

Editor's Note: The following three essays are a conversation between three of the nation's leading land use and zoning scholars. The first two essays, written by Professors Daniel R. Mandelker and Patricia E. Salkin, respond to Professor Michael Allan Wolf's recent article *Zoning Reformed*. These essays address some of Professor Wolf's forty-one zoning recommendations and offer their own reforms to American zoning. In the final essay, Professor Wolf replies to these critiques, provides unique insight into the origins of *Zoning Reformed*, and builds on his zoning recommendations. The *Kansas Law Review* appreciates the opportunity to be the forum for this timely and important conversation.

A Comment on Professor Wolf's *Zoning Reformed*

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Professor Wolf's article on zoning reform has a comprehensive list of changes that are required to reform the zoning system.¹ In response, I will comment on what he recommends and offer suggestions to supplement what he suggests, with an emphasis on housing affordability.² I recommend changes in key elements in the zoning system that create exclusionary barriers to affordable housing and changes in zoning procedures that can block or limit affordable housing projects.

I. PROFESSOR WOLF'S RECOMMENDATIONS

Professor Wolf's article could not have come at a better time. Land use regulation through zoning demands reform, pressured by a growing housing affordability crisis that is pricing families and individuals out of the housing market: A substantial number of households are burdened or severely burdened by housing costs.³ Zoning restriction plays an

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1. Michael Allan Wolf, *Zoning Reformed*, 70 U. KAN. L. REV. 171, 236–41 (2021).

2. Kriston Capps, *Does the White House Need a 'Zoning Czar'?*, BLOOMBERG (July 5, 2022, 6:00 AM) https://www.bloomberg.com/news/articles/2022-07-05/to-succeed-biden-s-housing-plan-needs-a-zoning-czar?utm_campaign=news&utm_medium=bd&utm_source=applenews [<https://perma.cc/XCE5-AC3R>] (“Exclusionary zoning is one of three factors identified by the White House as culprits in soaring housing costs and limited supply.”).

3. This housing problem is known as housing cost burden. JOINT CTR. FOR HOUS. STUD. HARV.

important role in this problem because it raises housing costs by reducing supply.⁴ Large lot zoning, which I discuss below, is an example. Zoning is not alone. Excessive subdivision requirements are another land use regulation that limits housing affordability.⁵

Racism is another major issue.⁶ History shows that the adoption of zoning often was racially motivated and used for racial exclusion. Detailed studies in Saint Louis, for example, discovered that suburban zoning was motivated by racial exclusion and adopted only after the U.S. Supreme Court ended reliance on racially restrictive covenants, which had been used in an aggressive campaign that covered the city.⁷ Zoning restrictions that restrict housing affordability have a racial content.

Ballot-box zoning, which I have always opposed, is a zoning strategy that creates affordable housing and racism issues. Professor Wolf recommends the elimination of ballot-box measures that target affordable housing.⁸ He makes this recommendation because of the negative record of the U.S. Supreme Court, which has “entertained, and then rejected, constitutional challenges to plebiscites in which local voters sought to thwart efforts to build affordable developments, often with financial support from government agencies.”⁹

I would reinforce and add to his suggestion. Opposition to ballot-box zoning is required because the U.S. Supreme Court has made it difficult to prove racial discrimination when voters adopt racially discriminatory

UNIV., THE STATE OF THE NATION’S HOUSING 2022 7, fig. 5 (2022), https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_State_Nations_Housing_2022.pdf [<https://perma.cc/U8UE-4825>].

4. This issue has been given attention in a recent study. Vanessa Brown Calder, CATO INST., *Zoning, Land-Use Planning, and Housing Affordability* Oct. 18, 2017, at 1, 6–7, <https://cpb-us-w2.wpmucdn.com/sites.wustl.edu/dist/a/3075/files/2021/12/Zoning-Land-Use-Planning-and-Housing-Affordability.pdf> [<https://perma.cc/KXD6-VLWZ>] (discussing affordability issues raised by zoning). See generally Joseph Gyourko & Raven Molloy, *Regulation and Housing Supply*, in 5 HANDBOOK OF REGIONAL AND URBAN ECONOMICS 1289 (Duranton Gilles, et al., eds., 2015).

5. U.S. Department Hous. & Urb. Dev., *Are Subdivision Costs Excessive?*, RESEARCHWORKS Apr. 2008 at 1, 1–2, (discussing the housing cost issues created by subdivision controls), https://archives.huduser.gov/periodicals/ResearchWorks/pdf/ResearchWorks_april_08.pdf [<https://perma.cc/LJC8-3F8U>] (discussing study of subdivision requirements).

