

**PROSPECTS FOR A UNIFIED APPROACH TO HOUSING  
AFFORDABILITY, HOUSING EQUITY, AND CLIMATE  
CHANGE**

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INTRODUCTION

Housing law and policy is undergoing tremendous change. The question remains, however, whether any of the new policies proposed thus far will have a significant impact on the production of housing units. It also remains to be seen whether any new units built will be the right type, and in the right place, to meet the country's housing needs.

This Article investigates how these questions play out in light of conflicting policy goals of housing advocates, all of which are dependent on incentivizing private market developers to build the kinds of homes the advocates desire.<sup>1</sup> In Part I, the Article provides

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<sup>1</sup> The parameters here were guided, in part, by the focus of the Vermont Law Review's symposium for which this Article was written. Symposium, *Balancing Corporate & Activist Interests: Clean Energy, Wildlife Protection, and Land Use*

background on the housing market, as well as a review of literature on the effects of zoning on production, equity, and environmental concerns. Part II defines three types of housing advocates operating today: the *affordability activists*, which are primarily concerned with increasing housing affordability; the *equity activists*, which are concerned with providing homes in areas that assist with de-concentrating poverty and its ill effects; and the *environmental activities*, which today focus increasingly on reducing climate change effects through land use planning. While these activists have overlapping goals, they are often at odds on policy prescriptions, which this Article analyzes. Part III of the Article investigates how the dissonance between the housing activists can be resolved by considering development through the lens of the entity that is charged with building housing: the private developer subject to real-life market demands. This section investigates the viability of several policy prescriptions for housing through the lens of a developer's realistic ability to produce the desired housing.

## I. BACKGROUND

Addressing affordability, equity, and climate in housing policy simultaneously is of paramount importance to the twenty-first century but doing so is a complex enterprise. It helps to start with some basic facts about the underlying housing problems the activists are trying to address.

Demand and supply play a foundational role. Demand for housing begins with population. The latest U.S. Census projections for population growth estimate an additional 52 million residents in the country by 2050.<sup>2</sup> Domestic in-migration also affects regional demand. For instance, as a region, the American South had the fastest migration in the country in 2018 (a net gain of 512,000 persons) and has had

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*Reform*, VT. L. REV., <https://lawreview.vermontlaw.edu/2021-symposium/> (last visited May 18, 2022).

<sup>2</sup> 2017 *National Population Projections Tables: Main Series*, U.S. CENSUS BUREAU (Sept. 2018), <https://www.census.gov/data/tables/2017/demo/popproj/2017-summary-tables.html> (see *Table 1. Projected Population Size and Births, Deaths, and Migration*).

significant net in-migration gains every year since 1981.<sup>3</sup> In mid-sized communities, such as Boise or Nashville, in-migration numbers that are modest by big-city standards have significant effects because of the region's smaller size.<sup>4</sup> That population growth means that the housing affordability and environmental crises that exist now with regard to housing will only get worse unless there is dramatic change in housing-production and land-use patterns.

The supply side is dominated by housing starts. One of the biggest issues is that the United States simply stopped building housing at the rate it used to do so after the Great Recession of the 2000s.<sup>5</sup> As a recent HUD study noted, and as illustrated in Figure 1:

New housing construction essentially stopped from 2009 to 2011 and has only barely kept pace with population growth since then. Housing permits averaged slightly more than one million annually over the past 10 years, compared with more than 1.5 million permits per year during the previous decade. The drop-off in new housing construction has kept upward pressure on house prices and rents. The shortfall in number of units produced since 2008 is estimated at 3 to 5 million.<sup>6</sup>

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<sup>3</sup> Kristin Kerns & L. Slagan Locklear, *Three New Census Bureau Products Show Domestic Migration at Regional, State, and County Levels*, U.S. CENSUS BUREAU (Apr. 29, 2019), <https://www.census.gov/library/stories/2019/04/moves-from-south-west-dominate-recent-migration-flows.html>.

<sup>4</sup> See Conor Sen, *Why Invest in Cities? There's Always Another Boise*, BLOOMBERG: OP. (Apr. 18, 2018), <https://www.bloomberg.com/opinion/articles/2018-04-18/growing-midsize-cities-like-boise-could-replace-urban-future> (describing how in-migration is making smaller cities the next big metropolises).

<sup>5</sup> See Asha Bharadwaj & Charles S. Gascon, *Slowing U.S. Housing Sector Still Shaped by Great Recession*, FED. RESRV. BANK OF ST. LOUIS (Apr. 8, 2019), <https://www.stlouisfed.org/publications/regional-economist/first-quarter-2019/slowing-us-housing-sector> (analyzing the rapid growth of the housing market following the Great Recession).

<sup>6</sup> U.S. DEP'T. OF HOUSING & URBAN DEV., *New Housing in High-Productivity Metropolitan Areas: Encouraging Production* 11 (June 2021), <https://www.huduser.gov/portal/sites/default/files/pdf/New-Housing-Production-Report.pdf> (citing Don Layton, *The Extraordinary and Unexpected Pandemic Increase in House Prices: Causes and Implications*, HARV. JOINT CTR. FOR HOUS. STUDIES (Jan. 7, 2021), <https://www.jchs.harvard.edu/blog/extraordinary-and-unexpected-pandemic-increase-house-prices-causes-and-implications>).

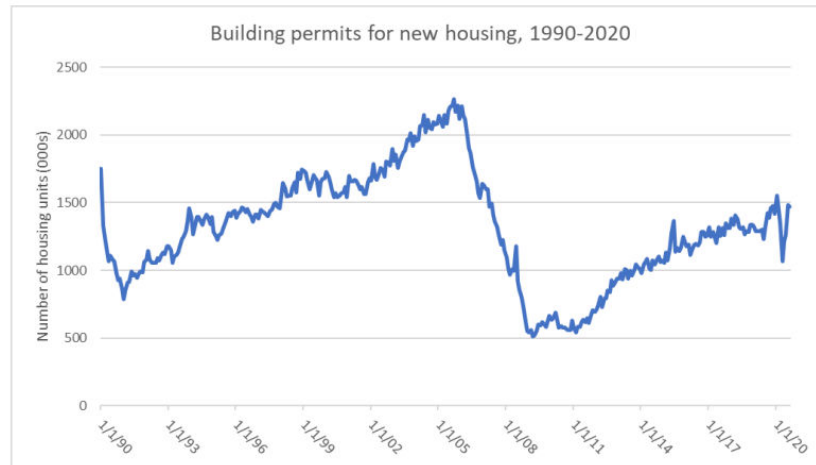


Figure 1

The dramatic decrease in housing production at a time of significant population growth is an obvious problem—one felt more acutely in those parts of the country where production has faltered, population has grown, or both have occurred. For instance, California’s rate of housing production is among the largest in the country. However, in the years from 2005 to 2014, when compared to population growth in that same time, California’s ratio of housing starts to population added is just near 60% of the housing produced per capita in that time period in New York.<sup>7</sup>

<sup>7</sup> U.S. DEP’T. OF HOUSING & URBAN DEV., *supra* note 6, at 13.

Exhibit 11: California housing production significantly lags population growth

Exhibit 2

California has produced less housing per capita than other US states—80 percent less than New York in 2005–14

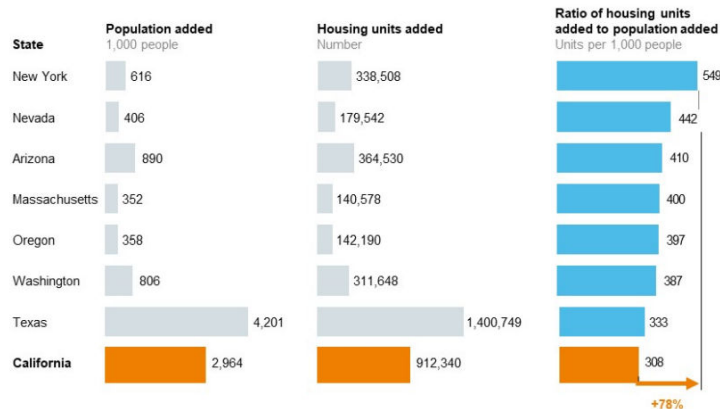


Figure 2

Another issue is where all of this new housing will—or should—go. Some metropolitan regions will experience this population growth more than others. Unless there is dramatic change in land-use patterns, the majority of the tens of millions of new residents and their millions of new houses will end up in the suburbs or *exurbs*.<sup>8</sup> Consider that a 2012 study by the EPA found that in the 209 metropolitan regions examined, only 21% of all new homes were built in previously developed—or infill—areas.<sup>9</sup> Even if the infill percentage were to double, or even triple, over the coming decades, a large percentage of growth will be in suburbs and exurbs on the far fringes of the metropolitan regions of today.

As affordability has worsened, there has been considerable investigation of what caused the mismatch between production and housing needs, as well as the segregated nature of such housing. Several recent studies by planning professors provide some answers.

