Lessons from Luminaries of Land Law: Latest and Greatest Decisions

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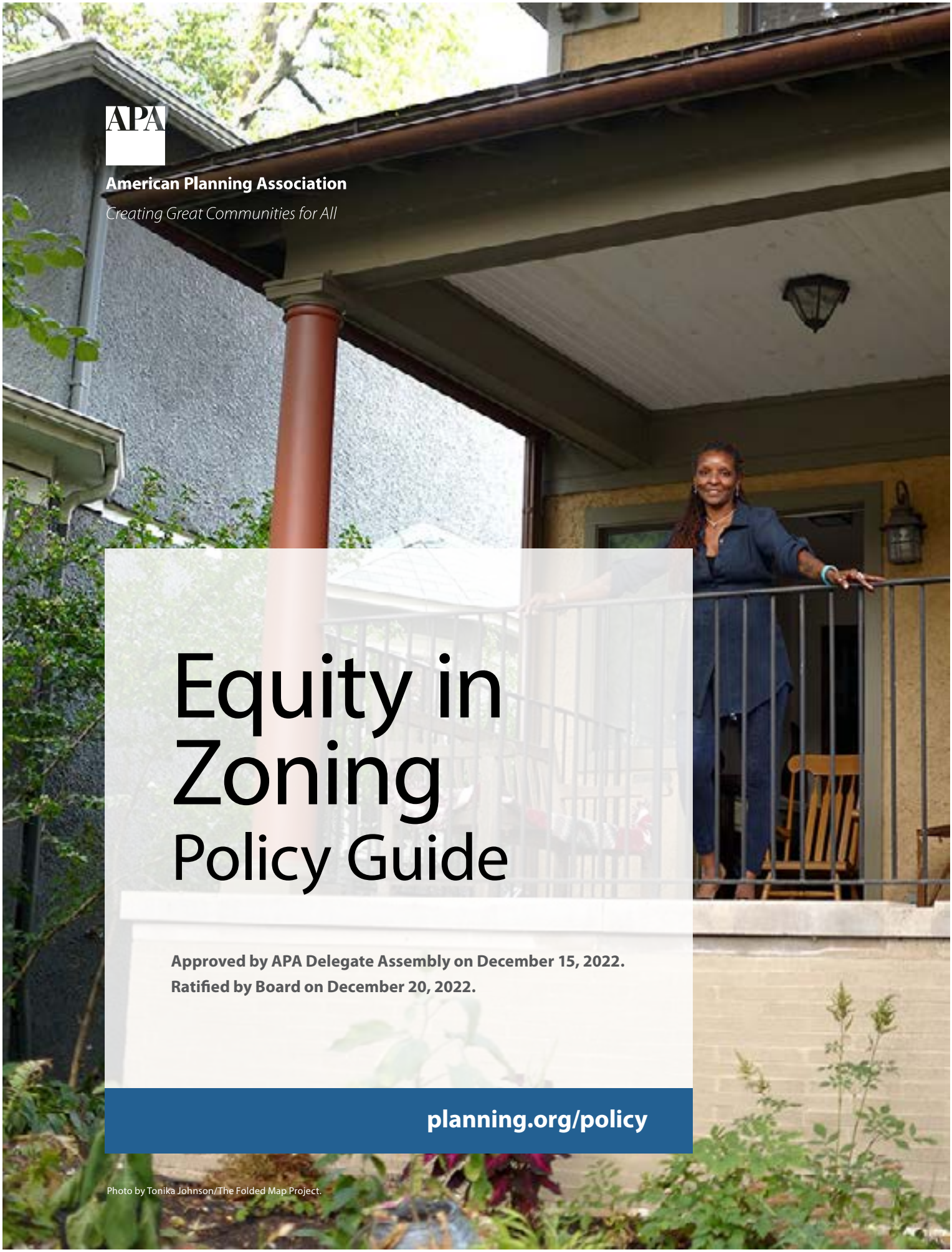

American Planning Association

Creating Great Communities for All

Equity in Zoning Policy Guide

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planning.org/policy

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Introduction and Overview

1.1 Goals of the Policy Guide

In 2019, after an inclusive two-year effort by its members, the American Planning Association (APA) adopted its Planning for Equity Policy Guide, which articulates the organization's advocacy positions on that topic. That Policy Guide reviews the pervasive impacts of both overt and unintended planning practices that result in racial, ethnic, gender, mobility-based, and ability-based bias and exclusion in many plans and policies adopted by local governments throughout America. It also reviews the complex web of institutional practices beyond the planning profession that reinforce the inequitable outcomes of these practices, and the ways in which they collectively disadvantage large segments of the American public. It addresses the serious lack of diversity and inclusion in the planning and zoning professions, along with the role and responsibility of planners to undo the unfairness woven into many current planning practices. Every planner, planning official, or elected official interested in making their communities more equitable should carefully read and follow that Policy Guide and implement its recommendations.

In addition, APA has adopted recent Policy Guides that set forth its advocacy positions on Hazard Mitigation (2020), Climate Change (2020), Housing (2019), Surface Transportation (2019), and Healthy Communities (2017), each of which recommends changes that would improve equitable practices and outcomes in our profession.

This Policy Guide does not repeat and restate any of that work, but builds on it and focuses on the ways in which planning bias is reinforced and implemented through zoning. Equitable planning is essential to

> **"The goal of this Policy Guide is to identify specific ways in which the drafting, public engagement, application, mapping, and enforcement of zoning regulations can be changed to dismantle the barriers that perpetuate the separation of historically disadvantaged and vulnerable communities."**

eliminate those zoning and design regulations that disproportionately burden Black, Latino/a/x, Tribal, Indigenous, and other communities of color, older adults, persons experiencing disabilities, persons of different national origins or religious faiths, and the lesbian, gay, bisexual, transgender, queer/questioning, intersex, and asexual/ally (LGBTQIA) community — which are often referred to in this document as "historically disadvantaged and vulnerable" communities and individuals. Where zoning rules or

procedures have a particularly negative impact on one or more of the communities included in that phrase, they are sometimes identified separately.

This work is also necessary because in many states plans are only advisory, while zoning is the law. Even in those states that mandate comprehensive or land use planning and require that zoning be consistent with those plans, there is always a gap between the aspirational language of the plan and what parts of that vision become the law governing development and redevelopment of property.

The goal of this Policy Guide is to identify specific ways in which the drafting, public engagement, application, mapping, and enforcement of zoning regulations can be changed to dismantle the barriers that perpetuate the separation of historically disadvantaged and vulnerable communities. While acknowledging the importance of dramatic changes in plans and policies, this Policy Guide focuses on identifying and removing those (often facially neutral) zoning laws and regulations that implement and perpetuate inequitable planning policies. This includes addressing "Redlining," which has historically been used to disadvantage many racial and ethnic groups, including persons of Asian, Mexican, and Japanese ancestry, and that continues to be particularly harmful to the Black community. It sets forth APA's advocacy positions to improve equity in zoning and calls on all practicing planners, planning officials, and elected officials to support these positions. History shows that efforts to protect disadvantaged and vulnerable Americans often produce broad (and sometimes unexpected) benefits to our communities as a whole.

Throughout this document, we use the term "city" to include other forms of municipal government such as villages and towns, and we use the term "county" to include other forms of sub-county governments created by state law, as each of those terms is defined in the applicable state law.

The case for state and federal intervention on zoning reform

Zoning reform is a local responsibility; however, both state and federal governments should exercise their authority to promote local planning efforts and empower community planners to overhaul exclusionary regulatory barriers to housing choice and production when possible.

APA urges states to review and update enabling statutes for zoning and housing policies. APA chapters are working closely with state legislatures to do so.

APA urges Congress to pass bipartisan bills like the Housing Supply and Affordability Act which would enable planners to reform zoning, create housing action plans, and put plans into action with dedicated planning and implementation grants.

1.2 The Need for Local, State, and National Action

Because most zoning decisions are made by local governments, this Policy Guide focuses on actions that could and should be taken by city and county governments to improve the equity of their zoning systems. However, local zoning authority sometimes operates within a regional governance structure, and in those cases the changes recommended in this document are addressed to those regional entities as well.

More importantly, local zoning authority almost always operates within the limits established in state constitutions and zoning enabling legislation. In many cases, the changes recommended in this Policy Guide would be accelerated if state governments acted to prohibit the exclusionary use of zoning powers, and some states have already moved in that direction. While some of the recommendations may not be legal in some states today, zoning enabling acts can and, in many cases, should be changed. Amending state zoning legislation to reduce or prohibit exclusionary residential zoning would be particularly helpful. In addition, or as an alternative, states could offer financial incentives or condition access to other state funds on local government implementation of some or all these recommended changes.

The federal government also has an important role in promoting more equitable zoning. Congress should authorize the U.S. Department of Housing and Urban Development (HUD) to take a closer look at the exclusionary and discriminatory zoning rules of those local governments to which it allocates funds, and to condition receipt of HUD funds on actions taken to remove the barriers to equitable housing and economic opportunity identified in this Policy Guide. Congress should also allocate additional funds to help local governments revise their local zoning controls and should incentivize local efforts to better align land use, transit, housing, and jobs—particularly in historically disadvantaged and vulnerable neighborhoods.

1.3 Cross-Cutting Issues That Compound the Impacts of Zoning

Before focusing on how to make zoning more equitable, it is important to acknowledge the many systems that reinforce discrimination and systems of privilege, and that thwart better opportunities and outcomes for many American households. The intertwined impacts of these systems all tend to compound the unfair intended or unintended impacts of zoning—and will continue to do so even if zoning is "fixed." While fairer, more inclusive zoning alone cannot end systemic racial and ethnic segregation, prevent the erosion of cultural communities that wish to remain intact, or dismantle long-established systems of privilege, it can be used as a tool to help achieve all those goals. Because zoning is law, many other financial and economic institutions point to and use existing zoning as the reason they cannot or need not reform their own practices. Fixing zoning can promote broader change to reduce the human costs and impacts of racist and exclusionary practices throughout the economy and the nation.

A. Lack of Diversity in the Profession

Like other parts of the planning profession, the drafting, application, mapping, and enforcement of zoning regulations remains an overwhelmingly white and largely male occupation. Most of the people determining what types of development are allowed in different parts of the community often have little experience living or working in historically disadvantaged and vulnerable communities, and little understanding of how zoning might impact them differently. Members of these communities remain significantly underrepresented in all

Congress funds new 'YIMBY' Grants for Zoning Reform

As part of its sweeping omnibus spending bill in 2022, Congress established a new $85 million grant program to help regional planning organizations and local governments identify and remove barriers to housing production and preservation.

Learn more about criteria and eligibilities for the new funding.

aspects of zoning practice, and until that changes many zoning rules will be drafted and decisions made without sufficient regard for the interests of those highly diverse communities. This problem is so serious that, in APA as an organization and in local planning departments, current staff and leadership may not be the best people to decide which sources of inequity to tackle and how to address them. It may be more productive to appoint a more representative group with significant representation from historically disadvantaged and vulnerable communities to make these threshold decisions. APA's Equity, Diversity, and Inclusion Steering Committee, Advisory Committee, and its population-based Divisions and Interest Groups are pursuing a number of strategies to increase the visibility of the profession and access to the profession within under-represented populations. Ideally, the local government staff, appointed officials, and consultants engaged in drafting, applying, and enforcing zoning should reflect the demographic makeup of the neighborhoods where the zoning will be applied.

B. Real Estate, Property Appraisal, and Lending Practices

For generations, portions of the real estate, appraisal, and banking industries have followed practices that favor lending to, constructing, and selling properties in whiter and wealthier neighborhoods while discouraging those activities in communities with more Black, Latino/a/x, Tribal, Indigenous, or other non-white households. The federal government has systematically supported those efforts through a variety of mechanisms, including Federal Housing Administration (FHA) regulations favoring single-household suburban housing "occupied by the same racial and social classes;" funding and locating highways and other public improvements in locations that divide Americans by income, race, or ethnicity; making it difficult or impossible for returning Black soldiers to qualify for the G.I Bill; and making mortgage interest deductible for those who were able to buy homes. While the federal government has taken some steps to mitigate some of the impacts of past decisions through legislation like the Fair Housing Act and the Community Reinvestment Act, federal support for some of these policies remains in place. Current lending and sales practices continue to make it more difficult for historically disadvantaged and vulnerable communities to access some of the increased opportunities that better zoning can create. Working together, these practices are a very distressing form of embedded racism.

C. Infrastructure and Public Facility Location and Financing

The equity and opportunity available in America's neighborhoods are heavily influenced by the location of infrastructure, streets, sidewalks, schools and pre-schools, parks, trails, and open spaces, which are largely determined not by zoning but by local government and school district

decisions about where to spend available funds and where to use eminent domain. Federal environmental justice policy prohibits denying, reducing, or significantly delaying environmental benefits to disadvantaged communities, but does affect many local government investment decisions. While developers can be required to mitigate their impacts on each of these public facilities, individual developers generally cannot be legally required to do "more than their fair share" through zoning to make up for systemic injustices of the past. Importantly, zoning generally cannot be used to force the replacement or upgrading of infrastructure or amenities unrelated to a proposed development, or to force the local government to allocate discretionary funding in specific neighborhoods.

D. Private Covenants

Many neighborhoods in America have a second level of legal protection against types of structures and land uses that they do not want to see in their neighborhoods—the restrictive covenants that buyers agree to when they purchase their homes, and that are enforced by homeowner's associations that may not share the goals of equitable zoning reform. Covenants are "private law" among property owners to which the city or county government is often not a party, and that may have been created before the land was annexed to a city. Local governments generally do not enforce restrictive covenants, and do not modify their zoning to match private covenants. Although enforced through private lawsuits, covenants can be and often are just as effective as zoning in preventing affordable housing, innovative types of housing, rental units, accessory dwelling units (ADUs), or social services from entering a neighborhood. Zoning does not have the power to rescind private covenants; that generally requires action by the homeowners subject to the covenants or by state or federal government to declare specific types of covenants unenforceable. State or federal action to prohibit the use of exclusionary residential covenants—similar to that prohibiting the use of exclusionary racial covenants -- would be particularly helpful. For all these reasons, the aims of equitable zoning reforms are often thwarted by private covenants.

E. Serious Income Disparities

One of the most important structural challenges that leads to racially or ethnically segregated communities is the fact that American law does not prohibit many forms of discrimination against low-income populations. Since a disproportionate percentage of low-income households are headed by Black people, Latinos, Tribal, Indigenous, or other communities of color, or by women, older adults, or persons experiencing disabilities, laws and regulations that tend to make land, houses and other goods more expensive have especially harmful impacts on the very groups we try to protect through anti-discrimination laws. While federal laws like the Fair Housing Amendments Act and the Americans with Disabilities Act prevent some forms of discrimination, they do not require that equivalent housing or facilities be made equally available to the poor who are not part of a protected class of citizens at prices they can afford.

As Richard Rothstein demonstrates in *The Color of Law*, when the Supreme Court invalidated overt racial zoning, many communities realized that zoning based on permitted forms of housing or minimum lot size could achieve the same result by making many neighborhoods less affordable

to less white, less abled, and less wealthy households. While originally adopted as a successor to overtly racial exclusion targeting Black and Asian people, zoning has had the effect of excluding much broader segments of the American population from many residential areas and job opportunities. Zoning cannot change the fact that anything that makes housing, education, transportation, health care, or childcare more expensive will tend to perpetuate the disadvantages faced by historically disadvantaged and vulnerable communities as well as other low-income Americans.

While zoning regulations do not grant or withhold development permission based on the race, ethnicity, color, national origin, or religious faith (and only rarely based on the gender, age, or disability) of the property owner or occupant, they often have disparate impacts based on the income of the occupant. Large lot zoning, minimum house size requirements, higher parking minimums, and higher open space requirements make property more expensive and limit the number of low-income households who can afford to use, own, or occupy neighborhoods with those benefits.

Over the last 70 years, the combination of zoning, banking, appraisal, and real estate practices, infrastructure decisions, and private covenants have tended to reinforce each other in ways that have created vast disparities in wealth and education between households headed by persons of color, women, those experiencing disabilities, older adults, and other American households. The generational impacts on education and wealth between Non-Latino White, Black, and Latino/a/x households has been particularly well documented. Zoning has been a complicit—and in some cases intentional—part of the systemic reinforcement of inequity and should be reformed to remove the rules and practices that create and perpetuate it. Zoning reform alone cannot "fix" the overlapping institutions that reinforce racism and segregation, but that is not a reason for inaction—it just highlights the importance of fixing the part of the problem that is often within local government control through better zoning regulations.

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F. The Need for Complementary Non-Zoning Solutions

Many of the impacts of zoning on historically disadvantaged and vulnerable communities can only be mitigated by actions that are not part of zoning regulations. Effective mitigation of negative zoning impacts may require, for example:

THE EXECUTION OF Community Benefit Agreements (i.e., an agreement between the developer and a community organization in which the developer agrees to provide amenities, or employment, or something else of value to the neighborhood where the development will be built);

PRIORITIZING the construction, repair, or upgrading of parks or other community amenities or infrastructure in historically disadvantaged neighborhoods;

REQUIRING developers to offer compensation for or providing a right-of-return for residents displaced by new development at prices those residents can afford;

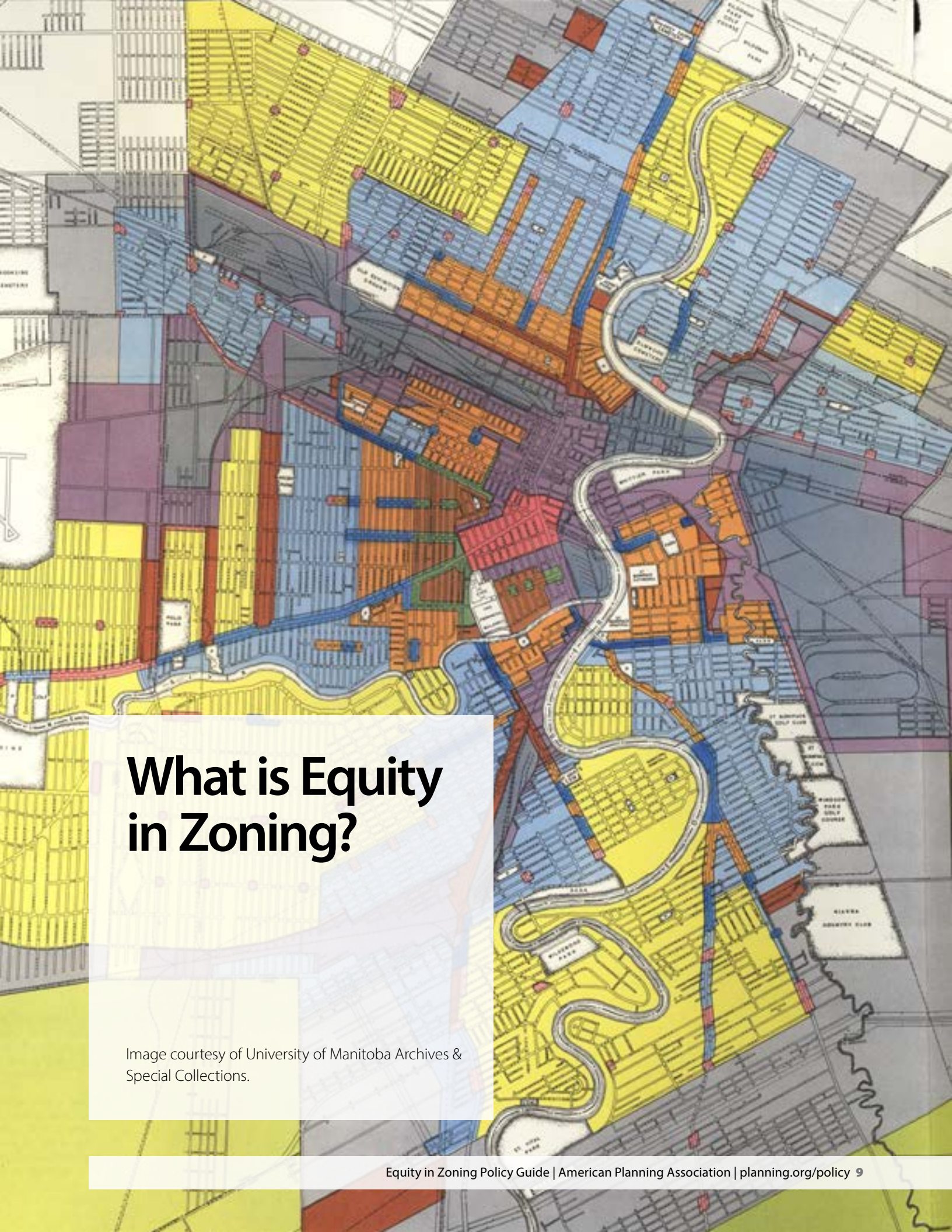
CREATING OR SUPPORTING a land bank, land trust, housing voucher, or other forms of financial support to stabilize and reinforce the existing culture and economy of a neighborhood without encouraging gentrification;

REVISING building codes to reduce barriers to needed forms of housing and investment, while still protecting public health and safety;

REDUCING OR SUBSIDING application or development impact fees for projects that improve neighborhood equity and opportunity; and

EDUCATING the public about the high community-wide costs of using zoning in ways that perpetuate segregation and discrimination.

Because the specific impacts of each development on each neighborhood are unique and typically different, it is usually difficult to agree in advance about what types of offsets or benefits need to be offered, but it does seem clear that there is a growing need for non-zoning agreements and commitments to accompany zoning actions if the equity of zoning outcomes is going to improve.



What is Equity in Zoning?

Image courtesy of University of Manitoba Archives & Special Collections.

2. What is Equity in Zoning?

At the start, it is important to define what is meant by zoning equity, and that requires revisiting the difference between equity and equality. Equality requires that everyone be given the same opportunities to participate in and benefit from a project or program. But different people have different abilities to participate in or influence zoning rules and procedures. Equal opportunity often leads to unequal outcomes, and in America those outcomes are often disproportionately felt by Black people, Latinos, members of Tribal and Indigenous groups, women, those experiencing disabilities, and other historically disadvantaged and vulnerable individuals. Equity in zoning means that those who write, administer, or enforce zoning regulations take clear steps to avoid or "undo" unfair outcomes and mitigate the unequal ability to participate in or influence all parts of the zoning process. Several of the Aspirational Principles in Section 1 of the *AICP Code of Ethics and Professional Conduct* underscore this duty, and this Policy Guide identifies specific steps to do that.

This is difficult because zoning is inherently designed to exclude. Zoning is very good at preventing individual property owners from making investments in property, building structures, or engaging in activities that the local government has decided should not occur in a certain location. While it can prevent money from being spent in ways that are not in the community's interest, zoning is much less effective in making investors build things they do not want to build or to use properties in ways they do not want to use them. Zoning can seldom force investors to invest where they do not want to invest, unless it subsidizes or incentivizes the outcome it wants. Zoning can condition approvals on the developer's willingness to do some things the community wants, but if those conditions make the investment unprofitable and the local government does not agree to make up the difference, the investor can decide to walk away.

The exclusionary nature of zoning is fact that harms historically disadvantaged or vulnerable communities more than others. As zoning is used to selectively exclude unwanted types of buildings and land uses from some neighborhoods (or to allow them in some neighborhoods while excluding them from others), some areas become more attractive to investors than others, and the same is true for residents and business owners. Those with more time to participate in the system have more ability to influence the rules, and those with more money have more ability to buy property, operate businesses, and live in the neighborhoods that best meet their needs.

Equity in zoning means that those who write, administer, or enforce zoning regulations take clear steps to avoid or "undo" unfair outcomes and mitigate the unequal ability to participate in or influence all parts of the zoning process.

2.1 Ending Disproportionate Exclusionary Impacts

To identify those specific steps to end disproportionate exclusionary impacts, this Policy Guide focuses on the substantive zoning rules that govern what can be built or not built, what activities can be conducted or not conducted, what incentives the community offers builders to build what it needs, how it drafts those rules and incentives, how it drafts maps to apply those rules, who participates in drafting the rules or changing the rules, how well they know the likely impacts of those rules and changes on their neighborhoods, how the rules are enforced, and how all of those decisions are made.

Because the Planning for Equity Policy Guide addresses the drafting and implementation of more equitable plans, this Policy Guide assumes that plans consistent with those policies are already under discussion or have already been adopted, and focuses instead on how zoning rules, maps, and procedures can be changed to implement those plans. This document identifies ways in which planners can look beyond the facially neutral text of zoning rules to focus on the disproportionate impacts of those rules on some individuals and neighborhoods, and then redraft and remap zoning to reduce those impacts.

While zoning can be revised to be less exclusive, the impacts of any changes may be very different when mapped in different neighborhoods. A change that could allow new types of housing that reduce exclusion from wealthy residential neighborhoods (for example, removing a ban on "missing middle" housing or rental housing) could open new opportunities to build the same types of housing in low-income neighborhoods, sometimes on a speculative basis, and often leading to displacement and gentrification. For that reason alone, zoning needs to be better tailored based on its human impacts in different neighborhoods and may need to include stronger anti-displacement conditions than it has in the past. It also needs to carefully consider whether each zoning change will increase or decrease opportunities or protection for historically disadvantaged or vulnerable populations.

This Policy Guide also addresses how apparently neutral zoning rules may need to be carefully tailored and mapped to avoid unintended consequences. In many cases, this will require unique zoning tools to be applied in different neighborhoods of similar size, scale, and character, opening some neighborhoods to new types of development while protecting others from the same type of development. In many cases, these

distinctions may need to be based largely on whether the change will have a positive or negative impact on those most seriously harmed by past zoning practices and decisions, and to prevent similar practices from arising in new forms in the future.

2.2 Three Kinds of Equity in Zoning

Removing the disproportionate impacts of zoning on historically disadvantaged and vulnerable communities involves close examination of three different aspects of zoning:

EQUITY IN THE "RULES" OF ZONING: *what* the substantive rules of zoning allow, prohibit, or incentivize in different parts of the community.

EQUITY IN THE "PEOPLE" IN ZONING: *who* is involved in drafting the rules and incentives, who is notified and engaged in whether to change those rules for different areas of the community, and who is involved in enforcement of the rules.

EQUITY IN THE "MAP" OF ZONING DISTRICTS: *where* the rules are applied through zoning maps and whether that reduces or reinforces exclusion and segregation in America.

Each of these topics is addressed in the next three chapters of this Policy Guide.

Advancing Zoning Reform

The policy ideas endorsed in this guide prioritize reversing and alleviating the disproportionate impacts of zoning on historically disadvantaged and vulnerable communities through three aspects of zoning: rules, people, and mapping.

The Rules: Equity in Substantive Zoning Regulations

Photo by © 2022 Celeste Noche.

3. The Rules — Equity in Substantive Zoning Regulations

This chapter addresses the substantive rules and incentives in zoning regulations—as distinguished from the procedural rules about how zoning is drafted, applied, and enforced (addressed in Chapter 4) and the map that applies zoning rules to geographic areas of a community (addressed in Chapter 5). Substantive rules include all the complex and cross-cutting land use regulations limiting the size and shape of lots and buildings, how those lots and buildings can be used, and the physical design of those lots and buildings.

In many cases, a change that could be achieved by changing the rules could also be achieved by remapping lands into a different zoning district where different rules apply (as discussed in Chapter 5). For most communities, there is no "right' way. For example, a change to the zoning ordinance text that would allow more diverse housing in a given zoning district (a rule change) could also be achieved by remapping the area to allow those same types of housing in a specific area (a map change). The right way is the one that produces outcomes that undo past harms and avoids creating new harms to historically disadvantaged and vulnerable communities, and for which planners can gain the political support necessary to make the change. While each community will need to identify its historically disadvantaged and vulnerable communities based on its unique context, some relevant factors may include race and ethnicity, household composition and size, average median income, concentrations of substandard public facilities and infrastructure, poor access to good jobs and services, and other available historical data.

There are six major equity concerns directly impacted by substantive zoning regulations:

1. PUBLIC HEALTH. Land use patterns are linked to public health by influencing the opportunity to live in affordable and appropriate housing; the provision of green open space; the distribution and quality of public schools, health care and rehabilitation services; the accessibility for people of all ages and abilities; the availability of affordable, healthy, and culturally appropriate food; and access to places of nature, recreation, and physical activity. APA's Healthy Communities Policy Guide provides more detail on this important topic.

2. ENVIRONMENTAL JUSTICE. Environmental justice is achieved when all people maintain "the same degree of protection from environmental and health hazards and equal access to the decision-making process to have a healthy environment in which to live, learn, and work." Communities of color in particular have long been exposed to higher levels of environmental and health hazards due to zoning

Communities of color in particular have long been exposed to higher levels of environmental and health hazards due to zoning that permits housing near pollution from major highways and waterways as well as regulations that permit or concentrate hazardous industries and facilities in certain neighborhoods. Climate change will exacerbate these impacts by increasing the frequency and intensity of flood and fire events.

that permits housing near pollution from major highways and waterways, as well as regulations that permit or concentrate hazardous industries and facilities in certain neighborhoods. Climate change will exacerbate these impacts by increasing the frequency and intensity of flood and fire events.

3. FAIR ACCESS TO ATTAINABLE HOUSING. Fair access to housing goes beyond the ability for any resident, regardless of income, to afford the mortgage or rent payments required for the available housing in their community. It also considers the ability of residents to live near their place of employment, schools, and services, in their preferred housing and ownership type, and in communities with a shared culture or identity if they so choose. The APA Housing Policy Guide provides much more detailed policy guidance on this topic.

4. FAIR ACCESS TO ECONOMIC OPPORTUNITY AND SERVICES. The ability to use, create, or reach a place to earn a living, to form and expand a business, and to access quality education, civic institutions, child and adult care, and other public services is also strongly influenced by zoning through permitted use controls, design controls, and the length and complexity of zoning procedures.

5. AGING IN PLACE. As the population of older Americans increases, the accessibility, affordability, functionality, and safety of the built environment becomes increasingly important. Opportunities for "aging in place" and multi-generational living, development regulations related to Universal Design, and connectivity requirements are all components of standard zoning regulations that effectively determine if an adult can stay in the same community as they age. APA's Aging in Community Policy Guide addresses this topic in more detail.

6. CULTURAL PRESERVATION. Zoning regulations can help retain and preserve culturally important sites and connections by incorporating provisions that protect certain uses, geographic areas, or design elements that are supported by and unique to that community to ensure cultural cohesion, even as development patterns change.

For the purposes of this Policy Guide, the recommendations have been organized to follow the structure of a traditional zoning ordinance. Due to the interwoven nature of zoning regulations, many recommendations are intended to address more than one of the larger themes described above, even if only one particular theme is highlighted.

Although the rules discussed in this chapter often appear in the zoning ordinance, some of the rules may instead appear in design standards or guidelines in separate documents. Often these documents are referred to in the zoning ordinance, and property owners are required to comply with them just as if they were part of the zoning ordinance. To fully remove the sources of zoning inequities, they will need to be addressed in both the zoning ordinance itself and in related development and design standards and guidelines.

3.79 million

The number of housing units the United States needs to create to address our housing supply crisis.

Source: APA-Sponsored *Up for Growth Housing Underproduction* Report

3.1 Zoning Districts

Most zoning ordinances divide their communities into districts based on the forms of buildings permitted (form-based zoning), based on mitigating the specific impacts of proposed development (performance zoning), or based on the permitted uses of land and buildings in the district (use-based or Euclidean zoning), or a mix of these three approaches. These types of controls are sometimes approved as a negotiated Planned Unit Development unique to a specific property. While the labels form-based or use-based generally describe the primary focus of the regulations, in practice almost all zoning districts regulate both the form and use of land and buildings within their boundaries. While some form-based districts have more flexible regulations on the use of property and eliminate or minimize the need for public hearings about land uses, others retain use controls very similar to those in use-based zoning (particularly for lower density residential neighborhoods). Similarly, while use-based zoning districts often have relatively simple building form controls (like maximum heights and minimum/maximum building setbacks), others include much more detailed building form and design standards. Over-regulation of building forms, site performance, and permitted uses can all create barriers to opportunities for historically disadvantaged and vulnerable communities. This chapter will address sources of inequitable zoning arising from both building form and use regulations, regardless of the Euclidean, performance-based, form-based, Planned Unit Development, or other label attached to the zoning district.

In most communities, implementation of the policies described below will require careful consideration of the demographics, economics, economic and social vulnerability, and potential for displacement of the existing population. The same zoning change that may expand opportunities for better housing, livelihoods, and services in one part of the community may lead to speculative investments and displacement of historically disadvantaged and vulnerable households and businesses in another.

We address base zoning districts first because overlay districts operate in relation to base districts. In some cases, however, overlay districts may be more important to protect the culture and integrity of historically disadvantaged and vulnerable communities than the base districts they modify.

A. Base Zoning Districts

ZONING DISTRICT POLICY 1. Establish new residential zoning districts or amend existing residential districts to allow more types of housing by right. Avoid districts limited to only single-household detached dwellings when that will limit housing opportunities for historically disadvantaged and vulnerable populations. Evidence shows that single-household only residential zoning has a disproportionate impact on the ability of historically disadvantaged and vulnerable groups to access attainable housing and quality schools and services. Revise zoning to allowing a broader range of building forms, lot sizes, lot widths, and residential types in low-density residential neighborhoods. However, if the residents of historically disadvantaged and vulnerable neighborhoods want to preserve single-household zoning to discourage speculative investment and displacement, those desires should be respected. More detailed information on this topic is available in the APA Housing Policy Guide.

ZONING DISTRICT POLICY 2. Establish new mixed-use zoning districts or allow a wider mix of residential and non-residential uses in existing zoning districts. Districts that allow a mix of appropriately-scaled housing, commercial, and service uses can increase opportunities for historically disadvantaged and vulnerable populations to live closer to sources of quality employment, goods, and services. Cities and counties should consider existing conditions and demographics to identify neighborhoods that would benefit from additional access to opportunities provided through an expanded list of permitted uses. Take care not to introduce new uses that could distort housing markets and lead to forced displacement of existing residents.

B. Overlay Zones

ZONING DISTRICT POLICY 3. Where supported by a historically disadvantaged or vulnerable community, consider establishing specialized overlay zones to help preserve business districts that have historically served and been focused on the needs of these communities. In many communities, traditional business, entertainment, or service centers serve as sources of jobs, revenue, and pride for the historically disadvantaged and vulnerable areas they serve. This is particularly true when businesses primarily serve racial, ethnic, Tribal, Indigenous, or religious groups or the LGBTQIA community that want specific goods and services in a context not often provided by the broader economy. An overlay district or legacy business zone designation can be used to recognize and preserve their cultural and economic contribution to the community, as well as allow additional flexibility in building forms and uses needed to accommodate current activities and to strengthen the image of the area for the future. These types of overlay districts acknowledge that it is not always a unique building

“Evidence shows that single-household only residential zoning has a disproportionate impact on the ability of historically disadvantaged and vulnerable groups to access attainable housing and quality schools and services.”

or architectural style that fosters a unique sense of place, but rather a collection of businesses, residential dwellings, and/or civic uses that establish a shared community identity.

ZONING DISTRICT POLICY 4. **Where supported by a historically disadvantaged or vulnerable communities, consider establishing specialized overlay zones to help protect residential areas that are affordable to low- and moderate-income households, but are not protected from speculative development pressures by any local, state, or federal program.** This can be done by defining and protecting established building forms, by prohibiting the demolition of more affordable types of housing, or by limiting the amount by which existing single-family homes can be expanded within a given time period. Preserving the existing scale and fabric of smaller and more affordable housing can help slow or prevent he replacement of smaller, affordable housing with much larger and more expensive homes in those neighborhoods that want to preserve current levels of affordability. This tool should be used only with the clear understanding that restricting private investment will mean that the existing housing stock may age and may remain substandard compared to surrounding areas unless funding for structural improvements or interior remodeling is made available. In addition, this tool should be clearly limited to disadvantaged and vulnerable neighborhoods and should not be used to create islands of housing in neighborhoods of wealth and privilege.

ZONING DISTRICT POLICY 5. **Establish specialized overlay zones to improve health outcomes and environmental justice by preventing concentration of pollution or environmental hazards, including hazards related to climate change, especially near historically disadvantaged and vulnerable populations.** A key element of pursuing environmental justice is balancing strategies that prevent hazards from being created with those that mitigate the impacts of pollution or hazards already existing. An overlay zone can accomplish both by severely restricting the expansion of existing harmful industrial uses, requiring larger setbacks and more intensive buffers from residential uses, requiring environmental remediation, protection of existing trees, and/or requiring sound walls during redevelopment. These types of zoning districts should be developed in close collaboration with the surrounding communities so that concerns about health, the environment, and employment reflect the values of the community.

ZONING DISTRICT POLICY 6.
Where supported by historically disadvantaged or vulnerable communities, establish specialized overlay zones to protect culturally significant sites, even if they may not qualify for designation as historic districts or landmarks. Sites or areas that are culturally important to historically disadvantaged or vulnerable communities are often undocumented and unprotected. A cultural preservation overlay zone can protect those sites or areas the community values and provide more flexibility in the design and development of surrounding properties to honor these locations.

3.2 Lot and Building Form and Design Standards

Building form and design standards were first established to advance public health, safety, and welfare during a time when overcrowded urban housing was spreading disease and increasing fire risk. More recently, building form and design standards have focused on public welfare (rather than health and safety) with regulations that protect neighborhood character, advance sustainability, and improve development quality. Each of these regulations has impacts on both development costs and human opportunities, and many of those negative impacts are disproportionately borne by historically disadvantaged and vulnerable communities. Cities and counties should consider how building form and design standards may increase the cost of building and maintaining properties, create barriers to access, and encourage or discourage investment and livelihoods in these communities.

A. Lot and Building Dimensional Standards

The most common form of zoning regulation influencing building form are those establishing minimum lot sizes, minimum setbacks from streets and other buildings, maximum building coverage, and maximum building heights.

FORM AND DESIGN POLICY 1. Reduce or remove limits on single-household minimum lot size requirements for different types of housing and eliminate minimum dwelling size and maximum floor area ratio standards that effectively require construction of more expensive homes that are less affordable to historically disadvantaged and vulnerable communities. While large minimum lot sizes are often defended on the basis of preserving neighborhood character or property values, their impact has been to perpetuate patterns of economic and demographic segregation of historically disadvantaged and vulnerable communities. There are many examples of neighborhoods with broad mixes of lot sizes and housing that maintain very high qualities of life without perpetuating those exclusionary impacts. Establish lot and building standards that accommodate less expensive "missing middle" housing (a range of multiple-unit housing types similar in scale and form to detached single-family homes, such as townhouses, tri- and four-plexes, cottage housing developments, and accessory dwelling units (ADUs)) plus manufactured and modular housing. In addition, consider limiting the ability to consolidate small lots into larger ones that facilitate development of larger homes or multi-household development

Cities and counties should consider how building form and design standards may increase the cost of building and maintaining properties, create barriers to access, and encourage or discourage investment and livelihoods in these communities.

FORM AND DESIGN POLICY 2. **Reduce or remove limits on multi-household development density, minimum dwelling unit sizes, or maximum dwelling units per acre that tend to force the construction of fewer, larger, more expensive dwelling units within these buildings.** In addition to limiting the ability of households to live closer to needed schooling, childcare, employment, and services, these types of artificial limits make it difficult for America's aging population to "age in place" in the neighborhoods they love. Regulations that focus on the form, size, and placement of these types of buildings, rather than the number of dwelling units in them, should be considered. If larger units are needed to accommodate growing populations of larger households, regulations may better promote construction of the needed housing by requiring more units with more bedrooms.

B. Lot and Building Form and Design Standards

As noted earlier, form-based zoning regulations generally focus more on ensuring that building forms fit their context while offering increased flexibility for the permitted uses of those buildings. While careful building form and design controls can help ensure that new development preserves traditional patterns of development in historically disadvantaged and vulnerable neighborhoods, it is important to ensure that these standards do not make it difficult and expensive to develop and redevelop properties in those neighborhoods.

FORM AND DESIGN POLICY 3. **Consider adopting building form and design standards that protect the quality and character or historically disadvantaged or vulnerable households and businesses, and that do not impose undue cost burdens.** Form and design standards that increase development costs while producing only marginal public benefits can prevent disadvantaged households from moving into a new neighborhood, creating a business in that neighborhood, or making improvements to their property.

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The number of ADU applications Salt Lake City, Utah, received within 10 months of its 2018 update to the city's ADU regulations. Current regulations permit all ADUs by right in most residential districts except for single-family only zoning districts. The city recently proposed new updates to make ADUs easier to build and to increase and diversify the places where they are legal.

Source: AARP and APA's *Expanding ADU Development and Occupancy: Solutions for Removing Local Barriers to ADU Construction* Report

FORM AND DESIGN POLICY 4. **Add standards to allow those with reduced mobility or without access to a motor vehicle to easily access and circulate in all neighborhoods.** These include standards requiring Universal Design or other accessibility programs that go beyond the minimum requirements of the Americans with Disabilities Act (ADA), to ensure that neighborhoods function for older adults as well as those experiencing disabilities. Because compliance with some of these requirements may increase development and housing costs, they should be accompanied by other zoning changes or incentives that balance out overall development costs.

FORM AND DESIGN POLICY 5. **Except in designated historic districts and cultural overlay zones, avoid drafting or allowing the use of architectural style design standards that have negative connotations among communities of color and vulnerable populations.** For example, antebellum and Spanish Colonial styles may discourage Black, Latino/a/x, or Native American households from feeling welcome in a neighborhood or community due to the historical use of these architectural styles to assert power over these communities. Other defined styles may create similar reactions from Asian or Pacific Islander communities.

FORM AND DESIGN POLICY 6. **Remove or modify restrictions on specific building or site features that are commonly found and disproportionately limited in historically disadvantaged and vulnerable neighborhoods.** Examples of development standards that place disparate burdens include bans on window-mounted air-conditioning units, outdoor clothes lines, parking of a single commercial vehicle, basketball hoops, or carports. If necessary, limits or prohibitions on these types of typical site features should be based on documented negative outcomes developed in collaboration with those neighborhoods most likely to be affected by them.

Prioritizing Housing Choice

From counties to cities and everywhere in between, communities are changing their build form and use controls to make room for missing middle housing. Accessory Dwelling Units, duplexes, triplexes and more are giving people more housing options that meet their unique needs.