6. Jonathan Rosenbloom, *Reducing Racial Bias Embedded in Land Use Codes*, CITYLAND (Nov. 30, 2020), <https://www.citylandnyc.org/reducing-racial-bias-embedded-in-land-use-codes/> [<https://perma.cc/2BRZ-737V>] (suggesting twenty-three recommendations for reducing racial bias in zoning).

7. See generally COLIN GORDON, *CITIZEN BROWN: RACE, DEMOCRACY, AND INEQUALITY IN THE ST. LOUIS SUBURBS* (2019) (discussing zoning, incorporation, annexation, schools, and redevelopment); COLIN GORDON, *MAPPING DECLINE: ST. LOUIS AND THE FATE OF THE AMERICAN CITY* (2008) (discussing zoning and urban renewal).

8. Wolf, *supra* note 1, at 216.

9. *Id.* (citing cases).

measures through initiatives and referenda.¹⁰ This was not always true—Supreme Court decisions struck down initiatives adopted by popular vote that adversely affected minorities.¹¹ They held a decision-making process that placed obstacles only in the path of racial minorities, such as a requirement that a fair housing ordinance must receive voter approval, violated equal protection.¹² The Supreme Court narrowed these cases by holding they required intentional discrimination, and that racial damage to the political process was not enough.¹³ With constitutional protection damaged, I recommend the total elimination of ballot-box zoning as a method for making zoning decisions or adopting zoning regulations.

Professor Wolf also has a zoning reform for noncumulative zoning.¹⁴ This issue may look like a technical side point, but noncumulative zoning has an undesirable effect on the structure of zoning and on land use. Zoning was originally cumulative, not noncumulative. Cumulative zoning allowed the mixing of uses because it allowed less restrictive uses to be located in more restrictive zoning districts.

But then, Professor Wolf says, “by the second half of the twentieth century, the American zoning paradigm shifted from cumulative to noncumulative”¹⁵ This change means that a zoning district is exclusive and allows only the uses permitted in that district. Professor Wolf does not like this restriction and recommends a return to cumulative zoning, which can allow a mix of uses in each zoning district.¹⁶

This is a good suggestion, but cumulative zoning is a blunt instrument if it is not matched with careful tailoring that avoids mixing incompatible uses in the same district with little control. If mixed-use is the objective, and it should be, then the adoption of zoning tailored for mixed-use development is required. Zoning can take many forms, including the adoption of zoning districts that provide a design format for mixed-use development.¹⁷

I am especially interested in Professor Wolf's recommendations for

10. Daniel R. Mandelker & Trevor Alexander, *Minority Discrimination Through Popular Vote in the Land Use Process*, ZONING & PLAN. L. REP. Nov. 13 2020 at 1, 1–2, <https://cpb-us-w2.wpmucdn.com/sites.wustl.edu/dist/a/3075/files/2021/12/ZPLR10PermissionMandelkerAlexander.pdf> [<https://perma.cc/W99G-BXYY>].

11. *Id.* at 4.

12. *Id.*

13. *Id.* at 5. *See generally* Washington v. Davis, 426 U.S. 229 (1976).

14. Wolf, *supra* note 1, at 195–99.

15. *Id.* at 196.

16. *Id.* at 195–99.

17. Daniel R. Mandelker, *Discovering Mixed-Use Zoning* (forthcoming REAL EST., TR. AND EST. J. Spring 2023).

affordable housing. One major issue is the exclusionary effect of single-family zoning, a well-documented problem that requires a remedy.¹⁸ Professor Wolf agrees that single family zoning must be changed, but is cautionary about improving housing opportunity by opening up single family districts to other types of housing.¹⁹ Early experience with the reform of single family zoning confirms his caution.²⁰ A more aggressive strategy is needed.

Inclusionary zoning is a successful affordable housing strategy that should be encouraged. It is a zoning strategy that requires developers to provide a stated percentage of affordable housing in their housing developments. Professor Wolf wants to reinvigorate inclusionary zoning by enhancing the amenities offered for building affordable housing.²¹ I am not quite sure what he means by amenities, but he may be referring to density bonuses. Many local governments offer a density bonus to developers who participate in inclusionary zoning programs by giving them an additional density if they provide affordable housing.²²

I agree that density bonuses should be widely available and perhaps authorized by state law, as in California. They should also be carefully calibrated so that they avoid environmental and other problems in the areas in which they are offered.²³ Inclusionary zoning also needs more support. It is a complex program that requires complicated administration, and requires the greater availability of model ordinances and guidance. Neither is legal support entirely solid. Litigation must be watched and supported.