<sup>8</sup> See Conor Dougherty & Ben Casselman, *House Hunters Are Leaving the City, and Builders Can't Keep Up*, N.Y. TIMES (May 29, 2021), <https://www.nytimes.com/2021/05/29/business/economy/new-home-building-suburbs.html> (describing *exurbs* as areas of development beyond suburbs that are expanding urban sprawl).

<sup>9</sup> *Residential Construction Trends in America's Metropolitan Regions: 2012 Edition*, U.S. EPA, (Sept. 1, 2020), <https://archive.epa.gov/epa/smartgrowth/residential-construction-trends-americas-metropolitan-regions-2012-edition.html>.

One useful study by planning professors Michael C. Lens and Paavo Monkkonen addressed income segregation and yielded three findings.<sup>10</sup> First, the authors found that density restrictions were not statistically associated with higher levels of segregation of low-income households.<sup>11</sup> Counterintuitively, the study found that density restrictions—such as large-lot zoning or single-family districts—directly lead to the concentration of affluence, not poverty.<sup>12</sup> This challenges the assumption that density isolates the poor. Instead, it appears to insulate the rich.

The study's second major finding looked at levels of income segregation relative to the complexity of a local government's land-use processes and the community involvement therein. The study found that income segregation was higher in metropolitan areas where local governments were considered to be more involved in the process of residential development and where there are more factors pressuring local governments to control growth.<sup>13</sup> In particular, the study found that where cities have more oversight mechanisms for development, there is a stronger association with segregation, as well as a more inelastic housing supply and higher housing prices at both the metropolitan and local level.<sup>14</sup> The study also found that forceful land-use regulation overall was not necessarily associated with segregation, even if it was associated with higher housing prices.<sup>15</sup> As the study's authors note, "[a] metropolitan area with many regulations on residential development can exhibit low levels of segregation."<sup>16</sup>

On the other hand, the study found that where there was more activity at the state level in residential development and growth management, there was also less income segregation.<sup>17</sup> This would indicate that state involvement in land-use decision-making could assist in ameliorating local segregationist tendencies.

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<sup>10</sup> Michael C. Lens & Paavo Monkkonen, *Do Strict Land Use Regulations Make Metropolitan Areas More Segregated by Income?*, 82 J. AM. PLAN. ASS'N 6 (2016).

<sup>11</sup> *Id.* at 11.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 12.

<sup>14</sup> *Id.* at 19.

<sup>15</sup> *See id.* (finding that local zoning and project approval are connected to higher housing prices and income segregation while state political involvement decreases segregation).

<sup>16</sup> *Id.* at 11.

<sup>17</sup> *Id.*

Finally, the study found that Metropolitan Statistical Areas (MSAs) “with central cities that regulate land use in a more restrictive manner relative to the surrounding suburbs have higher levels of income segregation.”<sup>18</sup> This indicated that the regulatory effects of the central city play as important a role in income segregation as those of the suburban communities.

Another recent article by planning professors Rolf Pendall, Lydia Lo, and Jake Wegmann examined zoning changes in U.S. metropolitan areas from 2003 to 2019.<sup>19</sup> The study found that compared with smaller jurisdictions, places with higher populations were less likely to adopt or retain anti-density regulations and more likely to adopt and retain pro-density measures.<sup>20</sup> Compared with cities, counties more often adopted and retained anti-density regulations.<sup>21</sup> Counties also tended not to adopt pro-density zoning if they did not allow it already, and they were more likely than cities to abandon it if they already had it.<sup>22</sup> “Places with high housing occupancy rates (i.e., low vacancy) dropped anti-density measures.”<sup>23</sup>

The study’s authors noted two trends. “In the first trend, high-density zoning became more common and low-density zoning less so in the most constrained housing markets.”<sup>24</sup> The survey found “many places that have both upzoned and adopted other constructive growth management innovations. Beyond allowing high-density housing, these communities adopt inclusionary zoning programs, spend money on affordable housing, and ensure adequate public services to accommodate growth.”<sup>25</sup> In addition, the study notes:

[M]any jurisdictions have zoning ordinances that allow high-density development but precious few neighborhoods zoned for apartments. If state and federal officials want local governments to upzone to

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<sup>18</sup> *Id.* at 12.

<sup>19</sup> Rolf Pendall et al., *Shifts Toward the Extremes: Zoning Change in Major U.S. Metropolitan Areas from 2003 to 2019*, 88 J. AM. PLAN. ASS’N. 55, 55–66 (2022).

<sup>20</sup> Lens & Monkkonen, *supra* note 10.

<sup>21</sup> *See id.* at 11.

<sup>22</sup> Pendall et al., *supra* note 19.

<sup>23</sup> *Id.* at 61.

<sup>24</sup> *Id.* at 64.

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

meet housing demand, they will need to go beyond exhortations about loosening zoning and make serious commitments both to regulations that support apartment development and adequate infrastructure to serve high density development. And even where zoning and infrastructure allow apartments, planners still often need information and support to ensure that pro-density policies are translated into new housing, especially affordable housing.

In the second trend, weaker markets with high levels of Black–White segregation downzoned to LDOZ more often than they upzoned from LDOZ. We found no statistically significant associations at the jurisdiction level between racial composition and these regulatory changes. This absence of evidence is not, however, evidence of absence. Communities using exclusionary zoning have significantly lower percentages of Black and Latino residents than those with more accommodating zoning. The persistence of this correlation makes it all the more important that state and local governments take affirmative measures to undo exclusionary zoning.<sup>26</sup>

In evaluating these results, the authors concluded that “the growth management interpretation is stronger than the exclusionary interpretation for the adoption and retention of restrictive or permissive zoning from 2003 to 2019.”<sup>27</sup>

## II. ACTIVISTS’ GOALS AND LIMITATIONS

The complexity in housing policy identified above is redoubled by activist interests’ increasing inability to find common ground. This section looks at some of the reasons affordability activists, equity activists, and environmental activists disagree on solutions to housing.

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 61.

As will be described below, affordability activists tend to focus on the country's ever-increasing lack of affordable housing for both low- and middle-income families. Equity activists tend to focus on the present segregation by race and class that result from a century of racist land-use, mortgage, and housing policies. Environmental activists tend to focus on how post-World War II land-use patterns have resulted in suburban and exurban sprawl requiring a transportation system that worsens the country's greenhouse gas emissions. The priorities of each camp can be simplified as follows: affordability activists tend to simply want more housing built anywhere; equity activists want a mix of tenure and price by location with adequate transportation servicing those neighborhoods; and environmental activists want to contain sprawl to reduce emissions. In theory, all three activist groups would be serviced by more densely settled residential development patterns, such as transit-oriented development.<sup>28</sup> In practice, the three activist groups routinely splinter against each other, and the country's infill development patterns have seen no sharp increase for all the work from the three activist camps.<sup>29</sup>

The affordability activists are led by the Yes in My Back Yard, or *YIMBY*, movement.<sup>30</sup> Several factors make it unusual. In the past, there have been few, if any, pro-development community groups that were not funded or driven—expressly or implicitly—by the developer community.<sup>31</sup> These groups tend to espouse a “market urbanism” that focuses on reducing process and regulation, which they perceive as the limitations on housing growth.<sup>32</sup> The organization is also

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<sup>28</sup> See Paula A. Franzese, *An Inflection Point for Affordable Housing: The Promise of Inclusionary Mixed-Use Redevelopment*, 52 UIC J. MARSHALL L. REV. 581, 583 (2019) (discussing trends toward accessible, compact, and environmentally and economically friendly living spaces).

<sup>29</sup> See OFF. SUSTAINABLE CMTYS., U.S. EPA, ATTRACTING INFILL DEVELOPMENT IN DISTRESSED COMMUNITIES: 30 STRATEGIES 1 (2015) (suggesting ways local governments can encourage infill development).

<sup>30</sup> See generally Renee Tapp, *Introducing the YIMBYs: Renters, Housing, and Supply-Side Politics in Los Angeles*, 39 ENV'T. & PLAN. C: POL. SPACE 1511, 1512 (2021) (noting the work that activists associated with the YIMBY movement are doing to challenge the anti-housing climate).

<sup>31</sup> See Dwight Merriam, *The Great “Yes in My Back Yard” (YIMBY) Movement: Driven by the Gig Economy*, 29 J. AFFORD. HOUS. CMTY. DEV. L. 57, 58 (2020) (noting how most NIMBY challenges try to reduce development).

<sup>32</sup> See Michael Lewyn, *Zoning and Land Use Planning: Explaining Market*

decentralized,<sup>33</sup> and so there is no official YIMBY platform. A review of three YIMBY local sites, however, gives a sense of the overlapping policies and agendas supported by the groups.