3.3 Property Use Regulations

Use regulations identify the types of uses allowed by-right, conditionally, with discretionary review, or as accessory or temporary uses in different zoning districts, and often include standards to mitigate potential impacts of those uses. Whether they appear in form-based or use-based zoning districts, use regulations can disproportionately affect historically disadvantaged and vulnerable populations in several ways. Narrowly defined uses that focus on the name of the activity rather than its land use, traffic, or environmental impacts sometimes single out additional restrictions for negatively perceived forms of retail, sales, or production activities that are frequent sources of employment for these communities. The same is true for strict limits on home occupations based on their names rather than their impacts on the neighborhood, since these communities are more likely to need to use their homes to generate income to live and raise their families. Requirements for public hearings and discretionary approvals for specific uses also tend to have disproportionate impacts on these households, since they are often less able to invest the time and energy necessary to complete those procedures. The large number of use-related recommendations in this portion of the Policy Guide is indicative of the wide range of ways in which permitted use controls have created inequitable zoning results.

A. Residential Uses

Most of the land in most American communities is zoned for residential development and use. Historically, many zoning districts are grounded in idealized concepts of a small, nuclear, two-generation family that is no longer the norm. Many of these districts permitted only single-household, detached houses (and sometimes supporting civic uses like schools and places of worship). The wide use of these practices has contributed significantly to rising housing prices and the inability of historically disadvantaged and vulnerable households to find quality affordable housing in areas with quality schools and services and has led to long-standing demographic and income segregation in many communities.

In many cities and counties, making a wider range of diverse forms of housing available will require changes to both building form and use controls. This section should be read together with the APA Housing Policy Guide, which includes several other policies related to housing, including APA's position on inclusionary zoning requirements.

PERMITTED USE POLICY 1. **Where supported by historically disadvantaged and vulnerable populations, expand the list of residential use types permitted in those neighborhoods to include one or more of the following forms of non-traditional and "missing middle" housing that is more available to America's diverse, aging population.** Types of housing that are missing from many zoning ordinances—or only available following a public hearing—include cottage or courtyard dwellings, duplexes, triplexes, fourplexes, attached single-household homes (townhouses or stacked townhouses), co-housing, tiny houses, live-work dwellings, single-room occupancy (SRO), manufactured/modular housing, and both attached and detached accessory dwelling units (ADUs). By including appropriate standards on these uses, they can often be made available "by-right" in a wide range of residential zoning districts without the need for a public hearing or negotiated approval. To support the viability of ADUs, co-housing, and multi-generational living, a second kitchen that meets building code standards should generally be permitted.

PERMITTED USE POLICY 2. **Allow accessory dwelling units (ADUs) without the need for a public hearing, subject to only those conditions needed to mitigate potential impacts on neighboring properties.** ADUs are complete, smaller, secondary dwelling units that are located within a principal dwelling or in a detached accessory structure. Administrative approval of ADUs significantly decreases the time, cost, and risk of the development review process for applicants and encourages property owners to use their own resources to increase housing diversity. While ADUs may support the stability of existing neighborhoods by accommodating extended families or creating an opportunity to generate revenue from tenants, they can also spur speculative investment that displaces current residents, particularly when ADUs are used as short-term rentals. Where allowing short-term rentals may lead to displacement, it may be necessary to limit them to properties where the primary dwelling unit is the owner's primary residence.

PERMITTED USE POLICY 3. **Allow manufactured and modular homes in many residential districts, protect existing manufactured housing parks, and allow the creation of new manufactured housing parks with quality common open space and amenities.** Redevelopment of manufactured housing parks can create unusual hardships if the residents cannot afford to move their units or cannot find affordable replacement housing. Cities and counties should allow the installation of individual manufactured homes in a variety of residential districts, as well as the creation of new manufactured home parks in desirable residential areas. Where risks of natural disasters create disproportionate risks for occupants of these units, additional public safety regulations for these types of housing, including but not limited to an engineered tie-down system or reinforced concrete or masonry foundation, may be appropriate. They should also protect

existing manufactured housing parks that meet public health and safety standards from displacement by limiting options for redevelopment without the approval of the elected officials.

PERMITTED USE POLICY 4. **Treat assisted living facilities, congregate care communities, retirement villages, and supportive housing types as residential (not commercial) uses and allow them in a wide variety of residential zoning districts where the scale of the facility is similar to other permitted uses in the district.** Although supportive housing facilities often include commercial activities such as providing healthcare or other support services, they function as residential facilities and should be treated as such. Classifying supportive housing types as residential uses and reducing the need for public hearings and conditional approvals also expands opportunities for older adults to "age in place."

PERMITTED USE POLICY 5. **Treat housing with supportive services for people with disabilities the same as similarly sized residential uses.** Group homes or supportive housing for those with physical and mental disabilities are protected by the federal Fair Housing Amendments Act (FHAA), and the required broad reading of the FHAA means that zoning should not treat group homes any differently than similar sized homes for people not experiencing disability. Ensure that the zoning regulations allow small group homes wherever single-household homes are permitted and allow large group homes wherever multi-household buildings of the same size are permitted.

PERMITTED USE POLICY 6. **Replace zoning references to "family" with a definition of "household" that includes all living arrangements that function as a household living unit or define residential units without reference to a family or household.** The definition of "family" is an important, and often overlooked, part of zoning regulations when it comes to disproportionate impacts on historically disadvantaged and vulnerable communities. Many definitions related to household composition are based on outdated assumptions about small, nuclear families and a largely white culturally-specific concept of family life that excludes other ways of living. Common exceptions to these assumptions include Asian and Latino/a/x multi-generational living and LGBTQIA partnerships. Ensure that the definition includes people related by adoption, guardianship, or foster placement, and accommodates larger groups of unrelated individuals living as single households in a cooperative community. As an alternative, define a residential unit as consisting of self-contained rooms located in a building or structure used for residential purposes and containing kitchen and bathroom facilities intended for use of that unit only, If the definition includes a maximum number of unrelated persons, ensure that it is no lower than the number of related persons that would be permitted in the same size residential home.

PERMITTED USE POLICY 7. **Allow administrative approval of "Reasonable Accommodations" for persons experiencing disabilities.** The FHAA requires that requests for reasonable variations and exceptions to zoning rules to accommodate persons experiencing disabilities (such as a request for a wheelchair

ramp that extends into a required setback) be considered and that decisions on those requests be reasonable. Establish a clearly defined administrative process for approval of requests for Reasonable Accommodation (perhaps in consultation with a caretaker or representative of persons experiencing disabilities). As opposed to the typical and sometimes lengthy variance process, an administrative process avoids a public hearing that will call attention to the disability of the applicant and may create public pressure on decision-makers to deny or condition approval of the request in ways that place an additional burden on the person experiencing disability.

PERMITTED USE POLICY 8. **Adopt Universal Design requirements for a significant share of new housing construction to better accommodate the needs of older adults and persons experiencing disabilities.** While the Americans with Disabilities Act (ADA) generally does not require accessible design for single-household homes, Universal Design requirements ensure that key features (like doorways wide enough to accommodate wheelchairs and at least one at-grade entrance) are incorporated into single-household dwellings. If the building code does not already require these elements in a percentage of new homes constructed, incorporating them into development regulations can substantially expand the ability to "age in place." Any increased costs for Universal Design should be addressed by zoning changes or incentives to offset those costs.

B. Commercial Uses

Commercial uses, including retail, personal, and medical services, are not only a large source of employment, but they also provide necessary goods and services for community residents and drive many local and regional economies. Historical practices in commercial zoning have resulted in inequitable patterns of development and a lack of fair access to employment and basic necessities. Limiting expansions of telecommunications systems tends to perpetuate the "digital divide" and can limit the ability of disadvantaged neighborhoods to access economic opportunities and prevent older adults from accessing needed services. The recommendations below are intended to dismantle the negative stereotypes of some commercial uses, expand the provision of essential goods and services into historically disadvantaged and vulnerable neighborhoods, and increase access to employment opportunities.

PERMITTED USE POLICY 9. **Evaluate the permitted uses regulations applied to small-scale commercial uses and eliminate restrictions and standards that are not based on documented public health, safety, economic, or other land use impacts on surrounding areas.** Businesses such as plasma clinics, laundromats, nail salons, social clubs, and tattoo parlors are often limited or prohibited in many commercial zoning districts even though they have similar operating characteristics and land use impacts as other commercial uses like banks, personal services, and urgent care clinics. In many communities, these uses serve as significant providers of goods, services, and employment in the surrounding areas, as well as important gathering places for historically disadvantaged and vulnerable communities. Restrictions on small-scale commercial uses should be based on documented

The recommendations below are intended to dismantle the negative stereotypes of some commercial uses, expand the provision of essential goods and services into historically disadvantaged and vulnerable neighborhoods, and increase access to employment opportunities.

land use impacts and should be adopted only after collaboration with the business communities that will be affected to balance those impacts with potential employment opportunities and to avoid over-concentration of those uses in historically disadvantaged and vulnerable neighborhoods. Defining broader and more flexible permitted use categories generally reduces barriers to small business formation and competitiveness.

PERMITTED USE POLICY 10. **Allow small-scale child and elder care and outpatient medical and health support facilities in a wide variety of zoning districts to allow convenient access by all residents and treat non-residential addiction services like other outpatient treatment facilities.** America's aging population will require increasing amounts of medical and dental care, physical and occupational therapy, and other supportive services located conveniently to the neighborhoods where they "age in place." In addition, serious shortages of convenient childcare have a disproportionate impact on single-parent, often female-headed, households. Outpatient addiction treatment centers operate similarly to other types of outpatient facilities and should be treated as such. Because substance addiction is a growing medical and mental health challenge that affects all demographics, these facilities should be allowed with few restrictions in a wide variety of commercial zoning districts and should not be subject to public hearing or development standards that are not also applied to other types of outpatient treatment facilities. For each of these uses, avoid regulations that add costs or repeat state regulations or licensing requirements.

PERMITTED USE POLICY 11. **Ensure access to healthy food by allowing grocery stores, local cuisine restaurants, and artisanal food producers with limited operational impacts within and near low-density residential neighborhoods and in food deserts.** Grocery stores and local food producers are important contributors to public health and are needed in almost every part of the community on a daily basis. Zoning regulations and procedures that create barriers to these uses should be removed or revised to allow wider access to healthy food in residential neighborhoods at scales consistent with established development. Revise permitted use regulations to reverse the overconcentration of convenience stores, cannabis outlets, safe injection sites, and other facilities that provide easy access to health compromising substances like alcohol and tobacco in historically disadvantaged and vulnerable communities.

C. Industrial Uses

Due to a long history of zoning practices that located or allowed environmentally harmful or polluting

uses in or near historically disadvantaged and vulnerable neighborhoods, Black, Latino/a/x, and Asian communities in particular, have suffered disproportionate burdens from air and water pollution, lack of safe or clean open and green space, and other environmental hazards. While current environmental regulations sometimes prohibit the creation of new hazardous or polluting uses, existing sources of environmental risk often remain in place and are protected by their legal nonconforming status. The recommendations below can reduce the disproportionate impacts from environmental hazards on these communities.

PERMITTED USE POLICY 12. **To improve environmental justice, prohibit the location of new industrial uses and the expansion of existing industrial uses that do not meet current public health and environmental safety standards.** Where existing environmentally harmful uses continue to operate as legal nonconforming uses, prohibit expansion of those uses unless the expansion will result in reduction and remediation of existing risks to public health and safety, particularly when they are located near schools, health care facilities, and other facilities serving vulnerable populations. Create incentives to spur redevelopment of hazardous and polluted sites near historically disadvantaged and vulnerable populations. Where permitted by law and supported by the surrounding community, use amortization powers to terminate hazardous nonconforming land uses.

PERMITTED USE POLICY 13. **Classify and clearly define low-impact and artisan manufacturing uses as commercial uses and allow them in more zoning districts.** While the term "industrial" is typically associated with large facilities with large neighborhood impacts, there are many small-scale assembly, processing, and fabrication activities with few or no negative impacts on the surrounding area. Because these uses are often grouped with the more intense industrial uses, there are often unnecessary limits on where they can be located. Allowing small-scale artisanal production and retail sale of their products in the same building lowers the barriers to economic activity to those without the resources to maintain different properties to make and to sell their products. Where residential and small-scale commercial uses occur in the same neighborhood, ensure that commercial sites are designed to protect the safety of vulnerable residents, particularly children and older adults.

D. Agricultural Uses

Agricultural use regulations, especially those related to urban agriculture, are an integral component of sustainable and equitable access to healthy, safe, and affordable food. Local production of food is increasingly allowed in many zoning districts but is particularly important in and near those historically disadvantaged and vulnerable neighborhoods where access to healthy food is limited. The recommendations below can help to not only increase access to healthy food sources but to empower and strengthen local food producers and connect them to local and regional food systems.

PERMITTED USE POLICY 14. **Allow small-scale urban agriculture — including but not limited to community gardens, greenhouses,**

beekeeping, and poultry raising — in a wide variety of zoning districts, including residential districts, and allow light processing, packaging, and sales of products grown on the property. To protect public health, ensure that soil on urban agriculture sites is not contaminated or that raised beds with clean soil are used, particularly when the site has been previously used for commercial or industrial purposes. Reduce noise impacts by prohibiting roosters and ensure households properly dispose of animal waste. Remove barriers to construction of supporting facilities needed to protect plants due to climate or soil conditions and reduce standards, such as the number of beehives allowed per lot, that significantly limit many properties from operating those uses. Do not allow large-scale or high-impact agricultural uses to locate near historically disadvantaged or vulnerable populations.

PERMITTED USE POLICY 15. **Allow farmer's markets and other facilities for local food distribution in a wide variety of zoning districts, including residential districts, as either temporary or permanent uses.** Easy public access to healthy food is as important as the ability to produce healthy food, particularly for those who do not have the ability to grow it themselves.

E. Home Occupations

Zoning regulations often severely limit the types of revenue earning activities that can be conducted from a house or apartment, which has a significant impact on those who do not have the resources to rent a separate business location, including but not limited to historically disadvantaged and vulnerable communities. In some cases, zoning limits are based on stereotypes regarding the activity rather than its impacts on the neighborhood. Removing prohibitions or overly restrictive requirements on home-based businesses are of particular benefit to single-parent or guardian households or other households with small children, older relatives, or other dependents by allowing them to run a business or be employed without the additional costs of childcare, eldercare, or commuting.

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The number of states with a housing underproduction problem as of 2019. The housing crisis is no longer just a coastal problem.

Source: APA-Sponsored *Up for Growth Housing Underproduction* Report

PERMITTED USE POLICY 16. **Update home occupation regulations to broaden the types of activities allowed to be conducted from dwelling units of all types.** Ensure that any restrictions on home occupations are based on documented neighborhood impacts and eliminate special permit requirements where possible. Regulations should allow those who occupy housing as their primary residence to also use that home as an economic asset to participate the "gig" economy. Regulations should focus on preventing negative impacts on the surrounding area rather than trying to list specific permitted home businesses. Limits on the use of accessory buildings, prohibitions on employment of even one person from outside the household, additional requirements for off-street parking, and prohibitions on cottage food operations all create significant barriers to economic activities and likely have a disproportionate impact on historically disadvantaged and vulnerable communities.

F. Temporary Events

PERMITTED USE POLICY 17. **Reduce zoning barriers for temporary events, entertainment, and outdoor sales, including garage/**

yard sales, "pop-up retail" sidewalk sales, street vending, and mobile food vendors where those barriers are likely to hinder social and economic opportunities for historically disadvantaged and vulnerable individuals. Temporary uses are often heavily restricted due to perceived or potential traffic and noise impacts, even though those impacts will be short-lived. Temporary events are often tied to cultural celebrations that foster a sense of community within a neighborhood and offer additional sources of temporary employment without the need to invest in a permanent place of business. Temporary use restrictions should be based on balancing the short-term impacts of these events with the social, economic, and cultural benefits they create. Larger temporary events should be required to be accessible to those using mobility devices such as wheelchairs and walkers, and to provide accessible support facilities such as parking and restrooms.

3.4 Site Development Standards

Site development standards address the physical layout and design of the lots and parcels on which buildings are built and activities are conducted, including access to the site, the number of parking spaces (if any) required, the amount of landscaping (if any) required, what kinds of outdoor lighting fixtures are permitted, and what types of signs are permitted. The recommendations below address several major elements of site development standards and how they can be used to improve equity for historically disadvantaged and vulnerable communities.

A. When is Compliance Required

Because site development standards can add significant costs to new development or redevelopment, it is important to clarify what level of investment triggers the need to comply with those standards. Smaller investments generally require only partial compliance, or are exempt altogether, while larger investments require full compliance. Site development regulations are often tailored to allow additional flexibility for infill and redevelopment projects and can also be tailored to allow additional flexibility to allow needed investment and employment in historically disadvantaged and vulnerable neighborhoods.

SITE DEVELOPMENT POLICY 1.

Draft thresholds for compliance with specific site development standards to avoid disproportionate impacts on historically disadvantaged and vulnerable neighborhoods. The triggers for compliance with different types of site development standards should be developed after close consultation with the affected neighborhoods so that they reflect a good balance between the desire to maintain and upgrade the quality of the neighborhood with the need to sustain investment and employment by existing businesses and the affordability of housing to area residents.

B. Access and Connectivity

Access and connectivity standards address internal circulation within a site, connections between development sites, and

multiple modes of mobility to and throughout the site. Connectivity standards accommodate the many individuals who rely on public transit, walking, and biking as alternatives to travel by car, those who must rely on mobility aids, those using strollers for small children, and children who need safe routes to school. Fire and emergency response times are often longer in historically disadvantaged and vulnerable neighborhoods, and improved connectivity can shorten those response times.

SITE DEVELOPMENT POLICY 2. **Require high levels of accessibility and connectivity for pedestrians, bicycles, and motor vehicles in all new development and significant redevelopment.** Require that bicycle routes, sidewalks, internal walkways, and pedestrian crossings are safe and usable by all people, including persons experiencing disabilities. Ensure existing pedestrian routes are preserved to the maximum extent practicable when new development is proposed, and require off-site enhancements such as improved crosswalk markings, protected bicycle lanes, and enhanced transit stops. Consider requiring Complete Streets, going beyond the standard requirements of the Americans with Disabilities Act, and requiring compliance with federal Public Right-of-Way Accessibility Guidelines. Prohibit the creation of new "gated communities" with single or limited points of access that lengthen walking, bicycling, and motor vehicle trips and are a significant contributor to exclusionary development patterns. Consider requiring large projects with multiple buildings to incorporate low vision, blind-supportive, and deaf-friendly design features such as wide sidewalks, raised crosswalks, and other tactile markers to differentiate pathways.

C. Required Parking

Minimum off-street parking regulations raise the cost of housing and other development and often make redevelopment of older infill sites difficult or impossible, which likely has a disproportionately negative impact on historically disadvantaged and vulnerable neighborhoods. Often these minimum requirements far exceed what is needed to achieve their original purposes, which were to protect public health and safety by reducing street congestion, to prevent overflow parking and related traffic from commercial uses in adjacent residential areas, and to prevent parking on yards and sidewalks. Average temperatures are often higher in historically disadvantaged and vulnerable neighborhoods, and reducing parking reduces the impervious surfaces that create urban heat islands and increase risks of flooding. Reducing or eliminating parking minimums can also increase the amount of land available to build

Minimum off-street parking regulations raise the cost of housing and other development and often make redevelopment of older infill sites difficult or impossible, which likely has a disproportionately negative impact on historically disadvantaged and vulnerable neighborhoods.

housing, parks and open space, or other community-supporting uses.

SITE DEVELOPMENT POLICY 3. **Eliminate or reduce minimum off-street parking requirements in areas where those requirements serve as significant barriers to investment and are not necessary to protect public safety of pedestrians, bicyclists, motorists, older adults, or persons with disabilities.** Minimum parking requirements are often based on suburban development models that are not applicable to denser, urban contexts or redevelopment projects. Reducing minimum parking requirements is particularly important for Transit-oriented Development and other areas with meaningful mobility options. However, because of poor public transit access to employment opportunities, some historically disadvantaged and vulnerable households may have no choice but to own a motor vehicle (or more than one) to reach more dispersed work opportunities. Some employers may need more off-street parking because their workforce arrives from widely dispersed neighborhoods not served by other forms of transportation. Reductions in parking requirements should be based on careful consultation with affected neighborhoods and employers to balance the affordability and walkability benefits of less parking with the need to accommodate vehicles used for employment without compromising public health and safety.

SITE DEVELOPMENT POLICY 4. **Do not require minor building expansions, minor site redevelopment projects, or adaptive reuse of existing buildings to provide additional parking unless the change will create significant impacts on public health or safety.** A major barrier to opening a small business or operating a restaurant or personal service use is additional parking requirements triggered when the intensity of use increases. This can disproportionately impact historically disadvantaged and vulnerable business owners who have more constrained sites and who may lack the resources to make significant site improvements to accommodate a relatively small change in use. Often, the time involved in evaluating incremental parking requirements for small changes in property use far outweighs the benefits of those parking adjustments to public health and safety.

D. Landscaping, Open Space, and Tree Canopy

Many historically disadvantaged and vulnerable neighborhoods have lower levels of vegetation, landscaping, and open space for outdoor gatherings and activities that promote public health and well-being. They often have less tree canopy to cool properties and offset heat island effects, which make many of these neighborhoods significantly warmer than others and creates health challenges for older adults and persons experiencing disabilities. Some of these discrepancies are caused by zoning regulations that do not require the same levels of private investment applicable to private property in other neighborhoods. Tailored site design standards can help reverse these shortcomings over time.

SITE DEVELOPMENT POLICY 5. **Draft zoning standards that require or incentivize new development and redevelopment to increase the amount of landscaping, open space, and tree canopy in those**

neighborhoods that currently have less of these site design features. Higher levels of these important amenities are particularly important where development intensity is increased. These requirements should be drafted in close collaboration with those most affected by the change, so that increases in these features are balanced with the need to preserve the affordability of housing and the viability of existing businesses. Ensure that new landscaping is located and sized to avoid obscuring sight lines for pedestrians, bicyclists, and motor vehicles that would increase risks to public health and safety, particularly children, older adults, and those reliant on public transit. The added costs of open space and tree canopy in these neighborhoods can be offset by additional flexibility other development standards, provided that the amount of open space per dwelling is increased.

Smaller communities choose redevelopment over parking

In **Fayetteville, Arkansas**, reducing the required spots from more than 30 to eight allowed one small business to turn a vacant building into a buzzy downtown hot spot.

In **Sandpoint, Idaho**, dropping parking minimums encouraged tech company Kochava to renovate an old lumber storage facility, resulting in a tax value assessment increase of more than $2 million.

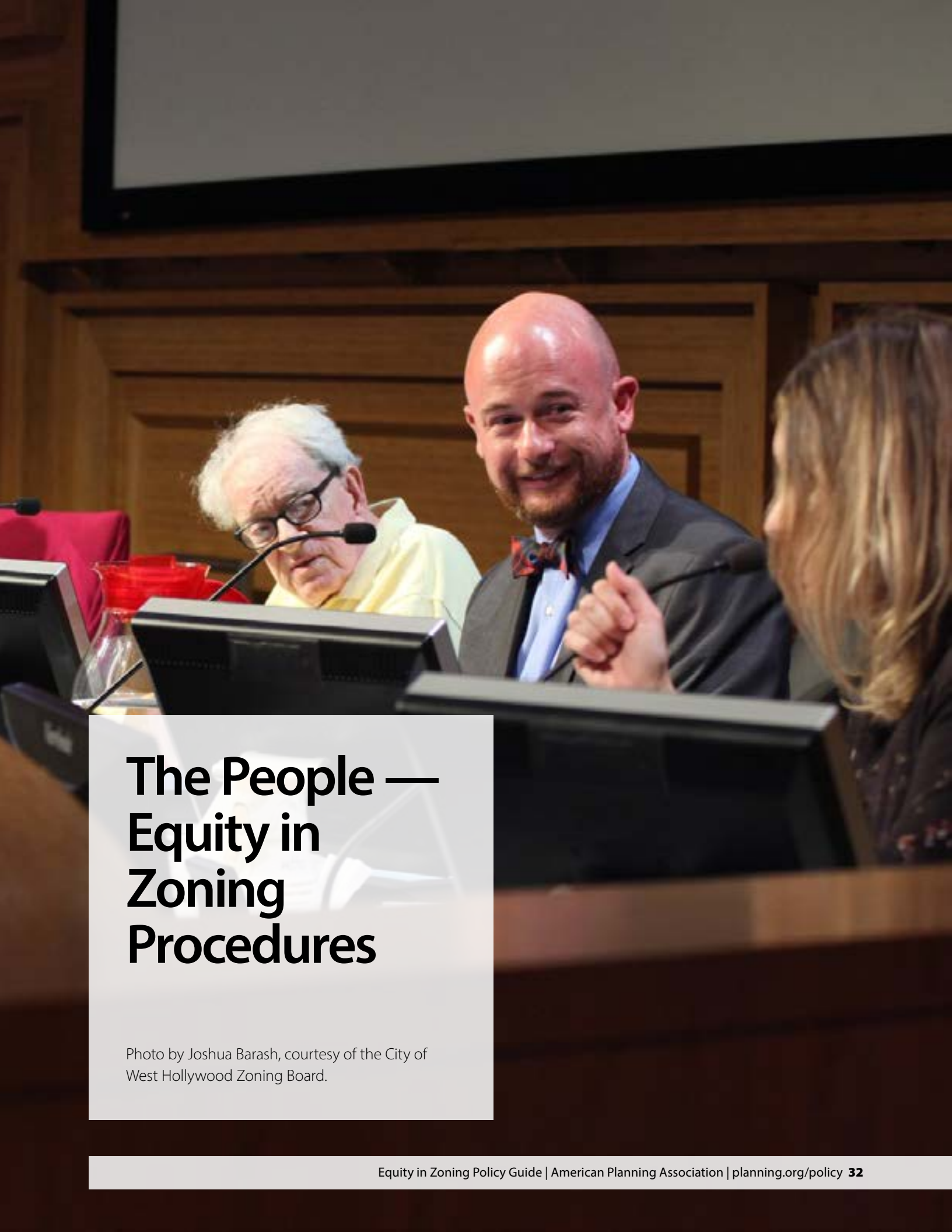
Source: Planning Magazine

E. Lighting for Public Safety

Because many historically disadvantaged and vulnerable neighborhoods are located in older areas of our communities, they often contain properties that were developed before minimum lighting standards to protect public safety were adopted. Nighttime safety is important to all residents of the community, but particularly important to vulnerable populations, including older adults, persons experiencing disabilities, women, children, and those relying on public transit.

SITE DEVELOPMENT POLICY 6.

Require adequate levels of lighting of sidewalks, crosswalks, walkways, public transit stops, and parking lots to protect the health and safety of vulnerable populations. Through shielding requirements, "dark sky" fixtures, limits on uplighting, and better light trespass standards, lighting needed for public safety can be readily balanced with community desires to "see the stars." Because excessive lighting standards have sometimes been used to increase surveillance of Black, Latino/a/x, and other persons of color, lighting standards should be drafted after careful consultation with the residents and businesses in the neighborhoods where they will be applied, so that they balance public safety for all residents and visitors.



The People — Equity in Zoning Procedures

Photo by Joshua Barash, courtesy of the City of West Hollywood Zoning Board.

4. The People — Equity in Zoning Procedures

While community participation has long been emphasized when creating planning documents, it is not always a priority when drafting and implementing zoning regulations, possibly because zoning is perceived as a technical topic. That omission is a serious mistake, however, because informed participation is as critical to eliminating racism and discrimination in zoning as it is in planning. Equity in zoning requires that communities ensure diverse, inclusive, and effective participation in writing and changing the zoning rules; drawing and changing the zoning map; applying the zoning ordinance to development applications; and deciding how the rules will be enforced.

The continuing need to achieve much greater diversity and maximum participation in the planning profession was addressed both in the Planning for Equity Policy Guide and in Chapters 1 and 2 of this Policy Guide so that discussion is not repeated here. On the ground outreach and community development work by planning staff, including efforts such as surveys, canvassing, and long-term relationship-building, are critical to expanding community participation. It is not enough to identify underrepresented groups and invite their participation. Pro-active efforts to recruit, engage, educate, and empower these individuals, and to mobilize their communities and community-based organizations for effective engagement are also vital. Education should focus not only on how zoning works and how to influence zoning decisions, but also on consensus-building and compromise, which are essential ingredients of all zoning reform efforts.

4.1 Capacity Building

Effective public education on what zoning is and what zoning does can be a crucial element in enabling participation from broader and more representative groups of citizens. Cities and counties that have offered zoning 101 or zoning academy events and programs often report a significant increase in public understanding of the most effective ways to make their wishes known and understood throughout the zoning process. In addition to explaining how zoning works, these programs should address the need for diverse participation by making accommodations for non-traditional work schedules, participants' needs to bring children to learning events, and those with limited English proficiency.

CAPACITY-BUILDING POLICY 1.
Design and offer events or classes to help historically disadvantaged and vulnerable communities understand and participate in zoning procedures, and to help

staff learn from members of those communities how current zoning procedures affect their neighborhoods, businesses, and quality of life. Events offering public education or seeking public input should be offered both virtually and in-person, at varying hours, at locations where participants normally gather, and in commonly used languages that avoid "legalese". They should create working partnerships among neighborhood residents, businesses, trusted community-based organizations, and planners. If possible, they should offer childcare, meals, and stipends to recognize the value of participants' time. These efforts need to go beyond traditional capacity building and "zoning 101" training to include collaborative community development, mobilization of residents, and encourage more elementary and high school students to understand planning and zoning and to enter the profession.

CAPACITY-BUILDING POLICY 2. Ensure that planners and elected and appointed officials receive diversity, equity, and inclusion (DEI) training. As the planning profession works to build diversity over time, planners should work to enhance their sensitivity and knowledge of issues and concerns relevant to historically disadvantaged and vulnerable populations and neighborhoods, as well as the perspectives of their co-workers who are members of these communities. Regardless of background, those working to draft and apply zoning should become aware of the history and negative impacts of past zoning policies while striving to improve present conditions and future outcomes by directly collaborating with those in the community who will be most affected by their actions.

4.2 Equity in Advisory and Decision-Making Boards

Although the ultimate authority to adopt and apply zoning regulations is almost always held by elected officials, appointed boards are often authorized to make recommendations or to make certain types of decisions. Examples include Planning Boards, Zoning Commissions, Historic Preservation Committees, Zoning Appeals Boards, and Hearing Officers. This Policy Guide has previously noted that the planning profession remains a predominantly white profession that often does not reflect the diversity of the communities it serves, and the same is frequently true of appointed zoning-related boards and officials. Some of the inequities in drafting, applying, and enforcing zoning regulations discussed in Sections 4.3 through 4.6 below may not be fully addressed until these boards truly reflect the diverse populations of our cities and counties.

> **Cities and counties should consider how building form and design standards may increase the cost of building and maintaining properties, create barriers to access, and encourage or discourage investment and livelihoods in these communities.**

APPOINTMENT POLICY 1. **The composition of non-elected boards and committees should reflect the community, including proportionate representation from historically disadvantaged and vulnerable communities.** While expertise in zoning, planning, real estate development, and real estate markets have often been the key criteria for appointment to these boards, that approach often results in memberships that do not reflect the makeup of the community. Professional expertise is important, but these boards also need to include significant local community expertise and lived experience. Their members need to bring different kinds of knowledge that can be conveyed by diverse voices that better understand the impacts of zoning decisions on historically disadvantaged and vulnerable neighborhoods. Announcements of opportunities to serve on boards should be disseminated broadly, appointment procedures should be transparent, and classes should be offered to provide training and information about the roles and responsibilities of board(s) members. Communities should consider offering support services like transportation or childcare to members who agree to serve on boards and committees.

4.3 Writing and Changing the Zoning Rules

While full rewrites of a zoning ordinances are relatively rare, amendments to the current zoning rules occur frequently. This section addresses both large-scale and more targeted changes to the text of the zoning regulations. Two equity considerations arise when communities draft or update zoning regulations: (1) Who is writing or amending the rules, and (2) Who will be affected by the proposed changes. To the greatest extent possible, the task forces, consultants, and advisory committees involved in writing or amending zoning rules should reflect the demographic makeup of the community. Staff or advisory groups should also include individuals living, educating, or doing business in the areas that will be affected by the new rules under consideration.

In addition, zoning rewrite projects must include significant outreach efforts to ensure they reflect input from diverse groups in the community, and particularly from historically disadvantaged and vulnerable communities. The rewrite process should include input from a standing advisory committee reflective of the community, and any proposed changes should be subject to public review and feedback long before there is an actual hearing on adopting those changes. Many of the outreach policies in the Planning for Equity Policy Guide apply to zoning rewrites as well.

Just as importantly, the zoning drafting process should include specific opportunities to evaluate the potential impact of revised zoning regulations on all of our diverse neighborhoods. It may be appropriate to perform an equity audit of the current zoning regulations based on the recommendations in this Policy Guide in order to identify potential changes and any unintended consequences of those changes.

DRAFTING POLICY 1. **Those framing, writing, and/or reviewing the zoning rules should reflect the demographic composition of**

the community and should include representatives from historically disadvantaged and vulnerable communities. Input from these groups should occur at least twice: once before amended language is being drafted, and again before that language is presented to a decision-making body. If changes are not incorporated based on public input prior to the hearing, discussion of that input and the reasons for not reflecting it in the proposed rules should become part of the public hearing.

DRAFTING POLICY 2. Ensure that drafting efforts include business and residential tenants, as well as property owners. This is important because historically disadvantaged and vulnerable communities generally have a higher percentage of renters than the overall population, and because the zoning changes can lead to gentrification and displacement that particularly impact tenants.

DRAFTING POLICY 3. Ensure that there are multiple opportunities for review of potential zoning impacts on historically disadvantaged and vulnerable communities. This could include developing indicators of neighborhood vulnerability and modeling the impacts of potential developments against these indicators. These reviews need to happen with sufficient time to receive and incorporate meaningful and equitable input before public hearings on the proposed regulations begin.

DRAFTING POLICY 4. Avoid overly complicated regulations and legalistic language and speak to the community in the language(s) they understand. Complicated regulations, and those that require detailed supporting documentation, make it difficult for residents (particularly those with limited English proficiency) to engage effectively in the drafting process. They also discourage zoning applications from those who do not have the resources to hire professional help to get through the zoning process. Communities with significant populations of persons with limited English proficiency should provide zoning and application materials in commonly spoken languages as well.

> **Zoning rewrite projects must include significant outreach efforts to ensure they reflect input from diverse groups in the community, and particularly from historically disadvantaged and vulnerable communities.**

DRAFTING POLICY 5. Draft clear and objective, equity-based standards and review criteria. Similar to overly complicated regulations, vague and subjective standards are difficult and time-consuming to interpret and often allow historical biases to enter the decision-making process. Overly subjective standards also make it easier for individuals familiar with the public process (who are typically wealthier and often white) to oppose zoning text and map changes that could produce more equitable development. Draft zoning approval criteria that prevent or mitigate displacement or further fragmentation of historically

disadvantaged and vulnerable communities. Because zoning criteria based on preserving neighborhood character and protecting property values have often been used to block the expansion of housing opportunity and variety in historically privileged neighborhoods, use of those terms and regulations related to them should be avoided. As alternative, define community character objectively so the term can be applied consistently across all neighborhoods. Outcomes from these changes should be periodically assessed to ensure that decision criteria are not perpetuating patterns of segregation.

A National Partnership for Zoning Reform

APA is partnering with the National League of Cities to improve local capacity, identify critical solutions, and speed zoning reforms that enable communities to meet housing needs at the local level.

The Housing Supply Accelerator will bring together local governments, planners, builders, financial institutions, housing policy associations and state and federal partners to develop, align and advance solutions for housing supply challenges.

4.4 Applying the Zoning Rules to Individual Properties

Although the drafting of zoning rules discussed in Section 4.2 and the adoption of area-wide zoning maps discussed in Section 5.1 are very important, most zoning administration involves the application of zoning rules that have already been drafted and adopted. The activities discussed in Sections 4.2 and 5.1 are often called "legislative" actions because they affect large areas of a community, they are almost always approved by elected officials, and those officials have wide discretion to do what they think is best for the entire community within the limits of state and federal law.

In contrast, most zoning activity involves actions that affect only one or a few properties. These types of decisions can include changing the zoning map for one or a few properties (often called a "rezoning"), or approving a conditional use permit, development permit, demolition permit, or variance from the strict terms of the zoning rules, as well as many other actions. In most communities, these include:

DECISIONS MADE BY STAFF to confirm whether a development application complies with the adopted rules (often called an "administrative" or "ministerial" action, because it involves little or no discretion),

DECISIONS BY AN APPOINTED BODY that involve some level of discretion as to whether a development application meets standards and criteria stated in the zoning code (sometimes called a "quasi-judicial" decision, because the appointed body is acting similarly to a judge who applies the law to the facts of a specific case), and

DECISIONS BY THE CITY COUNCIL OR COUNTY COMMISSIONERS regarding an application covering one or a few properties (which are categorized as "quasi-judicial" actions in some states and "legislative" actions in others).

A. Administrative and Ministerial Decisions

Administrative and ministerial decisions are generally made by a community's planning staff. Because these decisions do not require staff to exercise discretion or judgment, the key to equity is to ensure that the zoning rules themselves do not have disproportionate impacts on historically disadvantaged and vulnerable communities (See Section 4.3 above). Because staff are often trained to make the same decision in the same way for similar applications, without knowledge of the applicant's race, ethnicity, national origin, religious affiliation, gender, sexual orientation, or level of physical or mental ability, some of the opportunities for inequity introduced in the public hearing process are removed. The "applicant neutrality" of this type of decision-making has led some communities to focus on making as many zoning decisions as possible administrative decisions.

B. Decisions That Require a Public Hearing

While requiring a public hearing before making a zoning decision can increase opportunities for members of historically disadvantaged and vulnerable groups to be heard before decisions are made, they also create opportunities for inequities to enter the zoning decision-making process. In addition to the common use of vague or subjective criteria, inequity can enter the hearing process because of (1) how the public is notified of those hearings; (2) the time and location of the public hearing, which may require significant travel, arranging time off from work, and arranging child care; (3) the ways in which the public is permitted to participate in the hearing; (4) limited English proficiency; and (5) limits on how the least mobile members of the public can participate in the hearing. Equitable public hearings require that each of these barriers be removed as much as possible.

C. Notifying the Public

The importance of effective public notification, and improved ways to do that, are addressed in APA's Planning for Equity Policy Guide, and those same recommendations apply in the zoning context. Traditionally, written notice has been provided to property owners within a defined radius of the proposed development project. There are several inherently inequitable aspects to this practice.

A significant and growing percentage of Americans rent their housing, so limiting notification of public hearings to property owners effectively disenfranchises those residents from zoning decisions that affect them. Since historically disadvantaged and vulnerable communities have higher rental occupancy rates than the population as a whole, mailed notice requirements that ignore renters introduce significant bias into the public hearing process. Because property owners are by and large, older, whiter, and wealthier than other segments in a community, notice may be received by a disproportionately large number of these households. In areas with significant Tribal or Indigenous populations, effective engagement of those groups requires notice in well understood language when developments are proposed on adjacent lands.

The way that notice is given can also introduce bias. Depending on the type of decision being made, many zoning ordinances require mailed notice (sometimes certified), published notice in a newspaper, and/or posted signs on the potential

development site. Posted signs are a particularly effective means of reaching a broad audience, but only if passersby can read the sign. To minimize this barrier, any community with significant numbers of residents with limited English proficiency should require signs in commonly spoken languages.

The limitations of publishing zoning notices in a newspaper of record are also significant. This type of notice is not likely to be seen by younger residents who rely on electronic media for news and information, and unlikely to reach or be understood by those with limited English proficiency.

Local governments have access to several types of communication that can more readily reach a diverse audience, including the city or county website, community bulletin boards, social media, and e-mail or text notices. Many communities are already making use of these tools, but relatively few have codified these practices into zoning regulations or put them on a par with required mailings, newspaper notices, or posted signs.

The amount of time that notice must be given before the public hearing introduces a final form of potential bias. The shorter the notice given, the less likely those with children or other dependents to care for, those working multiple jobs, and those with fixed work schedules will be able to participate. Those individuals often include a disproportionate number of historically disadvantaged and vulnerable persons.

ZONING NOTIFICATION POLICY 1. Review, update, and expand traditional notification procedures to reach a wider range of possible participants. Where mailed notice is required, notices should be sent to tenants as well as property owners. If the neighborhood where the property is located has a significant population with limited English proficiency, notices should be sent in multiple languages, or should at least indicate how non-English speakers can follow up to learn more. Expand posted notice requirements to apply to more types of applications, including those that do not require a public hearing. Translate notices into languages commonly spoken in the neighborhood and make them accessible to persons with visual impairments. If responsibility for notices is placed on the applicant, the city or county should confirm that it has been done accurately and should periodically evaluate the effectiveness of notice procedures in reaching historically disadvantaged and vulnerable populations.

ZONING NOTIFICATION POLICY 2. Formalize and expand requirements to use newer means of notification. The range of media where published notices appear should be expanded beyond newspaper notice to include new and expanding sources of information. This should certainly include notice on the city or county website, distribution by email to individuals who have signed up to receive notification, and the use of English and non-English language social media where those are in common use by the public. Every application should be available for review on the city or county website, even for administrative decisions that do not require a public hearing. When a public hearing will be held, the website should allow the public to submit project-related comments through the website, rather than requiring them to send a separate

letter or email message. Staff should identify interested community members and groups (housing authorities, tenants unions, community activist groups) and maintain updated lists of their contact information. While not everyone can receive electronic notices, this is a valuable and increasingly widespread means of communication for many groups and individuals and should become a mandatory form of notice.

D. Conducting the Public Hearing

As noted above, requiring a public hearing introduces a predictable source of bias into zoning administration. While most residents care about their neighborhoods, some have a greater understanding of zoning laws and regulations, how to engage with their local government, and how to express themselves in English in ways that can influence zoning decisions. Historically disadvantaged and vulnerable communities are often less able than others to engage effectively in public hearings.

