Growth Management Fact Book

Fifth Edition

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PREFACE

This updated edition 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.

Brian W. Blaesser
Robinson & Cole LLP
November 2017

SECTION 1: INTRODUCTION

This 2017 edition 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.

In the Introduction to the 2008 edition of the *Fact Book* we noted that the Smart Growth movement that began in the 1990s has now converged with two other movements — New Urbanism, and Green Building — and that this convergence has 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, this 2017 edition of 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
- Affordable housing

Each of these broad categories is followed by sections describing specific government regulatory techniques utilized to address the issues involved. This new edition has been expanded to include a new section—*Vacant Property Regulations.*

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
- Summary of 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.

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*** in the *Appendix* to this book.

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
Urban Growth Boundaries (UGBs)	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
Growth Phasing	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
Rate of Growth Controls	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
Moratorium	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
Adequate Public Facilities (APF) and Concurrency	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
Impact Fees	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
Special Assessment District (SAD)	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
Tax Increment Financing (TIF)	Generally effective in achieving purposes *within* TIF district	Generally increases property values *within* TIF district. *Outside* TIF district, results can vary	Generally will lower development costs	Can negatively effect housing affordability unless TIF program requires affordable housing component

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
Open Space Preservation Techniques	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
Transferable Development Rights (TDR)	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
Cluster and Planned Unit Development	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
Sustainable Development Regulations	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 effect housing affordability; in long term, greater operating efficiencies of more sustainable housing units should make those units more affordable
Development Design Review	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
Neighborhood Conservation District	Generally effective	Generally positive effect	Can increase costs through review requirements	May help to conserve older housing stock

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
Scenic District and Conservation Easement	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
Tree Preservation	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
Form-Based Codes	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
Mixed-Use Regulations	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
Rental Restrictions	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
Vacant Property Regulations	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.
Inclusionary Zoning/Housing	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

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**
Housing Linkage	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
Accessory Dwelling Units	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

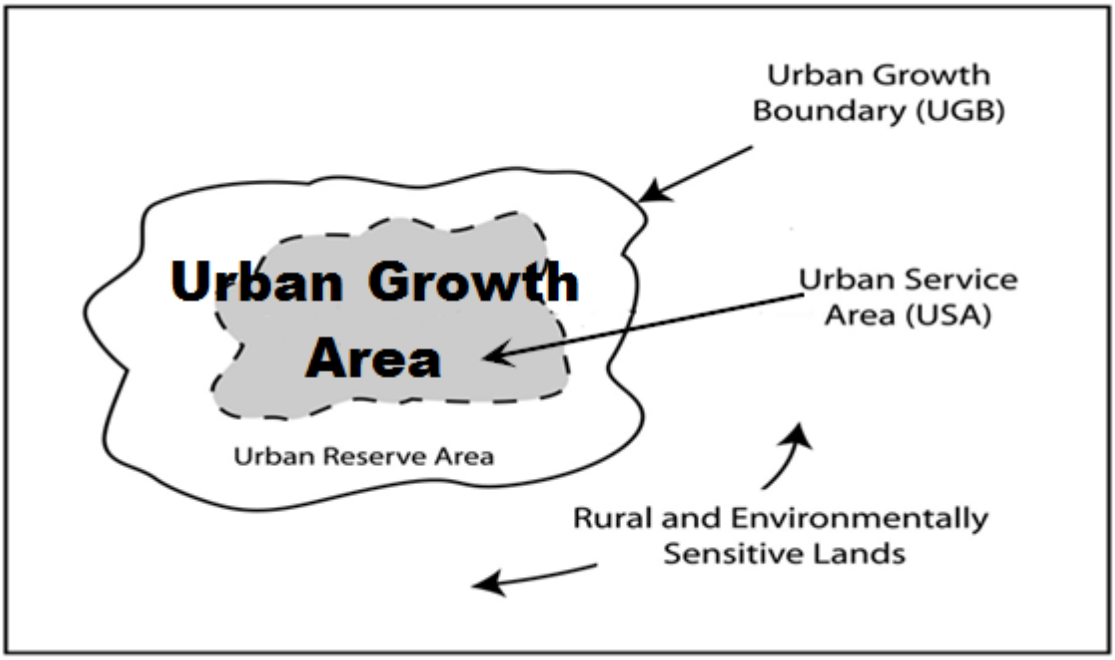
SECTION 2: URBAN GROWTH BOUNDARIES (UGBs)

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.[1]



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.[2] Within the UGB is also frequently established an **Urban Service Area (USA)** which is an area within, but not beyond which, urban services (roads, water, sewer, etc.) will be provided. In theory, the USA should be extended in conjunction with

[1] Arthur C. Nelson and James V. Duncan et al. *Growth Management Principles and Practices* (Planners Press: 1995) at 73.
[2] *See* Edward Sullivan, *Population Forecasting and Planning Authority*, 48 URB. LAW. 47 (2016).

planned public facilities set out in a Capital Improvements Program (CIP).[3] 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 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.[4]

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 UGBs 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 more costly 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 outside the regional UGB is prohibited, even if developers are willing to pay the costs of the entire additional infrastructure required.[5] The Washington State Growth Management Act ("GMA") requires that the state's most populated counties establish

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[3] *Id*. 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.

[4] Daniel R. Mandelker, "Managing Space to Manage Growth." 23 *William & Mary Environmental Law and Policy Review* 801 (1999).

[5] For a comprehensive overview and history of Oregon's state-wide UGB program, see Katherine H. Daniels, AICP, and Edward J. Sullivan, *Oregon's 40-Year-Old Innovation*, PLANNING (Feb. 2013) https://www.planning.org/planning/2013/feb/oregon.htm (hereinafter "40-Year-Old Innovation").

designated growth areas[6] designed to accommodate 20 years of projected growth.[7] 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 concluded that the GMA has been successful in curbing sprawl.[8]

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.[9]

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.[10]

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.[11] 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.[12] 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 development would have been economically viable were it not for the UGB.[13] 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

[6] "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[sm] *Legislative Guide Book (2002 Edition)*, Chapter 6 at 6-201 (quoting the GMA) (hereinafter "Growing Smart").
[7] *See* Joseph W. Tovar, FAICP, *Climbing the Mountain Called 'Growth Management*, PLANNING (Jan. 2015) https://www.planning.org/planning/2015/jan/growthmanagement.htm.
[8] *Id.*
[9] Jun Myung-Jin, *The Effects of Portland's Urban Growth Boundary on Urban Development Patterns and Commuting*, 41 URBAN STUDIES 1333 (2004).
[10] Growing Smart, at 6-201.
[11] *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).
[12] 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. *Id.* at 6-201.
[13] Antonio M. Bento, Sofia F. Franco, and Daniel Kaffine, "The Efficiency and Distributional Impacts of Alternative Anti-Sprawl Policies," 59 *Journal of Urban Economics* 121 (2006).

of more dense and better designed development, property values within the UGB will be higher due to perceived higher quality of development.[14]

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.[15] 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.[16]

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 UGB development approval process is streamlined.

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, the *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.[17] 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 been growing rapidly for the last 20 years.[18]

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[14] 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* Brookings Institution, A. Nelson, et al, *The Link Between Growth Management and Housing Affordability: The Academic Evidenc*e 29 (2002).

[15] 40-Year-Old Innovation, p. 3 (discussing opposition to inclusion in the UGB).

[16] In *Land Watch of Lane Cty. v. Lane Cty. City of Coburg*, 283 Or. App. 217 (2016), for instance, the court reviewed and affirmed the State Land Use Board of Appeals (LUBA) decision to require 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.

[17] Virginia McConnell & Keith Wiley, *Infill Development: Perspectives and Evidence from Economics and Planning*, 4, *available at* http://www.rff.org/RFF/Documents/RFF-DP-10-13.pdf (May 2010) (*hereinafter* McConnell & Wiley).

[18] Myung-Jin, *supra* note 9; *see also* McConnell & Wiley, at 4.

2.06 IMPACT ON HOUSING AFFORDABILITY

There is a substantial debate about the impact of UGBs on housing prices. The relatively rapid increase in housing prices in Portland during the 1990s precipitated this debate.[19] Some concluded that these price increases were the result of the UGB's supply constraining function.[20] 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.[21]

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 land supply constraints imposed by the UGB.[22] For example, the Oregon Land Conservation and Development Commission (LCDC) 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 each jurisdiction's location. It also required that new construction be mixed 50/50 in each jurisdiction 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. Their 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.[23]

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

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[19] *See* information and figures cited in Jim Robbins, "Oregon: Two Sides of the Anti-Sprawl Line," *The New York Times* (April 22, 2001).

[20] 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 *available at* https://web.archive.org/web/20100814061045/http://policy.rutgers.edu/cupr/rrs/files/vol38issue1/Cho_RRS_38(1).pdf) (*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.

[21] *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).

[22] 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.

[23] Charles A. Hales, "Higher Density + Certainty = Affordable Housing for Portland, Oregon," *Urban Land* (September 1991) at 14.

result of higher rents, property taxes, or housing prices. These households may then be forced to move further away from jobs and public transit.[24]

2.07 SUMMARY OF 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.

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.[25]
- 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.

[24] *See* Robbins, *supra* note 19.
[25] National Association of Industrial and Office Properties (NAIOP); National Growth Management Taskforce, *Growing to Greatness* (1999).

- 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.[26]

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 involves a downzoning of property in order to encourage owners to transfer their development rights to receiving zones. TDR is addressed in Section 9.[27]

[26] *Id.* at 35.
[27] *See* A Line in the Land, p. 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) which set out the location and sequence of capital improvements for the 12 years following the completion of the first 6-year plan. Over this eighteen year period, the town expected to become fully developed in accordance with its master plan. The regulations implementing this eighteen 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.[1]

This development timing provision was applied in combination with the town's traditional zoning ordinance based upon use districts, over 90% of which in the unincorporated area were zoned for residential use. The effect of this timing provision in combination with the basic zoning district scheme 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.[2]

Several 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.[3]

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[1] Julian Conrad Juergensmeyer & Thomas E. Roberts, *Growth Management and Smart Growth Programs*, Land Use Planning and Development Regulation Law § 9:2 (3d ed., 2016 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).

[2] *See Golden v. Planning Bd.*, 334 N.Y.S. 2d 138 (1972).

[3] *See* Juergensmeyer & Roberts and the discussion of concurrency in Section 4.

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 is that of the City of Petaluma, California. The so-called "Petaluma Plan" was adopted in 1971. Under the plan, a "green belt" boundary was drawn around the city. All residential growth and the extension of city services were prohibited beyond this line. This aspect, by itself, is similar to an **urban growth boundary**, discussed in Section 2. However, the City of Petaluma combined this boundary with a Residential Development Control System in order to regulate the actual number of building permits issued. In accordance with the Petaluma Plan, the number of building permits was limited to 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 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.[4] 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" period during which period land development activity is frozen or limited until permanent regulations implementing the plan can be adopted. If the objectives to be sought and the duration of the moratorium are both "reasonable," a moratorium is likely to be upheld.[5]

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 sanitary sewer.[6] Consequently, when faced with a delay in the completion of the regional sewage collection system, it was forced to decide to award an automatic 5 points to each development for sewer service, with the

[4] *See Construction Indus. Ass'n of Sonoma County v. City of Petaluma,* 522F.2d 897(9th Cir. 1975) *rev'g* 375 F Supp. 574 (N.D. Cal. 1974), *cert. denied*, 424 U.S. 1934 (1976)

[5] *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002). Note: 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*.

[6] 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).

result that each project received one-third of the points that it needed for approval.[7] The program was ultimately repealed.[8] However, growth phasing is currently being used in various forms in other jurisdictions around the country. For example, every two years Montgomery County, Maryland utilizes an updated growth policy (AGP) as a guide for the planning board's implementation of its adequate public facilities ordinance (APFO).[9] 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 policies areas, based on alternative scenarios of future public facility growth. This growth phasing system is part of a larger more complex growth management system that includes agricultural land preservation, functional and area master plans and land development regulations.[10] Although Maryland has been recognized as an early leader in growth-phasing policy, implementation of Maryland's APFO policy has been criticized. One study conclude:

> 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.[11]

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.[12] 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.[13]

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

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[7] *Id*.

[8] 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*, JOURNAL OF PLANNING HISTORY, Vol. 7, No. 2, May 2008 113, 139 *available at* http://journals.sagepub.com/doi/pdf/10.1177/1538513207310210.

[9] 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.

[10] Arthur C. Nelson and James B. Duncan, *Growth Management Principles & Practices* (Planners Press: 1995) at 101.; 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.shtm).

[11] The National Center for Smart Growth Research and Education University of Maryland for Home Builders Association of Maryland and the Maryland National Capital Building Industry Association, *Adequate Public Facilities Ordinances in Maryland: Inappropriate Use, Inconsistent Standards, Unintended Consequences*, p. 3-4 (April 20, 2006), *available at* http://smartgrowth.umd.edu/assets/documents/research/ncsg_apfomaryland_2006.pdf. *See also* Calandrillo, Deliganis, & Woods, *When Private Property Rights Collide With Growth Management Legislation*, CORNELL REAL ESTATE REVIEW, 13(1), 20-35 (2015) *available at* http://scholarship.sha.cornell.edu/crer/vol13/iss1/6 (noting ineffective implementation of Maryland's growth phasing system).

[12] Nelson at 102.

[13] *Id*. at 103-104.

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.[14]

Monroe County, Florida (the Florida Keys) employs a quota system of allocating building permits. This system applies to all buildings, not just projects with multiple units. This program was implemented as part of the State's Area of Critical State Concern program designed to protect the fragile ecosystem of the Keys and the surrounding waters.[15] Also, growth phasing regulations designed to slow growth until "double sessions" at school were no longer required or to preserve the environmental character of the area and to protect the existing way of life, have survived judicial review.[16]

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,[17] 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.[18] 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 has been 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.[19] 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 also withstood legal challenge because it was consistent with the city's planning and other regulatory provisions.[20]

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 measure of its success depends upon what is accomplished in the planning process during that interim

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[14] *Id*. at 105.

[15] *But see Galleon Bay Corp. v. Bd. of County Comm'rs of Monroe County*, 2012 WL 6027768 (Fl. Dist. Ct. 2012), where the retroactive application of a Rate-of-Growth Ordinance in "No Name Key" to a previously subdivided property deprived owners of practically all economically beneficial or productive use of land, causing a taking.

[16] Douglas W. Kmiec and Katherine Kmiec Turner, 1 Zoning & Plan. Deskbook § 5:29, *Growth and density controls—Timing or staged development regulation* (Dec. 2016 Update).

[17] *Construction Indus. Ass'n of Sonoma County v. City of Petaluma*, 522F.2d 897, 909 (9th Cir. 1975).

[18] *See* Kelly, E. *Managing Community Growth: Policies, Techniques and Impacts* (Praeger, Westport 1993) at 208-209.

[19] Kelly at 54-59.

[20] Douglas W. Kmiec and Katherine Kmiec Turner, *Growth and Density Controls--Timing or Staged Development Regulation*, 1 ZONING & PLAN. DESKBOOK § 5:29 (2016 update, 2d ed.). *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); s*ee also, Arcadia Development Co. v. City of Morgan Hill*, 197 Cal. App. 4th 1526, 1538 (6th Dist. 2011)(upholding 10-year extension of City Density Restriction when it furthered the "legitimate goal of minimizing the burden on City resources by discouraging noncontiguous development and urban sprawl.").

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.[21] It is also important that there be reasonable and beneficial economic uses possible during the period of the moratorium.[22]

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.[23] 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.[24] On the other hand, the U.S. Supreme Court has also ruled that the issue of whether a

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[21] *See* Rohan, 3-22 *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.*, 15-415 (La. App. 5 Cir. 12/23/15), 182 So. 3d 1252, 1263, *writ denied*, 2016-0162 (La. 3/24/16), 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).

[22] *See* Robert Meltz, Dwight H. Merriam and Richard M. Frank. *The Takings Issue* (Island Press: 1999) Chapter 17 at 278. 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).

[23] James A. Kushner, *Growth Management System Evaluation, Impact on land and housing costs*, 1 Subdivision Law and Growth Mgmt. § 4:5 (2d ed., 2016 update).

[24] *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 US 304 (1987).

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.[25]

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.[26] 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 program** 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). Capital facilities such as highways and sewer lines have been termed "the growth shapers".[27] **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 different. The resulting development patterns would not

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[25] *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 and Katherine Kmiec Turner, *Growth and Density Controls--Timing or Staged Development Regulation*, 1 ZONING & PLAN. DESKBOOK § 5:28 (2016 update, 2d ed.)(*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)).

[26] *See* Section 4 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), available at http://law.gsu.edu/files/2013/11/Adequate-Public-Facilities-Ordinances-and-the-Comprehensive-Plan-Jill-Skinner.pdf.

[27] Urban Systems Research & Engineering, Inc., *The Growth Shapers; The Land Use Impacts of Infrastructure Investments* (Council on Environmental Quality, Washington, 1976).

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.[28]

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.[29] Nevertheless, in the case of the Petaluma Plan the effect of the plan has been to significantly reduce the availability of affordable housing.[30] 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.[31] 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.

3.07 SUMMARY OF PROS AND CONS

PROS:

- A *growth phasing* program enables the timing of development with the availability of capital facilities.

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[28] *See* Geoffrey K. Turnbull, "Development Moratoria," 13 *Journal of Housing Economics* 155 (2004).
[29] Kushner, *supra* note 23:

> 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).
[30] *See* Rohan, 4 *Zoning and Land Use Controls* §4.04 [1] (LexisNexis Matthew Bender, 2016)).
[31] Arthur C. Nelson and James B. Duncan, *Growth Management Principles & Practices* (Planners Press: 1995) at 106.

- 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 S**pecial 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. 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.

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 typically made subject to APF requirements based on adopted **level of service (LOS)** standards are those relating to roads, sewer systems, schools, water supply and distribution systems, and fire protection.[1]

The financing of public infrastructure in this country has evolved. Traditionally, the states and federal government funded much of the infrastructure needed. However, fiscal priorities have changed and amounts available for public facilities has been less. 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 available capacity to serve the development at a predetermined acceptable level of service.[2] 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.[3] Unlike impact fees and in-kind exaction requirements, APF programs do not require that developers pay for public improvements, but 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.[4]

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

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[1] Michael Davidson and Faye Dolnick, eds., *A Glossary of Zoning, Development, and Planning Terms*, Planning Advisory Service Report Nos. 491/492 at 28 (American Planning Association 1999).

[2] American Planning Association, *Local Land Development Regulation*, Chapter 8 in *Growing Smart™ Legislative Guidebook* (2002 Edition) at 8-157.

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

[4] 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).

typically adopted based on locally desired rates of growth rather than on an analysis of facility availability.[5] Growth phasing and rate-of-growth programs are discussed in Section 3.

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.[6] 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.[7]

4.02 EFFECTIVENESS IN ACHIEVING STATED PURPOSE(S)

While most communities that initially used APF or concurrency were located in Florida, Maryland, California and Washington, the practice is now more widespread.[8] In Washington and Oregon, planning for adequate public facilities is a component of state requirements for comprehensive planning,[9] 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.[10] APF ordinances have also been adopted, without specific state authorizing or mandating legislation, in communities in several other states.[11]

Concurrency management has had the longest tenure in Florida. It was the policy foundation for Florida's Growth Management Act, adopted in 1985.[12] 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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[5] James Duncan and Associates and 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).
[6] 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).
[7] *Id.*
[8] Mark S. White and Elisa L. Paster, "Creating Effective Land Use Regulations through Concurrency," 43 *Natural Resources Journal* 753 (2003).
[9] Patricia E. Salkin, *American Law of Zoning: Adequate Public Facilities Ordinances*, 4 Am. Law. Zoning § 34.13 (5th ed, Nov. 2016)
[10] *Id.*
[11] *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.
[12] Randall G. Holcombe, *The Rise and Fall of Growth Management in Florida*, in *Property Rights, Entrepreneurship and Transaction Costs*, 234 (David Emanuel Andersson and Stefano Moroni eds. 2014).

- 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.[13]

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").[14] 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.[15] 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.[16] 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."[17] In 2011, the Florida Legislature repealed the state requirement that all communities adopt and implement transportation, school, and parks and recreation facility concurrency programs.[18] Local governments may continue these concurrency programs if they meet new requirements, including proportionate share mitigation of transportation impacts.[19] Concurrency is still required for sanitary sewer, solid waste, drainage, and potable water.[20]

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

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[13] 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) (http://www.dot.state.fl.us/planning/land_use/final.htm). *See also* Ivonne Audirac, William O'Dell and 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).

[14] Thomas G. Pelham, *Transportation Concurrency, Mobility Fees, and Urban Sprawl in Florida*, 42/43 Urb. Law. 105 (2010/2011), *discussing* 2009 Fla. Laws 96.

[15] *Id*. at 109-110.

[16] *Id*. at 110.

[17] 2009 Fla. Laws 96, § 13(1)(a).

[18] Cecelia Bonifay and Valerie Hubbard, *Community Planning Act Means Landmark Changes*, FLA. REAL ESTATE J., http://akerman.com/documents/Bonifay,Hubbard_FREJ_CommunityPlanningActMeansLandmarkChange.PDF; for additional discussion of the changes to the growth management statute in Florida *see* Holcombe *supra* n. 11.

[19] *Id.*

[20] Fla. Statutes. § 163.3180(1) (2016).

Maryland.[21] 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.[22] When local governments require fee payments in exchange for a waiver of concurrency requirements, these 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.[23]

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.[24] 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 would not be likely 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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[21] The National Center for Smart Growth Research and Education at University of Maryland, "Adequate Public Facilities Ordinances in Maryland: Inappropriate Use: Inconsistent Standards and Unintended Consequences," 20 (2006).

[22] 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)).

[23] *Id.* at 199-202.

[24] *See* A. C. Nelson, J. E. Frank and 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.[25] 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.[26] 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.[27] 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 some 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.[28] 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.[29]

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.[30] 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, Type 1, 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

[25] 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).
[26] Ruth L. Steiner, "Florida's Transportation Concurrency: Are The Current Tools Adequate To Meet The Need For Coordinated Land Use And Transportation Planning?" 12 *University 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).
[27] *See also* Holcombe, *supra* n. 11 at 237-39.
[28] Jeongseob Kim, Ruther L. Steiner, and Yizhao Yang, *The Evolution of Transportation Concurrency and Urban Development Pattern in Miami-Date County, Florida*, 50 URBAN AFFAIRS REVIEW 672, 693-95 (2014).
[29] *Id.*
[30] Chris Comeau, *Moving Beyond the Automobile: Multimodal Transportation Planning in Bellingham, Washington*, PRACTICING PLANNER (Vol. 7, No 3 Sept. 2009).

under the old system. It also restricts additional development in 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, builders will not build and the result will be growing scarcity in the number of housing units in a community. Such scarcity will tend to increase prices, thus making housing less affordable.[31]

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.[32] 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.[33] The author concluded that more research is needed to better understand the outcomes seen in this study.[34]

4.07 SUMMARY OF 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.[35]
- 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.[36]
- APF policy can act to prevent leapfrog development patterns and the concomitant costs of infrastructure extensions in this type of pattern.[37]

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[31] *See* The National Center for Smart Growth Research and Education at University of Maryland, "Adequate Public Facilities Ordinances in Maryland: Inappropriate Use: Inconsistent Standards and Unintended Consequences" 20 (2006).
[32] 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 AND SOCIETY 148-61. 157 (2015).
[33] *Id.* at 158.
[34] *Id.*
[35] American Planning Association, *Local Land Development Regulation*, Chapter 8 in *Growing Smart™ Legislative Guidebook* (2002 Edition) at 8-157.
[36] Maryland Office of Planning, *Managing Maryland's Growth: Models and Guidelines – Adequate Public Facilities* (1996).
[37] American Planning Association, *Local Land Development Regulation*, Chapter 8 in *Growing Smart™ Legislative Guidebook* (2002 Edition) at 8-157. Colorado Dep*artment of Local Affairs, *Colorado Growth Management Toolbox:*

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.[38]

- 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.[39]

- 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.[40]

- 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.[41]

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.

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

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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).

[38] American Planning Association, *Local Land Development Regulation*, Chapter 8 in *Growing Smart™ Legislative Guidebook* (2002 Edition) at 8-157, citing Porter, Douglas R., *Managing Growth in America's Communities* (Washington, D.C.: Island Press, 1997) at 130.

[39] Maryland Office of Planning.

[40] Colorado Department of Local Affairs, *Colorado Growth Management Toolbox: Appendix to Smart Growth and Development Summit White Paper* (Prepared by Clarion Associates, January 1995) (http://www.lcd.state.or.us/issues/tgmweb/pub/tools.html).

[41] *Growing to Greatness: A Growth Management Manual*, *supra* n. 3 at 25.

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.

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.

SECTION 5: IMPACT 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.[1] Impact fees are most commonly used to expand roads and utility services.[2]

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. 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.[3]

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.[4] 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.[5] 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.[6] Many states have enabling legislation for impact fees, which typically specify the types of facilities that are eligible for impact fees, or other statutory provisions that reflect the state's judicial

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[1] *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").
[2] Gregory S. Burge and Keith R. Ihlanfeldt, *Promoting Sustainable Land Development Patterns Through Impact Fee Programs*, 15 CITYSCAPE 83, 98 (2013).
[3] Blaesser and Kentopp, "Impact Fees: The Second Generation," 38 *Journal of Urban and Contemporary Law* 401 (1990).
[4] ARTHUR C. NELSON, ET AL., IMPACT FEES: PRINCIPLES AND PRACTICE OF PROPORTIONATE-SHARE DEVELOPMENT FEES (2009) (hereinafter, Nelson, IMPACT FEES) at 129; *see also* Bauman, Gus and William H. Ethier, "Development Exactions and Impact Fees: A Survey of American Practices," 50 *Law and Contemporary Problems* 51, 62 (1987).
[5] 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) (2017 Update) (hereafter "RATHKOPF").
[6] NATIONAL ASSOCIATION OF HOME BUILDERS, IMPACT FEE HANDBOOK (2008).

standards governing impact fees.[7] Other states have declined to adopt a statewide enabling statute, opting instead to allow local jurisdictions to pursue special enabling legislation from the state legislature to assess impact fees.[8]

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.[9] 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.[10] But, as a general rule, impact fees may not be used to pay for the maintenance of existing facilities or to cover operating expenses.[11] 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. 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. Impact fee enabling statutes often 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.[12]

As a result of the U.S. Supreme Court's decisions in the *Nollan* and the *Dolan* cases,[13] there has developed a constitutional test for exactions frequently referred to as the *Dual Nexus Test*. As illustrated in the diagram on the following page, the Supreme Court said in *Nollan* that a development condition or impact fee must

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[7] RATHKOPF § 90:43; Gregory S. Burge, University of Oklahoma, *How Development Impact Fees Can Finance Essential Public Facilities in Growing Local Economies* (Sept. 2013), ("Roughly 30 states have enacted legislation allowing impact fee programs, and they are protected by legal precedents in a handful of other states . . . ."); DUNCAN ASSOCIATES, NATIONAL IMPACT FEE SURVEY: 2015, at p. 3, http://www.growthandinfrastructure.org/resources/files/2015survey.pdf.

[8] *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).

[9] *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).

[10] NELSON, ARTHUR C. AND JAMES B. DUNCAN, GROWTH MANAGEMENT PRINCIPLES & PRACTICES, at 123 (APA, 1995).

[11] American Planning Association, "Local Land Development Regulation," Chapter 8 in *Growing Smart™ Legislative Guidebook* (APA: March 2, 2000) at 8-132. 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.

[12] *See Town of Londonderry v. Mesiti Development, Inc*., 168 N.H. 377, 381 (2015) (citing RSA 674:21, V(e)).

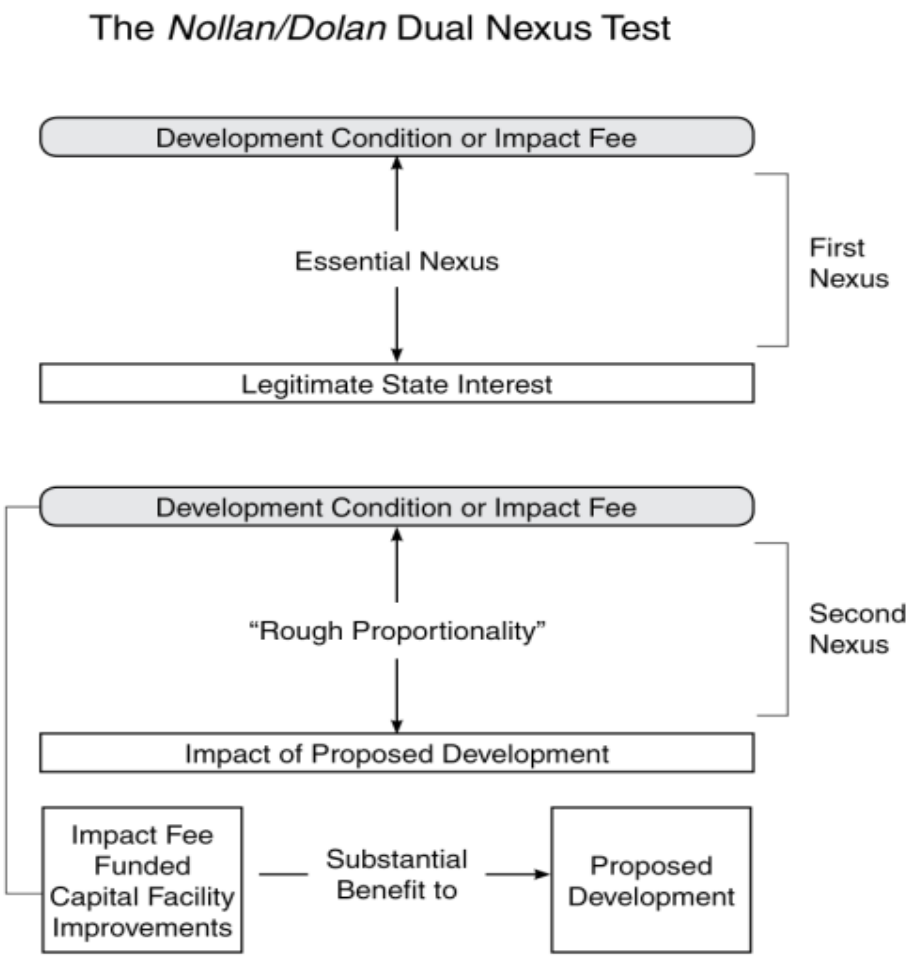
[13] *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

have an *essential nexus* to some legitimate governmental purpose in order to satisfy the first prong or first nexus. If that stated purpose is not really a legitimate objective based on a court's review of the objective as stated, 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 the diagram, 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 that second prong was articulated in the Supreme Court's decision in the *Dolan* case, it 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 and if that methodology supports the condition imposed upon the development. (*See Diagram*)

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.[14] *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.

[14] *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: 2017) (discussing the application of *Nollan* and *Dolan* to legislatively adopted development exactions).



As indicated at the bottom of the diagram, 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.[15]

[15] 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-Reuter: 2017). *See also* Michael B. Kent, Jr., *Theoretical Tension and Doctrinal Discord: Analyzing Development Impact Fees as Takings* 51 WM. & MARY L. REV. 1833 (2010).

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."[16] 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.[17] 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.[18]

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 2015 survey indicating that 256 jurisdictions nationwide are charging some form of impact fees.[19] In part, this seems to be because such fees have been perceived to be more politically acceptable than other potential revenue sources.[20] In addition, a 2008 study examining impact 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.[21]

Communities sometimes reduce or eliminate impact fees in order to encourage new development and to reflect lower costs of land and construction.[22] 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.[23] Impact fee surveys done in 2012 and 2015 found that between 2008 and 2015, impact fee amounts declined in most parts of the country.[24] In addition, some jurisdictions eliminated or suspended impact fees, a common trend in Florida following the collapse of the housing market.[25] One example is 2013 Lee County, Florida, which temporarily reduced its impact fees "in an effort to stimulate economic development and the pursuit of construction activity."[26] 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.[27]

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[16] Nelson and Duncan at 123.
[17] *Id.*
[18] Jack Estill, Benjamin Powell, and Edward Stringham, "Taxing Development: The Law and Economics of Traffic Impact Fees," 16 *Boston University Public Interest Law Journal* 1, 14 (2006).
[19] Duncan Associates, National Impact Fee Survey: 2015, at p. 5, http://www.growthandinfrastructure.org/resources/files/2015survey.pdf.
[20] Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth With Fees*, 59 S.M.U. L. REV. 177, 208-9 (2006).
[21] Nelson, IMPACT FEES at 24.
[22] *Id.*
[23] *See, e.g.*, Case Study of Shasta/Tehama Regional Impact Fee Program, CA: http://www.mdt.mt.gov/research/toolkit/m1/casestudies/redding_ca.shtml.
[24] Duncan Associates, National Impact Fee Survey: 2015, at 6, http://www.growthandinfrastructure.org/resources/files/2015survey.pdf, *see also* Duncan Associates, National Impact Fee Survey: 2012, at 6, http://www.impactfees.com/publications%20pdf/2012_survey.pdf.
[25] *See id.*
[26] *See* Lee County (FL) Ord. No. 13-06 (5th recital).
[27] Duncan Associates, National Impact Fee Survey: 2015, at 6.

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.[28] 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,[29] California,[30] Texas,[31] and Colorado.[32] These studies conclude that impact fees increase the cost of housing, primarily because they result in higher development costs. According to a survey of impact fees, in 2015 the national average impact fee amount for a single-family home was $11,868.[33] Among the states, California had by far the highest average impact fee amount at $31,787, followed by Maryland ($16,749), Oregon ($15,550), and Montana ($15,003).[34] Developers, in turn, attempt to pass the higher costs along to the ultimate homebuyer. 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. 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.[35] This dynamic will vary depending upon 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. 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 their increased costs and will have to absorb the fees or simply choose not to develop.[36]

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

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[28] Rosenberg at 214.
[29] Baden, Bret M., Don L. Coursey, and Jeannine M. Kannegiesser, *Effects of Impact Fees on the Suburban Chicago Housing Market*, Heartland Institute Policy Study No. 93 (November 19, 1999).
[30] Dresch, Maria and Steven M. Sheffrin, *Who Pays for Development Fees and Exactions?* (Public Policy Institute of America, 1997).
[31] 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).
[32] 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).
[33] *See* Duncan Associates, National Impact Fee Survey: 2015 at Table p. 7.
[34] *See id.*
[35] Rosenberg at 214.
[36] Dresch at 75.

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.

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, other things 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. All else being equal, 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.[37] 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.[38] 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.[39]

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 concluded 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.[40] 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.[41]

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[37] Gregory Burge and 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).

[38] Gregory S. Burge, University of Oklahoma, *How Development Impact Fees Can Finance Essential Public Facilities in Growing Local Economies* (Sept. 2013), http://www.scholarsstrategynetwork.org/brief/how-development-impact-fees-can-finance-essential-public-facilities-growing-local-economies.

[39] Emil Malizia, "Best and Worst Methods Of Calculating Impact Fees," 88 *Public Management* 23 (2006).

[40] Shishir Mathur, *Do All Impact Fees Affect Housing Prices the Same?*, JOURNAL OF PLANNING EDUCATION AND RESEARCH, 442, 452-53 (2013).

[41] *Id*. at 453.

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.[42] 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 new and existing homes.[43] 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.[44] 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 have shown that each dollar assessed as an impact fee increases housing prices by between $1.66 and $1.88.[45]

A study has shown that 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.[46]

In addition, research has examined the common practice of calculating flat-fee impact fees on a "dwelling unit" basis.[47] This practice may have a disproportionate impact on affordable housing, by saddling smaller homes with the same fee as for larger homes.[48] 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.[49] In addition, a number of 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.[50] 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.[51]

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[42] National Association of Industrial and Office Properties National Growth Management Task Force, *Growing to Greatness* (1999) at 39.
[43] Baden at 46.
[44] American Planning Association at 8-133.
[45] Shishir Mathur, Paul Waddell & Hilda Blanco, "The Effect of Impact Fees on the Price of New Single-family Housing," 41 *Urban Studies* 1303 (2004).
[46] Shishir Mathur, Do All Impact Fees Affect Housing Prices the Same?, JOURNAL OF PLANNING EDUCATION AND RESEARCH, 446(2013).
[47] 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").
[48] NELSON: HOUSING AFFORDABILITY at 3-4.
[49] *Id*. at 4.
[50] *Id*.
[51] Shishir Mathur, Do All Impact Fees Affect Housing Prices the Same?, JOURNAL OF PLANNING EDUCATION AND RESEARCH, 452(2013).

5.07 SUMMARY OF 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.

PROS:

- Impact 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 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.[52]
- Properly created and applied, impact fee systems can attribute specific costs to specific developments in a rational and predictable manner.

CONS:

- An impact fee requirement increases the costs of new development, especially for residential projects, and consequently may reduce the number of projects that are economically feasible.
- The increased costs resulting from such impact fees 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 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.[53]
- 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.[54]
- Impact fees are an unstable source of funding since they depend directly on new housing starts.

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 finance

[52] Nelson and Duncan, at 123.
[53] *Id*., at 122.
[54] South Carolina Policy Council, *Assessment of Impact Fees as Means of Financing Government Infrastructure* (1997).

public improvements.[55] 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.[56]

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 (see Section 6); and (4) user fees, such as water or wastewater connection fees and subsequent charges by volume of use.[57]

[55] *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").
[56] Nelson and Duncan at 123.
[57] *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.[1] 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.[2] SADs have been used to pay for water and sewer services, roads, parks, utility improvements, and investments in public transit.[3] An SAD is distinguishable from Tax Increment Financing (TIF), discussed in Section 7, which typically requires a finding of blight.[4]

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.[5] This apportionment based on the projected benefit to the individual property is usually cited as the distinctive feature of a special assessment.[6] 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.[7]

An SAD 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

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[1] *See* definition of "Special Benefit District" in Michael Davidson and Faye Dolnick, eds., *A Glossary of Zoning, Development, and Planning Terms*, Planning Advisory Service Report Nos. 491/492 at 213 (American Planning Association 1999).