The San Francisco YIMBY website states its platform as including the following:

- We believe in long-term planning. Once a citywide or neighborhood plan is made, the process for building should be streamlined, well-defined and predictable. It should not impose significant delays on or add significant costs to a project, nor should individual property owners or neighborhood associations have the power to hijack it.
- As-of-Right building: development plans approved at the departmental level if the project is within existing zoning.
- Mandate or incentivize cities to follow regional master plans and statewide housing policies or mandates.
- California Environmental Quality Act (CEQA) reform.
- Raise height limits.
- Form-based zoning.
- Mixed-use zoning.
- Complete streets.<sup>34</sup>

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*Urbanism*, 46 REAL EST. L.J. 589, 596–97 (2018) (asserting that market urbanists believe that government intervention to limit new housing is detrimental to meeting demands for housing supply); see generally Michael Lewyn, *Zoning and Land Use Planning: YIMBY and COVID-19*, 49 REAL EST. L. J. 244, 244 n.1 (2021) (contrasting YIMBY groups advocating for less government restrictions on housing to alleviate rising costs as a result of the pandemic).

<sup>33</sup> See generally Lee A. Fennell, *Crowdsourcing Land Use*, 78 BROOK. L. REV. 385 (2013) (arguing that “crowdsourcing” land use input from local community members through social media and apps creates greater public participation in local land use planning).

<sup>34</sup> San Francisco YIMBY lists several planks of its platform, including Zoning and Planning Policy Descriptions, listed here. *SF YIMBY Platform*, SF YIMBY, <https://www.sfyimby.org/platform> (last visited May 18, 2022).

This list of policies is typical of other YIMBY platforms.<sup>35</sup>

Housing equity activists are seeking integrated housing options for low-income persons and persons of color. Although there is a long tradition of housing equity activists, two galvanizing threads run through the current movement. The first is a heightened recognition of the legacy of racial policies interwoven into almost all aspects of housing production. Richard Rothstein's *The Color of Law* is the textbook of this group,<sup>36</sup> which laid out in an accessible format the playbook for housing segregation in American cities over the last 150 years.<sup>37</sup> This awareness was also heightened by the racial reckoning that began after the death of George Floyd in Minneapolis, a city that itself had begun the process of recognizing the racial legacy planning had played in the city's development through the city's comprehensive planning process.<sup>38</sup>

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<sup>35</sup> See Adele Peters, *The Pro-Growth YIMBY Movement Is Growing*, FAST CO. (Jul. 11, 2016), <https://www.fastcompany.com/3061595/the-pro-growth-yimby-movement-is-growing> (interviewing residents about YIMBY platforms in their communities that have similar zoning goals).

<sup>36</sup> See generally RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017) (arguing that modern zoning regulations passed by local, state, and federal governments effectively segregated communities based on race and socioeconomic status).

<sup>37</sup> See generally John Mangin, *Ethnic Enclaves and the Zoning Game*, 36 YALE L. & POL'Y REV. 419, 432–64 (2018) (examining three ethnic groups in New York City—Hasidic Jews in Brooklyn, Chinese communities in Chinatown, and South Asian communities in Queens—and how they leveraged culture, tradition, and politics to advocate for new zoning rules); Ganesh Sitaraman et al., *Regulation and the Geography of Inequality*, 70 DUKE L.J. 1763, 1767–68 (2021) (arguing that government regulation and subsequent deregulation of transportation, communications, trade created geographic inequality and proposing that better regulation of these areas could reverse systemic geographic inequality).

<sup>38</sup> See *Minneapolis 2040: The City's Comprehensive Plan*, MINNEAPOLIS CITY COUNCIL 19–22 (2019), [https://minneapolis2040.com/media/1488/pdf\\_minneapolis2040.pdf](https://minneapolis2040.com/media/1488/pdf_minneapolis2040.pdf) (discussing the Minneapolis City Council's comprehensive plan to resolve discriminatory zoning and housing policies and create affordable, inclusive housing); see also Jeff Clare, *Because Housing Is What? Fundamental. California's RHNA System as a Tool for Equitable Housing Growth*, 46 ECOL. L.Q. 373, 393, 396 (2019) (examining California's Regional Housing Needs Assessment for racial disparities, concluding that RHNA policies resulted in higher requirements in lower-income areas, disproportionately burdening lower-income populations with meeting housing demands); Christopher S. Elmendorf, *Beyond the Double Veto: Housing Plans as Preemptive Intergovernmental Compacts*, 71 HASTINGS L.J. 79, 92 n.74, 116–21

Second, the housing equity movement has been invigorated by powerful research over the last decade examining the neighborhood effects of moving from areas of concentrated poverty to areas where such poverty is lessened. Highlights of this research include investigations of the Department of Housing and Urban Development (HUD) Moving to Opportunity demonstration project.<sup>39</sup> Although initial research found little value in such moves for adults in the studies, subsequent research by Raj Chetty and other economists uncovered substantial life-time benefits for children—especially young children—who accompanied parents on such moves out of concentrated poverty.<sup>40</sup> As the literature has evolved, increasing attention has been paid to the difficulties of making such a move to areas of less-concentrated poverty, which tend to be suburban and necessitate heightened access to transportation options.<sup>41</sup> Such moves also routinely take families out of their social networks, which often provide childcare in lower-income communities, and thus can exacerbate the complexity of making such a move.<sup>42</sup> Research on vouchers has also shown how these forces often lead to low-income individuals, who might choose to live anywhere in a metropolitan region, often staying in neighborhoods near the high-poverty

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(2019) (evaluating the effects of increased land use regulation on inequality, concluding that there is a correlation between regulation and segregation, disproportionately impacting lower-income communities and communities of color).

<sup>39</sup> See generally Raj Chetty et al., *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment 1* (Nat'l Bureau of Econ. Rsch., Working Paper No. 21156, 2015), <http://www.nber.org/papers/w21156> (assessing the HUD Moving to Opportunity experiment and its effects on young children and their development into adulthood, including socioeconomic status and housing environment).

<sup>40</sup> *Id.* at 4–6 (concluding that HUD Moving to Opportunity housing vouchers requiring low-income families with young children to move to lower-income neighborhoods reduces intergenerational poverty).

<sup>41</sup> See Anika S. Lemar, *Access to Justice Requires Access to Opportunity Infrastructure*, 27 J. AFFORDABLE HOUS. & CMTY. DEV. L. 487, 489 (2019) (noting the segregation between the wealthy suburbs and poorer urban areas); Deborah N. Archer, *Transportation Policy and the Underdevelopment of Black Communities*, 106 IOWA L. REV. 2125, 2134, 2141 (2021) (illustrating how the federal highway system and underfunding of public transportation effectively segregated Black neighborhoods).

<sup>42</sup> EVA ROSEN, *THE VOUCHER PROMISE: “SECTION 8” AND THE FATE OF AN AMERICAN NEIGHBORHOOD* 20–21, 122–23 (Meagan Levinson & Jacqueline Delaney eds., 2020).

neighborhoods they originally sought to leave.<sup>43</sup> For these housing equity activists, the location of the housing options matter tremendously because variation in housing tenure (rented or owned) and housing stock (single-family or apartments), as well as transportation to and from such housing options, makes all the difference in whether mobility out of high-poverty neighborhoods is a viable possibility.<sup>44</sup>

The environmental activists address land-use policy through a variety of lenses, but one that has overtaken all others in importance is altering the land-use pattern to reduce greenhouse gas emissions. The importance of this could not have been stated more succinctly than in California's 2017 Scoping Plan, which is the state's policy guidebook for how it will meet its climate change goals.<sup>45</sup> The Scoping Plan notes, "Contributions from policies and programs, such as renewable energy and energy efficiency, are helping to achieve the near-term 2020 target, but longer-term targets cannot be achieved without land-use decisions that allow more efficient use and management of land and infrastructure."<sup>46</sup> In other words, if land-use policy cannot reduce greenhouse gas emissions, even California—with all of its

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<sup>43</sup> *Id.* at 20–21.

<sup>44</sup> *See, e.g., Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 522, 526 (2015) (bringing a disparate impact claim under the Fair Housing Act for federal tax credits funding low-income housing in impoverished areas).

<sup>45</sup> *See* Gregory L. Newmark & Peter M. Haas, *Income, Location Efficiency, and VMT: Affordable Housing as a Climate Strategy* 2–3 (Ctr. for Neighborhood Tech., Working Paper, 2015), <https://chpc.net/wp-content/uploads/2016/05/CNT-Working-Paper-revised-2015-12-18.pdf> (arguing that California's 2017 Scoping Plan is progressive in evaluating the relationship between housing and GHG emissions); *California TOD + GHG Analysis*, CTR. FOR NEIGHBORHOOD TECH., <https://www.cnt.org/projects/california-tod-and-ghg-analysis> (last visited May 18, 2022) (outlining the need for better access to public transportation for lower-income households to help California meet their 2017 Scoping Plan climate goals); *see generally* MARLON G. BOARNET ET AL., *AFFORDABLE HOUSING IN TRANSIT-ORIENTED DEVELOPMENTS: IMPACTS ON DRIVING AND POLICY APPROACHES* (Nat'l Ctr. for Sustainable Transp. & Univ. S. Cal. eds., 2015), <https://dot.ca.gov/-/media/dot-media/programs/research-innovation-system-information/documents/f0016779-ca17-2983-finalreport.pdf> (discussing California policies to expand affordable housing in areas with widely-accessible public transit and reduce emissions).