When public hearings are required, they should be conducted with as few barriers to participation as possible. Limiting public comment to a fixed time of day (particularly during working hours) and at a fixed location automatically disadvantages those who have inflexible work or family obligations at that time or lack the mobility to attend. Fortunately, many communities are offering expanded opportunities for virtual engagement in public hearings. Others are requiring staff reports to be posted on local government websites a week or more in advance of the hearing and then offering the ability to write or record comments that are then replayed and made a part of the record during the public hearing itself.

Because there is still a serious "digital divide" as well as a "language divide" in many communities, new electronic notice requirements should supplement but not replace other forms of notice. Those who do not have high-speed internet access from home or have limited English proficiency are very often the same groups that have typically been disenfranchised by traditional methods of participation.

> **Reform zoning requires also reform the public processes surrounding it: limit hearings, maximize participation, and bridge the divides.**

PUBLIC HEARING POLICY 1. **Only require public hearings when there is a genuine need to use discretion in applying zoning criteria and standards to the facts of a specific development proposal.** Where a decision can be made based on clear and objective standards in the zoning ordinance, an administrative decision will often reduce opportunities for bias to enter the decision-making process. When discretionary decisions require a public hearing, draft objective standards and criteria that avoid unintended negative impacts on historically disadvantaged and vulnerable individuals and neighborhoods.

PUBLIC HEARING POLICY 2. **Maximize the ways in which individuals can participate in public hearings and avoid limiting engagement to a specific time and place.** Allowing public comment for a period before the hearing itself, and allowing virtual participation, can significantly increase participation from historically disadvantaged and vulnerable communities.

PUBLIC HEARING POLICY 3. **Bridge the digital, language, and ability divides.** After expanding public notice, provide ways for public comments to be received through verbal conversations with staff or in writing. Make materials related to the hearing available in commonly spoken languages other than English, and in a format accessible to those experiencing visual impairment. This could include distribution of a short information sheet on the rules and procedures for conducting and effectively participating in public hearings. Provide interpretation and translation services for those languages commonly spoken in the neighborhood where the property is located.

4.5 Enforcing the Zoning Rules

Once the zoning rules and maps are adopted and decisions about proposed developments have been made, zoning needs to be enforced. This is another area where unfairness can enter the process. Because most local governments have limited zoning enforcement staff, they often cannot investigate every alleged zoning violation, and zoning administrators often have significant flexibility to decide which alleged violations are most serious and create the greatest threats to public health, safety, and welfare.

Historically disadvantaged and vulnerable communities are often less familiar with what zoning requires, the need to apply for zoning approvals, or the need to maintain their property in compliance with zoning standards. Because these communities often have lower incomes and limited English proficiency, they may also be less able to respond quickly to bring their properties into compliance with zoning standards.

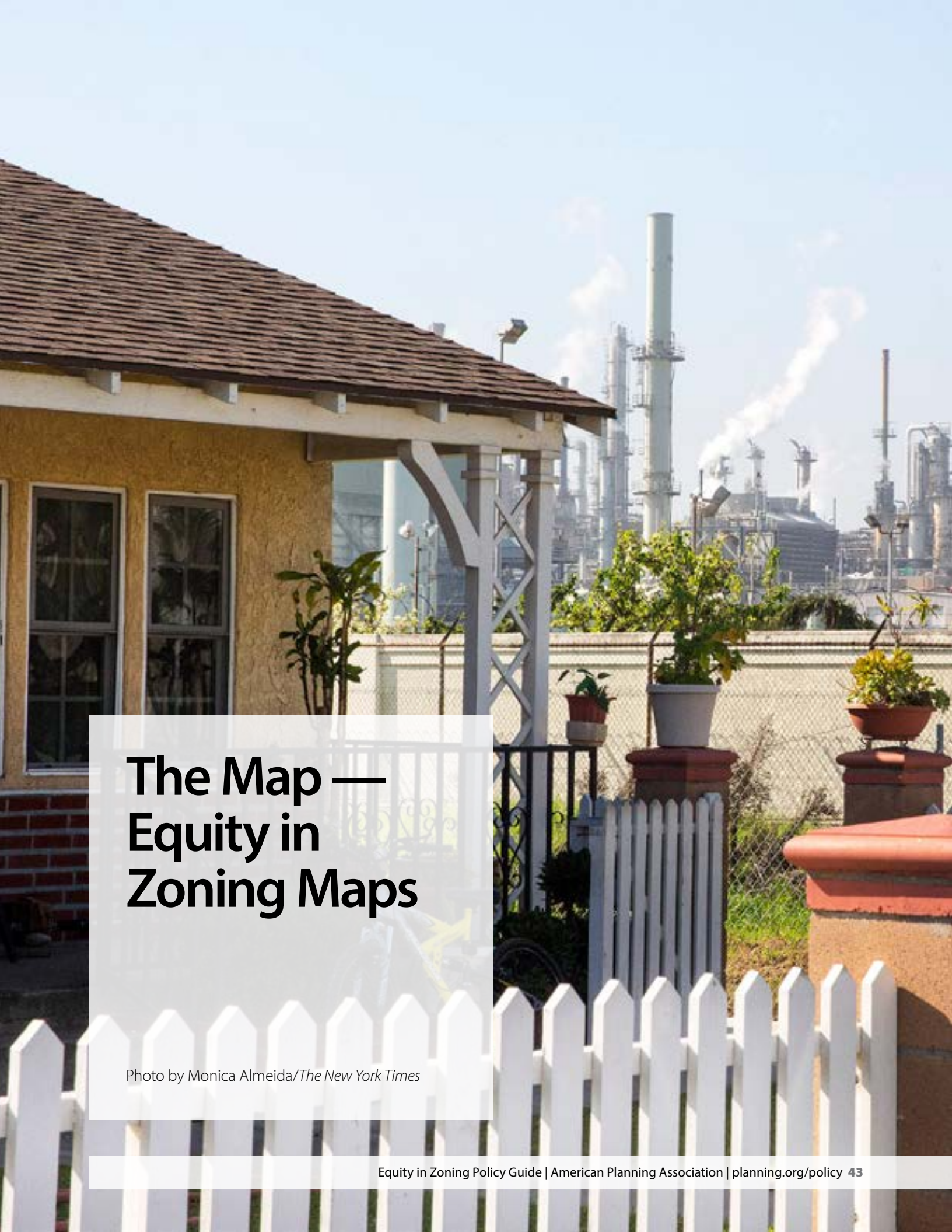
Zoning enforcement procedures need to be particularly sensitive to issues surrounding nonconformities, which are buildings and activities that were legally created but have become out of compliance with zoning rules due to a change in those rules, or for some other reason that was not caused by the property owner or tenant. Nonconformities are situations that happen to property owners and tenants, often without their knowledge or understanding, and where particular flexibility in enforcement while still protecting public health and safety is necessary.

ZONING ENFORCEMENT POLICY 1. **Ensure that local government discretion to enforce zoning rules is not disproportionately focused on historically disadvantaged and vulnerable neighborhoods unless the residents of the neighborhood itself have requested higher levels of zoning enforcement.** In some cases, disadvantaged neighborhoods request additional enforcement to address negligent landlords, tenants, or poor maintenance that creates public health and safety risks for the surrounding area. Those requests should be respected, but with a

focus on assisting owners to bring their properties into compliance rather than imposing penalties.

ZONING ENFORCEMENT POLICY 2. **Adopt a wide range of ways to bring violations into compliance with zoning requirements and allow adequate time and support for property owners to do so.** Keep in mind that residents of historically disadvantaged and vulnerable neighborhoods may not have as much time or money to resolve violations quickly, or the same ability to obtain loans or hire workers needed to bring the property into compliance. They may also need assistance from interpreters to understand the nature of the violation, timeframes for compliance, and paths to compliance.

ZONING ENFORCEMENT POLICY 3. **When nonconformities are discovered, focus enforcement efforts on those that create significant threats to public health and safety.** Allow wide latitude to continue using buildings and engaging in activities that do not create risks of injury, death, or damage to surrounding properties. Because many historically disadvantaged and vulnerable communities have fewer options about where to live and how to earn a living, the ability to continue to use existing buildings and to continue to operate existing businesses that do not create risks to others is particularly important. Consider allowing buildings in residential neighborhoods that have at some point been physically converted for use as corner stores and other low-impact commercial uses to be deemed conforming, to continue in operation, and to resume operations after they have been discontinued for a period of time.



The Map — Equity in Zoning Maps

Photo by Monica Almeida/*The New York Times*

5. The Map — Equity in Zoning Maps

Regardless of how fair the zoning rules are, and regardless of who wrote them, zoning rules do not exist in a vacuum. They are applied through zoning maps, and those maps can embed and perpetuate disproportionate impacts on historically disadvantaged and vulnerable communities just as effectively as unfair rules and procedures. More specifically, many current zoning maps reflect the damaging overuse of Urban Renewal powers in some neighborhoods, the location of freeways to divide neighborhoods based on race or ethnicity, and initial reliance on "redlining" maps that discouraged investment in Black, Latino/a/x, and Asian neighborhoods, among others. Even communities without formal redlining have often been subject to economic and social forces and policies that could produce similar results. More recently, zoning maps have been revised to implement planning for climate resilience, to increase residential densities to promote affordability, and to respond to the removal of outdated freeways, but each of these changes also has the potential to create disproportionate impacts on historically disadvantaged and vulnerable communities. Amending zoning maps to promote social, climate, or economic equity is difficult work because each action carries with it the likelihood of unintended consequences. This chapter addresses ways to think about and minimize those consequences.

In many cases, a change that could be achieved by changing the zoning map as recommended in this chapter could also be achieved by changing the rules that apply in the existing zoning district (as discussed in Chapter 3). For most communities, there is no "right" way to change zoning outcomes; the right way is the one that produces outcomes that are more equitable for these communities, and for which planners can gain the political support necessary to make the change.

Zoning maps can institutionalize inequitable opportunities and outcomes in one of four ways. They can:

CONSTRAIN land supply for needed types of development;

CONCENTRATE polluting and harmful land uses and facilities in some neighborhoods;

LIMIT access to key public services and facilities; and

PERPETUATE separation of populations based on old "redlining" maps.

Each of these sources of inequity are discussed separately on the following page.

5.1 Drawing and Changing the Area-wide Zoning Maps

While community-wide replacements of a zoning map are relatively rare, many communities amend their current zoning maps regularly, sometimes on a monthly or weekly basis. This section addresses all types of zoning map changes—those affecting the entire community, or a large area of the community, as well as those affecting only one or a few properties.

Initiatives to consider community-wide or area-wide changes to the zoning map raise the same kinds of challenges to effective engagement as changes to zoning rules. Because they affect large numbers of property owners and renters, it is particularly important that consultants, advisory groups, and assigned staff reflect the makeup of the areas to be affected as much as possible. In addition, because historically disadvantaged and vulnerable populations are particularly affected by the impacts of map changes, it is particularly important that the proposed changes be reviewed for potential impacts on affordability, gentrification, and environmental justice.

In almost all revisions of zoning maps, Drafting Policies 1, 2, and 3 described in Section 4 (The People) above, also apply. In the context of zoning map actions, those policies are:

ZONING MAP POLICY 1. Those recommending neighborhood-wide or area-wide changes to the zoning map should reflect the demographic composition of the community and should include representatives of historically disadvantaged and vulnerable communities.

ZONING MAP POLICY 2. Ensure that procedures to change zoning maps notify both residential and business tenants as well as property owners.

> **Amending zoning maps to promote social, climate, or economic equity is difficult work, because each action carries with it the likelihood of unintended consequences.**

ZONING MAP POLICY 3. Ensure that there are multiple opportunities for review of potential zoning impacts on historically disadvantaged and vulnerable communities. This may require developing new tools to describe the impact, such as a specific equity or vulnerability assessment or report card to aid decision-making.

5.2 Making Land Available for Needed Types of Development

Because historically disadvantaged and vulnerable communities tends to have lower-than-average incomes, members of these communities may be more likely to live in particular types of housing and to earn their livings in different types of employment. In many communities, they are more likely to live in apartments, in smaller houses on smaller lots, or in homes with a particular layout, such as a traditional "shotgun" house or mill village.

In many communities, they are more likely to live in apartments, in smaller houses on smaller lots, or in homes with a particular layout, such as a traditional "shotgun" house or mill village. Zoning maps that designate too little land for these types of housing have a serious disproportionate impact on these communities by driving up the cost of housing.

Zoning maps that designate too little land for these types of housing have a serious disproportionate impact on these communities by driving up the cost of housing.

The same disparity can often be found in the businesses owned and operated by members of historically disadvantaged and vulnerable communities, as well as the industries, services, and establishments that employ members of these communities. In many communities, these individuals are more likely to work in personal service, food service, hospitality, heavy commercial, construction, or industrial jobs, or rely on home occupations as first or second jobs. Zoning maps that make too little land available for these types of needed and often essential workplaces tend to make it harder for these individuals to form, grow, or be employed in the work needed to support their households.

While it is important to zone enough land to accommodate each of these activities, it is equally important to ensure that the locations of those lands do not perpetuate segregation based on race, ethnicity, national origin, or religion. In addition to revising zoning rules to allow these forms and types of housing and workplaces in more zoning districts, these disparities can be addressed by remapping more areas of the community into zoning districts that allow them.

ZONING MAP POLICY 4. **Apply zoning districts that make adequate amounts of land available in locations that do not perpetuate historic patterns of segregation.** Analyze local conditions to determine development types that correlate with homes, businesses, services, and other land uses needed by and affordable to historically disadvantaged and vulnerable communities. Use GIS and on the ground evaluations to identify sites with the potential to support equitable zoning goals.

ZONING MAP POLICY 5. **Avoid mapping that perpetuates over-restrictive or highly detailed zoning regulations.** Apply mapping that allows a wider range of property owners and investors to develop in ways that reflect the existing fabric and scale of the community. Where rezoning occurs as a part of a development application, and the development could be built under multiple zoning districts, apply the district that permits the greater variety of alternative development forms that could provide housing, employment, and service opportunities for historically disadvantaged and vulnerable communities.

5.3 Removing Disparities in Neighborhood Health Risk

A second way in which zoning maps can create or perpetuate disproportionate impacts on Black, Latino/a/x, Asian, and other communities of color is by concentrating polluting or harmful land uses, or the forms of structures that can accommodate them, in or close to the neighborhoods where these populations live. Because of their potential impacts on health and property values, these types of uses are sometimes referred to as locally unwanted land uses (LULUs). There is dramatic evidence that individuals exposed to polluting industries, highways, noise, air pollution, or other activities for extended periods of time have significantly higher health risks and shorter life expectancies, and that pre-existing health conditions are made worse through that exposure.

Fixing this situation is more difficult than it sounds, however, for a variety of reasons. Some types of facilities logically need to be located in particular locations. Water treatment plants generally need to be near a river, and trucking terminals often pollute the community less when located near the highways used by the truckers.

In addition, the relocation of LULUs leads to re-sorting of the population. Those with more resources tend to move away from unpopular facilities and developments, which can lower land values and make housing more affordable to lower-income populations, which then move in. Since historically disadvantaged and vulnerable communities tend to have lower-than-average incomes, the proximity of these households to LULUs may tend to re-establish itself over time.

Finally, some LULUs are important sources of employment to individuals who do not have many employment options, and making it difficult for those businesses to continue in operation in their current locations can result in loss of jobs and livelihoods. However, the fact that zoning cannot prevent market responses to zoning changes does not imply that zoning should reinforce existing patterns of exposure to harmful environmental forces, and it clearly should not.

ZONING MAP POLICY 6. Revise zoning maps to avoid the future location of polluting or environmentally harmful facilities and other locally unwanted land uses in neighborhoods that already contain a disproportionate share of those uses and facilities. Ensure that zoning maps allow practical locations for these and future similar uses in other areas of the community where they will not exacerbate health impacts on populations that have already been exposed to these uses. This analysis should consider how long existing nonconforming uses are likely to operate and how that affects the concentration of uses in different neighborhoods.

ZONING MAP POLICY 7. Where zoning district standards include protections from the potential negative effects of development in adjacent districts, revise zoning maps to avoid shifting the potential negative impacts onto historically disadvantaged and vulnerable communities in districts without the same protections. Ensure that zoning districts containing significant populations of color include the same protections from the impacts of nearby development as those containing whiter and more wealthy residents.

ZONING MAP POLICY 8. **Avoid map changes that increase residential development potential in areas near sources of pollution, hazards, or climate risks, particularly in historically disadvantaged and vulnerable neighborhoods, as much as possible.** Where residential intensity is increased near major highways and other sources of pollution, evaluate potential health risks, and ensure that buffering and other measures to mitigate risks and public health impacts are included.

> **Ensure that zoning districts containing significant populations of color include the same protections from the impacts of nearby development as those containing whiter and more wealthy residents.**

5.4 Removing Disparities in Access to Key Services and Facilities

A third way in which zoning maps can create or perpetuate disproportionate negative impacts on historically disadvantaged and vulnerable communities is by making it difficult for those individuals to access open spaces or public or private health, educational, religious, or civic facilities or services. While needs differ for each neighborhood, these often include childcare centers, health clinics, hospitals, mental health facilities, good schools, places of worship, recreation centers, and sources of healthy food. In many cases, these types of needed facilities are built and/or operated by private companies or non-profit organizations, and the local government has little control over their strategies to provide and expand (or contract) their services. Zoning cannot force any of these service providers to budget more money to close these gaps more quickly, but it can ensure that the uses are permitted and easy to develop where they are needed.

One way to address the shortage of needed facilities is to revise the zoning rules to allow or incentivize them in high need areas. However, where cities, or counties require approval of a public facility base or overlay zoning district to locate new facilities, the answer may include revised zoning maps.

ZONING MAP POLICY 9. **Revise zoning maps to ensure that needed health, educational, religious, and civic facilities or services are permitted and simple to establish in or near all residential areas of the city, including historically disadvantaged and vulnerable neighborhoods.** In many cases this simply involves removing prohibitions on specific uses based on outdated stereotypes about the impacts of the facility or the clientele that may need these services.

5.5 Removing Historic Segregation through Mapping

A fourth way in which zoning maps create inequity is by perpetuating zoning boundaries that were initially designed to separate historically disadvantaged and vulnerable communities from other

While zoning generally cannot force a local government to spend money to remove those barriers, it has a lot to do with whether the zoning maps reinforce those barriers, as well as what happens when and if the barrier comes down.

neighborhoods. In recent years, there has been increasing attention on the origins of the zoning maps used in American communities. More specifically, attention has focused on the fact that traditional zoning emerged after the U.S. Supreme Court invalidated overtly racial zoning in *Buchanan v. Warley* and appears to have been aimed at least in part on the same goal of separating different parts of the population from each other. There is a strong correlation between historically disadvantaged and vulnerable populations and lower-than-average incomes, so zoning that separates people based on income levels has the indirect effect of also separating them based on race, ethnicity, gender, and ability.

Increasing attention has also been focused on the federal mortgage insurance system, which historically often led lenders to "redline" neighborhoods with high levels of Black households. Many current zoning maps look surprisingly like those redlining maps. Together, these discussions have led to a stronger understanding of how today's zoning maps very often reflect older institutionalized dividing lines based largely on race and ethnicity, even if historically disadvantaged and vulnerable persons are no longer prohibited from buying property or obtaining a loan on either side of those lines.

In some cases, the zoning boundaries that formalized these separations were reinforced by public investments, like the location of a highway, park, or open space to create a physical and psychological wall between different populations, and there have been calls for local governments to remove those highways and barriers to "re-knit" the divided urban fabric. While zoning generally cannot force a local government to spend money to remove those barriers, it has a lot to do with whether the zoning maps reinforce those barriers, as well as what happens when and if the barrier comes down.

One possible response to redline-based zoning maps is simply to remap both divided neighborhoods to the same zoning district to try to equalize the opportunities for investment and development on both sides of the line. But that solution has potentially serious consequences. The effect of redline-based zoning maps was often to decrease the value of land in the historically disadvantaged and vulnerable neighborhood and increase it in the neighborhood next door or across the highway. Adopting the less permissive zoning district in both areas may well make many or most properties in the disadvantaged neighborhood nonconforming, making it more difficult for those residents to obtain improvement loans. Depending on the local housing market, it may also spur new investment that leads to gentrification and displacement of some of the most disadvantaged and vulnerable neighborhood residents. On the other hand, applying the more permissive zoning often used in

disadvantaged neighborhoods to the adjacent non-redlined neighborhoods may result in the construction of new housing that is still not affordable to residents in the formerly redlined areas and does little to improve their housing options.

ZONING MAP POLICY 10. **Analyze zoning map boundaries based on discriminatory lending policies or the construction of divisive public works, and revise maps to remove those historical boundaries if doing so would increase the economic health and welfare of the historically disadvantaged and vulnerable community.** These changes should open up neighborhoods formerly favored by redlining to allow more diverse and affordable forms of housing, and to allow more affordable forms of housing to locate closer to good jobs, services, and schools. Do not remove those zoning boundaries when they are desired by the existing residents and businesses to discourage speculative investment, gentrification, or displacement of residents. Removal of redline-based barriers should only be done after close consultation with the affected community to balance increased economic opportunity with the preservation of desired cultural or community character. Map changes may be more effective if paired with sustained technical and financial assistance to the residents of formerly redlined neighborhoods, so that the residents can remain in their neighborhoods of choice and become their own advocates to remove physical and regulatory barriers. Overlay zones can also be used to reduce displacement (See Zoning District Policy 3).

ZONING MAP POLICY 11. **Where zoning map changes have potential impacts on historically disadvantaged and vulnerable neighborhoods, consider the use of non-zoning agreements and commitments to offset those impacts or offer compensating benefits to the neighborhood.** This may involve the creation of a revolving loan fund to expand the resources available to current residents, or other agreements requiring that developers share the new opportunities created by remapping through employing or partnering with existing tenants, property owners, and business owners in the neighborhood. It could also include granting a "right of return" allowing existing residents displaced by redevelopment to own or rent housing or business locations within the new development. Because historically disadvantaged and vulnerable communities are often less familiar with the process of negotiating these agreements, cities and counties may need to offer support or facilitation during the negotiation process.

Make zoning reform a reality in the communities you support

Thinking of amending your community's land use regulations? Consider whether these proven reforms are right for your community:

- Increasing density
- Reducing minimum lot sizes
- Creating transit-oriented development zones
- Streamlining or shortening permitting processes
- Expanding by-right multifamily zoned areas
- Allowing ADUs on lots allowing only single family homes
- Eliminating or relaxing residential property height restrictions
- Eliminating or reducing off-street parking restrictions

Learn more about what APA is doing to advance zoning reform and housing choice at the federal and state levels.

6. Related Policy Guides

Aging in Community (2014)
Climate Change (2020)
Community Residences (1997)
Environment: Waste Management (2002)
Factory Built Housing (2001)
Food Planning (2007)
Hazard Mitigation (2020)
Healthy Communities (2017)
Historical and Cultural Resources (1997)
Homelessness (2003)
Housing (2019)
Planning for Equity (2019)
Provision of Child Care (1997)

7. References and Further Reading

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The American Planning Association advocates for public policies that create just, healthy, and prosperous communities that expand opportunity for all through good planning. APA's advocacy is based on adopted positions and principles contained in policy guides. These guides address the critical policy issues confronting planners and communities by identifying solutions for local, state, and federal policy makers. Policy guides are led by the APA Legislative and Policy Committee and advance the principles of good planning in law and regulation.

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HOUSE BILL 24-1152

BY REPRESENTATIVE(S) Amabile and Weinberg, Bacon, Boesenecker, Epps, Froelich, Garcia, Jodeh, Kipp, Lindsay, Lindstedt, Mabrey, McCormick, Ortiz, Ricks, Rutinel, Sirota, Story, Valdez, Vigil, Willford, Woodrow, McCluskie, English, Herod, Martinez, McLachlan, Parenti, Weissman;
also SENATOR(S) Mullica and Exum, Cutter, Hinrichsen, Priola, Roberts, Winter F.

CONCERNING INCREASING THE NUMBER OF ACCESSORY DWELLING UNITS, AND, IN CONNECTION THEREWITH, MAKING AN APPROPRIATION.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. In Colorado Revised Statutes, **add** article 35 to title 29 as follows:

ARTICLE 35
State Land Use Criteria For Strategic Growth
PART 1
ACCESSORY DWELLING UNITS

29-35-101. Legislative declaration. (1) (a) THE GENERAL ASSEMBLY HEREBY FINDS, DETERMINES, AND DECLARES THAT:

Capital letters or bold & italic numbers indicate new material added to existing law; dashes through words or numbers indicate deletions from existing law and such material is not part of the act.

(I) ACCESSORY DWELLING UNITS OFFER A WAY TO PROVIDE COMPACT, RELATIVELY AFFORDABLE HOUSING IN ESTABLISHED NEIGHBORHOODS WITH MINIMAL IMPACTS TO INFRASTRUCTURE AND TO SUPPLY NEW HOUSING OPPORTUNITIES WITHOUT ADDED DISPERSED LOW-DENSITY HOUSING;

(II) ACCESSORY DWELLING UNITS GENERATE RENTAL INCOME TO HELP HOMEOWNERS COVER MORTGAGE PAYMENTS OR OTHER COSTS, WHICH CAN BE IMPORTANT FOR A VARIETY OF RESIDENTS, SUCH AS OLDER HOMEOWNERS ON FIXED INCOMES AND LOW- AND MODERATE-INCOME HOMEOWNERS;

(III) ACCESSORY DWELLING UNITS PROVIDE FAMILIES WITH OPTIONS FOR INTERGENERATIONAL LIVING ARRANGEMENTS THAT ENABLE CHILD OR ELDER CARE AND AGING IN PLACE, AND A 2021 SURVEY BY THE AARP FOUND THAT APPROXIMATELY SEVENTY-FIVE PERCENT OF PEOPLE FIFTY YEARS OF AGE OR OLDER WANT TO STAY IN THEIR HOMES OR COMMUNITIES FOR AS LONG AS THEY CAN. ACCORDING TO A 2018 STUDY BY THE CENTER FOR AMERICAN PROGRESS, FIFTY-ONE PERCENT OF COLORADANS LIVE IN A CHILD CARE DESERT-A COMMUNITY WHERE THERE ARE NO CHILD CARE PROVIDERS OR SO FEW OPTIONS THAT THERE ARE MORE THAN THREE TIMES AS MANY CHILDREN AS THERE ARE LICENSED CHILD CARE SLOTS. THESE CHILD CARE DESERTS ARE SITUATED WITHIN RURAL, SUBURBAN, AND URBAN COMMUNITIES AND ARE A MAJOR REASON FOR WORKING PARENTS TO LEAVE THE WORKFORCE.

(IV) ACCESSORY DWELLING UNITS ARE OFTEN OCCUPIED AT LOW TO NO RENT BY FAMILY MEMBERS, AND IF THEY ARE RENTED PRIVATELY, THEIR RENTS ARE RELATIVELY AFFORDABLE BECAUSE OF THEIR SMALL SIZE;

(V) AS COLORADO'S POPULATION AGES AND TYPICAL HOUSEHOLD SIZE CONTINUES TO DECREASE, ACCESSORY DWELLING UNITS OFFER MORE COMPACT HOUSING OPTIONS THAT ALIGN WITH THE STATE'S CHANGING DEMOGRAPHICS, AND COLORADANS OVER SIXTY-FIVE YEARS OF AGE ARE THE FASTEST-GROWING AGE COHORT IN COLORADO ACCORDING TO THE STATE DEMOGRAPHY OFFICE;

(VI) ACCESSORY DWELLING UNITS ENABLE SENIORS TO DOWNSIZE, MOVE INTO ACCESSIBLE UNITS, OR LIVE WITH FAMILY OR A CAREGIVER WHILE

REMAINING IN THEIR COMMUNITIES. A 2018 AARP SURVEY FOUND THAT SIXTY-SEVEN PERCENT OF ADULTS WOULD CONSIDER LIVING IN AN ACCESSORY DWELLING UNIT TO BE CLOSE TO SOMEONE BUT STILL HAVE A SEPARATE SPACE. MOST SENIORS DO NOT LIVE IN HOMES THAT ARE ACCESSIBLE, EVEN THOUGH DISABILITY IS PREVALENT AMONG THE SENIOR POPULATION AND INCREASES WITH AGE. LESS THAN FOUR PERCENT OF EXISTING HOUSING UNITS IN THE UNITED STATES ARE ESTIMATED TO BE LIVABLE FOR PEOPLE WITH MODERATE MOBILITY DIFFICULTIES, ACCORDING TO "HOUSING FOR AN AGING POPULATION" IN THE JOURNAL HOUSING POLICY DEBATE.

(VII) RELATIVE TO DISPERSED, LOW-DENSITY DEVELOPMENT, COMPACT INFILL DEVELOPMENT, INCLUDING ACCESSORY DWELLING UNIT DEVELOPMENT, REDUCES WATER USE, GREENHOUSE GAS EMISSIONS, INFRASTRUCTURE COSTS, AND HOUSEHOLD ENERGY AND TRANSPORTATION COSTS;

(VIII) ACCESSORY DWELLING UNITS USE SIGNIFICANTLY LESS ENERGY FOR HEATING AND COOLING THAN SINGLE-UNIT DETACHED DWELLINGS BECAUSE OF THEIR SMALLER SIZE, WHICH REDUCES HOUSEHOLD ENERGY COSTS AND GREENHOUSE GAS EMISSIONS. ACCESSORY DWELLING UNITS CAN REDUCE LIFETIME CARBON DIOXIDE EMISSIONS BY FORTY PERCENT COMPARED TO MEDIUM-SIZED SINGLE-FAMILY HOMES, ACCORDING TO A REPORT FROM THE OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY. REDUCING EMISSIONS FROM THE HOUSING SECTOR IS CRITICAL FOR MEETING THE STATE'S GREENHOUSE GAS EMISSIONS TARGETS ESTABLISHED IN SECTION 25-7-102. ACCORDING TO "THE CARBON FOOTPRINT OF HOUSEHOLD ENERGY USE IN THE UNITED STATES" IN THE PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES, REDUCING FLOOR SPACE PER CAPITA IS A CRITICAL STRATEGY TO REACHING MID-CENTURY CLIMATE GOALS.

(IX) COMPACT INFILL DEVELOPMENT REDUCES WATER DEMAND AND INFRASTRUCTURE COSTS BY USING LESS PIPING, WHICH REDUCES WATER LOSS; INCLUDES LESS LANDSCAPED SPACE PER UNIT; AND MAKES BETTER USE OF EXISTING INFRASTRUCTURE.

(X) ACCESSORY DWELLING UNITS REDUCE GOVERNMENT CAPITAL AND MAINTENANCE COSTS FOR INFRASTRUCTURE SINCE ACCESSORY DWELLING UNITS ARE BUILT IN EXISTING NEIGHBORHOODS AND HAVE A RELATIVELY SMALL IMPACT ON EXISTING INFRASTRUCTURE. NATIONAL

STUDIES SUCH AS "RELATIONSHIPS BETWEEN DENSITY AND PER CAPITA MUNICIPAL SPENDING IN THE UNITED STATES", PUBLISHED IN URBAN SCIENCE, HAVE FOUND THAT LOWER DENSITY COMMUNITIES HAVE HIGHER GOVERNMENT CAPITAL AND MAINTENANCE COSTS FOR WATER, SEWER, AND TRANSPORTATION INFRASTRUCTURE AND LOWER PROPERTY AND SALES TAX REVENUE. THESE INCREASED COSTS ARE OFTEN BORNE BY BOTH STATE AND LOCAL GOVERNMENTS.

(XI) A NUMBER OF LOCAL LAND USE LAWS PROHIBIT HOMEOWNERS FROM BUILDING AN ACCESSORY DWELLING UNIT, OR APPLY REGULATIONS TO ACCESSORY DWELLING UNITS THAT SIGNIFICANTLY LIMIT THEIR CONSTRUCTION;

(XII) A NUMBER OF MUNICIPALITIES HAVE REMOVED BARRIERS TO ACCESSORY DWELLING UNIT CONSTRUCTION SUCH AS PARKING REQUIREMENTS, OWNER OCCUPANCY REQUIREMENTS, AND RESTRICTIVE SIZE AND DESIGN LIMITATIONS, WHICH HAS RESULTED IN ACCESSORY DWELLING UNIT PERMITS INCREASING TO TEN TO TWENTY PERCENT OF TOTAL NEW HOUSING PERMITS AND AN OVERALL INCREASE IN THE TOTAL HOUSING SUPPLY. SINCE CALIFORNIA IMPLEMENTED VARIOUS REFORMS TO ENCOURAGE ACCESSORY DWELLING UNIT CONSTRUCTION, INCLUDING REQUIRING CITIES TO ALLOW ACCESSORY DWELLING UNITS AS A USE BY RIGHT, PREVENTING THE IMPOSITION OF PARKING REQUIREMENTS, AND PREVENTING OWNER OCCUPANCY REQUIREMENTS, ACCESSORY DWELLING UNIT CONSTRUCTION HAS INCREASED SIGNIFICANTLY IN CALIFORNIA. FOLLOWING REFORMS TO CALIFORNIA'S ACCESSORY DWELLING UNIT LAW IN 2016, ACCESSORY DWELLING UNIT DEVELOPMENT HAS INCREASED RAPIDLY FROM AROUND ONE THOUSAND ACCESSORY DWELLING UNITS PERMITTED IN 2016 TO OVER TWENTY-FOUR THOUSAND IN 2022, OR ABOUT TWENTY PERCENT OF NEW HOUSING PERMITS STATEWIDE, ACCORDING TO DATA FROM THE CALIFORNIA DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT AND ANALYSIS BY THE BIPARTISAN POLICY CENTER.

(XIII) HOUSING SUPPLY IMPACTS HOUSING AFFORDABILITY, AND HOUSING PRICES ARE TYPICALLY HIGHER WHEN HOUSING SUPPLY IS RESTRICTED BY LOCAL LAND USE REGULATIONS IN A METROPOLITAN REGION, ACCORDING TO THE NATIONAL BUREAU OF ECONOMIC RESEARCH IN WORKING PAPERS SUCH AS "REGULATION AND HOUSING SUPPLY", "THE IMPACT OF ZONING ON HOUSING AFFORDABILITY", AND "THE IMPACT OF LOCAL RESIDENTIAL LAND USE RESTRICTIONS ON LAND VALUES ACROSS

AND WITHIN SINGLE FAMILY HOUSING MARKETS";

(XIV) INCREASING HOUSING SUPPLY MODERATES PRICE INCREASES AND IMPROVES HOUSING AFFORDABILITY ACROSS ALL INCOMES, ACCORDING TO STUDIES SUCH AS "THE ECONOMIC IMPLICATIONS OF HOUSING SUPPLY" IN THE JOURNAL OF ECONOMIC PERSPECTIVES AND "SUPPLY SKEPTICISM: HOUSING SUPPLY AND AFFORDABILITY" IN THE JOURNAL HOUSING POLICY DEBATE;

(XV) ACADEMIC RESEARCH SUCH AS "THE IMPACT OF BUILDING RESTRICTIONS ON HOUSING AFFORDABILITY" IN THE FEDERAL RESERVE BANK OF NEW YORK ECONOMIC POLICY REVIEW HAS IDENTIFIED ZONING AND OTHER LAND USE CONTROLS AS A PRIMARY DRIVER OF RISING HOUSING COSTS IN THE MOST EXPENSIVE HOUSING MARKETS;

(XVI) ACCESSORY DWELLING UNITS OFFER AFFORDABLE AND ATTAINABLE OPTIONS TO LIVE IN HIGH-OPPORTUNITY NEIGHBORHOODS, WHICH CAN HELP IMPROVE EQUITY OUTCOMES REGIONALLY AND STATEWIDE. AN ANALYSIS OF ACCESSORY DWELLING UNIT PERMITTING IN CALIFORNIA FOUND THAT ACCESSORY DWELLING UNITS ARE TYPICALLY PERMITTED ON PARCELS WITH RELATIVELY GOOD ACCESS TO JOBS COMPARED TO SURROUNDING AREAS, ACCORDING TO "WHERE WILL ACCESSORY DWELLING UNITS SPROUT UP WHEN A STATE LETS THEM GROW? EVIDENCE FROM CALIFORNIA" IN CITYSCAPE: A JOURNAL OF POLICY DEVELOPMENT AND RESEARCH.

(XVII) LOCAL GOVERNMENT REGULATION OF ACCESSORY DWELLING UNITS VARIES SIGNIFICANTLY WITHIN REGIONS AND STATEWIDE IN COLORADO IN TERMS OF WHERE THEY ARE ALLOWED, THE DIMENSIONAL AND DESIGN RESTRICTIONS APPLIED, AND OTHER REQUIREMENTS. THIS INCONSISTENCY INHIBITS THE DEVELOPMENT OF A ROBUST MARKET OF ACCESSORY DWELLING UNIT DEVELOPERS, MODULAR ACCESSORY DWELLING UNIT DESIGNS, AND ASSOCIATED COST REDUCTIONS. COLORADO IS SIMILAR TO MOST STATES IN THIS REGARD, AND, ACCORDING TO "ZONING BY A THOUSAND CUTS" IN THE PEPPERDINE LAW REVIEW, WHICH ANALYZED ACCESSORY DWELLING UNIT REGULATIONS ACROSS CONNECTICUT, "THE HIGH DEGREE OF REGULATORY VARIATION THWARTS THE DEVELOPMENT OF PROTOTYPE DESIGNS OR PREFABRICATED [ACCESSORY DWELLING UNITS] THAT COULD SATISFY DIFFERENT RULES ACROSS JURISDICTIONS".

(XVIII) MORE PERMISSIVE REGULATION BY LOCAL GOVERNMENTS OF ACCESSORY DWELLING UNITS PROVIDES A REASONABLE CHANCE FOR HOMEOWNERS TO CONSTRUCT OR CONVERT AN ACCESSORY DWELLING UNIT AND THEREBY INCREASE HOUSING SUPPLY, STABILIZE HOUSING COSTS, AND CONTRIBUTE TO AFFORDABLE AND EQUITABLE HOME OWNERSHIP TO ADEQUATELY MEET THE HOUSING NEEDS OF A GROWING COLORADO POPULATION.

(b) THEREFORE, THE GENERAL ASSEMBLY DECLARES THAT INCREASING THE HOUSING SUPPLY THROUGH THE CONSTRUCTION OR CONVERSION OF ACCESSORY DWELLING UNITS IS A MATTER OF MIXED STATEWIDE AND LOCAL CONCERN.

29-35-102. Definitions. AS USED IN THIS PART 1, UNLESS THE CONTEXT OTHERWISE REQUIRES:

(1) "ACCESSIBLE UNIT" MEANS A HOUSING UNIT THAT:

(a) SATISFIES THE REQUIREMENTS OF THE FEDERAL "FAIR HOUSING ACT", 42 U.S.C. SEC. 3601 ET SEQ., AS AMENDED;

(b) INCORPORATES UNIVERSAL DESIGN; OR

(c) IS EITHER A TYPE A DWELLING UNIT, AS DEFINED IN SECTION 9-5-101 (10), OR A TYPE B DWELLING UNIT, AS DEFINED IN SECTION 9-5-101 (12).

(2) "ACCESSORY DWELLING UNIT" MEANS AN INTERNAL, ATTACHED, OR DETACHED DWELLING UNIT THAT:

(a) PROVIDES COMPLETE INDEPENDENT LIVING FACILITIES FOR ONE OR MORE INDIVIDUALS;

(b) IS LOCATED ON THE SAME LOT AS A PROPOSED OR EXISTING PRIMARY RESIDENCE; AND

(c) INCLUDES FACILITIES FOR LIVING, SLEEPING, EATING, COOKING, AND SANITATION.

(3) "ACCESSORY DWELLING UNIT SUPPORTIVE JURISDICTION" MEANS

A LOCAL GOVERNMENT THAT THE DEPARTMENT HAS CERTIFIED PURSUANT TO SECTION 29-35-104 AS AN ACCESSORY DWELLING UNIT SUPPORTIVE JURISDICTION.

(4) "ACCESSORY USE" MEANS A STRUCTURE OR THE USE OF A STRUCTURE ON THE SAME LOT WITH, AND OF A NATURE CUSTOMARILY INCIDENTAL AND SUBORDINATE TO, THE PRINCIPAL STRUCTURE OR USE OF THE STRUCTURE.

(5) (a) "ADMINISTRATIVE APPROVAL PROCESS" MEANS A PROCESS IN WHICH:

(I) A DEVELOPMENT PROPOSAL FOR A SPECIFIED PROJECT IS APPROVED, APPROVED WITH CONDITIONS, OR DENIED BY LOCAL GOVERNMENT ADMINISTRATIVE STAFF BASED SOLELY ON ITS COMPLIANCE WITH OBJECTIVE STANDARDS SET FORTH IN LOCAL LAWS; AND

(II) DOES NOT REQUIRE, AND CANNOT BE ELEVATED TO REQUIRE, A PUBLIC HEARING, A RECOMMENDATION, OR A DECISION BY AN ELECTED OR APPOINTED PUBLIC BODY OR A HEARING OFFICER.

(b) NOTWITHSTANDING SUBSECTION (5)(a) OF THIS SECTION, AN ADMINISTRATIVE APPROVAL PROCESS MAY REQUIRE AN APPOINTED HISTORIC PRESERVATION COMMISSION TO MAKE A DECISION, OR TO MAKE A RECOMMENDATION TO LOCAL GOVERNMENT ADMINISTRATIVE STAFF, REGARDING A DEVELOPMENT APPLICATION INVOLVING A PROPERTY THAT THE LOCAL GOVERNMENT HAS DESIGNATED AS A HISTORIC PROPERTY, PROVIDED THAT:

(I) THE STATE HISTORIC PRESERVATION OFFICE WITHIN HISTORY COLORADO HAS DESIGNATED THE LOCAL GOVERNMENT AS A CERTIFIED LOCAL GOVERNMENT; AND

(II) THE APPOINTED HISTORIC PRESERVATION COMMISSION'S DECISION OR RECOMMENDATION IS BASED ON STANDARDS EITHER SET FORTH IN LOCAL LAW OR ESTABLISHED BY THE SECRETARY OF THE INTERIOR OF THE UNITED STATES.

(6) "COUNTY" MEANS A COUNTY, INCLUDING A HOME RULE COUNTY BUT EXCLUDING A CITY AND COUNTY.

(7) "DEPARTMENT" MEANS THE DEPARTMENT OF LOCAL AFFAIRS.