I would like to add to the recommendations in Professor Wolf's article by suggesting additional zoning reforms that address the housing affordability problem. They follow.

18. See Sara C. Bronin, *Zoning by a Thousand Cuts*, CORNELL J.L. & PUB. POL'Y (forthcoming 2022) (manuscript at 34) ("With accurate mapping for all zoning districts across Connecticut, the most significant finding is the simplest: zoning assigns 90.6% of the state's land to as-of-right single-family housing. Forty-seven municipalities issue as-of-right permits for only single-family housing, and thirty-eight exercise discretion in permitting other types of housing, only after a public hearing.") (available at <https://ssrn.com/abstract=3792544>).

19. Wolf, *supra* note 1, at 212–15.

20. See Sarah J. Adams-Schoen & Edward J. Sullivan, *Reforming Restrictive Residential Zoning: Lessons from an Early Adopter*, 30 J. AFFORDABLE HOUS. & CMTY. DEV. L. 161, 171–72 (2021) (discussing Oregon legislation allowing duplexes as of right in single family zones).

21. Wolf, *supra* note 1, at 193–95 (discussing reforms and arguing that attention must be given to setback and height requirements).

22. E.g., CAL. GOV'T CODE § 65915 (West 2022).

23. For example, raising densities may overwhelm infrastructure at the housing site.

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PROFESSOR MANDELKER'S RESPONSE

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II. HOUSING AFFORDABILITY

A. *Exclusionary Zoning and The Evil of Large Lot Zoning*

The key feature of state zoning enabling legislation is that it is based on a zoning district system. It authorizes the creation of zoning districts but does not specify their content. This limitation allows local governments to decide on how many zoning districts they want to have and how restrictive they can make them. It gives local governments an opportunity to adopt restrictive exclusionary zoning.

Exclusionary zoning is dominant. A recent study found exclusionary zoning in 15 cities in California, concluded that no urban cities had permissive regulatory environments for housing, and found that six were likely prohibitive.²⁴ One of the purposes of the study was to determine how much zoned land was available for multi-family housing, an important source of affordable housing, and these cities generally made little land available.

To make this determination the study defined two base zoning categories. "Permissive base zoning" allows multi-family residential use at a high enough density to accommodate housing affordable for all income levels. Restrictive base zoning is single family zoning. The study determined how much land was zoned for permissive base zoning and how much land was zoned for restrictive zoning by examining zoning maps and ordinances. Nine of the 15 cities zoned less than ten percent of their total zoned land area for multi-family housing that could accommodate all income levels. San Francisco had the most permissive base zoning, with 33.54 percent of its total zoned land area zoned for all income levels. San Diego had the most restrictive base zoning, with approximately three percent of its total zoned land area zoned for all income levels.²⁵ The report concluded that "state and cities should invest heavily to encourage dense housing in urban and suburban areas that are less car-centered and more oriented around mass-transit and walkable."²⁶

Exclusionary zoning has many evils, but large lot zoning is one of the worst. Large lot single family zoning is the principal zoning restriction

24. Moira O'Neill, Eric Biber, Giulia Gualco-Nelson & Nicholas Marantz, *Examining Entitlement in California to Inform Policy and Process: Advancing Social Equity in Housing Development Patterns* 63–70 (Sept. 18, 2021) (unpublished manuscript) (on file with the author).

25. *Id.* at 45–46.

26. *Id.* at 11.

that is used to limit the availability of affordable housing,²⁷ and is the major zoning strategy used by suburban governments.

Studies confirm this conclusion. One study of three cities concluded that they zoned a substantial amount of land for large lot zoning that was available only for single-family housing.²⁸ Another study found that almost all jurisdictions have large lot zoning.²⁹ It found that 39% of cities have extremely high large lot sizes over one acre.³⁰ It also found substantial bunching around minimum lot size areas, and that large lot size leads to racial segregation.³¹ The conclusion was that stricter zoning increases lot areas, decreases housing density, increases housing prices, and attracts white households and wealthy households.³² This study also looked at housing reform in Connecticut, and decided that halving minimum lot areas statewide “would substantially increase the supply of small and cheap homes. It would benefit minority households irrespective of the response of amenities to zoning reforms and either benefit or harm white households depending on the response of neighborhood amenities to zoning reforms.”³³

These problems with large lot zoning should have convinced courts to strike it down, but just the opposite has happened. Courts use a number of justifications, including protecting the “character of the community,” to uphold large lot zoning.³⁴ There is no understanding that large lot zoning is racist. An exclusionary motive for large lot zoning sometimes is

27. Michael C. Lens & Paavo Monkkonen, *Do Strict Land Use Regulations Make Metropolitan Areas More Segregated by Income?*, 82 J. AM. PLAN. ASS'N 6, 11 (2016) (concluding that large-lot zoning and single family housing lead to concentrations of affluence, not poverty).

