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ADDRESSING CHALLENGES  
TO AFFORDABLE HOUSING IN LAND USE LAW:  
RECOGNIZING AFFORDABLE HOUSING AS A RIGHT

The rise of zoning at the dawn of the twentieth century<sup>1</sup> ushered in an era of city planning that promised to improve the “safety and security of home life” in the wake of the Industrial Revolution.<sup>2</sup> However, the zoning movement also buoyed efforts to separate neighborhoods by race, income, and social class. In *Village of Euclid v. Ambler Realty Co.*,<sup>3</sup> the U.S. Supreme Court justified zoning’s burden on property rights in part by pointing to the necessity of sequestering the new apartment — “a mere parasite”<sup>4</sup> — for fear that higher-density housing would infect American social values and instigate “race suicide.”<sup>5</sup>

Nearly a century after *Euclid* was decided, the desire to limit higher-density residential construction continues to drive modern land use law.<sup>6</sup> Homeowners, who financially benefit from higher land prices, leverage outsized political influence at the local level to lobby for zoning laws protective of property values, which in turn fuel a housing shortage, dramatically inflating housing costs in urban and rural areas alike.<sup>7</sup> Housing payments amount to thirty percent or more of household income for half of the nation’s renters and a quarter of homeowners,<sup>8</sup> a level considered excessively burdensome by the U.S. Department of Housing and Urban Development (HUD).<sup>9</sup> Where housing is

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<sup>1</sup> *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386 (1926).

<sup>2</sup> *Id.* at 394; *see also id.* at 392; Anika Singh Lemar, *The Role of States in Liberalizing Land Use Regulations*, 97 N.C. L. REV. 293, 307 (2019) (describing zoning as a response to industrialization).

<sup>3</sup> 272 U.S. 365.

<sup>4</sup> *Id.* at 394.

<sup>5</sup> Maureen E. Brady, *Turning Neighbors into Nuisances*, 134 HARV. L. REV. 1609, 1641, 1667–68 (2021) (defining race suicide as “the idea that wealthier, white people were slowly becoming extinct by having smaller families, while the poor, feeble-minded, and immigrant classes were expanding,” *id.* at 1641).

<sup>6</sup> Memorandum from Lori Droste, Vice Mayor, City of Berkeley, et al., to Honorable Mayor and Members of the City Council, City of Berkeley (Feb. 23, 2021), [https://www.cityofberkeley.info/Clerk/City\\_Council/2021/02\\_Feb/Documents/2021-02-23\\_Item\\_29\\_Resolution\\_to\\_End\\_Exclusionary.aspx](https://www.cityofberkeley.info/Clerk/City_Council/2021/02_Feb/Documents/2021-02-23_Item_29_Resolution_to_End_Exclusionary.aspx) [<https://perma.cc/2TFU-ABAX>] (noting that Berkeley’s single-family zoning policy, which was the first of its kind in the nation, “has its roots in racist exclusionary zoning policy”).

<sup>7</sup> *See* Annie Lowrey, *The Great Affordability Crisis Breaking America*, THE ATLANTIC (Feb. 7, 2020), <https://www.theatlantic.com/ideas/archive/2020/02/great-affordability-crisis-breaking-america/606046> [<https://perma.cc/S5FX-AWYC>]; *infra* Part I, pp. 1106–09.

<sup>8</sup> Jared Bernstein et al., *The Conundrum Affordable Housing Poses for the Nation*, WASH. POST (Jan. 2, 2020), [https://www.washingtonpost.com/realestate/the-conundrum-affordable-housing-poses-for-the-nation/2020/01/01/a5b360da-1b5f-11ea-8d58-5ac3600967a1\\_story.html](https://www.washingtonpost.com/realestate/the-conundrum-affordable-housing-poses-for-the-nation/2020/01/01/a5b360da-1b5f-11ea-8d58-5ac3600967a1_story.html) [<https://perma.cc/ZN3C-TMMM>].

<sup>9</sup> *See* Off. of Pol’y Dev. & Rsch., U.S. Dep’t of Hous. & Urb. Dev., *Defining Housing Affordability*, HUD USER: THE EDGE (Aug. 14, 2017), <https://www.huduser.gov/portal/pdredge/pdr-edge-featd-article-081417.html> [<https://perma.cc/B68F-XDPU>].

affordable, it is often located in undesirable and difficult-to-access parts of town, away from grocery stores,<sup>10</sup> public transit,<sup>11</sup> parks,<sup>12</sup> and higher-quality schools.<sup>13</sup> This geographic separation of homeowners, who tend to be white and wealthier than nonhomeowners,<sup>14</sup> has allowed school segregation to resurge to levels unseen since the Fair Housing Act<sup>15</sup> (FHA) was passed in 1968.<sup>16</sup>

This Note argues that recognizing affordable housing as a right through state constitutional amendments is an effective and necessary intervention to address the role of legal barriers in exacerbating the growing affordable housing crisis. A rights-based approach empowers traditionally marginalized groups to overcome shortcomings in existing reforms by comprehensively curtailing the authority of local governments to enact exclusionary zoning measures. Part I overviews the role that flaws internal to land use law have played in contributing to the massive shortage of affordable housing in the United States. Part II surveys past attempts at reform, from the *Mount Laurel*<sup>17</sup> cases to modern efforts to set aside land for affordable housing. Part III argues for the necessity of recognizing affordable housing as a right and describes the contours that such a right might take, and Part IV briefly concludes.

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<sup>10</sup> Jessica Caporuscio, *What Are Food Deserts, And How Do They Impact Health?*, MED. NEWS TODAY (June 22, 2020), <https://www.medicalnewstoday.com/articles/what-are-food-deserts> [https://perma.cc/92DN-3R7R].

<sup>11</sup> See, e.g., MUSIC CITY RIDERS UNITED, BUS ROUTE REPORT CARD 4 (2019), <https://www.workersdignity.org/wp-content/uploads/2019/09/Bus-Route-Report-Card.pdf> [https://perma.cc/W3G7-K77L].

<sup>12</sup> See, e.g., TR. FOR PUB. LAND, THE HEAT IS ON 2 (2021), [https://www.tpl.org/sites/default/files/The-Heat-is-on\\_A-Trust-for-Public-Land\\_special-report.pdf](https://www.tpl.org/sites/default/files/The-Heat-is-on_A-Trust-for-Public-Land_special-report.pdf) [https://perma.cc/9A4C-MFPP].

<sup>13</sup> JONATHAN ROTHWELL, BROOKINGS INST., HOUSING COSTS, ZONING, AND ACCESS TO HIGH-SCORING SCHOOLS 1 (2012), [https://www.brookings.edu/wp-content/uploads/2016/06/0419\\_school\\_inequality\\_rothwell.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/0419_school_inequality_rothwell.pdf) [https://perma.cc/D6A6-JYJR].

<sup>14</sup> At the time of this writing, the homeownership rate for non-Hispanic white Americans was nearly fifteen percentage points higher than the homeownership rate for any other racial group, and the rate for all households with above-median income was nearly thirty percentage points higher than those with below-median income. See U.S. CENSUS BUREAU, QUARTERLY RESIDENTIAL VACANCIES AND HOMEOWNERSHIP, THIRD QUARTER 2021, at 10–11, tbls.7 & 8 (2021), <https://www.census.gov/housing/hvs/files/currenthvspress.pdf> [https://perma.cc/8GHS-7FZF].

<sup>15</sup> 42 U.S.C. §§ 3601–3619.

<sup>16</sup> Russell Contreras, *The Resegregating (and Diversifying) of U.S. Schools*, AXIOS (Jan. 13, 2020), <https://www.axios.com/schools-segregation-increasing-adb787aa-7de6-47b5-aff1-dba34774346d.html> [https://perma.cc/G3SS-XCCY].

<sup>17</sup> S. Burlington Cnty. NAACP v. Township of Mount Laurel (*Mount Laurel I*), 336 A.2d 713 (N.J. 1975); S. Burlington Cnty. NAACP v. Township of Mount Laurel (*Mount Laurel II*), 456 A.2d 390 (N.J. 1983).

## I. EXISTING BARRIERS TO THE CONSTRUCTION OF AFFORDABLE HOUSING WITHIN LAND USE LAW

While the causes of the national shortage of affordable housing are manifold,<sup>18</sup> this Note focuses on the role that land use law, particularly zoning, plays in constraining the supply of affordable housing. Restrictive zoning rules, like single-family zoning, reduce the supply of land available for new housing, which in turn inflates the cost of new housing projects. And where zoning laws do permit the construction of higher-density housing, density-reducing regulations — such as height restrictions, minimum lot size requirements, prohibitions on accessory dwelling units<sup>19</sup> (ADUs), or setback requirements — impair affordability by forcing each unit to bear a greater share of the cost of land.<sup>20</sup> Removing these legal barriers is not likely to be sufficient to fully relieve the nation's severe housing shortage, and other policy solutions such as rent subsidies are likely to be more effective in addressing the role that factors like income inequality play in magnifying the impact of the shortage.<sup>21</sup> However, legal reform remains critical to removing blockages to constructing additional affordable housing.