[2] Municipal Research and Services Center of Washington, "What is a Local Improvement District?," Chapter in *Local Improvement District Procedural Outline* (http://www.mrsc.org/subjects/pubworks/lidoutl.aspx#whatlid); *see also* Arden H. Rathkopf, Daren A. Rathkopf, and Edward H. Ziegler, Jr., 2 RATHKOPF'S THE LAW OF ZONING AND PLANNING § 15:48 (4th ed. 2013).

[3] Arden H. Rathkopf, Daren A. Rathkopf, and Edward H. Ziegler, Jr., 2 RATHKOPF'S THE LAW OF ZONING AND PLANNING § 15:48 (4th ed. 2013); Douglas W. Kmiec and Katherine Kmiec Turner, 2 ZONING & PLAN. DESKBOOK § 13:6, *Benefit Assessment Districts* (2d ed. 2013).

[4] Rachel MacCleery and Casey Peterson, Using Special Assessments to Fund Transit Investments, URBANLAND (Oct. 24, 2012), http://urbanland.uli.org/infrastructure-transit/using-special-assessments-to-fund-transit-investments/.

[5] *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).

[6] *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).

[7] 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.

facilities.[8] 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. An SAD, on the other hand, is generally not 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.[9] 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 SAD characterized as being "dependent," meaning that it is dependent on the local government.

Despite those differences between an SAD 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 of these mechanisms provide local governments with a means of separately financing improvements within a limited geographic area. In fact, a 1992 Urban Land Institute (ULI) report on Special Districts noted that independent districts like SADs, "are increasingly important for the provision of infrastructure."[10]

Finally, a SAD 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 District," "Special Area Protection District," "Special Purpose Development Districts," "Special Development Review District," and "Special Mixed Use District." [11]

6.02 EFFECTIVENESS IN ACHIEVING STATED PURPOSE(S)

The principle behind an SAD 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, an SAD 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,[12] and go by various names, such as Municipal Utility District (Texas), Community Development District (Florida), and Mello-Roos District (California). The 2012 Census of Governments reports that there were 38,266 independent special districts that were active in the United States, approximately equal to the 38,910 general purpose local governments.[13]

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[8] *Id.*
[9] *Id.*
[10] Douglas Porter, et al., *Special Districts: A Useful Technique for Financing Infrastructure*, at v. (Urban Land Institute, 1996).
[11] *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 Kenneth H. Young, Ed., *1993 Zoning and Planning Law Handbook* (Clark Boardman Callaghan, 1993).
[12] Douglas W. Kmiec and Katherine Kmiec Turner, 2 ZONING & PLAN. DESKBOOK § 13:6, *Benefit Assessment Districts* (2d ed. 2013); AASHTO Center for Excellence in Project Finance & U.S. Department of Transportation: Special Assessment Districts (2011). See: http://www.transportation-finance.org/funding_financing/funding/local_funding/value_capture/special_assessment_districts.aspx.
[13] 2012 Census of Governments, *available at* http://www2.census.gov/govs/cog/g12_org.pdf. 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.

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

- The use of a Special Assessment enables a group of property owners to pay for a public facility that specially benefits them. Since 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.[14]

- 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 an SAD can be formed and administered. Generally, the establishment of an SAD is subject to a vote of affected property owners.[15]

The procedures under which an SAD is established are usually very detailed and must be followed carefully in order for the district to survive challenge.[16]

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[14] *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.

[15] 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.bloomfieldtwp.org/Services/EES/Engineering/SpecialAssessmentDistricts.asp.

[16] *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). As an example of procedures for creating and utilizing an SAD, *see* the Special Assessment Procedures for Burleigh County, North Dakota: Burleigh County, North Dakota, Special Assessment Procedures (revised Mar. 18, 2003), 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).

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.[17] It 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.[18]

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.[19]

A report by the Planning and Conservation League of California credited benefit assessment districts in that state with enhancing that 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.[20] The use of this technique generated $304 million in revenue in 1992-93, up from $28 million only 15 years earlier.[21] 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.[22]

The District of Columbia has received recognition for using an SAD to fund the cost of constructing a new Metrorail station on New York Avenue. A special assessment levied against commercial properties within 2500 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. An SAD 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.[23]

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[17] 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).

[18] *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.

[19] "Church Street Marketplace, Burlington, Vermont," Urban Land Institute Development Case Study No. C016013 (1986).

[20] J. K. Knox, *Benefit Assessment Districts: Enhancing the Quality of Life in California*, Planning and Conservation League Foundation (1996).

[21] *Id.*

[22] *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).

[23] 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.

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.[24]

An SAD is also being used in Virginia to extend the District of Columbia's metro system to Tysons Corner, a sprawling retail and employment center.[25] In 2004, commercial and industrial property owners agreed to establish an SAD to fund up to $1 billion of the total $2.6 billion needed for this metro system extension.[26] 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.[27] This SAD is 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.[28]

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 an SAD. To the extent that the use of an SAD 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 up new areas to growth or allowing faster growth in developing areas.

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[24] 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).
[25] Rachel MacCleery and Casey Peterson, *Using Special Assessments to Fund Transit Investments*, URBANLAND (Oct. 24, 2012), http://urbanland.uli.org/infrastructure-transit/using-special-assessments-to-fund-transit-investments/.
[26] *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.
[27] Fairfax County Va website. *See* https://www.fairfaxcounty.gov/tysons/
[28] Rachel MacCleery and Casey Peterson, *Using Special Assessments to Fund Transit Investments*, URBANLAND (Oct. 24, 2012), http://urbanland.uli.org/infrastructure-transit/using-special-assessments-to-fund-transit-investments/.

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 prices 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-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.[29] 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.[30] 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 SUMMARY OF PROS AND CONS

PROS:

- SADs can provide important services in areas where local governments have limited financial and/or administrative capabilities.[31]
- The creation of SADs offers the government an opportunity to avoid increases in general property taxes, thereby avoiding public controversy[32] 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.[33]

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[29] Stephen B. Billings & Thomas G. Thibodeau, *Financing Residential Development with Special Districts*, 41 REAL ESTATE ECONOMICS, 131-163 (2013).
[30] *Id.* Nineteen years was the average remaining term for the bonds studied.
[31] Porter at 41.
[32] *Id.*
[33] National Association of Home Builders, *An Overview of Special Purpose Taxing Districts* (Sept. 2014), https://www.nahb.org/en/research/~/media/2B48470239CA435E816317B5FEC6344D.ashx.

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.[34]

- 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.

- When the assessments are limited to new developments, it may take decades for sufficient 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.[35]

- Mismanagement and lack of accountability may be concerns where special districts are created and managed by developers.[36]

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.

[34] 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*, Thursday, July 27, 1995.
[35] *Id*. Ross describes the example of Carmel Valley, California Community Park FBA funds being spent by the city on a highway.
[36] 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 TERMS8.01

7.02

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.[1] 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.[2] 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.[3] 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.[4] 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

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[1] Arden H. Rathkopf, Daren A. Rathkopf, and Edward H. Ziegler, Jr., 2 RATHKOPF'S THE LAW OF ZONING AND PLANNING § 15:59 (4th ed. 2013).

[2] 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).

[3] 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); Council for Development Finance Agencies, *TIF Across America – 5 Case Studies* [hereinafter TIF Across America] (available online at http://www.cdfa.net/cdfa/cdfaweb.nsf/fbaad5956b2928b086256efa005c5f78/09bb875ff7a9b74c862571c3006ac51e/$FILE/The%20Diversity%20of%20TIF.pdf).

[4] *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 statues to disallow use of TIF for maintenance of a TIF financed redevelopment project).

tool for financing the infrastructure required by growth.[5] All states except Arizona have enacted legislation authorizing TIF projects,[6] and TIF programs are currently in effect in approximately 40 states.[7]

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.[8]

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.[9]

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**).[10] The following chart illustrates AV over the life of a TIF project.

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

[6] *See* Council for Development Finance Agencies (CDFA), *2008 TIF State-By-State Report* (Council for Development Finance Agencies, December 2008) (available at http://www.cdfa.net/cdfa/cdfaweb.nsf/0/8ee94afeece08bc988257936006747c5/$FILE/CDFA-2008-TIF-State-By-State-Report.pdf.; *see also* Rob Kerth, U.S. PIRG Education Fund, *Tax-Increment Financing: The Need for Accountability in Local Economic Development Subsidies* 6 (Fall 2011), http://www.smartgrowthamerica.org/documents/Tax-Increment-Financing.pdf. *See* discussion below regarding proposed legislation for Economic Development Reimbursement Authorities in Arizona.

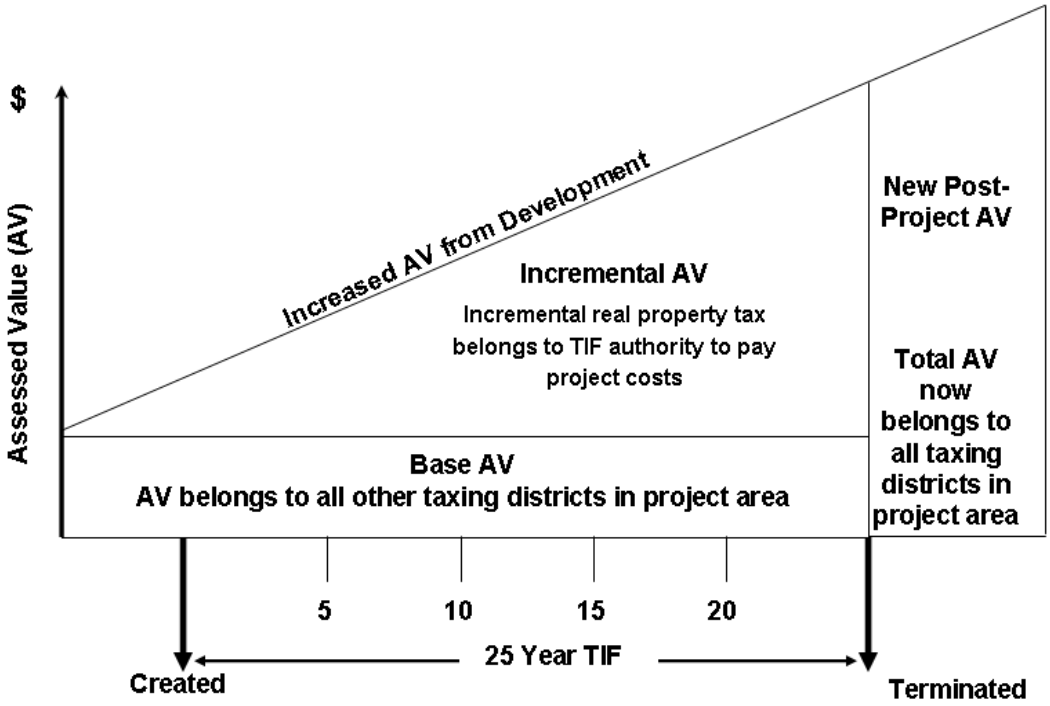
[7] Kenneth W. Bond and J.R. Clark, *Public Finance and Land Use in the Shadow of Fiscal Distress*, 65 PLANNING & ENVTL. LAW No. 1, at 2 (Jan. 2013).

[8] NAR TAX INCREMENT FINANCING, Part I at 5.

[9] *Id*. at 4.

[10] *Id*. at 5.

TIF Assessed Value (AV) Over Project Life



Source: *NAR Tax Increment Financing* (2002)

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.[11] Additionally, the proposed TIF program must meet various statutory requirements.[12] 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."[13] Many statutes also require that the proposed redevelopment project satisfy what is known as the "*but for*" test.[14] This test is intended to ensure that TIF is only used in cases where the desired redevelopment would not occur in the

[11] *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).

[12] Arden H. Rathkopf, Daren A. Rathkopf, and Edward H. Ziegler, Jr., 2 RATHKOPF'S THE LAW OF ZONING AND PLANNING § 15:59 (4th ed. 2013).

[13] 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).

[14] *See, e.g., Great Rivers Habitat Alliance v. City of St. Peters*, 384 S.W.3d 279, 289-91 (Mo. App. W.D. 2012) (pursuant to state statute authorizing TIF, city properly found that the redevelopment area was a blighted area, and the city's finding that the area would not reasonably be subject to development without TIF was not arbitrary).

absence of the governmental assistance.[15] Some state statutes also require a cost-benefit analysis or feasibility study as well as a blight determination and satisfaction of the "*but for*" test.

- **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.[16]

In addition to traditional property tax-based TIF programs, some states have authorized TIF programs based on sales tax or income tax increments.[17] 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.[18] Indiana and Maine are two states that currently provide 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.[19] New Jersey allows TIF programs to use 19 different sources of state and local revenue.[20] Another example of a non-traditional use of the tax increment is legislation proposed in Arizona to authorize local Economic Development Reimbursement Authorities (EDRA). This tool would allow cities and towns to use the increase in property tax revenues attributable to infrastructure or other improvements constructed by a developer to reimburse the costs of construction to the developer.[21] This approach relies on developers

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[15] *See* Rob Kerth, U.S. PIRG Education Fund, *Tax-Increment Financing: The Need for Accountability in Local Economic Development Subsidies* 7 (Fall 2011), http://www.smartgrowthamerica.org/documents/Tax-Increment-Financing.pdf.

[16] NAR TAX INCREMENT FINANCING, PART I AT 7-13, Part III at 1-5.

[17] Lauren Ashley Smith, *Alternatives to Property Tax Increment Finance Programs: Sales, Income, and Nonproperty Tax Increment Financing*, 41 URBAN LAWYER 705 (Fall 2009).

[18] *See id.*

[19] *See id.*

[20] Rob Kerth, U.S. PIRG Education Fund, *Tax-Increment Financing: The Need for Accountability in Local Economic Development Subsidies* 6-7 (Fall 2011), http://www.smartgrowthamerica.org/documents/Tax-Increment-Financing.pdf.

[21] League of Arizona Cities and Towns, *HB 2177: municipalities; development; reimbursement zones* (Summary of Legislation), http://www.azleague.org/index.aspx?NID=382. Note that a similar proposal was introduced in prior legislative sessions. Jeremy Duda, *Don't Call It a TIF – New Economic Development Tool Emerges*, The Arizona Capital Times (Sept. 14, 2015).

to front the costs of infrastructure and seek reimbursement out of the tax increment rather than permitting bonds to be issued and paying down the bonds with the tax increment.

7.03 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.[22] Opponents of TIF argue that TIF programs are ineffective and inefficient because the 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.[23] 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.[24] 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.[25] 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.[26]

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.[27]

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

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[22] Joyce Y. Man, *Introduction* in TAX INCREMENT FINANCING AND ECONOMIC DEVELOPMENT, USES, STRUCTURES AND IMPACT [hereinafter TAX INCREMENT FINANCING] 3 (Craig L. Johnson and Joyce Y. Man, eds., 2001).
[23] *Id*. at 4-5.
[24] 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).
[25] *Id.*
[26] Michael J. Hicks; Dagney Faulk, and 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.
[27] New York City Independent Budget Office, *Learning From Experience: A Primer on Tax Increment Financing* [hereinafter *Learning from Experience*] (2002) (available online at http://www.ibo.nyc.ny.us/iboreports/TIF-Sept2002.pdf)
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growth rates elsewhere in the community.[28] 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.[29] A subsequent study revealed that the overall economy of municipalities that adopt TIF 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.[30]

TIF may also have negative spillover costs to taxpayers outside the TIF district.[31] 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 the cities' TIF programs.[32] 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.[33] 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.[34] 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.[35] Similar charges of abuse have arisen in Nebraska, where the required "but-for" test was not seriously considered when many TIF districts were created.[36] Twelve legislative bills and four constitutional amendments have been proposed since 2012 to try to more tightly control the use of TIF.[37]

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[28] Richard F. Dye and David F. Merriman, *The Effects of Tax Increment Financing on Land Use* in THE PROPERTY TAX, LAND USE, AND LAND REGULATION [hereinafter THE PROPERTY TAX] 58 (Dick Netzer, ed., 2003).
[29] *Id.*
[30] Richard F. Dye, *The Effects of Tax Increment Financing on Economic Development*, 47 J. OF URB. ECON. 326 (2000).
[31] *Learning from Experience* at 4.
[32] Peter S. Fisher, Iowa Fiscal Partnership, *Tax Increment Financing: A Case Study of Johnson County*, at 1 & Executive Summary at 1 (2011), http://www.iowafiscal.org/2011docs/111121-TIF-JC.pdf.
[33] *See* Rob Kerth, U.S. PIRG Education Fund, *Tax-Increment Financing: The Need for Accountability in Local Economic Development Subsidies* 7 (Fall 2011), http://www.smartgrowthamerica.org/documents/Tax-Increment-Financing.pdf.
[34] *California Redevelopment Assn. v. Matosantos*, 53 Cal.4th 231, 241, 247 (2011).
[35] Peter Detwiler, Broken Promises: The End of California Redevelopment, 64 PLANNING & ENVTL. LAW No. 6, at 3 (June 2012).
[36] 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).
[37] *Id.* at 680-81.

7.04 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.[38]

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.[39] However, other studies have found differing impacts of TIF expenditures on AV. One study of property value growth between 2002 and 2012 in Chicago's TIF districts examined the effect of various types of expenditures on AV growth to attempt to determine whether TIF expenditures compel growth in property value or simply capture growth that would have occurred anyway.[40] 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.[41] 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 the City of 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 that expenditures for infrastructure negatively correlated with AV in the TIF districts.[42] This article 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.[43]

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.[44] Another study found a correlation between the adoption of TIF programs by cities in Michigan and the growth of property values in those cities.[45] These studies have found that communities that adopt TIF programs generally experience greater property values than non-TIF adopting communities.[46] A study in Indiana found that that Indiana TIF programs have increased the median owner-occupied housing value by 11.4 percent in cities that have utilized TIF relative to what it would have been without the program. This

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[38] *See* Peter Detwiler, *Broken Promises: The End of California Redevelopment*, 64 PLANNING & ENVTL. LAW No. 6, at 3 (June 2012).
[39] 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.
[40] Kevin Kane and Rachel Weber, *Municipal Investment and Property Value Appreciation in Chicago's Tax Increment Financing District*, 36 JOURNAL OF PLANNING EDUCATION AND RESEARCH 2, 167-181 (2016).
[41] *Id.* at 178.
[42] *Id.* at 172-73, 178.
[43] *Id.* at 178.
[44] Joyce Y. Man, *Effects of Tax Increment Financing on Economic Development* in TAX INCREMENT FINANCING at 103.
[45] *Id.*
[46] *Id.*

is equivalent to approximately a $4,900 increase in the median value of owner-occupied housing in the entire community.[47] This study went on to conclude 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.[48]

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.[49]

7.05 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.[50] 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.

7.06 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.[51] 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 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.[52]

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[47] *Id*. at 104.
[48] *Id*.
[49] Richard F. Dye and 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 Johnson and Man at 105.
[50] *See* National Association of Home Builders, *Tax Increment Financing in School Infrastructure Funding Alternatives*, https://www.nahb.org/~/media/Sites/NAHB/SupportingFiles/8/Sch/SchoolFundingfinalversion_116200880425AM.ashx?la=en (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).
[51] Jared F. Knight, *Is Tax Increment Financing Racist? Chicago's Racially Disparate TIF Spending*, 101 IOWA L. REV. 1681 (2016).
[52] TIF Across America, *supra*, note 1.

7.07 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.[53] 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.[54] Maine has also adopted a similar program entitled Affordable House Tax Increment Financing (AHTIF).[55] 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.[56]

7.08 SUMMARY OF 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.
- 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.

[53] Housing Policy, Using TIF to Preserve Affordable Housing Opportunities in Gentrifying Neighborhoods (available online at http://www.housingpolicy.org/toolbox/strategy/policies/tif.html?tierid=144).
[54] *Id.*
[55] For further information on Maine's AHTIF program, see the Maine State Housing Authority's Affordable Housing Tax Increment Financing webpage at http://www.mainehousing.org/TaxIncrement.
[56] *Id.*

- 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.

- 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 Base AV 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 sufficient 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 more costly, 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.[57]

- TIF commits future tax revenues to debt service rather than to general revenues.

7.09 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.

[57] Rob Kerth, U.S. PIRG Education Fund, *Tax-Increment Financing: The Need for Accountability in Local Economic Development Subsidies* 1-2 & 13-14 (Fall 2011), http://www.smartgrowthamerica.org/documents/Tax-Increment-Financing.pdf.

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 purposes, 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 as a way of preserving a rural "character" and creating "buffers" between developed areas. There are a variety of mechanisms by which local 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 design techniques such as cluster subdivisions, to developer exactions requiring the dedication of parkland or payment into an open space fund, to restrictive regulations such as large lot zoning and riverfront buffer zones.

Many state and local governments have undertaken open space purchase programs by which parcels of land identified as valuable for open space purchases 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 desired that the public entity have both ownership and control over the property.[1]

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. Under these programs, ownership, as well as, usually, the responsibility for operating and maintaining the property, remains with the fee owner. The fee owner may make whatever use of the property is not prohibited by the restriction or easement. PDRs are often used in the context of agricultural land, where they are sometimes called "Purchase of Agricultural Conservation Easement" programs.[2] 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 water course, or an area that provides a scenic view to others. The development is then designed to protect the area of interest from development impacts. These techniques can be imposed through subdivision or zoning law as mandatory requirements, or can be offered to landowners as an option under such laws, either with or without density bonuses or other incentives for their use.[3]

Low density regulations 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

[1] Colorado Department of Local Affairs, *Colorado Growth Management Toolbox: Appendix to Smart Growth and Development Summit White Paper* (Prepared by Clarion Associates, January, 1995).
[2] *See* discussion in Section 10, Farmland Preservation Techniques.
[3] Cluster development is further discussed in Section 11.

is a goal.[4] 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 adjacent to water bodies and river ways, land on steep slopes, or other protected or difficult terrain.

Transfer of 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. 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. TDR is discussed in detail in Section 9.

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.[5] 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.[6] 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.[7]

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.[8] 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.[9] PDR programs are sometimes constrained by the limited funding made available for open space purchases, and the need to identify and plan for the most effective use of these financial resources.[10] 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.[11] 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

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[4] Vermont Natural Resources Council, Community Planning Toolbox, http://vnrc.org/resources/community-planning-toolbox/tools/large-lot-zoning/.
[5] *See* Jessica Owley, *The Enforceability of Exacted Conservation Easements*, 36 VT. L. REV. 261, 268 (Winter 2011)
[6] 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.
[7] *See id.*
[8] Gayle Miller & Douglas Krieger, *Purchase of Development Rights: Preserving Farmland and Open Space*, PLANNING COMMISSIONERS JOURNAL No. 53 (Winter 2004).
[9] *Id*.
[10] Robert Liberty, *Stopping Low-Density Rural Residential Sprawl*, 15 VT. J. ENVTL. L. 124, 131 (Fall 2013).
[11] Anika Singh, *Implementing Planned Development: The Case of New Jersey*, 30 N.Y.U. REV. L. & SOC. CHANGE 151, 181 (2005).

resell the property or the easement rights, it would be unlikely to do so except under the most unusual circumstances.[12]

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.[13] 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.[14] Another example is the Jackson Meadow conservation community located west of St. Croix, Minnesota, a 145-acre development that in which 60 residential lots are clustered on just 40 acres.[15] However, clustering is not effective at transferring growth away from preservation areas, because it is restricted to redistributing development within a single development site.[16] 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.[17]

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. The judgment of 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 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.[18] 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 riverfronts 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. For example, since the TDR program in the Pinelands area of New Jersey was established in 1985, through 2014, more than 16,000 acres of agricultural and environmentally sensitive land have been preserved through a total of 11,117 individual density transfers.[19] The market for purchase of development rights in that case is created by allowing development rights to be used in the sending area at a 4:1 ratio (four units created for every one unit given up in the sending area)

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[12] R. Pruetz, *Saved by Development* (Arje Press, 1997) at 69-70.

[13] Edward T. McMahon, CONSERVATION COMMUNITIES: CREATING VALUE WITH NATURE, OPEN SPACE, AND AGRICULTURE at 134-147 (2010 Urban Land Institute).

[14] *See id*.

[15] *See id*. at 174-183.

[16] *See* 2 PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS, Ch. 12, Cluster Zoning and PUDs, § 12.01[3][a] (LexisNexis Matthew Bender, 2016) (hereinafter "ROHAN"); *see also* Pruetz at 78.

[17] *See* Edward T. McMahon, CONSERVATION COMMUNITIES: CREATING VALUE WITH NATURE, OPEN SPACE, AND AGRICULTURE, Ch. 2, Benefits and Limitations of Conservation Development (2010 Urban Land Institute).

[18] Mark W. Cordes, *Agricultural Zoning: Impacts and Future Directions*, 22 N. ILL. U. L. REV. 419, 440 (Summer 2002).

[19] Lucy Triedman, Caroline Caldwell, Elizabeth Sangree, Mark McCauley, *A Study on the Feasibility of a Transfer of Development Rights Program in Lewiston, Maine*, Bates College Community Engaged Research Reports, Paper 17 (2014).

and in part 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 twenty years, and its program is often cited as being among the most successful examples of this technique. As of June 2013, Montgomery County had preserved 52,052 acres through the sale of TDRs, which constitutes approximately 72% of all farmland protected by easements in the county.[20]

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 been relatively successful, is voluntary in that sending area properties were not downzoned.[21] The Long Island Pine Barrens TDR program is authorized in state legislation that is specific to the Pine Barrens.[22] 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.[23] 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 factor were: "strict sending-area development regulations" and "few or no alternatives to TDR for achieving additional development."[24]

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.[25] 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.[26] 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.[27] By contrast, the Massachusetts subdivision control law prohibits local planning boards from

[20] Jeremy V. Criss, *Montgomery County's Transferrable Development Rights Program in the Agricultural Reserve* at 12 (Montgomery County, MD, June 2013).
[21] *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).
[22] *See* Rizzo at 8 (citing the 1993 Long Island Pine Barrens Protection Act).
[23] (N.Y. Gen. City Law 20-f); (N.Y. Village Law § 7-701); (N.Y. Town Law, § 261(a)).
[24] *See* ARTHUR C. NELSON, RICK PRUETZ, AND 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 J. AM. PLAN. ASS'N 78, 83 (Winter 2009).
[25] Michael B. Kent, Jr. *Land Use Exactions, Anti-Evasion, and Koontz v. St. Johns River Water Management District.*
[26] Colorado Department of Local Affairs, *Colorado Growth Management Toolbox: Appendix to Smart Growth and Development Summit White Paper* (Prepared by Clarion Associates, January, 1995).
[27] *In re Appeal of Gibraltar Rock, Inc*., 2013 WL 5614244 (Pa. Cmwlth.) (citing 53 P.S. § 10503(11)).

conditioning a subdivision approval on the dedication of land to public use or conveyance to the town, without just compensation.[28]

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. Data from Amherst and Concord, Massachusetts, show that cluster development properties appreciate faster than residential properties with larger private yards but no protected open space.[29] A study from Boulder, Colorado, showed that proximity to the city's greenbelt was correlated to residential property prices.[30] 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 it could be developed in its entirety or if no payment has to 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.[31] 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.[32]

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. One can presume that if cluster development were the most profitable type of development, developers would provide it. It follows that *requiring* developers to provide a type of development that is less preferred in the marketplace would lead to lower property values.

8.04 IMPACT ON DEVELOPMENT COSTS

[28] *See Collings v. Planning Board of Stowe*, 79 Mass. App. Ct. 447, 451 (2011).
[29] Jeff Lacy, An Examination of Market Appreciation for Clustered Housing With Permanent Open Space (1990).
[30] Mark R. Correll, et al., *The Effects of Greenbelts on Residential Property Values: Some Findings on the Political Economy of Open Space*, Land Economics 54(2):207-217 (May 1978).
[31] Lucy Triedman, Caroline Caldwell, Elizabeth Sangree, Mark McCauley, *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," *Land Use Policy*, 51, 162-171, 2016.
[32] *Wilkinson v. St. Jude Harbors Inc.*, 570 So. 2d, 1332 (1990).

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.[33] 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.[34] On the other hand, cluster development options can result in development cost economies, including reduced infrastructure costs.[35] Likewise, increased densities allowed for projects incorporating TDR can potentially reduce the hard costs of development on a per unit basis.

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 minimums 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 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**, increases 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, however land economics is complicated and affected by many variables, including market demand[36] 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 SUMMARY OF PROS AND CONS

[33] *See* THE TDR HANDBOOK at xvi, 11.
[34] *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).
[35] John R. Nolon & Jessica Bacher, *Zoning and Land Use Planning*, 36 REAL ESTATE LAW JOURNAL 73, 85 (Summer 2007).
[36] RATHKOPF'S THE LAW OF ZONING AND PLANNING, Ch. 15, Growth Management, § 15.16 (2015).

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.

- 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 and no-build buffers have significant implications for property rights.

- PDR and low density zoning can lead to "leapfrog" 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, 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.

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, including the right to minerals below the surface, 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 to an adjacent property owner the right to use a road that runs across his or her property.

TDR is a market-based mechanism 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.[1] 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 resources areas identified on the property. Typically this grant of conservation right in the form of an easement is granted to a third party such as a not-for-profit organization that is given the right under the terms of the 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.

In exchange for this restriction, the property owner receives one or more **development rights**. These "transferable development rights," as the term suggests, can be transferred (sold) to a property owner in a "receiving area" who wants to build more than would otherwise be allowed by the development regulations applicable in that area. The "receiving area" is a designated district where denser development is appropriate and encouraged. (*See figure below*) The receiving area should be desirable for development from a market perspective, and the necessary infrastructure should be available.[2] 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 percent 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. Ensuring that there is a market for the purchase of transferable development rights is one of the most difficult aspects of devising a workable TDR system. This requires careful market analysis for the designation of appropriate receiving areas.

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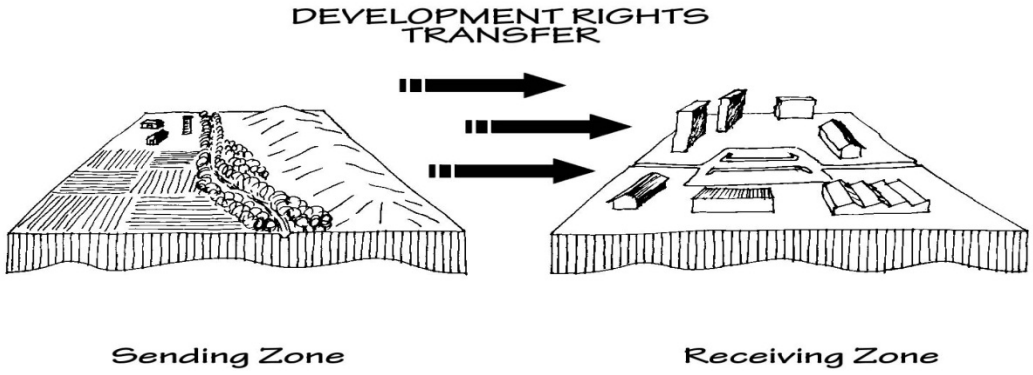
[1] *See Johnson v. Arlington County*, 794 S.E.2d 389, 390 (Va. 2016) (stating: "TDRs provide a tool for a locality to direct new growth away from environmentally sensitive areas, historic, agricultural, or open space areas.").

[2] *See generally* ARTHUR C. NELSON, RICK PRUETZ, AND DOUG WOODRUFF, THE TDR HANDBOOK: DESIGNING AND IMPLEMENTING TRANSFER OF DEVELOPMENT RIGHTS PROGRAMS, Ch. 9, Designing Receiving Areas (Island Press, American Bar Association, 2012) (hereinafter "THE TDR HANDBOOK"); Peter J. Pizor, "Making TDR Work," (*APA Journal, Spring, 1986*), at 210.



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.[3] 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,[4] 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 in the "sending area" in order to create a viable market for TDR transfers.

Programs incorporating the TDR concept come in a number of variants. In some programs, 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.[5] 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.[6] Such programs, premised on drastic

[3] *See* GROWING SMART LEGISLATIVE GUIDEBOOK at 9-37 (2002 ed., APA).
[4] *See Suitum v. Tahoe Regional Planning Agency*, 117 S. Ct 1659 (1997) (J. Scalia, concurring).
[5] *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* (Arje Press 1997) at 48-49.
[6] *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*

regulatory restrictions on development of the "sending areas," are sometimes called "mandatory" TDR programs, because the property owner's ability to develop its property has been constrained and the *only* way to recover development value is to sell development rights for use elsewhere.

In other cases, a TDR mechanism is established without 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 could be used to build twenty additional housing units on a receiving area property. Such a program would be described as having a "transfer ratio" of 2 to 1.[7] Such "voluntary" TDR programs are less vulnerable to challenge under constitutional due process and regulatory takings theories.[8]

Ideally under a TDR program, all parties end up ahead. The development rights purchaser ends up enhancing the value of its development project by more than the cost of the additional development rights. The seller of the development rights receives fair value for the foregone rights. The community secures the permanent protection of land that has high environmental, heritage 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."[9] Viewed strictly through a "property rights" lens, however, a TDR program may be viewed more cynically—as 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.[10]

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.[11] 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.[12] The ability to sell a development right gives the lot owner some economic value for its property and presumably alleviates the incentive to press ahead with construction on the original lot. TDR is used to mitigate the economic impact of restrictions intended to protect scenic views of Big Sur in Monterey County, California.[13] Seattle uses TDR to help protect low-income housing and performing arts centers from redevelopment.[14] TDR is also used in some jurisdictions as an incentive to move development away from areas with significant infrastructure limitations.[15]

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").

[7] THE TDR HANDBOOK at 286. Transfer ratios greater than 1:1 can be found in "mandatory" TDR programs, too.

[8] Jennifer Frankel, "Past, Present and Future Constitutional Challenges to Transferable Development Rights," 74 *Wash L. Rev.* 825, 841 (1999).

[9] Pruetz at 1.

[10] 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).

[11] *See* RATHKOPF'S THE LAW OF ZONING AND PLANNING § 59:2 (4th ed., Nov. 2016 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).

[12] Pruetz at 29.

[13] Pruetz at 29.

[14] Frankel at 833.

[15] Pruetz at 27.

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.[16] The 2012 *TDR Handbook* identified 239 local governments with TDR programs and 25 states that had adopted TDR enabling legislation.[17] The pace of new TDR proposals seems to have accelerated as communities have become increasingly concerned about growth and community character issues. Montgomery County, Maryland, has had a TDR program for more than thirty years, and its program is often cited as being among the most successful examples of this technique. As of June 2013, Montgomery County had preserved 52,052 acres through the sale of TDRs, which constitutes approximately 72% of all farmland protected by easements in the county.[18]

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.[19] For example, the Long Island Pine Barrens of New York is frequently cited as a TDR program that has been relatively successful.[20] 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.[21] 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.[22] In Rhode Island, municipalities are authorized to establish "a system for transfer of development rights within or between zoning districts designated in the zoning ordinance."[23] In addition to this statewide enabling legislation, special enabling legislation authorizes TDR programs in the Towns of North Kingstown and Exeter.[24]

The following provisions should be part of state TDR enabling legislation:

1. Comprehensive definition of terms.

2. A requirement that there be specific local program objectives for identifying *sending* areas.

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[16] *See* Pruetz at 9; *see also A Survey of Transferable Development Rights in New York City*, NYC Dept. Planning (Feb. 2015).
[17] *See* THE TDR HANDBOOK at 105, 131.
[18] Jeremy V. Criss, *Montgomery County's Transferrable Development Rights Program in the Agricultural Reserve* at 12 (Montgomery County, MD, June 2013).
[19] As of 2010, twenty-five states had adopted TDR-enabling legislation. *See* THE TDR HANDBOOK at 105.
[20] *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).
[21] *See* Rizzo at 8 (citing the 1993 Long Island Pine Barrens Protection Act).
[22] (N.Y. Gen. City Law 20-f); (N.Y. Village Law § 7-701); (N.Y. Town Law, § 261(a)).
[23] R.I. Gen. Laws §§ 45-24-33(b)(2).
[24] RHODE ISLAND TRANSFER OF DEVELOPMENT RIGHTS MANUAL at 13 (Feb. 2015) (citing R.I. Gen. Laws §§ 45-24-46.2, 45-24-46.3). North Kingstown and Exeter are the only municipalities in that have adopted at TDR program. *See id.*

3. A requirement that there be clear standards for delineating *receiving* areas and regulating development within receiving areas. Receiving areas must have sufficient demand for new development to absorb TDRs.

4. A requirement that local TDR programs follow steps to guide the initial allocation of TDRs and to measure and establish values. Standards should require a *market analysis* to ensure a reasonable balance between the supply of TDRs and the demand for them, so that there is an economic incentive for use of TDRs.

5. Standards to guide the administration of local programs so that programs are equitable, simple to administer, and have clearly defined procedures for the acquisition, transfer, and use of TDRs.

6. A requirement that the local government responsible for program implementation have or hire the expertise necessary to design, implement, and monitor the program.

7. If the state enabling legislation authorizes exceptions to standard restrictions placed on property following the sale of TDRs, the legislation should include provisions defining the circumstances under which such exceptions may be permitted.

8. A requirement for variance provisions to ensure the flexibility of local TDR programs and provide a way to address undue hardships.

