

Fix Housing to Fix America: Unlocking Housing Abundance with Land-Use Reform

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I. INTRODUCTION

The United States is currently experiencing a historic housing supply shortage. America currently has a shortage of 7.3 million affordable homes.¹ The problem is even more acute for those most in need. There are currently only 7 million homes affordable to the 11 million households with extremely low incomes.² Making the problem even worse, 3.3 million of those 7 million homes are occupied by people with higher incomes.³ Such a large market shortfall would seem to be an excellent opportunity for developers to enter the market and build enough supply to meet this demand. Yet, developers are legally prohibited from building the kinds of housing that would solve this supply issue in the places

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1. Andrew Aurand et al., *Addressing America's Affordable Housing Crisis*, HOUSING MATTERS (Apr. 12, 2023), <https://housingmatters.urban.org/research-summary/addressing-americas-affordable-housing-crisis> [<https://perma.cc/M8MS-8FXF>].

2. *Id.*

3. *Id.*

where they are needed most.⁴ Developers themselves are keen to become part of the solution to this housing shortage.⁵ This Note contends that the main impediment is local land use controls.

Some of the states experiencing the most acute housing crises have started to take state-level action to increase the supply of housing.⁶ These efforts almost always focus on knocking down local restrictive land use ordinances, and yet, these state-level efforts have been repeatedly stymied by local NIMBYs.⁷ NIMBY stands for “Not in my back yard”; a phenomenon in which local property owners and residents block any new development in their area.⁸ The reasons given for blocking developments vary from aesthetic concerns to perceived threats to their property values and a desire to exclude people that they would prefer not to live nearby.⁹ States need to consider the role that developers can play in identifying the restrictive regulations stopping new housing and allowing developers the tools to challenge it.

This Note begins with a historical look at the origins of zoning in America and how race and racial segregation helped form the modern zoning landscape. It then looks toward the current state of economic and legal research on the housing crisis and the commonly cited causes of the housing supply shortage. This includes a survey of common land use regulations in US cities, such as the wide prevalence of single-family exclusionary zoning and related ordinances such as parking minimums. This Note will also examine the usage of cost-benefit analysis in federal and state policymaking and the potential application of cost-benefit analysis in the housing space. It then compares housing reform efforts in California and Montana to determine what proposed solutions do and do not work and why Montana has been so much more successful than California in increasing the supply of housing. I propose a novel solution that provides a quick and cost-effective means for developers to challenge restrictive local zoning regulations that are preventing the construction of new housing.

4. *Id.*

5. 2024 POLICY PRIORITY, AM. PLANNING ASS'N, <https://www.planning.org/policy/priorities/zoning-reform/> [<https://perma.cc/ZBC2-H398>].

6. Ben Horowitz & Zakary Yudhishthu, *States Reform Regulations to Support More Housing Production*, FED. RSRV. BANK OF MINNEAPOLIS (Nov. 15, 2023), <https://www.minneapolisfed.org/article/2023/states-reform-regulations-to-support-more-housing-production> [<https://perma.cc/2K55-6E5A>].

7. Katie Roberts-Hull, *Our Cities Are Not Museums. We Must Stop Nimbys Weaponising Heritage Laws to Block Affordable Housing*, THE GUARDIAN (May 6, 2023), www.theguardian.com/commentis-free/2023/may/07/our-cities-are-not-museums-we-must-stop-nimbys-weaponising-heritage-laws-to-block-affordable-housing [<https://perma.cc/96QJ-DW8p>].

8. *Id.*

9. Emily Badger, *How ‘Not in My Backyard’ Became ‘Not in My Neighborhood’*, N.Y. TIMES (Jan. 3, 2018), <https://www.nytimes.com/2018/01/03/upshot/zoning-housing-property-rights-nimby-us.html> (on file with the *Journal of Corporation Law*).

II. BACKGROUND

A. *What the Housing Crisis looks like*

Our current system of land use and the inability of developers to meet demand for housing has resulted in housing becoming increasingly unaffordable.¹⁰ This unaffordability has squeezed budgets for Americans in all income brackets and has been especially difficult for poor and middle-class Americans.¹¹ This, in turn, has fueled a broad sense of economic dissatisfaction among the middle class.¹² Because of the political importance of the middle class, this has led some legislators to seek short-term fixes over long-term solutions. Current land use constraints, and the political environment it creates, make reform difficult but necessary. Therefore, states must work hard to find politically viable solutions that address the supply constraint at the heart of the problem. Large majorities of voters from California to Texas support reforms aimed at increasing supply, therefore it is up to politicians to find politically feasible ways to implement these popular supply-side reforms.¹³

Housing is a basic need for everyone and yet it has become increasingly unaffordable. For some, this means spending more and more of their paychecks on rent or mortgage payments while for others it means that housing is no longer affordable at all.¹⁴ Our current system of land use, and the unaffordability it creates, has meant that middle-class families are forced to spend far more on housing than in the past, and the poor are priced out of housing entirely. More than 650,000 Americans experience homelessness every year.¹⁵ People of color also experience homelessness at rates far higher than white Americans.¹⁶ A further 7.2 million households are severely cost-burdened, meaning they spend more than 50% of household income on housing.¹⁷ This represents 49% of all renters.¹⁸ Middle-

10. See Vanessa Brown Calder, *Zoning, Land-Use Planning, and Housing Affordability*, CATO INST. (Oct. 18, 2017), <https://www.cato.org/policy-analysis/zoning-land-use-planning-housing-affordability> [https://perma.cc/VU4S-CRDF] (“[T]he states that have increased the amount of rules and restrictions on land use the most have higher housing prices.”).

11. See Peyton Whitney, *Number of Renters Burdened by Housing Costs Reached a Record High in 2021*, JOINT CTR. FOR HOUS. STUD. (Feb. 1, 2023), <https://www.jchs.harvard.edu/blog/number-renters-burdened-housing-costs-reached-record-high-2021> [https://perma.cc/F9BE-TBGB] (“[T]he data indicate[s] the importance of programs targeted towards lower-income renters such as rental assistance and income support[.]”).

12. *Id.*

13. Alex Horowitz & Tushar Kansal, *Support for Policies That Promote More Housing Crosses Geographic Lines*, PEW (Jan. 31, 2024), <https://www.pewtrusts.org/en/research-and-analysis/articles/2024/01/31/support-for-policies-that-promote-more-housing-crosses-geographic-lines> [https://perma.cc/7D5H-JX5F].

14. *Rent Burden Rises as Millions Struggle to Pay*, NAVIGATE (Sept. 25, 2024), <https://www.navigatehousing.com/rent-burden-rises-millions-struggle-with-higher-prices/> [https://perma.cc/9Q2S-3XHH].

15. STATE OF HOMELESSNESS: 2024 EDITION, NAT’L ALL. TO END HOMELESSNESS, <https://endhomelessness.org/homelessness-in-america/homelessness-statistics/state-of-homelessness/>.

16. *Id.*

17. *DiNapoli: Housing Cost Burdens for New Yorkers Among Nation’s Highest*, N.Y. STATE COMPTROLLER (Feb. 14, 2024), <https://www.osc.ny.gov/press/releases/2024/02/dinapoli-housing-cost-burdens-new-yorkers-among-nations-highest> [https://perma.cc/FVN9-3MHL].

18. Whitney, *supra* note 11.

income households have been hit especially hard by the housing crisis.¹⁹ This is a major driver of inflation and the pain many middle-class families feel.²⁰

Much of American politics has focused on the recent divergence between middle-class Americans' view on the economy and the historical markers that have been used to measure the health of the economy. Middle-class Americans are increasingly unhappy with rising costs and inflation even at a time when the economy seems to be doing well overall.²¹ Given the central importance of the middle class both to party politics and to the popular conception of the 'American Dream,' this dynamic is critical to understand and address. In an interview with several middle-class Americans, their main complaint was the impossibility of buying or renting a home even after "doing everything right."²² Another common complaint was that previous generations could buy a home even on meager salaries, while many people today are locked out of the housing market.²³

The housing crisis is both a large part of what has caused this middle-class crisis and its most clear symptom. Rising housing costs have collided with other long-term economic changes such as stagnating wage growth.²⁴ This means that while housing prices have continued to skyrocket, wages have not kept up.²⁵ For example, in California between 2001 and 2017, the median rent increased by 30% while the average income of renters increased just 11%.²⁶ In New York the statistics are even more bleak with a 26% increase in rent against just a 2% increase in income.²⁷ This has meant that middle-class budgets have continued to feel the squeeze of increasing housing costs driven by restricted supply. Our overly restrictive land-use policies have meant that the nation's housing supply cannot keep up with population growth.²⁸

The housing market has become even more unaffordable in recent years, but returning to an old status quo is not a solution. Even in the 1950s, often looked back on as a time of great abundance and affordability in housing, America's land-use and housing policies were rife with issues. The most obvious is the systematic racism baked into our built

19. *Id.*

20. Dani Romero, *Housing Costs Again Frustrate the Fed's Efforts to Curb Inflation*, YAHOO! FIN. (Oct. 12, 2023), <https://finance.yahoo.com/news/housing-costs-again-frustrate-the-feds-efforts-to-curb-inflation-155809253.html> [<https://perma.cc/E38S-JWNB>].

21. Jennifer Sor, *Housing Has Become So Unaffordable That Over 75% of Homes on the Market are too Expensive for Middle-Income Buyers*, MKTS. INSIDER (June 12, 2023), <https://markets.businessinsider.com/news/commodities/housing-affordability-crisis-shortage-inventory-high-mortgage-rates-middle-class-2023-6> [<https://perma.cc/DJ9E-YSTX>].

22. Alana Semuels & Belinda Luscombe, *The Economy is Great. The Middle Class is Mad*, TIME (Apr. 28, 2022), <https://time.com/6171292/middle-class-falling-behind-economy/> [<https://perma.cc/4FSJ-Q556>].

23. *Id.*

24. Nigel Wilson, *Millennials and Housing, Part 3: How Wage Stagnation Has Flipped the Housing Equation*, FORBES (Dec. 20, 2021), <https://www.forbes.com/sites/nigelwilson/2021/12/18/millennials-and-housing-part-3-how-wage-stagnation-has-flipped-the-housing-equation/> (on file with the *Journal of Corporation Law*).

25. *Id.*

26. Alicia Mazzara, *Rents Have Risen More Than Incomes in Nearly Every State Since 2001*, CTR. ON BUDGET & POL'Y PRIORITIES (Dec. 10, 2019), <https://www.cbpp.org/blog/rents-have-risen-more-than-incomes-in-nearly-every-state-since-2001> [<https://perma.cc/9K88-GDL7>].

27. *Id.*

28. Jared Bernstein et al., *Alleviating Supply Constraints in the Housing Market*, HEARTLAND CAP. STRATEGIES (Sept. 1, 2021), <https://www.heartlandnetwork.org/single-post/alleviating-supply-constraints-in-the-housing-market> [<https://perma.cc/7WZ7-5EQT>].

environment. From racially motivated zoning ordinances and covenants to racist lending and financing practices, the existing housing stock reflects an outdated and unequal view of land use. Modern zoning requirements largely reflect these historical divisions.²⁹

In response to this political problem, governments have tried to just put money into solving the issue by looking for a short-term solution instead of pursuing reforms built on supply increases.³⁰ This has often manifested in states pursuing demand subsidies instead of reforms that will allow developers to respond to market demands to build more supply.³¹ The solutions to our current housing crisis must not just help people afford homes again, but make our cities and suburbs more livable and healthier places for everyone by letting developers respond to market demand.

B. The Origins of Zoning

America's current zoning regime is built on exclusion and distrust of the other. In a landmark Supreme Court case, *Village of Euclid v. Amber Realty Co.*, the Court held that zoning was constitutional and did little to hide their animus stating "very often the apartment house is a mere parasite."³² This case led to the term "Euclidian Zoning" to describe America's exclusionary zoning regime.³³ This regime came about after explicit racial-based zoning was struck down as unconstitutional in *Buchanan v. Warley*.³⁴ Early zoning ordinances in cities such as Seattle and St. Louis were designed to maintain the racial segregation of residential areas.³⁵ Poorer, disproportionately minority communities, were most likely to be zoned to permit polluting industries while wealthier, and whiter, areas were kept far from polluting industry.³⁶

The racial animus in early zoning regimes was clear. St. Louis, for example, a city planning official stated that an important goal of a newly proposed zoning ordinance was to stop "colored people" from moving into the "finer residential districts."³⁷ While the racist goals were explicit in their ends, the means employed were facially race-neutral to not run afoul of the prohibition of race-based land use restrictions in *Buchanan*.³⁸ The zoning commission also noted that an area with single-family homes covered by existing

29. John Mangin, *The New Exclusionary Zoning*, 25 STAN. L. & POL'Y REV. 91, 97 (2014) (discussing the effect of racial prejudice in housing markets).

30. Jacob Krimmel & Betty Wang, *Upzoning with Strings Attached: Evidence from Seattle's Affordable Housing Mandate*, 25 CITYSCAPE No. 2 257, 257 (2023).