This Part outlines two ways in which land use law internally contributes to affordable housing shortages. First, localism and failures of the democratic process in individual zoning decisions reinforce hostility to affordable housing. Second, judicially created doctrines impose considerable barriers preventing politically disempowered constituencies from challenging land use decisions that impede the development of affordable housing.

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<sup>18</sup> These include income inequality, racial discrimination, the primacy of the nuclear family, and a political tendency to favor current land usages. See Noah M. Kazis, *Fair Housing for a Non-sexist City*, 134 HARV. L. REV. 1683, 1688 n.21 (2021); Richard Florida, *The Double Whammy: Housing and Income Inequality*, BLOOMBERG CITYLAB (Aug. 1, 2019, 7:00 AM), <https://www.bloomberg.com/news/articles/2019-08-01/the-feedback-loop-of-housing-and-income-inequality> [<https://perma.cc/Q6KG-VGHC>]; Keith M. Phaneuf & Clarice Silber, *Housing Inequality Can Be Both Cause and Effect of Poverty in Wealthy CT*, CT MIRROR (Oct. 16, 2018), <https://ctmirror.org/2018/10/16/wealth-income-inequality-housing> [<https://perma.cc/9ZJ2-9M7R>]. See generally Robert C. Ellickson, *The Zoning Straitjacket: The Freezing of American Neighborhoods of Single-Family Houses*, 96 IND. L.J. 395 (2021).

<sup>19</sup> An accessory dwelling unit is a self-contained apartment that sits on the same land as a single-family house. See SAGE COMPUTING, INC., ACCESSORY DWELLING UNITS: CASE STUDY 1 (2008), <https://www.huduser.gov/portal/publications/adu.pdf> [<https://perma.cc/G76A-6H38>].

<sup>20</sup> 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> [<https://perma.cc/BT4B-E5BL>].

<sup>21</sup> Jenny Schuetz, *To Improve Housing Affordability, We Need Better Alignment of Zoning, Taxes, and Subsidies*, BROOKINGS INST. (Jan. 7, 2020), <https://www.brookings.edu/policy2020/big-ideas/to-improve-housing-affordability-we-need-better-alignment-of-zoning-taxes-and-subsidies> [<https://perma.cc/NJ75-7K3V>].

### A. Challenges in the Local Legislative Process

Most states statutorily delegate to local governments the authority to regulate and plan land use development.<sup>22</sup> These statutes are generally based on the framework developed under the 1926 Standard Zoning Enabling Act<sup>23</sup>: local governments develop comprehensive land use plans through planning commissions<sup>24</sup> and hear appeals of these decisions, which can be further appealed to courts of law.<sup>25</sup> This basic model of localism is still dominant today. But as James Madison warned,<sup>26</sup> this type of hyperlocal, participatory self-governance risks enabling the creation of tyrannical majorities in small groups.<sup>27</sup> Anti-affordable housing measures are not, however, the exclusive domain of local governments — states also impose legal barriers to expanding the supply of affordable housing.<sup>28</sup>

On its surface, the process of passing zoning ordinances is legislative. It often involves public hearings conducted at least in part by elected officials or political appointees who serve at the will of the mayor.<sup>29</sup> But zoning, even at the planning stage, often deals with small-scale classifications and reclassifications that are as much decisions about individual rights as they are about future community land use.<sup>30</sup> This has led many observers and some courts to characterize zoning as an exercise of

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<sup>22</sup> One notable exception is the city of Houston, which does not have any zoning but maintains some limited land use regulations, such as limits on the height of structures and other hazards around its airports. Letter from Margaret Wallace Brown, Dir., City of Hous. Plan. & Dev. Dep't (Jan. 1, 2021), [https://www.houstontx.gov/planning/DevelopRegs/docs\\_pdfs/No%20Zoning%20Letter%20&%20Map\\_2021.pdf](https://www.houstontx.gov/planning/DevelopRegs/docs_pdfs/No%20Zoning%20Letter%20&%20Map_2021.pdf) [<https://perma.cc/TKT9-XM9A>]. In the absence of zoning, homeowners in Houston rely on private covenants “to achieve results that resemble those produced by zoning.” Lee Anne Fennell, *Homes Rule*, 112 YALE L.J. 617, 624 n.29 (2002) (book review).

<sup>23</sup> ADVISORY COMM. ON CITY PLAN. & ZONING, A STANDARD STATE ZONING ENABLING ACT (rev. ed. 1926) [hereinafter A STANDARD STATE ZONING ENABLING ACT]. The Standard State Zoning Enabling Act was passed under the leadership of then-Secretary of Commerce Herbert Hoover. *Id.*

<sup>24</sup> The Standard City Planning Enabling Act of 1928 (SCPEA) was the influential template legislation for the state creation of planning commissions. *See generally* ADVISORY COMM. ON CITY PLAN. & ZONING, A STANDARD CITY PLANNING ENABLING ACT (1928) [hereinafter A STANDARD CITY PLANNING ENABLING ACT]. The SCPEA was also promulgated by then-Secretary Hoover. Planning commissions may also go by other names, such as city councils, boards of aldermen, or county commissioners.

<sup>25</sup> *See* ROBERT C. ELICKSON & VICKI L. BEEN, LAND USE CONTROLS 284–85 (3d ed. 2005); A STANDARD STATE ZONING ENABLING ACT, *supra* note 23, § 7.

<sup>26</sup> THE FEDERALIST NO. 10, at 73–76 (James Madison) (Clinton Rossiter ed., 2003).

<sup>27</sup> Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 837, 854 (1983).

<sup>28</sup> *See, e.g.*, TENN. CODE ANN. § 66-35-102 (2021) (prohibiting local governments from using zoning power to promote the development of affordable housing).

<sup>29</sup> The SCPEA provides that the planning commission be composed of the mayor, an administrative official, a member of the city council, and other members of the mayor's choice. A STANDARD CITY PLANNING ENABLING ACT, *supra* note 24, § 3.

<sup>30</sup> *See* Rose, *supra* note 27, at 848–53.

judicial power,<sup>31</sup> and others to suggest that planning commissions defy categorization at all within the tripartite separation of powers.<sup>32</sup>

Members of local land use authorities possess a political expertise that enables them to channel community desires, but that expertise also undermines their impartiality. As politicians, zoning board members may import their own beliefs as to the appropriate nature of land use as well as the desires of the politically influential.<sup>33</sup> This risk is heightened by the fact that local politicians are generally not the type of technocratic, subject-matter experts that might be expected to neutrally execute legislatively delegated duties.<sup>34</sup> Thus, local planning boards are often subject to capture by homeowners who oppose the construction of affordable housing<sup>35</sup> out of concern that a new development might change the character of their community by triggering an influx of lower-income and minority residents, creating congestion and safety risks, and depressing property prices.<sup>36</sup>

One significant way this cohort seeks to exercise its influence over local decisionmakers is by exerting political pressure at public hearings, where participants are disproportionately likely to be homeowners.<sup>37</sup> Consequently, public hearings generally oversample from the portion of the community that benefits most from measures that preserve property values at the expense of increasing the supply of affordable housing.<sup>38</sup>

### B. Challenges in the Judicial Process

Although zoning decisions denying special permits or variances from zoning rules are generally subject to judicial review, several restrictions

<sup>31</sup> See *id.* at 851 (discussing *Fasano v. Bd. of Cnty. Comm'rs*, 507 P.2d 23 (Or. 1973)).

<sup>32</sup> See *id.* at 882.

<sup>33</sup> See Nestor M. Davidson, *Localist Administrative Law*, 126 YALE L.J. 564, 618 (2017). For example, local decisionmakers may campaign on a platform of opposing outside development, engage in ex parte contacts with landowners, or face a conflict of interest if the proposed developer would enter into a contract with the city. See ELLICKSON & BEEN, *supra* note 25, at 306; Rose, *supra* note 27, at 869–70.

<sup>34</sup> See Davidson, *supra* note 33, at 618.

<sup>35</sup> NIMBY, an abbreviation for “not in my backyard,” is used to refer to individuals who oppose development in their communities that is publicly necessary but may lead to disfavored changes in the community. See, e.g., Peter D. Kinder, *Not in My Backyard Phenomenon*, BRITANNICA (Oct. 9, 2019), <https://www.britannica.com/topic/Not-in-My-Backyard-Phenomenon> [<https://perma.cc/HP4Z-JZEG>].

<sup>36</sup> The prospect of increased density often triggers resident concerns about traffic, child safety, community character, and municipal services. See generally, e.g., CITY OF WALNUT CREEK, AFFORDABLE HOUSING: MYTHS VS. FACTS (2017), <https://www.walnut-creek.org/home/showpublisheddocument?id=15669> [<https://perma.cc/BPB9-4BUC>].

