standards for a neighborhood conservation overlay district in Raleigh generally consist of basic dimensional requirements, such as minimum lot size and setback requirements and building height limitations.<sup>46</sup> The standards for the Laurel Hills Neighborhood, for example, include a half-acre minimum lot size requirement, a minimum front yard of 50 feet, and a maximum building height of 35 feet.<sup>47</sup>
- Knox County, Kentucky, where the Tazewell Pike Neighborhood Conservation Overlay District uses design standards to encourage traditional urban design and a diversity of uses historically present in the community, in conjunction with standards governing building bulk, setbacks, height, scale and massing, and facade articulation.<sup>48</sup>
- The City of Philadelphia, which has six NCDs (known as neighborhood conservation overlays) as of 2019, in addition to the City’s designated historic districts. The intent of Philadelphia’s NCDs, among other things, is to acknowledge the goal of preserving physical fabric as a public service. Five out of the six neighborhood conservation overlays do not regulate alterations, focusing instead on new construction.<sup>49</sup>

In 1998, the Connecticut legislature enacted the “Village District Act,” enabling local governments to establish “Village Districts” in “areas of distinctive character, landscape, or historic value.”<sup>50</sup> A village district ordinance will usually require property owners to adhere to neighborhood-specific standards whose primary goal is to preserve traditional village characteristics, including architectural elements,

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<sup>42</sup> Morris at 22.

<sup>43</sup> Holly Dollof & Brian Forrester, “Successes in East Nashville Have Stoked Interest Elsewhere,” *Nashville Business Journal* (May 6, 2005) (available at <http://www.bizjournals.com/nashville/stories/2005/05/09/story2.html>).

<sup>44</sup> The New Nashville: A Study of the Impacts of Historic Preservation, Prepared for the Metro Historical Commission, PlaceEconomics, April 2019.

<sup>45</sup> See City of Raleigh (NC) Code Unified Development Ord. § 5.4.3(B) (Neighborhood Conservation Overlay District; Locational Guidelines), available at <https://user-2081353526.cld.bz/UnifiedDevelopmentOrdinance/134/>.

<sup>46</sup> See *id.* § 5.4.3(E).

<sup>47</sup> See *id.* § 5.4.3(F)(7).

<sup>48</sup> Tazewell Pike Neighborhood Conservation Overlay District Design Guidelines, Knoxville-Knox County Planning, available at: <https://knoxplanning.org/resources/historic/guidelines/city/Tazewell%20Pike.pdf>.

<sup>49</sup> Meredith Johnson, Form Regulation to Address New Construction in Historic Districts (Masters Thesis), University of Pennsylvania, Philadelphia, PA (2019).

<sup>50</sup> Conn. Gen. Stat. § 8-2j (Village Districts), available online at [https://www.cga.ct.gov/current/pub/chap\\_124.htm#sec\\_8-2j](https://www.cga.ct.gov/current/pub/chap_124.htm#sec_8-2j).



“maintenance of public views,” and “design, paving materials, and placement of public roadways.” At least fourteen Connecticut municipalities have created a Village District.<sup>51</sup>

### **14.03 IMPACT ON PROPERTY VALUES**

To the extent that neighborhood conservation districts are effective at improving the quality and appropriateness of alterations and new construction, they support property values and can stabilize a downward cycle. However, they often protect existing development patterns, which can have a negative impact on the speculative, or development value of property depending on the location, density, and height of the existing buildings. Studies indicate that historic designation (in the form of historic district formation) had a negative impact on property values (between 11.6% and 15.5%) in the Boston metropolitan area in the 2000s and in Chicago during the 1990s.<sup>52</sup> Insofar as historic districts and neighborhood conservation districts, both limit a property owner’s ability to alter the exterior of a building, and their respective impacts on property values can be expected to be similar. However, establishing a causal relationship between historic designation and property value is inherently difficult due to the challenges of locating proper control neighborhoods and isolating the historic designation from a myriad of other variables.<sup>53</sup> In contrast to the Boston and Chicago studies, other studies have found that the establishment of a historic district can have a positive impact on property values. For example, a study in New York City found that the establishment of a historic district in some boroughs actually increased the value of properties both within and immediately outside of those areas.<sup>54</sup>

### **14.04 IMPACT ON DEVELOPMENT COSTS**

Because many neighborhood conservation districts require an additional layer of development review by a newly created board or committee (e.g., an Architectural Review Committee) that typically is partially comprised of neighborhood residents,<sup>55</sup> project review can be a significant component of Neighborhood Conservation Districts, and may increase development cost by adding time for board/committee or administrative review and requiring large amounts of information to be submitted before a building permit will be issued.

### **14.05 IMPACT ON AMOUNT AND PATTERNS OF LAND DEVELOPMENT**

When the density and height limitations are based on an existing suburban or lower density development pattern, the restrictions imposed by an NCD will limit the extent to which the land can be redeveloped to take greater advantage of the size of the parcels and/or the more generous regulations in the underlying zoning classification. This limitation may shift development to other neighborhoods or other jurisdictions.

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<sup>51</sup> See generally Preservation Connecticut at <https://preservationct.org/village-district-ordinances>.

<sup>52</sup> Martin Heintzelman and Jason Altieri, *Historic Preservation: Preserving Value?*, J. REAL ESTATE FINANCE & ECONOMICS, 46 (3): 543-563 (2013).

<sup>53</sup> The National Park Service issues annual reports on the Federal Historic Preservation Tax Incentives Program, quantifying the number of historic rehabilitations certified each year, their reported costs, and other statistical information on the program. The program is designed to not only preserve and rehabilitate historic buildings, but to also promote the economic revitalization of older communities in the nation’s cities and towns, along Main Streets, and in rural areas. The annual report is available at <http://www.nps.gov/tps/tax-incentives.htm>, along with information on the program in general.

<sup>54</sup> Brian McCabe et al., *Preserving History or Restricting Development, The Heterogeneous Effects of Historic Districts on Local Housing Markets in New York City*, JOURNAL OF URBAN ECONOMICS AT 28 (2015) (hereinafter “McCabe”).

<sup>55</sup> See Fischel at 339, 349.



In urban neighborhoods where development pressure is high, the limiting effects of NCDs on market-driven development can be significant. By requiring preservation of older building stock, an NCD can “freeze the neighborhood in time,” thus limiting future development potential and housing supply.<sup>56</sup> Some critics of historic preservation argue that by doing this, NCDs may have the undesired effect of rendering local and state governments unable to respond to changing demographics and market forces within neighborhoods and the needs of future housing consumers by reducing the number of delivered housing units below what would otherwise be feasible without historic preservation.<sup>57</sup>

One commentator has argued that that “some local governments preserve buildings or neighborhoods regardless of their actual historical value because what they genuinely care about is resisting change.”<sup>58</sup> In some states, local governments are able to accomplish this directly through the designation of a community preservation districts, while in others “local governments create a historic overlay on a neighborhood that they are trying to protect from redevelopment—not so much for the history of the place but instead to make it more difficult to subdivide and redevelop.”<sup>59</sup>

Seattle created the Pike/Pine Conservation Overlay District in 2009, purportedly one of the first uses of a conservation district in a commercial/mixed-use neighborhood in the United States, in an effort to conserve the “character” of the neighborhood while simultaneously encouraging residential growth. Among other things, the district’s regulations offer the incentive of additional height/area if the street-facing façades of pre-1940 “character structures” are retained in new development.<sup>60</sup> A 2021 study of the district indicates that once the ordinance took effect, developers immediately sought to obtain the additional height that was awarded as an incentive for façade preservation, leading to a period of rapid development. Without the ordinance, the neighborhood would have seen more demolition and entirely new construction. With the ordinance, new construction retains fragments of the past, and in areas with larger buildings the regulations have been found to actively discourage replacing historic structures.<sup>61</sup>

#### **14.06 IMPACT ON HOUSING AFFORDABILITY**

Housing preservation is often an objective of neighborhood conservation districts. Such NCDs typically list as one of their objectives, the promotion and retention of affordable housing. Typically, financial assistance and incentives are used in combination with NCDs to encourage rehabilitation and maintenance of older housing stock, whether rental or owner-occupied, or as with the Pike/Pine Conservation Overlay District in Seattle, to encourage the creation of additional residential units. Where it helps to conserve older housing stock or create additional units of housing, this technique contributes to housing affordability.

To the extent that an adopted NCD adds to the cost of new development through a more involved development review process, this technique could contribute to increased housing costs. An NCD that acts like a historic district by restricting the right to alter the exterior of affected buildings can have a

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<sup>56</sup> Anika Singh Lemar, *Zoning as Taxidermy: Neighborhood Conservation Districts and the Regulation of Aesthetics*, 90 INDIANA L. J. 1525 (2015).

<sup>57</sup> *See id.* at 1527; *see also* McCabe at 17.

<sup>58</sup> Christopher Serkin, *The Wicked Problem of Zoning*, 73 VANDERBILT L. REV. 1879, 1891 (2020).

<sup>59</sup> *Id.*

<sup>60</sup> This façade protection has been called “façadism” as developers receive benefits (added height and space) even if they demolish all of an historic building but retain the street-facing façades.

<sup>61</sup> Naoko Kuriyama & Jeffrey Karl Ochsner, *Protecting neighborhood character while allowing growth? Pike/Pine Conservation Overlay District, Seattle, Washington*, *Planning Perspectives*, 36:6, 1195-1223 (2021).

negative impact on housing affordability by driving up the prices of the housing stock both immediately in the designated area and immediately outside its boundaries.<sup>62</sup>

#### **14.07 RECOMMENDED TALKING POINTS: PROS AND CONS**

##### **PROS:**

- When a neighborhood lacks sufficient support or does not meet the historic requirements for designation as a historic district, an NCD offers a viable alternative for community preservation.
- NCDs are more “lenient,” susceptible to local definition, and more flexible than historic district designation, which often requires full-fledged design review.<sup>63</sup>
- NCD designation melds with the local planning process and administrative structure and involves “associative values” beyond historic or architectural merits.<sup>64</sup>
- Design and appearance initiatives “can play a significant role in supporting and reinforcing other elements of growth management programs.”<sup>65</sup>
- Some studies suggest that neighborhood conservation district designation have a positive impact on property values.<sup>66</sup>

##### **CONS:**

- NCDs typically add review steps and restrictions and/or involve downzoning to achieve their purpose.
- There are potential legal pitfalls that beset architectural review and design standards, generally related to the legality of “aesthetic zoning” and due process concerns because of standards or guidelines that are vague as to their meaning. Restrictions on building appearance may raise First Amendment freedom of expression challenges. Factors to consider are whether the state recognizes aesthetic regulation as valid, whether the ordinance is vague and allows too much discretion, and whether the restrictions imposed are a valid means of furthering neighborhood conservation.<sup>67</sup>
- Some studies suggest that NCD designation has a negative impact on housing affordability by increasing the value of affected property.

#### **14.08 INCENTIVE-BASED ALTERNATIVES**

In proposing a “conservation area” without a regulatory mechanism, Professor Stipe argued in 1993 that “it is time to supplement this traditional [historic preservation] regulatory stick with a proactive carrot ...

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<sup>62</sup> See McCabe at 16.

<sup>63</sup> Nellie at 15.

<sup>64</sup> Stipe at 2.

<sup>65</sup> Porter at 173.

<sup>66</sup> See Brian McCabe, et al., *Preserving History or Restricting Development, The Heterogeneous Effects of Historic Districts on Local Housing Markets in New York City*, JOURNAL OF URBAN ECONOMICS at 16 (2015).

<sup>67</sup> Dennison at 4.

the ideal conservation area becomes a device by which a city or county imposes on itself a special responsibility to undertake ambitious, specifically defined planning and design tasks targeted to the maintenance and improvement of the area so designated.”<sup>68</sup> Such a scheme is neither regulatory, nor necessarily incentive-based. Professor Stipe might argue that public initiatives, including revolving loan funds to promote home ownership or improvements to historic buildings, could be that “carrot” to go along with the regulatory “stick.”

Many communities have sought to promote improved design and appearance through regulatory provisions that provide incentives to encourage response to specific public design objectives.<sup>69</sup> The best known examples which pertain to downtown development in major cities rather than residential neighborhoods are: the New York City regulations that allow developers a floor area ratio bonus if they incorporate public pedestrian plazas;<sup>70</sup> Seattle’s downtown zoning provisions, which offer density bonuses for “public benefit” features such as open space or green street features;<sup>71</sup> and the program announced by Bethesda, Maryland that gave “first-in-line for approval” priority to projects around the Metrorail station that offered “a high quality of construction and significant public amenities.”<sup>72</sup> With the exception of Bethesda, all of these incentive programs operated in tandem with a prior downzoning.<sup>73</sup> As one expert observes:

[T]he problem with all incentive zoning programs is that they depend on real estate market activity and pricing levels to produce results. During the office heyday of the 1980s, developers used incentives to build as much space as quickly as possible.... In many cities, however, sharp reductions in market activity and profit levels in the late 1980s yielded far fewer public benefits through incentives.... Incentives also raise the issue of “zoning for sale” and highly discretionary decision making.... The essential ingredients for achieving a fair result in such negotiations are well-conceived design objectives and detailed guidelines to guide decisions.<sup>74</sup>

Downzoning property in order to “create” the incentive for developers to provide design features or amenities in exchange for recouping density lost through the downzoning is a questionable strategy. Such downzoning may be challenged as arbitrary if it is not done comprehensively and in relation to a carefully prepared design plan for the downzoned areas that identifies how and where specific public design objectives are to be achieved.

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<sup>68</sup> Stipe at 2.

<sup>69</sup> Porter at 165-166; *see also* Terry Lassar, *Carrots and Sticks; New Zoning Moves Downtown* (Washington, D.C.: Urban Land Institute, 1989); Richard F. Babcock & Wendy U. Larsen, *Special Districts: The Ultimate in Neighborhood Zoning* (Cambridge, MA: The Lincoln Institute of Land Policy, 1990).

<sup>70</sup> NEW YORK CITY DEPARTMENT OF CITY PLANNING, ZONING HANDBOOK, 2011 Edition.

<sup>71</sup> City of Seattle Office of Housing, *Incentive Zoning*, available at: <http://www.seattle.gov/documents/Departments/SDCI/Permits/IncentiveZoning.pdf>

<sup>72</sup> *See* Porter at 165-66.

<sup>73</sup> *See* Porter at 166.

<sup>74</sup> Porter at 167.

## SECTION 15: SCENIC DISTRICTS AND CONSERVATION EASEMENTS

### 15.01 PURPOSE AND KEY TERMS

**Scenic districts** and **conservation easements** are “another approach to preserving community character...[by] protect[ing] key views from key areas to prominent features.”<sup>1</sup> An APA Planning Advisory Services (PAS) report on aesthetics and community character notes:

The concern over view protection is not a new one and regulatory efforts to protect scenic views date back to the 1800s...In the 1930s, a scenic roadway movement swept the country and resulted in the creation of the Blue Ridge Parkway and Skyline Drive, among others... [V]iew protection is being rediscovered and reawakened with a vengeance. Polls show that protection of view sheds, view corridors, and scenic roadways enjoys wide political support.<sup>2</sup>

The purpose of this type of growth management technique is the preservation of significant natural or built features valued by a community. Aesthetic or preservation objectives often dovetail with the environmental goals of protecting “sensitive lands,” for example in ridgeline and mountain protection programs.<sup>3</sup>

A scenic district is usually a zoning technique, while a “conservation easement” (or “restrictive covenant”) is a non-regulatory tool which can limit specific development rights while leaving other property rights and ownership intact. In PDR and TDR programs they are used to limit development rights on properties in perpetuity. Conservation easements are often gifted by or purchased from property owners. However, easements are sometimes the subject of exactions imposed as a condition to discretionary development approvals.

The techniques most commonly used in protecting scenic areas are:

**Easement:** A grant of one or more of the property rights by the property owner to and/or for use by the public, a corporation, or another person or entity. An **affirmative easement** gives the holder a right to make some limited use of land owned by another. A **negative easement** is an easement that precludes the owner of the land from doing that which the owner would be entitled to do if the easement did not exist.<sup>4</sup>

**Conservation Easement:** A conservation easement is “an example of a negative easement...[which] can prohibit all future development or it can specify particular development activities that are prohibited.”<sup>5</sup> The authority to purchase development rights through a conservation easement must be granted by state enabling legislation.<sup>6</sup> Depending on how the easement is created, it may be enforceable only in equity, by

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<sup>1</sup> DOUGLAS R. PORTER, *MANAGING GROWTH IN AMERICA’S COMMUNITIES* at 168 (1997 Island Press) (hereinafter “Porter”).

<sup>2</sup> Christopher J. Duerkson & R. Matthew Goebel, *Aesthetics, Community Character and the Law* at 40 (1999 American Planning Association, Planners Advisory Service Report 489/490) (hereinafter “Duerkson”).

<sup>3</sup> Duerkson at 47.

<sup>4</sup> HARVEY S. MOSKOWITZ & CARL G. LINDBLOOM. *THE NEW ILLUSTRATED BOOK OF DEVELOPMENT DEFINITIONS* at 99-100 (Rutgers 1993).

<sup>5</sup> The America Planning Association, *Growing Smart Legislative Guidebook* at 9-61.

<sup>6</sup> Nancy A. McLaughlin, *Perpetual Conservation Easements in the 21st Century: What Have We Learned and Where Should We Go from Here?*, 2013 UTAH L. REV. 687, 696 (2013). The America Planning Association’s *Growing Smart Legislative Guidebook* includes in Section 9-402, a model Purchase of Development Rights statute.

injunction, or at law, with monetary damages.<sup>7</sup> Certain characteristics of common law easements make them ineffective for conservation purposes. Rules for enforcing easements vary among states, so that enforceability and assignability of conservation easements is sometimes uncertain. To resolve this difficulty, the Uniform Law Commission adopted in 1981 a “Uniform Conservation Easement Act” (the “UCEA”).<sup>8</sup> As of July 2022, 23 states and the District of Columbia have adopted some version of the UCEA.<sup>9</sup>

**Viewshed Protection Ordinance:** This approach is usually enacted through a zoning regulation and may incorporate tools such as height restrictions, setback requirements, design review, sign controls, landscaping, and environmental impact standards.<sup>10</sup> An example is the Viewshed Protection Overlay Zoning District established by the City of Cumberland, Maryland. The stated purpose of the viewshed overlay district is to “protect and enhance the aesthetic character of Haystack Mountain, Wills Mountain, and Shriver’s Ridge, with the broader goal of ensuring the preservation of views to these resources from downtown Cumberland.”<sup>11</sup>

## 15.02 EFFECTIVENESS IN ACHIEVING STATED PURPOSE(S)

**Scenic Districts.** There are numerous examples of effective scenic districts. The State of Washington’s Shoreline Management Act requires preservation of access as well as the protection of public views along the shoreline.<sup>12</sup> Denver imposes restrictions on the construction of structures within various view planes throughout the City.<sup>13</sup> The Champlain Valley Greenbelt Alliance has worked with local communities along the Route 7 driving corridor to help towns like Charlotte, Vermont adopt scenic overlay districts with boundaries based on topography, mountain views, and property boundaries.<sup>14</sup> Cincinnati’s Environmental Quality-Hillside Overlay District has been used to protect natural features and views along the Ohio River Valley.<sup>15</sup> Pittsburgh has adopted a View Protection Overlay District that allows the City to delineate various districts and provide guidelines that are specific to the scenic resources in each of these districts.<sup>16</sup> Salt Lake County’s Foothills and Canyons Overlay District restricts or prohibits development on slopes in excess of a 30% grade and on ridgelines in order to limit the visual impacts of

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<sup>7</sup> *Growing Smart Legislative Guidebook* at 9-61 to 9-62.

<sup>8</sup> See Uniform Law Commission, Uniform Conservation Easement Act, available online at <https://www.uniformlaws.org/committees/community-home?CommunityKey=4297dc67-1a90-4e43-b704-7b277c4a11bd>.

<sup>9</sup> See *id.*

<sup>10</sup> Duerkson at 44.

<sup>11</sup> See Cumberland, MD Viewshed Protection Overlay Zoning District, available online at <https://www.cumberlandmd.gov/DocumentCenter/View/188/Section-10-Viewshed-Protection-Overlay-District-PDF>.

<sup>12</sup> Shoreline Management Act, Washington State Legislature, available at <http://apps.leg.wa.gov/RCW/default.aspx?Cite=90.58>.

<sup>13</sup> See <https://www.denvergov.org/Government/Agencies-Departments-Offices/Agencies-Departments-Offices-Directory/Community-Planning-and-Development/Denver-Zoning-Code/Other-Regulations/View-Planes>

<sup>14</sup> Vermont Natural Resources Council, *Charlotte Scenic Overlay District*, <https://vnrc.org/community-planning-toolbox/case-studies/scenic-overlay-districts-charlotte/>. See also: Charlotte Land Use Regulations at Table 2.9 [https://www.charlottevt.org/vertical/sites/%7B5618C1B5-BAB5-4588-B4CF-330F32AA3E59%7D/uploads/Land Use Regs - for vote Town Meeting March 2 2021\(1\).pdf](https://www.charlottevt.org/vertical/sites/%7B5618C1B5-BAB5-4588-B4CF-330F32AA3E59%7D/uploads/Land%20Use%20Regs%20-%20for%20vote%20Town%20Meeting%20March%202%202021%281%29.pdf)

<sup>15</sup> Duerkson at 41, see also Cincinnati Land Development Code at Section. 1702.2 <https://www.cincinnati-oh.gov/planning/zoning-administration/view-the-draft-land-development-code/3-overlay-districts/>

<sup>16</sup> See Pittsburgh Zoning Code Section 906.08 [https://library.municode.com/pa/pittsburgh/codes/code\\_of\\_ordinances?nodeId=PIZOOC\\_TITNINEZOOC\\_ARTIII\\_OVZODI\\_CH906ENOVDI\\_906.08STSLOVDI](https://library.municode.com/pa/pittsburgh/codes/code_of_ordinances?nodeId=PIZOOC_TITNINEZOOC_ARTIII_OVZODI_CH906ENOVDI_906.08STSLOVDI)

development, but also to protect the fragile hills.<sup>17</sup> These districts typically regulate both the visual impacts of development and the disturbance of the land form.<sup>18</sup> In coastal areas, particularly in affluent areas like Southern California, jurisdiction-wide view preservation ordinances are common and can limit the height of fences and natural vegetation in order to preserve ocean views from adjacent properties.<sup>19</sup>

**Conservation Easements.** An example of a successful conservation easement program is Wisconsin’s “Great River Road” where easements were purchased beginning in the 1950s to protect views of the Mississippi River from adjacent highways. The program has been successful and endured for the following reasons: (1) limited rights were acquired; (2) the area experienced low development pressure; and (3) the Wisconsin Department of Transportation maintained its commitment to enforcing the easements.<sup>20</sup> Wisconsin also enacted a state statute that enables the United States Department of Agriculture Natural Resources Conservation Service (“NRCS”) to facilitate the purchase agricultural conservation easements for the purpose of maintaining land available for agricultural production. According to information provided by the NRCS, over the past 25 year, NRCS has worked with landowners to protect more than 4.4 million acres of wetlands and agricultural lands, with a value of over a billion dollars.<sup>21</sup>

The City of Austin, Texas, has taken a proactive approach to natural resource protection and aggressively monitors properties that it wishes to acquire outright or over which it wishes to acquire and place conservation easements. In December 2021, the city acquired a conservation easement on The Nature Conservancy’s 4,000+ acre Barton Creek Habitat Preserve, the latest in a series of water quality land protection initiatives totaling 34,000 acres in this area of Central Texas. These conservation efforts were successful thanks in part to a 2018 open space bond that was overwhelmingly approved by more than 80% of the voters in Austin.<sup>22</sup>

Private conservation easements now make up the lion’s share of land preservation in the United States, with more than 40 million acres of land under conservation easements. In addition, President Biden’s plan to protect 30% of the nation’s lands and waters by 2030, known as the America the Beautiful initiative, is expected to accelerate the pace of conservation easement acquisitions.<sup>23</sup>

Many conservation easements are held and monitored by organizations referred to as “land trusts.” Land trusts have evolved over the years, and the mission of many includes more than holding conservation easements for land preservation purposes:

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<sup>17</sup> See Salt Lake County Zoning Code, Ch. 19.72 (Foothills and Canyons Overlay Zone) available at [https://library.municode.com/ut/salt\\_lake\\_county/codes/code\\_of\\_ordinances?nodeId=TIT19ZO\\_CH19.72FOCAOV\\_ZOFC](https://library.municode.com/ut/salt_lake_county/codes/code_of_ordinances?nodeId=TIT19ZO_CH19.72FOCAOV_ZOFC).

<sup>18</sup> Duerkson at 49.

<sup>19</sup> Edwin Kiesel, *The War on Trees, How to Diffuse Neighborly Feuds Over View Rights*, 35 J. ENVTL. L. & LITIG. 145 (2020).

<sup>20</sup> Brian W. Ohm, *The Purchase of Scenic Easements and Wisconsin’s Great River Road: A Progress Report on Perpetuity*, 66 J. AMERICAN PLANNING ASS’N 177, 186 (2000).

<sup>21</sup> See Agricultural Conservation Easement Program, [Natural Resource Conservation Service, Wisconsin \(available online at https://www.nrcs.usda.gov/wps/portal/nrcs/main/wi/programs/easements/acep/#\)](https://www.nrcs.usda.gov/wps/portal/nrcs/main/wi/programs/easements/acep/#).

<sup>22</sup> Press Release: “The Nature Conservancy’s Barton Creek Habitat Preserve Bolstered by City of Austin Conservation Easement,” available at <https://www.austintexas.gov/news/springs-and-songbirds-benefit-land-protections>.

<sup>23</sup> See America the Beautiful, U.S. Dept. of the Interior, available at <https://www.doi.gov/priorities/america-the-beautiful>; see also Nancy A. McLaughlin, *Enforcing Conservation Easements: The Through Line*, Forthcoming in 34 GEO. ENVTL. L. REV. \_ (2022) (available at <https://dc.law.utah.edu/cgi/viewcontent.cgi?article=1336&context=scholarship>).

Land trusts today are undertaking activities once considered the sole purview of planning offices, like getting involved in developing and implementing smart growth policies, comprehensive planning, TOD, and PDR. They are also innovating beyond their traditional role of solely protecting natural areas, connecting their work to pressing issues of health, food, affordable housing, youth and education, water quality, and disaster planning and recovery. Some land trusts are also involved in mitigating and adapting to climate change, as well as providing access to natural areas and addressing distressed properties in urban areas.<sup>24</sup>

Although conservation easements are an established legal mechanism based on common law property law principles, their legal status has been challenged.<sup>25</sup> In addition, favorable federal tax benefits made available for the donation of an easement to a charitable organization were the subject of Congressional hearings that led to reforms being enacted in 2006.<sup>26</sup> The IRS has mounted regulatory challenges to the tax-deductible status of conservation easement donations.<sup>27</sup> However, a case from the Federal Court of Appeals for the Second Circuit reversed an IRS and tax court holding that disallowed a New York City resident's deduction for donating a "façade conservation easement" to the National Architectural Trust. The Court disagreed with the tax court and held that the taxpayer's appraisal insufficiently established the value of the easement grant.<sup>28</sup>

In 2020, the Eleventh Circuit Court of Appeals reversed a tax court opinion that the reservation of rights to build a limited number of residential units within a conservation easement violated the in-perpetuity requirement for conservation easements. In *Pine Mountain Pres., LLLP v. Comm'r of Internal Revenue*, the donor of a conservation easement claimed tax deductions in each of the tax years following the granting of the easement in the early 2000s.<sup>29</sup> The IRS had disallowed the deductions because the area of the easements was not dedicated to conservation purposes in their entirety, but rather allowed several large residential parcels at the periphery. The Court of Appeals disagreed, holding that the conservation easements did satisfy the in-perpetuity requirement "even if within that parcel there exist certain narrow exceptions to that limitation."<sup>30</sup>

The tax benefits of donating a conservation easement can also extend to the local property tax burden. Michigan Public Act 446 of 2006, for example, safeguards real estate under a conservation easement from a "pop-up" in property taxes upon transfer. When land that is subject to a conservation easement is sold, donated, or inherited, property taxes remain "capped" at the same level the original landowner was

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<sup>24</sup> Robert Aldrich, *Land Trusts: Conserving Land, Strengthening Communities*, APA Planning Advisory Service (2014).

<sup>25</sup> *U.S. v. Blackman*, 613 S.E.2d 442 (Va. 2005) (challenge to enforcement action brought by National Park Service to enforce preservation easements over rural historic district); see also Linda A. Malone, *Donation of conservation easements*, 1 *Envtl. Reg. of Land Use* § 6:47 (2013).

<sup>26</sup> National Trust for Historic Preservation, "Easement Reforms Enacted by Congress in 2006; "Conserve Your Land" (Land Trust Alliance 2008).

<sup>27</sup> See, e.g., *Belk v. CIR*, 774 F.3d 221 (4th Cir. 2014) (easement grant not tax deductible when donors retained the right to "substitute an area of land owned by [donors] which is contiguous to the Conservation Area for an equal or lesser area of land comprising a portion of the Conservation Area."); *Minnick v CIR*, 796 F.3d 1156 (9th Cir. 2015) (grant of conservation easement not tax deductible when easement is subordinate to mortgage).

<sup>28</sup> *Scheidelman v. Commissioner of Internal Revenue*, Second Circuit, Docket Nos. 10-3587-ag(L), 10-5316-ag (XAP) (2012); but compare *Kaufman v. CIR*, United States Tax Court, No. 15997-09, (2014) (Property owners found to have underpaid taxes when value of facade easement for property in Boston's highly regulated South End was grossly overstated).

<sup>29</sup> *Pine Mountain Pres., LLLP v. Comm'r of Internal Revenue*, 978 F.3d 1200, 1202 (11th Cir. 2020).

<sup>30</sup> *Pine Mountain Pres., LLLP v. Comm'r of Internal Revenue*, 978 F.3d at 1205.



paying, giving both current and future landowners a strong incentive to keep the affected lands intact with habitat, environmental and scenic benefits.<sup>31</sup>

The effectiveness of conservation easements can be hindered by ambiguous language. The 2020 case *Four B Properties, LLC v. Nature Conservancy*, involved an interpretation of conservation easement language that allowed a set number of single-family residential structures and “associated improvements” to be constructed on certain lots.<sup>32</sup> Ruling in favor of the Nature Conservancy, the Wyoming Supreme Court held that the phrase “associated improvements” was unambiguous and did not permit the construction of additional residential structures such as guest houses or caretaker’s quarters.<sup>33</sup>

### **15.03 IMPACT ON PROPERTY VALUES**

Because they protect natural and cultural resources considered to be valuable community assets, such as mountain or ocean views, scenic districts and conservation easements can have a positive overall impact on the values of properties that are able to view the attribute. A conservation easement will preserve undeveloped land in perpetuity, which increases the value of nearby properties at a greater rate when compared to properties near *developable* open space. In a 2002 study in Maryland, preserved conservation easement space increased nearby residential property values by an average of \$61,937 as opposed to \$17,834 for developable open space.<sup>34</sup> Where development rights are limited by restrictions on location, height, lot occupancy or other standards, they may impose a burden on individual property owners who must protect the view for others. From a property rights standpoint, a conservation easement is preferable to zoning and other regulatory restrictions on development for a number of reasons. It is voluntary, the property owner can choose the organization or entity to which the easement will be granted, and the property owner can draft the easement to include specific provisions that may provide for limited use consistent with the purposes of the grant of the conservation easement.

### **15.04 IMPACT ON DEVELOPMENT COSTS**

Where scenic districts require a review and permit process, either by a state or local government body, those additional requirements may add time, complexity and uncertainty to the permitting process, potentially increasing a developer’s costs.

### **15.05 IMPACT ON AMOUNT AND PATTERNS OF LAND DEVELOPMENT**

To the extent that scenic districts and conservation easements are adopted to limit development impacts, such as the location, density or height of buildings and structures on landscapes, viewsheds or other regulated areas, they will affect the patterns of development.

There is some debate regarding the appropriateness of the perpetual nature of most conservation easements and the impact that such easements may have on future generations. Critics have argued that

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<sup>31</sup> *The Conservation Easement: As a land protection and financial planning tool* at 9 (Little Traverse Conservancy, 2020 ed.) (<https://landtrust.org/wp-content/uploads/2020/11/Conservation-Easement-Owner-Handbook-%E2%80%93-2020.pdf>); see also A Powerful New Incentive for Private Land Conservation Michigan Public Act 446 of 2006 ([https://www.michigan.gov/-/media/Project/Websites/mdard/documents/environment/farmland/pa\\_446\\_fact\\_sheet.pdf?rev=118d119842e94e75b077dae096874011](https://www.michigan.gov/-/media/Project/Websites/mdard/documents/environment/farmland/pa_446_fact_sheet.pdf?rev=118d119842e94e75b077dae096874011)).

<sup>32</sup> See *Four B Properties, LLC v. Nature Conservancy*, 458 P.3d 832, 835 (Wyo. 2020).

<sup>33</sup> See *Four B Properties, LLC v. Nature Conservancy*, 458 P.3d at 844.

<sup>34</sup> Tyler Reeves, Bin Mei, Pete Bettinger & Jacek Siry, *Review of the Effects of Conservation Easements on Surrounding Property Values*, 116 JOURNAL OF FORESTRY 555, 557 (Nov. 2018).



the current generation does not have the capacity, or even the right, to engage in long-term conservation planning that is designed to predict the preferences of future generations and limit land to a non-development state forever. They have also questioned the assumption that if land is, in fact, developed, it can never go back to being “undeveloped.”<sup>35</sup> Efforts to terminate perpetual conservation easements, arguably made irrelevant or impossible to comply with due to unforeseen circumstances, could involve costs and potential liability issues that would deter future generations from undertaking such efforts.<sup>36</sup> The advancement of new energy sources, such as large-scale wind turbines, solar arrays, and fracking, has also led to conflicts regarding what energy-producing activities may be allowed on easement-encumbered property.<sup>37</sup>

## **15.06 IMPACT ON HOUSING AFFORDABILITY**

Scenic districts and conservation easements do not have a direct relationship to the cost of housing. However, by preserving valued amenities, they may contribute to price stability or appreciation.

## **15.07 RECOMMENDED TALKING POINTS: PROS AND CONS**

### **PROS:**

- Protecting scenic attributes through the acquisition of easements or by regulation within a scenic district can help to enhance property values in the affected areas by preserving significant natural or built features.
- Conservation easements are flexible and can be tailored to the protection requirements of the particular property and to the desires of the individual landowner.
- Conservation easements keep property in private hands and on the tax rolls and also carry a lower initial price tag than outright acquisition.<sup>38</sup> Conservation easements also have the potential to increase tax revenue to the extent that they increase nearby property values.<sup>39</sup>

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<sup>35</sup> Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, U. VA LAW SCH. WORKING PAPER NO. 01-11, 6-7 (2001).

<sup>36</sup> See, e.g., *Hicks v. Dowd*, 157 P.3d 914 (Wyo. 2007) in which the plaintiff (Hicks) challenged Johnson County Wyoming’s attempt to extinguish a conservation easement donated to it as a charitable gift for the purpose of preserving and protecting the conservation values of a ranch in perpetuity. The easement prohibited subdivision and other uses of the ranch inconsistent with that purpose. The new owners of the ranch (the “Dowds”), who had purchased the ranch subject to the perpetual easement, asked the Board of County Commissioners to release the easement on the grounds that coalbed methane operations on the ranch would force them into violation of the easement and expose them to potential liability. In response, the Board, without court approval, executed a deed transferring the easement to the Dowds, intending by doing so to terminate the easement. Hicks challenged the Board’s action. The Wyoming Supreme Court dismissed the case on the ground that Hicks did not have standing to sue to enforce a charitable trust, but it invited the Wyoming Attorney General (“AG”), as the supervisor of charitable trusts in the state, to become involved. In 2008, the AG filed a complaint in District Court requesting that the deed transferring the conservation easement to the Dowds be cancelled and declared null and void. (See *Salzburg v. Dowd*, Compl. for Declaratory J. Charitable Trust, Mandamus Relief, Breach of Fiduciary Duties, Violation of Constitutional Provisions 13 (July 8, 2008)). In 2009, the case settled and the Stipulated Judgment declared the County’s attempted transfer of the easement to the Dowds to be null and void and that the original easement remains in full force and effect.

<sup>37</sup> Gerald Korngold, *Conservation Easements and the Development of New Energies: Fracking, Wind Turbines, and Solar Collection*, 3 LSU J. ENERGY L. & RESOURCES 101 (2014).

<sup>38</sup> Janet Diehl, *The Conservation Easement Handbook* Alexandria, VA 1988: Land Trust & Exchange at 2.

<sup>39</sup> *Review of the Effects of Conservation Easements on Surrounding Property Values*, 116 J. FORESTRY at 560.

- Conservation easements can serve as a planning implementation tool for agencies with no regulatory authority such as a land trust or state transportation department.<sup>40</sup>
- Perpetual conservation easements can be used to protect lands with important and fragile scenic and environmental attributes than may otherwise be negatively impacted by development.

CONS:

- Scenic districts that involve zoning restrictions can impose a significant burden on individual property rights and development costs.
- Perpetual conservation easements may limit the ability of future generations to make independent land use decisions.

## 15.08 INCENTIVE-BASED ALTERNATIVES

Providing for cluster development in areas where, for example, vistas or ridgeline protection are a concern, is a non-confiscatory way to protect the resource while allowing development. Section 11 discusses cluster zoning as a means to allow community development while providing specific plans for the retention of open spaces and preservation of natural beauty. Density bonuses, tax credits, and development agreements can also be used by local municipalities as a means to help preserve areas with desirable environmental attributes.<sup>41</sup> Performance standards rather than inflexible, absolute height and other design and dimensional standards are also preferable to rigid standards.

**Transfer of development rights (TDR)**, while not strictly an incentive, is a market-based mechanism that addresses the loss of value resulting from the property restriction and allows it to be transferred to another parcel. TDR is discussed further in Section 9. TDR has been used to protect sensitive lands (e.g., the New Jersey Pine Lands and Hackensack Meadowlands) preserving rural character and farmland (e.g., Montgomery County, Maryland Rural Density Transfer<sup>42</sup>), and critical areas (e.g., the Santa Monica Mountain TDR program of the California Coastal Commission, and the Severable Urban Rights program used to protect the Florida Everglades outside the National Park).<sup>43</sup>

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<sup>40</sup> Ohm at 178, 186.

<sup>41</sup>J. Brown, *Biophillic Laws: Planning for Cities with Nature*, 34 VA. ENVTL. L.J. 52 (2016) (discussing incentive-based options for land preservation and environmentally sensitive development).

<sup>42</sup> The Montgomery County, Maryland has preserved more than 52,000 acres of farmland through its TRD program and an additional 21,00 acres through the purchase of development rights. Tom Daniels & Jack Wright, *Preserving Large Landscapes*, PLANNING (Nov. 2015) <https://www.planning.org/planning/2015/nov/largelandscapes.htm>.

<sup>43</sup> These programs are discussed in James C. Nicholas & Brian D. Leebuck, *Farmland Protection Techniques and Alternatives after Suitum*, 30 THE URBAN LAWYER 441-475 (Spring 1998). See also Scenic America, *Strategies for Protecting Scenic Views and Vistas*, <https://www.scenic.org/visual-pollution-issues/scenic-easements/strategies/>.

## SECTION 16: DEVELOPMENT DESIGN REVIEW

### 16.01 PURPOSE AND KEY TERMS

In their efforts to implement smart growth initiatives directed at the location and quality of development and the preservation of “community character,” communities utilize concepts and techniques that involve a high degree of discretionary decision-making. One prevalent discretionary review procedure is **development design review**.

Development design review processes usually take three forms: (1) **urban design review**, (2) **appearance review**, and (3) **architectural review**. Urban design review is a process and term more typically employed in the large built environment of cities, where the focus is the urban fabric—light, air, view protection, open space, and spatial and functional relationships within a city. In a survey published on design review practice, the following definition of design review was used:

Design Review refers to the process by which private and public development proposals receive independent scrutiny under the sponsorship of the local government unit, whether through informal or formalized processes. It is distinguished from traditional (Euclidean) zoning and subdivision controls, in that it deals with urban design, architecture, or visual impacts.<sup>1</sup>

Of the three terms used in this definition of design review—urban design, architecture, and visual impacts—the term “urban design” is perhaps least understood. One explanation that is helpful describes urban design as:

the composition of architectural form and open space in a community context. The elements of a city’s architecture are its buildings, urban landscape, and service infrastructure just as form, structure, and internal space are elements of a building.... Like architecture, urban design reflects considerations of function, economics, and efficiency as well as aesthetic and cultural qualities.<sup>2</sup>

Stated differently, from a city planning policy perspective, urban design is “designing cities without designing buildings.”<sup>3</sup>

By contrast, “appearance review,” primarily a suburban and small town phenomenon, is more directed at preserving and enhancing a perceived community identity or “character” and emphasizes compatibility with existing architectural styles and visual harmony throughout the community through review of site plans, landscape plans and signage. Architectural design, of course, is an important component of these community appearance review programs.

The third form of discretionary design review – “architectural review” – is the result of communities focusing primarily upon architectural design. To do this they establish architectural review boards. The architectural design review conducted by these boards can have varying missions. For example, in some communities, the board’s mission is to disapprove *excessive similarity* to any other existing or approved structure within a

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<sup>1</sup> BRENDA CASE SCHEER & WOLFGANG F.E. PREISER, DESIGN REVIEW: CHALLENGING URBAN AESTHETIC CONTROL (Chapman & Hall 1994) (citing survey by Professor Brenda Case Lightner).

<sup>2</sup> R. TSENG-YU LAI, LAW IN URBAN DESIGN AND PLANNING at 1 (Van Nostrand Reinhold Company, 1988).

<sup>3</sup> J. BARNETT, AN INTRODUCTION TO URBAN DESIGN at 55 (Harper & Row, 1982).

certain distance.<sup>4</sup> A mission of other such boards is to avoid *excessive differences* between structures.<sup>5</sup> There are also architectural review boards whose mission is to prevent *inappropriate* design. Some communities have even adopted architectural review ordinances that simultaneously prohibit excessive similarity, excessive dissimilarity, and inappropriateness.<sup>6</sup>

## 16.02 EFFECTIVENESS IN ACHIEVING STATED PURPOSE(S)

As a general principle, the effectiveness of design review depends upon the extent to which a community has taken the time to think through and clearly articulate the goals that it wishes to further through the combination of zoning and design standards or guidelines of the review process.<sup>7</sup> This includes setting forth the basic characteristics of its community form and organization that should inform the development design review process. If this context of community form and organization is defined, the effectiveness of development design review to inform the development approval process so that new individual buildings or combinations of buildings further the community's design goals, depends upon using standards and/or guidelines that give meaningful guidance to the developers and their designers. This means avoiding the use of terms that are vague or meaningless when defining design elements essential to the community's built environment.

Common failings in this regard that undermine the effectiveness of design review are: (1) the use of words that are not sufficiently "technical" so as to be understood by design professionals; and (2) the use of words that do not have any settled meaning based on usage and custom. These two demands occasionally may be contradictory, that is, a word that is sufficiently technical may be considered too professionally-oriented and thereby have no settled meaning for public review purposes. For example, in *Anderson v. City of Issaquah*, the Washington Court of Appeals ruled that the city's building design standards, which required that projects be evaluated based on the "quality of its design and relationship to the natural setting of the valley and surrounding mountains," were unconstitutionally vague.<sup>8</sup> Noting that the standards also required that a project's windows and doors be of "appropriate proportions," that projects should be "interesting,"<sup>9</sup> and that buildings and structures should be made "compatible" with adjacent buildings having "conflicting architectural styles" by use of "screens and site breaks, or other suitable methods and materials, the court held that the design standards "[did] not give effective or meaningful guidance to applicants, to design professionals, or to the public officials of Issaquah who are responsible for enforcing the code."<sup>10</sup>

Although design review criteria are mostly focused upon the totality of a project,<sup>11</sup> the imposition of design requirements on development proposals through design review can impact constitutional rights. Hence the design review process must employ language that is sufficiently precise for an applicant to ascertain what is

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<sup>4</sup> See LAND USE PLANNING AND DEVELOPMENT REGULATION LAW § 12:3 (Architectural Control) (3d ed., Jan. 2021 update).

<sup>5</sup> See *id.*

<sup>6</sup> BRIAN W. BLAESSER, DISCRETIONARY LAND USE CONTROLS: AVOIDING INVITATIONS TO ABUSE OF DISCRETION § 8:4 (Thompson-Reuters: August 2020 update) (hereinafter "DISCRETIONARY LAND USE CONTROLS").

<sup>7</sup> See Mark Hinshaw & Marya Morris, *Design Review: Guiding Better Development*, PAS REPORT 591 at 13 (American Planning Association, 2018) (stating: "A design review decision should be based on legislatively adopted design standards and guidelines, not neighborhood petitions or straw votes.").

<sup>8</sup> *Anderson v. City of Issaquah*, 851 P.2d 744, 751-52 (Co. Ct. App. 1993).

<sup>9</sup> *Id.* at 751 (citing Issaquah Municipal Code (IMC) § 16.16.060 (D)(1)-(6)).

<sup>10</sup> *Id.*

<sup>11</sup> James L. Bross, *Taking Design Review Beyond the Beauty Part*, 9 ENVIRONMENTAL LAW 211, 226-27 (1979) (stating that "teachers of architecture 'respond to the Gestalt,' the perceived totality of the project being presented.... [T]here is considerable flexibility in the weighting of critical values applied....") (quoting JOHN W. WADE, ARCHITECTURE, PROBLEMS, AND PURPOSES (John Wiley, 1977)).

being requested and to help the decision-maker arrive at fair, consistent decisions.<sup>12</sup> This is a difficult task. For example, the following architectural review board criteria for signs in the Borough of Stone Harbor, New Jersey ordinance were challenged on vagueness grounds. The court highlighted the offending terms:

Signs that *demand* public attention rather than *invite* attention should be discouraged. Color should be selected to *harmonize* with the overall building color scheme to create a *mood* and reinforce symbolically the sign’s primary communication message.... Care must be taken not introduce *too many* colors into a sign. A restricted use of color will maintain a communication function of the sign and create a *visually pleasing* element as an integral part of the *texture* of the street.<sup>13</sup>

The court found these criteria too vague, encouraging the imposition of subjective standards upon the applicant.<sup>14</sup> By contrast, a Connecticut superior court found that the design review criteria adopted by the Village of Noank were “reasonable criteria that could be applied to a significant variety of buildings, without falling afoul of prohibited ‘vague aesthetics’ considerations.”<sup>15</sup> The court described Noank’s design review criteria as follows:

They include scale, proportion of a building’s front facades, proportion of openings within the façade, the rhythm of solids to voids in the façade, the rhythm of spacing of buildings on the street, buildings and structures and relationship to materials, relationship to textures, relationship of roof shapes, walls of continuity, relationship to environmental setting, and last directional expression.<sup>16</sup>

Unlike Stone Harbor’s design standards for signs, which were criticized as being vague and subjective, Noank’s design criteria were deemed reasonable because they were found to be objective and related directly to the elements of a building’s construction.<sup>17</sup>

Design standards that are based on the effectiveness of architectural design can amount to censorship and therefore raise freedom of expression concerns.<sup>18</sup> While the U.S. Supreme Court has not addressed the question whether architecture is speech, some commentators support the idea that it is a form of protected expression.<sup>19</sup>

Finally, to be effective in giving direction to developers and their designers, development design review must also employ language that has practical application. Even when language appears to have a commonly understood meaning, it may be inadequate when applied to specific circumstances. For example, in one case in New Jersey, a design standard required that the building design be “early American.” When a court examined that standard in light of the actual physical development in the surrounding area, it observed that

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<sup>12</sup> See Daniel R. Mandelker, *The Constitutionality of Design Standards in Planned Community Regulations*, 33 No. 6 ZONING AND PLANNING LAW REPORT 1 (June 2010) (“Design standards can be challenged in court if they are ... unconstitutionally vague in violation of the constitutional right to due process.”); see also LAND USE PLANNING AND DEVELOPMENT REGULATION LAW § 12:3 (observing: “Proper standards are necessary for reasonable implementation of aesthetic zoning because they help avoid the abuse of discretion inherent in decisions based on aesthetics.”).

<sup>13</sup> *Diller and Fisher Company, Inc. v. Architectural Review Board*, 587 A.2d 674, 678 (N.J. 1990) (emphasis in original).

<sup>14</sup> *Id.* at 680.

<sup>15</sup> *Halsey v. Noank Zoning Board of Appeals*, 57 Conn. L. Rptr. 587 (Conn. Super. Ct. 2014).

<sup>16</sup> *Id.* at \*8.

<sup>17</sup> See *id.*

<sup>18</sup> LAND USE PLANNING AND DEVELOPMENT REGULATION LAW §12:3 (citing Rice, *Zoning Law: Architectural Appearance Ordinances and the First Amendment*, 76 MARQ. L. REV. 439, 450 (1993); Nivala, *Constitutional Architecture: The First Amendment and the Single Family House*, 33 SAN DIEGO L. REV. 291, 316 (1996).

<sup>19</sup> *Id.*

there was no discernable consistent character. “Consequently, ‘early American’ design could mean anything from log cabin or tepee to a Cape Cod or Dutch colonial style.”<sup>20</sup>

### **16.03 IMPACT ON PROPERTY VALUES**

Design standards—whether imposed through a development design review process, or as part of an overall community design plan, can generally be expected to increase property values, particularly if the requirements for site layout and building design are viewed by local residents and consumers as being consistent with and enhancing the perceived character of a neighborhood.<sup>21</sup> The “character” of an area typically is expressed through a design plan guidelines, or through design standards and guidelines derived from a “neighborhood” or “area” character study.