(8) "DWELLING UNIT" MEANS A SINGLE UNIT PROVIDING COMPLETE INDEPENDENT LIVING FACILITIES FOR ONE OR MORE INDIVIDUALS, INCLUDING PERMANENT FACILITIES FOR COOKING, EATING, LIVING, SANITATION, AND SLEEPING.

(9) "EXEMPT PARCEL" MEANS A PARCEL THAT IS:

(a) NOT SERVED BY A DOMESTIC WATER AND SEWAGE TREATMENT SYSTEM, AS DEFINED IN SECTION 24-65.1-104 (5), OR IS SERVED BY A WELL WITH A PERMIT THAT CANNOT SUPPLY AN ADDITIONAL DWELLING UNIT;

(b) A HISTORIC PROPERTY THAT IS NOT WITHIN A HISTORIC DISTRICT; OR

(c) IN A FLOODWAY OR IN A ONE HUNDRED YEAR FLOODPLAIN, AS IDENTIFIED BY THE FEDERAL EMERGENCY MANAGEMENT AGENCY.

(10) "HISTORIC DISTRICT" MEANS A DISTRICT ESTABLISHED BY LOCAL LAW THAT MEETS THE DEFINITION OF "DISTRICT" SET FORTH IN 36 CFR 60.3 (d).

(11) "HISTORIC PROPERTY" MEANS A PROPERTY LISTED:

(a) ON THE NATIONAL REGISTER OF HISTORIC PLACES;

(b) ON THE COLORADO STATE REGISTER OF HISTORIC PROPERTIES; OR

(c) AS A CONTRIBUTING STRUCTURE OR HISTORIC LANDMARK BY A CERTIFIED LOCAL GOVERNMENT, AS DEFINED IN SECTION 39-22-514.5 (2)(b).

(12) "LOCAL GOVERNMENT" MEANS A MUNICIPALITY, COUNTY, OR TRIBAL NATION WITH JURISDICTION IN COLORADO.

(13) "LOCAL LAW" MEANS ANY CODE, LAW, ORDINANCE, POLICY, REGULATION, OR RULE ENACTED BY A LOCAL GOVERNMENT THAT GOVERNS THE DEVELOPMENT AND USE OF LAND, INCLUDING LAND USE CODES, ZONING CODES, AND SUBDIVISION CODES.

(14) "LOW- AND MODERATE-INCOME HOUSEHOLD" MEANS A HOUSEHOLD THAT IS CONSIDERED LOW-, MODERATE-, OR MEDIUM-INCOME, AS DETERMINED BY THE FEDERAL DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT.

(15) "METROPOLITAN PLANNING ORGANIZATION" MEANS A METROPOLITAN PLANNING ORGANIZATION UNDER THE "FEDERAL TRANSIT ACT OF 1998", 49 U.S.C. SEC. 5301 ET SEQ., AS AMENDED.

(16) "MUNICIPALITY" MEANS A HOME RULE OR STATUTORY CITY OR TOWN, TERRITORIAL CHARTER CITY OR TOWN, OR CITY AND COUNTY.

(17) "OBJECTIVE STANDARD" MEANS A STANDARD THAT:

(a) IS A DEFINED BENCHMARK OR CRITERION THAT ALLOWS FOR DETERMINATIONS OF COMPLIANCE TO BE CONSISTENTLY DECIDED REGARDLESS OF THE DECISION MAKER; AND

(b) DOES NOT REQUIRE A SUBJECTIVE DETERMINATION CONCERNING A DEVELOPMENT PROPOSAL, INCLUDING BUT NOT LIMITED TO WHETHER THE APPLICATION FOR THE DEVELOPMENT PROPOSAL IS:

(I) CONSISTENT WITH MASTER PLANS, OR OTHER DEVELOPMENT PLANS;

(II) COMPATIBLE WITH THE LAND USE OR DEVELOPMENT OF THE AREA SURROUNDING THE AREA DESCRIBED IN THE APPLICATION; OR

(III) CONSISTENT WITH PUBLIC WELFARE, COMMUNITY CHARACTER, OR NEIGHBORHOOD CHARACTER.

(18) "RESTRICTIVE DESIGN OR DIMENSION STANDARD" MEANS A STANDARD IN A LOCAL LAW THAT:

(a) REQUIRES AN ARCHITECTURAL STYLE, BUILDING MATERIAL, OR LANDSCAPING THAT IS MORE RESTRICTIVE FOR AN ACCESSORY DWELLING UNIT THAN FOR A SINGLE-UNIT DETACHED DWELLING IN THE SAME ZONING DISTRICT;

(b) DOES NOT ALLOW FOR ACCESSORY DWELLING UNIT SIZES

BETWEEN FIVE HUNDRED AND SEVEN HUNDRED FIFTY SQUARE FEET;

(c) REQUIRES SIDE SETBACKS FOR AN ACCESSORY DWELLING UNIT THAT ARE LARGER THAN THE SIDE SETBACKS REQUIRED FOR A PRIMARY DWELLING UNIT IN THE SAME ZONING DISTRICT;

(d) REQUIRES A REAR SETBACK FOR AN ACCESSORY DWELLING UNIT THAT IS LARGER THAN THE GREATER OF:

(I) THE REAR SETBACK REQUIRED FOR OTHER ACCESSORY BUILDING TYPES IN THE SAME ZONING DISTRICT; OR

(II) FIVE FEET;

(e) IS A MORE RESTRICTIVE MINIMUM LOT SIZE STANDARD FOR AN ACCESSORY DWELLING UNIT THAN FOR A SINGLE-UNIT DETACHED DWELLING IN THE SAME ZONING DISTRICT; OR

(f) APPLIES MORE RESTRICTIVE AESTHETIC DESIGN OR DIMENSIONAL STANDARDS TO ACCESSORY DWELLING UNITS THAT ARE FACTORY-BUILT RESIDENTIAL STRUCTURES, AS DEFINED IN SECTION 24-32-3302 (10), THAN OTHER ACCESSORY DWELLING UNITS.

(19) (a) "SHORT-TERM RENTAL" MEANS THE RENTAL OF A LODGING UNIT FOR LESS THAN THIRTY DAYS. AS USED IN THIS SUBSECTION (19), "LODGING UNIT" MEANS ANY PROPERTY OR PORTION OF A PROPERTY THAT IS AVAILABLE FOR LODGING; EXCEPT THAT THE TERM EXCLUDES A HOTEL OR MOTEL UNIT.

(b) NOTWITHSTANDING SUBSECTION (19)(a) OF THIS SECTION, A LOCAL GOVERNMENT MAY APPLY ITS OWN DEFINITION OF "SHORT-TERM RENTAL" FOR PURPOSES OF THIS PART 1.

(20) "SINGLE-UNIT DETACHED DWELLING" MEANS A DETACHED BUILDING WITH A SINGLE DWELLING UNIT ON A SINGLE LOT.

(21) "SUBJECT JURISDICTION" MEANS EITHER:

(a) A MUNICIPALITY THAT BOTH HAS A POPULATION OF ONE THOUSAND OR MORE, AS REPORTED BY THE STATE DEMOGRAPHY OFFICE,

AND IS WITHIN A METROPOLITAN PLANNING ORGANIZATION; OR

(b) THE PORTION OF A COUNTY THAT IS BOTH WITHIN A CENSUS DESIGNATED PLACE WITH A POPULATION OF FORTY THOUSAND OR MORE, AS REPORTED IN THE MOST RECENT DECENNIAL CENSUS, AND WITHIN A METROPOLITAN PLANNING ORGANIZATION.

(22) "TANDEM PARKING SPACE" MEANS A PARKING SPACE THAT IS LOCATED EITHER IN FRONT OF OR BEHIND ONE OR MORE OTHER PARKING SPACES THAT SHARE THE SAME POINT OF ACCESS.

(23) "UNIVERSAL DESIGN" MEANS ANY DWELLING UNIT DESIGNED AND CONSTRUCTED TO BE SAFE AND ACCESSIBLE FOR ANY INDIVIDUAL REGARDLESS OF AGE OR ABILITIES.

(24) "VISITABLE UNIT" MEANS A DWELLING UNIT THAT A PERSON WITH A DISABILITY CAN ENTER, MOVE AROUND THE PRIMARY ENTRANCE FLOOR OF, AND USE THE BATHROOM IN.

29-35-103. Accessory dwelling unit requirements for a subject jurisdiction. (1) ON OR AFTER JUNE 30, 2025, A SUBJECT JURISDICTION SHALL ALLOW, SUBJECT TO AN ADMINISTRATIVE APPROVAL PROCESS, ONE ACCESSORY DWELLING UNIT AS AN ACCESSORY USE TO A SINGLE-UNIT DETACHED DWELLING IN ANY PART OF THE SUBJECT JURISDICTION WHERE THE JURISDICTION ALLOWS SINGLE-UNIT DETACHED DWELLINGS.

(2) ON OR AFTER JUNE 30, 2025, A SUBJECT JURISDICTION SHALL NOT:

(a) REQUIRE THE CONSTRUCTION OF A NEW OFF-STREET PARKING SPACE IN CONNECTION WITH THE CONSTRUCTION OR CONVERSION OF AN ACCESSORY DWELLING UNIT, EXCEPT AS DESCRIBED IN SUBSECTIONS (3)(a) AND (3)(b) OF THIS SECTION;

(b) REQUIRE AN ACCESSORY DWELLING UNIT, OR ANY OTHER DWELLING ON THE SAME LOT AS AN ACCESSORY DWELLING UNIT, TO BE OWNER-OCCUPIED; EXCEPT THAT A SUBJECT JURISDICTION MAY REQUIRE A PROPERTY OWNER TO DEMONSTRATE THAT THE PROPERTY OWNER RESIDES ON THE PARCEL WHEN AN APPLICATION IS SUBMITTED:

(I) TO CONSTRUCT OR CONVERT AN ACCESSORY DWELLING UNIT. THIS EXCEPTION DOES NOT APPLY FOR AN ACCESSORY DWELLING UNIT THAT IS BEING CONSTRUCTED SIMULTANEOUSLY WITH A NEW PRIMARY DWELLING UNIT.

(II) FOR A LICENSE OR PERMIT FOR A SHORT-TERM RENTAL ON THE PARCEL THROUGH A LOCAL LAW OR PROGRAM.

(c) APPLY A RESTRICTIVE DESIGN OR DIMENSION STANDARD TO AN ACCESSORY DWELLING UNIT.

(3) NOTHING IN THIS SECTION PREVENTS A SUBJECT JURISDICTION OR OTHER LOCAL GOVERNMENT FROM:

(a) REQUIRING THE DESIGNATION OF AN OFF-STREET PARKING SPACE IN CONNECTION WITH AN ACCESSORY DWELLING UNIT, SO LONG AS THERE IS AN EXISTING DRIVEWAY, GARAGE, TANDEM PARKING SPACE, OR OTHER OFF-STREET PARKING SPACE AVAILABLE FOR SUCH A DESIGNATION AT THE TIME OF THE CONSTRUCTION OR CONVERSION OF THE ACCESSORY DWELLING UNIT;

(b) REQUIRING, IN CONNECTION WITH THE CONSTRUCTION OR CONVERSION OF AN ACCESSORY DWELLING UNIT, ONE NEW PARKING SPACE ON A PARCEL THAT:

(I) DOES NOT HAVE AN EXISTING OFF-STREET PARKING SPACE, INCLUDING A DRIVEWAY, GARAGE, OR TANDEM PARKING SPACE, THAT COULD BE USED FOR AN ACCESSORY DWELLING UNIT;

(II) IS IN A ZONING DISTRICT THAT, AS OF JANUARY 1, 2024, REQUIRES ONE OR MORE PARKING SPACES FOR THE PRIMARY DWELLING UNIT; AND

(III) IS LOCATED ON A BLOCK WHERE ON-STREET PARKING IS PROHIBITED FOR ANY REASON INCLUDING ENSURING ACCESS FOR EMERGENCY SERVICES;

(c) ALLOWING THE CONSTRUCTION OR CONVERSION OF AN ACCESSORY DWELLING UNIT THAT IS SMALLER THAN FIVE HUNDRED SQUARE FEET OR GREATER THAN EIGHT HUNDRED SQUARE FEET, OR RESTRICTING THE

SIZE OF AN ACCESSORY DWELLING UNIT SO THAT IT IS NO LARGER THAN THE SIZE OF THE PRINCIPAL DWELLING UNIT ON THE SAME LOT AS THE ACCESSORY DWELLING UNIT;

(d) ALLOWING THE CONSTRUCTION OR CONVERSION OF MULTIPLE ACCESSORY DWELLING UNITS ON THE SAME LOT;

(e) APPLYING A DESIGN OR DIMENSION STANDARD TO AN ACCESSORY DWELLING UNIT THAT IS NOT A RESTRICTIVE DESIGN OR DIMENSION STANDARD;

(f) ADOPTING OR ENFORCING A GENERALLY APPLICABLE REQUIREMENT FOR:

(I) THE PAYMENT OF AN IMPACT FEE OR OTHER SIMILAR DEVELOPMENT CHARGE, PURSUANT TO SECTION 29-20-104.5; OR

(II) THE MITIGATION OF IMPACTS IN CONFORMANCE WITH THE REQUIREMENTS OF PART 2 OF ARTICLE 20 OF THIS TITLE 29;

(g) ENACTING OR APPLYING A LOCAL LAW CONCERNING THE SHORT-TERM RENTAL OF AN ACCESSORY DWELLING UNIT OR ANY OTHER DWELLING ON THE SAME LOT AS AN ACCESSORY DWELLING UNIT;

(h) APPLYING THE DESIGN STANDARDS AND PROCEDURES OF A HISTORIC DISTRICT TO A LOT ON WHICH AN ACCESSORY DWELLING UNIT IS ALLOWED IN THAT HISTORIC DISTRICT, INCLUDING A STANDARD OR PROCEDURE RELATED TO DEMOLITION;

(i) APPLYING AND ENFORCING A LOCALLY ADOPTED LIFE SAFETY CODE, INCLUDING BUT NOT LIMITED TO, A BUILDING, FIRE, UTILITY, OR STORMWATER CODE;

(j) ALLOWING THE CONSTRUCTION OF, OR ISSUING A PERMIT FOR THE CONSTRUCTION OF, A SINGLE-UNIT DETACHED DWELLING IN AN AREA ZONED FOR SINGLE-UNIT DETACHED DWELLINGS;

(k) ENCOURAGING THE CONSTRUCTION OF ACCESSORY DWELLING UNITS THAT ARE, THROUGH THE APPLICATION OF LOCAL LAWS OR PROGRAMS INCLUDING THROUGH DEED RESTRICTIONS, MADE AFFORDABLE TO

HOUSEHOLDS UNDER CERTAIN INCOME LIMITS OR USED PRIMARILY TO HOUSE THE LOCAL WORKFORCE PURSUANT TO A LOCAL, REGIONAL, OR STATE AFFORDABLE HOUSING PROGRAM;

(l) DEFINING ACCESSORY DWELLING UNIT IN LOCAL LAW AS INCLUDING OR EXCLUDING OTHER DWELLING UNIT TYPES SUCH AS A "MOTOR HOME", AS DEFINED IN SECTION 42-1-102 (57), A "MULTIPURPOSE TRAILER", AS DEFINED IN SECTION 42-1-102 (60.3), AND A "RECREATIONAL VEHICLE", AS DEFINED IN SECTION 24-32-902 (9); OR

(m) REQUIRING A STATEMENT BY A WATER OR WASTEWATER SERVICE PROVIDER REGARDING ITS CAPACITY TO SERVICE THE PROPERTY AS A CONDITION OF PERMITTING AN ACCESSORY DWELLING UNIT.

(4) THIS SECTION ONLY APPLIES TO A PARCEL IN A SUBJECT JURISDICTION THAT IS NOT AN EXEMPT PARCEL.

29-35-104. Accessory dwelling unit supportive jurisdiction report - certification of a jurisdiction as an accessory dwelling unit supportive jurisdiction. (1) (a) IN ORDER TO BE CERTIFIED AS AN ACCESSORY DWELLING UNIT SUPPORTIVE JURISDICTION BY THE DEPARTMENT, A LOCAL GOVERNMENT MUST SUBMIT TO THE DEPARTMENT, IN A FORM AND MANNER DETERMINED BY THE DEPARTMENT, A REPORT DEMONSTRATING EVIDENCE OF THE LOCAL GOVERNMENT:

(I) COMPLYING WITH SECTION 29-35-103 AS A SUBJECT JURISDICTION OR, IF THE LOCAL GOVERNMENT IS NOT A SUBJECT JURISDICTION, AS IF THE LOCAL GOVERNMENT WERE A SUBJECT JURISDICTION FOR PURPOSES OF SECTION 29-35-103; AND

(II) IMPLEMENTING ONE OR MORE OF THE FOLLOWING STRATEGIES:

(A) WAIVING, REDUCING, OR PROVIDING FINANCIAL ASSISTANCE FOR ACCESSORY DWELLING UNIT-RELATED FEES THAT ARE INCURRED BY LOW- AND MODERATE-INCOME HOUSEHOLDS;

(B) ENACTING LOCAL LAWS OR PROGRAMS THAT INCENTIVIZE THE AFFORDABILITY OF CERTAIN ACCESSORY DWELLING UNITS INCLUDING ACCESSORY DWELLING UNITS USED PRIMARILY TO HOUSE THE LOCAL WORKFORCE;

(C) PROVIDING PRE-APPROVED PLANS FOR THE CONSTRUCTION OF ACCESSORY DWELLING UNITS;

(D) IMPLEMENTING A PROGRAM TO PROVIDE EDUCATION AND TECHNICAL ASSISTANCE TO HOMEOWNERS TO CONSTRUCT OR CONVERT AN ACCESSORY DWELLING UNIT;

(E) IMPLEMENTING A PROGRAM TO REGULATE THE USE OF ACCESSORY DWELLING UNITS FOR SHORT-TERM RENTALS;

(F) ENACTING LOCAL LAWS THAT INCENTIVIZE THE CONSTRUCTION AND CONVERSION OF ACCESSIBLE AND VISITABLE ACCESSORY DWELLING UNITS;

(G) ASSISTING PROPERTY OWNERS WITH ENSURING THAT PRE-EXISTING ACCESSORY DWELLING UNITS COMPLY WITH LOCAL LAWS;

(H) ENABLING A PATHWAY FOR THE SEPARATE SALE OF AN ACCESSORY DWELLING UNIT;

(I) ENACTING LOCAL LAWS THAT ENCOURAGE THE CONSTRUCTION OF ACCESSORY DWELLING UNITS THAT ARE FACTORY-BUILT RESIDENTIAL STRUCTURES, AS DEFINED IN SECTION 24-32-3302 (10); OR

(J) ANY OTHER STRATEGY THAT IS APPROVED BY THE DEPARTMENT AND THAT ENCOURAGES THE CONSTRUCTION, CONVERSION, OR USE OF ACCESSORY DWELLING UNITS.

(b) (I) ON OR BEFORE JUNE 30, 2025, A SUBJECT JURISDICTION SHALL SUBMIT THE REPORT DESCRIBED IN SUBSECTION (1)(a) OF THIS SECTION.

(II) NOTWITHSTANDING SUBSECTION (1)(b)(I) OF THIS SECTION, THE DEPARTMENT MAY ALLOW A SUBJECT JURISDICTION TO SUBMIT THE REPORT DESCRIBED IN SUBSECTION (1)(a) OF THIS SECTION NO MORE THAN SIX MONTHS AFTER THE DEADLINE DESCRIBED IN SUBSECTION (1)(b)(I) OF THIS SECTION IF THE SUBJECT JURISDICTION DEMONSTRATES, IN A FORM AND MANNER DETERMINED BY THE DEPARTMENT, THAT THE SUBJECT JURISDICTION HAS:

(A) INITIATED A PROCESS TO UPDATE ITS LOCAL LAWS AS NECESSARY

TO COMPLY WITH THE REQUIREMENTS OF THE REPORT DESCRIBED IN SUBSECTION (1)(a) OF THIS SECTION;

(B) A PLAN AND TIMELINE TO UPDATE ITS LOCAL LAWS AS NECESSARY TO COMPLY WITH THE REQUIREMENTS OF THE REPORT DESCRIBED IN SUBSECTION (1)(a) OF THIS SECTION; AND

(C) PROVIDED AN EXPLANATION FOR NOT BEING ABLE TO MEET THE DEADLINE DESCRIBED IN SUBSECTION (1)(b)(I) OF THIS SECTION.

(c) IF A LOCAL GOVERNMENT THAT IS NOT A SUBJECT JURISDICTION SUBMITS A REPORT PURSUANT TO SUBSECTION (1)(a) OF THIS SECTION, THAT LOCAL GOVERNMENT SHALL, AS PART OF THE REPORT, SUBMIT EVIDENCE OF COMPLYING WITH THE REQUIREMENTS FOR A SUBJECT JURISDICTION DESCRIBED IN SECTION 29-35-103.

(2) (a) WITHIN NINETY DAYS OF RECEIVING A LOCAL GOVERNMENT'S REPORT SUBMITTED PURSUANT TO SUBSECTION (1)(a) OF THIS SECTION, THE DEPARTMENT SHALL REVIEW THE REPORT, EITHER APPROVE OR REJECT THE REPORT, AND PROVIDE FEEDBACK TO THE LOCAL GOVERNMENT ON THE REPORT.

(b) IF THE DEPARTMENT APPROVES A LOCAL GOVERNMENT'S REPORT SUBMITTED PURSUANT TO SUBSECTION (1)(a) OF THIS SECTION, THE DEPARTMENT SHALL ISSUE TO THAT LOCAL GOVERNMENT A CERTIFICATE INDICATING THAT THE LOCAL GOVERNMENT QUALIFIES AS AN ACCESSORY DWELLING UNIT SUPPORTIVE JURISDICTION. THE DEPARTMENT MAY REVOKE SUCH A CERTIFICATE IF A LOCAL GOVERNMENT DOES NOT SATISFY THE REQUIREMENTS OF SUBSECTION (1)(a) OF THIS SECTION.

(c) IF THE DEPARTMENT REJECTS A LOCAL GOVERNMENT'S REPORT SUBMITTED PURSUANT TO SUBSECTION (1)(a) OF THIS SECTION, THE DEPARTMENT MAY GRANT THE LOCAL GOVERNMENT AN ADDITIONAL ONE HUNDRED TWENTY DAYS TO CORRECT ANY DEFICIENCIES IDENTIFIED IN THE REPORT AND RESUBMIT AN AMENDED REPORT. WITHIN NINETY DAYS OF RECEIVING AN AMENDED REPORT, THE DEPARTMENT SHALL REVIEW THE AMENDED REPORT, EITHER APPROVE OR REJECT THE AMENDED REPORT, AND PROVIDE FEEDBACK ON THE AMENDED REPORT.

(3) THE DEPARTMENT, IN CONSULTATION WITH THE DEPARTMENT OF

TRANSPORTATION, THE COLORADO ENERGY OFFICE, AND THE COLORADO OFFICE OF ECONOMIC DEVELOPMENT, MAY DEVELOP POLICIES AND PROCEDURES AS NECESSARY TO IMPLEMENT THIS SECTION.

29-35-105. Accessory dwelling unit fee reduction and encouragement grant program - created - application - criteria - awards - fund - reporting requirements - rules - definitions - repeal. (1) THE ACCESSORY DWELLING UNIT FEE REDUCTION AND ENCOURAGEMENT GRANT PROGRAM IS CREATED IN THE DEPARTMENT TO PROVIDE GRANTS TO ACCESSORY DWELLING UNIT SUPPORTIVE JURISDICTIONS FOR ACTIVITIES THAT PROMOTE THE CONSTRUCTION OF ACCESSORY DWELLING UNITS, INCLUDING BUT NOT LIMITED TO, OFFSETTING COSTS INCURRED IN CONNECTION WITH DEVELOPING PRE-APPROVED ACCESSORY DWELLING UNIT PLANS, PROVIDING TECHNICAL ASSISTANCE TO PERSONS CONVERTING OR CONSTRUCTING ACCESSORY DWELLING UNITS, OR WAIVING, REDUCING, OR PROVIDING FINANCIAL ASSISTANCE FOR ACCESSORY DWELLING UNIT ASSOCIATED FEES AND OTHER REQUIRED COSTS.

(2) GRANT RECIPIENTS MAY USE THE MONEY RECEIVED THROUGH THE GRANT PROGRAM TO OFFSET BOTH ELIGIBLE COSTS AND THE COST OF WAIVING, REDUCING, OR PROVIDING FINANCIAL ASSISTANCE FOR REASONABLE AND NECESSARY ACCESSORY DWELLING UNIT FEES AND OTHER REQUIRED COSTS FOR:

(a) LOW- AND MODERATE-INCOME HOUSEHOLDS;

(b) AFFORDABLE ACCESSORY DWELLING UNITS;

(c) ACCESSIBLE OR VISITABLE ACCESSORY DWELLING UNITS;

(d) ACCESSORY DWELLING UNITS USED AS LONG-TERM RENTALS FOR MEMBERS OF THE LOCAL WORKFORCE; OR

(e) ACCESSORY DWELLING UNITS USED TO SUPPORT OTHER DEMONSTRATED HOUSING NEEDS IN THE COMMUNITY.

(3) THE DEPARTMENT SHALL ADMINISTER THE GRANT PROGRAM AND, SUBJECT TO AVAILABLE APPROPRIATIONS, PROVIDE TECHNICAL ASSISTANCE, DEVELOP A TOOLKIT TO SUPPORT LOCAL GOVERNMENTS IN ENCOURAGING ACCESSORY DWELLING UNIT CONSTRUCTION, RECEIVE GRANT APPLICATIONS

AND AWARD GRANTS AS PROVIDED IN THIS SECTION.

(4) TO RECEIVE A GRANT, AN ACCESSORY DWELLING UNIT SUPPORTIVE JURISDICTION MUST SUBMIT AN APPLICATION TO THE DEPARTMENT IN ACCORDANCE WITH THE POLICIES AND PROCEDURES DEVELOPED BY THE DEPARTMENT PURSUANT TO SUBSECTION (9) OF THIS SECTION. AT A MINIMUM, THE APPLICATION MUST INCLUDE THE FOLLOWING:

(a) A COPY OF THE CERTIFICATE ISSUED BY THE DEPARTMENT PURSUANT TO SECTION 29-35-104 CERTIFYING THAT THE LOCAL GOVERNMENT IS AN ACCESSORY DWELLING UNIT SUPPORTIVE JURISDICTION;

(b) THE NUMBER OF ACCESSORY DWELLING UNITS THAT THE LOCAL GOVERNMENT HAS PERMITTED AND WHEN THE LOCAL GOVERNMENT PERMITTED THOSE ACCESSORY DWELLING UNITS;

(c) THE TYPE AND COSTS OF FEES AND OTHER ELIGIBLE COSTS THAT THE LOCAL GOVERNMENT IS PROPOSING TO USE A GRANT AWARD TO PAY FOR;

(d) THE NUMBER OF ACCESSORY DWELLING UNITS THAT THE LOCAL GOVERNMENT EXPECTS TO SUPPORT WITH A GRANT AWARD AND THE PERIOD FOR WHICH THE LOCAL GOVERNMENT INTENDS TO SUPPORT THOSE ACCESSORY DWELLING UNITS; AND

(e) INFORMATION ABOUT THE TYPES OF HOUSEHOLDS AND ACCESSORY DWELLING UNITS THAT THE LOCAL GOVERNMENT INTENDS TO SUPPORT WITH A GRANT AWARD, SUCH AS WHETHER THE LOCAL GOVERNMENT INTENDS TO SUPPORT LOW- AND MODERATE-INCOME HOUSEHOLDS, AFFORDABLE ACCESSORY DWELLING UNITS, ACCESSIBLE OR VISITABLE ACCESSORY DWELLING UNITS, ACCESSORY DWELLING UNITS FOR HOUSING THE LOCAL WORKFORCE, OR ACCESSORY DWELLING UNITS SUPPORTING OTHER DEMONSTRATED HOUSING NEEDS IN THE COMMUNITY.

(5) THE DEPARTMENT SHALL REVIEW THE APPLICATIONS RECEIVED PURSUANT TO SUBSECTION (4) OF THIS SECTION. IN AWARDING GRANTS, THE DEPARTMENT SHALL GIVE PRIORITY TO LOCAL GOVERNMENTS THAT:

(a) IMPOSE ACCESSORY DWELLING UNIT FEES AND COSTS THAT ARE REASONABLE AND NECESSARY;

(b) HAVE DEMONSTRATED A SIGNIFICANT COMMITMENT TO FURTHER CONSTRUCTION AND CONVERSION OF ACCESSORY DWELLING UNITS THROUGH THE ADOPTION OF STRATEGIES DESCRIBED IN SECTION 29-35-104 (1)(a)(II); AND

(c) PROVIDE OFFSETS FOR, OR WAIVE A GREATER NUMBER OF ACCESSORY DWELLING UNIT FEES FOR:

(I) LOW- AND MODERATE-INCOME HOUSEHOLDS; OR

(II) ACCESSORY DWELLING UNITS THAT ARE RENTED TO LOW- AND MODERATE-INCOME HOUSEHOLDS.

(6) IN AWARDING A GRANT, THE DEPARTMENT SHALL AWARD A LOCAL GOVERNMENT AN AMOUNT EQUAL TO NO MORE THAN FIFTEEN THOUSAND DOLLARS PER ACCESSORY DWELLING UNIT PERMITTED BY THE LOCAL GOVERNMENT, TO BE REIMBURSED BASED ON THE NUMBER OF PERMITTED ACCESSORY DWELLING UNITS.

(7) (a) THE ACCESSORY DWELLING UNIT FEE REDUCTION AND ENCOURAGEMENT GRANT PROGRAM FUND IS CREATED IN THE STATE TREASURY. THE FUND CONSISTS OF ANY MONEY THAT THE GENERAL ASSEMBLY MAY TRANSFER OR APPROPRIATE TO THE FUND AND GIFTS, GRANTS, OR DONATIONS CREDITED TO THE FUND. THE STATE TREASURER SHALL CREDIT ALL INTEREST AND INCOME DERIVED FROM THE DEPOSIT AND INVESTMENT OF MONEY IN THE FUND TO THE FUND.

(b) SUBJECT TO ANNUAL APPROPRIATION BY THE GENERAL ASSEMBLY, THE DEPARTMENT MAY EXPEND MONEY FROM THE FUND FOR THE PURPOSE OF IMPLEMENTING AND ADMINISTERING THE GRANT PROGRAM.

(c) ON OR BEFORE JUNE 30, 2024, THE STATE TREASURER SHALL TRANSFER FIVE MILLION DOLLARS FROM THE GENERAL FUND TO THE FUND.

(8) IN ACCORDANCE WITH THE POLICIES AND PROCEDURES DEVELOPED BY THE DEPARTMENT PURSUANT TO SUBSECTION (9) OF THIS SECTION, EACH LOCAL GOVERNMENT THAT RECEIVES A GRANT THROUGH THE GRANT PROGRAM SHALL SUBMIT A REPORT TO THE DEPARTMENT. AT A MINIMUM, THE REPORT MUST INCLUDE THE FOLLOWING INFORMATION:

(a) THE NUMBER OF ACCESSORY DWELLING UNITS WITH ACCESSORY DWELLING UNIT FEES OR COSTS THAT LOCAL GOVERNMENTS WAIVED, REDUCED, OR PROVIDED FINANCIAL ASSISTANCE FOR IN THE PAST YEAR;

(b) THE TOTAL AMOUNT OF ELIGIBLE COSTS THAT LOCAL GOVERNMENTS INCURRED AND WERE REIMBURSED FOR THROUGH THE GRANT PROGRAM IN THE PAST YEAR IN CONNECTION WITH THE GRANT PROGRAM;

(c) THE NUMBER OF THE ACCESSORY DWELLING UNITS DESCRIBED IN SUBSECTION (8)(a) OF THIS SECTION THAT WERE BUILT IN THE PAST YEAR THAT WERE BUILT BY LOW- AND MODERATE-INCOME HOUSEHOLDS, THAT ARE AFFORDABLE ACCESSORY DWELLING UNITS, AND THAT ARE VISITABLE OR ACCESSIBLE ACCESSORY DWELLING UNITS;

(d) THE NUMBER OF ACCESSORY DWELLING UNITS THAT ARE FACTORY-BUILT RESIDENTIAL STRUCTURES, AS DEFINED IN SECTION 24-32-3302 (10); AND

(e) THE NUMBER OF ACCESSORY DWELLING UNIT PERMITS AWARDED, DENIED, OR IN PROGRESS IN THE LOCAL GOVERNMENT'S JURISDICTION.

(9) THE DEPARTMENT SHALL IMPLEMENT THE GRANT PROGRAM IN ACCORDANCE WITH THIS SECTION. THE DEPARTMENT SHALL DEVELOP, IN CONSULTATION WITH THE DEPARTMENT OF TRANSPORTATION, THE COLORADO ENERGY OFFICE, AND THE COLORADO OFFICE OF ECONOMIC DEVELOPMENT, POLICIES AND PROCEDURES BOTH AS REQUIRED IN THIS SECTION AND AS MAY BE NECESSARY TO IMPLEMENT THE GRANT PROGRAM.

(10) AS USED IN THIS SECTION, UNLESS THE CONTEXT OTHERWISE REQUIRES:

(a) "ACCESSORY DWELLING UNIT FEE" MEANS A REASONABLE AND NECESSARY FEE COLLECTED OR REQUIRED BY A LOCAL GOVERNMENT IN CONNECTION WITH THE CONSTRUCTION OR CONVERSION OF AN ACCESSORY DWELLING UNIT. SUCH A FEE MAY INCLUDE IMPACT FEES.

(b) (I) "ELIGIBLE COSTS" MEANS COSTS INCURRED BY A LOCAL GOVERNMENT AND DETERMINED BY THE DEPARTMENT TO BE INCURRED IN CONNECTION WITH DEVELOPING PRE-APPROVED ACCESSORY DWELLING UNIT PLANS, PROVIDING TECHNICAL ASSISTANCE TO PERSONS CONVERTING OR

CONSTRUCTING ACCESSORY DWELLING UNITS, OR OTHER REASONABLE AND NECESSARY FEES LEVIED BY OR COSTS BORNE BY THE LOCAL GOVERNMENT FOR THE CONSTRUCTION OR CONVERSION OF AN ACCESSORY DWELLING UNIT.

(II) NOTWITHSTANDING SUBSECTION (10)(b)(I) OF THIS SECTION, IN ORDER FOR COSTS INCURRED BY A LOCAL GOVERNMENT IN CONNECTION WITH DEVELOPING PRE-APPROVED ACCESSORY DWELLING UNIT PLANS TO QUALIFY AS ELIGIBLE COSTS, AT LEAST ONE SUCH PRE-APPROVED ACCESSORY DWELLING UNIT PLAN MUST BE FOR AN ACCESSIBLE OR VISITABLE ACCESSORY DWELLING UNIT.

(c) "FUND" MEANS THE ACCESSORY DWELLING UNIT FEE REDUCTION AND ENCOURAGEMENT GRANT PROGRAM FUND CREATED IN SUBSECTION (7) OF THIS SECTION.

(d) "GRANT PROGRAM" MEANS THE ACCESSORY DWELLING UNIT FEE REDUCTION AND ENCOURAGEMENT GRANT PROGRAM CREATED IN THIS SECTION.

(11) THIS SECTION IS REPEALED, EFFECTIVE DECEMBER 31, 2030.

SECTION 2. In Colorado Revised Statutes, 24-32-3305, **add** (3.3) as follows:

24-32-3305. Rules - advisory committee - enforcement. (3.3) THE DEPARTMENT SHALL CREATE FOR FACTORY-BUILT STRUCTURES, INCLUDING THOSE THAT WOULD BE CONSIDERED ACCESSORY DWELLING UNITS, MODEL PUBLIC SAFETY CODE REQUIREMENTS RELATED TO GEOGRAPHIC OR CLIMATIC CONDITIONS, SUCH AS WEIGHT RESTRICTIONS FOR ROOF SNOW LOADS, WIND SHEAR FACTORS, OR WILDFIRE RISK, FOR LOCAL GOVERNMENTS TO CONSIDER AND ADOPT PURSUANT TO SECTION 24-32-3318 (2)(a).

SECTION 3. In Colorado Revised Statutes, 24-46-104, **add** (1)(q) as follows:

24-46-104. Powers and duties of commission - repeal. (1) The commission has the following powers and duties:

(q) (I) TO EXPEND EIGHT MILLION DOLLARS TO CONTRACT WITH THE COLORADO HOUSING AND FINANCE AUTHORITY, CREATED IN PART 7 OF

ARTICLE 4 OF TITLE 29, FOR THE CREATION AND OPERATION OF ONE OR MORE OF THE FOLLOWING PROGRAMS TO BENEFIT LOW- TO MODERATE-INCOME RESIDENTS IN LOCAL GOVERNMENTS THAT HAVE BEEN CERTIFIED AS ACCESSORY DWELLING UNIT SUPPORTIVE JURISDICTIONS BY THE DEPARTMENT OF LOCAL AFFAIRS:

(A) AN ACCESSORY DWELLING UNIT CREDIT ENHANCEMENT PROGRAM THAT SUPPORTS LENDERS OFFERING AFFORDABLE LOANS TO ELIGIBLE LOW- AND MODERATE-INCOME BORROWERS FOR THE CONSTRUCTION OR CONVERSION OF ACCESSORY DWELLING UNITS;

(B) A PROGRAM THAT ALLOWS FOR THE BUYING DOWN OF INTEREST RATES ON LOANS MADE TO ELIGIBLE LOW- AND MODERATE-INCOME BORROWERS IN CONNECTION WITH THE CONSTRUCTION OR CONVERSION OF ACCESSORY DWELLING UNITS;

(C) A PROGRAM THAT OFFERS DOWN PAYMENT ASSISTANCE IN CONNECTION WITH ACCESSORY DWELLING UNITS, PRINCIPAL REDUCTION ON LOANS TO ELIGIBLE LOW- AND MODERATE-INCOME BORROWERS MADE IN CONNECTION WITH ACCESSORY DWELLING UNITS, OR BOTH; OR

(D) A PROGRAM IN WHICH THE COLORADO HOUSING AND FINANCE AUTHORITY OFFERS LOANS, REVOLVING LINES OF CREDIT, OR GRANTS TO ELIGIBLE NON-PROFITS, PUBLIC HOUSING AUTHORITIES, AND COMMUNITY DEVELOPMENT FINANCIAL INSTITUTIONS TO MAKE DIRECT LOANS OR GRANTS TO SUPPORT THE CONSTRUCTION OR CONVERSION OF ACCESSORY DWELLING UNITS FOR LOW- AND MODERATE-INCOME BORROWERS OR TENANTS.

(II) ANY CONTRACT MADE BY THE COMMISSION WITH THE COLORADO HOUSING AND FINANCE AUTHORITY PURSUANT TO THIS SUBSECTION (1)(q) MAY INCLUDE NORMAL AND CUSTOMARY FEES AND EXPENSES FOR ADMINISTRATING THE PROGRAMS DESCRIBED IN THIS SUBSECTION (1)(q).

SECTION 4. In Colorado Revised Statutes, 24-46-105, **add** (1)(c) as follows:

24-46-105. Colorado economic development fund - creation - report - repeal. (1) (c) (I) ON JULY 1, 2024, THE STATE TREASURER SHALL TRANSFER EIGHT MILLION DOLLARS FROM THE GENERAL FUND TO THE FUND.

THE COMMISSION SHALL USE THE FUNDS TRANSFERRED PURSUANT TO THIS SUBSECTION (1)(c)(I) TO CONTRACT WITH THE COLORADO HOUSING AND FINANCE AUTHORITY, CREATED IN PART 7 OF ARTICLE 4 OF TITLE 29, FOR THE PURPOSES DESCRIBED IN SECTION 24-46-104 (1)(q).

(II) THIS SUBSECTION (1)(c) IS REPEALED, EFFECTIVE JULY 1, 2025.

SECTION 5. In Colorado Revised Statutes, 24-67-105, **add** (5.3) as follows:

24-67-105. Standards and conditions for planned unit development - definitions. (5.3) (a) IN A SUBJECT JURISDICTION, ANY PLANNED UNIT DEVELOPMENT RESOLUTION OR ORDINANCE THAT IS ADOPTED OR APPROVED ON OR AFTER THE EFFECTIVE DATE OF THIS SUBSECTION (5.3), AND THAT ALLOWS THE CONSTRUCTION OF ONE OR MORE SINGLE-UNIT DETACHED DWELLINGS, MUST NOT RESTRICT THE CREATION OF AN ACCESSORY DWELLING UNIT AS AN ACCESSORY USE TO ANY SINGLE-UNIT DETACHED DWELLING MORE THAN THE LOCAL LAW THAT APPLIES TO ACCESSORY DWELLING UNIT DEVELOPMENT OUTSIDE OF A PLANNED UNIT DEVELOPMENT OR IN ANY WAY THAT IS PROHIBITED BY SECTION 29-35-103.

(b) IN A SUBJECT JURISDICTION, ANY PLANNED UNIT DEVELOPMENT RESOLUTION OR ORDINANCE THAT WAS ADOPTED OR APPROVED BEFORE THE EFFECTIVE DATE OF THIS SUBSECTION (5.3), THAT ALLOWS THE CONSTRUCTION OF ONE OR MORE SINGLE-UNIT DETACHED DWELLINGS, AND THAT RESTRICTS THE CONSTRUCTION OF AN ACCESSORY DWELLING UNIT AS AN ACCESSORY USE TO ANY SINGLE-UNIT DETACHED DWELLING MORE THAN THE LOCAL LAW THAT APPLIES TO ACCESSORY DWELLING UNIT DEVELOPMENT OUTSIDE OF A PLANNED UNIT DEVELOPMENT:

(I) SHALL NOT BE INTERPRETED OR ENFORCED TO RESTRICT THE CREATION OF AN ACCESSORY DWELLING UNIT AS AN ACCESSORY USE TO ANY SINGLE-UNIT DETACHED DWELLING UNIT IN ANY WAY THAT IS PROHIBITED BY SECTION 29-35-103; AND

(II) MAY BE SUPERSEDED BY THE ADOPTION OF A LOCAL LAW PURSUANT TO SECTION 29-35-103.