<sup>37</sup> Richard Florida, *NIMBYs Dominate Local Zoning Meetings*, BLOOMBERG CITYLAB (Sept. 6, 2018, 2:46 PM), <https://www.bloomberg.com/news/articles/2018-09-06/nimbys-dominate-local-zoning-meetings> [<https://perma.cc/MB38-F876>] (drawing on a sample of public hearing participants in the Boston area).

<sup>38</sup> See WILLIAM A. FISCHER, THE HOMEVOTER HYPOTHESIS 4 (2001).

limit courts' ability to act as a check on the imbalances of the local land use planning processes.

1. *Stringent Standing Requirements.* — In order to challenge zoning decisions in general courts of law, states require plaintiffs to prove that they have standing, which is generally accomplished by alleging an injury distinct from that incurred by the community at large.<sup>39</sup> Those owning land proximate to the parcel in question usually have standing, although some states recognize claims by non-neighbors.<sup>40</sup> Courts often impose further limits on third-party standing by adopting an approach similar to that set out by the U.S. Supreme Court in *Warth v. Seldin*.<sup>41</sup> *Warth* barred third parties from bringing land use claims unless they suffered an injury themselves, such as being denied access to existing housing, or, if the third party is an association, an injury shared by its members that involves concrete harm.<sup>42</sup> This limits the ability of better-resourced parties like developers, industry lobbies, or nonprofits to bring suit on behalf of lower-income groups who may not own land in the area.<sup>43</sup> As a result, those with standing are often the same as those who are well situated to influence the local legislative processes — neighbors who own property and are concerned about property values, rather than those who would benefit from a new affordable housing development.

2. *Standard of Review for Zoning Decisions.* — When plaintiffs do have standing, courts generally review due process claims against zoning decisions under a deferential rational basis standard.<sup>44</sup> In some jurisdictions, a court might find that community opposition against affordable housing voiced at public hearings is sufficient to determine that a zoning board was rational in determining that a proposed use would not benefit the community.<sup>45</sup> Given that statements of those attending public hearings are unlikely to be representative of the broader community, judicial deference to zoning decisions relying on these statements can reinforce the unrepresentative nature of zoning decisions regarding the construction of affordable housing.<sup>46</sup>

<sup>39</sup> See, e.g., *Cherry Cmty. Org. v. Charlotte*, 809 S.E.2d 397, 400 (N.C. Ct. App. 2018).

<sup>40</sup> See, e.g., *id.* at 401. Some states have passed statutes to recognize claims from non-neighbors. See, e.g., FLA. STAT. § 163.3215 (2021); N.J. STAT. ANN. § 40:55D-4 (West 2021) (defining an “interested party” to include persons “residing within or without the municipality”).

<sup>41</sup> 422 U.S. 490 (1975); *Hendee v. Putnam Township*, 786 N.W.2d 521, 532 (Mich. 2010).

<sup>42</sup> See *Warth*, 422 U.S. at 2213–15. *Warth* was based on Article III’s limitation on federal judicial power, see *id.* at 2205 — a limit that does not, by its terms, extend to state courts, see U.S. CONST. art. III, § 2, cl. 1.

<sup>43</sup> See, e.g., *Lemar*, *supra* note 2, at 328–29.

<sup>44</sup> See Ashira Pelman Ostrow, *Judicial Review of Local Land Use Decisions: Lessons from RLUIPA*, 31 HARV. J.L. & PUB. POL’Y 717, 729–32 (2008).

<sup>45</sup> See ROBERT C. ELLICKSON ET AL., *LAND USE CONTROLS* 338 (5th ed. 2021).

<sup>46</sup> See *id.* Hearing attendees may also object based on a pretextual reason, like a change in community character, when their opposition is actually rooted in factors that are improper for a court to vindicate, like discriminatory animus toward the party requesting the use. See Jacqueline

## II. OVERVIEW OF PRIOR REFORMS

Legal barriers to constructing affordable housing have proved remarkably resilient, despite a rich history of reform. Concerns about the exclusionary effects of zoning ordinances propelled by excessive localism have driven zoning reform for decades, particularly during the 1970s.<sup>47</sup> For example, at the federal level, a desire to insulate national needs from the decisions of local zoning boards pushed Congress to restrain local governments from exercising their zoning powers to restrict where cell towers can be sited.<sup>48</sup> At the state level, legislatures and supreme courts have sought to check excess competition among localities for the wealthiest residents and the highest tax base<sup>49</sup> by retaking police power and reducing the authority of local governments to enact zoning measures to exclude lower-income and minority populations.<sup>50</sup> While these reforms have played an important role in helping address the affordable housing crisis, they offer incomplete solutions that leave many legal barriers to expanding access to affordable housing intact.

A. *Prior Reforms*

One of the most influential legislative interventions has been Massachusetts's Chapter 40B program.<sup>51</sup> Chapter 40B was developed in 1969 and grants developers a right to appeal some local decisions restricting the construction of affordable housing when less than ten percent of housing stock is devoted to affordable housing.<sup>52</sup> Local governments can also achieve immunity from suit if construction has begun

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Rabe Thomas, *Separated by Design: How Some of America's Richest Towns Fight Affordable Housing*, CT MIRROR (May 22, 2019, 5:00 AM), <https://www.propublica.org/article/how-some-of-america-s-richest-towns-fight-affordable-housing> [https://perma.cc/27ZF-SRNM]. Pretextual objections also present a problem for cell tower siting. Proposals to locate cell towers in a community are often met with strong community opposition over the aesthetic impact of the towers. In response, local governments have pretextually used their status as property owners of rights of way to vindicate community aesthetic concerns by restricting access to rights-of-way. See *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Development*, 33 FCC Rcd. 9088, 9138 ¶ 97 (2018); *Portland v. United States*, 969 F.3d 1020, 1045–46 (9th Cir. 2020) (upholding FCC ordinance restricting governments' ability to limit access to rights-of-way).

<sup>47</sup> John Infranca, *The New State Zoning: Land Use Preemption amid a Housing Crisis*, 60 B.C. L. REV. 823, 828, 836–39 (2019).

<sup>48</sup> See 47 U.S.C. § 253(a), (d); see also *Portland*, 969 F.3d at 1031–32.

<sup>49</sup> See, e.g., *Mount Laurel I*, 336 A.2d 713, 723 (N.J. 1975). But see Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 416 (1956) (suggesting that competition among municipalities may have a positive effect by enabling localities to specialize to meet residents' preferences).

<sup>50</sup> See, e.g., ELLICKSON & BEEN, *supra* note 25, at 284–85, 302–08.

<sup>51</sup> MASS. GEN. LAWS ch. 40B (2020); see Infranca, *supra* note 47, at 837, 839.

<sup>52</sup> See CITIZENS' HOUS. & PLAN. ASS'N, FACT SHEET ON CHAPTER 40B: THE STATE'S AFFORDABLE HOUSING ZONING LAW 1 (2011), <https://www.chapa.org/sites/default/files/Fact%20Sheet%20on%20Chapter%2040B%202011%20update.pdf> [https://perma.cc/F7F6-YDBD] [hereinafter CHAPA FACT SHEET].

on a sufficient quantity of affordable housing that year.<sup>53</sup> This system establishes a presumption in favor of constructing affordable housing until ten percent of a town's housing stock consists of affordable housing and affords developers a right to appeal adverse municipal decisions to a special Housing Appeals Committee<sup>54</sup> (HAC). Massachusetts places the burden of proving whether the denial of affordable housing was proper on the developer,<sup>55</sup> while other states developing similar set-aside programs place the burden on the government.<sup>56</sup> After the ten percent threshold is reached, however, Massachusetts law relaxes the presumption in favor of constructing affordable housing, and towns have more freedom to restrict construction of affordable housing with protection from legal challenges.<sup>57</sup>

Courts have also exercised a great deal of creativity to address the affordable housing crisis. At the state level, the most notable such reform is arguably the New Jersey Supreme Court's *Mount Laurel* doctrine, which created a "builder's remedy" that allows developers to sue to challenge exclusionary zoning laws.<sup>58</sup> At the federal level, the

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<sup>53</sup> Chapter 40B insulates local governments from challenges to decisions denying authorization to construct affordable housing if, in a given calendar year, construction on affordable housing was begun on either 0.3% of its land or ten acres, whichever is greater. *See* DEP'T OF HOUS. & CMTY. DEV., COMMONWEALTH OF MASS., CH. 40B: "SAFE HARBOR THROUGH PRODUCTION" 2 (2018), <https://www.chapa.org/sites/default/files/Phil%20DeMartino%20-%20DHCD.pdf> [<https://perma.cc/WG69-VNWJ>]. In addition, municipalities can achieve safe harbor if more than 1.5% of the municipality's total land area is devoted to affordable housing. *See id.* Connecticut's affordable housing appeals procedure, in contrast, exempts communities only when ten percent of the housing supply is dedicated to affordable units. *See* CONN. GEN. STAT. § 8-30g(f), (k) (2019).