### **16.04 IMPACT ON DEVELOPMENT COSTS**

Design requirements placed upon development proposals through a design review process typically add to the cost of development, particularly when such conditions are imposed through vague standards or guidelines and could not have been anticipated by the developer. This result is especially true in the case of requirements pertaining to individual building designs. Noting that the design fees for most construction projects fall in a narrow range of between five and eight percent of construction costs, a Planning Advisory Services Report on design review suggests that “the added cost of better design is probably around two percent of the total [construction cost].”<sup>22</sup>

### **16.05 IMPACT ON AMOUNT AND PATTERNS OF LAND DEVELOPMENT**

Development design review to achieve or preserve community character does not in and of itself affect the amount and patterns of land development. Only when design considerations are imposed through a particular approach such as **Traditional Neighborhood Development (TND)**, which changes the typical pattern of low density, single-family subdivisions, does the result impact the typical patterns of land development.<sup>23</sup>

### **16.06 IMPACT ON HOUSING AFFORDABILITY**

Development design review can have an exclusionary effect when it requires more costly processes and methods of design and construction. An overly lengthy design review process can also threaten complex financing for any development project, including affordable housing.<sup>24</sup> As one commentator points out:

Because of the open-endedness of design review, it could be used as an easy subterfuge to block unwanted housing for low- and moderate-income people.... Furthermore, design review is a way to increase development cost just in order to insure that all new

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<sup>20</sup> See RATHKOPF’S THE LAW OF ZONING AND PLANNING § 16:15 (4th ed.) (updated June 2021); see also DISCRETIONARY LAND USE CONTROLS § 8:10 (citing *Hankins v. Borough of Rockleigh*, 150 A.2d 63 (N.J. 1959)).

<sup>21</sup> See ROHAN: ZONING AND LAND USE CONTROLS § 16.04[3][a] (updated 2021) (stating that “aesthetic considerations in land use planning gained validity and recognition from their association with increasing property values”); see also IMPLEMENTATION MANUAL: DESIGN REVIEW (Vermont Land Use Education & Training Collaborative, 2007) (available online at <http://vpic.info/ImplementationManual.html>).

<sup>22</sup> See Mark Hinshaw & Marya Morris, *Design Review: Guiding Better Development*, PAS REPORT 591 at 16 (American Planning Association, 2018).

<sup>23</sup> For further discussion of Traditional Neighborhood Development, see Section 18 of this book.

<sup>24</sup> See *Design Review: Guiding Better Development* at 16.

housing in a community must bear “snob appeal” price tags. If such abuses were tolerated, they would undermine the legal basis for design review and discredit the entire concept.<sup>25</sup>

But to the extent that design requirements require or allow for a mixture of housing types and a mixture of uses, it may be possible to create affordable housing. For example, TND may provide for the construction of residential apartments above retail shops. To the extent that land and infrastructure costs are financed in whole or large part by such retail shops, the housing can be provided at a much lower cost than housing-only development, thereby, enhancing affordability.

One way a community can avoid the potential exclusionary effect of its design review process is to simply exempt affordable housing developments from design review. While a community may not wish to exempt mixed income or low-income housing development from design review, its regulations should provide that design considerations alone cannot be used as a basis to deny the approval of an affordable housing development proposal. That is especially true in cases where design review is the primary discretionary review required for a project that otherwise complies with underlying zoning and therefore would be permitted by-right.<sup>26</sup>

## **16.07 RECOMMENDED TALKING POINTS: PROS AND CONS**

### **PROS:**

- Development design review, if applied to implement planning and design policies derived from careful study of a particular area, can enhance property values.
- Community design solutions such as Traditional Neighborhood Development (TND) can provide an alternative housing solution in the marketplace that can also be cost effective because land uses, open spaces, and transportation options are integrated with services and infrastructure.

### **CONS:**

- Development design review, if based upon vague standards or guidelines, can result in arbitrary decisions that increase development costs without enhancing community character.
- Development design review can impose a costly process and require methods of design and construction that increase development costs.
- Development design review can have an exclusionary effect when used as a means of blocking affordable housing solutions that may not comply with “community design” principles.

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<sup>25</sup> DESIGN REVIEW BOARDS: A HANDBOOK FOR COMMUNITIES at 15 (American Institute of Architects, 1974) (remarks of George Lefcoe).

<sup>26</sup> Moira O’Neill, et al, *Developing Policy from the Ground Up: Entitlement in the Bay Area to Inform California’s Housing Policy Debates*, 25 HASTINGS ENVTL. L.J. 1, 49-51 (Winter 2019).

## 16.08 INCENTIVE-BASED ALTERNATIVES

The most obvious incentive-based alternative to design review is the marketplace itself, where developers and designers, driven by competition for their products and by examples of good design, will propose design solutions consistent with community character and adopted standards that do not require the scrutiny of a design review body. Most developers and their designers believe that the solutions they propose are grounded in principles of good design and in the practical realities of the marketplace and consumer preferences, and that discretionary design review is unwarranted.

One alternative to design review is an award program for design excellence. An example of this approach is the program established by the Hillsborough County Planning Commission in Florida. Together with corporate partners, the Planning Commission hosts an annual awards program for excellence in planning in which a jury of planners from outside the county selects winners in approximately 20 categories, many of which have a design component. The awards are presented each October to align the program with Tampa Bay Design Week, National Community Planning Month, and APA's Great Places in America recognitions.<sup>27</sup>

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<sup>27</sup> See *Design Review: Guiding Better Development* at 16.



## SECTION 17: FORM-BASED CODES

### 17.01 PURPOSE AND KEY TERMS<sup>1</sup>

In contrast to conventional land development regulations, form-based development regulations – known as “form-based codes” – are designed to place the ultimate physical form of the development in a superior position to the uses to which individual property can be put. **Form-based codes** are:

A land development regulation that fosters predictable built results and a high-quality public realm by using physical form (rather than separation of uses) as the organizing principle for the code. A form-based code is a regulation, not a mere guideline, adopted into city, town, or county law. A form-based code offers a powerful alternative to conventional zoning regulation.<sup>2</sup>

The Form-Based Codes Institute expands upon that definition with the following:

Form-based codes address the relationship between building facades and the public realm, the form and mass of buildings in relation to one another, and the scale and types of streets and blocks. The regulations and standards in form-based codes are presented in both words and clearly drawn diagrams and other visuals. They are keyed to a regulating plan that designates the appropriate form and scale (and therefore, character) of development, rather than only distinctions in land-use types. They are drafted to implement a community plan. They try to achieve a community vision based on time-tested forms of urbanism.<sup>3</sup>

Form-based codes look different than conventional zoning regulations because they tend to be more graphically intense, but their most unique attribute is the recommended *process* by which they are initially developed. These regulations are inherently place-specific, so a great deal of planning and public participation (often undertaken through a “charrette” planning process) typically occurs well before the regulations are drafted. It is through this process that the community expresses its desired physical outcome, and memorializes it by a vision or illustrative plan. The standards ultimately contained in the form-based code are derived from this urban design vision.

Contrary to conventional belief, form-based codes do not “toss out” uses as a means of regulation.<sup>4</sup> For example, uses are presented in the SmartCode<sup>5</sup> as “Building Function Standards.” The SmartCode, now in Version 9.2, is a comprehensive model form-based code promulgated by Duany Plater-Zyberk & Company.<sup>6</sup> The SmartCode is increasingly being proposed in various forms, from Gulf Coast communities to the City of Miami.<sup>7</sup> As of June 2019, the Codes Study group identified 728 codes that meet the criteria established by the Form-Based Codes Institute, 439 of which have already been

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<sup>1</sup> This subsection is substantively based on Robert J. Sitkowski, *Update on Form-Based Development Regulations*, Proceedings of 23rd Annual American Law Institute-American Bar Association Land Use Institute (August 2007). The content of that article appearing in this subsection is used with his express permission.

<sup>2</sup> Form-Based Codes Institute, *Form-Based Code Defined*, available at <https://formbasedcodes.org/definition/>.

<sup>3</sup> *See id.*

<sup>4</sup> *See* Michael Lewyn, *The (Somewhat) False Hope of Comprehensive Planning*, 37 U. HAW. L. REV. 39, 63 (Winter 2015).

<sup>5</sup> SmartCode Version 9.2, available at <http://www.smartcodecentral.com>. *See also* Andres Duany, William Wright & Sandy Sorlien, SMARTCODE VERSION 9 AND MANUAL (New Urban News Publications, Inc., 2008).

<sup>6</sup> *See* Chad D. Emerson, THE SMARTCODE SOLUTION TO SPRAWL (Environmental Law Institute, 2007).

<sup>7</sup> *See* “Miami 21, Your City, Your Plan,” at [www.miami21.org](http://www.miami21.org).

adopted.<sup>8</sup> Like most form-based codes, the Building Function Standards in the SmartCode are presented in a table that is designed to be flexible, allowing the market to decide what goes on inside the building types. Also, form-based codes cannot ignore the relevance of land uses in one particular legal context: Federal statutes such as the Fair Housing Amendments Act, the Telecommunications Act of 1996, and the Religious Land Use and Institutionalized Persons Act (RLUIPA), preempt local land use regulations to the extent that they are found to violate the use-specific protections established under each statute.

Form-based codes are generally implemented in one of three methods: mandatory, optional-parallel, or optional-floating zone.<sup>9</sup> Mandatory form-based codes generally replace existing conventional zoning regulations, while optional-parallel form-based codes supplement existing zoning code and allow developers to choose which set of regulations to follow.<sup>10</sup> Optional-floating zones similarly act as a supplement to conventional zoning codes when applied at a specific location rather than widely across a community, like an optional-parallel form-based code.<sup>11</sup>

### Key Components of Form-Based Code

Although form-based codes are designed to be place-specific, most contain the following identifiable concepts and component parts, which address topics common to zoning, subdivision, and other land development ordinances.<sup>12</sup>

**Regulating Plan.** The regulating plan is a map – similar to, but more detailed than, a zoning map – that typically shows streets and public open spaces and designates the specific locations where the various building form standards will apply. A regulating plan is an essential means for translating a vision or illustrative plan into place-specific development regulations. The regulating plan in some form-based codes simply replaces the official zoning map or other regulatory maps.

Most regulating plans, however, look quite different from traditional zoning maps, and are presented in many different formats. Some regulating plans, such as the Hartford-Simsbury Form-Based Code adopted by the Town of Simsbury, Connecticut, are based on street frontage types. For each type of street frontage the Simsbury plan specifies building types, build-to lines, building mass and transparency (i.e., window-to-wall) ratios, facade articulation, building access, and various building elements that are required, allowed, or prohibited.<sup>13</sup> Simsbury’s regulating plan also establishes special setbacks for key places and requires that building heights and roof configurations be within certain ranges depending on the street type.<sup>14</sup> Other regulating plans identify which building types may be constructed on individual lots as well as the sizes of those individual lots. When a building-type regulating plan is proposed by a developer for a specific site, it may indicate one building-type or a narrow range of building types that may be constructed on each lot (for example, townhouses, mixed use buildings, or detached homes).

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<sup>8</sup> See “Form-Based Codes? You’re not alone.,” at <http://www.placemakers.com/how-we-teach/codes-study/>.

<sup>9</sup> Patricia E. Salkin, *Implementation of Form-Based Codes*, AMERICAN LAW OF ZONING § 23:4 (Form-Based Codes) (November 2021 update).

<sup>10</sup> See *id.*

<sup>11</sup> See *id.*

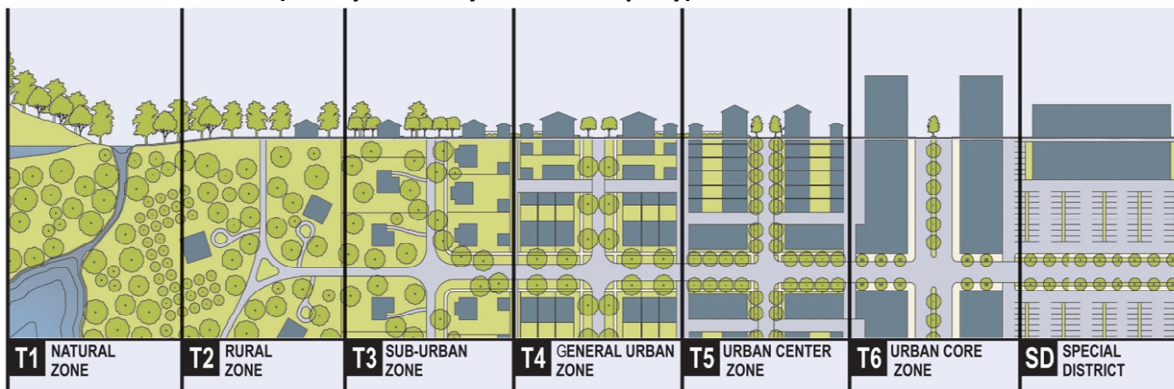
<sup>12</sup> This list of elements was derived from the following sources: DANIEL PAROLEK, KAREN PAROLEK & PAUL CRAWFORD, *FORM-BASED CODES: A GUIDE FOR PLANNERS, URBAN DESIGNERS, MUNICIPALITIES, AND DEVELOPERS* (2008) (*hereinafter* “FORM-BASED CODES: A GUIDE FOR PLANNERS”); Form-Based Codes Institute, *Form-Based Code Defined*; and Peter Katz, *Form First*, *PLANNING* at 17 (Nov. 2004); see also AMERICAN LAW OF ZONING § 23:1.

<sup>13</sup> See generally Hartford-Simsbury Form-Based Code (effective date August 1, 2014) (available online at [https://www.simsbury-ct.gov/sites/g/files/vyh1if1216/f/file/file/final\\_the\\_hartford-simsbury\\_form\\_based\\_code\\_0.pdf](https://www.simsbury-ct.gov/sites/g/files/vyh1if1216/f/file/file/final_the_hartford-simsbury_form_based_code_0.pdf)); see also Randall Arendt, *Simplify That Code!*, *PLANNING* at 2 (June 2015).

<sup>14</sup> See *id.*

Many newer regulating plans, chief among them those implementing the SmartCode, are based on a physical organizing system called “The Transect” – a continuum of human habitation from urban core to rural.<sup>15</sup> For example, the Rural-Urban Transect Zone diagram developed by Duany Plater-Zyberk & Company (see image below) contains six “Transect Zones” (also called “T-Zones”) that are used for the zoning of urban areas as well as natural lands.<sup>16</sup> The Rural-Urban Transect is intended to be as general as possible in order to serve model form-based codes like the SmartCode.<sup>17</sup>

**Rural-Urban Transect (Duany Plater-Zyberk & Company)<sup>18</sup>**



**“Urban” or “Building Form” Standards.** These standards, addressing location, bulk, height, coverage and use, among other things, are commonly presented in a graphic form with supporting text.

**Public Realm.** This term refers to “those parts of the urban fabric that are held in common such as plazas, squares, parks, thoroughfares and civic buildings.”<sup>19</sup> The public realm is a central organizing principle in the form-based code because it ties together the principles of walkable, interconnected aspects of a neighborhood, and the concern for how streets, lots, and buildings fit together.

**Public Space Standards.** These regulations address the widths and dimensions of streets, parking areas, sidewalks, paths, street trees and furniture, parks, plazas, and other standards applicable to the creation of the Public Realm.

**Administration and Definitions.** A definitions section is usually included because some of the terms used in a form-based code may not typically be included in conventional zoning or subdivision regulations. Since another of the goals of a form-based code is to promote predictability in process and effect — allowing development applications that meet all requirements to be approved administratively rather than through a public hearing process. Typically, a clearly defined application and project review process is included either in the form-based code itself or by reference to another section of the municipality’s land development regulations.

<sup>15</sup> See Andres Duany & Emily Talen, *Making the Good Easy: The Smart Code Alternative*, 29 FORDHAM URB. L. J. 1445 (2002); Andres Duany & Emily Talen, *Transect Planning*, 68 J. AM. PLAN. ASS’N. 245 (Summer 2002). See also J. URB. DESIGN (Special Issue, Oct. 2002) (containing seven papers examining applications of The Transect).

<sup>16</sup> *Image Library: Rural-Urban Transects* (Center for Applied Transect Studies) (available online at [https://transect.org/rural\\_img.html](https://transect.org/rural_img.html)).

<sup>17</sup> See *id.*

<sup>18</sup> See *id.* Note that the elements of each Transect Zone are drawn in section view above and in plan view below.

<sup>19</sup> *The Lexicon of the New Urbanism* at 1.5 (Duany Plater-Zyberk & Co., 2014) (<https://www.dpz.com/wp-content/uploads/2017/06/Lexicon-2014.pdf>).

**Other Components.** In addition to the above components, some form-based codes contain standards dealing with the layout and dimension of blocks, building types, and landscaping. Some also include architectural standards, which govern the building details and materials that are permitted and the ways in which they can be incorporated into specific building elements.

**Form-Based Code Adoption Process.** The process of adopting a form-based code consists of three major steps: (1) documenting; (2) visioning; and (3) assembling the code. A leading guidebook on form-based codes summarizes these three steps as follows:

### **Phase 1: Documenting**

The coding process begins by studying and documenting exemplary existing conditions in the community as well as the existing planning regulations in order to thoroughly understand the existing place. This is critical to ensure that the vision and the code are appropriate for the community. In addition, the details of the places the community selects to emulate become the base regulatory details the DNA of the code....<sup>20</sup>

### **Phase 2: Visioning**

Since a Form-Based Code is a prescriptive document, it needs a detailed vision to prescribe. Using the gathered information from the documentation phase as a base, the team and stakeholders work together to create a Vision Plan, a detailed vision of the future of the community. The Vision Plan includes an Illustrative Plan, a variety of three-dimensional renderings, and descriptive text to express the intentions of the vision.... In addition, in order to be detailed enough to enable the creation of a Form-Based Code, the Vision Plan should also include the preliminary versions of the Regulating Plan, Regulation Matrix, and Development Review Process.... Finally, the development application review process is drafted based on the desires of the community to ensure or even create incentives for development that implements the community's vision.<sup>21</sup>

### **Phase 3: Assembling**

Once the Form-Based Code regulations have been drafted, any additional regulations necessary to tie the code into the existing regulatory framework are drafted. Finally, the content is formatted into the final code document to ensure the code is clear, concise, and easy to use.<sup>22</sup>

A site-specific form-based code can be adopted through a planned unit development (PUD) process.<sup>23</sup> One example of this approach is Riverfront Park, a planned unit development that includes 1,859 housing units in 14 buildings, 49,000 square feet of retail and restaurant space, a museum, and three parks on a 23-acre site adjacent to downtown Denver.<sup>24</sup> The Riverfront Park PUD was developed under a form-based code that was adopted for the project site through Denver's PUD process and provided considerable

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<sup>20</sup> FORM-BASED CODES: A GUIDE FOR PLANNERS at 95-96.

<sup>21</sup> *Id.* at 96-97.

<sup>22</sup> *Id.* at 97.

<sup>23</sup> PUD programs are further discussed in Section 11 of this book.

<sup>24</sup> *ULI Case Studies – Riverfront Park* at 1 (Urban Land Institute, Feb. 2014) (<http://casestudies.uli.org/wp-content/uploads/2016/01/Riverfront-Park-PDF.pdf>).

flexibility in the mix of residential and retail uses, while organizing all of the buildings between two major elements of the project, the Commons Park and the Millennium Bridge.<sup>25</sup>

## 17.02 EFFECTIVENESS IN ACHIEVING STATED PURPOSE(S)

Generally speaking, the effectiveness of form-based codes depends on the extent to which a community has taken the time to fully articulate its goals.<sup>26</sup> In the context of form-based codes, this is largely accomplished through the charrette process.<sup>27</sup> The standards derived from the master plan (or vision plan) resulting from the charrette become the regulations governing development community-wide or within a defined area. Accordingly, the translation of the master plan into regulations is the critical juncture in this process. This step must be accomplished with a high degree of precision, in order to avoid producing physical outcomes inconsistent with the vision in the master plan.

Also important to the successful adoption of a form-based code is conformance with state zoning law. Only a handful of states have adopted legislation that expressly authorizes the use of form-based codes. Pennsylvania and Wisconsin, for example, permit “traditional neighborhoods,”<sup>28</sup> while California law allows communities to determine neighborhood form.<sup>29</sup> Some commentators argue that the Standard State Zoning Enabling Act, which serves as the framework for most state zoning enabling statutes, authorizes local governments to regulate development on the basis of form in addition to the traditional use-based approach.<sup>30</sup> However, in the absence of specific form-based code legislation, local governments need to ensure that the adoption of a form-based code satisfies both the substantive and procedural requirements of the state zoning enabling law. Of particular concern is the need to ensure that proper standards are included to avoid arbitrary and overly discretionary approval processes.<sup>31</sup> Some commentators also express concern that form-based codes may “run afoul” of due process and First Amendment rights.<sup>32</sup>

Compared to traditional use-based zoning, which dates back to the early 1900s, form-based codes are a relatively new regulatory technique, with the first “on the ground” examples originating in the early 1980s.<sup>33</sup> Nevertheless, the early evidence indicates that form-based codes can be effective at creating mixed use, dense, pedestrian-friendly places and changing the urban form in the ways that their authors

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<sup>25</sup> *Id.* at 3-5.

<sup>26</sup> Daniela A. Tagtachian, Natalie N. Barefoot & Adrienne L. Harreveld, *Building by Right: Social Equity Implications of Transitioning to Form-Based Code*, J. AFFORDABLE HOUSING & COMMUNITY DEV. L. (2019).

<sup>27</sup> For further discussion of the charrette process, see Bill Lennertz, Aarin Lutzenhiser & Tamar Failor, *An Introduction to Charettes*, PLANNING COMMISSIONERS JOURNAL (Summer 2008) (available online at <http://plannersweb.com/wp-content/uploads/2012/07/262.pdf>).

<sup>28</sup> See Pennsylvania Municipalities Planning Code, Art. VII-1 (Traditional Neighborhood Development); Wisconsin Stat. Ann. § 66.1027 (Traditional neighborhood developments and conservation subdivisions).

<sup>29</sup> See Matthew J. Lawlor, *Gaining Ground in the Final Frontier: Surveying Legal Issues Raised by New England’s Form-Based Codes*, 43 URB. LAW. 839, 844 (Summer 2011); see also ROBERT H. FREILICH, ROBERT J. SITKOWSKI & SETH D. MENNILLO, FROM SPRAWL TO SUSTAINABILITY: SMART GROWTH, NEW URBANISM, GREEN DEVELOPMENT, AND RENEWABLE ENERGY at 179-181 (2010) (hereinafter “FROM SPRAWL TO SUSTAINABILITY”); Richard S. Geller, *The Legality of Form-Based Zoning Codes*, 26 J. LAND USE & ENVTL. L. 35 (2010); AMERICAN LAW OF ZONING § 23:2.

<sup>30</sup> See *id.*; see also John M. Barry, *Form-Based Codes: Measured Success Through Both Mandatory and Optional Implementation*, 41 CONN. L. REV. 305, 322 (2008); Andrew Bauman, *Legally Enabling a Modern-Day Mayberry: A Legal Analysis of Form-Based Zoning Codes*, THE URBAN LAWYER, Volume 50, Issue 1 (Spring 2019).

<sup>31</sup> FROM SPRAWL TO SUSTAINABILITY at 183.

<sup>32</sup> BRIAN W. BLAESSER, DISCRETIONARY LAND USE CONTROLS: AVOIDING INVITATIONS TO ABUSE DISCRETION § 8:60 (August 2021 update); see also AMERICAN LAW OF ZONING §§ 23:6, 23:8.

<sup>33</sup> See FORM-BASED CODES: A GUIDE FOR PLANNERS at 7-9.



intended. A study of six communities with form-based codes concluded that “[f]ive of the six communities point to new construction approved under their systems as examples of how their codes are producing better building design—particularly in relation to streets and walkability.”<sup>34</sup> Researchers studying cities in Southern California found that the “strongest form-based codes include more sustainability criteria to a stronger degree than the conventional zoning regulations they replaced and those of matched cities.”<sup>35</sup>

Since 2007, the Form-Based Codes Institute has annually awarded the Driehaus Form-Based Code Award “for achievement in the writing and implementation of form-based codes.”<sup>36</sup> Recent recipients include the City of Hartford, Connecticut, which completely replaced its 50-year old zoning code with a citywide form-based code; and Rancho Cucamonga, California, which created a form-based code and neighborhood plan for newly annexed property.<sup>37</sup> Past recipients include the Cincinnati Form-Based Code, the “Miami 21” code, which completely replaced Miami’s former zoning code; and the City of Lacey, Washington’s Woodland District Hybrid Form Based Code, which integrated simplified land-use regulations with “provisions for proportional compliance and landscape frontage types, and the definitions and illustrations of street intersections types.”<sup>38</sup>

### 17.03 IMPACT ON PROPERTY VALUES

The extent to which the form-based code can affect property values is largely dependent on where and how the code is applied. In those cases where the code is used in a redevelopment (or “infill”) context, it can generally be expected to increase property values if the code is carefully written to promote development that reinforces or enhances the already-existing character of the area. According to the executive director of the Metropolitan Nashville-Davidson County Planning Department, between 2005 and 2013 property values increased by 115% in areas where form-based codes were applied—particularly in downtown locations and along highway corridors—compared to a 33% increase in property values countywide over the same time period.<sup>39</sup> Where the area to be redeveloped has been significantly neglected or abandoned, use of a form-based code to create a “place” where none presently exists can generally be expected to increase property values in that area. In a “greenfield” context, the positive impact of a form-based code may not be so dramatic, except in those cases where the conventional zoning regulations have prevented a more intense, mixed use development. In those cases, the existence of form-based options may increase property value as the type of mixed use development authorized achieves market acceptance. The depth of that market is as yet unknown.

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<sup>34</sup> See Donald L. Elliott, Matthew Goebel & Chad Meadows, *The Rules That Shape Urban Form*, American Planning Association, Planning Advisory Service Report No. 570 at 113 (Oct. 2012) (hereinafter “*The Rules That Shape Urban Form*”).

<sup>35</sup> Ajay Garde and Cecilia Kim, *Form-Based Codes for Zoning Reform to Promote Sustainable Development: Insights from Cities in Southern California*, 83 J. AM. PLANNING ASS’N 346-364 (Autumn 2017).

<sup>36</sup> See Driehaus Award Recipients at <http://formbasedcodes.org/driehaus-award-recipients/>; see also Hartford Form Based Code at <https://www.hartfordct.gov/files/assets/public/development-services/planning-zoning/pz-documents/zoning-regulations/zoning-regulations-06052020.pdf>; Rancho Cucamonga (Etiwanda Heights) Neighborhood Plan at <https://www.cityofrc.us/sites/default/files/2021-01/Etiwanda%20Heights%20Plan%20Final.pdf>.

<sup>37</sup> See *id.*; see also Sean Doyle, *Progress & Preservation in Award Winning Zoning Codes* (June 2020) at <https://smartgrowthamerica.org/progress-preservation-in-award-winning-zoning-codes/>.

<sup>38</sup> See *id.*

<sup>39</sup> Randall Arendt, *Simplify That Code!*, PLANNING at 1 (June 2015).

## 17.04 IMPACT ON DEVELOPMENT COSTS

The “charrette” process may bring with it relatively significant costs at the front end of a form-based codes project. The writing of regulations based on this exercise is also time-intensive and can be costly.<sup>40</sup> Accordingly, if a developer proposes and funds the creation of a form-based code for a specific area, the costs associated with creating the form-based code may be passed on to future purchasers and tenants in the form of higher sales prices and rental fees. On the other hand, if the municipality itself engages in the production of the form-based code, the direct cost of the code production would not be borne by the market.

As with review and approval processes under conventional zoning regulations, there also is a cost associated with the local government permitting process under a form-based code. However, if the code is sufficiently prescriptive, it is possible that the majority of development permits can be granted as of right, thereby streamlining the development approval process. In those cases where the codes are not sufficiently detailed or where the municipality prefers to keep development approvals under the form-based code discretionary in nature, there would be no cost savings over a conventional regulatory process that utilizes discretionary review for development approvals.

Form-based codes can also impose high “compliance costs.” These costs flow in large part from the imposition of architectural standards, which, at a minimum, require securing the services of an architect to ensure compliance, but may also require expensive materials.<sup>41</sup> While not specific to form-based codes, one study examining the economic return on New Urbanist developments<sup>42</sup> found that such developments typically resulted in increased development costs, but that homes in these developments generally sold at a premium over homes in comparable conventional developments.<sup>43</sup>

## 17.05 IMPACT ON AMOUNT AND PATTERNS OF LAND DEVELOPMENT

Because form-based codes promote mixed use and higher density, they directly affect the amount and patterns of land developed in a community. If formulated with a sufficient level of detail, a form-based code can clearly establish the pattern of land development where it is applied. The regulating plan is intended to be largely predictive of the location of public improvements and buildings.

Some proponents of form-based codes argue that a more regional approach is needed to address the negative effects of suburban sprawl.<sup>44</sup> Form-based codes can be implemented at a regional level to focus density in key areas, such as transportation corridors, and limit the development of open space and agricultural areas.<sup>45</sup>

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<sup>40</sup> See AMERICAN LAW OF ZONING § 23:3 (stating that the process of adopting a regulating plan “can take as little as one year, but in at least one case took seven years to complete”).

<sup>41</sup> See Nicole Stelle Garnett, *Redeeming Transect Zoning?*, 78 BROOK. L. REV. 571, 579 (Winter 2013).

<sup>42</sup> Form-based codes are often linked to New Urbanist influenced land development patterns, and have been identified as the “preferred instrument for implementing new urbanist ideas of all scales and in all setting.” PAROLEK at xv.

<sup>43</sup> Orange County, Florida, Growth Mgmt. Dep’t Planning Div., *The Economic Return on New Urbanism Study* (2008) at 21-23.

<sup>44</sup> Richard Rogers, *Regional Form-Based Zoning: Repairing and Preventing the Negative Effects of Suburban Sprawl*, ZONING AND PLANNING LAW REPORT (April 2017).

<sup>45</sup> See *id.*

## 17.06 IMPACT ON HOUSING AFFORDABILITY

The American Planning Association report “The Rules That Shape Urban Form” points out three ways in which form-based codes can be a good tool for addressing housing affordability:

- (1) By requiring that buildings of a certain size and shape be built in specific transect zones, form-based controls can make it more likely that attached or multifamily homes are built in zones where they are permitted.<sup>46</sup>
- (2) The form-based principles of focusing less on permitted use controls should allow building use to change from nonresidential to residential over time—for example, from office building or warehouse to lofts, condos, or apartments—which could help meet the nation’s shortage of multifamily units.<sup>47</sup>
- (3) Form-based tools could allow more units to be built within a specific building form. More units in a given envelope mean smaller units and more units to bear the land costs, which may make them more affordable.<sup>48</sup>

On the other hand, the report also notes that there four ways in which form-based codes may not promote housing affordability.

- (1) Form-based codes may restrict or eliminate density or height bonuses, a tool that communities often use to encourage affordable housing construction.<sup>49</sup>
- (2) Form-based codes may inhibit affordability by requiring vertical mixed use buildings (i.e., housing over a retail or commercial ground floor), which may be more expensive to build.<sup>50</sup>
- (3) Because they better reflect the built environment, form-based codes may reduce opportunities for affordable housing by eliminating “overzoning” (i.e., zoning regulations that permit residential buildings of three or more stories but are developed with one- and two-story single-family homes).<sup>51</sup>
- (4) Form-based controls often include architectural standards for new development and redevelopment that can indirectly raise the cost of housing constructed under the code.<sup>52</sup>

Since one of the promises of a form-based code is to achieve a “fine grain” of mixed use, including multiple housing types, it may be possible for the code to create a market environment in which affordable housing can be achieved. This outcome would be especially true where a form-based code explicitly establishes different housing types in a redevelopment area where no residential development presently exists. To date, most developments that have proceeded under form-based codes have tended to be above average cost for the region. However, a 2021 study by the Form-Based Codes Institute and Smart Growth America found that the average rent for multifamily development in places with form-

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<sup>46</sup> See *The Rules That Shape Urban Form* at 94.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 100.

<sup>50</sup> *Id.* at 101.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*



based codes grew at a slower pace than comparison areas with conventional zoning.<sup>53</sup> The study determined that this was because there were more housing options in the studied form-based code areas serving a wider range of household incomes.<sup>54</sup>

## 17.07 RECOMMENDED TALKING POINTS: PROS AND CONS

### PROS:

- When the form-based code is sufficiently detailed and prescriptive, local governments can achieve predictable types and patterns of physical development.
- Form-based code regulations purposefully create dense, mixed use and pedestrian-friendly places.
- To the extent the form-based code allows significant by-right development, it can streamline the development process, with resulting cost savings for developer applicants and municipalities.<sup>55</sup>
- A form-based code may be easier to use than a conventional land development code because it gives direction primarily through graphics and relies less on text provisions.<sup>56</sup>

### CONS:

- The acceptance of a form-based code requires all stakeholders to engage in a way of thinking about development that is not the norm in all places.
- There may be significant up-front costs associated with organizing a charrette and preparing the form-based code.
- The need to accept the level of prescription required in form-based codes and the perception that form-based codes lack flexibility are factors that may be politically difficult to overcome.
- Form-based codes may be perceived as too specific to a given area relative to the master plan visioning effort and code drafting that are required to produce them.<sup>57</sup>

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<sup>53</sup> *Zoned In: Economic Benefits & Shared Prosperity with Form-Based Codes* at 6 (Form-Based Codes Institute and Smart Growth America, September 2021).

<sup>54</sup> *See id.*

<sup>55</sup> *See The Rules That Shape Urban Form* at 79 (stating: “Because form-based codes focus on the form of the building rather than its specific use, they aim at allowing more uses by right.”).

<sup>56</sup> *See* Katherine A. Woodward, *Form Over Use: Form-Based Codes and the Challenge of Existing Development*, 88 NOTRE DAME L. REV. 2627, 2649 (June 2013) (“Form-based codes ... make use of concise diagrams, drawings, and matrices to make the requirements and physical vision understandable to the general public, government officials, developers, and the professionals who work with them.”) (internal citation omitted).

<sup>57</sup> *See e.g.*, Christopher Duerksen, *Saving the World Through Zoning*, PLANNING (January 2008); City of Santa Barbara, *Single Family Design Guidelines Update/Neighborhood Preservation Ordinance Update*, ISSUE PAPER “H” - FORM-BASED ZONING (November 3, 2004); *Smart Growth/Smart Energy Tool Kit*, FORM-BASED CODES at [www.mass.gov/envir/smart\\_growth\\_toolkit/pages/mod-fbc.html](http://www.mass.gov/envir/smart_growth_toolkit/pages/mod-fbc.html).

## **17.08 INCENTIVE-BASED ALTERNATIVES.**

To the extent that a community already enjoys a tradition of well-designed places, the establishment of a form-based code may be unnecessary. In those communities seeking to improve the quality of their urban design but also wanting to maintain flexibility in their regulations, incentive-based development regulations that allow developers to propose projects in specific locations with increased density or mixed uses in exchange for a higher level of urban design can provide a viable alternative to the form-based code.

## SECTION 18:MIXED-USE REGULATIONS

### 18.01 PURPOSE AND KEY TERMS

#### Defining Mixed-Use Development and Mixed-Use Regulations

Various real estate industry organizations, advocates, and researchers have attempted to define the term **mixed-use development**.<sup>1</sup> For purposes of the discussion in this section, the following definition is used:

Mixed-use developments contain a complementary mix of uses such as residential, retail, commercial, employment, civic and entertainment uses in close proximity – sometimes in the same building. Compatibility issues are addressed through performance standards, transition tools, careful site layout and building design, rather than by separating uses into single use zones.<sup>2</sup>

**Mixed-use regulations** are zoning, subdivision, and related land-use regulatory mechanisms, such as planned unit development and design review regulations that are used by local governments to permit, encourage, or require mixed-use development.

#### Early Form and Modern Form

Historically, human settlements have predominantly been composed of “mixed-use” developments, with homes and businesses being interspersed and populations being concentrated in certain focal points of higher density. However, the rise of industrialism began to alter this pattern, with manufacturing uses being separated from residential uses.<sup>3</sup> The emergence of single-use (Euclidian) zoning in the 1920s further limited mixed-use development as a form of development; mixed-use was largely left to the downtowns of major cities. But prior to the influence of smart growth and New Urbanism on development patterns in the 1990s, a project might be described as “mixed use” because it combined more than one use on the same site, without regard to whether the project incorporated a residential use, or was designed to truly integrate the uses — both being key concerns of smart growth and New Urbanism.<sup>4</sup> Beginning in the 1990s, a combination of changes in demographics, lifestyles, and consumer preferences gave rise to mixed-use development as a modern form of development designed to create

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<sup>1</sup> For example, a combination of organizations from retail, office, industrial and multi-family developers and owners endorsed the following definition: “A mixed-use development is a real estate project with planned integration of some combination of retail, office, residential, hotel, recreation or other functions. It is pedestrian-oriented and contains elements of a live-work-play environment. It maximizes space usage, has amenities and architectural expression and tends to mitigate traffic and sprawl.” Joseph S. Rabianski & J. Sherwood Clements, *Mixed Use Development: A Review of the Professional Literature*, (NAIOP, November 2007) (hereinafter “RABIANSKI”). The organizations endorsing this definition include the International Council of Shopping Centers, NAIOP, the Building Owners and Managers Association, and the National Multi Housing Council. An earlier definition offered by the Urban Land Institute in a technical bulletin from the 1970s stated: “A ‘mixed use development’ means a relatively large-scale real estate project characterized by: 1. three or more significant revenue-producing uses ..., 2. significant functional and physical integration of project components ..., 3. development in conformance with a coherent plan.” Robert E. Witherspoon, et al., *Mixed Use Development: New Ways of Land Use* (ULI: 1976).

<sup>2</sup> Municipal Research and Services Center of Washington (Seattle, WA): from webpage entitled “Mixed Use,” available at <http://mrsc.org/Home/Explore-Topics/Planning/Development-Types-and-Land-Uses/Mixed-Use.aspx>.

<sup>3</sup> See RATHKOPF’S THE LAW OF ZONING AND PLANNING § 10:1 (4th ed., Nov. 2021 update).

<sup>4</sup> See Dorothy D. Nachman, *When Mixed Use Development Moves in Next Door: Finding a Home for Public Discourse and Input*, 23 FORDHAM ENVTL. L. REV. 55, 56 (2012).

“live-work-play” environments in which people can experience these three essential elements of daily life in closer proximity than possible within conventional land use patterns.<sup>5</sup>

Mixed-use development requires more than simply proposing more than one use in a development project. Case law examples help define what is not “mixed-use development.” For example, in a Texas case, a developer proposed a “mixed-use” development comprised of three lots, with Lot 1 designated as hotel space, Lot 2 for residential dwellings, and Lot 3 for commercial uses.<sup>6</sup> The city denied the developer’s application for a zoning change to a mixed-use zone, in part, due to concern that the project was really three separate developments, not an integrated mix of uses.<sup>7</sup> The city was concerned that the lots could be split up and the component projects not completed, leaving the city with multifamily housing not connected to the proposed retail, office, or hotel uses.<sup>8</sup> In a Minnesota case, the court found that the proposed development—a residential center for adults transitioning from the federal corrections system—did not substantially comply with the city’s comprehensive and district plans which designated the proposed location as an “opportunity site” that should focus on either mixed-use development or creation of employment centers.<sup>9</sup> The applicant argued that the proposed use was a “mixed use” because staff members have offices in the building. The court found that the office space is “part and parcel of the service” offered to residents and not a distinct use of the property.<sup>10</sup>

The increase in mixed-use development beginning in the 1990s had impacts across all forms of real estate development, starting with residential development, then in the 2000s particularly in the retail sector, as well as in other sectors of the real estate industry.<sup>11</sup> Preference surveys and sales data over the last decade have found that, regardless of the labels given to these mixed-use, neighborhood-style residential developments – New Urbanism, Traditional Neighborhood Development, Transit Oriented Development, Livable Communities, Smart Growth, or LEED-ND (Neighborhood Development) – they are desired by an increasing portion of the home-buying population.<sup>12</sup> NAR’s 2017 National Community and Transportation Preference Survey found that 62% of millennials, 45% of Gen Xers and baby boomers, and 55% of the silent generation want to live in walkable communities and prefer shorter commutes.<sup>13</sup> Likewise, a 2013 survey by the Urban Land Institute concluded that more Americans prefer to live in or close to mixed-use communities than those who do not.<sup>14</sup> NAR’s 2020 Community and Transportation

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<sup>5</sup> Charles C. Bohl, “The Return of the Town Center,” *Wharton Real Estate Review*, Vol. VII (1), Spring 2003: 54-70, at 62 (hereinafter *Bohl*).

<sup>6</sup> *Hackbelt 27 Partners, L.P. v. City of Coppell*, 661 F. App’x 843 (5th Cir. 2016).

<sup>7</sup> *Id.* at 845.

<sup>8</sup> *Id.* The court upheld the city’s denial of the rezoning over the applicant’s claims that the city’s actions violated its substantive due process and equal protection rights, and was a regulatory taking.

<sup>9</sup> *Volunteers of America-Minnesota v. City of Saint Paul*, 2015 WL 234288 \* 3 (Wisc. App. Ct. 2015).

<sup>10</sup> *Id.*

<sup>11</sup> Bohl at 59; *see also* “Big mall owner sees its future in town centers,” *New Urban News*, June 2007 (hereinafter *NUN 2007*); “Builders turn to mixed use in malls,” *The Economic Times*, August 13, 2005; “Retail shifts toward livability, says mixed-use expert,” *New Urban News*, June 2005 (hereinafter *NUN 2005*).

<sup>12</sup> *See, e.g.,* Restore, *Commercial and Mixed Use Development Trends in the Rocky Mountain West*, at 3 (Nov. 2019), <https://communitybuilders.org/wp-content/uploads/2019/11/RESTORE-Report.pdf>.

<sup>13</sup> 2017 National Community and Transportation Preferences Survey (NAR, Sept. 2017) (available at <https://www.nar.realtor/reports/nar-community-and-transportation-preference-surveys>). The NAR/Portland State University 2015 Community & Transportation Preferences Survey of the 50 largest metropolitan statistical areas (MSAs) in the U.S. found that when asked to choose between a more conventional suburb and a walkable community, respondents were about evenly split. Among these respondents, millennials showed a stronger preference compared to other generations for developing communities where people do not need to drive long distances to work or shop. *See* <https://www.nar.realtor/reports/nar-2015-community-preference-survey>.

<sup>14</sup> Urban Land Institute, *Americans’ Views on Their Communities, Housing, and Transportation*, at 19 (March 2013), <http://www.uli.org/wp-content/uploads/ULI-Documents/America-in-2013-Final-Report.pdf> (reporting that 53% of Americans prefer to live close to commercial activity, while 45% prefer to live away from it).

Preference Survey found that one in five people living in a detached home would prefer to live in “an attached home in a walkable community with a shorter commute.”<sup>15</sup> Corresponding to consumers’ preferences, mixed housing types and mixed uses became more prevalent in the early 2000s.<sup>16</sup> In the retail sector, a key component of mixed-use, the change was widespread and relatively swift, with only a small number of enclosed shopping centers under construction in the United States, after a massive building boom from the 1950s through the 1990s that saw over 2,000 of such centers built.<sup>17</sup> study of mixed-use development in Montgomery County, Maryland found that from 2010 to 2020, mixed-use development constituted nearly half (49%) of all new commercial and multifamily development in the county.<sup>18</sup> The study also found mixed-use development to be steadily growing as a share of total development, with the percentage of multifamily, retail, office, and hospitality projects in the development pipeline tilted even more toward mixed-use development.<sup>19</sup>

### **Benefits of Mixed-Use Development**

A study for the Federal Reserve Bank of Minneapolis identified the following as the commonly-cited benefits of mixed-use development:

- Creating a “sense of place;”
- Increasing economic vitality and expanding economic market opportunities;
- Supporting long-term economic stability by providing tax base and jobs for communities, building and maintaining markets for businesses, and enhancing investment potential for lending institutions and investors;
- Increasing transportation options such as walking, biking or busing, subsequently reducing auto-dependent travel;
- Maximizing use of public investment and infrastructure, i.e., roads, sewer, water;
- Maximizing use of land and supporting sustainable development;
- Providing affordable and market-rate housing options; and
- Encouraging historic preservation, reuse or redevelopment of existing buildings.<sup>20</sup>

### **Historical Concerns and Legal Limitations Regarding Mixed Use**

Mixed-use development is not new. Before widespread industrialization occurred in the United States around the turn of the last century, cities and towns were required by the dominant modes of transportation—principally walking, horsepower, and railroads—to be developed compactly and with a general mixing of uses. During the first two decades of the 20th century, however, the scale and operational impacts of industrialization magnified the incompatibility of certain land uses, particularly, industrial with residential. This circumstance gave rise to a public health-based movement to regulate

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<sup>15</sup> NAR 2020 Community and Transportation Preference Survey available at:

<https://www.nar.realtor/reports/nar-community-and-transportation-preference-surveys>.

<sup>16</sup> “ICSC Report: Marcus & Millichap Weighs In On National Retail Trends,” CoStar Group, 2007 (hereinafter *Marcus & Millichap Report*); *NUN 2007*; *Bohl* at 60.

<sup>17</sup> Parija Bhatnagar, “Not a mall, it’s a lifestyle center,” *CNNMoney.com*, January 12, 2005; Brian J. Lorch, “Big Boxes, Power Centres and the Evolving Retail Landscape of Winnipeg: A Geographical Perspective,” Institute of Urban Studies, University of Winnipeg, 2004, at 1; *Marcus & Millichap Report*; *NUN 2005*.

<sup>18</sup> Montgomery County (MD) Mixed Use Development Study at 6 (July 2021) (available at [https://montgomeryplanning.org/wp-content/uploads/2021/07/Montgomery-County-Mixed-Use-Study-7-12-21\\_FINAL.pdf](https://montgomeryplanning.org/wp-content/uploads/2021/07/Montgomery-County-Mixed-Use-Study-7-12-21_FINAL.pdf)).

<sup>19</sup> *See id.*

<sup>20</sup> Nicole Bennett, “Partnerships and Financing are Critical to Mixed-use Development,” *Community Dividend* (November 1999).

and, more importantly, to *separate* uses that were perceived to be incompatible. During this period, the advent of mass-produced, cheap, and reliable automobiles and the undertaking of national highway improvement programs provided the technical means to achieve that separation of residential uses from other non-residential uses.

***The Standard State Zoning Enabling Act.*** In the 1920s, this new land use regulatory regime was advocated at the national level and quickly found acceptance at the local level, resulting in the conventional land use regulatory system that is prevalent in various forms still today. First promulgated by an advisory committee of the United States Department of Commerce in the early 1920s, the Standard State Zoning Enabling Act (“SSZEA”) was directed at mitigating the negative impacts of industry on residential and other non-industrial uses at a time when populations were more concentrated in urban areas.<sup>21</sup> The SSZEA, with relatively few modifications, was the template for most state zoning enabling acts, and its standard provisions can still be found in many current state zoning enabling acts.<sup>22</sup> Although different approaches are not expressly prohibited and the regulatory tools authorized, such as height, number of stories, and size of buildings, are generally applicable to all types of uses, the purposes and objectives of zoning regulation in the SSZEA are focused on separation of uses into districts, “prevention of overcrowding,” preservation of light and air, and similar concerns, all of which can be interpreted in ways that frustrate the objective of integrating uses to achieve mixed-use development.<sup>23</sup>

The Standard City Planning Enabling Act (“SCPEA”)<sup>24</sup> which, along with other model subdivision statutes circulated in the 1930s, is the principal basis for subdivision enabling statutes in the United States, evidences the same bias toward the separation of uses and the “avoidance of congestion of population” in the provisions regulating the subdivision of land.<sup>25</sup> For example, Section 14 of the SCPEA states that the purposes for which the subdivision of land could be regulated are principally ways to reduce density through the provision of “proper arrangement of streets, ... adequate and convenient open spaces for traffic, utilities, access of fire-fighting apparatus, recreation, light and air, and for the avoidance of congestion of population, including minimum width and area of lots.”<sup>26</sup> The laying out and construction of streets to accommodate pedestrians and multiple modes of travel and to facilitate the mixing of uses are not objectives found in subdivision enabling statutes modeled on the SCPEA.

While zoning and subdivision enabling statutes based upon these model acts have evolved since the 1920s, the extent to which mixed-use regulations are possible within a particular state depends upon the state’s particular constitutional and statutory structure which, in turn, determines the power of a municipality to depart from the provisions under a state’s zoning and subdivision enabling legislation. However, courts have generally upheld the creation of mixed-use districts under state zoning enabling

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<sup>21</sup> Advisory Committee on Zoning, U.S. Department of Commerce, *A Standard State Zoning Enabling Act*, revised edition (Washington, D.C. U.S. GPO, 1926).

<sup>22</sup> See MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 25:3 (July 2022 update) (hereinafter MCQUILLIN).

<sup>23</sup> See SSZEA §§ 1-2; Robert J. Sitkowski & Brian W. Ohm, *Form-Based Land Development Regulations*, 38 *THE URBAN LAWYER* 163, 167 (Winter 2006) (hereinafter Sitkowski & Ohm).

<sup>24</sup> Advisory Committee on Planning Zoning, U.S. Department of Commerce, *A Standard City Planning Enabling Act* (Washington, D.C. U.S. GPO, 1928).

<sup>25</sup> See *Growing Smart Legislative Guidebook* at 8-58 to 8-59 (American Planning Association, 2002) (hereinafter *Growing Smart*).

<sup>26</sup> In the commentary regarding the minimum width and area of lots, the SCPEA’s authors observed:

One of the fundamental purposes of platting regulations, in addition to insuring a proper street plan, is also to insure [sic] that property shall not be subdivided into narrow lots which will bring in their train a host of evils, notably congestion of population, as well as an unsatisfactory type of housing development.

acts.<sup>27</sup> The structure of a state’s laws generally falls into one of two categories: (1) Dillon’s Rule states; and (2) Home Rule states. These two categories are discussed below.

***Dillon’s Rule States.*** The term *Dillon’s Rule* refers to a decision written in 1868 by Iowa Judge John F. Dillon. The rule states that the powers of a political subdivision (i.e., municipality, county, town, township, or village) are strictly limited to only those powers that the state legislature has expressly granted to them, that are necessarily or fairly implied in or incident to the expressly granted powers, or that are essential to the accomplishment of the declared objects and purposes of the local government, and not simply convenient.<sup>28</sup> In states where the courts have held that Dillon’s Rule applies, the argument is made that without an express grant of authority by statute from the state legislature, a municipality or county does not have the power to adopt mixed-use regulations. Some commentators dispute that conclusion.<sup>29</sup>

***Home Rule States.*** Home Rule refers to the delegation of power from the state to municipalities and counties to act in areas of concern without prior state statutory authority. The delegation of home rule powers to municipalities is usually done through the state constitution, and, in some states, statutes have also been adopted as supplementary to the constitutional provisions.<sup>30</sup> A typical state constitutional provision will authorize local governments to adopt ordinances and regulations in areas concerning their “municipal” or “corporate” affairs. In order to implement constitutionally-granted home rule authority, most local governments will adopt a “charter” specifying their home rule authority. States with supplementary statutory home rule authority also typically must adopt a charter outlining the scope of authority.<sup>31</sup> What that home rule authorization encompasses will usually be a matter of state court interpretation. In most home rule states, the courts have held that land use regulation is included in the grant of home rule authority, even though some may hold that land use controls are a matter of shared state and local concern.<sup>32</sup> Local governments in home rule states have more latitude to adopt land use regulations that allow for or mandate mixed-use development, but their state courts may still be asked to address questions of whether mixed-use regulations as proposed conflict with the state’s zoning enabling act or some other statutory provision. For example, in 2021 the Supreme Court of Connecticut ruled that the state’s zoning enabling law authorized of the City of Shelton, Connecticut to create planned development districts.<sup>33</sup>

## **Impediments to Mixed-Use Development Under Conventional Zoning**

Because of the fundamental premise of conventional zoning – namely, the importance of separating uses and establishing provisions designed to support that approach to land use regulation – any effort to create mixed-use regulations must overcome certain structural impediments in conventional zoning.

