Land Use in the United States:
The Changing Roles of the Federal, State, and Local Governments

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1. Introduction

Until 1900, the federal government deferred to the state governments on most issues pertaining to the use of private property, and the state legislatures, in turn, usually deferred to state courts. In the early 20th century, this pattern began to change. At all levels of government, legislatures and then administrative agencies began to assert increasing control over activities pertaining to land.

Some of these initiatives affected land use directly – by prescribing what could and could not be done on particular parcels. Others did so indirectly – by controlling the availability of services (financing, transportation, utilities, and so forth) necessary to use particular parcels in specific ways. Still others prescribed (directly or indirectly) *who* could own, occupy, or use land in particular areas.

Summarized below are the principal types of interventions of this sort. As the story unfolds, pay close attention to the ways in which lawmakers at the federal, state, and local levels interacted – sometimes collaborating; sometimes undercutting one another.

2. Zoning

A zoning enabling act (ZEA) is a state statute that empowers municipal governments within the state to regulate uses of land within their jurisdictions, so long as the governments abide by some procedural requirements. The Standard State Zoning Enabling Act (SZEA) was developed by an advisory committee appointed by Secretary of Commerce Herbert Hoover in 1921. The first printed edition was released in May 1924, and a revised version was released in 1926.[1] The SZEA was divided into nine sections, including a grant of power, statement of purpose of the zoning regulations, and procedures for establishing and amending the zoning regulations.[2] By 1930, 35 states had adopted legislation based on the SZEA.[3] All 50 states eventually adopted the SZEA, and it is still in effect, in modified form, in 47 states.[4]

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[1] *Standard State Zoning Enabling Act and Standard City Planning Enabling Act*, Am. Planning Ass'n (last visited Oct. 6, 2021), https://www.planning.org/growingsmart/enablingacts/.

[2] *Id.*

[3] Ruth Knack et al., *The Real Story Behind the Standard Planning and Zoning Acts of the 1920s*, Am. Planning Ass'n (Feb. 1996), https://planning-org-uploaded-media.s3.amazonaws.com/document/real-story-behind-enabling-acts.pdf.

[4] Stuart Meck, *Model Planning and Zoning Enabling Legislation: A Short History*, 3, Am. Planning Ass'n, https://planning-org-uploaded-media.s3.amazonaws.com/legacy_resources/growingsmart/pdf/PAS462.pdf.

The overwhelming majority of cities and towns in the United States have now exercised the power that the ZEAs confer upon them. A representative early example was the ordinance at issue in Village of Euclid v. Ambler Realty (SCOTUS 1926), which you will read shortly. A representative *modern* example is the ordinance currently in force in Lexington, Massachusetts – excerpts of which appear below.

Zoning Bylaw of Lexington, Massachusetts

> 2.3.1. Zoning districts are shown on a map entitled "Zoning Map of the Town of Lexington" [reprinted on the following page] prepared by the Planning Board and on file in the offices of the Town Clerk and the Planning Board.[5] The district boundaries shown on the Zoning Map are part of this bylaw….

[5] A high-resolution color version of the map is available at https://www.lexingtonma.gov/sites/g/files/vyhlif7101/f/uploads/zoning_map_archd_live_2019.pdf_9.pdf.

Standard Zoning Districts

RESIDENTIAL DISTRICTS

- CSX
- RO - One Family Dwelling
- RS - One Family Dwelling
- RT - Two Family Dwelling

COMMERCIAL / INDUSTRIAL DISTRICTS

- CB - Central Business
- CLO - Local Office
- CM - Manufacturing
- CN - Neighborhood Business
- CRO - Regional Office
- CRS - Retail Shopping
- CS - Service Business

Transportation Management Overlay Districts

District

- Forbes Road - Marrett Street TMO
- South Lexington TMO
- Hartwell Avenue Area TMO

National Flood Insurance Overlay District

Flood Zone Designations

- A: 1% Annual Chance of Flooding, no BFE
- AE: 1% Annual Chance of Flooding, with BFE
- AE: Regulatory Floodway

OTHER

- GC - Government Civic

PLANNED DEVELOPMENT DISTRICTS

- PD - Planned Development
- CD - Planned Commercial
- RD - Planned Residential

4.1.1. Each use, building, or structure must comply with the standards described in Table 2, Schedule of Dimensional Controls [reprinted below], except where provided otherwise by this bylaw.

	Zoning Districts										
	GC	**RO**	**RS & RT**	**CN**	**CRS**	**CS**	**CB**	**CLO**	**CRO**	**CM**	**CSX**
Minimum lot area	NR	30,000 SF	15,500 SF	15,500 SF	15,500 SF	20,000 SF	NR	30,000 SF	5 AC(f)	20,000 SF(f)	20,000 SF
Minimum lot frontage in feet	NR	150	125	125	125	125	20	175	300(f)	50(f)	125
Minimum front yard in feet (a), (b)	NR	30	30	30	30	30	NR(c)	50	100(f)	NR	30
Minimum side yard in feet	NR	15(d)(i)	15(d)(i)	20	20	15	NR	30	50(f)	15(f)	15
Minimum rear yard in feet	NR	15(d)	15(d)	20	20	20	10	30	50(f)	15(f)	20
Minimum side and rear yard adjacent to a residential district in feet	NR	15	15	30	30	30	30	50	100(f)	50(f)	30
Maximum nonresidential floor area ratio (FAR)	NR	NR(g)	NR(g)	0.20	0.20	0.20	2.0	0.25	0.15(f)	NR	0.20
Maximum site coverage	NR	15% (e)	15% (e)	20%	25%	25%	NR	20%	NR	NR	25%
Public and institutional buildings, maximum height:											
In stories:	2.5(f)	2.5	2.5	3	3	3	2	3	NR	NR	3
In feet:	40(f)	40	40	45	45	45	30	45	45(f)	115(f) (h)	45
Other buildings, maximum height:											
In stories:	2.5 (f)	2.5	2.5	1	2	2	2	2	NR	NR	2
In feet:	40(f)	40	40	15	25	25	25	30	45(f)	115(f) (h)	25

NOTES:

As used in the Schedule of Dimensional Controls, symbol "NR" means no requirements, "AC" means acres, "SF" means square feet, and "feet" means linear feet.

a. Where lawfully adopted building lines require yards in excess of these requirements, the building line shall govern.
b. The minimum front yard for any other street, which is not the frontage street (see definition), shall be 2/3 of that required for the frontage street. In the case of nonresidential uses located in the RO, RS, or RT Districts (see Table 1) or for uses located in the CM and CRO Districts, the minimum front yard facing all streets shall be the same as that for the frontage street.
c. Except ten-foot yard on Muzzey Street, Raymond Street, Vine Brook Road and Wallis Court for lots abutting these streets.
d. For institutional uses (see Table 1) the minimum setback for a building shall be the greater of 25 feet or a distance equal to the height of the building as defined in § 4.3. For other nonresidential uses (see Table 1), increase the required side yard to 20 feet plus one foot for every 1/2 acre (or fraction thereof) over 1/2 acre lot area.
e. Applicable only to uses permitted by special permit.
f. This limit may be waived by special permit.
g. For institutional uses (see Table 1), the maximum floor area ratio shall be 0.25.
h. See § 7.4.1.
i. For nonconforming one- and two-family residential structures, the side yard setback may be reduced as allowed in Section 8.4.1, No Increase in Nonconforming Nature.

4.4. Residential Gross Floor Area.

4.4.1. Purpose. Lexington seeks to have a socially and economically diverse community, both over the whole of the community and within its neighborhoods. In support of that fundamental social goal, a basic housing goal is to provide housing opportunities supportive of the population diversity we seek. The Town encourages small- and medium-sized housing stock, in the interest of providing diverse housing sizes throughout the Town, § 4.4 limits the massing of buildings, which may impact owners of abutting properties, the streetscape, landscape, and the character of the neighborhood and Town.

4.4.2. Maximum Allowable Residential Gross Floor Area Table. The total gross floor area of all buildings on a lot containing a one-family or two-family dwelling may not exceed the amount listed in the table below based on lot area.

Lot Area (in square feet)	*Maximum Gross Floor Area (in square feet)*
0 to 5,000	0.8 * Lot Area
5,000 to 7,500	4,000 + 0.55 * (Lot Area - 5,000)
7,500 to 10,000	5,375 + 0.23 * (Lot Area - 7,500)
10,000 to 15,000	5,950 + 0.2 * (Lot Area - 10,000)
15,000 to 30,000	6,950 + 0.16 * (Lot Area - 15,000)
More than 30,000	9,350 + 0.16 * (Lot Area - 30,000)

4.4.3. Special Permit. Pursuant to § 9.4, the SPGA may grant a special permit for a building to exceed the maximum gross floor area otherwise allowed by § 4.4 provided that the SPGA finds that the desired relief may be granted without substantial detriment to the neighborhood and without derogating from the intent and purpose of this bylaw including Town policy documents that define housing goals. In addition to the criteria in § 9.4.2, the SPGA shall find that:

a. The project is compatible with the scale of the neighborhood;
b. The massing of the project does not adversely impact the solar access of adjoining lots;
c. Noise generated by fixed plant equipment, such as, but not limited to, air conditioners, pumps, fans, and furnaces, does not adversely impact adjoining lots; and

d. The project design addresses specific neighborhood and Town concerns….

