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Unlocking Innovation & Opportunity

Legislative Exits from the Land Use Labyrinth

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Introduction

In every American city, a labyrinth of rules determines the types and locations of permissible construction. These laws and regulations limit housing supply and increase housing costs. In this paper, we examine the current judicial standards that permit localities to restrict development without consideration for the costs of land use regulations; we then describe several potential legislative solutions available to state and local policymakers.

What do we mean when we refer to land use restrictions? We mean minimum lot size requirements, parking requirements, bans on multifamily housing (ranging from bans on duplexes to bans on apartment buildings), and other restrictions that limit housing construction and drive up prices. Such residential land use restrictions strain household budgets because they limit the stock of affordable housing.

Home prices will spike as regional demand for housing increases if local land use rules prevent housing construction from keeping pace with consumers' preferences. Housing construction is ultimately driven by supply and demand. However, the incongruity between home prices and construction costs is a relatively recent phenomenon. Starting in 1985, house prices started rising markedly faster than the cost of construction might suggest.[1] Today, nearly half of households that rent are housing cost burdened, meaning that they spend more than 30 percent of their income on rent.[2] Low-income people living in high-cost cities bear the most direct costs of land use regulations.[3] Insufficient housing supply and accompanying high prices are even contributing to high and rising homelessness rates in the most expensive states.[4]

The best solution to the problem of housing affordability is letting people build more of it; this puts more housing on the market and pushes down housing prices. One study finds that the construction of a large new apartment building lowers rents in the immediate area by five to seven percent.[5]

Land use restrictions have broad effects. Limiting the amount of housing that can be built near the most productive labor markets restricts the number of people who can benefit from local employment and educational opportunities. In turn, land use regulations limit economic output[6] and income mobility.[7]

One contributing factor to this problem that we describe below is that the United States Supreme Court has interpreted the Constitution to the detriment of private property owners. Residential land use restrictions limit what a property owner can do with property that he or she owns. Even though

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[1] Joseph Gyourko and Raven Molloy, *Regulation and Housing Supply*, *in* Handbook of Regional and Urban Economics, 1291-2. (Gilles Duranton, J. Vernon Henderson, William C. Strange, ed., vol. 5 2015).
[2] Joint Center for Housing Studies of Harvard University, *The State of the Nation's Housing* (Marcia Fernald, ed.).
[3] Sanford Ikeda and Emily Hamilton, *How Land-Use Regulations Undermine Affordable Housing* (Mercatus Center, Nov. 4, 2015).
[4] Chris Glynn, Thomas H. Byrne, and Dennis P. Culhane, *Inflection Points in Community-Level Homeless Rates* (Working Paper, 2018).
[5] Brian J. Asquith, Evan Mast, and Davin Reed, *Supply Shock Versus Demand Shock: The Local Effects of New Housing in Low-Income Areas*, (Upjohn Institute, Working Paper, Dec. 2019).
[6] Salim Furth, *New Urban Econ Research Shows the Macroeconomic Benefits of Big Cities* (Mercatus Center, May 12, 2020).
[7] Peter Ganong and Daniel Shoag, *Why Has Regional Income Convergence in the U.S. Declined?*, J. of Urban Econ. 102 (2017).

property rights are constitutionally protected[8]—indeed, their protection was of paramount concern to America's Founders[9]—the courts have not always given great weight to these constitutional guarantees. Therefore, if policymakers wish to seriously address this problem, they must take the reins.

Given these dynamics, we evaluate some reform options that offer cause for hope. Arizona's Proposition 207 is a bright spot. Arizona law requires proportional compensation in the event of diminution of value caused by post-enactment regulation. This requires the public to bear the costs of the measures their representatives enact, rather than letting those representatives hand those costs off to small numbers of private citizens. We alsopoint to other reforms that state and local policymakers have implemented to increase development rights, address the costs of existing land use regulations, and improve housing affordability.

I. Why Judicial Relief Is Unlikely To Redress Lost Development Rights

When most people think about government takings of property, they imagine eminent domain—the process in which the government announces its intent to take private property and then deposits money to guarantee payment of just compensation. Assuming that the compensation is "just" and that the intended use is truly a public use, the matter is closed. But property owners are more likely to discover that government is taking their property by other means than this formal condemnation procedure. The government can also take private property through regulations that prohibit property owners from using, selling, or building on their land.[10] Although these regulations do not result in the taking of title, they limit the owner's right to use his land. In other words, they affect property rights so much that they create a taking.