28. Robert C. Ellickson, *Zoning and the Cost of Housing: Evidence from Silicon Valley, Greater New Haven, and Greater Austin*, 42 CARDOZO L. REV. 1611, 1624–27 (2021).

29. Jaehee Song, *The Effects of Residential Zoning in U.S. Housing Markets* 2, n.2 (Nov. 28, 2021) (unpublished manuscript) (available at <https://cpb-us-w2.wpmucdn.com/sites.wustl.edu/dist/a/3075/files/2022/06/Song-Article.pdf>) (“For instance, 91% of jurisdictions in the Wharton Land Use Regulatory Index survey and 96% in the Turner Center California Land Use Survey reply that they impose minimum lot area restrictions.”); see also ROLF PENDALL, ROBERT PUENTES & JONATHAN MARTIN, BROOKINGS INST., FROM TRADITIONAL TO REFORMED: A REVIEW OF THE LAND USE REGULATIONS IN THE NATION’S 50 LARGEST METROPOLITAN AREAS 22–23 (2006), https://www.brookings.edu/wp-content/uploads/2016/06/20060802_Pendall.pdf [<https://perma.cc/82PP-PUSX>] (finding suburbs of Boston most exclusionary, “84 percent of jurisdictions (47 percent of population, 81 percent of land area) have low density-only zoning”).

30. Song, *supra* note 29, at 19.

31. *Id.* at 20–21.

32. *Id.* at 23–25.

33. *Id.* at 47.

34. *E.g.*, *Flora Realty & Inv. Co. v. City of Ladue*, 246 S.W.2d 771, 776 (Mo. 1952) (discussing three acre lot size and accepting protection of the value of houses previously constructed on large lots against the depreciation that would result “if sections here and there are developed with smaller lots”).

blatantly accepted.³⁵ There is some dissent. An early Pennsylvania case saw the problem and held unconstitutional a four acre zoning ordinance adopted by a suburban municipality that was in the path of development,³⁶ but courts outside Pennsylvania have not followed that decision.

The most effective measure to eliminate large lot zoning is a minimum density requirement high enough to allow affordable multi-family housing. Minimum density decisions can be based on housing need backed by a requirement for adequate public services and can be part of a comprehensive housing program that includes inclusionary housing. Minimum densities can also help create compact, high density, walkable mixed-use developments that can include affordable housing.³⁷

B. Manufactured Housing

Zoning reform must make housing available that can lower housing costs. An effective strategy for lowering housing costs is to provide an alternative to the dominant site-built home, which is a home built entirely on site. Manufactured housing can provide attractive housing at a cost substantially lower than the cost of site-built housing.³⁸ It has changed dramatically, and is no longer the metal trailer pulled on wheels that many people imagine.³⁹ Gone is the single-wide metal trailer with metal siding and a metal roof that was the historic manufactured housing image.⁴⁰ Most manufactured housing has doubled in size, matches site-built housing in appearance and durability, and provides a superior housing product.⁴¹ It can be two stories instead of one. Problems with safety, quality, and

35. *Clary v. Borough of Eatontown*, 124 A.2d 54, 62–66 (N.J. App. Div. 1956) (discussing half-acre minimum, court approved zoning for some “high class” low-density residential areas viewed as essential to the local economy and the “blanketing” of the community with small, low-cost houses); *see Berry v. Volunteers of Am., Inc.*, 64 So.3d 347, 354 (La. Ct. App. 2011) (holding plaintiff’s successfully pleaded that rezoning of their property to a lower, medium density was to block an affordable housing project.)

36. *Nat’l Land & Inv. Co. v. Kohn*, 215 A.2d 597, 613 (Pa. 1965); *see also Appeal of Kit-Mar Builders, Inc.*, 268 A.2d 765, 766 (Pa. 1970) (invalidating two and three acre large lot zoning).

37. *See, e.g., Stephen Fesler, Minimum Density Rules*, URBANIST (Mar. 18, 2014), <https://www.theurbanist.org/2014/03/18/minimum-density-rules/> [<https://perma.cc/CDE2-LQPR>] (discussing minimum floor area ratio density requirement for pedestrian retail areas).