6.6. Congregate Living Facility

6.6.1. Purpose. This section is intended to:

1. Encourage alternative living arrangements for the Town's elderly residents;
2. Permit housing arrangements compatible in size and scale with one-family and two-family neighborhoods; and
3. Encourage an economic, energy-efficient use of the Town's housing supply while maintaining the appearance and character of the Town's neighborhoods.

6.6.2. Conditions and Requirements; General. Congregate living facilities must meet each of the following conditions and requirements:

1. In the RO, RS and RT Districts, there shall be accommodations for not more than 15 residents in the dwelling.
2. The lot area shall be at least 10,000 square feet.
3. The dwelling shall be connected to the public water and sanitary sewer system.

6.6.3. Conditions and Requirements; Exterior Appearance. Congregate living facilities shall be designed so that the appearance of the structure is that of a dwelling characteristic of the zoning district in which it is located, i.e. a detached one-family dwelling if located in a RO, RS or RT District or a two-family dwelling if located in a RT District, subject further to the requirement that any stairway to a second or third story shall be enclosed within the exterior walls of the dwelling. There shall be no exterior fire escapes.

6.6.4. Conditions and Requirements; Off-Street Parking. In order to maintain the appearance of a one-family neighborhood, not more than two outdoor parking spaces shall be located in the front yard. All other parking spaces shall comply with the standards in § 5.1 for a parking lot. Additional screening may be required to minimize the visual impact of parking on adjacent properties.

6.6.5. Services and Facilities for Residents.

1. Supportive services, such as nutrition, housekeeping, or social activities and access to other services, such as health care, recreation or transportation, shall be provided. At least

one meal per day shall be served to residents in a common dining room.

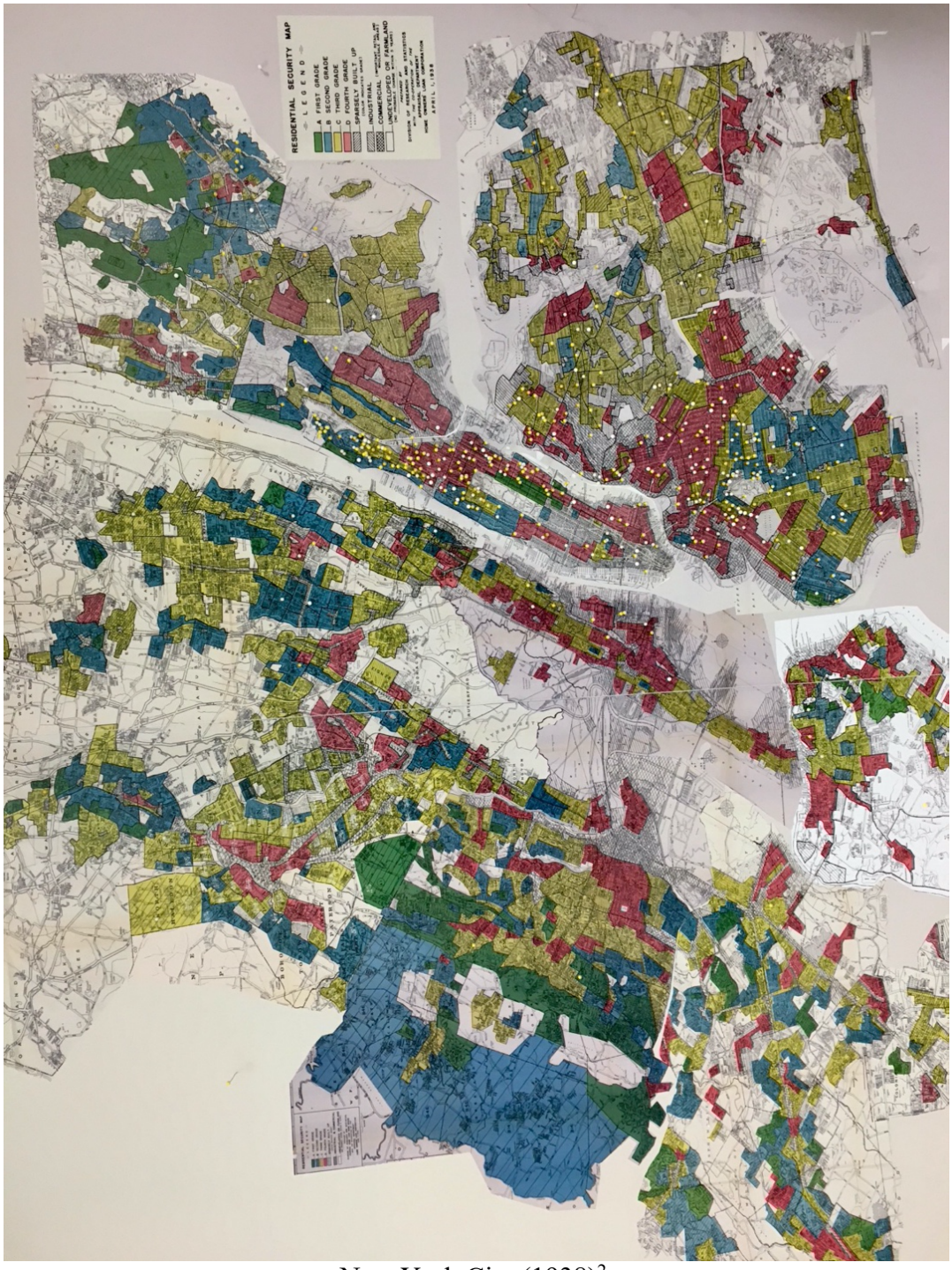
2. There shall be rooms and facilities that promote a shared living experience for residents including at least: a dining room, one living/common room suitable for social activities, space for outdoor activities and other rooms for other supportive services.
3. A service providing organization, with sufficient resources, responsible for the provision of the supportive services shall be identified. If the relationship between that organization and the facility is terminated, and if, within 90 days, another comparable service providing organization is not designated, the certificate of occupancy shall be suspended or revoked. The service providing organization shall employ a manager or coordinator to direct the supportive services, and the manager or coordinator, or a designee, who shall not be a client of the congregate living facility, shall be on the site at least eight hours per day, seven days per week.
4. A resident may occupy a separate bedroom or a suite of rooms which may have one or more of the following: a private full or half bath, a kitchenette of a size and type suitable for preparation of light meals for one or two persons, but not larger, or a living room.
5. There shall be provided at least 150 square feet of open space for each resident.
6. The dwelling may not contain any separate dwelling unit other than that provided for the manager or coordinator.

3. Managing Mortgages

The Home Owners Loan Corporation (HOLC) was created by the Home Owners Loan Act passed by Congress in June 1933, near the end of the "First Hundred Days" of the New Deal. The HOLC's mission encompassed two distinct phases: a 1933–35 "rescue" phase, in which it refinanced struggling homeowners' mortgages on generous terms, and a 1935–51 "consolidation phase" in which the HOLC managed and sold off its accumulated housing inventory, with an eye on its own eventual liquidation.