In discussing these "regulatory takings," courts have often said that the property owner is only entitled to compensation when a regulation goes "too far."[11] But how far is too far? The rules governing these cases have proven vexing.[12] The U.S. Supreme Court has even admitted, "In 70-odd years of succeeding 'regulatory takings' jurisprudence, we have generally eschewed any 'set formula' for determining how far is too far, preferring to 'engag[e] in . . . essentially ad hoc, factual inquiries.'"[13]

There is at least one bright-line rule. A land use restriction is unconstitutional when it denies a property owner of "all economically beneficial or productive use of land."[14] This is often referred to as a "total taking," because the restriction destroys all development opportunities or all economic value.[15]

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[8] U.S. Const. Amend. V.
[9] Most Americans at the time of the Founding owned and lived off their land. 80% made their living off agriculture. Nor were they meager landowners. The typical farm was larger than 100 acres. Paul J. Larkin Jr., *The Original Understanding of "Property" in the Constitution*, 100 Marq. L. Rev. 1, 4, n.12 (2016).
[10] *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538-42 (2005).
[11] *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).
[12] *See* R.S. Radford, Luke A. Wake, *Deciphering and Extrapolating: Searching for Sense in Penn Central*, 38 Ecology L.Q. 731, 732 (2011).
[13] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992) (quoting *Penn Central Transp. v. City of New York*, 438 U.S. 104, 124 (1978).
[14] *Lucas*, 505 U.S. at 1015.
[15] Luke A. Wake, *The Enduring (Muted) Legacy of* Lucas v. South Carolina Coastal Council: *A Quarter-Century Retrospective*, 28 Geo. Mason U. Civ. Rts. 1, 5-7 (2017) (examining the split in authority between jurisdictions

But most regulatory taking claims fall outside this narrow rule.[16] Often, local governments evade a "taking" by leaving a homeowner with a token value. In other words, the land use restriction deprives an owner of a fraction of the property'svalue, but not all of it. For example, a city maypass a law banning any rentals shorter than 30 days or enforce draconian rules on short-term rentals that have most of the impact of a ban in practice. Bothof those regulations place a serious burden on owners who would like to offer visitors an affordable alternative to local hotels. They may take away the property owner's ability to pay the mortgage. They also deprive a property owner of a fraction of the property's value. Whether it is 10 percent or 90 percent, the question remains: is the loss compensable?

Courts review cases like these under the amorphous balancing test set forth by the U.S. Supreme Court in Penn Central Transportation Co. v. City of New York; this test instructs courts to consider several factors, including (1) the economic impact of the contested restriction; (2) the owner's investment-backed expectations; and (3) the character of the government's conduct.[17] But because the U.S. Supreme Court has balked at explaining how these factors work in practice, no one really knows what these factors mean or how they should be weighed.

Penn Central's three-factor test has been described as the "polestar" of regulatory takings jurisprudence.[18] But here we are, four decades later, and the Supreme Court has yet to offer much guidance on how judges should approach the factors or on whether any single factor is dispositive. The Supreme Court itself has acknowledged its own lack of guidance on multiple occasions.[19] Scholars frequently disagree on how the courts should approach takings cases; analysts across the spectrum agree that Penn Central provides no judicially manageable standard,[20] lacks both structure and justification,[21] and destabilizes the law.[22] These "cryptic and convoluted"[23] regulatory takings rules result in such intense confusion among the lower federal courts and state courts that it is not much of an exaggeration to say that the government always wins by default. The result: fewer than 10 percent of regulatory takings claims are successful in state or federal courts.[24]

How do the lower courts review regulatory takings claims and apply the Penn Central factors? Most courts don't engage in any balancing—where more evidence about one element may offset lesser

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holding that *Lucas* requires the claimant to demonstrate loss of all residuary value and those holding that a claimant need only demonstrate denial of all economically beneficial losses).