***Single-Use Zones.*** Under conventional zoning, separation of uses means separating residential uses from retail uses, industrial uses from office uses, and so on. Broad use categories are often broken down further so that residential zoning districts, for example, are restricted according to housing type –

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<sup>27</sup> RATHKOPF § 11:12.

<sup>28</sup> See MCQUILLIN § 4:11.

<sup>29</sup> See Sitkowski & Ohm at 167 (arguing that there is very little in a typical mixed-use regulation that cannot find support in a state zoning enabling statute based on the SSZEA).

<sup>30</sup> MCQUILLAN § 3:42.

<sup>31</sup> See e.g., Michigan Home Rule City Act, Act 279 of 1909; see also MCQUILLAN § 3:42 (citing to cases from Colorado, Louisiana, Michigan, and New York as having supplemental statutory home rule authority).

<sup>32</sup> DANIEL R. MANDELKER, LAND USE LAW §§ 4.24 - 4.25 (6th ed., Nov. 2021).

<sup>33</sup> See generally *Tillman v. Plan. & Zoning Comm’n of City of Shelton*, 341 Conn. 117, 129, 266 A.3d 792, 800 (2021).

detached single-family housing in one zoning district, two- and three-family housing in another zoning district, townhouses in a third district, and apartments or multi-family housing in yet another district. This structure makes it difficult to provide for the integration of residential, retail, and commercial uses and of building and housing types that is critical to the success of mixed-use development.

***Dimensional Limitations.*** Dimensional limitations in conventional zoning ordinances are intended to work hand-in-hand with the separation of uses in order to also keep the buildings containing such uses separated. Thus, ample minimum lot sizes and front, side, and rear yard setbacks push buildings back from the street and away from each other. This is potentially fatal for effective mixed-use development, which requires close integration of uses and puts special emphasis on the arrangement of buildings in relation to public spaces, especially streets. Height restrictions can also be a significant problem if vertical as well as horizontal mixing of uses is desired in a mixed-use development. Maximum floor area ratios (FARs), maximum building lot coverage levels, and minimum open space requirements can also substantially impact the achievement of the development densities and integrated design necessary to make mixed-use development function as intended.

***Parking Requirements.*** The accommodation and location of off-street parking areas for cars is also a major factor in the design of all types of development. Conventional zoning provisions requiring minimum parking ratios determined by highly specific use types can thwart the potential for shared parking. The typical zoning provision that all parking required for new development must be accommodated entirely on the same lot as the uses to be served, without considering any available public or on-street parking, is also an impediment to the flexibility in parking needed in mixed-use development. In addition to parking requirements, conventional zoning or development regulations may tend to defer to trip generation estimates from the *Trip Generation Manual* published by the Institute of Transportation Engineers (ITE),<sup>34</sup> which generally undervalues mixed-use efficiencies due to internal, non-vehicle trips, thereby overestimating traffic impacts of a proposed development.

The interaction of mixed-use projects with contemporary zoning can be seen in a Supreme Court of Delaware decision in which the court overturned a local denial of a mixed-use project.<sup>35</sup> The court found that the town's minimum lot size requirements for multifamily dwellings were not applicable because the project's mixture of uses meant that it no longer qualified as a "residential multiunit structure."<sup>36</sup>

### **Impediments to Mixed-Use Development Under Conventional Subdivision Regulations**

As with the zoning issues discussed above, conventional local subdivision ordinance provisions can also frustrate efforts to achieve mixed-use development. Typical provisions that impede the ability to do mixed-use development are:

- Excessive minimum right-of-way and roadway widths that result in streets that are too wide in relation to adjacent buildings;
- Required minimum turning radii and corner building clearances that make already wide streets even wider at intersections and discourage pedestrian crossings;
- Failure to make provision for street classifications that are often used in mixed-use development, such as alleys; and
- Failure to require development and pedestrian amenities such as sidewalks and street trees, on-street/parallel parking, and traffic calming measures, which further reduces the walkability that is essential to successful mixed-use development projects.

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<sup>34</sup> TRIP GENERATION MANUAL, INSTITUTE OF TRANSPORTATION ENGINEERS (11th ed., 2021).

<sup>35</sup> *Dewey Beach Enterprises, Inc. v. Board of Adjustment of Town of Dewey Beach*, 1 A.3d 305 (Del. Supr. 2010).

<sup>36</sup> *Id.* at 309-310.



## Non-Regulatory Impediments to Mixed-Use Development

There are other kinds of impediments to developing mixed-use projects.

- Community attitudes toward different development types, particularly when located adjacent to low density single-family development, can be a barrier to realizing mixed-use developments in some communities.<sup>37</sup>
- A local government's focus on sales tax revenue generated by certain kinds of retail can preclude the smaller, locally owned businesses that are important to the success of mixed-use developments.<sup>38</sup>
- Lack of understanding of real estate development principles, such as the misperception that reducing the number of units in a project will improve the project is another potential impediment, may also keep mixed-use developments out of certain communities.<sup>39</sup>

Educating local governments on the need for density in mixed-use projects to make the commercial and retail uses viable is often necessary to overcome these barriers.<sup>40</sup> Also, educating the community generally as to how established single-family neighborhoods can be protected by mixed-use regulations, such as including performance standards for noise and light impacts, even though retail and commercial uses will not be separate as under traditional zoning, is also helpful in overcoming these community attitudes.<sup>41</sup>

## State Zoning and Subdivision Enabling Authority Modifications for Mixed-Use Regulations

Recognizing the need to authorize more flexibility in their state zoning and subdivision statutes to allow for mixed-use development, a number of states have either modified their statutory provisions or provided separate statutory schemes. The following describes some of these state statutory modifications to authorize mixed-use development.

**Louisiana:** In 2016, Louisiana enacted legislation specifically authorizing municipalities to promote “smart growth development,”<sup>42</sup> which the statute defines as development of structures, facilities and appurtenances with the intent of creating a new community that (a) mixes land uses together; (b) creates a range of housing opportunities and choices, and (c) creates walkable neighborhoods, including schools and grocery stores.<sup>43</sup> This legislation appears to be a response to Louisiana municipalities reluctance to embrace smart growth principles.<sup>44</sup> By providing direct authorization to encourage smart growth, with mixed-use, walkable neighborhoods, and housing choice as central purposes, more mixed-use zoning ordinances may be adopted.

**California:** In 2004, California adopted an amendment to its Government Code to specifically authorize mixed-use regulations:

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<sup>37</sup> Aric Jensen, *Understanding and Implementing Mixed-Use Development in the West: Case Studies from Bountiful, Utah*, THE WESTERN PLANNER (Jul. 1, 2015).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *See id.*

<sup>41</sup> *See id.*

<sup>42</sup> La. Rev. Stat. §§ 33:140.211 - 212.

<sup>43</sup> La. Rev. Stat. § 33:140.212.

<sup>44</sup> State and Local Government in Louisiana: An Overview 2012-2016 Term, 3A-8, <http://house.louisiana.gov/slg/PDF/Chapter%203%20Part%20A%20-%20Local%20Government.pdf>.

The text and diagrams in the land use element [of the applicable general plan] that address the location and extent of land uses, and the zoning ordinances that implement these provisions, may also express community intentions regarding urban form and design. These expressions may differentiate neighborhoods, districts, and corridors, provide for a mixture of land uses and housing types within each, and provide specific measures for regulating relationships between buildings, and between buildings and outdoor public areas, including streets.<sup>45</sup>

The effect of this enabling act change was relatively minor. California was already a leading jurisdiction for mixed-use regulation before its adoption and has remained one since.

**Connecticut:** Adopted in 1998, the Connecticut Village Districts Act authorizes zoning commissions and planning & zoning commissions to establish “village districts” as part of the regulations adopted under their general zoning enabling legislation or any special act so that municipalities can protect the distinctive character, landscape, or historic value of the areas so identified in the municipal Plan of Conservation and Development.<sup>46</sup> The scope of such regulations includes the design and placement of buildings, the maintenance of public views, the design, paving materials, and placement of public roadways, and other elements that the commission may deem appropriate to maintain and protect the character of the district. Simply put, commissions are granted broad discretion in regulating a wide variety of aesthetic concerns, be it in the idiom of mixed-use development or otherwise. Based on an informal review, over 30 municipalities have adopted village district zoning in Connecticut since the inception of the Act.

**Massachusetts:** The Massachusetts Smart Growth Zoning Act,<sup>47</sup> adopted in 2004, specifically authorizes municipalities to adopt “smart growth zoning districts” as overlays to their existing zoning in “eligible locations,” consisting of areas (1) near transit stations; (2) of concentrated development, including town and city centers and existing commercial and rural village districts; and (3) “that by virtue of their infrastructure, transportation access, existing underutilized facilities, and/or location make highly suitable locations for residential or mixed use ... districts.”<sup>48</sup> Minimum by-right residential densities are specified, and at least 20% of the units in the district as a whole and 20% of the units in any single development of 12 or more units must be affordable. Such districts are specifically authorized to provide for “mixed-use development” containing a mixture of single and multi-family residential, commercial, institutional, industrial and other uses “all conceived, planned and integrated to create vibrant, workable, livable and attractive neighborhoods.”<sup>49</sup> The act is framed as a voluntary municipal opt-in with specific state financial incentives for rezoning and building permit issuance paid directly to municipalities.<sup>50</sup> As of May 2019, the Massachusetts Department of Housing and Community Development reported that 51 Smart Growth Zoning Overlay Districts had been adopted in 42 municipalities, covering a total of 2,326 acres and permitting 22,213 new units of housing as-of-right.<sup>51</sup>

**Wisconsin:** Effective January 1, 2002, Wisconsin law has mandated that every city and village with a population of at least 12,500 adopt a specifically-enabled traditional neighborhood development ordinance.<sup>52</sup> The requirement for TND ordinances affects approximately 60 cities and villages in the state. Cities or villages that reach a population of at least 12,500 are required to enact a traditional

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<sup>45</sup> Cal. Gov’t. Code § 65302.4.

<sup>46</sup> Conn. Gen. Stat. § 8-2j.

<sup>47</sup> Codified at Mass. Gen. L. c. 40R.

<sup>48</sup> Mass. G.L. c. 40R, § 2.

<sup>49</sup> Mass. G.L. c. 40R, §§ 1, 6.

<sup>50</sup> Mass. G.L. c. 40R, § 9.

<sup>51</sup> See 40R Districts Activity Summary at <https://www.mass.gov/doc/40r-districts-activity-summary/download>.

<sup>52</sup> See generally Wis. Stat. § 66.1027.

neighborhood development ordinance within 11 months of the time the population of the city or village reaches at least 12,500.<sup>53</sup> The law defines traditional neighborhood development as “a compact, mixed use neighborhood where residential, commercial, and civic buildings are within close proximity to each other.”<sup>54</sup> The traditional neighborhood development requirement is meant to provide an option for developers seeking an alternative approach to conventional development. While the legislature did not require cities and villages to map the ordinance, local communities may, at their option, map Traditional Neighborhood Development districts. Cities and villages therefore may treat the ordinance requirement as a zoning district designation, an overlay zone, a floating zone, or as a modified approach to planned unit developments.<sup>55</sup>

## **18.02 EFFECTIVENESS IN ACHIEVING STATED PURPOSE(S)**

The ability of mixed-use regulations to achieve their stated purposes depends upon more than simply providing for the “mixing” of uses. There are three basic considerations that must go into formulating mixed-use regulations: (1) regulatory provisions needed to support and help a mixed-use development perform as intended; (2) mechanisms used to implement mixed-use regulations; and (3) consideration of whether certain minimum percentages of various uses or building types should be mandated by the mixed-use regulations.

### **Additional Regulatory Provisions Essential to Supporting Mixed-Use Development**

***Planned Sustainability.*** The principles of mixed-use development should be based on or reflected in a comprehensive land use plan that addresses land use, environmental, energy, and market considerations.

***Compact Development.*** For land uses and infrastructure to interact effectively with one another and with the people who will use the area created by the mixed-use regulations, the development must be dense, but also at a scale that is suitable for live-work-play concerns.

***Accessibility and Connectivity.*** Within the mixed-use development, easy pedestrian movement is very important, but the district or area must also be connected to adjoining areas by public transit and safe road systems.

***Design Standards or Guidelines.*** The design of a successful mixed-use development differs significantly from the design of a single-use project because greater attention must be given to the relationships of buildings to their streets, to one another, and to adjacent developments. Designing a successful mixed-use development is more complex and requires much more attention to the detail of structures and how they work together. Mixed-use regulations that incorporate appropriate design standards and guidelines based on generally accepted principles of good design need to be tailored to specific circumstances. The local government must also address whether the regulations should be standards (i.e., mandatory) or guidelines (i.e., permissive). The question of a local government’s legal authority to regulate for design and “aesthetics” under the applicable enabling statute must also be addressed.<sup>56</sup>

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<sup>53</sup> Wis. Stat. § 66.1027(3).

<sup>54</sup> Wis. Stat. § 66.1027(1)(c).

<sup>55</sup> See generally Robert J. Sitkowski, et al., *Enabling Legislation for Traditional Neighborhood Development Regulation*, LAND USE LAW & ZONING DIGEST (October 2001).

<sup>56</sup> Massachusetts Executive Office of Energy and Environmental Affairs, *A Model Ordinance for a Traditional Neighborhood Development*, available at: <https://www.mass.gov/doc/smart-growthsmart-energy-bylaws-traditional-neighborhood-development-tnd-master-plan-approach/download>.

**Flexibility.** The principles of mixed-use development should be based on a comprehensive land use plan that addresses land use, environmental, energy, and market considerations.

### **Mechanisms for Implementing Mixed-Use Regulations**

If the mixed-use regulatory provisions are sufficiently detailed and well crafted, regulations that permit mixed-use development by-right, without the necessity of any discretionary review process such as a special permit or planned unit development (PUD) process, are preferable. When mixed-use development is allowed by-right, with minimal administrative review, predictability is increased for the developer and the objectives articulated by the community through the mixed-use regulations are more likely to be achieved. However, opposition to mixed-use development in some communities may make as-of-right mixed-use zoning unworkable,<sup>57</sup> so other approaches are often used. One approach is to use the **planned unit development** (PUD) technique.<sup>58</sup> Most local land-use regulatory systems provide for some form of PUD in which a single tract, usually of some minimum size and under single ownership or control, can be given special treatment with regard to design, uses, dimensions, and parking, through a discretionary review and approval process.

Another technique that can be used is the **overlay zone**. This is a special purpose zone that is “laid over” one or more existing base zoning districts to achieve certain defined objectives without having to resort to modifications of each underlying zoning district. All property located within an overlay zone is then governed by the provisions of both the applicable base zoning district and the overlay zone. Initially, the objectives to be achieved by overlay zones were principally environmental, such as the protection of aquifers or other natural resources. Now, however, overlay zones are being used to preserve historic districts, promote better design, and, increasingly, to promote mixed-use development.

Finally, there is the option of creating in the text of the ordinance a provision for a **floating zone**. The floating zone or district is mapped on the official zoning map, replacing the base zoning district, only upon approval of an application by the property owner or a developer acting on behalf of the owner. The map amendment is adopted by the local legislative body only if the zoning map amendment application satisfies the criteria for establishing the floating zone. The principal advantage of a floating zone is the ability to create a relatively detailed, specific base zone that is structured with the provisions necessary to support mixed-use development.<sup>59</sup>

### **Encouraged Versus Mandatory Mixing of Uses**

Finally, there is the question of whether to require certain levels of use or even certain building types determined to be necessary to create a viable mixed-use development, or whether to adopt provisions that encourage the mixture of uses, but do not mandate the details. For example, in developments that are primarily retail in character, should there be a minimum percentage of other uses, such as 10% office or 20% residential? Should multi-level buildings with different uses by floor (i.e., “vertical mixed use”) be required to be a component in all cases? Should certain uses, such as drive-through fast-food restaurants, be limited to maximum percentages in a true mixed-use development? These questions require thoughtful

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<sup>57</sup> See, e.g., Matthew Enright, *Opposition to Mixed-Use Zoning Continues*, THE INDEPENDENT (discussing local opposition to proposed zoning changes to designate 19 parcels for mixed-use development in the Town of Narragansett, RI).

<sup>58</sup> Planned Unit Development is further discussed in Section 11 of this book.

<sup>59</sup> Among many such examples, floating zones for mixed-use development have been adopted in Chesapeake City, Maryland, and Gainesville, Florida, where the districts have been term “traditional neighborhood development districts.” *Planning Advisory Service Report No. 526, Codifying New Urbanism*, American Planning Association/Congress for the New Urbanism (2004), at Appendix A, Part 3.

consideration and debate within the particular community in light of local market considerations before deciding whether to make such provisions mandatory or permissive.

### **Example of Mandatory Mixed Use: New or Modified Base Zoning Districts**

**Omaha, Nebraska** (New and Modified Conventional Base Zoning Districts and Subdivision Code Changes): The City of Omaha made selective zoning code changes to implement a new citywide Urban Design Element of their comprehensive plan in 2007. Among those changes were substantial modifications to an existing Mixed-Use (MU) district that the City maps at comprehensive plan-designated “Four Corners” locations throughout Omaha to provide for urban design standards, building design guidelines, and required mixing of uses. In particular, at least ten percent (10%) of the land area of an MU district must be used for office uses and no more than twelve percent (12%) of an MU district’s area can be used for “free-standing fast food restaurants.”<sup>60</sup> A new residential district – entitled the Walkable Residential District – was added as an option for designation of new growth areas in the City.<sup>61</sup> In these new districts, a wider variety of housing types and accessory dwelling units are permitted, maximum floor area ratio (or FAR) was eliminated as a regulator, a build-to/set-back line for 60% of the front facades of houses was introduced, and a minimum front-facing garage setback of 25 feet was imposed.<sup>62</sup>

**Effectiveness:** The code changes in Omaha have generally been successful in generating new mixed-use development, even during the real estate recession that began in 2008.<sup>63</sup> In 2017 alone, Omaha received proposals for an 8-acre mixed-use development in downtown and a 180 acre office, retail, residential, and green space development in western Omaha.<sup>64</sup> The trend toward mixed-use development looks to continue in 2022, with a new proposal for a project that will convert both new and historic structures into 172 apartments and space for artists.<sup>65</sup>

### **Examples of Optional Mixed Use: Planned Unit Developments, Overlays, Floating Zones**

**Indianapolis, Indiana (Floating Zone):** In 2016, Indianapolis adopted a re-write of the zoning ordinance and subdivision regulations, called “Indy Rezone.” The new zoning ordinance created four mixed-use districts permitted different types of mixed-use development.<sup>66</sup> Zone MU-1 is intended for high-rise buildings on arterial streets with office and residential uses intermixed.<sup>67</sup> Zones MU-2, MU-3 and MU-4 are intended to accommodate “compact, walkable places at a variety of scales and intensity, appropriate to their contexts.”<sup>68</sup> These zoning districts allow for flexibility but also contain several urban design requirements. Upon adoption, the City did not map these districts in areas where no mixed-use

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<sup>60</sup> See Omaha Zoning Code § 55-564.

<sup>61</sup> See Omaha Zoning Code § 55-208.

<sup>62</sup> See Omaha Zoning Code § 55-213.

<sup>63</sup> Conversation with Connie Spellman, Omaha by Design, September 15, 2011.

<sup>64</sup> See “Omaha Civic Leaders Plan \$125 Million Mixed-Use Development on Lot Across from CenturyLink Center,” *Omaha World-Herald* (Jan. 16, 2017); “Proposed \$1.2 Billion Mixed-Use Development Would be ‘Unique’ in West Omaha, Planner Says,” *Omaha World-Herald* (Mar. 6, 2017).

<sup>65</sup> See “The \$34.5 million Dizzy Mule is headed to downtown Omaha,” *3NewsNow.com* (May 5, 2022).

<sup>66</sup> See City of Indianapolis Consolidated Zoning/Subdivision Ordinance, Chapter 742, Article I, Section 05 (Mixed Use Districts), available at <https://media.graphcms.com/qbMIDQ8tSXePbNPqInSk>.

<sup>67</sup> See *id.* § 742.05.B.

<sup>68</sup> See *id.* § 742.05.C.

development existed; instead it has allowed the market to dictate what areas are appropriate for mixed-use development and re-zone accordingly.<sup>69</sup>

**Effectiveness:** Mixed-use projects were developed prior to the rezone but these projects typically required significant zoning relief in order to be completed.<sup>70</sup> The adoption of four mixed-use zoning districts should facilitate the development of mixed-use projects by giving developers a standard set of criteria to meet and a predictable re-zoning application process. Since the new zoning ordinance was adopted several requests for rezoning have been brought.<sup>71</sup>

**Lakewood, Ohio (Floating Zone/Mixed-Use Overlay):** Lakewood’s Mixed-Use Overlay District, adopted as Chapter 1135 of the city’s zoning ordinance, is a fairly typical unmapped floating zone available for new mixed-use development pursuant to a development plan process. Once adopted, the zone allows for flexibility in uses and dimensions under a “consistent with the surrounding properties” standard. To obtain the floating zone treatment, a proposal must offer at least one of nine “advantages” including “[d]esigns which encourage a mix of retail, service, office, housing, live-work units, and public activities to coexist in a manner that reflects human scale and emphasizes pedestrian orientation, taking advantage of the vitality that mixed uses can bring to the community.”<sup>72</sup> The Mixed-Use Overlay District was amended in 2013 to allow overlay over residential districts.<sup>73</sup>

**Effectiveness:** Although the City’s zoning map indicates that only a handful of parcels have been designated as mixed use,<sup>74</sup> it appears that several mixed-use developments have been built in Lakewood since Chapter 1135 was adopted, including redevelopment of a 1970s era office building begun in early 2017 and a City-issued request for proposals for redevelopment of a former hospital site.<sup>75</sup>

**Columbia Pike Plan, Arlington County, Virginia (Form-Based Overlay Zoning):** This form-based code, adopted in 2003, is an optional development approval process designed to help revitalize the Columbia Pike corridor of Arlington County, located in Virginia just outside of Washington, D.C., and transform it into a walkable, mixed-use main street. The code includes regulating plans, required building lines, parking setbacks, building envelope standards, architectural standards, and streetscape standards. The code includes vertical use mixing requirements, so that, for example, retail use is required on the ground floor of “Main Street Sites.” Developers who use the form-based code process receive an expedited approval process and, if developing in a revitalization district, are eligible for county investment.<sup>76</sup> In 2012, the County Board adopted the Columbia Pike Neighborhoods Area Plan for surrounding residential areas as the second phase of the Columbia Pike Initiative in order to create a walkable and bicycle-friendly corridor, and to sustain the Corridor’s 6,200 units of affordable housing.<sup>77</sup>

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<sup>69</sup> Marilyn Odendahl, *Indy Rezone Creates Roadmap for City’s Future*, *The Indiana Lawyer* (Apr. 6, 2016), <https://www.theindianalawyer.com/articles/39941-indy-rezone-creates-roadmap-for-citys-future>.

<sup>70</sup> *Id.*

<sup>71</sup> See generally Metropolitan Development Commission Staff Reports, available <https://www.indy.gov/agency/department-of-metropolitan-development>.

<sup>72</sup> Codified Ordinances of City of Lakewood, Ohio, Section 1135.01.

<sup>73</sup> See Codified Ordinances of City of Lakewood, Ohio, Section 1135.04.

<sup>74</sup> City of Lakewood Zoning Map, available at:

<https://onelakewood.maps.arcgis.com/apps/View/index.html?appid=e2132119e8d947c1ad1c0c3f0a856037>.

<sup>75</sup> See “Work Begins on Lakewood Center North’s Mixed-Use Transformation,” *Cleveland.com* (Apr. 6, 2017); “Mixed-Use Development Planned for Lakewood Hospital Site,” *Cleveland.com* (Feb. 6, 2017).

<sup>76</sup> See the webpage for the code and the broader Columbia Pike Revitalization Plan at <http://projects.arlingtonva.us/projects/columbia-pike/>.

<sup>77</sup> Columbia Pike Plan, Arlington County, Virginia: Arlington, VA, Newsroom, Columbia Pike Initiative Wins Award for “Best Corridor Plan” (June 11, 2014), <http://news.arlingtonva.us/releases/columbia-pike-initiative-wins-award-for-best-corridor-plan>.



The County adopted a second form-based code to implement this Neighborhoods Area Plan, following the success of the form-based code adopted for the Corridor’s commercial areas.<sup>78</sup>

**Effectiveness:** In 2014, the Congress for the New Urbanism awarded the Columbia Pike Initiative its 2014 “Best Corridor Plan.”<sup>79</sup> According to the report “Fiscal Year 2021 Arlington Corridors Development Update,” as of July 1, 2021 approximately 871,000 square feet of office, 924,000 square feet of retail, and 18,900 residential dwelling units have been built in the Columbia Pike Corridor, with another 36,000 square feet of retail space and 800 dwelling units approved for construction.<sup>80</sup>

**City of St. Louis Park, Minnesota (Mixed-Use District):** Article IV, Division 9 of the city’s zoning ordinance is a mixed-use district which allows vertical mixed use (MX-1 District) and neighborhood mixed use (MX-2 District). The dimensional standards include a maximum nonresidential density of 1.5 FAR and a maximum residential density of 50 dwelling units per acre, a required recreational open space requirement, reduced parking requirements for joint/shared parking, and flexible building design standards.<sup>81</sup>

**Effectiveness:** The city’s zoning map<sup>82</sup> indicates that several sites are currently zoned within the MX District designations, including the 125-acre Excelsior & Grand New Urbanist redevelopment of a former commercial greyfield site.<sup>83</sup> New development proposals continue to be brought for rezoning under the MX designation.<sup>84</sup> These positive results can be attributed in large part to the fact that the ordinance contains provisions that address the three categories of consideration for successful mixed-use development described at the beginning of Section 18.02 above.

### Effectiveness of Mixed-Use Regulations Generally

There is little empirical research on the effectiveness of mixed-use development. This may be because of lack of public data on mixed-use developments, the difficulty in dissecting the component parts of developments for research purposes, and the overall diversity of developments that could be said to satisfy the definition of mixed-use development.<sup>85</sup> One study examined mixed-use developments in Seattle, Washington to determine efficacy as a real estate investment class by studying the tenant makeup and turnover in mixed-use developments.<sup>86</sup> It found that only 17% of tenants were classified as retail tenants, whereas 61% of tenants were classified as personal or professional services. The authors noted that the lack of retail uses was surprising and contradicts the narrative supporting the value of mixed-use developments, i.e., that mixed-use developments create neighborhoods where residents can satisfy their commercial needs within walking distance of home. The authors further discussed the importance of understanding the tenant mix for building design. For example, buildings built-out for retail uses may need significant retrofitting for restaurant uses. Mixed-use development that incorrectly assumes a

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> See FY 2021 Arlington Corridors Development Update, Columbia Pike Corridor, available at <https://arlingtonva.s3.amazonaws.com/wp-content/uploads/sites/31/2021/09/CorridorReport2021.pdf>.

<sup>81</sup> St. Louis Park Zoning Ordinance § 36-264

<sup>82</sup> St. Louis Park Official Zoning Map, December 14, 2021, available at <https://services.slpGIS.org/AGO/Gallery/zoningmap.pdf>.

<sup>83</sup> See the project description webpage on the Congress for the New Urbanism website, available at <http://www.cnu.org/node/869>.

<sup>84</sup> St. Louis Park, Minnesota, *Proposed Development: Former McGarvey Coffee Property/PLACE*, <https://www.stlouispark.org/government/departments-divisions/community-development/development-projects>.

<sup>85</sup> James R. DeLisle and Terry V. Grissom, *An Empirical Study of the Efficacy of Mixed-Use Development: The Seattle Experience*, 21 J. REAL ESTATE LITERATURE 1, 25 (2013).

<sup>86</sup> *Id.*

particular tenant class, may underperform due to the miscalculation. This study also found relatively high turnover and vacancy rates, emphasizing the conclusion that knowing the market is integral to a successful mixed-use project.

The success of mixed-use regulations to stimulate intended development types can vary by community and type of regulations. One study found that form-based zoning regulations may “fail to act as a catalyst for mixed-use development in some instances when demand is very weak or when market dynamics disfavor the integration of multiple real estate types.”<sup>87</sup> The context of a mixed-use development can also impact the ability to achieve the intended mix of uses. A study of four mature core areas in suburban developments following the principles of New Urbanism (Fairview Village, Oregon; Northwest Landing, Washington; Cornell, Ontario; and Snoqualmie Ridge, Washington) found that the population was not sufficient to support retail establishments beyond basic convenience retail, and, as a result, retail spaces were often filled with professional services such as finance and healthcare.<sup>88</sup>

### 18.03 IMPACT ON PROPERTY VALUES

Mixed-use development is intended to permit more uses (e.g., commercial in addition to residential) and a more intense use of land. Greater flexibility of uses and more intense use of land should increase property values. Mixed-use developments are also typically unique in design and composition, which can also increase their value over time.<sup>89</sup> An empirical study of real estate transaction prices (both per square foot of built floor area and of land) in Boston evaluated mixed-use buildings and neighborhoods to determine what, if any, premium is associated with mixed-use, to help inform the decision to develop mixed or single use.<sup>90</sup> The study found that, for mixed-use buildings, there is a higher land value but not a higher associated building value per square foot associated with mixed-use developments. The study concluded that this implies the value is derived from additional density and/or faster initial lease-up rather than any kind of increase in operational efficiency or rent premium. The study also found that larger mixed-use developments, containing three or more uses, are generally in locations with fewer amenities because they are usually located further away from city centers due to the land area requirements for development. These areas generally have lower property values because of the lack of amenities. The study found that the value created by the mixing of uses did not overcome the lower valued location.

Some communities experienced significantly higher returns in property taxes from mixed-use developments in urban centers due to increases in property values. For example, Asheville, North Carolina saw an 800% or more return per acre on downtown mixed-use projects, in tax revenues, compared to single-use projects at the city’s fringe.<sup>91</sup> However, when mixing of uses is required or new, and unfamiliar design features are mandated, mixed-use regulations can reduce property values if the local market is not ready for these innovations. Property values may also suffer if debt and equity providers, who are unfamiliar with mixed-use development, discount properties with this type of zoning until its success in a given market is proven through sufficient comparables.

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<sup>87</sup> W. Keener Hughen & Dustin C. Read, *Analyzing Form-Based Zoning’s Potential to Stimulate Mixed-Use Development in Different Economic Environments*, 61 LAND USE POLICY 1-11 (2017).

<sup>88</sup> Matthew Novak, *Assessing The Long-Term Performance of the Urban Cores in Four New Urbanist Communities*, 24 JOURNAL OF URBAN DESIGN 368-384 (2019).

<sup>89</sup> Restore, *Commercial and Mixed Use Development Trends in the Rocky Mountain West*, at p. 9 (November 2019), <https://communitybuilders.org/wp-content/uploads/2019/11/RESTORE-Report.pdf>.

<sup>90</sup> Jason A. Tilley, *The Value of Mixing Uses: An Empirical Analysis of Mixed-Use Developments in Boston, MA* (Sept. 2016) (unpublished Master’s Thesis, Massachusetts Institute of Technology) <https://dspace.mit.edu/bitstream/handle/1721.1/106752/969450141-MIT.pdf?sequence=1>.

<sup>91</sup> Joseph Minicozzi, “The Smart Math of Mixed Use Development.” Planetizen, 23 (Jan. 2012), <http://www.planetizen.com/node/53922> (“A typical acre of mixed use downtown Asheville yields \$360,000 more in tax revenue to city government than an acre of strip malls or big box stores.”).



The premium that mixed-use developments can command over traditional single-use development can also vary based on property type. A study analyzing four mixed-use communities (Kendall Square in Cambridge, Massachusetts; Seaport District in Boston, Massachusetts; Union Square in Denver, Colorado; and South Lake Union in Seattle, Washington) found that while office and retail properties in these communities had higher market values compared to those outside, there was no clear return premium for apartments within these mixed-use communities.<sup>92</sup>

#### **18.04 IMPACT ON DEVELOPMENT COSTS**

Although mixed-use development should allow for a potentially more profitable development through the greater flexibility in uses and more intense use, it can negatively impact development costs. Programming, design, the permitting timeline, and financing are different from conventional development. This difference may result in increased transactional costs for the project team and for local officials reviewing the development. Because development costs tend to be higher for mixed-use developments, the return on investment for such projects typically must be higher.<sup>93</sup> In addition, financing can be more difficult and expensive for mixed-use development.<sup>94</sup>

#### **18.05 IMPACT ON AMOUNT AND PATTERNS OF LAND DEVELOPMENT**

Mixed-use development is specifically intended to affect the amount and shape the patterns of land development. This type of development should increase the level of development on all sites, thereby reducing aggregate demand for land for new development. The resulting pattern of land development should be more compact and more oriented toward infill and centrally-located sites. The effectiveness of mixed-use development on reducing the amount of land needed for new development is difficult to quantify or predict, however. A study of Oregon cities (not including the Portland Metro area) concluded that smaller cities are less likely to see mixed-use development, but most cities that provide financial incentives and favorable zoning conditions will see some mixed-use development.<sup>95</sup> Although this study did not provide a methodology for predicting the level of mixed-use development a community can expect as a result of financial incentives or favorable zoning conditions and, consequently, for predicting demand for land for new development, the conclusions derived from examining case studies provide some guidance for communities interested in promoting more mixed-use development.

#### **18.06 IMPACT ON HOUSING AFFORDABILITY**

Mixed-use development should result in an expansion of housing supply by allowing land to be developed more intensely for residential use. This increase in supply should improve housing affordability on a broad, market-wide basis. Because it allows for a greater variety of development

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<sup>92</sup> Shohei Nakamura, Richard Peiser & Raymond Torto, *Are There Investment Premiums for Mixed-Use Properties?*, 40 JOURNAL OF REAL ESTATE RESEARCH 1-40 (2018).

<sup>93</sup> Regional Plan Association, *Mixed Use Development and Federal Housing Regulations: A Report to the Oram Foundation on Literature and Case Studies Findings*, at 5-6 (Jan. 2013), [https://www.cnu.org/sites/default/files/mixed\\_use\\_final\\_report\\_1-14-13\\_0.pdf](https://www.cnu.org/sites/default/files/mixed_use_final_report_1-14-13_0.pdf).

<sup>94</sup> RABIANSKI at 11; *Mixed Use Development and Federal Housing Regulations: A Report to the Oram Foundation on Literature and Case Studies Findings* (Jan. 2013), [https://www.cnu.org/sites/default/files/mixed\\_use\\_final\\_report\\_1-14-13\\_0.pdf](https://www.cnu.org/sites/default/files/mixed_use_final_report_1-14-13_0.pdf).

<sup>95</sup> University of Oregon, *Analysis of Mixed-Use Development and Redevelopment in Oregon Cities: A Report to the HB 2254 Rules Advisory Committee* (Sept. 2015), [https://web.archive.org/web/20170329200808/https://www.oregon.gov/LCD/docs/rulemaking/UGB\\_RAC/UO\\_Report\\_MixedUse\\_Redevelopment\\_FINAL.pdf](https://web.archive.org/web/20170329200808/https://www.oregon.gov/LCD/docs/rulemaking/UGB_RAC/UO_Report_MixedUse_Redevelopment_FINAL.pdf).

contexts, mixed-use development also encourages production of housing in a wide variety of formats and price points. In addition, New Urbanism principles concentrate development along transportation corridors, which has successfully furthered affordable housing development in certain places including Maryland and Washington.<sup>96</sup> Some studies have concluded that financing mixed-use projects with an affordable housing component involves additional barriers, such as difficulty with commercial lending and a lack of understanding of mixed-use development within the lending community.<sup>97</sup> In addition, to the extent that mixed-use development increases development costs, those costs may ultimately be passed on to purchasers of new homes, potentially resulting in a negative impact on housing affordability. To address affordability concerns in mixed-use development, some commentators suggest the consideration of measures such as inclusionary zoning, density bonuses linked to affordable housing and affordable housing trusts.<sup>98</sup>

## 18.07 RECOMMENDED TALKING POINTS: PROS AND CONS

### PROS:

- Mixed-use development allows developers and land owners to meet growing market demand for live-work-play environments.
- Mixed-use development can increase property values by allowing for a wide variety of uses and more intensive use of properties through compact development.
- Mixed-use projects may have lower parking space requirements if their uses have different operating times and can therefore share parking spaces.
- Mixed-use development can improve housing affordability by promoting a wide range of housing types at a variety of price points, and by allowing higher-density development, can lower the cost of land per square foot.<sup>99</sup>

### CONS:

- If use-mixing requirements and/or design standards are mandated in a particular local market that is not yet ready for mixed use, forcing mixed-use development on specific sites can negatively impact property values and may negatively impact housing affordability by making development of the affected property infeasible.

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<sup>96</sup> Ngai Pindell, Growth Management and Affordable Housing: Risks and Opportunities at 2, LEG. GUIDE TO AFFORDABLE HOUSING DEV. § 2.III, (2011).

<sup>97</sup> Regional Plan Association, *Mixed Use Development and Federal Housing Regulations: A Report to the Oram Foundation on Literature and Case Studies Findings*, at 6 (Jan. 2013), [https://www.cnu.org/sites/default/files/mixed\\_use\\_final\\_report\\_1-14-13\\_0.pdf](https://www.cnu.org/sites/default/files/mixed_use_final_report_1-14-13_0.pdf) (reporting “71% [of survey findings] saying that they encountered significant barriers in financing mixed use, mixed-income development[.]” but noting that “the growth of mixed use projects themselves can be evidence of their growing viability.”) (quoting Emily Talen, *Prospects for Affordable, Walkable Neighborhoods, Report Prepared for the Oram Foundation*, at 11 (Mar. 2011), available at <http://community-wealth.org/sites/clone.community-wealth.org/files/downloads/report-talen.pdf>).

<sup>98</sup> Markus Moos, Tara Vinodrai, Nick Revington & Michael Seasons, *Planning for Mixed Use: Affordable for Whom?*, 84 J. AM. PLANNING ASSN 7-20 (Winter 2018).

<sup>99</sup> Restore, *Commercial and Mixed Use Development Trends in the Rocky Mountain West*, a9 (November 2019), <https://communitybuilders.org/wp-content/uploads/2019/11/RESTORE-Report.pdf>.

- Financing mixed-use developments, particularly with an affordable housing component, can be difficult, as the financial system tends to favor single-use projects.<sup>100</sup>

## 18.08 INCENTIVE-BASED ALTERNATIVES

As discussed above, mandatory mixed-use regulations can have limited effectiveness if certain provisions such as well-crafted urban design standards are not included or use-mixing requirements are not carefully calibrated to local market acceptance. Incentive-based approaches to facilitate mixed-use development, including expedited permitting, dimensional flexibility, and increased residential and commercial density, may be more appropriate than mandating mixed use. In addition, as described above, mixed-use regulations can be applied through use of a PUD that provides for flexibility and tradeoffs with the private sector, or a market-initiated floating zone. Ultimately, the effectiveness of these incentive-based alternatives to mandated mixed-use provisions depends upon local market acceptance of mixed-use development.

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<sup>100</sup> *Id.* at 5; Regional Plan Association, *Mixed Use Development and Federal Housing Regulations: A Report to the Oram Foundation on Literature and Case Studies Findings*, at 5-6 (Jan. 2013), [https://www.cnu.org/sites/default/files/mixed\\_use\\_final\\_report\\_1-14-13\\_0.pdf](https://www.cnu.org/sites/default/files/mixed_use_final_report_1-14-13_0.pdf).

## SECTION 19: VACANT PROPERTY REGULATIONS

### 19.01 PURPOSE AND KEY TERMS

A vacant property regulation (“VPR”)—also sometimes referred to as a vacant building ordinance or vacant property registration ordinance—requires the owner of a vacant property to register the property with the local government. VPRs generally require property owners to pay a registration fee in order to defray the cost of providing municipal services. Additional VPR provisions may include property maintenance standards, a proof of insurance requirement, and a requirement that the property owner submit a plan to return the vacant property to productive use.<sup>1</sup> From the local government perspective, VPRs are a tool for gathering information on vacant properties, monitoring vacant properties, and motivating owners to maintain vacant buildings and return them to productive use.<sup>2</sup>

Generally speaking, there are three basic types of vacant property regulations: (1) those that target all vacant and abandoned properties regardless of ownership; (2) those that target properties in foreclosure; and (3) hybrids, which target vacant and abandoned properties as well as properties in foreclosure.<sup>3</sup> The key difference among these types of vacant property regulation is the event that triggers the registration requirement and the need to comply with the requirements of the VPR. Under the vacant and abandoned property model, registration is required after a certain period of vacancy, while under the foreclosure model, the registration requirement typically is triggered by the filing of a notice of default or intent to foreclose in a judicial foreclosure proceeding, or by a notice of intent to foreclose that is advertised by the lender in a nonjudicial foreclosure proceeding.<sup>4</sup> In a hybrid VPR, the registration requirement can be triggered either by a period of vacancy or by a foreclosure action.<sup>5</sup>

Due in large part to the foreclosure crisis of the mid-2000s, the number of communities with a VPR in the United States rose dramatically in 2008 and 2009, and continued to rise thereafter, albeit at a slower pace.<sup>6</sup> According to a national database of vacant property registration ordinances, from 2008 to 2009 a total of 240 communities adopted a VPR, for an average of 120 VPRs per year, compared to just 70 local VPRs that were adopted from 2000 to 2007 (for an average of less than nine VPRs per year).<sup>7</sup> According to a mortgage services company that tracks adopted and proposed VPRs, as of June 2022 nearly 1,700 communities in the United States had adopted a VPR.<sup>8</sup>

While the details vary from one jurisdiction to the next, most VPRs share the following basic components.

**Definition of “Vacant.”** A VPR that requires registration of vacant properties must establish the point in time at which a property becomes “vacant,” either by defining the term or establishing criteria for a determination of vacancy. Some communities define “vacant” based on how long a property has been

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<sup>1</sup> See David Morley, *Meeting the Vacant Property Challenge*, 27 ZONING PRACTICE No. 6 (June 2010, American Planning Association) (hereinafter “*Meeting the Vacant Property Challenge*”).

<sup>2</sup> See Elizabeth M. Tisher, *Re-Stitching the Urban Fabric: Municipal-Driven Rehabilitation of Vacant and Abandoned Buildings in Ohio’s Rust Belt*, 15 VT. ENVTL. L. REV. 173, 179 (Fall 2013).

<sup>3</sup> *Meeting the Vacant Property Challenge* at 5; see also Yun Sang Lee, Patrick Terranova & Dan Immergluck, *New Data on Vacant Property Registration Ordinances*, 15 CITYSCAPE: A JOURNAL OF POLICY DEVELOPMENT AND RESEARCH 259, 259-60 (2012) (hereinafter “*New Data on VPROs*”).

<sup>4</sup> See *New Data on VPROs* at 260.

<sup>5</sup> See *id.*

<sup>6</sup> See *New Data on VPROs* at 259.

<sup>7</sup> See *New Data on VPROs* at 262.

<sup>8</sup> See Vacant Property Registration Database (available online at [http://www.safeguardproperties.com/Resources/Vacant\\_Property\\_Registration.aspx](http://www.safeguardproperties.com/Resources/Vacant_Property_Registration.aspx)).

unoccupied. For example, under the “Vacant Structures” ordinance of the village of Campton Hills, Illinois, vacant means a “structure that is lacking the habitual presence of human beings, who have a legal right to be on the premises for 90 consecutive days.”<sup>9</sup> By contrast, the vacant buildings ordinance adopted by the City of Evanston, Illinois defines “vacant building” in terms of a list of nine property conditions (e.g., a structure that is “unoccupied and has multiple code violations” or “unoccupied for over two years”) any one of which is sufficient for the city to determine that a building is vacant.<sup>10</sup>

An overly broad definition of vacant property may cause the VPR to be struck down as an unconstitutional.<sup>11</sup> In an unpublished decision, the New Jersey Superior Court held that the VPRs adopted by three New Jersey municipalities included impermissibly overbroad definitions of vacant and abandoned property that were based on “whether a homeowner defaulted on their mortgage.”<sup>12</sup> The court ruled that the VPRs in question were “arbitrary, capricious, and unreasonable” because the overly broad categorizations of vacant and abandoned property would allow the municipalities “to collect fees from properties that were never abandoned, never blighted, and never vacant.”<sup>13</sup>

**Registration Requirement.** VPRs require that the owner of a vacant property register the property with the local government. The timing of the registration requirement varies. Some VPRs require registration within a certain number of days after a property becomes vacant or after the owner *knows* that the property is vacant, while others require that a property be registered as soon as the owner or other responsible party *should know* that the property is vacant.<sup>14</sup> Registration typically is done on forms provided by the local government and may include a description of the property, the names and addresses of the owners, and the names and addresses of all known lienholders and parties with an ownership interest in the property.

**Inspections.** VPRs can require that vacant properties be inspected in order to assess and document the condition of the property and to ensure compliance with applicable safety and maintenance requirements. Some communities recover the cost of inspections by building them into the registration fee, while others charge a separate inspection fee. For example, after a determination that a property is vacant, Evanston, Illinois requires a code compliance inspection for which it charges a \$500 fee.<sup>15</sup>

**Security and Maintenance Requirement.** Most VPRs require that vacant properties meet minimum standards for security and maintenance. These requirements are designed to “prevent unauthorized persons from entering the building, maintain the structural integrity of the building for code enforcement and public safety officers, and minimize adverse effects on adjacent properties and the larger neighborhood.”<sup>16</sup> Some VPRs do this by requiring that vacant buildings meet existing building code standards, while others contain maintenance and security requirements that apply solely to vacant properties.

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<sup>9</sup> Campton Hills, IL Code of Ordinances § 9-3-1.

<sup>10</sup> See Evanston, IL Code of Ordinances § 4-16-3.

<sup>11</sup> See *McCormick 106 L.L.C. v. Cmty. Champions Corp.*, No. ATL-L-2311-18, 2021 at 35 (N.J. Super. Ct. Law Div. Aug. 16, 2021).

<sup>12</sup> *Id.* at 26.

<sup>13</sup> *Id.*

<sup>14</sup> *Vacant Buildings Ordinances: Strategies for Confronting Vacant Building Challenges* at 13 (Metropolitan Mayors Caucus, May 2016) (citing Evanston and South Chicago Heights as two communities that require registration as soon as the responsible party should know that the property is vacant) (hereinafter “*Strategies for Confronting VB Challenges*”) (available online at <http://mayorscaucus.org/wp-content/uploads/2016/06/Vacant-Building-Ordinances.6-1-16.pdf>).

<sup>15</sup> Evanston, IL Code of Ordinances § 4-16-4.

<sup>16</sup> See *Strategies for Confronting VB Challenges* at 12.

**Reuse Plan Requirement.** Many VPRs require owners to submit a plan detailing how they will bring the vacant property into code compliance (if violations are discovered on the property) and return it to productive use. For example, the Village of Alsip, Illinois requires owners to submit, at the time of registration, a “vacant building plan” that documents the steps the owner will take to bring the property into code compliance and targets a date when the property will either be demolished or ready for reuse.<sup>17</sup>

**Registration Fees.** Registration fees can be structured as a *flat fee* that must be paid annually with the vacant property registration, or as an *escalating fee* that increases with every year that a property remains vacant. Flat fee amounts can range from as little as \$70 per year (Chula Vista, California) up to \$5,000 per year (Wilmington, Delaware).<sup>18</sup> The rationale for the escalating fee approach is that it provides a strong incentive for property owners to remedy the vacant property situation as quickly as possible in order to avoid the higher fees that could be assessed beyond the first year of vacancy. Some communities have adopted variable fee schedules that take into account several factors in determining the registration fee amount. An example of this approach is the vacant property registration program adopted by the City of Syracuse, New York, which charges a fee based on the following factors: (1) property type (i.e., residential vs. commercial); (2) the size of the vacant building (i.e., number of units in a residential building or the square footage of a commercial building); and (3) the length of time for which the property is vacant.<sup>19</sup> The Syracuse vacant property registration fee schedule is reproduced below.

| Property Type                     | Year 1                   | Year 2  | Year 3                   | Each Subsequent Year     |
|-----------------------------------|--------------------------|---|--------------------------|--------------------------|
| Plan A or C (rehab or demo)       | \$100                    | If no extension is granted, then the maximum fee for the relevant property type will be charged each subsequent year. |                          |                          |
| 1-3 unit residential              | \$250                    | \$500   | \$750                    | \$1,000                  |
| 4-6 unit residential              | \$500                    | \$1,000   | \$1,500                  | \$2,000                  |
| 7+ unit residential               | \$250/unit               | \$500/unit  | \$750/unit               | \$1,000/unit             |
| Commercial (whichever is greater) | \$1,000 or \$.05/sq. ft. | \$2,000 or \$.10/sq. ft.  | \$3,000 or \$.15/sq. ft. | \$4,000 or \$.20/sq. ft. |

Syracuse gives the following rationale for this variable fee approach:

While other communities charge a flat fee for all property types, by tying the fee to the size of the property Syracuse’s fee schedule is designed to have a measurable impact on commercial and larger properties, without placing an undue burden on the owners of smaller vacant properties. Since larger vacant properties are typically higher-value properties, this will ensure that the fee influences owners’ development plans,

<sup>17</sup> Alsip, IL Code of Ordinances § 6-609.

<sup>18</sup> Joseph Schilling, *Code Enforcement and Community Stabilization: The Forgotten First Responders to Vacant and Foreclosed Homes*, 2 ALB. GOV’T L. REV. 101, 131 (2009); City of Chula Vista, CA, Master Fee Schedule 10-100 (April 2021); Wilmington, DE, *Register a Vacant Property* (available online at [https://www.wilmingtonde.gov/government/city-departments/licenses-and-inspections/vacant-property-registration-program/register-a-vacant-property#:~:text=or%20fax%20to%20\(302\)%20658,the%20owner%20of%20the%20property.](https://www.wilmingtonde.gov/government/city-departments/licenses-and-inspections/vacant-property-registration-program/register-a-vacant-property#:~:text=or%20fax%20to%20(302)%20658,the%20owner%20of%20the%20property.)).