(c) NOTWITHSTANDING SUBSECTION (5.3)(b) OF THIS SECTION, A LOCAL GOVERNMENT MAY ADOPT CONFORMING AMENDMENTS TO ANY SUCH

PLANNED UNIT DEVELOPMENT.

(d) AS USED IN THIS SUBSECTION (5.3), UNLESS THE CONTEXT OTHERWISE REQUIRES:

(I) "ACCESSORY DWELLING UNIT" HAS THE SAME MEANING AS SET FORTH IN SECTION 29-35-102 (2).

(II) "LOCAL LAW" HAS THE SAME MEANING AS SET FORTH IN SECTION 29-35-102 (13).

(III) "SUBJECT JURISDICTION" HAS THE SAME MEANING AS SET FORTH IN SECTION 29-35-102 (21).

SECTION 6. In Colorado Revised Statutes, 38-33.3-106.5, **add** (4) as follows:

38-33.3-106.5. Prohibitions contrary to public policy - patriotic, political, or religious expression - public rights-of-way - fire prevention - renewable energy generation devices - affordable housing - drought prevention measures - child care - definitions. (4) (a) IN A SUBJECT JURISDICTION OR AN ACCESSORY DWELLING UNIT SUPPORTIVE JURISDICTION, NO PROVISION OF A DECLARATION, BYLAW, OR RULE OF AN ASSOCIATION THAT IS ADOPTED ON OR AFTER THE EFFECTIVE DATE OF THIS SUBSECTION (4) MAY RESTRICT THE CREATION OF AN ACCESSORY DWELLING UNIT AS AN ACCESSORY USE TO ANY SINGLE-UNIT DETACHED DWELLING IN ANY WAY THAT IS PROHIBITED BY SECTION 29-35-103, AND ANY PROVISION OF A DECLARATION, BYLAW, OR RULE THAT INCLUDES SUCH A RESTRICTION IS VOID AS A MATTER OF PUBLIC POLICY.

(b) IN A SUBJECT JURISDICTION OR AN ACCESSORY DWELLING UNIT SUPPORTIVE JURISDICTION, NO PROVISION OF A DECLARATION, BYLAW, OR RULE OF AN ASSOCIATION THAT IS ADOPTED BEFORE THE EFFECTIVE DATE OF THIS SUBSECTION (4) MAY RESTRICT THE CREATION OF AN ACCESSORY DWELLING UNIT AS AN ACCESSORY USE TO ANY SINGLE-UNIT DETACHED DWELLING IN ANY WAY THAT IS PROHIBITED BY SECTION 29-35-103, AND ANY PROVISION OF A DECLARATION, BYLAW, OR RULE THAT INCLUDES SUCH A RESTRICTION IS VOID AS A MATTER OF PUBLIC POLICY.

(c) SUBSECTIONS (4)(a) AND (4)(b) OF THIS SECTION DO NOT APPLY

TO REASONABLE RESTRICTIONS ON ACCESSORY DWELLING UNITS. AS USED IN THIS SUBSECTION (4)(c), "REASONABLE RESTRICTION" MEANS A SUBSTANTIVE CONDITION OR REQUIREMENT THAT DOES NOT UNREASONABLY INCREASE THE COST TO CONSTRUCT, EFFECTIVELY PROHIBIT THE CONSTRUCTION OF, OR EXTINGUISH THE ABILITY TO OTHERWISE CONSTRUCT, AN ACCESSORY DWELLING UNIT CONSISTENT WITH PART 1 OF ARTICLE 35 OF TITLE 29.

(d) AS USED IN THIS SUBSECTION (4), UNLESS THE CONTEXT OTHERWISE REQUIRES:

(I) "ACCESSORY DWELLING UNIT" HAS THE SAME MEANING AS SET FORTH IN SECTION 29-35-102 (2).

(II) "ACCESSORY DWELLING UNIT SUPPORTIVE JURISDICTION" HAS THE SAME MEANING AS SET FORTH IN SECTION 29-35-102 (3).

(III) "SUBJECT JURISDICTION" HAS THE SAME MEANING AS SET FORTH IN SECTION 29-35-102 (21).

SECTION 7. Appropriation. (1) For the 2024-25 state fiscal year, $537,246 is appropriated to the department of local affairs. This appropriation is from the accessory dwelling unit fee reduction and encouragement grant program fund created in section 29-35-105 (7)(a), C.R.S. To implement this act, the department may use this appropriation as follows:

(a) $467,246 for use by division of local government for accessory dwelling unit fee reduction and encouragement grant program related to local government services, which amount is based on an assumption that the division will require an additional 4.9 FTE; and

(b) $70,000 for the purchase of information technology services.

(2) For the 2024-25 state fiscal year, $70,000 is appropriated to the office of the governor for use by the office of information technology. This appropriation is from reappropriated funds received from the department of local affairs under subsection (1)(b) of this section. To implement this act, the office may use this appropriation to provide information technology services for the department of local affairs.

SECTION 8. Safety clause. The general assembly finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, or safety or for appropriations for the support and maintenance of the departments of the state and state institutions.

Julie McCluskie
SPEAKER OF THE HOUSE
OF REPRESENTATIVES

Steve Fenberg
PRESIDENT OF
THE SENATE

Robin Jones
CHIEF CLERK OF THE HOUSE
OF REPRESENTATIVES

Cindi L. Markwell
SECRETARY OF
THE SENATE

APPROVED Monday, May 13th, 2024 at 12:45 pm
(Date and Time)

Jared S. Polis
GOVERNOR OF THE STATE OF COLORADO

HOUSE BILL 24-1313

BY REPRESENTATIVE(S) Woodrow and Jodeh, Bacon, Boesenecker, deGruy Kennedy, Epps, Froelich, Garcia, Hernandez, Herod, Kipp, Lindsay, Lindstedt, Mabrey, McCormick, Parenti, Rutinel, Sirota, Story, Valdez, Vigil, McCluskie, English, Ortiz, Titone, Weissman, Willford;
also SENATOR(S) Hansen and Winter F., Cutter, Hinrichsen, Priola.

CONCERNING MEASURES TO INCREASE THE AFFORDABILITY OF HOUSING IN TRANSIT-ORIENTED COMMUNITIES, AND, IN CONNECTION THEREWITH, MAKING AN APPROPRIATION.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. In Colorado Revised Statutes, **add** article 37 to title 29 as follows:

ARTICLE 37
State Land Use Criteria For Strategic Growth
PART 1
DEFINITIONS

29-37-101. Short title. THE SHORT TITLE OF THIS ARTICLE 37 IS THE "STATE LAND USE CRITERIA FOR STRATEGIC GROWTH ACT".

Capital letters or bold & italic numbers indicate new material added to existing law; dashes through words or numbers indicate deletions from existing law and such material is not part of the act.

29-37-102. Legislative declaration. (1) THE GENERAL ASSEMBLY HEREBY FINDS, DETERMINES, AND DECLARES THAT:

(a) SINCE THE "LOCAL GOVERNMENT LAND USE CONTROL ENABLING ACT OF 1974", ARTICLE 20 OF TITLE 29, WAS ADOPTED, COLORADO'S POPULATION HAS MORE THAN DOUBLED, WITH THE STATE GROWING AT TWICE THE NATIONAL RATE BETWEEN 2010 AND 2020;

(b) THE COLORADO STATE DEMOGRAPHY OFFICE ESTIMATES THAT COLORADO WILL ADD ONE MILLION SEVEN HUNDRED THOUSAND TWO HUNDRED PEOPLE BY 2050, BRINGING COLORADO'S POPULATION TO NEARLY SEVEN MILLION FIVE HUNDRED THOUSAND. THE NEED FOR HOUSING FOR THE GROWING POPULATION IS AN ISSUE THAT AFFECTS ALL COLORADO COMMUNITIES REGARDLESS OF REGION OR SIZE. IN A BIPARTISAN POLL CONDUCTED BY THE COLORADO POLLING INSTITUTE IN NOVEMBER 2023, COLORADO VOTERS LISTED HOUSING AFFORDABILITY AS ONE OF THEIR TOP FIVE ISSUES FOR THE COLORADO STATE GOVERNMENT TO ADDRESS. THEREFORE, IT IS CRITICAL TO ADDRESS THE COST AND AVAILABILITY OF HOUSING ACROSS THE STATE TO ADDRESS HISTORIC POPULATION GROWTH.

(c) IN EXPERIENCING SIGNIFICANT POPULATION GROWTH AT A TIME OF INCREASED VEHICLE OWNERSHIP AND COMMUTE TIMES, THE SUPPLY AND AFFORDABILITY OF HOUSING IN ONE COMMUNITY AFFECTS THE RESOURCES OF NEIGHBORING COMMUNITIES. COLORADO'S NEED FOR HOUSING IMPACTS THE STATE'S TRANSIT, TRANSPORTATION, EMPLOYMENT, ECONOMY, ENERGY, WATER, AND INFRASTRUCTURE AND REQUIRES INNOVATIVE, COLLABORATIVE SOLUTIONS.

(d) COLORADO'S HOUSING SUPPLY HAS NOT KEPT PACE WITH POPULATION GROWTH IN THE STATE. BETWEEN 2010 AND 2020, COLORADO ADDED ONE HUNDRED TWENTY-SIX THOUSAND FEWER HOUSING UNITS THAN IN THE PRIOR DECADE, DESPITE COLORADO'S POPULATION INCREASING BY A SIMILAR AMOUNT IN EACH DECADE. THE STATE DEMOGRAPHER ESTIMATES THAT BETWEEN APPROXIMATELY SIXTY-FIVE THOUSAND AND NINETY THOUSAND HOUSING UNITS ARE NEEDED TO KEEP PACE WITH COLORADO'S CURRENT POPULATION GROWTH.

(e) ACROSS THE STATE, COLORADO NEEDS MORE HOUSING URGENTLY TO SUPPORT OUR GROWING WORKFORCE, AND HOUSING OPPORTUNITIES ARE NEEDED ACROSS ALL INCOME LEVELS. ADDRESSING THE

CRITICAL ISSUE OF COST AND AVAILABILITY OF HOUSING REQUIRES MAINTAINING AND EXPANDING ACCESS TO AFFORDABLE AND ATTAINABLE HOUSING BY REMOVING BARRIERS TO AND EXPEDITING NEW HOUSING OPPORTUNITIES FOR EVERY COMMUNITY, ESPECIALLY NEAR TRANSIT. AS HOUSING RENTS AND PRICES HAVE INCREASED FASTER THAN WAGES ACROSS THE STATE, INDIVIDUAL HOUSEHOLDS ARE EXPERIENCING DISPLACEMENT FROM HOMES THEY COULD ONCE AFFORD AND HAVING TO LIVE FARTHER FROM WORK WITH INCREASED COMMUTE TIMES. AS STATE AND LOCAL GOVERNMENTS SEEK TO INCREASE HOUSING OPTIONS AND ADDRESS AFFORDABILITY FOR RESIDENTS, IT IS ESSENTIAL TO PROVIDE SOLUTIONS THAT INCORPORATE TRANSIT NEEDS AS WELL.

(f) BETWEEN 2010 AND 2021, THE PERCENTAGE OF COLORADANS MAKING LESS THAN SEVENTY-FIVE THOUSAND DOLLARS A YEAR WHO WERE HOUSING COST-BURDENED, MEANING THEY SPEND MORE THAN THIRTY PERCENT OF THEIR INCOME ON HOUSING NEEDS, INCREASED FROM FIFTY-FOUR PERCENT TO SIXTY-ONE PERCENT, AND, FOR RENTERS MAKING LESS THAN SEVENTY-FIVE THOUSAND DOLLARS A YEAR, THAT PERCENTAGE INCREASED FROM FIFTY-NINE PERCENT TO SEVENTY-THREE PERCENT, ACCORDING TO THE AMERICAN COMMUNITY SURVEY;

(g) NATIONALLY, CITIES WITH THE HIGHEST HOUSING COSTS AND LOWEST VACANCY RATES EXPERIENCE THE HIGHEST RATES OF HOMELESSNESS, ACCORDING TO A REPORT BY THE URBAN INSTITUTE, "UNSHELTERED HOMELESSNESS: TRENDS, CHARACTERISTICS, AND HOMELESS HISTORIES". THESE INDICATORS EXPLAIN A GREATER PORTION OF THE VARIATION IN REGIONAL RATES OF HOMELESSNESS THAN OTHER COMMONLY ASSUMED FACTORS, SUCH AS POVERTY RATE, SUBSTANCE USE, OR MENTAL ILLNESS, ACCORDING TO A STUDY IN THE EUROPEAN JOURNAL OF HOUSING POLICY, "THE ECONOMICS OF HOMELESSNESS: THE EVIDENCE FROM NORTH AMERICA".

(h) HOUSING PRICES ARE TYPICALLY HIGHER WHEN HOUSING SUPPLY IS RESTRICTED BY LOCAL LAND USE REGULATIONS IN A METROPOLITAN REGION, ACCORDING TO STUDIES SUCH AS THE NATIONAL BUREAU OF ECONOMIC RESEARCH WORKING PAPERS "REGULATION AND HOUSING SUPPLY" AND "THE IMPACT OF ZONING ON HOUSING AFFORDABILITY". INCREASING HOUSING SUPPLY MODERATES PRICE INCREASES AND IMPROVES HOUSING AFFORDABILITY ACROSS ALL INCOMES, ACCORDING TO STUDIES SUCH AS "THE ECONOMIC IMPLICATIONS OF HOUSING SUPPLY", IN THE

JOURNAL OF ECONOMIC PERSPECTIVES, AND "SUPPLY SKEPTICISM: HOUSING SUPPLY AND AFFORDABILITY", IN THE JOURNAL HOUSING POLICY DEBATE.

(i) RESEARCHERS HAVE FOUND SUBSTANTIAL EVIDENCE THAT NEW HOUSING CONSTRUCTION ENABLES HOUSEHOLDS TO MOVE WITHIN A REGION, OPENS UP HOUSING OPTIONS FOR MORE DIVERSE INCOME LEVELS, AND PROMOTES COMPETITION THAT LIMITS HOUSING COST INCREASES, ACCORDING TO THE NEW YORK UNIVERSITY LAW AND ECONOMICS RESEARCH PAPER "SUPPLY SKEPTICISM REVISITED". WHILE NEW HOUSING SUPPLY CAN RARELY MEET THE NEEDS OF THE LOWEST INCOME HOUSEHOLDS, ENABLING NEW HOUSING SUPPLY CAN MODERATE PRICE INCREASES AND REDUCE THE NUMBER OF HOUSEHOLDS THAT NEED SUBSIDIES TO AFFORD HOUSING. RESIDENT OPPOSITION FREQUENTLY LIMITS NEW HOUSING DEVELOPMENT IN EXISTING COMMUNITIES AND EITHER LEADS TO LESS HOUSING PRODUCTION AND INCREASED HOUSING COSTS OR PUSHES HOUSING DEVELOPMENT TO GREENFIELD AREAS WHERE THERE ARE FEWER NEIGHBORS BUT GREATER ENVIRONMENTAL AND FISCAL COSTS.

29-37-103. Definitions. AS USED IN THIS ARTICLE 37, UNLESS THE CONTEXT OTHERWISE REQUIRES:

(1) "ACCESSIBLE UNIT" MEANS A HOUSING UNIT THAT:

(a) SATISFIES THE REQUIREMENTS OF THE FEDERAL "FAIR HOUSING ACT", 42 U.S.C. SEC. 3601 ET SEQ., AS AMENDED;

(b) INCORPORATES UNIVERSAL DESIGN; OR

(c) IS A TYPE A DWELLING UNIT, AS DEFINED IN SECTION 9-5-101 (10); A TYPE A MULTISTORY DWELLING UNIT, AS DEFINED IN SECTION 9-5-101 (11); A TYPE B DWELLING UNIT, AS DEFINED IN SECTION 9-5-101 (12); OR A TYPE B MULTISTORY DWELLING UNIT, AS DEFINED IN SECTION 9-5-101 (13).

(2) (a) "ADMINISTRATIVE APPROVAL PROCESS" MEANS A PROCESS IN WHICH:

(I) A DEVELOPMENT PROPOSAL FOR A SPECIFIED PROJECT IS APPROVED, APPROVED WITH CONDITIONS, OR DENIED BY LOCAL GOVERNMENT ADMINISTRATIVE STAFF BASED SOLELY ON ITS COMPLIANCE

WITH OBJECTIVE STANDARDS SET FORTH IN LOCAL LAWS; AND

(II) DOES NOT REQUIRE, AND CANNOT BE ELEVATED TO REQUIRE, A PUBLIC HEARING, A RECOMMENDATION, OR A DECISION BY AN ELECTED OR APPOINTED PUBLIC BODY OR A HEARING OFFICER.

(b) NOTWITHSTANDING SUBSECTION (2)(a) OF THIS SECTION, AN ADMINISTRATIVE APPROVAL PROCESS MAY REQUIRE AN APPOINTED HISTORIC PRESERVATION COMMISSION TO MAKE A DECISION, OR TO MAKE A RECOMMENDATION TO LOCAL GOVERNMENT ADMINISTRATIVE STAFF, REGARDING A DEVELOPMENT APPLICATION INVOLVING A PROPERTY THAT THE LOCAL GOVERNMENT HAS DESIGNATED AS A HISTORIC PROPERTY, PROVIDED THAT:

(I) THE STATE HISTORIC PRESERVATION OFFICE WITHIN HISTORY COLORADO HAS DESIGNATED THE LOCAL GOVERNMENT AS A CERTIFIED LOCAL GOVERNMENT; AND

(II) THE APPOINTED HISTORIC PRESERVATION COMMISSION'S DECISION OR RECOMMENDATION IS BASED ON STANDARDS EITHER SET FORTH IN LOCAL LAW OR ESTABLISHED BY THE SECRETARY OF THE INTERIOR OF THE UNITED STATES.

(3) "APPLICABLE TRANSIT PLAN" MEANS A PLAN OF A TRANSIT AGENCY WHOSE SERVICE TERRITORY IS WITHIN A METROPOLITAN PLANNING ORGANIZATION, INCLUDING A SYSTEM OPTIMIZATION PLAN OR A TRANSIT MASTER PLAN THAT:

(a) HAS BEEN APPROVED BY THE GOVERNING BODY OF A TRANSIT AGENCY ON OR AFTER JANUARY 1, 2019, AND ON OR BEFORE JANUARY 1, 2024;

(b) IDENTIFIES THE PLANNED FREQUENCY AND SPAN OF SERVICE FOR TRANSIT SERVICE OR SPECIFIC TRANSIT ROUTES; AND

(c) IDENTIFIES SPECIFIC TRANSIT ROUTES FOR SHORT-TERM IMPLEMENTATION ACCORDING TO THAT PLAN, OR IMPLEMENTATION BEFORE JANUARY 1, 2030.

(4) "BUS RAPID TRANSIT SERVICE" MEANS A TRANSIT SERVICE:

(a) THAT IS IDENTIFIED AS BUS RAPID TRANSIT BY A TRANSIT AGENCY, IN A METROPOLITAN PLANNING ORGANIZATION'S FISCALLY CONSTRAINED LONG RANGE TRANSPORTATION PLAN OR IN AN APPLICABLE TRANSIT PLAN; AND

(b) THAT TYPICALLY INCLUDES ANY NUMBER OF THE FOLLOWING:

(I) SERVICE THAT IS SCHEDULED TO RUN EVERY FIFTEEN MINUTES OR LESS DURING THE HIGHEST FREQUENCY SERVICE HOURS;

(II) DEDICATED LANES OR BUSWAYS;

(III) TRAFFIC SIGNAL PRIORITY;

(IV) OFF-BOARD FARE COLLECTION;

(V) ELEVATED PLATFORMS; OR

(VI) ENHANCED STATIONS.

(5) "COMMUTER BUS RAPID TRANSIT SERVICE" MEANS A BUS RAPID TRANSIT SERVICE THAT OPERATES FOR A MAJORITY OF ITS ROUTE ON A FREEWAY WITH ACCESS THAT IS LIMITED TO GRADE-SEPARATED INTERCHANGES.

(6) "COMMUTER RAIL" MEANS A PASSENGER RAIL TRANSIT SERVICE BETWEEN AND WITHIN METROPOLITAN AND SUBURBAN AREAS.

(7) "COUNTY" MEANS A COUNTY INCLUDING A HOME RULE COUNTY, BUT EXCLUDING A CITY AND COUNTY.

(8) "DEPARTMENT" MEANS THE DEPARTMENT OF LOCAL AFFAIRS.

(9) "DISPLACEMENT" MEANS:

(a) THE INVOLUNTARY RELOCATION OF RESIDENTS, PARTICULARLY LOW-INCOME RESIDENTS, OR LOCALLY-OWNED COMMUNITY-SERVING BUSINESSES AND INSTITUTIONS DUE TO:

(I) INCREASED REAL ESTATE PRICES, RENTS, PROPERTY

REHABILITATION, REDEVELOPMENT, DEMOLITION, OR OTHER ECONOMIC FACTORS;

(II) PHYSICAL CONDITIONS RESULTING FROM NEGLECT AND UNDERINVESTMENT THAT RENDER A RESIDENCE UNINHABITABLE; OR

(III) PHYSICAL DISPLACEMENT WHEREIN EXISTING HOUSING UNITS AND COMMERCIAL SPACES ARE LOST DUE TO PROPERTY REHABILITATION, REDEVELOPMENT, OR DEMOLITION;

(b) INDIRECT DISPLACEMENT RESULTING FROM CHANGES IN NEIGHBORHOOD POPULATION, IF, WHEN LOW-INCOME HOUSEHOLDS MOVE OUT OF HOUSING UNITS, THOSE SAME HOUSING UNITS DO NOT REMAIN AFFORDABLE TO OTHER LOW-INCOME HOUSEHOLDS IN THE NEIGHBORHOOD, OR DEMOGRAPHIC CHANGES THAT REFLECT THE RELOCATION OF EXISTING RESIDENTS FOLLOWING WIDESPREAD RELOCATION OF THEIR COMMUNITY AND COMMUNITY-SERVING ENTITIES.

(10) "LIGHT RAIL" MEANS A PASSENGER RAIL TRANSIT SERVICE THAT USES ELECTRICALLY POWERED RAIL-BORNE CARS.

(11) "LOCAL GOVERNMENT" MEANS A MUNICIPALITY, COUNTY, OR TRIBAL NATION WITH JURISDICTION IN COLORADO.

(12) "LOCAL LAW" MEANS ANY CODE, LAW, ORDINANCE, POLICY, REGULATION, OR RULE ENACTED BY A LOCAL GOVERNMENT THAT GOVERNS THE DEVELOPMENT AND USE OF LAND, INCLUDING BUT NOT LIMITED TO LAND USE CODES, ZONING CODES, AND SUBDIVISION CODES.

(13) "METROPOLITAN PLANNING ORGANIZATION" MEANS A METROPOLITAN PLANNING ORGANIZATION UNDER THE "FEDERAL TRANSIT ACT OF 1998", 49 U.S.C. SEC. 5301 ET SEQ., AS AMENDED.

(14) "MUNICIPALITY" MEANS A HOME RULE OR STATUTORY CITY OR TOWN, TERRITORIAL CHARTER CITY OR TOWN, OR CITY AND COUNTY.

(15) "OBJECTIVE STANDARD" MEANS A STANDARD THAT:

(a) IS A DEFINED BENCHMARK OR CRITERION THAT ALLOWS FOR DETERMINATIONS OF COMPLIANCE TO BE CONSISTENTLY DECIDED

REGARDLESS OF THE DECISION MAKER; AND

(b) DOES NOT REQUIRE A SUBJECTIVE DETERMINATION CONCERNING A DEVELOPMENT PROPOSAL, INCLUDING BUT NOT LIMITED TO WHETHER THE APPLICATION FOR THE DEVELOPMENT PROPOSAL IS:

(I) CONSISTENT WITH MASTER PLANS, OR OTHER DEVELOPMENT PLANS;

(II) COMPATIBLE WITH THE LAND USE OR DEVELOPMENT OF THE AREA SURROUNDING THE AREA DESCRIBED IN THE APPLICATION; OR

(III) CONSISTENT WITH PUBLIC WELFARE, COMMUNITY CHARACTER, OR NEIGHBORHOOD CHARACTER.

(16) "REGULATED AFFORDABLE HOUSING" MEANS AFFORDABLE HOUSING THAT:

(a) HAS RECEIVED LOANS, GRANTS, EQUITY, BONDS, OR TAX CREDITS FROM ANY SOURCE TO SUPPORT THE CREATION, PRESERVATION, OR REHABILITATION OF AFFORDABLE HOUSING THAT, AS A CONDITION OF FUNDING, ENCUMBERS THE PROPERTY WITH A RESTRICTED USE COVENANT OR SIMILAR RECORDED AGREEMENT TO ENSURE AFFORDABILITY, OR HAS BEEN INCOME-RESTRICTED UNDER A LOCAL INCLUSIONARY ZONING ORDINANCE OR OTHER REGULATION OR PROGRAM;

(b) RESTRICTS OR LIMITS MAXIMUM RENTAL OR SALE PRICE FOR HOUSEHOLDS OF A GIVEN SIZE AT A GIVEN AREA MEDIAN INCOME, AS ESTABLISHED ANNUALLY BY THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT; AND

(c) ENSURES OCCUPANCY BY LOW- TO MODERATE-INCOME HOUSEHOLDS FOR A SPECIFIED PERIOD DETAILED IN A RESTRICTIVE USE COVENANT OR SIMILAR RECORDED AGREEMENT.

(17) "UNIVERSAL DESIGN" MEANS ANY DWELLING UNIT DESIGNED AND CONSTRUCTED TO BE SAFE AND ACCESSIBLE FOR ANY INDIVIDUAL REGARDLESS OF AGE OR ABILITIES.

(18) "URBAN BUS RAPID TRANSIT SERVICE" MEANS A BUS RAPID

TRANSIT SERVICE THAT OPERATES ON A SURFACE STREET FOR THE MAJORITY OF ITS ROUTE.

(19) "VISITABLE UNIT" MEANS A DWELLING UNIT THAT A PERSON WITH A DISABILITY CAN ENTER, MOVE AROUND THE PRIMARY ENTRANCE FLOOR OF, AND USE THE BATHROOM IN.

PART 2
TRANSIT-ORIENTED COMMUNITIES

29-37-201. Legislative declaration. (1) THE GENERAL ASSEMBLY HEREBY FINDS, DETERMINES, AND DECLARES THAT:

(a) MULTIFAMILY HOUSING IS TYPICALLY MORE AFFORDABLE THAN SINGLE-UNIT DWELLINGS. ACCORDING TO THE AMERICAN COMMUNITY SURVEY, COLORADO MULTIFAMILY UNITS COST BETWEEN FOURTEEN AND FORTY-THREE PERCENT LESS TO RENT IN 2019, DEPENDING ON THE SIZE OF THE BUILDING, COMPARED TO SINGLE-UNIT DETACHED DWELLINGS.

(b) ALLOWING HIGHER DENSITY RESIDENTIAL DEVELOPMENT IS IMPORTANT FOR THE COST EFFECTIVENESS AND AVAILABILITY OF AFFORDABLE HOUSING. AN ANALYSIS OF OVER SIXTY AFFORDABLE HOUSING PROJECTS FUNDED BY THE U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT IN TRANSIT-ORIENTED AREAS IN COLORADO SINCE 2010 FOUND THAT HALF WERE DEVELOPED AT OVER FIFTY UNITS PER ACRE, AND TWENTY PERCENT WERE OVER ONE HUNDRED UNITS PER ACRE.

(c) THROUGHOUT COLORADO, LESS THAN HALF OF AVAILABLE ZONING CAPACITY IS TYPICALLY UTILIZED, AND GREATER UTILIZATION OF ZONING CAPACITY IS NECESSARY TO MEET ANTICIPATED HOUSING NEEDS. NUMEROUS FACTORS CURRENTLY PREVENT DEVELOPMENT FROM FULLY UTILIZING AVAILABLE ZONING CAPACITY AND ALLOWED DENSITIES, INCLUDING SITE LEVEL CONSTRAINTS, FINANCIAL FEASIBILITY AND DEMAND, AND LANDOWNERS' WILLINGNESS TO SELL OR REDEVELOP.

(d) COLORADO HAS INVESTED SIGNIFICANTLY IN PUBLIC TRANSIT IN THE LAST SEVERAL DECADES, FUNDING OVER SIX BILLION DOLLARS ACROSS EIGHTY-FIVE MILES OF NEW RAIL LINES. THE INVESTMENTS WILL CONTINUE IN THE COMING YEARS WITH NEW BUS RAPID TRANSIT AND RAIL SYSTEMS ALONG THE FRONT RANGE. DESPITE THESE INVESTMENTS, TRANSIT

RIDERSHIP LAGS BEHIND PEER AGENCIES AROUND THE COUNTRY, DUE AT LEAST IN PART TO A LACK OF DENSITY NEAR THESE TRANSIT LINES. BEFORE THE COVID-19 PANDEMIC, THE REGIONAL TRANSPORTATION DISTRICT HAD TWO AND THREE-TENTHS RIDES PER VEHICLE REVENUE MILE ON THEIR RAIL SYSTEM, COMPARED TO OVER FOUR RIDES PER VEHICLE REVENUE MILE FOR AGENCIES IN MINNEAPOLIS AND PORTLAND AND OVER EIGHT RIDES PER VEHICLE REVENUE MILE IN SEATTLE, ACCORDING TO DATA FROM THE FEDERAL TRANSIT ADMINISTRATION'S NATIONAL TRANSIT DATABASE.

(e) ALLOWING HIGHER DENSITY RESIDENTIAL DEVELOPMENT NEAR TRANSIT IS IMPORTANT FOR INCREASING TRANSIT RIDERSHIP AND IMPROVING THE COST EFFECTIVENESS OF TRANSIT SERVICES. RESEARCHERS HAVE FOUND THAT HIGHER BUILT GROSS DENSITIES CITYWIDE INCREASE COST-EFFECTIVENESS FOR LIGHT RAIL AND BUS RAPID TRANSIT SERVICES, AS DESCRIBED IN THE ARTICLE, "COST OF A RIDE: THE EFFECTS OF DENSITIES ON FIXED-GUIDEWAY TRANSIT RIDERSHIP AND COSTS" BY ERICK GUERRA AND ROBERT CERVERO.

(f) MOST LIGHT AND COMMUTER RAIL STATIONS AND FREQUENT BUS CORRIDORS IN COLORADO HAVE LOWER HOUSING UNIT DENSITY THAN IS NECESSARY TO SUPPORT FREQUENT TRANSIT. BASED ON 2020 CENSUS BLOCK HOUSING UNIT DATA, OVER NINETY PERCENT OF RAIL STATIONS AND EIGHTY-FOUR PERCENT OF BUS RAPID TRANSIT AND FREQUENT BUS CORRIDORS IN COLORADO HAVE LESS THAN FIFTEEN HOUSING UNITS PER ACRE ON AVERAGE WITHIN WALKING DISTANCE. RESEARCHERS HAVE GENERALLY FOUND A MINIMUM OF FIFTEEN HOUSING UNITS PER ACRE OF BUILT DENSITY IS NEEDED TO SUPPORT FREQUENT TRANSIT.

(g) LIVING NEAR TRANSIT, JOBS, AND SERVICES ENABLES HOUSEHOLDS TO ALSO SAVE ON TRANSPORTATION COSTS BY OWNING FEWER VEHICLES AND REDUCING FUEL CONSUMPTION. COLORADANS COMMUTE OVER FIFTY MINUTES TO AND FROM WORK ON AVERAGE, ACCORDING TO THE LATEST AMERICAN COMMUNITY SURVEY'S FIVE YEAR ESTIMATES. ANALYSES OF TRANSIT-ORIENTED COMMUNITIES HAVE FOUND THAT RESIDENTS TAKE AN AVERAGE OF FORTY-FOUR PERCENT FEWER VEHICLE TRIPS, ACCORDING TO THE ARTICLE "VEHICLE TRIP REDUCTION IMPACTS OF TRANSIT-ORIENTED HOUSING" IN THE JOURNAL OF PUBLIC TRANSPORTATION.

(h) IN COLORADO, HOUSEHOLDS IN MORE DENSE AREAS, WHICH ARE

DEFINED AS CENSUS TRACTS WITH MORE THAN FOUR THOUSAND UNITS PER SQUARE MILE OR ABOUT FIFTEEN UNITS PER ACRE, DRIVE TWENTY PERCENT LESS THAN THE STATE AVERAGE, AND HIGHER DENSITY AREAS, CENSUS TRACTS WITH MORE THAN TEN THOUSAND UNITS PER SQUARE MILE OR ABOUT FORTY UNITS PER ACRE, DRIVE FORTY PERCENT LESS THAN THE STATE AVERAGE, ACCORDING TO DATA FROM THE 2017 NATIONAL HOUSEHOLD TRAVEL SURVEY;

(i) HIGH TRANSPORTATION COSTS IMPACT LOW-INCOME HOUSEHOLDS IN PARTICULAR. HOUSEHOLDS MAKING LESS THAN FORTY THOUSAND DOLLARS PER YEAR IN THE WESTERN UNITED STATES ARE SPENDING OVER TWENTY-FOUR PERCENT OF THEIR INCOME ON TRANSPORTATION, WHEN SPENDING MORE THAN FIFTEEN PERCENT OF INCOME ON TRANSPORTATION IS CONSIDERED COST BURDENED, ACCORDING TO DATA FROM THE BUREAU OF LABOR STATISTICS CONSUMER EXPENDITURE SURVEYS.

(j) IN ADDITION TO SAVING ON TRANSPORTATION COSTS BY LIVING NEAR TRANSIT, OWNING FEWER VEHICLES AND TRAVELING TO WORK AND ACCESSING SERVICES WITHOUT DRIVING OR DRIVING LESS REDUCES GREENHOUSE GAS EMISSIONS AND AIR POLLUTION, WHICH IMPACTS AIR QUALITY NOT JUST IN TRANSIT-ORIENTED COMMUNITIES BUT IN GREATER REGIONS ACROSS THE STATE;

(k) IN COLORADO, HOUSEHOLD ENERGY DEMAND ON AVERAGE IS SEVENTY PERCENT LESS FOR MULTIFAMILY HOUSING COMPARED TO SINGLE-UNIT DETACHED DWELLINGS, ACCORDING TO THE NATIONAL RENEWABLE ENERGY LABORATORY RESTOCK ANALYSIS TOOL;

(l) SCENARIOS ANALYZED FOR THE "COLORADO WATER AND GROWTH DIALOGUE FINAL REPORT" WITH HIGHER PERCENTAGE OF FUTURE HOUSING SHIFTING TO HIGHER DENSITIES WERE ESTIMATED TO ACHIEVE A TOTAL DECREASE IN WATER DEMAND BETWEEN FOUR AND EIGHT TENTHS PERCENT AND NINETEEN AND FOUR TENTHS PERCENT;

(m) NATIONAL STUDIES, SUCH AS THE ARTICLE "RELATIONSHIPS BETWEEN DENSITY AND PER CAPITA MUNICIPAL SPENDING IN THE UNITED STATES", PUBLISHED IN URBAN SCIENCE, HAVE FOUND THAT LOWER DENSITY COMMUNITIES HAVE HIGHER GOVERNMENT CAPITAL AND MAINTENANCE COSTS FOR WATER, SEWER, AND TRANSPORTATION INFRASTRUCTURE AND LOWER PROPERTY AND SALES TAX REVENUE. THESE

INCREASED COSTS ARE OFTEN BORNE BY BOTH STATE AND LOCAL GOVERNMENTS.

(n) A STUDY FOR A MUNICIPALITY IN COLORADO FOUND THAT DOUBLING THE AVERAGE RESIDENTIAL DENSITY FOR FUTURE GROWTH WOULD SAVE THIRTY-ONE PERCENT IN CAPITAL AND MAINTENANCE COSTS OVER TWENTY YEARS;

(o) ACCORDING TO A 2022 ARTICLE TITLED "DOES DISCRETION DELAY DEVELOPMENT?" IN THE JOURNAL OF THE AMERICAN PLANNING ASSOCIATION, RESIDENTIAL PROJECTS USING ADMINISTRATIVE APPROVAL PROCESSES ARE APPROVED TWENTY-EIGHT PERCENT FASTER THAN THOSE USING DISCRETIONARY APPROVAL PROCESSES, AND FASTER APPROVAL TIMES REDUCE DEVELOPER COSTS AND THEREFORE HOUSING COSTS. STUDIES HAVE SHOWN THAT HOMEBUILDERS, INCLUDING AFFORDABLE HOUSING DEVELOPERS, WILL AVOID PARCELS THAT NEED TO GO THROUGH A DISCRETIONARY PROCESS.

(p) COMMUNITY OPPOSITION TO SPECIFIC AFFORDABLE HOUSING DEVELOPMENTS FREQUENTLY CAUSES DELAYS, INCREASES COSTS, REDUCES THE NUMBER OF HOUSING UNITS DELIVERED, PUSHES SITING OF AFFORDABLE HOUSING TO LESS OPPORTUNITY-RICH AREAS, AND PREVENTS DEVELOPMENTS FROM OCCURRING ALTOGETHER, ACCORDING TO STUDIES SUCH AS "DEMOCRACY IN ACTION? NIMBY AS IMPEDIMENT TO EQUITABLE AFFORDABLE HOUSING SITING" IN THE JOURNAL HOUSING STUDIES;

(q) RESEARCHERS HAVE FOUND THAT UPWARD MOBILITY IS SIGNIFICANTLY GREATER IN MORE COMPACT DEVELOPMENT AREAS THAN IN LOW-DENSITY AREAS, PRIMARILY DUE TO BETTER JOB ACCESSIBILITY BY MULTIPLE TRANSPORTATION MODES, ACCORDING TO THE STUDY "DOES URBAN SPRAWL HOLD DOWN UPWARD MOBILITY?", PUBLISHED IN THE JOURNAL OF LANDSCAPE AND URBAN PLANNING;

(r) TRANSIT-ORIENTED DEVELOPMENT, INCLUDING CONNECTING HOUSING OPPORTUNITIES AND SERVICES WITH SAFE MULTIMODAL INFRASTRUCTURE AND PUBLIC TRANSIT, IMPROVES THE ACCESSIBILITY OF CITIES FOR PEOPLE WITH DISABILITIES AND THOSE WITH LIMITED MOBILITY. PEOPLE WITH DISABILITIES ARE MORE LIKELY TO LIVE IN HOUSEHOLDS WITH ZERO CARS, ARE LESS LIKELY TO DRIVE, AND ARE MORE LIKELY TO RELY ON PUBLIC TRANSIT OR PARATRANSIT, ACCORDING TO THE 2017 "NATIONAL

HOUSEHOLD TRAVEL SURVEY";

(s) ACCORDING TO THE GREENHOUSE GAS POLLUTION REDUCTION ROADMAP PUBLISHED BY THE COLORADO ENERGY OFFICE, DATED JANUARY 14, 2021, THE TRANSPORTATION SECTOR IS THE SINGLE LARGEST SOURCE OF GREENHOUSE GAS POLLUTION IN COLORADO. NEARLY SIXTY PERCENT OF THE GREENHOUSE GAS EMISSIONS FROM THE TRANSPORTATION SECTOR COME FROM LIGHT-DUTY VEHICLES, WHICH ARE THE MAJORITY OF CARS AND TRUCKS THAT COLORADANS DRIVE EVERY DAY.

(t) MOTOR VEHICLE POLLUTION, INCLUDING GREENHOUSE GAS EMISSIONS, DOES NOT STAY WITHIN THE GEOGRAPHIC BOUNDARIES OF THE LOCAL GOVERNMENT WHERE IT IS EMITTED;

(u) THE GREENHOUSE GAS TRANSPORTATION PLANNING STANDARD ADOPTED BY THE TRANSPORTATION COMMISSION OF COLORADO IN 2021 SET A STATEWIDE TARGET TO REDUCE TRANSPORTATION GREENHOUSE GAS EMISSIONS THROUGH THE TRANSPORTATION PLANNING PROCESS BY ONE MILLION FIVE HUNDRED THOUSAND TONS BY 2030; AND

(v) THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY HAS CLASSIFIED THE DENVER METRO AND NORTH FRONT RANGE AREA AS BEING IN SEVERE NON-ATTAINMENT FOR OZONE AND GROUND LEVEL OZONE, WHICH HAS SERIOUS IMPACTS ON HUMAN HEALTH, PARTICULARLY FOR VULNERABLE POPULATIONS.

(2) THE GENERAL ASSEMBLY FURTHER FINDS AND DECLARES THAT:

(a) THE CONSEQUENCES OF COMMUNITY OPPOSITION AND LOCAL LAND USE POLICIES THAT LIMIT HOUSING SUPPLY IN TRANSIT-ORIENTED COMMUNITIES IMPACT HOUSING OPTIONS FOR COLORADANS OF LOW AND MODERATE INCOMES AND WORKFORCE HOUSING TO SUPPORT EMPLOYMENT GROWTH. INCREASING HIGHER-DENSITY HOUSING IN TRANSIT-ORIENTED COMMUNITIES ENSURES STABLE QUANTITY AND QUALITY OF HOUSING FOR EVERYONE AND CORRECTS POLICIES THAT PERPETUATE SEGREGATED AND UNEQUAL COMMUNITIES, REDUCED MOBILITY AND LONG COMMUTES, REDUCED OPTIONS FOR OLDER ADULTS TO AGE IN THEIR COMMUNITY OF CHOICE, LOSS OF OPEN SPACE AND AGRICULTURAL LAND, HIGH WATER USAGE, AND INCREASED GREENHOUSE GAS AND AIR POLLUTION.