38. *See Loren Berlin, From Stigma to Housing Fix The Evolution of Manufactured Housing*, LINCOLN INST. LAND POL’Y (July 2015), <https://www.lincolninst.edu/publications/articles/stigma-housing-fix> [<https://perma.cc/L7QN-AKLX>].

39. *Id.*

40. *See id.* (“Whereas manufactured homes built prior to the 1976 regulations were made to be portable, like recreational vehicles, modern models are built with stronger materials and designed to be permanent.”).

41. *Id.*

durability have disappeared now that manufactured housing must meet federal quality standards.⁴²

Enter zoning.⁴³ Although some local governments have excluded manufactured housing,⁴⁴ exclusion is no longer a realistic option and would probably be held unconstitutional. Local governments today do not have to prohibit manufactured housing entirely as they have other equally effective exclusion strategies. Unequal treatment is the trigger that allows local governments to adopt zoning barriers to manufactured housing.⁴⁵ Unequal restrictive zoning restrictions are one strategy. Local governments have adopted, and courts have generally upheld, zoning restrictions on manufactured housing that do not apply to site-built housing.⁴⁶

Any zoning restriction can be applied unequally. Exclusion from residential zones is typical. A zoning ordinance usually excludes manufactured housing from some but not all residential zones, usually the lowest density residential zones.⁴⁷ Manufactured housing can also be limited to mobile home parks,⁴⁸ which often are substandard, and where the manufactured housing occupant has to rent a “pad” for her home at a rent that is at the mercy of the park landlord.

Discriminatory aesthetic controls are another problem. They can require manufactured housing to have an appearance that looks like housing in its immediate area, which can make it unaffordable.⁴⁹ Design standards can be an acceptable and welcome aesthetic control, but they can include excessive restrictions that raise the cost of manufactured housing and discourage its construction. Excessive roof pitch⁵⁰ and exterior treatment requirements are an example. When this happens, manufactured housing either will not be built or will not provide housing that is affordable. It is questionable whether these design standards justify

42. See National Manufactured Housing Construction and Safety Standards Act of 1974, 42 U.S.C. §§ 5401–5426.

43. The following discussion of manufactured housing is taken from Daniel R. Mandelker, *Zoning Barriers to Manufactured Housing*, 48 URB. LAW. 233 (2016).

44. *Id.* at 245.

45. *Id.* at 247.

46. *Id.* at 247–48.

47. *Id.* at 255.

48. *Id.* at 236–37 (“Zoning burdens take several forms, such as a total exclusion, an exclusion from residential zones, and requirements that manufactured housing be limited to manufactured housing parks.”).

49. *Id.* at 261 (discussing “look-alike” ordinances).

50. *Id.* at 261–63. It is claimed that local governments adopted roof pitch requirements to make the roofs of manufactured housing so high that they could not be transported under bridges. Adjustments to the structure solved that problem.

the additional cost, and it is questionable whether they would be applied to site-built housing.

Discriminatory zoning restrictions for manufactured housing can be prevented through a statutory equal treatment requirement, which a number of states have adopted. The requirement varies, but the Nebraska statute provides an effective solution: “The city council may not require additional standards unless such standards are uniformly applied to all single-family dwellings in the zoning district.”⁵¹ Local governments may have the authority to adopt a similar provision in their zoning ordinances. Equal treatment requirements can prevent discriminatory zoning requirements, such as exclusion from a residential district, restriction to a mobile home park, and excessive aesthetic restrictions like a roof pitch requirement.

Federal preemption of local zoning that discriminates against manufactured housing is necessary. Federal law requires quality standards for manufactured housing and an approval from the Department of Housing and Urban Development.⁵² This law preempts local building codes so they cannot apply restrictions that block manufactured housing approved under the federal law.⁵³ The federal law should be extended to preempt zoning restrictions that create barriers to manufactured housing. Preemption should cover any zoning restriction that does not apply equally to all residential housing, such as an exclusion of manufactured housing from single-family residential areas or a design standard that applies only to manufactured housing. Preemption of restrictive zoning, like large lot zoning, that blocks manufactured housing may also be needed.

A requirement for a zoning exception, also called a conditional use, is another strategy local governments use to block manufactured housing. This time-tried measure for administrative relief from zoning ordinances was authorized almost 100 years ago by the Standard State Zoning Enabling Act, published by the U.S. Department of Commerce,⁵⁴ which provides a foundation for most state zoning laws. All zoning legislation has this authority. One form of administrative relief included in the Standard State Zoning Enabling Act authorizes a Zoning Board of Adjustment to grant special exceptions for uses that may be acceptable in their zoning district, such as a day care center in a residential district, but

51. NEB. REV. STAT. § 14-402(2)(b).

52. 42 U.S.C. § 5403.