<sup>19</sup> See Syracuse (NY) Vacant Property Registry (available online at <http://www.syr.gov.net/VacantRegistry.aspx>); Syracuse, NY Code of Ordinances § 27-116(e)(2).



encouraging them to actively market the property. This proposal of escalating fees tied to the type of property is based on the experience of Vacant Property Registration administrators in Binghamton, Albany, and Newburgh.<sup>20</sup>

Vacant property registration fees must be reasonable. In 2021 a New Jersey Superior Court struck down three municipal VPR ordinances on several grounds, including a finding that the registration fees “exceed the bounds of reasonableness in connection to the costs and services of compiling the ... registry” and thereby “rendering the ordinance arbitrary, capricious, and unreasonable” and unconstitutional.<sup>21</sup> The court stated that it was “alarmed by the excessive fee structure,” calling it a “revenue scheme” that targeted financially vulnerable homeowners.<sup>22</sup>

**Posting Requirements.** VPRs can require the owner to post 24-hour contact information or a warning sign on a vacant property. The contact information ensures that emergency responders or concerned neighbors can notify a responsible party in the event of fire or criminal activity, and the warning sign can provide the basis for prosecution of trespassers on the property.<sup>23</sup>

**Land Bank.** Some communities have used land banks to acquire, maintain, and facilitate the redevelopment of vacant properties. Generally speaking, a land bank is a governmental (or quasi-governmental) entity that is designed to receive title to property, usually to rehabilitate it, and thereafter pass clean title to a subsequent purchaser.<sup>24</sup> Land banks generally are authorized by state legislation and established by local ordinance. The funding for land banks typically comes from the local government budget or from revenue generated through its operations.<sup>25</sup> Although land banks historically have functioned to acquire tax-foreclosed properties, the Neighborhood Stabilization Program authorized by the Housing and Economic Recovery Act of 2008 provided funding to state and local governments that were hit hardest by the foreclosure crisis.<sup>26</sup> This program, together with the subsequent American Recovery and Reinvestment Act of 2009, enabled land banks to acquire foreclosed and abandoned properties in addition to those with tax liens.<sup>27</sup> The Center for Community Progress reports that approximately 80% of land banks that currently exist in the United States were created pursuant to comprehensive state-enabling statutes; as of March 2022 seventeen states have passed comprehensive land bank enabling legislation.<sup>28</sup>

**Zombie Property Regulations.** The term “zombie property” is used to describe a situation where a homeowner vacates their property after receiving a notice of default from the mortgage lender who has initiated, but failed to complete, the foreclosure action and repossess the property.<sup>29</sup> As such, record title to the property remains with the owner of record and “[t]he mortgages, accompanying fees, and real estate

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<sup>20</sup> *Id.*

<sup>21</sup> See *McCormick 106 L.L.C. v. Cmty. Champions Corp.*, No. ATL-L-2311-18, 2021 at 35-36.

<sup>22</sup> *Id.* at 22, 29, 31.

<sup>23</sup> See *Meeting the Vacant Property Challenge* at 6.

<sup>24</sup> See David P. Weber, *Cities and States Battle Back: Taking the Fight to Zombie (Mortgages) and Abandoned Properties*, 29 PROB. & PROP. 42, 43 (Jan./Feb. 2015).

<sup>25</sup> See *Meeting the Vacant Property Challenge* at 6.

<sup>26</sup> See *id.*

<sup>27</sup> See *id.* at 7.

<sup>28</sup> See *National Land Bank Map*, CENTER FOR COMMUNITY PROGRESS (listing Michigan, Ohio, New York, Georgia, Tennessee, Missouri, Pennsylvania, Nebraska, Alabama, West Virginia, Delaware, Virginia, Indiana, Kentucky, Connecticut, New Jersey and Maryland) (available online at <https://communityprogress.org/resources/land-banks/national-land-bank-map/>).

<sup>29</sup> See David P. Weber, *Taxing Zombies: Killing Zombie Mortgages with Differential Property Taxes*, U. OF ILL. L. REV. 1135, 1136 (2017).

taxes are ‘zombies’ because the affected homeowner cannot escape them by abandoning the property.”<sup>30</sup> Some states have sought to address the problem of zombie properties through legislation. For example, in 2016 the New York State Legislature enacted the Zombie Property and Foreclosure Prevention Law, which: (a) requires certain mortgagees to inspect properties that are more than 90 days mortgage-delinquent and to secure and maintain properties that are found to be vacant and abandoned; (ii) requires certain mortgagees to register vacant and abandoned properties with a state-maintained registry; and (iii) provides expedited mortgage foreclosure procedures for vacant and abandoned properties.<sup>31</sup>

## 19.02 EFFECTIVENESS IN ACHIEVING STATED PURPOSE(S)

The overall effectiveness of VPRs is difficult to measure, partly because the specific requirements of VPRs vary significantly among communities, and partly because the goals of a VPR can be very broad. For example, the stated purpose of the Registration and Maintenance of Vacant Buildings ordinance adopted by the City of Attleboro, Massachusetts, is “to help protect the health, safety and welfare of the residents of Attleboro by preventing blight, protecting property values and neighborhood integrity, protecting City’s resources and ensuring the safe and sanitary maintenance of vacant buildings.”<sup>32</sup>

Measuring the success of VPRs as a tool for reducing the number of vacant properties in a community also can be difficult. A 2009 study of vacant property registration ordinances explained the challenge of measuring the success of VPRs as follows:

From a policy perspective, the overall effectiveness of [vacant property] registration ordinances is an open question. Do they directly reduce the number of vacant properties? Do they reduce the number of foreclosed and vacant properties? The principle challenge is determining the right evaluation method as well as indicators. Local governments often measure success by the annual decrease in vacant properties and the amount of registration fees it collects each year; however, it is difficult to determine whether it was the ordinance that causes this overall decrease. Plus, it is difficult to inventory and track the property conditions and ownership status of each vacant and foreclosure property over a period of several years. More research is needed to devise such a tracking system and gather baseline data.<sup>33</sup>

Nevertheless, some communities have attempted to measure the success of a VPR simply by comparing the number of vacant properties in the community before and after the VPR was adopted. The Vacant Property Registration Fee Program adopted in 2003 by the City of Wilmington, Delaware (the “Wilmington VPR Program”), was credited with reducing the number of vacant properties in the city by 22% percent from 2003 (1,455 vacant properties) to 2007 (1,135 vacant properties).<sup>34</sup> Wilmington also reported that from 2005 to 2006, 380 vacant properties became reoccupied, 16 vacant buildings were demolished, and 217 vacant properties were sold to new owners with the intention of returning them to productive use.<sup>35</sup> The effectiveness of the Wilmington VPR Program also was measured in terms of the increase in the valuation of building permits issued for the rehabilitation of abandoned properties—the valuation of building permits issued to vacant structures in Wilmington more than tripled from \$6.8

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<sup>30</sup> *Id.* at 1136-37.

<sup>31</sup> Wade Beltramo, *New York’s Zombie Property and Foreclosure Prevention Law*, 19(1) N.Y. ZONING L. AND PRAC. REP. 1, 2 (July/August 2018).

<sup>32</sup> See Attleboro (MA) Revised Ordinances § 3-12.1.

<sup>33</sup> Joseph Schilling, *Code Enforcement and Community Stabilization: The Forgotten First Responders to Vacant and Foreclosed Homes*, 2 ALB. GOV’T L. REV. 101, 129 (2009).

<sup>34</sup> See *id.* at 139.

<sup>35</sup> See *id.*



million in 2005 to \$20.8 million in 2007.<sup>36</sup> Ostensibly, due to its success in addressing the problem of vacant properties, the Wilmington VPR Program was selected as a finalist for Harvard University's 2007 Innovations in American Government Award.<sup>37</sup>

Similarly, the Urban Institute measured the effectiveness of New York's 2016 Zombie Property and Foreclosure Prevention Law by comparing the number of reported zombie before and after the law was enacted.<sup>38</sup> The Urban Institute reports that within two to three years after implementation of the zombie regulations, the total number of "distressed vacants and/or zombies" declined from 25,752 to 14,600, an overall reduction of 43% among reporting municipalities.<sup>39</sup>

The effectiveness of a VPR program depends, in part, on how well it is implemented and enforced. Critics of Cincinnati's Vacant Building Maintenance License ordinance, for example, argued that the program was "fraught with inefficient and inconsistent enforcement," noting that many property owners were paying the required fees and rehabilitating their buildings as required by the VBML program, while neighboring properties were left unsecured and deteriorating.<sup>40</sup> Chicago's Vacant Building Ordinance has also faced criticism over its implementation. One commentator noted that, as of March 2013, Chicago's index of vacant properties included approximately 16,000 properties, but DePaul University's Institute for Housing Studies counted 34,000 vacant properties in the city.<sup>41</sup> This discrepancy in the number of vacant properties suggests that more than half of vacant property owners were evading the Vacant Building Ordinance by simply not registering their property with the city.<sup>42</sup>

At least one court has ruled that VPRs are *not* enforceable against lenders that foreclose on federally-backed mortgages.<sup>43</sup> In 2013, the Federal Housing Finance Agency (FHFA) successfully challenged the City of Chicago's vacant property registration ordinance.<sup>44</sup> The U.S. District Court for the Northern District of Illinois held that the federal law putting Fannie Mae and Freddie Mac into receivership, which gave FHFA exclusive control over the agencies, preempted Chicago's vacant property registration ordinance.<sup>45</sup> The court found that the registration fees were an unlawful tax on the federal government.<sup>46</sup> This ruling calls into question the enforceability of any VPR against lenders with mortgages backed by these federal agencies while they remain under the control of the FHFA.

VPRs that contain a mandatory inspection requirement can raise concerns under the Fourth Amendment of the United States Constitution, which protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."<sup>47</sup> Generally speaking, any

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<sup>36</sup> *See id.*

<sup>37</sup> *See id.* at 136-137.

<sup>38</sup> *See* Helene Caloir et al., *Reclaiming Vacant Houses & Preventing Foreclosure: Lessons from LISC's New York State Vacants Initiative*, URBAN INSTITUTE (March 2022) (available online at [https://www.lisc.org/media/filer\\_public/a1/35/a135e66b-f37d-493d-b0e5-d29a2cddfc7c/031322\\_reclaiming\\_vacant\\_houses\\_report\\_final\\_compressed.pdf](https://www.lisc.org/media/filer_public/a1/35/a135e66b-f37d-493d-b0e5-d29a2cddfc7c/031322_reclaiming_vacant_houses_report_final_compressed.pdf)).

<sup>39</sup> *Id.* at 6.

<sup>40</sup> *See* Elizabeth M. Tisher, *Re-Stitching the Urban Fabric: Municipal-Driven Rehabilitation of Vacant and Abandoned Buildings in Ohio's Rust Belt*, 15 VT. ENVTL. L. REV. 173, 186 (Fall 2013).

<sup>41</sup> Elizabeth Butler, *Second Chances for the Second City's Vacant Properties: An Analysis of Chicago's Policy Approaches to Vacancy, Abandonment, & Blight*, 91 CHI.-KENT L. REV. 233, 250 (2016).

<sup>42</sup> *See id.*

<sup>43</sup> Benton C. Martin, *Federalism and Municipal Innovation: Lessons from the Fight Against Vacant Properties*, 46 URB. LAW 361, 372-73 (2014) (citing *Fed. Housing Fin. Agency v. Chicago*, 962 F. Supp. 2d 1044 (N.D. Ill. 2013)).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> U.S. Const., amend. IV.

government action that intrudes on a person’s “reasonable expectation of privacy” violates the Fourth Amendment.<sup>48</sup> Moreover, Fourth Amendment protections extend to commercial buildings as well as private homes,<sup>49</sup> regardless of whether a property is considered “occupied” at the time of the search. Under the Fourth Amendment, an owner has a right to refuse entry, even for an inspection pursuant to a code enforcement program, after which the inspector must obtain a warrant to enter the building.<sup>50</sup> A VPR that requires vacant properties to be inspected but does not require the inspector to obtain consent from the property owner or an administrative warrant prior to conducting the inspection therefore may be vulnerable to challenge on Fourth Amendment grounds.<sup>51</sup>

### 19.03 IMPACT ON PROPERTY VALUES

Studies have shown that vacant and abandoned properties have a negative impact on the value of surrounding properties.<sup>52</sup> A 2011 report by the Center on Policy Initiatives found that homes that are left vacant and untended during a foreclosure lose an average of 22% of their value, and homes within 1/8 of a mile of a foreclosure also decline in value.<sup>53</sup> A study of vacant properties in Chicago found that the collective cost to neighboring properties within a 150 degree radius of a block with a large concentration of vacant properties amounted to a \$220,000 loss in terms of capital depreciation of their home.<sup>54</sup> Similarly, a study of vacant properties in Cuyahoga County, Ohio found that each vacant home located within 500 feet of a home for sale reduces the selling price of the home by 1.7% in a low-poverty area, and by 2.1% in a medium-poverty area.<sup>55</sup> The study also found that the presence of a recent foreclosure within 500 feet of a home for sale decreases the sale price of the home by 2.7% in medium-poverty tracts and 4.6% in low-poverty tracts.<sup>56</sup>

While proponents of VPRs, and the communities that adopt them, frequently argue that VPRs are an effective strategy for addressing the negative impacts of vacant properties, evidence for that conclusion is lacking. To date, there do not appear to be any studies that have assessed the effectiveness of VPRs as a tool for protecting the value of surrounding properties.

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<sup>48</sup> WILLIAM E. RINGEL, SEARCHES AND SEIZURES ARRESTS AND CONFESSIONS § 2:1 (2d ed., March 2022 update).

<sup>49</sup> See WESTLAW’S SEARCH AND SEIZURE CHECKLISTS § 21:1 (June 2022 update) (citing *Marshall v. Barlow’s Inc.*, 436 U.S. 307 (U.S. 1978)); see also WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 10.1 (2011).

<sup>50</sup> See LAFAVE § 10.1.

<sup>51</sup> *But see, Benjamin, as Trustee of Rebekah C. Benjamin Trust v. Stemple*, 915 F.3d 1066, 1069 (6th Cir. 2019) (holding that a City ordinance requiring vacant property owners to consent to future vacant property searches if the property was found to be dangerous by a neutral decision-maker at a hearing provided adequate pre-compliance review to merit an exception to the warrant requirement for administrative searches to apply).

<sup>52</sup> See Alan Mallach, *The Empty House Next Door: Understanding and Reducing Vacancy and Hypervacancy in the United States*, LINCOLN INSTITUTE OF LAND POLICY 1, 19 (2018) (stating that studies in Philadelphia and Columbus found that a vacant building can reduce the value of nearby properties by 20 percent or more); see, e.g., David T. Kraut, *Note: Hanging Out the No Vacancy Sign: Eliminating the Blight of Vacant Buildings From Urban Areas*, 74 N.Y.U. L. Rev. 1139, 1149 (Oct. 1999) (stating that vacant buildings reduce the value of neighboring homes).

<sup>53</sup> *Foreclosure: The Cost Communities Pay* (June 2011, Center on Policy Initiatives) (available online at [http://onlinecpi.org/wp-content/uploads/2011/06/Foreclosure-the-cost-communities-pay\\_web.pdf](http://onlinecpi.org/wp-content/uploads/2011/06/Foreclosure-the-cost-communities-pay_web.pdf)).

<sup>54</sup> See Joseph Schilling, *Code Enforcement and Community Stabilization: The Forgotten First Responders to Vacant and Foreclosed Homes*, 2 ALB. GOV’T L. REV. 101, 111 (2009).

<sup>55</sup> See Timothy A. Davis, *A Comparative Analysis of State and Local Government Vacant Property Registration Statutes*, 44 Urb. Law. 399, 404 (2012) (citing Stephan Whitaker & Thomas J. Fitzpatrick IV, *The Impact of Vacant, Tax-Delinquent and Foreclosed Property on Sales Prices of Neighboring Homes* 24 (Fed. Reserve Bank of Cleveland, Working Paper No. 11-23R, 2001)).

<sup>56</sup> See *id.*

The high cost of complying with a VPR could have the unintended effect of discouraging investment in a community and depressing property values. To the extent that buildings become vacant or abandoned because the owner is unable to keep up with financial obligations, it is logical to presume that the costs associated with a VPR (e.g., registration fees, the costs of necessary repairs and maintenance, and potential penalties for noncompliance) constitute an additional burden that may prove too great for struggling property owners to overcome.

The ability to invest in vacant properties and return them to the market depends heavily on the overall strength of the local real estate market and the return on investment that can be obtained.<sup>57</sup> If an owner cannot make an appropriate return on the investment, he or she is unlikely to make the repairs necessary to return a vacant building to productive use and occupancy.<sup>58</sup> Until the return on investment is adequate (i.e., the price of the property has dropped so low that, even with extensive repairs, there will be profit in the rehabilitation) vacant buildings are likely to remain vacant.

It is unlikely that most owners intentionally allow property to become vacant, abandoned, and unproductive. The high costs associated with a VPR may cause owners to attempt to find creative ways to avoid the VPR rather than to comply. Moreover, investors who redevelop distressed properties may also be less inclined to take on properties that are subject to a VPR.

VPRs that require vacant properties to be “posted” or “boarded up” can have a negative impact on property values. Studies of foreclosed, real-estate-owned (“REO”) properties have shown that a “stigma” discount can be associated with foreclosed properties, which typically sell for less than comparable, occupied homes.<sup>59</sup> A decline in the value of REO properties may also have a negative effect on the values of adjacent occupied properties.<sup>60</sup> A requirement that vacant properties be posted with a highly visible label signifying that the property is “vacant,” and the associated stigma, may affect potential buyers’ perception of the property. Measures taken by a property owner to ensure that a vacant building is “secure,” such as covering windows and doors with plywood, make the property visually unappealing to potential buyers and can also detract from the appearance of abutting properties and make a neighborhood feel less safe. To the extent that posting and securing requirements signify that a property is not occupied, they effectively make vacant properties a potential target for theft, vagrancy, the use and sale of illegal substances, and other undesirable activity.<sup>61</sup>

#### **19.04 IMPACT ON DEVELOPMENT COSTS**

Because VPRs apply to existing buildings, they are more likely to impact the cost of redevelopment rather than new development. In particular, the costs imposed by a VPR, including registration fees, repair and maintenance costs, and potential penalties for noncompliance, would be added to the cost of redeveloping a vacant building that is subject to a VPR. If the cost of compliance is substantial, a VPR can discourage redevelopment of vacant properties. If an owner or investor cannot make an appropriate return on the

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<sup>57</sup> James J. Kelly, Jr. *A Continuum in Remedies: Reconnecting Vacant Houses to the Market*, 33 ST. LOUIS U. PUB. L. REV. 109, 117 (2013).

<sup>58</sup> *Id.* (noting that even if an owner is willing, often lenders will not provide the necessary funds if the value will not be recaptured through the re-use or sale).

<sup>59</sup> See generally, *REO & Vacant Properties, Strategies for Neighborhood Stabilization*, a joint publication of the Federal Reserve Banks of Boston and Cleveland and the Federal Reserve Board (2010), available at [http://www.federalreserve.gov/events/conferences/2010/reovpsns/downloads/reo\\_20100901.pdf](http://www.federalreserve.gov/events/conferences/2010/reovpsns/downloads/reo_20100901.pdf).

<sup>60</sup> *Id.* at 49 (“post-REO sales price figures have disastrous effects on the values of neighboring properties not in foreclosure and on the tax bases of neighborhoods and communities.”)

<sup>61</sup> J. Shane, *The Problem of Abandoned Buildings and Lots*, Center for Problem-Oriented Policing, ([http://www.popcenter.org/problems/abandoned\\_buildings\\_and\\_lots/](http://www.popcenter.org/problems/abandoned_buildings_and_lots/)) (“As a crime attractor, abandoned buildings provide cover, concealment, and opportunities for motivated criminals.”)

investment, he or she is unlikely to make the repairs necessary to return a vacant building to productive use and occupancy.<sup>62</sup> Consequently, until the return on investment is adequate (i.e., the price of the property has dropped so low that, even with extensive repairs, there will be profit in the rehabilitation), vacant buildings are likely to remain vacant.

## **19.05 IMPACT ON AMOUNT AND PATTERNS OF LAND DEVELOPMENT**

VPRs could deter the redevelopment of existing vacant buildings if the costs associated with the VPR make it financially infeasible for an owner or developer to make a reasonable return on investment. A VPR that makes new construction more profitable than redevelopment will place increased pressure on new development to satisfy market demand.

## **19.06 IMPACT ON HOUSING AFFORDABILITY**

Land banks that focus on the rehabilitation of vacant and abandoned properties can increase the supply of affordable housing in a community. For example, since it was established in 2004, the Genesee County Land Bank (GCLB) has demolished 8,400 blighted structures in Genesee County and the City of Flint, Michigan.<sup>63</sup> In 2021, GCLB rehabilitated and sold 196 homes in the area.<sup>64</sup> To the extent that the costs imposed by a VPR (e.g., registration fees and repair/maintenance costs) increase the cost of rehabilitating or redeveloping a vacant building into residential units, a VPR will increase the cost of housing units in the project to the extent that such costs are passed along to the consumer in the form of higher rental rates or sales prices.

## **19.07 RECOMMENDED TALKING POINTS: PROS AND CONS**

### **PROS:**

- VPRs enable local governments to gather information on and to monitor vacant properties.
- VPRs can improve the safety and security of vacant properties by imposing security, maintenance, and inspection requirements on vacant properties.
- VPRs provide an incentive for owners to return vacant properties to productive use.
- VPRs can help communities protect against the negative impact on property values commonly associated with vacant properties.

### **CONS:**

- VPRs that require payment of high registration fees and impose security, inspection, and maintenance requirements impose a significant financial burden for affected property owners.
- The high cost of complying with a VPR can have the unintended effect of discouraging investment in and rehabilitation of vacant properties.

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<sup>62</sup> *Id.* (noting that even if an owner is willing, often lenders will not provide the necessary funds if the value will not be recaptured through the re-use or sale).

<sup>63</sup> See Genesee County Land Bank FY 2021 Annual Review (available online at <https://www.thelandbank.org/downloads/lbanewsletterannualreportfy2021winter2022final.pdf>).

<sup>64</sup> See *id.*

- A mandatory inspection requirement of a VPR can raise concerns under the Fourth Amendment to the U.S. Constitution, which protects against unreasonable searches and seizures.
- The effectiveness of a VPR depends, in part, on how well it is implemented and enforced by the local government.
- VPRs that require vacant buildings to be “posted” or “boarded up” can have a negative impact on property values and effectively make vacant properties a potential target for theft, vagrancy, the use and sale of illegal substances, and other undesirable activity.<sup>65</sup>

## 19.08 INCENTIVE-BASED ALTERNATIVES

In response to the growing number of VPRs being adopted nationwide, the Mortgage Bankers Association (“MBA”) and its lender/servicer members made the Mortgage Electronic Registration System (“MERS”) available at no cost to local jurisdictions.<sup>66</sup> Referred to as the “MBA Vacant Property Registration MERS Initiative,” the program contains information on more than 2,500 lenders nationwide and houses contact information for vacant properties, thereby alleviating the need for local jurisdictions to develop and maintain their own registry of vacant properties.<sup>67</sup> Many municipalities with vacant property registration ordinances offer MERS as an alternative. By October 2009, more than 16% of cities with a VPR reportedly allowed registration with MERS to satisfy the registration requirements of the VPR.<sup>68</sup>

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<sup>65</sup> J. Shane, *The Problem of Abandoned Buildings and Lots*, Center for Problem-Oriented Policing, ([http://www.popcenter.org/problems/abandoned\\_buildings\\_and\\_lots/](http://www.popcenter.org/problems/abandoned_buildings_and_lots/)) (stating: “As a crime attractor, abandoned buildings provide cover, concealment, and opportunities for motivated criminals.”).

<sup>66</sup> See “California Association of Code Enforcement Officers: Foreclosures Information” (available online at <http://www.caceo.us/displaycommon.cfm?an=1&subarticlenbr=65>).

<sup>67</sup> See Memorandum of the Office of the Independent Budget Analyst (San Diego), dated April 10, 2012 (hereinafter the “IBA Memorandum”); see also “Mortgage Banking – The MERS Alternative to Vacant Property Registration Ordinances” (Safeguard Properties).

<sup>68</sup> See *id.*; see also Benton C. Martin, *Vacant Property Registration Ordinances*, 39 REAL ESTATE LAW J. 6, 34 (2010).

## SECTION 20: PARKING REFORM

### 20.01 PURPOSE AND KEY TERMS

In the United States it is estimated that there are approximately eight parking spaces for every car, due in large part to minimum parking requirements that many believe have led to an oversupply of parking across the country.<sup>1</sup> As the automobile became more widely used in the 1940s and 1950s, cities began to implement parking requirements in an effort to reduce congestion.<sup>2</sup> Over time, the proliferation of parking requirements has caused an overbuilding and underutilization of parking,<sup>3</sup> largely because minimum parking requirements are based on peak parking demands that require a larger supply of spaces than needed during a normal day.<sup>4</sup> Some commentators argue that many cities already have more than enough off-street parking, calling into question the need to continue imposing minimum parking requirements.<sup>5</sup>

Planners and elected officials have begun to realize that parking requirements can put the brakes on what they want to promote, such as infill development and affordable housing, and accelerate what they want to prevent.<sup>6</sup> Parking reform initiatives are aimed at reducing the impacts of parking requirements on the built environment in order to encourage redevelopment.

Parking reform policies include the reduction or elimination of minimum parking requirements, maximum parking limitations, shared parking arrangements, and unbundled parking. A zoning text amendment to **reduce or eliminate minimum parking requirements** might apply broadly to all new development or it may be more limited to specific types of development (e.g., affordable housing) or within certain locations, such as a downtown commercial district or in close proximity to public transportation. In 2021, for example, California Assembly Bill 1401 proposed to prohibit local governments from imposing or enforcing a minimum parking requirement for the development of any parcel located within a half-mile walking distance of a “high-quality transit corridor” or a “major transit stop,” as defined in the bill.<sup>7</sup>

A 2021 study of the parking reforms adopted by Buffalo, New York notes that while “large scale parking reforms are a recent phenomenon,” many U.S. cities, including as Chicago, Fargo, New Orleans, Pittsburg, Santa Monica, and Lexington have “deregulated parking in key development districts,” while other communities have eliminated minimum parking requirements for specific types of development,

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<sup>1</sup> *Parking Policy Reform: Types of Off-Street Parking Policy Updates*, Urban Land Institute (2021 Fact Sheet).

<sup>2</sup> *Id.* See also Richard Willson, *Parking Reform Made Easy*, ACCESS MAGAZINE (Fall 2013); Sara Bronin, *Rethinking Parking Minimums*, JOURNAL OF THE AMERICAN PLANNING ASSOCIATION (J.A.P.A.) (2018); Sara C. Bronin & Dwight M. Merriam, *Parking Minimums*, RATHKOPF’S THE LAW OF ZONING AND PLANNING § 83:2 (June 2021).

<sup>3</sup> Richard Willson, *Parking Reform Made Easy*, ACCESS MAGAZINE (Fall 2013).

<sup>4</sup> Calvin G. Thigpen, *Giving Parking the Time of Day: A Case Study of a Novel Parking Occupancy Measure and an Evaluation of Infill Development and Carsharing as Solutions to Parking Oversupply*, Research in Transportation Business and Management (December 2018 29: 108-115).

<sup>5</sup> Jeffrey Spivak, *People Over Parking*, J.A.P.A. (October 2018).

<sup>6</sup> Donald Shoup, *Yes, Parking Reform is Possible*, J.A.P.A. (October 2011).

<sup>7</sup> See AB-1401, Residential and commercial development: remodeling, renovations, and additions: parking requirements (California 2021-2022)

[https://leginfo.ca.gov/faces/billTextClient.xhtml?bill\\_id=202120220AB1401](https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB1401).



such as affordable housing projects.<sup>8</sup> Municipalities that have eliminated off-street parking requirements altogether include Hartford, Buffalo, San Francisco, and South Bend.<sup>9</sup>

Parking reductions can also take the form of a zoning provision authorizing the local planning or zoning board to waive or grant a special exception from the minimum parking requirement on a case by case basis, thereby enabling projects to be built with fewer parking spaces, or none at all.<sup>10</sup> Where a municipality has eliminated minimum parking requirements altogether, the amount of parking provided for a project is left to the market and the developer to determine.<sup>11</sup> By reducing or eliminating minimum parking requirements, “developers, parking consultants, and other stakeholders” are able to “determine how much parking to include in projects rather than requiring developers to build a set ratio of parking spaces based on a building’s square footage, planned uses, or the number of bedrooms in multifamily units.”<sup>12</sup>

A **maximum parking limitation** caps the number of parking spaces that can be provided for new development or redevelopment projects.<sup>13</sup> This technique can be implemented by itself or in conjunction with a reduction or elimination of parking minimums and are a useful tool for preventing developers from “overparking” new development and creating “an asphalt wasteland that blights the environment and compels people to drive.”<sup>14</sup>

**Shared parking** arrangements between more than one use can reduce the amount of parking provided by mixed-use developments where the parking demand by the uses does not overlap, recognizing that most parking spaces are only used part of the time. Parking shared between mutually beneficial uses can reduce the amount of parking provided by 40 to 60 percent, compared with the standard off-street parking requirements for each destination.<sup>15</sup> For example, offices require maximum parking during weekdays, whereas restaurants and theaters primarily require maximum parking during evenings and weekends.<sup>16</sup>

The cost of parking is often included in the cost of housing and other development. **Unbundled parking** policies “prohibit embedded parking costs with unrelated charges, such as including parking in the cost of housing or an office lease.”<sup>17</sup> This technique allows for residents or tenants to pay less for housing or commercial space when they do not have a car or have the need for parking. In unbundled parking scenarios, parking spaces are often leased or sold separately.<sup>18</sup> Santa Monica’s unbundled parking policy, for example, requires off-street parking spaces to be sold or leased separately from the purchase or lease of residential units at new buildings with four or more dwelling units.<sup>19</sup>

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<sup>8</sup> Daniel B. Hess & Jeffrey Rehler, *Minus Minimums: Development Response to the Removal of Minimum Parking Requirements in Buffalo (NY)*, J.A.P.A. (2021).

<sup>9</sup> *Id.*

<sup>10</sup> Sara C. Bronin & Dwight M. Merriam, *Special Exceptions*, RATHKOPF’S THE LAW OF ZONING AND PLANNING § 83:36 (June 2021).

<sup>11</sup> Richard Willson, *Parking Reform Made Easy*, ACCESS MAGAZINE (Fall 2013).

<sup>12</sup> *Parking Policy Reform: Types of Off-Street Parking Policy Updates*, Urban Land Institute (2021 Fact Sheet).

<sup>13</sup> *Id.*

<sup>14</sup> Donald Shoup, *Putting a Cap on Parking Requirements*, J.A.P.A. (May 2015).

<sup>15</sup> *Parking Policy Reform: Types of Off-Street Parking Policy Updates*, Urban Land Institute (2021 Fact Sheet).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *See id.*

## 20.02 EFFECTIVENESS IN ACHIEVING STATED PURPOSE(S)

To date, very few jurisdictions in the U.S. have eliminated minimum parking requirements altogether. As a result, until just recently studies of the effects of eliminating minimum parking requirements were almost nonexistent. A 2021 article in the *Journal of the American Planning Association* analyzed the parking reforms adopted by Buffalo, New York, which **eliminated off-street parking requirements** and introduced transportation demand management plans in 2017.<sup>20</sup> In order to evaluate the initial impact of Buffalo’s parking reform, the authors studied a total of 36 “major developments in the first 2 years under the Green Code and analyzed whether developers included the same, more, or less parking than previously allowable (less than 2 years earlier) under the preceding zoning code.”<sup>21</sup> Below is a summary of several key findings of the study:

- Collectively, new major developments created 21% fewer off-street parking spaces in the first 2 years of the Green Code than would have been mandated by the former minimum parking requirements.<sup>22</sup>
- The effect on parking supply varied considerably by land use. Developers of mixed-use projects (39% of the projects analyzed) took advantage of the reform to build less parking, but single-use residential, commercial, and civic projects actually supplied parking in excess of that required by the former minimum parking requirements.<sup>23</sup>
- Among developments receiving major site plan approval under the Green Code, 47% created fewer off-street parking spaces than previously required, while 53% created the same number of parking spaces or more.<sup>24</sup>
- Developments that provided fewer parking spaces than previously required did so by an average of 56% less than the preceding minimum parking requirements, while projects provided the same or more parking spaces did so by 82% more than the former minimums.<sup>25</sup>

Since minimum parking standards have been engrained in American development regulations for so long, it can be politically impractical to impose parking maximums or eliminate parking standards altogether in some cities.<sup>26</sup> In *Parking Reform Made Easy*, a leading commentator on parking reform offers a “12-step toolkit to inform reasoned decisions about minimum parking requirements,” noting that approaches to parking reform will vary between communities.<sup>27</sup> The author argues that an incremental approach to parking reform can produce better results where financial resources or political capital are not sufficient for comprehensive parking reform; early successes can build support for future reforms.<sup>28</sup>

From a project-specific standpoint, **parking waivers** can be very effective, but as a parking reform measure they tend to be less effective than a parking reduction because they are granted on a case-by-case basis. In contrast, a legislatively adopted parking reduction or waiver can apply broadly to all new

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<sup>20</sup> Daniel Hess & Jeffrey Rehler, *Minus Minimums: Development Response to the Removal of Minimum Parking Requirements in Buffalo (NY)*, J.A.P.A. (2021).

<sup>21</sup> *Id.* at 4.

<sup>22</sup> *Id.* at 7.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 9.

<sup>25</sup> *Id.* at 12.

<sup>26</sup> Calvin G. Thigpen, *Giving Parking the Time of Day: A Case Study of a Novel Parking Occupancy Measure and an Evaluation of Infill Development and Carsharing as Solutions to Parking Oversupply*, *Research in Transportation Business and Management* (December 2018 29: 108-115).

<sup>27</sup> Richard Willson, *Parking Reform Made Easy*, *ACCESS MAGAZINE* (Fall 2013).

<sup>28</sup> *Id.*



development or redevelopment within a community. Because the decision granting a parking waiver is a quasi-judicial act, parking waivers are subject to appeal and lack the presumption of validity that a legislatively adopted parking reduction would enjoy.<sup>29</sup>

Following London’s transition in 2004 from traditional minimum parking requirements to a scheme of **maximum parking limits** with no minimum requirement, a study comparing developments completed before and after the reform found that parking supplied after the reform was only 68% of the maximum allowed and 52% of the previous minimum.<sup>30</sup> This result suggests that London’s parking minimum required developers to build nearly twice as many parking spaces as they would have built voluntarily.<sup>31</sup> Moreover, the study found that 98% of the reduction in parking spaces was attributable to the removal of the parking minimum, while only two percent of the reduction could be attributed to the new parking maximum caused, a clear indication that removing the minimum was by far the more effective technique.<sup>32</sup>

### **20.03 IMPACT ON PROPERTY VALUES**

The proliferation of parking lots can impact property tax revenues, such as in Hartford where it is estimated that “parking uses cost the city \$50 million in tax revenues annually.”<sup>33</sup> Conversely, parking is often viewed as a value-add for development projects<sup>34</sup> and could therefore impact resale property values. Properties with ample parking may command a premium over those with a perceived lack of parking.

### **20.04 IMPACT ON DEVELOPMENT COSTS**

Various studies have shown that surface parking lot spaces cost upwards of \$5,000 each, while above-ground parking garages average around \$25,000 per space and below-ground garages average around \$35,000 per space.<sup>35</sup> Minimum parking requirements place the cost of providing parking spaces on developers rather than drivers, since the actual users of parking spaces are rarely charged a fee for using them.<sup>36</sup> The high cost of providing parking can be a barrier to development and result in disinvestment<sup>37</sup> as parking can make up 10% to 18% of typical building development costs.<sup>38</sup>

### **20.05 IMPACT ON AMOUNT AND PATTERNS OF LAND DEVELOPMENT**

Traditional parking requirements have created a “patchwork of surface parking lots that detract from the pedestrian realm and are an aesthetic nuisance”<sup>39</sup> and have “created an asphalt wasteland that blights the environment and compels people to drive.”<sup>40</sup> Minimum parking requirements prevent private developers

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<sup>29</sup> See, e.g., *Peachin v City of Oneonta*, N.Y.S.3d, 194 A.D.3d 1172 (2021) (rejecting an appeal of a parking waiver for a mixed-use development by neighboring property owners who argued that their businesses would be negatively affected by a lack of parking); see also *FCFC Realty LLC v. Weiss*, 192 A.D.3d 683, 144 N.Y.S.3d 57 (2021).

<sup>30</sup> Donald Shoup, *Putting a Cap on Parking Requirements*, J.A.P.A. (May 2015).

<sup>31</sup> See *id.*

<sup>32</sup> See *id.*

<sup>33</sup> Sara Bronin, *Rethinking Parking Minimums*, J.A.P.A. (2018).

<sup>34</sup> *Parking Policy Reform: Implications for Real Estate Development*, Urban Land Institute (2021 Fact Sheet).

<sup>35</sup> Jeffrey Spivak, *People Over Parking*, J.A.P.A. (October 2018).

<sup>36</sup> Joe Cortright, *The Price of Parking*, City Observatory (October 2016).

<sup>37</sup> Sara Bronin, *Rethinking Parking Minimums*, J.A.P.A. (2018).

<sup>38</sup> *Parking Policy Reform: Implications for Real Estate Development*, Urban Land Institute (2021 Fact Sheet).

<sup>39</sup> *Id.*

<sup>40</sup> Donald Shoup, *Putting a Cap on Parking Requirements*, J.A.P.A. (May 2015).

from responding to market conditions, and lessen developers' interest in sharing parking or developing sites that are accessible without driving.<sup>41</sup> A leading proponent of parking reform describes how minimum parking requirements affect infill development and redevelopment as follows:

First, parking requirements prevent infill redevelopment on small lots where fitting both a new building and the required parking is difficult and expensive. Second, parking requirements prevent new uses for many older buildings that lack the parking spaces required for the new uses.<sup>42</sup>

## **20.06 IMPACT ON HOUSING AFFORDABILITY**

Parking requirements are generally the same for all housing, including affordable housing. The “cost of required parking can consume the entire subsidy intended for affordable housing.”<sup>43</sup> Some parking reform efforts have specifically targeted affordable housing. In Seattle, for instance, parking requirements were eliminated for all “nonprofit affordable housing developments in the city” in order to remove barriers to the supply of housing.<sup>44</sup> A 2016 study of U.S. rental data found that garage parking typically costs renter households approximately \$142 per month, or an additional 17 percent of a housing unit’s rent.<sup>45</sup> Other studies have found even larger impacts on rents.<sup>46</sup>

Unbundled parking can improve housing affordability. In Denver, Colorado, for example, a residential development that unbundled parking was estimated to make the residences at least \$50,000 less expensive. Residents of this development are provided with the flexibility to lease parking spaces on a month-to-month basis depending on their needs so that they are not required to pay for parking they do not use.<sup>47</sup>

## **20.07 RECOMMENDED TALKING POINTS: PROS AND CONS**

### **PROS:**

- Reduction of development costs, which can encourage redevelopment and increase housing affordability.
- Development projects become more feasible with the removal of minimum parking requirements, particularly infill development on smaller lots and the reuse of existing buildings.
- Developers are provided with the flexibility to provide parking based on the actual market demand or need rather than industry standards calculated for peak demand.

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<sup>41</sup> Richard Willson, *Parking Reform Made Easy*, ACCESS MAGAZINE (Fall 2013).

<sup>42</sup> Donald Shoup, *Yes, Parking Reform is Possible*, J.A.P.A. (October 2011).

<sup>43</sup> *Id.*

<sup>44</sup> Jeffrey Spivak, *People Over Parking*, J.A.P.A. (October 2018).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Parking Policy Reform: Implications for Real Estate Development*, Urban Land Institute (2021 Fact Sheet).

CONS:

- Where parking reforms do not include parking maximums, there is nothing to prevent developers from continuing to overpark new developments.
- New development might face financing issues where banks refuse to lend to projects that do not meet traditional parking standards.<sup>48</sup>
- Parking is often viewed as a value-add for development projects (including developers, lenders, and investors).<sup>49</sup> The perceived lack of adequate parking may be a deterrent.

## **20.08 INCENTIVE-BASED ALTERNATIVES**

Some approaches to parking reform allow reductions in parking requirements in exchange for providing amenities or some other community benefits within a development. Increased discretion may be necessary in development review to ensure that the provided benefits justify the reduction in parking requirements. Affordable housing can be encouraged through the reduction or elimination of parking requirements in exchange for the inclusion of affordable housing within new developments.

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<sup>48</sup> Calvin G. Thigpen, *Giving Parking the Time of Day: A Case Study of a Novel Parking Occupancy Measure and an Evaluation of Infill Development and Carsharing as Solutions to Parking Oversupply*, Research in Transportation Business and Management (December 2018 29: 108-115).

<sup>49</sup> *Parking Policy Reform: Implications for Real Estate Development*, Urban Land Institute (2021 Fact Sheet).

## PART V: AFFORDABLE HOUSING

### SPOTLIGHT ON – PLANNING FOR EQUITY

While there is no formal definition or set of principles describing **equitable development**, various definitions of the term tend to have much in common. Urban planner Carlton Eley, for example, defines equitable development as “an approach to meet the needs of underserved communities and individuals through projects, programs, and/or policies that reduce disparities while fostering places that are healthy, vibrant, and diverse.”<sup>1</sup> Other definitions reflect these same goals but emphasize the participatory process. Community leaders in Pittsburgh, for example, described equitable development as a “strategy that ensures everyone participates in and benefits from the region’s economic transformation – especially low-income residents, communities of color, immigrants, and others at risk of being left behind.”<sup>2</sup> Equitable development has also been described as form of urban planning that “descends from what has been called variously advocacy, equity, or equitable planning, which professional planners adopted in reaction to postwar urban renewal and highway policies that disproportionately destroyed low-income and minority neighborhoods.”<sup>3</sup>

A 2019 report by the Joint Center for Housing Studies describes the evolution of the equitable development planning concept as follows:

Although equitable development planning was meant to correct the imbalance in wealth and opportunity between suburbs and the inner city, the movement also came to be seen as a way to protect the low- and moderate-income residents of urban neighborhoods from the effects brought about by the influx of the well-to-do and steep increases in real estate values. Generally known as gentrification, the nature and effect of such changes are complex and debated, but many people believe that gentrification threatens to displace existing residents, prevent people of modest incomes from moving to certain neighborhoods, and deprive minority residents of their cultural communities. Equitable development efforts have aimed to prevent these effects of gentrification by helping low-income and minority residents to remain and thrive in changing neighborhoods, first and foremost by enabling the residents to participate fully in the planning for their communities.<sup>4</sup>

Others attribute the need for equitable planning to the history of exclusionary planning and zoning practices that “exclude[d] undesirable populations (e.g., people of color, poor people, immigrants) and undesirable industries” to the benefit of advantaged populations and contributed to “unequal development within metropolitan areas limiting access of all citizens to affordable housing, public transportation, good

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<sup>1</sup> Carlton C. Eley, *Equitable Development: Untangling the Web of Urban Development through Collaborative Problem Solving*, 21 SUSTAIN 3, 5 (Fall/Winter 2009/2010). Ely’s definition is closely mirrored by the U.S. Environmental Protection Agency, which describes equitable development as “an approach for meeting the needs of underserved communities through policies and programs that reduce disparities while fostering places that are healthy and vibrant.” See Equitable Development and Environmental Justice (U.S. EPA), <https://www.epa.gov/environmentaljustice/equitable-development-and-environmental-justice>.

<sup>2</sup> Alexander von Hoffman, *The Ingredients of Equitable Development Planning: A Cross-Case Analysis of Equitable Development Planning and CDFIs* at 8 (Joint Center for Housing Studies of Harvard University, 2019) (citing Sarah Treuhaft, *Equitable Development: The Path to an All-In Pittsburgh* (PolicyLink, 2016)).

<sup>3</sup> *Id.* at 9.

<sup>4</sup> *Id.* at 10-11.

school systems, and economic infrastructure (e.g., high paying jobs in technology, health, and service sectors).”<sup>5</sup>

Generally speaking, equity in planning seeks to expand access to resources and opportunities for those who are “most lacking in political and financial power,” including “people of color, people with disabilities, low-income people, women, children, and the elderly.”<sup>6</sup> Different planning fields emphasize different aspects of equity. For example, a park planner might see equity issues in the distribution of parkland, questioning whether the community has a history of locating and investing in parks in higher income areas that already have good access to such amenities, while “a transportation planner might see equity issues in terms of spatially consistent access to transportation, the provision of alternatives to private car use, financing, and funding allocations to different modes (such as between road building and transit investment) or different routes.”<sup>7</sup> Others emphasize the need for equity in public participation, with an expectation for an “inclusive planning process in which residents, stakeholders, and experts come together to engage in shared plan and decision making where at least some power is transferred to nonexperts.”<sup>8</sup>

In a study of 48 local comprehensive plans, the Michigan Association of Planning (MAP) Social Equity Committee found that less than half of the plans even mentioned “equity,” while only 42% included “a goal that mentions affordable, workforce, or fair share housing” and less than 25% mentioned equitable environmental protection.<sup>9</sup> In contrast, the study suggest that an equitable comprehensive plan should be created through an inclusive public participation process and have the following characteristics:

It would recommend an arrangement and mix of land uses that provides enough housing for all income levels, with access to multiple transportation modes. It would identify vulnerable populations and neighborhoods and plan for their protection from natural and human-caused hazards, including those likely to be exacerbated by climate change. The plan would identify and seek to correct inequities in the provision of community facilities. The plan would recommend economic development strategies that benefited the community as a whole, including its most vulnerable members.<sup>10</sup>

## **EQUITABLE PLANNING IN PRACTICE: THE MINNEAPOLIS 2040 PLAN**

The process of planning for equity in Minneapolis, Minnesota began when residents and politicians expressly recognized pervasive racial inequity in the city and, in 2016, tasked its planners with making racial equity the focus of the city’s comprehensive plan update. The city’s comprehensive planning process has been lauded for going beyond the base requirements of regional planning and providing a broad and deep view of the City.<sup>11</sup> As part of the planning process, more than 150 staff members and elected officials joined in working groups to develop fourteen goals for the plan.<sup>12</sup> The city then embarked on a multi-year, multi-pronged public engagement process that included multiple engagement strategies, including street festivals; a mobile, interactive display of the city’s history and potential future;

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<sup>5</sup> Sacoby Wilson, Malo Hutson & Mahasin Mujahid, *How Planning and Zoning Contribute to Inequitable Development, Neighborhood Health, and Environmental Injustice*, 4 ENVIRONMENTAL JUSTICE 211, 212 (2008).

<sup>6</sup> Carolyn G. Loh & Rose Kim, *Are We Planning for Equity?*, JOURNAL OF THE AMERICAN PLANNING ASSOCIATION at 2 (2020).

<sup>7</sup> *Id.* at 3.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 1.

<sup>10</sup> *Id.* at 3.

<sup>11</sup> PAS Memo at 4.

<sup>12</sup> PAS Memo at 5.

open houses staging a mock television program with resident interviews; and meetings where residents could speak casually with artists, poets, and planners while enjoying food from local restaurants.<sup>13</sup> The city also partnered with the University of Minnesota to create the Mapping Prejudice project, which used GIS mapping to show each property in Hennepin County that is burdened with a racially restrictive covenant.<sup>14</sup>

After the multi-year planning process that identified the need to address racial equity, housing affordability, and climate change, the city adopted a new comprehensive plan called “Minneapolis 2040” (the “Minneapolis 2040 Plan”),<sup>15</sup> which expressly recognizes that the city’s zoning regulations “have favored single-family housing at the expense of housing access since the era of segregation.”<sup>16</sup> The plan also established the following “Accessible and Affordable Housing” goal (Goal 3) for the city: “In 2040, all Minneapolis residents will be able to afford and access quality housing throughout the city.”<sup>17</sup> In order to increase access to housing, Minneapolis 2040 calls for the city to “achieve greater housing supply and diversity by allowing small-scale residential structures with up to three dwelling units” on lots in neighborhoods farthest from downtown that primarily contain single-family homes.<sup>18</sup> To achieve that goal, Minneapolis became the first major city in the United States to “eliminate” single-family zoning.<sup>19</sup>

Proponents of eliminating single-family zoning in Minneapolis advanced three major arguments: (1) reform would make the city more affordable, by expanding the supply of housing; (2) it would make the city fairer, by reducing racial and economic segregation; and (3) it would combat climate change, by reducing commutes and making housing more environmentally friendly.<sup>20</sup>

The first step in implementing Goal 3 of the Minneapolis 2040 plan was the adoption of a set of zoning amendments at the same meeting where the city council formally approved the plan.<sup>21</sup> In particular, the initial zoning amendments permitted up to three residential units on every lot in the city zoned for single-family development.<sup>22</sup> At the same time the city also adopted an inclusionary zoning ordinance that requires multifamily projects of 20 units or more to set aside between 4% and 20% of the units created as affordable, depending on the income-level served by the affordable units and whether the project receives financial assistance from the city.<sup>23</sup> In the alternative, developers may choose an optional method of

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<sup>13</sup> *Id.*

<sup>14</sup> PAS Memo at 5. The Mapping Prejudice project found 20,000 deeds in Hennepin County, mostly for homes developed during the first half of the twentieth century, that included racial or ethnic restrictions, and expected to find at least 10,000 to 15,000 more as the research continued. Even though racial covenants were deemed unconstitutional in 1948, Minneapolis neighborhoods that were predominately developed with such covenants are still 79% white, compared to 53% citywide. See Greta Kaul, “With covenants, racism was written into Minneapolis housing. The scars are still visible,” *MinnPost* (Feb. 22, 2019).

<sup>15</sup> Paul Mogush & Heather Worthington, *The View from Minneapolis: Comments on “Death to Single-Family Zoning” and “It’s Time to End Single-Family Zoning,”* JOURNAL OF THE AMERICAN PLANNING ASSOCIATION at 120 (2020).