<sup>54</sup> CITIZENS' HOUS. & PLAN. ASS'N, ZONING LITIGATION AND AFFORDABLE HOUSING PRODUCTION IN MASSACHUSETTS 5 (2008), [https://www.chapa.org/sites/default/files/qwert\\_11.pdf](https://www.chapa.org/sites/default/files/qwert_11.pdf) [<https://perma.cc/6RG9-57NW>] [hereinafter ZONING LITIGATION]. Decisions of the HAC are appealable to general courts of law. *Id.* Many cases before the HAC are settled out of committee and are resolved at the local level. *Id.* at 9.

<sup>55</sup> 760 MASS. CODE REGS. § 56.07(2)(a) (2021).

<sup>56</sup> *See, e.g., Affordable Housing Appeals Listing*, CONN. STATE DEP'T OF HOUS., <https://portal.ct.gov/DOH/DOH/Programs/Affordable-Housing-Appeals-Listing> [<https://perma.cc/R8LF-JSQ9>].

<sup>57</sup> *See* Infranca, *supra* note 47, at 838 & n.71. Massachusetts has expanded the scope of its interventions to restrict barriers to the construction of affordable housing, including ADUs. *See* Isabela Dorneles, *Planners Secure Zoning Reform Win in Massachusetts*, AM. PLAN. ASS'N (Jan. 27, 2021), <https://www.planning.org/blog/0211391/planners-secure-zoning-reform-win-in-massachusetts> [<https://perma.cc/H5N4-U95A>].

<sup>58</sup> *See, e.g., Mount Laurel II*, 456 A.2d 390, 413-14 (N.J. 1983) (citing *Oakwood at Madison, Inc. v. Township of Madison*, 371 A.2d 1192, 1226-27 (N.J. 1977)). State supreme courts have also struck down local zoning plans as improperly exclusionary, *see, e.g., Appeal of Kit-Mar Builders*, 268 A.2d 765, 770 (Pa. 1970), *abrogated by C & M Devs., Inc. v. Bedminster Twp. Zoning Hearing Bd.*, 820 A.2d 143 (Pa. 2002), or developed antidelegation doctrines curbing the policymaking discretion of local planning commissions, *see* ELLICKSON & BEEN, *supra* note 25, at 284-85, 302-08.

Supreme Court has interpreted the FHA to authorize citizen suits seeking relief from discriminatory housing practices.<sup>59</sup> While the FHA is not strictly directed toward addressing the cost of housing, a reduction in housing discrimination may increase access to affordable housing.<sup>60</sup>

In recent years, one popular target of reform has been single-family zoning, which prevents new residential construction from housing more than one family. From the days of *Euclid*, governments have generally privileged single-family zoning in all residential districts.<sup>61</sup> However, zoning that limits construction to single-family houses has primarily benefited wealthier residents. Since single-family zoning places the full cost of land on each household, it is often unaffordable for lower- or middle-income households.<sup>62</sup> Currently, single-family, detached homes are the only permissible use for roughly three-quarters of residential land in many cities.<sup>63</sup> Since most zoning schemes grandfather in non-conforming uses previously in place, single-family zoning primarily operates to limit new residential construction.<sup>64</sup> Consequently, states like Oregon and California and municipalities like Minneapolis and Charlotte have taken steps to reduce or eliminate single-family zoning and reduce barriers to growing the housing supply.<sup>65</sup>

### B. *Limits of Prior Reforms*

Although these reforms have made important progress, land use law's anti-affordable housing tendency continues to pose a significant barrier to the construction of affordable and higher-density housing.

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<sup>59</sup> See *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 115 (1979). HUD has also developed a similar interpretation. See HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 85 Fed. Reg. 60,228, 60,317 (Sept. 24, 2020) (to be codified at 24 C.F.R. pt. 100).

<sup>60</sup> See HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 85 Fed. Reg. at 60,290 (describing public comment to this effect).

<sup>61</sup> See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 380–81 (1926).

<sup>62</sup> See Eric Jaffe, *Is It Time to End Single-Family Zoning?*, MEDIUM: SIDEWALK TALK (Feb. 6, 2020), <https://medium.com/sidewalk-talk/is-it-time-to-end-single-family-zoning-56233d69a25a> [<https://perma.cc/99GY-873E>].

<sup>63</sup> Badger & Bui, *supra* note 20.

<sup>64</sup> See, e.g., *Nonconforming Uses, Structures, and Lots*, MRSC (Apr. 2, 2021), <http://mrsc.org/Home/Explore-Topics/Planning/Development-Regulations/Nonconforming-Uses-Structures-and-Lots-Regulation.aspx> [<https://perma.cc/B9MJ-JELB>].

<sup>65</sup> See Laurel Wamsley, *Oregon Legislature Votes to Essentially Ban Single-Family Zoning*, NPR (July 1, 2019, 7:03 PM), <https://www.npr.org/2019/07/01/737798440/oregon-legislature-votes-to-essentially-ban-single-family-zoning> [<https://perma.cc/CWY5-J7MX>]; Manuela Tobias, *Victorious in Recall, Newsom Refocuses on California Housing Crisis*, CALMATTERS (Sept. 20, 2021), <https://calmatters.org/housing/2021/09/california-housing-crisis-newsom-signs-bills> [<https://perma.cc/7RB6-CWAQ>]; Megan Thompson & Melanie Saltzman, *How Minneapolis Became the First to End Single-Family Zoning*, PBS (Nov. 23, 2019, 5:24 PM), <https://www.pbs.org/newshour/show/how-minneapolis-became-the-first-to-end-single-family-zoning> [<https://perma.cc/TW8V-TXMX>]; Henry Grabar, *The Most Important Housing Reform in America Has Come to the South*, SLATE (June 28, 2021, 10:55 AM), <https://slate.com/business/2021/06/charlotte-single-family-zoning-segregation-housing.html> [<https://perma.cc/6PNL-4P2P>].

For example, while Massachusetts's influential Chapter 40B program has been instrumental in increasing the construction of housing during its nearly fifty-year history, its impact has been fairly limited — only sixty-five of the state's 351 municipalities comply with the ten percent set-aside requirement.<sup>66</sup> Even municipalities meeting the ten percent requirement face significant shortages of affordable housing.<sup>67</sup> In every Massachusetts municipality, extremely low-income residents are rent-burdened and without affordable housing.<sup>68</sup>

Like many states, Massachusetts relies on developers to mitigate the problem of access to affordable housing and does not grant individuals a right to challenge anti-affordable housing zoning actions. Massachusetts hears developer claims in specialized administrative fora that are appealable to general courts of law.<sup>69</sup> However, the delays associated with litigating through two different fora raise the risk that a developer may choose to forgo the development altogether,<sup>70</sup> which may fuel, rather than mitigate, the housing shortage.<sup>71</sup>

Targeted interventions, like bans on single-family zoning, make important progress toward reducing legal barriers to the construction of affordable housing. But they are at most capable of addressing a portion of the problem and cannot address the effects of equally effective exclusionary alternatives, such as burdensome requirements of minimum lot size or height restrictions.<sup>72</sup> Furthermore, minority neighborhoods, where real estate demand may be less than in white neighborhoods absent forces like gentrification, may not benefit from the elimination of

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<sup>66</sup> See Edward G. Goetz & Yi Wang, *Overriding Exclusion: Compliance with Subsidized Housing Incentives in the Massachusetts 40B Program*, 30 HOUS. POL'Y DEBATE 457, 466 tbl.1 (2020).

<sup>67</sup> See NICHOLAS CHIUMENTI, NEW ENG. PUB. POL'Y CTR., *THE GROWING SHORTAGE OF AFFORDABLE HOUSING FOR THE EXTREMELY LOW INCOME IN MASSACHUSETTS* 13 (2019), <https://www.bostonfed.org/publications/new-england-public-policy-center-policy-report/2019/growing-shortage-affordable-housing-extremely-low-income-massachusetts.aspx> [<https://perma.cc/24YF-W5NK>].

<sup>68</sup> See *id.* at 7–8. This statistic represents the housing needs of those earning less than thirty percent of area median income. See *id.* at 3.

<sup>69</sup> See ZONING LITIGATION, *supra* note 54, at 5–7.

<sup>70</sup> Indeed, some have observed that when it comes to authorizing development, “delay is as good as denial,” *id.* at 8, and opponents of affordable housing have actively pursued delay as a method of preventing development, *see id.* at 3. In addition to the costs of fighting for authorization, delay creates a risk of rising construction costs and changed market conditions. See *id.* at 1.