(b) THERE IS AN EXTRATERRITORIAL IMPACT WHEN LOCAL GOVERNMENTS RESTRICT HOUSING DEVELOPMENT WITHIN THEIR JURISDICTIONS. THE CALL FOR JOB GROWTH IN ONE COMMUNITY THAT DOES NOT ALSO ADDRESS THE NEED FOR ADDITIONAL HOUSING AFFECTS THE DEMAND OF HOUSING DEVELOPMENT IN NEIGHBORING JURISDICTIONS. IN COLORADO, THE NUMBER OF JOBS WITHIN LARGE MUNICIPALITIES IS GENERALLY CORRELATED TO THE MUNICIPALITY'S TRANSIT SERVICE, AND RESEARCH HAS SHOWN THAT REGIONAL IMBALANCES BETWEEN JOBS AND HOUSING HAVE A SIGNIFICANT IMPACT ON VEHICLE MILES TRAVELED AND COMMUTE TIMES ACROSS JURISDICTIONS, ACCORDING TO STUDIES SUCH AS "WHICH REDUCES VEHICLE TRAVEL MORE: JOBS-HOUSING BALANCE OR RETAIL-HOUSING MIXING?", PUBLISHED IN THE JOURNAL OF THE AMERICAN PLANNING ASSOCIATION. WHEN PEOPLE ARE UNABLE TO LIVE NEAR WHERE THEY WORK, WORKERS HAVE NO OPTIONS BUT TO SPEND MORE HOURS ON THE ROAD COMMUTING TO AND FROM WORK. THE LONGER COMMUTE INCREASES VEHICLE TRAFFIC AND PUTS ADDITIONAL STRAIN ON COLORADO'S ROADS AND INCREASES POLLUTION.

(c) THE AVAILABILITY OF AFFORDABLE HOUSING IS A MATTER OF MIXED STATEWIDE AND LOCAL CONCERN. THEREFORE, IT IS THE INTENT OF THE GENERAL ASSEMBLY IN ENACTING THIS PART 2 TO:

(I) PROVIDE FUNDING FOR INFRASTRUCTURE AND AFFORDABLE HOUSING TO SUPPORT LOCAL GOVERNMENTS WHOSE ZONING DOES MEET THE GOALS OF THIS PART 2, AND TO ENCOURAGE MORE DENSE MULTIFAMILY HOUSING DEVELOPMENT PROJECTS THAT CAN ADDRESS THE STATE'S HOUSING SHORTAGE FOR ALL PARTS OF THE INCOME SPECTRUM, AND SUPPORT MORE FISCALLY AND ENVIRONMENTALLY SUSTAINABLE DEVELOPMENT PATTERNS;

(II) IMPROVE REGIONAL COLLABORATION AND OUTCOMES BY REDUCING THE ABILITY OF INDIVIDUAL LOCAL GOVERNMENTS' LAND USE RESTRICTIONS TO NEGATIVELY INFLUENCE REGIONAL CONCERNS SUCH AS HOUSING AFFORDABILITY, OPEN SPACE, TRAFFIC, AND AIR POLLUTION; AND

(III) COLORADO HAS A LEGITIMATE STATE INTEREST IN MANAGING POPULATION AND DEVELOPMENT GROWTH AND ENSURING STABLE QUALITY AND QUANTITY OF HOUSING FOR COLORADANS; AND

(d) COLORADO HAS A LEGITIMATE STATE INTEREST IN MANAGING POPULATION AND DEVELOPMENT GROWTH AND ENSURING STABLE QUALITY

AND QUANTITY OF HOUSING FOR COLORADANS AS THIS IS AMONG THE MOST PRESSING PROBLEMS CURRENTLY FACING COMMUNITIES THROUGHOUT COLORADO.

(3) THEREFORE, THE GENERAL ASSEMBLY FINDS, DETERMINES, AND DECLARES THAT THE LACK OF HOUSING SUPPLY AND UNSUSTAINABLE DEVELOPMENT PATTERNS REQUIRE A STATEWIDE SOLUTION THAT ADDRESSES LOCAL GOVERNMENT POLICIES THAT EFFECTIVELY LIMIT THE CONSTRUCTION OF A DIVERSE RANGE OF HOUSING TYPES IN AREAS ALREADY SERVED BY INFRASTRUCTURE OR IN CLOSE PROXIMITY TO JOBS AND PUBLIC TRANSIT, ALONG WITH A LACK OF FUNDING FOR INFRASTRUCTURE AND AFFORDABLE HOUSING NEAR TRANSIT-ORIENTED COMMUNITIES.

(4) THEREFORE, THE GENERAL ASSEMBLY DECLARES THAT INCREASING HOUSING IN TRANSIT-ORIENTED COMMUNITIES IS A MATTER OF MIXED STATEWIDE AND LOCAL CONCERN.

29-37-202. Definitions. AS USED IN THIS PART 2, UNLESS THE CONTEXT OTHERWISE REQUIRES:

(1) "CERTIFIED TRANSIT-ORIENTED COMMUNITY" MEANS A TRANSIT-ORIENTED COMMUNITY THAT HAS MET THE REQUIREMENTS OF SECTION 29-37-204 (4).

(2) "EXEMPT PARCEL" MEANS:

(a) ANY PARCEL THAT A TRANSIT-ORIENTED COMMUNITY HAS APPLIED TO THE DEPARTMENT FOR QUALIFICATION AS AN EXEMPT PARCEL BECAUSE THE TRANSIT-ORIENTED COMMUNITY BELIEVES THE PARCEL CANNOT BE DEVELOPED FOR REASONS INCLUDING HEALTH AND SAFETY, TOPOGRAPHY, OR PRACTICAL LIMITATIONS AND FOR WHICH THE DEPARTMENT HAS APPROVED THE TRANSIT-ORIENTED COMMUNITY'S APPLICATION ACCORDING TO A PROCESS ESTABLISHED BY POLICIES AND PROCEDURES DEVELOPED BY THE DEPARTMENT;

(b) A PARCEL THAT, AS OF JANUARY 1, 2024, IS NOT SERVED BY A DOMESTIC WATER AND SEWAGE TREATMENT SYSTEM, AS DEFINED IN SECTION 24-65.1-104 (5), IS SERVED BY A WELL THAT IS NOT CONNECTED TO A WATER DISTRIBUTION SYSTEM, AS DEFINED IN SECTION 25-9-102 (6), OR IS SERVED BY A SEPTIC TANK, AS DEFINED IN SECTION 25-10-103 (18);

(c) ANY PART OF A PARCEL THAT, AS OF JANUARY 1, 2024, IS LOCATED WITHIN AN UNINCORPORATED AREA AS DEFINED IN SECTION 29-37-202 (12)(d)(II), AND IS SERVED BY A DOMESTIC WATER AND SEWAGE TREATMENT SYSTEM, AS DEFINED IN SECTION 24-65.1-104 (5), THAT IS OWNED BY A MUNICIPALITY;

(d) A PARCEL THAT, AS OF JANUARY 1, 2024, IS IN AN AGRICULTURAL, FORESTRY, NATURAL RESOURCE PRESERVATION, OR OPEN SPACE ZONING DISTRICT;

(e) A PARCEL THAT, AS OF JANUARY 1, 2024, IS ZONED OR USED PRIMARILY FOR INDUSTRIAL USE, WHICH, FOR PURPOSES OF THIS SUBSECTION (1)(d), MEANS A BUSINESS USE OR ACTIVITY AT A SCALE GREATER THAN HOME INDUSTRY INVOLVING MANUFACTURING, FABRICATION, MINERAL OR GRAVEL EXTRACTION, ASSEMBLY, WAREHOUSING, OR STORAGE, AND PARCELS THAT ARE IDENTIFIED WITHIN THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY'S TOXIC RELEASE INVENTORY;

(f) ANY PART OF A PARCEL THAT, AS OF JANUARY 1, 2024, IS IN A FLOODWAY OR IN A ONE HUNDRED-YEAR FLOODPLAIN, AS IDENTIFIED BY THE FEDERAL EMERGENCY MANAGEMENT AGENCY;

(g) ANY PART OF A PARCEL THAT, AS OF JANUARY 1, 2024, IS SUBJECT TO AN EASEMENT FOR A MAJOR ELECTRIC OR NATURAL GAS FACILITY, AS DEFINED IN SECTION 29-20-108 (3);

(h) A PARCEL THAT, AS OF JANUARY 1, 2024, IS USED AS A CEMETERY, AS DEFINED IN SECTION 31-25-701 (2);

(i) ANY PART OF A PARCEL THAT, AS OF JANUARY 1, 2024, IS SUBJECT TO A CONSERVATION EASEMENT;

(j) A PARCEL OR EASEMENT THAT, AS OF JANUARY 1, 2024, IS OWNED BY, USED AS, OR OPERATED BY AN AIRPORT;

(k) A PUBLIC OR RAILROAD RIGHT-OF-WAY THAT EXISTS AS OF JANUARY 1, 2024;

(l) A PARCEL THAT, AS OF JANUARY 1, 2024, IS USED AS A MOBILE HOME PARK, AS DEFINED IN SECTION 38-12-201.5 (6);

(m) A PARCEL THAT IS:

(I) WITHIN A TRANSIT STATION AREA;

(II) SEPARATED BY A STATE-OWNED LIMITED-ACCESS HIGHWAY OR RAILROAD TRACK FROM ALL EXITS TO THE TRANSIT STATION THAT IS USED TO ESTABLISH THE TRANSIT STATION AREA REFERENCED IN SUBSECTION (1)(j)(I) OF THIS SECTION; AND

(III) WHOLLY BEYOND AN AREA THAT IS REACHABLE BY A PERSON WALKING A DISTANCE OF NO MORE THAN ONE-HALF MILE FROM THE TRANSIT STATION REFERENCED IN SUBSECTION (1)(j)(II) OF THIS SECTION, AS DESIGNATED BY THE WALKSHED MAP PUBLISHED BY THE DEPARTMENT PURSUANT TO SECTION 29-35-207 (1)(e);

(n) A PARCEL THAT, AS OF JANUARY 1, 2024, IS OWNED BY A FEDERAL, STATE, OR LOCAL GOVERNMENT ENTITY;

(o) ANY PART OF A PARCEL THAT, AS OF JANUARY 1, 2024, INCLUDES LAND THAT IS PARK AND OPEN SPACE, AS DEFINED IN SECTION 29-7.5-103 (2);

(p) A PARCEL THAT AS OF JANUARY 1, 2024, IS OWNED BY A SCHOOL DISTRICT, AS DEFINED IN SECTION 22-30-103 (13); OR

(q) ANY PART OF A PARCEL'S ZONING CAPACITY WHERE RESIDENTIAL USE IS PREVENTED OR LIMITED TO LESS THAN FORTY DWELLING UNITS PER ACRE BY STATE REGULATION, FEDERAL REGULATION, OR DEED RESTRICTION PURSUANT TO EITHER:

(I) FEDERAL AVIATION ADMINISTRATION RESTRICTIONS PURSUANT TO 14 CFR PART 77;

(II) AN ENVIRONMENTAL COVENANT PURSUANT TO SECTION 25-15-318 TO SECTION 25-15-323; OR

(III) RESTRICTIONS WITHIN A FLAMMABLE GAS OVERLAY ZONING DISTRICT.

(3) "HOUSING OPPORTUNITY GOAL" MEANS A GOAL FOR THE ZONING

CAPACITY FOR RESIDENTIAL UNITS IN A TRANSIT-ORIENTED COMMUNITY. A LOCAL GOVERNMENT SHALL CALCULATE ITS HOUSING OPPORTUNITY GOAL PURSUANT TO SECTION 29-37-204 (2).

(4) "MIXED-USE PEDESTRIAN-ORIENTED NEIGHBORHOOD" MEANS AN AREA THAT INTEGRATES LAND USE TYPES THAT INCLUDE RESIDENTIAL AND NONRESIDENTIAL USES WITHIN A WALKABLE NEIGHBORHOOD.

(5) "NEIGHBORHOOD CENTER" MEANS AN AREA THAT BOTH MEETS THE REQUIREMENTS OF SECTION 29-37-206 AND IS DESIGNATED AS A NEIGHBORHOOD CENTER BY A LOCAL GOVERNMENT.

(6) "NET HOUSING DENSITY" MEANS THE NUMBER OF RESIDENTIAL UNITS ALLOWED PER ACRE OF LAND ON PARCELS THAT ALLOW FOR RESIDENTIAL DEVELOPMENT. IN CALCULATING NET HOUSING DENSITY FOR AN AREA, A LOCAL GOVERNMENT SHALL INCORPORATE ANY DIMENSIONAL OR OTHER RESTRICTIONS IN LOCAL LAWS USED TO REGULATE ALLOWED DENSITY IN THE AREA, INCLUDING BUT NOT LIMITED TO RESTRICTIONS RELATED TO UNITS PER ACRE, LOT AREA PER UNIT, LOT COVERAGE, SITE LEVEL OPEN SPACE REQUIREMENTS, FLOOR AREA RATIOS, SETBACKS, MINIMUM PARKING REQUIREMENTS, AND MAXIMUM HEIGHT. NOTHING IN THIS SUBSECTION (5) MEANS THAT, IN CALCULATING NET HOUSING DENSITY FOR AN AREA, A LOCAL GOVERNMENT SHALL INCLUDE AN AREA OF AN INDIVIDUAL PARCEL REQUIRED FOR STORMWATER DRAINAGE OR A UTILITY EASEMENT.

(7) "OPTIONAL TRANSIT AREA" MEANS THE TOTAL AREA, MEASURED IN ACRES, WITHIN A TRANSIT-ORIENTED COMMUNITY THAT IS WITHIN ONE-QUARTER MILE OF A PUBLIC BUS ROUTE OR BUS RAPID TRANSIT CORRIDOR AS IDENTIFIED IN THE CRITERIA IN SUBSECTION 29-37-207 (4).

(8) "TRANSIT AREA" MEANS BOTH A TRANSIT STATION AREA, AS DEFINED IN SUBSECTION (12) OF THIS SECTION, OR A TRANSIT CORRIDOR AREA, AS DEFINED IN SUBSECTION (10) OF THIS SECTION.

(9) "TRANSIT CENTER" MEANS AN AREA THAT BOTH MEETS THE REQUIREMENTS OF SECTION 29-37-205 AND IS DESIGNATED AS A TRANSIT CENTER BY A TRANSIT-ORIENTED COMMUNITY.

(10) "TRANSIT CORRIDOR AREA" MEANS THE TOTAL AREA,

MEASURED IN ACRES, WITHIN A TRANSIT-ORIENTED COMMUNITY THAT IS WITHIN ONE-QUARTER MILE OF A PUBLIC BUS ROUTE AS IDENTIFIED IN THE CRITERIA IN SECTION 29-37-207 (3).

(11) "TRANSIT-ORIENTED COMMUNITY" MEANS A LOCAL GOVERNMENT THAT:

(a) IS EITHER ENTIRELY OR PARTIALLY WITHIN A METROPOLITAN PLANNING ORGANIZATION;

(b) HAS A POPULATION OF FOUR THOUSAND OR MORE ACCORDING TO THE MOST RECENT DATA FROM THE STATE DEMOGRAPHY OFFICE;

(c) CONTAINS AT LEAST SEVENTY-FIVE ACRES OF TRANSIT AREA; AND

(d) IF THE LOCAL GOVERNMENT IS A COUNTY, CONTAINS EITHER:

(I) A PART OF A TRANSIT STATION AREA THAT IS BOTH IN AN UNINCORPORATED PART OF THE COUNTY AND WITHIN ONE-HALF MILE OF A TRANSIT STATION THAT SERVES ONE OR BOTH OF A COMMUTER RAIL OR A LIGHT RAIL SERVICE; OR

(II) A PART OF A TRANSIT CORRIDOR AREA THAT IS BOTH IN AN UNINCORPORATED PART OF THE COUNTY AND FULLY SURROUNDED BY ONE OR MORE MUNICIPALITIES.

(12) "TRANSIT STATION AREA" MEANS THE TOTAL AREA, MEASURED IN ACRES, WITHIN A TRANSIT-ORIENTED COMMUNITY THAT IS WITHIN ONE-HALF MILE OF A STATION, AS IDENTIFIED IN THE CRITERIA IN SECTION 29-37-207 (2).

(13) "ZONING CAPACITY" MEANS THE TOTAL NUMBER OF HOUSING UNITS ALLOWED IN AN AREA, AS LIMITED BY THE RESTRICTIONS IN LOCAL LAW THAT REGULATE DENSITY IN THAT AREA, AND AS CALCULATED BY TOTALING THE NET HOUSING DENSITY OF ALL PARCELS WITHIN THE AREA.

(14) "ZONING CAPACITY BUFFER" MEANS THE RATIO OF THE NUMBER OF HOUSING UNITS ANTICIPATED TO BE CONSTRUCTED IN AN AREA TO THE ZONING CAPACITY OF THE AREA.

29-37-203. Department of local affairs collaboration - goals - transit-oriented community authority. (1) AS DETERMINED TO BE APPROPRIATE BY THE EXECUTIVE DIRECTOR OF THE DEPARTMENT, THE DEPARTMENT SHALL COLLABORATE WITH THE DEPARTMENT OF TRANSPORTATION AND THE COLORADO ENERGY OFFICE IN FULFILLING THE REQUIREMENTS AND GOALS OF THIS PART 2.

(2) THE GOALS OF THIS PART 2 ARE TO:

(a) INCREASE OPPORTUNITIES TO CONSTRUCT HOUSING NEAR TRANSIT IN ORDER TO PROVIDE BENEFITS INCLUDING REGULATED AFFORDABLE HOUSING, ACCESSIBLE HOUSING, REGIONAL EQUITY THROUGH A BALANCE OF JOBS AND HOUSING, IMPROVED AND EXPANDED TRANSIT SERVICE, AND MULTIMODAL ACCESS TO DAILY NEEDS WITHIN MIXED-USE PEDESTRIAN-ORIENTED NEIGHBORHOODS; AND

(b) INCREASE OPPORTUNITIES FOR HOUSING PRODUCTION BY PROVIDING APPROPRIATE ZONING CAPACITY BUFFERS.

(3) NOTHING IN THIS PART 2 PREVENTS A TRANSIT-ORIENTED COMMUNITY, OR OTHER RELEVANT ENTITY, FROM:

(a) ENFORCING INFRASTRUCTURE STANDARDS IN LOCAL LAW THAT RESULT IN THE DENIAL OR CONDITIONING OF PERMITS OR APPROVALS FOR SPECIFIC HOUSING PROJECTS IN A TRANSIT CENTER, INCLUDING BUT NOT LIMITED TO UTILITIES, TRANSPORTATION, OR PUBLIC WORKS CODES OR STANDARDS;

(b) ADOPTING GENERALLY APPLICABLE REQUIREMENTS FOR THE PAYMENT OF IMPACT FEES OR OTHER SIMILAR DEVELOPMENT CHARGES, IN ACCORDANCE WITH SECTION 29-20-104.5, OR THE MITIGATION OF IMPACTS IN ACCORDANCE WITH PART 2 OF ARTICLE 20 OF THIS TITLE 29;

(c) APPROVING A DEVELOPMENT APPLICATION AT A LOWER NET HOUSING DENSITY THAN THE MAXIMUM ALLOWED NET HOUSING DENSITY;

(d) ALLOWING A HIGH AMOUNT OF ZONING CAPACITY IN ONE TRANSIT AREA, WHILE ALLOWING A VERY LOW AMOUNT OF OR NO ZONING CAPACITY IN ANOTHER TRANSIT AREA;

(e) IMPLEMENTING DISCRETIONARY APPROVAL PROCESSES FOR SUBDIVISIONS, REZONINGS, VARIANCES, OR OTHER PROCESSES IN TRANSIT CENTERS OUTSIDE OF PROJECT-SPECIFIC ZONING STANDARDS;

(f) CREATING AN OPTIONAL DISCRETIONARY REVIEW PROCESS THAT MAY APPROVE GREATER DENSITY OR OTHER MORE PERMISSIVE STANDARDS THAN THE OBJECTIVE STANDARDS SUBJECT TO ADMINISTRATIVE APPROVAL IN A TRANSIT CENTER;

(g) CREATING A DISCRETIONARY REVIEW PROCESS IN TRANSIT CENTERS THAT IS AVAILABLE AT THE APPLICANT'S OPTION AND IS SUBJECT TO CRITERIA CONSISTENT WITH THE PURPOSES OF THIS PART 2 AS ESTABLISHED IN SUBSECTION (2) OF THIS SECTION, INCLUDING PROCESSES SUCH AS PLANNED UNIT DEVELOPMENTS;

(h) NOT PUBLICLY DISCLOSING ANY CONFIDENTIAL INFORMATION RELATED TO WATER SUPPLIES OR FACILITIES;

(i) ALLOWING COMMERCIAL USES, BUSINESS USES, OR MIXED-USE DEVELOPMENT ON A PARCEL IN A DESIGNATED TRANSIT CENTER; AND

(j) DENYING OR CONDITIONING DEVELOPMENT PROJECTS OR BUILDING PERMIT APPROVALS FOR A FAILURE TO MEET THE REQUIREMENTS OF A TRAFFIC STUDY THAT IS CONDUCTED USING OBJECTIVE STANDARDS.

29-37-204. Transit-oriented community housing opportunity goal calculation - preliminary transit-oriented community assessment report - housing opportunity goal compliance - insufficient water supplies for meeting a housing opportunity goal - affordability and displacement mitigation strategies - housing opportunity goal report - legislative declaration. (1) **Legislative declaration.** THE GENERAL ASSEMBLY HEREBY FINDS AND DECLARES THAT:

(a) TRANSIT RIDERSHIP, LAND USE DEVELOPMENT PATTERNS, AFFORDABILITY AND AVAILABILITY OF HOUSING, ROADS, AND GREENHOUSE GAS EMISSIONS FROM THE TRANSPORTATION SECTOR ARE INTERCONNECTED ISSUES THAT HAVE IMPACTS AND CONCERNS WELL BEYOND THE BORDERS OF A SINGLE LOCAL COMMUNITY;

(b) COLORADO HAS AN INTEREST IN ENSURING A STABLE QUANTITY

AND QUALITY OF HOUSING IN ALIGNMENT WITH POPULATION GROWTH AND ENSURING THAT SHARED RESOURCES, INVESTMENTS, AND GOALS SUCH AS ROADS, INFRASTRUCTURE, TRANSIT, AIR QUALITY, WATER, AND GREENHOUSE GAS MITIGATION, ARE PROTECTED IN THE PROCESS; AND

(c) INCREASING HOUSING DENSITY IN TRANSIT-ORIENTED COMMUNITIES IS A MATTER OF MIXED STATEWIDE AND LOCAL CONCERN THAT REQUIRES STATEWIDE COOPERATION.

(2) **Housing opportunity goal calculation.** A TRANSIT-ORIENTED COMMUNITY SHALL CALCULATE ITS HOUSING OPPORTUNITY GOAL BY MULTIPLYING THE TOTAL AREA OF THE TRANSIT AREAS, AS DEFINED IN THE TRANSIT AREAS MAP CREATED PURSUANT TO SECTION 29-37-207 (1), WITHIN THE LOCAL GOVERNMENT'S JURISDICTION, EXCLUSIVE OF THE EXEMPT PARCELS IN THOSE TRANSIT AREAS, BY FORTY DWELLING UNITS PER ACRE.

(3) **Preliminary transit-oriented community assessment report.** (a) ON OR BEFORE JUNE 30, 2025, A TRANSIT-ORIENTED COMMUNITY SHALL, IN A FORM AND MANNER DETERMINED BY THE DEPARTMENT, SUBMIT A PRELIMINARY TRANSIT-ORIENTED COMMUNITY ASSESSMENT REPORT THAT INCLUDES:

(I) THE TRANSIT-ORIENTED COMMUNITY'S HOUSING OPPORTUNITY GOAL AND THE DATA AND METHOD THE TRANSIT-ORIENTED COMMUNITY USED TO CALCULATE ITS HOUSING OPPORTUNITY GOAL; AND

(II) A MAP OF EXISTING ZONING DISTRICTS WITHIN THE TRANSIT-ORIENTED COMMUNITY THAT MAY QUALIFY AS TRANSIT CENTERS AND PRELIMINARY EVIDENCE FOR THIS QUALIFICATION INCLUDING THE STANDARDS APPLICABLE TO THESE ZONING DISTRICTS.

(b) IF APPLICABLE, A TRANSIT-ORIENTED COMMUNITY MAY INCLUDE IN THE REPORT DESCRIBED IN SUBSECTION (3)(a) OF THIS SECTION ANY AFFORDABILITY OR DISPLACEMENT STRATEGIES THAT THE TRANSIT-ORIENTED COMMUNITY HAS IMPLEMENTED.

(c) THE DEPARTMENT SHALL REVIEW A PRELIMINARY TRANSIT-ORIENTED COMMUNITY ASSESSMENT REPORT SUBMITTED BY A TRANSIT-ORIENTED COMMUNITY PURSUANT TO THIS SUBSECTION (3) AND EITHER PROVIDE WRITTEN NOTICE APPROVING THE REPORT OR PROVIDE

DIRECTION FOR AMENDING AND RESUBMITTING THE REPORT.

(4) **Housing opportunity goal compliance.** ON OR BEFORE DECEMBER 31, 2027, A TRANSIT-ORIENTED COMMUNITY SHALL SATISFY THE FOLLOWING CRITERIA, WHICH MUST BE SATISFIED TO QUALIFY AS A CERTIFIED TRANSIT-ORIENTED COMMUNITY. A TRANSIT-ORIENTED COMMUNITY SHALL:

(a) DESIGNATE AREAS WITHIN THE TRANSIT-ORIENTED COMMUNITY AS TRANSIT CENTERS AND ENSURE THAT THOSE AREAS SATISFY THE REQUIREMENTS IN SECTION 29-37-205;

(b) ENSURE THAT THE TOTAL ZONING CAPACITY FOR ALL TRANSIT CENTERS WITHIN THE TRANSIT-ORIENTED COMMUNITY IS GREATER THAN OR EQUAL TO THE TRANSIT-ORIENTED COMMUNITY'S HOUSING OPPORTUNITY GOAL;

(c) SUBMIT A HOUSING OPPORTUNITY GOAL REPORT AND HAVE THE REPORT APPROVED BY THE DEPARTMENT PURSUANT TO SUBSECTION (8) OF THIS SECTION; AND

(d) THREE YEARS AFTER A SUBMITTING A HOUSING OPPORTUNITY GOAL REPORT PURSUANT TO SUBSECTION (8) OF THIS SECTION, AND EVERY THREE YEARS THEREAFTER, SUBMIT A STATUS REPORT PURSUANT TO SUBSECTION (9) OF THIS SECTION THAT IS APPROVED BY THE DEPARTMENT.

(5) **Insufficient water supplies for meeting a housing opportunity goal.** (a) ON OR BEFORE DECEMBER 31, 2026, AND EVERY THREE YEARS THEREAFTER, A TRANSIT-ORIENTED COMMUNITY MAY SUBMIT A NOTICE, IN A FORM AND MANNER DETERMINED BY THE DEPARTMENT, THAT THE SUPPLY OF WATER FROM ALL WATER SUPPLY ENTITIES, AS DEFINED IN SECTION 29-20-302 (2), THAT SERVE THE TRANSIT-ORIENTED COMMUNITY IS INSUFFICIENT DURING THE NEXT THREE-YEAR PERIOD TO PROVIDE THE DOMESTIC WATER SERVICE NECESSARY TO MEET THE TRANSIT-ORIENTED COMMUNITY'S HOUSING OPPORTUNITY GOAL. THE WATER SUPPLY ENTITIES SHALL PROVIDE INFORMATION AND ASSISTANCE AS NECESSARY TO COMPLETE THE NOTICE ALLOWED BY THIS SUBSECTION (5). THE NOTICE ALLOWED BY THIS SUBSECTION (5) MUST INCLUDE, BUT IS NOT LIMITED TO:

(I) AN ANALYSIS OF WATER DEMAND BASED ON:

(A) PROJECTED HOUSING AND POPULATION GROWTH, AS ESTIMATED BY THE STATE DEMOGRAPHY OFFICE OR A RELEVANT METROPOLITAN PLANNING ORGANIZATION; AND

(B) A REASONABLE ZONING CAPACITY BUFFER, AS ESTIMATED BASED ON RELEVANT LOCAL, REGIONAL, OR STATE DATA.

(II) ANY DATA, PROFESSIONAL OPINIONS, OR OTHER INFORMATION USED TO CREATE THE ANALYSIS IN SUBSECTION (5)(a)(I) OF THIS SECTION;

(III) DOCUMENTATION DEMONSTRATING BOTH AN UP-TO-DATE WATER SUPPLY PLAN THAT COMPLIES WITH SECTION 29-20-304 (3) AND AN UP-TO-DATE WATER EFFICIENCY PLAN THAT COMPLIES WITH SECTION 37-60-126 (1) THROUGH (5); AND

(IV) A PROPOSAL THAT MAY INCLUDE:

(A) EVIDENCE THAT THE WATER SUPPLY ENTITY LACKS ADEQUATE WATER SUPPLY TO PROVIDE THE AMOUNT OF WATER IDENTIFIED IN SUBSECTION (5)(a)(I) OF THIS SECTION; AND

(B) A REQUEST FOR A MODIFICATION OF THE HOUSING OPPORTUNITY GOAL DURING THE NEXT THREE YEAR PERIOD BASED ON THE ANALYSIS OF WATER DEMAND IDENTIFIED IN SUBSECTION (5)(a)(I) OF THIS SECTION.

(b) UPON RECEIVING THE NOTICE DESCRIBED IN SUBSECTION (5)(a) OF THIS SECTION, THE DEPARTMENT SHALL REVIEW THE NOTICE AND DETERMINE WHETHER TO ACCEPT, PROVIDE COMMENT ON, OR DENY THE PROPOSAL DESCRIBED IN SUBSECTION (5)(a)(IV) OF THIS SECTION.

(6) **Affordability strategies.** (a) ON OR BEFORE DECEMBER 31, 2026, A TRANSIT-ORIENTED COMMUNITY SHALL IDENTIFY AFFORDABILITY STRATEGIES THAT IT WILL IMPLEMENT OR HAS ALREADY IMPLEMENTED WHILE MEETING ITS HOUSING OPPORTUNITY GOAL. IN SO DOING, THE TRANSIT-ORIENTED COMMUNITY SHALL IDENTIFY AFFORDABILITY STRATEGIES BASED ON THE DEMONSTRATED HOUSING NEEDS WITHIN THE TRANSIT-ORIENTED COMMUNITY INCLUDING FOR-SALE AND RENTAL HOUSING NEEDS AND THE HOUSING NEEDS OF LOW-, MODERATE-, AND MEDIUM-INCOME HOUSEHOLDS, AS DESIGNATED BY THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT.

(b) (I) ON OR BEFORE DECEMBER 31, 2026, A TRANSIT-ORIENTED COMMUNITY SHALL INCLUDE THE FOLLOWING IN ITS HOUSING OPPORTUNITY GOAL REPORT SUBMITTED PURSUANT TO SUBSECTION (8)(a)(IV) OF THIS SECTION:

(A) AT LEAST TWO STRATEGIES INCLUDED IN THE STANDARD AFFORDABILITY STRATEGIES MENU DESCRIBED IN SECTION 29-37-208 (1) THAT THE TRANSIT-ORIENTED COMMUNITY IDENTIFIED PURSUANT TO SUBSECTION (6)(a) OF THIS SECTION AND INTENDS TO IMPLEMENT;

(B) AT LEAST ONE STRATEGY INCLUDED IN THE LONG-TERM AFFORDABILITY STRATEGIES MENU DESCRIBED IN SECTION 29-37-208 (2) THAT THE TRANSIT-ORIENTED COMMUNITY IDENTIFIED PURSUANT TO SUBSECTION (6)(a) OF THIS SECTION AND INTENDS TO IMPLEMENT; AND

(C) AN IMPLEMENTATION PLAN DESCRIBING HOW THE TRANSIT-ORIENTED COMMUNITY HAS OR WILL IMPLEMENT THE AFFORDABILITY STRATEGIES IDENTIFIED PURSUANT TO SUBSECTIONS (6)(b)(I)(A) AND (6)(b)(I)(B) OF THIS SECTION.

(II) FOR PURPOSES OF SATISFYING THE REQUIREMENTS OF THIS SUBSECTION (6)(b), A TRANSIT-ORIENTED COMMUNITY SHALL NOT:

(A) COUNT ONE OR BOTH OF THE STRATEGIES DESCRIBED IN SECTIONS 29-37-208 (1)(e) AND 29-37-208 (2)(c) TOWARDS SATISFYING THE REQUIREMENTS OF BOTH SUBSECTIONS (6)(b)(I)(A) AND (6)(b)(I)(B) OF THIS SECTION; OR

(B) COUNT ANY STRATEGY DESCRIBED IN SECTION 29-37-208 THAT IS OTHERWISE REQUIRED BY STATE LAW.

(7) **Displacement mitigation strategies.** ON OR BEFORE DECEMBER 31, 2026, A TRANSIT-ORIENTED COMMUNITY SHALL INCLUDE THE FOLLOWING IN ITS HOUSING OPPORTUNITY GOAL REPORT, PURSUANT TO SUBSECTION (8)(a)(V) OF THIS SECTION:

(a) TWO DISPLACEMENT MITIGATION STRATEGIES THAT THE TRANSIT-ORIENTED COMMUNITY HAS ADOPTED OR WILL ADOPT FROM THE LONG-TERM DISPLACEMENT MITIGATION STRATEGIES MENU DEVELOPED BY THE DEPARTMENT PURSUANT TO SECTION 29-37-209 (3) TO MITIGATE

DISPLACEMENT RISKS WHILE MEETING ITS HOUSING OPPORTUNITY GOAL; AND

(b) AN IMPLEMENTATION PLAN DESCRIBING HOW THE TRANSIT-ORIENTED COMMUNITY WILL IMPLEMENT THE DISPLACEMENT MITIGATION STRATEGIES IT IDENTIFIES PURSUANT TO SUBSECTION (7)(a) OF THIS SECTION.

(8) **Housing opportunity goal report.** (a) ON OR BEFORE DECEMBER 31, 2026, A TRANSIT-ORIENTED COMMUNITY SHALL SUBMIT A HOUSING OPPORTUNITY GOAL REPORT TO THE DEPARTMENT IN A FORM AND MANNER DETERMINED BY THE DEPARTMENT. IF A TRANSIT-ORIENTED COMMUNITY CANNOT INCLUDE ANY OF THE FOLLOWING ITEMS IN ITS HOUSING OPPORTUNITY GOAL REPORT ON OR BEFORE DECEMBER 31, 2026, THE TRANSIT-ORIENTED COMMUNITY SHALL INDICATE WHY IT CANNOT DO SO AND ITS PROGRESS TOWARDS BEING ABLE TO INCLUDE THOSE ITEMS IN ITS HOUSING OPPORTUNITY GOAL REPORT. THE REPORT MUST INCLUDE THE FOLLOWING, ALONG WITH ANY OTHER ELEMENTS IDENTIFIED BY THE DEPARTMENT:

(I) THE TRANSIT-ORIENTED COMMUNITY'S HOUSING OPPORTUNITY GOAL;

(II) EVIDENCE THAT THE TRANSIT-ORIENTED COMMUNITY HAS MET ITS HOUSING OPPORTUNITY GOAL PURSUANT TO SUBSECTION (4)(b) OF THIS SECTION;

(III) A MAP THAT IDENTIFIES THE BOUNDARIES OF ANY TRANSIT CENTERS WITHIN THE TRANSIT-ORIENTED COMMUNITY AND EVIDENCE THAT THOSE AREAS SATISFY THE REQUIREMENTS IN SECTION 29-37-205;

(IV) AFFORDABILITY STRATEGIES IDENTIFIED PURSUANT TO SUBSECTION (6)(b)(I)(A) AND (6)(b)(I)(B) OF THIS SECTION AND THE IMPLEMENTATION PLAN DESCRIBED PURSUANT TO SUBSECTION (6)(b)(I)(C) OF THIS SECTION;

(V) DISPLACEMENT MITIGATION STRATEGIES IDENTIFIED PURSUANT TO SUBSECTION (7)(a) OF THIS SECTION AND THE IMPLEMENTATION PLAN DESCRIBED PURSUANT TO SUBSECTION (7)(b) OF THIS SECTION;

(VI) A DESCRIPTION OF COMMUNITY ENGAGEMENT THAT THE

TRANSIT-ORIENTED COMMUNITY CONDUCTED IN THE PROCESS OF MEETING ITS HOUSING OPPORTUNITY GOAL, IDENTIFYING AFFORDABILITY STRATEGIES PURSUANT TO SUBSECTION (6)(b)(I)(A) AND (6)(b)(I)(B) OF THIS SECTION AND IDENTIFYING DISPLACEMENT MITIGATION STRATEGIES PURSUANT TO SUBSECTION (7)(a) OF THIS SECTION; AND

(VII) IF APPLICABLE, AND IF THE TRANSIT-ORIENTED COMMUNITY SO CHOOSES, EVIDENCE THAT THE TRANSIT-ORIENTED COMMUNITY HAS SATISFIED THE REQUIREMENTS OF SUBSECTION (5) OF THIS SECTION.

(b) THE DEPARTMENT SHALL REVIEW A HOUSING OPPORTUNITY GOAL REPORT SUBMITTED BY A TRANSIT-ORIENTED COMMUNITY PURSUANT TO SUBSECTION (8)(a) OF THIS SECTION AND PROVIDE WRITTEN NOTICE THAT EITHER:

(I) APPROVES THE REPORT AND AFFIRMS THAT THE TRANSIT-ORIENTED COMMUNITY HAS SATISFIED THE RELEVANT REQUIREMENTS OF THIS SECTION AND IS THEREFORE CONSIDERED A CERTIFIED TRANSIT-ORIENTED COMMUNITY; OR

(II) PROVIDES DIRECTION FOR AMENDING AND RESUBMITTING THE REPORT AND REQUIRES THAT THE TRANSIT-ORIENTED COMMUNITY RESUBMIT THE REPORT WITHIN NINETY DAYS OF RECEIVING THE WRITTEN NOTICE.

(c) IF THE DEPARTMENT HAS NOT APPROVED A TRANSIT-ORIENTED COMMUNITY'S HOUSING OPPORTUNITY GOAL REPORT ON OR BEFORE DECEMBER 31, 2027, THE DEPARTMENT SHALL PROVIDE THE TRANSIT-ORIENTED COMMUNITY WRITTEN NOTICE THAT THE TRANSIT-ORIENTED COMMUNITY IS IN NON-COMPLIANCE WITH THIS PART 2 AND IS NOT A CERTIFIED TRANSIT-ORIENTED COMMUNITY.

(d) (I) THE DEPARTMENT SHALL IDENTIFY CERTIFIED TRANSIT-ORIENTED COMMUNITIES FOR THE PURPOSE OF ESTABLISHING ELIGIBILITY FOR STATE GRANT AND INCENTIVE PROGRAMS.

(II) PURSUANT TO SECTION 29-37-210 (6), A CERTIFIED TRANSIT-ORIENTED COMMUNITY IS ELIGIBLE FOR THE AWARD OF A TRANSIT-ORIENTED COMMUNITIES INFRASTRUCTURE GRANT PROGRAM GRANT.

(III) THE DEPARTMENT SHALL IDENTIFY CERTIFIED TRANSIT-ORIENTED COMMUNITIES, INCLUDING COMPLIANCE WITH THE REQUIREMENTS FOR AFFORDABILITY STRATEGIES IN SUBSECTION (8)(a)(IV) OF THIS SECTION AND DISPLACEMENT MITIGATION STRATEGIES IN SUBSECTION (8)(a)(V) OF THIS SECTION, FOR THE PURPOSES OF ESTABLISHING ELIGIBILITY FOR THE COLORADO AFFORDABLE HOUSING IN TRANSIT-ORIENTED COMMUNITIES INCOME TAX CREDIT IN PART 54 OF ARTICLE 22 OF TITLE 39.

(9) **Status report.** (a) EVERY THREE YEARS AFTER SUBMITTING A HOUSING OPPORTUNITY GOAL REPORT PURSUANT TO SUBSECTION (8)(a) OF THIS SECTION, A TRANSIT-ORIENTED COMMUNITY SHALL SUBMIT A STATUS REPORT TO THE DEPARTMENT IN A FORM AND MANNER DETERMINED BY THE DEPARTMENT THAT CONFIRMS THAT THE TRANSIT-ORIENTED COMMUNITY IS STILL A CERTIFIED TRANSIT-ORIENTED COMMUNITY.

(b) THE DEPARTMENT SHALL REVIEW A STATUS REPORT SUBMITTED BY A TRANSIT-ORIENTED COMMUNITY PURSUANT TO SUBSECTION (9)(a) OF THIS SECTION AND PROVIDE WRITTEN NOTICE THAT EITHER:

(I) APPROVES THE REPORT AND AFFIRMS THAT THE TRANSIT-ORIENTED COMMUNITY HAS SATISFIED THE RELEVANT REQUIREMENTS OF THIS SECTION AND IS THEREFORE CONSIDERED A CERTIFIED TRANSIT-ORIENTED COMMUNITY; OR

(II) PROVIDES DIRECTION FOR AMENDING AND RESUBMITTING THE REPORT AND REQUIRES THAT THE TRANSIT-ORIENTED COMMUNITY RESUBMIT THE REPORT WITHIN NINETY DAYS OF RECEIVING THE WRITTEN NOTICE.

(c) (I) IF A TRANSIT-ORIENTED COMMUNITY FAILS TO SUBMIT A STATUS REPORT TO THE DEPARTMENT PURSUANT TO SUBSECTION (9)(a) OF THIS SECTION OR FAILS TO SUBMIT AN AMENDED STATUS REPORT PURSUANT TO SUBSECTION (9)(b)(II) OF THIS SECTION, THE DEPARTMENT SHALL PROVIDE THE TRANSIT-ORIENTED COMMUNITY WRITTEN NOTICE STATING THAT THE TRANSIT-ORIENTED COMMUNITY WILL NOT BE DEEMED A CERTIFIED TRANSIT-ORIENTED COMMUNITY.