[16] One study of 1,700 state and federal opinions found "only 27 cases in 25 years in which courts found a categorical taking under *Lucas*." Carol Necole Brown & Dwight H. Merriam, *On the Twenty-Fifth Anniversary of Lucas: Making or Breaking the Takings Claim*, 102 Iowa L. Rev. 1847, 1848-49 (2017).

[17] 438 U.S. 104.

[18] *Tahoe-Sierra Pres. Council v. Tahoe Reg. Planning Agency*, 535 U.S. 302, 336 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring).

[19] *Murr v. Wisconsin*, 137 S. Ct. at 1942-43; *Palazzolo*, 533 U.S. at 617; *Arizona Game & Fish Comm'n v. United States*, 568 U.S. 23, 31 (2012).

[20] Radford & Wake, 38 Ecology L.Q. at 736.

[21] John D. Echeverria, *Is the* Penn Central *Three-Factor-Test Ready for History's Dustbin?*, 52 Land Use L. & Zoning Digest 3, 11 (2000).

[22] Gideon Kanner, *"Landmark Justice" or "Economic Lunacy"? A Quarter-Century Retrospective on* Penn Central, in *Inverse Condemnation and Related Government Liability* 379, 381-382, ALI-ABA Course Study (Apr. 22-24, 2004).

[23] *Ganson v. City of Marathon*, 222 So.3d 17, 20 (Fla. Dist. Ct. App. 2016) (Shepherd, J., dissenting).

[24] *Id*. at 77, 88-89; Adam R. Pomeroy, Penn Central *After 35 Years: A Three Part Balancing Test or A One Strike Rule?*, 22 Fed. Circuit B.J. 677 (2013).

evidence of another.[25] Instead, they use a "one strike rule" and require a property owner to show all three factors.[26] Other courts have adopted their own categorical rules within the Penn Central framework.[27] Some pay only lip service to the factors.[28] But even if the courts agreed on how to consider the three factors together, questions remain regarding how to consider each of the three factors separately.

Take the first factor: economic impact. The Supreme Court in Penn Central acknowledged the need for property owners to make a "reasonable return" on their investment. But it never defined the term. Although a majority of the Justices say that courts should know a regulatory taking when they see it, at least one Justice had the forethought to note that the Supreme Court would eventually need to define "reasonable return."[29] To this day, the Court has refused to do so. We are left with the spectacle of lower courts operationalizing their own definitions. Most treat the economic impact prong as an all-or-nothing proposition, effectively rendering Penn Central (and partial takings) dead. This means that even if a property owner suffers a 91 percent reduction in value, as Janice Smyth did when the Town of Falmouth denied a permit to build a home on property she inherited from her parents, this is insufficient economic harm to receive compensation.

Consider the second factor: investment-backed expectations. In Penn Central, the Supreme Court was careful to explain that courts should examine the extent to which land use regulation interferes with the owner's "distinct" investment-backed expectations. To put it another way, the property owner's expectations were critical. But just a few years later, the Court replaced the word "distinct" with the word "reasonable."[30] Predictably, confusion reigned. The substitution of just one word led to many lower courts refusing to recognize investment-backed expectation, solely because the land use restriction was enacted before the property owner acquired the property.[31] The result is a subjective standard—courts can now consider whether the property owner's investment plans were rational, rather than simply confirming that plans existed.

This is exactly what happened to Dennis and Carol Kelleher. In 1999, they purchased an undeveloped lot in an established residential neighborhood with the intention of building a small summer home. After receiving local permit approvals, a New York agency denied the permits because it believed that the lot would provide more public benefits if it remained undeveloped. The Kellehers sued for a regulatory taking, presenting a "textbook" and "persuasive" claim showing a 98% reduction in value. But the state court held that the Kellehers lacked a reasonable investment-backed expectation; after all, the court reasoned, the Kellehers knew that the agency had the discretion to deny the land use permit at the time of their purchase. Refusing to consider any other Penn Central factor, the state court left the Kellehers uncompensated for their loss. And when the Kellehers asked the Supreme Court to hear their case to clarify the investment-backed expectation factor and how the Penn Central factors should be considered together, the Supreme Court declined.