<sup>71</sup> Cf. Robert C. Ellickson, *The Irony of “Inclusionary” Zoning*, 54 S. CAL. L. REV. 1167, 1170 (1981) (arguing that inclusionary zoning programs place additional costs on developers and may actually have an exclusionary effect).

<sup>72</sup> See Christian Britschgi, *Seattle Is Proposing to Get Rid of Single-Family Zoning in Name Only. Literally.*, REASON (June 29, 2021, 3:25 PM), <https://reason.com/2021/06/29/seattle-is-proposing-to-get-rid-of-single-family-zoning-in-name-only-literally> [<https://perma.cc/X3RG-Z5JR>].

single-family zoning.<sup>73</sup> Thus, eliminating single-family zoning may only ease the housing bottleneck for white neighborhoods without addressing the needs of minority neighborhoods.<sup>74</sup> Piecemeal interventions also risk deflating the affordable housing movement by purporting to make significant change through reforms that are in fact limited in scope. Cities like Seattle<sup>75</sup> and Berkeley,<sup>76</sup> for example, have recently garnered attention for taking aim against single-family zoning, but the initiatives themselves have been largely symbolic.<sup>77</sup>

### III. THE CONTOURS OF AFFORDABLE HOUSING AS A RIGHT

Recognizing affordable housing as a right protects those whose access to affordable housing is impaired by state or local laws. By placing affordable housing on the same playing field as other traditionally favored forms of residential uses, like single-family housing, states can codify a norm of allowing the construction of affordable housing and empower those who have been traditionally boxed out of the land use planning process.

This Note focuses on examining a right to affordable housing as a negative right, which would guard against regulations placing an unjustified burden on the new development of affordable housing.<sup>78</sup> The proposed right would protect landowners' ability to construct affordable housing, so long as it is designed to be accessible for low- or middle-income individuals, and would prevent municipalities from using their regulatory powers to reduce access to affordable housing. While the right would not create an additional duty for state or local governments to provide housing, governments would have a duty to refrain from imposing unjustified barriers to the development of housing by enacting anti-affordable housing measures or enforcing existing ones.

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<sup>73</sup> See Deonna Anderson, *Will Banning Single-Family Zoning Make for More Affordable Homes?*, YES! MAG. (Aug. 1, 2019), <https://www.yesmagazine.org/economy/2019/08/01/housing-minneapolis-affordable-single-family> [https://perma.cc/J5FE-A7WJ].

<sup>74</sup> See *id.*

<sup>75</sup> See Britschgi, *supra* note 72.

<sup>76</sup> Melanie Curry, *Berkeley's Move Towards Eliminating Single-Family Zoning*, STREETS BLOG SF (Feb. 24, 2021), <https://sf.streetsblog.org/2021/02/24/berkeleys-move-towards-eliminating-single-family-zoning> [https://perma.cc/28RT-NZPU].

<sup>77</sup> See *id.*; Britschgi, *supra* note 72.

<sup>78</sup> States may consider providing an affirmative right to housing, as there is precedent for affirmative rights in state constitutions, including the provision of public education. See, e.g., KY. CONST. § 183; *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 189, 206 (Ky. 1989). However, countries with affirmative rights to housing, such as South Africa, have faced challenges in providing sufficient housing and meeting their affirmative burden. See Soraya Beukes, *Promise of Right to Housing Remains Elusive in Democratic South Africa*, THE CONVERSATION (Nov. 26, 2018, 8:34 AM), <https://theconversation.com/promise-of-right-to-housing-remains-elusive-in-democratic-south-africa-105706> [https://perma.cc/RW8P-WXA0].

### A. *Advantages of the Right*

A rights-based approach offers greater flexibility in addressing legal barriers to expanding affordable housing compared to existing reform approaches. While set-aside programs provide developers a cause of action to challenge exclusionary zoning policies, this cause of action expires once an area's housing supply has met a predetermined threshold, which falls below the area's need for affordable housing.<sup>79</sup> Similarly, bans on specific policies that limit construction address only one possible tool used to limit the expansion of affordable housing. In contrast, a rights-based framework protects against anti-affordable housing policies at the state or local level as long as legal barriers to expanding affordable housing persist, without regard to the form of the policy, and accommodates a region's changing needs in the amount of affordable housing supply.

In addition to establishing substantive legal protections for building affordable housing, recognizing affordable housing as a right offers a clear method of recourse to those whose ability to construct or access affordable housing has been injured. In most states, the absence of a clear cause of action, limited third-party standing, and deferential standards of review combine to deprive those harmed by anti-affordable housing decisions of judicial protection.<sup>80</sup> By recognizing the injuries suffered from exclusionary policies, a right can encourage meaningful judicial oversight of the individual zoning decisions that can aggregate to have a vast influence on the state's housing supply.

Preserving local authority to regulate land use, subject to judicial oversight, enables those who are most familiar with a community's needs to shape growth according to community input in ways that are not improperly exclusionary or otherwise forbidden by law. This approach encourages a more democratic form of local governance that considers the housing needs of less wealthy and less politically influential residents. Retaining local control may also help reduce political backlash against the reduction of local power to regulate land use.<sup>81</sup> Preventing this local authority from being abused will require enforcing the right in individual land use decisions, such as denials of special

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<sup>79</sup> See *supra* pp. 1010–11.

<sup>80</sup> As discussed *supra* Part II, pp. 1010–14, there are several notable exceptions, as some states offer procedural remedies as a component of set-aside programs or other forms of builders remedies.

<sup>81</sup> For example, the FHA prohibits zoning regulations that have a disparate impact on suspect classes. See U.S. DEP'T OF HOUS. & URB. DEV. & U.S. DEP'T OF JUST., STATE AND LOCAL LAND USE LAWS AND PRACTICES AND THE APPLICATION OF THE FAIR HOUSING ACT 5 (2016), <https://www.justice.gov/opa/file/912366/download> [<https://perma.cc/2XFU-LK7D>].

permits to build affordable housing, which makes the task naturally suited for courts, rather than state legislatures.<sup>82</sup>

Relying on litigation to enforce the right, however, raises the concern that the costs and delays associated with litigation may render enforcement of the right inaccessible to some. To minimize this risk, legislatures may adopt specific policies targeted at minimizing delays, such as requiring those opposing the approval of an affordable housing project to post bonds that cover the cost of delay.<sup>83</sup> Furthermore, if courts demonstrate a willingness to enforce the right and afford individuals asserting it procedural protections, the prospect of unfavorable court decisions may be enough to encourage a municipality to zone to promote affordable housing at the outset or to settle before trial.<sup>84</sup>

Despite the seemingly dramatic nature of this proposal, wholesale elimination of governmental authority to promulgate anti-affordable housing measures may enjoy political advantages compared to other reforms. A piecemeal approach to reducing individual zoning barriers to the construction of affordable housing provides opponents multiple opportunities to stymie progress.<sup>85</sup> The uptick of statutory protections of affordable housing development and growing bipartisan support for zoning reform to minimize barriers to affordable housing<sup>86</sup> indicates increasing political appetite for bigger zoning reforms. A rights-based approach may face less political opposition than other reform efforts because, by recognizing the right in individuals, it addresses the critique that zoning-focused approaches to promoting construction of affordable

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<sup>82</sup> Although some states have statewide land use plans or planning boards, these entities generally exist to assist in long-term planning, including for statewide development projects. They may be composed of members who have other full-time jobs in the private or public sectors. *See, e.g., State Planning Board*, PA. DEP'T OF CMTY. & ECON. DEV., <https://dced.pa.gov/local-government/boards-committees/state-planning-board> [<https://perma.cc/MS2Y-5G2N>]. They are not geared toward handling the volume of individualized concerns and cases that would be needed to institute a state-level check on the abuse of local discretion in spot rezonings, variances, conditional uses, and permits.

<sup>83</sup> *Cf. ZONING LITIGATION*, *supra* note 54, at 8 (discussing the limited use of such bonds in the Chapter 40B context).

<sup>84</sup> *See Infranca*, *supra* note 47, at 845–46. Lack of a willingness to strike down municipal decisions denying developers permission to construct affordable housing appears to be a major barrier to fully realizing Chapter 40B's promise. *See ZONING LITIGATION*, *supra* note 54, at 13–14.

<sup>85</sup> *See Badger & Bui*, *supra* note 20.

<sup>86</sup> Both the Obama and Trump White Houses issued calls for local deregulation to ease the bottleneck on the construction of housing. *See WHITE HOUSE, HOUSING DEVELOPMENT TOOLKIT 2* (2016), [https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/images/Housing\\_Development\\_Toolkit%20of.2.pdf](https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/images/Housing_Development_Toolkit%20of.2.pdf) [<https://perma.cc/68WR-WV8Q>]; Press Release, Off. of the Press Sec'y, Donald J. Trump Is Tearing Down Red Tape in Order to Build More Affordable Housing (June 25, 2019), <https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-tearing-red-tape-order-build-affordable-housing> [<https://perma.cc/B66E-6ZFH>].

housing grant windfalls to developers without sufficiently addressing the need for affordable housing.<sup>87</sup>

### *B. Beneficiaries of the Right*

By providing for a rights-based protection against undue governmental interference in securing access to affordable housing, legislatures can both reduce barriers to constructing affordable housing and recognize the interests of prospective residents in new housing developments.