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.[25] Transfers will only occur where the jurisdiction is successful in creating a market for development rights.[26] 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."[27] 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."[28] 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.[29] To maintain an effective TDR program, local governments should be prepared to continually monitor the TDR marketplace and make adjustments to reflect changing supply and demand factors.[30] 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

[25] *See* Leventhal at 286 (noting that Miami's TRD program had not generated a single TDR transaction).
[26] Pruetz at 50.
[27] Walls & McConnell at 124; *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").
[28] Keith Aoki, Kim Briscoe & Ben Hovland, *Transferable Development Rights as a Path out of Deadlock*, 20 J. ENVTL. L. & LITIG. 273, 314 (2005).
[29] Aoki, Briscoe & Hovland, 20 J. ENVTL. L. & LITIG. at 315.
[30] *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*").

decline to pay for additional density.[31] 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 need for additional density provided by TDR.[32]

In a 2016 report on TDR programs in Maryland, by the TDR Committee of the Maryland Department of Planning 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. In Charles County, the cost of development is high even before use of TDRs: $14,000 for a school impact fee and then $15,550 for a developer rights and responsibility agreement, through which developers basically pay for new schools. Economist Margaret Walls reports that with the price of TDRs averaging $6,000 in Calvert County, 2011-2012, and the need to purchase five TDRs for each bonus unit, the cost per unit using TDRs rose by $30,000.[33]

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.[34] 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 resolve valuation problems.[35] 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.[36] 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,

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[31] 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).

[32] *See* James C. Nicholas, *Lee County TDRs: Existing Programs, An Expanded Program, and a TDR Bank* (November 2013) at 13.

[33] TRANSFER OF DEVELOPMENT RIGHTS COMMITTEE REPORT, Maryland Dept. of Planning (April 2016).

[34] *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.").

[35] *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 function of a TDR bank is to serve "as a market regulator, ensuring equitable pricing for TDRs").

[36] *See* THE TDR HANDBOOK at 230; *see also* Frankel at 829; Pizor at 207.

and provide sales price information. By providing a single point of contact, a TDR bank can streamline the process for TDR buyers and sellers.[37]

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

TDR programs are variations on cluster development. Both programs begin with the premise that some properties should not be developed and that the community will be better off if development is moved from one site to another. If both sites are within the same parcel, it is "cluster." If the two sites are in different parcels, it is a transfer of development. 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."[38] 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. 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 be exceeded by TDR and to encourage higher density development."[39] For example, assume, as is commonly the case, that 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.[40]

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

[37] *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).
[38] Miller at 471-472.
[39] Pruetz at 56.
[40] Pizor at 209.

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.[41] 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.[42] 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."[43] 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.[44]

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[45] or away from coastal areas.[46] Whether a TDR program affects the amount of overall land development should depend 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

[41] Pruetz at 58-59.
[42] Pizor at 210.
[43] THE TDR HANDBOOK at 120.
[44] *See* Daniel J. Pasquale, *A Pragmatic Proposition: Regionally Planned Coastal TDRs in Light of Rising Seas*, 48 URB. LAW. 179, 187 (Winter 2016).
[45] *Suffolk County Transfer of Development Rights (TDR) Study*, Suffolk County Dept. Economic Development & Planning (May 2014).
[46] *See* Daniel J. Pasquale, *A Pragmatic Proposition: Regionally Planned Coastal TDRs in Light of Rising Seas*, 48 URB. LAW. at 187.

otherwise have taken place without the downzoning. In contrast to PDR programs, TDRs shift development to different locations within a community without necessarily reducing the total amount of development allowed.[47]

9.06 IMPACT ON HOUSING AFFORDABILITY

Whether a TDR program has any effect on housing affordability, and what that effect is, will depend on the design of the TDR program and the nature of the relevant housing markets. 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. 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 TDR process may drive development costs up and create upward pressure on housing costs.

9.07 SUMMARY OF PROS AND CONS

PROS:

- A well-designed TDR program can be a way to help preserve environmental, historic and other 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 development
- TDR programs may employ downzoning or similar restrictions in "receiving areas" in order to generate demand for the use of development rights.

[47] Walls & McConnell at 123.

9.08 INCENTIVE-BASED ALTERNATIVES

A voluntary TDR program provides an incentive for the protection of desirable environmental or built features 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 "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.[48] 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.[49] Sunderland, Massachusetts, relieves receiving site developments from minimum lot size and frontage requirements.[50] 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. In Gunnison County, Colorado, for example, the RDT fee is 10% of the increase in the receiving-site land value.[51]

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[48] Pruetz at 63.
[49] THE TDR HANDBOOK at 237.
[50] Pruetz at 64.
[51] *See* THE TDR HANDBOOK at 239; *see also* Mike Pelletier, Rick Pruetz & Christopher Duerksen, *TDR-Less TDR Revisited: Transfer of Development Rights Innovations and Gunnison County's Residential Density Transfer Program*, PAS MEMO (APA May/June 2010).

SECTION 10: FARMLAND PROTECTION TECHNIQUES

10.01 PURPOSE AND KEY TERMS

Farmland preservation 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."[1] 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.[2] From the standpoint of environmental protection, saving farmland is encouraged on the grounds that "well-managed farmland protects soil and water resources and can prevent flooding. It absorbs and filters wastewater and provides groundwater recharge."[3] 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.[4]

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."[5] 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.[6] 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" which "create identifiable and unique community character and add to our quality of life."[7] Farmland also plays an integral role in our national heritage as an agrarian population.[8]

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

- **Exclusive Use or 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.[9] These zones typically require much larger lot sizes or allow much lower development densities than other zones.[10] APZ ordinances in some jurisdictions place limitations on the ability to subdivide agricultural parcels, often with an exemption for agricultural worker housing or family

[1] SAVING AMERICAN FARMLAND: WHAT WORKS at 3 (American Farmland Trust, 1997) (hereinafter "SAVING AMERICAN FARMLAND").
[2] SAVING AMERICAN FARMLAND at 5-6.
[3] SAVING AMERICAN FARMLAND at 7.
[4] *Id*.
[5] *Id*.
[6] SAVING AMERICAN FARMLAND at 7-8.
[7] SAVING AMERICAN FARMLAND at 8.
[8] SAVING AMERICAN FARMLAND at 9.
[9] *See* SAVING AMERICAN FARMLAND at 49.
[10] *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* 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.[11] 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.[12] 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.[13] 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.[14] 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 used to forestall land speculation by non-farmers. APZ is also used to "promote orderly growth" and as a means of preserving open space and scenic landscapes.[15]

- **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.[16] PDR programs are based on the concept that property owners have a "bundle of rights," including the right to use their land; to lease, sell and bequeath it; to borrow money using it as security; to construct buildings on it and mine it; or to protect it from development, subject to reasonable local land use regulations.[17] Under a PDR program, the right to develop or use a specified agricultural property for non-farming purposes is severed from the right to use the land. This occurs through the imposition of a **conservation easement** which "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.[18] Such restrictions are sometimes called **Agricultural Preservation Restrictions** (**APR**). In terms of the "bundle of rights" analogy for the rights of a fee simple property owner, the development rights are acquired by the government for compensation, while the farmer retains the remaining property rights.[19] In addition to the right to reside and continue farming on the property, these retained rights include the right to exclude others, the right to pass the property to descendants or to sell it to another agricultural user, as well as, often, the ability to provide housing for workers or family members.[20] The price paid for the easement is generally, but not always, set by an appraisal.[21] 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. PDR is also discussed in Section 8 above pertaining to Open Space Preservation. 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.[22]

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[11] *See* SAVING AMERICAN FARMLAND at 61.
[12] SAVING AMERICAN FARMLAND at 65-66.
[13] *See* SAVING AMERICAN FARMLAND at 62-63.
[14] SAVING AMERICAN FARMLAND at 49, 56-57.
[15] *See* SAVING AMERICAN FARMLAND at 50.
[16] SAVING AMERICAN FARMLAND at 83; *see also* ROHAN, ZONING AND LAND USE CONTROL § 56.04[2] (hereinafter "ROHAN").
[17] *See Purchase of Agricultural Conservation Easements*, American Farmland Trust – Farmland Information Center (September 2015).
[18] SAVING AMERICAN FARMLAND at 83, note.
[19] *See Purchase of Agricultural Conservation Easements*, *supra* note 17.
[20] *See id.*
[21] SAVING AMERICAN FARMLAND at 98-99.
[22] SAVING AMERICAN FARMLAND at 83.

- **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 above in Section 9, 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.[23] These types of provisions are less common and of more recent vintage than the other mechanisms discussed above.

- **Right-to-Farm Legislation** is intended to strengthen a farmer's legal defense against suits by neighbors for private nuisance, and to protect farmers from local regulations that would constrain farming practices.[24] These provisions may be imposed at the state or local levels.[25] 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 develops residentially cannot generally 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 operation.[26] 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."[27] Many states also protect farmers by expressly preempting local governments from adopting any ordinance or zoning restriction that would adversely affect agricultural operations.[28] 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.[29]

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[23] SAVING AMERICAN FARMLAND at 33.

[24] *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).

[25] 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/.

[26] *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)).

[27] Mich. Comp. Laws § 286.473(1).

[28] *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).

[29] *Id*. at 342-43.

10.02 EFFECTIVENESS IN ACHIEVING STATED PURPOSE(S)

Farmland preservation techniques seem to be most effective in achieving their purpose of preventing the conversion of farmland to urban development when used in combination with one another.[30] However some farmers dispute that approaching urban development causes a reduction in farmland. High water and labor costs and low commodity prices also reportedly are major factors in encouraging farmers to sell their land for development rather than continuing in business.[31] Federal farm policy and its effect on profitability is probably more important in determining whether farming in an area survives in the long run than the implementation of farmland preservation measures.[32] Furthermore, there is considerable doubt whether the "loss" of farmland is really the crisis that farm advocates claim it is. A U.S. Department of Agriculture study reports that the amount of land used for growing crops is virtually the same today as it was fifty years ago, and the same agency has said that "losing farmland to urban uses does not threaten total cropland or the level of agricultural production.[33]

Exclusive Use or 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."[34] APZ has reportedly been successful in maintaining the agricultural land base in predominantly rural areas of the Midwest and West where farmland preservation 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."[35] 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 author of the study concluded that "the adoption of agricultural zoning significantly reduced the flow of land in the agricultural district from owners who generally intend to keep it in rural use to owners whose ultimate intention is development."[36] The same author notes that the would-be developers clearly considered the agricultural zoning in that case to be relatively permanent.[37] A frequent criticism of agricultural zoning as a farmland preservation 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.[38]

AFT states that in rapidly growing communities, "APZ alone cannot address the economic challenges that farmers face."[39] It has been more successful in those areas where it is combined with PDR and TDR programs.[40] APZ is used to protect land from development until funds are available for the purchase of development rights.[41] 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 have enacted APZ as part of the state's

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[30] SAVING AMERICAN FARMLAND at 39.
[31] Russell, Kiley "State Report Shows Open Space Disappearing" Associated Press, 10/12/2000.
[32] Daniels, *The Purchase of Development Rights*, 57 APA JOURNAL 421, 430 (Autumn 1991).
[33] National Association of Home Builders *Smart Growth: Building Better Places to Live, Work and Play* at 8, read at http://www.nahb.com/main_features/smart.pdf.
[34] SAVING AMERICAN FARMLAND at 71.
[35] *Id.*
[36] Coughlin at 190-91.
[37] Coughlin at 191.
[38] *See* SAVING AMERICAN FARMLAND at 52.
[39] *Id.*
[40] *Id.*
[41] *Id.* at 69.

growth management program.[42] 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.[43]Area- 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.[44] 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 hasten its decline by increasing land consumption for non-farming purposes.[45]

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."[46] 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.[47]

In urban areas, APZ may result in the creation of non-agricultural "ranchettes" or "estates." For example, in western Marin County, California, where APZ requires 60-acre zoning, wealthy San Franciscans built country houses on 60-acre lots.[48] 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.[49] 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.[50]

According to the 1997 AFT report, "APZ is most widespread in Pennsylvania, Maryland, parts of the Midwest, and along the Pacific Coast."[51] In a national survey of all counties and some municipalities, AFT identified 24 states with local jurisdictions that had adopted APZ zoning.[52] In particular, AFT found a concentration of APZ ordinances in Wisconsin and Pennsylvania, accounting at that time for 75 percent of the jurisdictions surveyed having APZ zoning.[53]

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[42] *Id*. at 52.
[43] Esseks, J., Kraft, S., McSpadden, L, *Owners' Attitudes Towards Regulation of Agricultural Land*, May, 1998, American Farmland Trust.
[44] Coughlin at 184.
[45] SAVING AMERICAN FARMLAND at 49.
[46] Mark W. Cordes, *Agricultural Zoning: Impacts and Future Directions*, 22 N. ILL. U. L. REV. 419, 446 (Summer 2002).
[47] Cordes, 22 N. ILL. U. L. REV. at 440.
[48] *Id*.
[49] *Id*.
[50] Daniels at 428. *See also* Dennis Canty, Alex Martinsons, & Anshika Kumar, *Losing Ground: Farmland Protection in the Puget Sound Region* (American Farmland Trust, Jan. 2012) (hereinafter "*Losing Ground*") at 18 (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").
[51] SAVING AMERICAN FARMLAND at 52.
[52] SAVING AMERICAN FARMLAND at 40.
[53] SAVING AMERICAN FARMLAND at 51.

Purchase of Development Rights (PDR) Programs

Programs such as PDR, that involve the **purchase of development rights**[54] 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.[55] More than 2,672,364 acres of farmland were protected through state PDR programs as of January 2016.[56] 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 these programs' effectiveness are their cost and the resulting slow pace of acquisitions.[57]

PDR programs can obtain funding from a variety of revenue sources, including property taxes, transfer taxes, bonds, appropriations of general revenues, and private contributions.[58] 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.[59] 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)[60] and establish eligibility and scoring criteria for ranking properties.[61] 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.[62]

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 and then the 2014 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.[63] Eligible entities include state and local governments, Indian tribes, and certain non-governmental organizations formed for conservation purposes. According to the AFT, more than $1,386,598,060 in matching funds had been allocated under ACEP-ALE by the end of 2014.[64]

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[54] *See* discussion of transferable development right (TDR) in Section 9.
[55] SAVING AMERICAN FARMLAND at 107.
[56] *Fact Sheet - Status of State PACE Programs*, American Farmland Trust – Farmland Information Center (September 2016).
[57] *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).
[58] *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).
[59] 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).
[60] *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).
[61] Gayle Miller & Douglas Krieger, *Purchase of Development Rights: Preserving Farmland and Open Space*, PLANNING COMMISSIONERS JOURNAL No. 53 (Winter 2004).
[62] *Id*.
[63] *Fact Sheet – Agricultural Conservation Easement Program – Agricultural Land Easements*, American Farmland Trust – Farmland Information Center (September 2015).
[64] *See id*.

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.[65] Isolated islands of preserved land can actually attract development to abutting parcels because of the proximity of the permanently preserved open space.[66] AFT reports that Forsyth County, North Carolina, 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.[67] 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.[68] At least 95 independently funded local PDR programs in 20 states had acquired funding and/or easements as of January 2016, according to an AFT survey.[69] As of May 2013, 27 states had state-level programs, and some states have been very aggressive with their purchase programs. For example, as of January 2016, New Jersey had spent $1,057,740,065 to preserve 219,379 acres of farmland through the New Jersey Farmland Preservation Program.[70] 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.[71] In addition to local and state governments, non-profit organizations also operate PDR programs focused on preserving agricultural property, and very often these non-profit groups partner with governmental entities in acquiring development restrictions on such properties.

Transferable Development Rights (TDR) Programs[72]

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.[73] 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.[74] A number of reasons are given for TDR falling short. They include the reluctance of some jurisdictions to implement such programs 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.[75] 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, AFT reports on Calvert County, Maryland, which implemented a growth management program that depressed the market for development rights so

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[65] Anna Vinson, *Re-Allocating the Conservation Easements Landscape: Conservation Easements and Regulation Working in Concert*, 18 FORDHAM ENVTL. L. REV. 273, 278 (Spring 2007).
[66] Daniels at 424.
[67] SAVING AMERICAN FARMLAND at 106.
[68] SAVING AMERICAN FARMLAND at 88-89.
[69] *Fact Sheet - Status of Local PACE Programs*, American Farmland Trust – Farmland Information Center (October 2016).
[70] *Fact Sheet - Status of State PACE Programs*, American Farmland Trust – Farmland Information Center (September 2016).
[71] *Cultivate New York: An Agenda to Protect Farmland for Growing Food and the Economy* (American Farmland Trust, January 2016).
[72] *See* discussion of transferable development right (TDR) in Section 9.
[73] *See* SAVING AMERICAN FARMLAND at 138.
[74] *See id.*
[75] *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).

that few transfers occurred.[76] 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.[77] According to an AFT Fact Sheet, a 2007 Farmland Information Center survey identified 99 TDR programs established for the protection of farmland.[78] The AFT Fact Sheet notes that since 1980, Montgomery County, Maryland, has protected 51,489 acres of farmland using TDR.[79]

Mitigation Ordinances and Policies

AFT reports on two local Mitigation Ordinances and Policies: a Davis, California, ordinance that requires developers to permanently protect one acre of farmland for every acre that is converted to another use; and a "no net loss of farmland" policy in King County, Washington's comprehensive plan.[80] 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.[81] As of November 2002, Vermont's off-site mitigation program led to the purchase of conservation easements on 22 farms containing a total of 5,183 acres of land.[82]

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.[83] AFT concludes that "right to farm laws often seem to promise more than they deliver" but remain very popular with farmers.[84] 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."[85] 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.[86] AFT quotes the former director of the University of Iowa Agricultural Law Center as seeing "Iowa's right-to-farm laws as a threat to rural 'neighborliness.'"[87] Right to farm laws do not protect against the conversion of farmland for development, but do provide support to

[76] SAVING AMERICAN FARMLAND at 138-139.
[77] SAVING AMERICAN FARMLAND at 135.
[78] *Fact Sheet – Transfer of Development Rights*, American Farmland Trust – Farmland Information Center (April 2008).
[79] *Fact Sheet - Transfer of Development Rights*, American Farmland Trust – Farmland Information Center (April 2008).
[80] SAVING AMERICAN FARMLAND at 33.
[81] Elisa Paster, *Preservation of Agricultural Lands Through Land Use Planning Tools and Techniques*, 44 NAT. RESOURCES J. 283 (Winter 2004).
[82] *Id*.
[83] *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].
[84] SAVING AMERICAN FARMLAND at 184-85.
[85] Paster at 299-300.
[86] SAVING AMERICAN FARMLAND at 186.
[87] *Id*.

the agricultural community in the form of protection against nuisance litigation.

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.[88] 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 preservation.[89] Farmers may oppose APZ on those grounds, making it difficult to pass such provisions in rural jurisdictions.[90] Depending upon market factors, one would expect the institution of APZ zoning 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."[91] Some programs use other mechanisms, such as point systems, to determine the price that will be paid for an agricultural easement.[92] 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.[93] 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.[94] 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.[95]

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.[96]

Right-to-Farm Legislation is considered by some to be an impairment of property rights because it amounts to a limitation on the property rights of non-farmers by constraining their ability to sue for damages caused by the effects of abutting farm operations on their property values. In an Iowa Supreme Court case,

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[88] 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.
[89] *See* ROHAN § 56.02[1].
[90] SAVING AMERICAN FARMLAND at 50.
[91] Vinson at 280.
[92] SAVING AMERICAN FARMLAND at 98-100.
[93] Vinson at 281.
[94] SAVING AMERICAN FARMLAND at 92.
[95] SAVING AMERICAN FARMLAND at 230.
[96] Paster at 307.

the court found that a right-to-farm law making farmers immune from nuisance suits effected an unconstitutional taking of property by effectively giving 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.[97] 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.[98]

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.[99] The other farmland preservation 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.[100] For example, the Farmland Preservation Plan adopted by the Town of Milton, New York in 2016, recommended that the town reduce the permitted density in agricultural areas while increasing the allowable density around the existing town center.[101] 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.[102] Evidence also exists that some types of large-lot zoning result in increased sprawl by scattering development further from existing farmland.[103]

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[97] *Bormann v. Board of Supervisors in and for Kossoth County* 584 N.W. 2d 309 (Iowa 1998) *cert denied,* 119 S. Ct. 1096 (1999).
[98] SAVING AMERICAN FARMLAND at 185.
[99] Rick Pruetz, *Saved by Development,* Arje Press (1997) at 58-59.
[100] Cordes, 22 N. ILL. U. L. REV. at 440.
[101] *See Town of Milton (NY) Farmland Preservation Plan* at 29 *(*Behand Planning and Design) (Feb. 2016).
[102] *See id*.
[103] Cordes, 22 N. ILL. U. L. REV. at 440.

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.[104] This may be avoided by the community maintaining an adequate supply of appropriately zoned land for development.

10.07 SUMMARY OF 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.[105]

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.[106]
- Placing permanent development restrictions on land currently used for agriculture through PDR or TDR can have negative 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.

[104] Cordes, 22 N. ILL. U. L. REV. at 442.
[105] *See Losing Ground* at 23 (stating: "Ideally, PDR will be used in combination with zoning to achieve both broad and deep results.").
[106] 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 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,"[107] 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.[108] 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.[109] 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.

[107] *Losing Ground* at 25.
[108] SAVING AMERICAN FARMLAND at 34-39.
[109] *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 pieces of land, and in large-scale development it tends to discourage creativity and flexibility.[1]

Cluster zoning applies the concept of concentrating development on smaller lots in order to preserve larger open spaces.[2] 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.[3]

It is also called **"open space" or "density" zoning**.[4]

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.[5] Thus, cluster development groups residences to increase dwelling densities on specific portions of a development and leaves other portions free of dwellings.[6]

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.[7] 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.[8]

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.[9] They accomplish these purposes by using varying lot sizes and integrating different structures and uses in ways that would be considered incompatible under traditional

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[1] 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. 2016) (hereinafter "ROHAN").
[2] ROHAN § 12.01[3][a]; *see also* 2 AMERICAN LAND PLANNING LAW, Ch. 48 (Cluster Zoning), § 48.5 (Rev. ed. 2014).
[3] ROHAN § 12.01[3[a]; *see also* DONALD G. HAGMAN & JULIAN CONRAD JUERGENSMEYER, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW § 7.15, at 221 (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").
[4] ROHAN § 12.01[3][a].
[5] ROHAN § 12.01[3][b].
[6] ROHAN § 12.01[3][b].
[7] ROHAN § 12.01[3][b].
[8] DANIEL R. MANDELKER, LAND USE LAW § 9.25 (Matthew Bender & Company, Inc. 2016) (hereinafter "MANDELKER").
[9] *See Kenwood Gardens Condos., Inc. v. Whalen Props., LLC*, 449 Md. 313, 326 (2015) (stating: "A PUD is a planning tool employed to allow increased flexibility in the land development process.")

zoning principles.[10] 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.[11] 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.[12]

The PUD combines elements of cluster zoning and subdivision platting,[13] and PUD regulations incorporate elements of zoning and subdivision controls.[14] Like a zoning ordinance, planned unit development regulations regulate land use density and site development. A PUD can also incorporate innovative planning techniques, such as form-based codes,[15] that do not exist under the applicable zoning regulations.[16]

They also may include internal design and thoroughfare requirements, such as those contained in subdivision ordinances.[17]

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.[18]

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 level of the individual lot. This results in applying prevailing density regulations to the project and parcel of land as a whole rather than to each lot and component of the project.[19] In other words, a PUD allows **"density zoning,"** a concept that has been defined as follows:

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[10] *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").
[11] ROHAN § 12.01[4][b][ii].
[12] *See Kenwood Gardens Condos., Inc. v. Whalen Props., LLC*, 449 Md. 313, 327 (2015).
[13] HAGMAN & JUERGENSMEYER § 7.15, at 220.
[14] MANDELKER § 9.26.
[15] *See* Section 17.
[16] *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).
[17] MANDELKER § 9.27.
[18] HAGMAN & JUERGENSMEYER § 7.15, at 220, *citing* U.S. Advisory Commission on Intergovernmental Relations, ACIR State Legislative Program, 1970 Cumulative Supp. 31-36-11 at 5 (1969).
[19] RATHKOPF'S THE LAW OF ZONING AND PLANNING, Ch. 88 (Planned Unit Developments), § 88.1 (4th ed., Thomson Reuters, Nov. 2016 Update) (hereinafter "RATHKOPF").

> 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.[20]

Without PUD, traditional zoning of a large scale planned development could require two or more zoning districts if the development includes, for example, 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.[21]

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—conditions may vary from parcel to parcel.[22] 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.[23] In that regard, the PUD process can enable a landowner or developer to negotiate these and other aspects of the development with the municipality.[24] 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.[25] However, providing open space is not necessarily the primary objective, particularly in non-residential PUDs.[26] 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.[27]

The PUD represented an early attempt—preceding approaches such as concurrency and adequacy of public facilities—to address the timing dimension of development.[28] Traditional zoning was historically unable to control development to keep pace with the growth of public facilities and services and to 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.[29]

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

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[20] ROHAN § 12.01[3][a], fn. 13 (internal citations omitted).
[21] MANDELKER § 9.25.
[22] HAGMAN & JUERGENSMEYER § 7.16, at 222-23.
[23] *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).
[24] *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).
[25] MANDELKER § 9.25.
[26] *See* RATHKOPF § 88.1 (stating that the "dominant, most frequently cited objective of PUD is flexibility").
[27] HAGMAN & JUERGENSMEYER § 7.15, at 220-21.
[28] *See* Section 4.
[29] 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).

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.

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.[30] 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.[31]

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 is this type of development is the 13,522 acre Galisteo Basin Preserve, a conservation development located southeast of Santa Fe, Mexico.[32] 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.[33] Another example is the Jackson Meadow conservation community located west of St. Croix, Minnesota, a 145-acre development in which sixty residential lots are clustered on just 40 acres.[34]

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 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

[30] *See* ROHAN § 12.01[4][a][i].
[31] *See id.*
[32] Edward T. McMahon, CONSERVATION COMMUNITIES: CREATING VALUE WITH NATURE, OPEN SPACE, AND AGRICULTURE at 134-147 (2010 Urban land Institute) (hereinafter "CONSERVATION COMMUNITIES").
[33] *See id.*
[34] *See id.* at 174-183.

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.[35]

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.[36] 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.[37] 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.[38]

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.[39] A case study that compared the impacts of a 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.[40] 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.[41] To illustrate these potential cost savings, the South Kingstown, Rhode Island, study found that lots in conservation subdivisions cost $7,400 less to produce

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[35] 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., Nov. 2000, at 81-92.

[36] Jeff Lacy, An Examination of Market Appreciation for Clustered Housing With Permanent Open Space (1990), available at http://www.capeelizabeth.com/council_packets/2011/03%2021%202011%20Ordinance%20Committee/article-1.pdf.

[37] *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*").

[38] *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*").

[39] *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).

[40] *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).

[41] ROHAN § 12.01[4][b][iii] (citing *How Will America Grow?*, Citizens Advisory Committee on Environmental Quality 15 (Apr. 1976)).

than lots in conventional subdivisions.[42] If a PUD ordinance allows developers to build at higher overall densities, development costs can be spread over a larger number of units.[43]

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.[44] 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.

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.[45]

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 parcel.[46] 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.[47] 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.[48]

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.[49] 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 quasicommercial establishments.[50]

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[42] *See The Economics of Conservation Subdivisions* at 393.
[43] 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*").
[44] HAGMAN & JUERGENSMEYER § 7.19, at 232.
[45] ROHAN § 12.01[4][b][i].
[46] MANDELKER § 9.25; ROHAN § 12.01[4][b][iv].
[47] ROHAN § 12.01[4][b][ii].
[48] *Affordable Housing Techniques*.
[49] ROHAN § 12.01[1].
[50] RATHKOPF § 88.1 (quoting *Cheney v. Village 2 at New Hope, Inc.*, 429 Pa. 626, 241 A.2d 81 (1968)).

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.[51] 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.[52] 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.[53] The Maine legislature has expressly authorized municipalities to employ cluster zoning and has encouraged them to use cluster zoning in conjunction with the development of affordable housing.[54]

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.[55]

11.07 SUMMARY OF 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.[56]

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[51] ROHAN § 12.01[4][b][iv].
[52] *Affordable Housing Techniques*.
[53] Nolon & Bacher, 36 REAL ESTATE LAW JOURNAL at 85.
[54] Nolon & Bacher, 36 REAL ESTATE LAW JOURNAL at 92-93.
[55] *Fees, Infrastructure Costs, and Density*.
[56] *Affordable Housing Techniques*.

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)**[57] or for **transfer of development rights (TDR)**[58] 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.

[57] *See* Sections 8 and 10.
[58] *See* Section 9.

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 data collected by the U.S. Green Building Council ("USGBC"), the design, construction, and operation of buildings still represent:

- 41% of U.S. primary energy use;
- 38% of U.S. CO2 emissions;
- 73% of U.S. electricity consumption;
- 13.6% of total potable water use in the U.S.; and
- 40% of global raw materials use (3 billion tons annually).[1]

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 which

> meets the needs of the present without compromising the ability of future generations to meet their own needs.[2]

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," and then stating that

> [p]overty 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.[3]

Within this broader context of intersecting economic, social, and environmental considerations, "green building" focuses on environmental protection and a healthy environment for humans. As defined by the Office of the Federal Environmental Executive, "green building" is

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[1] Ashley Katz, USGBC, *Green Building Facts* (July 1 2012), http://www.usgbc.org/ShowFile.aspx?DocumentID=5961 (citing to data from the U.S. Department of Energy's Environmental Information Administration, the U.S. Geological Survey, and others); *see also* Patricia E. Salkin, *Why Sustainable Design and Green Buildings?*, 3 N.Y. ZONING LAW & PRAC. § 32A:1 (2016).

[2] *Report of the United Nations World Commission on Environment and Development: Our Common Future*, 20 March 1987, Gro Harlem Brundtland, chairman (available at: http://www.worldinbalance.net/pdf/1987-brundtland.pdf) (hereinafter *Our Common Future*).

[3] United Nations General Assembly, *2005 World Summit Outcome*, 15 September 2005, at 12.

> the practice of (1) increasing the efficiency with which buildings and their sites use energy, water, and materials, and (2) reducing building impacts on human health and the environment, through better siting, design, construction, operation, maintenance, and removal—the complete building life cycle.[4]

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.

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.[5] 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 production 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, and all at a level of dispersal and scale that was unprecedented.[6] As the environmental impacts of these emerging building construction and development practices became apparent and it became increasingly clear that they were not sustainable over the long term both economically and environmentally, the stage was set for a new approach. In the mid-1980s, *Our Common Future* promulgated the first widely accepted definition of this 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, Brazil. Following on 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[7] from Great Britain, and Building Environmental Performance Assessment Criteria (BEPAC) from British Columbia, Canada, the first building rating system in North America.[8] Regional and local variants of note that have appeared in

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[4] Office of the Federal Environmental Executive, Report: *The Federal Commitment to Green Building: Experiences and Expectations* (2003), available at: https://web.archive.org/web/20130214012409/http://ofee.gov/Resources/Guidance_reports/Guidance_reports_archives/fgb_report.pdf (hereinafter *Federal Green Building Report*) at Section V (defining Green Building).

[5] U.S. EPA, Green Buildings, Basic Information, https://archive.epa.gov/greenbuilding/web/html/about.html; The Editors, BUILDING DESIGN & CONSTRUCTION, *White Paper on Sustainability: A Report on the Green Building Movement*, at 4 (November 2003) (hereinafter *Sustainability White Paper*).

[6] *Sustainability White Paper*.

[7] Building Research Establishment (BRE) Environmental Assessment Method, http://www.breeam.org/

[8] Marshall Leslie, *History of Green Building Rating Systems in Canada* (Aug. 1, 2008), http://www.canadianconsultingengineer.com/news/history-of-green-building-rating-systems-in-canada/1000223877/?&er=NA.

the last couple of decades include the Austin Energy Green Building System,[9] Built Green Colorado, and Green Built Texas (GBT) (designed off of Green Built North Texas).[10] Four major rating systems available in the U.S. are:

> *LEED Rating System*™: The Leadership in Energy and Environmental Design or "LEED" system was developed by the U.S. Green Building Council ("USGBC"). USGBC 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.[11] LEED is currently the most popular of the major rating systems. In 2016, USGBC had more than 13,000 members in all fifty states and in more than 150 countries and territories.[12] It is discussed in more detail below.
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> *Green Globes*: Developed by the Green Building Initiative ("GBI") and launched in the U.S. in 2004, the Green Globes 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.[13]
>
> *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.[14] 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,[15] 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. ENERGY STAR for Homes applies to new or renovated existing homes of three stories or less, focusing on a tight building envelope and efficient mechanical systems, lighting, and appliances. Qualified houses must exceed the 2004 International

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[9] *See* http://austinenergy.com/wps/portal/aegb/home/. Austin, in 1992, was the first jurisdiction to pass green building legislation. Greg Franklin, *Baltimore City's Green Building Standards, Building Towards an Uncertain Future*, 4 U. BALT. J. LAND & DEV. 85, 89 (2014).

[10] *See* https://web.archive.org/web/20150325054351/http://www.txhero.org/?page=HBONHGBGreenBuiltTx.

[11] *Sustainability White Paper* at 7.

[12] 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).

[13] GBI, *A Brief History of GBI and Green Globes*®, https://www.thegbi.org/about-gbi/. Some have criticized GBI as "less stringent than LEED," and have argued that "while nominally run by a nonprofit, [GBI] is controlled and funded by the timber, paper, plastics, and chemical industry groups that founded the non-profit." Hajin Kim, *Eco-Labels and Competition: Eco-Certification Effects on the Market for Environmental Quality Provisions,* 22 N.Y.U. ENVTL. L.J. 181 (2015) (citing Steve Law, *LEED vs. Green Globes*, Portland Trib., Nov. 14, 2013, http://portlandtribune.com/sl/201025-leed-vs-green-globes).

[14] See Palmer & Walls, *Can Benchmarking and Disclosure Laws Provide Incentives for Energy Efficiency Improvements in Buildings?* at Box 1, p. 8 (March 2015) (available online at: http://www.rff.org/RFF/Documents/RFF-DP-15-09.pdf).

[15] Industrial and manufacturing buildings need to enter data into a plan "energy performance indictor" as opposed to Portfolio Manager.

Residential Code (IRC) requirements for energy efficiency by at least 15 percent, but ENERGY STAR says qualified buildings typically exceed the IRC requirement by 20 to 30 percent. A Home Energy Rating System ("HERS") inspector must independently verify compliance with ENERGY STAR. HERS raters set their own fees.[16] As can be seen 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 system that covers various categories. For example, under LEED v4[17] for Building Design & Construction (updated from LEED 2009), the nine categories of credits are:

- Integrative Process;
- Location and Transportation;
- Sustainable Sites;
- Water Efficiency;
- Energy and Atmosphere;
- Materials and Resources;
- Indoor Environmental Quality;
- Innovation in Design; and
- Regional Priority Credits.[18]

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[16] *See generally* Energy Star, http://www.energystar.gov/index.cfm?c=green_buildings.green_buildings_index.

[17] LEED users who registered projects prior to October 31, 2016 were still permitted to register under the 2009 rating system. The "sunset date" for projects submitted for certification under the 2009 standard remains June 30, 2021. USGBC Press Release, *Extension offers the green building industry additional time to prepare for the newest version of LEED* (Nov. 18, 2014), http://www.usgbc.org/articles/usgbc-announces-extension-leed-2009. *See also*, Michael O'Brien, *Bringing Detroit Back to Life: The Utilization of Leadership in Energy and Environmental Design* ("LEED") *Certification to Revive Urban Decay*, 16 J. HIGH TECH. L. 458, 469 (2016).

[18] *See* LEED v4 for Building Design & Construction, http://www.usgbc.org/sites/default/files/Summary%20of%20Changes%20-%20LEED%202009%20to%20LEED%20v4%20-%20BD+C.pdf; USGBC, LEED BD+C: New Construction, http://www.usgbc.org/credits.

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
Sustainable Sites	Erosion, sediment, and stormwater runoff control
	Access to public transportation
	Reduced parking or preferred parking for low emission vehicles and/or carpools
Water Efficiency	Water-efficient landscaping
	Water-efficient (low-flow) fixtures
Energy and Atmosphere	Passive or active solar heating and cooling
	Solar energy, wind power, hydropower, or other renewable energy
Materials and Resources	Recycled-content building materials
	Reduced construction waste
Indoor Environmental Quality	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) can become "LEED Certified," and projects that go further can achieve ratings of Silver (at 50 points), Gold (at 60 points), and Platinum (at 80 or more points).[19]

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 four 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, homes and multifamily lowrise, and multifamily midrise;
- **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;

[19] Owens, et. al., *LEED v4, Impact Category and Point Allocation Development Process*, at 3, http://www.usgbc.org/sites/default/files/LEED%20v4%20Impact%20Category%20and%20Point%20Allocation%20Process_Overview_0.pdf; *see also* O'Brien, *supra* note 17 at 474.

- **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.[20]

Sustainable Development Market Penetration

By September 2003, 948 projects representing nearly 140 million square feet of new commercial space had registered for certification under the LEED-NC rating system.[21] By 2012, 41% of all nonresidential buildings being constructed were green, compared to only 2% in 2005.[22] As of January 1, 2014, more than 2.8 billion square feet of building space had been certified under LEED.[23] USGBC estimated that by 2015, 40-48% of new nonresidential construction, based on value, will be certified green.[24] In addition, USGBC reports that square footage of LEED-certified existing buildings has surpassed LEED-certified new construction by 15 million square feet.[25]

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.