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[25] James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 Wm. & Mary L. Rev. 35, 62 (2016).
[26] Pomeroy, at 677, 680.
[27] *See e.g.*, *Love Terminal Partners*, 889 F.3d 1331, 1343-44 (Fed. Cir. 2018).
[28] *See e.g.*, *Florida v. Basford*, 119 So. 2d 478, 481 (Fla. Dist. Ct. App. 2013).
[29] *Penn Central*, 438 U.S. at 149 (Rehnquist, J., dissenting).
[30] *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979); *see also Love Terminal Partners*, 889 F.3d at 1344 & n.3.
[31] Notably, this approach both ignores and contradicts the Supreme Court's ruling in *Palazzolo*, that acquisition of property after the allegedly unconstitutional land use restriction was applied to it is not categorically fatal to a taking claim. 533 U.S. at 626-27.

As far as the third factor goes—that is, the character of the government's conduct—no one really knows what this means, let alone how it factors into the analysis. But here's what attorneys, scholars, and jurists know for sure: the result in regulatory takings cases is that, more often than not, government defendants win and the property owner is left with the (frequently catastrophic) cost.

The continued "vexing" questions surrounding regulatory takings need to be resolved. But for reasons that only the Justices can answer, the Supreme Court has largely refrained from explaining how its "ad hoc" factors work. This lack of guidance is not for lack of cases. Each term, the Supreme Court is presented with numerous opportunities to elaborate on and clarify how the test should be applied. And each term, the Supreme Court refuses to enter the fray. This term, it refused to enter the field, despite the objections of Justice Thomas; he noted that the Court's "regulatory takings jurisprudence leaves much to be desired" and explained that "it would be desirable for [the Court] to take a fresh look at our regulatory takings jurisprudence."[32] Until the Supreme Court provides much-needed clarification, property owners will continue to suffer (and remain uncompensated for) even the most egregious takings.

A question remains: What can we do about it? The most promising answer lies with a central aspect of our country's unique federal system and its detailed checks and balances: the legislative branch.

II. Potential Legislative Reforms: Options for Protecting Property Rights and Promoting Housing Affordability

Property owners in most states lack recourse when new land use regulations restrict their development rights. The risk to property owners of uncompensated regulatory takings is not the only problem under the status quo; land use restrictions that hobble housing construction also contribute to widespread housing affordability problems. Housing affordability and limits on property owners' rights to build housing are two sides of the same coin. State and local land use regulations (primarily the latter) limit how much housing can be built while increasing its cost. Rules that restrict development rights reduce property values where denser development would otherwise be built; in turn, those rules increase housing costs. In this section, we offer solutions both to protect property owners from future regulatory takings and to improve opportunities for homebuilders to provide more lower-cost housing relative to what is possible under the status quo.

A. Tool No. 1: Comprehensive Property Fairness Reform

As discussed above, current judicial standards provide relief only when the government's regulatory taking is permanent and reduces property value to zero. This leaves property owners vulnerable to partial (and uncompensated) regulatory takings. But state policymakers have an opportunity to protect property owners from uncompensated regulatory takings—including those that do not reduce the property's value to zero or that are temporary in time. Arizona offers a proven model.

In 2006, Arizona residents took to the voting booths and passed the Property Ownership and Fairness Act—a law which protects private property owners from uncompensated regulatory takings. Specifically, the law requires the government to pay private property owners when: (1) a regulation takes away a preexisting property right, (2) a regulation as applied to a particular piece of property reduces the property's value, and (3) the regulation does not protect public health and

[32] *Bridge Aina Le'a v. Haw. Land Use Comm'n*, _ U.S. _ (Feb. 22, 2021) (Thomas, dissenting).

safety.[33] It also provides a swift, simple administrative process for property owners to seek just compensation without the need for attorneys or lawsuits. Because property owners cannot use the law to seek compensation for regulatory changes unless new rules take away property rights, they cannot use it to seek compensation for rules that liberalize land use—whether or not an "upzoning" reduces property values.