1. *Developers.* — To enable the proposed right to have full impact, states should extend the right to developers as well as to those who would live in the development, as both groups have significant interests in the creation of additional affordable housing. Recognizing developers' right enables them to bring suits in states where they do not currently have standing.<sup>88</sup> Developers are generally better resourced than individuals, and their financial interest in securing authorization to build is likely to present a strong incentive to marshal the resources necessary to protect the right from infringement. In some circumstances, developers may find that a proposed development is still profitable even if they must pay the costs of challenging a local government's action. This is especially likely to be true if the developer is able to challenge a zoning scheme wholesale, rather than challenging decisions denying permission to build particular developments, as success in the former scenario may open an opportunity for multiple developments.

2. *Individuals Harmed by Anti-Affordable Housing Actions.* — To maximize enforcement of the right, states should also recognize an individual right to challenge local zoning decisions that restrict the development of affordable housing. Unlike developers, whose interests in building affordable housing in a community may fluctuate based on the finances of doing so, those in need of affordable housing have a deep and persisting interest in vindicating the right. Additionally, community organizations have historically been a powerful force in advocating for and enforcing housing protections at the local level<sup>89</sup> and are likely to

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<sup>87</sup> See, e.g., Richard Florida, *Does Upzoning Boost the Housing Supply and Lower Prices? Maybe Not.*, BLOOMBERG CITYLAB (Jan. 31, 2019, 11:05 AM), <https://www.bloomberg.com/news/articles/2019-01-31/zoning-reform-isn-t-a-silver-bullet-for-u-s-housing> [<https://perma.cc/8ELL-79GA>] (demonstrating that upzoning particular neighborhoods or lots may lead to increased land prices since the newly zoned properties can support more units per lot).

<sup>88</sup> See, e.g., CHAPA FACT SHEET, *supra* note 52, at 1 (describing how Massachusetts's Chapter 40B program limits appeals to developers seeking to build affordable housing or those seeking to overturn a permit approval). As Justice Brennan noted in his *Warth* dissent, broad standing is particularly important in exclusionary zoning cases because these policies are designed to prevent plaintiffs from developing the type of direct relationships with municipalities that are normally required to satisfy strict ripeness and injury requirements. See *Warth v. Seldin*, 422 U.S. 490, 523 (1975) (Brennan, J., dissenting).

<sup>89</sup> See Mara S. Sidney, *The Struggle for Housing Equality: Impact of Fair Housing and Community Reinvestment Laws on Local Advocacy*, 7 CITYSCAPE 135, 137 (2004).

continue playing a major role in future efforts to expand the supply of affordable housing.<sup>90</sup> Placing the power of enforcing the right in the hands of those in need of housing, instead of developers solely, also helps address concerns that zoning-based affordable housing reforms bestow windfalls upon developers who capitalize on a region's growth and contribute to developments that further gentrify lower-income neighborhoods.<sup>91</sup> Giving community members a voice in shaping the future of affordable housing helps ensure that growth will be informed by a community's assessments of its needs rather than being dictated by developers' financial interests.

Once individuals' substantive right to access affordable housing is recognized, courts can also develop more robust procedural due process rights to protect against infringements on the substantive right.<sup>92</sup> In developing these procedural rights, courts may draw on existing models of due process rights designed to protect nonproperty rights like free speech, which deem the substantive right to be a procedurally protected interest.<sup>93</sup> If individuals and developers are granted procedural rights that afford them the chance to have hearings on whether a specific governmental action violates the right, these hearings are likely to provide focal points around which community activism can coalesce and counteract existing participation imbalances in local government.<sup>94</sup>

Recognizing an individual right to access affordable housing has an important expressive function in addition to practical import. A state constitutional amendment enshrining that right expresses a collective understanding that the state has equal regard and concern for the basic needs of lower- and middle-income residents as it does for wealthier residents.<sup>95</sup> It would mark an important step to fulfilling the

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<sup>90</sup> Indeed, fair housing groups are likely to bring suit more frequently than developers. STUART MECK ET AL., REGIONAL APPROACHES TO AFFORDABLE HOUSING 46 (2003), [https://huduser.gov/publications/pdf/regional\\_app\\_aff\\_hsg.pdf](https://huduser.gov/publications/pdf/regional_app_aff_hsg.pdf) [<https://perma.cc/UFE3-76GQ>].

<sup>91</sup> See Jerusalem Demsas, *In Defense of the "Gentrification Building,"* VOX (Sept. 10, 2021, 2:11 PM), <https://www.vox.com/22650806/gentrification-affordable-housing-low-income-housing> [<https://perma.cc/TV6C-PM5H>].

<sup>92</sup> This development would be especially important in states that require third parties to hold a separate entitlement to receive procedural due process protections in land use decisions. See, e.g., *Brenner Assocs. v. City of Del Mar*, 81 Cal. Rptr. 2d 324, 334–37 (Ct. App. 1998).

<sup>93</sup> See Henry P. Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518, 518 (1970). While individuals who are under a conditional contract to own a unit in a proposed development may hold a property right entitling them to due process protections, prospective renters and homebuyers generally do not have a property right entitling them to due process protections. See James R. Kahn, *In Accordance with a Constitutional Plan: Procedural Due Process and Zoning Decisions*, 6 HASTINGS CONST. L.Q. 1011, 1021–23 (1979).

<sup>94</sup> See Barry Checkoway, *The Politics of Public Hearings*, 17 J. APPLIED BEHAV. SCI. 566, 569–70 (1981).

<sup>95</sup> See Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1520 (2000) (citing RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 180 (1977)).

state's moral obligation to its residents to protect them equally from governmental incursions on their basic right to housing.<sup>96</sup> Recognition of the right, and holding the state accountable to uphold the right, establishes a strong norm that lower- and middle-income residents should not be ostracized. This norm can help bolster community ideals of acceptance, in contrast to the many existing exclusionary policies that legitimize and fuel private divisional attitudes.<sup>97</sup> While policies protecting residents from barriers to affordable housing may indicate a collective value for providing affordable housing, constitutional rights play a central role in shaping the social and political values of a community through the expressive impact of their text and interpretations through judicial opinion.<sup>98</sup> Thus, a rights-based approach makes a stronger expressive statement against policies that harm the dignity and wellbeing of those seeking affordable housing.

### C. *Adjudicating Violations of the Right*

To evaluate whether localities have been successful in protecting the right to affordable housing, states should adopt a two-step burden-shifting framework.<sup>99</sup> At step one, plaintiffs must make a showing that a specific land use decision or zoning scheme is designed to or has the effect of causing a shortage in the supply of affordable housing by imposing undue burdens on new residential construction. If plaintiffs can make that prima facie showing, step two allows the government to prove that the decision is necessary to achieve a legitimate government interest and could not be achieved through an alternative, less burdensome approach. If the government is unable to meet this burden, courts would then strike down the land use policy as an unjustifiable infringement on the right to affordable housing. This framework balances the right to

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<sup>96</sup> Cf. *id.* at 1519 (arguing that collective action through government is subject to “fundamental moral demands”).

<sup>97</sup> See *id.* at 1518–19 (discussing how group ideals can influence the actions of members, even if the group's attitudes conflict with the individual's personal beliefs).

<sup>98</sup> See *id.* at 1531 n.55.

<sup>99</sup> This model draws heavily on other burden-shifting schemes, including that established under the FHA. See Reinstatement of HUD's Discriminatory Effects Standard, 86 Fed. Reg. 33,950, 33,951 (proposed June 25, 2021) (proposing to reinstate the long-standing burden-shifting approach to challenges to facially neutral housing practices that are discriminatory in effect). However, it breaks with the FHA model by placing the burden of proving that there are feasible, less-burdensome alternatives on the government. While the FHA burden-shifting scheme represents important and significant progress for fair housing litigation, it has been criticized as having had limited success and retaining “formidable” burdens on plaintiffs. *Preliminary Analysis of HUD's Final Disparate Impact Rule*, NAT'L LOW INCOME HOUS. COAL. (Sept. 14, 2020), <https://nlihc.org/resource/preliminary-analysis-huds-final-disparate-impact-rule> [https://perma.cc/9DVQ-R94F] [hereinafter NLIHC]; see also Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 AM. U. L. REV. 357, 412–13 (2013).

affordable housing with the government's other legitimate interests, while ensuring that litigation remains an accessible option for harmed parties to enforce the right.