53. Mandelker, *supra* note 43, at 241–44.

54. U.S. DEP'T OF COMMERCE, A STANDARD STATE ENABLING ACT § 7 (1926), <https://cpb-us-w2.wpmucdn.com/sites.wustl.edu/dist/a/3075/files/2022/01/StdZoningEnablingAct1926.pdf> [<https://perma.cc/893U-AYGS>].

that must comply with criteria included in the zoning ordinance that ensure their acceptability.⁵⁵ Compatibility with adjacent uses is a commonly adopted criterion, but there is no limit on what local governments can require as long as there are no constitutional problems.⁵⁶ Notice how this delegation of authority gives local governments the authority to adopt broadly-stated criteria that allow a wide discretion to exclude by denying applications for exceptions they don't like.

It is not necessary to adopt exclusionary criteria for exceptions, such as restrictive design criteria. Local governments can adopt typically vague criteria, such as a requirement for compatibility with adjacent property, and apply them to deny exceptions for manufactured housing. *Rolling Pines Ltd. Partnership v. City of Little Rock*,⁵⁷ is a typical case. Five manufactured homes required a conditional use, which is another term for an exception, so they could be located in a subdivision of 26 site-built homes.⁵⁸ The zoning board could approve a conditional use if the "proposed land use is compatible with and will not adversely affect other property in the area where it is proposed to be located," and does "not have objectionable characteristics."⁵⁹ These are typically vague criteria that can justify a rejection.

The board denied the conditional use and the court upheld the denial, holding that "it was determined that the aggregate placement of manufactured homes was not compatible with the character of the existing neighborhood, which is one that is well-established and consists of modest, well-kept homes where all but one are brick-and-frame structures."⁶⁰ There also was a concern about the quality of manufactured homes and their impact on property values.⁶¹ Neither of these concerns is legitimate.

Rolling Pines is an illustration of how a local zoning board can apply an exception or conditional use requirement to block manufactured

55. *Id.*

56. See Daniel R. Mandelker, *Delegation of Power and Function in Zoning Administration*, 1963 WASHINGTON U. L.Q. 60, 61–65 (discussing administrative relief in zoning ordinances); see also *Anderson v. Sawyer*, 329 A.2d 716, 720 (Md. Ct. Spec. App. 1974) ("The special exception is a valid zoning mechanism that delegates to an administrative board a limited authority to allow enumerated uses which the legislature has determined to be permissible absent any fact or circumstance negating the presumption.").

57. 40 S.W.3d 828 (Ark. Ct. App. 2001).

58. *Id.*

59. *Id.* at 831–32 (citations omitted).

60. *Id.* at 834. The manufactured homes had vinyl exteriors, which are common in residential construction.

61. Because the homes were built after 1976 they had to meet federal quality standards. See 42 U.S.C. § 5403.

housing. Legislation can prevent this result by prohibiting the adoption of vague and restrictive criteria. Oregon is an example. Legislation there provides that “a local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of housing.”⁶² They may include “the density or height of a development,” but “[m]ay not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay.”⁶³ This legislation prohibits the adoption of criteria that include unjustifiable and costly design standards and other exclusionary requirements.⁶⁴

C. *The Housing Appeals Remedy*

The *Rolling Pines* case shows that blocking affordable housing projects or approving projects with unacceptable conditions is a serious housing affordability problem. Three New England states and the state of Illinois remedy this problem by authorizing an appeal, either to a court or a state board, when a local government rejects low-income or moderate-income housing or approves it with infeasible conditions.⁶⁵

With slight variation, the housing appeals statutes have three primary goals: First, they may expedite low-income or moderate-income housing development by authorizing comprehensive permits that avoid getting approval from several municipal boards.⁶⁶ Second, they authorize a formal appellate review process for affordable housing decisions.⁶⁷ An appellate board or court can overrule an affordable housing denial or modification that is not justified by acceptable reasons detailed in the statute. It may also have the authority to amend a zoning ordinance if an amendment is necessary. Third, they can authorize the board or court to modify or eliminate conditions attached to affordable housing approvals that make a project financially infeasible.⁶⁸

Many housing appeals statutes include affordable housing inventory thresholds that help incentivize development by requiring a ten percent

62. OR. REV. STAT. § 197.307(4) (2019).

63. *Id.* § 197.307(4)(b).