If a city passes an ordinance that takes away property rights and reduces a property's value—even if it does not eliminate it—the Act allows a property owner to file a claim by sending the city a letter requesting compensation. The city has 90 days to decide if it will repeal the regulation and restore the property rights or if it will pay the owner just compensation for the reduction in property value. If the city opts to do neither, then the property owner can sue the city in state court and assert a takings claim. If the court finds that the regulation did in fact reduce the property value by the given amount and does not genuinely protect public health and safety, then the court will order the city to pay them just compensation.

This differs greatly from the current judicial standard applied by federal courts and nearly all other state courts[34] which follow Penn Central—a standard which allows state and local governments to pass measures that can reduce private property values to almost zero without being required to provide any compensation at all.

The Property Ownership and Fairness Act is a principled, practical solution that strikes a fair balance. It allows government to bar property uses that threaten public health or safety, but it also bars officials from making property owners bear the cost when land-use restrictions go beyond what is necessary to protect the public. For example, Phoenix policymakers issued a development moratorium for land near Luke Air Force Base that would have reduced the value of existing single-family homes by 50 percent and undeveloped lots by 95 percent. When faced with the prospect of compensating property owners for the losses in value, Phoenix abandoned its plans.[35] In Tempe, policymakers abandoned a proposed historic district when it became clear that the government would have to pay the district's property owners for their lost development rights. And in Tucson, policymakers—recognizing the state law compensation requirements—rejected resident requests to downzone areas near the University of Arizona, which would have prevented private property owners from building relatively low-cost apartments for students.

So far, the law's primary effect has been to prevent local policymakers from pursuing widespread changes in land use ordinances that would limit development rights, reduce land prices, increase housing costs, and require costly compensation. Critics of the Act argued that "these laws interfere with the ability of governments to regulate land use for the public good."[36] However, in states other than Arizona, local policymakers tend to consider only the benefits of land use restrictions—generally the benefit of maintaining the status quo—in isolation from higher housing

[33] For example, localities that adopt new building code restrictions intended to promote fire safety that also limit development feasibility and reduce land values would not require compensation for property owners. See Christina Sandefur, *The Property Ownership Fairness Act: Protecting Private Property Rights* (Goldwater Institute, Feb. 2016).

[34] Florida's Harris Act offers property owners some of the protections of Proposition 207, but it is much more limited. Under the Harris Act, property owners are only entitled to compensation for restrictions that do not diminish the rights of all owners of similar property.

[35] Sandefur, *The Property Ownership Fairness Act: Protecting Private Property Rights*.

[36] Jeffrey L. Sparks, *Land Use Regulation in Arizona After the Property Rights Protection Act*, 51 Ariz. L. Rev. 211 (2009).

costs as well as from the cost of fewer people being able to live and work in the location of their choice. Legal scholars Roderick J. Hills Jr. and David Schleicher explain the political economy of land use decisions that underweight the benefits of development rights:

> "The sides in virtually all land-use disputes are the same. On one side are incumbent property owners seeking to limit or stop new development. On the other are renters, future residents, and—crucially—developers. When zoning decisions are made seriatim, and particularly when individual developers have no existing interest in downzoned land, this is hardly a fair fight. The benefits of new development are dispersed both geographically and across many individuals. In contrast, the costs are concentrated on neighbors who have a great deal invested in the outcome of land-use decisions."[37]

Arizona's law requires local policymakers to weigh the benefits of restricting development against the costs—costs that are reflected in the loss of property values following downzonings. By protecting property owners' development rights, the Act has also reduced the feasibility of downzonings that would have harmed housing affordability for Arizona's current and prospective residents. If residents value new land use regulations enough to pay for them, local policymakers will have the political support needed to use tax revenues to compensate property owners for potential partial regulatory takings.

Having a law like Arizona's would likely have prevented recent downzonings in locations where housing costs are high and more housing is badly needed. For example, under the Bloomberg Administration, New York City policymakers significantly amended zoning rules to allow more development along commercial corridors, but less development in lower density areas where small, infill projects were being built.[38] If the State of New York had a law similar to Arizona's, upzonings would still be feasible, but downzonings like New York City's that reduce property value, dampen housing construction, and harm affordability would be unlikely. This is because such decisions would require a large outlay of tax revenue to property owners facing takings-related losses.