<sup>46</sup> CAL. AIR RES. BD., *CALIFORNIA'S 2017 CLIMATE CHANGE SCOPING PLAN* (Nov. 2017), [https://ww2.arb.ca.gov/sites/default/files/classic/cc/scopingplan/scoping\\_plan\\_2017.pdf](https://ww2.arb.ca.gov/sites/default/files/classic/cc/scopingplan/scoping_plan_2017.pdf).

sophisticated policy interventions—cannot meet its climate goals. The primary effort of environmental activists in California is to reduce vehicle miles traveled (VMT), which essentially means land-use patterns that require less driving.<sup>47</sup> Ideally, that entails more densely settled environments, but it also means a better balance of jobs and homes and prioritizing alternative methods of transportation (such as public transportation, biking, and walking) for shorter trips.<sup>48</sup>

Despite this importance placed on land use in reducing VMT, there is reason to be skeptical that land-use policies can meet the climate demands. For over fifty years, land-use experts around the country have sought to reduce sprawl and thus reduce the kinds of infrastructural and transportation-related choices that have abetted a warming climate.<sup>49</sup> In a recent study of the literature on such local growth management policies, planning professor John D. Landis provided a sobering analysis of their success.<sup>50</sup> First, empirical studies found almost no difference in land-use patterns between cities that adopted local growth management policies and those similarly situated cities that did not do so.<sup>51</sup> For instance, one study compared the development pattern of Houston, which has no zoning, with Dallas, which adopted its first zoning ordinance in 1930.<sup>52</sup> The study found that the two cities had largely developed in a similar fashion despite Dallas's early zoning and Houston's lack of it.<sup>53</sup> Perhaps even more surprisingly, another study comparing development in metropolitan Portland—arguably the most regulated city in America—found almost no difference between Portland and other similarly-situated western

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<sup>47</sup> *Id.* at 35.

<sup>48</sup> *See id.* at 100 (discussing how sustainable land use decisions can reduce GHGs while creating green jobs and increasing mobility).

<sup>49</sup> *See generally* John D. Landis, *Fifty Years of Local Growth Management in America*, 145 PROGRESS PLANNING 1, 5 (Mar. 2021) (discussing the history of growth management programs and their benefits).

<sup>50</sup> *See id.* at 5 (finding that the relationship between the use of traditional land use regulations and current settlement patterns is tenuous).

<sup>51</sup> *See id.* (finding few differences in development patterns between stringently zoned and loosely zoned places).

<sup>52</sup> *Id.* (citing C. Berry, *Land Use Regulation and Residential Segregation: Does Zoning Matter?*, 3 AM. L. ECON. REV. 251, 251 (2001) (comparing development patterns in Houston and Dallas)).

<sup>53</sup> Landis, *supra* note 49, at 6.

cities.<sup>54</sup> A key takeaway from such studies, Landis notes, is that planning research indicates that “zoning tends to follow market preferences rather than lead them.”<sup>55</sup> In other words, zoning does not actually plan future growth; instead, it locks in the development pattern that the market already sought for that area of land and operates to protect the investment against change.

The ineffectiveness of zoning to plan for growth was equally noted in local growth management programs. A review of suburban growth between 1982 and 1997 found that even where average densities declined less in metropolitan areas with active urban containment programs, most of the observable difference did not result from the growth management programs.<sup>56</sup> Instead, the difference resulted from “natural” constraints to development, “such as steep slopes,” mountains, and oceans.<sup>57</sup> Put simply, growth management did not do much unless there was also a mountain in the way. More recently, another study of sprawl by Landis of the largest metropolitan areas “found no evidence that local regulatory regimes or growth management programs had any effect on sprawl patterns.”<sup>58</sup>

For the environmental activist, the dissonance between the clarion call to reduce VMT in the California Scoping Plan and the empirical research indicating that the last half-century of local growth management has been almost universally unsuccessful could prove profoundly disheartening. But for environmental activists, the failure of past policies in light of the climactic need for action only redoubles the desire to ensure that housing policy achieves an environmental

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<sup>54</sup> *Id.* (citing Robert E. Lang & Steven P. Hornburg, *Planning Portland Style: Pitfalls and Possibilities*, 8 HOUS. POL’Y DEBATE, 1997, 1, 10 (discussing the regional growth management in Portland)); *see generally* Arthur C. Nelson, *Comparing States with and Without Growth Management Analysis Based on Indicators with Policy Implications*, 16 LAND USE POL’Y. 121 (1999) (comparing Portland’s urban management to that of other U.S. cities).

<sup>55</sup> Landis, *supra* note 49, at 6; *see also* Robert C. Ellickson, *The Zoning Straitjacket: The Freezing of American Neighborhoods of Single-Family Houses*, 96 IND. L.J. 395, 396 (2021) (finding politics of local zoning force neighborhoods remain virtually unchanged).

<sup>56</sup> *See* Landis, *supra* note 49.

<sup>57</sup> *Id.* at 6 (citing WILLIAM FULTON ET AL., WHO SPRAWLS THE MOST? HOW GROWTH PATTERNS DIFFER ACROSS THE U.S. (2001)).

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

objective that is imperative, though often overlooked, in the country's climate change solution.

These three activist camps could all agree in the abstract that, ideally, future housing development would be densely settled along transit accessible routes. In practice, there is considerable animus that has evolved between the activists at both the project level and the conceptual level.<sup>59</sup> Three examples of conflicts that arise are below:

- Affordability activists tend to disfavor environmental review and believe that it unnecessarily lengthens the project entitlement process. Environmental activists disagree, and often note that without such review, important environmental mitigations for projects would not occur.<sup>60</sup>
- Affordability activists tend to disfavor discretionary reviews, such as conditional-use permits, and seek more “by right” development. Equity and environmental housing activists often disagree and cite the importance of local community participation in the development process for environmental justice purposes. Equity activists have spent years trying to get more of a voice for low-income communities in the development process, which would largely be eliminated with the removal of discretionary reviews.<sup>61</sup>
- Equity activists, who often favor traditional affordable housing remedies such as inclusionary housing, Low-Income Housing Tax Credit (LIHTC)-backed affordable-housing units, and vouchers, are often dismayed by the YIMBY-affordability activists that pay little attention to such things. Affordability activists tend to argue that any housing is good and there is no

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<sup>59</sup> See generally Rich Campbell, *State Housing Affordability Initiatives and Environmental Protection: Can They Work Together?*, 35 NAT. RES. & ENV'T 26, 26–30 (2021) (discussing nationwide conflicts between affordable housing, environmental justice, and environmental activists).

<sup>60</sup> See Jennifer Hernandez, *California Environmental Quality Act Lawsuits and California's Housing Crisis*, 24 HASTINGS ENV'T L.J. 21, 35, 39–40 (2018) (arguing that CEQA standards impose costly environmental reviews, contributing to rising housing prices in urban areas but encouraging cleanup work).

<sup>61</sup> See Hilary T. Jacobs & Benjamin Wilson, *Mapping the Movement: The Future of Identifying and Addressing Cumulative Impacts*, 51 ENV'T L. REP. 10688, 10689 (2021) (advocating for integrating environmental justice considerations into governmental decision-making for siting and permitting).

need to regulate size or tenure. For instance, YIMBYs often argue that “filtering” is the most important housing policy, which suggests that even if the only thing built is high-income housing, the result will be that all prices will come down because there are only so many high-end homes that can be supported by the top of the market. A corollary to the filtering theory is that developers will follow a market saturated by high-end properties down to middle-income and low-income properties where money is still to be made. Given equity activists concern with the actual location of affordable units to reduce segregation and permit opportunity, tensions can arise.<sup>62</sup>

All the housing activists have a common enemy—at least in theory. They share disdain for the *NIMBY*, or “Not in My Back Yard,” resident who comes out to project hearings to oppose density projects.<sup>63</sup> The literature of all three activists is littered with disparagement of these “homevoters” that only seek to protect their housing value or that invoke *community character* as a shibboleth to maintain a neighborhood without minorities.<sup>64</sup> These accusations, in turn, can set the activists against local populations that challenge the protectionist- and racist-label and, instead, imagine themselves—rightly or wrongly—as honest protectors of “the way we have always done things around here.”<sup>65</sup>

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<sup>62</sup> See Campbell, *supra* note 59, at 27 (contrasting YIMBYs’ and affordability advocates’ support for “supply side” policies incentivizing developers to build affordable housing in lower-income areas from equity activists’ concern for impacts of such policies on gentrification and racial segregation).

<sup>63</sup> See Grant Glovin, *Power and Democracy in Local Public Participation Law*, 51 URB. LAW. 43, 45, 58–60 (2021) (asserting that the public participation process in local land use planning allows NIMBY advocates, primarily in wealthier areas, to reject high-density development projects, despite available resources to mitigate the housing crisis).