The demand for sustainable, green design and building features appears to be substantial and poised for even greater growth. According to a 2015 study conducted by Dodge Data & Analytics in association with the National Association of Home Builders ("NAHB"), over half of homebuilders expect that 60% of new homes will be green by 2020.[26] The same study concluded that the association between green building and healthier homes, as well as the increasing use of renewable energy will help to drive growth in the market.[27] NAHB Chairman Tom Woods, has observed that "Builders and remodelers have long recognized that green is the future of home building…. Since we first began partnering on this study with Dodge Data & Analytics in 2006, we've seen that commitment grow. 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."[28]

General Benefits of Sustainable Development

According to the U.S. Environmental Protection Agency ("USEPA"), buildings in the Unites States account for:

- 39 percent of total energy use
- 12 percent of the total water consumption

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[20] USGBC, *LEED Rating System Selection Guidance*, (July 29, 2014), http://www.usgbc.org/articles/rating-system-selection-guidance; USGBC, LEED, http://www.usgbc.org/leed#rating; USGBC, Certification, http://www.usgbc.org/certification.
[21] *Sustainability White Paper* at 7.
[22] Ashley Katz, USGBC, *Green Building Facts* (July 1 2012), http://usgbc-li.org/content/green-building-facts.
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] Dodge Data & Analytics, New Study Suggests Strong Outlook for Green Homes (Nov. 18, 2015), https://www.construction.com/about-us/press/New-Study-Suggests-Strong-Outlook-for-Green-Homes.asp.
[27] *Id.*
[28] *Id.*

- 68 percent of total electricity consumption
- 38 percent of the carbon dioxide emissions[29]

Looking strictly at energy/environmental impacts, one study estimated that LEED-certified buildings provided substantial benefits over conventional construction[30]:

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, USEPA touts the following benefits of sustainable or "green" building design and construction:[31]

Environmental Benefits

- Enhances and protects biodiversity and ecosystems
- 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.[32] As specific examples of these benefits, USGBC reports that LEED-certified buildings saved 0.35% of total U.S. CO2 emissions in 2011, and LEED projects have saved more than 80

[29] EPA, Green Building, "Why Build Green?" https://archive.epa.gov/greenbuilding/web/html/whybuild.html (hereinafter, Why Build Green).
[30] *Sustainability White Paper* at 8.
[31] Why Build Green.
[32] *See* USGBC, *Green Building Facts*.

million tons of waste.[33] In addition, a study of over 7,000 LEED-certified new construction projects show that 92.2% of the projects have improved energy performance by 10.5%.[34] Further, green building retrofit projects have resulted in: 9% decrease in operating costs in the first year after completion, and 13% decrease over five years; an expected increase in value of the buildings of 4%; and the amount of money spent on green retrofitting being recouped within 7 years.[35]

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.[36] LEED v4 recognizes the link between green building and climate mitigation by awarding building rating points through its "Reverse Contribution to Global Climate Change" impact category[37] 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."[38]

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. [39] 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.[40] "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."[41] 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.[42] This rise in popularity as a *regulatory* tool is all the more dramatic when one recalls that LEED was intended as an

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[33] Ashley Katz, USGBC, *Green Building Facts* (July 1 2012), http://www.usgbc.org/ShowFile.aspx?DocumentID=5961.

[34] *Id.*

[35] *Id.*

[36] 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 (May 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).

[37] Christina Huynh, USGBC, *How green buildings can help fight climate change* (April 19, 2017), http://www.usgbc.org/articles/how-green-buildings-can-help-fight-climate-change.

[38] *Id.*

[39] *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 that non-certified buildings).

[40] 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).

[41] John J. Delaney, 2 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).

[42] *See* Delaney § 42:5.

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**[43] sustainable development programs currently adopted in the U.S.:

Babylon, New York:[44] 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)."[45]

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, automatically controlled mechanical ventilation system and comply with combustion safety testing standards.[46]

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."[47]

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.[48] 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."[49] 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

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[43] 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 49, available at http://www.myfloridagreenbuilding.info/pdf/review_municipal_ord.pdf (2006).

[44] New York has adopted a State-wide energy code that is based on the 2009 International Energy Conservation Code for Residential Construction and the American Society of Heating, Refrigerating and Air-Conditioning Engineers ("ASHRAE") Standard 90.1-2007 for Commercial construction. Patricia E. Salkin, *Why Sustainable Design and Green Buildings?*, 3 N.Y. ZONING LAW & PRAC. § 32A:1 (2016). Municipalities may pass energy and building codes more restrictive than the state standards. *Id.*

[45] Babylon (New York) Town Code, Chapter 89, Section 79 (2011).

[46] *Id.* Section 89-79(A)-(C).

[47] Babylon (New York) Town Code, Chapter 89, Section 83 (2006).

[48] *Id.* at Sections 84-87.

[49] *Id.* at Section 84(A).

his/her designee."[50] 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.[51]

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.[52] 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.[53] The Town subsequently created a retrofit financing program to target the reduction of greenhouse gas from existing buildings, including single family homes.[54] As of 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.[55] Although Babylon remains committed to the program, only one homeowner was assisted under this program in 2016.[56]

Boston, Massachusetts: Boston adopted its "Green Buildings" standards as part of its zoning ordinance in January 2007, the first major U.S. city to amend its zoning code to incorporate a green building program.[57]

Purposes: The first section of the article declares that its purposes are "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."

Provisions: Starting in January 2007, new developments or major renovation projects subject to Large Project Review under Article 80B of the Boston Zoning Code – generally, projects newly constructing or adding 50,000 square feet or more of gross floor area or rehabilitating/renovating 100,000 s.f. or more of gross floor area – are required to demonstrate green building compliance.[58] 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,[59] but does not require that the buildings actually become LEED-certified.[60] Up to four of the required credits may be obtained by fulfilling specially designated Boston Green Building Credits in four categories:

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[50] *Id.* at Section 86(A).
[51] *Id.* at Section 86(B).
[52] USGBC's searchable LEED project database is available at http://www.usgbc.org/projects?clearsmartf=true.
[53] ICLEI Local Governments for Sustainability, *Municipal Clean Energy Toolkit – Case Study: Long Island Green Homes Program in Babylon, New York*.
[54] *Id*; *see also* the website for the Long Island Green Homes program at http://ligreenhomes.com.
[55] ICLEI, *Long Island Green Homes Program in Babylon, New York*, http://ligreenhomes.com/blog/item/ligh_hits_1.
[56] Town of Babylon Consolidated Annual Performance Evaluation and Report, at p. 31 (2016), http://www.townofbabylon.com/documentcenter/view/2302.
[57] Boston Zoning Code, Article 37 (Jan. 2007), available at https://www.cityofboston.gov/images_documents/Article%2037%20Green%20Buildings%20LEED_tcm3-2760.pdf; AIA, Local Leaders in Sustainability, Case Studies, https://web-beta.archive.org/web/20160313202710/http://www.aia.org/aiaucmp/groups/aia/documents/document/aiab081623.pdf.
[58] Boston Zoning Code, Article 37.
[59] *Id.* at Sections 37-2.4 and 37-4.
[60] 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).

- 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).[61]

In 2013, Boston enacted the Building Energy Reporting and Disclosure Ordinance (BERDO), requiring large- and medium-sized buildings to report their annual energy and water use to the City, which information becomes publicly available. In addition, buildings must complete an energy assessment or energy action every five years, as part of the City's goal of reducing greenhouse gas emissions by 25% by 2020.[62]

Effectiveness: During the initial roll out of the program, the City's review agency, the Boston Redevelopment Authority (the "BRA"),[63] 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.[64]

Dallas, Texas: Dallas' green building program is administered through Chapter 52 of the Dallas City Code.[65] Dallas also adopted a 2015 Green Building Ordinance, effective March 1, 2017, which provides

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[61] *Id.* at Appendix A.
[62] City of Boston, Building Energy Reporting and Disclosure Ordinance, http://www.cityofboston.gov/eeos/reporting/. Regulations for BERDO implementation are available at http://www.cityofboston.gov/images_documents/BERDO%20Regulations%20Approved%2018Dec2013_tcm3-42376.pdf. For a discussion of 11 different energy disclosure ordinances, see Palmer & Walls, *Can Benchmarking and Disclosure Laws Provide Incentives for Energy Efficiency Improvements in Buildings?* (March 2015) (available online at: http://www.rff.org/RFF/Documents/RFF-DP-15-09.pdf).
[63] Since passage of BERDO, the BRA has been renamed the Boston Planning and Redevelopment Agency (BPRA"). See BPRA, http://www.bostonplans.org/.
[64] 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).
[65] Dallas City Code, Chapter 52, subchapter 10, available at https://dallascityhall.com/departments/sustainabledevelopment/buildinginspection/DCH%20documents/pdf/Chapter52Booklet.pdf.

green building standards for both new residential and commercial buildings.[66] The 2015 update adopted certain changes to the 2015 Edition of the International Green Construction Code of the International Code Council, Inc.[67]

Purpose: Purpose: The purposes of the City's green building program are defined as "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."[68]

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.[69]

Effectiveness: USGBC has reported that through its Green Building Program, Dallas has 892 projects that are LEED-certified or seeking certification.[70] As of September 1, 2011, the City began to accept third party plan review and inspection results for the program.[71] 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.

Montgomery County, Maryland: Montgomery County adopted a Green Building Law in 2006.

Purpose: The county's Green Building Law is "intended to protect the public health and welfare by requiring an integrated approach to planning, design, construction, and operation of a covered building and its surrounding landscape that helps mitigate the energy and environmental impacts of the building so that it is energy efficient, sustainable, secure, safe, cost-effective, accessible, functional, and productive."[72]

Provisions: Effective September 1, 2008, the provisions of the Montgomery County Green Building Law[73] became mandatory. All new or substantially modified County-funded buildings must either achieve a certification of Silver or greater under the applicable LEED rating system, be certifiable at that level under the applicable system as determined by the County Planning Director, or meet alternative energy and

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[66] City of Dallas, Building Inspection, Sustainable Development and Construction, Green Building, http://dallascityhall.com/departments/sustainabledevelopment/buildinginspection/pages/greenBuilding.aspx.
[67] Dallas Ordinance Number 30327 (Dec. 19, 2016), 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.
[68] Dallas City Code, Chapter 52, Section 1001.1.
[69] Dallas City Code, Chapter 52, Section 1001.3.2.
[70] USGBC's searchable LEED project database is available at http://www.usgbc.org/projects?clearsmartf=true; *see also* Brandon Baker, Dallas Strengthens Green Building Code, EcoWatch (Oct. 29, 2013), http://ecowatch.com/2013/10/29/dallas-green-building/.
[71] City of Dallas website "Sustainable Development and Construction/Building Inspection," available at http://dallascityhall.com/departments/sustainabledevelopment/buildinginspection/Pages/index.aspx.
[72] Montgomery County Code, Sections 8-47, available at http://library.amlegal.com/nxt/gateway.dll?f=templates&fn=default.htm&vid=amlegal:montgomeryco_md_mc.
[73] Codified at Montgomery County Code, Chapter 8 (Buildings), Article VII (Energy Efficiency and Environmental Design), Sections 8-46 through 8-52.

environmental design standards that the director identifies as equivalent.[74] New construction or additions to private non-residential or multi-family residential (taller than 4 stories) buildings of 10,000 square feet or more in gross floor area must be at least certifiable under the applicable LEED rating system, an equivalent standard approved by the County Planning Director, or alternative energy and environmental design standards identified by the director as equivalent.[75]

Effectiveness: Montgomery County has dozens of green-certified businesses,[76] and the County is hailed as being at the forefront of Maryland's Sustainable Development, which is particularly significant considering that Maryland ranked seventh among all states in 2017 in terms of green building square footage per capita, according to the USGBC.[77]

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.[78]

Purpose: The preamble to the Act states an intent 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, to establish a Green Building Fund, and to establish the Green Building Advisory Council; to amend the Construction Codes Approval and Amendments Act of 1986 to provide for the revision of the Construction Codes and to include green building practices; and to amend the Office of Property Management Establishment Act of 1998 to require priority leasing of buildings that meet certain green building standards." [79]

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 required to meet either ENERGY STAR, LEED (at the silver level), or Green Communities 2006 standards.[80] 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.[81] Finally, starting on January 1, 2012, all such structures are required to meet the minimum LEED standards upon building permit application submittal.[82] 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

[74] Montgomery County Code at Section 8-49(a).
[75] *Id.* at Section 8-49(b).
[76] Montgomery County Chamber of Commerce, Montgomery County Green Certified Businesses, http://www.montgomerycountychamber.com/foundation/green-business-certification-program/montgomery-county-green-certified-businesses.
[77] USGBC, Leticia McCadden, U.S. Green Building Council Releases Annual Top 10 States for LEED Green Building (Jan. 25, 2017), http://www.usgbc.org/articles/us-green-building-council-releases-annual-top-10-states-for-leed-green-building.
[78] District of Columbia, Department of Energy & Environment (Oct. 11, 2011), https://doee.dc.gov/publication/green-building-act-2006.
[79] District of Columbia Green Building Act of 2006, Preamble.
[80] *Id.* at Section 3.
[81] *Id.* at Section 4(a).
[82] *Id.* at Section 4(b)(2).

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.[83]

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.[84] The primary concern was that the Act's requirements are better suited for implementation through building code adoption, as opposed to a LEED mandate.[85] From 2010 through fiscal year 2013, the City gained $5.2 million in permit fees through its green building program.[86]

California: California was the first state to adopt a mandatory state-wide green building code.[87] Part 11 of the Title 24 Building Standards Code is the California Green Building Standards Code, also known as the CALGreen Code.[88] A local government may adopt a modified version of the CALGreen Code, but its code may not be less restrictive than the state standard.[89]

Purpose: CALGreen was "developed to (1) reduce GHG from buildings; (2) promote environmentally responsible, cost-effective, healthier places to live and work; (3) reduce energy and water consumption; and (4) respond to the environmental directives of the administration."[90] California has had mandatory greenhouse gas reduction targets since passage of the Global Warming Solutions Act of 2006.[91]

Provisions: CALGreen is updated every three years. All applications for a building permit that occur on or after January 1, 2017 are subject to compliance with the 2016 CALGreen Code.[92] As a result of the 2016 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, graving and paving requirements, electric vehicle supply equipment in new construction (including one and two-family dwellings), water conservation measures, and construction waste

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[83] *Id.* at Section 6.
[84]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/.
[85] *Id.*
[86] District of Columbia, Department of Energy & Environment, Green Building Report (last updated 2012), available at https://doee.dc.gov/sites/default/files/dc/sites/ddoe/publication/attachments/20140113_Green%20Building%20Report%202012_FINAL.pdf; *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/.
[87] California Building Standards Commission, http://www.bsc.ca.gov/.
[88] *Id.*
[89] California Building Standards Commission, Guide for Local Amendments of Building Standards (July 2016), https://www.documents.dgs.ca.gov/bsc/Title_24/Guide_for_Local_Amendments_of_Building_Standards_2016-opt.pdf.
[90] California Building Standards Commission, Guide to the 2016 California Green Building Standards Code (Nonresidential), at viii, https://www.documents.dgs.ca.gov/bsc/CALGreen/CALGreen-Guide-2016-FINAL.pdf.
[91] *Id.*
[92] Building Standards Information Bulletin 16-0 (July 1, 2016), https://www.documents.dgs.ca.gov/bsc/2015TriCycle/Information%20Bulletins/BSC-Bulletin-16-01.pdf.

reduction.[93] New mandatory standards for nonresidential buildings range from light pollution reduction to prescriptive standards for indoor and outdoor water use.[94]

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.[95] A group of "LEED User Peer Reviewers" released a paper in 2015 that assessed CALGreen's effectiveness and provided suggestions for improvement.[96] The report concluded that CALGreen "has been successful in expanding the opportunity and demand for green building products, services, manufacturing and associated industries."[97] The report's suggestions for improvement include expanding education and outreach, increasing code clarity and increased funding for enforcement.[98] 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 of these cases 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 issue with preemption.[99] 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.[100]

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[93] CalGreen, Chapter 4; California Housing and Community Development, Residential Mandatory Measures Effective January 1, 2017, http://www.hcd.ca.gov/building-standards/calgreen/docs/HCDSHL605_2016.pdf.

[94] California Building Standards Commission, 2016 California Green Building Standards Code Nonresidential Mandatory Measures, https://www.documents.dgs.ca.gov/bsc/CALGreen/2016-CALGreen-Summary.pdf.

[95] 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.

[96] *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.

[97] *Id.* at 8.

[98] *Id.* at 9.

[99] *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 and *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; *Bldg. Indus. Ass'n of Wash. v. Wash. State Bldg. Code Council* ("Washington II"), 683 F.3d 1144 (9th Cir. 2012)(affirming district court decision); *Bldg. Indus. Ass'n of Wash. v. Wash. State Bldg. Code Council*, 2011 U.S. Dist. LEXIS 12316 (W.D. Wash. 2011)(finding that Washington State's requirements were not preempted). *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).

[100] Brian W. Blaesser, DISCRETIONARY LAND USE CONTROLS: AVOIDING INVITATIONS TO ABUSE OF DISCRETION, Chapter 8 (Thomson-Reuters 2017); 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, *Incorporating Third Party Green Building Rating Systems into Municipal Building and Zoning Codes*, 31 PACE ENVTL. L. REV. 832, 844 (2014).

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;[101] 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.[102]

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,"[103] 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"[104] 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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[101] 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.
[102] GREEN BUILDING A TO Z at 49, 54-56.
[103] Davis Langdon, *Examining the Cost of Green* (October 2004), available at http://www.davislangdon.com/upload/images/publications/USA/The%20full%20report.pdf.
[104] 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.[105]

With regard to "learning curve" costs, the study went on to note that it had 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."[106] 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.[107] 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.[108] The World Green Building Council also reported that green building generally improves marketability and more easily attracts tenants and buyers.[109]

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.[110] 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.[111] These findings are in line with the costs reported by Yudelson in *Green Building A to Z*.[112] 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: Yudelson reports an energy savings increase of 10% to 15% from commissioning, and D'Antonio references studies that have found the median recovery for commissioning costs to be less than five years.[113] Alternative rating systems such as Green Globes and proponents of LEED alternatives 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.[114]

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 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.

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[105] *Id.* at 3.
[106] *Id.*
[107] 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.
[108] *Id.* at 56.
[109] *Id.* at 8.
[110] *LEED-NC Commissioning Study* at 4.
[111] *Id.*
[112] GREEN BUILDING A TO Z at 49.
[113] *Id.*; *LEED-NC Commissioning Study* at 5.
[114] *Why Green Globes Is Better*, available at http://www.greenglobes.com/about-why.asp; Auden Schendler and Randy Udall, *LEED Is Broken; Let's Fix It* (*Grist*, Environmental News and Commentary: October 26, 2005).

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.[115] This could lead to a greater capacity to finance acquisition costs among homebuyers and bring more homes within reach of more buyers.

12.07 SUMMARY OF 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.

[115] Ngai Pindell, Leg. Guide to Affordable Housing Dev. § 2.IV, *Environmental Planning and Review of Affordable Housing Development*, at p. 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.[116] 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.[117] As described elsewhere in this section, ENERGY STAR has also spawned widespread local adaptations. The federal Energy Policy Act of 2005[118] 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.[119]

Prior to becoming president, Donald Trump, was not a proponent of green building in his development projects—"A single unit in one of more than 50 buildings either owned by the Trump Organization or licensed to use the Trump name is publicly listed by U.S. Green Building Council as a candidate for LEED."[120] In the first 100 days of his administration, President Trump blocked four Obama executive orders that were designed to improve the efficiency of portable air conditioners, walk-in coolers and freezers, commercial boilers and uninterruptible power supplies.[121] A March 2017, Trump administration memorandum revealed that the president may seek to reduce the Environmental Protection Agency's budget by 24%, reduce its staff by 20% and potentially eliminate programs impacting the built environment such

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[116] *Federal Green Building Report* at Section V.
[117] *See* www.energystar.gov for a full description of the range of rating products available under the ENERGY Star label; see also U.S. EPA, "How Will ENERGY STAR® Benefit My Shopping Center?, available online at http://www.energystar.gov/sites/default/files/tools/MallsFlyer_091014.pdf ("Between 2008 and 2011, organizations that consistently tracked their energy use in Portfolio Manager experienced annual energy savings of 2.4 percent on average, with total savings reaching an average of 7 percent over the period of analysis.").
[118] P.L. 109-58.
[119] USGBC, Analysis of the Conservation and Energy Efficiency Tax Provisions in the Energy Policy Act of 2005, October 28, 2005, available at: https://www.usgbc.org/ShowFile.aspx?DocumentID=1123.
[120] The Kendeda Fund, *Will Trump deconstruct green building progress?* (Feb. 6, 2017), http://livingbuilding.kendedafund.org/2017/02/06/trump-deconstruct-green-building-progress/.
[121] *Id.*

as the "Energy Star" program.[122] The Energy Department's Weatherization Assistance Program may also be defunded.[123]

State and Local Incentives for Sustainable Development

State and local incentives for Sustainable Development include the full range of possible incentives described above:[124]

Type of Incentive	Examples of Jurisdictions Offering Incentive
Expedited Permitting	Local Level: Chicago (IL), San Diego County (CA), San Francisco (CA)
Property Tax Abatement or Credit	State Level: Nevada, Virginia Local Level: Howard County (MD)
State Tax Credits	State Level: New Mexico, Oregon
Density Bonuses	Local Level: Arlington County (VA), Seattle (WA)
Permit Fee Waiver/Reimbursement	State Level: North Carolina
Grants	Local Level: El Paso (TX)

States

Nevada (Property Tax Abatement and Sales Tax Exemption): State law authorizes property tax abatements of up to fifty percent (50%) for up to 10 years for newly constructed buildings that are LEED Silver certified. The law also exempts from the sales tax products and materials used in the construction of a LEED Silver building.

New Mexico (Tax credit): 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. Total credits statewide were capped at $5 million with respect to commercial and residential buildings, but the cap was reduced in 2013 to $4 million for residential tax credits and $1 million for commercial tax credits.

North Carolina (Fee reduction/waiver): Cities and counties in the state are granted authority to encourage green building practices by reducing or partially rebating permit fees.

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[122] Chris Bentley, The Journal of the American Institute of Architects, *How Trump's Potential Budget Cuts to the EPA Could Affect the Building Industry* (March 13, 2017), http://www.architectmagazine.com/practice/how-trumps-potential-budget-cuts-to-the-epa-could-affect-the-building-industry_o.

[123] Chelsea Harvey, The Washington Post, *Trump wants to cut programs that help buildings save energy. This new study says they work.* (March 27, 2017), https://www.washingtonpost.com/news/energy-environment/wp/2017/03/27/trump-wants-to-cut-programs-that-help-buildings-save-energy-this-new-study-says-they-work/?utm_term=.01dc6a8329a3.

[124] Available at: http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1779. *See also* GREEN BUILDING A TO Z at 92; Yudelson Associates, *Green Building Incentives That Work: A Look at How Local Governments Are Incentivizing Green Development* (NAIOP Foundation: November 2007), at 8-9, Appendix 1.

Oregon (Tax credit): LEED Business Energy Tax Credit, administered by the state Office of Energy, is tied to the level of LEED certification achieved. LEED-NC, LEED-CS, or LEED-CI projects achieving a minimum of Silver certification, and achieving certain specifically identified credits, are eligible.

Virginia (Tax credit): Energy efficient buildings can be treated as a separate class of taxation from other real property. Localities can levy equal or lesser taxes on energy efficient buildings, defined as meeting the performance standards of LEED, ENERGY STAR, Green Globes, or EarthCraft.

Counties and Municipalities

Arlington County, Virginia (Density bonus): The Arlington County Green Building Incentive Program provides a density bonus for projects earning LEED Silver or better. Participating projects must report their energy usage to the County for 10 years. Additional density bonuses are available for committing to achieve LEED for Existing Buildings Operations and Maintenance or ENERGY STAR certification.[125]

Chicago, Illinois (Expedited permitting): LEED-Certified projects accepted into the City's Green Permit Program can receive their permits in as few as 15 business days depending on the complexity of the project. If a project goes for a higher level of LEED certification, waiver of plan review fees is also possible.[126]

El Paso, Texas (Grants): The El Paso Green Building Grant Program awards grants for commercial and multi-family, multi-story residential projects earning LEED certification. The maximum grant allowance is $200,000 for platinum under LEED-NC and $400,000 for projects achieving LEED platinum for a multi-story existing building that includes mixed uses and reuses a structure that has been 50% vacant for 5 years.[127]

Howard County, Maryland (Property tax credits): The 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 certification: 25% for Silver, 50% for Gold, and 75% for Platinum. Similar credits are provided for LEED-EB for a period of three years.[128]

San Diego County, California (Expedited permitting): 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.[129]

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[125] 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 20, available at http://www.myfloridagreenbuilding.info/pdf/review_municipal_ord.pdf (2006).

[126] Chicago also provides a Tax Increment Financing ("TIF") program as a tool for developers to implement sustainable and green construction practices. O'Brien, *supra* note 17 at 478-79.

[127] USGBC, Summary of Government LEED® Incentives – March, 2009, p. 3; City of El Paso Green Building Grant Program Guidelines, http://legacy.elpasotexas.gov/muni_clerk/meetings/lrcm0121100900/01211004.pdf.

[128] 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. BALT. J. LAND & DEV. 85, 89 (2014).

[129] San Diego County, California, Green Building Incentive Program, http://www.sandiegocounty.gov/pds/greenbuildings.html.

San Francisco, California (Expedited permitting): Project proponents that enter a written, binding commitment to third party, green building certification may receive priority permitting processing. Third party certification can be achieved through:

- LEED Platinum certification using the Leadership in Energy and Environmental Design rating system of the U.S. Green Building Council; or
- GreenPoint Rated with 150 Green Points under the GreenPoint Rated system developed by Build It Green; or
- Living Building Challenge Certification or Petal Recognition or Net Zero Energy Certification from the International Living Future Institute; or
- Certified Passive House Certification or EnerPHIT Certification by the International Passive House Institute or PHIUS+ Certification by the Passive House Institute US. [130]

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.[131]

12.09 SUSTAINABLE DEVELOPMENT STANDARDS AT THE NEIGHBORHOOD OR DISTRICT LEVEL

The growth in the popularity of LEED-NC and its related family of site-based rating systems over the last fifteen years, has not come without a certain amount of criticism from various quarters. While some critics have focused on the effort and expense of obtaining LEED certification and others observed that LEED suffers from the same drawback as all rating systems and can be gamed into achieving building ratings higher than might be considered appropriate, one of the more resonant critiques came from the Smart Growth/New Urbanist movements in real estate development and urban planning. To these critics, LEED addresses only half the problem by focusing on buildings and sites in isolation and not considering their context. Smart Growth/New Urbanist critics of LEED also take the system to task for failing to meaningfully incorporate the urban design and connectivity elements that make densely developed neighborhoods and work places, which have been found to have inherent energy use-reduction as well as public health benefits,[132] more successful. To these critics, relating a green building to its context, especially other buildings and public spaces such as streets, is a critical piece of the puzzle.

USGBC's LEED for Neighborhood Development rating system was created in response to this criticism. According to USGBC, "LEED for Neighborhood Development integrates the principles of smart growth, New Urbanism and green building into the first national rating system for neighborhood design."[133] Included on the Core Committee were representatives from USGBC as well as the National Resources Defense Council and the Congress for the New Urbanism. Following the evaluation of the rating system in a pilot program, the LEED ND rating system was published in 2009 and project registration began in early 2010.

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[130] Department of the City and County of San Francisco, SF Environment, Priority Permitting, https://sfenvironment.org/article/larger-projects-commercial-amp-multifamily/priority-permitting.

[131] Seattle Department of Construction & Inspections, Green Building Permit Incentives, http://www.seattle.gov/dpd/permits/greenbuildingincentives/.

[132] *See* Design, Community & Environment, et al., Understanding the Relationship Between Public Health and the Built Environment. (USGBC/LEED-ND Core Committee: May 2006)

[133] USGBC, FAQ, LEED for Neighborhood Development, *available at* http://www.usgbc.org/Docs/Archive/General/Docs6423.pdf.

The LEED-ND prerequisites and credits are organized into 3 broad categories: Smart Location & Linkage, Neighborhood Pattern & Design, and Green Infrastructure & Building, with additional categories for Innovation and Design Process and Regional Priority Credits. Like other LEED rating systems, LEED-ND has a potential 100 credit points among the main categories, with 10 additional points being available for the Innovation and Design Process and Regional Priority Credits.[134]

LEED-ND is heavily biased toward infill development and redevelopment, where transit and other infrastructure are already available, and where there are few environmentally-based site constraints, such as important habitat, wetlands, or floodplain. Unlike other rating systems, LEED-ND allows for three stages of certification: Stage 1 – Conditional Approval; Stage 2 – Pre-Certified; and Stage 3 – Certified.

In its initial years, it appeared that LEED-ND was not being integrated into local land use regulatory systems in the same way that the other LEED and alternative site and building rating systems had been. Two factors may explain this circumstance. First, unlike LEED's mature rating systems, LEED-ND was viewed as a more novel system. Second, the intent of the LEED-ND system is to have a bias in favor of infill and redevelopment, as expressed most clearly in the Smart Location & Linkage prerequisites. This means that it will not be possible for many locations (such as greenfields or other environmentally sensitive or remote sites) to achieve LEED-ND certification.[135]

However, LEED-ND's credits have been incorporated as planning goals in local plans, such as in Boston's Columbia Point Master Plan.[136] Local governments have also incorporated LEED-ND criteria into regulations for specific zoning districts. For example, Champaign, Illinois used the LEED-ND rating system to develop its Urban Neighborhood-Residential, Urban Neighborhood-Activity Center, and Urban Neighborhood-Corporate districts, including design and parking requirements, and requiring developers of buildings larger than 50,000 square feet, and commercial uses larger than 75,000 square feet, to provide showers and locker rooms, based on the number of bicycle parking spaces included.[137] To assist local governments with using this rating system to evaluate their local comprehensive plans, codes, and land use policies, the Land Use Law Center at Pace Law School and USGBC created a Technical Guidance Manual for Sustainable Neighborhoods, a guide for local officials, planners, and other professionals who work with municipalities in planning and land use efforts.[138] The manual also provides LEED-ND non-regulatory strategies, including guidance on capital improvement plans, transit pass programs, vehicle-sharing programs, waste management programs, infrastructure improvements, and urban agriculture programs.[139]

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[134] USGBC, Rukesh Samarasekera, LEED for Neighborhood Development credits, prerequisites and points (April 10, 2017), http://www.usgbc.org/articles/leed-nd-credits-and-points; USGBC, LEED v4 for Neighborhood Development (April 5, 2016), http://www.usgbc.org/resources/leed-v4-neighborhood-development-current-version; USGBC, *Neighborhood Development Guide*, http://www.usgbc.org/guide/nd.

[135] *See* Nate Berg, "LEED-ND: Creating a More Complete Vision of Neighborhood Sustainability" (Planetizen: 19 November 2007), available at: http://www.planetizen.com/node/28493. In connection with the location-related prerequisites of LEED-ND, Jennifer Henry, then the director for LEED-ND at USGBC, is quoted as stating that "[i]t's really important to the Smart Growth constituency that not every bad location is able to be certified, because if it is, it's not much of a rating system for smart growth."

[136] City of Boston, Columbia Point Master Plan (2011), http://bslanow.org/wp-content/uploads/Columbia-Point-Master-Plan-Final-June-2011.pdf; see also, Meg Byerly, *Using USGBC's LEED for Neighborhood Development Rating System to Evaluate and Amend Local Plans, Codes, and Policies*, 36 No. 3 ZPLR 1, 3 (March 2013).

[137] *Id.* at 3-4.

[138] USGBC and Pace Land Use Law Center, *Technical Guidance Manual for Sustainable Neighborhoods* (Dec. 2013).

[139] Meg Byerly, *Using USGBC's LEED for Neighborhood Development Rating System to Evaluate and Amend Local Plans, Codes, and Policies*, 36 No. 3 ZPLR 1, 6-7 (March 2013).

A search of USGBC's online database indicates that 214 jurisdictions have adopted plans that incorporate LEED-ND.[140] The Kashiwa-no-ha area of Northeast Japan, home to the University of Tokyo, Chiba University, recently received LEED-ND v4 Platinum certification for its "International Campus Town Initiative," which has the goal "to build a city on this foundation that is integrated with the environment, promotes long and healthy lives, and cultivates industrial innovation."[141] An example of an individual project receiving LEED-ND certification is Twinbrook Station, a transit-oriented neighborhood development in Rockville, Maryland.[142] When fully built out, the project will span 26 acres and includes 1,595 multifamily residential units,[143] 220,00 square feet of ground-floor retail and 325,00 square feet of Class-A commercial space.[144]

[140] USGBC's searchable LEED project database is available at http://www.usgbc.org/projects/neighborhood-development-plan.
[141] USGBC, Kashiwa-no-ha Smart City (Sept. 23, 2016), http://www.usgbc.org/projects/kashiwanoha-smart-city.
[142] USGBC, TwinBrook Station, (Nov., 10, 2008), http://www.usgbc.org/projects/twinbrook-station.
[143] By 2017, Twinbrook had completed nearly 1,600 condominiums and apartments. Twinbrook, http://www.twinbrookurbanbynature.com/neighborhood/residential.
[144] USGBC, TwinBrook Station.

PART IV: PRESERVATION OF COMMUNITY CHARACTER

SECTION 13: DEVELOPMENT DESIGN REVIEW

13.01 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 review 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.[1]

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.[2]

Stated differently, from a city planning policy perspective, urban design is "designing cities without designing buildings."[3]

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

[1] BRENDA CASE SCHEER & WOLFGANG F.E. PREISER, DESIGN REVIEW: CHALLENGING URBAN AESTHETIC CONTROL (Chapman & Hall 1994) (citing survey by Professor Brenda Case Lightner).
[2] R. TSENG-YU LAI. LAW IN URBAN DESIGN AND PLANNING (New York: Van Nostrand Reinhold Company, 1988) at 1.
[3] J. BARNETT. AN INTRODUCTION TO URBAN DESIGN (New York: Harper & Row 1982) at 55.

or approved structure within a certain distance.[4] A mission of other such boards is to avoid *excessive differences* between structures.[5] 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.[6]

13.02 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. 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 one case in Washington in which the court found the city's building design criteria too vague, the criteria stated that evaluation of a proposed building project would be based on the "quality of its design and relationship to the natural setting of the valley and surrounding mountains." The criteria further stated that a project's windows, doors, eaves and parapets should be of "appropriate proportions" and seldom "bright" or "brilliant"; its mechanical equipment should be screened from public view; its exterior lighting should be "harmonious" with the building design and "monotony should be avoided." The city's building design criteria also stated that a project should be "interesting,"[7] 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. "Harmony in texture, lines and masses [is] encouraged."[8]

Although design review criteria are mostly focused upon the totality of a project,[9] 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 being requested and to help the decision-maker arrive at fair, consistent decisions.[10] This is a difficult task.

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[4] *See* LAND USE PLANNING AND DEVELOPMENT REGULATION LAW § 12:3 (Architectural Control) (3d ed., 2014).
[5] *See id*.
[6] BRIAN W. BLAESSER, DISCRETIONARY LAND USE CONTROLS: AVOIDING INVITATIONS TO ABUSE OF DISCRETION § 8:4 (Thompson-Reuters: 2017) (hereinafter "DISCRETIONARY LAND USE CONTROLS").
[7] *Anderson v. City of Issaquah*, 851 P.2d 744 (Div. 1 1993), citing City of Issaquah Municipal Code (IMC) 16.16.060 (D) (1)-(6).
[8] *Anderson v. City of Issaquah*, 851 P.2d 744 (Div. 1 1993), citing Issaquah Municipal Code (IMC) 16.16.060 (B) (1)-(3).
[9] Bross, Taking Design Review Beyond the Beauty Part, 9 ENVIRONMENTAL LAW 211, 226-27 (1979). ("[T]eachers 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 (New York: John Wiley 1977)).
[10] *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

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. (Court's emphasis)[11]

The court found these criteria too vague, encouraging the imposition of subjective standards upon the applicant.[12] 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."[13] 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.[14]

Unlike Stone Harbor's sign standards, 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.[15]

Design standards that are based on the effectiveness of architectural design can amount to censorship and therefore raise freedom of expression concerns.[16] 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.[17]

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 there was no consistent character. "Consequently, 'early American' design could mean anything from log cabin or tepee to a Cape Cod or Dutch colonial style." [18]

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.").

[11] *Diller and Fisher Company, Inc. v. Architectural Review Board*, 587 A.2d 674, 678 (N.J. 1990).

[12] *Id.* at 680.

[13] *Halsey v. Noank Zoning Board of Appeals*, 2014 Conn. Super. LEXIS 233 at *24.

[14] *Id.* at *25.

[15] *See id*.

[16] 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).

[17] *Id*.

[18] *See* RATHKOPF'S THE LAW OF ZONING AND PLANNING § 16:15 (4th ed.) (updated Nov. 2013); *see also* DISCRETIONARY LAND USE CONTROLS § 8:10 (citing *Hankins v. Borough of Rockleigh*, 150 A.2d 63 (N.J. 1959)).

13.03 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.[19] 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.

13.04 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.

13.05 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.[20]

13.06 IMPACT ON HOUSING AFFORDABILITY

Development design review can have an exclusionary effect when it requires more costly processes and methods of design and construction. As one commentator noted:

> 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 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.[21]

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

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[19] *See* ROHAN: ZONING AND LAND USE CONTROLS § 16.04[3][a] (updated 2014) (observing 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://www.vpic.info/Publications/Reports/Implementation/Design.pdf).

[20] *See* Section 18.