64. For example, manufactured homes in the *Rolling Pines* case had to meet eight specific standards including a pitched roof of three in 12 or 14 degrees or greater, an exterior wall finish compatible with the neighborhood, and a multi-sectional structure requirement. *Rolling Pines*, 40 S.W.3d at 831.

65. Bob Neel, Note, *Combating Exclusion & Achieving Affordable Housing: The Case for Broad Adoption of Housing Appeals Statutes*, 99 WASH. U.L. REV. 1397, 1402–05 (2022).

66. *Id.* at 1401.

67. *Id.*

68. *Id.*

affordable housing quota for each local government. A local government is no longer subject to state housing appeals board review when the inventory level is achieved and maintained.⁶⁹ Courts have upheld these statutes against arguments that they interfere with local zoning controls.⁷⁰

Housing appeals statutes have created tensions between the state and local governments in some states, where they have not been as effective as expected. But in Massachusetts the housing appeal law produced 60,000 housing units and increased the affordable housing stock by 10.1 percent by 2020.⁷¹ Twenty-two local governments in Illinois achieved a ten percent affordable housing inventory.⁷²

Housing appeals statutes provide a powerful remedy that gets affordable housing built. Although opposition has blocked progress in some states,⁷³ “[s]ome of the most powerful force of housing appeals statutes comes from engendering political will for affordable housing development.”⁷⁴

D. The Zoning Process

The denial of exceptions and conditional uses for manufactured housing shows that getting affordable housing built requires reform of the zoning process. Requiring the approval of development projects through a process that requires an exercise of discretion long obliterated the traditional zoning district format, which permits land uses by right. In addition to the exception, the model zoning legislation published by the U.S. Department of Commerce provided criteria for variances granted by the Zoning Board of Adjustment as backup relief from restrictive zoning that might otherwise create a takings problem.⁷⁵ Planned unit development, a discretionary system of land use control in which a local government and its planning agencies adopt a development plan that provides the land use regulations for a development project, is another dominant zoning measure that requires discretionary review.⁷⁶ Many local

69. *Id.* at 1401–02.

70. *Bd. of Appeals v. Hous. Appeals Comm.* in *Dep’t of Cmty. Affairs*, 294 N.E.2d 393, 414 (Mass. 1973).

71. Neel, *supra* note 65, at 1415.

72. *Id.* at 1416.

73. *Id.* at 1415–16.

74. *Id.* at 1417.

75. ADVISORY COMM. ON ZONING, DEP’T OF COMM., A STANDARD STATE ZONING ENABLING ACT § 7 (rev. ed. 1926).

76. DANIEL R. MANDELKER, PLANNED UNIT DEVELOPMENTS, PLANNING ADVISORY SERV.

governments have adopted design review ordinances that require the design review of developments in a design review process.⁷⁷ These are just a few of the discretionary review hurdles that developers have to overcome.

Discretionary reviews can be used to block affordable housing. Even when a local government agency approves a project, it can include unacceptable conditions or demand unacceptable modifications even though the project complies with local regulations. Discretionary review creates delay and increases costs because it creates unexpected, expensive challenges that a developer must meet in order to obtain approval. In a California study, five of the studied cities did not allow any development to avoid discretionary approval.⁷⁸ Several cities used a design or architectural review to require discretionary review for development that otherwise conformed to base zoning and planning.⁷⁹ Only four cities had a nondiscretionary process to approve development.⁸⁰ Housing appeals statutes can provide a remedy for the abuse of discretionary review if they are available, but appeals are costly.

Zoning by right can avoid the difficulties with discretionary review in the zoning process. Zoning by right allows development to occur following compliance with zoning regulations enforced through administrative review. Careful drafting of zoning ordinances can provide an acceptable zoning framework for affordable housing.⁸¹

Public participation is another major problem created by discretionary land use controls. A hearing is usually required for most discretionary reviews, and hearings are often undisciplined and chaotic and provide an opportunity for opposition that can delay, restrict, and trigger the denial of

REP. NO. 545, at 32–34 (Am. Plan. Ass'n 2007) (discussing concept and zoning regulations for planned unit developments); Daniel R. Mandelker, *New Perspectives on Planned Unit Developments*, 52 REAL PROP. TR. & EST. L.J. 229, 257–60 (2017) (discussing concept).