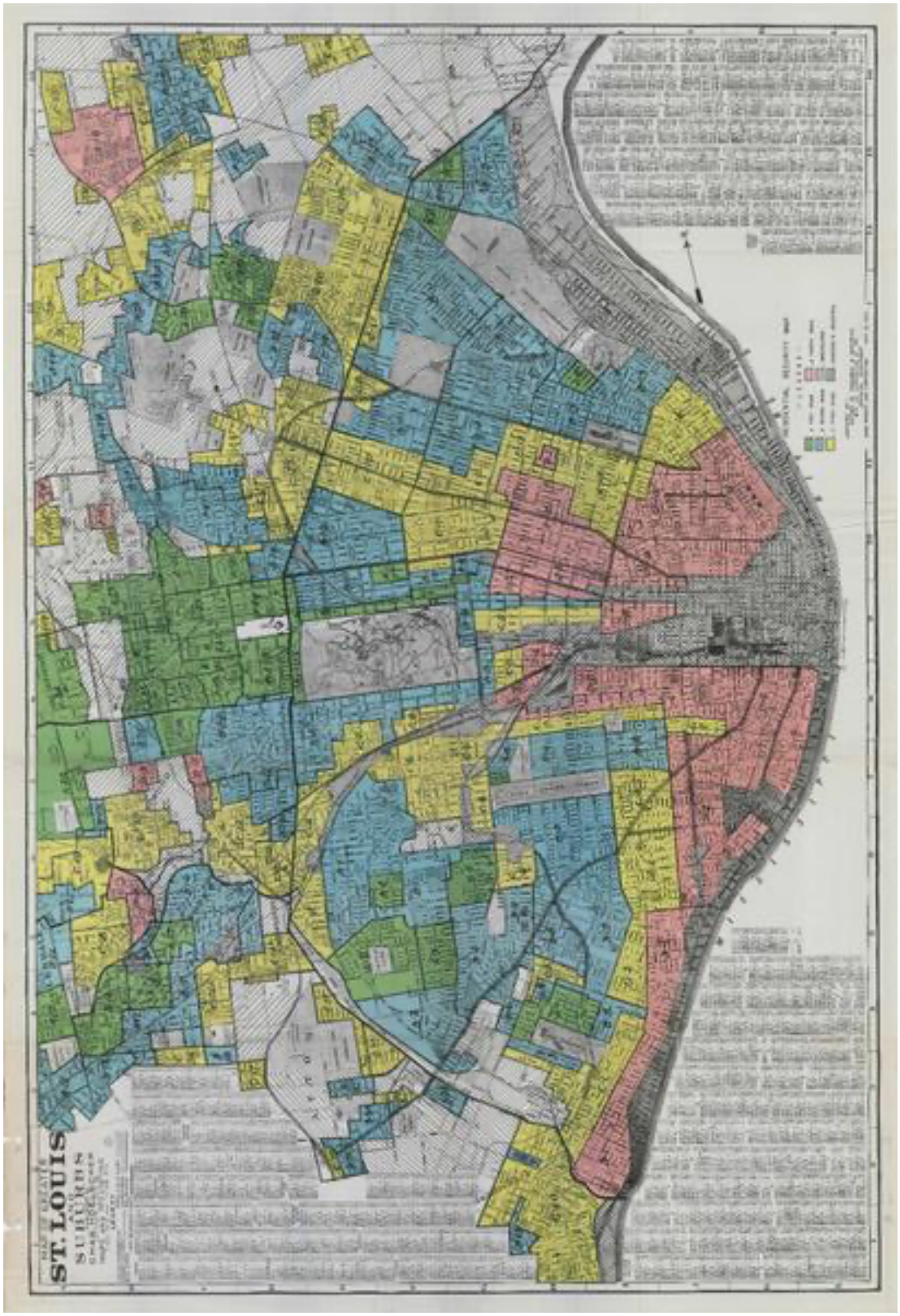
It was during the latter phase that the HOLC created what became known as "redlining" maps. The HOLC deployed examiners across the country to classify neighborhoods by their perceived level of lending risk. These examiners consulted with local bank loan officers, city officials, appraisers, and realtors to create "Residential Security" maps of American cities, which systematically graded neighborhoods. The neighborhoods were color-coded on maps: green for "Best," blue for "Still Desirable," yellow for "Definitely Declining," and red for "Hazardous." The maps developed by the HOLC for the cities of New York, St. Louis, and Los Angeles are set forth on the following pages.[1]

[1] The corresponding maps for 140 other cities are available online through : *Home Owners' Loan Corporation (HOLC) Neighborhood Redlining Grade*, ArcGIS (last visited January 5, 2022), https://www.arcgis.com/apps/mapviewer/index.html?webmap=063cdb28dd3a449b92bc04f904256f62. The map opens in Sacramento, but by zooming out and in, you can find other cities that were subdivided in this way.

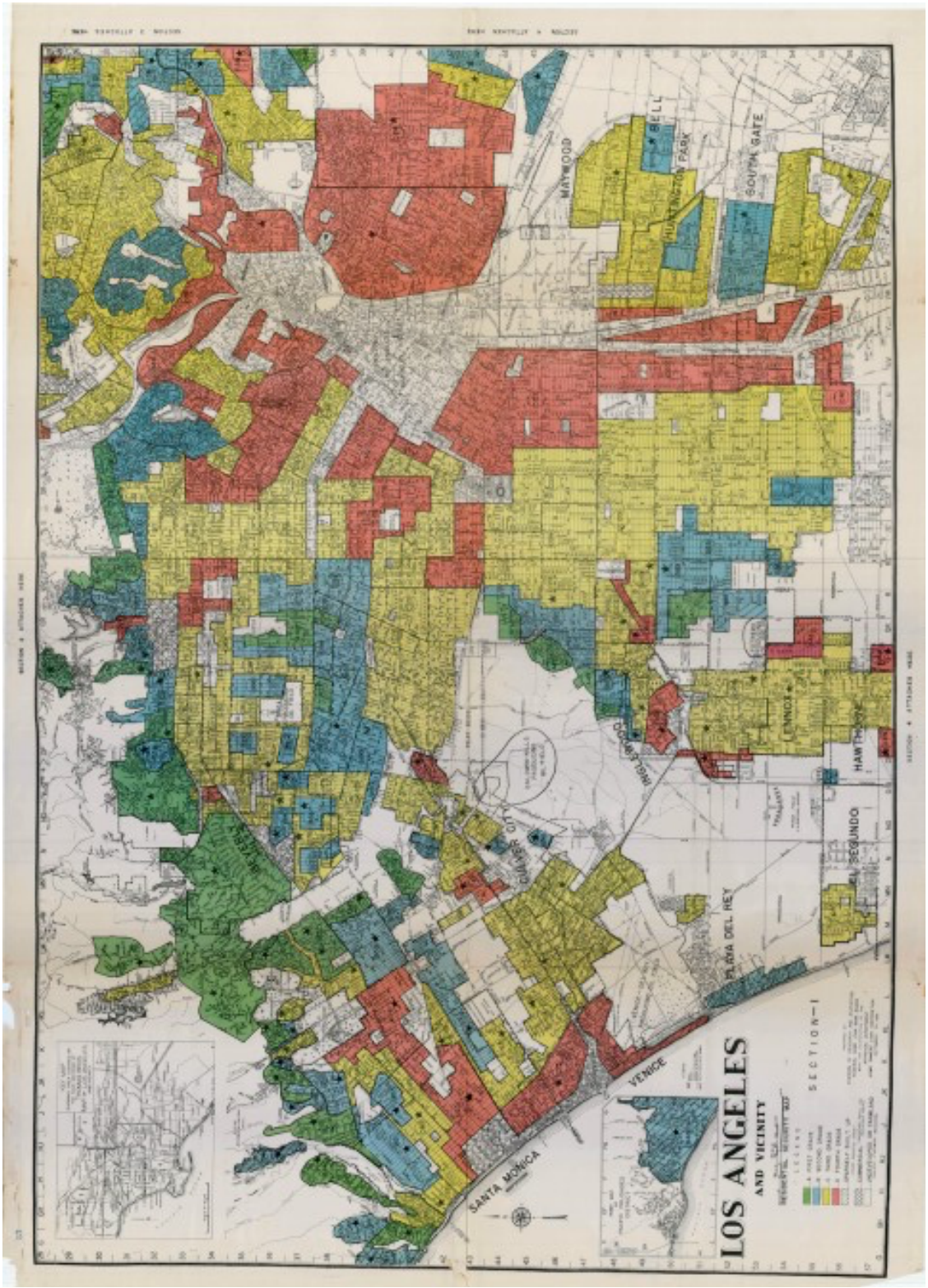


New York City (1938)[2]

[2] Source: Syed Ali, Undesigning the Redline in the Bronx and Beyond (2018), https://medium.com/@SyedAAli/undesigning-the-redline-in-the-bronx-and-beyond-c6b6bbad82a1



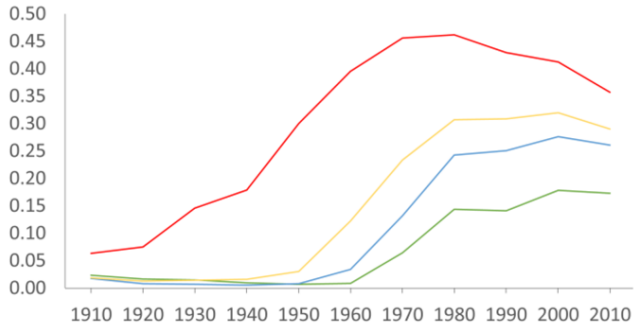
St. Louis (1937)



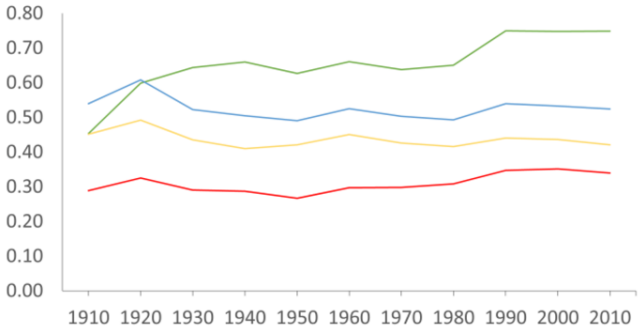
Los Angeles (1939)

In 2020, a group of economists associated with the Federal Reserve Bank of Chicago published a comprehensive study of the changing socioeconomic conditions of neighborhoods that the HOLC had classified in 139 cities.[3] Their conclusion, in brief, was "that the HOLC maps had meaningful and lasting effects on the development of urban neighborhoods through reduced credit access and subsequent disinvestment." Some of the trends underlying their conclusion are apparent from the following graphs. In each, the colors of the lines correspond to the colors assigned to neighborhoods by the HOLC.