[21] Remarks of George Lefcoe in American Institute of Architects, *Design Review Boards*, at 15.

design considerations alone cannot be used as a basis to deny the approval of an affordable housing development proposal.

13.07 SUMMARY OF 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.

13.08 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.

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**.[1]

The neighborhood conservation zoning district is a technique that has been in use since the mid-1970s, when Boston established a Landmarks Commission.[2] It 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. Its purpose is primarily to preserve neighborhood character, as defined by the neighborhood's historic, architectural or aesthetic features, or by the nature of its use (e.g., residential); and sometimes to act as a catalyst for rehabilitation.[3]

The broadest definition of this technique, offered in 1993 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.[4]

The City of Indianapolis Historic Preservation Commission describes the difference between a neighborhood conservation district and a historic district as follows:

> 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.[5]

Professor Stipe argued that, ideally, neighborhood conservation districts should be non-regulatory in nature.[6] In practice, however, most conservation districts are regulatory, following either a "historic

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[1] Mark S. Dennison, "Conservation Districts: Latest Zoning Tool to Preserve Neighborhood Character," *Zoning News* November 1992, p. 1 (hereinafter "Dennison"); Marya Morris, *Innovative Tools for Historic Preservation*, Chicago: 1992 American Planning Association, Planners Advisory Service (PAS) Report No. 438, p. 13 (hereinafter "Morris").
[2] Dennison at 1.
[3] Morris at 13.
[4] 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 http://www.okhistory.org/shpo/lpb/13a.pdf) (hereinafter "Stipe").
[5] "The Difference Between Districts," Indianapolis Historic Preservation Commission (October 2003) (available at http://www.indy.gov/eGov/City/DMD/IHPC/Documents/newsletters/200310.pdf).
[6] Stipe at 4.

preservation" or a "neighborhood planning" model.[7] The neighborhood conservation district that follows the "historic preservation " model is most often used as a means to protect and rehabilitate older buildings and neighborhoods. This approach may involve some level of design review for new construction 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 typically does not include design review, relying instead on zoning dimensional regulations such as lot size and setbacks, consistent with a neighborhood's built form.[8]

Where the focus is historic preservation, the overlap between a "conservation" and a "historic" district can be confusing and the distinctions are often blurred.[9] 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."[10]

Three types of neighborhoods, or "conservation areas," have been identified as appropriate for designation as a neighborhood conservation district:

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.[11]

The scope of review in a conservation district 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.[12] Districts administered by planning and zoning commissions, whose purpose is broader than historic preservation, consider uses, aesthetics, neighborhood character and property values.[13] 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.[14] Districts vary in the extent to which they regulate alterations, demolitions, and new construction. Nashville, Tennessee, for example, has created several historic overlay districts, including

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[7] 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 at. 2 (available online at http://www.okhistory.org/shpo/lpb/13a.pdf).

[8] Adam Lovelady, "Broadened Notions of Historic Preservation and the Role of Neighborhood Conservation Districts, *The Urban Lawyer* (Winter 2008; Vol. 40. No. 1) at 155.

[9] Morris at 17. See also Brian Blaesser, DISCRETIONARY LAND USE CONTROLS: AVOIDING INVITATIONS TO ABUSE OF DISCRETION, 2016 Ed. Chapter 8: Neighborhood Character and Design Conservation Regulations at 551.

[10] Julia Miller, *Protecting Older Neighborhoods Through Conservation District Programs* (National Trust for Historic Preservation: 2004) at 5.

[11] Stipe at 4.

[12] Malachi Reid Peacock, NEIGHBORHOOD CONSERVATION DISTRICTS AND THEIR RELEVANCE TO HISTORIC PRESERVATION IN THE 21ST CENTURY, 2009.

[13] Dennison at 2.

[14] Dennison at 3.

Historic Preservation (HP) Districts and Neighborhood Conservation (NC) Districts.[15] In HP Districts, no structure may be constructed, altered, repaired, relocated, or demolished unless the proposed project complies with the HP District regulations.[16] By contrast, alterations and repairs are not regulated in Nashville's more permissive NC Districts.[17]

Neighborhood conservation districts that follow the "neighborhood planning" model implement neighborhood plans, which are often a prerequisite to adoption of the district.[18] 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.[19]

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 "overlaying" regulations over an existing zoning district, adding provisions that supersede the underlying zoning standards or procedures if inconsistent. Neighborhood conservation districts typically are implemented using this zoning technique.[20]

- **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."[21]

- **Downtown and Corridor Plans.** These plans rely heavily on the use of design guidelines and, sometimes, incentives to achieve renovation of older downtowns or commercial corridors. Prominent examples include the downtown plan for Scottsdale, Arizona; the series of overlay zones for the airport, watershed and state park and gateway highway

[15] *See* Adam Lovelady, *Broadened Notions of Historic Preservation and the Role of Neighborhood Conservation Districts*, 40 URBAN LAWYER 147, 158 (Winter 2008).
[16] *See id*. at 159.
[17] *See id*.
[18] Zellie at 9.
[19] Morris at 19.
[20] *See* William A. Fischel, *Neighborhood Conservation Districts: The New Belt and Suspenders of Municipal Zoning*, 78 BROOK. L. REV. 339, 348 (Winter 2013).
[21] Quoted in Morris at 22.

corridors in Raleigh, North Carolina; and the creation of special highway districts to encourage employment opportunities in Plano, Texas.[22]

- **Special Zoning/Design Districts.** These "tailored" zoning districts are created to meet the needs of an existing area (as opposed to setting parameters for future build-out). They are an emerging phenomenon related to neighborhood conservation districts.[23] Examples are New York's "Special Midtown District" and Chicago's "Planned Manufacturing District."

Preserving "community character" and "livability" through control of an area's design aspects has been referred to as "the 'soft' side of growth management."[24] Neighborhood conservation districts, 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.[25] 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."[26]

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.[24]

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.[27]

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.[28] 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.[29] 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

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[22] Douglas R. Porter. *Managing Growth in America's Communities* (Washington, D.C. Island Press, 1997) at 164.
[23] *Id*. at 165.
[24] Porter at 173.
[25] MAX ABRAHAM YESTON, NEIGHBORHOOD CONSERVATION DISTRICTS: AN ASSESSMENT OF TYPOLOGIES, EFFECTIVENESS, AND COMMUNITY RESPONSE (May 2014) at 7.
[26] *Id*.
[24] Zellie at 15.
[27] Peacock at 13.
[28] *See* William A. Fischel, *Neighborhood Conservation Districts: The New Belt and Suspenders of Municipal Zoning*, 78 BROOK. L. REV. 339, 348 (Winter 2013) (noting that neighborhood conservation districts "are usually established as the result of neighborhood activism").
[29] Chapel Hill Land Use Management Ordinance § 3.6.5 (Neighborhood Conservation Districts).

residents. Under the Neighborhood Conservation District Enabling Bylaw adopted In 2015 by the Town of Lexington, Massachusetts, the boundaries of a neighborhood conservation district must be drawn to encompass an area in which at least 67% of affected properties support the designation.[30] The boundaries of a neighborhood conservation district can be redrawn over time as resident support changes.[31]

Generally speaking, neighborhood conservation 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.[32] 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.[33]

The Lockeland Springs – East End neighborhood 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 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."[34] The overlay district is credited with having stabilized property values and minimized incompatible infill development.[35]

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 district may apply only to areas of 15 contiguous acres or more which are 75-percent developed, and where development began at least 25 years prior to adoption of the overlay zone.[36]

The Tazewell Pike Neighborhood Conservation Overlay District in Knox County, Kentucky, which 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.[37]

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."[38] The Village District approach includes "maintenance of public views" and "design, paving materials, and placement of

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[30] Town of Lexington, Massachusetts, Frequently Asked Questions Proposed Lexington Neighborhood Conservation District Enabling Law (2015).
[31] *See id.*
[32] Yeston at 9.
[33] Adrian Scott Fine and Jim Lindberg, "Taming the Teardown Trend," *Forum News* (July/Aug. 2002)
[34] Morris at 22.
[35] Holly Dollof and 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).
[36] *See generally* City of Raleigh (NC) Code Unified Development Ord. § 5.4.3(B) (Neighborhood Conservation Overlay District; Locational Guidelines).
[37] Tazewell Pike Neighborhood Conservation Overlay District Design Guidelines, Knoxville-Knox County Metropolitan Planning Commission (available at http://archive.knoxmpc.org/historic/dguides/tazpike.pdf).
[38] Conn. Gen. Stat. § 8-2j - Village Districts (1998, as amended 2012).

public roadways" as well as more typical architectural elements. At least thirteen Connecticut municipalities have created a Village District.[39]

Neighborhood conservation districts have also been used in some jurisdictions to preserve "suburban" neighborhoods. Unlike in-town neighborhood conservation districts that are typically based on detailed studies and plans, these suburban neighborhood conservation districts are relatively simple and rely upon standard suburban zoning provisions. For example, under Raleigh, North Carolina's Neighborhood Conservation District ordinance, the applicable development standards for a neighborhood conservation district are established in accordance with the neighborhood's "built environmental characteristics" and are comprised of fairly standard zoning requirements, including minimum lot size and setback requirements and building height limitations.[40] As an example, the development standards for the Laurel Hills Neighborhood in Raleigh include a half-acre minimum lot size requirement, a minimum front yard of 50 feet, and a maximum building height of 35 feet.[41]

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.[42] Insofar as historic districts and neighborhood conservation districts, both act to 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.[43] 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.[44]

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[39] Village Districts Act, Connecticut Trust for Historic Preservation (available online at http://cttrust.org/cttrust/page/village-district-act-pa-98-116.

[40] *See* City of Raleigh (NC) Unified Development Ord. § 5.4.3(E) (Neighborhood Conservation Overlay District; Development Standards).

[41] *See id.* § 5.4.3(F)(7).

[42] Martin Heintzelman and Jason Altieri, *Historic Preservation: Preserving Value?*, Journal of Real Estate Finance and Economics, 46 (3): 543-563.

[43] David Listokin, Michael L, Lahr, Kevin St. Martin, THIRD ANNUAL REPORT ON THE ECONOMIC IMPACT OF THE FEDERAL HISTORIC TAX CREDIT, 2013.

[44] Brian McCabe, Edward Glaeser, Ellen Michael, Ingrid Gould, Vicki Been, *Preserving History or Restricting Development, The Heterogeneous Effects of Historic Districts on Local Housing Markets in New York City*, JOURNAL OF URBAN ECONOMICS (2015) *16.

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 that typically is partially comprised of neighborhood residents,[45] project review can be a significant component of Neighborhood Conservation Districts, and may increase development cost by adding time for agency or administrative review and calling for 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 a neighborhood conservation overlay district 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. In urban neighborhoods where development pressure is high, the limiting effects of neighborhood conservation districts on market-driven development can be significant. By requiring preservation of older building stock, a neighborhood conservation district can "freeze the neighborhood in time" thus limiting future development potential and housing supply.[46] Some critics of historic preservation argue that by doing this, neighborhood conservation districts 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.[47]

14.06 IMPACT ON HOUSING AFFORDABILITY

Housing preservation is often an objective of Neighborhood Conservation Districts. Such districts typically list as one of their objectives, the promotion and retention of affordable housing. Typically financial assistance and incentives are used in combination with Neighborhood Conservation Districts to encourage rehabilitation and maintenance of older housing stock, whether rental or owner-occupied. Where it helps to conserve older housing stock, this technique contributes to housing affordability. To the extent that an adopted Neighborhood Conservation District adds to the cost of new development through a more involved development review process, this technique could contribute to increased housing costs. A neighborhood conservation district that acts like a historic district by restricting the right to alter the exterior of affected buildings can have a 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.[48]

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[45] *See* William A. Fischel, *Neighborhood Conservation Districts: The New Belt and Suspenders of Municipal Zoning*, 78 BROOK. L. REV. 339, 349 (Winter 2013).

[46] Anika Singh Lemar, Zoning as Taxidermy: Neighborhood Conservation Districts and the Regulation of Aesthetics, INDIANA LAW JOURNAL, VOL. 90:1525 (2015).

[47] *See Id*. VOL 90:1527, *See also* Brian McCabe, Edward Glaeser, Ellen Michael, Ingrid Gould, Vicki Been, *Preserving History or Restricting Development, The Heterogeneous Effects of Historic Districts on Local Housing Markets in New York City*, JOURNAL OF URBAN ECONOMICS (2015) *17.

[48] *See* Brian McCabe, Edward Glaeser, Ellen Michael, Ingrid Gould, Vicki Been, *Preserving History or Restricting Development, The Heterogeneous Effects of Historic Districts on Local Housing Markets in New York City*, JOURNAL OF URBAN ECONOMICS (2015) *16.

14.07 SUMMARY OF PROS AND CONS

PROS:

- When a neighborhood lacks sufficient support for a full-fledged local historic district, a neighborhood conservation district offers a viable alternative for historic preservation.

- This technique is more "lenient," susceptible to local definition, more flexible than historic district designation, which often require full-fledged design review.[49]

- Neighborhood conservation district designation melds with the local planning process and administrative structure, and involves "associative values" beyond historic or architectural merits.[50]

- Design and appearance initiatives "can play a significant role in supporting and reinforcing other elements of growth management programs."[51]

- Some studies suggest that neighborhood conservation district designation have a positive impact on property values.[52]

CONS:

- Neighborhood conservation districts 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.[53]

- Some studies suggest that neighborhood conservation district 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 … 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

[49] Nellie at 15.
[50] Stipe at 2.
[51] Porter at 173.
[52] *See* Brian McCabe, Edward Glaeser, Ellen Michael, Ingrid Gould, Vicki Been, *Preserving History or Restricting Development, The Heterogeneous Effects of Historic Districts on Local Housing Markets in New York City*, JOURNAL OF URBAN ECONOMICS (2015) *16.
[53] Dennison at 4.

improvement of the area so designated."[54] 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.[55] 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;[56] Seattle's downtown zoning provisions, which offer density bonuses for "public benefit" features such as open space or green street features;[57] 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."[58] With the exception of Bethesda, all of these incentive programs operated in tandem with a prior downzoning.[59] 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.[60]

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 as 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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[54] Stipe at 2.
[55] 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 and Wendy U. Larsen, *Special Districts: The Ultimate in Neighborhood Zoning* (Cambridge, MA: The Lincoln Institute of Land Policy, 1990).
[56] New York City Department of City Planning, Zoning Handbook, 2011 Edition.
[57] City of Seattle Office of Housing, *Incentive Zoning*, https://www.seattle.gov/dpd/cs/groups/pan/@pan/documents/web_informational/s048509.pdf.
[58] *See* Porter at 165-66.
[59] *See* Porter at 166.
[60] 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."[1] 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.[2]

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.[3]

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 most common techniques 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.[4]

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."[5] The authority to purchase development rights through a conservation easement must be granted by state enabling legislation.[6] Depending on how the easement is created, it may be enforceable only in equity, by injunction, or at law, with monetary damages.[7] Certain characteristics of common law easements make

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[1] Douglas R Porter, *Managing Growth in America's Communities* Washington, D.C.: 1997 Island Press, p. 168 (hereinafter "Porter").
[2] Christopher J. Duerkson and R. Matthew Goebel, *Aesthetics, Community Character and the Law* (Chicago: 1999 American Planning Association, Planners Advisory Service Report 489/490) at 40 (hereinafter "Duerkson").
[3] Duerkson at 47.
[4] Harvey S. Moskowitz and Carl G. Lindbloom. *The New Illustrated Book of Development Definitions* (Rutgers 1993) at 99-100.
[5] The America Planning Association *Growing Smart Legislative Guidebook* at 9-61.
[6] 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 *Growing Smart Legislative Guidebook* includes in Section 9-402, a model Purchase of Development Rights statute.
[7] The America Planning Association *Growing Smart Legislative Guidebook* at 9-61 – 9-62.

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 National Conference of Commissioners on Uniform State Laws adopted in 1984 a "Uniform Conservation Easement Act" (the "UCEA"). [8] As of January 2014, 28 states and the District of Columbia have adopted some version of the UCEA.[9] Another 22 states have enacted easement enabling legislation that is not based on the UCEA.[10] Interestingly, North Dakota is the only state that has not adopted conservation easement enabling legislation.[11]

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.[12]

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 of 1971 requires preservation of access as well as the protection of public views along the shoreline.[13] Denver imposes height limits so buildings do not block views of the Rockies. Similarly, Burlington, Vermont, protects views of Lake Champlain.[14] Similarly, 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.[15] Cincinnati's Environmental Quality-Hillside Overlay District has been used to protect natural features and views along the Ohio River Valley.[16] The City of Pittsburgh has adopted a Hillside Preservation Ordinance and building heights are restricted adjacent to the Monongahela River to protect river views.[17] Salt Lake County's Foothills and Canyons Overlay District restricts or prohibits development on slopes in excess of a 30% grade in order to limit the visual impacts of development, but also to protect the fragile hills.[18] These districts typically regulate both the visual impacts of development and the disturbance of the land form.[19]

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

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[8] *Id*. at 9-62. See also the National Conference of Commissioners on Uniform State Laws, Conservation Easement Act, http://www.uniformlaws.org/Act.aspx?title=Conservation%20Easement%20Act.

[9] Robert H. Levin, Esq. under contract with the Land Trust Alliance, *A Guided Tour to the Conservation Easement Enabling Statutes*, pg. 8 (Jan. 2014), available at http://conservationtools.org/library_items/1410-A-Guided-Tour-of-the-Conservation-Easement-Enabling-Statutes.

[10] *Id.*

[11] *Id.*

[12] Duerkson at 44.

[13] Shoreline Management Act of 1971, Washington State Legislature, available at http://apps.leg.wa.gov/RCW/default.aspx?Cite=90.58.

[14] Porter at 168.

[15] Vermont Natural Resources Council, *Charlotte Scenic Overlay District*, http://vnrc.org/resources/community-planning-toolbox/case-studies/scenic-overlay-districts-charlotte/.

[16] Duerkson at 41.

[17] General Plan: Pittsburg 2020, Selected Goals and Policies, City of Pittsburgh; Duerkson at 44.

[18] David Scroggin and L. Darlene Batatian, Abstract: "Avalanche Hazard Investigations, Ordinances, and Zoning, Salt Lake County, Utah," available at http://arc.lib.montana.edu/snow-science/objects/issw-2004-435-440.pdf.

[19] Duerkson at 49.

Wisconsin Department of Transportation maintained its commitment to enforcing the easements.[20] Wisconsin also enacted a state statute that enables the State Department of Agriculture, Trade, and Consumer Protection to purchase agricultural conservation easements for the purpose of maintaining land available for agricultural production.[21] Some, however, have questioned the program's effectiveness given the lack of funding available for easement purchase.[22]

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. The City acquired three thousand acres of land as part of an ambitious public-private partnership that utilizes conservation easements and outright acquisition to maximize the amount of contiguous protected land leading from the center of Austin into an adjacent county. This sizable acquisition connects to lands protected by conservation easements held by a number of local nonprofit organizations to create a thirty-five mile protected corridor with valuable wetlands and wildlife habitat.[23]

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:

> 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.[24]

Although conservation easements are an established legal mechanism based on common law property law principles, their legal status has been challenged.[25] In addition, the provisions making favorable federal tax benefits 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.[26] The IRS has mounted regulatory challenges to the tax-deductible status of conservation easement donations.[27] However, one case from the Federal Court of Appeals for the Second Circuit reversed an IRS and tax court holding that disallowed a

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[20] Brian W. Ohm, "The Purchase of Scenic Easements and Wisconsin's Great River Road: A Progress Report on Perpetuity" *Journal of the American Planning Association*, 66:2 (2000): 186.
[21] Jennifer E. Krueger, *Conservation Easements as a Way to Preserve Wisconsin's Farmland: Why Wisconsin Should Adopt a Transferable Tax Credit Program*, 99 MARQ. L. REV. 1073 (2016).
[22] *Id.* at 1088.
[23] Press Release: "Austin secures 3,000 acres for environmental protection and public access," Austin City Connection website, available at http://www.ci.austin.tx.us/council/mw_env_acres.htm.
[24] Robert Aldrich, *Land Trusts: Conserving Land, Strengthening Communities*, APA Planning Advisory Service (2014).
[25] *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).
[26] National Trust for Historic Preservation, "Easement Reforms Enacted by Congress in 2006; "Conserve Your Land" (Land Trust Alliance 2008).
[27] *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).

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.[28] Some commentators have noted a trend away from past IRS and tax court decisions that limited the availability of tax-exempt status.[29]

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. 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 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."[30] 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.[31] The advancement of new energy

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[28] *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). *See also* Robert W. Wood, Forbes Magazine, *Big IRS Defeat in Conservation Easement Case* (June 22, 2012), http://www.forbes.com/sites/robertwood/2012/06/22/big-irs-defeat-in-conservation-easement-case/.

[29] Sirote & Permutt, PC, *Conservation Easement: The Worm is Turning* (Aug. 2, 2012) (discussing three tax court cases), http://www.sirote.com/blog/conservation-easement/conservation-easement-the-worm-is-turning/.

[30] 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).

[31] *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

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.[32]

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 SUMMARY OF 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.

- Easements are flexible and can be tailored to the protection requirements of the particular property and to the desires of the individual landowner.

- Easements keep property in private hands and on the tax rolls and also carry a lower initial price tag than outright acquisition.[33]

- Easements can serve as a planning implementation tool for agencies with no regulatory authority such as a land trust or state transportation department.[34]

- 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.

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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.

[32] Gerald Korngold, *Conservation Easements and the Development of New Energies: Fracking, Wind Turbines, and Solar Collection*, 3 LSU J. ENERGY L. & RESOURCES 101 (2014).

[33] Janet Diehl, *The Conservation Easement Handbook* Alexandria, VA 1988: Land Trust & Exchange at 2.

[34] Ohm at 178; 186.

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.[35] 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[36]), 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.)[37]

[35]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).

[36] 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 and Jack Wright, *Preserving Large Landscapes*, PLANNING (Nov. 2015), https://www.planning.org/planning/2015/nov/largelandscapes.htm.

[37] These programs are discussed in James C. Nicholas and Brian D. Leebuck, "Farmland Protection Techniques and Alternatives after *Suitum*," *The Urban Lawyer* Vol. 30, No. 2 Spring 1998 at 441-475. *See also* Scenic America, *Strategies for Protecting Scenic Views and Vistas*, http://www.scenic.org/issues/scenic-easements-a-view-protection/strategies-for-protecting-scenic-views-and-vistas (visited Aug. 22, 2014) ("Monterey County, CA and Burlington County, NJ are just two of the more than 50 areas nationwide that have successfully used TDR programs to protect their unique character from the development pressure of nearby cities.").

SECTION 16: TREE PRESERVATION

16.01 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 environmental purposes asserted for tree preservation efforts are: (1) protection against soil erosion through stabilization of the soil 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; (5) water conservation through reducing evaporation and decreasing the amount of water that runs off a site rather than infiltrating back into the ground; (6) serving as buffers against noise; (7) maintenance of woodland and wetland wildlife habitat and ecology; (8) providing resistance against colonization of an area by non-native plant species; (9) reduction of the urban "heat island" effect through increased shading; and (10) capture of carbon dioxide (CO_2) (carbon sequestration) in furtherance of community-based climate change avoidance goals.[1]

Among the aesthetic benefits that trees are said to provide are a "scale" and "sense of place."[2] Trees are said to "foster psychological well-being"[3] and to make an area "pedestrian friendly".[4] Trees also are protected to evoke other community character concerns like an association with a particular historic event or period, or a rural cultural heritage.[5]

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 property values.[6] Other economic benefits attributed to considering tree preservation in the development process are a reduction in the cost of providing landscaping and stormwater detention.[7] 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.[8]

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[1] Christopher J. Duerksen & Suzanne Richman, *Tree Conservation Ordinances: Land-use Regulations Go Green*, at 10-15; 36, 40 (APA 1993)("Duerksen/Richman"); Scenic America, Trees in Your Community, An Important but Disappearing Resource, *available at* http://www.scenic.org/issues/tree-conservation/strategies-for-tree-conservation; Brabec, at 99 in Duerksen/Richman; Thomas Hayden, *Hot Ways to Cool Down our Cities*, City Trees, Vol. 36, No. 6, November/December 2000 [read on line at www.urban-forestry.com/citytrees]; E. Gregory McPherson, James R. Simpson, Paula J. Peper, and Qingfu Xiao, Benefit-Cost Analysis of Modesto's Municipal Urban Forest, 25 *Journal of Arboriculture* 235, September 1999; Michael F. Galvin, Becky Wilson, and Marian Honeczy, "Maryland's Forest Conservation Act: A Process for Urban Greenspace Protection During the Development Process," 26 *Journal of Arboriculture* 275 (September, 2000); Jim Schwab, ed. *Planning the Urban Forest*, PAS Report #555 (American Planning Association, 2009).

[2] Duerksen/Richman at 9-10.

[3] McPherson et al at 235. *See also* Templeton, Nancy, and David Rouse, The Role of Tree Preservation Ordinances in Green Infrastructure, Zoning Practice, September 2013, https://www.planning.org/zoningpractice/2012/pdf/sep.pdf. ("[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").

[4] Richard P. Thompson and 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.

[5] *See* Duerksen/Richman at 40.

[6] 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).

[7] Templeton & Rouse.

[8] Duerksen/Richman at 15-16.

With such a wide range of purposes 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.[9] Subsequently, communities shifted their attention to trees located on private property.[10] Some of these communities focused their tree protection regulations only on large trees or trees of a particular species or "specimen" trees.[11] However, others looked also, or instead, at preserving tracts of woodland by regulating the percentage of tree canopy that must be preserved on a private development site.[12] The percentages used around the country range from as low as 15% in some jurisdictions, to as high as 70% in others.[13] Many of these regulations impose costly and time-consuming permit application requirements, such as a comprehensive inventory of vegetation existing on a development site.[14] 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.[15] Regulations vary in their geographic scope, as well. Some apply throughout a jurisdiction, while others apply only in specific areas such as along designated riverways or roadways.[16] A number of tree ordinances also require tree maintenance to be performed by a certified forester or arborist.[17]

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.[18] 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.[19]

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** is the conversion of open land into forest, and refers to the requirement that open land be planted with trees to increase vegetative cover.[20]

[9] *See e.g.*, Massachusetts Scenic Roads Act, General Laws c. 40, sec. 15C.
[10] *See* Duerksen/Richman at 3.
[11] *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).
[12] Duerksen/Richman at 38-40.
[13] *Id.* at 40-41.
[14] *Id.*
[15] 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 Nov. 2016) (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).
[16] *See* Duerksen/Richman at 7; Cooper.
[17] Ruthmarie Shea, *Whose Tree is it Anyway? A Case of First Impression*, 77 U. DET. MERCY L. REV. 579 (2000).
[18] Tree and Vegetation Protection, 2 Rathkopf's The Law of Zoning and Planning § 20:60 (4th ed., 2013); Duerksen/Richman at 29.
[19] Galvin et al.; MD Code Ann. Natural Resources, Title 5, Subtitle 16.
[20] Duerksen/Richman at 46.

- **Canopy** or "crown" is the above-ground parts of a tree consisting of the branches, stems, buds, fruits, and leaves.[21]

- **Dbh** refers to a tree trunk's "diameter at breast height," which is typically measured at four and a half feet above the ground.[22]

- **Dripline** is (an imaginary) vertical line extending from the outermost edge of a tree canopy to the ground.[23]

- **Specimen tree** is one 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 diameter at breast height 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."[24]

16.02 EFFECTIVENESS IN ACHIEVING STATED PURPOSE(S)

The wide range of approaches to tree preservation regulations make it difficult to draw generalizations 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.[25] Tree protection legislation has burgeoned at the local level, with hundreds of communities adopting tree conservation ordinances over the last decade.[26] There is also an increasing amount of variety among the types of tree ordinances adopted.[27] Many communities have found that these ordinances are a successful way to protect trees and help replant trees in areas where trees have been previously cut down.[28] The success of these programs is dependent upon the willingness of the community to enforce the tree protection ordinances and whether the regulation takes into account local characteristics.[29]

Regulations that are adopted without regard for the particular ecological, climatic, topographic, and other characteristics of the jurisdiction are unlikely to be successful. For that reason, local governments should be discouraged from "borrowing" regulations from dissimilar jurisdictions.[30] An ordinance that is helpful

[21] Duerksen/Richman at 105 – Appendix C.
[22] Duerksen/Richman at 105 – Appendix C. Selected Sample Definitions.
[23] Duerksen/Richman at 105 – Appendix C.
[24] Duerksen/Richman at 36.
[25] Thompson at 29.
[26] Chris Duerksen, et at., *Got Trees*, ZONING PRACTICE 1 (July 2006).
[27] *Id*.
[28] *Id*.
[29] *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 and 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).
[30] 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).

in maintaining native palm species in Florida may not be beneficial or workable in a New England town concerned for its native hardwoods.

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 more 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.[31] Tampa, Florida, is cited as an example of a community that uses a point system to target trees with desirable characteristics depending on species.[32]

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.[33]

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.[34] Many ordinances exempt single residential lots or small-scale development and specific uses such as agricultural, forestry, and recreational uses.[35] One survey of California jurisdictions found that barely half of the jurisdictions surveyed thought that their ordinances were adequately enforced.[36]

A number of jurisdictions have gained attention for their particular approaches to tree conservation. The state of Maryland passed legislation in 1991 requiring forest preservation, and afforestation or reforestation on both private and public lands.[37] Maryland's Forest Conservation Act is credited with there being 120% more forest retained and planted than cleared for development during the first five years of the Act.[38] The New Jersey Pinelands Act requires all local governments in the district to enact ordinances that address vegetation protection during land clearance.[39] Lake County, Illinois, is known for its requirement that 70 percent of mature woodlands on a site be protected from development.[40] Freeport, Maine, is cited for an

[31] Cooper at 274.
[32] *See* Duerksen/Richman at 39.
[33] Duerksen/Richman at 41.
[34] Duerksen/Richman at 46; *see also* Donna London & Eileen Duffy, *Status of Tree Ordinances in South Carolina,* THE STROM THURMOND INSTITUTE (Oct. 2003), http://sti.clemson.edu/publications-mainmenu-38/publications-library/doc_details/150-status-of-tree-ordinances-in-south-carolina (discussing issues surrounding the effectiveness of various tree protection ordinances in South Carolina) .
[35] Duerksen/Richman at 46.
[36] Thompson et al at 29.
[37] Duerksen/Richman at 3. MD Code Ann. Natural Resources, Title 5, Subtitle 16.
[38] Galvin et al at 278.
[39] Duerksen/Richman at 3.
[40] Duerksen/Richman at 40-41.

unusual approach involving a limitation (7,500 square feet) on the size of any opening in the forest tree canopy.[41] Thousand Oaks, California requires a permit for any pruning of live oak trees.[42]

16.03 IMPACT ON PROPERTY VALUES

Proponents of tree preservation requirements defend them on economic grounds with the observation that trees can add considerably to the value of property.[43] Indeed, a large specimen tree has been said to be worth thousands of dollars.[44] 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.[45] Another study of 4,800 parcels surrounding a nature reserve in urbanized Riverside County, California, found that a decrease of 10 percent 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.[46] 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.[47] Prohibitions on the removal of specimen or historic trees could, at an extreme, have a drastic effect on property value by rendering it impossible, as a 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 takings claim against the jurisdiction.[48]

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.[49] 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.[50]

The dissenting justice, Justice Carley, argued that the ordinance should be reviewable under the U.S. Supreme Court's takings test for discretionary exactions as articulated by the U.S. Supreme Court in the *Dolan* case.[51] 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

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[41] Duerksen/Richman at 41.
[42] Duerksen/Richman at 44.
[43] City of Crystal Lake, Illinois, *Tree Preservation*, http://www.crystallake.org/residents/tree-preservation (claiming that tree preservation increases property values by 15%).
[44] 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.").
[45] 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).
[46] Duerksen, et al. at 2.
[47] Brian W. Blaesser, *Discretionary Land Use Controls: Avoiding Invitations to Abuse of Discretion* (Thomson-Reuters: 2017) §1:27.
[48] *Id.*
[49] *Greater Atlanta Homebuilders Association v. DeKalb County*, 588 S.E.2d 694 (Ga. 2003).
[50] *Greater Atlanta*, 588 S.E.2d at 698.
[51] *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

must be an individualized determination that the required exaction is roughly proportional to the nature and extent of the impact of the proposed development."[52]

Justice Carley pointed out that the majority had given scant attention to the actual provisions of the tree ordinance. He provided a brief and instructive summary of the ordinance, starting with the ordinance's broad statements of purpose, including:

> the protection of the public health, safety, general welfare, and aesthetics of the County and all of its citizens; the promotion of several environmental benefits for the citizens and their communities; the protection of specimen and historical trees; the prevention of the loss of mature trees and the ensuring of appropriate replanting; and, the enhancement of the quality of life in the County.[53]

He also noted that the ordinance, subject to certain exemptions, conditioned the issuance of every building or land development permit in the county on an applicant's submission of a tree survey and a tree protection plan for approval by the County Arborist.[54]

Justice Carley 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.[55] In his view, the ordinance also 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.[56] The ordinance in question did not have different requirements based on the type of development or the area in which the development would occur.[57] These problems were compounded by the ordinance's lack of standards to guide its implementation.[58] While Justice Carley was the minority, his dissent provided 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 to a tree removal ordinance brought by the New Jersey Shore Builders Association.[59] The trial court found that the tree 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.[60] The New Jersey Supreme Court overturned the lower court decision (in part) and upheld the ordinance enacted by the Township of Jackson, on the grounds that the tree ordinance did not regulate the "use of land" and therefore it did not need to meet the standards of the state Municipal Land Use Law.[61] Instead, it merely had to meet a "rational basis" test to be valid under the town's general police power.[62] The court found that the Association failed to meet its burden to overcome the ordinance's presumption of validity, and observed that the Association, in challenging the

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[52] *Id.* at 386-391.
[53] *Greater Atlanta*, 588 S.E.2d at 699 (Justice Carley dissenting), citing to Code of DeKalb County § 14-39(a).
[54] *Id*. (Justice Carley dissenting), citing to Code of DeKalb County § 14-39(c), (e).
[55] *Greater Atlanta*, 588 S.E.2d at 702.
[56] *Id*. (Justice Carley dissenting).
[57] *Id*. (Justice Carley dissenting).
[58] *Id*. at 702-03
[59] *New Jersey Shore Builders Ass'n v. Township of Jackson*, 970 A.2d 992 (N.J. 2009).
[60] Blaesser at § 1.:27.
[61] *New Jersey Shore Builders Ass'n*, 970 A.2d at 1002.
[62] *Id.*

ordinance, "cannot see the forest for the trees."[63] Despite these findings, the court recognized that the ordinance remained in limbo because of the lower court's ruling that the ordinance was invalid based on vagueness, a ruling that was not challenged on appeal to the Supreme Court.[64]

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.[65] The Supreme Court, in *Koontz,*[66] confirmed that the *Nollan/Dolan* Dual Nexus Test applies not only to required dedications of land but also to monetary exactions.[67] No 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.[68] Further, the cases cited by the United States 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.[69] 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.

16.04 IMPACT ON DEVELOPMENT COSTS

Some common tree preservation regulations have a significant effect on development costs. Requirements for 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.[70] One study of California municipalities and counties found that developers paid for and planted 90 percent of the trees added to the urban landscape in 1997, and that this percentage represented an increase from 75 percent ten years earlier.[71] Viewed purely

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[63] *New Jersey Shore Builders Ass'n*, 970 A.2d at 1005.
[64] *New Jersey Shore Builders Ass'n*, 970 A.2d at 1006.
[65] In addition to the discussion that follows, *see Mira Mar Development Corp. v. City of Coppell, Texas*, 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." 421 S.W.3d at 96.
[66] *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013).
[67] *Id.*
[68] 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." Blaesser at § 1.38 (*quoting Parking Ass'n of Georgia, Inc. v. City of Atlanta, Ga.*, 515 U.S. 1116 (1995)).
[69] Blaesser at § 1.38. 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-ehrlich-v-culver-city/.
[70] One study found that complying with tree preservation requirements increased development costs by 5.5 percent. Kathleen L. Wolf, *City Trees and Property Values*, 16 ARBORIST NEWS 35 (Aug. 2007).
[71] Thompson et al., at 10.

from a development cost perspective, any prohibition or limitation on tree 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.

16.05 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 clear trees from a property to accommodate new buildings and paved surfaces. Plan review provisions can have the effect of reconfiguring a development on a site to avoid forested areas. Those provisions that require a certain percentage of tree canopy to be retained, or that require 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).

16.06 IMPACT ON HOUSING AFFORDABILITY

Tree preservation, reforestation or 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 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 more attractive 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.

16.07 SUMMARY OF PROS AND CONS

PROS:

- Proponents of tree preservation ordinances have identified a number of benefits to maintaining tree cover on public and private property, many of which accrue to society as a whole, 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 cutting trees on private properties represent a significant intrusion into what is traditionally considered to be a core attribute of private property ownership.

- Such ordinances typically complicate and add cost to the development process.

16.08 INCENTIVE-BASED ALTERNATIVES

Commentators and communities have been creative in seeking to alleviate the burden imposed by intrusive 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.[72]

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.[73] 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.[74]

[72] Duerksen/Richman at 27, 62.
[73] Duerksen/Richman at 61; see also RATHKOPF'S THE LAW OF ZONING AND PLANNING § 20:76 (4th ed. 2016).
[74] Duerksen/Richman at 62; *see also* RATHKOPF'S § 20:76.