31. Ashfaq Khan et al., *The Rental Housing Crisis is a Supply Problem That Needs Supply Solutions*, CTR. FOR AM. PROGRESS (Aug. 22, 2022), <https://www.americanprogress.org/article/the-rental-housing-crisis-is-a-supply-problem-that-needs-supply-solutions/> [<https://perma.cc/8BGF-4SMW>].

32. *Village Of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394 (1926).

33. Spencer Gardner, *A History of Zoning in Three Acts - Part I*, STRONG TOWNS (June 28, 2017), <https://www.strongtowns.org/journal/2017/6/28/a-history-of-zoning-in-three-acts-part-i> [<https://perma.cc/QJ8K-7H4K>].

34. *Buchanan v. Warley*, 245 U.S. 60, 70 (1917).

35. Cecilia Rouse et al., *Exclusionary Zoning: Its Effect on Racial Discrimination in the Housing Market*, THE WHITE HOUSE (June 23, 2022), <https://www.ocompt.com/DocumentCenter/View/14919/2022-06-23-Handout-by-Commissioner-Wilson-PDF> [<https://perma.cc/AQ34-TLPV>].

36. *Id.*

37. RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 49 (2017).

38. *Id.*

racial covenants would be zoned as single-family only going forward.³⁹ The single-family zoning designation was to “help . . . preserve its all-white character.”⁴⁰ A survey undertaken by the planning commission took note of the race of each occupant of current housing structures.⁴¹ This was seemingly important information to the architects of a zoning regime that was legally prohibited from being explicitly racist. The St. Louis zoning ordinance, clearly built with the goal of racial discrimination, was adopted into law in 1919, two years after the Supreme Court ostensibly banned race-based zoning in *Buchanan*.⁴² The example of St. Louis is a clear illustration of how even after explicit racial zoning was officially outlawed, it continued to persist and was a motivating force behind the facially race-neutral zoning ordinances adopted across the country. From the beginning, single-family zoning was used to preserve racially segregated neighborhoods.

Zoning was not just used to preserve the existing racial segregation in housing but also to adapt and reinforce segregation. Just after the St. Louis zoning ordinances discussed above went into effect, a debate broke out regarding whether to reclassify a then single-family-home-only area as a commercial zone instead.⁴³ This change was ‘needed’ because the area just south of it had been “invaded” by African Americans.⁴⁴ The proposal was defeated because the commission decided that maintaining single-family zoning in the neighborhood would ensure that it remained unaffordable to African Americans and, therefore, stop the “invasion.”⁴⁵ This is another example of how facially neutral zoning classifications, in this case, a commercial zoning restriction, were used for racist ends, as well as how the unaffordability created by single-family zoning was used to preserve segregation.

Federal policies during and after the Great Depression entrenched these facially neutral but racially motivated zoning policies and exacerbated racial segregation in America’s cities.⁴⁶ The Fair Housing Administration (FHA) was created in 1934 to ensure low-interest-rate mortgages that private banks would otherwise not issue.⁴⁷ Because the FHA was guaranteeing these loans, they carried out their loan appraisals to ensure the loans were low-risk enough for the government to assume.⁴⁸ To conduct this analysis, the FHA issued an underwriting manual laying out the government’s criteria for a loan that could be guaranteed.⁴⁹ The 1936 FHA underwriting manual stated:

39. *Id.*

40. *Id.*

41. *Id.*

42. ROTHSTEIN, *supra* note 37, at 53.

43. *Id.*

44. *Id.*

45. *Id.*

46. Russell Fowler, *The Ugly History of Redlining: A Federal Policy ‘Full of Evil’*, TENN. BAR ASS’N (Jan. 1, 2023), <https://www.tba.org/?pg=Articles&blAction=showEntry&blogEntry=85873> [<https://perma.cc/FR6V-LEZB>].

47. *About Us*, U.S. DEP’T. OF HOUS. & URB. DEV. https://www.hud.gov/program_offices/housing/fhahistory [<https://perma.cc/6WK8-GZ7C>].

48. ROTHSTEIN, *supra* note 37, at 65.

49. FED. HOUS. ADMIN., UNDERWRITING MANUAL 233 (1936), https://fraser.stlouisfed.org/files/docs/publications/fha/1936apr_fha_underwritingmanual.pdf?utm_source=direct_download [<https://perma.cc/5X6K-ECWZ>].

If a neighborhood is to retain stability it is necessary that properties shall continue to be occupied by the same social and racial classes. A change in social or racial occupancy generally leads to instability and a reduction in values. The protection offered against adverse changes should be found adequate before a high rating is given to this feature. Once the character of a neighborhood has been established it is usually impossible to induce a higher social class than those already in the neighborhood to purchase and occupy properties in its various locations.⁵⁰

Racial segregation became official government policy because the only way to access an affordable home mortgage was through FHA backing, and decades of systematic discrimination followed.⁵¹ This was the practice known as “redlining.”⁵² The areas previously preserved by racially motivated zoning ordinances, as in St. Louis above, as well as those with private racial covenants became the very same areas that the FHA guaranteed loans to.⁵³ This is because the FHA manual encouraged loans in areas with the racially restrictive covenants creating a fiscal feedback loop in which federal money went primarily to areas with racially restrictive land use.⁵⁴

This led to the development pattern that created our modern built environment.⁵⁵ Federally backed loans in whites-only areas represented a massive wealth transfer to white residents and their descendants; a difference that persists to this day.⁵⁶ It is against this backdrop that we must now reckon with our housing crisis. The zoning ordinances NIMBYs are seeking to protect today are the very ones created by this historical practice of redlining. Put another way, “[b]eneath the surface . . . is the long shadow of Jim Crow, lingering.”⁵⁷

The housing crisis is a key driver of the modern racial wealth gap.⁵⁸ For decades, the federal government has viewed homeownership as a primary means of building middle-class wealth.⁵⁹ This has resulted in large wealth gains for those who could access home

50. *Id.* at 194.

51. See generally ROTHSTEIN, *supra* note 37 (discussing the history of segregation and how it was advanced by government policies).

52. *Id.*

53. *Id.* at 228.

54. *Id.*

55. Ryan Best & Elena Mejía, *The Lasting Legacy of Redlining*, FIVETHIRTYEIGHT (Feb. 9, 2022), <https://projects.fivethirtyeight.com/redlining/> [<https://perma.cc/6KLQ-68LF>].

56. Pedro da Costa, *Housing Discrimination Underpins the Staggering Wealth Gap Between Blacks and Whites*, ECON. POL’Y INST. (Apr. 8, 2019), <https://www.epi.org/blog/housing-discrimination-underpins-the-staggering-wealth-gap-between-blacks-and-whites/> [<https://perma.cc/2BTT-YP9L>].

57. Samantha Hancox-Li, *NIMBYism is Segregation Persisting*, LIBERALCURRENTS (Aug. 29, 2022), <https://www.liberalcurrents.com/nimbyism-is-segregation-persisting/> [<https://perma.cc/J32K-U3M2>].

58. Diana Goldsmith & Stephanie Onuaja, *Narrowing the Racial Wealth Divide: Supporting the Homeownership Journey*, NATIONAL LEAGUE OF CITIES (Apr. 9, 2024), <https://www.nlc.org/article/2024/04/09/narrowing-the-racial-wealth-divide-supporting-the-homeownership-journey/> [<https://perma.cc/NR4X-RMKR>].

59. See THOMAS P. BOEHM & ALAN SCHLOTTMANN, U.S. DEP’T OF HOUSING & URBAN DEV., WEALTH ACCUMULATION AND HOMEOWNERSHIP: EVIDENCE FOR LOW-INCOME HOUSEHOLDS v (2004), <https://www.huduser.gov/publications/pdf/wealthaccumulationandhomeownership.pdf> [<https://perma.cc/5YE9-MEM4>] (stating “[f]or many years the federal government has promoted homeownership as an important goal for low income families. A primary motivation of this policy goal is the concept that owner-occupied housing can be an important means of wealth accumulation”).

ownership. For those shut out of home ownership, the opportunity to build wealth and the opportunity to pass it along to subsequent generations is lost. This results in compounding inequity. For example, in 2022, the average white family had \$261,200 in home equity wealth while the average Black family had only \$92,700.⁶⁰ The racial homeownership gap has also increased slightly over time as well.⁶¹ In 1900 it stood at 24.3%, in 1960 at 27.3%, and peaked in 2020 at 29.6%.⁶²

The historical inequity in American land use continues to be felt throughout society today. Some scholars have even begun to argue that using homeownership as the primary means of wealth accumulation is itself a bad policy.⁶³ America's housing policy is built on a fundamental contradiction—"[h]omeownership works for some because it cannot work for all."⁶⁴ Homes cannot both be a perpetually appreciating investment that builds wealth and a cheap and abundant resource for future generations. Policymakers serious about making housing more affordable will have to confront this contradiction head-on.

C. Current Forms of Local Land Use Controls

Local land use permeates every element of our built environment. Zoning ordinances today severely limit what uses are allowed on a specific plot of land.⁶⁵ These zoning ordinances usually involve dividing plots of land into three main types: residential, commercial, and manufacturing.⁶⁶ These use types are then further broken down by assigning a number to each subsection with a higher number allowing for more density within each zone.⁶⁷ In New York City, for example, there are 10 different levels of residential (R) zoning. R-1 single-family zoning results in very low density while R-10 allows high-rise condominiums.⁶⁸

The layout of R-1 zoning to R-10 zoning demonstrates the stark difference in the type and scale of housing allowable under each zoning regime.⁶⁹ Many American cities are currently overwhelmingly zoned for single-family housing only, and exclude all other

60. Joseph Dean, *The Racial Wealth Divide and Black Homeownership: New Data Show Small Gains, Deep Fragility*, NAT'L CMTY. REINVESTMENT COAL. (Feb. 28, 2024), <https://nrc.org/the-racial-wealth-divide-and-black-homeownership-new-data-show-small-gains-deep-fragility/> [<https://perma.cc/2QWK-BRVP>] (citing Federal Reserve Survey of Consumer Finance data).

61. *Id.*

62. *Id.* (citing Census data).

63. Jerusalem Demsas, *The Homeownership Society Was a Mistake*, THE ATLANTIC (Dec. 20, 2022), <https://www.theatlantic.com/newsletters/archive/2022/12/homeownership-real-estate-investment-renting/672511/> [<https://perma.cc/DE85-5L46>].

64. *Id.*

65. Nathaniel Meyersohn, *The Invisible Laws That Led to America's Housing Crisis*, CNN (Aug. 5, 2023), <https://www.cnn.com/2023/08/05/business/single-family-zoning-laws/index.html> [<https://perma.cc/QK83-8V2>].

66. *About Zoning Districts*, N.Y.C. DEP'T OF CITY PLAN., <https://www.nyc.gov/site/planning/zoning/districts-tools.page> [<https://perma.cc/B8LQ-UVD6>].

67. *Id.*

68. *Residence Districts: R1*, NYC DEP'T OF CITY PLAN., <https://www.nyc.gov/site/planning/zoning/districts-tools/r1> (on file with the *Journal of Corporation Law*); *Residence Districts: R10 - R10A - R10X*, N.Y.C. DEP'T OF CITY PLAN., <https://www.nyc.gov/site/planning/zoning/districts-tools/r10.page> [<https://perma.cc/7KTB-E52C>].

69. *Id.*

types of more dense housing.⁷⁰ In Los Angeles, 75% of the land is zoned for single-family, in Seattle the number is 81%, and in San Jose, 94% of all land is locked away behind a single-family-only restriction.⁷¹ This means the vast majority of these cities are required to be sprawled, low-density, single-family homes with no option to build any other type of home.

R1 + R2		Low-Density Non-Contextual Residence Districts											
		Lot Area min.	Lot Width min.	Front Yard min.	Rear Yard min.	Side Yards #	Open Space Ratio	FAR	Sky Exposure Plane max.	DU Factor	Required Parking min.		
R1-1	Single-Family Detached	9,500 sf	100 ft	20 ft		15 ft	35 ft					4,750	
R1-2		5,700 sf	60 ft		30 ft	2	8 ft	20 ft	150.0	0.50	Starts at 25 ft	2,850	1 per DU
R2		3,800 sf	40 ft	15 ft			5 ft	13 ft				1,900	

Zoning Restraints on R1 Development⁷²

Zoning restrictions come with a plethora of other requirements that must also be met.⁷³ These restrictions act to further limit the ability of landowners and developers to build any other type of home besides a single-family home.

A very common restriction included in zoning ordinances is a minimum parking requirement.⁷⁴ Mandatory parking minimums have resulted in a large overabundance of parking, with an estimated two billion parking spots built across the country.⁷⁵ Parking minimum requirements are often extremely use-specific. For example, in the town of SeaTac, Washington, a moth or butterfly breeding site is required to have one parking spot per 250 square feet of office space.⁷⁶ In that town, a golf course is required to have three parking spots per hole, and a driving range must have one spot per tee.⁷⁷ These mandatory minimum parking laws prescribe a minimum number of parking spots for a development but are very often based on little to no empirical evidence.⁷⁸ This results in absurd outcomes that further exacerbate the housing crisis. For example, the city of Des Moines, Iowa

70. Emily Badger & Quoc Trung Bui, *Cities Start to Question an American Ideal: A House with a Yard on Every Lot*, N.Y. TIMES (June 18, 2019), <https://www.nytimes.com/interactive/2019/06/18/upshot/cities-across-america-question-single-family-zoning.html> (on file with the *Journal of Corporation Law*).