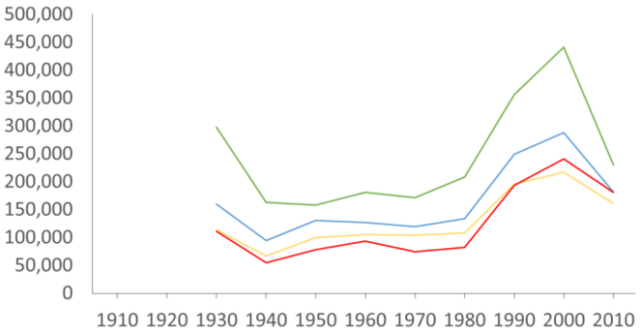
Panel A: Share African American



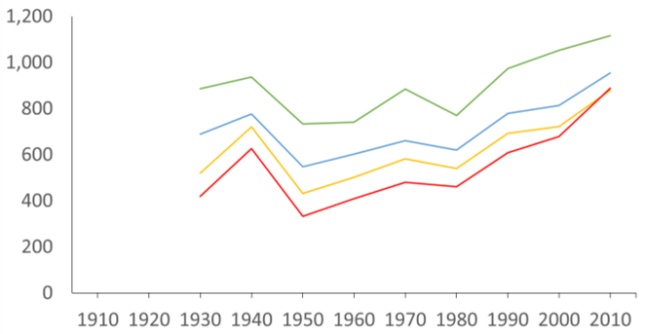
Panel B: Home Ownership



Panel C: Home Values



Panel D: Rent



A related New Deal initiative was the Federal Housing Administration (FHA), chartered by the 1934 National Housing Act as part of an effort to alleviate the

[3] Daniel Aaronson, Daniel Hartley, and Bhashkar Mazumder, "The Effects of the 1930s HOLC "Redlining" Maps" (Federal Reserve Bank of Chicago 2020), available at https://fraser.stlouisfed.org/files/docs/historical/frbchi/workingpapers/frbchi_workingpaper_2017-12.pdf. Similar conclusions are reached by Bruce Mitchell & John Franco, *HOLC Redlining Maps: The Persistent Structure of Segregation and Economic Inequality*, Nat'l Cmty. Reinvestment Coalition (Feb. 2018), https://ncrc.org/wp-content/uploads/dlm_uploads/2018/02/NCRC-Research-HOLC-10.pdf.

mortgage crisis created by the stock market crash of 1929. The Act empowered the FHA to coordinate several mortgage-market reforms, the most important of which was to insure lenders against any loss on loans made for purchasing homes. As the insurer, the FHA could dictate the range of acceptable, insurable terms and conditions of home lending. As a government body responsible for both insuring the market's operation and ensuring its growth, the FHA sought to eliminate all elements of risk that could potentially destabilize real estate development. By equating African Americans with risk, the FHA produced a lending drought in neighborhoods of mixed racial composition and directed the majority of capital to homogenous, white suburbs.[4] Just two percent of the $120 billion in FHA loans distributed between 1934 and 1962 were given to non-white families.[5]

The FHA's 1934 underwriting manual, used to evaluate the suitability of communities for mortgage insurance, stated: "If a neighborhood is to retain stability, it is necessary that properties shall continue to be occupied by the same social and racial classes."[6] The manual went on to suggest that subdivision regulations and appropriate restrictive covenants are the best way to ensure such neighborhood stability, stating that "[d]eed restrictions are apt to prove more effective than a zoning ordinance in providing protection from adverse influences."[7] The manual also discussed zoning, characterizing "well drawn zoning ordinances" as "[o]ne of the best artificial means of providing protection from adverse influences."[8]

Yet another federal initiative administered along similar lines was the Veterans Administration Loan Program, created by one component of the Servicemen's Readjustment Act of 1944, commonly known as the G.I. Bill. The Veterans Administration (VA) provided mortgage insurance to more than twelve million homes in the three decades following the passage of the National Housing Act. While the statute's language did not expressly exclude African Americans from its benefits, in practice the program largely excluding Black veterans. Because the VA did not administer the loans itself (it could cosign, but not actually guarantee the

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[4] John Kimble, *Insuring Inequality: The Role of the Federal Housing Administration in the Urban Ghettoization of African Americans*, 32 L. & Soc. Inquiry 399 (2007).

[5] Danyelle Solomon et al., *Systemic Inequality: Displacement, Exclusion, and Segregation*, Ctr. for Am. Progress (Aug. 7, 2019), https://www.americanprogress.org/issues/race/reports/2019/08/07/472617/systemic-inequality-displacement-exclusion-segregation/.

[6] *Underwriting Manual: Underwriting and Valuation Procedure Under Title II of the National Housing Act*, Part II, Section 9, No. 937, Fed. Hous. Admin. (Feb. 1938), https://www.huduser.gov/portal/sites/default/files/pdf/Federal-Housing-Administration-Underwriting-Manual.pdf.

[7] *Id.* at Part II, Section 9, No. 934.

[8] *Id.* at Part II, Section 9, No. 933.

loans), white-run financial institutions could (and frequently did) refuse to extend loans to Black people.[9]

The Levittown development on Long Island (depicted below) symbolizes the convergence of public and private forces around a formal policy of racial exclusion in housing. Developer William Levitt opened his first mass-produced suburb in 1947 and initially restricted it to white families with GI Bill mortgages. In 1955, a NAACP lawsuit against the Levitt Corporation sought an injunction restraining the FHA and VA from insuring homes in a development restricted to whites only, but the District Court dismissed the suit on the ground that the Constitution did not compel a government agency to require a private property owner to practice racial nondiscrimination.[10]

Source: Brian Moss, "Levittown and the suburban dream of postwar New York," Daily News, August 14, 2017.

[9] Erin Blakemore, *How the GI Bill's Promise Was Denied to a Million Black WWII Veterans*, History (updated Apr. 20, 2021), https://www.history.com/news/gi-bill-black-wwii-veterans-benefits.

[10] *Johnson v. Levitt & Sons, Inc.*, 131 F. Supp. 114 (E.D. Pa. 1955).

4. Public Housing

The Housing Act of 1949 dramatically expanded the role of the federal government in managing housing in America. The main elements of the Act were:

- federal financing for slum clearance programs associated with urban renewal projects in American cities (Title I);
- increased authorization for the FHA mortgage insurance program, discussed above (Title II);
- extension of federal money to build more than 800,000 public housing units (Title III);
- funding for research on housing and building techniques (Title IV); and
- financing of "dwelling and other farm buildings on . . . farms" (Title V).[1]

The best-known provisions of the Act concerned public housing and urban development. Fights over where to situate new public housing often led housing authorities to build new housing projects near old ones, "thus concentrating public housing in certain working- and lower-class areas of the city. As a result, the construction of new projects often reinforced old racial ghettos."[2] Critics of public housing also decried the racial segregation of the projects; despite the Court's ruling in *Brown v. Board of Education* and a 1961 presidential order barring discrimination in public housing, most local authorities segregated tenants by race.[3]

In *Gautreaux v. Chicago Housing Authority*, a federal court found that the Chicago City Council had limited public housing project sites to ghetto neighborhoods with the direct intent to maintain racial segregation.[4] The court ordered that the next 700 units of public housing, plus 75 percent of all units built thereafter, were to be built in white neighborhoods—a remedy that prompted scholarly criticism of the court's role in policy issues such as public housing and urban planning writ large.[5]

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[1] Senate Comm. on Banking & Currency, *Summary of Provisions of the National Housing Act of 1949* (July 14, 1949), https://web.archive.org/web/20160215080101/https://bulk.resource.org/gao.gov/81-171/00002FD7.pdf.

[2] Alexander von Hoffman, *A Study in Contradictions: The Origins and Legacy of the Housing Act of 1949*, 11 Housing Pol'y Debate 299, 315 (2000).

[3] *Id. See also* Arnold R. Hirsch, *Searching for a "Sound Negro Policy": A Racial Agenda for the Housing Acts of 1949 and 1954*, 11 Housing Pol'y Debate 393 (2000); Arnold R. Hirsch, "Less than *Plessy*: The Inner City, Suburbs, and State-Sanctioned Residential Segregation in the Age of *Brown*," *in The New Suburban History* (Kruse & Sugrue eds., 2006); Martha Biondi, *To Stand and Fight: The Struggle for Civil Rights in Postwar New York City* 129 (2006).

[4] 296 F. Supp. 907, 914 (N.D. Ill. 1969).

[5] Note, *Public Housing and Urban Policy:* Gautreaux v. Chicago Housing Authority, 79 Yale L.J. 712, 719 (1970).

According to a comprehensive assessment by sociologists Douglas Massey and Nancy Denton, "[u]rban renewal almost always destroyed more housing than it replaced." "By 1970, after two decades of urban renewal, public housing projects in most large cities had become Black reservations, highly segregated from the rest of society, . . . the direct result of an unprecedented collaboration between local and national government."[6] Many observers had come to believe that the federal programs "were fostering the slums and blight they were meant to eradicate."[7]

Such sentiments helped shape the Housing and Community Development Act of 1974. Among its creations was the "Section 8" program, under which the Department of Housing and Urban Development (HUD) issued vouchers that low-income families could use in the private residential market. HUD also offered bonus grants to suburbs that built a specified percentage of affordable housing units for Section 8 recipients, but most municipalities with exclusionary zoning policies declined to participate.

[6] Douglas S. Massey & Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* 56–57 (1998).

[7] von Hoffman, *supra* note 2, at 323.