SECTION 17: FORM-BASED CODES

17.01 PURPOSE AND KEY TERMS[1]

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 method of regulating development to achieve a specific urban form. Form-based codes create a predictable public realm by controlling physical form primarily, with a lesser focus on land use, through city or county regulations.[2]

Form-based codes look different than conventional zoning regulations[3] 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.[4] For example, uses are presented in the SmartCode[5] as "Building Function Standards." The SmartCode, now in Version 9.2, is a comprehensive model form-based code promulgated by Duany Plater-Zyberk & Company.[6] The SmartCode is increasingly being proposed in various forms, from Gulf Coast communities to the City of Miami.[7] As of February 2017, the Codes Study group has identified 654 codes that meet the criteria established by the Form-Based Codes Institute, 387 of which have already been adopted.[8] 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.

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[1] 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.

[2] Form-Based Codes Institute, *Form-Based Code Defined*, available at www.formbasedcodes.org/definition.html.

[3] Copies of Driehaus Award-winning form-based codes for 2016 and prior years can be found online at http://formbasedcodes.org/driehaus-award-recipients/.

[4] *See* Michael Lewyn, *The (Somewhat) False Hope of Comprehensive Planning*, 37 U. Haw. L. Rev. 39, 63 (Winter 2015).

[5] SmartCode Version 9.2, available at http://www.smartcodecentral.com. *See also*, Andres Duany, William Wright and Sandy Sorlien, SMARTCODE VERSION 9 AND MANUAL (New Urban News Publications, Inc., 2008).

[6] *See* Chad D. Emerson, THE SMARTCODE SOLUTION TO SPRAWL (Environmental Law Institute, 2007).

[7] *See* "Miami 21, Your City, Your Plan," at www.miami21.org.

[8] *See* "Form-Based Codes? You're not alone.," at http://www.placemakers.com/how-we-teach/codes-study/.

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.[9]

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 one adopted by the Town of Simsbury, Connecticut, are based on street frontage types. For each street type 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.[10] 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.[11] 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).

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.[12] For example, the Rural-Urban Transect Zone diagram developed by Duany Plater-Zyberk & Company (see image on next page) contains six "Transect Zones" (also called "T-Zones") that are used for the zoning of urban areas as well as natural lands.[13] The Rural-Urban Transect is intended to be as general as possible in order to serve model form-based codes like the SmartCode.[14]

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[9] This list of elements was derived from the following sources: DANIEL PAROLEK, KAREN PAROLEK AND 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*, available at www.formbasedcodes.org/definition.html; and Peter Katz, *Form First*, PLANNING (November 2004) at 17.

[10] Randall Arendt, *Simplify That Code!*, PLANNING (June 2015) at 2.

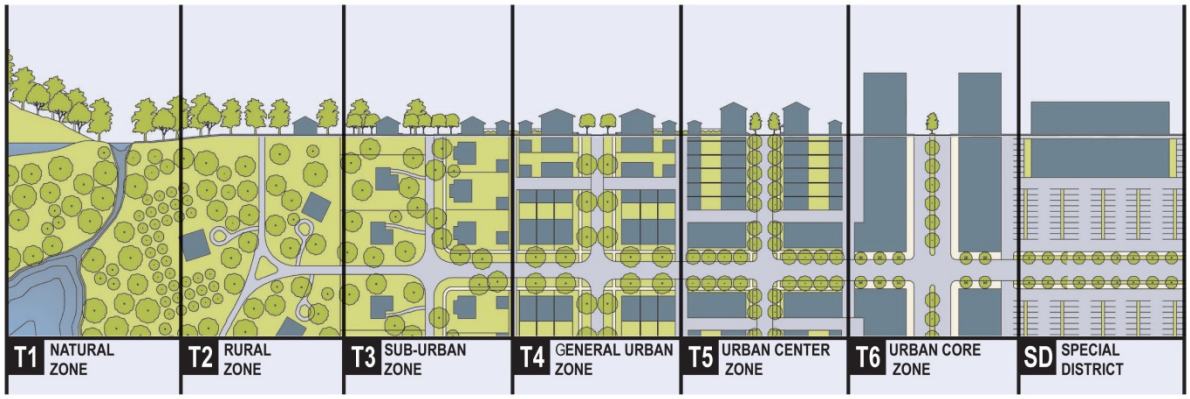
[11] *See id*.

[12] *See* Andres Duany and Emily Talen, *Making the Good Easy: The Smart Code Alternative*, 29 FORDHAM URB. L. J. 1445 (2002); Andres Duany and 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).

[13] *IMAGE LIBRARY: RURAL-URBAN TRANSECTS* (Center for Applied Transect Studies) (available online at https://transect.org/rural_img.html).

[14] *See id*.

Rural-Urban Transect (Duany Plater-Zyberk & Company)[15]



"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."[16] 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.

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

[15] *See id*. Note that the elements of each Transect Zone are drawn in section above and in plan below.
[16] Duany Plater-Zyberk & Co.: *The Lexicon of the New Urbanism* (Version 3.2: 2002) at A5.

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....[17]

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.[18]

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.[19]

A site-specific form-based code can be adopted through a planned unit development (PUD) process.[20] 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.[21] 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 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.[22]

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. In the context of form-based codes, this is largely accomplished through the charrette process.[23] 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

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[17] FORM-BASED CODES: A GUIDE FOR PLANNERS at 95-96.
[18] FORM-BASED CODES: A GUIDE FOR PLANNERS at 96-97
[19] FORM-BASED CODES: A GUIDE FOR PLANNERS at 97.
[20] *See* Section 11.
[21] *ULI Case Studies – Riverfront Park* (Urban Land Institute, Feb. 2014) at 1.
[22] *Id*. at 3-5.
[23] For further discussion of the charrette process, see Bill Lennertz, Aarin Lutzenhiser & Tamar Failor, *An Introduction to Charrettes*, PLANNING COMMISSIONERS JOURNAL (Summer 2008) (available online at http://plannersweb.com/wp-content/uploads/2012/07/262.pdf) and the PowerPoint presentation entitled "Meaningful Public Involvement: Charrettes for Sustainable Communities," prepared for NAR by the National Charrette Institute for NAR (available online at https://www.nar.realtor/smart_growth.nsf/docfiles/nar_charrettes_slides.pdf/$FILE/nar_charrettes_slides.pdf).

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.[24] 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.[25] 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.[26]

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.[27] 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 intended. A recent 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."[28] Since 2007 the Form-Based Codes Institute has annually awarded the Driehous Form-Based Code Award "for achievement in the writing and implementation of form-based codes."[29] 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."[30]

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.[31] 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

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[24] *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 and Seth D. Mennillo, FROM SPRAWL TO SUSTAINABILITY: SMART GROWTH, NEW URBANISM, GREEN DEVELOPMENT, AND RENEWABLE ENERGY (2010) at 179-181. *See also* Richard S. Geller, *The Legality of Form-Based Zoning Codes*, 26 J. LAND USE & ENVTL. L. 35 (2010).

[25] *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).

[26] *Id*. at 183.

[27] *See* FORM-BASED CODES: A GUIDE FOR PLANNERS at 7-9.

[28] *See* Donald L. Elliott, Matthew Goebel & Chad Meadows, *The Rules That Shape Urban Form* (American Planning Association, Planning Advisory Service Report No. 570) (Oct. 2012) at 113.

[29] *See* Dreihaus Award Recipients at http://formbasedcodes.org/driehaus-award-recipients/.

[30] *See id*.

[31] Randall Arendt, *Simplify That Code!*, PLANNING (June 2015) at 1.

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.

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.[32] The writing of regulations based on this exercise is also time-intensive and can be costly.[33] 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. 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.[34] While not specific to form-based codes, one study examining the economic return on New Urbanist developments[35] 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.[36]

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[32] The National Charrette Institute notes that, while the cost of a charrette depends largely on project scale and complexity, the "price for projects using charrettes, including all preparation and implementation, ranges from $100,000 to $500,000, depending on the geographic location." *See* NCI Frequently Asked Questions (available online at http://charretteinstitute.org/how-much-do-charrettes-cost/).

[33] *See* PATRICIA E. SALKIN, AMERICAN LAW OF ZONING § 23:3 (5th ed., 2016) (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").

[34] *See* Nicole Stelle Garnett, *Redeeming Transect Zoning?*, 78 BROOK. L. REV. 571, 579 (Winter 2013).

[35] 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.

[36] Orange County, Florida, Growth Mgmt. Dep't Planning Div., *The Economic Return on New Urbanism Study* (2008) at 21-23.

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.

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.[37]

(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.[38]

(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.[39]

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.[40]

(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.[41]

(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).[42]

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[37] *See* Donald L. Elliott, Matthew Goebel & Chad Meadows, *The Rules That Shape Urban Form* (American Planning Association, Planning Advisory Service Report No. 570) (Oct. 2012) at 94.
[38] *Id*. at
[39] *Id*.
[40] *Id*. at 100.
[41] *Id*. at 101.
[42] *Id.*

(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.[43]

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. Nevertheless, affordability options should be enhanced as form-based codes become more common.

17.07 SUMMARY OF 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.[44]
- 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.[45]

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.

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[43] *Id.*

[44] *See* Donald L. Elliott, Matthew Goebel & Chad Meadows, *The Rules That Shape Urban Form* (American Planning Association, Planning Advisory Service Report No. 570) (Oct. 2012) 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.").

[45] *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).

- 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.[46]

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.

[46] *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.

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**.[1] For purposes of the discussion in this section, the following definition of this term 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.[2]

Mixed Use Regulations are zoning, subdivision, and related land-use regulatory mechanisms, such as planned unit developments and design review 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.[3] Single-use (Euclidian) zoning emergence in the 1920s further limited mixed use development as a form of development, and mixed use was largely left to the downtowns of major cities. But prior to the influence of smart growth and New Urbanism in the 1990s on development patterns, 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 residential use, or was designed to truly integrate the uses — both being key concerns of smart growth and New Urbanism.[4] 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 "live-work-play" environments in which

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[1] 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." National Association of Industrial and Office Parks Foundation, Joseph S. Rabianski & J. Sherwood Clements, *Mixed Use Development: A Review of the Professional Literature*, (November 2007) (hereinafter "RABIANSKI"). The organizations endorsing this definition include the International Council of Shopping Centers, NAIOP – the Commercial Real Estate Development Association, 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).

[2] 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.

[3] *See* Arden H. Rathkopf, Daren A. Rathkopf, and Edward H. Ziegler, Jr., 2 RATHKOPF'S THE LAW OF ZONING AND PLANNING § 10:1 (4th ed. 2013).

[4] *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, at pp. 1-2 (2012).

people can experience these three essential elements of daily life in closer proximity than has been possible within conventional land use patterns.[5] 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,[6] 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. 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.[7] 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.[8] 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.[9] 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.[10]

The increase in mixed use development since the 1990s has had impacts across all forms of real estate development, starting with residential development, but now particularly in the retail sector, as well as in other sectors of the real estate industry.[11] 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.[12] The "2013 Community Preference Survey" conducted by NAR indicated that 60% of Americans prefer to live in communities with a mix of uses, including residential, commercial, and office, within walking distance.[13] 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.[14] Corresponding to consumers' preferences, mixed housing types and mixed uses are becoming more

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[5] Charles C. Bohl, "The Return of the Town Center," *Wharton Real Estate Review*, Vol. VII (1), Spring 2003: 54-70, at 62 (hereinafter *Bohl*).

[6] *Hackbelt 27 Partners, L.P. v. City of Coppell*, 661 F. App'x 843 (5th Cir. 2016).

[7] *Id.* at 845.

[8] *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.

[9] *Volunteers of America-Minnesota v. City of Saint Paul*, 2015 WL 234288 * 3 (Wisc. App. Ct. 2015).

[10] *Id.*

[11] 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*).

[12] *See, e.g.*, Restore, *Commercial and Mixed Use Development Trends in the Rocky Mountain West*, at p. 3 (June 2014), http://communitybuilders.net/wp-content/uploads/2014/06/RESTORE-Report.pdf.

[13] NAR 2013 Community Preference Survey available at https://www.nar.realtor/sites/default/files/reports/2013/2013-community-preference-press-release.pdf.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.

[14] Belden Russonello Strategists, LLC for the Urban Land Institute, *Americans' Views on Their Communities, Housing, and Transportation*, at p. 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).

prevalent.[15] In the retail sector, a key component of mixed use, the change has been widespread and relatively swift. Today, there are only a small handful of enclosed malls 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.[16] Much of the discussion in the retail marketplace is about greyfield development, "de-malling," lifestyle centers, downtown revitalization or retrofits, adding residential spaces within, on top of, and adjacent to retail centers, and the retail components of Mixed Use Developments.[17]

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.[18]

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 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 very 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

[15] "ICSC Report: Marcus & Millichap Weighs In On National Retail Trends," CoStar Group, 2007 (hereinafter *Marcus & Millichap Report*); *NUN 2007*; *Bohl* at 60.
[16] 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*.
[17] *Marcus & Millichap Report*; *Bohl* at 62-63; David Myers, Mixed Use in an Overretailed Landscape, URBANLAND (July 1, 2013), http://urbanland.uli.org/planning-design/mixed use-in-an-overretailed-landscape/.
[18] Bennett, Nicole. " Partnerships and Financing are Critical to Mixed-use Development", Community Dividend, November, 1999.

other non-industrial uses at a time when populations were more concentrated in urban areas.[19] 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.[20] 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.[21]

The Standard City Planning Enabling Act ("SCPEA")[22] 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.[23] For example, in Section 14 of the SCPEA, 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."[24] 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. The structure of a state's laws generally falls into one of two categories: (1) Dillon's Rule states; (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, and that are essential to the accomplishment of the declared objects and purposes of the local government, and not simply convenient.[25] In states where the courts have held that Dillon's Rule applies, the argument is made that

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[19] Advisory Committee on Zoning, U.S. Department of Commerce, *A Standard State Zoning Enabling Act*, revised edition (Washington, D.C. U.S. GPO, 1926).

[20] *See* McQuillin, *The Law of Municipal Corporations* (West 2006) at § 25.04 (hereinafter *McQuillin*).

[21] *See* SSZEA, §§ 1 and 2; Robert J. Sitkowski and Brian W. Ohm, "Form-Based Land Development Regulations," THE URBAN LAWYER, Vol. 38, No. 1, 163, 167 (Winter 2006) (hereinafter *Sitkowski & Ohm*).

[22] Advisory Committee on Planning Zoning, U.S. Department of Commerce, *A Standard City Planning Enabling Act* (Washington, D.C. U.S. GPO, 1928).

[23] *See Growing Smart Legislative Guidebook*, American Planning Association, Stuart Meck, FAICP, General Editor (2002) (hereinafter *Growing Smart*) at 8-58 to 8-59.

[24] In the commentary to the last clause, regarding minimum width and area of lots, the SCPEA's authors noted that

> One of the fundamental purposes of platting regulations, in addition to insuring a proper street plan, is also to insure 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.

[25] *See* McQuillin at 4:11.

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.[26]

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.[27] 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.[28] What that home rule authorization encompasses will usually be a matter of state court interpretation. In most of the home rule states, the courts have held that land use regulation is included in the grant of home rule, even though some may hold that land use controls are a matter of shared state and local concern.[29] Local governments in states that are home rule jurisdictions 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.

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 – 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 all substantially impact the achievement of the development densities and integrated design necessary to make Mixed Use Development function as intended.

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[26] *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).
[27] McQuillan, *The Law of Municipal Corporations*, § 3:43.
[28] *See e.g.* Michigan Home Rule City Act, Act 279 of 1909; *see also* McQuillan, *The Law of Municipal Corporations*, § 3:43 (citing to cases from Colorado, Louisiana, Michigan, and New York as having supplemental statutory home rule authority).
[29] Daniel R. Mandelker, *Land Use Law* (5th ed.) (LexisNexis: 2003) §§ 4.24-4.25.

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 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 taking into account 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 Institute of Transportation Engineers (ITE) *Trip Generation* report, which generally undervalues mixed use efficiencies due to internal, non-vehicle trips, thereby overestimating traffic impacts of a proposed development.[30]

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.[31] 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."[32]

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.

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.

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.[33]

[30] Transportation Research Board of the National Academies, Brian S. Bochner, et. al. *NCHRP Report 684: Enhancing Internal Trip Capture Estimation for Mixed Use Developments* (2011).
[31] *Dewey Beach Enterprises, Inc. v. Board of Adjustment of Town of Dewey Beach*, 1 A.3d 305 (Del. Supr. 2010).
[32] *Id*. at 309-310.
[33] Aric Jensen, *Understanding and Implementing Mixed-Use Development in the West: Case Studies from Bountiful, Utah*, The Western Planner (Jul. 1, 2015).

- 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.[34]
- 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.[35]

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.[36] 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.[37]

State Zoning and Subdivision Enabling Authority Modifications for Mixed Use Regulations

Louisiana: In 2016, Louisiana enacted legislation specifically authorizing municipalities to promote "smart growth development,"[38] 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.[39] This legislation appears to be a response to Louisiana municipalities reluctance to embrace smart growth principles.[40] 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:

> 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.[41]

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

[34] *Id.*
[35] *Id.*
[36] *See id.*
[37] *See id.*
[38] La. Rev. Stat. Ann. §§ 33:140:211 - 33:140:212.
[39] La. Rev. Stat. Ann. § 33:140:212.
[40] 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.
[41] Cal.Gov't. Code § 65302.4.

Development.[42] 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, at least 13 municipalities have adopted village district zoning in Connecticut since the inception of the Act.

Massachusetts: The Massachusetts Smart Growth Zoning Act,[43] 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."[44] 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."[45] 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.[46] In 2011, the Massachusetts Department of Housing and Community Development reported that 33 Smart Growth Zoning Overlay Districts have been adopted to date, covering a total of 1,436 acres and permitting 12,350 new units of housing as-of-right.[47]

Pennsylvania: Pennsylvania adopted its Traditional Neighborhood Development authorizing statute as a part of a major Smart Growth-related reform to its municipal government code in 2000.[48] The statute's second express purpose is to:

> encourage innovations in residential and nonresidential development and renewal which makes use of a mixed use form of development so that the growing demand for housing and other development may be met by greater variety in type, design and layout of dwellings and other buildings and structures and by the conservation and more efficient use of open space ancillary to said dwellings and uses;…[49]

Based on information provided by a local consulting firm, by 2010, at least 10 municipalities had adopted TND ordinances in Pennsylvania.[50] In addition, the Association for the New Urbanism in Pennsylvania lists 25 "traditional neighborhood development" projects in the state, either approved, completed, or in the planning or construction phases.[51]

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[42] Conn. Gen. Stat. § 8-2j.
[43] Codified at Mass. Gen. L. c. 40R.
[44] Mass. Gen. L. c. 40R, § 2.
[45] Mass. Gen. L. c. 40R, §§ 1, 6.
[46] Mass. Gen. L. c. 40R, § 9.
[47] *See* webpage at http://www.mass.gov/Ehed/docs/dhcd/cd/ch40r/40rdistricts.pdf.
[48] Penn. Stat. Title 53, Article VII-1, §§ 10701-A – 10709-A.
[49] Penn. Stat. Title 53, Article VII-1, § 10701-A(2).
[50] Thomas Comitta Associates, Inc., Land Planning and Landscape Architecture Blog: *10 Years of TND in Pennsylvania, Part I* (April 13, 2010), available at: https://web.archive.org/web/20150818131408/http://www.comitta.com/blog/.
[51] Pennsylvania: Association for the New Urbanism in Pennsylvania, List of Traditional Neighborhood Development Projects, https://web.archive.org/web/20150812021359/http://www.anupa.org/tndlist.php.

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.[52] 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 were required to enact a traditional neighborhood development ordinance within 11 months of the time the population of the city or village reaches at least 12,500. 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." The law also specifies that the ordinance is not required to be mapped. 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.[53] In 2008, Thousand Friends of Wisconsin reported that it has polled 50 of the affected cities and villages statewide and found that 25, or 50%, had complied with the mandate to adopt a TND ordinance, while another 16 were in the process of complying, and a further 9 had not taken any action to comply.[54]

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) mechanism(s) 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

[52] Wis. Stat. § 66034.
[53] This discussion of the Wisconsin law is based on Robert J. Sitkowski, et al., *Enabling Legislation for Traditional Neighborhood Development Regulations* (American Planning Association Commentary: October 2002), available at: http://www.planning.org/PEL/commentary/oct01comm.htm.
[54] Webpage: *Wisconsin's Traditional Neighborhood Development Ordinances: Progress or Procrastination?*, available at: http://www.1kfriends.org/new/tnd/intro.html.

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.[55] (See Section 13)

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,[56] so other approaches are often used. One approach is to use the *planned unit development* (PUD*)* technique. 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.[57]

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, upon application by the property owner or developer acting on behalf of the owner. The map amendment is adopted by the local legislative body only if the floating zone amendment application satisfies the mixed use 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.[58]

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[55] Massachusetts Executive Office of Energy and Environmental Affairs, *A Model Ordinance for a Traditional Neighborhood Development*, available at: http://www.mass.gov/envir/smart_growth_toolkit/bylaws/TND-Bylaw.pdf.

[56] *See e.g.*, Matthew Enright, *Opposition to Mixed-Use Zoning Continues*, The Independent, http://www.independentri.com/independents/ind/narragansett/article_e786abe4-9416-5194-9ce3-84dbb081619e.html (discussing local opposition to proposed zoning changes to designate 19 parcels for mixed-use development).

[57] *See* Section 11 of this *Fact Book* (Cluster Zoning and Planned Unit Development).

[58] 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.

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 and scope, should there be a minimum percentage of other uses, such as ten percent (10%) office or twenty percent (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 consideration and debate within the particular community in light of local market considerations before deciding whether to make such provisions mandatory or permissive.

Local Mixed Use Regulations: Zoning and Subdivision Ordinance Modifications

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 City-wide 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." A new residential district – entitled the Walkable Residential District – was added as an option for designation of new growth areas in the City. 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. In addition, a maximum block perimeter of 2,000 feet was adopted. Omaha Subdivision Code changes included new horizontal curve radii standards for certain street types and new street yard and sidewalk standards to improve pedestrian connectivity.[59]

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.[60] In order to address issues subsequent to the code's adoption, the City also modified certain building code requirements that were inconsistent with mixed use, such as certain plumbing codes and restrictions on living above workspace.[61] Developers report that mixed use projects in Omaha, including in the central business district, are on the rise.[62] In early 2017 alone, Omaha has seen proposals for an 8-acre mixed use development in downtown and a 180 acre office, retail, residential, and green space development in western Omaha.[63]

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[59] For more information, *see Omaha by Design Urban Design Element Implementation Measures*, available at: http://www.omahabydesign.org/projects/urban-design-element/.
[60] Conversation with Connie Spellman, Omaha by Design, September 15, 2011.
[61] *Id.*
[62] Seldin Company, Omaha Area Mixed Use Property Development on the Rise (Sept. 5, 2013), http://www.seldin.com/blog/omaha-area-mixed use-property-development-on-the-rise/.
[63] *See* Roseann Moring, *Omaha Civic Leaders Plan $125 Million Mixed-Use Development on Lot Across From CenturyLink Center*, Omaha World-Herald, (Jan. 16, 2017); Christopher Burbach, *Proposed $1.2 Billion Mixed-Use Development Would be 'Unique" in West Omaha, Planner Says*, Omaha World-Herald (Mar. 6, 2017).

Farmers Branch, Texas (New Form-Based Code): The zoning for the area of Farmers Branch, Texas, adjacent to a proposed light-rail station on the Dallas Area system, adopted in 2005, follows the basic tenets of form-based codes, including a regulating plan, comprehensive regulation of building envelopes based on street frontages, streetscapes, and building design features.[64] This code is also emblematic of the particular way in which form-based codes address vertical use mixing. For example, the building envelope standards for "Shopfront Colonnade Sites" require retail uses on the ground floor of multi-story buildings while upper stories are to house either commercial or residential uses.[65]

Effectiveness: All of the critical elements of successful Mixed Use Regulations appear to be present and the local real estate market appears to be able to support the required first floor retail space. A 300,000 square foot development, comprised of 257 dwelling units on upper floors and up to 10,000 square feet of ground floor retail was completed in 2015 in this zoning area. The city continues to hold this area out as an important area for continued mixed use development in Farmers Branch.[66]

Optional Mixed Use: Planned Unit Developments, Overlays, Floating Zones:

Indianapolis, Indiana (Floating Zone): In 2016, the City of 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.[67] Zone MU-1 is intended for high-rise buildings on arterial streets with office and residential uses intermixed. Zone MU-2 is intended to accommodate neighborhood mixed use commercial and residential developments to provide office, retail, personal service, and residential uses. Zone MU-3 is intended to accommodate moderate and high-density residential with a variety of commercial uses in a village-type development. And, MU-4 is intended for transit-oriented development. 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 development existed; instead it has allowed the market to dictate what areas are appropriate for mixed use development and re-zone accordingly.[68]

Effectiveness: Mixed Use projects were developed prior to the rezone but these projects typically required significant zoning relief in order to be completed.[69] 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.[70]

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

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[64] For more information, *see Farmers Branch Station Area Code*, available at: http://www.farmersbranch.info/Planning/stationareacode.html; *see also Form-based Code Station Area Ordinance 2800*, http://www.farmersbranch.info/DocumentCenter/View/594.

[65] *Farmers Branch Station Area Code*, Chapter III, Section B.

[66] DART News Release, *Rail-Connected Development Driving Regional Growth* (Oct. 25, 2016) (quoting Mayor Bob Phelps), available at http://www.dart.org/news/news.asp?ID=1271.

[67] *See* City of Indianapolis Consolidated Zoning/Subdivision Ordinance, effective April 1, 2016, http://downtowndevelopment.com/pdf/Indpls%20Zoning%20Ord.pdf.

[68] Marilyn Odendahl, *Indy Rezone Creates Roadmap for City's Future*, The Indiana Lawyer (Apr. 6, 2016), http://www.theindianalawyer.com/indy-rezone-creates-roadmap-for-citys-future/PARAMS/article/39941.

[69] *Id.*

[70] *See generally* Metropolitan Development Commission Staff Reports, available http://www.indy.gov/eGov/City/DMD/Current/Reports/Pages/mdc_2016.aspx.

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."[71] The Mixed Use Overlay District was amended in 2013 to allow overlay over residential districts.[72]

Effectiveness: Although the City's zoning map indicates that only one, small area has been rezoned to a Mixed Use overlay,[73] it appears that several mixed use developments have been built in Lakewood since Chapter 1135 was adopted in 2004, 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. [74]

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. As with the Farmers Branch code, above, there are 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.[75] 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.[76] 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.[77]

Effectiveness: A 2009 EPA study reported that since the adoption of the code in 2003, over $1 billion in new development, in more than 10 separate projects, was in the design and/or construction stage.[78] In addition, since 2003, over 1,500 residential units and 220,000 square feet of commercial space have been added.[79] In 2014, the Congress for the New Urbanism awarded the Columbia Pike Initiative its 2014 "Best Corridor Plan."[80] Despite the cancellation of a planned streetcar line in late 2014 and continued difficulty

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[71] Codified Ordinances of City of Lakewood, Ohio, Section 1135.01.
[72] *See* Docket of Meeting of The Lakewood City Council (Oct. 7, 2013) and Codified Ordinances of City of Lakewood, Ohio, Section 1135.04.
[73] Note that the only Zoning Map appears to be last updated in June 2009. Zoning Map, City of Lakewood Ohio, Amended June, 2009, available at: https://onelakewood.maps.arcgis.com/apps/View/index.html?appid=e2132119e8d947c1ad1c0c3f0a856037.
[74] *See* John Benson, *Work Begins on Lakewood Center North's Mixed-Use Transformation*, Cleveland.com (Apr. 6, 2017); Emily Bamforth, *Mixed-Use Development Planned for Lakewood Hospital Site*, Cleveland.com (Feb. 6, 2017).
[75] *See* the webpage for the code and the broader Columbia Pike Revitalization Plan at http://projects.arlingtonva.us/projects/columbia-pike/.
[76] 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.
[77] *Id.*
[78] US EPA Smart Growth Implementation Assistance Program, *Implementing Living Streets: Ideas and Opportunities for the City and County of Denver*; Appendix C (April 2009).
[79] 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.
[80] *Id.*

in improving public transportation along the corridor,[81] mixed use developments continue to be constructed along the corridor.[82]

City of St. Louis Park, Minnesota (Mixed Use PUD): Division 9 of Article IV of the city's zoning ordinance is a conventional mixed use PUD provision, allowing Mixed Use Development of two varieties—commercial mixed use (CMX) or civic mixed use (CIVMX)—pursuant to conditions related to conformity with the city's comprehensive plan land use designations for the area, conformity with any redevelopment plan previously adopted, and conformity with the performance standards of the mixed use PUD. The performance 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.[83]

Effectiveness: The city's zoning map[84] indicates that at least six sites are currently zoned within the MX PUD designation, including the 125-acre Excelsior & Grand New Urbanist redevelopment of a former commercial greyfield site.[85] New development proposals continue to be brought for rezoning under the MX PUD designation.[86] 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.[87] 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.[88] 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 assume a 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.

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[81] Patricia Sullivan, *A Year Later, Plan to Improve Columbia Pike Transit is Still a Work in Progress*, The Washington Post (Nov. 15, 2015).
[82] *See Columbia Pike Redevelopment Projects*, https://batchgeo.com/map/2499d5bc7127d95344688474ba54e666.
[83] St. Louis Park Zoning Ordinance, § 36-266
[84] St. Louis Park Official Zoning Map, December 12, 2016, available at https://www.stlouispark.org/webfiles/file/maps/zoning_map.pdf.
[85] *See* project description webpage on the Congress for the New Urbanism website, available at : http://www.cnu.org/node/869.
[86] St. Louis, Minnesota, *Proposed Development*: *Former McGarvey Coffee Property/PLACE*, https://www.stlouispark.org/proposed-development.html.
[87] 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).
[88] *Id.*

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.[89] 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.[90] 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 author 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. This 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.

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 has seen 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.[91] 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.

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.[92] In addition, financing can be more difficult and expensive for mixed use development.[93]

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[89] Restore, Commercial and Mixed Use Development Trends in the Rocky Mountain West, at p. 9 (June 2014), http://communitybuilders.net/wp-content/uploads/2014/06/RESTORE-Report.pdf.

[90] 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.

[91] 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.").

[92] 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.

[93] RABIANSKI at 11; Regional Plan Association, *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.

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 that most cities that provide financial incentives and favorable zoning conditions will see some mixed use development.[94] 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 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.[95] However, at least some research shows that walkable communities, including those served by transit, tend to lack affordability, and one reason for this is that transit-oriented mixed use development typically occurs in desirable areas with higher land values.[96] 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.[97] 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.

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[94] 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.

[95] Ngai Pindell, Leg. Guide to Affordable Housing Dev., § 2.III, Growth Management and Affordable Housing: Risks and Opportunities, at 2 (2011).

[96] Emily Talen, *Prospects for Affordable, Walkable Neighborhoods, Report Prepared for the Oram Foundation*, at 5-6 (Mar. 2011), available at http://community-wealth.org/sites/clone.community-wealth.org/files/downloads/report-talen.pdf.

[97] 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 (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).

18.07 SUMMARY OF 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.[98]

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.

- Financing Mixed Use Developments, particularly with an affordable housing component, can be difficult, as the financial system tends to favor single-use projects.[99]

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.

[98] Restore, Commercial and Mixed Use Development Trends in the Rocky Mountain West, at p. 9 (June 2014), http://communitybuilders.net/wp-content/uploads/2014/06/RESTORE-Report.pdf.
[99] *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), http://www.cnu.org/sites/www.cnu.org/files/mixed_use_final_report_1-14-13.pdf.

SECTION 19: RENTAL RESTRICTIONS

19.01 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 a large number and variety of types, of rental restrictions around the country, and they are imposed to achieve a variety of policy goals, including preserving property values or community character; holding absentee landlords accountable for property maintenance or public health or safety issues;[1] fairer competition with licensed lodging (in the case of short-term rental restrictions); or addressing negative impacts on communities commonly associated with rentals, such as increased traffic, maintenance issues, increased noise levels, overcrowding, and nuisances.[2] Since the housing crisis that began in 2007, they also have been used to try to deter real estate speculation.[3] 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 properties used for short-term rentals that are therefore subject to taxation.[4] In fact, many communities, including San Francisco, Phoenix, and Portland, Oregon, have adopted laws that require online booking platforms (e.g., Airbnb, Homeway, and Flipkey) to collect and remit applicable lodging or tourism taxes on behalf of short-term rental hosts.[5] 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.[6]

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 and contact landlords when necessary such as in cases of complaints, emergencies, nuisances, or code violations. Having a licensing scheme in addition to requiring registration is more labor- and cost-intensive, as inspections are typically required as a means to ensure

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[1] *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.").

[2] *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").

[3] *Home Sweet Home?* at 44.

[4] *See* RESIDENTIAL RENTALS WHITE PAPER § 3.1(b).

[5] *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); Greggary 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).

[6] *See* Va. Code § 55-248.56; Arizona Rev. Stat § 42-5014.E.

that rental units meet minimum health and safety standards.[7] To obtain a permit, the owner typically must demonstrate compliance with safety regulations, maintenance codes, or building codes, which generally is determined through an inspection of the property. The inspection can include inspecting the building's exterior, lighting and ventilation, general conditions, electrical systems, and heating and fuel burning appliances.[8] Inspections may be required periodically, either annually or every few years. The local government may also require a registration or permit application fee, which may also be required annually, and may provide for fines for failing to properly register or obtain a license. Such fines are used to pay for the registration and licensing programs. For example, the city of Minneapolis fines property owners $250 for failing to obtain a rental license before renting their properties.[9]

Land use or zoning restrictions include requiring the owner 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; requiring owner occupancy of a house as a condition of a special land use approval, such as approval of a variance, conditional use permit, or special exception; or requiring 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.[10] Such land use restrictions have been struck down if they apply to the "user" rather than the use of the property,[11] or if they target a particular property or area too narrowly.[12] 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.[13] 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."[14]

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 for rentals;
- 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 short-term or vacation rentals outright or regulating them specifically, such as for how long they can be rented;
- parking restrictions;
- noise level limits;
- requiring postings on rental properties;
- emergency access requirements for rentals;
- mandatory lease provisions;
- local contact person requirements; and

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[7] 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.
[8] *Id.* at 55 (discussing Boulder, Colorado's rental inspection program).
[9] *Id.* at 51.
[10] *Home Sweet Home?* at 50.
[11] *See, e.g., CHR General, Inc. v. City of Newton*, 387 Mass. 351 (1982).
[12] *Home Sweet Home?* at 62.
[13] *Heef Realty and Investments, LLP v. City of Cedarburg Bd*, 361 Wis. 2d 185, 189 (Ct. App. 2015.
[14] *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)

- additional maintenance requirements for rental properties such as trash and recycling facility storage.[15]

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.[16] 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.[17]

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.[18] 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 Household Living 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.[19]

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."[20] Under the "Home Sharing and Vacation Rentals" ordinance, vacation rentals are banned citywide, while home-sharing is permitted, provided that the owner obtains a business license and pays a 14% hotel tax on all home sharing stays.[21]

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.

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[15] *See* RESIDENTIAL RENTALS WHITE PAPER §§ 3.1(d) (Quantitative Restrictions), 3.1(g) (Operational Restrictions).
[16] City of Hagerstown, MD, City Ordinance Chapter 197, §§ 197-2(M), 197-9.
[17] *See* City of Brooklyn Center (MN) Crime Free Housing Program (available online at http://www.cityofbrooklyncenter.org/index.aspx?NID=608); *see also* Allison Sloto, *Targeted Rental Licensing Programs: A Strategic Overview*, 48 URB. LAW. 639, 643-45 (Summer 2016).
[18] San Francisco Code § 41A.5(g)(1) (available online at http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/ordinances14/o0218-14.pdf).
[19] Portland, OR Code § 33.207.040(A)(1) (available online at http://www.portlandonline.com/auditor/index.cfm?c=28197&a=501886).
[20] *See generally* Santa Monica, CA Ordinance No. CSS (available online at http://www.smgov.net/departments/council/agendas/2015/20150512/s2015051207-A-1.htm); *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).
[21] *See id.*

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.[22] They also may be imposed as private restrictions, such as through development agreement restrictions or private covenants.[23] 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.[24] Rental restrictions may apply only to short-term rentals, only to long-term rentals, or to both short-term and long-term rentals.

19.02 EFFECTIVENESS IN ACHIEVING STATED PURPOSE(S)

Studies indicate that it is difficult to measure the effectiveness of rental restrictions, partly because goals, issues, and the types of rental restrictions in place vary significantly among communities.[25] 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."[26] It also concluded that the program would be expensive to implement.[27] Therefore, it recommended that Milwaukee not implement a rental licensing program.[28]

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, Aurora, Illinois has had a rental licensing program in effect since 1982 and reports that very few complaints related to rentals are now received by the city, and "[t]he overall building maintenance is drastically improved. Many unsafe and ghastly living conditions have been eliminated from those multi-unit buildings."[29] Although the rental licensing and inspection program requires significant resources and time to operate—initial inspections of buildings in poor condition can take hours—property values have increased, including for buildings once set to be demolished.[30]

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."[31]

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[22] *See, e.g.*, Code of East Lansing, MI, Chapter 50, Division 5 (Residential Rental Restriction Overlay Districts) (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).
[23] *See generally* Sklar & Edwards, *Florida Community Associations versus Airbnb and VRBO in Florida*, 91 FLA. B.J. 16 (Feb. 2017).
[24] *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.
[25] *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.
[26] Ian Crichton, Matt Rosenberg, and Joe Thompson, *Rental Unit Licensing: Applicability to Milwaukee, Milwaukee, Wisconsin*, City of Milwaukee Department of Neighborhood Services (2003).
[27] *Id.*
[28] *Id.*
[29] Albert Dennis, Twenty-Three Years of Rental Licensing – Observations, City of Aurora, IL (2005).
[30] *Id.*
[31] Heather K. Way et al., *An Analysis of Rental Property Registration in Austin*, at pp. 1-2 (July 2013).