71. *Id.*

72. *Residence Districts: R1*, *supra* note 68.

73. *Id.* This includes attributes such as lot size, lot width, parking minimums and others.

74. Michael J. Coren, *Why Free Street Parking Could Be Costing You Hundreds More in Rent*, WASH. POST (May 2, 2023), <https://www.washingtonpost.com/climate-environment/2023/05/02/eliminating-parking-minimums-liveable-cities/> (on file with the *Journal of Corporation Law*).

75. Nathaniel Meyersohn, *This Little-Known Rule Shapes Parking in America. Cities Are Reversing it*, CNN (May 21, 2023), <https://www.cnn.com/2023/05/20/business/parking-minimums-cars-transportation-urban-planning/index.html> [<https://perma.cc/PRQ4-8UGL>].

76. SeaTac, Wash. Parking & Circulation ch.15.455, § 120 (2024).

77. *Id.*

78. See Climate Town, *Parking Laws Are Strangling America*, YOUTUBE (Jul. 17, 2023), <https://www.youtube.com/watch?v=OUNXFHpUhu8> [<https://perma.cc/5KMR-TMHH>] (discussing how most parking minimums are based on very few data points and have extremely low fit between the occupancy and the mandated number of spots).

has 19 parking spots for each household in the city, and the same number of parking spots as Seattle, a city three times its size.⁷⁹

D. History of Cost Benefit Analysis

A cost-benefit analysis (CBA) is a decision-making framework that seeks to maximize the social welfare of people by taking into account the costs and benefits of a specific policy.⁸⁰ This analytical framework has been used for decades by federal agencies in the rulemaking process.⁸¹ CBA of regulations became a legal requirement at the federal level since 1993.⁸² There has been significant debate surrounding the use of CBA at the federal level and in the law more generally.⁸³

Critics accurately state that there are certainly times in which CBA will struggle to accurately quantify the externalities of a policy or regulation. For example, a regulation requiring all vehicles to have backup cameras is reflected in the higher price of vehicles.⁸⁴ On the other hand, its benefits, such as fewer accidents resulting in fewer children being hurt or killed, will be harder to quantify.⁸⁵ A legislature or regulator may rationally conclude that a price placed on a child's life does not adequately account for the harm caused, and so a backup camera requirement is valid because of the moral implications. Debates on these issues are outside of the scope of this Note. Critics of CBA often claim these ethereal externalities render the analysis futile; it is clear that there is still great benefit to CBA when done properly.⁸⁶ Governments at all levels already use CBA in several contexts.⁸⁷ This Note will take CBA as it broadly exists today within government.

79. ERIC SCHARNHORST, QUANTIFIED PARKING: COMPREHENSIVE PARKING INVENTORIES FOR FIVE U.S. CITIES 1–2 (2018); *Des Moines City*, U.S. CENSUS BUREAU, https://data.census.gov/profile/Des_Moines_city,_Iowa?g=160XX00US1921000 (on file with the *Journal of Corporation Law*); *About Seattle*, OFF. OF PLAN. & CMTY. DEV., <https://www.seattle.gov/opcd/population-and-demographics/about-seattle> (on file with the *Journal of Corporation Law*) (citing 2020 census data for Seattle).

80. MAEVE P. CAREY, CONG. RSCH. SERV., IF12058, COST-BENEFIT ANALYSIS IN FEDERAL AGENCY RULEMAKING 2 (2022).

81. *Id.*

82. Exec. Order No. 12866, 58 Fed. Reg. 190 (Sept. 30, 1993).

83. Todd Phillips & Sam Berger, *Reckoning with Conservatives' Bad Faith Cost-Benefit Analysis*, CTR. AM. PROGRESS (Aug. 14, 2020), <https://www.americanprogress.org/article/reckoning-conservatives-bad-faith-cost-benefit-analysis/> [https://perma.cc/3NQ5-GUAE].

84. Arden Rowell, *Valuing the Rear-view Camera Rule*, THE REG. REV. (May 30, 2012), <https://www.theregview.org/2012/05/30/30-rowell-camera/> [https://perma.cc/M5WD-VE4E].

85. Federal Motor Vehicle Safety Standard, Rearview Mirrors, Department of Transportation National Highway Traffic Safety Administration, 49 CFR Parts 571, 585 (proposed Dec. 7, 2010) (highlighting that there is a “qualitatively distinct risk” that parents or caregivers will be the ones who hurt or kill the children in their care and that “[w]hile these benefits cannot be monetized, they could be significant,” therefore, NHSTA concluded that the clear cost of the regulation was outweighed by the non-quantifiable benefits); Andy Cross, *Study Shows Cameras Can Help Stop Drivers Backing into Children*, NBC NEWS (Mar. 13, 2014), <https://www.nbcnews.com/business/autos/study-shows-cameras-can-help-stop-drivers-backing-children-n51816> [https://perma.cc/MW74-PWZN] (describing the results of a NHSTA study showing “using cameras could reduce the death toll to between 95 and 112 annually, while also preventing as many as 8,374 injuries”).

86. *Id.*

87. See Phillips & Berger, *supra* note 83.

While the use of CBA at the federal level has been well-established for decades, its use at the local level is patchwork.⁸⁸ In one survey of local governments, 56% of larger cities, those with a population above 49,622, utilized CBA when considering a zoning change, while only 22% of smaller cities did so.⁸⁹ One reason for the lower utilization of CBA at the local level is the administrative cost and complexity of carrying out such a study.⁹⁰ These costs include gathering data and either employing staff or hiring an outside consultant to conduct the analysis.⁹¹

Many states utilize CBA sparingly, if at all when setting state-level policies.⁹² For the states that utilize CBA more extensively, they are often used inconsistently across agencies and policies.⁹³ These inconsistencies include mandating using CBA for some policy areas while excluding other policy areas from analysis entirely.⁹⁴ There is also great variance between states in their use of CBA. In a Pew study of CBA use at the state level, researchers identified ten states “leading the way” in using data to drive desirable policy outcomes, 29 states with mixed results in usage, and a further 11 states lagging in the use of data to drive policy decisions.⁹⁵ When it came to using CBA to assess multiple different program alternatives, the news was more grim, with only 18% of CBA studies considering at least two alternatives.⁹⁶ In addition, only five states consistently compared policy alternatives while 21 states did not.⁹⁷

Between 2008–2011, 30 states used CBA to evaluate economic development policies while just seven states did so for housing policy.⁹⁸ Use of CBA at the state level is growing, with much of that due to requirements included in state legislation.⁹⁹

E. CBA of Zoning Restrictions

Economists have taken an increased interest in the economic viability and efficacy of America’s restrictive land use regimes.¹⁰⁰ Land use has certain features that make the

88. See Exec. Order, *supra* note 82 (reporting the disconnect between CBA at the federal and state level); Jiwon Park, *Do Municipalities Use Cost-Benefit Analysis for Incentive Zoning?*, AM. PLAN. ASS’N (May 18, 2023), <https://www.planning.org/blog/9270243/do-municipalities-use-cost-benefit-analysis-for-incentive-zoning/> [<https://perma.cc/5KB3-YMCF>].

89. *Id.*

90. *Id.*

91. *Id.*

92. Ryan Nunn, Jana Parsons & Jay Shambaugh, *Nine Facts about State and Local Policy*, HAMILTON PROJECT (Jan. 31, 2019), <https://www.hamiltonproject.org/publication/economic-fact/nine-facts-about-state-and-local-policy/> [<https://perma.cc/DF2B-ECMF>].

93. *Id.*

94. *Id.*

95. THE PEW CHARITABLE TRUSTS & MACARTHUR FOUNDATION, STATES’ USE OF COST-BENEFIT ANALYSIS IMPROVING RESULTS FOR TAXPAYERS 14 (2013), https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pcs_assets/2013/pewresultsfirst50staterreportpdf [<https://perma.cc/PJ8P-W8N6>]

96. *Id.* at 20.

97. *Id.*

98. *Id.* at 16.

99. *Id.* at 18.

100. Evan Mast, *JUE Insight: The Effect of New Market-Rate Housing Construction on the Low-Income Housing Market* (Upjohn Inst., Working Paper No. 19-307, 2021), https://research.upjohn.org/up_workingpapers/307; John F. McDonald, *Cost Benefit Analysis of Local Land Use Allocation Decisions*, 41 J. REG’L

debate over reform more difficult than some other economic debates.¹⁰¹ One issue is that externalities, such as environmental harm, are simply not accounted for by private actors.¹⁰² Landowners do not always maximize economic interests because they act on non-economic interests.¹⁰³ CBA will simply not accurately capture the entire residential property market because it fails to account for the non-economic factors of consumers.¹⁰⁴ These non-economic interests can be seen in a suburb's development guidelines cited in a NIMBY lawsuit seeking to stop a new housing development.¹⁰⁵ The suit claimed that they wanted to "protect low density character, preserve open space, and maintain neighborhood scale."¹⁰⁶ This dynamic manifests in the so-called 'holdout problem,' where a landowner will refuse to sell to a developer even if doing so would result in a much larger payment to the owner than the fair market value of the land.¹⁰⁷ Government intervention such as the use of eminent domain is sometimes used to address this market failure while other times costly litigation is the only means of addressing holdouts.¹⁰⁸ Any discussion of CBA in the land-use context must bear in mind these non-economic interests and seek to include them in the analysis as much as possible.

Much of the housing market, however, can be properly quantified and analyzed by applying simple economic principles. Developers will build housing so long as they can sell for more than the cost and normal profits.¹⁰⁹ In growing cities, developers will continue to build when there is excess demand.¹¹⁰ Developers respond to the market when deciding when and where to develop.¹¹¹ A White House analysis of housing supply clearly shows when supply increases, prices decrease, and vice versa.¹¹²

Cities have tried to use affordability requirements, also called inclusionary zoning, to achieve lower prices without carrying out the reforms needed to increase supply.¹¹³ These cities were trying to shortcut the necessary economic solution of boosting supply to lower prices. However, inclusionary zoning has instead often resulted in lower overall

SCI. No. 2 277 (2001); Bruno Albuquerque et. al., *The Declining Elasticity of US Housing Supply*, VOXEU CEPR (Feb. 25, 2020), <https://cepr.org/voxeu/columns/declining-elasticity-us-housing-supply> [<https://perma.cc/CY55-ZCV2>].

101. Eduardo Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821 (2009).

102. *Id.* at 850 (discussing how there is no market mechanism for certain externalities therefore individual private owners can make decisions with negligible impacts on the environment but in the aggregate, cause great harm overall).

103. *See id.* Professor Peñalver mentioned specifically environmental concerns. However, this Note contends that an individual's non-economic interests could be informed by their desire to reduce 'undesirable' outcomes like the presence of minorities, low-income individuals, or multi-family living arrangements. *See generally supra* Part I.A.

104. *Id.*

105. *Cummins v. D.C. Zoning Comm'n*, 229 A.3d 768 (D.C. 2020).

106. *Id.* at 776.

107. Ted Landphair, *Stubborn Holdouts Trip Up Land Developers*, VOA (Apr. 10, 2021), <https://www.voanews.com/a/stubborn-holdouts-trip-up-land-developers/179452.html> [<https://perma.cc/D8WS-NYJH>].

108. *Id.*

109. Mangin, *supra* note 29, at 97.

110. *Id.* at 98.

111. *Id.*

112. Bernstein et al., *supra* note 28.

113. Krimmel & Wang, *supra* note 30.

construction.¹¹⁴ The reason is straightforward: when developers are required to reserve some part of the development for sale at a below-market rate, the developer will have to price the rest of the units higher to compensate for the units forcibly priced below market value.¹¹⁵

When demand increases and supply is constrained, prices will increase.¹¹⁶ Reforms, such as inclusionary zoning, that fail to address this basic economic reality will inevitably fail.¹¹⁷ Inclusionary zoning regimes assume a broken housing market in which supply can never meet demand, and instead asks the majority of residents in a development to pay extra to subsidize the few below-market rates units. Such a plan is not scalable and can never remedy the broken housing market because it assumes its perpetual existence.