5. Promoting Equality

In the last third of the 20th century, legislatures shifted – gradually and erratically – from the promotion of racial and class segregation to the promotion of equality in access to residential housing. The most visible of the federal initiatives of the latter sort was the Fair Housing Act – adopted in 1968 (in the aftermath of the assassination of Martin Luther King, Jr.) and subsequently amended.

Among other things, the Fair Housing Act proscribes specific sorts of discriminatory behavior. The current versions of the relevant provisions appear below.

42 U.S.C. 3601 et seq.

3601: Declaration of policy

It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.

3602: Definitions

As used in this subchapter—…

(b) "Dwelling" means any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.…

(h) "Handicap" means, with respect to a person—

(1) a physical or mental impairment which substantially limits one or more of such person's major life activities,

(2) a record of having such an impairment, or

(3) being regarded as having such an impairment,

but such term does not include current, illegal use of or addiction to a controlled substance (as defined in section 802 of title 21).

(i) "Aggrieved person" includes any person who—

(1) claims to have been injured by a discriminatory housing practice; or

(2) believes that such person will be injured by a discriminatory housing practice that is about to occur.…

(k) "Familial status" means one or more individuals (who have not attained the age of 18 years) being domiciled with—

(1) a parent or another person having legal custody of such individual or individuals; or

(2) the designee of such parent or other person having such custody, with the written permission of such parent or other person.

The protections afforded against discrimination on the basis of familial status shall apply to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years.…

3603: Effective dates of certain prohibitions…

(b) Exemptions: Nothing in section 3604 of this title (other than subsection (c)) shall apply to—

(1) any single-family house sold or rented by an owner: Provided, That such private individual owner does not own more than three such single-family houses at any one time: Provided further, That in the case of the sale of any such single-family house by a private individual owner not residing in such house at the time of such sale or who was not the most recent resident of such house prior to such sale, the exemption granted by this subsection shall apply only with respect to one such sale within any twenty-four month period: Provided further, That such bona fide private individual owner does not own any interest in, nor is there owned or reserved on his behalf, under any express or voluntary agreement, title to or any right to all or a portion of the proceeds from the sale or rental of, more than three such single-family houses at any one time: Provided further, That after December 31, 1969, the sale or rental of any such single-family house shall be excepted from the application of this subchapter only if such house is sold or rented (A) without the use in any manner of the sales or rental facilities or the sales or rental services of any real estate broker, agent, or salesman, or of such facilities or services of any person in the business of selling or renting dwellings, or of any employee or agent of any such broker, agent, salesman, or person and (B) without the publication, posting or mailing, after notice, of any advertisement or written notice in violation of section 3604(c) of this title; but nothing in this proviso shall prohibit the use of attorneys, escrow agents, abstractors, title companies, and other such professional assistance as necessary to perfect or transfer the title, or

(2) rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence.…

3604: Discrimination in the sale or rental of housing and other prohibited practices

As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful—

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status, or national origin.

(f) (1) To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of—

(A) that buyer or renter,

(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

(C) any person associated with that buyer or renter.

(2) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of—

(A) that person; or

(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

(C) any person associated with that person.

(3) For purposes of this subsection, discrimination includes—

(A) a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises except that, in the case of a rental, the landlord may where it is reasonable to do so condition permission for a modification on the renter agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted.

(B) a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling; or

(C) in connection with the design and construction of covered multifamily dwellings for first occupancy after the date that is 30 months after September 13, 1988, a failure to design and construct those dwellings in such a manner that—

(i) the public use and common use portions of such dwellings are readily accessible to and usable by handicapped persons;

(ii) all the doors designed to allow passage into and within all premises within such dwellings are sufficiently wide to allow passage by handicapped persons in wheelchairs; and

(iii) all premises within such dwellings contain the following features of adaptive design:

(I) an accessible route into and through the dwelling;

(II) light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;

(III) reinforcements in bathroom walls to allow later installation of grab bars; and

(IV) usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.

(4) Compliance with the appropriate requirements of the American National Standard for buildings and facilities providing accessibility and usability for physically handicapped people (commonly cited as "ANSI A117.1") suffices to satisfy the requirements of paragraph (3)(C)(iii).

(5) (A) If a State or unit of general local government has incorporated into its laws the requirements set forth in paragraph (3)(C), compliance with such laws shall be deemed to satisfy the requirements of that paragraph.

(B) A State or unit of general local government may review and approve newly constructed covered multifamily dwellings for the purpose of making determinations as to whether the design and construction requirements of paragraph (3)(C) are met.

(C) The Secretary shall encourage, but may not require, States and units of local government to include in their existing procedures for the review and approval of newly constructed covered multifamily dwellings, determinations as to whether the design and construction of such dwellings are consistent with paragraph (3)(C), and shall provide technical assistance to States and units of local government and other persons to implement the requirements of paragraph (3)(C).

(D) Nothing in this subchapter shall be construed to require the Secretary to review or approve the plans, designs or construction of all covered multifamily dwellings, to determine whether the design and construction of such dwellings are consistent with the requirements of paragraph 3(C).

(6) (A) Nothing in paragraph (5) shall be construed to affect the authority and responsibility of the Secretary or a State or local public agency certified pursuant to section 3610(f)(3) of this title to receive and process complaints or otherwise engage in enforcement activities under this subchapter.

(B) Determinations by a State or a unit of general local government under paragraphs (5)(A) and (B) shall not be conclusive in enforcement proceedings under this subchapter.

(7) As used in this subsection, the term "covered multifamily dwellings" means—

(A) buildings consisting of 4 or more units if such buildings have one or more elevators; and

(B) ground floor units in other buildings consisting of 4 or more units.

(8) Nothing in this subchapter shall be construed to invalidate or limit any law of a State or political subdivision of a State, or other jurisdiction in which this subchapter shall be effective, that requires dwellings to be designed and constructed in a manner that

affords handicapped persons greater access than is required by this subchapter.

(9) Nothing in this subsection requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.

3605: Discrimination in residential real estate-related transactions

(a) In general

It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.

(b) "Residential real estate-related transaction" defined

As used in this section, the term "residential real estate-related transaction" means any of the following:

(1)The making or purchasing of loans or providing other financial assistance—

(A) for purchasing, constructing, improving, repairing, or maintaining a dwelling; or

(B) secured by residential real estate.

(2) The selling, brokering, or appraising of residential real property.

(c) Appraisal exemption

Nothing in this subchapter prohibits a person engaged in the business of furnishing appraisals of real property to take into consideration factors other than race, color, religion, national origin, sex, handicap, or familial status.

3606: Discrimination in the provision of brokerage services

After December 31, 1968, it shall be unlawful to deny any person access to or membership or participation in any multiple-listing service, real estate brokers' organization or other service, organization, or facility relating to the business of selling or renting dwellings, or to discriminate against him in the terms or conditions of such access, membership, or participation, on account of race, color, religion, sex, handicap, familial status, or national origin.

3607: Religious organization or private club exemption

(a) Nothing in this subchapter shall prohibit a religious organization, association, or society, or any nonprofit institution or organization operated, supervised or controlled by or in conjunction with a

religious organization, association, or society, from limiting the sale, rental or occupancy of dwellings which it owns or operates for other than a commercial purpose to persons of the same religion, or from giving preference to such persons, unless membership in such religion is restricted on account of race, color, or national origin. Nor shall anything in this subchapter prohibit a private club not in fact open to the public, which as an incident to its primary purpose or purposes provides lodgings which it owns or operates for other than a commercial purpose, from limiting the rental or occupancy of such lodgings to its members or from giving preference to its members.

(b) (1) Nothing in this subchapter limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling. Nor does any provision in this subchapter regarding familial status apply with respect to housing for older persons.

(2) As used in this section, "housing for older persons" means housing—

(A) provided under any State or Federal program that the Secretary determines is specifically designed and operated to assist elderly persons (as defined in the State or Federal program); or

(B) intended for, and solely occupied by, persons 62 years of age or older; or

(C) intended and operated for occupancy by persons 55 years of age or older, and—

(i) at least 80 percent of the occupied units are occupied by at least one person who is 55 years of age or older;

(ii) the housing facility or community publishes and adheres to policies and procedures that demonstrate the intent required under this subparagraph; and

(iii)the housing facility or community complies with rules issued by the Secretary for verification of occupancy, which shall—

(I) provide for verification by reliable surveys and affidavits; and

(II) include examples of the types of policies and procedures relevant to a determination of compliance with the requirement of clause (ii). Such surveys and affidavits shall be admissible in administrative and judicial proceedings for the purposes of such verification.

> (3) Housing shall not fail to meet the requirements for housing for older persons by reason of:
>
> (A) persons residing in such housing as of September 13, 1988, who do not meet the age requirements of subsections [1] (2)(B) or (C): Provided, That new occupants of such housing meet the age requirements of subsections [1] (2)(B) or (C); or
>
> (B) unoccupied units: Provided, That such units are reserved for occupancy by persons who meet the age requirements of subsections (2)(B) or (C).
>
> (4) Nothing in this subchapter prohibits conduct against a person because such person has been convicted by any court of competent jurisdiction of the illegal manufacture or distribution of a controlled substance as defined in section 802 of title 21.
>
> (5) (A) A person shall not be held personally liable for monetary damages for a violation of this subchapter if such person reasonably relied, in good faith, on the application of the exemption under this subsection relating to housing for older persons.
>
> (B) For the purposes of this paragraph, a person may only show good faith reliance on the application of the exemption by showing that—
>
> (i) such person has no actual knowledge that the facility or community is not, or will not be, eligible for such exemption; and
>
> (ii) the facility or community has stated formally, in writing, that the facility or community complies with the requirements for such exemption.