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 public nuisances that are required to be addressed, such as failing to repair property in a dilapidated state; discarding trash or recyclable items on the property rather than properly disposing of them; property that is in disrepair such that it imposes 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 see whether the issues they seek to address through rental restrictions could be addressed by better enforcement of existing ordinances, such as nuisance, building, and maintenance codes, and parking and traffic regulations.[32] 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."[33] 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."[34]

Rental Restrictions and Property Rights

Certain rental restrictions—particularly those that prohibit rentals or restrict a property owner's right to rent they property—may face judicial scrutiny for infringing upon the constitutional rights of the property owner or tenants. The right to rent the private property on a temporary basis to another party has been recognized as a fundamental right of property ownership.[35] In a Connecticut case, the "right to rent" was recognized as one of the "sticks" in the bundle property rights:

> [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.[36]

[32] *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).
[33] 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).
[34] *Id.* at 5.
[35] *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").
[36] *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).

The right to rent has been underscored by courts in other states[37] and is echoed by a leading treatise, *Thompson on Real Property*, which observes that "the right to lease property is an incident of ownership."[38]

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."[39] 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.[40]

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."[41] 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."[42] Neither the form of one's interest in property (i.e., owner or 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.[43] Therefore, a rental restriction that is adopted as a zoning regulation violates this fundamental principle by attempting to regulate the users or occupants of residences (i.e., renters) rather than the use of land.

For example, a regulation that requires that a rental unit pass an inspection for compliance with applicable building or property maintenance codes, but does not require that the inspector obtain consent from the occupant or an administrative warrant would be vulnerable to challenge as a violation of the Fourth Amendment protection against unreasonable search and seizures.[44]

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[37] *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 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).

[38] THOMPSON ON REAL PROPERTY § 14.02(a) (2016, 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)).

[39] MCQUILLIN MUN CORP § 26:2 (Municipal Licenses and Permits – Definitions; nature of municipal license) (3d ed).

[40] *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).

[41] RATHKOPF'S THE LAW OF ZONING AND PLANNING § 2:16 (Zoning regulates the use of land—Identity or status of land users) (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).

[42] *See FGL & L Prop. Corp. v. City of Rye*, 485 N.E. 986, 989 (N.Y. 1985).

[43] *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).

[44] *See* RESIDENTIAL RENTALS WHITE PAPER § 8.6(e).

Rental restrictions may also raise concerns under the federal Fair Housing Act (the "FHA")[45] or state fair housing laws. The federal Fair Housing Act,[46] as amended by the Fair Housing Amendments Act[47] (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 race, color, religion, sex, familial status or national origin."[48] The FHA applies to state and local governments as well as direct providers of housing, such as landlords and real estate companies.[49] 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."[50] 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."[51] 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.[52]

Unintended Consequences

Finally, rental restrictions can have unintended consequences on communities and the housing market, including a substantial economic impact on property owners by burdening or limiting their ability to rent their properties. Short-term or vacation rental restrictions, or moratoria or prohibitions of rentals, for example, can result in significant lost rental income. For second homes of owners in vacation areas, such rental restrictions also decrease the usefulness of the house, as the owners' primary homes will be elsewhere.

19.03 IMPACT ON PROPERTY VALUES

Rental restrictions may increase some property values by increasing compliance with maintenance standards and building and nuisance codes, which improve the quality and appearance of rental buildings. Prospective buyers also know that the buildings meet certain minimum standards, including possibly 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

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[45] Fair Housing Act of 1968, 42 U.S.C. §§ 3591 et seq.
[46] Fair Housing Amendments Act of 1988, 42 U.S.C. § 3604.
[47] Fair Housing Amendments Act of 1988, 42 U.S.C. § 3604.
[48] 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; 42 U.S.C. § 3604(a).
[49] U.S. Department of Justice, The Fair Housing Act, http://www.justice.gov/crt/about/hce/housing_coverage.php.
[50] 42 U.S.C. § 3615.
[51] 42 U.S.C. § 3615.
[52] 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.

a positive effect on property values in that same area.[53] 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.[54]

However, rental restrictions can also negatively impact property values. For example, they may decrease the value of properties to the extent that would-be buyers would pay less for a home that is unable to be rented, or can be rented under onerous conditions, compared to other properties in the municipality or nearby communities that are not encumbered by such restrictions.[55] Further, if rental restrictions prevent rentals from being an alternative to foreclosure or short sale, they could negatively impact surrounding property values.[56] 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.[57]

19.04 IMPACT ON DEVELOPMENT COSTS

Rental restrictions may not impact costs of development as much as what types of development occurs, as discussed below. However, such restrictions could increase development costs to the extent that rentals could offset development costs, but are deterred or prohibited by the rental restrictions. By restricting or prohibiting rentals, rental restrictions could limit or eliminate this income stream.

19.05 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 deter new construction for rental units. 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 renting has increased sharply in the last several years in the wake of the housing crisis,[58] and much of the construction activity following the housing crisis has been in rental housing.[59] Rental restrictions may also restrict the types of housing units available or constructed, as rentals are often multi-family units, and single-family units are more often owner-occupied.[60] Rental restrictions could likewise limit mixed use developments, which often contain a multi-family rental

[53] Edward Coulson and Herman Li, *Measuring the External Benefits of Homeownership*, Working Paper at p. 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 p. 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.").

[54] *Id.* at 64.

[55] *Home Sweet Home?* at 53.

[56] 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.").

[57] *Id.* at 29.

[58] *America's Rental Housing: Evolving Markets and Needs*, Cambridge, Massachusetts: Joint Center for Housing Studies of Harvard University, 1-2 (2013) ("From 31 percent in 2004, the renter share of all US households climbed to 35 percent in 2012, bringing the total number to 43 million by early 2013.").

[59] *Id.* at 5, 23-24 (multifamily construction surged in 2011, increased another 38% in 2012, and increased another 31% in the first eight months of 2013).

[60] *Id.* at 3-4 (showing that 87% of owner-occupied housing is single-family, and 61% of renter-occupied housing is multi-family).

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.[61]

19.06 IMPACT ON HOUSING AFFORDABILITY

Rental restrictions can decrease the amount of available affordable housing by deterring rentals, making it more difficult for homeowners to rent their properties, or even prohibiting rentals, or capping the total number of rental units permitted in the municipality. By lowering the total available supply of rental units, rental restrictions tend to increase the cost of rentals and, therefore, lessen the number of rental units that are affordable. 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.[62] In addition, to the extent that landlords are required to pay for rental registration or licensing programs, or any additional costs associated with rental restrictions, they are likely to pass on such costs to renters through increased rent. Rental housing is concentrated in low-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.[63] These impacts are of serious concern, as the percentage of renters paying more than 30% of income for housing rose from 17.7 million in 2008 to 21.3 million in 2014.[64] Indeed, it is estimated that 11.4 million renters paid more than half of their income on housing in 2014.[65]

On the other hand, some communities have argued that short-term rental restrictions are necessary to preserve their inventory of affordable long-term housing.[66] 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.[67] 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.[68]

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[61] *Id.* ("Rental housing is more likely to be located in in urban areas, with central cities home to 43 percent of renters. But nearly as large a share (40 percent) of renters reside in the suburbs[.]"); *see also id.* at 16.
[62] Wendy Usrey, *The Rental Next Door: The Impact of Rental Proximity on Home Values* 28-30 (Fall 2012).
[63] *See America's Rental Housing: Evolving Markets and Needs*, Cambridge, Massachusetts: Joint Center for Housing Studies of Harvard University, 6 (2013).
[64] *See The State of the Nation's Housing* at 4 (Joint Center for Housing Studies of Harvard University, 2016).
[65] *See id.*
[66] *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).
[67] *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.
[68] *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).

In vacation destination communities, where land prices tend to be inflated and second homes are prevalent, long-term rental housing often is 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 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.[69]

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.

19.07 SUMMARY OF 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,[70] and can prevent minor code violations from developing into significant health or safety problems;[71]
- Rental property registrations can increase accountability for rental properties, particularly 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.[72]

CONS:

[69] Wiley Rogers, "Affordable Housing in the Rockies: Housing a Region in Transition at __ (2008 Colorado College State of the Rockies Report Card) (available online at https://www.coloradocollege.edu/dotAsset/293cae6f-8a9e-4a33-bff0-d37f17197b3b.pdf).
[70] *Home Sweet Home?* at 61.
[71] *See* Gary, IN, Rental Registration/Inspection Program Fact Sheet, http://www.gary.in.us/building-department/pdf/Rental_Registration_Fact_Sheet.pdf.
[72] *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.

- 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 that tenants who are 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.

19.08 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 supply of affordable housing as a result of rental restrictions.[73] 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.[74] 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.[75]

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.[76] For example, in Utah, where cities impose a fee or tax on rental housing based on the

[73] *See America's Rental Housing: Evolving Markets and Needs*, Cambridge, Massachusetts: Joint Center for Housing Studies of Harvard University, 7 (2013).
[74] *Id.* at 21; Alan Mallach, Meeting the Challenge of Distressed Property Investors in America's Neighborhoods, at p. 72 (2010), *available at* http://www.lisc.org/docs/publications/102010_Distressed_Property_Investors.pdf.
[75] *America's Rental Housing: Evolving Markets and Needs*, Cambridge, Massachusetts: Joint Center for Housing Studies of Harvard University, 31 (2013).
[76] Alan Mallach, Meeting the Challenge of Distressed Property Investors in America's Neighborhoods, at p. 68 (2010), *available at* http://www.instituteccd.org/uploads/iccd/documents/102010_distressed_property_investors.pdf.

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.[77]

[77] Utah Housing Coalition, "What is the 'Good Landlord Program'" (Apr. 19, 2011); Utah Code § 10-1-203.5.

SECTION 20: VACANT PROPERTY REGULATIONS

20.01 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.[1] From the local government perspective, VPRs are viewed as a tool for gathering information on vacant properties, monitoring vacant properties, and motivating owners to maintain vacant buildings and return them to productive use.[2]

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.[3] The key difference among these types of vacant property regulation is the event that triggers the registration requirement and the need 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.[4] In a hybrid VPR, the registration requirement can be triggered either by a period of vacancy or by a foreclosure action.[5]

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.[6] 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).[7] It has been estimated that of April 2016, more than 1,900 communities in the United States had adopted a VPR.[8]

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 solely on how long a property has

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[1] *See* David Morley, *Meeting the Vacant Property Challenge*, 27 ZONING PRACTICE No. 6 (June 2010, American Planning Association) (hereinafter "*Meeting the Vacant Property Challenge*").
[2] *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).
[3] *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 VRPOs*").
[4] *See New Data on VRPOs* at 260.
[5] *See id*.
[6] *See New Data on VRPOs* at 259.
[7] *See New Data on VRPOs* at 262.
[8] *See* Vacant Property Registration Database (available online at http://www.safeguardproperties.com/Resources/Vacant_Property_Registration.aspx).

been unoccupied. For example, under the "Vacant Structure Registration" ordinance of the city of Waukegan, 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 30 consecutive days."[9] 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.[10]

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.[11] 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 for which it charges a $500 fee.[12]

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."[13] 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 property.

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.[14]

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).[15] 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

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[9] Waukegan, IL Code of Ordinances § 6-405.
[10] *See* Evanston, IL Code of Ordinances § 4-16-3.
[11] *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).
[12] *See Strategies for Confronting VB Challenges* at 12.
[13] *See Strategies for Confronting VB Challenges* at 12.
[14] *See Strategies for Confronting VB Challenges* at 6.
[15] Joseph Schilling, *Code Enforcement and Community Stabilization: The Forgotten First Responders to Vacant and Foreclosed Homes*, 2 ALB. GOV'T L. REV. 101, 132 (2009).

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.[16] The Syracuse vacant property registration fee schedule is reproduced below.

Property Type	Year 1	Year 2	Year 3	Subsequent Years
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, 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.[17]

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.[18]

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.[19] 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.[20] Although land banks historically have

[16] *See* Syracuse (NY) Vacant Property Registry (available online at http://www.syrgov.net/VacantRegistry.aspx).
[17] *Id.*
[18] *See Meeting the Vacant Property Challenge* at 6.
[19] *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).
[20] *See Meeting the Vacant Property Challenge* at 6.

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.[21] 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.[22] Currently, only a handful of states have adopted enabling legislation for land banks.[23]

20.02 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."[24]

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.[25]

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 (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).[26] 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.[27] 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

[21] *See id*.
[22] *See id*. at 7.
[23] *See Revitalizing Foreclosed Properties with Land Banks*, U.S. Dept. Housing and Urban Development (Aug. 2009) (listing Ohio, Georgia, Indiana, Texas, Kentucky, and Maryland).
[24] *See* Attleboro, MA Revised Ordinances § 3-12.1.
[25] 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).
[26] *See id*. at 139.
[27] *See id*.

structures in Wilmington more than tripled from $6.8 million in 2005 to $20.8 million in 2007.[28] 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.[29]

The effectiveness of a VPR program depends, in part, on how well it is implemented and enforced by local government. 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.[30] 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.[31] 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.[32]

At least one court has ruled that VPRs are *not* enforceable against lenders that foreclose on federally-backed mortgages.[33] In 2013, the Federal Housing Finance Agency (the "FHFA") successfully challenged the City of Chicago's vacant property registration ordinance.[34] 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.[35] The court found that the registration fees were an unlawful tax on the federal government.[36] 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."[37] Generally speaking, any government action that intrudes on a person's "reasonable expectation of privacy" violates the Fourth Amendment.[38] Moreover, Fourth Amendment protections extend to commercial buildings as well as private homes,[39] regardless of whether or not 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.[40] A VPR that requires vacant properties to be inspected but lacks a provision requiring that the inspector obtain consent from the property

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[28] *See id*.
[29] See id. at 136-137.
[30] *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).
[31] 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).
[32] *See id.*
[33] 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)).
[34] *Id*.
[35] *Id.*
[36] *Id.*
[37] U.S. Const., amend. IV.
[38] WILLIAM E. RINGEL, SEARCHES AND SEIZURES ARRESTS AND CONFESSIONS § 2:2 (2011).
[39] *See* WESTLAW'S SEARCH AND SEIZURES CHECKLISTS § 21:1 (2012) (*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).
[40] *See* LAFAVE § 10.1.

owner or an administrative warrant prior to conducting the inspection therefore are vulnerable to challenge on Fourth Amendment grounds.

20.03 IMPACT ON PROPERTY VALUES

Studies have shown that vacant and abandoned properties have a negative impact on the value of surrounding properties.[41] 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.[42] 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.[43] 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.[44] The study 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.[45]

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.

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.[46] 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.[47] 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.

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[41] *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).

[42] *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).

[43] *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).

[44] *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)).

[45] *See id.*

[46] James J. Kelly, Jr. *A Continuum in Remedies: Reconnecting Vacant Houses to the Market*, 33 ST. LOUIS U. PUB. L. REV. 109, 117 (2013).

[47] *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).

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.[48] A decline in the value of REO properties may also have a negative effect on the values of adjacent occupied properties.[49] 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.[50]

20.04 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 investment, he or she is unlikely to make the repairs necessary to return a vacant building to productive use and occupancy.[51] 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.

20.05 IMPACT ON AMOUNT AND PATTERNS OF 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.

20.06 IMPACT ON HOUSING AFFORDABILITY

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[48] *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.

[49] *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.")

[50] J. Shane, *The Problem of Abandoned Buildings and Lots*, Center for Problem-Oriented Policing, (http://www.popcenter.org/problems/abandoned_buildings_and_lots/) ("As a crime attractor, abandoned buildings provide cover, concealment, and opportunities for motivated criminals.")

[51] *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).

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 2003 the Genesee County Land Bank (GCLB) has demolished nearly 1,000 unsafe and abandoned buildings and managed the rehabilitation of 90 affordable rental units and 80 single-family homes in Flint, Michigan.[52] 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.

20.07 SUMMARY OF 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.
- 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.[53]

20.08 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")

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[52] Joseph Schilling, *Code Enforcement and Community Stabilization: The Forgotten First Responders to Vacant and Foreclosed Homes*, 2 ALB. GOV'T L. REV. 101, 118 (2009).

[53] J. Shane, *The Problem of Abandoned Buildings and Lots*, Center for Problem-Oriented Policing, (http://www.popcenter.org/problems/abandoned_buildings_and_lots/) ("As a crime attractor, abandoned buildings provide cover, concealment, and opportunities for motivated criminals.")

available at no cost to local jurisdictions.[54] 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.[55] 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.[56]

[54] *See* "California Association of Code Enforcement Officers: Foreclosures Information" (available online at http://www.caceo.us/displaycommon.cfm?an=1&subarticlenbr=65).

[55] *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).

[56] *See id*.; *see also* Benton C. Martin, *Vacant Property Registration Ordinances*, 39 REAL ESTATE LAW J. 6, 34 (2010).

PART V: AFFORDABLE HOUSING

SECTION 21: INCLUSIONARY ZONING/HOUSING

21.01 PURPOSE AND KEY TERMS

Inclusionary zoning is a technique that originated in the 1970s to generate affordable housing via private development. But it 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.[1] When new development includes affordable housing, then development of cheaper, outlying land to achieve 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.[2]

The National Association of Homebuilders (NAHB) comments:

> In many high-growth markets, teachers, police officers, fire fighters and other public servants are commuting 50 to 100 miles to work each day because they can't find affordable housing to rent or buy close to their jobs…Growth boundaries, large-lot zoning and resistance to infill development are pushing people to satellite cities in search of homes that are affordable to middle income families.[3]

Underscoring the importance of this issue, the Fannie Mae Foundation captioned its November 2000 conference "Fair Growth: Connecting Sprawl, Growth Management and Social Equity."[4] Noting that smart growth has been primarily concerned with protecting open space, curbing sprawl and improving regional transportation, the Foundation advocated "Fair Growth" as a set of "land use practices that attempt to curb urban sprawl without endangering housing affordability and access to jobs for minorities and low income residents."[5]

The interrelationship of sprawl and affordable housing in high-growth areas is succinctly outlined in a 1999 study of the Basalt/Glenwood Springs, Colorado area:[6]

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[1] Angela Glover Blackwell, President of Oakland (CA) based Policy Link, states that while the smart growth movement aims to promote "the three "E"s of sustainable development … Environment, Economy and Equity" thus far the discussion has focused on the first two. (Quoted by Andrew LePage in the *Sacramento Bee*, 9/25/00, "Downside to Fixing Up Cities: 'Smart Growth' Policies May Hurt Poor Residents".

[2] "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.

[3] NAHB, *Growth Restrictions Push Cost of Housing Higher*, http://www.nahb.com/news/ growth%20htm (Oct. 17, 2000).

[4] For example, see one article that that grew out of the 2000 Fannie Mae conference, Matthew E. Kahn, *Does Sprawl Reduce the Black/White Housing Consumption Gap?* Fannie Mae Foundation Housing Policy Debate (2001), available at http://americandreamcoalition.org/housing/black-whitegap.pdf.

[5] Davis, Stacey (2000) "The Only 'Smart' Growth is Fair Growth," Housing Facts & Findings. Vol. 2, No. 4. pg. 2.

[6] HEALTHY MOUNTAIN COMMUNITIES REGIONAL AFFORDABLE HOUSING INITIATIVE FINAL REPORT 2000 (Excerpt available at http://www.stevevanderleest.com/rfv-yimby2/tools/Housing%20Strategies.pdf).

> [H]ousing prices have been escalating at a faster rate than income…rents have increased 48 percent faster than wages, and for-sale housing has increased roughly 2.5 times faster than wages…The fallout from these patterns can be numerous . . . [M]any households end up devoting a high proportion of their income to housing, or move to areas further down valley where housing is cheaper. Additional impacts…can include:
>
> - increased traffic
> - loss of community
> - delayed homeownership
> - overcrowding
> - high rates of households with unrelated roommates (to split housing costs)
> - inability of employers to fill jobs
> - turnover in the population due to a disadvantageous housing situation relative to other communities.

Inclusionary zoning seeks to respond to these problems by "requiring housing developers to dedicate a certain percentage of their constructed projects to low or moderate income housing."[7] This technique may be applied to both rental and owned units, and single and multi-family housing.[8] 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 22, "refers to the practice of requiring developers to contribute either in-kind or by payment to the off-site construction of low or moderate income housing or other 'needs' of the community."[9] From an historical perspective, as one authority has noted, while "the initial impetus for inclusionary housing programs was clearly suburban in nature, [by the '80s] . . . developments in America's central cities . . . created a new form of inclusionary program, grounded in the linkage between downtown office and commercial development and the rise and fall of surrounding urban residential neighborhoods."[10] 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 an 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;

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[7] American Bar Association, Theodore Taub, *Exactions, Linkages and Regulatory Takings: The Developer's Perspective* in Frielich & Bushek, EXACTIONS, IMPACT FEES AND DEDICATIONS: SHAPING LAND USE DEVELOPMENT AND FUNDING INFRASTRUCTURE IN THE DOLAN ERA 125-163 (1995).
[8] Municipal Research and Services Center ("MRSC"), p. 12, "Affordable Housing Techniques – A Primer for Local Government Officials" March 1992 Report No. 22, https://web.archive.org/web/20140719190207/http://www.mrsc.org/Publications/textaht.aspx.
[9] Taub, at 125.
[10] Alan Mallach, *Inclusionary Housing Programs, Policies and Practices*, 179 (Rutgers 1984); and, generally, Dwight Merriam, et al., editors, *Inclusionary Zoning Moves Downtown* (Chicago: American Planning Association Planners Press, 1985).

3. Sometimes, achieving economic integration by making affordable units indistinguishable from market rate units and locating them within market-rate developments.

Inclusionary zoning programs typically include the following elements:

- 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);
- Income limits for eligibility of buyers or renters;
- A distribution mechanism (lottery or other method);
- Pricing criteria for the affordable units;
- A period of control over resale price on rental increase;
- Building standards, including how affordable units are designed and located.[11]

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.[12] 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.[13] 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 downpayment)."[14] Cost information also includes estimated property taxes and property insurance, but does not include mortgage insurance.[15] Another common standard is that a family pay no more than 30% of its annual income.[16]

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

[11] Joyce Siegel, *Inclusionary Zoning Around the Country* (Baltimore, MD: Innovative Housing Institute, 2 March 2000) (Siegel).
[12] Town of Cary, North Carolina, *2020 Affordable Housing Plan, available at* http://www.townofcary.org/home/showdocument?id=676
[13] What is the NAHB-Wells Fargo Housing Opportunity Index?, https://www.nahb.org/en/research/housing-economics/housing-indexes/housing-opportunity-index.aspx (Aug. 1, 2007); *see also* National Association of Home Builders, *Housing Affordability Holds Steady in Fourth Quarter* (Feb. 20, 2014), https://web.archive.org/web/20141227015858/http://www.nahb.org/news_details.aspx?sectionID=135&newsID=16692 (" In all, 64.7 percent of new and existing homes sold between the beginning of October and end of December were affordable to families earning the U.S. median income of $64,400.").
[14] What is the NAHB-Wells Fargo Housing Opportunity Index?
[15] *Id.*
[16] 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.

for the provision of specified amenities, which now encompass infill or mixed use development and transit oriented development, as well as affordable housing.[17]

Inclusionary Zoning: An ordinance that either ties development approval to, or creates regulatory incentives for, the provision of low and moderate income housing as part of a proposed market rate development.[18]

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.[19] In another document,[20] 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
>
> Extremely Low – less than 30% of area median income

Generally speaking, inclusionary zoning has not been used as a tool for creating housing for households at the extremely low income level.

21.02 EFFECTIVENESS IN ACHIEVING STATED PURPOSE(S)

The key elements for an effective inclusionary zoning program are:

- Required Affordability Percentage: "The ordinance must establish a reasonable and non-excessive goal for the development of low and moderate income housing and must establish other land-use standards which do not interfere with the achievement of that goal."[21] Non-excessive would mean that no more than 5 to 15 percent of the units would be required to be affordable. For example, a statewide study of California municipalities' and counties' experience with inclusionary zoning requirements found that the mean percentage of affordable housing required in both rental and for-sale developments was 13%, while the modal level was 10%.[22]

- 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

[17] Mary Morris, "Using Zoning Bonuses for Smart Growth and Development," *Zoning News* at 1-4, (American Planning Association, July 2000).
[18] S. Mark White, *Affordable Housing: Pro-Active and Reactive Planning Strategies, Washington, DC*: 1992 PAS Report 441, American Planning Association, cited by Mallach, *supra*, note 10.
[19] U.S. Department of Housing and Urban Development, "FY 2012 Income Limits," available at https://web.archive.org/web/20170113102611/https://www.huduser.gov/portal/datasets/il/il12/index.html.
[20] HUD Consolidated Plan Training Manual 2000, Housing and Homeless Needs Assessment, at 2-2. These income levels apply to all categories of housing. Updated HUD-established income limits by area of the country are available at: https://web.archive.org/web/20160516123325/https://www.huduser.gov/portal/datasets/il/il14/index.html.
[21] Mallach at 107. *See* Non-Profit Housing Association of Northern California and the Coalition for Rural Housing, *Inclusionary Housing in California: 30 Years of Innovation* (San Francisco, CA: 2003) at iii (hereinafter, *IZ in California*).
[22] *IZ in California* at iii.

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 80% to 120% of area median income or "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.[23]

- 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. 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: Up-zonings and other land-use 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. In this regard, it has been found that "income mix works or does not work according to whether the mix occurs in a well-designed, well-constructed, and well-managed development. These latter factors are the crucial determinants of satisfaction. Income mix and racial mix are, in themselves, of no particular relevance."[24]

- Applicability Based on Project Size: An appropriate threshold for development size subject to an inclusionary requirement should be established. In California, it has typically been 5 to 25 units.[25] In Montgomery County, Maryland, the threshold is 50 units or more.[26]

- Affordability Control Period: The time period for retaining affordable units varies widely. In Montgomery County, Maryland, there is a ten-year control period on for-sale units and 20 years for rental units.[27] To maintain affordability levels, in 2012, Montgomery County adopted a housing policy that includes the goal of net loss of income-restricted affordable housing.[28] In California,

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[23] In some cases, the ordinance may provide the developer with a choice of providing fewer affordable units but at a higher level of affordability or more affordable units at a lower level of affordability. *See IZ in California* at 10.
[24] Mallach at 100, citing Ryan William, "All in Together, An Evaluation of Mixed-income Multi-family Housing."
[25] Siegel at 2. Some communities have eliminated the threshold requirement altogether. For example, the City of Carlsbad, California, applies the requirement to all residential projects, regardless of size, and collects a mandatory in-lieu fee for projects of six (6) or fewer units. *See* Institute for Local Self Government, *California Inclusionary Housing Reader* (Sacramento, CA: 2003) at 21.
[26] Business and Professional People in the Public Interest, *Opening the Door to Inclusionary Housing* (Chicago, IL: 2003) (*BPI Study*) at 90.
[27] Siegel at 6.
[28] Montgomery County, Maryland, Housing Policy, http://montgomerycountymd.gov/dhca/director/housingpolicy.html; and Edward J. Sullivan & Karin Power, *Coming Affordable Housing Challenges for Municipalities After the Great Recession*, 21 J. Affordable Housing & Community Dev. L. 297, 309 (2013).

the mean control period for rental housing is 42 years, while the mean control period for homeownership housing is 34 years.[29]

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.[30] 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.[31] Several jurisdictions where inclusionary housing programs have succeeded or have fallen short of expectations in producing affordable housing are discussed below.

California: By 2013, 125 municipalities in California had adopted inclusionary programs.[32] Although most programs in California are mandatory, there is significant local variation "in terms of targeted income groups and the size of projects that were subject to the affordability requirements."[33] For example, Davis, California requires a 25% to 35% affordable set aside—targeted at 80% or less of the area median income—for developments with five or more rental units. Between the late 1980s and 2014, the community produced approximately 2,000 affordable units.[34] San Mateo, California requires a 10% to 15% mandatory set aside for developments with five or more units, with affordability restrictions for rental units of 50% to 80% of the area median income. Between 1992 and 2014, San Mateo produced 196 affordable rental units and 129 for-sale homes.[35]

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 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 have 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.[36]

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."[37]

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[29] *IZ in California* at iv.
[30] Robert Hickey, Lisa Sturtevant, and Emily Thaden, *Achieving Lasting Affordability through Inclusionary Housing*, at 3 (Lincoln Institute of Land Policy, 2014) (*hereinafter* Hickey, et al.).
[31] *Id.* at 4.
[32] Urban Land Use Institute, *The Economics of Inclusionary Development*, p. 6 (2016) (*hereinafter* ULI Report); *see also* David Callies, Leigh Anne King, AICP, James C. Nicholas, Cecily Talbert Barclay, *Workforce and Affordable Housing: Local Government Inclusionary Housing Programs and the Courts*, 63 Planning & Environmental Law No. 10 (2011). ("nearly one-third of California jurisdictions have inclusionary programs").
[33] Hickey, et al. at 3.
[34] *Id.* at 47.
[35] *Id.* at 55.
[36] 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.
[37] North Carolina Low Income Housing Coalition, *Fair Share Housing: New Jersey*.

The New Jersey Council on Affordable Housing ("COAH") is the executive agency that was tasked with calculating each community's "fair share" of affordable development required under the *Mount Laurel* decisions.[38] Between 1987 and 2011, COAH oversaw the production of 60,242 new units and the rehabilitation of 14,854 units.[39] The last "fair share" allocations released by COAH, however, were only valid until 1999.[40] In 2015, the New Jersey Supreme Court ruled that, given the 16-year delay in releasing new fair share numbers, COAH did not timely promulgate regulations required by the state's Fair Housing Act.[41] The Court's decision authorized trial courts to hear cases regarding municipalities' fair share obligations and "established a declaratory judgment proceeding for cities seeking to establish that they were in compliance with their *Mt. Laurel* obligations…."[42] At the beginning of 2017, the New Jersey Supreme Court ruled on a consolidated declaratory judgment action by 13 New Jersey municipalities.[43] The Court held that municipalities must not only create realistic opportunities for the creation of affordable housing in the future, but must also address the need for low- and moderate-income housing that arose during the 16-year gap period without COAH allocations.[44] Some expect the ruling to create tens of thousands of new affordable units in New Jersey over the next decade.[45]

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 is modeled on Maryland's MPDU System and has, between 1990 and 2003, produced over 2,000 units.[46] By 2014, the total was 2,722 units.[47] Between 2000 and 2013, Arlington County has produced more than 3,400 committed affordable units, which is 15% of the County's total rental stock.[48] It has also 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.[49] In Loudoun County, an Affordable Dwelling Unit program begun in 1993 had produced 509 affordable units serving households earning at 50-80% of AMI through June 2001.[50]

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[38] Frizell & Cuchiaro, § 21.25, *The Compliance Calculation*, 36 N.J. PRAC., LAND USE LAW § 21.25 (2016, 3d ed.).
[39] New Jersey Council on Affordable Housing (COAH) Reports (3/1/11) at https://web.archive.org/web/20170429012543/http://www.nj.gov/dca/services/lps/hss/transinfo/reports/units.pdf.
[40] *Id.*
[41] *In re Adoption of N.J.A.C. 5:96 & 5:97 ex rel. New Jersey Council on Affordable Hous.*, 221 N.J. 1, 6, 110 A.3d 31, 34 (2015).
[42] Stephen R. Miller, Land Use Institute, *Update on Planning, Land Use, and Eminent Domain Decisions*, p. 3 (July, 2015).
[43] *In re Declaratory Judgment Actions Filed By Various Municipalities*, 2017 WL 192895 (2017).
[44] *Id.*
[45] Salvador Rizzo, *N.J. Supreme Court: Towns Must Have Affordable Housing*, State House Bueau, Northjersey.com (Jan. 18, 2017), available at http://www.northjersey.com/story/news/new-jersey/2017/01/18/nj-supreme-court-ramps-up-towns-affordable-housing-obligations/96712760/.
[46] 3 BPI Study at 90; David Rusk, "Overcoming America's Core Problem: Concentrated Poverty," in Cities in the 21st Century, Urban Land Institute, 2000, Washington, DC, at 18. ("Rusk").
[47] Hickey, et al. at 3.
[48] Tools for Affordable Housing in Arlington (2013), https://arlingtonva.s3.dualstack.us-east-1.amazonaws.com/wp-content/uploads/sites/15/2013/11/Fact-Sheet_Housing-Budget-Tools.pdf.
[49] 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.
[50] Karen D. Brown, Expanding Affordable Housing Through Inclusionary Zoning: Lessons from the Washington Metropolitan Area, Report prepared for the Brookings Institute (Washington, DC: 2001) at 9.

Florida: Inclusionary housing programs in Florida counties and municipalities suffered significantly during the great recession.[51] 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.[52] 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.[53] Since 2015, Jupiter found that developers were more willing to pay the fee in-lieu than develop affordable units, which has not lead to the actual production of units.[54] City staff has now recommended ordinance amendments to eliminate the in-lieu fee option and require developers to construct a comparable or better unit on or offsite in order to meet their inclusionary obligations.[55] Whether these modifications will be effective in producing affordable units is yet to be seen.

Colorado: Boulder's mandatory inclusionary housing program, adopted in 2000, followed 15 years of a voluntary inclusionary program that produced few results. Under the new program, new residential projects must provide at least 20% of their units as permanently affordable. The mandatory program has helped the City produce 3,319 permanently affordable units in the first sixteen years of its operation.[56]

Massachusetts: The City of Boston's Inclusionary Development Policy, 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 10% on-site affordable housing set-aside for all residential development projects of 10 or more units seeking zoning relief. The required set-aside increases to 15% for off-site units and fee-in-lieu options (at a rate of $200,000 per unit). Boston has the largest percentage of affordable housing out of any major United States City.[57] According to the Boston Globe, the City's inclusionary housing policy is "responsible for over 2,000 affordable units and $74 million in affordable housing funds for completed projects since 2000."[58]

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

[51] NAHB, Inclusionary Zoning Primer (2015), p. 20-30, https://www.nahb.org/en/research/~/media/303B1BCB16D6445999E2F8746A02F0C1.ashx (hereinafter "2015 NAHB Primer").
[52] *Id.*
[53] Presentation to the Florida American Planning Association, 2016 Annual Conference, Case Study of Workforce Housing Regulations, available at http://www.floridaplanning.org/wp-content/uploads/2016/09/FAPA_2016_Annual_Conference_Presentation2.pdf.
[54] *Id.*
[55] *Id.*; Notice of Public Hearing, Second Round Hearing August 1, 2017, http://www.jupiter.fl.us/DocumentCenter/View/12839.
[56] City of Boulder, Affordable Housing Development Trends (2016), available at: https://www-static.bouldercolorado.gov/docs/2016_Affordable_Housing_Profile-1-201610110829.pdf.
[57] Urban Land Use Institute, Overcoming Barriers to Affordable Housing in Colorado (2016), http://colorado.uli.org/wp-content/uploads/sites/19/2016/10/Overcoming-barriers-to-affordable-ULI-CO-report-9-30-16.pdf. Note, however, "approximately 80% of all affordable housing production in Boston is created under Chapter 40B instead of local inclusionary ordinances." David L. Callies, Mandatory Set-asides As Land Development Conditions, Urban Lawyer, 42/43 Urb. Law. 307 (Fall, 2010/Winter, 2011). Chapter 40B is a state-wide act that authorizes local zoning overrides for affordable housing development projects.
[58] *See* Sam Tyler and Matthew Kiefer, *Doing the math on affordable housing*, THE BOSTON GLOBE (Jan. 21, 2016), available at https://www.bostonglobe.com/opinion/editorials/2016/01/21/doing-math-affordable-housing/AfqMEi8mOKeFeyQLTFYUnM/story.html.

development in the local market."[59] 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.[60] However, "careful attention to the design details and the structuring of incentives is critical to avoid adverse effects."[61] ULI found that some markets, such as Fairfax County, Virginia; Montgomery County, Maryland; Palm Beach County, Florida; and those in southern California, have been successful in achieving significant, new, below-market rate production.[62] 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.[63]

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 cases, 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.[64]

In California, over 40% of the jurisdictions with inclusionary housing requirements provide direct subsidies to developers in addition to the state-mandated density bonus and other incentives.[65] 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.[66] 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.[67]

[59] ULI Report, at p. IX (2016).
[60] *Id.* at 7.
[61] *Id.*
[62] *Id.* at 6.
[63] *Id.* at 7.
[64] Id. at 12.
[65] *IZ in California* at 17.
[66] For a detailed discussion of this issue see Merriam, et al., *Supra*, or the summary of this edited panel discussion, "Inclusionary Zoning: Who Pays?" *Planning*, August 1985.
[67] *See* Zoning Matters, *Inclusionary Housing*, http://zoningmatters.org/trends/inclusion.

Economic Integration

Inclusionary zoning achieves the purpose of creating economically integrated communities when affordable units are constructed within a market rate project. Allowing housing fund in lieu contributions or off-site developments to meet fair share goals or merit an incentive bonus diminishes the integration effect, but may still have a positive impact where off-site development supports the mixed-income goal.[68] 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.[69]

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."[70]

Over a decade ago, another commentator observed that the beneficiaries of inclusionary zoning are not the urban poor, but:

> "subsidy seekers" - young couples, divorced single mothers, the elderly, and other middle-class people who are knowledgeable enough to take advantage of the system…In reality, it makes absolutely no difference whether the few winners of subsidized units are "low-income," "middle-income" or even "upper-income." Housing is housing, and the only way to have more of it is to build more of it. The only benefits of Mt. Laurel will come from the density bonuses, which will allow more housing units to be built.[71]

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.[72] 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.[73] 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.