<sup>16</sup> Minneapolis 2040 at 19. The Minneapolis 2040 Plan is available at:

[https://minneapolis2040.com/media/1489/pdf\\_minneapolis2040-just-policy-document.pdf](https://minneapolis2040.com/media/1489/pdf_minneapolis2040-just-policy-document.pdf).

<sup>17</sup> Minneapolis 2040, Goal 3.

<sup>18</sup> *Id.* at 107.

<sup>19</sup> *Advancing Racial Equity Through Land-Use Planning*.

<sup>20</sup> Kahlenberg.

<sup>21</sup> *Advancing Racial Equity Through Land-Use Planning* at 7.

<sup>22</sup> *Id.*

<sup>23</sup> *Advancing Racial Equity Through Land-Use Planning* at 8.

compliance, such as paying a fee in lieu, donating of land to the city, creating the required affordable housing units off-site, or preserving existing affordable housing, subject to approval by the city council.<sup>24</sup>

Next, in December 2020, the city adopted a “Built Form Overlay District” and a set of zoning text amendments that provide for increased building height and bulk standards<sup>25</sup> as an incentive for developers to include affordable housing and much needed amenities such as child care, grocery stores, or pedestrian connectivity in their projects.<sup>26</sup>

As expected, the results in Minneapolis have been incremental.<sup>27</sup> Reflecting an expected, slow pace, in 2020, “the city approved building permits for 34 duplexes and nine triplexes (both conversions and new construction).”<sup>28</sup> In collaboration with the city, the Federal Reserve Bank of Minneapolis (FRBM) has agreed to monitor how the policies and regulatory changes that resulted from the 2040 Plan impact future development in the city. In particular, the FRBM will develop indicators to measure the city’s progress toward achieving that following housing goal of the 2040 Plan: “In 2040, all Minneapolis residents will be able to afford and access quality housing throughout the city.”<sup>29</sup>

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<sup>24</sup> See Minneapolis, Inclusionary zoning requirements,

<https://www2.minneapolismn.gov/government/projects/cped/current-future/inclusionary-zoning/>.

<sup>25</sup> See Minneapolis 2040, Built Form Regulations, <https://minneapolis2040.com/implementation/built-form-regulations/>.

<sup>26</sup> *Advancing Racial Equity Through Land-Use Planning* at 7.

<sup>27</sup> *Advancing Racial Equity Through Land-Use Planning* at 8.

<sup>28</sup> *Id.*

<sup>29</sup> Federal Reserve Bank of Minneapolis, “Minneapolis Fed to measure long-term housing impact of Minneapolis 2040 plan” (May 5, 2020), <https://www.minneapolisfed.org/article/2020/minneapolis-fed-to-measure-long-term-housing-impact-of-minneapolis-2040-plan>.

## SECTION 21: RENTAL RESTRICTIONS

### 21.01 PURPOSE AND KEY TERMS

**Rental Restrictions** are regulations imposed by local governments to promote land use and community goals by placing limits on the ability of homeowners to rent their properties. Rental restrictions take a variety of forms and include: (1) procedural restrictions, (2) land use or zoning restrictions, (3) quantitative and operational restrictions, (4) remedial action mandates, or (5) rental moratoria. There are many types of rental restrictions around the country, and they are imposed to achieve a broad range of policy goals, including protecting property values or community character; holding absentee landlords accountable for property maintenance for public health and safety reasons;<sup>1</sup> fairer competition with licensed lodging (in the case of short-term rental restrictions); and addressing negative impacts on communities commonly associated with short-term rentals, such as increased traffic, maintenance issues, increased noise levels, overcrowding, and nuisances.<sup>2</sup> Since the housing crisis that began in 2007, they also have been used to try to deter real estate speculation.<sup>3</sup> Communities that desire to collect taxes from short-term rentals, which can be significant for tourist communities, have imposed registration or licensing requirements in order to identify short-term rental properties that are subject to taxation at the state and/or local level.<sup>4</sup> In fact, many communities, including San Francisco, Phoenix, and Portland, Oregon have adopted laws that require online booking platforms (e.g., Airbnb, VRBO, and Flipkey) to collect and remit applicable lodging or tourism taxes on behalf of short-term rental hosts.<sup>5</sup> Some states (e.g., Virginia and Arizona) have also passed legislation that requires online booking platforms to collect and remit applicable taxes on short-term rentals.<sup>6</sup>

*Procedural restrictions* include requiring that rental properties be registered with the local government and/or that the owner obtain a permit or license in order to rent the property. The registration component allows local governments to keep track of rental properties and contact landlords when necessary, such as in the case of a complaint, emergency, nuisance, or code violation. Having a licensing scheme in addition to requiring registration is more labor- and cost-intensive, as inspections are typically required to ensure that rental units meet minimum health and safety standards.<sup>7</sup> To obtain a permit, the owner typically must

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<sup>1</sup> See Edward Coulson and Herman Li, *Measuring the External Benefits of Homeownership*, Working Paper (2011), available at <http://erwan.marginalq.com/HULM11s/ec.pdf> (in the absence of policies or incentives, a review of the literature “suggests that neighborhood maintenance is more likely to be undertaken by owner-occupiers than by renters.”).

<sup>2</sup> See generally WHITE PAPER: RESIDENTIAL RENTALS – THE HOUSING MARKET, REGULATIONS, AND PROPERTY RIGHTS § 3.1 (prepared by Robinson & Cole LLP for NAR, 2015) (hereinafter “RESIDENTIAL RENTALS WHITE PAPER”); Ngai Pindell, *Home Sweet Home? The Efficacy of Rental Restrictions to Promote Neighborhood Stability*, 29 ST. LOUIS UNIV. PUB. L. REV. 41, 46-47 (2009) (hereinafter “*Home Sweet Home?*”); see also Allison Sloto, *Targeted Rental Licensing Programs: A Strategic Overview*, 48 URB. LAW. 639, 640 (Summer 2016) (stating that the principal function of rental licensing programs is to “protect and promote the health, safety, and welfare of tenants and to prevent the deterioration of housing stock by enforcing property maintenance codes”).

<sup>3</sup> *Home Sweet Home?* at 44.

<sup>4</sup> See RESIDENTIAL RENTALS WHITE PAPER § 3.1(b).

<sup>5</sup> See, e.g., San Francisco Code § 41A.4 (requiring “online hosting platforms” to collect and remit Transient Occupancy Taxes); Portland (OR) Ordinance Amending Transient Lodgings Tax (available online at <http://media.oregonlive.com/front-porch/other/Short-term%20rental%20ordinance.pdf>); Gregory E. Lines, *Hej, Not Hej Da: Regulating Airbnb in the New Age of Arizona Vacation Rentals*, 57 ARIZ. L. REV. 1163 (2015). See also *Airbnb – In what areas is occupancy tax collection and remittance by Airbnb available?* (available online at <https://www.airbnb.com/help/article/653/in-what-areas-is-occupancy-tax-collection-and-remittance-by-airbnb-available>) (listing locations worldwide where Airbnb collects and remits taxes on behalf of hosts).

<sup>6</sup> See Va. Code § 55-248.56; Arizona Rev. Stat § 42-5014.E.

<sup>7</sup> Alan Mallach, *Meeting the Challenge of Distressed Property Investors in America’s Neighborhoods*, at 56 (2010), available at [http://www.instituteccd.org/uploads/iccd/documents/102010\\_distressed\\_property\\_investors.pdf](http://www.instituteccd.org/uploads/iccd/documents/102010_distressed_property_investors.pdf).



demonstrate compliance with safety regulations, maintenance codes, or building codes, which generally is determined through an inspection of the property. Rental property inspections can include the building's exterior, lighting and ventilation, general conditions, electrical systems, and heating and fuel burning appliances.<sup>8</sup> Inspections may be required on a regular periodic basis, often annually. The local government may also require a registration or permit application fee, which may be required annually, and may impose fines for failing to properly register or obtain a license. Such fines are used to pay for the registration and licensing programs. For example, Minneapolis requires rental property owners to pay an additional twenty percent of the applicable license fee for failing to obtain a rental license before renting their properties.<sup>9</sup>

*Land use or zoning restrictions* can include regulations requiring property owners to obtain a special land use approval if the property will be occupied by anyone other than the owner; geographically-based restrictions, such as limiting rentals to certain zones within the municipality; provisions requiring owner occupancy of a house as a condition of a special land use approval, such as approval of a conditional use permit or special exception; or regulations that require owner occupancy of some or all of the residential dwelling units. Land use approvals must be substantially related to a legitimate land use policy objective, such as protecting community character or public health and safety, and the extent to which a local government is authorized to enact such land use rental restrictions varies from state to state.<sup>10</sup> Such land use restrictions have been struck down if they apply to the “user” rather than the use of the property,<sup>11</sup> or if they target a particular property or area too narrowly.<sup>12</sup> In a 2015 Wisconsin case, the City of Cedarburg argued that the short-term rental of a single-family home was not permitted because in order to qualify as a single-family dwelling, a property must be occupied as a residence.<sup>13</sup> The court rejected that argument, reasoning that “what makes a home a residence is its use to sleep, eat, shower, relax, things of that nature. What matters is residential use, not the duration of the use.”<sup>14</sup>

*Quantitative and operational restrictions* limit how properties may be rented, but not whether they can be rented at all. These restrictions include:

- limiting the total number of rental units allowed in a municipality or zone;
- maximum occupancy limits;
- limiting the number of unrelated people who can live in a dwelling unit;
- limiting the amount of time for which a property can be rented;
- restricting the duration or frequency of short-term rentals;
- off-street parking requirements;
- noise level limits;
- requiring postings on rental properties;
- emergency access requirements for rentals;
- mandatory lease provisions;
- local contact person requirements; and
- additional maintenance requirements, such as trash and recycling facility storage.<sup>15</sup>

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<sup>8</sup> *Id.* at 55 (discussing Boulder, Colorado’s rental inspection program).

<sup>9</sup> Minneapolis Code of Ord. § 261.20.

<sup>10</sup> *Home Sweet Home?* at 50.

<sup>11</sup> *See, e.g., CHR General, Inc. v. City of Newton*, 387 Mass. 351 (1982).

<sup>12</sup> *Home Sweet Home?* at 62.

<sup>13</sup> *Heef Realty and Investments, LLP v. City of Cedarburg Bd*, 361 Wis. 2d 185, 189 (Ct. App. 2015), *rev. denied* 865 N.W.2d 503 (Wis. 2015).

<sup>14</sup> *Id.* at 194; ); *but see Vilas County v. Accola*, 364 Wis. 2d 409, ¶17 (Ct. App. 2015) (upholding a Vilas County zoning ordinance that prohibited short-term rentals of single-family detached dwellings in the R-1 zoning district)

<sup>15</sup> *See* RESIDENTIAL RENTALS WHITE PAPER §§ 3.1(d) (Quantitative Restrictions), 3.1(g) (Operational Restrictions).

*Remedial action mandates* include requiring owners or landlords to take certain steps to address criminal or “disorderly” conduct. For example, the City of Hagerstown, Maryland requires landlords to take certain crime prevention steps in certain circumstances, including issuing written notifications to tenants or no trespass letters, pursuing legal remedies, and cooperating and communicating with the city’s police department.<sup>16</sup> Other communities, such as the City of Brooklyn Center, Minnesota require rental property owners or managers to complete a Crime Free Housing Program or similar a training course in order to obtain a rental license.<sup>17</sup>

*Host occupancy requirements* for short-term rentals have been adopted by some communities as a means of preventing the loss of long-term rental housing. These provisions expressly require that short-term rental “hosts” reside in the dwelling unit for a minimum number of days each calendar year. For example, San Francisco’s short-term residential rental ordinance requires that a “permanent resident” occupy a short-term rental unit for at least 275 days per calendar year and that the permanent resident maintain records demonstrating compliance with the requirement for a period of two years.<sup>18</sup> Portland, Oregon’s Accessory Short-Term Rentals ordinance contains a similar requirement, which states:

A Type A accessory short-term rental must be accessory to a residential use on a site. This means that a resident must occupy the dwelling unit for at least 270 days during each calendar year, and unless allowed by Paragraph .040.B.2 or .040.B.3, the bedrooms rented to overnight guests must be within the dwelling unit that the resident occupies.<sup>19</sup>

The vacation rental ordinance adopted by the City of Santa Monica, California in 2015 takes a similar approach. Santa Monica’s “Home Sharing and Vacation Rentals” ordinance divides short-term rentals into two categories: (1) “vacation rentals,” in which a guest has “exclusive private use of the unit” for less than thirty days; and (2) “home-sharing,” in which the primary resident of the property lives “on-site during the visitor’s stay.”<sup>20</sup> Under the “Santa Monica ordinance, vacation rentals are banned citywide, but home-sharing is permitted provided that the owner obtains a business license and pays a 14% hotel tax on all home sharing stays.<sup>21</sup>

*Rental moratoria* include prohibiting issuance of rental licenses or permits for a certain period of time, or prohibiting the conversion of single-family homes to rental dwelling units for a certain period of time.

Rental restrictions also vary in how they are created. They are typically imposed by ordinances passed by the local government, but some communities authorize neighborhoods to petition the city council to establish rental restrictions through a residential rental restriction overlay district.<sup>22</sup> They also may be imposed as private restrictions, such as through development agreement restrictions or private

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<sup>16</sup> City of Hagerstown, MD, City Ordinance Chapter 197, §§ 197-2 (definition of “reasonable steps”), 197-9.

<sup>17</sup> See City of Brooklyn Center (MN) Crime Free Housing Program (available online at <https://www.ci.brooklyn-center.mn.us/government/departments/administration/business-licensing/rental-dwellings>); see also Allison Sloto, *Targeted Rental Licensing Programs: A Strategic Overview*, 48 URB. LAW. 639, 643-45 (Summer 2016).

<sup>18</sup> San Francisco Code § 41A.5(g)(1).

<sup>19</sup> Portland, OR Code § 33.207.040(A)(1).

<sup>20</sup> See Santa Monica Municipal Code § 6.20; see also Sam Sanders, “Santa Monica Cracks Down on Airbnb, Bans ‘Vacation Rentals’ Under a Month,” NPR (May 13, 2015) (available online at <http://www.npr.org/sections/thetwo-way/2015/05/13/406587575/santa-monica-cracks-down-on-airbnb-bans-vacation-rentals-under-a-month>).

<sup>21</sup> See *id.*

<sup>22</sup> See, e.g., Code of East Lansing, MI, Chapter 50, Art. VII, Division 5 (Residential Rental Restriction Overlay Districts), Sec. 50-773 (authorizing property owners to petition the city council to establish a residential rental overlay district by obtaining signatures from two-thirds of the property owners within the proposed overlay district).

covenants.<sup>23</sup> For example, a development agreement may prohibit rentals within a certain time period, or a private covenant may prohibit renting in a common interest community.<sup>24</sup> Rental restrictions may apply only to short-term rentals, only to long-term rentals, or to both short-term and long-term rentals.

## 21.02 EFFECTIVENESS IN ACHIEVING STATED PURPOSE(S)

It is difficult to measure the effectiveness of rental restrictions, partly because the goals, issues, and the types of rental restrictions in place vary significantly among communities.<sup>25</sup> A 2003 study of rental unit licensing, prepared to provide a recommendation on whether Milwaukee should implement a rental licensing program, analyzed rental licensing programs in 15 cities and concluded that such licensing programs have “very uncertain benefits and can create negative effects on housing markets and the availability of affordable housing.”<sup>26</sup> It also concluded that the program would be expensive to implement.<sup>27</sup> Therefore, it recommended that Milwaukee not implement a rental licensing program.<sup>28</sup> As of June 2022, Milwaukee has not adopted a rental licensing program.

However, rental restrictions have been successful in certain communities in requiring landlords to properly maintain their properties, particularly absentee landlords that were difficult to track down or hold accountable without any registration requirement. For example, a 2005 analysis of the rental licensing program in effect Aurora, Illinois since 1982 found that very few complaints related to rentals had been received by the city, and that “[t]he overall building maintenance [had] drastically improved. Many unsafe and ghastly living conditions have been eliminated from those multi-unit buildings.”<sup>29</sup> Although Aurora’s rental licensing and inspection program requires significant resources and time to administer (e.g., initial inspections of buildings in poor condition can take several hours), the analysis found that property values actually increased, including for buildings once set to be demolished.<sup>30</sup>

Rental registration and licensing programs also have been effective in certain cities where complaint-driven systems were ineffective, such as in Austin and other cities in Texas. A 2013 study of rental registration programs in Texas concluded that such programs have been particularly effective “in communities with large low-income, immigrant populations, since these tenants are more likely to avoid reporting code violations for fear of retaliation.”<sup>31</sup>

Rental restrictions are often imposed to address negative impacts to communities that are commonly attributed to rental units, but might not solely have to do with rental units, and which are often able to be addressed through better enforcement of existing property maintenance, building, and nuisance codes. These issues include increased traffic, unacceptable noise levels, overcrowding, and disrepair of properties. Often, municipalities already have ordinances that declare certain properties or activities to be a public nuisance that must be abated, such as failing to repair property in a dilapidated state; discarding

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<sup>23</sup> See generally Sklar & Edwards, *Florida Community Associations versus Airbnb and VRBO in Florida*, 91 FLA. B.J. 16 (Feb. 2017).

<sup>24</sup> See Lara Major, *There’s No Place Like (Your) Home: Evaluating Existing Models and Proposing Solutions for Room-Sharing Regulation*, 53 SAN DIEGO L. REV. 469, 492 (Spring 2016); *Home Sweet Home?* at 47.

<sup>25</sup> See, e.g., Fort Collins (Colorado), “Neighborhood Quality of Life Task Force Update,” Study Session Item, Fort Collins City Council, April 27 (2004), available at <http://citydocs.fcgov.com/?cmd=convert&vid=10&docid=761782&dt=SPECIFICATION>.

<sup>26</sup> Ian Crichton, Matt Rosenberg, and Joe Thompson, *Rental Unit Licensing: Applicability to Milwaukee, Milwaukee, Wisconsin*, City of Milwaukee Department of Neighborhood Services (2003).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Albert Dennis, *Twenty-Three Years of Rental Licensing – Observations*, City of Aurora, IL (2005).

<sup>30</sup> *Id.*

<sup>31</sup> Heather K. Way et al., *An Analysis of Rental Property Registration in Austin*, at pp. 1-2 (July 2013).

trash or recyclable items on the property rather than properly disposing of them; property that is in such a state of disrepair that it constitutes a public health or safety risk; or property or activities that threaten others' quiet use and enjoyment of their property.

Particularly because such problems are not exclusive to rental properties, municipalities should first assess whether they could be addressed through enhanced enforcement of existing ordinances, such as noise control, nuisance, property maintenance, and parking and traffic regulations.<sup>32</sup> If so, the municipalities should bolster their enforcement of existing code provisions, as well as existing federal, state, and local criminal laws. Such an approach would be less restrictive of property rights and would acknowledge that a healthy rental market can positively benefit the community. As explained by a 2009 report by the Fels Institute of Government, Penn Arts & Sciences, a healthy rental market, among other things, “[p]romotes vibrant downtowns and neighborhood commercial corridors by increasing housing density (and associated consumer buying power) in nearby residential areas[,]” and “[s]erves as a housing resource for young families and others seeking high-quality, reasonably-priced rental housing rather than homeownership.”<sup>33</sup> The report also concluded that a “well-managed code enforcement and housing preservation strategy can pay for itself (through revenue generated by fees, fines, and penalties) and upgrade the quality of rental housing citywide.”<sup>34</sup>

### **Rental Restrictions and Property Rights**

Certain rental restrictions—particularly those that prohibit rentals or restrict a property owner's right to rent their property—may face judicial scrutiny for infringing upon the constitutional rights of the property owner or tenants. The right to rent private property on a temporary basis to another party has been recognized as a core right of property ownership.<sup>35</sup> In a Connecticut case, the “right to rent” was recognized as one of the “sticks” in the property rights bundle:

[It] is undisputable that the *right of property owners to rent their real estate* is one of the bundle of rights that, taken together, constitute the essence of ownership of property.... Owners of a single-family residence can do one of three economically productive things with the residence: (1) live in it; (2) rent it; or (3) sell it.<sup>36</sup>

The right to rent has been underscored by courts in other states<sup>37</sup> and is echoed by a leading treatise, *Thompson on Real Property*, which observes that “the right to lease property is an incident of ownership.”<sup>38</sup>

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<sup>32</sup> See Lara Major, *There's No Place Like (Your) Home: Evaluating Existing Models and Proposing Solutions for Room-Sharing Regulation*, 53 SAN DIEGO L. REV. 469, 503 (Spring 2016).

<sup>33</sup> John Kromer, *Beyond the Foreclosure Crisis: Reconstituting the Rental Housing Market in Pennsylvania*, Philadelphia: University of Pennsylvania Fels Institute of Government, at p. 1 (2009).

<sup>34</sup> *Id.* at 5.

<sup>35</sup> See J.E. Penner, *The “Bundle of Rights” Picture of Property*, 43 UCLA L. REV. 711 (1996) (noting that conventional “bundle of rights” formulation and various views of the “bundle of rights”).

<sup>36</sup> *Gangemi v. Zoning Bd. of Appeals of the Town of Fairfield*, 763 A.2d 1011, 1015-16 (Conn. 2001) (citing J. DUKEMINIER & J. KRIER, *PROPERTY* at 86 (3d ed. 1993) (stating (“[property] consists of a number of disparate rights, a ‘bundle’ of them: the right to possess, the right to use, the right to exclude, the right to transfer”) (emphasis added)).

<sup>37</sup> See, e.g., *Apartment Association of Los Angeles County, Inc. v. City of Los Angeles*, 24 Cal. 4th 830, 841 (2001) (stating: “The power to alienate property or a property right is not limited to the right to sell or assign it. It means generally the power “to transfer or convey [it] to another.” The conveyance need not be the whole fee. The right of alienation applies when fee holders seek to convey lesser estates. “[T]he power or right of alienation” “incident to

Rental regulations that require property owners to obtain a license in order to rent their home impair this fundamental right of private property ownership by making the “right to rent” a mere privilege. In general, a “license” is defined as “permission or privilege to do what otherwise would be unlawful.”<sup>39</sup> In effect, a rental regulation that contains a licensing requirement treats the property right to rent one’s residence as an unlawful business that requires the privilege of a license to exist. Although the courts in some states have ruled that a residential rental may be considered a “business” that could be subjected to a business or occupational tax, the right to rent remains a core right of property ownership—not a privilege.<sup>40</sup>

A rental restriction that is adopted as a zoning regulation may be susceptible to claims that it constitutes an unlawful exercise of the zoning power. A well-recognized principle of local zoning power is that “zoning deals with land *use*, not the user – the owner, operator, or occupant of the land.”<sup>41</sup> Zoning inherently pertains to land rather than to the landowner – it “deals basically with land use and not with the person who owns or occupies it.”<sup>42</sup> Neither the form of one’s interest in property (i.e., owner vs. renter) nor the duration of the occupancy (e.g., short-term vs. long-term) is relevant to the issue of use. Moreover, the transitory or temporary nature of a rental use does not defeat its residential status.<sup>43</sup> Therefore, a rental restriction that is adopted as a zoning regulation arguably violates this fundamental principle by attempting to regulate the users or occupants of residences (i.e., renters) rather than the use of property.

Rental restrictions may also raise concerns under the federal Fair Housing Act (the “FHA”)<sup>44</sup> or state fair housing laws. The federal Fair Housing Act,<sup>45</sup> as amended by the Fair Housing Amendments Act<sup>46</sup> (the “FHA”) makes it unlawful “to discriminate against any person in the terms, condition, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of

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the ownership of an estate in fee-simple” “include[s] the power or right to dispose of property held in fee ... by lease, mortgage, or other mode of conveyance ....”) (citations omitted) (emphasis added).

<sup>38</sup> 2 THOMPSON ON REAL PROPERTY § 14.02(a) (2021, Matthew Bender & Company, Inc.) (citing *Norwest Bank Arizona v. Superior Court In and For County of Maricopa*, 963 P.2d 319, 323 (Ariz. 1998) (right to rent under a lease of real property is an incorporeal hereditament that is an incident to an estate in land); *Magnolia Petroleum Co. v. Carter*, 2 So. 2d 680 (La. App. 1941); *Assessors of West Springfield v. Eastern States Exposition*, 93 N.E.2d 462 (Mass. 1950); *Attorney General v. Pere Marquette Ry. Co.*, 248 N.W. 860 (Mich. 1933)).

<sup>39</sup> 9 MCQUILLIN MUN CORP § 26:2 (Municipal Licenses and Permits – Definitions; nature of municipal license) (3d ed.).

<sup>40</sup> See, e.g., *Englewood v. Wright*, 147 Colo. 537, 544 (1961) (stating that “the renting of commercial or residential property is a ‘business,’ and is subject to the power of Englewood to impose a business or occupational tax thereon”); *Leffen v. Hurlbut-Glover Mortuary*, 363 Mo. 1137, 1143 (1953) (stating: “No doubt the owner or operator of an apartment building is engaged in and derives income from ‘business’ or a ‘commercial activity.’”); but see *Crowninshield v. Blaisdell*, 2007 Mass. App. Unpub. LEXIS 277 (holding that the short-term rental of a residential condominium unit constitutes a residential use).

<sup>41</sup> 1 RATHKOPF’S THE LAW OF ZONING AND PLANNING § 2:16 (Zoning regulates the use of land—Identity or status of land users) (4th ed.) (hereinafter “RATHKOPF”) (citing cases in Connecticut, Iowa, Louisiana, Maryland, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, and Washington) (emphasis added).

<sup>42</sup> See *FGL & L Prop. Corp. v. City of Rye*, 485 N.E. 986, 989 (N.Y. 1985).

<sup>43</sup> *Lowden v. Bosley*, 909 A.2d 261, 267 (Md. 2006); see also *In re Toor*, 59 A.3d 722, 727 (Vt. 2012); *Estates at Desert Ridge Trails Home Owners’ Association v. Vazquez*, 300 P.3d 736 (N.M. Ct. App. 2013).

<sup>44</sup> Fair Housing Act of 1968, 42 U.S.C. §§ 3591 et seq.

<sup>45</sup> Fair Housing Amendments Act of 1988, 42 U.S.C. § 3604.

<sup>46</sup> *Id.*

race, color, religion, sex, familial status or national origin.”<sup>47</sup> The FHA applies to state and local governments as well as direct providers of housing, such as landlords and real estate companies.<sup>48</sup> The FHA provides that any state or local regulation “that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid.”<sup>49</sup> Of relevance to rental regulations, the FHA provides that any state or local regulation “that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid.”<sup>50</sup> A rental ordinance that results in members of a protected class (e.g., handicapped persons and families with children) being denied access to residential rentals in significantly greater numbers than tenants who are not members of a protected class (e.g., by limiting the number of unrelated people who can live together, but not the number of related people who can live together), would be vulnerable to a “disparate impact” (discriminatory effect) claim under the FHA.<sup>51</sup>

## Unintended Consequences

Finally, rental restrictions can have unintended consequences on communities and the housing market. This includes possibly significant financial impact of a regulation that burdens or severely limits property owners’ ability to rent their property. A short-term rental restriction, or a moratorium or ban on residential rentals, for example, can result in significant lost rental income. For vacation home owners, such rental restrictions also decrease the usefulness of the house, as the owners’ primary homes will be elsewhere. For example, Santa Monica’s short-term rental regulations, among the country’s most restrictive, requires that the owner remain on-site during the rental tenancy.<sup>52</sup> This owner-occupancy requirement reportedly resulted in about 80% of the then-existing short-term rentals in Santa Monica being terminated.<sup>53</sup> The owner-occupancy requirement harmed not only property owners seeking extra income from renting out their vacation homes and primary residences while they were away, but also hurt Santa Monica’s “local businesses that earned income by providing services to [short-term rental] hosts”

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<sup>47</sup> U.S. Department of Housing and Urban Development, *Title VIII: Fair Housing and Equal Opportunity* [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/fair\\_housing\\_equal\\_opp/progdesc/title8](http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/progdesc/title8); 42 U.S.C. § 3604(a).

<sup>48</sup> U.S. Department of Justice, The Fair Housing Act, [http://www.justice.gov/crt/about/hce/housing\\_coverage.php](http://www.justice.gov/crt/about/hce/housing_coverage.php).

<sup>49</sup> 42 U.S.C. § 3615.

<sup>50</sup> 42 U.S.C. § 3615.

<sup>51</sup> Under the Department of Housing and Urban Development regulations, “disparate impact” is defined in terms of discriminatory effect: “Discriminatory effect. A practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin.” 24 C.F.R. §100.500 (a). Prior to 2015, although nine federal Courts of Appeals had concluded the Fair Housing Act encompassed disparate impact claims, the U.S. Supreme Court had never ruled on the question. However, in 2015, the U.S. Supreme Court decided that disparate impact claims are, indeed, cognizable under the Fair Housing Act. *See Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015). *See also* RESIDENTIAL RENTALS WHITE PAPER § 8.5(C) (ii); *see also* Home Sweet Home? at 48.

<sup>52</sup> *See* Santa Monica Municipal Code § 6.20 (“Home-Sharing and Vacation Rentals”); *see* Nicholas E. Anania, *The Short-Term Rental Economy in Rural Maine Communities: An Opportunity for Economic Growth Instead of a Target for Regulation*, 71:2 MAINE L. REV. 342, 351 (June 2019).

<sup>53</sup> *Id.* (citing Andrew Bender, *New Regulations to Wipe Out 80% of Airbnb Rentals in California’s Santa Monica*, FORBES (June 15, 2015), <https://www.forbes.com/sites/andrewbender/2015/06/15/new-regulations-to-wipe-out-80-of-airbnb-rentals-in-californias-santa-monica/?sh=1da40a00169a>; Niki Cervantes, *Santa Monica Gets Even Tougher on Short-Term Vacation Rental “Hosts,”* SANTA MONICA LOOKOUT (Jan. 12, 2017), [https://www.surfsantamonica.com/ssm\\_site/the\\_lookout/news/News-2017/January-2017/01\\_12\\_2017\\_Santa\\_Monica\\_Gets\\_Even\\_Tougher\\_on\\_Short\\_Term\\_Vacation\\_Rental\\_Hosts.html](https://www.surfsantamonica.com/ssm_site/the_lookout/news/News-2017/January-2017/01_12_2017_Santa_Monica_Gets_Even_Tougher_on_Short_Term_Vacation_Rental_Hosts.html)).

who reportedly “noticed a huge decline in their own operations as a result of the ordinance, some even going out of business.”<sup>54</sup>

### 21.03 IMPACT ON PROPERTY VALUES

Rental restrictions can increase property values to the extent that they result in greater compliance with maintenance standards and building and nuisance codes, thereby improving the quality and appearance of rental buildings. Prospective buyers also know that the buildings must meet certain minimum standards, including possible standard inspections, which can increase their value. Rental restrictions that deter or prohibit renting may increase rates of homeownership, and some studies have concluded that an increase in homeownership has a positive effect on property values in that same area.<sup>55</sup> In this way, rental restrictions may increase property values by increasing the perception that an area will be occupied by homeowners, a concept that many people associate with stability and wealth.<sup>56</sup>

However, rental restrictions can also negatively impact property values. For example, they may decrease the value of properties to the extent that buyers are unwilling to pay as much for a home that cannot be rented, or can be rented under onerous conditions, than they would for a comparable home that is not encumbered by such restrictions.<sup>57</sup> A 2019 study of short-term rental regulations in New Orleans found that “individuals factor the option to participate in the [short-term rental] market in their housing purchasing decision” and ultimately that regulations that restricted short-term rental use negatively impacted property values.<sup>58</sup> To put a numerical value to this, a 2021 study by the Harvard Business Review “conservatively” estimated that short-term rental restrictions “reduced property values by a total of \$2.8 billion” across 15 cities studied.<sup>59</sup> Further, if rental restrictions prevent rentals from being an alternative to foreclosure or short sale, they could negatively impact surrounding property values.<sup>60</sup> In addition, ordinances that restrict the total number of people who can occupy a rental unit can lead to an increase in the total number of rentals in the community—as larger groups of people who live together break up into smaller groups—which can negatively impact property values.<sup>61</sup>

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<sup>54</sup> *Id.* (citing Cervantes, *Santa Monica Gets Even Tougher on Short-Term Vacation Rental “Hosts,”* (reporting that one individual had to close his start up cleaning business which offered cleaning services for Santa Monica’s once thriving short-term rental market)).

<sup>55</sup> Edward Coulson and Herman Li, *Measuring the External Benefits of Homeownership*, Working Paper at 3 (2011), available at <http://erwan.marginalq.com/HULM11s/ec.pdf> (finding that “a marginal increase in the ownership rate of about nine percentage points (i.e. one house in an 11-house cluster) increases the price of housing in the neighborhood by about 4.5%.”); N. Edward Coulson and Lynn M. Fisher, *Housing Tenure and Labor Market Impacts: The Search Goes On*, 65(3) J. URB. ECON. 252 at 2 (2009); but see Kortelainen, Mika and Tuukka Saarimaa, *Do Homeowners Benefit Urban Neighborhoods? Evidence from Housing Prices*, at 20 (2013) (finding “that neighborhood homeownership rate has no effect on housing prices, and thus, there is no evidence of positive externalities.”).

<sup>56</sup> *Home Sweet Home?* at 64.

<sup>57</sup> *Home Sweet Home?* at 53.

<sup>58</sup> Maxence Valentin, *The effects of regulating the housing short-term rental market: Evidence from New Orleans*, 1, 23 (January 25, 2019).

<sup>59</sup> Ron Bekkerman et al., *Research: Restricting Airbnb Rentals Reduces Development*, HARV. BUS. REV. (Nov. 17, 2021), <https://hbr.org/2021/11/research-restricting-airbnb-rentals-reduces-development>.

<sup>60</sup> Wendy Usrey, *The Rental Next Door: The Impact of Rental Proximity on Home Values*, at p. ii (Fall 2012) (finding that “[r]entals within ¼ mile of a sold home had a negative impact on price, while rentals between ¼ and ½ mile had a positive impact on price. If rentals are considered an alternative to foreclosure or short sale, these results suggest the negative impacts of distressed sales are greater than those of rental properties on surrounding home values. Further research is needed to test for this scenario.”).

<sup>61</sup> *Id.* at 29.



## 21.04 IMPACT ON DEVELOPMENT COSTS

Rental restrictions do not directly affect the cost of development, but could factor into decisions regarding the type of residential development being built (i.e., rental apartments vs. ownership units, such as a condominium or common interest community). Additionally, research shows that rental restrictions can significantly impact government tax revenues derived from residential rentals, which could be used to fund housing development.<sup>62</sup> For example, a study article published by the *Harvard Business Review* estimates that restrictions on Airbnb rentals “directly leads to less residential development, less growth in home prices, and thus less tax revenue for cities (to the tune of at least \$40 million per year in the U.S.).”<sup>63</sup>

## 21.05 IMPACT ON AMOUNT AND PATTERNS OF LAND DEVELOPMENT

Rental restrictions, particularly moratoria or prohibitions on rental units, but also onerous rental licensing or permitting requirements, could discourage the construction of new residential rental housing. In such communities, new residential construction could be limited to all or mostly owner-occupied residences. This can be significant for many communities, particularly because, even in the midst of the COVID-19 pandemic, renting in the early 2020s,<sup>64</sup> with the United States experiencing a “boom” in multifamily construction.<sup>65</sup> Rental restrictions may also restrict the types of housing units available or constructed, as rentals are often multifamily units, and single-family units are more often owner-occupied.<sup>66</sup> Rental restrictions could likewise limit mixed use developments, which often contain a multi-family rental component. Further, rentals are more concentrated in urban areas, followed closely by suburban areas, so rental restrictions will likely have a disproportionate impact on urban and suburban areas as opposed to rural areas.<sup>67</sup>

## 21.06 IMPACT ON HOUSING AFFORDABILITY

Rental restrictions can have a negative impact on housing affordability to the extent that they increase the cost of owning and operating a residential rental property or result in a reduced inventory of rental housing units. By reducing the supply of available rental housing units in a community, rental restrictions can result in higher rental fees and fewer affordable units. Additionally, restrictions on the number of unrelated people who can reside together in a rental unit could increase the total demand for rental units in a municipality by forcing larger groups of people living together to split into smaller groups occupying separate housing units, thereby lowering the supply of available affordable housing.<sup>68</sup> Furthermore, to the extent that landlords are required to pay for rental registration or licensing programs, or any additional

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<sup>62</sup> See Bekkerman et al., *Research: Restricting Airbnb Rentals Reduces Development*.

<sup>63</sup> *Id.*

<sup>64</sup> *America's Rental Housing*, HARVARD UNIVERSITY: JOINT CENTER FOR HOUSING STUDIES at 9 (2022) (“Despite the ongoing pandemic, renter household growth was on the upswing between the first quarter of 2020 and the third quarter of 2021. According to the latest Housing Vacancy Survey, the number of renter households climbed by more than 870,000 over this period, to a total of 44 million.”).

<sup>65</sup> *Id.* at 13, 26.

<sup>66</sup> *America's Rental Housing: Evolving Markets and Needs*, HARVARD UNIVERSITY: JOINT CENTER FOR HOUSING STUDIES at 4 (2013) (showing that 87% of owner-occupied housing is single-family, and 61% of renter-occupied housing is multi-family); see also, *America's Rental Housing*, HARVARD UNIVERSITY: JOINT CENTER FOR HOUSING STUDIES at 16-17 (2022) (finding that large multifamily buildings account for most rental stock and that the number of single-family rentals dropped significantly, “down by some 770,000 units in 2014-2019 to 15.3 million.”).

<sup>67</sup> See *America's Rental Housing*, HARVARD UNIVERSITY: JOINT CENTER FOR HOUSING STUDIES at 12 (2022) (“the 2019 American Community Survey found that renters made up 52 percent of households in urban neighborhoods, 30 percent in suburban neighborhoods, and 29 percent in non-metro neighborhoods.”).

<sup>68</sup> Wendy Usrey, *The Rental Next Door: The Impact of Rental Proximity on Home Values* 28-30 (Fall 2012).



costs associated with rental restrictions, they are likely to pass on such costs to renters through increased rent. Rental housing tends to be concentrated in lower-income neighborhoods and, therefore, lower-income communities can be disproportionately affected by rental restrictions. Housing units that are affordable to lower-income renters also tend to be older and in poorer condition and, thus are more likely to be impacted by rental restrictions pertaining to maintenance or aesthetic issues.<sup>69</sup> As evidenced by a 2022 report by Harvard University’s Joint Center for Housing Studies, these impacts are of serious concern. The report “America’s Rental Housing” found that in 2019, approximately 46% of renters were at least moderately cost-burdened (spending more than 30% of their income for rent and utilities), including 24% with severe burdens (spending more than half of their income for housing).<sup>70</sup>

Some communities have argued that short-term rental restrictions are necessary to preserve their inventory of affordable long-term housing.<sup>71</sup> The concern is that the conversion of long-term rental properties into short-term rentals is having a negative impact on the available supply of long-term rental housing in some markets. An October 2014 report by the New York State Attorney General found that in 2013, more than 4,600 residential units in New York City were dedicated primarily or exclusively to short-term rentals.<sup>72</sup> The report, entitled “Airbnb in the City,” noted that most of the buildings converted to short-term rentals were located in popular neighborhoods in Brooklyn and Manhattan, and observed that:

A dozen buildings in those same neighborhoods had 60 percent or more of their units used at least half the year as private short-term rentals, suggesting that the buildings were operating as de facto hotels.<sup>73</sup>

In vacation destination communities, where land prices tend to be inflated and second homes are prevalent, long-term rental housing is often in short supply. A study of affordable housing in the Rocky Mountain communities observed that the supply of affordable housing is especially problematic in resort communities:

In most Rockies resort communities there simply are not enough affordable housing units, forcing locals to commute hours to work while second-homes sit vacant; in these areas affordable housing is a crisis. Second, third, or even fourth-home owners flooding Rocky Mountain resort towns transform small, inexpensive communities surrounding resort destinations into towns resembling Gucci-fringed Aspen and faux-cowboy Jackson

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<sup>69</sup> See *America’s Rental Housing: Evolving Markets and Needs*, HARVARD UNIVERSITY: JOINT CENTER FOR HOUSING STUDIES at 6-7 (2013); see also *America’s Rental Housing*, HARVARD UNIVERSITY: JOINT CENTER FOR HOUSING STUDIES at 14 (2022).

<sup>70</sup> See *America’s Rental Housing*, HARVARD UNIVERSITY: JOINT CENTER FOR HOUSING STUDIES at 3-4 (2022).

<sup>71</sup> See Ashley M. Peterson, *Sharing Space: To Counteract the Impact on Long-Term Rental Availability Various Jurisdictions Are Restricting the Ability of Homeowners and Tenants to Offer Short-Term Vacation Rentals*, 39 L.A. LAW. 28, 30 (Jan. 2017).

<sup>72</sup> *Airbnb in the City* (Oct. 2014, New York State Office of the Attorney General) (available online at <https://ag.ny.gov/pdfs/AIRBNB%20REPORT.pdf>).

<sup>73</sup> *Id.* at 12. See also Dayne Lee, *How Airbnb Short-Term Rentals Exacerbate Los Angeles’s Affordable Housing Crisis: Analysis and Policy Recommendations*, 10 HARV. L. & POLICY REV. 229, 235 (2016) (concluding that rents rose 20% higher and increased 33% faster in Los Angeles neighborhoods with a high density of Airbnb listings, compared to rents citywide).

Hole. Finding affordable housing for locals and service workers in these communities is difficult when the median house price is far from affordable, given their annual income.<sup>74</sup>

It is not yet known whether short-term rental restrictions are effective at protecting a community's affordable long-term rental housing inventory. In vacation destination communities, it stands to reason that short-term rental restrictions would not be an effective means of protecting affordable rental housing, since the majority of homes that are made available for rent on a short-term basis are vacation homes, which are neither affordable nor available for long-term rent in the first place.

## 21.07 RECOMMENDED TALKING POINTS: PROS AND CONS

### PROS:

- Rental restrictions can result in greater compliance with maintenance, buildings, and nuisance codes than complaint-driven systems, which can be inefficient and inconsistent;
- Rental restrictions can stabilize neighborhoods that are threatened by short-term disruptive activities,<sup>75</sup> and can prevent minor code violations from developing into significant health or safety problems;<sup>76</sup>
- Rental property registrations can increase accountability for rental properties, particularly for properties with absentee landlords; and
- Short-term rental registration and licensing programs can facilitate collection of municipal taxes on short-term rentals, a potentially significant source of tax revenue, particularly for communities with a robust tourist industry.<sup>77</sup>

### CONS:

- Depending upon the type of community (e.g., vacation destination community or non-vacation destination community) rental restrictions may decrease the amount of affordable rental units available in a community;
- Rental restrictions that prohibit renting without a permit or license, or that impose warrantless inspections, infringe upon the core right of property owners to rent their properties and raise federal and state constitutional issues;
- Rental restrictions burden property owners' right to rent their properties, which can result in a significant economic loss for many owners;
- A rental restriction that results in members of a protected class (e.g., families with children) being denied access to residential rentals in significantly greater numbers than tenants who are

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<sup>74</sup> Wiley Rogers, "Affordable Housing in the Rockies: Housing a Region in Transition" at 66, 67 (2008 Colorado College State of the Rockies Report Card) (available online at <https://www.coloradocollege.edu/dotAsset/293cae6f-8a9e-4a33-bff0-d37f17197b3b.pdf>).

<sup>75</sup> *Home Sweet Home?* at 61.

<sup>76</sup> See Gary, IN, Rental Registration/Inspection Program Fact Sheet, [http://www.gary.in.us/building-department/pdf/Rental\\_Registration\\_Fact\\_Sheet.pdf](http://www.gary.in.us/building-department/pdf/Rental_Registration_Fact_Sheet.pdf).

<sup>77</sup> See Jennifer M. Leaphart, *Sharing Solutions?: An Analysis of Taxing the Sharing Economy in the United States and Europe*, 91 TULANE L. REV. 189, 195 (Nov. 2016) (noting that Airbnb collected and remitted an estimated \$20 million in state occupancy taxes); see also RESIDENTIAL RENTALS WHITE PAPER §§ 3.1(m); 6.5; 9.4.

not members of a protected class—for example, by limiting the number of unrelated people who can live together, but not the number of related people who can live together—raises concerns under the federal Fair Housing Act and state fair housing laws.

- Rental restrictions, particularly ordinances that require registration, inspections, and other actions on behalf of the local government, can require significant resources to implement and can be time-consuming; and
- Rental restrictions may be duplicative of existing maintenance, nuisance, and building codes, in which case, the purported need for the rental restrictions could be better or more efficiently addressed by increasing code enforcement.

## 21.08 INCENTIVE-BASED ALTERNATIVES

Municipalities can adopt housing policies that promote longer-term occupancy by renters as well as owners in order to attract renters who are invested in their communities. In addition, local governments could consider rental subsidies for low-income renters in order to offset any reduction in the supply of affordable housing as a result of rental restrictions.<sup>78</sup> To encourage landlords to invest in, and upgrade, their rental buildings, local governments could provide a variety of incentives, including fast-track approval for permits for upgrades or repairs; reduced fees for permits or licenses if the property complies with maintenance and building codes; or tax incentives for upgrades that meet housing affordability standards.<sup>79</sup> Local governments can also consider subsidizing landlords' investments in improving energy efficiency in rental buildings, such as through loans or grants for property improvements or tax credits for improving energy efficiency. Tenants typically pay directly for their energy use so such incentives for improving energy efficiency could have the effect of improving the quality of the housing while also making tenants' monthly payments for energy more affordable.<sup>80</sup>

Local governments can also provide educational programs and support systems to encourage landlords to be more responsible with respect to maintaining their properties such as through training and information sessions.<sup>81</sup> For example, in Utah, where cities impose a fee or tax on rental housing based on the disproportionate costs of municipal services caused by the rental housing (e.g., for a higher number of police calls, greater calls for emergency response, etc.), state law requires those cities to establish a “good landlord program” to allow the landlords to qualify for a reduction in such fees. Under the program, the landlord qualifies for a fee reduction by completing a landlord training program approved by the city, by implementing measures to reduce crime, and by operating and managing the rentals in accordance with applicable municipal ordinances.<sup>82</sup>

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<sup>78</sup> See *America's Rental Housing: Evolving Markets and Needs*, HARVARD UNIVERSITY: JOINT CENTER FOR HOUSING STUDIES at 7 (2013); see also *America's Rental Housing*, HARVARD UNIVERSITY: JOINT CENTER FOR HOUSING STUDIES at 8 (2022).

<sup>79</sup> See *America's Rental Housing: Evolving Markets and Needs* at 21 (2013); see *America's Rental Housing*, at 6-8 (2022); Alan Mallach, *Meeting the Challenge of Distressed Property Investors in America's Neighborhoods*, at 72 (2010), available at <https://www.lisc.org/our-resources/resource/meeting-challenge-distressed-property-investors-america-neighborhoods/>.

<sup>80</sup> *America's Rental Housing* at 7 (2022).

<sup>81</sup> Mallach, *Meeting the Challenge of Distressed Property Investors in America's Neighborhoods* at 68.

<sup>82</sup> Utah Housing Coalition, “What is the ‘Good Landlord Program’” (Apr. 19, 2011); Utah Code § 10-1-203.5.

## SECTION 22: INCLUSIONARY ZONING/HOUSING

### 22.01 PURPOSE AND KEY TERMS

Inclusionary zoning is a technique that originated in the 1970s to generate affordable housing by incentivizing or requiring developers to set aside a percentage of housing units at below-market prices.<sup>1</sup> Inclusionary zoning relates to “Smart Growth” objectives in several ways. By providing housing for all market levels, it furthers the social goal of sustaining a balanced, diverse community.<sup>2</sup> When new development includes affordable housing, the development of lower-cost, outlying land to achieve housing affordability is, in theory, curbed. Where growth management/growth control measures either encourage gentrification of older areas or increase the cost of housing by severely limiting land available for development, inclusionary zoning attempts to ensure that affordable housing gets built, countering the exclusionary effects of growth management programs.<sup>3</sup>

The National Association of Homebuilders (NAHB) comments:

Millions of American families struggle to find housing at a price they can afford as the gap between incomes and the cost of housing grows larger every year. Many families are forced to commute long distances, pay a disproportionate share of their incomes on housing, or live in housing that does not meet their needs.

The reasons for this gap are many. Local governments have developed plans that foster job growth but do not provide sufficient housing for workers, and some discourage or limit multifamily housing. Elaborate planning and zoning schemes, or outdated ones, make it difficult to develop land and a variety of housing types, especially the affordable housing needed to keep up with demand. Complex, lengthy, and uncertain development approval processes, fees imposed on new housing and environmental requirements constrain the availability of developable land and drive up the cost of housing. Those resisting higher density development (often referred to as NIMBY groups) have become more sophisticated and organized over time to deter growth and development.<sup>4</sup>

The interrelationship of sprawl and affordable housing described as follows in a 2019 study of anti-sprawl policies in the United States by the Cascade Policy Institute:

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<sup>1</sup> Kriti Ramakrishnan, Mark Trekson & Solomon Greene, *Inclusionary Zoning, What Does the Research Tell Us about the Effectiveness of Local Action?*, URBAN INSTITUTE at 1 (January, 2019), available online at: [https://www.urban.org/sites/default/files/publication/99647/inclusionary\\_zoning\\_what\\_does\\_the\\_research\\_tell\\_us\\_about\\_the\\_effectiveness\\_of\\_local\\_action\\_2.pdf](https://www.urban.org/sites/default/files/publication/99647/inclusionary_zoning_what_does_the_research_tell_us_about_the_effectiveness_of_local_action_2.pdf).

<sup>2</sup> Angela Glover Blackwell, President of Oakland (CA) based Policy Link, states that while the smart growth movement aims to promote “the three Es of sustainable development ... Environment, Economy and Equity,” thus far the discussion has focused on the first two.” See “Downside to Fixing Up Cities: ‘Smart Growth’ Policies May Hurt Poor Residents,” *Sacramento Bee* (Sept. 25, 2000).

<sup>3</sup> “There is no doubt in the minds of economists who have studied [growth management laws] that they make housing less affordable” Randal O’Toole, Using Disparate Impact to Restore Housing Affordability and Property Rights in Colorado, at 5 (Feb. 2017), [https://i2i.org/wp-content/uploads/2015/01/IP-1-2017\\_d-mike.pdf](https://i2i.org/wp-content/uploads/2015/01/IP-1-2017_d-mike.pdf).

<sup>4</sup> National Association of Home Builders, *Inclusionary Zoning Primer*, (August 2019), available online at: <https://www.nahb.org/-/media/NAHB/advocacy/docs/industry-issues/land-use-101/state-local-affordability/inclusionary-zoning-primer-082019.pdf>.