<sup>64</sup> WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS* ix (2001); see Anika S. Lemar, *Overparticipation: Designing Effective Land Use Public Processes*, 90 FORDHAM L. REV. 1083, 1133–34, 1143 (2021) [hereinafter Lemar, *Overparticipation*] (arguing that “homevoters”—homeowners that argue for policies that protect housing value—dominate the public participation process of land use planning).

<sup>65</sup> See Lemar, *Overparticipation*, *supra* note 64, at 1108–10 (arguing that residents of traditionally white, wealthier neighborhoods are more inclined to advocate for

### III. DEVELOPER-COGNIZANT SOLUTIONS

Given the importance of resolving housing issues for affordability, equity, and climate considerations, the rest of this Article is dedicated to thinking through how these activist objectives are limited—or potentially enhanced—by a consideration of developer objectives. Activists, like local governments, face a conundrum in trying to resolve land-use problems: all planning is useless unless there is a private developer willing to build according to the regulations imposed. That is because neither activists nor governments build substantial housing in this country. For that simple reason, thinking through how housing policy will work with an eye toward the developer-market participant that must give form to the regulation—or lack thereof—is vital. This is particularly true in light of the research, noted above, showing that zoning tends to follow the market rather than the other way around.<sup>66</sup> The past history indicates that very little land-use regulation—or lack thereof—guides the market. To achieve any of the policy objectives of the three housing activist camps considered here, the policies enacted will need to convince a developer—and considerable capital—to build the desired housing where it is needed and with an eye toward maximizing profit that any market lender will demand.

#### *A. Eliminating Single-Family Districts*

Perhaps the most obvious disconnect between activism and the reality of developer economics is the effort to eliminate *single-family districts*.<sup>67</sup> The single-family district has long been in the crosshairs of environmental activists but to little avail.<sup>68</sup> The single-family district

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exclusionary policies in the land use planning process, disproportionately impacting lower-income people of color).

<sup>66</sup> Landis, *supra* note 49, at 6.

<sup>67</sup> Christopher S. Elmendorf & Darien Shanske, *Auctioning the Upzone*, 70 CASE W. RES. L. REV. 513, 516 (2020) (discussing the tension between high demand for new apartments and condos and the reality that most metropolises remain exclusively zoned for single-family homes).

<sup>68</sup> See Emily Badger & Quoc Trung Bui, *Cities Start To Question an American Ideal: A House with a Yard on Every Lot*, N.Y. TIMES (June 18, 2019),

became anathema to housing activists who saw it as the very embodiment of anti-market urbanism, routinely eating up over half of the land even within a metropolitan region's central city urban core.<sup>69</sup> Equity activists came to see the single-family district as the legacy of *Buchanan v. Warley*<sup>70</sup> and *Village of Euclid v. Ambler Realty Co.*<sup>71</sup> These early land use cases simultaneously gave credence to the single-family district while openly acknowledging the intent to avoid the arrival of apartment buildings, which routinely housed people of color at that time, as "nuisances."<sup>72</sup>

By the end of 2021, California and Oregon had largely eliminated the single-family district through statewide legislation, a move that was replicated in several cities across the country.<sup>73</sup> From the activist perspective, the move was momentous in light of the history of the single-family district, which had become the defining land-use form of the American city.<sup>74</sup>

From the developer's perspective, the importance of eliminating single-family zoning was not so evident. For instance, a study from the Turner Center at U.C. Berkeley found that just 5.4% of single-family lots in the state could realistically be expected to be redeveloped to a higher level of density, such as a duplex, triplex, or fourplex.<sup>75</sup> At most, that would account for just 700,000 new units in

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<https://www.nytimes.com/interactive/2019/06/18/upshot/cities-across-america-question-single-family-zoning.html> ("Single-family zoning 'means that everything else is banned . . . Apartment buildings—banned. Senior housing—banned. Low-income housing, which is only multi-unit—banned. Student housing—banned.'").

<sup>69</sup> See *id.*

<sup>70</sup> See Oral Argument for Defendant in Error, *Buchanan v. Warley*, 245 U.S. 60, 66–68 (1917) (holding that a state may not rely on police powers to regulate sale of private property in residential districts based on race).

<sup>71</sup> See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394 (1926) (upholding an ordinance restricting certain housing zones to single-family districts as constitutional because it bears a rational relationship to the health and safety of the community).

<sup>72</sup> *Id.* at 394–95.

<sup>73</sup> Sarah J. Adams-Schoen & Edward J. Sullivan, *Reforming Restrictive Residential Zoning: Lessons from an Early Adopter*, 30 J. AFFORDABLE HOUS. & CMTY. DEV. L. 161, 166–67 (2021).

<sup>74</sup> See SONIA A. HIRT, *ZONED IN THE USA: THE ORIGINS AND IMPLICATIONS OF AMERICAN LAND-USE REGULATION* 7 (2014) (noting the overwhelming influence of single-family zoning).

<sup>75</sup> See BEN METCALF ET AL., *WILL ALLOWING DUPLEXES AND LOT SPLITS ON*

California, which is less than 10% of the 7.5 million new single-family homes the state estimates that it needs just to stabilize its housing stock.<sup>76</sup> As developers begin to weigh options, some equity activists have also become more concerned. The single-family districts most likely to be redeveloped are those where land values are low relative to potential market growth.<sup>77</sup> Such neighborhoods are often urban neighborhoods or inner-ring suburbs that are thriving neighborhoods for people of color.<sup>78</sup> There is increasing concern that such neighborhoods might be the first—and maybe the only—neighborhoods that are turned from single-family use to higher levels of density.<sup>79</sup> Indeed, as the single-family unit loses its zoning-protected status, the single-family home might even begin to acquire a premium. The first single-family districts were not protected from more intense development by zoning but by restrictive covenants.<sup>80</sup> In today's suburban communities, it is routine for developers to already utilize such restrictive covenants to limit uses in the subdivision to single-family dwellings.<sup>81</sup> A recent study found that in some regions, such as the Mountain West, upwards of 86% of new home development was subject to restrictive covenants.<sup>82</sup> If the state, and the country, were serious about eliminating the single-family district, they would also

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PARCELS ZONED FOR SINGLE-FAMILY CREATE NEW HOMES?: ASSESSING THE VIABILITY OF NEW HOUSING SUPPLY UNDER CALIFORNIA'S SENATE BILL 9, 9 (2021); Manuela Tobias, *California's Housing Crisis: How Much Difference Will a Zoning Bill Make?*, CAPRADIO (Sept. 17, 2021), <https://www.capradio.org/articles/2021/09/17/californias-housing-crisis-how-much-difference-will-a-zoning-bill-make/> (affirming SB 9's policy of allowing development of two duplexes, or four total units, on single-family lots without local approval).

<sup>76</sup> METCALF ET AL., *supra* note 75, at 8.

<sup>77</sup> *See id.* at 2 (asserting that SB 9 offers affordable housing in “higher-resourced, single-family” neighborhoods through new development, creating greater opportunities for attainable homeownership).

<sup>78</sup> *See* Cydnee V. Bence, *A House Is Not a Home: Learning from Our Mistakes To Prevent Unequitable Gentrification on a Local Level*, 44 VT. L. REV. 429, 431 (2019) (discussing low-income Black neighborhoods as targets for gentrification).

<sup>79</sup> *See id.*

<sup>80</sup> *See* Lawrence Berger, *Conflicts Between Zoning Ordinances and Restrictive Covenants: A Problem in Land Use Policy*, 43 NEB. L. REV. 449, 469 (1964).

<sup>81</sup> *See* Hannah Wiseman, *Public Communities, Private Rules*, 98 GEO. L.J. 697, 721 (2010) (discussing developers' work to create a private covenanted community preserving prior rules for use and building design).

<sup>82</sup> Wyatt Clarke & Matthew Freedman, *The Rise and Effects of Homeowners Associations*, 112 J. URB. ECON. 1, 9 (2019).

declare that the single-family dwelling covenant in restrictive covenants was against public policy and void.

The fact that the elimination of single-family districts might result in very little housing production is sobering because it is arguably the most high-profile win of the housing activists. It raises the question of whether a better approach might have been to target a class of undervalued parcels that still might exhibit a fine-grained penetration into urban neighborhoods. While some researchers have focused on the potential for sites of urban vacancy,<sup>83</sup> a larger-scale solution is suburban strip-mall retail. The COVID-19 pandemic, coupled with the rise of internet shopping over the last several decades, has left vast swaths of retail with reduced demand and lowered valuations.<sup>84</sup> Retail was also built along transit corridors, and much of it still receives considerable transit service relative to other locations in the single-family districts. From a developer perspective, incentives to develop former retail locations that exist along transit corridors seems a natural fit to achieve objectives of affordability, equity, and environmental activists. While some development schemes have emerged in this vein, the concept has not caught the public imagination. Perhaps the most notable proposal thus far is Peter Calthorpe's proposal to redevelop the El Camino Real suburban retail strip down the Bay Area peninsula, as well as other arterials in the five-county Bay Area region, to produce 1.2 million new dwelling units on existing retail land that is already interwoven into existing communities and along transit lines.<sup>85</sup>

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<sup>83</sup> Dan Wu & Sheila R. Foster, *From Smart Cities to Co-Cities: Emerging Legal and Policy Responses to Urban Vacancy*, 47 *FORDHAM URB. L.J.* 909, 910–11 (2020).