When new housing stock is built and occupied, the existing housing stock becomes available for others to inhabit through a process called “filtering.”¹¹⁸ This occurs because as new and more desirable housing options become available, the individuals with the most purchasing power in the housing market will move into those new units, leaving their old units available for those with less purchasing power.¹¹⁹ In a study of the effects of building 100 market-rate units of housing, the author found that because of “filtering” housing availability in below-median-income areas increased significantly.¹²⁰

This reality is far from the oft-repeated yet erroneous claims that new market-rate construction harms lower-income people; new housing construction helps by both freeing up housing stock, increasing the total supply, and relieving price pressures in lower-income areas.¹²¹

Several variables need to be accounted for when determining the proper use of any given lot. An example of how microeconomic models can be applied to land-use decisions is found in Professor McDonald’s article examining how an undeveloped parcel of land

114. *Id.*

115. If a building is to be constructed with 100 units and 20 are to be priced at \$1000 a month below market, the rest of the units will have to be priced higher and undercut the financial feasibility of the project meaning at least some will never be built. 100 ‘market rate’ units will do much more to reduce prices than 20 theoretical ‘affordable’ units that were never built in the first place. Creating housing supply would do more to bring down housing prices than other methods which involve not building housing. *See, e.g.,* JACK BILLINGS & DAVID VATZ, PRO-HOUSING PITTSBURGH, THE EFFECTS OF INCLUSIONARY ZONING ON NEW HOUSING CONSTRUCTION IN PITTSBURGH I (Jan. 27, 2025) (finding that inclusionary zoning requirements reduced housing production while areas without such requirements increased housing production).

116. Diccon Hyatt, *Supply and Demand in Real Estate*, THE BALANCE (Sept. 13, 2022), <https://www.thebalancemoney.com/real-estate-supply-and-demand-2866979> [<https://perma.cc/CXB5-KJHH>].

117. *Id.*; Krimmel & Wang, *supra* note 30.

118. Todd Litman, *How Filtering Increases Housing Affordability*, PLANETIZEN (Aug. 27, 2018), <https://www.planetizen.com/blogs/100293-how-filtering-increases-housing-affordability> [<https://perma.cc/H255-HGPY>].

119. *Id.*

120. Mast, *supra* note 100.

121. Noah Smith, *The Left-NIMBY Meltdown*, NOAHPINION (June 22, 2022), <https://www.noahpinion.blog/p/the-left-nimby-meltdown> [<https://perma.cc/LG43-HHJ9>] (highlighting that while many left-NIMBYs claim to fight for the interests of lower-income people, their policies are actively harmful to those groups); Ross Barkan, *The YIMBY War Breaking Out on the Left*, N.Y. MAG. (Sept. 16, 2022), <https://nymag.com/intelligencer/2022/09/a-war-is-breaking-out-on-the-left-between-yimbys-and-nimbys.html> [<https://perma.cc/4R8R-MLYJ>] (highlighting that many local Democratic Socialists of America politicians have opposed new housing construction in New York while also complaining about the high cost of housing in the city).

could be used for either an industrial or residential purpose.¹²² The analysis seeks to capture the combination of “land, labor, and capital” to maximize output.¹²³ This analysis assumes perfectly competitive markets with no externalities.¹²⁴ An important externality of our current suburban sprawl is the negative health effects of car-centric cities.¹²⁵

The model for quantifying the benefit is Annual Rental Income $[R_h] = (\text{Market Price } [p_h] \times \text{Units } [H]) - (\text{Opportunity Cost } [r] \times \text{Unit of Capital Services for Housing } [K_h])$.¹²⁶ There are also benefits to the local municipality when new housing is built because it increases the tax base for the jurisdiction.¹²⁷ While these new taxes benefit the jurisdiction collecting the tax, they are, of course, a cost to the future residents of that development as the ones paying the taxes. Therefore to account for this, the resulting net benefit equation will be $(\text{Net Cost } [T_h] + \text{Annual Rental Income } [R_h]) = (\text{Market Price } [p_h] \times \text{Units } [H]) - (\text{Opportunity Cost per Unit } [r] \times \text{Unit of Capital Services for Housing } [K_h])$.¹²⁸ Development also comes with additional costs to localities, such as the cost of providing utilities, schools, and other services to the public.¹²⁹ To capture this, Net Cost is used to represent the net between tax revenue raised and the cost of services provided.¹³⁰ This net figure represents the tradeoff between the increased tax base to the city and the increase in cost for services the city must provide. Models that consider the reality of elastic supply and localized impacts from intra-regional movement are also modeled in the paper.¹³¹ While such effects are potentially useful tools in the future, they do not represent the current American housing market.

American housing markets are relatively inelastic at the current level of supply.¹³² Elasticity in a market is a measure of the ability of one economic metric to influence another.¹³³ In the context of the housing market, it is a measure of the ability for increased demand for housing to result in a rational market response through an increased supply of housing, as opposed to merely an increase in price for the same static supply of housing.¹³⁴

122. McDonald, *supra* note 100, at 277.

123. *Id.* at 281.

124. *Id.* at 280. This is of course not true of the housing market and legislatures should account for the negative externalities of suburban sprawl on people’s health and the environment when implementing any CBA policy. Jiho Yeo, Sungjin Park & Kitae Jang, *Effects of Urban Sprawl and Vehicle Miles Traveled on Traffic Fatalities*, 16 TRAFFIC INJ. PREVENTION 397, 397–403 (2015).

125. See Haque, *infra* note 153 and accompanying text (discussing VMT).

126. This equation can be noted as $R_h = p_h H - r K_h$ where R_h is the annual rental income produced, that is, the market price of the combined housing units, H is the units produced, r is the opportunity cost per unit, which is the capital expenditure per unit, p_h is the market price for a unit of housing, K_h is the unit of capital services for housing. McDonald, *supra* note 100, at 280–82.

127. Brad Broberg, *Growing Up and Not Out: The Fiscal Benefits of Higher Density Development*, NAT. ASS’N REALTORS (Nov. 20, 2014), <https://www.nar.realtor/articles/growing-up-and-not-out-the-fiscal-benefits-of-higher-density-development> [https://perma.cc/QE4D-BCFQ].

128. This equation can be noted as $T_h + R_h = p_h H - r K_h$. McDonald, *supra* note 100, at 283. T_h is the net contribution of the parcel to the public sector measured as Taxes minus Value of Services Provided. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 293.

132. Bruno Albuquerque, André Kallåk Anundsen & Knut Are Aastveit, *The Declining Elasticity of US Housing Supply*, CEPR: VOXEU (Feb. 25, 2020), <https://cepr.org/voxeu/columns/declining-elasticity-us-housing-supply> [https://perma.cc/6F4B-JTP7].

133. *Id.*

134. *Id.*

A well-functioning elastic market will respond to an increase in demand by providing more supply; an inelastic market will respond to increased demand by increasing prices on the consumer while introducing little to no new supply to the market.¹³⁵ Simply stated, an inelastic housing market will respond to new residents moving to an area by just raising rents instead of building new homes. Elasticity across the nation has declined following the 2008 financial crisis, with elasticity declining the most in places where land-use restrictions are the tightest.¹³⁶ Inelasticity reflects how demand shifts are reflected in higher housing costs instead of an increase in supply through new construction.¹³⁷ Policymakers must recognize the importance of bringing new housing supply to the market to lower prices.¹³⁸ This requires addressing the underlying land-use laws that are causing the supply constraint.

One area where the costs of local land-use regulations are clear and well understood is parking minimums. The average cost to construct a parking spot is approximately \$5000 per spot in a surface lot and up to \$50,000 per spot in a garage.¹³⁹ This results in harm to localities because additional parking increases the cost of construction while decreasing the tax revenue generated from the land.¹⁴⁰ The increased costs of additional parking include the upkeep of pavement, utilities, and other infrastructure as well as the significant opportunity cost of uses that bring in tax revenue like housing or retail.¹⁴¹

The municipal costs associated with parking minimums are best demonstrated by suburban big-box stores. While seemingly a center for commerce, a store with a large surface lot barely produces more tax revenue for a municipality than a detached house.¹⁴² This is because only a small portion of the total lot is being used for retail while the rest is used to freely store the private vehicles of the patrons. This large parking lot is a significant opportunity cost. Car-free and car-lite areas such as downtown areas, newer urban developments, and historic districts that predate car-centric infrastructure all produce substantially more revenue despite being a much smaller portion of the land.¹⁴³ These more dense forms of development reduce maintenance costs while increasing tax revenue.

135. *Id.*

136. *Id.*

137. Albuquerque, Anundsen & Aastveit, *supra* note 132.

138. Another potential market-based solution to inefficient land use is the land value tax (LVT). Jerusalem Demsas, *Tax the Land*, VOX (Mar. 4, 2022), <https://www.vox.com/policy-and-politics/22951092/land-tax-housing-crisis> [<https://perma.cc/LQ44-8J2J>]. By taxing the value of the land, as opposed to just the property sitting atop the land, underutilized land such as a single-family home, parking lot, or vacant lot in a growing area can be taxed as its highest and best use, thereby incentivizing the owner to build more dense housing. *See id.* (noting that LVT incentivizes efficient land use by taxing property by the potential optimal use of the land rather than taxing according to the land's actual use and development). This Note does not separately address the efficacy of an LVT, but an LVT can help localities and state legislators supplement the reforms discussed here by better aligning the incentives of the tax structure with the goal of more dense, affordable housing.

139. Jeff Spivak, *A Business Case for Dropping Parking Minimums*, AM. PLAN. ASS'N (June 1, 2022), <https://www.planning.org/planning/2022/spring/a-business-case-for-dropping-parking-minimums/> [<https://perma.cc/KMS2-6CJZ>].

140. Joshua McCarty, *Mapping the Effects of Parking Minimums*, STRONG TOWNS (Nov. 20, 2017), <https://www.strongtowns.org/journal/2017/11/20/mapping-the-effects-of-parking-minimums> [<https://perma.cc/GFC2-RX34>].

141. *Id.*

142. *Id.*

143. *Id.*

The cost of mandatory parking minimums also increases the cost to developers by mandating more parking than the market demands.¹⁴⁴ This oversupply of parking results in a decrease in the number of housing units that could be built.¹⁴⁵ Mandatory parking minimums essentially require developers to trade housing supply for rarely used parking spots.¹⁴⁶ When mandatory parking minimums were lifted in Buffalo, New York, 53% less off-street parking was constructed as compared to pre-reform levels.¹⁴⁷ This greater freedom and flexibility allowed developers to build new types of developments not allowed under the previous zoning regime, such as a mixed-use development near transit.¹⁴⁸ Replacing parking spots near transit with homes means more people can live close to and use transit, replacing cars with transit. This reality, exemplified in Buffalo, shows how land use requirements such as parking minimums do not match the market demand for dense, walkable communities.

Some critics may say that parking is needed because most people drive, and they need to be able to quickly park,¹⁴⁹ but these critics are mistaken. Such criticism of efforts to make cities more livable reverses the causality of driving and sprawl and ignores the negative externalities of driving. The reason people are required to drive everywhere is because parking mandates result in large, wasted surface lots, which spread destinations out, meaning the only way to get anywhere is by driving.¹⁵⁰ When destinations are designed to only be accessible by car, then people will use a car to reach them. This is not a *fait accompli*, but a result of car-centric land-use policies which can be changed to allow for more dense and livable cities.

An overabundance of parking has many other negative externalities as well. As the availability of parking increases, so too does the amount of driving a person does, and even whether they choose to own a car in the first place.¹⁵¹ Allocating space for cars instead of people by mandating large parking lots means that buildings must be further apart, making public transit less accessible and effective, and walking impractical and dangerous, thereby requiring the use of a car.¹⁵² This means that the more parking that is built, the more vehicle miles traveled (VMT) are induced.¹⁵³

144. Daniel Baldwin Hess & Jeffrey Rehler, *Minus Minimums*, 87 J. AM. PLAN. ASS'N 396, 397 (2021).

145. *Id.*

146. *Id.*

147. *Id.* at 403.

148. *Id.* at 404.

149. See Jonathan D. Epstein, *Downtown Landowners Fret Over Lack of Parking*, BUFFALO NEWS (Dec. 14, 2023), https://buffalonews.com/news/local/downtown-landlords-fret-over-lack-of-parking/article_90ce10a0-4c2b-5b3b-8c56-e906e3dda422.html [<https://perma.cc/SLD6-ZDNZ>] (outlining the concerns from business leaders and developers in Buffalo, arguing that inadequate parking could stifle economic development, which supports the notion that critics of parking reforms believe accessible parking is essential because most people drive).

150. See Joshua McCarty, *Mapping the Effects of Parking Minimums*, STRONG TOWNS (Nov. 20, 2017), <https://www.strongtowns.org/journal/2017/11/20/mapping-the-effects-of-parking-minimums> [<https://perma.cc/K68A-GFBN>] (explaining that auto-oriented developments maximize the distance between destinations by requiring large parking lots, which forces reliance on driving as a primary mode of transportation).

151. Adam Millard-Ball et al., *What Do Residential Lotteries Show Us About Transportation Choices?*, URB. STUD. (2021), <https://escholarship.org/content/qt8rg465zd/qt8rg465zd.pdf?t=rtq5zr> [<https://perma.cc/FA2A-283R>].

152. *Id.*

153. Mustafa Haque, *To Save Carbon, Cut Out the Parking Lot*, PUB. SQUARE (Oct. 11, 2023), <https://www.cnu.org/publicsquare/2023/10/11/cut-carbon-put-down-parking-lot> [<https://perma.cc/9G5G-7R5R>].