Other provisions of the Fair Housing Act encouraged federal agencies to foster housing equity. Early efforts to implement those directives sometimes came to naught. For example, George Romney, serving as Secretary of HUD in the Nixon administration, developed the Open Communities Initiative to dismantle segregation in the suburbs. He interpreted the Fair Housing Act's words directing the government to "affirmatively further" fair housing to mean that HUD had the authority to pressure predominantly white communities to build more affordable housing and to end discriminatory zoning practices. Under the Initiative, HUD officials were instructed to reject applications for sewer and highway projects from cities and states with segregationist policies. The initiative was short-lived. In 1971

President Nixon intervened, shutting down the program and eventually driving Romney out of the Cabinet entirely.[1]

A more recent initiative of the same sort was the "Affirmatively Furthering Fair Housing Mandate," adopted in 2015 during the Obama administration. HUD's description of the mandate appears below:

> WHAT IS AFFH?
>
> Title VIII of the Civil Rights Act of 1968, known as the Fair Housing Act, requires HUD and recipients of federal funds from HUD to affirmatively further the policies and purposes of the Fair Housing Act, also known as "affirmatively further fair housing" or "AFFH." The obligation to affirmatively further fair housing requires recipients of HUD funds to take meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics, which are:
>
> - Race
> - Color
> - National origin
> - Religion
> - Sex (including sexual orientation and gender identity)
> - Familial status
> - Disability
>
> Generally, in administering programs and activities relating to housing and community development, the federal government, HUD, and its recipients must:
>
> - Determine who lacks access to opportunity and address any inequity among protected class groups
> - Promote integration and reduce segregation
> - Transform racially or ethnically concentrated areas of poverty into areas of opportunity
>
> HOW DOES HUD IMPLEMENT THE AFFH MANDATE?

[1] Nikole Hannah-Jones, *Living Apart: How the Government Betrayed a Landmark Civil Rights Law*, ProPublica (June 25, 2015), https://www.propublica.org/article/living-apart-how-the-government-betrayed-a-landmark-civil-rights-law.

For decades, HUD has required recipients of federal financial assistance such as States, local governments, insular areas, and PHAs (program participants) to engage in fair housing planning. Such planning has previously consisted of the Analysis of Impediments to Fair Housing Choice and the Assessment of Fair Housing and was done in connection with other types of planning required by program requirements, such as the consolidated plan, annual action plan, and PHA plan.

HUD implements the AFFH mandate in other ways, such as through its collection of certifications from grantees, provisions regarding program design in its notices of funding opportunity (NOFOs), affirmative fair housing marketing and advertising requirements, and enforcement of site and neighborhood standards.

HUD's 2021 Interim Final Rule (IFR), "Restoring Affirmatively Furthering Fair Housing Definitions and Certifications," requires program participants to submit certifications that they will affirmatively further fair housing in connection with their consolidated plans, annual action plans, and PHA plans. In order to support these certifications, the IFR creates a voluntary fair housing planning process for which HUD will provide technical assistance and support.

The IFR also rescinds the 2020 Preserving Communities and Neighborhood Choice rule, which was causing funding recipients to certify "compliance" with a regulatory definition that is not a reasonable construction of the Fair Housing Act's mandate to affirmatively further fair housing. HUD is putting itself and its program participants back in a position to take meaningful steps towards improved fair housing outcomes.

The IFR does not require program participants to undertake any specific type of fair housing planning to support their certifications, and commits HUD to providing technical assistance to those that wish to undertake Assessments of Fair Housing (AFHs), Analyses of Impediments to Fair Housing Choice (AIs), or other forms of fair housing planning. HUD is providing resources to assist program participants.

This mandate was suspended by the Trump administration in 2017, but has since been restored by the Biden administration.[2]

A few state legislatures have attempted, not just to combat racial discrimination, but to mitigate class segregation within their jurisdictions. The premier example is "Chapter 40B" in Massachusetts. In *Zoning Board of Appeals of Greenfield v. Housing Appeals Committee*, 15 Mass. App. Ct. 553 (1983), the Court described as follows the system created by that statute:

> G.L.c. 40B, §§ 20-23 … (popularly known as the anti-snob zoning act) was enacted to provide expeditious relief from exclusionary local zoning by-laws and practices which might inhibit the construction of low and moderate income housing[3] in the Commonwealth's cities and towns. See *Board of Appeals of Hanover v. Housing Appeals Comm.*, 363 Mass. 339, 353-354 (1973) (the Hanover case). Under the statute, an eligible developer[4] wishing to construct low or moderate income housing may seek from the local zoning board of appeals a comprehensive permit to develop the project instead of seeking separate approvals from each local board having jurisdiction over the project.[5] G.L.c. 40B, § 21. See *Zoning Bd. of Appeals of Wellesley v. Housing Appeals Comm.*, 385 Mass. 651, 656 (1982) (the Wellesley case).
>
> If the board denies an application for a comprehensive permit, or authorizes a permit on conditions which would make the project uneconomical, the developer may appeal to HAC. G.L.c. 40B, § 22. On appeal, HAC must conduct a de novo review to determine whether the board's decision is "reasonable and consistent with local needs." G.L.c. 40B, § 23 (inserted by St. 1969, c. 774, § 1). HAC cannot order the issuance of a comprehensive permit, however, where the locality has fulfilled its minimum low or moderate income housing obligation under one of the criteria set forth in G.L.c. 40B, § 20.[6] See the Wellesley case,

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[2] *Affirmatively Furthering Fair Housing*, Poverty & Race Research Action Council (July 23, 2020), https://www.prrac.org/affirmatively-furthering-fair-housing/.

[3] "Low or moderate income housing" is "any housing subsidized by the federal or state government under any program to assist the construction of low or moderate income housing as defined in the applicable federal or state statute, whether built or operated by any public agency or any nonprofit or limited dividend organization." G.L.c. 40B, § 20 (inserted by St. 1969, 774, § 1). See also 760 Code Mass. Regs. § 30.02(i) (1978).

[4] A qualified developer is a public agency, nonprofit organization or limited dividend organization. G.L.c. 40B, § 21. …

[5] This procedure eliminates the need for applications to boards, such as the board of health, the planning board, and the board of selectmen, and officials, such as the building inspector.

[6] A locality has fulfilled its minimum housing obligation "where [1] low or moderate income housing exists which is in excess of ten per cent of the housing units reported in the latest decennial

> supra at 657. The critical criterion in this case is the first one whether, at the time of the initial application for a comprehensive permit, low or moderate income housing existed in more than ten percent of the housing units in the latest decennial census of Greenfield.[7] G.L.c. 40B, § 20.
>
> Assuming the municipality has not met its minimum housing obligation, HAC may still uphold denial of the permit as "reasonable and consistent with local needs" if the community's need for low or moderate income housing is outweighed by valid planning objections to the proposal based on considerations such as health, site, design, and the need to preserve open space. G.L.c. 40B, §§ 20-23. See the Hanover case, supra at 364-367. However, a municipality's failure to meet its minimum housing obligation "provide[s] compelling evidence that the regional need for housing does in fact outweigh the objections to the proposal."

The current (2020) version of the "inventory" to which the court refers in footnote 7 is available at https://www.mass.gov/doc/subsidized-housing-inventory/download. It indicates that the town of Lexington (whose zoning ordinance we examined above) has 11,946 housing units, of which 1,334 (11.2%) qualify as "subsidized housing units."