Arizona is not the only state that has enacted comprehensive regulatory takings reform, but it is the only one that has had lasting success. A few years before Arizona passed its Property Ownership Fairness Act, Oregon voters passed Measure 37, which allowed private property owners to seek compensation for any land use restriction that reduced their property value at any time during their ownership. This differed from Arizona's law, which requires a property owner to file a claim within three years after the land use restriction is first applied to the property and only applies to local land use regulations implemented after the state law was passed. Measure 37 opened the floodgates; Oregon saw 7,000 claims filed in three years.[39] In all but one case, local policymakers reversed their downzonings rather than compensate landowners. Although private property owners in each of those cases were likely pleased by this outcome, this explosion of claims proved politically untenable. Three years later, Oregon voters approved Measure 49, which offered some protections for development rights but repealed the requirement for governments to compensate property owners

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[37] Roderick J. Hills Jr. and David Schleicher, *Balancing the 'Zoning Budget,* Regulation (Fall 2011).
[38] Vicki Been and Simon McDonnell, *How Have Recent Rezonings Affected the City's Ability to Grow?* (Furman Ctr. for Real Estate & Urban Policy, Policy Brief Mar. 2010); *see also* Sarah Laskow, *The Quiet, Massive Rezoning of New York*, Politico, Feb. 24, 2014.
[39] William Fischel, Zoning Rules! The Economics of Land Use Regulation 250 (2015).

for all partial regulatory takings—leaving the problems discussed above with *Penn Central* in place and leaving many property owners without recourse.[40]

B. Tool No. 2: State Preemption of Local Land Use Restrictions

Arizona's reform demonstrates the potential of property owner protections that require local taxpayers to cover the cost of land use restrictions that limit housing construction and cause affordability problems. Its Act makes future widespread downzonings unlikely to pass going forward. But it does not provide a direct path to repealing existing land use restrictions that limit housing construction and contribute to expensive prices in high-demand locations. State legislatures can address this problem with preemption statutes—state laws that require local policymakers to repeal specific types of zoning rules and prevent them from being implemented in the future.

As "creatures of their states," localities get their authority to regulate land use from state police powers, and state policymakers set the guidelines that shape this local authority. A recent Massachusetts reform demonstrates the role that state policymakers play in shaping local land use policy. That reform dropped the required vote threshold for local land use reforms from a two-thirds majority to a simple majority. Given the role that state law plays in shaping land use institutions, state policymakers don't have the option to take a neutral stance on zoning.

Single-family zoning is one of the most restrictive—and most prevalent—residential land use rules. Under single-family zoning, a property owner can only build one house per lot. Such zoning restricts development to one of the most expensive housing formats. For example, a developer may want to build duplexes on a tract of land and sell each unit for $150,000. Under single-family zoning, however, the developer can only build one house and sell that for, say, $250,000. The regulations standing in the way of building denser housing have real individual and public consequences. First, they reduce the value of the private property. Second, they reduce not only overall housing supply, but specifically prevent lower-cost units. Property owners and homebuilders routinely encounter profit incentives to build denser, lower-cost housing, but zoning rules stand in their way.

Economists have referred to the difference between the cost of building housing and house prices as the "zoning tax," the portion of house prices that reflect scarcity due to regulatory constraints. An estimate using data from 1999 found that about half of the cost of housing in the San Francisco Bay Area was due to the zoning tax.[41] At the time, the study found that the zoning tax contributed more than $200,000 to average house prices, and prices have risen steeply since then.

Through preemption, state policymakers can restore development rights to landowners and improve conditions for housing affordability. In 2019, Oregon became the first state to preempt single-family zoning for all of its localities with 10,000 residents or more.[42] Oregon state law now requires local governments to allow (at least) duplexes; in the Portland area, the law requires the possibility of fourplexes on each lot zoned for residential development.[43] Oregon's law provides a model ordinance that localities can use to permit this development in lieu of single-family zoning.[44] It has

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[40] *Id*., 257.
[41] Edward L. Glaeser, Joseph Gyourko, and Raven Saks, *Why Is Manhattan So Expensive? Regulation and the Rise in House Prices*, (Nat'l Bureau of Economic Research, Working Paper No. 10124, Nov. 2003).
[42] H.B. 2001, 80th Gen. Assemb., Reg. Sess. (Or. 2019).
[43] *Id*.
[44] Oregon Land Conservation and Development Department, Chapter 660 Division 46, Middle Housing in Medium and Large Cities.