*I. Step One.* — To establish a prima facie case, plaintiffs must first identify a government action that restricts the right to access affordable housing. States should allow plaintiffs to challenge both specific incursions against the right, such as a denial of a construction permit for a low- or moderate-income development in an area with insufficient housing, as well as other zoning decisions that operate to preclude the development of affordable housing.<sup>100</sup> For example, exclusionary zoning maps that allocate insufficient land to higher-density housing, like multifamily dwellings, or drive up the price of housing by establishing high acreage requirements for homes would be subject to challenge.<sup>101</sup> Requiring plaintiffs to allege sufficient facts to establish a prima facie case also reduces the risk that expanding the right to aggrieved individuals in addition to developers would overwhelm courts and local land use planning processes, as courts can dismiss suits that do not prove a prima facie case.

In order to effectively evaluate whether a particular government action infringes on the right to access affordable housing, states should clearly define what constitutes affordable housing. While state-specific definitions do vary, housing often qualifies as affordable if it costs no more than thirty percent of the state's average household income.<sup>102</sup> Some states also designate housing as affordable if it is eligible for state or federal grants, or if it is offered to lower-income residents at below market value, even if the price is above thirty percent of the average household income.<sup>103</sup> States may also consider higher-density housing to be affordable housing, regardless of the costs of individual units, under the theory that efforts to ease the overall housing shortage will drive down housing prices.<sup>104</sup>

Because the affordable housing crisis impacts both residents of a municipality by making housing less affordable and residents outside of the municipality by excluding them from living within its boundaries, the

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<sup>100</sup> Municipalities may also prevent the construction of specific developments through secondary means, like denying a sewer connection. See, e.g., *ZONING LITIGATION*, *supra* note 54, at 10.

<sup>101</sup> See *Mount Laurel II*, 456 A.2d 390 (N.J. 1983); and *Appeal of Kit-Mar Builders, Inc.*, 268 A.2d 765 (Pa. 1970), *abrogated by* *C & M Devs., Inc. v. Bedminster Twp. Zoning Hearing Bd.*, 820 A.2d 143 (Pa. 2002), for examples of courts hearing wholesale challenges to exclusionary zoning schemes.

<sup>102</sup> See, e.g., *Affordable Housing (Mayor's Office)*, NASHVILLE.GOV, <https://www.nashville.gov/departments/mayor/housing> [<https://perma.cc/U825-QW76>]. This is HUD's influential definition of affordable housing. See MECK ET AL., *supra* note 90, at 22.

<sup>103</sup> See, e.g., Robert D. Carroll, Note, *Connecticut Retrenches: A Proposal to Save the Affordable Housing Appeals Procedure*, 110 YALE L.J. 1247, 1255 (2001). States may require developers to guarantee that housing remains affordable by entering into private covenants. See *id.*

<sup>104</sup> See *id.* at 1248.

availability of affordable housing should be assessed on a regional level.<sup>105</sup> For example, an individual alleging that a zoning map operated to impair her ability to access affordable housing by causing a shortage of affordable housing would need to demonstrate a prima facie case that the amount of land allocated for affordable housing was insufficient to accommodate the housing needs of the region. Measurement at a statewide level may be too imprecise because housing needs for rural and urban areas are likely to be substantially different, and communities may not fluidly move from urban areas, where housing needs are highest, to rural communities.<sup>106</sup>

2. *Step Two.* — In order to uphold the challenged government decision, the government must prove that its policy is necessary to achieve a legitimate government interest and could not be achieved through an alternative approach that is less burdensome to the right.<sup>107</sup> Allocating the burden of proof to the government helps ensure that litigation remains an accessible option for harmed parties to enforce the right. This approach also avoids forcing plaintiffs to create alternative, less burdensome policies to defend against when the government is more knowledgeable about the policy options available to it.<sup>108</sup>

Regulations that aim to exclude lower- to middle-income residents or prevent new development in an area<sup>109</sup> would not be based on legitimate government interests. Other regulations that are designed to promote critical policies, such as public health, building safety, and environmental protections, safeguard the quality of housing and community resources and should be preserved. It is imperative to avoid past affordable housing programs' tendency to increase supply while deepening segregation and disparities in access to public resources like transportation and quality education.<sup>110</sup> For example, zoning ordinances that require minimum buffers from waterways may restrict

<sup>105</sup> This was one of the key insights of *Mount Laurel II*, 456 A.2d at 430. See MECK ET AL. *supra* note 90, at 23–25, for a thorough discussion of factors to consider in defining a region.

<sup>106</sup> In fact, data suggests increasing trends of rural-to-urban migration, although there are exceptions to this trend. See Shaun A. Golding & Richelle L. Winkler, *Tracking Urbanization and Exurbs: Migration Across the Rural–Urban Continuum, 1990–2016*, 39 POPULATION RSCH. & POL'Y REV. 835, 851 (2020).

<sup>107</sup> The FHA employs a similar approach, requiring a government entity to defend a challenged action by demonstrating that it “is necessary to achieve one or more of its substantial, legitimate, nondiscriminatory interests . . . [that are] supported by evidence and [not] hypothetical or speculative.” U.S. DEP'T OF HOUS. & URB. DEV. & U.S. DEP'T OF JUST., *supra* note 81, at 5 (citing 24 C.F.R. § 100.500).

<sup>108</sup> See NLIHC, *supra* note 99.

<sup>109</sup> Cf. U.S. DEP'T OF HOUS. & URB. DEV. & U.S. DEP'T OF JUST., *supra* note 81, at 5 (listing policies without legally sufficient justifications in FHA disparate impact cases, such as “minimum floor space or lot size requirements that increase the size and cost of housing” or “prohibit[ions on] low-income or multifamily housing” that have the effect of excluding protected classes).

<sup>110</sup> See Editorial Board, Opinion, *America's Federally Financed Ghettos*, N.Y. TIMES (Apr. 7, 2018), <https://www.nytimes.com/2018/04/07/opinion/sunday/americas-federally-financed-ghettos.html>

construction but protect residents by ensuring that there is sufficient undeveloped land to hold back floodwaters<sup>111</sup> or absorb runoff that could pollute a water supply.<sup>112</sup> Therefore, they play a critical role in protecting the public welfare and should be preserved. Zoning plans separating toxic industrial uses from residential uses<sup>113</sup> similarly safeguard residents' wellbeing.

By demanding that decisions restricting construction of affordable housing be justified by legitimate governmental interests, states can preclude planning authorities from relying on impermissible factors, like discriminatory animus, while continuing to protect legitimate policy goals.<sup>114</sup> To help local governments and courts<sup>115</sup> understand how to balance the varied and sometimes-competing interests that characterize land use planning,<sup>116</sup> legislatures should provide clear guidelines illustrating what types of concerns may be considered in evaluating how to best increase the supply of affordable housing. In designing these guidelines, legislatures may build upon the successful efforts of the more than thirty states that have developed similar tailoring requirements to overcome local opposition to manufactured housing.<sup>117</sup>

Once the legitimacy of the asserted government interest is established, the government must next prove that there were no other, less burdensome means of achieving it. The mere existence of a competing,

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[<https://perma.cc/S8R3-8KAN>]; J. David Goodman, *What the City Didn't Want the Public to Know: Its Policy Deepens Segregation*, N.Y. TIMES (July 16, 2019), <https://www.nytimes.com/2019/07/16/nyregion/segregation-nyc-affordable-housing.html> [<https://perma.cc/6HC8-C7G9>].

<sup>111</sup> See WILLIAMSON CNTY., TENN., ZONING ORDINANCE § 19.01 (2021); Frank P. Braconi, *Environmental Regulation and Housing Affordability*, 2 CITYSCAPE 81, 90 (1996).

<sup>112</sup> See *Soak up the Rain: What's the Problem?*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/soakuptherain/soak-rain-whats-problem> [<https://perma.cc/E5VE-QAAC>].

<sup>113</sup> See, e.g., Nicole Javorsky, *How to Use Zoning Laws to Reduce Pollution in Low-Income Communities*, PAC. STANDARD (May 20, 2019), <https://psmag.com/environment/how-to-use-zoning-laws-to-promote-environmental-justice> [<https://perma.cc/ABZ6-X5SV>].

<sup>114</sup> Cf. U.S. DEP'T OF HOUS. & URB. DEV. & U.S. DEP'T OF JUST., *supra* note 81, at 5 (stating that zoning regulations that have the effect of excluding protected classes cannot be justified by reference to community concerns that development would increase crime or erode property values).

<sup>115</sup> Specialized fora created for adjudicating affordable housing claims, such as Massachusetts's Housing Appeals Committee, would also qualify.