This is a concept known as induced demand: the more car-centric infrastructure is built, the more people will drive cars.¹⁵⁴ Making car use cheaper and easier, while simultaneously creating a sprawled built environment that spreads out destinations, results in sustainable alternative forms of transportation such as walking, biking, and public transit, infeasible, and thereby leading to more driving and greater VMT.¹⁵⁵

Driving brings myriad issues, from pollution to crashes, and the many health effects that follow from them.¹⁵⁶ Some have observed that the car is an enabler of dangerous and anti-social behavior, in 1964 Marshall McLuhan observed: “the car has become the carapace, the protective and aggressive shell, of urban and suburban man.”¹⁵⁷ There is a link between an increase in VMT and increased traffic fatalities,¹⁵⁸ there is a direct causal link between urban sprawl and traffic fatalities.¹⁵⁹ Land-use decisions such as mandatory parking minimums come with massive costs, both financially and in human lives, and these costs must be accounted for in policymaking. Allowing developers to respond to the market demand for more dense and walkable urban spaces is not just good economic and climate policy, it is good public health policy as well.¹⁶⁰

American cities and suburbs were built for cars, with people as an afterthought.¹⁶¹ This is reflected in suburban sprawl and the endless parking lots of suburban America.¹⁶² Sprawl leads to higher costs associated with car ownership, such as insurance, gas, and other associated costs.¹⁶³ There is also the tremendous impact that a car-centric society has on climate change and the environment.¹⁶⁴ The sedentary lifestyle car-centric infrastructure creates also has health impacts as people walk and bike less while sitting and driving

154. *Id.*

155. *Id.*

156. While other developed nations have seen a decrease in deaths from cars, the United States stands alone in seeing an increase. See David Leonhardt, *The Rise in U.S. Traffic Deaths What's Behind America's Unique Problem with Vehicle Crashes?*, N.Y. TIMES (Dec. 11, 2023), <https://www.nytimes.com/2023/12/11/briefing/us-traffic-deaths.html> (on file with the *Journal of Corporation Law*) (“[T]he U.S. has chosen to accept a vehicle death rate that is almost three times higher than that of Canada, Australia or France, more than four times higher than that of Germany or Japan and more than five times higher than that of Scandinavia, Switzerland or Britain.”).

157. MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN 224–25 (McGraw-Hill, 1st ed. 1965); SPENCER HEADWORTH, RULES OF THE ROAD 93 (2023).

158. Yeo, Park & Jang, *supra* note 124 at 397–403.

159. *Id.*

160. Maura Kelly, *Traffic Deaths are a Public Health Crisis in The U.S.*, HARV. PUB. HEALTH (Dec. 13, 2023), <https://harvardpublichealth.org/policy-practice/car-accidents-with-pedestrians-cyclists-are-too-common-in-u-s/> [<https://perma.cc/6F8B-ZA93>] (discussing the increasing number of pedestrian and cyclist deaths in the United States).

161. This is best demonstrated in the *Cars* movie where even though the cars are the sentient beings, not people, the built environment remains unchanged because American cities are already designed for cars, not people. See *CARS* (Pixar Studios 2006) (illustrating how the American built environment is designed for cars).

162. See McCarty, *supra* note 150.

163. Whitney Vandiver & Shannon Bradley, *What is the Total Cost of Owning a Car?*, NERDWALLET (Jan. 22, 2024), <https://www.nerdwallet.com/article/loans/auto-loans/total-cost-owning-car> [<https://perma.cc/B67U-JC6K>].

164. Sarah Wesseler, *American Society Wasn't Always so Car-Centric. Our Future Doesn't Have to be, Either*, YALE CLIMATE CONNECTIONS (Oct. 3, 2023), <https://yaleclimateconnections.org/2023/10/american-society-wasnt-always-so-car-centric-our-future-doesnt-have-to-be-either/> [<https://perma.cc/U6R7-Z7W6>].

more.¹⁶⁵ The externalities associated with how we have chosen to build our society could each stand alone as a full article, and a full accounting of myriad harms that our sprawled, car-centric land use has wrought would be too long to list here. Suffice it to say that from the economic damage of unaffordable housing to the finances of middle-class families, and the health and environmental impacts of low-density sprawl, our current land-use patterns have significant economic and non-economic costs.

F. Current Efforts to Reform Local Land Use Restrictions

Housing supply constraints have grown to such an extent that every single state in the nation now has at least some level of housing underproduction.¹⁶⁶ The economic consensus is clear: housing unaffordability is caused by a lack of supply, and the solution is to let developers build more housing.¹⁶⁷ States have tried responding to this challenge in a variety of ways. Some states have recognized the economic reality that the only sustainable and effective solution is to boost housing production and have pursued reforms to that end.¹⁶⁸ Other states, like California, have come to the same conclusion, that supply must increase but have failed to pass reforms that meet the challenge.¹⁶⁹ This is often because reform efforts are compromised for political expediency.¹⁷⁰ While states have increasingly realized the detrimental effects of limited housing on their state economy and the connection to local land-use restrictions, states have been less successful in tailoring their reforms to address the fundamental economic reality of supply and demand. The housing shortage in states such as California and New York are so severe that they are even impactful on national politics through the electoral college.¹⁷¹

Montana quickly went from having home prices below the national median to some markets like Bozeman having prices at double the average.¹⁷² But Montana has been fairly

165. Anne Price & Ariel Godwin, *Mapping Transportation and Health in the United States*, PLANETIZEN (Jan. 16, 2012), <https://www.planetizen.com/node/53728> [<https://perma.cc/ETV4-ET7X>].

166. Emily Pasi & Sophia Flionis, *No State Immune to Housing Supply Shortage*, AM. PLAN. ASS'N (Oct. 13, 2023), <https://www.planning.org/blog/9278898/no-state-immune-to-housing-supply-shortage> [<https://perma.cc/BL2M-VUST>].

167. See Bernstein et al., *supra* note 28 (demonstrating that housing prices are highly correlated with the supply of housing); see Audrey McGlinchy, *Rents in the Austin Area Have Been Falling for a Year*, KUT NEWS (June 13, 2024), <https://www.kut.org/austin/2024-06-13/austin-texas-rent-prices-falling-2024> [<https://perma.cc/T5FU-5ZB5>] (discussing how rents have fallen as Austin has added new housing supply).

168. See Emily Hamilton, *Four Elements of a Successful Housing Task Force: Lessons from the Montana Miracle*, MERCATUS CTR. (Aug. 23, 2023), <https://www.mercatus.org/research/policy-briefs/four-elements-successful-housing-task-force-lessons-montana-miracle> [<https://perma.cc/T8W5-P8GF>].

169. Julia Gill & Jenny Schuetz, *In California, Statewide Housing Reforms Brush Against Local Resistance*, BROOKINGS (June 28, 2023), <https://www.brookings.edu/articles/in-california-statewide-housing-reforms-brush-against-local-resistance/> [<https://perma.cc/WK4B-UAC6>].

170. *Id.*

171. Scott Lemieux, *Crushing NIMBYism is Critical to the Future of American Democracy*, LAWYERS, GUNS & MONEY (Nov. 15, 2024), <https://www.lawyersgunsmoneyblog.com/2024/11/crushing-nimbyism-is-critical-to-the-future-of-american-democracy> [<https://perma.cc/39UR-EKDE>] (discussing how anti-growth policies in Illinois, New York, and California have resulted in a projection by the Brennan Center of loss of four to five electoral college votes in the 2030 census and stating “[c]oastal elites who have made building multifamily housing somewhere between effectively impossible to outright illegal in most of their jurisdictions are . . . the best friends the Republican Party ever had”).

172. Hamilton, *supra* note 168.

successful at averting a housing supply crisis. The state has passed a broad range of reforms that have allowed landowners and developers to build dense housing on their land.¹⁷³ Other states are now seeking to replicate this ‘Montana Miracle.’ The legislature responded with bills that allowed multi-family development in commercial areas, permitted duplexes in all single-family neighborhoods, and required localities to plan for supply growth and reduce administrative difficulties in getting a permit.¹⁷⁴ These reforms combined to allow developers to effectively respond to market demand for new housing by building more housing.¹⁷⁵

California has similarly realized that they have a serious housing affordability problem, yet their reform efforts have been far less successful. The state has passed over 100 different pieces of legislation targeting the housing affordability crisis.¹⁷⁶ One such bill, SB 9, effectively eliminated single-family zoning in the state by allowing accessory dwelling units (ADUs) on lots and allowing subdividing of a single parcel.¹⁷⁷ This reform faced conflict with local NIMBYs seeking to undermine the reform and block any new housing construction.¹⁷⁸ These included “poison pills” in local land-use regulations regarding how ADUs were allowed to be built, the most popular of which was increased parking requirements.¹⁷⁹ These new restrictions made ADUs physically or financially impossible to construct.¹⁸⁰ The California legislature responded to these local efforts to block reform by passing new laws aimed at closing off these loopholes.¹⁸¹

By studying the flurry of recent state activity, the Mercatus Center developed a list of the most effective reforms states can implement to tackle the housing crisis.¹⁸² Several of these included legal reforms aimed at reducing the effects of restrictive zoning and spurring new housing construction.¹⁸³ Many proposed reforms also highlight how increasing density and reducing car dependency can lower the cost of housing and result in more affordable and accessible housing options.¹⁸⁴

The increased salience of climate change among certain politically influential groups also changes the potential political path for enacting land-use reform at the state level.¹⁸⁵

173. Kriston Capps, *How YIMBYs Won Montana*, BLOOMBERG (Apr. 28, 2023), <https://www.bloomberg.com/news/articles/2023-04-28/montana-s-yimby-revolt-aims-to-head-off-a-housing-crisis> [<https://perma.cc/WK4B-UAC6>].

174. *Id.*

175. *Id.*

176. Gill & Schuetz, *supra* note 169.

177. CAL. DEP’T OF HOUS. CMTY. DEV., SB 9 FACT SHEET 1 (2021), <https://www.hcd.ca.gov/docs/planning-and-community-development/sb9factsheet.pdf> (on file with the *Journal of Corporation Law*).

178. Gill & Schuetz, *supra* note 169.

179. *Id.*

180. *Id.*

181. A.B. 88, 2019–20 Legis. Sess. (Cal. 2019); A.B. 68, 2019–20 Legis. Sess. (Cal. 2019).

182. Emily Hamilton, Salim Furth & Charles Gardner, *Housing Reform in the States: A Menu of Options for 2024*, MERCATUS CTR. (Aug. 23, 2023), <https://www.mercatus.org/research/policy-briefs/housing-reform-states-menu-options-2024> [<https://perma.cc/MRT3-5VZ2>].

183. *Id.* (recommending the creation of a Housing or Land Use Appeals Board, nullifying zoning that makes existing conditions illegal, and reforming zoning enablement laws).

184. *Id.*

185. Sarah Wessler, *State, Local Governments Increasingly Turn to Zoning Reforms*, YALE CLIMATE CONNECTIONS (Nov. 29, 2022), <https://yaleclimateconnections.org/2022/11/state-local-governments-increasingly-turn-to-zoning-reforms/> [<https://perma.cc/89YS-JUNX>].

States are beginning to recognize that meeting climate goals is going to necessarily require land-use reform that promotes denser housing as it is better for the climate.¹⁸⁶ For example, doubling urban density results in a 48% drop in carbon emissions from household travel and a 35% reduction in residential energy usage.¹⁸⁷ While in 1950 only 64% of the US population lived in an urban area, that number is now 83% and is expected to reach 89% by 2050.¹⁸⁸ Current urban land-use decisions will have a profound effect on whether the world will be able to mitigate the climate crisis. Climate change represents a new opportunity to change the politics around housing and density. Because of the increasing importance of climate policy among the political left, the climate benefits of dense, walkable housing can broaden the political coalition on the issue and help in passing legislation.¹⁸⁹ This has also been the motivation for lawmakers in several states seeking reform zoning.¹⁹⁰ By promoting land-use reform as both a sound supply-side economic policy, and a strong progressive climate policy, reform efforts stand a greater chance of attracting bipartisan support.

The most ambitious plan to reform housing to meet climate goals is found in the Minneapolis 2040 plan.¹⁹¹ The city has aimed to reduce greenhouse gas emissions by 80%, which the city estimates will require a 37% reduction in car trips.¹⁹² Land-use reforms to increase density and reduce car dependency are at the heart of the city's plan to meet its climate targets. The 2040 plan has been targeted by NIMBYs in court, who were granted an injunction prohibiting the city from implementing it while it is litigated.¹⁹³ The Minnesota legislature had considered including a provision in a housing law prohibiting suits that weaponize environmental review laws to stop housing which would have stopped suits like

186. Maanvi Singh & Oliver Milman, *Denser Cities Could Be a Climate Boon – But Nimbyism Stands in the Way*, THE GUARDIAN (Aug. 22, 2021), <https://www.theguardian.com/us-news/2021/aug/22/cities-climate-change-dense-sprawl-yimby-nimby> [<https://perma.cc/Q42E-QYBR>].

187. UNIV. OF MICH. CTR. FOR SUSTAINABLE SYS., U.S. CITIES FACTSHEET (2024), <https://css.umich.edu/publications/factsheets/built-environment/us-cities-factsheet> [<https://perma.cc/G8LQ-JGUY>].