become a model for bills in other states, including California,[45] Washington,[46] Nebraska,[47] Virginia,[48] and Maryland,[49] although no other state legislature has passed a single-family preemption bill so far. State bills that advance new reforms often take time to pass, and it's likely that other states will adopt something similar to the Oregon model in the coming years. [50]

Preemption laws are not limited to preventing single-family zoning. Many local governments ban homeowners from building accessory dwelling units (ADUs), which can take the form of backyard cottages, basement apartments, or garage conversions. ADUs often provide some of the lowest-cost housing available within a given neighborhood. In Washington, DC, for example, basement ADUs tend to rent for hundreds of dollars less per month relative to units in nearby apartment buildings.[51] Recognizing the benefits of ADUs for homeowners and tenants, multiple states have passed laws preempting local bans on ADUs in an effort to improve affordability by making more housing construction feasible, including California, Washington, and New Hampshire.[52]

Legal scholar John Infranca explains the benefits of the approach of these recent state-level efforts to increase housing supply and improve affordability:

> "Interventions that displace, rather than simply channel, local land use decision-making can, perhaps paradoxically, better serve to vindicate valid local interests. Although these interventions limit the discretion and range of options afforded local governments, they do so through legislative action setting clearly defined parameters for local zoning and acceptable deviations from state regulation, rather than leaving local decisions subject to an uncertain administrative appeal process or a vague standard."[53]

C. Tool No. 3: Local Zoning Reform

State preemption laws are an important tool, but their success may require local policymaker buy-in. In 1982, California policymakers first enacted a law[54] intended to permit ADUs across the state. But many local policymakers wanted to thwart state policymaker intentions, so they imposed and enforced minimum lot size rules, siting restrictions, parking requirements, and impact fees for those property owners who wanted to build ADUs.[55] In other words, they got creative to work around the state law. Today, Los Angeles policymakers have embraced state laws intended to make ADU construction feasible, and as a result the city is permitting thousands of ADUs annually.

Due to the geographically localized benefits and dispersed costs of land use restrictions, state preemption is sometimes more politically feasible than local reform; however, reforms implemented

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[45] S. B. 50, 2019–2020 Reg. Sess. (Cal. 2018).
[46] S. B. 6536, 2019—2020 Reg. Sess. (Wash. 2020).
[47] L. B. 794, 2020 Reg. Sess. (Neb. 2020).
[48] H. B. 151, 2019—2020 Reg. Sess. (Virg. 2020).
[49] H.B. 1406, 2020 Reg. Sess. (Mar. 2020).
[50] H. B. 341, 2021 Reg. Sess. (N.H. 2021).
[51] Jennifer Barger, *How to Rent Your Basement in DC*, Washingtonian, Aug. 13, 2015.
[52] John Infranca, *The New State Zoning: Land Use Preemption Amid a Housing Crisis*, 60 B. C. L. Rev. 823 (Mar. 28, 2019).
[53] *Id*.
[54] 1982 Cal. Stat. 5484, ch. 1438.
[55] Chris Elmendorf, *Beyond the Double Veto: Housing Plans as Preemptive Intergovernmental Compacts*, 71 Hastings L.J. 79 (2019).

by local policymakers may be more effective than state efforts to liberalize local land use policy. But what should local reform look like? Houston provides one model. The Houston region is well-known for permitting extensive greenfield development at its urban fringes. In addition to permitting this development at its outskirts, Houston has made some reforms to ease infill densification. In 1999, city policymakers reduced its functional minimum lot size requirement for housing from 5,000 square feet to 1,400 square feet.[56] This allowed owners of lots that are 5,000 square feet or larger to subdivide their lots to build three houses where only one would have been allowed under the previous rules. As a result, tens of thousands of townhouses have been built. In spite of rapid population growth in recent decades, Houston's median house price is below the national median because of local rules that have permitted housing construction to respond to increasing demand.[57]

Houston policymakers have made progress in other areas as well; for instance, they have taken important steps to reduce parking requirements.[58] In places where land is expensive, parking requirements are a huge driver of construction costs. In some cases, building the required parking alone makes up more than $100,000 of the cost of buildinga new apartment unit.[59] Policymakers in many cities across the country have made reforms to downtown parking requirements in recent years, and a few have eliminated parking mandates entirely.[60] Leaving parking provision to the market opens up more opportunities for lower-cost construction.