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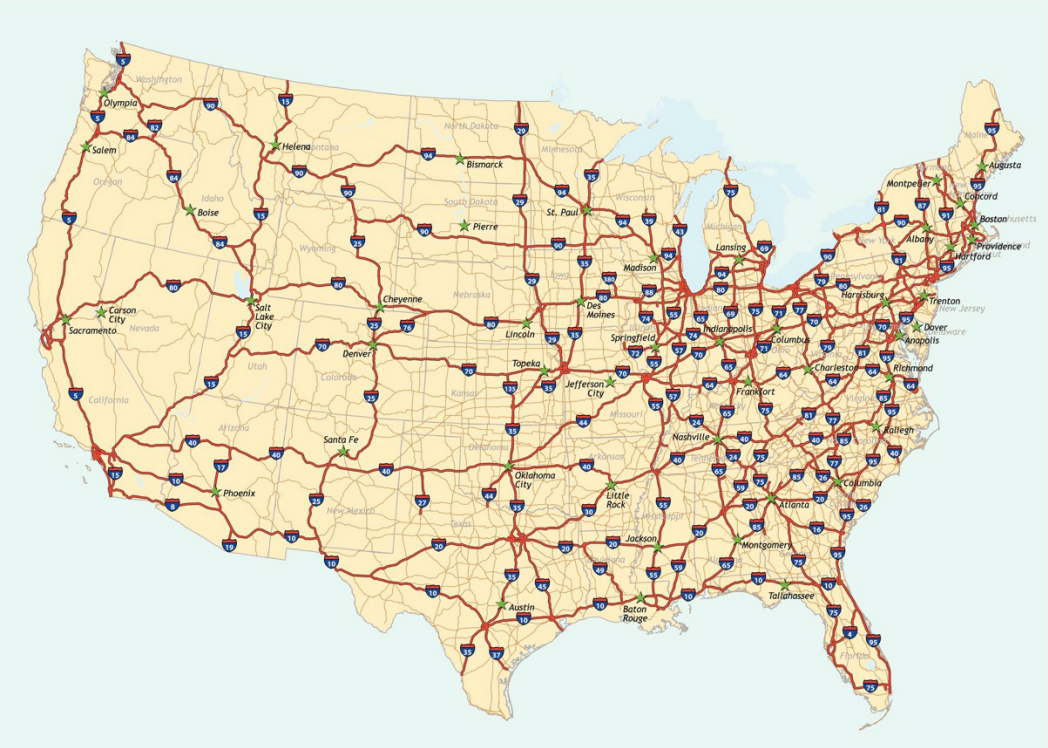
census of the city or town or [2] on sites comprising one and one half per cent or more of the total land area zoned for residential, commercial or industrial use or [3] the application before the board would result in the commencement of construction of such housing on sites comprising more than three tenths of one per cent of such land area or ten acres, whichever is larger, in any one calendar year." G.L.c. 40B, § 20.

[7] A running inventory of subsidized housing is maintained by the Department of Community Affairs (DCA) as part of an ongoing "housing needs study," which is published periodically. The latest two publications of the study at the time that this case arose were printed in 1976 and 1978. For the convenience of prospective applicants under the statute, DCA also maintains records of the total units in a locality and the extent to which the applicable percentage required by G.L.c. 40B, § 20, has been met.

6. Roads and Public Transportation

A less obvious way in which the federal government in the late 20th century shaped housing in the United States was through its management of the American transportation networks. The most visible manifestation of its intervention is the Interstate Highway System, shown below.



Largely completed by the early 1970s, the interstate highway network represented a massive public works project that subsidized suburban growth and downtown redevelopment, remaking urban centers primarily for the benefit of metropolitan commuters and corporate interests. It has been observed that "U.S. urban development has not only been caused by the car, but also by regulations that limited denser development and therefore made sprawl necessary."[1] These regulations, which include single-family zoning and minimum lot size requirements, result in lower-density communities located farther from the urban center, which contributes to Americans' dependency on automobiles and

[1] David Schleicher, "How Land Use Law Impedes Transportation Innovation," *in Evidence and Innovation in Housing Law and Policy* 38, 44 (Fennell & Keys eds., 2017).

highways.[2] Car dependency is baked into many zoning laws, as shown by regulations that require developers who build housing and office space to build parking for cars as well.[3]

The manner in which the Interstate Highway System was funded influenced its shape, its socioeconomic impact, and the viability of alternative transportation systems. The major relevant statutes are summarized below.

- **Federal-Aid Highway Act of 1944:** The Act called for the designation of a National System of Interstate Highways. The Act did not authorize funds specifically for the Interstate System; the first funding specifically for the system would not come until the Federal-Aid Highway Act of 1952. The 1952 Act allotted $25 million a year for 1954 and 1955. Legislation in 1954 authorized an additional $175 million annually for 1956 and 1957.[4]

- **Federal-Aid Highway Act of 1956:** The question of how to fund the Interstate System was resolved with this Act. It set the federal government's share of the project cost at 90% and created the Highway Trust Fund as a dedicated source of funding for the Interstate System.

- **Federal Highway Trust Fund**[5]
    - **Surface Transportation Assistance Act of 1982:** In the "Great Compromise," supporters of increased highway spending had come to an agreement with transit supporters that a penny of the proposed five-cents-per-gallon increase in the fuel tax would be dedicated to a new mass transit account within the HTF. The 80-20 split that was devised in 1982 as the "Great Compromise" remains the standard for congressional funding decisions.[6]

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[2] Gregory H. Shill, *Americans Shouldn't Have to Drive, but the Law Insists on It*, The Atlantic (July 9, 2019), https://www.theatlantic.com/ideas/archive/2019/07/car-crashes-arent-always-unavoidable/592447/.

[3] *The High Cost of Free Parking*, Vox (July 19, 2017), https://www.youtube.com/watch?v=Akm7ik-H_7U.

[4] *Interstate System: Dwight D. Eisenhower National System of Interstate and Defense Highways*, U.S. Dep't of Transp. (last visited Oct. 7, 2021), https://www.fhwa.dot.gov/programadmin/interstate.cfm.

[5] Robert S. Kirk & William J. Mallett, *Funding and Financing Highways and Public Transportation*, Congressional Research Serv. (updated May 11, 2020), https://sgp.fas.org/crs/misc/R45350.pdf.

[6] Ian Duncan, *Transit Funding Is a Final Obstacle to an Infrastructure Deal: What is the 80–20 Split, and Why Does it Matter?*, The Wash. Post (July 23, 2021), https://www.washingtonpost.com/transportation/2021/07/23/transit-highways-infrastructure-deal/.

    - **Omnibus Budget Reconciliation Act of 1990:** Raised the tax on gasoline by five cents, two of which went to the highway account and 0.5 of which went to the mass transit account. The other 2.5 cents were dedicated to deficit reduction.
    - **Omnibus Budget Reconciliation Act of 1993:** Redirected the 2.5-cents-per-gallon fuel tax dedicated to deficit reduction in OBRA90 to the HTF. The highway account received two cents per gallon, and the mass transit account 0.5 cents per gallon, of the re-dedicated amount.

- **Fixing America's Surface Transportation (FAST) Act (2015):** The Act provided $305 billion in funding for transportation projects. The Act includes $225.2 billion for highway investment and $61 billion for federal transit programs.[7]

- **Biden's Infrastructure Plan:** The allocation of funds between highways and public transit has revealed partisan divides in recent infrastructure negotiations. Democrats, who tend to represent urban areas with public transit systems, have advocated for funding to build more electric buses and rails. Republicans, whose constituents are more likely to rely on cars, have aimed to secure large sums of money for roads.[8] The Bipartisan Infrastructure Agreement maintains the traditional ratio between funding for types of transportation ($110 billion in new spending for highways, roads, and bridges; $39 billion for public transit).[9] Some criticize the bill for not doing enough for public transit, especially given the climate impact of automobile emissions.[10]

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[7] *FAST Act Summary*, Transp. for Am. (Jan. 2016), https://t4america.org/wp-content/uploads/2016/01/FAST-Act-Summary.pdf.

[8] Sahil Kapur, *A Red-Blue Divide Made Transit Money Contentious in the Infrastructure Bill* (Aug. 8, 2021), https://www.nbcnews.com/politics/congress/red-blue-divide-made-transit-money-so-contentious-infrastructure-bill-n1275852.

[9] Andrew Witherspoon & Alvin Chang, *What's in the Bipartisan Infrastructure Bill and What's Left Out: Visual Explainer*, The Guardian (Aug. 4, 2021), https://www.theguardian.com/us-news/2021/aug/04/infrastructure-bill-Bipartisan-visual-explainer.

[10] Corinne Kisner & Janette Sadik-Khan, *Statement: The Senate's Infrastructure Bill Allows for Unchecked Highway Expansion and Reverses Climate Action*, Nat'l Ass'n of City Transp. Officials (Aug. 10, 2021), https://nacto.org/2021/08/10/infrastructure-bill-reverses-climate-action/.

7. Reform Proposals

How, if at all, the complex network of laws surveyed above should be modified is a hotly contested question. A few of the many answers that have been proposed recently are set forth below.

a) A report published by the Century Foundation suggested that exclusionary zoning practices could be curbed by: increasing the number of Fair Housing testers and enforcement; reestablishing and strengthening federal inter-agency task forces that combat lending discrimination; instituting an Economic Fair Housing Act; funding disparate-impact litigation; adopting inclusionary zoning policies; expanding housing-choice vouchers and banning source-of-income discrimination; expanding housing-mobility programs; and reconsidering tax abatements and implementing longtime owner occupancy programs.[1]

b) "Form-based" codes have emerged as an alternative to conventional zoning.

> *A form-based code is a land development regulation that fosters predictable built results and a high-quality public realm by using physical form (rather than separation of uses) as the organizing principle for the code…. Form-based codes address the relationship between building facades and the public realm, the form and mass of buildings in relation to one another, and the scale and types of streets and blocks.*
>
> In short, a form-based code puts the emphasis on making sure the *buildings* in a neighborhood are compatible with their surroundings, while letting the mix of actual *activities* in them be more eclectic. In contrast, conventional, or Euclidean, zoning code works like the game SimCity—the primary thing it regulates is allowable use, as well as the density or level of activity….
>
> Ultimately, the problem with Euclidean zoning is that the things it regulates most heavily aren't actually the things that result in a successful, lovable, resilient or financially stable place. We regulate all the wrong things. We obsess over height, even though it often has little bearing on how a place looks and feels—for example, a 4-story building and a 10-story building are roughly the same if you're a pedestrian

[1] Kimberly Quick & Richard D. Kahlenberg, *Attacking the Black-White Opportunity Gap That Comes from Residential Segregation*, The Century Found. (June 25, 2019), https://tcf.org/content/report/attacking-black-white-opportunity-gap-comes-residential-segregation/.