In summary, this study finds anti-sprawl policy to have been implemented in a manner that has pernicious effects on housing affordability. Specifically, regulatory constraints on site supply have caused an on-going crisis of housing supply and affordability. In many markets, the development of land for housing is regulated too aggressively. Additionally, existing and new programs for addressing housing affordability rely on other regulation and spending programs that will not have the designed effect of providing affordable housing. This study strongly recommends, instead, relaxation of regulations that limit the land area available for housing development. Any residual concerns about sprawl should be addressed by reforming current highway and transit pricing and finance practices, which are known to be economically inefficient.<sup>5</sup>

Inclusionary zoning seeks to respond to these problems by creating “affordable housing by encouraging or requiring developers to set aside a percentage of housing units to be sold or rented at below-market prices.”<sup>6</sup> This technique may be applied to both rental and owned units, and single-family and multi-family housing.<sup>7</sup> Inclusionary zoning can rely on mandatory or incentive features to achieve its purpose but, in either case, requires dedication of a percentage of units being proposed in a housing development.

Inclusionary zoning is often confused with **housing linkage**. Both mechanisms for producing affordable housing through new development. Linkage, which is further addressed in Section 23 of this book, is a type of local regulation that requires or induces developers of office buildings or other, typically “downtown” non-residential uses to build housing, to pay a fee in-lieu of construction into a housing trust fund, or to make equity contributions toward the development of low-income housing.<sup>8</sup> The rationale behind linkage is “that office development attracts new residents to the city which in turn increases the need for housing.”<sup>9</sup> In practice, the distinctions are often blurred, with many “inclusionary” programs allowing payments to housing trust funds or other alternative measures as alternatives to actually providing the housing.

The purposes of inclusionary zoning regulations are:

1. Creation of low and moderate income, “affordable,” housing units, including what is now called “workforce” housing;
2. Private sector subsidy for construction, achieved either by distributing the cost of such units among the market-rate units and/or by lowering the per-unit development cost by increasing density;
3. Sometimes, achieving economic integration by making affordable units indistinguishable from market rate units and locating them within market-rate developments.<sup>10</sup>

Inclusionary zoning programs typically include the following elements:

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<sup>5</sup> Randall Pozdena, *The Housing Affordability Crisis: The Role of Anti-Sprawl Policy*, Cascade Policy Institute (January 2019).

<sup>6</sup> Ramakrishnan, at 1.

<sup>7</sup> *Id.* at 2.

<sup>8</sup> Douglas W. Kmiec and Katherine Kmiec Turner, § 11:12. *General construction taxes—Linkage of development to social goals*, 2 ZONING & PLAN. DESKBOOK § 11:12 (2d ed., 2021 update).

<sup>9</sup> *Id.*

<sup>10</sup> See generally Christina Plerhoples Stacy, Jorge Morales-Burnett, Eleanor Noble, Timothy Hodge & Timothy Komarek, *Inclusionary Zoning, How Different IZ Policies Affect Tenant, Landlord, and Developer Behaviors*, URBAN INSTITUTE (July 2021) (hereinafter “Stacy”) available online at:

[https://www.urban.org/sites/default/files/publication/104631/inclusionary-zoning-how-different-iz-policies-affect-tenant-landlord-and-developer-behaviors\\_0.pdf](https://www.urban.org/sites/default/files/publication/104631/inclusionary-zoning-how-different-iz-policies-affect-tenant-landlord-and-developer-behaviors_0.pdf).

- A density or other bonus to those who participate (for voluntary programs, the bonus is the incentive; for mandatory programs, it is used as compensation to avoid a “takings” claim);
- A percentage of units required to be affordable (typically between 10 to 20%);
- Income limits for eligible buyers or renters;
- A distribution mechanism (lottery or other method);
- Pricing criteria for the affordable units;
- A term of years that the unit must remain affordable; and
- Building standards, including how affordable units are designed and located.<sup>11</sup>

Key terms in the area of affordable housing and inclusionary zoning are:

**Affordable Housing:** Affordability is usually defined as “affordable” to a family whose income is at or below household median income for a defined locale. For example, the Town of Cary in Wake County, North Carolina, in its 2020 Affordable Housing Plan, assesses the local housing needs for Low Income (30% to 50% of Area Median Income (“AMI”)), Moderate Income (51% to 80% AMI) and Middle Income (81% to 120%) AMI renters and homebuyers.<sup>12</sup> The NAHB-Wells Fargos Housing Opportunity Index (“HOI”) measures the percentage of homes sold that a family earning the median income can buy based on standard mortgage underwriting criteria.<sup>13</sup> The HOI incorporates “information on state, county, date of sale, and sales price of homes sold. The monthly principal and interest that an owner would pay is based on the assumption of a 30 year fixed rate mortgage, with a loan for 90 percent of the sales price (i.e., 10 percent down payment).”<sup>14</sup> In addition to principal and interest, cost also includes estimated property taxes and property insurance for that home.<sup>15</sup> Another common standard is that a family pay no more than 30% of its annual income.<sup>16</sup>

**Incentive Zoning:** The use of zoning bonuses originated in New York City and Chicago during the 1950s and 1960s, when those cities wanted certain public amenities (such as plazas and arcades) or design features (such as greater building setbacks) without the expenditure of public funds. Incentive zoning offers bonuses, usually in the form of increased density of units, floor area ratio or building height, in exchange for the provision of specified amenities, which now encompass infill or mixed use development and transit oriented development, as well as affordable housing.<sup>17</sup>

**Inclusionary Zoning:** An ordinance that either ties development approval to, or creates regulatory incentives for, the provision of low or moderate income housing as part of a proposed market rate development.<sup>18</sup>

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<sup>11</sup> Joyce Siegel, *Inclusionary Zoning Around the Country* (Baltimore, MD: Innovative Housing Institute, 2 March 2000) (Siegel); *see also* Ramakrishnan, at 2; *see generally* Stacy.

<sup>12</sup> Town of Cary, North Carolina, *2020 Affordable Housing Plan*, available at <http://www.townofcary.org/home/showdocument?id=676>.

<sup>13</sup> *See* NAHB-Wells Fargo Housing Opportunity Index, available at <https://www.nahb.org/news-and-economics/housing-economics/indices/housing-opportunity-index>.

<sup>14</sup> *Id.*

<sup>15</sup> *See id.*

<sup>16</sup> For example, this standard is used in Connecticut, C.G.S. Section 8-30g(6), Affordable Housing Land Use Appeals (Chapter 126a), to define the affordable units to be set aside. This statute, like many others, also defines income eligibility as 80% of area median income.

<sup>17</sup> Mary Morris, “Using Zoning Bonuses for Smart Growth and Development,” *Zoning News* at 1-4, (American Planning Association, July 2000).

<sup>18</sup> Stacy, at 3.



**Moderate, Low and Very Low Income:** Most state and local programs that address affordable housing rely on definitions and income levels established by the U.S. Dept. of Housing and Urban Development (“HUD”). However, between programs there is some variance in the distinctions between “moderate,” “low,” and “very low” income. For example, the federal tax credit for low-income housing refers to “very low income” as “at or below 50 percent of the area median gross income” and low income as at or below 80 percent.<sup>19</sup> HUD defines income levels as follows:

- Middle – 81 to 100% of area median income;
- Moderate – 51 to 80% of area median income;
- Low – 31 to 50% of area median income; and
- Extremely Low – less than 30% of area median income.<sup>20</sup>

Generally speaking, inclusionary zoning has not been used as a tool for creating housing for households at the extremely low income level.<sup>21</sup>

## 22.02 EFFECTIVENESS IN ACHIEVING STATED PURPOSE(S)

The key elements for an effective inclusionary zoning program are:

- Mandatory vs. Voluntary: “Some jurisdictions *require* affordable housing development (or payment to a housing trust fund), while others *encourage* it through incentives like allowing additional building density or height, reducing the number of required parking spaces, waiving fees, or simplifying the public approval process (such as no public hearing on projects of a certain size).”<sup>22</sup>
- Required Affordability Percentage: This is “the ratio of market-rate to affordable units that housing developers must have to obtain a residential permit. Square footage may also be considered. Some cities require affordable units to be a minimum size (e.g. two bedrooms) to increase the amount of housing for families.”<sup>23</sup> For example, in San Jose, California, in a for-sale residential development (on-site units) 15% of the units must be affordable at 110% of AMI and sold to households making at most 120% of AMI. For residential rental projects, either 5% of the units must be affordable for households at 100% AMI, 5% must be affordable for households at 80% AMI and 5% of the units must be affordable to households at 50% AMI, or 10% of the units must be affordable to households at 30% AMI.<sup>24</sup>
- Target Affordable Unit Income Ranges: The ordinance should determine the income ranges for households occupying the affordable units based on careful study of the community’s affordable housing needs and in a manner consistent with any requirements under state law regarding affordable housing production. Along with the affordability percentage, this ordinance element is critical in determining the burden placed on developers in an inclusionary zoning program. An informed decision needs to be made whether and to what extent units should be targeted at households in the moderate-income or “work force housing” range (households earning from

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<sup>19</sup> U.S. Department of Housing and Urban Development, “FY 2022 Income Limits,” available at [https://www.huduser.gov/portal/datasets/il.html#2022\\_query](https://www.huduser.gov/portal/datasets/il.html#2022_query).

<sup>20</sup> Irving Texas, “Housing and Urban Development (HUD) Income Guidelines”, available online at: <https://www.cityofirving.org/564/HUD-Income-Guidelines>.

<sup>21</sup> Ramakrishnan, at 7.

<sup>22</sup> Stacy, at 3.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 8.

80% to 120% of AMI, as opposed to low- to very low-income households (households earning from 50% to 80% and less than 50%, respectively, of AMI), or some mixture of the two.<sup>25</sup>

- Compliance Alternatives: The ordinance should provide for alternatives (such as in-lieu fees) for developments that cannot satisfy the inclusionary requirement due to an unusually high cost of construction or other problems for a particular site. But in-lieu fees, if too low, may not generate enough money to construct housing units, and the collection of funds, by itself, does nothing to get the housing built.<sup>26</sup> In addition, available sites for housing constructed with in-lieu fee revenue may lack proximity to transit, job centers, and other amenities, leading to higher transportation costs for residents.
- Incentives and Mitigation: Incentives such as a development bonus, expedited permitting procedures, or other regulatory changes to increase residential development capacity should accompany inclusionary zoning. This will help offset the financial impact of inclusionary requirements and fees.
- Affordable and Market-Rate Unit Integration: Inclusionary units should be integrated within the project so as not to be distinguishable from the market-rate units.<sup>27</sup>
- Applicability Based on Project Size: An appropriate threshold for development size subject to an inclusionary requirement should be established. For example, in Davis, California, the threshold is 5 units or more,<sup>28</sup> while in Montgomery County, Maryland, the threshold is much higher at 20 units or more.<sup>29</sup>
- Affordability Control Period: The time period for retaining affordable units can vary widely. In Montgomery County, Maryland, there is a 99-year affordability term for rental units and a 30-year term on for-sale units that “restarts” if the unit is sold during the control period.<sup>30</sup> In New Jersey, all inclusionary housing units must be affordable for a period of at least 30 years.<sup>31</sup> A nationwide study conducted in 2016, found that at least 90% of inclusionary housing programs had affordability requirements that lasted for 30 years or longer, which can viewed a local government’s commitment to the preservation of affordable housing within the community.<sup>32</sup>

In a comparison of inclusionary housing programs pre-2007 and post-2007, newer programs (post-2007) were more likely to apply to certain zones, neighborhoods or districts; were less likely to use expedited

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<sup>25</sup> See *id.* at 6-7.

<sup>26</sup> Emily Thaden & Ruoniu Wang, *Inclusionary Housing in the United States – Prevalence, Impact, and Practices*, LINCOLN INSTITUTE OF LAND POLICY at 57 (September 2017), available online at: <https://www.lincolninst.edu/publications/working-papers/inclusionary-housing-in-united-states>.

<sup>27</sup> Stacy, at 4.

<sup>28</sup> Siegel at 2; Davis, CA Municipal Code, Chapter 18 “Housing”, Section 18.05.050.

<sup>29</sup> Montgomery County, MD Department of Housing and Community Affairs, *History of the MPDU Program*, available online at: <https://www.montgomerycountymd.gov/DHCA/housing/singlefamily/mpdu/history.html>.

<sup>30</sup> *Id.*, see also Casey Dawkins, Jae Sik Jeon, and Gerrit-Jan Knaap, *Creating and Preserving Affordable Homeownership Opportunities: Does Inclusionary Zoning Make Sense?*, JOURNAL OF PLANNING EDUCATION AND RESEARCH, Vol. 37(4) at 447 (2016).

<sup>31</sup> Ruoniu Wang & Sowmya Balachandran, Grounded Solutions Network, *Inclusionary Housing in the United States, Prevalence, Practices and Production in Local Jurisdictions as of 2019*, p. 30, available online at: <https://groundedsolutions.org/tools-for-success/resource-library/inclusionary-housing-united-states>.

<sup>32</sup> Thaden, at 57.



permitting as an incentive; were less likely to use in-lieu fees as an alternative for developers; and were more likely to allow developers to preserve or rehabilitate existing housing.<sup>33</sup>

### ***Creation of Affordable Housing***

The design of inclusionary programs across the country varies significantly and while many are mandatory, some jurisdictions provide voluntary, or incentive-based-only programs.<sup>34</sup> One major criticism of inclusionary programs is that they may be effective in producing meaningful levels of affordable housing in some jurisdictions, but have made a small impact on affordable production nationwide.<sup>35</sup> Inclusionary housing programs must consider local market conditions and balance the economic impacts of a policy against the desire to create affordable housing.<sup>36</sup> Several jurisdictions where inclusionary housing programs have succeeded or have fallen short of expectations in producing affordable housing are discussed below.

*California:* By 2019, 162 municipalities in California had adopted inclusionary programs.<sup>37</sup> There is significant local variation “in terms of targeted income groups and the size of projects that were subject to the affordability requirements.”<sup>38</sup> For example, the City of Davis requires that residential rental projects totaling 5-19 units to set aside 25% of the units as affordable (15% for low income households and 10% for very low income households), while projects with twenty or more units must set aside 35% of the units as affordable (25% for low income households and 10% for very low income households).<sup>39</sup> As of 2020, the City issued building permits for a total of 1,371 inclusionary housing units, including 147 very low income units, 151 low income units, 412 moderate income units, and 661 above moderate units.<sup>40</sup> San Mateo County requires a 20% set aside for multi-family ownership developments with five or more units, with affordability restrictions for very low, low, or moderation-income households.<sup>41</sup> Between 2018 and July 2022, the San Mateo County program produced 108 affordable units.<sup>42</sup>

*New Jersey:* As a result of two exclusionary zoning lawsuits, *Mount Laurel I* in 1975 and *Mount Laurel II* in 1983, the state required all jurisdictions to develop and implement mandatory “fair share” housing programs targeted to people below 80% of are median income. Although more than 55,000 units reportedly had been produced as of 1999, a subsequent report estimated that only 15,000 affordable homes had actually been built. Of those, 6,300 were built in high poverty urban neighborhoods, contrary to the anti-exclusionary intent of the *Mount Laurel* decisions.<sup>43</sup>

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<sup>33</sup> *Id.* at 49.

<sup>34</sup> Thaden, at 56; *see also* Robert Hickey, Lisa Sturtevant, & Emily Thaden, *Achieving Lasting Affordability through Inclusionary Housing* at 3 (Lincoln Institute of Land Policy, 2014) (*hereinafter* Hickey).

<sup>35</sup> Hickey, at 4.

<sup>36</sup> Thaden, at 2.

<sup>37</sup> Ruoniu Wang & Sowmya Balachandran, Grounded Solutions Network, *Inclusionary Housing in the United States, Prevalence, Practices and Production in Local Jurisdictions as of 2019*, pp. 15-16, available online at: <https://groundedsolutions.org/tools-for-success/resource-library/inclusionary-housing-united-states>.

<sup>38</sup> Hickey, at 3.

<sup>39</sup> Davis, CA Municipal Code § 18.05.060(a).

<sup>40</sup> California Department of Housing and Community Development, “Annual Progress Reports – Data Dashboard and Downloads”, available online at: <https://www.hcd.ca.gov/apr-data-dashboard-and-downloads>.

<sup>41</sup> County of San Mateo Housing Element 2014-2022, available online at: <https://www.smcgov.org/media/73656/download?inline=>.

<sup>42</sup> California Department of Housing and Community Development, “Annual Progress Reports – Data Dashboard and Downloads”, available online at: <https://www.hcd.ca.gov/apr-data-dashboard-and-downloads>

<sup>43</sup> David Rusk, “Overcoming America’s Core Problem: Concentrated Poverty,” in *Cities in the 21st Century*, Urban Land Institute, 2000, Washington, DC (“Rusk”), *Mt. Laurel – More Honored in the Breach*, sidebar in Rusk, at 20.

The ineffectiveness of the New Jersey program has been attributed to the fact that the regional fair share housing allocation is not mandatory. “[A]s in California, much of the early progress made in bringing municipalities into compliance with the court’s ruling came at the hands of local legal action. In dozens of cases, community advocates sued local governments which had failed to outline effective plans to meet their housing needs...Ironically, it is now developers—seeking density bonuses from reluctant zoning boards—who bring most of the *Mount Laurel* cases to court.”<sup>44</sup>

In 2017 the Fair Housing Act Administration of the New Jersey Department of Community Affairs was established to assist municipalities with their affordable housing programs. According to a 2019 study of all inclusionary zoning programs, 222 municipalities in New Jersey had inclusionary zoning programs, the most of any state in the United States.<sup>45</sup> As of 2016, New Jersey had produced a total of 34,631 affordable housing units through its inclusionary zoning programs.<sup>46</sup>

*Virginia:* The state authorized voluntary inclusionary programs in 1990 and mandatory programs in 1997. After Fairfax County’s 1970 inclusionary zoning ordinance was declared unconstitutional, a system of “proffers” was used until 1997. The current program, which is modeled on Maryland’s MPDU System, set a goal of producing a minimum of 10,000 new homes by the year 2034 at 60% AMI or below.<sup>47</sup> Fairfax County also committed to having no net loss of affordable homes.<sup>48</sup> Between 2019 and April 2022, the County produced an additional 144 affordable homes and has 2,767 homes in the pipeline.<sup>49</sup> Arlington County has adopted a goal of producing 400 committed affordable housing units each year, and was close to the goal in fiscal year 2015, producing 375 units.<sup>50</sup> Since 2015, the County has added 3,626 committed affordable housing units, increasing its inventory by 49% in about six years.<sup>51</sup>

*Florida:* Inclusionary housing programs in Florida counties and municipalities suffered significantly during the great recession.<sup>52</sup> In Palm Beach County, of instance, the demand for development was so low that *no* projects were approved between 2006 and 2010, and therefore no affordable units were created as well.<sup>53</sup> Since the market has recovered substantially in many parts of Florida, towns like Jupiter, Florida have worked with the Florida Housing Coalition and Innovative Housing Institute to modify their existing inclusionary programs. In 2015, Jupiter adopted a new Workforce Housing Ordinance, which included a mandatory inclusionary percentage, density bonuses, and allowance for a payment in lieu.<sup>54</sup> After finding that developers were more willing to pay the fee in-lieu than to build affordable units, Jupiter eliminated

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<sup>44</sup> North Carolina Low Income Housing Coalition, *Fair Share Housing: New Jersey*.

<sup>45</sup> Ruoni Wang & Sowmya Balachandran, Grounded Solutions Network, *Inclusionary Housing in the United States, Prevalence, Practices and Production in Local Jurisdictions as of 2019*, pp. 15-16, available online at: <https://groundedsolutions.org/tools-for-success/resource-library/inclusionary-housing-united-states>.

<sup>46</sup> Thaden, at 34.

<sup>47</sup> Fairfax County Affordable Housing Dashboard, available online at: <https://www.fairfaxcounty.gov/housing/affordablehousingdashboard>.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> Arlington County, Meeting the Affordable Housing Challenge: Annual Affordable Housing Targets Report for FY 2015, <https://arlingtonva.s3.dualstack.us-east-1.amazonaws.com/wp-content/uploads/sites/15/2016/02/Annual-Affordable-Housing-Targets-Report-FY-2015.pdf>.

<sup>51</sup> 2022 Arlington County, VA Affordable Housing Master Plan Implementation Framework, available online at: <https://www.arlingtonva.us/files/sharedassets/public/housing/documents/affordable-housing/2022-ahmp-if-final.pdf>.

<sup>52</sup> National Association of Home Builders, *Inclusionary Zoning Primer*, August 2019, available online at: <https://www.nahb.org/-/media/NAHB/advocacy/docs/industry-issues/land-use-101/state-local-affordability/inclusionary-zoning-primer-082019.pdf>.

<sup>53</sup> *Id.*

<sup>54</sup> Memorandum from Jupiter Director of Planning & Zoning to Jupiter Mayor and Town Council, dated July 18, 2017, available online at: <http://www.ordinancewatch.com/files/82613/LocalGovernment118071.pdf>.

the in-lieu fee option, thereby requiring developers to construct a comparable or better unit on or offsite in order to meet their inclusionary obligations.<sup>55</sup>

*Colorado:* Boulder’s mandatory inclusionary housing program, adopted in 2000, followed 15 years of a voluntary inclusionary program that produced few results. In 2009, the program was updated to require new residential projects to provide at least 20% of their units as permanently affordable for low and moderate-income housing.<sup>56</sup> In 2018, the program was updated again to require that 5% of units be affordable for middle-income housing, in addition to the existing 20% requirement for low- and moderate-income housing.<sup>57</sup> As of June 2022, the City had produced over 3,800 affordable homes.<sup>58</sup>

*Massachusetts:* Boston’s Inclusionary Development Policy (“IDP”), adopted by the mayor as an Executive Order rather than by the City’s Zoning Commission as an amendment to the zoning code, requires a 13% on-site affordable housing set-aside for all market-rate residential development projects of 10 or more units seeking zoning relief.<sup>59</sup> The required set-aside increases to 15% or 18% for off-site units, depending on the location of the proposed residential development.<sup>60</sup> Alternatively, a developer can contribute to the Inclusionary Development Policy Fund, which is used by the Department of Neighborhood Development to fund the creation of affordable/income restricted housing across Boston.<sup>61</sup> Boston has the largest percentage of affordable housing of any major United States city.<sup>62</sup> In January 2021, the Massachusetts State Legislature approved a Home Rule Petition that allows Boston to codify inclusionary development into the zoning code. Through 2021, almost 3,600 on-site and off-site income-restricted units have been created through the IDP, while the fund has supported the construction or preservation of nearly 2,500 additional income-restricted units.<sup>63</sup> In 2022, Boston commenced efforts to update the IDP, including possibly increasing the set-aside to 20% affordable unit, deepening the affordability requirements, increasing contribution fees to the IDP Fund, and other reforms so as to better meet Boston’s housing needs.<sup>64</sup>

Massachusetts General Laws Chapter 40B, a state statute to promote affordable housing within the Commonwealth, sets a goal of at least 10% of housing stock in each community to be affordable.<sup>65</sup> Chapter 40B provides a comprehensive permitting scheme to incentivize developers to build, as long as 25% or more homeownership units are affordable to households at 80% AMI or as long as 20% or more rental units are affordable to households at 50% AMI.<sup>66</sup>

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<sup>55</sup> *Id.*; see also Town of Jupiter, FL Municipal Code, Chapter 27, Article XI, Division 44.

<sup>56</sup> City of Boulder, Inclusionary Housing – Expanding Affordable Housing Options, available online at: <https://bouldercolorado.gov/services/inclusionary-housing>.

<sup>57</sup> *Id.*

<sup>58</sup> City of Boulder, Affordable Housing Goals, available online at: <https://bouldercolorado.gov/guide/affordable-housing-boulder#:~:text=The%20city%20has%20come%20a,account%20for%20market%20rate%20developments>.

<sup>59</sup> Boston Inclusionary Development Policy, available online at: <https://www.bostonplans.org/getattachment/91c30f77-6836-43f9-85b9-f0ad73df9f7c>.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> Urban Land Use Institute, Overcoming Barriers to Affordable Housing in Colorado (2016), available online at: <http://nwccog.org/edd/wp-content/uploads/2019/04/Overcoming-barriers-to-affordable-ULI-CO-report-9-30-16-1.pdf>.

<sup>63</sup> City of Boston, *Progress Toward Reforming Inclusionary Development Policy and Commercial Linkage Program Announced*, April 20, 2022, available online at: <https://www.boston.gov/news/progress-toward-reforming-inclusionary-development-policy-and-commercial-linkage-program>.

<sup>64</sup> *Id.*

<sup>65</sup> Thaden, at 29.

<sup>66</sup> *Id.* at 29-30.

## *Private Sector Subsidy*

The Urban Land Use Institute (“ULI”) has concluded that the single most important factor in creating affordable housing through inclusionary policy “is a significant and sustained level of market-rate development in the local market.”<sup>67</sup> Although some studies have questioned the effectiveness of inclusionary programs and noted the potential to depress market conditions, the bulk of evidence suggests that inclusionary programs do lead to the creation of affordable housing.<sup>68</sup> However, “careful attention to the design details and the structuring of incentives is critical to avoid adverse effects.”<sup>69</sup> ULI found that some markets, such as Fairfax County, Virginia; Montgomery County, Maryland; Palm Beach County, Florida; and several in southern California, have been successful in achieving significant, new, below-market rate production.<sup>70</sup> On the other hand, inclusionary programs have fallen short in a variety of markets for at least three reasons:

- Insufficient levels of new market-rate development;
- Shortcomings in program design and administration; and
- Lack of adequate development incentives.<sup>71</sup>

Development incentives may not be necessary in jurisdictions with a robust enough market so that market-rate units offset or subsidize below-market rents. When this is not the case, however, incentives such as direct subsidies, tax abatements, density bonuses, or reduced parking requirements should be offered to substantially offset the loss of economic value associated with inclusionary requirements.<sup>72</sup>

A 2019 report on inclusionary housing programs throughout the United States found that only 4% of programs involved a direct public subsidy incentive for developers.<sup>73</sup> In Montgomery County, Maryland, private developers have constructed all the units, but the public housing agency or other nonprofit has the option of purchasing them. This is a provision adopted by many other jurisdictions as well, guaranteeing a market for the units and long-term control over resale and affordability. Combining voluntary inclusionary measures with incentives such as density bonuses and restrictive underlying zoning is more likely to produce results.

The fundamental question underlying inclusionary zoning is whether it is right to place the burden of producing affordable housing on the individual developer rather than on the community as a whole, particularly where an existing housing shortage is to be rectified.<sup>74</sup> Proponents view inclusionary zoning as a feasible way for developers to assist with a community problem, while opponents charge that it will raise the cost of existing and new homes and shift a problem created by government policies to the developers. The debate continues.<sup>75</sup>

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<sup>67</sup> Urban Land Use Institute, *The Economics of Inclusionary Development*, p. IX (2016), available online at: <https://uli.org/wp-content/uploads/ULI-Documents/Economics-of-Inclusionary-Zoning.pdf>.

<sup>68</sup> *Id.* at 7.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 6.

<sup>71</sup> *Id.* at 7.

<sup>72</sup> *Id.* at 12.

<sup>73</sup> Ruoniu Wang & Sowmya Balachandran, Grounded Solutions Network, *Inclusionary Housing in the United States, Prevalence, Practices and Production in Local Jurisdictions as of 2019*, pp. 15-16, available online at: <https://groundedsolutions.org/tools-for-success/resource-library/inclusionary-housing-united-states>.

<sup>74</sup> See generally Ramakrishnan.

<sup>75</sup> Ramakrishnan at 1, 4-5.

## ***Economic Integration***

Inclusionary zoning achieves the purpose of creating economically integrated communities when affordable units are constructed within a market rate project. Allowing developers to pay a fee-in-lieu or construct affordable housing units off-site diminishes the integration effect, but may still have a positive impact where units built off-site supports the mixed-income goal.<sup>76</sup> Many inclusionary programs in California require the affordable units to look like the market-rate units. Dispersal throughout the project and equal site access are also common requirements that help achieve the goal of integration.<sup>77</sup>

In New Jersey, only seven percent (7%) of the new suburban affordable housing is occupied by former city residents. “Most suburban affordable housing is occupied by elderly suburbanites or children of current residents seeking starter homes in the communities where they grew up. These are worthwhile goals, but they are not the primary goals of the New Jersey Supreme Court’s *Mt. Laurel* decision which sought to eliminate exclusionary zoning.”<sup>78</sup>

## ***Legal Challenges to Inclusionary Zoning***

In the early 1970s the Virginia Supreme Court struck down Fairfax County’s first-in-the-nation mandatory inclusionary zoning ordinance, which required a 15% set-aside, as beyond the county’s authority under Virginia’s zoning enabling statute and a taking of private property without just compensation under the Virginia Constitution.<sup>79</sup> In 2006, the Wisconsin Supreme Court voided the City of Madison’s inclusionary zoning requirement with respect to rental units, holding that the inclusionary requirement was preempted by a state statute prohibiting rent control.<sup>80</sup> Whether a municipality has the authority to adopt a mandatory inclusionary zoning program depends upon the applicable zoning enabling statute, whether that authority is preempted by other state statutes, and the holdings of state court regulatory takings decisions.<sup>81</sup>

Some commentators also believe that inclusionary housing programs are exactions subject to scrutiny under United States Supreme Court takings jurisprudence since the decision in *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013).<sup>82</sup> *Koontz* explicitly extended judicial scrutiny to payments negotiated by municipalities to off-set development approvals by requiring that such negotiated payments pass the “essential nexus” and “rough-proportionality” 5th Amendment takings analysis.<sup>83</sup> However, appellate court cases have upheld the validity of mandatory inclusionary zoning programs,

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<sup>76</sup> Rusk at 20, citing a separate Seton Hall University study; *see also BPI Study* at 17-18.

<sup>77</sup> Siegel at 3.

<sup>78</sup> Rusk at 20.

<sup>79</sup> *Board of Supervisors of Fairfax County v. Degroff Enterprises, Inc.*, 198 S.E.2d 600 (Va. 1973).

<sup>80</sup> *Apartment Ass’n of South Cent. Wisconsin, Inc. v. City of Madison*, 296 Wis.2d 173 (2006).

<sup>81</sup> Arden H. Rathkopf, Daren A. Rathkopf, Edward H. Ziegler, Jr., *Inclusionary Zoning – Legal Validity – Ultra Vires and Takings Claims*, 2 RATHKOPF’S THE LAW OF ZONING AND PLANNING § 22:28 (4th ed., November 2021 update).

<sup>82</sup> BRIAN W. BLAESSER, DISCRETIONARY LAND USE CONTROLS: AVOIDING INVITATIONS TO ABUSE OF DISCRETION § 1:38 (Thomson-Reuters, August 2021 Update).

<sup>83</sup> *See* Ray Demers & Michael A. Spotts, *Will an Under-the-Radar Supreme Court Case Create Challenges for Affordable Housing and Sustainable Development?* (Oct. 22, 2013) (“Negotiated fees in-lieu of restrictions (possibly including inclusionary zoning requirements) will have to meet these standards as well.”). *See also* Chelsea Maclean, *Inclusionary Housing After Koontz*, 66 PLANNING & ENV. LAW 10 (2014); David L. Callies & Benjamin Kudo, *Land Development Conditions After Koontz v. St. Johns River Water Management District: Sic Semper Nexus and Proportionality*, American Bar Association Section of State and Local Government Law (2013), available at: [http://www.americanbar.org/content/dam/aba/events/state\\_local\\_government/2013/08/Planning\\_materials.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/state_local_government/2013/08/Planning_materials.authcheckdam.pdf).



before and after the *Koontz* case.<sup>84</sup> In *California Building Industry Association v. City of San Jose*,<sup>85</sup> the California Supreme Court held that San Jose’s mandatory inclusionary housing ordinance, which required new development projects to sell 15% of units at affordable prices, was not a regulatory taking subject to the unconstitutional conditions doctrine, but was merely “an example of a municipality’s permissible regulation of the use of land under its broad police power.”<sup>86</sup> A similar outcome, based on similar reasoning, was reached by the Northern District of Illinois, when it held that Chicago’s Affordable Requirements Ordinance, which requires market rate developers to either set aside affordable units or pay a fee, did not impose a per se or regulatory taking.<sup>87</sup> The court stated that, in contrast to “unconstitutional conditions” that were imposed in the *Nollan*, *Dolan*, and *Koontz* cases, Chicago’s mandatory inclusionary requirement was not a seizure of property, but merely a restriction on the *use* of property:

Because a permissible use restriction does not violate the Constitution, such a restriction cannot be an unconstitutional condition, and so does not even require consideration of the *Nollan/Dolan* test.<sup>88</sup>

Whether or not the holdings in the San Jose and Chicago cases—that the unconstitutional conditions doctrine does not apply to legislatively adopted conditions on land use approvals—are consistent with Supreme Court precedent is an issue that is primed for Court review.<sup>89</sup> Justice Thomas concurred in the denial of certiorari in the *San Jose* case, and observed:

For at least two decades ... lower courts have divided over whether the *Nollan/Dolan* test applies in cases where the alleged taking arises from a legislatively imposed condition rather than an administrative one. That division shows no signs of abating... Until we decide this issue, property owners and local governments are left uncertain about what legal standard governs legislative ordinances and whether cities can legislatively impose

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<sup>84</sup> See, e.g., *In re Egg Harbor Associates*, 464 A.2d 1115 (N.J. 1983); *Home Builders Association of North California v. City of Napa*, 89 Cal.App.4th 897 (mod. and rep. 90 Cal.App.4th 188) (1st Dist. 2001), cert. denied 535 U.S. 954, 122 S. Ct. 1356 (2002).

<sup>85</sup> *California Building Industry Association v. City of San Jose*, 61 Cal. 4th 435; 351 P.3d 974 (2015), cert. denied 136 S.Ct. 928 (2016).

<sup>86</sup> *Id.* at 492. See also Ahva Aflatooni, *San Jose Shows the Way: Inclusionary Housing Ordinance Survives Facial Challenge*, 26 No. 6 MILLER & STARR, REAL ESTATE NEWSALERT NL 1 (July 2016) (“Both the California Supreme Court’s decision [in *California Building Industry Association*] and the United States Supreme Court’s denial of certiorari came as victories for municipalities that have enacted or seek to adopt inclusionary housing ordinances.”); Tim Iglesias, *Inclusionary Zoning Affirmed: California Building Industry Association v. City of San Jose*, 24 J. AFFORDABLE HOUSING & COMMUNITY DEV. L., 409 (2016)(“the court held that inclusionary zoning is a constitutionally permissible strategy to produce affordable housing and promote economic integration that is subject to rational basis review and not heightened scrutiny.”); Jai Keep-Barnes, *Inclusionary Zoning as a Taking: A Critical Look at its Ability to Provide Affordable Housing*, 49 URB. LAW. 67 (Winter, 2017).

<sup>87</sup> *Home Builders Association of Greater Chicago v. City of Chicago*, No. 15 C 8268, 2016 WL 5720482, (N.D. Ill. Sept. 30, 2016) (appeal pending). The Court did not apply the *Nollan/Dolan* “essential nexus” and “rough-proportionality” 5th Amendment takings analysis “[b]ecause a permissible use restriction does not violate the Constitution, [and] such a restriction cannot be an unconstitutional condition”). *Id.* at \*4.

<sup>88</sup> *Home Builders Association of Greater Chicago*, at \*4 (citing *California Building Industry Association v. City of San Jose*, 61 Cal. 4th 435; 351 P.3d 974 (2015), cert. denied 136 S.Ct. 928 (2016).

<sup>89</sup> In 2019, the U.S. Supreme Court declined to review a challenge to the Marin County, CA inclusionary zoning program in *Cherk v. County of Marin*, 2018 WL 6583442 (Court of Appeal, First Dist. Div. 1, California, 2018), cert. denied 140 S.Ct. 652 (2019). In *Cherk*, the plaintiff, property owners challenged the constitutionality of an almost \$40,000 in-lieu fee imposed by Marin County, under its inclusionary zoning program, upon the approval of a residential subdivision. The Court compared the case to the *San Jose* case, finding the in-lieu fee was not an unconstitutional condition because the County’s inclusionary zoning regulations allowed for constitutional alternatives to paying the in-lieu fee, such as deed-restricting a lot for affordable housing.

exactions that would not pass muster if done administratively. These factors present compelling reasons for resolving this conflict at the earliest practicable opportunity.<sup>90</sup>

### 22.03 IMPACT ON PROPERTY VALUES

Most studies have found that affordable housing development has no long-term negative impacts on property values.<sup>91</sup>

- With limited exceptions, a study of the nation’s 20 least affordable markets, found no significant effect on home values located near a low-income housing project. Additionally, the price per-square-foot value of housing near low-income development in Denver, Colorado showed a measurable increase.<sup>92</sup>
- The “vast majority of studies” indicate that affordable housing does not lower nearby property values and may even raise them. Also, the type of affordable development seems to matter less than the quality of property design, management and maintenance.<sup>93</sup>
- A 2015 study found that properties financed by the Low Income Housing Tax Credit (LIHTC) helped to increase housing prices by 6.5% in low-income neighborhood. However, LIHTC developments in higher income, low minority areas lead to a 2.5% decrease in value.<sup>94</sup>

### 22.04 IMPACT ON DEVELOPMENT COSTS

Like linkage and impact fees, inclusionary zoning relies on private sector subsidy of construction. A 2021 study by NAHB found that, on a percentage basis, regulations imposed by “government at all levels account for 23.8 percent of the final price of a new single-family home built for sale.”<sup>95</sup> By including density bonuses, other zoning waivers, and/or fast track permitting, most inclusionary zoning ordinances attempt to offset the developer’s subsidy of affordable units by reducing the per-unit cost of the development. In 2019, the Florida State Legislature passed a bill that requires local governments to “fully offset all costs” to a developer when those costs result from an inclusionary housing ordinance.<sup>96</sup> For example, if a 100-unit residential development is proposed with a 10% inclusionary requirement, the local government would have to fully offset the costs associated with the 10 required affordable units.<sup>97</sup> Local

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<sup>90</sup> *California Bldg. Indus. Ass’n v. City of San Jose, Calif., cert. denied*, 136 S. Ct. 928, 194 L. Ed. 2d 239 (2016) (Thomas, concurring).

<sup>91</sup> National Association of Realtors®, *Field Guide to Effects of Low-Income Housing on Property Values* (2016), <https://www.nar.realtor/field-guides/field-guide-to-effects-of-low-income-housing-on-property-values>.

<sup>92</sup> Trulia’s Blog, *There Doesn’t go the Neighborhood*, <https://www.trulia.com/blog/trends/low-income-housing/#sthash.xQDVDTxp.dpuf> (2016).

<sup>93</sup> The Center for Housing Policy, *Don’t Put it Here: Does Affordable Housing Cause Nearby Property Values to Decline?* (2009), [http://furmancenter.org/files/media/Dont\\_Put\\_It\\_Here.pdf](http://furmancenter.org/files/media/Dont_Put_It_Here.pdf).

<sup>94</sup> Rebecca Diamond, Timothy James McQuade, *Who Wants Affordable Housing in their Backyard? An Equilibrium Analysis of Low Income Property Development* (2015), <https://www.gsb.stanford.edu/faculty-research/working-papers/who-wants-affordable-housing-their-backyard-equilibrium-analysis-low>.

<sup>95</sup> NAHB, *Government Regulation in the Price of a New Home: 2021*, <https://www.nahb.org/-/media/NAHB/news-and-economics/docs/housing-economics-plus/special-studies/2021/special-study-government-regulation-in-the-price-of-a-new-home-may-2021.pdf>.

<sup>96</sup> Florida Housing Coalition, *Inclusionary Zoning*, available online at: <https://flhousing.org/inclusionary-zoning/>.

<sup>97</sup> *Id.*

governments can do this through incentives such as density bonuses, fee reductions or fee waivers, or other incentives.<sup>98</sup>

## **22.05 IMPACT ON AMOUNT AND PATTERNS OF LAND DEVELOPMENT**

Unlike growth boundaries, urban services areas, transfer of development rights, or other techniques which direct the location and pattern of growth, inclusionary zoning does not directly affect patterns of land development. However, where demand for housing is elastic, and other jurisdictions do not impose mandatory inclusionary measures, development will be likely to move to the less costly, less regulated area.

## **22.06 IMPACT ON HOUSING AFFORDABILITY**

The purpose of inclusionary zoning is to increase supplies of affordable housing. Evidence that inclusionary zoning regulations negatively affect private market and development costs is mixed. According to a study published by the Urban Institute, the type of impact inclusionary zoning regulations has on the market and developer costs appears dependent on the design of the policy, the neighborhood location, and the housing market in the area.<sup>99</sup> Still, it is logical to assume that, depending on market conditions, market rate units are priced higher to account for the developer subsidy of the inclusionary units. In studies conducted in suburban Boston and the Bay Area, inclusionary zoning regulations increased housing prices when the housing market was strong, but did not have the same effect when the market was weak.<sup>100</sup> Another study concluded, based on econometric analysis, that mandatory inclusionary zoning requirements lead to decreased housing production and higher prices throughout the marketplace because they force developers to exit the marketplace or price market-rate units higher in order to subsidize the required affordable units.<sup>101</sup> Similarly, NAHB concludes that inclusionary housing programs act like a tax on new development and have caused production to stiff away from single family construction.<sup>102</sup> Therefore, NAHB's current policy on inclusionary zoning states:

Inclusionary zoning should only be implemented with sufficient compensation to developers and builders and should only be considered as part of a “broad and comprehensive strategy to address housing affordability at the state and local level that closely examines the causes of that problem and relies on a variety of targeted approaches to address those causes, including direct income and housing subsidies, removal of zoning and regulatory barriers to provide for sufficient number of housing units to meet projected growth, rather than relying primarily on mandatory Inclusionary Zoning.”<sup>103</sup>

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<sup>98</sup> *Id.*

<sup>99</sup> Ramakrishnan et al., at 5.

<sup>100</sup> *Id.*

<sup>101</sup> Tom Means, et al., *Below-Market Housing Mandates as Takings: Measuring Their Impact* (The Independent Institute: November 2007) at 15.

<sup>102</sup> National Association of Home Builders, *Inclusionary Zoning Primer*, August 2019, available online at: <https://www.nahb.org/-/media/NAHB/advocacy/docs/industry-issues/land-use-101/state-local-affordability/inclusionary-zoning-primer-082019.pdf>.

<sup>103</sup> *Id.*



## 22.07 RECOMMENDED TALKING POINTS: Pros AND CONS

### PROS:

- Affordable units in a mixed income housing development can be made indistinguishable from adjacent market rate housing, thus avoiding the stigma often attached to affordable housing.
- By using incentives (density bonuses, special permitting treatment), inclusionary zoning achieves the social good of developing affordable housing and seeks to offset some of the developer's per-unit costs.
- While many government subsidized housing programs have the effect of concentrating affordable housing in certain areas of a community or region, inclusionary zoning fosters mixed socio-economic neighborhoods by integrating affordable housing throughout the community.
- Integrating affordable housing within new residential developments gives equal access to better schools, better commercial centers, good parks, and a higher quality of life often found in newer neighborhoods.
- Deed restrictions and resale controls on homeowners who sell within a defined period of years (usually 30 years) and permanent affordability requirements on rental units, if enforced, ensure the long-term affordability of units.
- Where applied, in-lieu fees and equity recaptures provide local governments with the revenue to purchase or build more affordable units or to finance renter assistance programs.<sup>104</sup>
- Mandatory inclusionary zoning may be more acceptable in communities opposed to up-zoning (increased density) as a solution to affordable housing shortages.<sup>105</sup>
- Inclusionary zoning is a local technique subject to local control, not dependent on state or federal subsidies or the direct involvement of outside agencies. There is greater certainty as to affordable housing requirements, which over time, may result in lower land costs.
- Inclusionary programs that rely on voluntary incentives have the benefit of allowing the developer to determine participation and whether it will be cost effective.<sup>106</sup>
- At times when financial resources needed to undertake the high cost of development are limited, inclusionary zoning provides a means of encouraging the construction of affordable housing.<sup>107</sup>

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<sup>104</sup> The above "PROS" (1-7) were identified by the California Association of Realtors® statement of "pros and cons" for inclusionary zoning,

<https://web.archive.org/web/20101224133705/http://www.car.org/governmentaffairs/localgovernmentaffairs/inclusionary/izproscons/>.

<sup>105</sup> University of Minnesota, "Inclusionary Zoning", Feb. 2020, available online at: <https://create.umn.edu/wp-content/uploads/2020/02/Inclusionary-Zoning.pdf>; Jenna Davis, Brookings Institute, "How We Rise, The Double-Edged Sword of Upzoning", July 15, 2021, available online at: <https://www.brookings.edu/blog/how-we-rise/2021/07/15/the-double-edged-sword-of-upzoning/>

<sup>106</sup> These two "PROS" and additional inclusionary housing sources are discussed on the Association of Bay Area Governments website, <https://web.archive.org/web/20150921163339/http://www.abag.ca.gov/planning/toolkit/26inclusionary.html>.

<sup>107</sup> Westchester County, New York, "Inclusionary Zoning Helps Build Housing."

## CONS:

- It is unfair to place the burden of providing affordable housing solely on individual developers. The lack of affordable housing is a societal problem, and all of society should share the responsibility for and the cost of addressing it.
- Inclusionary zoning does not address the factors that contribute to the high cost of market rate housing, i.e., high land costs, lack of available sites, low densities, development fees and exactions, cumbersome permitting process, etc.
- Inclusionary zoning places financial hardships on developers. Ultimately, they may no longer be able to provide housing in the community because the costs are too high or they will pass the cost on to market rate buyers thus making it more expensive for those buyers to acquire a home.
- Deed restrictions and resale price controls restrict homeowners' ability to realize a reasonable profit on the resale of their home and therefore reduce the incentive for them to maintain their home. This makes it harder to resell inclusionary units, and therefore, hurts the real estate market.
- The cost of implementing an inclusionary zoning ordinance for a local government entity is significantly high. Many local governments cannot afford the amount of staff resources and experience required to implement and administer an effective program.
- Incentives such as reduced land costs and land restrictions, increased availability of housing sites, and reduced fees make the development process less costly and time-consuming, and can be a more effective way for local government to provide affordable housing.
- The practice of in-lieu fees is a tax on developers and their customers.<sup>108</sup>
- Inclusionary zoning programs are generally not effective at producing very low-income units, nor do they have the “anti-exclusionary” effect where the beneficiaries are existing residents or middle to middle-upper income residents.

## 22.08 INCENTIVE-BASED ALTERNATIVES

Some examples of incentive-based alternatives are:

**Community Land Trusts:** In areas where gentrification is an issue, nonprofit housing organizations can form community land trusts, or buy land and build below-market housing. The trust could permanently own the land and sell only the structures. This strategy can help stabilize the cost of homes by separating the cost of the units from the value of the land,<sup>109</sup> but resale restrictions would still be necessary.

**Maximum Floor Area:** Rather than directly regulating price, a community may consider establishing a maximum floor area for at least a percentage of the dwelling units within any proposed residential

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<sup>108</sup> All of the above are “CONS” identified by the California Association of Realtors®. See also Jonathon J. Andersh, *Inclusionary Zoning: Chicago and the 2015 Affordable Requirements Ordinance*, 2016 MICH. ST. L. REV. 853 (2016)(discussing inclusionary housing burdens placed on development and the housing market).

<sup>109</sup> See John Kromer, *Beyond the Foreclosure Crisis: Reconstituting the Rental Housing Market in Pennsylvania*. Philadelphia, University of Pennsylvania Fels Institute of Government (2009), available at: [https://web.archive.org/web/20140702171318/http://www.phfa.org/forms/presentation\\_material/2009\\_Commonwealth\\_Housing\\_Forum/S8\\_Kromer\\_Rental\\_HsngMkt0409.pdf](https://web.archive.org/web/20140702171318/http://www.phfa.org/forms/presentation_material/2009_Commonwealth_Housing_Forum/S8_Kromer_Rental_HsngMkt0409.pdf); see also LePage at 2.

development. This technique ensures that development includes a mix of housing choices, including smaller homes where cost would be reduced by reducing size. Market rate developments with a variety of sizes and styles helps to provide homes in a variety of price ranges. Cumberland Region Tomorrow, a regional land-planning organization dedicated to fostering well-planned development in the Middle Tennessee Region, encourages municipalities to use zoning tools to limit housing size and provide a variety of housing sizes and choices to suit individuals at all income levels.<sup>110</sup> Reduced housing size can greatly reduce a local government's costs of administering an affordable housing program because the market would establish the affordable price.

**Expedited Review of Affordable Housing Proposals:** “Fast track permitting” is a preferable alternative to mandatory programs and is offered in Massachusetts and Austin, Texas.<sup>111</sup> The advantages of this approach are that it signals that the municipality is serious about affordable housing because it has put those types of projects “first in line,” and it has the potential to be a sufficient incentive to attract residential developers who are frustrated with a cumbersome or time-consuming review process.

**Development Fee Waivers or Reimbursement of Fees:** In some cases, all fees (school and traffic impact fees, water and sewer fees, park fees, building permit fees, etc.) are waived or otherwise abated. Some examples of jurisdictions that have used this technique are:

Longmont, Colorado – The Longmont Affordable Housing Incentive Program allows a percentage of certain development fees (e.g., permitting fees and impact fees) to be waived for qualifying affordable housing projects. Fee reductions can range from 50% to 75% for for-sale units and from 20% to 50% for rental units.<sup>112</sup>

Martin County, Florida – Martin County provides a variety of impact fee deferral options for developers of affordable housing for very low, low, and moderate income households.<sup>113</sup> The builder may apply to defer payment until issuance of the certificate of occupancy or one year after the issuance of the building permit, whichever is earlier.<sup>114</sup>

Albuquerque, New Mexico – Albuquerque waives impact fees completely for owner-occupied housing that is affordable to households earning 80% or less of AMI in targeted redevelopment areas. New affordable homes in areas zoned for higher-density, mixed-use, and mixed-income development are also eligible for impact fee waivers. All homes that receive an impact fee waiver are subject to a five-year deed restriction, which ensures that the units remain affordable to qualifying families during this period.<sup>115</sup>

**Growth Control Exemptions:** In high-growth areas which have enacted moratoria, growth caps, Adequate Public Facilities Ordinances, or other growth management/growth control tools, allowing exemptions for affordable housing is a strong incentive.