<sup>116</sup> In other circumstances, synergies may exist between efforts to protect public health or the environment and to ensure sufficient access to housing. Denser living environments promote walking and reduce the risk of the myriad health concerns stemming from physical inactivity, thereby reducing the need for driving and mitigating pollution. See ATLANTA REG'L HEALTH F. & ATLANTA REG'L COMM'N, LAND USE PLANNING FOR PUBLIC HEALTH 11 (L. Flemming Fallon, Jr. & Jeffrey Neistadt eds., 2006), <https://www.cdc.gov/healthypplaces/publications/landusenalboh.pdf> [<https://perma.cc/N9WL-RZRM>]; Robert Sanders, *Suburban Sprawl Cancels Carbon-Footprint Savings of Dense Urban Cores*, BERKELEY NEWS (Jan. 6, 2014), <https://news.berkeley.edu/2014/01/06/suburban-sprawl-cancels-carbon-footprint-savings-of-dense-urban-cores> [<https://perma.cc/UC2K-ADRK>].

<sup>117</sup> See Lemar, *supra* note 2, at 320–22. These states have enumerated permissible aesthetic considerations while requiring local governments to treat manufactured housing similarly to non-manufactured housing. See *id.*

legitimate policy interest cannot be an excuse to obstruct the growth of affordable housing. Rather, governments must genuinely try to accommodate the need to promote the expansion of affordable housing.

While some zoning rules may be justified by reference to legitimate government interests, closer examination reveals that they are untethered to these interests and are instead based on covert or overt desires to restrict growth. This is often the case for laws requiring new construction to conform to an existing community character. While these limits may be justified as attempts to promote historical or environmental preservation, they are frequently the product of covert or overt desires to keep the community free of the types of residents that might populate affordable housing.<sup>118</sup> Allowing governments to vindicate such animus violates the state's moral duty to give its citizens equal regard,<sup>119</sup> as it deprives a large group of residents of their right to housing based merely on another group's dislike. Consequently, courts in states recognizing affordable housing as a right could not allow local governments to justify zoning rules obstructing the construction of affordable housing on such grounds. To ensure that a legitimate government interest is not used to justify means that are not in fact necessary to further that interest, courts will likely need to review a government's justification for more than facial rationality.<sup>120</sup>

In addition to ensuring that the asserted government interest is legitimate and that the challenged action is in fact necessary to achieve this interest, the government must prove that there is no feasible alternative that is less burdensome to the right to access affordable housing. One common reason given for zoning regulations that restrict the construction of new housing and cap growth is a concern that local governments will not be able to scale up public services, like sanitation, sewers, and public education,<sup>121</sup> if new housing attracts new residents.<sup>122</sup> Providing sufficient municipal services is a legitimate government interest, and careful attention to adequate expansion of municipal services is especially important to avoid perpetuating historical discrimination in the provision of municipal services to minority communities.<sup>123</sup> However,

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<sup>118</sup> See Thomas, *supra* note 46 (cataloguing concerns from town officials and residents that new development would erode neighborhood character by introducing "drug addicts," "slumlords," and "riffraff").

<sup>119</sup> See Anderson & Pildes, *supra* note 95, at 1520.

<sup>120</sup> See Ostrow, *supra* note 44, 729–32 (describing the deferential standard of review for zoning decisions).

<sup>121</sup> See, e.g., Carroll, *supra* note 103, at 1283, 1285.

<sup>122</sup> See Robert P. Inman & Daniel L. Rubinfeld, *The Judicial Pursuit of Local Fiscal Equity*, 92 HARV. L. REV. 1662, 1685–89 (1979).

<sup>123</sup> See, e.g., *Hawkins v. Town of Shaw*, 437 F.2d 1286, 1288 (5th Cir. 1971) (describing the Town of Shaw's historic discrimination in the provision of municipal services), *aff'd on reh'g per curiam*, 461 F.2d 1171 (5th Cir. 1972) (en banc).

using static limits on housing to cap growth and limit municipal costs is an excessively burdensome approach to protecting this interest. Increased costs will necessarily accompany growth. Allowing fiscal concerns to stymie the construction of affordable housing would perpetuate the regional competition for higher tax bases and encourage municipalities to respond to public pressure to keep property taxes low in wealthier regions, thereby enabling municipalities to shirk their share of the fiscal burden of providing for the region's lower- and middle-income residents.<sup>124</sup> Instead, alternative means of addressing fiscal concerns should be considered, such as raising property taxes.<sup>125</sup>

*D. Recognizing and Implementing Affordable Housing as a Right*

States recognizing a right to affordable housing should ideally codify the right through a state constitutional amendment in order to maximize its impact. Adopting the right through a state constitutional amendment, rather than by statute, maximizes the expressive power of the right, given constitutions' unique cultural role in influencing the values and ideals of political society in the United States.<sup>126</sup> The right is also less likely to be subsequently revoked if it is codified constitutionally, as state constitutions are generally more resistant to change than state statutes<sup>127</sup> or supreme court opinions that read implied rights into state constitutions.<sup>128</sup>

Once the right is recognized, states will face the task of defining the precise contours of the right in a manner that gives full force to the right and grants sufficient leeway to planning authorities to pursue other legitimate policy goals. The complex policy decisions underlying land use planning and the continually evolving nature of the affordable housing crisis suggest that legislatures may be best suited to provide guidance on how to accommodate competing policy interests against the need to

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<sup>124</sup> See, e.g., *Mount Laurel I*, 336 A.2d 713, 724 (N.J. 1975); RANDALL BARTLETT, *THE CRISIS OF AMERICA'S CITIES* 191 (1998) (describing local pressures to keep taxes low or lose wealthy residents); Tim Evans, *Where Do New Jersey's Property Tax Bills Hit the Hardest?*, N.J. FUTURE (Feb. 15, 2021), <https://www.njfuture.org/2021/02/15/where-do-new-jerseys-property-tax-bills-hit-the-hardest> [<https://perma.cc/TL93-493T>] (noting that "high property tax rates are found most consistently among municipalities where incomes are lower").

<sup>125</sup> To assist municipalities in scaling up their provision of services, states may also offer temporary funding to assist with the growth. State funding may help expedite expansion and reduce local opposition to increased growth, especially where there are state limitations on local revenue-raising power. See Carroll, *supra* note 103, at 1285.

<sup>126</sup> See Jason Mazzone, Essay, *The Creation of a Constitutional Culture*, 40 TULSA L. REV. 671, 672 (2005) (discussing the unique role constitutions play in shaping shared ideals in American society); *supra* note 98 and accompanying text.

<sup>127</sup> Cf. Maureen E. Brady, *Zombie State Constitutional Provisions*, Essay, 2021 WIS. L. REV. 1063, 1066 (noting that the relative difficulty of amending state constitutions often leads states to retain constitutional provisions even if they cannot be enforced).

<sup>128</sup> See, e.g., *Mount Laurel II*, 456 A.2d 390, 415-18 (N.J. 1983).

allow greater construction of affordable housing.<sup>129</sup> For example, states are often major landowners, and the legislature may wish to impose rules as to whether, and how, affordable housing can be constructed on state property. Policies that seek to promote development are also often accompanied by fact-intensive environmental concerns, including managing drainage from buildings with bigger footprints and reducing pollution, that a legislature will need to balance against the need to construct more housing in order to provide clear guidelines to planning authorities.<sup>130</sup>

Like any other policy intervention, the success of the right in addressing legal barriers to affordable housing will depend upon implementation. Courts must be willing to fulfill their duty of scrutinizing local governments' justifications for land use decisions that burden the right, a duty that may be made easier by legislative action defining the contours of the right.<sup>131</sup> While the act of recognizing a right to affordable housing will not itself be sufficient, it can bolster broader housing reform efforts by helping address the legal power imbalance between politically influential homeowners and traditionally excluded groups.

#### CONCLUSION

Recognizing affordable housing as a right is an effective solution to remove legal barriers to the construction of affordable housing and would help additional interventions, such as rent subsidies or construction grants, to grow the supply of affordable housing without obstruction from land use authorities. The expressive value of recognizing prospective residents' right to affordable housing is also likely to provide significant rhetorical and social support to other forms of political and economic housing advocacy. Thus, recognizing affordable housing as a right offers a path forward for comprehensive reform to increase the supply of affordable housing and empower those communities that have suffered most from exclusionary zoning practices.

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<sup>129</sup> Cf. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 357 (1978) (examining what "social tasks," *id.* at 354, are properly assigned to courts for adjudication).

<sup>130</sup> Cf. WILLIAM BRADSHAW ET AL., *NEW ECOLOGY & GREEN CDCS INITIATIVE, THE COSTS & BENEFITS OF GREEN AFFORDABLE HOUSING* 18 (2005) (describing the "extreme[] difficult[y]" of balancing environmental considerations, such as reducing pollution, reducing drainage from buildings with bigger footprints, and protecting vulnerable ecological habitats, against building costs).

<sup>131</sup> States similarly recognize a right to public education constitutionally and clarify the contours of the right through detailed statutory schemes that include regional adjustments. *See, e.g.*, TENN. CONST. art. XI, § 12; TENN. CODE ANN. §§ 49-3-351 to 370 (2021).