<sup>84</sup> See Rich Fox et al., *Redefining Value and Affordability in Retail's Next Normal*, MCKINSEY & CO. 1, 4 (June 15, 2020), <https://www.mckinsey.com/industries/retail/our-insights/redefining-value-and-affordability-in-retails-next-normal>.

<sup>85</sup> Robert Steuteville, *The Corridor Model for More Affordable Housing*, PUB. SQUARE: CONG. FOR NEW URBANISM J. (Sept. 15, 2020), <https://www.cnu.org/publicsquare/2020/09/15/corridor-model-more-affordable-housing>.

### B. Accessory Dwelling Units

*Accessory dwelling units* (ADUs) have also become a popular solution to the affordability crisis.<sup>86</sup> An ADU is a second dwelling unit on a lot that otherwise permits just one single-family dwelling unit.<sup>87</sup> Typical ADU legislation, at both the state and local level, usually restricts the size of an ADU to 700 square feet.<sup>88</sup> Activists fighting for ADUs emphasized the ability to create additional housing stock within existing communities, which would also provide a rental tenure within otherwise owner-based neighborhoods.<sup>89</sup>

However, there is reason to believe that ADUs will also prove to be a less-than-effective means of producing housing.<sup>90</sup> The size of an ADU makes it desirable only for one or two individuals, which is smaller than the average household size.<sup>91</sup> Many ADUs are aboveground and inaccessible to those with disabilities unless some alteration is added to the structure.<sup>92</sup> Because the ADU must be sold

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<sup>86</sup> See Haisten Willis, *Accessory Dwellings Offer One Solution to the Affordable Housing Problem*, WASH. POST (Jan. 7, 2021), [https://www.washingtonpost.com/realestate/accessory-dwellings-offer-one-solution-to-the-affordable-housing-problem/2021/01/07/b7e48918-0417-11eb-897d-3a6201d6643f\\_story.html](https://www.washingtonpost.com/realestate/accessory-dwellings-offer-one-solution-to-the-affordable-housing-problem/2021/01/07/b7e48918-0417-11eb-897d-3a6201d6643f_story.html) (arguing that ADUs create affordable rentals to meet housing demands).

<sup>87</sup> See MASTER BUILDERS ASS'N, ACCESSORY DWELLING UNIT ORDINANCES 1 (2021), <https://www.mbaks.com/docs/default-source/documents/advocacy/issue-briefs/adu-ordinances.pdf>; Brian Martucci, *What Is an Accessory Dwelling Unit (Granny Flat) – ADU Costs & Benefits*, MONEY CRASHERS (Dec. 13, 2021), <https://www.moneycrashers.com/accessory-dwelling-unit-granny-flat-costs/>.

<sup>88</sup> See MASTER BUILDERS ASS'N, *supra* note 87, at 7 (documenting ADU regulations in Washington state).

<sup>89</sup> See Willis, *supra* note 86 (claiming ADUs mitigate housing demand without changing neighborhood structure); MASTER BUILDERS ASS'N, *supra* note 87, at 1 (arguing that ADUs utilize existing housing to provide further options).

<sup>90</sup> See Lauren Ashley Week, *Less Is Not More: The False Promise of Accessory Dwelling Units for San Francisco's Lowest-Income Communities*, 30 J. AFFORDABLE HOUS. & CMTY. DEV. L. 281, 285–86, 298–99 (2021) (weighing the benefits of incorporating ADUs into zoning ordinances in San Francisco and concluding that ADUs do not necessarily solve affordable housing availability issues in lower-income areas).

<sup>91</sup> See Martucci, *supra* note 87 (documenting that the majority of ADU renters are single individuals or couples).

<sup>92</sup> See *ADUs Are Good for People and Places*, AARP, <https://www.aarp.org/livable-communities/housing/info-2019/adus-are-good-for-people-and-places.html> (last visited May 18, 2022) (describing how ADUs are being built with accessible doorways, hallways, and bathrooms for those with disabilities).

with the existing principal use, the presence of an ADU increases the price of the principal use.<sup>93</sup> A persistent problem for housing policy is the ADU being used as a short-term rental, which generates more income than typical rental housing.<sup>94</sup>

Another approach localities could take would be to revisit their subdivision or lot-split codes to permit the ADU to become its own for-sale unit. If the local government wanted to limit the use to residential, as opposed to short-term rental, that could be a condition of approval in the lot-split application. Facilitating lot splits of ADUs from the principal use could facilitate the creation of doubling ownership units in urban areas. The split units—the ADU without the “accessory” designation—should yield two lower-priced units because the former principal use would have less land and thus, presumably, less land value. Such subdivisions or lot splits would need to be creative given the variety of ways that ADUs are built onto existing properties, but it is nothing not already perfected through existing methods of property division such as airspace parcels or the employment of a land surveyor.

### C. Code Reform

Code reform of bulk—such as front- and side-yard setbacks, lot coverage requirements and height—has also become popular for housing activists seeking freedom from the constraints of *Euclidean zoning*.<sup>95</sup> While these efforts are commendable, it is unclear how much of a difference they will make in actual development. The limitations of Euclidean zoning were made abundantly clear as early as the

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<sup>93</sup> See Martucci, *supra* note 87 (arguing that the benefits of ADUs for homeowners include increase in property value).

<sup>94</sup> See AARP, *ADUs Are Good for People and Places*, *supra* note 92 (explaining how the market-rate rents for ADUs are slightly higher than typical housing options of the same size).

<sup>95</sup> *Euclidian zoning* refers to the practice of zoning towns into subsections based on desired use of the area, rather than mixing zoning types. See generally *We're Trying To Make Connecticut More Inclusive, by Design*, DESEGREGATE CONN., <https://www.desegregatect.org/about> (last visited May 18, 2022) (discussing Desegregate Connecticut, a housing activist group working to change land-use zoning polices to promote racial, economic, and climate justice).

1950s.<sup>96</sup> At that time, the “floating zone,” which resembled the “planned unit development,” became a popular tool to permit developments that could not otherwise be permitted under the Euclidean rules.<sup>97</sup> It wasn’t long before, in most jurisdictions, most major projects were being approved almost exclusively with PUDs. The result was that there were really two codes: the Euclidean codes on the books and the negotiated code that the PUD permitted.<sup>98</sup> The lax approach to enforcing Euclidean codes was reinforced by the ready availability of the variance from area requirements and, in some states, also use requirements.<sup>99</sup> The development agreement, which brought contractual bargaining to the otherwise administrative and regulatory field of land-use planning, completed the large development’s total divorce from the Euclidean code that purported to govern development in a city.<sup>100</sup> This was especially true in suburban and exurban communities. In urban environments, the release valve often came through the establishment of urban-renewal districts—or other special development districts—where the ordinary rules would not apply.<sup>101</sup> In many instances, these special redevelopment districts came to populate almost the entire city such that nothing of significance happened outside of them.<sup>102</sup>

A related movement, seeking to eliminate Euclideanism altogether, aims to move toward form-based codes.<sup>103</sup> Here again,

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<sup>96</sup> See Daniel R. Mandelker, *Legislation for Planned Unit Developments and Master-Planned Communities*, 40 URB. LAW. 419, 420, 428 n.31 (2008) (arguing that planned unit developments countered traditional Euclidean zoning and allowed local land-use planners to circumvent Euclidean requirements).

<sup>97</sup> See *id.* at 427–28 (discussing the new procedures allowed through PUDs and floating zones).

<sup>98</sup> See Daniel R. Mandelker, *New Perspectives on Planned Unit Developments*, 52 REAL PROP., TR. & EST. L.J. 229, 230–33 (2017) (documenting the rise of planned unit developments as an alternative to traditional zoning because of the availability of discretionary review in approving major projects).

<sup>99</sup> See David W. Owens, *The Zoning Variance: Reappraisal and Recommendations for Reform of a Much-Maligned Tool*, 2 COLUM. J. ENV’T L. 279, 280–81 (2004) (discussing the “conventional wisdom” that zoning variance is “widely abused”).

<sup>100</sup> See Daniel P. Selmi, *The Contract Transformation in Land Use Regulation*, 63 STAN. L. REV. 591, 593 (2011) (describing development agreements).

<sup>101</sup> Richard Briffault, *The Most Popular Tool: Tax Increment Financing and the Political Economy of Local Government*, 77 U. CHI. L. REV. 65, 69 (2010).

<sup>102</sup> Jared F. Knight, *Is Tax Increment Financing Racist? Chicago’s Racially Disparate TIF Spending*, 101 IOWA L. REV. 1681, 1685–86 (2016).