Houston is not the only city taking action. As compared to other high-income coastal regions in the U.S., the DC region is relatively permissive with development rights, particularly with regard to transit-oriented multifamily development. Ahead of the arrival of new stations on the Washington Metropolitan Area Transit Authority's Orange Line, Arlington County adopted zoning reforms permitting dense development around the new transit stops. More recently, the Fairfax County Board of Supervisors adopted a plan to permit a large increase in its stock of multifamily housing in the area around some of its new Silver Line stations. Increasing development rights was not without controversy, but no supervisors lost reelection bids following this reform.[61] Since 2010, real rents have fallen in the DC region, in part due to its relative openness to multifamily construction.[62]

In 2019, Minneapolis policymakers made headlines by becoming the first large city that adopted single-family zoning to eliminate it. Reforms to its zoning ordinance now permit triplexes to be built where only single-family houses were originally permitted; these reforms allow three households to share the cost of land that would otherwise have to be borne by one household. However, the Minneapolis experience shows that the devil is in the details for this kind of incremental development. Minneapolis still has rules on the books that limit the height of triplexes and how

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[56] M. Nolan Gray and Adam A. Millsap, *Subdividing the Unzoned City: An Analysis of the Causes and Effects of Houston's 1988 Subdivision Reform*, J. of Planning Educ. & Research (July 2020).
[57] Zillow, "Houston Home Values."
[58] Erica Grieder, *Houston's Expansion of Market-Based Parking is a Step Toward a More Walkable City*, Houston Chronicle, July 23, 2019.
[59] Donald C. Shoup, The High Cost of Free Parking (Chicago: American Planning Association, 2011).
[60] Joe Linton, *L.A. Proposes Eliminating Parking Requirements Downtown,* Streetsblog LA, (Oct. 31, 2019).
[61] Emily Hamilton, *The Politics of Redevelopment Planning in Tysons and Outcomes 10 Years Later*, (Mercatus Center, Working Paper, July 13, 2020).
[62] Salim Furth, *Housing Supply in the 2010s*, (Mercatus Center, Working Paper, Feb. 14, 2019).

much of their lot they may cover.[63] So far, these remaining restrictions appear to slow the rate of triplex permitting.

In some cases, current local zoning restrictions represent the loudest voices opposed to development, rather than the majority of a locality's residents. The Houston, Northern Virginia, and Minneapolis cases show that land use reform that increases property owners' development rights and permits more lower-cost housing to be built can be politically feasible.

Conclusion

Local land use restrictions present two key problems. First, in all states except Arizona, property owners face the risk that new land use restrictions will reduce their asset value and they will have no way to receive compensation for that loss. The Penn Central balancing test fails to provide clarity. Lower courts have generally held that long as regulations leave any economic value in the property at all, local policymakers have the authority to limit land uses without providing compensation for losses or considering the economic cost of these rules.

Second, land use restrictions limit development generally and housing construction in particular. These restrictions have direct consequences for households in supply-constrained cities. They drive up the cost of housing and place the most serious costs on the lowest-income households. Further, these rules constrain occupancy in some of the country's most productive regions, limiting economic opportunity and income mobility as a result.

Arizona's Property Ownership and Fairness Act provides property owners with some degree of security: if future land use restrictions hurt their property values without providing a health or safety benefit, they can seek compensation. Arizona's experience with this law also shows that it reduces the likelihood of future downzonings, preventing housing supply constraints that cause affordability problems from metastasizing. However, improving housing availability and affordability from its current baseline requires a different approach: policymakers should repeal the rules on the books that limit the amount of housing that can be built, particularly low-cost housing. Fortunately, states and cities across the country offer potential models that will expand housing supply and affordability.

[63] Emily Hamilton, *Want More Housing? Ending Single-Family Zoning Won't Do It*, Bloomberg CityLab (July 29, 2020).