188. *Id.*

189. Alec Tyson, Cary Funk & Brian Kennedy, *What the Data Says About Americans' Views of Climate Change*, PEW RSCH. CTR. (Aug. 9, 2023), <https://www.pewresearch.org/short-reads/2023/08/09/what-the-data-says-about-americans-views-of-climate-change/> [<https://perma.cc/8HTK-CZBF>]; see also *Minnesota Introduces First-in-the-Nation Bill To Eliminate Minimum Parking Mandates Statewide*, STRONG TOWNS (Jan. 29, 2024), <https://www.strongtowns.org/journal/2024/1/29/minnesota-introduces-first-in-the-nation-bill-to-eliminate-minimum-parking-mandates-statewide> [<https://perma.cc/Q2D5-MQY7>] (discussing how a repeal of mandatory parking minimums aligns with the interests of a politically diverse group even though the bill sponsor focused on the climate benefits).

190. Dan Grossman, *Increasing Urban Density Could Reduce Climate Change*, DENVER7 (Sep. 1, 2021), <https://www.denver7.com/longform/increasing-urban-density-could-reduce-climate-change> [<https://perma.cc/U9PK-RQQG>].

191. *Land Use & Built Form*, MINNEAPOLIS 2040, <https://minneapolis2040.com/topics/land-use-built-form/> [<https://perma.cc/2DSV-6LU7>].

192. *Id.*

193. *Order Granting Preliminary Injunction, State by Smart Growth Minneapolis v. City of Minneapolis*, No. 27-CV-18-19587 (Minn. Dist. Ct. Sep. 5, 2023); *State by Smart Growth Minneapolis v. City of Minneapolis*, 7 N.W.3d 418, 423 (Minn. App. 2024) (holding that the lower court abused its discretion in granting the injunction and noting that this was the third appeal by plaintiffs in this case claiming violations of the Minnesota Environmental Quality Act).

this, but the provision was dropped before passage.¹⁹⁴ This is a lesson that state legislators must be prepared to protect their reform efforts from sabotage, either by localities or local NIMBY litigation. The differences in experience between Montana, California, and Minnesota show just how many different issues can thwart even strong state-level policies.

III. ANALYSIS

A. *Montana Miracle v. California Calamity*

As more cities and states have come to realize that the status quo of land use is untenable, efforts to reform land use have proliferated. The different approaches used by different government bodies and the different rates of success from these reforms demonstrate what does and does not work. The difference between the success of the ‘Montana Miracle’ and the mixed results of the many reform bills passed by California highlights that while state-level action is a necessary starting point, specific state enforcement of reform efforts in the face of local opposition matters a great deal.

1. *California’s Failed Reforms*

The housing crisis in California is the worst in America.¹⁹⁵ This crisis has spurred the legislature to act with a flurry of bills aimed at increasing the state’s housing supply, yet the path has been much more difficult than in Montana. Local opposition in California has been fierce and has resulted in many state-level efforts being undermined by localities. Of particular importance has been the abuse of the California Environmental Quality Act (CEQA).¹⁹⁶ Affluent NIMBYs have frequently filed suit to stop all sorts of development, from new housing to new bike lanes, from being constructed.¹⁹⁷ Recently, Bay Area NIMBYs, using CEQA, advocated for protecting a “historic parking lot” from the scourge of a community food bank.¹⁹⁸

194. Max Nesterak, *The Legislature Almost Killed the Lawsuit Against the Minneapolis 2040 Plan*, MINN. REFORMER (Sept. 8, 2023), <https://minnesotareformer.com/briefs/the-legislature-almost-killed-the-lawsuit-against-the-minneapolis-2040-plan/> [<https://perma.cc/2YNC-SUXH>].

195. Adam Barnes, *These Are the States Where the Housing Shortage Is the Worst*, THE HILL (July 14, 2022), <https://thehill.com/changing-america/sustainability/infrastructure/3559650-these-are-the-states-where-housing-shortage-is-the-worst/> [<https://perma.cc/8SZH-JBEE>].

196. While CEQA started out with laudable goals when it was first enacted in the 1970s by then-Governor Ronald Reagan, its current use is far from that. It came about at a time when environmental issues were a nationwide concern, exemplified by the famous scenes of rivers catching on fire and sought to require certain big projects to account for their potential environmental damage. While CEQA may have started from a good place, it is now a serious impediment to housing affordability and building clean energy sources to address climate change. M. Nolan Gray, *How Californians Are Weaponizing Environmental Law*, THE ATLANTIC (Mar. 12, 2021), <https://www.theatlantic.com/ideas/archive/2021/03/signature-environmental-law-hurts-housing/618264/> [<https://perma.cc/G3NN-97D5>].

197. Liam Dillon, *Want A Bike Lane in Your Neighborhood? It’s Not So Simple in California*, L.A. TIMES (Apr. 7, 2016), <https://www.latimes.com/politics/la-pol-sac-enviro-bike-lanes-20160407-story.html> [<https://perma.cc/3YLB-JHM2>].

198. Sara Stinson, *Alameda Food Bank Services in Jeopardy Due to Lawsuit*, KRON4 (Sept. 17, 2024), <https://www.kron4.com/news/bay-area/alameda-food-bank-services-in-jeopardy-due-to-lawsuit/> (on file with the *Journal of Corporation Law*). The previous location of the foodbank served 1200 families a week but was so small that it required needy families to wait outside in the heat and rain. *Id.*

CEQA requires an environmental impact report (EIR) detailing both potential harms and mitigation measures.¹⁹⁹ Such a process is clearly beneficial in a project such as a new mine or heavy industrial use, yet very few CEQA challenges are targeted at these potentially harmful projects. Only 1% of CEQA challenges are for agriculture or forestry, 4% are for industry, 5% for mining, and 4% for renewable energy and energy retrofit projects.²⁰⁰ This means that only 14% of CEQA challenges target projects with any reasonable environmental concern even including challenges to renewable energy projects and ignoring that stopping renewable energy is harmful, not helpful to the environment. 80% of CEQA challenges are targeting infill projects that increase residential density.²⁰¹ Instead of stopping sprawl, which is bad for the environment, CEQA is inducing it by stopping infill development and forcing developers to look elsewhere.²⁰²

Extensive and costly EIRs are required for new housing projects, such as a new apartment building in a formerly R-1 zone, they are not required for so-called “ministerial projects.”²⁰³ Ministerial projects are projects that conform to existing zoning codes and other land use ordinances.²⁰⁴ A ministerial permit is much easier and cheaper to obtain than the full EIR that would be required under CEQA.²⁰⁵ Existing land-use controls have a built-in bias towards unstable and sprawling development patterns. Applying these arcane land-use controls to new dense infill housing project proposals results in higher costs for developers trying to build dense, infill housing. By failing to address how laws such as CEQA are blocking housing development, state legislators undermine their own goals. CEQA has been described by a San Francisco land use lawyer as “the tool of choice for preventing cities from approving high-density housing.”²⁰⁶ State legislators must take a holistic approach to land-use reform and address all impediments to housing abundance.

In the latest high-profile abuse of CEQA, a NIMBY group called “Save Berkley’s Neighborhoods” sued the University of California claiming that increasing enrollment required a full CEQA review.²⁰⁷ The California Court of Appeals agreed and ruled that potential harms resulting from increased enrollment included more noise, trash, and traffic.²⁰⁸ The court held that the UC Berkley increased enrollment plan constituted a “physical

199. Noah DeWitt, Note, *A Twisted Fate: How California’s Premier Environmental Law Has Worsened the State’s Housing Crisis, and How to Fix It*, 49 PEPP. L. REV. 413, 423 (2022).

200. Jennifer L. Hernandez, David Friedman & Stephanie DeHerrera, *In the Name of the Environment: Litigation Abuse Under CEQA*, HOLLAND & KNIGHT 12 (2015), <https://www.hklaw.com/en/insights/publications/2015/08/in-the-name-of-the-environment-litigation-abuse-un> [<https://perma.cc/N3U8-WDLQ>].

201. *Id.*

202. See Justin Ewers, *There’s A Better Way Than CEQA: Urban Planner’s Perspective*, CA FWD (Jan. 31, 2013), <https://cafwd.org/news/theres-a-better-way-than-ceqa-urban-planners-perspective> [<https://perma.cc/2YX5-X4V4>] (“CEQA has contributed to sprawl and worsened the housing shortage by inhibiting dense infill development far more than local planning and zoning would have done alone. To re-form California, we must first reform CEQA.”).

203. *When Does CEQA Apply?*, CAL. STATE PARK OFF. OF HIST. PRES., web.archive.org/web/20200420030755/https://ohp.parks.ca.gov/?page_id=21723.

204. *Id.*

205. *Id.*

206. Alastair Bland, *Weakling or Bully? The Battle Over CEQA, the State’s Iconic Environmental Law*, CAL MATTERS (Jun. 23, 2020), <https://calmatters.org/economy/2019/05/weakling-or-bully-ceqa-environmental-law-california-development-battles/> [<https://perma.cc/A42K-BJ5U>].

207. *Save Berkeley’s Neighborhoods v. Regents of Univ. of California*, 51 Cal. App. 5th 226, 239 (2020).

208. *Id.* at 234.

development and land use plan,” and therefore required a full EIR under CEQA.²⁰⁹ This ruling threatened to force the University to rescind 3000 acceptances until the legislature ultimately stepped in.²¹⁰ The Governor signed AB 1307 into law and decried the court ruling as “an example of NIMBYism”; the lead sponsor of the bill said the new law will affirm that “people are not pollution.”²¹¹

This episode is just one example of the problems that California has experienced in trying to address its housing crisis. It is unsustainable for the state legislature to, as one California housing activist stated, play “whack-a-mole” with “arcane rules that no one was paying attention to.”²¹² California Senator Scott Weiner, a leading housing reform leader in the state, stated “[t]o tackle our housing crisis, we need a multi-pronged approach . . . [w]e need to reform zoning, but we also need to end loopholes that make it impossible for our communities to actually build the multifamily housing for which we have already zoned.”²¹³ These comments came after his bill, The Housing Opportunity Act (SB-478), passed the state senate.²¹⁴ The bill was targeted at closing one method that localities were using to undermine legislation meant to increase density. The localities would set highly restrictive floor-to-air ratios and lot size requirements for small apartments, making constructing more dense housing dimensionally and fiscally difficult.²¹⁵ Although SB-478 was successful, sabotaged reform, followed by a “whack-a-mole” response, is not a sustainable model for housing reform.

These examples of local sabotage impact how much housing is being built in the state. In 2017, Governor Newsom campaigned on building 3.5 million new homes by 2025, while in 2023 that promise stood at only 2.5 million by 2030.²¹⁶ Housing construction in the state is at a 15-year high but housing growth is a mere 0.85%.²¹⁷ This is far below the rate needed to begin to address the housing crisis, and still below pre-2008 levels of housing

209. *Id.*

210. Teresa Watanabe, *UC Berkeley May be Forced by Court to Cut 3,000 Undergraduate Seats, Freeze Enrollment*, L.A. TIMES (Feb. 14, 2022), <https://www.latimes.com/california/story/2022-02-14/uc-berkeley-may-be-forced-to-cut-3-000-freshman-seats-under-court-order-to-halt-growth> [<https://perma.cc/6AVR-S8C6>].

211. Travis Schlepp, *‘People Are Not Pollution’: Newsom Signs Bill to Clear Way for Universities to Build More Student Housing*, KTLA 5 (Sept. 7, 2023), <https://ktla.com/news/california/people-are-not-pollution-newsom-signs-bill-to-clear-way-for-universities-to-build-more-student-housing/> [<https://perma.cc/3DUY-HNW6>].

212. Rachel Cohen, *Where Are All the Apartments for Families?*, VOX (Apr. 23, 2023), <https://www.vox.com/policy/2023/4/23/23686130/housing-apartments-family-yimby-nimby-zoning-suburbs> [<https://perma.cc/HE4B-GWWR>].

213. Press Release, Sen. Scott Weiner, Senate Passes Senator Wiener’s SB 478, The Housing Opportunity Act (May 28, 2021), <https://sd11.senate.ca.gov/news/senate-passes-senator-wieners-sb-478-housing-opportunity-act> [<https://perma.cc/3G8D-3H5J>].

214. *Id.*

215. *Id.*

216. Manuela Tobias, *Newsom Campaigned on Building 3.5 Million Homes. He Hasn’t Gotten Even Close*, CAL MATTERS (Oct. 31, 2022), <https://calmatters.org/housing/2022/10/newsom-california-housing-crisis/> [<https://perma.cc/VEH7-L7VF>].

217. Press Release, Cal. Dep’t. of Fin., State’s Population Decline Slows While Housing Grows Per New State Demographic Report (May 1, 2023), https://dof.ca.gov/wp-content/uploads/sites/352/Forecasting/Demographics/Documents/E-1_2024_Press_Release.pdf [<https://perma.cc/MH5S-4MEV>].

construction.²¹⁸ It is clear that for all of California's efforts, there is still much to be done to address the housing crisis.