29-37-205. Criteria for qualification as a transit center - criteria for qualification as a transit center outside of a transit area. (1) TO DESIGNATE AN AREA AS A TRANSIT CENTER, A TRANSIT-ORIENTED

COMMUNITY SHALL:

(a) ENSURE THAT THE AREA IS COMPOSED SOLELY OF ZONING DISTRICTS THAT UNIFORMLY ALLOW A NET HOUSING DENSITY OF AT LEAST FIFTEEN UNITS PER ACRE WITH NO PARCEL OR ZONING DISTRICT BEING COUNTED AS ALLOWING A NET HOUSING DENSITY OF MORE THAN FIVE HUNDRED UNITS PER ACRE;

(b) (I) IDENTIFY A NET HOUSING DENSITY ALLOWED FOR THE AREA OR FOR SUBDISTRICTS WITHIN THE AREA. AS PART OF THE GUIDANCE THE DEPARTMENT DEVELOPS PURSUANT TO SECTION 29-37-207 (7), THE DEPARTMENT SHALL PROVIDE LOCAL GOVERNMENTS WITH SIMPLE AND EFFECTIVE METHODS OF CALCULATING NET HOUSING DENSITY. THE IDENTIFIED NET HOUSING DENSITY MUST:

(A) REFLECT ANY SIGNIFICANT DIMENSIONAL OR OTHER RESTRICTIONS IN LOCAL LAWS USED TO REGULATE DENSITY IN THE AREA, INCLUDING BUT NOT LIMITED TO RESTRICTIONS RELATED TO UNITS PER ACRE, LOT AREA PER UNIT, LOT COVERAGE, SITE LEVEL OPEN SPACE REQUIREMENTS, FLOOR AREA RATIOS, SETBACKS, MINIMUM PARKING REQUIREMENTS, AND MAXIMUM HEIGHT. WHERE A DIMENSIONAL RESTRICTION HAS MULTIPLE POTENTIAL OUTCOMES WITHIN THE SAME ZONING DISTRICT OR WITHIN RELATED ZONING DISTRICTS, THE AVERAGE OUTCOME OF THE DIMENSIONAL RESTRICTION MAY BE UTILIZED BY THE TRANSIT-ORIENTED COMMUNITY TO MEASURE NET HOUSING DENSITY.

(B) ASSUME MINIMUM PARKING REQUIREMENTS ARE MET WITH SURFACE PARKING; EXCEPT THAT THREE-FOURTHS OF A PARKING SPACE PER DWELLING UNIT MAY BE COUNTED AS STRUCTURED PARKING WITHIN THE BUILDING FOOTPRINT;

(C) ASSUME AN AVERAGE HOUSING UNIT SIZE, AS DETERMINED BASED ON EITHER THE TYPICAL SIZE OF A MULTIFAMILY HOUSING UNIT THAT WAS RECENTLY BUILT IN COLORADO AS ESTABLISHED IN THE CENSUS'S AMERICAN HOUSING SURVEY OR THE TYPICAL SIZE OF A MULTIFAMILY HOUSING UNIT IN THE TRANSIT-ORIENTED COMMUNITY ACCORDING TO LOCAL DATA;

(II) NOTHING IN THIS SUBSECTION (1)(b) REQUIRES A LOCAL GOVERNMENT TO INCLUDE AREAS OF INDIVIDUAL PARCELS REQUIRED FOR

STORMWATER DRAINAGE OR UTILITY EASEMENTS IN CALCULATING NET HOUSING DENSITY; AND

(III) IF A PARCEL'S EXISTING RESIDENTIAL USES HAVE A HIGHER NET HOUSING DENSITY THAN THE NET HOUSING DENSITY ALLOWED FOR THE PARCEL BY CURRENT RESTRICTIONS IN LOCAL LAW, THE NET HOUSING DENSITY OF THE EXISTING RESIDENTIAL USE MAY BE COUNTED;

(c) EXCLUDE ANY AREA WHERE LOCAL LAW EXCLUSIVELY RESTRICTS HOUSING OCCUPANCY BASED ON AGE OR OTHER FACTORS;

(d) ESTABLISH AN ADMINISTRATIVE APPROVAL PROCESS FOR MULTIFAMILY RESIDENTIAL DEVELOPMENT ON PARCELS IN THE AREA THAT ARE NO MORE THAN FIVE ACRES IN SIZE. FOR MULTIFAMILY RESIDENTIAL DEVELOPMENT APPLICATIONS ON PARCELS GREATER THAN FIVE ACRES IN SIZE, A TRANSIT-ORIENTED COMMUNITY SHALL IDENTIFY A TARGET NET HOUSING DENSITY FOR THE PARCELS TO COUNT THE PARCELS AS PART OF THE TRANSIT CENTER THAT COVERS THE AREA. THIS SUBSECTION (1)(d) DOES NOT PREVENT THE ESTABLISHMENT OF DEVELOPER AGREEMENTS BETWEEN THE LOCAL GOVERNMENT AND DEVELOPERS.

(e) ENSURE THAT THE AREA OF A TRANSIT CENTER IS COMPOSED OF PARCELS THAT ARE LOCATED WHOLLY OR PARTIALLY WITHIN EITHER:

(I) A TRANSIT AREA OR OPTIONAL TRANSIT AREA; OR

(II) ONE-QUARTER MILE FROM THE BOUNDARY OF A TRANSIT AREA OR OPTIONAL TRANSIT AREA.

(2) (a) NOTWITHSTANDING SUBSECTION (1)(e) OF THIS SECTION, A TRANSIT-ORIENTED COMMUNITY MAY ONLY DESIGNATE AN AREA AS A TRANSIT CENTER WITHIN AN OPTIONAL TRANSIT AREA AS DESCRIBED IN SECTION 29-37-207 (4), IF THE TRANSIT-ORIENTED COMMUNITY HAS PROVIDED REASONABLE EVIDENCE IN THE HOUSING OPPORTUNITY GOAL REPORT SUBMITTED PURSUANT TO SECTION 29-37-204 (8) THAT:

(I) TO THE MAXIMUM EXTENT FEASIBLE, AN AVERAGE NET HOUSING DENSITY OF AT LEAST FORTY DWELLING UNITS PER ACRE IS ALLOWED ON ALL PARCELS WITHIN THE TRANSIT AREA THAT ARE BOTH ONE-HALF ACRE OR MORE IN SIZE AND NOT EXEMPT PARCELS; AND

(II) AREAS WITHIN THE OPTIONAL TRANSIT AREA HAVE FEWER BARRIERS TO HOUSING DEVELOPMENT THAN AREAS WITHIN THE TRANSIT AREA.

(b) FOR PURPOSES OF SUBSECTION (2)(a)(II) OF THIS SECTION, BARRIERS TO HOUSING DEVELOPMENT MAY INCLUDE:

(I) AN ANTICIPATED LACK OF WATER SUPPLY, AFTER ACCOUNTING FOR A REASONABLE ZONING CAPACITY BUFFER;

(II) AN ANTICIPATED LACK OF SUFFICIENT FUTURE INFRASTRUCTURE CAPACITY, INCLUDING WATER TREATMENT PLANTS, WASTEWATER TREATMENT PLANTS, OR ELECTRICAL POWER NETWORKS IN THE AREA, AFTER ACCOUNTING FOR A REASONABLE ZONING CAPACITY BUFFER;

(III) UNIQUE SITE CHARACTERISTICS WHICH CONTRIBUTE TO A HIGH COST OF HOUSING DEVELOPMENT; OR

(IV) SITES THAT ARE INFEASIBLE FOR HOUSING DEVELOPMENT.

29-37-206. Criteria for qualification as a neighborhood center. (1) (a) TO DESIGNATE AN AREA AS A NEIGHBORHOOD CENTER, A LOCAL GOVERNMENT SHALL, IN ACCORDANCE WITH POLICIES AND PROCEDURES ADOPTED BY THE DEPARTMENT THAT MAY INCLUDE DIFFERENT CRITERIA FOR VARYING REGIONAL AND LOCAL CONTEXTS, IDENTIFY AREAS THAT MEET THE FOLLOWING CRITERIA:

(I) ALLOW A NET HOUSING DENSITY THAT SUPPORTS MIXED-USE PEDESTRIAN-ORIENTED NEIGHBORHOODS, THE DEVELOPMENT OF REGULATED AFFORDABLE HOUSING, AND INCREASED PUBLIC TRANSIT RIDERSHIP;

(II) WITHIN CENSUS URBANIZED AREAS, AS DEFINED IN THE LATEST FEDERAL DECENNIAL CENSUS, ESTABLISH AN ADMINISTRATIVE APPROVAL PROCESS FOR MULTIFAMILY RESIDENTIAL DEVELOPMENT ON PARCELS IN THE AREA THAT ARE NO LARGER THAN A SIZE DETERMINED BY THE DEPARTMENT;

(III) ENSURE THAT THE AREA HAS A MIXED-USE PEDESTRIAN-ORIENTED NEIGHBORHOOD, AS DETERMINED BY CRITERIA ESTABLISHED BY THE DEPARTMENT; AND

(IV) SATISFY ANY OTHER CRITERIA, AS DETERMINED BY THE DEPARTMENT, AND AS MAY VARY BY REGIONAL CONTEXT, FOR THE QUALIFICATION OF AN AREA AS A NEIGHBORHOOD CENTER.

(b) NOTWITHSTANDING THE REQUIREMENTS FOR A LOCAL GOVERNMENT DESIGNATING AN AREA AS A NEIGHBORHOOD CENTER PURSUANT TO SUBSECTION (1)(a) OF THIS SECTION, THE DEPARTMENT SHALL ESTABLISH SEPARATE REQUIREMENTS FOR LOCAL GOVERNMENTS DESIGNATING AREAS WITHIN POTENTIAL TRANSIT AREAS IDENTIFIED BY THE DEPARTMENT OF TRANSPORTATION PURSUANT TO SECTION 29-37-207 (5).

(2) IF A LOCAL GOVERNMENT DESIGNATES AN AREA AS A NEIGHBORHOOD CENTER PURSUANT TO SUBSECTION (1) OF THIS SECTION, THE LOCAL GOVERNMENT SHALL SUBMIT A NEIGHBORHOOD CENTER REPORT TO THE DEPARTMENT IN A FORM AND MANNER DETERMINED BY THE DEPARTMENT.

29-37-207. Transit areas map - transit station area criteria - transit corridor area criteria - housing opportunity goals, models, and guidance. (1) **Transit areas map.** (a) ON OR BEFORE SEPTEMBER 30, 2024, THE DEPARTMENT, IN CONSULTATION WITH METROPOLITAN PLANNING ORGANIZATIONS, AND TRANSIT AGENCIES THAT OPERATE WITHIN METROPOLITAN PLANNING ORGANIZATIONS, SHALL PUBLISH A TRANSIT AREA MAP, OR TRANSIT AREA MAPS, BASED ON THE CRITERIA IN SUBSECTIONS (2), (3), (4), (5) AND (6), OF THIS SECTION. ONLY TRANSIT AREAS THAT ARE IDENTIFIED PURSUANT TO SUBSECTIONS (2) AND (3) OF THIS SECTION AND IDENTIFIED ON A TRANSIT AREA MAP PURSUANT TO THIS SUBSECTION (1) MUST BE INCLUDED IN THE CALCULATION OF A HOUSING OPPORTUNITY GOAL PURSUANT TO SECTION 29-37-204 (2).

(b) IN PUBLISHING THE MAP DESCRIBED IN SUBSECTION (1)(a) OF THIS SECTION, THE DEPARTMENT SHALL ALSO PUBLISH A WALKSHED MAP THAT IDENTIFIES THE AREAS THAT ARE REACHABLE BY A PERSON WALKING A DISTANCE OF NOT MORE THAN ONE-HALF MILE FROM A TRANSIT STATION WHERE PART OF THE TRANSIT STATION AREA BASED ON THAT TRANSIT STATION IS SEPARATED FROM ANY EXIT TO THE TRANSIT STATION BY A STATE-OWNED LIMITED-ACCESS HIGHWAY OR RAILROAD TRACK, USING SIMPLE AND EFFICIENT GEOSPATIAL ANALYSIS METHODS AND READILY AVAILABLE NETWORK DATA.

(2) **Transit station criteria.** THE DEPARTMENT SHALL DESIGNATE TRANSIT STATION AREAS, FOR PURPOSES OF SUBSECTION (1) OF THIS SECTION, BASED ON ROUTES IDENTIFIED IN AN APPLICABLE TRANSIT PLAN FOR EXISTING STATIONS FOR:

(a) COMMUTER BUS RAPID TRANSIT;

(b) COMMUTER RAIL; AND

(c) LIGHT RAIL.

(3) **Transit corridor area criteria.** (a) THE DEPARTMENT SHALL DESIGNATE TRANSIT CORRIDOR AREAS, FOR PURPOSES OF SUBSECTION (1) OF THIS SECTION, BY IDENTIFYING TRANSIT ROUTES THAT MEET ONE OR MORE OF THE FOLLOWING CRITERIA:

(I) AN URBAN BUS RAPID TRANSIT SERVICE THAT IS IDENTIFIED WITHIN:

(A) A METROPOLITAN PLANNING ORGANIZATION'S FISCALLY-CONSTRAINED, LONG-RANGE TRANSPORTATION PLAN ADOPTED PRIOR TO JANUARY 1, 2024, AND PLANNED FOR IMPLEMENTATION, ACCORDING TO THAT PLAN, PRIOR TO JANUARY 1, 2030; OR

(B) AN APPLICABLE TRANSIT PLAN THAT HAS BEEN PLANNED FOR SHORT-TERM IMPLEMENTATION, ACCORDING TO THAT PLAN;

(II) A PUBLIC BUS ROUTE THAT:

(A) HAS A PLANNED FREQUENCY OR SCHEDULED FREQUENCY OF FIFTEEN MINUTES OR MORE FREQUENT FOR EIGHT HOURS OR MORE ON WEEKDAYS; AND

(B) IS IDENTIFIED WITHIN AN APPLICABLE TRANSIT PLAN FOR SHORT-TERM IMPLEMENTATION OR IMPLEMENTATION BEFORE JANUARY 1, 2030, ACCORDING TO THAT PLAN.

(b) FOR TRANSIT AGENCIES WITHIN METROPOLITAN PLANNING ORGANIZATIONS THAT DO NOT HAVE APPLICABLE TRANSIT PLANS, THE DEPARTMENT SHALL DESIGNATE TRANSIT CORRIDOR AREAS, FOR PURPOSES

OF SUBSECTION (1) OF THIS SECTION, BY IDENTIFYING ANY PUBLIC BUS ROUTES WITH EXISTING TRANSIT SERVICE LEVELS AS OF JANUARY 1, 2024, WITH A SCHEDULED FREQUENCY OF FIFTEEN MINUTES OR MORE FREQUENT FOR EIGHT HOURS OR MORE ON WEEKDAYS.

(c) NOTWITHSTANDING SUBSECTION (3)(a) AND (3)(b) OF THIS SECTION, THE DEPARTMENT SHALL NOT DESIGNATE TRANSIT CORRIDOR AREAS, FOR PURPOSES OF SUBSECTION (1) OF THIS SECTION, WITHIN A TRANSIT-ORIENTED COMMUNITY THAT HAS DESIGNATED TWENTY PERCENT OR MORE OF ITS AREA AS A MANUFACTURED HOME ZONING DISTRICT AS OF JANUARY 1, 2024.

(4) **Optional transit area criteria.** (a) THE DEPARTMENT SHALL DESIGNATE OPTIONAL TRANSIT AREAS, FOR PURPOSES OF SUBSECTION (1) OF THIS SECTION, BASED ON THE FOLLOWING CRITERIA:

(I) A BUS RAPID TRANSIT SERVICE THAT IS IDENTIFIED WITHIN A METROPOLITAN PLANNING ORGANIZATION'S FISCALLY-CONSTRAINED, LONG-RANGE TRANSPORTATION PLAN ADOPTED PRIOR TO JANUARY 1, 2024, AND INTENDED FOR IMPLEMENTATION AFTER JANUARY 1, 2030, AND BEFORE DECEMBER 31, 2050;

(II) PUBLIC BUS ROUTES OTHER THAN THOSE IDENTIFIED IN SUBSECTION (3)(a)(II)(B) OF THIS SECTION THAT OPERATE AT A PLANNED OR SCHEDULED FREQUENCY OF THIRTY MINUTES OR MORE FREQUENT DURING THE HIGHEST FREQUENCY SERVICE HOURS AS IDENTIFIED BY:

(A) EXISTING SERVICE AS OF JANUARY 1, 2024; OR

(B) IDENTIFIED WITHIN AN APPLICABLE TRANSIT PLAN; AND

(III) OTHER AREAS PLANNED AS MIXED-USE PEDESTRIAN ORIENTED NEIGHBORHOODS.

(b) FOR PURPOSES OF SUBSECTION (4)(a)(III) OF THIS SECTION, A TRANSIT ORIENTED COMMUNITY MAY REQUEST THAT THE DEPARTMENT DESIGNATE A MIXED-USE PEDESTRIAN-ORIENTED NEIGHBORHOOD AS AN OPTIONAL TRANSIT AREA. THE DEPARTMENT SHALL REVIEW AND APPROVE OR REJECT SUCH A REQUEST BASED ON WHETHER THE MIXED-USE PEDESTRIAN-ORIENTED NEIGHBORHOOD FULFILLS THE GOALS OF THIS PART

2 ESTABLISHED IN SECTION 29-37-203 (2).

(5) **Potential transit area criteria.** (a) THE DEPARTMENT SHALL DESIGNATE AN AREA AS A POTENTIAL TRANSIT AREA, FOR PURPOSES OF SUBSECTION (1) OF THIS SECTION, IF IT CONSISTS OF CORRIDORS, AS IDENTIFIED BY THE DEPARTMENT OF TRANSPORTATION THAT:

(I) INCLUDE MAJOR TRAVELSHEDS, AS DEFINED BY COMMON TRAVEL PATTERNS IN AN AREA, THAT IMPACT ANTICIPATED NEW OR MODIFIED INTERCHANGES ON STATE-OWNED HIGHWAYS; AND

(II) ARE OUTSIDE OF CENSUS URBANIZED AREAS, AS IDENTIFIED IN THE LATEST FEDERAL DECENNIAL CENSUS;

(b) IN DESIGNATING POTENTIAL TRANSIT AREAS, FOR PURPOSES OF SUBSECTION (1) OF THIS SECTION, THE DEPARTMENT SHALL ATTEMPT TO IDENTIFY AREAS WHERE FUTURE TRANSIT SERVICE AND NEIGHBORHOOD CENTERS COULD POTENTIALLY ALIGN TO PROVIDE INFORMATION FOR STATE, REGIONAL, AND LOCAL PLANNING EFFORTS.

(c) IN UPDATING THE TRANSIT AREA MAP PURSUANT TO SUBSECTION (1) OF THIS SECTION, THE DEPARTMENT SHALL IDENTIFY ANY NEIGHBORHOOD CENTERS THAT A LOCAL GOVERNMENT HAS DESIGNATED WITHIN A POTENTIAL TRANSIT AREA.

(6) IN IDENTIFYING THE BOUNDARIES OF TRANSIT AREAS AND OPTIONAL TRANSIT AREAS PURSUANT TO THIS SECTION, THE DEPARTMENT SHALL USE:

(a) GEOSPATIAL DATA FROM RELEVANT TRANSIT AGENCIES AND METROPOLITAN PLANNING ORGANIZATIONS; AND

(b) ROADWAY LOCATIONS BASED UPON THE CENTERLINE OF THE ROADWAY.

(7) **Housing opportunity goals, models, and guidance.** ON OR BEFORE FEBRUARY 28, 2025, THE DEPARTMENT SHALL PUBLISH MODELS AND GUIDANCE TO SATISFY THE GOALS OF THIS PART 2 AS ESTABLISHED IN SECTION 29-37-203 (2) AND INTERPRET THE DENSITY AND DIMENSIONAL STANDARDS ESTABLISHED IN SECTION 29-37-205 (1)(b) OF THIS SECTION

WITH THE INTENT OF PROVIDING SIMPLE AND EFFICIENT METHODS FOR LOCAL GOVERNMENTS TO CALCULATE THE NET HOUSING DENSITY OF TRANSIT CENTERS IN ORDER TO MEET THEIR HOUSING OPPORTUNITY GOALS. IN PUBLISHING MODELS AND GUIDANCE, THE DEPARTMENT SHALL ESTABLISH MODELS, GUIDANCE, AND TYPICAL BUILDING TYPOLOGIES FOR LOCAL GOVERNMENTS WITH FORM-BASED CODES.

29-37-208. Standard affordability strategies menu - long-term affordability strategies menu - alternative affordability strategies - impact fees. (1) **Standard affordability strategies menu.** ON OR BEFORE JUNE 30, 2025, THE DEPARTMENT SHALL DEVELOP A STANDARD AFFORDABILITY STRATEGIES MENU FOR TRANSIT-ORIENTED COMMUNITIES AND SHALL UPDATE THIS MENU AS NECESSARY. THE MENU MUST INCLUDE THE FOLLOWING STRATEGIES:

(a) IMPLEMENTING A LOCAL INCLUSIONARY ZONING ORDINANCE THAT ACCOUNTS FOR LOCAL HOUSING MARKET CONDITIONS, IS CRAFTED TO MAXIMIZE REGULATED AFFORDABLE HOUSING, AND COMPLIES WITH THE REQUIREMENTS OF SECTION 29-20-104 (1)(e.5) AND (1)(e.7);

(b) ADOPTING A LOCAL LAW OR PLAN TO LEVERAGE PUBLICLY OWNED, SOLD, OR MANAGED LAND FOR REGULATED AFFORDABLE HOUSING DEVELOPMENT;

(c) CREATING OR SIGNIFICANTLY EXPANDING A PROGRAM TO SUBSIDIZE OR OTHERWISE REDUCE IMPACT FEES OR OTHER SIMILAR DEVELOPMENT CHARGES FOR REGULATED AFFORDABLE HOUSING DEVELOPMENT;

(d) ESTABLISHING A DENSITY BONUS PROGRAM FOR TRANSIT CENTERS THAT GRANTS INCREASED FLOOR AREA RATIO, DENSITY, OR HEIGHT FOR REGULATED AFFORDABLE HOUSING UNITS;

(e) CREATING A PROGRAM TO PRIORITIZE AND EXPEDITE DEVELOPMENT APPROVALS FOR REGULATED AFFORDABLE HOUSING DEVELOPMENT;

(f) REDUCING LOCAL PARKING REQUIREMENTS FOR REGULATED AFFORDABLE HOUSING TO ONE-HALF SPACE PER UNIT OF REGULATED AFFORDABLE HOUSING, WITHOUT LOWERING THE PROTECTIONS PROVIDED

FOR INDIVIDUALS WITH DISABILITIES, INCLUDING THE NUMBER OF PARKING SPACES FOR INDIVIDUALS WHO ARE MOBILITY IMPAIRED, UNDER THE FEDERAL "AMERICANS WITH DISABILITIES ACT OF 1990", 42 U.S.C. SEC. 12101 ET SEQ., AND PARTS 6 AND 8 OF ARTICLE 34 OF TITLE 24; EXCEPT THAT, UPON THE PASSAGE OF HOUSE BILL 24-1304, THIS SUBSECTION (1)(f) SHALL NOT BE IDENTIFIED BY A TRANSIT-ORIENTED COMMUNITY AS AN AFFORDABILITY STRATEGY THAT SATISFIES THE REQUIREMENTS OF 29-37-204 (6)(b)(I)(A);

(g) ENACTING LOCAL LAWS THAT INCENTIVIZE THE CONSTRUCTION OF ACCESSIBLE AND VISITABLE REGULATED AFFORDABLE HOUSING UNITS;

(h) ENACTING LOCAL LAWS THAT SUPPORT HOUSING FOR FAMILIES, SUCH AS INCENTIVIZING CONSTRUCTION OF HOUSING UNITS WITH MULTIPLE BEDROOMS; AND

(i) ANY OTHER STRATEGY DESIGNATED BY THE DEPARTMENT THAT OFFERS A COMPARABLE IMPACT ON LOCAL HOUSING AFFORDABILITY.

(2) **Long-term affordability strategies menu.** ON OR BEFORE JUNE 30, 2025, THE DEPARTMENT SHALL DEVELOP A LONG-TERM AFFORDABILITY STRATEGIES MENU AND SHALL UPDATE THIS MENU AS NECESSARY. THE MENU MUST INCLUDE THE FOLLOWING STRATEGIES:

(a) ESTABLISHING A DEDICATED LOCAL REVENUE SOURCE FOR REGULATED AFFORDABLE HOUSING DEVELOPMENT, SUCH AS INSTITUTING A LINKAGE FEE ON MARKET RATE HOUSING DEVELOPMENT TO SUPPORT NEW REGULATED AFFORDABLE HOUSING DEVELOPMENTS;

(b) REGULATING SHORT-TERM RENTALS, SECOND HOMES, OR OTHER UNDERUTILIZED OR VACANT UNITS IN A WAY, SUCH AS VACANCY FEES FOR UNDERUTILIZED UNITS, THAT PROMOTES MAXIMIZING THE USE OF LOCAL HOUSING STOCK FOR LOCAL HOUSING NEEDS;

(c) MAKING A COMMITMENT TO AND REMAINING ELIGIBLE TO RECEIVE FUNDING PURSUANT TO ARTICLE 32 OF THIS TITLE 29;

(d) INCENTIVIZING OR CREATING A DEDICATED LOCAL PROGRAM THAT FACILITATES INVESTMENT IN LAND BANKING OR COMMUNITY LAND TRUSTS;

(e) ESTABLISHING AN AFFORDABLE HOMEOWNERSHIP STRATEGY SUCH AS:

(I) ACQUIRING OR PRESERVING DEED RESTRICTIONS ON CURRENT HOUSING UNITS;

(II) ESTABLISHING AN INCENTIVE PROGRAM TO ENCOURAGE REALTORS TO WORK WITH LOW-INCOME AND MINORITY PROSPECTIVE HOME BUYERS;

(III) ESTABLISHING AN AFFORDABLE RENT-TO-OWN PROGRAM; OR

(IV) INCENTIVIZING AFFORDABLE CONDOMINIUM DEVELOPMENTS; AND

(f) ANY OTHER STRATEGY DESIGNATED BY THE DEPARTMENT THAT OFFERS A COMPARABLE IMPACT ON LOCAL HOUSING AFFORDABILITY.

(3) **Alternative affordability strategies.** A TRANSIT-ORIENTED COMMUNITY MAY SUBMIT AN EXISTING OR PROPOSED LOCAL LAW OR PROGRAM, IN A FORM AND MANNER DETERMINED BY THE DEPARTMENT, TO THE DEPARTMENT, AND THE DEPARTMENT MAY DETERMINE THAT THE ADOPTION OF THAT LOCAL LAW OR PROGRAM QUALIFIES AS AN AFFORDABILITY STRATEGY FOR PURPOSES OF SECTION 29-37-204 (6)(a) AND (6)(b), SO LONG AS THE LOCAL LAW OR PROGRAM SUPPORTS EQUAL OR GREATER OPPORTUNITY FOR REGULATED AFFORDABLE HOUSING AND ACCESSIBLE UNITS THAN THE STRATEGIES DESCRIBED IN SUBSECTIONS (1) AND (2) OF THIS SECTION.

29-37-209. Displacement risk assessment - displacement mitigation strategies menu - displacement mitigation strategies menu goals - alternative displacement mitigation strategies. (1) ON OR BEFORE JUNE 30, 2025, THE DEPARTMENT SHALL CONDUCT AN ASSESSMENT THAT INCLUDES RECOMMENDATIONS IDENTIFYING THE RESOURCES NECESSARY TO IMPLEMENT THE DISPLACEMENT MITIGATION STRATEGIES IN THE DISPLACEMENT RISK MITIGATION STRATEGIES MENU DESCRIBED IN SUBSECTION (3) OF THIS SECTION. THE ASSESSMENT MUST IDENTIFY:

(a) APPROPRIATE LOCAL, REGIONAL, OR NONPROFIT ENTITIES TO ASSIST RESIDENTS AT ELEVATED RISK OF DISPLACEMENT, WITH A FOCUS ON

RESIDENTS IN LOCAL GOVERNMENTS THAT HAVE A SMALLER POPULATION AND FEWER FINANCIAL RESOURCES THAN OTHER LOCAL GOVERNMENTS WITHIN THE SAME METROPOLITAN PLANNING ORGANIZATION; AND

(b) APPROPRIATE SOURCES OF FINANCIAL AND OTHER RESOURCES TO IMPLEMENT THE DISPLACEMENT MITIGATION STRATEGIES IN THE DISPLACEMENT RISK MITIGATION STRATEGIES MENU DESCRIBED IN SUBSECTION (3) OF THIS SECTION, WHILE TAKING INTO ACCOUNT REGIONAL DISPARITIES IN RESOURCES.

(2) (a) NO LATER THAN JUNE 30, 2025, THE DEPARTMENT SHALL DEVELOP GUIDANCE FOR TRANSIT-ORIENTED COMMUNITIES IN CONDUCTING A DISPLACEMENT RISK ASSESSMENT AND IMPLEMENTING DISPLACEMENT MITIGATION STRATEGIES. THE DEPARTMENT SHALL UPDATE THIS GUIDANCE AS NECESSARY.

(b) IN CREATING GUIDANCE FOR THE DISPLACEMENT RISK ASSESSMENT DESCRIBED IN SUBSECTION (2)(a) OF THIS SECTION, THE DEPARTMENT SHALL DEVELOP A METHODOLOGY, WITH VARIATIONS FOR DIFFERENT LOCAL CONTEXTS INCLUDING THE SIZE AND RESOURCE LEVELS OF LOCAL GOVERNMENTS, FOR TRANSIT-ORIENTED COMMUNITIES WITHIN METROPOLITAN PLANNING ORGANIZATION BOUNDARIES TO USE TO:

(I) GATHER FEEDBACK THROUGH COMMUNITY ENGAGEMENT; AND

(II) IDENTIFY INFORMATION FROM NEIGHBORHOOD-LEVEL EARLY DISPLACEMENT WARNING AND RESPONSE SYSTEMS, OR IF THOSE SYSTEMS ARE UNAVAILABLE, IDENTIFY THE BEST AVAILABLE LOCAL, REGIONAL, STATE, OR FEDERAL DATA THAT CAN BE ANALYZED TO IDENTIFY RESIDENTS AT ELEVATED DISPLACEMENT RISK, WHICH MAY INCLUDE:

(A) THE PERCENTAGE OF HOUSEHOLDS THAT ARE EXTREMELY LOW-INCOME, VERY LOW-INCOME, AND LOW-INCOME, AS DESIGNATED BY THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT;

(B) THE PERCENTAGE OF HOUSEHOLDS THAT ARE RENTERS;

(C) THE PERCENTAGE OF COST-BURDENED HOUSEHOLDS, DEFINED AS HOUSEHOLDS THAT SPEND MORE THAN THIRTY PERCENT OF THE HOUSEHOLD'S INCOME ON HOUSING NEEDS;

(D) THE NUMBER OF ADULTS WHO ARE TWENTY-FIVE YEARS OF AGE OR OLDER AND HAVE NOT EARNED AT LEAST A HIGH SCHOOL DIPLOMA;

(E) THE PERCENTAGE OF HOUSEHOLDS IN WHICH ENGLISH IS NOT THE PRIMARY SPOKEN LANGUAGE;

(F) THE PERCENTAGE OF HOUSING STOCK BUILT PRIOR TO 1970;

(G) THE LOCATION OF MANUFACTURED HOME PARKS;

(H) AREAS THAT QUALIFY AS DISADVANTAGED AS DETERMINED WITH THE CLIMATE AND ECONOMIC JUSTICE SCREENING TOOL DEVELOPED BY THE COUNCIL ON ENVIRONMENTAL QUALITY IN THE OFFICE OF THE PRESIDENT OF THE UNITED STATES; AND

(I) THE TRANSIT-ORIENTED COMMUNITIES WHERE INCREASES IN ZONING CAPACITY WILL OCCUR AS A RESULT OF THE REQUIREMENTS OF THIS PART 2.

(3) ON OR BEFORE JUNE 30, 2025, THE DEPARTMENT SHALL DEVELOP A LONG-TERM DISPLACEMENT MITIGATION STRATEGIES MENU THAT INCLUDES THE FOLLOWING STRATEGIES:

(a) DEVELOPING A PROGRAM TO OFFER TECHNICAL ASSISTANCE AND FINANCIAL SUPPORT FOR COMMUNITY ORGANIZATIONS TO DEVELOP INDEPENDENT COMMUNITY LAND TRUSTS;

(b) PRIORITIZING SPENDING ON REGULATED AFFORDABLE HOUSING UNIT PRESERVATION OR IMPLEMENTING OR CONTINUING DEED RESTRICTIONS FOR REGULATED AFFORDABLE HOUSING UNITS;

(c) PROVIDING HOMESTEAD TAX EXEMPTIONS FOR EITHER LONG-TIME HOMEOWNERS IN NEIGHBORHOODS THAT A DISPLACEMENT RISK ASSESSMENT IDENTIFIES AS VULNERABLE TO DISPLACEMENT OR LOW- TO MODERATE-INCOME HOMEOWNERS WITHIN, OR WITHIN ONE-HALF MILE OF, A DESIGNATED TRANSIT CENTER;

(d) REQUIRING MULTIFAMILY HOUSING DEVELOPERS TO CREATE A COMMUNITY BENEFITS AGREEMENT WITH AFFECTED POPULATIONS WITHIN ONE-QUARTER MILE OF A DEVELOPMENT BUILT IN AN AREA THAT IS

VULNERABLE TO DISPLACEMENT;

(e) ENSURING NO NET LOSS WITHIN THE DESIGNATED AREA OF AFFORDABLE UNITS SUCH THAT AFFORDABILITY LEVELS ARE EQUAL OR GREATER THAN EXISTING LEVELS OF FAMILY SERVING UNITS THAT INCLUDE THREE OR MORE BEDROOMS;

(f) ESTABLISHING A PROGRAM TO PROVIDE COMMUNITY OR SMALL LOCAL BUSINESS INVESTMENT IN AN AREA THAT IS VULNERABLE TO DISPLACEMENT; AND

(g) OTHER STRATEGIES IDENTIFIED BY THE DEPARTMENT THAT PROVIDE DISPLACEMENT MITIGATION EQUIVALENT TO THE OTHER STRATEGIES DESCRIBED IN THIS SUBSECTION (3).

(4) IN DEVELOPING THE DISPLACEMENT RISK MITIGATION STRATEGIES MENU DESCRIBED IN SUBSECTION (3) OF THIS SECTION, THE DEPARTMENT'S GOALS MUST BE TO SUPPORT:

(a) RESOURCES, SERVICES, AND INVESTMENTS THAT SERVE VULNERABLE HOMEOWNERS AND RENTERS WITH ELEVATED RISK OF DISPLACEMENT;

(b) THE PRESERVATION OF REGULATED AFFORDABLE HOUSING STOCK;

(c) LOCAL GOVERNMENT PLANNING AND LAND USE DECISIONS THAT INCORPORATE INCLUSIVE AND EQUITABLE DISPLACEMENT MITIGATION STRATEGIES, AND THE EMPOWERMENT OF LOW-INCOME PERSONS AND COMMUNITIES OF COLOR TO PARTICIPATE IN THOSE DECISIONS; AND

(d) THE ABILITY OF VULNERABLE RESIDENTS TO REMAIN IN OR RETURN TO THEIR NEIGHBORHOODS OR COMMUNITIES BY ACCESSING NEW AFFORDABLE HOUSING OPPORTUNITIES IN THEIR NEIGHBORHOODS OR COMMUNITIES.

29-37-210. Transit-oriented communities infrastructure grant program - transit-oriented communities infrastructure fund - definitions. (1) **Grant program created.** THE TRANSIT-ORIENTED COMMUNITIES INFRASTRUCTURE GRANT PROGRAM IS CREATED IN THE

DEPARTMENT. THE PURPOSE OF THE GRANT PROGRAM IS TO ASSIST LOCAL GOVERNMENTS IN UPGRADING INFRASTRUCTURE AND SUPPORTING REGULATED AFFORDABLE HOUSING IN TRANSIT CENTERS AND NEIGHBORHOOD CENTERS.

(2) **Allowable purposes.** GRANT RECIPIENTS MAY USE MONEY RECEIVED THROUGH THE GRANT PROGRAM TO FUND:

(a) ON-SITE INFRASTRUCTURE FOR AFFORDABLE HOUSING, INCLUDING REGULATED AFFORDABLE HOUSING, WITHIN A TRANSIT CENTER OR NEIGHBORHOOD CENTER;

(b) PUBLIC INFRASTRUCTURE PROJECTS THAT ARE WITHIN, OR THAT PRIMARILY BENEFIT, A TRANSIT CENTER OR NEIGHBORHOOD CENTER;

(c) PUBLIC INFRASTRUCTURE PROJECTS THAT BENEFIT AFFORDABLE HOUSING, INCLUDING REGULATED AFFORDABLE HOUSING, IN A TRANSIT CENTER OR NEIGHBORHOOD CENTER;

(d) ACTIVITIES RELATED TO DETERMINING WHERE AND HOW BEST TO IMPROVE INFRASTRUCTURE TO SUPPORT A TRANSIT CENTER OR NEIGHBORHOOD CENTER;

(e) INFRASTRUCTURE PROJECT DELIVERY, PLANNING, AND COMMUNITY ENGAGEMENT; AND

(f) ACTIVITIES CONTRACTED BY AN AREA AGENCY ON AGING, AS DEFINED IN SECTION 26-11-201 (2), TO A TRANSIT-ORIENTED COMMUNITY TO PROVIDE SERVICES WITHIN, OR THAT BENEFIT, TRANSIT CENTERS AND NEIGHBORHOOD CENTERS, AND THAT FURTHER THE GOALS OF THIS PART 2.

(3) **Grant program administration.** THE DEPARTMENT SHALL ADMINISTER THE GRANT PROGRAM AND, SUBJECT TO AVAILABLE APPROPRIATIONS, AWARD GRANTS AS PROVIDED IN SUBSECTION (7) OF THIS SECTION AND PROVIDE TECHNICAL ASSISTANCE TO LOCAL GOVERNMENTS IN COMPLYING WITH THE REQUIREMENTS OF THIS PART 2.

(4) **Grant program policies and procedures.** THE DEPARTMENT SHALL IMPLEMENT THE GRANT PROGRAM IN ACCORDANCE WITH THIS SECTION. THE DEPARTMENT SHALL DEVELOP POLICIES AND PROCEDURES AS

NECESSARY TO IMPLEMENT THE GRANT PROGRAM.

(5) **Grant application.** TO RECEIVE A GRANT, A LOCAL GOVERNMENT MUST SUBMIT AN APPLICATION TO THE DEPARTMENT IN ACCORDANCE WITH POLICIES AND PROCEDURES DEVELOPED BY THE DEPARTMENT.

(6) **Grant program criteria.** THE DEPARTMENT SHALL REVIEW THE APPLICATIONS RECEIVED PURSUANT TO THIS SECTION AND SHALL ONLY AWARD GRANTS TO CERTIFIED TRANSIT-ORIENTED COMMUNITIES. IN AWARDING GRANTS, THE DEPARTMENT SHALL CONSIDER THE FOLLOWING CRITERIA:

(a) THE POTENTIAL IMPACT OF A PROJECT THAT A LOCAL GOVERNMENT WOULD FUND WITH A GRANT AWARD ON THE DEVELOPMENT OF REGULATED AFFORDABLE HOUSING, MIXED-USE DEVELOPMENT, ACCESSIBLE OR VISITABLE HOUSING UNITS, OR THE CREATION OR ENHANCEMENT OF HOME OWNERSHIP OPPORTUNITIES WITHIN A TRANSIT CENTER OR NEIGHBORHOOD CENTER. IF A PROJECT IS A LARGE-SCALE INFILL DEVELOPMENT PROJECT, SUBJECT TO A DISCRETIONARY APPROVAL PROCESS, AND ADJACENT TO AN ESTABLISHED NEIGHBORHOOD, THE DEPARTMENT SHALL GIVE PRIORITY TO SUCH A PROJECT IF A COMMUNITY BENEFITS AGREEMENT HAS BEEN ESTABLISHED IN CONNECTION WITH THE PROJECT.

(b) IN RESPONSE TO DEMONSTRATED NEEDS, THE EXTENT TO WHICH THE LOCAL GOVERNMENT HAS:

(I) INTEGRATED MIXED-USE DEVELOPMENT BY ALLOWING NEIGHBORHOOD COMMERCIAL USES THAT HAVE THE MAIN PURPOSE OF MEETING CONSUMER DEMANDS FOR GOODS AND SERVICES WITH AN EMPHASIS ON SERVING THE SURROUNDING RESIDENTIAL NEIGHBORHOOD WITHIN ONE-QUARTER MILE OF A TRANSIT CENTER OR NEIGHBORHOOD CENTER;

(II) ADOPTED AFFORDABILITY STRATEGIES FROM THE AFFORDABILITY STRATEGIES MENUS IN SECTION 29-37-208 BASED ON THE LOCAL GOVERNMENT'S DEMONSTRATED HOUSING NEEDS, INCLUDING HOUSING NEEDS FOR RENTAL AND FOR-SALE HOUSING AND FOR LOW-, MODERATE-, AND MEDIUM-INCOME HOUSEHOLDS, AS DESIGNATED BY THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, AND

PERMANENT SUPPORTIVE HOUSING;

(III) ADOPTED DISPLACEMENT MITIGATION STRATEGIES FROM THE DISPLACEMENT MITIGATION STRATEGIES MENU IN SECTION 29-37-209; AND

(IV) DESIGNATED NEIGHBORHOOD CENTERS WITHIN OPTIONAL TRANSIT AREAS; AND

(c) INFORMATION CONTAINED IN THE REPORTS SUBMITTED BY A LOCAL GOVERNMENT PURSUANT TO SECTION 29-37-204 THAT PROVIDES EVIDENCE THAT THE LOCAL GOVERNMENT HAS MET THE REQUIREMENTS OF SECTION 29-37-204.

(7) **Grant awards.** SUBJECT TO AVAILABLE APPROPRIATIONS, THE DEPARTMENT SHALL AWARD GRANTS USING MONEY IN THE FUND AS PROVIDED IN THIS SECTION.

(8) **Transit-oriented communities infrastructure fund.** (a) (I) THE TRANSIT-ORIENTED COMMUNITIES INFRASTRUCTURE FUND IS CREATED IN THE STATE TREASURY. THE FUND CONSISTS OF MONEY TRANSFERRED TO THE FUND PURSUANT TO SUBSECTION (8)(a)(III) OF THIS SECTION, GIFTS, GRANTS, AND DONATIONS, AND ANY OTHER MONEY THAT THE GENERAL ASSEMBLY MAY APPROPRIATE OR TRANSFER TO THE FUND. THE STATE TREASURER SHALL CREDIT ALL INTEREST AND INCOME DERIVED FROM THE DEPOSIT AND INVESTMENT OF MONEY IN THE FUND TO THE FUND.