> standing at the foot of them. We obsess over density, even though it's not the same thing as crowding or any actual measure of quality of life. We obsess over parking, even though all evidence suggests we have far too much of it.
>
> A form-based code is not a panacea for everything wrong with American planning. But it's a model that lets us open up discussion about correcting a lot of the mistakes of the past 70 or so years. [2]

c) Oregon was the first state to officially abolish single-family zoning with a 2019 bill that allows duplexes on all residential land in medium-sized cities (more than 10,000 people), and four-unit homes on all residential land in Oregon's largest cities (more than 25,000 people). The bill is characterized by Oregon lawmakers as a "bill . . . about choices" and does not disallow aesthetic zoning or purport to change immediately the landscape of traditional single-family homes.[3] The city of Portland recently moved to allow up to six homes on almost any residential lot through its "Residential Infill Project."[4]

d) California seems to be moving in the same direction. The state legislature recently passed two statutes aimed at alleviating the housing shortage in the state. SB9, which ends single-family zoning in the state, means Californians can convert their houses into up to four units, depending on the size of their plots. SB10 makes it easier for cities to build up to ten apartments on land currently set aside for single-family homes near busy public-transport corridors.[5]

e) The Massachusetts Executive Office of Energy and Environmental Affairs suggests that towns consider using "inclusionary zoning," which the office defines as follows:

> Inclusionary zoning is an effective tool that can be used by municipalities to ensure adequate affordable housing is included in the normal course of real estate development.

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[2] Daniel Herriges, *6 Reasons Your City Needs a Form-Based Code*, Strong Towns (June 8, 2020), https://www.strongtowns.org/journal/2020/6/8/6-reasons-your-city-needs-a-form-based-code.

[3] *House Bill 2001: More Housing Choices for Oregonians*, State of Oregon (last visited Oct. 7, 2021), https://www.oregon.gov/lcd/UP/Documents/HB2001OverviewPublic.pdf.

[4] Laura Bliss, *How Portland's Landmark Zoning Reform Could Work*, Bloomberg CityLab (Aug. 13, 2020), https://www.bloomberg.com/news/articles/2020-08-13/how-portland-dethroned-the-single-family-home.

[5] *California Ends Single-Family Zoning*, The Economist (Sept. 23, 2021), https://www.economist.com/
united-states/2021/09/23/california-ends-single-family-zoning.

However, a distinction exists between inclusionary zoning and incentive zoning:

- Inclusionary zoning is a **mandatory** approach that requires developers to make a portion of the housing units in their project affordable to low- and moderate-income households.
- Incentive zoning is a **voluntary** approach that either waives certain regulatory requirements or provides additional density (the incentives) for developers in exchange for providing affordable housing.

The mandatory zoning approach to affordable housing (often in concert with a density bonus, as is recommended) is the most effective means of increasing the number affordable housing units and creates a wider variety of affordability levels within a development.

An inclusionary zoning bylaw may include some flexibility to its mandatory provisions. For example, bylaws may only apply to certain types of development, such as new construction or substantial rehabilitation. Inclusionary zoning bylaws may include "in-lieu-of" payment or construction alternatives providing developers the option of paying a fee per unit, building affordable units off-site, or rehabilitating units elsewhere in place of constructing affordable units within the proposed development.[6]

f) Opticos Design founder Daniel Parolek sees "Missing Middle Housing" as a way to provide more housing and more housing choices in sustainable, walkable places. These building types include duplexes, fourplexes, cottage courts, and courtyard buildings. Opticos Design is urging cities, elected officials, urban planners, architects and builders to fundamentally rethink the way they design, locate, regulate, and develop homes.[7]

g) Many homeowners think that we have already moved too far in curbing the discretion of towns and cities to shape their landscapes – and, in particular,

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[6] Smart Growth / Smart Energy Toolkit Modules - Inclusionary Zoning, https://www.mass.gov/service-details/smart-growth-smart-energy-toolkit-modules-inclusionary-zoning. For a variety of other forms of inclusionary zoning, see Jenny Schuetz et al., *31 Flavors of Inclusionary Zoning: Comparing Policies from San Francisco, Washington, DC, and Suburban Boston*, 75 J. of Am. Planning Ass'n 441 (2009), https://www.tandfonline.com/doi/abs/10.1080/01944360903146806.

[7] *What Is Missing Middle Housing*, Missing Middle Hous. (last visited Oct. 7, 2021), https://missingmiddlehousing.com/about.

to use the power of zoning to preserve quiet, safe communities that function as havens in an increasingly tumultuous society. One variant of that sentiment was invoked by President Trump in the tweet with which he announced the rescission of the AFFH Mandate: "I am happy to inform all the people living their Suburban Lifestyle Dream that you will no longer be bothered or financially hurt by having low income housing built in your neighborhood. Your housing prices will go up based on the market, and crime will go down. I have rescinded the Obama-Biden AFFH Rule. Enjoy!!"

h) Other critics contend on libertarian grounds that all zoning ordinances should be abolished. Mark Friedman summarizes and defends this position as follows:[8]

> [L]ibertarians' primary objection to zoning is rights-based. That is, it "precludes perfectly innocent activities that pose no threat to the legitimate interests of area residents." However, … it is impossible to separate rights claims from utilitarian considerations. If the absence of zoning results in vicious chaos, producing widespread, serious injury to homeowners, renters, and society at large, we would be forced to rethink our principles. [But] this is not the case….
>
> The popularity of this regulatory/bureaucratic scheme … is primarily attributable to the widespread perception that it is necessary to preserve property values in middle class and affluent neighborhoods by preventing the intrusion of lower income residents and obnoxious uses. But zoning is not required to protect people's legitimate expectations, for three reasons. First, the repeal of zoning would not lead to a chaotic free-for-all where major industrial operations and bustling commercial enterprises move into sleepy residential neighborhoods. This is because businesses are driven to site their activities by financial and operational considerations that will naturally segregate them from residential neighborhoods.
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> For example, even in the absence of zoning, Toyota will not locate a new assembly plant in a middle class residential neighborhood because (among other things): the cost of land acquisition would be unnecessarily high; the plant would not (in all probability) be close enough to major transportation hubs, such as railroad terminals, interstate highways, ports, and airports;

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[8] "Libertarianism and Zoning," April 2, 2017, https://naturalrightslibertarian.com/2017/04/libertarianism-and-zoning/. For similar arguments, see Bart Frazier, "Zoning's Attack on Liberty and Property," The Future of Freedom Foundation, https://www.fff.org/explore-freedom/article/zonings-attack-liberty-property/; Vanessa Brown Calder, Zoning Reform is For Conservatives Too," Cato Foundation (February 28, 2019), https://www.cato.org/blog/zoning-reform-conservatives-too.

and it would be too distant from its pool of (primarily) blue-collar workers. Similarly, Siegan has observed, "gas stations and shopping centers will only locate on major thoroughfares because they require ready auto accessibility to succeed." In other words, it is reasonable to expect that in the absence of zoning a "spontaneous order" will emerge, i.e. a harmonious, self-generating arrangement that in Hayek's words "is the result of human action but not human design."

Second, real property owners can often protect themselves against unwelcome land use(s) by entirely voluntary means. To take a simple example, suppose neighbors A and B own adjoining homes somewhere in suburbia. Both owners strongly prefer to live next to another single family residence and also believe that the resale value of their homes will be enhanced if potential purchasers can rely on this limitation remaining in force.

Accordingly, they agree to place restrictive covenants on the deeds of their respective properties, which will bind all future owners. Obviously, there is nothing to preclude A and B from attempting to widen the scope of their agreement to include neighbors C, D, and E before implementing it. They could, for example, condition the covenant's effectiveness on getting these neighbors to agree to the same restriction. Moreover, as mentioned above, new developments will generally be accompanied by restrictive covenants designed to protect the quiet enjoyment of these residences, while allowing complementary commercial uses.

Finally, even if a homeowner is faced with an obnoxious land use that violates his rights, a laissez faire system would not leave him without recourse. Prior to the advent of zoning, disputes between neighbors regarding land use were handled through the common law tort of nuisance, which dates back to medieval England. Most broadly, a "nuisance" consists of a "non-trespassory invasion of another's interest in the private use and enjoyment of land." Accordingly, an aggrieved (typically residential) landholder could bring a private cause of action seeking compensation or an injunction against the allegedly unneighborly use, i.e. a gas station, factory, funeral parlor, etc. While the use of this tort for purposes of resolving land use conflicts has largely been displaced by zoning ordinances (which supersede the common law), the tort of nuisance remains good law, and thus an available remedy if zoning ordinances were repealed.

In short, there is no reason to believe that the repeal of zoning would have disastrous consequences. In fact, there are at least as good grounds for supposing that there would be net benefits. The fact that zoning persists,

without substantial controversy, simply testifies as to how difficult it will be in our lifetimes to realize anything even remotely resembling the libertarian vision.