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).[74] *Koontz* explicitly extended judicial scrutiny to payments negotiated by municipalities to off-set development approvals by requiring that such negotiated payments

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[68] Rusk at 20, citing a separate Seton Hall University study; *see also BPI Study* at 17-18.
[69] Siegel at 3.
[70] Rusk at 20.
[71] William Tucker, "Zoned Out: How an Effort to Protect the Health and Welfare of Neighborhoods Has Become Legally Enforced Segregation," *Reason*, May 1990; http://totse2.com/totse/en/politics/political_spew/zone.html.
[72] *Board of Supervisors of Fairfax County v. Degroff Enterprises, Inc.*, 198 S.E.2d 600 (Va. 1973).
[73] *Apartment Ass'n of South Cent. Wisconsin, Inc. v. City of Madison*, 296 Wis.2d 173 (2006).
[74] BRIAN W. BLAESSER, DISCRETIONARY LAND USE CONTROLS: AVOIDING INVITATIONS TO ABUSE OF DISCRETION § 1:38 (Thomson-Reuters 2017).

pass the "essential nexus" and "rough-proportionality" 5th Amendment takings analysis.[75] However, appellate court cases have upheld the validity of mandatory inclusionary zoning programs, before and after the *Koontz* case.[76] Most recently, in *California Building Industry Association v. City of San Jose*,[77] the California Supreme Court held that the City of 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."[78] 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.[79] 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.[80]

Whether or not the holdings in the *San Jose* and the Chicago case—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. Justice Thomas concurred in the denial of certiorari in the *San Jose* case, and observed:

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[75] 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.") http://www.enterprisecommunity.org/blog/2013/10/will-under-radar-supreme-court-case-create-challenges-affordable-housing-and. *See also* Chelsea Maclean, *Inclusionary Housing After Koontz*, 66 PLANNING & ENV. LAW NO. 4, p. 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.

[76] *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 Ca.App.4th 188) (1st Dist. 2001), cert. denied 535 U.S. 954, 122 S. Ct. 1356, 152 L. Ed. 2d 353 (2002).

[77] *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).

[78] *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.").

[79] *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.

[80] *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).

> For at least two decades, however, 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. *See Parking Assn. of Georgia, Inc. v. Atlanta*, 515 U.S. 1116, 1117, 115 S.Ct. 2268, 132 L.Ed.2d 273 (1995) (THOMAS, J., dissenting from denial of certiorari). That division shows no signs of abating. The decision below, for example, reiterated the California Supreme Court's position that a legislative land-use measure is not a taking and survives a constitutional challenge so long as the measure bears "a reasonable relationship to the public welfare." 61 Cal.4th, at 456–459, and n. 11, 189 Cal.Rptr.3d 475, 351 P.3d, at 987–990, n. 11; compare *ibid*. with, e.g., *Home Builders Assn. of Dayton and Miami Valley v. Beavercreek*, 89 Ohio St.3d 121, 128, 729 N.E.2d 349, 356 (2000) (applying the *Nollan/Dolan* test to legislative exaction).[81]

21.03 IMPACT ON PROPERTY VALUES

Most studies indicate that affordable housing development has no long-term negative impacts on property values.[82]

- 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.[83]

- 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.[84]

- 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.[85]

21.04 IMPACT ON DEVELOPMENT COSTS

Like linkage and impact fees, inclusionary zoning relies on private sector subsidy of construction. NAHB has found that close to 25 percent of the cost of building a new home can be attributed to regulations.[86] By including density bonuses, other zoning waivers, and/or fast track permitting, most inclusionary zoning

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[81] *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).

[82] 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.

[83] Trulia's Blog, *There Doesn't go the Neighborhood*, https://www.trulia.com/blog/trends/low-income-housing/#sthash.xQDVDTxp.dpuf (2016).

[84] 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.

[85] 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.

[86] NAHB, Government Regulation in the Price of a New Home (2016), https://www.nahbclassic.org/fileUpload_details.aspx?contentTypeID=3&contentID=250611&subContentID=670247.

ordinances attempt to offset the developer's subsidy of affordable units by reducing the per-unit cost of the development.

21.05 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.

21.06 IMPACT ON HOUSING AFFORDABILITY

The purpose of inclusionary zoning is to increase supplies of affordable housing. While it may have a negative effect is in the distribution of subsidy costs among market rate units; no data is available in published sources to quantify that effect. 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. However, one recent 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.[87] 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.[88] 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."[89]

21.07 SUMMARY OF 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.

[87] Tom Means, et al., *Below-Market Housing Mandates as Takings: Measuring Their Impact* (The Independent Institute: November 2007) at 15.
[88] 2015 NAHB Primer.
[89] *Id.*

- 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.[90]

- Mandatory inclusionary zoning may be more acceptable in communities opposed to up-zoning (increased density) as a solution to affordable housing shortages.[91]

- 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.[92]

- 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.[93]

[90] 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/izprosncons/.

[91] Municipal Research and Services Center "Affordable Housing Techniques—A Primer For Local Government Officials" March 1992 Report Number 22, https://web.archive.org/web/20140719190207/http://www.mrsc.org/publications/textaht.aspx.

[92] 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.

[93] 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.[94]

- 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.

21.08 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,[95] 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 development. This technique ensures that development includes a mix of housing choices, including

[94] 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).

[95] Kromer, John, *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.; LePage at 2 (*Sacramento Bee* Article).

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.[96] 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 Fort Collins, Colorado, and Monterey County, California.[97] 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. Examples of jurisdictions that have used this technique are:

> Longmont, California – Up to 14 fees are waived if more affordable units (or units at deeper levels of affordability) are provided. Average fees waived are $3,250 per single family home, $2,283 per apartment unit.[98]
>
> Arvada, Colorado – A development fee waiver "for all housing developments which will be granted a federal subsidy for rent or mortgage payment."[99]
>
> Longmont, Colorado – Up to 100 percent waiver of certain fees, using a five-year affordability period for single-family development, ten-years for multi-family.[100]
>
> Hillsborough County, Florida – Impact Fee Relief Program waiving water, sewer, rights-of-way, parks and transportation fees. In one affordable apartment project, almost $500,000 in fees was waived.[101]
>
> Martin County, Florida – The County provides a variety of impact fee deferral options for developers of affordable housing for very low, low, and moderate income households.[102] 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. It may also apply for a loan from the County for 100 percent of the impact fees assessed due upon sale or

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[96] Cumberland Region Tomorrow, *Creating a Variety of Housing Choices*, (2005), http://www.cumberlandregiontomorrow.org/resources/quality-growth-toolbox.pdf (p.57).
[97] Mixed-Income Transit-Oriented Development.Org, Action Guide, *Fast Track Permitting*, http://www.mitod.org/fasttrackpermitting.php.
[98] Policy Link, Inclusionary Housing, http://www.kintera.org/site/c.lkIXLbMNJrE/b.5137031/k.8659/How_to_Use_It.htm.
[99] City of Suffolk, VA, Affordable Housing Task Force Report to the Mayor and City Council (2005), http://www.tbaonline.org/builderservices/Affordable-Final-Plan-to-Council.pdf (hereinafter Suffolk, VA Report).
[100] *Id.*
[101] *Id.*
[102] Martin County, FL Code Art. 6 § 6.11.C.1—C.5.

transfer of the affected property, or at the end of 15 years, although the County may choose to refinance the loan if the unit continues to meet eligibility criteria.[103]

Santa Fe, New Mexico – Fee waivers for development proposals offering 75 percent of the units to households at or below 80 percent of the median family income.[104]

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.

Arvada, Colorado exempts "low/moderate income housing," from its residential building permit allocation system.

The Town of Cary, North Carolina allows 5 percent additional development above the adequate public facilities ordinance limit for affordable housing projects.[105]

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.[106]

Orlando, Florida - "pioneered" allowing subdivisions to include "tandem single-family development" as a conditional use on lots that allow duplex development. The City's "tandem single-family development" ordinance, however, is currently under review with the goal of increasing the aesthetic quality of such development without undermining the rate of development.[107]

Babylon, New York - passed a two-family dwelling law that allows owners of existing houses to add a second living space which may be either sold or rented.[108]

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[103] *Id.* § 6.11.C.1 & C.3.
[104] Affordable Housing Regulatory Tools Case Studies, Compiled by the Alexandria Office of Housing (Dec. 2010), https://www.alexandriava.gov/uploadedFiles/housing/info/AffordableHousingCaseStudies12302010.pdf.

[105] Town of Cary Affordable Housing Tool Kit, https://web.archive.org/web/20160309151123/http://www.townofcary.org/Assets/Planning+Department/Planning+Department+PDFs/affordablehousing/toolkit.pdf at 11.
[106] *See* for example, NAHB's March 2011 Mutifamily Issues Report, https://web.archive.org/web/20120416114549/http://www.nahb.org/fileUpload_details.aspx?contentID=156592.
[107] Suffolk, VA Report; *see also* City of Orlando, Florida, Staff Report to the Municipal Planning Board, Duplexes and Tandems (Dec. 20, 2016) https://orlando.novusagenda.com/AgendaPublic/Mobile/ItemView.aspx?agendaitemid=41364&meetingid=799.
[108] *Id.*

State Mandated Special Treatment of Affordable Housing Applications: Special procedures provide an incentive to developers to include affordable housing.

> Massachusetts' "Anti-snob Zoning Act"[109], (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.[110]
>
> 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 "reverses the presumption of the validity ordinarily accorded to land use decisions" so that the burden is on the local commission to justify its decision in denying or requiring unreasonable modifications of a proposed application.[111]

Using Government Funds: Leveraging or subsidizing the production of affordable units with public money is an effective technique. One approach links municipal deposits to financial institutions which provide loans and other resources for affordable housing development. For example, Loudoun County, Virginia, linked a proportion of the county's deposit in local financial institutions with the affordable housing activities of those institutions.[112] Activities included affordable housing mortgages, marketing, first-time homebuyer seminars, home mortgage funding with no private mortgage insurance, residential construction funds, targeted residential construction funds, and other housing activities initiated by the bank. Atlanta, Georgia; Charlotte, North Carolina; and Durham, North Carolina, either have or are considering similar programs.[113] These are excellent examples of public-private partnership which extend beyond the limits of inclusionary housing provisions. Another method is to provide grants to affordable housing developers. Columbus, Ohio, in 1995 partnered with two developers and a state savings bank to produce mixed-income housing within the city's school district. This program has been cited in a HUD report entitled "Models That Work."[114] Highpoint, North Carolina, operates an "Infill Housing Reimbursement Program" which subsidizes at $10,000 per home the construction of homes for first-time buyers in inner-city neighborhoods.[115]

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[109] G.L. 40B, §§ 20-23.

[110] Peter Salsich, *Zoning Override ("Antisnob") Legislation*, American Bar Association, The Legal Guide to Affordable Housing Development, Leg. Guide to Affordable Housing Dev. s 4.II.A (2011); Richard Huber, et al. "Low - and Moderate – Income Housing: The Anti Snob Zoning Act, Linkage, Inclusionary Zoning and Incentive Zoning" Chapter 5, *Massachusetts Zoning Manual*, Supp. 1999 §§ 5.3 and 5.4.2.

[111] Julie M. Solinski "Affordable Housing Law In New York, New Jersey, and Connecticut: Lessons for Other States" in *Journal of Affordable Housing*, Volume 8, #1 Fall 1998, p. 63. Ms. Solinski finds that the Connecticut and New Jersey statutes have been more effective than New York's enabling legislation authorizing density bonuses for affordable housing, p. 52.

[112] Suffolk, VA Report, at 65-66.

[113] *Id.*

[114] *Id.* at 67.

[115] *Id.*

There are numerous programs which assist on the demand side by providing either down payment, or closing cost, or second mortgage assistance, or supporting employee home ownership, all of which assist the buyer.[116]

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). A report recommends innovative zoning techniques such as zero lot line, cluster and mixed use zoning as ways to reduce the cost effects of traditional zoning standards.[117]

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.

[116] *Id.* at 8-12.
[117] M. White, at 14 and 41.

SECTION 22: HOUSING LINKAGE

22.01 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 to a low-income housing project.[1] 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.[2] 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.[3] 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.[4] The new workers need places to live, transit systems, day-care facilities, and the like.[5]

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 21. 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.[6] There are, however, some instances of linkage programs being used to combine residential with non-residential development.[7]

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[1] 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., 2016 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*, Urban Lawyer, 42/43 Urb. Law. 307 (Fall, 2010/Winter, 2011).

[2] 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.

[3] Jane Schukoske, "Housing Linkage: Regulating Development Impact on Housing Costs," 76 *Iowa Law Review* 101, 1064 (1991).

[4] White at 26.

[5] Christine I. Andrew and Dwight H. Merriam, "Defensible Linkage," *Journal of the American Planning Association*, at 200, Spring 1988.

[6] Theodore C. Taub, "Exactions, Linkages and Regulatory Takings: A Developer's Perspective," 20 *The Urban Lawyer* 515, 535 (1988).

[7] For example, Jackson, Wyoming, Pitkin County, Colorado, and Islamorada, Florida apply linkage to both types of development. *See* Town of Jackson/ Teton County, WY, § Article 6. Division 6.3 Employee Housing Requirements: Town Code(PDF): http://www.tetonwyo.org/compplan/LDRUpdate/CurrentTownLDRs.pdf County Code(PDF): http://www.tetonwyo.org/compplan/LDRUpdate/CurrentCountyLDRs.pdf http://www.tetonwyo.org/house/topics/housing-regulations/252741/; Pitkin County, CO: Chapter 8. Section 8-30 Employee Housing Impact Fee, County Code, http://pitkincounty.com/DocumentCenter/View/13606; Village of Islamorada, FL: Article IV. Division 16 Affordable Housing Standards, https://library.municode.com/fl/islamorada/codes/code_of_ordinances?nodeId=PTIICOOR_CH30LADERE_ARTIVADPR_DIV16AFHOST.

22.02 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[8]); 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.[9] This relationship is necessary for the linkage program to survive a constitutional challenge on due process grounds.[10] 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.[11]

Housing linkage programs should address the following issues:

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[8] 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*).

[9] *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., 2016 update)(compiling legal challenges to linkage programs across the United States).

[10] 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" 5th Amendment takings analysis. Ray Demers & Michael A. Spotts, *Will an Under-the-Radar Supreme Court Case Create Challenges for Affordable Housing and Sustainable Development?* (Oct., 22, 2013), http://www.enterprisecommunity.org/blog/2016/07/will-under-radar-supreme-court-case-create-challenges-affordable-housing-and. 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.").

[11] 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;
- 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.[12]

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.[13]

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.[14]

From 1981 to 1985, office developers agreed to subsidize 3,793 residential units and 44% of those units had been completed as of April 1985.[15] In August 1985 the City adopted its "Downtown Plan," which incorporated expanded linkage policies for housing and transit. The Plan also established the Office of the Affordable Housing Production Program or OAHPP, which required that if office developers themselves produced units, 62% of them must be affordable; if the office developers pay in-lieu fees, then 100% of the units must be affordable; and, a system of credits contained in the Affordable Housing Production Program was eliminated. The exaction fee was set at $5.34 per square foot.

In February 2001, the Board of Supervisors enacted an ordinance which changed the name of the program from the Affordable Housing Production Program to the Jobs-Housing Linkage Program; expanded the reach of the program to include hotels, entertainment space, retail space, and research and development space over 25,000 square feet; substantially increased the applicable fees; and required a study every five

[12] Schukoske at 1015.
[13] 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).
[14] *Id.*
[15] *Id.*

years to determine the demand for housing created by commercial development.[16] According to the 2015 Downtown Plan Annual Monitoring Report, $7.1 million was collected in the 2014-2015 fiscal year through the Housing and Jobs Linkage Fee program.[17] Between 1985 and 2009, the program has collected more than $72 million in affordable housing fees and has contributed to the development of over 1,000 units of affordable housing.[18]

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.[19] Effective January 1, 2015, San Francisco's linkage fees on a per square foot basis were: $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.[20]

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 work, and containing certain specific commercial uses or directly resulting in a reduction of the supply of low- or moderate-income housing.[21]

Any project deemed to be a DIP requires the approval of a plan by the Boston Planning & Development Agency ("BPDA").[22] To gain the required zoning relief, such a plan must meet two requirements: the BPDA must find after public hearing 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. The fee is paid to an administrative agency known as a Neighborhood Trust in twelve equal annual installments.[23] As of October 1984, nine projects had been approved and it was estimated that developers of the nine projects would pay $24.5 million in linkage fees after their completion.[24]

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[16] Ordinance 28-01, codified at Section 413 of the San Francisco Municipal Code. *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).

[17] San Francisco Planning Department, *Downtown Plan Annual Monitoring Report*, p. 11 (2015).

[18] San Francisco Planning Department, *25-Years: Downtown Plan Monitoring Report 1985-2009*, p. 14 (2011), http://208.121.200.84/ftp/files/Citywide/25-Years_Downtown-Plan-Monitoring-Report-1985-2009.pdf; San Francisco Planning Department, *Downtown Plan Monitoring Report 2001-2007*, p. 20 (2009), available at http://default.sfplanning.org/Citywide/Downtown_Monitoring_Report_5-Year_2008_revised.pdf; Rosen & Sullivan, STAN. L. & POL'Y REV. 121, 138.

[19] San Francisco Planning Department, *Development Impact Fee Adjustments-Effective May 1, 2011*, http://forms.sfplanning.org/Impact_Fee_Schedule-070117.pdf (April 1, 2011).

[20] San Francisco Mayor's Office of Planning and Department, *Development Impact Fee Adjustments-Effective January 1, 2014*, http://www.sf-moh.org/index.aspx?page=1031 (September 13, 2014). As of March, 2017, the linkages fees have not been increased. San Francisco Office of Housing and Community Development, *Jobs-Housing Linkage Fee Schedule*, available at http://sfmohcd.org/jobs-housing-linkage-fee-schedule%20.

[21] John J. Griffin, Jr., "Inclusionary Zoning and Linkage in Boston and Cambridge, Massachusetts", Chapter in Dougles Porter, ed. *Downtown Linkages* (Urban Land Institute, 1985).

[22] The BPDA was formerly named the Boston Redevelopment Authority ("BRA").

[23] Griffin, *supra* note 21.

[24] Keating at 137.

In May 2000, the BRA issued a report in which it concluded that its linkage program had produced more funds for affordable housing creation than any other program in the country—more than $45 million had been allocated for the construction of nearly 5,000 housing units.[25] In 2000, the BRA attributed the strong performance of its program to four factors:

- Higher fees than most cities;
- Full-city coverage;
- Broad coverage of development types; and
- Flexibility to reduce disincentives of development.[26]

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."[27]

Between fiscal year 2006 and 2015, Boston's linkage program generated $51 million for affordable housing, which contributed to the creation of 2,181 new affordable units.[28] 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.[29] In October 2013, the BPDA adjusted the Housing exaction to $8.34 and the Jobs Contribution exaction to $1.67 per square foot.[30] 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.[31]

22.03 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

[25] Boston Redevelopment Authority, Office of Policy Development and Research, *Survey of Linkage Programs in U.S. Cities with Comparisons to Boston* at 3 (May 2000), available at http://www.bostonplans.org/getattachment/8440bf23-afa7-40b0-a274-4aca16359252/.
[26] *Id.*
[27] Boston Zoning Code, Article 80B, Section 80B-7.1.
[28] Boston Municipal Research Bureau, *City's Linkage Program Under Review* (Aug. 20, 2015), available at http://bmrb.org/citys-linkage-program-under-review/.
[29] 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 Chapter 371 of the Acts of 1987).
[30] *Id.* See also *Boston 2030, Housing a Changing City*, ch. 8, pp. 110, 114 (2014) https://www.boston.gov/sites/default/files/boston2030_chapter_8_resource_development.pdf. One goal of Boston Mayor Martin Walsh for the 2017-2018 Massachusetts State Legislative Session is to pass legislation that would expand the linkage program to smaller projects, including those that do not require large project review under Article 80 of the Boston Zoning Code. City of Boston, *Mayor Walsh Files 2017-2018 Legislative Agenda* (Jan. 23, 2017), https://www.boston.gov/news/mayor-walsh-files-2017-2018-legislative-agenda.
[31] 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.

market options, the additional cost of development associated with linkage fees will be borne by the property seller.[32] 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."[33]

22.04 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.

22.05 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.

22.06 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.

22.07 SUMMARY OF 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.

[32] 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.

[33] Association of Bay Area Governors, *Commercial Linkage Fees: Summaries and Benefits*, available at http://abag.ca.gov/files/CommercialLinkageFees.pdf.

CONS:

- Housing linkage will not succeed if the local market does not support increased commercial development.[34]

- It is unfair to single out new commercial development as the cause of general and complex transit and employment issues in the inner city.[35]

- 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.[36]

- 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.[37]

- 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."[38]

22.08 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.[39] 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.[40] Special Assessment Districts are discussed in Section 6.

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[34] Andrew and 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 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/.
[35] Keating at 140.
[36] *Id.*
[37] *Id.*
[38] 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).
[39] Keating at 140.
[40] *Id.*

SECTION 23: ACCESSORY DWELLING UNITS

23.01 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.[1]

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.[2] Many ADUs were created by middle-aged and older persons seeking to take in boarders after their children moved out.[3] 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.[4] Suburban development continued to be a prevalent form of housing development through the 1950s and 1960s, leading most communities to prohibit ADU construction.[5]

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.[6]

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 the convergence of factors made innovative housing solutions like ADUs a "policy necessity":[7]

> 1. Changing Demographics. American families are growing in number but shrinking in size. People are living longer, more people are staying single longer, and married couples are having fewer children. The housing stock has not kept up with this change in family demographics. In some communities, the need for housing, especially for people with special physical and financial needs, has become acute.

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[1] *Accessory Dwelling Units: Case Study* at 1-2 (U.S. Dept. Housing and Urban Development) (June 2008) (hereinafter "*ADU Case Study*").
[2] *ADU Case Study* at 1.
[3] Rodney L. Cobb & Scott Dvorak, *Accessory Dwelling Units: Model State Act and Local Ordinance* at 9 (Public Policy Institute, 2000) (hereinafter "*Model ADU Ordinance*").
[4] *Id*.
[5] *ADU Case Study* at 1.
[6] *Id*.
[7] Cobb & Dvorak, *Accessory Dwelling Units*; s*ee also* William Macht, *Rethinking Private Accessory Dwellings*, URBANLAND, (Mar. 6, 2015), http://urbanland.uli.org/planning-design/rethinking-private-accessory-dwellings/.

Underused space in single-family houses is one of the nation's largest untapped housing resources.

2. Changing Economics. Not only is family size changing, but so are the economic circumstances of families. As the population ages, many older people find themselves living in their family homes alone. They may need additional income to pay for health care services, cover home maintenance costs, or make mortgage payments. Others may want a family member or caretaker to live nearby, while maintaining privacy for both parties.

3. Changing Community Goals. Many communities have recognized the need to stabilize or increase densities in certain areas in order to maintain existing public infrastructure, services, and a broader tax base. In addition, many communities have sought to concentrate population density in specific areas in order to encourage public transit service and reduce urban sprawl. These communities do not, however, necessarily want their single-family neighborhoods to become structurally more dense.[8]

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. As of 2013, nine states had passed legislation enabling such reforms, including three states that require local governments to allow ADUs.[9] In Vermont, ADUs are allowed as of right, provided that the property's wastewater system can support the ADU, that the ADU not exceed 30% of the original home's square footage, and that it is compliant with applicable setback, coverage, and parking requirements.[10] New Hampshire passed legislation, effective June 1, 2017, that 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.[11] Changes to enabling legislation in California, that will also take effect in 2017, reduce parking requirements and utility connection fees and will require local governments to ministerially approve applications for one ADU per single-family home in a single-family residential district if the ADU is contained within an existing structure, with independent exterior access and meets setbacks sufficient for fire safety.[12] 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."[13] At the local level, hundreds of municipalities have adopted

[8] *Model ADU Ordinance* at 8.
[9] Margaret F. Brinig & Nicole Stelle Garnett, *A Room of One's Own? Accessory Dwelling Unit Reforms and Local Parochialism*, 45 URB. LAW 519, 521 (Summer 2013) (hereinafter "*A Room of One's Own*") (citing ADU statutes enacted in California, Florida, Hawaii, Maryland, New Hampshire, Rhode Island, Vermont, Washington, and Massachusetts).
[10] 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 (2013)).
[11] 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.
[12] California Dept. of Housing and Community Development, *Accessory Dwelling Unit Memorandum* (Dec. 2016), http://www.hcd.ca.gov/policy-research/docs/2016-12-12-ADU-TA-Memo.docx.pdf. The new law also authorizes local governments to permit "junior accessory dwelling units" in single-family homes, which are units of no more than 500 square feet located entirely within a single-family residence that are required to have cooking facilities and a sink but are not required to have a private bathroom.
[13] *A Room of One's Own* at 521 (citing Florida, Massachusetts, Vermont, and Washington).

ordinances permitting and regulating ADUs, either in response to state legislation or independent of state law.[14]

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), "residents are often concerned about the ADU's *compatibility with neighborhood character and design*, the *impact on parking*, and the *effects on property values and community services*."[15] 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."[16]

As demonstrated in one case from Connecticut, neighbor opposition to an ADU sometimes inappropriately focuses on the user rather than the use.[17] In this case, the property owner was denied a special permit for an ADU despite having met the requirements in the zoning bylaw. The opponents were focused on the ability to rent the unit to "strangers" rather than using the in-law suite for family members.[18] The court sustained the applicant's appeal of a denial of a special permit for the accessory unit because the only requirement in the zoning bylaw is that one of the two units be occupied by the owner.[19] 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. A report prepared by the Municipal Research & Services Center of Washington (MRSC) described this balancing of interests as follows:

> The challenge for policy-makers is to find the right balance between the community's need for more affordable housing and the desire to preserve the quality of residential neighborhoods. There are many opportunities for communities to be creative in meeting this challenge.
>
> The purpose of allowing ADUs is to:
>
> 1. Provide homeowners with a means of obtaining, through tenants in either the ADU or the principal unit, rental income, companionship, security, and services.
>
> 2. Add affordable units to the existing housing.
>
> 3. Make housing units available to moderate-income people who might otherwise have difficulty finding homes within the (city/county).

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[14] *Id.*
[15] *Model ADU Ordinance* at 9 (emphasis added).
[16] 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*").
[17] *Whittemore v. Town of Simsbury Zoning Commission*, 2015 WL 9684441 (Ct. Superior Nov. 24, 2015).
[18] *Id.* at *7.
[19] *Id.* at *8.

4. Develop housing units in single-family neighborhoods that are appropriate for people at a variety of stages in the life cycle.

5. Protect neighborhood stability, property values, and the single-family residential appearance of the neighborhood by ensuring that ADUs are installed under the conditions of this Ordinance.[20]

23.02 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.[21] For example, ADUs must be located on a lot having at least 5,000 square feet and the property owner must occupy either the primary residence or the ADU. Together with an ADU Development Program that provides technical, financial, and other assistance to homeowners, the Santa Cruz program has produced 40 to 50 ADUs annually and has been used as a model by other communities.

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.[22]

Portland, Oregon saw ADU development skyrocket after adopting policy changes that reduced construction costs by $8,000 to $10,000 per ADU in 2010.[23] In 2013, 200 ADUs were permitted, which was a six-fold increase over the average number of ADUs permitted between 2000 and 2009.[24] And the trend appears to have continued, with 350 ADUs permitted in 2015.[25]

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[20] *See Accessory Dwelling Units* (MRSC Report No. 33)(Oct. 1995) (available online at http://mrsc.org/getmedia/54c058a5-4d57-4192-a214-15f2fa5ac123/Accessory-Dwelling-Units.pdf.aspx?ext=.pdf.
[21] *ADU Case Study* at 4.
[22] *See* Accessory Dwelling Units (ADU) Suburban Case Study: Lexington, MA (available online at (http://www.mass.gov/envir/smart_growth_toolkit/pages/CS-adu-lexington.html).
[23] Kathleen McCormick, *Gentle Infill*, LAND LINES, Jul. 2016, at 18.
[24] *Id.*
[25] *Id.*

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 Public Policy Institute, in partnership with the American Planning Association, published a model ADU ordinance that "attempts to balance the need to specify clear, rigorous standards that protect the community with the need to avoid requirements so onerous that no one will apply to install an ADU."[26] The model ADU ordinance contains several regulatory techniques that communities can use to control the location and proliferation 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: In a survey of 50 ADU ordinances, the minimum lot size requirement varied from 4,500 square feet to one acre. At least one community allowed detached ADUs only on lots that contain 1.5 times the minimum lot size of the zoning district, while others applied the same minimum lot size requirement to all ADUs. Where there are concerns about overcrowding and potential impacts on property values and aesthetics, communities might set a minimum lot size requirement for ADUs that that is greater than the minimum lot area required in the zoning district.[27]

- Conditional or Special Use Permit Requirement: A lengthy and burdensome application process will discourage homeowners from developing ADUs. One way to allow ADUs without making it "too easy" for homeowners to get an approval is to require that a homeowner obtain a special use permit (sometimes referred to as a conditional use or special exception),which typically involves public notice and a public hearing, for an ADU.[28]

- Owner Occupancy Requirement: In communities where residents are concerned that allowing ADUs will invite speculators to buy up houses with ADUs and rent out both units, which some believe could result in a deterioration of neighborhood properties, a popular approach to address these concerns is to require that the owner of the lot reside on the premises. By reducing the likelihood of speculative buying of single family properties that either have or can be improved with an ADU, an owner occupancy requirement can also be an effective tool in preventing the proliferation of ADUs within single family neighborhoods.[29]

- Minimum Floor Area Requirement for the Principal Dwelling Unit: Establishing a minimum size requirement for the principle dwelling unit on a property can also reduce the number of potential ADUs, as properties with homes that do not meet the requirement would not be eligible for an ADU.[30]

- Minimum Age of Principal Dwelling Unit: A minimum age requirement generally addresses how soon an ADU can be installed after the principal dwelling is constructed. Regulations that require houses to be a certain age before becoming eligible for an ADU typically are adopted out of homeowners' concerns that too many ADUs will overwhelm a neighborhood and that houses will be designed and marketed with ADUs if new houses are allowed to have them. The Model ADU Ordinance notes that in a 1996 accessory dwelling unit survey, the age required for the principal dwelling unit is generally from two to five years.[31]

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[26] *Model State Act* at 12.
[27] *Model State Act* at 36-37.
[28] *Model State Act* at 32.
[29] *See generally Model State Act* at 37-39.
[30] *See Model ADU Ordinance* at 40.
[31] *See generally Model ADU Ordinance* at 40-41.

- Minimum Parking Requirements: One of the most frequently expressed concerns with ADUs in single family neighborhoods is parking. A 2014 survey of "neighborhood councils" in the City and County of Los Angeles, California asked respondents to name their top concerns with "backyard homes" or ADUs, and the top concern for almost a third of all respondents was "parking and the potential adverse effect of backyard homes on the availability of street parking."[32] The Model ADU Ordinance generally recommends an off-street parking requirement of one space per ADU.[33]

- Density Limitations: According to a leading scholar of New Urbanism, a neighborhood can absorb one ADU for every ten single-family homes without adversely impacting the single-family low-density neighborhood character.[34] Communities have used a wide range of methods to limit the density of ADUs and minimize their projected effects on single family neighborhoods, including the following:

    - Caps on the number of ADU permits that will be issued before an ADU ordinance is repealed;
    - Quotas on the number of ADU permits issued before an ADU ordinance is reviewed;
    - Periodic reviews of ADU ordinances to evaluate the number of permits issued;
    - Limitations on the number of ADUs per area (e.g., by block or census tract);
    - Restrictions on the number of ADUs as a percentage of the residences in an area; and
    - Spacing requirements between ADUs.[35]

The Model ADU Ordinance notes that "density controls can be an essential political tool in some communities. Guarantees that neighborhoods will not be overrun by ADUs may increase support for an ADU ordinance in a community."[36] On the other hand, the Model ADU Ordinance also cautions that ADU proponents may argue that density rules reduce the number of ADUs unjustifiably, questioning: "When the infrastructure in single-family neighborhoods is underutilized, why is it fair to say 'no' to one homeowner applying to create an ADU simply because another homeowner in the area already installed one?"[37]

There is little existing research on the effect that ADUs have on neighborhoods once constructed. However, one study in the Bay Area, and one in Seattle, found that most residents in each community did not perceive negative impacts from ADUs in their neighborhoods, suggesting that ADUs may have a lesser impact on neighborhood character than critics suggest.[38]

23.03 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

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[32] Vinit Mukhija, Dana Cuff & Kimberly Serrano, *Backyard Homes and Local Concerns: How Can Local Concerns be Better Addressed?* at 39 (UCLA Dept. of Architecture + Urban Design, April 2014) (hereinafter "*Backyard Homes and Local Concerns*").
[33] *See Model ADU Ordinance* at 46.
[34] Patricia Therese Tyre, *Accessory Dwelling Units as Affordable Housing and Smart Growth: Case Studies of Winter Park and Orlando, Florida* at 21 (Univ. Florida, 2008) (citing Duany, A., Plater-Zyberk, E., & Speck, J. SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM (New York: North Point Press, 2000).
[35] *Model ADU Ordinance* at 48.
[36] *Model ADU Ordinance* at 48.
[37] *Model ADU Ordinance* at 48.
[38] John Infranca, Housing *Changing Households: Regulatory Challenges for Micro-Units and Accessory Dwelling Units*, 25 STAN. L. POL'Y REV. 53, 66 (2014).

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.[39] 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.[40]

There is also disagreement in the literature as to whether the construction of an ADU increases the value of a single-family home. A study of the appraised value of homes with ADUs in Portland, Oregon concluded that "ADUs provided a substantial proportion of the appraised value" of the properties studied, ranging from 17% to 48% of the total appraised value depending on the appraisal method used.[41] 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.[42] 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.[43] The result in some cases is to significantly increase assessed values on older homes and, consequently, to increase the amount of property tax owed.[44]

23.04 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 an ADU.[45] 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.[46] 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.[47] Also, owner-occupancy requirements may make it difficult to finance ADUs because the occupancy may become illegal if the lender forecloses.[48]

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[39] Martin J. Brown & Taylor Watkins, *Understanding and Appraising Properties with Accessory Dwelling Units*, THE APPRAISAL JOURNAL at 300 (Fall 2012).
[40] *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)).
[41] *Id*.
[42] Robert E. Lang, *Valuing the Suburbs: Why Some "Improvements" Lower Home Prices*, 1 OPOLIS: AN INTERNATIONAL JOURNAL OF SUBURBAN AND METROPOLITAN STUDIES at 7 (2005).
[43] 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.
[44] *Id.*
[45] 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).
[46] *Model ADU Ordinance* at 42.
[47] *Model ADU Ordinance* at 45.
[48] Infranca, *supra* note 21 at 84-85.

23.05 IMPACT ON AMOUNT AND PATTERNS OF LAND DEVELOPMENT

In general, ADU regulations encourage infill development that increases the density of existing single-family neighborhoods.[49] 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.

23.06 IMPACT ON HOUSING AFFORDABILITY

ADUs are generally regarded as a source of affordable housing.[50] The authors of the research paper *A Room of One's Own?: Accessory Dwelling Unit Reforms and Local Parochialism*, describe this perspective as follows:

> 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.[51]

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[49] 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*").

[50] *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.").

[51] *A Room of One's Own* at 533-534.

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.[52] Second, they note that 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 costs that are 30% or less of income are considered affordable—ADU advocates often speak of affordability in a less precise way.[53] 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.[54]

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.[55] 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 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.[56]

23.07 SUMMARY OF 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.
- ADUs are less costly to build (by 25 to 40 percent, according to one study) than a new dwelling unit of the same size.[57]

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[52] *ADUs in Portland* at 34.
[53] *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.).
[54] *Id*.
[55] *Id*. at 36.
[56] *Id*. at 37.
[57] 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).

- 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.[58]

- 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.[59]

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.

23.08 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. The ADU Development Program established by the City of Santa Cruz, California offers financial assistance through a grant program.[60] The Santa Cruz program also provide technical assistance through an ADU Plan Set Book that contains seven ADU prototype concepts designed by local architects and an ADU Manual that provides a step-by-step guide on how to plan, design, and obtain permits for an ADU.[61] To promote the construction of new ADUs within city limits, Portland, Oregon agreed to waive its "system development charges" (which generally cost $7,000 to $12,000) on all ADUs.[62] The Energy Trust of Oregon also promotes ADUs by offering rebates for the construction of ADUs that meet the

[58] *Id.*
[59] *Id.* at 22.
[60] *See* Santa Cruz Accessory Dwelling Unit Development Program (available online at http://www.cityofsantacruz.com/departments/planning-and-community-development/programs/accessory-dwelling-unit-development-program).
[61] *See id.*
[62] *See* City of Portland, Oregon – Service Level Update for Accessory Dwelling Units (ADU) (available online at http://www.portlandoregon.gov/bds/article/440155); *see also* "City of Portland offering big incentives to build ADUs" (available online at http://brooklyn-neighborhood.org/2012/01/03/city-of-portland-offering-big-incentives-to-build-adus/).

Northwest Energy Star standards for energy efficiency.[63] In Maryland, the Department of Housing and Community Development offers loans for the rehabilitation of home that include accessory housing units.[64]

APPENDIX

GLOSSARY OF KEY TERMS

(Bolded Page Number Indicates Page Where Term is Defined)

[63] *See* "New Energy Performance Incentive Available for New ADUs," (available online at http://accessorydwellings.org/2012/01/04/new-energy-performance-incentive-available-for-new-adus/).
[64] *A Room of One's Own* at 536.

APPENDIX

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