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<sup>110</sup> Cumberland Region Tomorrow, *Creating a Variety of Housing Choices*, (2005), <https://web.archive.org/web/20170226213500/http://www.cumberlandregiontomorrow.org/resources/quality-growth-toolbox.pdf>.

<sup>111</sup> Mixed-Income Transit-Oriented Development.Org, Action Guide, *Fast Track Permitting*, available online at: <http://www.mitod.org/fasttrackpermitting.php?tab=1&return=listpos6>.

<sup>112</sup> City of Longmont, Colorado, Affordable Housing Incentives for Developers, available online at: <https://www.longmontcolorado.gov/departments/departments-e-m/housing-and-community-investment/housing-programs/affordable-housing-incentives>.

<sup>113</sup> Martin County, FL Code § 6.11.C.1 to C.5.

<sup>114</sup> *Id.*

<sup>115</sup> National Housing Conference, Program Profiles, available online at: <https://nhc.org/policy-guide/impact-fees-the-basics/program-profiles-if/>.

Falmouth, Maine – Exempts affordable housing from its rate of growth ordinance, which otherwise limits the amount of residential building permits that may be issued in a calendar year.<sup>116</sup>

**Higher Density:** Back-to-back houses, zero lot-line zoning and accessory apartments are a means of extending the current housing stock or allowing existing development sites to absorb higher-density housing. Increasing density is the most commonly recognized way to reduce housing cost and thereby create affordable housing units. The NAHB has repeatedly called for federal, state, and local measures to facilitate the development of multi-family housing as a way to address the need for affordable housing.<sup>117</sup>

Orlando, Florida – This city “pioneered” allowing subdivisions to include “tandem single-family development” as a conditional use on lots that allow duplex development. In 2017, the City approved the “tandem single-family development” ordinance, which had the goal of increasing the aesthetic quality of such development without undermining the rate of development.<sup>118</sup>

Los Angeles, California – Established the Small Lot Ordinance and Small Lot Design Guidelines to promote the development of higher density homes on single or small lots. The ordinance allows the subdivision of these lots for infill development homes while the guidelines provide a design framework in accordance with the area’s General Plan Framework and Community Plans.<sup>119</sup>

**State Mandated Special Treatment of Affordable Housing Applications:** Special procedures provide an incentive to developers to include affordable housing.

Massachusetts’ “Anti-snob Zoning Act”<sup>120</sup>, (also known as the Comprehensive Permit Statute or Chapter 40B) has since 1969 provided expedited review of low and moderate income proposals through the use of a “comprehensive permit” process that centralizes development review in the Zoning Board of Appeals. The Zoning Board of Appeals on a comprehensive permit application may override local regulatory requirements where the requirements would preclude development that would be used to satisfy statutory thresholds for affordable housing within the municipality.<sup>121</sup>

Connecticut’s Affordable Housing Appeals Act of 1990, as amended, provides an expedited appeals procedure for a developer who has been denied an application which meets criteria for an affordable housing project. The Connecticut Statute “allows the developer to appeal directly to Connecticut Superior Court when local zoning and planning commission decisions deny affordable housing or approve with infeasible

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<sup>116</sup> Town of Falmouth, ME, Zoning and Floodplain Management Code, Section 19-69.

<sup>117</sup> See for example, NAHB’s March 2011 Multifamily Issues Report, [https://web.archive.org/web/20120416114549/http://www.nahb.org/fileUpload\\_details.aspx?contentID=156592](https://web.archive.org/web/20120416114549/http://www.nahb.org/fileUpload_details.aspx?contentID=156592).

<sup>118</sup> City of Orlando, *Duplex and Tandem Development & Design Standards*, available online at: <https://www.orlando.gov/files/sharedassets/public/departments/edv/city-planning/duplextandemdesignstandards.pdf>; see also City of Orlando Land Development Code, Chapter 58, Part 3C.

<sup>119</sup> Local Housing Solutions, “Zoning changes to allow for higher residential density”, available online at: <https://localhousingsolutions.org/housing-policy-library/zoning-changes-to-allow-for-higher-residential-density/>.

<sup>120</sup> G.L. c. 40B, §§ 20-23.

<sup>121</sup> Benjamin B. Tymann, “Low - and Moderate – Income Housing: The Anti Snob Zoning Act, Linkage, Inclusionary Zoning and Incentive Zoning” Chapter 5, *Massachusetts Zoning Manual* (7th ed., 2021).

conditions. Importantly, the burden of proof switches from the developer to the local jurisdiction.”<sup>122</sup>

**Using Government Funds:** Leveraging or subsidizing the production of affordable units with public money is an effective technique. Capital subsidies for affordable housing developments can come from a variety of federal, state and local sources including: Proceeds from the sale (also known as syndication) of federal or state Low-Income Housing Tax Credits, HOME or CDBG grants; proceeds from the issuance of general obligation bonds; Housing trust funds; special purpose state tax credits (e.g., historic tax credits); and Federal Home Loan Banks’ Affordable Housing Program. For example, “the City of Chicago allocates proceeds from its Low-Income Housing Trust Fund to the Multi-year Affordability through Upfront Investment (MAUI) program. MAUI funds can be used to fund upfront development costs for multifamily rental projects as well as operating reserve funds. Developers who apply for a capital investment receive a non-interest bearing forgivable loan in an amount up to 50% of the first mortgage loan. In exchange, MAUI-funded units must be reserved for households that meet income restrictions – generally, half of the units must be set aside for households with incomes below 15 percent of the area median income, and half must be set aside for households with incomes up to 30 percent of the area median.”<sup>123</sup>

An example of a successful public-private partnership is the Village at Beechwood in Lancaster, California, which rehabilitated 100 units of affordable housing. There, “the Housing Partnership Fund supplied the predevelopment loan, while the acquisition loan came from four different national lenders. Half of the permanent financing came from the state Multifamily Housing Program funds; 30 percent came from federal tax credit funds; and 20 percent came from a California Housing Finance Authority loan. This financing structure allowed for the combination of several funding sources and also permitted very low rents (35 percent of the median income for Los Angeles County).”<sup>124</sup> Miami-Dade County, Florida has implemented an Infill Housing Initiative Program to increase the availability of affordable homes by requiring developers to build homes to be sold to very-low-, low- and moderate-income households.<sup>125</sup>

**Reducing the “Regulatory Barriers” to Affordable Housing:** Zoning and subdivision controls affect the cost of housing by restricting density, thereby restricting the supply of housing as well as the cost per unit of land. Substantive standards such as limiting construction to single-family dwellings, setback, minimum lot size, minimum floor area, and other design restrictions often increase housing costs or permit fewer dwellings to be placed on particular land parcels. The increasingly common requirement of offsite facilities as a condition of rezoning or development approval passes costs on to the consumer (see sections on impact fees and development exactions). Local governments are recognizing the need to rethink restrictive zoning and outdated land use regulations that can suppress the housing supply. For

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<sup>122</sup> National Association of Home Builders, *State Survey of Housing Appeals Statutes*, June 2017, available online at: <https://perma.cc/4JPU-U78V>.

<sup>123</sup> Local Housing Solutions, “Capital subsidies for building affordable housing developments”, available online at: <https://localhousingsolutions.org/housing-policy-library/capital-subsidies-for-building-affordable-housing-developments/>.

<sup>124</sup> CCIM Institute, “New Funding for Affordable Housing Encourages Public/Private Partnerships” available at: <https://www.ccim.com/cire-magazine/articles/new-funding-affordable-housing-encourages-publicprivate-partnerships/>.

<sup>125</sup> Miami-Dade County, *Infill Housing Initiative Program Guidelines*, revised February 7, 2017, available online at: <https://www.miamidade.gov/housing/library/guidelines/infill-housing.pdf>.

example, in 2018 Minneapolis eliminated single-family zoning in an effort to increase housing supply and density.<sup>126</sup>

**Using Government-Owned Land:** State and local governments often own land that is either vacant or underutilized. The government can sell or lease this land to developers, subject to requirements that ensure that the projects will include an affordable housing component.

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<sup>126</sup> Solomon Green & Jorge Gonzalez-Hermoso, *How Communities Are Rethinking Zoning to Improve Housing Affordability and Access to Opportunity*, Urban Institute (June 12, 2019), available online at: <https://www.urban.org/urban-wire/how-communities-are-rethinking-zoning-improve-housing-affordability-and-access-opportunity>.



## SECTION 23: HOUSING LINKAGE

### 23.01 PURPOSE AND KEY TERMS

**Housing linkage** is a type of local regulation that requires or induces developers of office buildings or other, typically “downtown” non-residential uses to build housing, to pay a fee in-lieu of construction into a housing trust fund, or to make equity contributions toward the development of low-income housing.<sup>1</sup> The *exaction* may be either a condition for permit approval or a prerequisite for receiving some type of development incentive, such as a density bonus.<sup>2</sup> The concept arose, in part, as a response to a decrease in federal housing subsidies in the 1980s. Linkage can be viewed as an employee-centered device for the production of affordable housing, the modern equivalent of the “company town” concept.<sup>3</sup> This housing is often referred to as “workforce housing.” The underlying rationale for a housing linkage program is that new non-residential development creates a need for housing by attracting employees to an area.<sup>4</sup> The new workers need places to live, transit systems, day-care facilities, and the like.<sup>5</sup>

The term **inclusionary zoning** has often been used interchangeably with housing linkage. However, these two concepts are different. Inclusionary zoning refers to the practice of requiring *housing developers* to dedicate a certain percentage of their housing construction project to low- or moderate-income buyers or renters or to support other “needs” of the community. Inclusionary zoning is addressed in Section 22 of this book. Housing linkage, on the other hand, as a general rule, refers to the practice of requiring *developers of office and commercial space* to contribute, either in-kind, or by payment to a fund used for off-site construction elsewhere, of low- or moderate-income housing or other “needs” of the community.<sup>6</sup> There are, however, some instances of linkage programs being used to combine residential with non-residential development. Examples include Teton County, Wyoming’s Affordable Workforce Housing Standards;<sup>7</sup> Pitkin County, Colorado’s Employee Housing Impact Fee;<sup>8</sup> and the Village of Islamorada, Florida’s Affordable Housing Standards.<sup>9</sup>

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<sup>1</sup> Douglas W. Kmiec and Katherine Kmiec Turner, § 11:12. *General construction taxes—Linkage of development to social goals*, 2 ZONING & PLAN. DESKBOOK § 11:12 (2d ed., 2021 update) (hereinafter Kmiec & Kmiec); S. Mark White, *Affordable Housing: Proactive & Reactive Planning Strategies*, Planning Advisory Service Report No. 441 at 26 (American Planning Association, 1992) (hereinafter “White”); David L. Callies, *Mandatory Set-asides As Land Development Conditions*, 42/43 URB. LAW. 307 (Fall 2010/Winter 2011).

<sup>2</sup> Municipal Research and Services Center of Washington, *Affordable Housing Techniques: A Primer for Local Governments*, Report No. 22 (March 1992) (available at [http://www.tbrpc.org/resource\\_center/pdfs/housing/AH\\_Techniques\\_Primer.PDF](http://www.tbrpc.org/resource_center/pdfs/housing/AH_Techniques_Primer.PDF)).

<sup>3</sup> Jane Schukoske, “Housing Linkage: Regulating Development Impact on Housing Costs,” 76 *Iowa Law Review* 101, 1064 (1991).

<sup>4</sup> White at 26.

<sup>5</sup> Christine I. Andrew & Dwight H. Merriam, “Defensible Linkage,” *Journal of the American Planning Association*, at 200, Spring 1988.

<sup>6</sup> Theodore C. Taub, “Exactions, Linkages and Regulatory Takings: A Developer’s Perspective,” 20 *The Urban Lawyer* 515, 535 (1988).

<sup>7</sup> See Teton County, WY: Land Development Regulations § 6.3 Employee Housing Requirements: <https://jacksontetonplan.com/DocumentCenter/View/932/Teton-County-Land-Development-Regulations-PDF>.

<sup>8</sup> See Pitkin County, CO: County Code § 8-30 Employee Housing Impact Fee <http://pitkincounty.com/DocumentCenter/View/13606>.

<sup>9</sup> See Village of Islamorada, FL: Article IV, Division 16, Affordable Housing Standards, [https://library.municode.com/fl/islamorada/codes/code\\_of\\_ordinances?nodeId=PTIICOOR\\_CH30LADERE\\_ARTI\\_VADPR\\_DIV16AFHOST](https://library.municode.com/fl/islamorada/codes/code_of_ordinances?nodeId=PTIICOOR_CH30LADERE_ARTI_VADPR_DIV16AFHOST).

## 23.02 EFFECTIVENESS IN ACHIEVING STATED PURPOSE(S)

It is critical for the implementation of a linkage program that the local commercial real estate market be strong. Therefore, it is no coincidence that housing linkage regulations were prevalent in the mid-1980s and again in the late 1990s and the early part of the 2000s. These programs first emerged in the nation's largest cities, such as San Francisco, Boston, Seattle, and Miami, which, at the time, were experiencing significant increases in commercial development. Numerous smaller cities – including several in California (most significantly Berkeley, Oakland, Sacramento, and Santa Monica<sup>10</sup>); Hartford, Connecticut; Aspen, Colorado; and Cambridge, Massachusetts – as well as larger cities such as Chicago and Washington, D.C., have also experimented, to varying degrees, with linkage programs. The relative success of these programs has hinged largely on the strength and duration of the building “booms” in these particular jurisdictions.

A critical requirement affecting the legitimacy of a housing linkage program is that it demonstrate a “rational nexus” between the proposed development and the amenity to be funded, in this case affordable housing.<sup>11</sup> This relationship is necessary for the linkage program to survive a constitutional challenge on due process grounds.<sup>12</sup> One of the rationales commonly asserted in support of linkage programs is that large-scale commercial developments bring in middle- and upper-income dwellers, who displace lower-income dwellers and that the creation of lower-income housing is necessary to offset these effects.<sup>13</sup>

Housing linkage programs should address the following issues:

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<sup>10</sup> City of Walnut Creek, California, Staff Report Regarding the City's Commercial Linkage Fee Ordinance (January 4, 2005) at Table V-5 (available at: <http://www.walnut-creek.org/citygov/depts/cd/housing/linkfee.asp>). The full list of California cities and counties with jobs-housing linkage programs as of late 2004 included Palo Alto, San Francisco (city and county), Marin County, St. Helena, Oakland, Corte Madera, Berkeley, Sunnyvale, Santa Monica, Alameda, Petaluma, San Diego, Napa (city and county), Sacramento (city and county), Cupertino, Livermore, and Pleasanton. Walnut Creek's jobs-housing linkage program was adopted in February of 2005 (the *Walnut Creek Study*).

<sup>11</sup> See Kmiec & Kmiec (“By their operation, linked development funds attempt to forge a relationship between office development and housing. This of course begs the question whether a sufficient legal relationship exists between office development and housing beyond the obvious macroeconomic relationship which seldom, if ever, has justified municipal impositions in other contexts.”); see also James A. Kushner, § 6:28. *Exactions—Affordable housing—Linkage programs*, 1 SUBDIVISION LAW AND GROWTH MGMT. § 6:28 (2d ed., 2021 update) (hereinafter Kushner) (compiling legal challenges to linkage programs across the United States).

<sup>12</sup> The United States Supreme Court decision, *Koontz v. St. Johns River Water Management District*, 133 S. Ct 2586 (2013), explicitly extended judicial scrutiny to payments negotiated by municipalities to off-set development approvals by requiring that such negotiated payments pass the “essential nexus” and “rough-proportionality” takings analysis. Generally, linkage fees are not negotiated on a per-development basis, but are established legislatively after completion of what is often referred to as a “nexus” study. See for example, the City of Somerville, Massachusetts, *Somerville Linkage Fee Nexus Study* (March 2013), available at <http://www.somervillebydesign.com/wp-content/uploads/2015/04/Citywide-2013-Linkage-Nexus-Study.pdf>. Nevertheless, *Koontz* clearly establishes that the Supreme Court's takings jurisprudence on exactions applies to monetary exactions (such as linkage fees and impact fees) as well as in-kind developer contributions. David L. Callies, FAICP, *Koontz Redux: Where We Are and What's Left*, 65 PLANNING & ENVTL. LAW No. 10 (Oct. 2013) (“the Court specifically rejected the monetary versus real property interest distinction in applying *Nollan* and *Dolan* essential nexus and proportionality”). See also Luke A. Wake & Jarod M. Bona, *Legislative Exactions after Koontz v. St. Johns River Management District*, 27 GEO. ENVTL. L. REV. 539, 579 (2015) (“*Koontz* calls into question permitting regimes requiring applicants to pay into special funds—regardless of which public goals the regimes seek to advance.”).

<sup>13</sup> Richard G. Huber, et al., “Low- and Moderate-Income Housing: The Anti-Snob Zoning Act, Linkage, Inclusionary Zoning and Incentive Zoning,” Chapter 5 of the *Massachusetts Zoning Manual* at 5-32 (Supp. 1995).



- Whether the program is mandatory or incentive-based;
- The type of development that triggers the obligation;<sup>14</sup>
- The target group for whom housing is to be created;
- The formula by which the housing impact will be calculated;
- The rate of the housing linkage fee;
- The mechanics of the program; and
- The administration of the program.<sup>15</sup>

The two largest linkage programs in the country, San Francisco, California, and Boston, Massachusetts, have been reviewed for their effectiveness.

### ***San Francisco Jobs-Housing Linkage Fee Program***

In 1981, San Francisco became the first U.S. city to adopt linkage policies, for several reasons: community opposition to continued downtown development was growing (based on the argument that it was having an adverse effect on San Francisco’s expensive housing market and troubled mass transit system); the city was seeking new revenue sources to offset property tax loss caused by the passage of Proposition 13 in 1978; active community based coalitions were pressuring the city to develop and preserve affordable housing and to improve its municipal transit system; and federal aid for housing was starting to decline.<sup>16</sup>

Under the program, known as the Office Housing Production Program (or OHPP), all developers of buildings exceeding 50,000 square feet in the central business district were required either to provide new or rehabilitated housing or to pay an in-lieu fee of \$5.00 per square foot to the city for housing. A complex formula gave developers more credit for producing or subsidizing low and moderate income housing than for market rate housing.<sup>17</sup> From 1981 to 1985, office developers agreed to subsidize 3,793 residential units, 44% of which were completed by April 1985.<sup>18</sup>

In February 2001, the Board of Supervisors enacted an ordinance that renamed the Affordable Housing Production Program the “Jobs-Housing Linkage Program” and expanded the program to include all types of commercial development, not just office development.<sup>19</sup> The ordinance also substantially increased the applicable fees and required a study every five years to determine the demand for housing created by

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<sup>14</sup> See, e.g., *Union Mkt. Neighbors v. DC Zoning Comm’n*, 204 A3d 1267 (D.C. 2019 ) (holding that developers were not required to address the housing linkage mandate in the zoning regulations at the first-stage of the planned unit development process; the first stage of the process involved a general review, whereas the second stage included a detailed site plan review to determine compliance).

<sup>15</sup> Schukoske at 1015.

<sup>16</sup> Dennis W. Keating, “Linking Downtown Development to Broader Community Goals: An Analysis of Linkage Policy in Three Cities,” 52 *Journal of the American Planning Association* at 135 (February 1986).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> See Marcia Rosen & Wendy Sullivan, *From Urban Renewal and Displacement to Economic Inclusion: San Francisco Affordable Housing Policy 1978-2014*, 25 *STAN. L. & POL’Y REV.* 121, 148 (2014).

commercial development.<sup>20</sup> According to the 2018 Downtown Plan Annual Monitoring Report, in fiscal year 2017-18, San Francisco collected nearly \$31.4 million in Jobs-Housing Linkage fees.<sup>21</sup>

As of May 2011, San Francisco's linkage fees on a per square foot basis were: \$19.96 for office uses, \$18.62 for retail and entertainment uses, \$14.95 for hotel uses, and \$13.30 for research and development uses.<sup>22</sup> On January 1, 2015, the linkage fee amounts increased to \$24.03 for office uses, \$22.42 for retail and entertainment uses, \$17.99 for hotel uses, and \$16.01 for research and development uses.<sup>23</sup> In September 2019, the Board of Supervisors raised the fees again based on an updated nexus study.<sup>24</sup> The fee for development approved prior to September 10, 2019 was increased from \$28.57 to \$57.14 per square foot and to \$63.37 for development submitted from September 10, 2019 to January 1, 2022. Projects submitted after January 1, 2022 would be required to pay \$69.60 per square foot.<sup>25</sup> The increased fees are expected to generate \$400 million to help fund approximately 2,000 affordable homes over a seven-year period.<sup>26</sup>

### ***Boston Jobs-Housing Linkage Fee Program***

The Boston linkage program, enacted in 1983 and modeled on San Francisco's, initially required a \$5.00 per square foot "housing exaction fee" from certain large commercial developments requiring zoning relief for completion. The fee applies to any "development impact project" falling within a zoning classification known as Development Impact Projects ("DIPs"). The linkage program applies to projects requiring some special zoning relief, such as a variance or conditional permit, involving more than 100,000 square feet of new commercial construction or rehabilitation, and containing certain specific commercial uses or directly resulting in a reduction of the supply of low- or moderate-income housing.<sup>27</sup>

Any project deemed to be a DIP requires the approval of a plan by the Boston Planning & Development Agency ("BPDA").<sup>28</sup> To gain the required zoning relief, such a plan must meet two requirements: the BPDA must find that the plan conforms to the general needs of the city and will not harm the neighborhood; and an agreement between the developer and the BPDA must be in place obligating the developer to pay a linkage fee or making an in-kind contribution of low- or moderate-income housing.

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<sup>20</sup> See San Francisco Municipal Code §§ 410, 413; see also Marcia Rosen & Wendy Sullivan, *From Urban Renewal and Displacement to Economic Inclusion: San Francisco Affordable Housing Policy 1978-2014*, 25 STAN. L. & POL'Y REV. 121, 148 (2014).

<sup>21</sup> San Francisco Planning, *Downtown Plan Annual Monitoring Report 2018* at Table 15 (June 2019) (available at [https://default.sfplanning.org/Citywide/Downtown\\_Plan\\_Monitoring\\_Report\\_2018.pdf](https://default.sfplanning.org/Citywide/Downtown_Plan_Monitoring_Report_2018.pdf)).

<sup>22</sup> San Francisco Planning Department, *Development Impact Fee Adjustments-Effective May 1, 2011* (April 1, 2011).

<sup>23</sup> San Francisco Mayor's Office of Planning and Department, *Development Impact Fee Adjustments-Effective January 1, 2014* (September 13, 2014).

<sup>24</sup> CITY & CTY OF SAN FRANCISCO, INCREASING THE JOBS-HOUSING LINKAGE ECON. IMPACT REPORT 2 (Oct. 21, 2019) (hereinafter "SF JOBS-HOUSING LINKAGE REPORT") available at [https://sfcontroller.org/sites/default/files/Documents/Economic%20Analysis/190548\\_Economic%20Impact\\_final.pdf](https://sfcontroller.org/sites/default/files/Documents/Economic%20Analysis/190548_Economic%20Impact_final.pdf).

<sup>25</sup> Kevin Truong, *SF Moves Forward with Controversial Jobs-Housing Linkage Fee*, SAN FRANCISCO BUSINESS TIMES (Oct. 22, 2019) available at <https://www.bizjournals.com/sanfrancisco/news/2019/10/22/sf-moves-forward-with-controversial-jobs-housing.html>.

<sup>26</sup> Blanca Torres, *Supervisors Approve Steep Fee Hike on Commercial Development in SF*, SAN FRANCISCO BUSINESS TIMES (Oct. 30, 2019) available at <https://www.bizjournals.com/sanfrancisco/news/2019/10/30/sf-supervisors-approve-steep-fee-hike-on.html>.

<sup>27</sup> John J. Griffin, Jr., "Inclusionary Zoning and Linkage in Boston and Cambridge, Massachusetts," Chapter in Douglas Porter, ed. DOWNTOWN LINKAGES (Urban Land Institute, 1985).

<sup>28</sup> The BPDA was formerly named the Boston Redevelopment Authority ("BRA").

The fee is paid to an administrative agency known as a Neighborhood Trust in twelve equal annual installments.<sup>29</sup>

Article 80B.7 of the Boston Zoning Code requires two linkage fee payments for DIPs: a Housing exaction and a Jobs Contribution exaction. The Housing exaction is meant to “mitigate the impacts of large-scale real estate development on the available supply of low and moderate income housing and increase the availability of such housing,” while the Jobs Contribution exaction is designed to “mitigate the adverse impacts of new large-scale real estate development projects by providing for related job training for low and moderate income people.”<sup>30</sup>

The program’s authorizing statute allows for linkage fee increases on a three-year cycle to reflect the rise in inflation based on the Consumer Price Index.<sup>31</sup> A Mayoral Executive Order, effective January 1, 2016, divided Boston into three zones based on housing prices. Development in two zones in the center of the City, which tend to have higher housing prices, are subject to increased linkage fees or in-kind contribution.<sup>32</sup> In early 2021, Boston increased its linkage fees from \$10.81 to \$15.39 per square foot, with \$13.00 dedicated to affordable housing and \$2.39 dedicated to workforce training.<sup>33</sup> As of March 2021, Boston’s housing linkage program had accumulated over \$200 million for affordable housing and job training.<sup>34</sup> In 2021 alone, the city collected \$31,810,976 in linkage fees to support affordable housing, and over \$6,109,360 in linkage fees to support job training programs.<sup>35</sup>

### 23.03 IMPACT ON PROPERTY VALUES

One would expect that property values in an area subject to a linkage program would be lower than the value of the same property absent the linkage requirement, because linkage represents a direct additional cost of development in that area. Many economists agree that when buyers and developers have other market options, the additional cost of development associated with linkage fees will be borne by the property seller.<sup>36</sup> Of course, given the scarcity of developable land in many urban cores, the additional cost of the linkage requirement will be low enough compared with other pro forma cost items not to discourage the new development or significantly depress a favorable seller’s market. In other words, “reasonable fees enacted in areas experiencing high levels of economic growth and strong demand for commercial space should not negatively affect the rate of commercial development.”<sup>37</sup>

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<sup>29</sup> Griffin, *supra* note 21.

<sup>30</sup> Boston Zoning Code, Article 80B, Section 80B-7.1.

<sup>31</sup> J. Hampton & E. Lopez, BRA, *Article 80: Development Impact Project Exactions*, (Oct. 17, 2013), <http://www.bostonredevelopmentauthority.org/getattachment/da90485a-da0b-445c-b5a0-4280a994d887> (citing Ch. 371 of the Acts of 1987).

<sup>32</sup> Benjamin Swasey, WBUR News, *Walsh To Seek More From Boston Developers For Affordable Housing* (Dec. 8, 2015), available at <http://www.wbur.org/news/2015/12/08/walsh-inclusionary-development-housing-reform>.

<sup>33</sup> BOSTON PLANNING & DEV. AGENCY, *Mayor Walsh Signs 42 Percent Increase in Linkage Fees into Law* (Mar. 11, 2021), available at <https://www.bostonplans.org/news-calendar/news-updates/2021/03/11/mayor-walsh-signs-42-percent-increase-in-linkage-f>.

<sup>34</sup> *Id.*

<sup>35</sup> “BPDA approves more than 6,000 units of new housing in 2021, with over 35 percent designated income-restricted,” *BPDA 2021 Year in Review* (Dec. 30, 2021).

<sup>36</sup> InclusionaryHousing.org, *Commercial Linkage Fees, Common Questions*, <http://inclusionaryhousing.org/designing-a-policy/program-structure/linkage-fee-programs/commercial-linkage-fees/>. InclusionaryHousing.org is a project of Grounded Solutions Network developed with support from the National Housing Conference and the Lincoln Institute for Land Policy.

<sup>37</sup> Association of Bay Area Governments, *Commercial Linkage Fees: Summaries and Benefits*.

## **23.04 IMPACT ON DEVELOPMENT COSTS**

Housing linkage programs directly and measurably increase development costs because they require that direct expenditures be made on housing construction or in lieu of payments for housing. In July 2020, the city of Los Angeles adjusted its linkage fees for inflation and required developers pay permit fees prior the issuance of a building permit.<sup>38</sup> When San Francisco increased its Jobs-Housing Linkage Fee amounts in 2019, the city’s comptroller calculated that the increased fees would drive up development costs by about six percent on average.<sup>39</sup>

## **23.05 IMPACT ON AMOUNT AND PATTERNS OF LAND DEVELOPMENT**

A successful linkage program should increase the amount of affordable/workforce housing constructed in a jurisdiction with such a program. Except to the extent that they may serve to discourage some development because of their impact on developer profit, housing linkage programs otherwise probably have little effect on the amount or patterns of land development.

## **23.06 IMPACT ON HOUSING AFFORDABILITY**

Since the premise of housing linkage programs is to promote low- and moderate-income housing, these programs presumably provide housing affordable to those in the low and moderate income range. There is no reason to expect that linkage programs targeted only at commercial development would have any significant effect on the general housing market. However, to the extent that linkage is applied to market rate or luxury housing developments, the costs of the linkage program will likely be passed along to buyers or tenants of units in the affected developments if the local market will allow such price increases. Absent a shifting of these costs to consumers, the costs would be borne by developers or landowners.

The goal of linkage programs is to provide affordable housing in the lower price ranges. This is done by either reducing the value of developable land or by increasing the prices of “other” housing.

## **23.07 RECOMMENDED TALKING POINTS: PROS AND CONS**

### **PROS:**

- Assuming that the local government can show the required nexus between the commercial or other nonresidential development and its impact in terms of housing, a linkage program could lessen the negative effects associated with downtown gentrification and help to create affordable housing.

### **CONS:**

- Housing linkage will not succeed if the local market does not support increased commercial development.<sup>40</sup>

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<sup>38</sup> LOS ANGELES DEP’T OF BLDG & SAFETY, *Affordable Housing Linkage Fee Adjustment Effective July 1, 2020* (Jun. 23, 2020) available at <https://www.ladbs.org/our-organization/messaging/news/news-details/2020/06/23/affordable-housing-linkage-fee-adjustment-effective-july-1-2020>.

<sup>39</sup> “SF may more than double fees on office construction,” *Curbed San Francisco* (Oct. 23, 2019).

<sup>40</sup> Andrew & Merriam at 200. The City of San Diego, California recently repealed an increase in its commercial development linkage fee after the City business community collected enough signatures in opposition to the increase

- It is unfair to single out new commercial development as the cause of general and complex transit and employment issues in the inner city.<sup>41</sup>
- Assessing fees at the building permit or an earlier stage of the application process can increase development costs and deter the production of affordable housing.<sup>42</sup>
- If the housing linkage exaction fees are set too low, then revenue generated will be insufficient to provide enough of the facilities or services to meaningfully address the problems ostensibly caused by the development.<sup>43</sup>
- If the housing linkage exaction fees are set too high, the resulting increase in development costs and commercial rents may deflect commercial development from the central city to the suburbs.<sup>44</sup>
- The argument can be made that housing linkage is no more than a cynically veiled effort to tax one segment of society for redistribution to another while the “getting is good.”<sup>4546</sup>

### 23.08 INCENTIVE-BASED ALTERNATIVES

There are at least two incentive-based alternatives that achieve the same goals as those sought to be achieved by housing linkage programs.

**Incentive Zoning** would allow developers who want to exceed maximum floor area ratios or obtain density bonuses to agree to provide housing in exchange for receiving these incentives. Incentive zoning differs from linkage policies in that developers receive a tradeoff, such as additional rentable space, under the former but not under the latter.<sup>47</sup> These types of incentives could also be applied in a mixed use zoning context, through which greater floor area ratios and/or density bonuses would be allowed for the residential buildings than for the commercial structures.

**Special Assessment Districts** can be created to cover all or most affected businesses and the revenues generated by special assessments could be used for the same purposes as linkage exaction fees. This would spread the cost burden to all benefitted businesses instead of imposing them on specific developments.<sup>48</sup> Special Assessment Districts are discussed in Section 6.

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to qualify a repeal vote as a referendum item. KPBS Public Broadcasting, *Developer Fee Rescinded By San Diego City Council* (Mar. 4, 2014), <http://www.kpbs.org/news/2014/mar/04/linkage-fee-rescinded-san-diego-city-council/>.

<sup>41</sup> Keating at 140.

<sup>42</sup> Shane Phillips, “Reducing Development Costs with Impact Fee Deferral.” *Working Paper Series, University of California* (2021).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Jerold Kayden and Robert Pollard, “Linkage Ordinances and Traditional Exaction Analysis: The Connection Between Office Development and Housing,” 50 *Journal of Law and Contemporary Problems* at 129 (1987).

<sup>46</sup> See Kmiec & Kmiec (“Welfare-related income redistribution of this nature is a public responsibility which cannot fairly be apportioned in a representative democracy wedded to the norm of equality under law to office developers who just happen to look like a ‘deep pocket.’”)

<sup>47</sup> Keating at 140.

<sup>48</sup> *Id.*

## SECTION 24: ACCESSORY DWELLING UNITS

### 24.01 PURPOSE AND KEY TERMS

An **accessory dwelling unit** (“ADU”)—also referred to as an in-law apartment, secondary apartment, backyard cottage, or granny flat—is an additional dwelling unit that is independent of the primary residence and is located on a single-family lot. ADUs typically contain separate kitchen and bathroom facilities and generally can be classified into three types: (1) interior ADUs, which are located within a primary dwelling, such as a basement or attic apartment; (2) attached ADUs, which consist of living spaces that are added onto the primary dwelling; and (3) detached ADUs, which are structurally separate from the primary dwelling.<sup>1</sup>

The development of ADUs in the United States can be traced back to the early twentieth century, when they were a common feature in single-family housing.<sup>2</sup> Many ADUs were created by middle-aged and older persons seeking to take in boarders after their children moved out.<sup>3</sup> After World War II, the increased demand for housing led to explosive growth in the suburbs, where the zoning regulations focused almost exclusively on the housing needs of the traditional nuclear family.<sup>4</sup> Suburban development continued to be a prevalent form of housing development through the 1950s and 1960s, leading most communities to prohibit ADU construction.<sup>5</sup>

In response to “suburban sprawl,” increased traffic congestion, restrictive zoning, and the affordable housing shortage, community leaders began advocating a change from the sprawling suburban development pattern toward a more traditional style of planning:

Urban design movements, such as Smart Growth and New Urbanism, emerged in the 1990s to limit automobile dependency and improve the quality of life by creating inclusive communities that provide a wide range of housing choices. Both design theories focus on reforming planning practices to create housing that is high density, transit-oriented, mixed use, and mixed-income through redevelopment and infill efforts.<sup>6</sup>

Communities also began to view the development of ADUs as one way to meet their growing and changing housing needs. The report *Accessory Dwelling Units: Model Act and Local Ordinance* argues that changes over the 20-year period beginning in 2000 have highlighted the importance of reevaluating postwar housing regulations in favor of solutions, particularly the use of ADUs, to meet our housing needs.<sup>7</sup> These social and economic changes include:

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<sup>1</sup> *Accessory Dwelling Units: Case Study* at 1-2 (U.S. Dept. Housing and Urban Development) (June 2008) (hereinafter “ADU Case Study”).

<sup>2</sup> *ADU Case Study* at 1.

<sup>3</sup> *Accessory Dwelling Units: Model State Act and Local Ordinance* at 9 (AARP, 2020) (hereinafter “*Model ADU Ordinance*”), available online at

<https://www.aarp.org/content/dam/aarp/livable-communities/housing/2021/AARP%20ADU%20Model%20State%20Act%20and%20Local%20Ordinance-0212021-08.pdf>.

<sup>4</sup> *Id.*

<sup>5</sup> *ADU Case Study* at 1.

<sup>6</sup> *Id.*

<sup>7</sup> *Model ADU Ordinance*; see also William Macht, *Rethinking Private Accessory Dwellings*, URBANLAND, (Mar. 6, 2015), <http://urbanland.uli.org/planning-design/rethinking-private-accessory-dwellings/>.



1. The aging of the U.S. population and the growing need for housing that serves people of all ages, including older adults;
2. The crisis of unaffordable rents and home prices, which has spread to many urban areas, large and small;
3. Out-of-pocket costs for care in residential settings may be out of reach for many who need long-term care and are looking for lower-cost housing alternatives to allow for family caregiving needs;
4. The COVID-19 pandemic, which has driven home the need for housing that allows for caregiving. The pandemic has also worsened socioeconomic disparities in housing affordability as well as substandard housing conditions, which impact many households, including ones in communities of color affected by discriminatory housing practices and residential segregation;
5. The lack of adequate retirement savings for many older adults;
6. A greater awareness of the significant fiscal and environmental benefits of infill and redevelopment, including as part of a strategy for combating climate change;
7. The rise of online, short-term rental services that compete for existing housing in high amenity locations;
8. An increase in the awareness of systemic racism and class division that is embedded in typical single-family zoning, which excludes people of color and of modest means from neighborhoods that offer advantages in schooling, amenities, transportation and jobs; and
9. A modest shift back to larger, multigenerational households (partly a reflection of high home prices and rents), which are a more traditional form of households.<sup>8</sup>

Since zoning regulations typically segregate apartments from single-family homes and almost always prohibit their co-location on a single residential parcel, reforms authorizing ADUs were necessary to bring existing, unauthorized ADUs into compliance and to encourage the development of new ADUs.

In Vermont, ADUs are allowed as of right, provided that the property's wastewater system can support the ADU, the ADU does not exceed 30% of the original home's square footage, and the ADU complies with applicable setback, coverage, and parking requirements.<sup>9</sup> New Hampshire's ADU law, which went into effect June 1, 2017, requires municipalities to allow single-family homeowners to add an accessory dwelling, while giving the municipality the authority to require a conditional use permit or special exception for the accessory use.<sup>10</sup>

Amendments to California's ADU legislation that took effect in 2021 are intended to encourage the production of ADUs by streamlining the approval process and reducing barriers to the creation of this

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<sup>8</sup> *Model ADU Ordinance*.

<sup>9</sup> Patricia Salkin & Lora Lucero, *Planning for the Aging Boom: Assessing the Needs of a Diverse Population*, 37 No. 7 ZONING AND PLANNING REPORT 1, 5 (July 2014) (citing 24 V.S.A. § 4412).

<sup>10</sup> National Low Income Housing Coalition, *From the Field: New Hampshire Wins Protections for Accessory Dwelling Units* (Mar. 28, 2016), <http://nlihc.org/article/field-new-hampshire-wins-protections-accessory-dwelling-units>.

type of housing. These measures include, among others, a mandate that ADUs be deemed approved within 60 days of an application if there is no action on behalf of the jurisdiction.<sup>11</sup> Other changes include prohibiting local governments from imposing a minimum lot size requirement on ADUs, eliminating owner-occupancy requirements for ADUs approved between January 1, 2020, and January 1, 2025, and prohibiting a local governments from imposing a maximum size limit of less than 850 square feet, or 1,000 square feet if the ADU contains more than one bedroom.<sup>12</sup> Some states also offer incentives for communities to allow ADUs, such as providing low interest loans, tax relief, grants, relief from filing fees, and “ready-to-enact model ordinances.”<sup>13</sup> At the local level, hundreds of municipalities have adopted ordinances permitting and regulating ADUs, either in response to state legislation or independent of state law.<sup>14</sup>

Communities that allow ADUs typically do so as a means of creating additional affordable housing units. However, many homeowners view ADUs as a potential threat to the stability of single-family neighborhoods that should not be allowed, or should at least be closely controlled to avoid any potential negative impacts. Although the impacts of ADUs on single-family neighborhoods are relatively low in comparison to other types of affordable housing (e.g., multi-family apartments), “neighbors’ concerns about property values, aesthetics and ‘neighborhood character’ have often caused communities to ban detached ADUs [in single-family zones] or to allow them only on larger lots.”<sup>15</sup> A study published by the UCLA Department of Architecture & Urban Design confirmed these concerns, stating that, in order of importance, the top concerns raised with ADUs were: “parking (particularly the availability of street parking), increased density and overcrowding, potential crime and disorder, inadequate infrastructure, increase in renters and low-income residents, safety, decline in property values, and changes to neighborhood character.”<sup>16</sup>

As demonstrated by a case Connecticut superior court case, neighbor opposition to an ADU sometimes inappropriately focuses on the user rather than the use.<sup>17</sup> In *Whittemore v. Town of Simsbury Zoning Commission*, a property owner was denied a special permit for an ADU despite having met the requirements in the zoning bylaw. During the hearing, several neighbors opposed the application on the ground that it would allow the ADU to be occupied by “strangers” rather than relatives of the property owner.<sup>18</sup> The court overturned the denial, noting that the only occupancy-related requirement in the zoning bylaw was that one of the two units had to be occupied by the owner.<sup>19</sup> The applicant met that requirement and there was nothing unlawful about renting the other unit to non-family members.

In developing an ADU ordinance, local governments need to strike an appropriate balance between the community’s need for affordable housing and neighborhood concerns about ADUs. The challenge for policy-makers is to minimize the barriers for the development of ADUs in support of their communities affordable housing needs while being sensitive to the concerns of existing residents. The City of Alexandria, Virginia compiled the following recommendations for maintaining this balance in its own ADU regulations:

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<sup>11</sup> See California Dept. of Housing and Community Development, *Accessory Dwelling Unit Handbook* (Dec. 2020) [https://www.hcd.ca.gov/policy-research/docs/adu\\_december\\_2020\\_handbook.pdf](https://www.hcd.ca.gov/policy-research/docs/adu_december_2020_handbook.pdf).

<sup>12</sup> *Id.* at 11.

<sup>13</sup> *A Room of One’s Own* at 521 (citing Florida, Massachusetts, Vermont, and Washington).

<sup>14</sup> *Id.*

<sup>15</sup> *Model ADU Ordinance* at 33.

<sup>16</sup> Vinit Mukhija, Dana Cuff & Kimberly Serrano, *Backyard Homes and Local Concerns: How Can Local Concerns be Better Addressed?* at 111 (UCLA Dept. of Architecture & Urban Design, April 2014) (hereinafter “*Backyard Homes and Local Concerns*”).

<sup>17</sup> *Whittemore v. Town of Simsbury Zoning Commission*, 2015 WL 9684441 (Ct. Superior Nov. 24, 2015).

<sup>18</sup> *Id.* at \*7.

<sup>19</sup> *Id.* at \*8.



1. Adopt a by-right process for ADU development that reduces costs and uncertainty and streamlines the approval;
2. Do not impose an owner occupancy requirement on the ADU or the main unit;
3. Do not require off-street parking;
4. Adopt a tiered approach to setbacks whereby single-story detached ADUs have smaller, less restrictive setbacks than larger, two story units, and implement regulations for ADU window placements to maintain the privacy of nearby homes;
5. Impose size limits on ADUs that ensure the units are not too large (and therefore less like to be affordable) but also do not overly restrict the size of the ADU for homeowners with smaller homes.;
6. Do not place any minimum lot size restrictions on the development of ADUs;
7. Adopt the same restrictions around short-term rentals for ADUs as for other homes in Alexandria;
8. Consider developing innovative financing mechanisms and partnerships with banks and CDFIs to ensure that homeowners of all wealth and income levels are able to build their own ADUs;
9. Support programs that incentivize rather than require affordability to increase the supply of affordable rental units in the city. Also consider partnering with a local developer or nonprofit to front the cost of building an ADU in exchange for rent sharing or affordability.;
10. Consider both resident input and equity implications in the design and implementation of an ADU regulation.<sup>20</sup>

## **24.02 EFFECTIVENESS IN ACHIEVING STATED PURPOSE(S)**

Generally speaking, an assessment of the effectiveness of ADU ordinances depends on the specific purpose or purposes for which the ordinance was adopted.

### ***Creation of Affordable Housing***

As a technique for the production of affordable housing units, the effectiveness of an ADU ordinance can be measured by the number of units created under the ordinance. In 2003, the City of Santa Cruz, California adopted an ordinance permitting ADUs in certain residential zoning districts, subject to compliance with regulations concerning the location, permit process, deed restrictions, zoning incentives, and design and development standards. Together with an ADU Development Program that provides technical, financial, and other assistance to homeowners, the Santa Cruz program has produced 40 to 50

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<sup>20</sup> Stacy, Christina, et. al., *Designing Accessory Dwelling Unit Regulations Recommendations for the City of Alexandria, Virginia*, Urban Institute, Metropolitan Housing and Communities Policy Center (November 2020). <https://www.urban.org/sites/default/files/publication/103275/designing-accessory-dwelling-unit-regulations.pdf>.

ADUs annually.<sup>21</sup> Santa Cruz amended its ADU ordinance in 2021 to further reduce barriers, including allowing ADUs on any property zoned for residential or mixed-uses.<sup>22</sup>

Lexington, Massachusetts, a highly built-out suburb with a strong housing demand, implemented its first accessory dwelling unit bylaw in 1983. With only 60 units constructed in more than twenty years, the town amended its ADU bylaw in 2005 in order to remove market constraints, improve clarity, and enable the development of more ADUs. The changes made include reduced lot size and floor area requirements; allowing ADUs by-right in homes newer construction; and allowing ADUs by special permit in new construction.<sup>23</sup>

Portland, Oregon saw ADU development skyrocket after adopting policy changes that reduced construction costs by \$8,000 to \$10,000 per ADU in 2010.<sup>24</sup> In 2013, 200 ADUs were permitted, a six-fold increase over the average number of ADUs permitted between 2000 and 2009.<sup>25</sup> After reaching a peak of 531 ADU permits issued in 2018 and a predictable dip in permits during the COVID-19 pandemic, the number of ADU permits issued settled at a rate of about 250-300 permits per year.<sup>26</sup>

### ***Neighborhood Character and Property Values***

When viewed from the perspective of protecting neighborhood stability, property values, and the single-family character of a neighborhood, the effectiveness of an ADU ordinance depends on the extent to which a community has tailored the ordinance to achieve those goals. To guide communities in drafting ADU ordinances, the AARP, in partnership with the American Planning Association, published a Model ADU Ordinance that sets out the parameters for local regulation of ADUs, including “reasonable regulations and restrictions” that can be placed on ADUs. The Model ADU Ordinance contains several regulatory techniques that communities can use to control the location of ADUs and to minimize their potential adverse impacts on existing single-family neighborhoods. Below are some examples of these techniques.

- **Minimum Lot Size Requirement:** The Model ADU Ordinance recommends that communities not impose an increased lot size standard for ADUs. It also goes one step further and recommends allowing ADUs within or attached to an existing house on lots smaller than the minimum lot size if there is an existing house on the lot.<sup>27</sup>
- **Minimum Size of ADUs:** The Model ADU Ordinance recommends eliminating minimum-size limits on ADU units and instead recommends only requiring that an ADU be smaller than the primary dwelling unit. In cases where the primary dwelling unit is very small, local governments may consider allowing ADUs that are larger than that primary dwelling. An example provided is the City of Burlington, Vermont, which allows accessory dwelling units to be 30% of the gross square footage of the house or 800 square feet, whichever is *greater*.<sup>28</sup>

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<sup>21</sup> *ADU Case Study* at 4.

<sup>22</sup> See the City of Santa Cruz General Information and Standards and Frequently Asked Questions (available online at <https://www.cityofsantacruz.com/government/city-departments/planning-and-community-development/accessory-dwelling-units-adus>).

<sup>23</sup> See Accessory Dwelling Units (ADU) Suburban Case Study: Lexington, MA (available online at <https://www.mass.gov/service-details/case-studies-accessory-dwelling-units-adu>).

<sup>24</sup> Kathleen McCormick, *Gentle Infill*, LAND LINES, Jul. 2016, at 18.

<sup>25</sup> *Id.*

<sup>26</sup> See Portland, Oregon’s ADU Permit Data for 2020 (available online at <https://accessorydwellings.org/2021/07/22/portland-oregons-adu-permit-data-for-2020/>)

<sup>27</sup> *Model ADU Ordinance* at 36.

<sup>28</sup> *Model ADU Ordinance* at 37.

- Floor Area Ratios (FAR): FAR is recommended as a good way of regulating ADUs because FAR can provide more flexibility in the size of ADUs allowed. The standard also lends itself to bonus provisions that can be offered for the types of ADUs that accomplish local housing goals.<sup>29</sup>
- Architectural Consistency and Design Review: The Model ADU Ordinance recommends against establishing separate design standards for ADUs and instead recommends holding them to the same standards that are applied to primary residences.<sup>30</sup>

### 24.03 IMPACT ON PROPERTY VALUES

The extent to which ADU regulations affect property values will depend on local market conditions and the terms of the particular regulation. If there is significant demand in the marketplace for ADUs in single-family neighborhoods, then an ordinance that permits the construction of ADUs can be expected to have a positive effect on property values, while an ordinance that prohibits or severely restricts them would have a negative impact on the value of affected properties. Despite the common concern of opponents that ADUs result in declining property values, very little relevant evidence can be found in the literature. One statistical examination of low-density neighborhoods in Philadelphia associated ADUs with a 5% decline in property values.<sup>31</sup> However, other research suggests that buyers will pay a premium of about 15% to live in a New Urbanist community with features such as ADUs, over a suburban subdivision.<sup>32</sup>

A 2021 study found that the additional of an ADU can add considerably to a property's value. The study states that in America's largest cities, properties with an ADU can be priced 35% higher than properties without them.<sup>33</sup> By contrast, a study of more than 28,000 single-family home sales in 21 counties in a region stretching from central New Jersey to northern Maryland to determine whether certain types of home improvements actually reduces the value of a suburban home found that the existence of an "in-law suite" actually resulted in a 5.2% reduction in the selling price of a home.<sup>34</sup> Construction of ADUs can also affect property assessments. One example of unintended consequences is found in Portland, Oregon, where the county assessor is required to update the assessed value of a property any time there is a new use, such as the construction of an ADU.<sup>35</sup> The result in some cases is to significantly increase assessed values on older homes and, consequently, to increase the amount of property tax owed.<sup>36</sup>

### 24.04 IMPACT ON DEVELOPMENT COSTS

Some common ADU regulations can have a significant effect on development costs. Regulations that require payment of application fees or impose a lengthy or burdensome application process (e.g., those that impose a conditional use or special use permit requirement) can increase the soft cost of developing

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<sup>29</sup> *Model ADU Ordinance* at 39.

<sup>30</sup> *Model ADU Ordinance* at 39.

<sup>31</sup> Martin J. Brown & Taylor Watkins, *Understanding and Appraising Properties with Accessory Dwelling Units*, THE APPRAISAL JOURNAL at 300 (Fall 2012).

<sup>32</sup> *Id.* (citing Robert E. Lang, *Valuing the Suburbs: Why Some "Improvements" Lower Home Prices*, 1 OPOLIS: AN INTERNATIONAL JOURNAL OF SUBURBAN AND METROPOLITAN STUDIES at 5-12 (2005)).