<sup>103</sup> Briffault, *supra* note 101, at 69.

there is much to commend the effort. However, it is worth noting the experience of several large cities that have experimented with such codes. Those cities have found that form-based codes do not necessarily eliminate discretionary approvals. For instance, in Denver, the move to form-based codes largely shifted discretion to the site-design approval stage.<sup>104</sup> As another example, form-based codes have not eliminated the potential for graft in securing development approvals. Cincinnati, which adopted one of the first form-based codes in the country, is currently embroiled in a development bribery scheme alleging that three of its city council members sought to sell their votes to developers.<sup>105</sup>

Other states, seeking to address the problems of race and equity that have been found in research at the local decision-making level, have sought to utilize state preemption of certain project approvals, especially around transit centers.<sup>106</sup> At the same time, many equity housing activists are concerned that doing so makes it harder for people of color to participate in the decision-making in their communities.<sup>107</sup> Rather than seeking to eliminate local participation in decision-making, such equity activists have sought racial-impact analyses.<sup>108</sup>

#### D. Subdivisions

Despite efforts to promote infill in the urban core, new development will almost certainly occur in suburban or *greenfield*

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<sup>104</sup> See *How Form-Based Codes Became Denver*, ARCHITECT (May 30, 2012), [https://www.architectmagazine.com/technology/how-form-based-codes-became-denver\\_o](https://www.architectmagazine.com/technology/how-form-based-codes-became-denver_o) (describing Denver's move to form-based codes).

<sup>105</sup> Jared Goffinet & Chris Riva, *P.G. Sittenfeld Claims Innocence, Plans to Fight Charges Until Very End*, FOX19 NOW (Sept. 7, 2021), <https://www.fox19.com/2021/09/07/pg-sittenfeld-claims-innocence-plans-fight-charges-until-very-end/>; Sittenfeld Indictment, U.S. v. Alexander Sittenfeld, No. 1:20-CR-0014 (S.D. Ohio filed Nov. 18, 2020); *Oakland YIMBY Housing Platform*, OAKLAND WIKI, [https://localwiki.org/oakland/Oakland\\_YIMBY\\_housing\\_platform](https://localwiki.org/oakland/Oakland_YIMBY_housing_platform) (last visited May 18, 2022).

<sup>106</sup> John Infranca, *The New State Zoning: Land Use Preemption Amid a Housing Crisis*, 60 B.C.L. REV. 823, 825 (2019).

<sup>107</sup> See Lance Freeman, *Build Race Equity into Rezoning Decisions*, BROOKINGS (July 13, 2021), <https://www.brookings.edu/blog/how-we-rise/2021/07/13/build-race-equity-into-rezoning-decisions/> (advocating for consistent racial equity analyses with every major land-use and zoning regulation).

<sup>108</sup> *Id.*

development.<sup>109</sup> For that reason, activists need to focus less on the urban core and more on how the panoply of suburban jurisdictions will develop. To address this future suburbanism, one option is to reevaluate statewide subdivision enabling statutes.

Such subdivision codes could achieve considerable value for the three activist groups while also working within expectations of the developer community. First, subdivision reform could require that any *plat* illustrate a commitment to a mix of tenures.<sup>110</sup> For instance, a suburban plat that has 100 lots could be required to dedicate twenty of those to rental properties. Alternatively, the plat could restrict a part of the development to an apartment building. Second, subdivision reform could require a commitment to a mix of lot sizes. Subdivisions routinely make all home lots the same—or approximately the same—size.<sup>111</sup> There is no reason that the state cannot restrict that. In particular, the state could require variation of lot sizes within the subdivision, varying the cost threshold to enter the subdivision. Third, subdivision regulation could require a commitment to a mix of housing size. Since 1973, average house size has increased by one-third, or 1,000 square feet.<sup>112</sup> This means that despite the recent run-up in housing prices, the price-per-square-foot of a new single home in the United States has remained largely constant over the last five decades when adjusted for inflation, as illustrated by Figure 3.<sup>113</sup>

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<sup>109</sup> See Jim Heid, *Greenfield Development Without Sprawl: The Role of Planned Communities*, URB. LAND INST. 5 (2004), [http://europe.uli.org/wp-content/uploads/ULI-Documents/GreenfieldDev.ashx\\_.pdf](http://europe.uli.org/wp-content/uploads/ULI-Documents/GreenfieldDev.ashx_.pdf) (explaining how to make greenfield and urban infill development “smart”).

<sup>110</sup> See *Platting Information*, FORT WORTH TEX., <https://www.fortworthtexas.gov/departments/development-services/platting> (last visited May 18, 2022) (discussing the diversity of plats and their appropriateness for various projects).

<sup>111</sup> Jon Healy & Matthew Ballinger, *What Just Happened with Single-Family Zoning in California?*, L.A. TIMES (Sept. 17, 2021), <https://www.latimes.com/homeless-housing/story/2021-09-17/what-just-happened-with-single-family-zoning-in-california>.

<sup>112</sup> Mark J. Perry, *New US Homes Today Are 1,000 Square Feet Larger Than in 1973 and Living Space per Person Has Nearly Doubled*, AM. ENTER. INST. (June 5, 2016), <https://www.aei.org/carpe-diem/new-us-homes-today-are-1000-square-feet-larger-than-in-1973-and-living-space-per-person-has-nearly-doubled/>; Joe Pinsker, *Why Are American Homes So Big?*, ATLANTIC (Sept. 12, 2019), <https://www.theatlantic.com/family/archive/2019/09/american-houses-big/597811/>.

<sup>113</sup> Andrew Latham, *Believe It or Not, Real Estate Affordability Hasn't Changed*

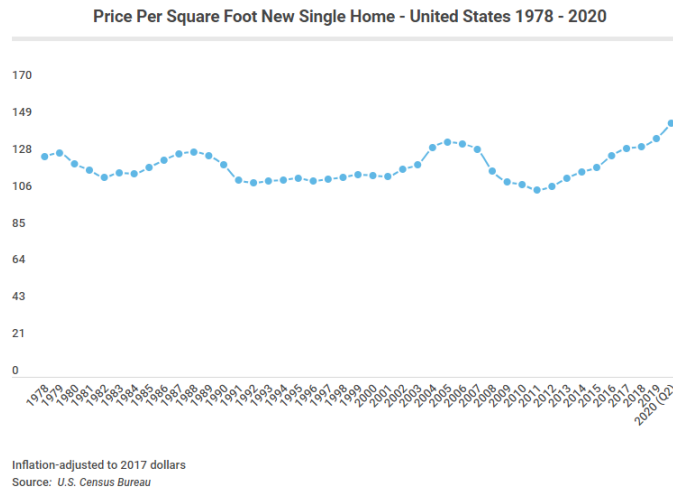


Figure 3

Subdivision statutes should also encourage rethinking traffic and transit throughout subdivisions in a manner that incentivizes density and alternative travel. A century ago, the radical design of the Radburn subdivision forced residents to leave their cars in common lots and walk through a neighborhood of connected paths to homes.<sup>114</sup> Subdivision regulations that prioritize street access take up a significant amount of land value.<sup>115</sup> By permitting subdivisions to have fewer roads, additional density—and equitable considerations in that density—could be sought and insisted upon.

Because subdivision is not a right but rather a privilege, states would be unlikely to face an unconstitutional conditions claim on such generally applicable subdivision provisions.<sup>116</sup> The result in such

*Much in 40 Years*, SUPERMONEY (Sept. 22, 2020), <https://www.supermoney.com/inflation-adjusted-home-prices/>.

<sup>114</sup> Michael Fagence, *The Radburn Idea-1*, 2 BUILT ENV'T 467, 467 (1973).

<sup>115</sup> See *Model Land Development & Subdivision Regulations That Support Access Management for Florida Cities and Counties*, CTR. URB. TRANSP. RSCH. OF S. FLORIDA, [https://www.cutr.usf.edu/wp-content/uploads/2021/03/Land\\_Regs.pdf](https://www.cutr.usf.edu/wp-content/uploads/2021/03/Land_Regs.pdf) (last visited May 18, 2022) (discouraging use of flag lots due to their consuming substantial space to give the property street access).

<sup>116</sup> See, e.g., *Associated Homebuilders, Inc. v. City of Walnut Creek*, 4 Cal. 3d 630, 633 (1971) (assessing the constitutionality of requiring a subdivider to dedicate land

policies would also be that future suburban buildout would have within it a variation of tenure, lot size, and housing size that should produce market-based price variations and affordability at a fine-grained scale.

### *E. Greenfield Development*

To the extent that *greenfield development* remains an option, it will continue to be the preferred development option of most developers. It is simply easier, and usually more profitable, to build at the periphery on land that is unlikely to have costly surprises from past uses (toxics, historical artifacts, etc.) that slow development. For that reason, greenfield development must stop being an option. Only once the spigot of easy land is turned off will developers begin to think in earnest about how to develop existing infrastructure at scale to meet housing needs. For many affordability activists, this is a non-starter; however, that is short-sighted. The long-term costs of continuing to sprawl are not only significant infrastructure charges, but an almost certain failure of the country to meet climate change goals in this century. That is a simply unacceptable future.