California recognizes they have a problem, yet they have gone about solving it in completely the wrong way. State reforms tried to target specific zoning laws that restrict supply yet left loopholes in these new laws that allowed local NIMBYs to fight off the state-level reforms, rendering the reforms weakened. California has also allowed its once useful environmental review law to be turned into a weapon by NIMBYs to stop housing construction. The state's failure to deal with local obstruction has doomed their reform efforts. California will not be able to build enough housing until developers can respond to the market demand without being blocked by local NIMBYs.

2. Montana's Successful Start

Montana came to the problem clear-eyed and with a firm grasp of the fundamental economic reality it was facing, with one official simply stating, "the math doesn't work."²¹⁹ The Montana governor plainly stated that the problem was an inadequate supply of housing in the face of resulting demand, resulting in higher prices.²²⁰ The solutions put forth were focused on this fundamental issue. Montana did not try and make arbitrary distinctions between 'affordable housing' and 'market rate housing' but instead recognized that all housing is part of the same market and is subject to the same market dynamics.²²¹ The need for clear and effective policy may have been driven by necessity. While California enjoys good weather year-round, Montana has a shortage of skilled tradespeople and the frozen ground in winter means a shorter building season.²²² It may also have been driven by Montana's unique political coalition.²²³ While the state is controlled by Republicans, housing and land-use reform found support across the political spectrum with everyone from libertarian conservatives to anti-sprawl environmental activists joining in the push for reform.²²⁴ Students, urban density advocates, and real estate developers also joined in to create what is described as "the most pro-development, pro-housing set of policies of any state."²²⁵ Even though coastal states had a large head start, Montana was able to make significant progress much more quickly.

Montana Senate Bill 161²²⁶ and House Bill 259²²⁷ exemplify the reform efforts of Montana. S.B. 161 aimed to increase housing supply with the Governor stating that "[f]or

218. Ben Christopher, *California is Losing Population and Building New Houses. When Will Home Prices Come Down?*, CAL MATTERS (May 15, 2023), <https://calmatters.org/housing/2023/05/california-exodus-housing-cost/> [https://perma.cc/9QNP-RC3D].

219. Annie Lowrey, *The Anti-California How Montana: Performed a Housing Miracle*, THE ATLANTIC (Aug. 9, 2023), <https://www.theatlantic.com/ideas/archive/2023/08/rural-montana-housing-crisis-supply/674950/> [https://perma.cc/VSG3-RH8V].

220. *Id.*

221. Bradley Warren, *Gianforte Signs Market Driven Affordable Housing Bill into Law*, ABC MONT. NOW (Apr. 24, 2021), https://www.montanarightnow.com/rightnow/gianforte-signs-market-driven-affordable-housing-bill-into-law/article_a9e97d0c-a4ec-11eb-90aa-b3820ef641f4.html [https://perma.cc/J2AN-MWK2].

222. Lowrey, *supra* note 219.

223. *Id.*

224. *Id.*

225. *Id.*

226. S.B. 161, 67th Leg., Reg. Sess. (Mont. 2021).

227. H.B. 259, 67th Leg., Reg. Sess. (Mont. 2021).

too long, burdensome regulations have constricted housing supply, driven up prices, and made buying a home out of reach for Montanans” and “[t]o increase the supply of affordable workforce housing, we’re cutting red tape and removing unnecessary roadblocks to home ownership.”²²⁸ This focus on increased affordability through supply-side reform reflects the basic supply and demand problem at work in America’s housing market.²²⁹ The bill passed the Montana House with broad support.²³⁰

H.B. 259 eliminated an inclusionary zoning regime that was in place under the affordable housing plans of Whitefish and Bozeman.²³¹ This bill was much more contentious, with its passage occurring almost entirely along party lines.²³² The inclusionary zoning requirement and the more partisan vote totals reflect the extent to which even states at the forefront of effecting land use reform are snarled in policy disagreements. Empirical studies have shown that inclusionary zoning does not work, but inclusionary zoning is still, unfortunately, a common part of liberal and Democratic land-use reform proposals.²³³

The main point of agreement across the political and ideological spectrum in Montana was a desire to avoid becoming another California.²³⁴ One progressive housing activist and member of the state housing taskforce stated, “[w]ith all these new people moving here, everybody is scared to death that we’re going to be California. Miles of urban sprawl that will take over all this beautiful land we have surrounding our cities.”²³⁵ A right-wing think tank president stated, “[w]e’ve got to contain growth in these existing urban areas so it doesn’t sprawl out and take all the ranchland that we love.”²³⁶ Montana exemplifies the unique politics of land-use reform both in the difficulty of building coalitions capable of delivering lasting positive change and the opportunity for bipartisan cooperation to contain sprawl.

B. State-Level Attempts to Support Developers

Many states have taken different approaches to increasing the amount of affordable housing. Some, as seen in Seattle, have imposed inclusive zoning requirements. However, the issues with this approach have become increasingly clear.²³⁷ Absent larger reforms to make housing production easier, supply will remain low. This results in higher prices for the market units, which reduces the number of people who can afford to rent those units. Poorly designed policy acts as a tax on the project, making it less likely to be built in the

228. Press Release, Montana Governor’s Office, Governor Gianforte Cuts Red Tape to Increase Housing Supply (Apr. 24, 2023), https://news.mt.gov/Governors-Office/Governor_Gianforte_Cuts_Red_Tape_To_Increase_Housing_Supply [https://perma.cc/9FJN-6HDM].

229. See Bernstein et. al., *supra* note 28 (describing supply and demand issues in the housing market).

230. Press Release, *supra* note 228.

231. Chad Sokol, *Gianforte Signs Bill Stripping Whitefish Affordable-Housing Program*, DAILY INTER LAKE (Apr. 22, 2021), <https://dailyinterlake.com/news/2021/apr/22/gianforte-signs-bill-affordable-housing/> [https://perma.cc/KHW4-W9ZU].

232. *Id.*

233. See Krimmel & Wang, *supra* note 30 (describing Seattle’s housing reform and its effects).

234. Kriston Capps, *How YIMBYs Won Montana*, BLOOMBERG (Apr. 28, 2023), <https://www.bloomberg.com/news/articles/2023-04-28/montana-s-yimby-revolt-aims-to-head-off-a-housing-crisis> [https://perma.cc/9Y75-UGGW].

235. *Id.*

236. *Id.*

237. See Krimmel & Wang, *supra* note 30.

first place.²³⁸ A study of the Seattle inclusionary zoning mandate also found a large substitution effect where projects that originally would have been permitted within the inclusionary zoning area were instead located in other areas.²³⁹ This means entire neighborhoods miss out on housing development.

Some states have developed promising alternatives by creating a path for developers to challenge restrictive local land-use regulations directly. Several northeastern states have created State Affordable Housing Appeals Systems (SAHASs), which allow developers to seek permission to override local land-use restrictions.²⁴⁰ These SAHAS plans are currently limited to only developers who seek to build qualifying, below-market-rate housing.²⁴¹ Evidence from the Massachusetts SAHAS showed that this mechanism encouraged some localities to reduce zoning restrictions, and enabled developers to challenge restrictions in localities that maintained restrictive zoning regimes.²⁴²

The Massachusetts SAHAS (Chapter 40b), allows developers to take advantage of this administrative appeals process if their project meets a minimum affordability threshold.²⁴³ Developers are in the best position to bring these suits because they are the ones best able to recognize exactly which land-use restrictions are stifling growth. As developers seek to meet market demand for housing by planning new projects, they will encounter certain regulatory and zoning roadblocks. These restrictions can then be challenged by the developer and allow the state to determine if such local restrictions on housing are appropriate. State SAHAS systems demonstrate a potential path forward but are currently limited to a small subset of the market.

The main impediments to state-level efforts like the one seen in Massachusetts are that they fail to recognize the main reason that developers cannot build. Developers will not build new housing when it is too expensive to construct and without an adequate payoff once constructed to recoup the costs of development. Developers will only build when the revenue made from a project is greater than the cost. Policy must therefore be targeted at reducing development costs to induce greater housing production.

The cost to builders is broken down into three parts; the land costs (10–20%), the hard costs (e.g. labor and materials 50–70%), and the soft costs (20–30%) for straightforward projects.²⁴⁴ This third category includes all the other costs associated with new builds such as financing, engineering, permitting, and impact fees.²⁴⁵ This category is also the one most susceptible to cost increases when a project requires rezoning or facing opposition from NIMBYs.²⁴⁶ This is because the more legal and regulatory hurdles that a developer must

238. *Id.* at 261.

239. *Id.*

240. Nicholas J. Marantz & Huixin Zheng, *State Affordable Housing Appeals Systems and Access to Opportunity: Evidence from the Northeastern United States*, 30 HOUS. POL'Y DEBATE 370, 370 (2020).

241. *Id.*

242. *Id.* at 373.

243. *Id.*; see also Aaron Sege, *The Missing Middle History of Massachusetts Zoning: State Overrides and Preemption in the Postwar Era*, 65 B.C. L. REV. 2897, 2897 (2024) (discussing the history and role of state-level preemption of restrictive zoning regimes and the utility of Chapter 40b in promoting housing supply).

244. Hannah Hoyt & Jenny Schuetz, *Making Apartments More Affordable Starts with Understanding the Costs of Building Them*, BROOKINGS (May 5, 2020), <https://www.brookings.edu/articles/making-apartments-more-affordable-starts-with-understanding-the-costs-of-building-them/> [<https://perma.cc/R7JZ-67M4>].

245. *Id.*

246. *Id.*

overcome to begin construction, the more expensive that eventual project will be. For example, developers that seek to construct subsidized or “affordable” housing through utilizing available government subsidies have higher soft costs because of the expense needed to apply and assemble the funding from the different subsidy sources.²⁴⁷ Each one of these costs is determined by what land-use controls are imposed on the developer and the project. Oftentimes, debates surrounding reform stray far from this economic reality. The way to build more housing supply is to reduce the cost to developers so that they can better respond to market demands.

Land-use reform can address both the first and third parts of a developer’s costs. By freeing up more land to be developed, those parcels will decrease in price as the supply of developable land is increased. The greatest impact will be on the third category because that is where many of the costs today are driven directly by current restrictive land-use policies. This is where the Massachusetts reform is currently lacking; it fails to account for all these other costs developers are faced with while limiting the remedy to developers engaging in a very narrow part of the market. Government policy can also have a significant impact on hard costs, but these policies often touch on other contentious political issues and may prove to be more difficult to reform.²⁴⁸

IV. RECOMMENDATION

States are increasingly taking action to address the housing crisis, yet their efforts have produced mixed results. After 100 years of stifling zoning restrictions, reforms cannot fix the crisis overnight, but far too many reform efforts have failed to reckon with the supply and demand dynamics at the core of the housing crisis.²⁴⁹ State-level reforms that attempt to give developers greater ability to build housing by rolling back constrictive local land use regulations still fail to consider the myriad costs developers face that result in housing underproduction.²⁵⁰

A state-level reform bill that still allows localities to undermine housing development with ‘poison-pill’ zoning amendments designed to make projects economically unfeasible will not result in any new housing supply. This leaves developers stuck as the regulatory environment changes yearly with no predictability of the future regulatory environment.

This regulatory uncertainty, unmoored from any cohesive framework, also leaves lenders unsure of which projects to back and what their investment time horizon will be.²⁵¹

247. Carolina Reid, *The Costs of Affordable Housing Production: Insights from California’s 9% Low-Income Housing Tax Credit Program*, TERNER CTR. FOR HOUS. INNOVATION 24 (Mar. 2020), <https://turnercenter.berkeley.edu/research-and-policy/development-costs-lihtc-9-percent-california/> [<https://perma.cc/7FLA-QVFN>] (“[E]xamin[ing] the ways in which lengthy permitting processes as well as local regulations and requirements can increase the cost of both market-rate and affordable housing projects.”).

248. Sarah Wolak, *Trump Tariffs Would Result in Homebuilder Price Increases*, HOUSINGWIRE (Nov. 8, 2024), <https://www.housingwire.com/articles/trump-tariffs-price-hikes-homebuilders/> [<https://perma.cc/4KTM-ZFTK>] (discussing how tariffs will result in a greater cost of raw materials such as lumber which will increase the overall cost of construction); Jason Ward, *Project Labor Agreements and Affordable Housing Production Costs in Los Angeles*, RAND (Aug. 13, 2024), https://www.rand.org/pubs/research_reports/RRA1362-2.html [<https://perma.cc/HM5T-AJ2T>] (highlighting that union labor mandates in subsidized housing grants resulted in a 21% increase in construction costs and average project delays of 8 months).

249. Mangin, *supra* note 29.

250. See *supra* Part III.C (explaining how the states have attempted to fix the housing crisis).

251. David Waite, *Regulatory Uncertainty*, 46 REAL ESTATE ISSUES, no. 10, 2022, at 2, 3.

Given the rapid change in interest rates over the past few years, lenders are unwilling to take on such unpredictable risk, leaving developers without a secure funding source. Lenders and developers need a “clear, stable, durable, and predictable regulatory environment,”²⁵² yet state reforms thus far have done the exact opposite.