77. City of Mill Valley, *Multi-Family Residential, Downtown Residential, & Mixed-Use Design Guidelines & Development Standards* 8 (2016) (discussing design guidelines to be applied by city through design review process outlined in the Mill Valley Residential Design Review Handbook.), <https://millvalleylibrary.org/DocumentCenter/View/570/Design-Guidelines-and-Development-Standards-PDF> [<https://perma.cc/A6B7-E66U>]; see MUKILTEO MUN. CODE § 17.25.020 (2021) (explaining that “[a]dministrative design review will be used by the city to approve development (site plans and architectural designs) in mixed-use districts”).

78. O’Neill, Biber, Gualco-Nelson & Marantz, *supra* note 24, at 51.

79. *Id.*

80. *Id.* at 52.

81. ASHEVILLE, N.C., URBAN PLACE FORM DISTRICT § 1.2 (2022) (intent of Urban Place Form District in part is to mix uses and integrate a wide range of housing options), <https://library.municode.com/nc> [<https://perma.cc/RZB9-EGZP>].

an affordable housing project.⁸² Although public participation was supposed to be an open process intended to provide diversified public input, it has been preempted by project opponents. Hearings are dominated by white upper income participants who have a bias in favor of opposition, and who are skilled at finding a variety of baseless reasons for opposing housing projects, even when affordable housing is not an issue.⁸³ A reduction in the scale of a project or outright rejection often occurs. Opposition is fierce, well-informed, destructive, and effective. In one case, effective objections to an affordable housing project were based on opposition to the elimination of a magnificent, irreplaceable copper beach tree.⁸⁴

There are remedies for this problem. One is that local governments can stand up to these attacks and reject baseless claims. There also are structural remedies. One is a pre-application conference with the developer and neighbor residents that can help resolve problems that could trigger opposition. This is standard practice in some local governments. A local government can also get better control of the hearing process by setting hearing agenda issues in the hearing notice. The agenda can prevent consideration of baseless claims. This is a statutory requirement in Oregon.⁸⁵ Issues not on the agenda are not be eligible for discussion.

Procedure is also a problem. The Standard State Zoning Enabling Act's administrative procedures are incomplete and do not provide for hearings that allow the cross-examination that is essential for accurate fact-finding, and do not require findings of fact or a written decision.⁸⁶ Undisciplined public hearings with uncontrolled public participation call for the adoption of disciplined procedures for quasi-judicial administrative hearings that can effectively control the hearing process and provide an adequate basis for decision making. Model legislation proposed by the American Planning Association for administrative hearings provides reform of the hearing process that includes a hearing notice stating the issues that will be considered, quasi-judicial hearing procedures including

82. Anika Singh Lemar, *Overparticipation: Designing Effective Land Use Public Processes*, 90 FORDHAM L. REV. 1083, 1122 (2021) (describing difficulties in zoning hearing process).

83. KATHERINE LEVINE EINSTEIN, DAVID M. GLICK & MAXWELL PALMER, NEIGHBORHOOD DEFENDERS 82–88 (2020) (discussing opposition to development projects in an empirical study of Massachusetts local governments).

84. *Id.* at 48.

85. OR. REV. STAT. ANN. § 197.763(3)(b) (West 2022) (requiring municipalities to “[l]ist the applicable criteria from the ordinance and the plan that apply to the application at issue”).

86. Daniel R. Mandelker, *Model Legislation for Land Use Decisions*, 35 URB. LAW. 635, 638–39 (2003) (describing statutory procedures). Discretionary reviews not authorized by the Standard State Zoning Enabling Act are not subject to statutory procedural requirements. *Id.*

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a right to cross examination, and a requirement for findings of fact and a statement of the decision.⁸⁷ Local governments probably have the authority to adopt these reforms for their zoning process without legislative authority.

III. FINAL THOUGHTS

Zoning is the silent presence that shapes our cities. Its unrestricted application has created a system that has unacceptable social consequences, is hostile to affordable housing, and is badly in need of reform. Professor Wolf has provided a thoughtful list of zoning reforms that can help revise the system. I have added additional reforms that improve housing affordability. We have made a good start in the right direction.

87. AM. PLAN. ASS'N, GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MGMT. OF CHANGE § 10-205 (Stuart Meck ed., 2002), https://planning-org-uploaded-media.s3.amazonaws.com/publication/download_pdf/Growing-Smart-Legislative-Guidebook.pdf [<https://perma.cc/XQS9-NLQT>]. The American Bar Association adopted a model statute and Appendix prepared by a task force from two of its sections that is based on this model, see *Model Statute on Local Land Use Process*, ABA (Feb. 12, 2008), <https://cpb-us-w2.wpmucdn.com/sites.wustl.edu/dist/a/3075/files/2022/01/ModelLandUseCode.pdf> [<https://perma.cc/AH4N-ZTZK>].