At the same time, it is almost impossible to imagine that existing local growth management tools can do what they must and prevent further growth. There are many culprits of this failure: decentralized local government, lack of knowledge among local officials, the failure to properly value agricultural land for the use value it provides, and more. The failure of such local growth management to make even the slightest dent in growth over the last half-century is humbling. For local government, however, it means acknowledging that the current procedural system—which replicates a planning body (usually 5–9 members) in addition to an elected body (usually another 5–9 members) across 39,000 local governments—is placing the future of affordability, equity, and environmental concerns of housing in the hands of an ever-shifting set of hundreds of thousands of

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or pay fees as a condition of the approval of a subdivision map); James C. Nicholas & Julian C. Juergensmeyer, *A Rational Nexus Approach to Workforce Housing Land Development Conditions*, 52 UIC J. MARSHALL L. REV. 647, 651 (2019) (discussing the “reasonableness” standard for constitutionally permissible development conditions).

individuals.<sup>117</sup> Most of these individuals have no training in local government, much less land-use or housing issues.<sup>118</sup> That is a procedural proposition that is never going to work effectively. At the same time, regionalism in the United States is a proposition deeply frozen in the ancient times of the 1970s for which no thaw is foreseen.<sup>119</sup> If regionalism is dead, then alternatives must emerge. The most likely short-term solution is to do the best possible with the existing local volunteers, which means utilizing trainings and resources provided by the state and other centers.

The importance of the task at hand means past efforts must be redoubled. It likely also means that local governments must do more than attempt to draw a line in the sand beyond which development cannot go.

#### *F. Redefining the Development Industry*

Given the past failures of such local growth management, this likely also means trying to change the culture of the development community itself. Local governments, and perhaps even federal or state governments, must begin training and incentivizing the development community in the tools of redevelopment, whether those lots be single-family transitioning to duplex or retail transitioning to six-story apartment buildings.

A more radical approach is to create a new category of developers and developer incentives. One approach is to utilize the example of regulated utilities but applied to market developers. In such an instance, a developer might receive some kind of guaranteed return on an affordable housing investment in exchange for preferential financing.<sup>120</sup> The government entity financing the project might even

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<sup>117</sup> *What Is a Regional Council, COG, or MPO?*, NAT'L ASS'N. OF REG'L COUNCILS, <https://narc.org/about/what-is-a-cog-or-mpo/> (last visited May 18, 2022).

<sup>118</sup> See generally Kellen Zale, *Compensating City Councils*, 70 STAN. L. REV. 839, 885–86 (2018) (arguing that city councils and other local governing bodies tend to suffer from legislative under-compensation, decreasing legislative effectiveness).

<sup>119</sup> See Bruce Katz, *Editor's Overview*, BROOKINGS, [https://www.brookings.edu/wp-content/uploads/2016/07/reflections\\_chapter.pdf](https://www.brookings.edu/wp-content/uploads/2016/07/reflections_chapter.pdf) (last visited May 18, 2022).

<sup>120</sup> This proposed approach would establish the same structural incentives for market developers that already exist for regulated utilities to create more accessible and

take any profit above a particular percentage that could be returned to a housing trust fund to provide funding for the next project, and perhaps the developer that generated the profit has first preference on that money in the fund. An example close to this is the Bay Area Housing Finance Authority the California Legislature recently created.<sup>121</sup> At this time, the authority is operating only pilot projects; however, its long-term outlook is promising for experimentation in housing finance as a way to incentivize housing growth that meets affordability, equity, and environmental considerations.

### G. Federal Investment

There is a role for the federal government to play in housing affordability as well.<sup>122</sup> Some interesting options that were mentioned in Democratic platforms but which have not yet been put into place at this time, include the following.

Senator Michael Bennet proposed a Low Cost Housing Innovation Fund, which would be a \$100 million national demonstration grant competition for home-builders to rethink housing to bring down the cost per square foot or total cost per unit by half or more.<sup>123</sup>

Beto O'Rourke proposed ARPA-Build, a new agency focused on breakthroughs in building, which he proposed to pair with zoning reform to address climate change and housing costs.<sup>124</sup>

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equitable programs. *See, e.g., Supporting Low-Income Energy Efficiency: A Guide for Utility Regulators*, AM. COUNCIL FOR AN ENERGY-EFFICIENT ECON. (Apr. 28, 2021), <https://www.aceee.org/toolkit/2021/04/supporting-low-income-energy-efficiency-guide-utility-regulators>.

<sup>121</sup> *Bay Area Housing Financing Authority (BAHFA)*, METRO. TRANSP. COMM'N, <https://mtc.ca.gov/about-mtc/authorities/bay-area-housing-financing-authority-bahfa> (last visited May 18, 2022).

<sup>122</sup> *See generally* Gabrielle Kolencik, *Harmony Between Man and His Environment: Reviewing the Trump Administration's Changes to the National Environmental Policy Act in the Context of Environmental Racism*, 9 *JOULE: DUQ. ENERGY & ENV'T L.J.* 1, 18–20 (2021) (documenting the Trump administration's dismantling of NEPA requirements and adverse impacts on communities of color).

<sup>123</sup> Stephen R. Miller, *Housing Policy Ideas from the 2020 Presidential Candidate Platforms*, (Dec. 10, 2020) (unpublished manuscript) (on file with the University of Idaho College of Law–Boise),

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3547833](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3547833).

<sup>124</sup> *Id.*

Tom Steyer proposed that public housing should be made climate-smart, with increased weatherization and energy efficiency investments. He proposed \$195 billion for clean affordable housing, urban parks, and greenspace.<sup>125</sup> He also proposed universal renter displacement climate disaster insurance, as well as \$250 billion over 10 years in National Health Communities Climate Bonds to implement climate smart urban design.<sup>126</sup> He would also provide \$650 billion in federal and private investment in rail and fleet purchases for local governments prioritizing integrated climate smart community planning. He also proposed incorporating climate models in permitting, insurance, construction, and renovation process to protect tenants from extreme weather, fire, and other climate-threats.

Raul Castro proposed requiring climate sensitivity and ‘Carbon Scoring’ in future planning and government projects that would ensure any government project contributes towards meeting climate goals and sets benchmarks to reduce carbon impact and mitigate climate change, including net-zero carbon emission targets for new federal housing construction.<sup>127</sup> He would make Community Development Block Grant Disaster Recovery Assistance a permanent program to help communities recover from natural disasters more effectively, and support long-term sustainable land use.<sup>128</sup>

Tom Inslee proposed to direct 40% of all green federal investments into front-line communities experiencing the greatest environmental burden, economic inequality, and climate change impacts.<sup>129</sup> These are but a few of the policy ideas that could be pursued by the present or future presidential administration.

## CONCLUSION

By investigating the goals of the three major camps of housing activists—affordability, equity, and environmental—and evaluating them in light of market considerations under which developers operate to produce housing, this Article has argued for several new pathways

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<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

in housing development. This Article has also sought to illustrate some of the most important aspects of developers' concerns. Meeting the demands of the current housing affordability crisis will require solutions like those noted here, and also evolving in significant additional research.<sup>130</sup> Other housing issues, such as homelessness and post-incarceration housing, also need solutions now. For those activists that continue to work diligently on all housing issues, a focus on the commercial viability of policies is essential to ensuring that housing for future generations is not only affordable and equitable but environmentally resilient as well.<sup>131</sup>

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<sup>130</sup> See generally Christopher S. Elmendorf et al., *Making It Work: Legal Foundations for Administrative Reform of California's Housing Framework*, 47 *ECOL. L.Q.* 973, 976 (2020) (proposing that the Department of Housing could use California's planning framework to bring about substantial reductions in cost and time to build housing); see also Roderick M. Hills Jr. & David Schleicher, *Building Coalitions out of Thin Air: Transferable Development Rights and "Constituency Effects" in Land Use Law*, 12 *J. LEGAL ANALYSIS* 79, 82 (2020) (arguing transferable development rights programs can be used to counteract influential neighborhoods that oppose new development); Christopher Serkin, *Divergence in Land Use Regulations and Property Rights*, 92 *S. CAL. L. REV.* 1055, 1057 (2019) (navigating the new zoning reality and how land-use regulations can still be used to achieve affordability in this new reality); Andrea J. Boyack, *Responsible Devolution of Affordable Housing*, 46 *FORDHAM URB. L.J.* 1183, 1187 (2019) (reasoning that broader, federal-level involvement in the housing realm could create sustainable and equitable housing support).

<sup>131</sup> See generally C. Anthony Arnold, *Resilience Justice and Community-Based Green and Blue Infrastructure*, 45 *WM. & MARY ENV'T. L. POL'Y. REV.* 665, 668 (2021) (noting the continued struggle for public policies to "remedy unequal green and blue infrastructure in low-income neighborhoods").