Montana offers many positive lessons for change, including the importance of state-level policy grounded in a sound, economic understanding of reality.²⁵³ Montana also found great success by limiting, or entirely abolishing, local land use powers.²⁵⁴ This is a laudable accomplishment but one that is unlikely to be replicated in other states facing a similarly acute housing crisis. The unique coalition of Republican libertarians, anti-sprawl environmentalists, and pro-development Democrats that allowed Montana to succeed, does not exist in large, coastal blue states where the crisis is at its worst.²⁵⁵ Therefore, these states must find another politically viable path to reform. They do not have to start from scratch; state legislators can borrow the SAHAS framework from another coastal state, Massachusetts, and pick existing, off-the-shelf, economic metrics to craft their state regulatory oversight mechanism.

The experience of California has been an entirely intra-Democratic fight with many legacy environmentalist groups lining up squarely behind the NIMBYs.²⁵⁶ This, combined with self-interested property owners, has produced the regulatory impasse found in localities across the state.²⁵⁷ States like California need a way of integrating the economic understanding undergirding Montana’s reforms without having to recreate the unicorn political coalition that only exists in Montana.

States should create a CBA framework for local land-use decision-making. This framework can borrow heavily from the existing cost-benefit framework in place for federal agencies. By setting out an economic framework, state legislatures can ensure that their goals are being advanced by local decision-making. As shown by Professor McDonald’s economic modeling above, there is an existing and well-developed mechanism for analyzing land-use decisions using objective metrics.²⁵⁸ These models can account for the soft costs faced by developers and state legislators should consider how their policies affect these costs.

This economic-based approach will be far more politically feasible than a blanket reform of local land-use controls and allows state legislatures to tailor the framework to their preferences. For example, states can choose to include a carbon price in their analysis to

252. *Id.*

253. *See supra* Part III.B.2 (explaining how the state of Montana recognized and has begun to fix its housing problems).

254. Eliminating local land use controls is a reform that should be pursued everywhere that it is feasible to do so. The tyranny of the NIMBY is often at its worst in these local control mechanisms, such as zoning boards and community input meetings. It should be a long-term goal of state policymakers to strip localities of this power, but it is unlikely to occur in time to alleviate the housing crisis.

255. *See supra* Part III.B (discussing California and Montana’s cultural and political differences).

256. *See* Hernandez, Friedman & DeHerrera, *supra* note 200, at 24 (64% of those filing CEQA lawsuits are individuals or local associations, most without a prior history of environmental advocacy, while 13% are environmental organizations, with most CEQA litigation often being used by NIMBY opponents and special interests—such as competitors and labor unions—for non-environmental purposes).

257. Gray, *supra* note 196.

258. *See* McDonald, *supra* note 100 (offering a cost-benefit analysis of different land use models for urban development).

account for how a housing project will impact the climate. Carbon pricing is another very well-established means of integrating policy goals into an economic framework so market actors can respond and carry out those policy goals.²⁵⁹

Legislatures can also include categorical exclusions to their analysis, such as protecting any park or nature preservation from development, if politically necessary to implement the program.²⁶⁰ This flexible approach to implementation will make the use of CBA more palatable for a wide variety of political coalitions. Instead of playing ‘whack-a-mole’ with ill-conceived local ordinances explicitly designed to undermine state laws, those localities will have to show their work to demonstrate that their policies are economically sound and in line with the state objectives.

This shifts the burden from the state having to constantly revise reforms, as is currently happening in California, to the localities to justify their restrictions.²⁶¹ The necessity for localities to economically justify their actions may also result in fewer attempts to undermine state reforms in the first place, like has occurred in Massachusetts.²⁶² Imagine a city in California seeking to implement a new parking requirement for all duplexes in response to a state law abolishing single-family zoning. The added requirement of producing a CBA and submitting it to the state, with full knowledge that such a requirement cannot stand up to this scrutiny, may make the locality reconsider even attempting the measure. A statewide framework will also give developers and lenders greater confidence in the future regulatory environment and help reduce the cost of capital.

States should also create a private right of action for developers to challenge local land use ordinances as in violation of this CBA requirement. This process should be designed with special sensitivity for the need to reduce the soft costs on developers. The current private right-of-action litigation framework used in environmental review laws, such as CEQA and NEPA, are very cost and time-intensive. Such delay serves the NIMBY plaintiffs in those cases well because their main goal is to stop a particular development. Long delays caused by dragged-out litigation serve that end because a delay in a project is just as good as a court-ordered denial. Therefore, simply replicating this sort of long litigation process would not serve the policy goals of reducing developers’ project costs. While creating an avenue to challenge land-use restrictions would be better than the current status quo in most states, it would likely rarely be used because the litigation costs would render most projects cost-prohibitive.²⁶³

SAHASs are a promising model for providing this cost-effective private action. The main issue with SAHASs, like the one used in Massachusetts, is not in their implementation, but that they rely on flawed economic reasoning. Keeping costs high for market-rate housing construction while only allowing for a remedy for below-rate projects means much less housing will be built. This is because below-market-rate housing is economically

259. *What is Carbon Pricing*, THE WORLD BANK, <https://carbonpricingdashboard.worldbank.org/what-carbon-pricing> [<https://perma.cc/JR8Y-8CW7>].

260. While categorical exceptions may not be the ideal implementation of a CBA requirement, they can be useful to create small carveouts needed to make the overall scheme politically feasible.

261. *See supra* notes 212–215 and accompanying text.

262. *See supra* note 240–43 and accompanying text.

263. This is also why states must be proactive in ensuring that local land use regulations that violate the state-level reforms cannot proliferate. Requiring an up-front CBA before a local ordinance can go into effect will go a long way to reducing the number of burdensome regulations passed at the local level.

unsustainable due to the price pressures on the rest of the units in the development.²⁶⁴ The administrative process created by these laws, however, is a great idea and should be the model for states seeking to implement a developer right of action. These quasi-judicial administrative appeals have a significantly lower cost and can be adjudicated more quickly. Because localities derive their land use regulatory powers from the state, the state can empower the zoning appeals board to override the local ordinance.²⁶⁵

SAHASs, such as the one in Massachusetts, offer an excellent starting point for creating a cost-effective means for developers to challenge land use regulations inhibiting development. Such systems build on the well-established field of administrative courts and, therefore, do not require state legislature to do anything novel or difficult. State legislators seeking to enact similar reforms would only need to copy the existing framework used in other administrative adjudicatory proceedings and implement it. An administrative process tethered to economic fundamentals is also more efficient than the state trying to pinpoint every local land use restriction and preempting it through bespoke legislation. This solution is much more scalable and therefore likely to effectively meet the scale of development needed to address the housing shortage.

A developer seeking to build a new townhome development will know which of the myriad local restrictions is the one causing their costs to balloon. While a state legislature can only see the macro impacts of their reforms, developers can see the granular pricing impacts and can therefore more effectively bring suits to challenge the exact land-use regulations standing in the way of progress.

The state agency overseeing the implementation of housing reforms can build institutional knowledge by administering the CBA oversight of localities on the front end and hearing challenges to local rules on the back end through the appeals board process. This means that the agency will develop a clear understanding of what does and does not qualify under the state law CBA statute and apply it efficiently to appeals that it hears. This streamlined process will give developers a cost-effective means of challenging land-use restrictions inhibiting the development of new housing within an administration well-versed in the requirements of the state CBA. Cost-effective CBA challenges from developers resulting in less restrictive land use will reduce the soft costs of development and encourage new entrants to the market. Because lenders will have a better sense of the regulatory environment, they will also be more willing to finance long-term projects. This combination of reduced lending costs and more attractive land use regulations can produce a virtuous cycle of development.

If desired, a state could copy the administrative framework of Massachusetts' Chapter 40b statute, creating the SAHAH for affordable housing developers, and expand the eligibility requirement to bring an action. A legislator would need only to cross out "only below market rate developers" and write in "to any developer seeking to challenge an inadequate CBA."²⁶⁶ This would fix the existing flaw at the heart of the Massachusetts SAHAH plan

264. See Krimmel & Wang, *supra* note 30, at 257.

265. Roger Valdez, *Preemption and Housing: Dillon and the Legal Basis for State Action*, FORBES (Apr. 1, 2024), <https://www.forbes.com/sites/rogervaldez/2024/04/01/preemption-and-housing-the-legal-basis-for-state-action/> (on file with the *Journal of Corporation Law*) (discussing the history of state preemption and the role it can play in furthering housing reform).

266. MASS. GEN. LAWS ch. 40B, § 21 (2024).

while allowing state legislators to largely copy an existing plan instead of having to draft a reform from scratch.

Take, for example, a new parking minimum enacted by a city in response to legislation banning single-family-only zoning. The locality would have to undertake a CBA using the framework and model set forth by the state. This analysis would quantify the increased cost to design and build with and without the new regulation. Space for parking can either be surface or garage. A surface lot will consume more lot space making the development impractical so developers may opt for a garage solution. This will add substantial costs to the development. This CBA borrows directly from long-established economic research, recalling the basic model for housing, $(\text{Net Cost} + \text{Annual Rental Income}) = (\text{Capital Expenditure per Unit} \times \text{Units}) - (\text{Opportunity Cost per Unit} \times \text{Unit of Capital Services for Housing})$, it is clear how each of these zoning requirements directly affects the variables found in the equation.²⁶⁷ Taking space away from housing space to accommodate more car storage will reduce the total units built 'H'. The price to build each unit 'K' also increases. The tax base 'T_h' also shrinks because fewer people can live in the complex while the services needed are relatively unchanged. The opportunity cost 'r' also increases because of the loss of the additional units that could be built. Critically this is true of a housing project in a transit-oriented development area where cars are unnecessary, but much less true in a sprawled development where vehicle demand stays high.²⁶⁸ This demonstrates how this recommended framework is responsive to the individual circumstances of a city while also ensuring that policies are sound and based on solid economic rationale.

This equation-based analytical framework does not have to be identical for every state and allows legislatures to ensure their priorities are included in the decision-making process by including externalities they feel should be priced in. California, for example, can include a variable 'C' to account for the carbon impact of a project. The state already calculates transportation impacts from projects as part of CEQA EIRs so this same vehicle miles traveled (VMT) metric could be carried over to this analysis as well. The state could choose to use the prevailing cost of carbon from respected organizations such as the IMF or EU or choose to define its own cost of carbon. A sprawled suburban project with no transit connection will have substantially higher VMT than would a dense, walkable development near transit. Therefore, the greater carbon emissions that result from the sprawled suburban project can be directly quantified and captured as part of a CBA. In addition to all the other reasons suburban sprawl is financially unsustainable, it is also environmentally unsustainable, and a CBA framework can capture that and allow policymakers to weigh the costs and benefits such of a project.

This proposed CBA framework is built upon well-established and consistently applied means of administrative governance and sound economics. Housing and land use is a policy space in desperate need for objective, rigorous reform and the tools exist to make it happen. Developers are best positioned to identify exactly which regulations are standing in the way of progress. If developers are given a cost-effective means of challenging them, they can deliver the more livable and more affordable cities that America needs.

267. See McDonald, *supra* note 100 (discussing the impact of zoning on housing markets).

268. Hannah Hoyt & Jenny Schuetz, *Parking Requirements and Foundations Are Driving up the Cost of Multifamily Housing*, BROOKINGS (June 2, 2020), <https://www.brookings.edu/articles/parking-requirements-and-foundations-are-driving-up-the-cost-of-multifamily-housing/> [<https://perma.cc/3UU6-3DA2>].

V. CONCLUSION

America's housing crisis is continuing to worsen due to a severe lack of housing supply. This shortage is driven by extremely restrictive land use regulations that found their beginning as a means of keeping America segregated and continue to entrench inequality to this day. A hundred years of local land use restrictions, founded deep in 20th century racism but supported by current-day NIMBYs, have led to this crisis. The housing crisis is also a central part of the climate crisis and the reduction of the American middle class. The suburban sprawl that single-family zoning, mandatory parking minimums, and the myriad other requirements have led to unaffordable car-centric cities. Reform will not just decrease housing prices, but also deliver more dense, walkable, and livable cities that are better for people and the planet.

States have attempted to solve this problem but have continually run into intense local opposition and political headwinds and have found themselves lacking a consistent framework to methodically work through reform.

This Note proposes using CBA, already heavily used at the federal agency level, to provide structure and objective metrics to measure land use decision-making. Developers are a key piece in unlocking more housing supply and are also the market actors best suited to identify which regulations are most inhibiting development. States should build on the idea of using lower-cost administrative courts to provide developers a private right of action to challenge local land use restrictions that violate the state-mandated CBA.

This system will allow states to preempt ill-conceived local land use decisions by subjecting them to CBA and will allow developers to challenge both unwise existing restrictions and any future limitations that slip through the cracks. This reform package can easily be attached to state housing reform bills and administered through state housing agencies. The state capacity already exists to accomplish this, and enlisting developers to challenge the most odious restrictions cost-effectively will lead to much quicker change and more new housing than a prolonged legislative fight.