<sup>33</sup> *2021 Study: How Much Value Do Granny Flats and other Accessory Dwelling Units Add to a Home?*, Porch Research (2021).

<sup>34</sup> *Id.* at 7.

<sup>35</sup> Steve Law, *County, City at Odds over Accessory Dwelling Units*, Oregon Local News, Sept. 22, 2015, <http://portlandtribune.com/pt/9-news/273752-148211-county-city-at-odds-over-accessory-dwelling-units>.

<sup>36</sup> *Id.*

an ADU.<sup>37</sup> Architectural design standards, which often require that the ADU be “architecturally consistent” with the primary single-family residence, can also add to the cost of development, particularly where such conditions are imposed through vague standards or guidelines and could not have been anticipated by the homeowner.<sup>38</sup> Regulations that require the installation of landscaping or privacy fence in order to screen the ADU from neighboring properties can also add to the cost of developing an ADU.<sup>39</sup> Also, owner-occupancy requirements may make it difficult to finance ADUs because the occupancy may become illegal if the lender forecloses.<sup>40</sup>

A 2021 publication by an ADU builder estimated the average cost to construct a new 499 square foot one-bedroom, one-bathroom ADU at between \$161,700 and \$201,125; these cost estimates include design and planning costs of \$6,000 to \$14,000, city fees of \$3,000 to \$11,000, construction labor and materials of \$175-\$300/square foot, and finish materials at \$50-\$75/square foot.<sup>41</sup> Another source estimated the cost to construct an ADU at \$156,000.<sup>42</sup>

## 24.05 IMPACT ON AMOUNT AND PATTERNS OF LAND DEVELOPMENT

In general, ADU regulations encourage infill development that increases the density of existing single-family neighborhoods.<sup>43</sup> Regulations that restrict ADUs to specific zoning districts, or that contain minimum lot size, setback, and coverage requirements can increase the size of the parcel that is required for an ADU and limit the extent to which ADUs can be constructed in a community. ADU regulations that contain setback and other dimensional restrictions, or that govern whether an ADU can be interior, attached, or detached from the primary residence can also effect the location of ADU development on existing lots.

## 24.06 IMPACT ON HOUSING AFFORDABILITY

ADUs are generally regarded as a source of affordable housing.<sup>44</sup> The authors of the research paper *A Room of One's Own?: Accessory Dwelling Unit Reforms and Local Parochialism*, describe this perspective as follows:

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<sup>37</sup> Gerald E. Buker, *A Study of Backyard Cottage Policy in Seattle, Washington: Existing Conditions Study, Capacity Analysis, and Survey in Conjunction with Seattle's Department of Planning and Development* (2015) (unpublished Master's thesis, University of Washington) <https://digital.lib.washington.edu/researchworks/handle/1773/34200>, (discussing the length of permitting review, and average permit fees of \$1,950 as impediments to creating ADUs).

<sup>38</sup> *Model ADU Ordinance* at 42.

<sup>39</sup> *Model ADU Ordinance* at 45.

<sup>40</sup> John Infranca, *Changing Households: Regulatory Challenges for Micro-Units and Accessory Dwelling Units*, 25 STAN. L. POL'Y REV. 53, 84-85 (2014).

<sup>41</sup> ADU Cost: Complete ADU Development Cost Breakdown (2021) (available online at <https://leviconstruction.com/adu-cost-complete-adu-development-cost-breakdown/>).

<sup>42</sup> Chapple, Karen, *Jumpstarting the Market for Accessory Dwelling Units*, (2017) Berkeley Blog. (available online at <https://blogs.berkeley.edu/2017/05/23/jumpstarting-the-market-for-accessory-dwelling-units/>).

<sup>43</sup> Martin J. Brown & Jordan Palmeri, *Accessory Dwelling Units in Portland, Oregon: Evaluation and Interpretation of a Survey of ADU Owners* at 14 (Oregon Dept. of Environmental Quality) (last updated June 2014) (hereinafter “ADUs in Portland”).

<sup>44</sup> See, e.g., *Accessory Dwelling Units* (MRSC Report No. 33)(Oct. 1995) (stating: “Allowing ADUs is one way that communities can provide more affordable housing opportunities without the necessity of local government expenditures or subsidies.”); *Model ADU Ordinance* at 5 (stating: “ADUs also offer a cost-effective means of increasing the supply of affordable rental housing in a community”); PATRICIA E. SALKIN, AMERICAN LAW OF ZONING § 22:46 (Accessory Apartments) (5th ed., 2014) (stating: “In Florida, state enabling statutes specifically acknowledge that accessory dwelling units should be used as a form of affordable housing.”).

Affordable housing advocates agree that ADUs will promote people’s ability to live in single-family communities containing mixed rental and more expensive ownership properties, while paying approximately the same rent as for a studio apartment. In fact, ADUs rents may actually be below market, since the landlord can conceivably depend on the tenant for house sitting and minor maintenance tasks, etc. Particularly in locales with high real estate values and property taxes, single-family houses remain out of the reach of individuals and families of modest means. They may also be too expensive to maintain for older Americans, especially those on fixed incomes. ADUs are more affordable than single-family homes, almost by definition, since they usually are smaller than other units in the neighborhood (by regulation in many municipalities they must be much smaller than the “principal dwelling”).

On the supply side, proponents claim they will “provide for new housing,” encourage full utilization of single-family properties, and “provide a cost-effective means of creating new housing.” Construction will either take place within the existing principal dwelling or in the rear, and because it will be small scale, in any event, and will take advantage of existing land ownership, it will cost less than a typical rental unit. Allowing the residents of single-family homes to rent their unneeded space can provide additional income as well as the living space. Even where the ADU unit will house an elderly family member, it will save the costs of full-time nursing care (for the elder) and/or daycare for a small child living in the principal unit. ADUs also may offer lower-income people the opportunity to live near suburban employment opportunities and access to high-quality public schools.<sup>45</sup>

Despite the widely-held notion that ADUs are a source of affordable housing, some commentators have questioned whether that perception is appropriate. In a study of ADUs in Portland, Oregon, the authors argue that it is difficult, for several reasons, to determine whether ADUs actually provide affordable housing. First, they argue that there is an overall lack of empirical data on the subject.<sup>46</sup> Second, they note that discussions of ADUs as affordable housing use many definitions of “affordable.” While government housing programs usually define “affordable” with a 30% standard—i.e., housing that costs less than 30% of household income is considered affordable—ADU advocates often speak of affordability in a less precise way.<sup>47</sup> The authors note that the few research pieces that actually examined ADU rents used “a more pragmatic, relative assessment of affordability”—namely they compared ADU rents to competing rentals in the same area, but did not measure affordability from the perspective of housing costs relative to tenant income.<sup>48</sup>

Applying the same relative-assessment of affordability approach in their study of ADUs in Portland, the authors made a number of findings that called into question whether ADUs were, in fact, more affordable than other types of rental units in the area. First, they observed that a substantial number of ADUs (13%) were occupied for zero rent, while another 5% were occupied for “ultra-low rents” of less than \$500/month.<sup>49</sup> When comparing ADU and market rate rents, the authors observed:

The statistical comparison of ADU and market rents depends greatly on whether the zero-cash-rent units are included in the analysis. When they are, there is no significant

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<sup>45</sup> *A Room of One’s Own* at 533-34.

<sup>46</sup> *ADUs in Portland* at 34.

<sup>47</sup> *Id.* (citing a publication of the Puget Sound Regional Council stating: “Monthly rent of the [ADU] unit would likely be lower than a mortgage payment for a house in the same neighborhood.”).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 36.

difference between observed ADU rents, which had a mean of \$753 for attached ADUs, and the comparable rents from the Multifamily Northwest survey, which had a mean of \$778. If the zero-cash-rent units are omitted, attached Portland ADUs have a mean rent of \$872, which is significantly higher than the Multifamily NW (2013) comparables.<sup>50</sup>

San Francisco, CA, a city known for its acute housing affordability crisis has had moderate success with an ADU ordinance that was implemented in 2014 and has recorded over 900 permits since its adoption (as of 2019).<sup>51</sup> However, A recent study of the San Francisco program found a significant locational mismatch between where affordable housing is needed and where the ADU permits are being issued. Most of the ADU permits have been issued in the neighborhoods with the highest median household incomes, suggesting that ADUs have failed to provide San Francisco’s lowest-income communities with theoretically below market-rate housing.<sup>52</sup>

Some communities have sought to ensure the affordability of ADUs by requiring that they be restricted as affordable to low-income or moderate-income households. However, a mandatory affordability requirement can have the unintended effect of discouraging the construction of any ADUs. A November 2020 report by the Urban Institute argues that affordability requirements can be counterproductive, noting that housing advocates in Washington, D.C. “recognized that an affordability requirement would have ‘killed the market’ for building ADUs, given the level of effort involved in meeting affordability standards.”<sup>53</sup> In 2007, the Town of Truro, Massachusetts adopted an affordable ADU bylaw that required ADUs to be occupied exclusively by low- or moderate-income families, with a maximum rent based on the Fair Market Rental Guidelines published by HUD. After it result in “zero AADUs” being built over a several year period,<sup>54</sup> Truro amended the bylaw to remove the affordability requirement.<sup>55</sup>

## **24.07 RECOMMENDED TALKING POINTS: PROS AND CONS**

### PROS:

- ADUs can contribute to housing affordability and can provide alternative rental housing options within single-family neighborhoods.
- ADUs provide an opportunity for independent housing for elderly parents, grown children, extended family, care providers (including nurses, housekeepers, and au pairs), and guests.
- ADUs can make it possible for adult children to provide care and support to a parent in a semi-independent living arrangement and offer a way for seniors to live near family or to age in place and maintain their independence while living in smaller housing units that require less care and maintenance.

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<sup>50</sup> *Id.* at 37.

<sup>51</sup> Week, Lauren, *Less is Not More: The False Promise of Accessory Dwelling Units for San Francisco’s Lowest Income Communities*, 30 J. Affordable Housing & Community Dev. L. 281 (2017).

<sup>52</sup> *Id.* at 289.

<sup>53</sup> *Designing Accessory Dwelling Unit Regulations* (Nov. 2020, Urban Institute) (available online at <https://www.urban.org/sites/default/files/publication/103275/designing-accessory-dwelling-unit-regulations.pdf>) at 17.

<sup>54</sup> “Wellfleet Looks at Changing its Accessory Dwelling Bylaw,” *The Provincetown Independent* (Dec. 17, 2020) (available online at <https://provincetownindependent.org/featured/2020/12/17/wellfleet-looks-at-changing-its-accessory-dwelling-bylaw/>).

<sup>55</sup> Town of Truro Zoning Bylaw (updated 2019) § 40.2.



- ADUs can be constructed for only 25% to 50% of the cost of a single-family dwelling in high cost areas.<sup>56</sup>
- ADUs can provide homeowners with needed additional income to meet high mortgage and maintenance costs. For a young family in its first home or for a single parent after a divorce, the additional income from an ADU may make a difference in whether they are able to stay in their home or not. The additional income from an ADU may be particularly helpful for elderly homeowners who are living on fixed incomes.<sup>57</sup>
- From the municipal perspective, ADU construction can result in additional property tax revenues to the extent that the unit increases the value of the property.<sup>58</sup>

#### CONS:

- Opponents of ADUs frequently express concern about compatibility of ADUs with neighborhood character and design, the availability of on-street parking in the neighborhood, and impact that ADUs have on property values, and community services.
- ADU regulations can increase development costs by requiring the payment of application fees and by imposing a lengthy or burdensome application process and architectural design standards on ADU development.
- An ordinance that prohibits or severely restricts the development of ADUs in single-family residential zoning districts can be expected to have a negative impact on property values if there is significant demand for ADUs in the local marketplace.

## 24.08 INCENTIVE-BASED ALTERNATIVES

Communities seeking to accommodate or encourage the creation of ADUs generally have to amend their zoning regulations to explicitly allow them in single-family residential districts. Once they are permitted, communities can offer a number of incentives for homeowners to create ADUs, such as informational and technical assistance programs to help residents with permitting, designing, and financing the construction of an ADU.

To promote the construction of new ADUs within city limits, Portland, Oregon agreed to waive its “system development charges” (which amounted to \$22,000 in 2020) for all ADUs, provided that the owner agreed not to list it as a short-term rental on platforms such as Airbnb for a ten-year period.<sup>59</sup> The City of Newport Beach, California agreed to waive all permitting fees for the construction of new detached ADUs through the end of 2022—a savings of \$1,000 to \$5,000.<sup>60</sup> The City of Boston, Massachusetts has implemented a pilot program to encourage ADUs through benefits that include

<sup>56</sup> *2021 Study: How Much Value Do Granny Flats and other Accessory Dwelling Units Add to a Home?*, Porch Research (2021).

<sup>57</sup> <sup>57</sup> Patricia Therese Tyre, *Accessory Dwelling Units as Affordable Housing and Smart Growth: Case Studies of Winter Park and Orlando, Florida* at 20 (Univ. Florida, 2008).

<sup>58</sup> *Id.* at 22.

<sup>59</sup> See Housing Policy Case Studies Facilitating the Development of Accessory Dwelling Units in Portland, Oregon, (available online at <https://localhousingsolutions.org/housing-policy-case-studies/facilitating-the-development-of-accessory-dwelling-units-in-portland->).

<sup>60</sup> *ADU Aid Programs Across the U.S.* (available online at <https://villahomes.com/blog/adu-aid-programs/#:~:text=Program%3A%20Accessory%20Dwelling%20Unit%20Program,affordable%20rate%20for%20five%20years>).

deferred equity loans up to \$30,000 and a toolkit for homeowners covering permitting, financing, construction, and more.<sup>61</sup>

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<sup>61</sup> *Id.*



## SECTION 25: MISSING MIDDLE HOUSING

### 25.01 PURPOSE AND KEY TERMS

“**Missing Middle Housing**,” a term coined by architect and urban designer Dan Parolek, consists of “a range of house-scale buildings with multiple units—compatible in scale and form with detached single-family homes—located in a walkable neighborhood.”<sup>1</sup> These types of housing, including duplexes, triplexes, fourplexes, cottage courts, and courtyard buildings, are deemed “missing” because since the mid-1940s zoning regulations have largely banned or severely restricted their development in single-family residential districts and neighborhoods. They are in the “middle” because “they sit in the middle of a spectrum between detached single-family homes and mid-rise to high-rise apartment buildings, in terms of form and scale, as well as number of units and often, affordability.”<sup>2</sup> Simply put, the missing middle housing types occupy a middle ground between single-family homes and large apartment buildings.

Currently, exclusive single-family zoning constitutes a large majority of urban land use in the United States.<sup>3</sup> For example, in about 70% of the cities and towns in the Greater Boston area, 80% or more of the land area is zoned for single-family housing.<sup>4</sup> In a move to encourage the development of Missing Middle Housing (“MMH”), some jurisdictions have eliminated, or severely limited areas zoned exclusively for single-family development. This approach has led, in some instances, to sensationalized and misleading headlines, that a community has “banned” single-family zoning.<sup>5</sup> In no jurisdiction, however, have zoning reforms aimed at increasing MMH actually *prohibited* single-family development. Instead, as discussed below, rezoning efforts designed to increase “middle” housing options generally have diversified the types of housing that can be developed in existing single-family neighborhoods, with the intent of supplementing, not eliminating, single-family development. MMH advocates note that single-family zoning “is not problematic because it allows detached single-family homes. It is problematic because it *does not allow* anything else.”<sup>6</sup>

Conventional zoning, also known as “Euclidean” zoning, traditionally regulates by land use and density.<sup>7</sup> In an R1 residential zoning district, for example, an owner might be able to build a 3,000 square foot single-family home by-right, but would not be able to build the same size structure containing two 1,500 square foot units (i.e., a duplex) or three 1,000 square foot units (triplex) on the same lot. While communities that have a traditional R1 residential district may also have one or more multifamily zoning districts, the minimum lot size requirements and the size of multifamily buildings in general tend to be much larger than single-family construction; as a result, multifamily development tends to be

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<sup>1</sup> Opticos Design, *Missing Middle Housing*, <https://missingmiddlehousing.com/> (hereinafter “Opticos Design, *Missing Middle Housing*”); see also Congress for the New Urbanism, *Missing Middle Housing*, <https://www.cnu.org/our-projects/missing-middle-housing>.

<sup>2</sup> Opticos Design, *Missing Middle Housing*.

<sup>3</sup> Robert C. Ellickson, *The Zoning Straitjacket: The Freezing of American Neighborhoods of Single-Family Houses*, 96 IND. L.J. 395, 397 (2021) (hereinafter “*The Zoning Straitjacket*”).

<sup>4</sup> Jake Wegmann, *Death to Single-Family Zoning...and New Life to the Missing Middle*, JOURNAL OF THE AMERICAN PLANNING ASSOCIATION 86(1), 113-119, (2020) (hereinafter “*Death to Single-Family Zoning*”).

<sup>5</sup> NAHB, *Why a “Ban” on Single-Family Zoning Should Be a Good Thing*, <https://www.nahb.org/-/media/NAHB/advocacy/docs/industry-issues/land-use-101/state-local-affordability/why-ban-on-single-family-zoning-should-be-a-good-thing.pdf>.

<sup>6</sup> Michael Manville, Paavo Monkkonen & Michael Lens, *It’s Time to End Single-Family Zoning*, JOURNAL OF THE AMERICAN PLANNING ASSOCIATION 86(1), 106-112 (2020).

<sup>7</sup> Opticos Design, *What’s the best way to enable Missing Middle Housing?*, <https://missingmiddlehousing.com/about/how-to-enable>.

incompatible with neighboring single-family development, in terms of mass and scale, leaving no room for MMH.<sup>8</sup>

In lieu of conventional zoning, Parolek and other MMH advocates recommend using a form-based code as a possible solution, since a form-based regulation can permit a wide range of housing types (e.g., single-family detached homes, cottage courts, and side-by-side duplexes) while using building form standards to ensure that new development is compatible, in terms of mass and scale, with the existing built environment.<sup>9</sup> However, as shown in the examples below, not all MMH efforts take this approach.

## **25.02 EFFECTIVENESS IN ACHIEVING STATED PURPOSE(S)**

Proponents of missing middle housing view it as a means of providing “solutions along a spectrum of affordability to address the mismatch between the available U.S. housing stock and shifting demographics combined with the growing demand for walkability.”<sup>10</sup> Zoning changes to accommodate MMH are generally designed to increase the total supply of housing as well as the diversity of available housing types. MMH options, at a variety of price points, arguably open the housing market to a broader and more diverse group of buyers. An increased supply of MMH also can have both equitable and environmental benefits.<sup>11</sup>

Zoning changes that promote the creation of missing middle housing are unlikely to immediately change the character of neighborhoods that are already auto-dependent into transit-oriented nodes or to notably increase the supply of housing options. Existing community attributes make some locations better suited for missing middle housing: “One of the main reasons that it made sense for Minneapolis to allow triplexes citywide is that a large majority of the city was laid out in a pattern of walkable streets and blocks with a mix of housing types prior to World War II.”<sup>12</sup> Even if zoning codes are modified to eliminate single-family only restrictions, “such houses will persist in large numbers. In many, perhaps most, neighborhoods, economic conditions will not justify denser housing types.”<sup>13</sup> It may be too soon to evaluate the effectiveness of legislative efforts designed to increase missing middle housing.

### **“Middle Housing” Legislation (Oregon House Bill 2001)**

In 2019 the Oregon legislature passed House Bill 2001 (HB 2001) with a stated goal of developing more affordable housing choices throughout the state.<sup>14</sup> The bill required all “medium cities” (i.e., those with a population of 10,000 to 25,000 residents)<sup>15</sup> to amend their zoning regulations to permit the development of a duplex on every lot zoned for single-family development on or before June 30, 2021.<sup>16</sup> It also requires all “large cities”<sup>17</sup> in the state to amend their zoning regulations, no later than June 30, 2022, to

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Opticos Design, *Missing Middle Housing*.

<sup>11</sup> See generally *Death to Single-Family Zoning*; see also Minneapolis 2040 (Goals), <https://minneapolis2040.com/>.

<sup>12</sup> Dan Parolek, CNU, *Best practices for ending exclusive single-family zoning* (2/25/2020), <https://www.cnu.org/publicsquare/2020/02/25/best-practices-ending-exclusive-single-family-zoning>.

<sup>13</sup> *Death to Single-Family Zoning*.

<sup>14</sup> Oregon Urban Planning, Department of Land Conservation and Development (“DLCD”), Housing Choices (House Bill 2001), <https://www.oregon.gov/lcd/UP/Pages/Housing-Choices.aspx> (hereinafter “DLCD Housing Choices”); Adams-Schoen, *Dismantling* at 16-19; HB 2001 (2019) (amending O.R.S. 197.296, 197.303, 197.312 and 455.610 and section 1, chapter 47, Oregon Laws 2018).

<sup>15</sup> See DLCD Housing Choices.

<sup>16</sup> DLCD, Key Elements of House Bill 2001, <https://www.oregon.gov/lcd/UP/Documents/HB2001TechnicalOverview.pdf> (Nov. 6, 2019).

<sup>17</sup> All Oregon cities with a population of more than 25,000, unincorporated areas within the Portland Metro boundary that are served by sufficient urban services, and all cities within the Portland Metro boundary with a population of more than 1,000. DLCD Housing Choices.

permit all “middle housing types in areas zoned for residential use that allow for the development of detached single-family dwellings.”<sup>18</sup> HB 2001 defines “middle housing” to mean duplexes, triplexes, quadplexes, cottage clusters, and townhouses.<sup>19</sup> Regulated cities are allowed to “regulate siting and design of middle housing required to be permitted under” HB 2001, provided that the “regulations do not, individually or cumulatively, discourage the development of all middle housing types permitted in the area through unreasonable costs or delay.”<sup>20</sup>

With few exceptions, cities that fail to adopt the required zoning changes by the statutory deadlines will be preempted by and must apply a model ordinance adopted by the Department of Land Conservation and Development Commission (“DLCD”).<sup>21</sup> On July 23, 2020 and December 9, 2020, DLCD adopted a model housing code and administrative rules for medium-sized cities and large-size cities, respectively.<sup>22</sup> One criticism of the regulations includes that LCDC defined “duplex” to include “two detached dwelling units on a Lot or Parcel.”<sup>23</sup> Therefore, a medium or large city could meet the duplex requirement of HB 2001 by permitting DADUs by right, which seems to contravene the purpose of the HB 2001 since Oregon already requires the allowance of an ADU.<sup>24</sup>

Because the law is so new, it is too early to evaluate the effectiveness of HB 2001 in increasing middle housing production in general and more affordable development in particular. The DLCD itself has said that it “expects the transformation of housing choices to be gradual.”<sup>25</sup> Nonetheless, it bears mention that the regulations adopted by the DLCD do address several common barriers to more dense and affordable housing, including minimum off-street parking requirements. For example, the middle housing regulations provide that a medium city “may not require more than a total of two off-street parking spaces for a Duplex.”<sup>26</sup> In addition, the impact of other affordability barriers, such as the application of development charges, property taxes, or construction taxes, must be considered as part of the local comprehensive plan and development code amendment process.<sup>27</sup>

### **Elimination of Single-Family Zoning (Minneapolis)**

After an extensive public planning process, in 2019 Minneapolis, Minnesota adopted a new compressive plan known as “Minneapolis 2040,”<sup>28</sup> which expressly recognized that the city’s zoning regulations had “favored single-family housing at the expense of housing access since the era of segregation.”<sup>29</sup> The plan also established the following “Accessible and Affordable Housing” goal (Goal 3) for the city: “In 2040, all Minneapolis residents will be able to afford and access quality housing throughout the city.”<sup>30</sup> In order to increase access to housing, Minneapolis 2040 calls for the city to “achieve greater housing supply and

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<sup>18</sup> HB 2001.

<sup>19</sup> HB 2001. Cottage clusters are “groupings of no fewer than four detached housing units per acre with a footprint of less than 900 square feet each and that include a common courtyard.”

<sup>20</sup> HB 2001.

<sup>21</sup> DLCD Housing Choices.

<sup>22</sup> DLCD, Housing Rulemaking, <https://www.oregon.gov/lcd/LAR/Pages/Housing.aspx>.

<sup>23</sup> OAR § 660-046-0020.

<sup>24</sup> Sarah J. Adams-Schoen, *Dismantling Segregationist Land Use Controls*, ZONING AND PLANNING LAW REPORTS, Vol. 43, No. 8 (September 2020) (hereinafter “Adams-Schoen, *Dismantling*”).

<sup>25</sup> DLCDL Housing Choices.

<sup>26</sup> OAR § 660-046-0120.

<sup>27</sup> DLCD, *HB 2001 and HB 2003 Frequently Asked Questions*, (March 25, 2020), [https://www.oregon.gov/lcd/UP/Documents/HB\\_2001\\_HB\\_2003\\_Frequently\\_Asked\\_Questions.pdf](https://www.oregon.gov/lcd/UP/Documents/HB_2001_HB_2003_Frequently_Asked_Questions.pdf).

<sup>28</sup> Paul Mogush, *Advancing Racial Equity Through Land-Use Planning*, AMERICAN PLANNING ASSOCIATION PLANNING ADVISORY SERVICE (May/June 2021) (hereinafter “*Advancing Racial Equity Through Land-Use Planning*”).

<sup>29</sup> Minneapolis 2040 at 19. The Minneapolis 2040 Plan is available at: [https://minneapolis2040.com/media/1489/pdf\\_minneapolis2040-just-policy-document.pdf](https://minneapolis2040.com/media/1489/pdf_minneapolis2040-just-policy-document.pdf).

<sup>30</sup> Minneapolis 2040, Goal 3.

diversity by allowing small-scale residential structures with up to three dwelling units” on lots in neighborhoods farthest from downtown that primarily contain single-family homes.<sup>31</sup> To achieve that goal, Minneapolis became the first major city in the United States to “eliminate” single-family zoning.<sup>32</sup> In particular, the city revised its zoning regulations to permit up to three residential units on every lot in the city zoned for single-family development.<sup>33</sup> It also adopted a “Built Form Overlay District” and a set of zoning text amendments that provide for increased building height and bulk standards<sup>34</sup> as an incentive for developers to include much needed amenities such as affordable housing, child care, grocery stores, or pedestrian connectivity in their projects.<sup>35</sup>

As expected, the results in Minneapolis have been incremental.<sup>36</sup> Reflecting an expected, slow pace, in 2020, “the city approved building permits for 34 duplexes and nine triplexes (both conversions and new construction).”<sup>37</sup> In collaboration with the city, the Federal Reserve Bank of Minneapolis (FRBM) has agreed to monitor how the policies and regulatory changes that resulted from the 2040 Plan impact future development in the city. In particular, the FRBM will develop indicators to measure the city’s progress toward achieving that following housing goal of the 2040 Plan: “In 2040, all Minneapolis residents will be able to afford and access quality housing throughout the city.”<sup>38</sup>

### **State Accessory Dwelling Unit Laws**

Although single attached and detached ADUs have been permitted by right in Seattle since 1994 and 2004 respectively, the prevalence of ADUs remained low – as of 2019, less than 1% of eligible single-family lots were developed with a detached ADU (“DADU”).<sup>39</sup> To encourage ADU production, the city revised its zoning code in 2019 to allow up to twelve unrelated individuals to reside on a single-family lot having a principal dwelling and two ADUs; removed the owner-occupancy and off-street parking requirements; decreased the minimum lot size required for an ADU; and increased the applicable floor area and building height limits.<sup>40</sup> A year later, Seattle’s Department of Planning and Development launched a website called “ADUniverse,”<sup>41</sup> a resource that “features a gallery of pre-approved DADU designs, a step-by-step guide to the ADU process, and a search tool to identify the feasibility of adding an ADU to your property.”<sup>42</sup>

These steps have resulted in a sharp increase in the number of ADU permits issued annually in Seattle. Prior to 2016, the city averaged well under 200 ADU permits per year. By 2019, the number of ADU permits issued rose to 285, reflecting an upward trend that began in 2016-2018.<sup>43</sup> Since then the numbers

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<sup>31</sup> *Id.*, p. 107.

<sup>32</sup> *Advancing Racial Equity Through Land-Use Planning*.

<sup>33</sup> *Id.*

<sup>34</sup> See Minneapolis 2040, Built Form Regulations, <https://minneapolis2040.com/implementation/built-form-regulations/>.

<sup>35</sup> *Advancing Racial Equity Through Land-Use Planning* at 7.

<sup>36</sup> *Advancing Racial Equity Through Land-Use Planning* at 8.

<sup>37</sup> *Id.*

<sup>38</sup> Federal Reserve Bank of Minneapolis, “Minneapolis Fed to measure long-term housing impact of Minneapolis 2040 plan” (May 5, 2020), <https://www.minneapolisfed.org/article/2020/minneapolis-fed-to-measure-long-term-housing-impact-of-minneapolis-2040-plan>.

<sup>39</sup> Adams-Schoen, *Dismantling*.

<sup>40</sup> *Id.*

<sup>41</sup> ADUniverse, <https://aduniverse-seattlecitygis.hub.arcgis.com/>.

<sup>42</sup> Seattle Department of Planning and Development, *Accessory Dwelling Unit*, <https://www.seattle.gov/sdci/permits/common-projects/accessory-dwelling-units>.

<sup>43</sup> ADUniverse.

continued to rise, with 513 ADU permits issued in 2020 and 388 ADU permits issued in the first half of 2021.<sup>44</sup>

In 2020 the Vermont legislature passed an amendment to the state’s equal treatment of housing law, which already prohibited municipalities (except in limited circumstances) from banning attached or detached ADUs on an owner-occupied lot.<sup>45</sup> The expanded ADU law provides that Vermont municipalities must permit ADUs, provided that the unit not exceed 30% of the total habitable floor area of the principal home or 900 square feet, whichever is greater, and cannot limit the number of bedrooms allowed in an ADU. It also requires that municipalities allow the property owner to reside in either the principal home or the ADU.<sup>46</sup>

Since 2017, New Hampshire has also required municipalities to permit attached ADUs either by-right or with a conditional use permit.<sup>47</sup> Municipalities cannot impose greater dimensional standards on homes with ADUs than on homes without an ADU, but may require that adequate water supply and sanitary disposal is available.<sup>48</sup> In addition, the size of an ADU may not be limited to less than 750 square feet, bedrooms may not be limited to one, and the ADU bylaw cannot require a familial relationship between the occupants of an ADU and the principal unit. An ADU bylaw may, but is not required to, permit detached ADUs.<sup>49</sup>

### 25.03 IMPACT ON PROPERTY VALUES

Those who oppose “upzoning” efforts to accommodate multi-unit development in heretofore exclusively single-family neighborhoods often cite the preservation of community character and property values as reasons to resist change.<sup>50</sup> However, to date there is no indication that any empirical evidence exists to back these claims. However, there is evidence that a strong market for MMH housing types exists. A survey done by NAR in 2020 found that one in five individuals living in a detached single-family home would prefer to live in an attached home in a walkable community with a shorter commute.<sup>51</sup> Conversely, only one in ten would prefer to move from an attached home in a walkable community to a detached home.<sup>52</sup> Similarly, a survey of metro-Houston residents “preferring a ‘smaller home in a more urbanized area, within walking distance of shops and restaurants’ to ‘a single-family home with a big yard where you would need to drive everywhere you go’ rose from 40% to 50% from 2008 to 2016.”<sup>53</sup> Additional research also indicates that potential homebuyers who would prefer something other than a detached suburban home simply have been unable to find it.<sup>54</sup>

A 2019 report compiled for the National Association of Home Builders (“NAHB”) found that when local zoning codes are targeted at increasing the production of MMH, development of these market rate units

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<sup>44</sup> *Id.* The online dataset is updated on a quarterly basis.

<sup>45</sup> 24 V.S.A. § 4412(1)(E); Leslie Black-Plumeau, Vermont Housing and Finance Agency, *Vermont Legislature and Governor expand options for accessory dwelling units* (10/15/2020), <https://www.vhfa.org/news/blog/vermont-legislature-and-governor-expand-options-accessory-dwelling-units>.

<sup>46</sup> *Id.* See also Dwight Merriam, *The Great “Yes I my Backyard” (YIMBY) Movement Driven by the Gig Economy*, 29 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 57, 58 (2020) (hereinafter “YIMBY Movement”).

<sup>47</sup> RSA 674:71-73; New Hampshire Housing, Accessory Dwelling Units, <https://www.nhhfa.org/housing-challenges-solutions/accessory-dwelling-units/>.

<sup>48</sup> RSA 674:72.

<sup>49</sup> RSA 674:73.

<sup>50</sup> YIMBY Movement at 58.

<sup>51</sup> NAR, 2020 Community and Transportation Survey, <https://www.nar.realtor/reports/nar-community-and-transportation-preference-surveys>.

<sup>52</sup> *Id.*

<sup>53</sup> *Death to Single-Family Zoning*.

<sup>54</sup> *Id.*



can increase both housing diversity and affordability.<sup>55</sup> The NAHB report also found that the “market responds favorably to well-designed, smaller-unit buildings that fit within a single-family neighborhood”<sup>56</sup> and that the demand for missing middle housing stretches across both income and generational spectrums:

[T]he demand for walkable neighborhoods is strong. Many Baby Boomers and retirees do not want to stay in their empty nester single-family homes or move to traditional retirement communities. Millennials seek to blend their urban wants with suburban needs as they age. Millennials and Boomers both want to live in communities where they can live, work, and play. Further, millennials are willing to have less space in in favor of more flexible working situations. Retirees are looking for greater accessibility, and multigenerational households are also on the rise.<sup>57</sup>

Although the idea of a detached, single-family home is commonly equated with the “American Dream,”<sup>58</sup> there is no evidence to suggest that encouraging denser and appropriately scaled development will negatively impact property values. To the contrary, the studies done by NAR and NAHB have found that there is a demand for MMH, which could lead to increased property values.

## 25.04 IMPACT ON DEVELOPMENT COSTS

A primary policy argument in promoting MMH is that by allowing more and smaller units on less land, MMH development can be sold at a lower cost than traditional detached single-family housing.<sup>59</sup> That is especially true in markets where land values are high and development costs can be reduced on a per-unit basis by virtue of permitting more development on less land. The densification of existing neighborhoods with MMH can also take advantage of existing infrastructure, such as water, wastewater, sidewalks, and roadways, at a low incremental cost.<sup>60</sup> In some cases, such as the addition of one or two ADUs or the conversion of an existing home to a multifamily dwelling, land acquisition costs may be zero.<sup>61</sup>

As one MMH advocate noted,

Missing Middle, in the vast majority of North American built-up neighborhoods, is the least costly way to build housing. By contrast, units in elevator buildings are expensive to build per square foot (even including land); not much can change that basic fact. Also, the demolition of single-family houses and their replacement with new-build Missing Middle is far from the only outcome R1 suppresses: allowing a homeowner to internally partition a house, subdivide the lot and sell a portion to a homebuilder, or rent space in

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<sup>55</sup> The National Association of Homebuilders (NAHB) *Diversifying Housing Options with Smaller Lots and Smaller Homes* at 5 (June, 2019) <https://www.nahb.org/-/media/NAHB/advocacy/docs/top-priorities/housing-affordability/nahb-2019-small-homes-research-report.pdf> (hereinafter “NAHB Report”).

<sup>56</sup> NAHB Report at 7.

<sup>57</sup> NAHB Report at 5.

<sup>58</sup> Haisten Willis, WASHINGTON POST, *Downsizing the American Dream: The new trend toward ‘missing middle housing’* (2/14/2019), [https://www.washingtonpost.com/realestate/downsizing-the-american-dream-the-new-trend-toward-missing-middle-housing/2019/02/13/0f6d0568-232b-11e9-81fd-b7b05d5bed90\\_story.html](https://www.washingtonpost.com/realestate/downsizing-the-american-dream-the-new-trend-toward-missing-middle-housing/2019/02/13/0f6d0568-232b-11e9-81fd-b7b05d5bed90_story.html) (hereinafter “Willis”).

<sup>59</sup> Todd Litman, Victoria Transport Policy Institute, *A Recipe for Achieving Real Housing Affordability* (4/21/2021), <https://www.governing.com/community/a-recipe-for-achieving-real-housing-affordability> (hereinafter “A Recipe for Achieving Real Housing Affordability”) (“Upzoning can significantly reduce housing-development costs. Townhouses typically cost 30 percent less per unit, and apartments 50 percent less, than comparable-quality single-family homes. Increasing the supply of such housing tends to increase both moderate- and lower-priced housing affordability through ‘filtering.’”).

<sup>60</sup> YIMBY Movement at 68.

<sup>61</sup> *Id.*

the backyard for a tiny house on wheels are all thrifty practices that R1 either ended or never allowed.<sup>62</sup>

Many factors beyond density and use restrictions, however, influence development costs and may make MMH development infeasible. For instance, parking requirements above one space per unit can make residential infill development infeasible.<sup>63</sup> Impact fees tied to the number of units instead of unit size can also make MMH development too costly.<sup>64</sup> Finally, discretionary, often lengthy and expensive, design review processes can stymie MMH development.<sup>65</sup>

## 25.05 IMPACT ON AMOUNT AND PATTERNS OF LAND DEVELOPMENT

MMH efforts call for higher density, and thereby directly affect the amount and patterns of land developed in a community. MMH also encourages infill development, arguably reducing more sprawling development patterns and associated vehicle miles traveled.<sup>66</sup> “Walkability” is a key component of MMH, where jobs and shops needed for day-to-day life are in easy walking distance of the home.<sup>67</sup>

As a best practice for promoting density and affordability, advocates of MMH suggest regulating building form and mass instead of limiting the number of permitted units. While density limitations often push builders to develop the largest, most expensive units permissible, MMH form-based regulations provide more flexibility.

Proponents of MMH also note that various types of middle housing options (e.g., duplexes, fourplexes, cottage courts, and courtyard buildings) can be built at a low “perceived density.”<sup>68</sup> When two-family dwellings and other types of missing middle housing are added to an existing neighborhood, they are mixed with existing buildings and provided on the same scale—i.e., the new buildings look like a single-family home, not like a higher density building. An added benefit to the increase in housing units is that the resulting density may reach the level needed to support neighborhood amenities such as transit options and neighborhood-serving local business (typically about 16 dwelling units per acre).<sup>69</sup>

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<sup>62</sup> Jacob Wegmann, *Last Thoughts from Wegmann*, JOURNAL OF THE AMERICAN PLANNING ASSOCIATION, 86(1), 128-128, (2020) (hereinafter “*Last Thoughts*”).

<sup>63</sup> Opticos Design, *What’s the best way to enable Missing Middle Housing?*.

<sup>64</sup> *Id.*

<sup>65</sup> Nick Quijas, *Micro Housing: Seattle’s Contradictory Approach to Affordable, Sustainable Housing*, 8 SEATTLE J. ENVTL. L. 35, 51 (2018).

<sup>66</sup> Robert C. Ellickson, *Zoning and the Cost of Housing: Evidence from Silicon Valley, Greater New Haven, and Greater Austin* (Jan. 1, 2020) (“Denser living arrangements are more energy-efficient. Large-lot zoning increases automobile dependence and wastes land through sprawl.”), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3472145](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3472145) (hereinafter “Ellickson, *Cost of Housing*”).

<sup>67</sup> Opticos Design, *What is Missing Middle Housing*, <https://missingmiddlehousing.com/about>.

<sup>68</sup> Missing Middle Housing, created by Opticos Design, *What are the characteristics of Missing Middle Housing?* <https://missingmiddlehousing.com/about/characteristics>.

<sup>69</sup> *Id.*

## 25.06 IMPACT ON HOUSING AFFORDABILITY

Due to numerous demographic and economic factors, there are too few homes in the United States to accommodate the demand.<sup>70</sup> For these reasons, “[r]ents are rising faster than incomes in almost every large market in the country” and demand for homes is at an all-time high.<sup>71</sup> As one report notes, there is widespread agreement that the U.S. has a cumulative shortfall in housing production of over five million homes,<sup>72</sup> while some estimates indicate the deficit is closer to 7.3 million.<sup>73</sup> Between 1960 and 2000, about eleven housing units were built for every ten new households created.<sup>74</sup> By contrast, from 2010 to 2016, only about seven homes were built for every ten new households formed. As a result, today “[t]he key challenge in the housing market is a lack of supply.”<sup>75</sup>

As one report observed, “[w]ithout a fundamental shift in policies to support growth and address the persistent underproduction of units, we should expect the rate of housing production to decrease further from current levels as we head into the next down cycle.”<sup>76</sup> Further, many have come to recognize that inclusionary housing and subsidy programs alone are not enough to address affordability barriers:

These have important but limited roles in solving unaffordability problems. In most communities, subsidized housing can only satisfy a small portion of needs, and although inclusivity requirements help the households that receive the below-market units, by increasing development costs they can reduce affordability for other households, many of which are equally deserving but less lucky when subsidized units are allocated.”<sup>77</sup>

Sometimes referred to as “filtering”<sup>78</sup> or the “supply effect,”<sup>79</sup> some housing advocates believe that the creation of more market-rate units, even if too expensive for lower- and middle-income households, “make nearby housing more affordable by increasing availability and relieving pressure on the existing

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<sup>70</sup> NewDems, *Missing Millions of Homes, Findings of the New Democrat Coalition Housing Task Force*, [https://newdemocratcoalition.house.gov/imo/media/doc/NDC%20Missing%20Millions%20of%20Homes\\_Housing%20TF%20Findings%20Report\\_June%202018.pdf](https://newdemocratcoalition.house.gov/imo/media/doc/NDC%20Missing%20Millions%20of%20Homes_Housing%20TF%20Findings%20Report_June%202018.pdf) (hereinafter “NewDems Report”).

<sup>71</sup> NewDem Report at 3, 5. (“Housing is increasingly unaffordable because prices and rents are rising faster than wages because construction is not keeping up with demand.”); see also Sarah J. Adams-Schoen, *Two Steps Forward: Promoting Inclusive Infill Development with Middle Housing by Right and Increased Protections for Tenants*, 28 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 363, 363 (2019) (“median home price has risen forty-one percent faster than inflation”) (hereinafter “Adams-Schoen, *Two Steps*”).

<sup>72</sup> NewDems Report at 6.

<sup>73</sup> Up For Growth, *Housing Underproduction in the U.S. Economic, Fiscal and Environmental Impacts of Enabling Transit-Oriented Smart Growth to Address America’s Housing Affordability Challenge* at 9 [https://www.upforgrowth.org/sites/default/files/2018-09/housing\\_underproduction.pdf](https://www.upforgrowth.org/sites/default/files/2018-09/housing_underproduction.pdf) (hereinafter “Housing Underproduction”).

<sup>74</sup> Housing Underproduction at 8.

<sup>75</sup> Romina Ruiz-Goiriena, *Biden’s infrastructure plan calls for cities to limit single-family zoning and instead build affordable housing*, USA Today (4/14/2021) <https://www.usatoday.com/in-depth/news/nation/2021/04/14/zoning-biden-infrastructure-bill-would-curb-single-family-housing/7097434002/> (hereinafter Ruiz-Goiriena).

<sup>76</sup> Housing Underproduction at 7.

<sup>77</sup> *A Recipe for Achieving Real Housing Affordability*.

<sup>78</sup> *Id.*

<sup>79</sup> UCLA Lewis Center for Regional Policy Studies, Research Roundup: The Effect of Market-Rate Development on Neighborhood Rents (2/17/2021), <https://www.lewis.ucla.edu/research/market-rate-development-impacts/> (hereinafter “UCLA Study”).



housing stock.”<sup>80</sup> The existing housing stock may also become more affordable, as it ages, relative to new units built.<sup>81</sup> Generally, rental units “filter” more quickly than owner-occupied units.<sup>82</sup>

A “research roundup” published by the UCLA Lewis Center for Regional Policy Studies in February 2021 (the “UCLA Study”) examined six recent working papers on the effect of market rate development on neighborhood rents. The UCLA Study observed that five of the six papers reviewed found that an increase in market-rate housing makes nearby housing more affordable across the income distribution of rental units, while one paper found mixed results.<sup>83</sup> In these papers, the “supply effect” was found to outweigh the potential impact of the “amenity effect” or “demand effect,” where new development is found to make areas more desirable and therefore less affordable. While concerns about low-income tenant displacement are real, strategies to address that problem “probably involve[] policies that are not directly related to the total quantity of housing.”<sup>84</sup> “The most viable method for reducing the cost of housing is to make more of it available.”<sup>85</sup>

Because of the “supply effect,” MMH can also have a positive impact on the low- to moderate-income housing market. The UCLA Study observed that:

Perhaps most important is that this whole discussion – of what happens when new development arrives in a neighborhood where many lower-income people live – could be largely avoided if we built new housing mostly in higher-income, higher-resourced communities. Development in more affluent places, where fewer residents are precariously housed, could allow more people access to opportunities and alleviate demand pressures elsewhere in a region. *But such development rarely happens now, because zoning prevents it.*<sup>86</sup>

Reducing regulatory barriers to MMH would enable the private market to increase the supply of housing in desirable neighborhoods, which can play a key role in keeping housing affordable.<sup>87</sup> Although the studies reviewed in the UCLA Study indicate that more housing demonstrably helps to make housing more affordable, it does not measure the effectiveness of rezoning to permit MMH as a means of increasing housing production. Efforts in Minneapolis and Oregon, for example, are still too new to reliably evaluate their impact on the local housing market.<sup>88</sup>

Indeed, some have argued that banning single-family-only zoning may not be an effective technique for producing affordable housing, stating: “There is no evidence that eliminating single-family zoning will increase the supply of affordable housing or improve its economic viability.”<sup>89</sup> While there is no guarantee that the units produced by MMH development will be affordable, or that enough units will be produced to make an impact on affordability via filtering,<sup>90</sup> supply and demand economics suggests that

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<sup>80</sup> *Id.* at 4.

<sup>81</sup> Paul A. Diller, Edward J. Sullivan, *The Challenge of Housing Affordability in Oregon: Facts, Tools and Outcomes*, 27 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 183, 226-27 (2018).

<sup>82</sup> *Id.*

<sup>83</sup> UCLA Study at 3.

<sup>84</sup> *Id.* at 17.

<sup>85</sup> Housing Underproduction at 22.

<sup>86</sup> UCLA Study at 17.

<sup>87</sup> *Id.*

<sup>88</sup> *Last Thoughts* at 128.

<sup>89</sup> Lane Kendig, *Eliminating Existing Single-Family Zoning Is a Mistake*, JOURNAL OF THE AMERICAN PLANNING ASSOCIATION 86(1), 124-125 (2020) (hereinafter “Kendig”).

<sup>90</sup> *Id.*

an increase in housing production attributable to MMH should have a positive impact on housing affordability.<sup>91</sup>

## **25.07 RECOMMENDED TALKING POINTS: PROS AND CONS**

### **PROS:**

- A more diverse housing stock provides choice to potential buyers.
- MMH can be designed to integrate into existing neighborhoods and match neighborhood design and scale.
- Increased housing production may lead to a higher degree of affordability.

### **CONS:**

- Political pressure against “upzoning” or “densification” can in some instances be insurmountable.<sup>92</sup>
- In order to ensure that increased housing density fits into existing neighborhoods, careful attention should be paid to building design and scale.
- In some areas, CC&Rs with restrictive covenants disallowing smaller lots, ADUs, etc. may impact the effectiveness of upzoning in increasing the housing stock.<sup>93</sup>
- Some argue that there is no evidence that eliminating single-family only districts in favor of zoning to accommodate the MMH will increase housing supply or impact affordability.<sup>94</sup>

## **25.08 INCENTIVE-BASED ALTERNATIVES**

Zoning efforts to encourage MMH largely rely on the market to provide increased density. MMH encourages, but does not require denser, infill housing. Voluntary inclusionary housing programs can incentivize developing affordable housing while offsetting some of the developer’s per-unit costs. MMH efforts may be most effective when paired with other market-based housing solutions discussed in Section 22.08 of this book.

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<sup>91</sup> Housing Underproduction at 22.

<sup>92</sup> Ellickson, *The Zoning Straitjacket* at 414.

<sup>93</sup> Paul A. Diller, Edward J. Sullivan, *The Challenge of Housing Affordability in Oregon: Facts, Tools and Outcomes*, 27 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 183, 225, n. 224 (2018).

<sup>94</sup> Kendig.

# APPENDIX A: COMPENDIUM OF NAR RESOURCES

*(Last Updated August 29, 2022)*

For the most up-to-date list of resources, visit the REALTOR® Party web site at this [link](#)

## **Hot Topic Alerts**

These mini white papers cover important trending state and local real estate issues. Each paper contains historical context on the issue, a concise summary of current research and other helpful information. Hot Topic Alerts also highlight advocacy efforts of state and local REALTOR® Associations.

- [Hydraulic Fracturing](#) (December 2021)
- [Natural Disasters](#) (November 2021)
- [Backyard Farming](#) (November 2021)
- [Complete Streets](#) (September 2021)
- [Coastal Policies, Water Issues and Water Rights](#) (September 2021)
- [Government Responses to Climate Change](#) (September 2021)
- [Short Term Rentals](#) (September 2021)
- [State and Local Tax Deductions, State Mortgage Interest Deductions](#) (September 2021)
- [Land Banks](#) (August 2021)
- [Equity in Real Estate](#) (November 2020)
- [State and Local Taxation in the Wake of COVID-19](#) (November 2020)
- [Infrastructure](#) (November 2020)
- [Rental Restrictions](#) (November 2020)
- [Inclusionary Zoning](#) (December 2019)
- [Accessory Dwelling Units](#) (October 2019)

## **White Papers and Studies**

White Papers provide an in-depth review of select topics, input from industry thought leaders, and insight into emerging trends in the area.

- [Water Wells, Septic, and Sewage Systems](#) (2021)

## **OTHER RESOURCES**

The [State Legislative Monitor](#) is a service designed to help association staff to identify and monitor state legislation. This database allows you to monitor legislation in your state and other states. Government Affairs Directors (GADs) and Association Executives (AEs) are permitted direct access to the State Legislative Monitor database (FOCUS platform).

The [Land Use Initiative](#) assists state and local REALTOR® Associations in their public policy advocacy of land-use issues. NAR provides provide an analysis of proposed legislative and regulatory land-use measures – comprehensive plans, amendments, legislation, ordinances or regulations – that impact the transfer of real property. All analyses of proposed measures analyzed since 1999 are available via the Land Use Initiative Database (log-in required).

# APPENDIX B: GLOSSARY OF KEY TERMS

## GLOSSARY OF KEY TERMS

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