(II) MONEY IN THE FUND IS CONTINUOUSLY APPROPRIATED TO THE DEPARTMENT FOR THE PURPOSE OF IMPLEMENTING THE GRANT PROGRAM, AND THE DEPARTMENT MAY EXPEND UP TO SIX PERCENT OF ANY MONEY IN THE FUND FOR COSTS INCURRED BY THE DEPARTMENT IN ADMINISTERING THE GRANT PROGRAM.

(III) ON JULY 1, 2024, THE STATE TREASURER SHALL TRANSFER THIRTY-FIVE MILLION DOLLARS FROM THE GENERAL FUND TO THE FUND.

(9) **Reporting.** (a) ON OR BEFORE JANUARY 1, 2025, AND EACH JANUARY 1 THEREAFTER FOR THE DURATION OF THE GRANT PROGRAM, THE DEPARTMENT SHALL SUBMIT A SUMMARIZED REPORT TO THE HOUSE OF REPRESENTATIVES TRANSPORTATION, HOUSING, AND LOCAL GOVERNMENT COMMITTEE AND THE SENATE LOCAL GOVERNMENT AND HOUSING

COMMITTEE, OR THEIR SUCCESSOR COMMITTEES, ON RELEVANT INFORMATION REGARDING THE GRANT PROGRAM.

(b) NOTWITHSTANDING SECTION 24-1-136 (11)(a)(I), THE REPORTING REQUIREMENTS SET FORTH IN THIS SECTION CONTINUE UNTIL ALL GRANT PROGRAM MONEY IS FULLY EXPENDED.

(10) **Definitions.** AS USED IN THIS SECTION, UNLESS THE CONTEXT OTHERWISE REQUIRES:

(a) "FUND" MEANS THE TRANSIT-ORIENTED COMMUNITIES INFRASTRUCTURE FUND CREATED IN SUBSECTION (8)(a) OF THIS SECTION.

(b) "GRANT PROGRAM" MEANS THE TRANSIT-ORIENTED COMMUNITIES INFRASTRUCTURE GRANT PROGRAM CREATED IN THIS SECTION.

SECTION 2. In Colorado Revised Statutes, 24-67-105, **add** (5.5) as follows:

24-67-105. Standards and conditions for planned unit development - definitions. (5.5) (a) ANY PLANNED UNIT DEVELOPMENT RESOLUTION OR ORDINANCE THAT APPLIES WITHIN A TRANSIT CENTER OR NEIGHBORHOOD CENTER THAT IS ADOPTED OR APPROVED BY A LOCAL GOVERNMENT ON OR AFTER THE EFFECTIVE DATE OF THIS SUBSECTION (5.5) MUST NOT RESTRICT THE DEVELOPMENT OF HOUSING IN ANY MANNER THAT IS INCONSISTENT WITH THE REQUIREMENTS FOR DESIGNATING AN AREA AS A TRANSIT CENTER PURSUANT TO SECTION 29-37-205, OR AS A NEIGHBORHOOD CENTER PURSUANT TO SECTION 29-37-206.

(b) ANY PLANNED UNIT DEVELOPMENT RESOLUTION OR ORDINANCE THAT APPLIES WITHIN A TRANSIT CENTER OR NEIGHBORHOOD CENTER THAT IS ADOPTED OR APPROVED BY A LOCAL GOVERNMENT BEFORE THE EFFECTIVE DATE OF THIS SUBSECTION (5.5) AND THAT RESTRICTS THE DEVELOPMENT OF HOUSING IN ANY MANNER THAT IS INCONSISTENT WITH THE REQUIREMENTS FOR DESIGNATING AN AREA AS A TRANSIT CENTER PURSUANT TO SECTION 29-37-205, OR AS A NEIGHBORHOOD CENTER PURSUANT TO SECTION 29-37-206:

(I) MUST NOT BE INTERPRETED OR ENFORCED TO RESTRICT THE

DEVELOPMENT OF MULTIFAMILY RESIDENTIAL DWELLING UNITS SO THAT A TRANSIT-ORIENTED COMMUNITY COULD NOT DESIGNATE AN AREA AS A TRANSIT CENTER OR NEIGHBORHOOD CENTER THAT WOULD OTHERWISE QUALIFY AS SUCH; AND

(II) MAY BE SUPERSEDED BY THE ADOPTION OF A LOCAL LAW ADOPTED IN ACCORDANCE WITH THE REQUIREMENTS FOR DESIGNATION OF A TRANSIT CENTER PURSUANT TO SECTION 29-37-205, OR AS A NEIGHBORHOOD CENTER PURSUANT TO SECTION 29-37-206.

(c) NOTWITHSTANDING SUBSECTION (5.5)(b) OF THIS SECTION, A LOCAL GOVERNMENT MAY ADOPT CONFORMING AMENDMENTS TO ANY SUCH PLANNED UNIT DEVELOPMENT RESOLUTION OR ORDINANCE.

(d) AS USED IN THIS SUBSECTION (5.5), UNLESS THE CONTEXT OTHERWISE REQUIRES:

(I) "LOCAL LAW" HAS THE SAME MEANING AS SET FORTH IN SECTION 29-37-102 (12).

(II) "NEIGHBORHOOD CENTER" HAS THE SAME MEANING AS SET FORTH IN SECTION 29-37-202 (5).

(III) "TRANSIT CENTER" HAS THE SAME MEANING AS SET FORTH IN SECTION 29-37-202 (10).

SECTION 3. In Colorado Revised Statutes, 29-20-203, **add** (1.5) as follows:

29-20-203. Conditions on land-use approvals. (1.5) WHEN REQUIRING AN OWNER OF PRIVATE PROPERTY TO DEDICATE REAL PROPERTY TO THE PUBLIC, IF THE SUBJECT PROPERTY DOES NOT MEET LOCAL GOVERNMENT STANDARDS FOR DEDICATION AS DETERMINED BY THE LOCAL GOVERNMENT, INCLUDING DEDICATION TO THE PARKS, TRAILS, OR OPEN SPACE SYSTEMS, A LOCAL GOVERNMENT SHALL PROVIDE THE PRIVATE PROPERTY OWNER THE OPTION OF PAYING A FEE IN LIEU OF DEDICATION.

SECTION 4. In Colorado Revised Statutes, 38-33.3-106.5, **add** (5) as follows:

38-33.3-106.5. Prohibitions contrary to public policy - patriotic, political, or religious expression - public rights-of-way - fire prevention - renewable energy generation devices - affordable housing - drought prevention measures - child care - definitions. (5) (a) IN A TRANSIT CENTER OR NEIGHBORHOOD CENTER, AN ASSOCIATION SHALL NOT ADOPT A PROVISION OF A DECLARATION, BYLAW, OR RULE ON OR AFTER THE EFFECTIVE DATE OF THIS SUBSECTION (5) THAT RESTRICTS THE DEVELOPMENT OF HOUSING MORE THAN THE LOCAL LAW THAT APPLIES WITHIN THE TRANSIT CENTER OR NEIGHBORHOOD CENTER, AND ANY PROVISION OF A DECLARATION, BYLAW, OR RULE THAT INCLUDES SUCH A RESTRICTION IS VOID AS A MATTER OF PUBLIC POLICY.

(b) IN A TRANSIT CENTER OR NEIGHBORHOOD CENTER, NO PROVISION OF A DECLARATION, BYLAW, OR RULE OF AN ASSOCIATION THAT IS ADOPTED BEFORE THE EFFECTIVE DATE OF THIS SUBSECTION (5) MAY RESTRICT THE DEVELOPMENT OF HOUSING MORE THAN THE LOCAL LAW THAT APPLIES WITHIN THE TRANSIT CENTER OR NEIGHBORHOOD CENTER, AND ANY PROVISION OF A DECLARATION, BYLAW, OR RULE THAT INCLUDES SUCH A RESTRICTION IS VOID AS A MATTER OF PUBLIC POLICY.

(c) AS USED IN THIS SUBSECTION (5), UNLESS THE CONTEXT OTHERWISE REQUIRES:

(I) "LOCAL LAW" HAS THE SAME MEANING AS SET FORTH IN SECTION 29-37-102 (11).

(II) "NEIGHBORHOOD CENTER" HAS THE SAME MEANING AS SET FORTH IN SECTION 29-37-202 (5).

(III) "TRANSIT CENTER" HAS THE SAME MEANING AS SET FORTH IN SECTION 29-37-202 (10).

SECTION 5. In Colorado Revised Statutes, 43-1-1103, **add** (5.5) as follows:

43-1-1103. Transportation planning. (5.5) THE DEPARTMENT OF TRANSPORTATION SHALL CONDUCT A STUDY THAT IDENTIFIES:

(a) POLICY BARRIERS AND OPPORTUNITIES WITHIN THE DEPARTMENT THAT INCLUDES AN EXAMINATION OF POLICIES WITHIN THE STATE ACCESS

CODE, ROADWAY DESIGN STANDARDS, AND THE TREATMENT OF PEDESTRIAN AND BICYCLE CROSSINGS. THE STUDY SHALL EXAMINE THE IMPACT OF THESE POLICIES ON NEIGHBORHOOD CENTERS AND TRANSIT CENTERS, INCLUDING THE IMPACT ON HOUSING PRODUCTION, THE IMPLEMENTATION OF CONTEXT-SENSITIVE DESIGN, COMPLETE STREETS, AND PEDESTRIAN-BICYCLE SAFETY MEASURES; AND

(b) THE PORTIONS OF STATE HIGHWAY THAT PASS THROUGH LOCALLY-IDENTIFIED TRANSIT CENTERS AND NEIGHBORHOOD CENTERS THAT ARE APPROPRIATE FOR CONTEXT-SENSITIVE DESIGN, COMPLETE STREETS AS DEFINED IN THE "INFRASTRUCTURE INVESTMENT AND JOBS ACT", PUB.L. 117-5, AND PEDESTRIAN-BICYCLE SAFETY MEASURES.

SECTION 6. Appropriation. (1) For the 2024-25 state fiscal year, $183,138 is appropriated to the office of the governor for use by the Colorado energy office. This appropriation is from the general fund and is based on the assumption that the office will require an additional 0.8 FTE. To implement this act, the office may use this appropriation for program administration.

(2) For the 2024-25 state fiscal year, $70,000 is appropriated to the office of the governor for use by the office of information technology. This appropriation is from reappropriated funds received from the department of local affairs from the transit-oriented communities infrastructure fund created in section 29-37-210 (8)(a)(I), C.R.S. To implement this act, the office may use this appropriation to provide information technology services for the department of local affairs.

SECTION 7. Safety clause. The general assembly finds, determines, and declares that this act is necessary for the immediate

preservation of the public peace, health, or safety or for appropriations for the support and maintenance of the departments of the state and state institutions.

Julie McCluskie
SPEAKER OF THE HOUSE
OF REPRESENTATIVES

Steve Fenberg
PRESIDENT OF
THE SENATE

Robin Jones
CHIEF CLERK OF THE HOUSE
OF REPRESENTATIVES

Cindi L. Markwell
SECRETARY OF
THE SENATE

APPROVED Monday, May 13th, 2024 at 2:00 pm
(Date and Time)

Jared S. Polis
GOVERNOR OF THE STATE OF COLORADO

140 Nev., Advance Opinion 29

IN THE SUPREME COURT OF THE STATE OF NEVADA

CITY OF LAS VEGAS, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA, Appellant, vs. 180 LAND CO., LLC, A NEVADA LIMITED LIABILITY COMPANY; AND FORE STARS, LTD., Respondents.	No. 84345
180 LAND CO., LLC, A NEVADA LIMITED LIABILITY COMPANY; AND FORE STARS, LTD., A NEVADA LIMITED LIABILITY COMPANY, Appellants/Cross-Respondents, vs. CITY OF LAS VEGAS, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA, Respondent/Cross-Appellant.	No. 84640

Consolidated appeals and cross-appeal from a district court judgment and post-judgment order in an inverse condemnation action. Eighth Judicial District Court, Clark County; Timothy C. Williams, Judge.

Affirmed.

Leonard Law, PC, and Debbie A. Leonard, Reno; Jeffry M. Dorocak, City Attorney, and Jeffrey L. Galliher and Rebecca L. Wolfson, Deputy City Attorneys, Las Vegas; McDonald Carano LLP and George F. Ogilvie, III, Amanda C. Yen, and Christopher Molina, Las Vegas; Shute, Mihaly & Weinberger, LLP, and Andrew W. Schwartz and Lauren M. Tarpey, San Francisco, California,
for City of Las Vegas.

24-13605

Law Offices of Kermitt L. Waters and Kermitt L. Waters, James J. Leavitt, Michael A. Schneider, and Autumn L. Waters, Las Vegas; Claggett & Sykes Law Firm and Micah S. Echols, Las Vegas,
for 180 Land Co., LLC, and Fore Stars, Ltd.

Davison Van Cleve, PC, and Robert D. Sweetin, Las Vegas; Matthew Leo Cahoon, Las Vegas,
for Amicus Curiae Nevada League of Cities.

Goicoechea, Di Grazia, Coyle & Stanton, Ltd., and Nancy Porter and Lauren A. Landa, Elko,
for Amicus Curiae City of West Wendover.

Nicholas G. Vaskov, City Attorney, and Amanda Kern and Brandon P. Kemble, Assistant City Attorneys, Henderson,
for Amicus Curiae City of Henderson.

Nossaman, LLP, and Steven M. Silva, Reno; Karl Hall, City Attorney, and Jonathan Shipman, Assistant City Attorney, Reno; Micaela Moore, City Attorney, North Las Vegas,
for Amici Curiae City of Reno, City of North Las Vegas, and International Municipal Lawyer's Association.

BEFORE THE SUPREME COURT, EN BANC.[1]

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[1]The Honorable Kristina Pickering, Justice, and the Honorable Patricia Lee, Justice, voluntarily recused themselves from participation in the decision of this matter. The Honorable Abbi Silver, Senior Justice, and the Honorable Egan Walker, District Judge, respectively, were appointed by the court to sit in their places. Nev. Const. art. 6, § 19; SCR 10.

OPINION

By the Court, HERNDON, J.:

Our constitutional takings jurisprudence has long recognized that regulatory agency decisions that deprive a landowner of all economically beneficial use of their property—a per se regulatory taking—require just compensation to the landowner under both the Fifth Amendment of the United States Constitution and Article 1, § 8(3) of the Nevada Constitution. In this matter, the City of Las Vegas challenges the district court's determination that a per se regulatory taking occurred and its $48 million award to the landowner, 180 Land Co., LLC. In its separate appeal, 180 Land challenges the district court's award of prejudgment interest.

The totality of the circumstances surrounding the City's handling of 180 Land's attempts to develop the 35 acres at issue, demonstrated through 180 Land's applications to develop the property, the official actions of the city council, and statements and actions of City representatives and employees, evinces the futility of 180 Land's past and future development efforts on the property. With any efforts to develop the property rendered futile, the district court did not err in determining that a per se regulatory taking occurred. The district court also did not err in relying on 180 Land's expert's valuation of the property to determine just compensation, especially as the City neither challenged the valuation nor provided alternative valuations. Finally, both parties' challenges to other

aspects of the district court's damages award fail to present a basis for reversal. Accordingly, we wholly affirm the district court.[2]

FACTS AND PROCEDURAL HISTORY

Development of the golf course

In 1981, the City adopted a Generalized Land Use Plan to reclassify 2,200 acres of land, called Peccole Ranch, to allow for "residential densities" that would align with the City's General Plan. In 1986, the City preliminarily approved, subject to a resolution of intent, a request to zone the proposed golf course within Peccole Ranch for residential planned-unit development, or R-PD.[3] Other conditions having been met, a revised master plan, the Peccole Ranch Master Development Plan, was fully approved in 1990, with the golf course acreage zoned as R-PD7.

The golf course was developed between 1992 and 1996. In 1992, the City adopted a new Las Vegas General Plan classifying the golf course acreage as "Parks/Schools/Recreation/Open Space" (PR-OS). However, the land was not rezoned; rather, the 1992 ordinance adopting the General Plan stated that it "shall not be deemed to modify or invalidate any . . . zoning designation." In line with that ordinance, the City confirmed to the golf course acreage's owner in a 1996 letter that the zoning remained R-PD7 for the golf course. The golf course acreage also retained the PR-OS land

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[2]In light of this opinion, we vacate the stay ordered by this court on May 9, 2022.

[3]R-PD zoning was established in 1972 "to allow a maximum flexibility for imaginative residential design and land utilization in accordance with the General Plan" and "to promote an enhancement of residential amenities by means of an efficient consolidation and utilization of open space, separation of pedestrian and vehicular traffic and a homogeneity of use patterns."

designation in subsequent iterations of the General Plan through 2018. In 2001, the City adopted another ordinance regarding the golf course acreage that formally rezoned it to R-PD7 on the Official Zoning Map Atlas, and repealed any previous conflicting ordinances. Zoning Bill No. Z-2001, Ordinance 5353. In 2015, the operator of the golf course informed the then-landowners, Fore Stars, Ltd., that it could no longer make a profit operating the golf course and thereafter terminated its lease in 2016.

180 Land purchases and seeks to develop the golf course acreage

180 Land eventually came to hold all of the ownership interest in Fore Stars, which included the golf course acreage and Fore Stars' business assets, with the acquisition being finalized in or around 2016. According to a manager of 180 Land, Yohan Lowie, in 2001 he began negotiating a "handshake deal" with the former landowners of Peccole Ranch to partner with them to purchase certain properties, and in exchange, Lowie would have the right of first refusal if the golf course acreage ever went up for sale. When the Peccole Ranch landowners started to have financial and legal struggles regarding their various properties, including the golf course, Lowie was able to negotiate an agreement that, in relevant part, provided him, or entities he owned or managed, ownership of the golf course acreage at a purported cost of $30 million. The 2005 meeting minutes from the board of directors for the Peccole-Nevada Corporation show that the board adopted a resolution "to reserve . . . approximately $30 million to pay off the current loan in full with Nevada State Bank related to the purchase of the leasehold interest of the . . . Golf Course when such loan can be paid." A separate 2014 contract, however, showed a purchase price of $7.5 million for the ownership interest in Fore Stars, which included the golf course acreage.

Although the golf course acreage contained nine parcels, 180 Land segmented it into four areas for development purposes: (1) the 35-acre site at issue in these appeals, (2) a 17-acre site, (3) a 65-acre site, and (4) a 133-acre site. 180 Land first sought development by way of an application to develop the 17-acre site filed in November 2015, which the City approved in February 2017. That approval, however, was met with significant opposition from a group of homeowners. In 2020, following litigation instituted by the homeowners, the City notified 180 Land of its entitlement to move forward to develop 435 multifamily housing units on the 17-acre parcel, with such approvals remaining valid for two years.[4] This included changing the PR-OS designation to high-density residential and rezoning the site from R-PD7 to medium-density residential (R-3).

180 Land first sought to develop the 35-acre site in December 2016, filing (1) a General Plan Amendment as to the golf course acreage to change the designation from PR-OS to low-density residential, and, specifically as to the 35-acre site contained therein, (2) a site development review for 61 lots, (3) a Tentative Map Plan application, and (4) a waiver on the size of private streets. City planning staff recommended approving the applications.

In May 2017, while the foregoing applications regarding the 35 acres were still pending, 180 Land also applied for a new, comprehensive Master Development Agreement for the entire golf course acreage. City

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[4]The district court granted the homeowners' petition for judicial review, but this court reversed the district court on appeal such that the City's approval of the development application was reinstated. *See Seventy Acres, LLC v. Binion*, No. 75481, 2020 WL 1076065 (Nev. Mar. 5, 2020) (Order of Reversal).

planning staff recommended approving the Master Development Agreement application as well. Indeed, 180 Land had collaborated on this application with the City's planning staff for more than two years, requiring numerous meetings and revisions to the proposed application.

In March 2017, the homeowner group filed its challenge to the to the City's approval of the 17-acre application. While that case was being litigated, the proposed development of the 35 acres was discussed at a contentious City Council hearing in June 2017, with strong public opposition to 180 Land's applications. The City ultimately denied the applications despite the City's planning staff having recommended approval. The City's final decision stated that the denials were "due to significant public opposition to the proposed development, concerns over the impact of the proposed development on surrounding residents, and concerns on piecemeal development of the Master Development Plan area rather than a cohesive plan for the entire area." Despite rejecting the 35-acre application, in part because of concerns over "piecemeal development," the City also rejected the comprehensive Master Development application in August 2017, two months after rejecting the 35-acre application. Also in August 2017, the City rejected applications from 180 Land pending since 2016 for three access points to the golf course acreage from neighboring public streets and to install fencing around two water features on the acreage. The City stated it denied the applications because of "the various public hearings and subsequent debates concerning the development on the subject site" and instructed 180 Land to file an application for a "Major Review" under the City's municipal code. 180 Land did not file any Major Review applications. The City also denied 180 Land's application for a

technical drainage study, though Las Vegas Municipal Code (LVMC) 19.16.105 requires such a study before residential development is allowed.

City employees and representatives respond to 180 Land's residential development proposals

Although the City rejected 180 Land's development proposals, its representatives had previously recognized the site's ability to be developed residentially. At a 2016 Special Planning Commission Meeting, an attorney for the City, along with a public works employee, confirmed that the area was "hard zon[ed]" R-PD7: "[T]he Council gave hard zoning to this golf course, R-PD7, which allows somebody to come in and develop." The same attorney for the City confirmed this again before the City Council in 2017 when it was considering whether to amend the master plan, stating that "[i]f you do not grant the general plan amendment tonight, you will merely leave in place a general plan that's inconsistent with the zoning, and the zoning trumps, in my opinion." A year later at another City Council meeting, the same city attorney and a member of the City's planning staff reconfirmed the R-PD7 zoning and told the City that "the [master plan] was changed after the zoning was in place." A planning director for the City testified in a 2016 deposition regarding development of the golf course acreage that "[i]f the land use and the zoning aren't in conformance, then the zoning would be a higher order entitlement." And in 2019, when responding to a discovery request, the City stated that it "does not dispute that the [35 acres] is zoned R-PD7."

Members of the City Council also commented regarding 180 Land's development proposals. While seeking election, former City Councilperson Steve Seroka stated in a news interview that the City would have the golf course acreage turned over to it in a land swap. Former Councilperson Bob Coffin also said, in a group text, that he was looking for

"intel on the scum behind the [golf course] takeover. Dirt will be handy if I need to get rough." Councilperson Coffin further directed others to use their personal emails to discuss the golf course development issue and not to use the name of the golf course to avoid the communications being subject to disclosure under a previously issued subpoena. In an email, Councilperson Coffin referred to someone from 180 Land, presumably Lowie, as a "motherfucker," "son-of-a-bitch," and "[a]sshole."

180 Land successfully sues for inverse condemnation

After the denial of its applications, 180 Land sued the City for inverse condemnation.[5] The district court entered numerous orders to resolve 180 Land's claims after taking evidence and holding multiple hearings. It first found that the hard zoning for the site was R-PD7 and that such zoning permitted, as a right, single-family and multiresidential development. It also granted summary judgment on all four theories of takings claims raised by 180 Land. In the just compensation portion of the proceedings, the district court ultimately adopted 180 Land's expert's valuation of the land, $34,135,000, noting that the City did not present any contrary valuations or any other rebuttal evidence and did not depose 180 Land's expert. The district court also granted 180 Land's requests for reimbursement of its property taxes, prejudgment interest, and attorney fees. In doing so, the district court rejected 180 Land's request for a 23-percent prejudgment interest rate, calculating its prejudgment interest

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[5]180 Land also sought judicial review of the City's decisions. The district court denied judicial review but severed the inverse condemnation claims and allowed 180 Land to proceed on those claims. As no party appealed the district court's order denying judicial review, that order is not before us, and we do not address it in this opinion.

award using a prime plus 2-percent rate. The final judgment in favor of 180 Land totaled $48,114,039.30.

Both parties now appeal. The City challenges the district court's finding that a taking occurred, the just compensation award, and the other monetary awards made to 180 Land. 180 Land challenges only the amount of the prejudgment interest award.

DISCUSSION

We first address the parties' arguments regarding the interaction between the PR-OS designation on the 35-acres and its R-PD7 zoning. We then address whether the district court properly determined that a taking occurred. Finally, we resolve the City's challenges to the just compensation award and the parties' challenges to the other damages awarded by the district court.

Land designation and zoning

An overarching issue in this case is whether the site's R-PD7 residential zoning or its PR-OS land designation governed 180 Land's ability to develop the property and/or conferred certain rights on 180 Land. The City argues that the district court erred in rejecting the PR-OS land designation in the Peccole Ranch Master Plan, especially because that designation predated 180 Land's purchase of the land at issue. The City acknowledges the R-PD7 zoning but asserts that zoning must comply with the general plan. Based on these assertions, and because it claims the discretion to deny any development applications, the City argues that the district court also erred in concluding that the R-PD7 zoning conferred a vested right on 180 Land to develop the land residentially. The amici briefs received by this court also argue that the PR-OS designation bars any finding that 180 Land had a right to develop the property residentially,

foreclosing any takings claims.[6] 180 Land responds that zoning is the appropriate basis to determine any rights it may have to develop the property, noting that the City confirmed the RPD-7 zoning before 180 Land came to own the property and that this creates a "vested right to use the 35 Acre Property for single-family and multi-family residential, as a matter of law."

A master or general plan is a "comprehensive, long-term general plan for the physical development of the city." NRS 278.150(1). Nevada law authorizes a city to create zoning districts wherein "it may regulate and restrict the erection, construction, reconstruction, alteration, repair or use of buildings, structures or land." NRS 278.250(1). Such zoning regulations must, among other things, "be adopted in accordance with the master plan for land use." NRS 278.250(2). When exercising zoning powers, a city "may use any controls relating to land use or principles of zoning that the governing body determines to be appropriate." NRS 278.250(4).

We have previously held that zoning enactments are "entitled to a presumption of validity" and that, while a master or general plan "is a standard that commands deference," "it is not a legislative mandate from which no leave can be taken." *Sustainable Growth Initiative Comm. v. Jumpers, LLC*, 122 Nev. 53, 64, 128 P.3d 452, 460 (2006). We have further held that "a zoning ordinance need not be in perfect conformity with every master plan policy." *Id.* at 64-65, 128 P.3d at 461. In tandem with these holdings, we have recognized that "zoning regulations shall be adopted in accordance with the master plan for land use," referring to this as a

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[6]The cities of Reno, Henderson, North Las Vegas, and West Wendover, along with the International Municipal Lawyer's Association and Nevada League of Cities, filed amici briefs.

"consistency requirement." *Id.* at 64, 128 P.3d at 460 (quoting *Nova Horizon v. City Council, Reno*, 105 Nev. 92, 96, 769 P.2d 721, 723 (1989)).

The problem with applying the consistency requirement in this case is that substantial evidence demonstrates that the R-PD7 zoning *predated* the PR-OS land designation. Thus, the zoning had already been adopted at the time the land was designated as PR-OS in the master plan. The record shows that, as early as 1986, the City had preliminarily approved zoning the golf course acreage as residential, albeit subject to a later-satisfied resolution of intent. The PR-OS designation, on the other hand, was first imposed on the subject acreage in 1992 when the City adopted a new Las Vegas General Plan. Also detrimental to the City's argument, the ordinance adopting the PR-OS designation explicitly stated that it did not "modify or invalidate any . . . zoning designation, or development approval that occurred before the adoption of the Plan." Indeed, in line with that ordinance, the City confirmed to the golf course acreage's owner in a 1996 letter that the zoning remained R-PD7.

Ample authority supports our conclusion that the zoning ordinance trumps the designation on the master plan. NRS 278.349(3)(e) provides that when deciding whether to approve a tentative map to subdivide property, the governing body must consider whether the subdivision conforms with "zoning ordinances and [the] master plan, except . . . if any existing zoning ordinance is inconsistent with the master plan, the zoning ordinance takes precedence." *See also* Op. Att'y Gen. 84-6 (1984) (concluding that amending the land use Master Plan "does not require immediate amendment of pre-existing zoning ordinances that are not in strict compliance with the amended plan" and noting that "the Nevada Legislature expressly declared its intention [in the statute that

eventually became NRS 278.349(3)(e)] that zoning ordinances take precedence over provisions contained in a master plan"); *Clark Cnty. Off. of the Coroner/Med. Exam'r v. Las Vegas Rev.-J.*, 136 Nev. 44, 57 n.5, 458 P.3d 1048, 1058 n.5 (2020) (explaining that "while Attorney General opinions are not binding legal authority, they are of persuasive legal significance").

Further, the record includes admissions by the City's attorney that he could not determine how the PR-OS designation was placed on the land and that zoning would trump any inconsistent land use designation in the master plan. Indeed, the City's own "land use hierarchy" places zoning designation at the pinnacle.[7] Although the City now claims that this means that a zoning designation is inferior to a land use designation, it stated the opposite in its briefing in the case involving the 17-acre site:

> In the hierarchy, the land use designation is subordinate to the zoning designation, for example, because land use designations indicate the intended use and development density for a particular use, while zoning designations specifically define allowable uses and contain the design and development guidelines for those intended uses.

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[7]According to the City's "Land Use & Rural Neighborhoods Preservation Element" (adopted Sept. 2, 2009), the hierarchy "is designed to progress from broad to specific," with the master plan at the bottom, followed by the land use element, the land use designation, the master development plans/special area plans and, finally, the zoning designation at the top of the hierarchy.

Thus, we reject any assertion that the PR-OS land designation overrides the R-PD7 zoning.[8]

The City's assertions that the district court committed reversible error in finding that 180 Land had a vested right to develop the 35 acres because the City retains discretion to reject any application, even where it complies with applicable zoning, are likewise unavailing. Rather than considering if 180 Land had vested rights to development, this case requires us to determine whether the City's actions destroyed the economic value of the land such that it amounts to a taking, which could still occur under the City's discretionary authority. *See Boulder City v. Cinnamon Hills Assocs.*, 110 Nev. 238, 245-46, 871 P.2d 320, 324-25 (1994) (rejecting a takings claim where the government's use of its discretionary authority to reject "a permit to build living quarters for the elderly did not destroy all viable economic value of the prospective property").

The takings claim

"Whether the government has inversely condemned private property is a question of law that we review de novo." *McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 661, 137 P.3d 1110, 1121 (2006). 180 Land asserted four theories in support of its takings claim below: (1) a *Penn Central*[9] taking alleging that the City's actions destroyed nearly all the economic value of the 35 acres; (2) a per se regulatory taking alleging that

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[8]We further note that other documents, including governmental records, recognized the 35 acres as being residential. For instance, 180 Land's 2017-18 statement of the taxable value of its land lists the 35 acres as residential, and the Clark County Assessor's valuation stated that the parcel was zoned as R-PD7 and that its "probable use" is "residential."

[9]*Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

the City's actions destroyed all of the site's economic value; (3) a per se regulatory physical taking alleging that the City granted the public access to the site, ousting 180 Land from the site; and (4) a nonregulatory de facto taking alleging that the City obstructed its right to residentially develop the property such that it became valueless. Because we ultimately conclude that a per se regulatory taking occurred, we need not address the three other theories.

"The Takings Clause of the Fifth Amendment of the United States Constitution, applicable to the states through the Fourteenth Amendment, prohibits the government from taking private property for public use without just compensation." *Sisolak*, 122 Nev. at 661-62, 137 P.3d at 1121 (footnote omitted). The Nevada Constitution similarly provides that "[p]rivate property shall not be taken for public use without just compensation having been first made, or secured." Nev. Const. art. 1, § 8(3). Courts initially viewed these provisions as protecting only against an owner's ouster from possession but later recognized "that state regulation of property may also require just compensation." *Sisolak*, 122 Nev. at 662, 137 P.3d at 1121 (citing *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)). This occurs when government regulation is "so onerous that its effect is tantamount to a direct appropriation or ouster." *Id.* at 662, 137 P.3d at 1121-22. "[S]uch 'regulatory takings' may be compensable under the Fifth Amendment." *Id.* at 662, 137 P.3d at 1122 (quoting *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005)).

Initial considerations

Property interest

"An individual must have a property interest in order to support a takings claim." *Id.* at 658, 137 P.3d at 1119. Thus, when considering

inverse condemnation claims, a "court must first determine 'whether the plaintiff possesses a valid interest in the property affected by the governmental action.'" *Id.* (quoting *Karuk Tribe of Cal. v. Ammon*, 209 F.3d 1366, 1374 (Fed. Cir. 2000)). Stated another way, a court must ensure that "'the plaintiff possesse[s] a stick in the bundle of property rights,' before proceeding to determine whether the governmental action at issue constitute[s] a taking." *Id.* (quoting *Karuk Tribe*, 209 F.3d at 1374). Property rights include the rights to possess, use, and enjoy the property. *Id.* There is no question that 180 Land, the owner of the 35 acres, has a valid interest in the property to support a takings claim.

The property at issue

Pertinent to our takings analysis is a determination of the property at issue. The City contends that, rather than considering the 35-acre site individually, the entire 250 acres comprising the golf course must be considered together to determine if a complete loss of economic value occurred. "'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Penn Cent.*, 438 U.S. at 130. Instead, we focus "both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole." *Id.* at 130-31.

Because the test for a per se regulatory taking requires "compar[ing] the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property whose value is to furnish the denominator of the fraction." *Murr v. Wisconsin*, 582 U.S. 383, 395 (2017) (quoting *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987)).

Indeed, "[t]o the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question." *Id.* (quoting *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 644 (1993)).

We recognize that "no single consideration can supply the exclusive test for determining the denominator" in a takings action. *Id.* at 397. Instead, we must attempt to "determine whether reasonable expectations about property ownership would lead a landowner to anticipate that [their] holdings would be treated as one parcel, or, instead, as separate tracts." *Id.* Factors to consider include "the treatment of the land under state and local law; the physical characteristics of the land; and the prospective value of the regulated land." *Id.* As to the first factor, the court should give substantial weight to how the state measures metes and bounds and divides the land. *Id.* at 398.

Turning to the property's physical characteristics, we must consider "the physical relationship of any distinguishable tracts, the parcel's topography, and the surrounding human and ecological environment." *Id.* The City asserts that the entirety of the golf course acreage had related topography and thus should be considered the relevant parcel for 180 Land's takings claim. But we see no such unique concerns regarding the golf course acreage, which the record demonstrates is in a suburban area surrounded by residential and commercial development, that might require treating the entirety of the golf course acreage as a single parcel. *Cf. Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992) (Kennedy, J., concurring) (noting that "[c]oastal property may

present . . . unique concerns for a fragile land system") (cited with approval by *Murr*, 582 U.S. at 398).

As to the prospective value of the regulated land, "courts should assess the value of the property under the challenged [governmental action], with special attention to the effect of burdened land on the value of other holdings." *Murr*, 582 U.S. at 398; *see id.* at 398-99 (providing an example of where a restriction on one property's use may increase another property's value "by increasing privacy, expanding recreational space, or preserving surrounding beauty"). We recognize that the City's approval of development on the 17-acre parcel would likely derive value that would have to be considered in resolving 180 Land's takings claim if we considered the golf course acreage to be the denominator acreage in this case.[10]

Applying these principles here demonstrates that treating the 35 acres as the denominator parcel of land for 180 Land's takings claim is appropriate. It is a single parcel with an individual parcel number and was treated as an individual parcel throughout the entirety of 180 Land's attempts to obtain the City's approval to develop it, even when 180 Land submitted applications regarding the entire 250 acres. And that the City approved development on the 17-acre parcel, but not on the 35-acre parcel, further demonstrates the 35 acres' separate nature. While the 35 acres used to be part of the 250 acres making up a golf course, there are no ecological or other physical aspects of the land that warrant us treating the 250 acres

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[10]To the extent 180 Land argues that the City has since acted in a manner that prohibits development on the 17-acre parcel, that issue was not before the district court, and we therefore do not consider it. *See FDIC v. Rhodes*, 130 Nev. 893, 897, 336 P.3d 961, 964 (2014) (providing that this court generally does not consider issues not raised before the district court when it rendered its decision).

as the whole parcel in this case. The approval of development on the 17 acres adding value to the entire 250 acres does not outweigh these other considerations.

Ripeness

We next address the City's assertion that 180 Land's takings claim was not ripe, such that the district court exceeded its jurisdiction by allowing the claim to proceed. "[A]n essential prerequisite to [the] assertion [of a regulatory takings claim] is a final and authoritative determination of the type and intensity of development legally permitted on the subject property." *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986); *see also Palazzolo v. Rhode Island*, 533 U.S. 606, 620 (2001) ("[O]nce it becomes clear that . . . the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened."); *Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985) ("[A] claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue."). This is so the court can understand the "nature and extent of permitted development before adjudicating the constitutionality of the [government actions] that purport to limit it." *Sisolak*, 122 Nev. at 664, 137 P.3d at 1123 (quoting *Lucas*, 505 U.S. at 1011). Otherwise, "it is impossible to tell whether the land retain[s] any reasonable beneficial use or whether [existing] expectation interests ha[ve] been destroyed." *MacDonald*, 477 U.S. at 349 (alternations in original) (quoting *Williamson Cnty.*, 473 U.S. at 190 n.11).

Finality is normally achieved by exhausting administrative remedies, *Sisolak*, 122 Nev. at 664, 137 P.3d at 1123, but "[w]hen exhausting available administrative remedies . . . is futile, a matter is deemed ripe for review," *State ex rel. Dep't of Transp. v. Eighth Jud. Dist. Ct. (Ad Am.)*, 131 Nev. 411, 418, 351 P.3d 736, 742 (2015). Futility occurs when "the state agency charged with enforcing a challenged land-use regulation entertains an application from an owner and its denial of the application makes clear the extent of development permitted, and neither the agency nor a reviewing state court has cited noncompliance with reasonable state-law exhaustion or pre-permit processes." *Palazzolo*, 533 U.S. at 625-26; *see also id.* at 626 (concluding that, under such facts, "federal ripeness rules do not require the submission of further and futile applications with other agencies").

The Ninth Circuit Court of Appeals has further commented on ripeness and futility as they apply to regulatory takings claims in *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496 (9th Cir. 1990). That court held that a landowner "must submit one formal development plan and seek a variance from any regulations barring the development proposed in the plan [and] a landowner may need to resubmit modified development proposals that satisfy the local government's objections to the development as initially proposed." *Id.* at 1501. But the Ninth Circuit recognized that further applications would be futile if they required the landowner to apply "through piecemeal litigation or unfair procedures." *Id.* Whether a takings claim is ripe is a question of law reviewed de novo. *MHC Fin. Ltd. v. City of San Rafael*, 714 F.3d 1118, 1130 (9th Cir. 2013).

The City and the amici argue that 180 Land submitted only one development application for the 35-acre site before filing suit and that neither the City's denial of the master plan amendment for the entire 250-acre site, nor its rejection of two other nondevelopment applications, nor the City's other actions constituted a final decision ripening 180 Land's per se regulatory takings claim. 180 Land argues that its per se regulatory takings claim is ripe because it exhausted its administrative remedies or, alternatively, that such efforts would have been futile.[11]

Considering the totality of the City's actions, we conclude that any further attempts to apply for development by 180 Land would have been futile, such that its takings claim was ripe. While the City is correct that 180 Land submitted only one application specifically regarding residential development to the 35 acres, the City's denial of that application failed to provide 180 Land with any basis for the denial that would allow it to "seek a variance" or "satisfy the [City]'s objections to the development as initially proposed." *Del Monte Dunes*, 920 F.2d at 1501. The City merely stated that it was concerned with piecemeal development and there was public opposition to 180 Land's request to develop. Regarding the alleged

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[11]We reject 180 Land's argument that the ripeness requirement does not apply to per se regulatory takings claims. We have previously held that "courts only consider ripe regulatory takings claims, and 'a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding application of the regulations to the property at issue.'" *Ad Am.*, 131 Nev. at 419, 351 P.3d at 742 (quoting *Williamson Cnty.*, 473 U.S. at 186). As both per se regulatory and *Penn Central* takings claims analyze whether regulations caused a loss of property value, either totally (per se) or nearly totally (*Penn Central*), it follows that the City's decision of how to apply the regulations must be final, or further efforts must be futile, for such claims to be ripe.

concern over piecemeal development, the City had already approved piecemeal development when it approved the development of the 17-acre site. And although the City stated in its denial that it wanted to see a "cohesive plan for the entire area," referring to all of the golf course acreage, the City also denied 180 Land's Master Development application. This latter denial occurred despite City planning staff collaborating with 180 Land on the application for more than two years and recommending that the City approve it. While the Master Development application does not constitute a formal request for a variance, we conclude that it satisfies the mandate that the landowner attempt to comply with the bases for denial by submitting an amended or second development proposal to the requisite governmental agency because it aligned with the City's stated desire for a cohesive development plan regarding all of the golf course acreage.

As to public opposition, the City provided 180 Land with no indication of what request for a variance or modified development application 180 Land could submit in the future that would avoid another denial due to public opposition. The comprehensive Master Development application was started, in part, because 180 Land was told by the City that a Master Development application was the only development request that would be considered due to the public opposition voiced by neighboring property owners. The Master Development application was then denied, and it is unclear from the record what, if any, specific issues were raised by the public opposition that the City concluded warranted denying 180 Land's applications. Without any insight into why the City concluded that the public's opposition was a valid basis to deny 180 Land's development applications, further applications attempting to resolve the unspecified concerns would be futile.

Other evidence also supports our conclusion that any further submissions by 180 Land to residentially develop the 35 acres would have been futile because the City showed a general hostility to allowing any development on the site. The City stated it denied 180 Land's basic requests for additional access points and to place fencing around water features because such requests had to be made via a "Major Modification" application under LVMC 19.16.100(G)(1). But that ordinance provides that such an application is only necessary when "through prior action, [the City] has determined that the proposed project or improvement shall be processed as a Major Review; or [it is] determine[d] that the proposed development could significantly impact the land uses on the site or surrounding properties." LVMC 19.16.100(G)(1). It does not appear that access points to vacant land or fences around water features would meet the standards for this more rigorous application process, which requires a pre-application conference, drawings and plans, and notice and a hearing, among other items or actions not required for a minor review under subsection (F). LVMC 19.16.100(G)(2). Indeed, the City's denials did not rely on LVMC 19.16.100(G)(1) but instead stated that it required a "Major Review" because of the pressure from the public debates over the land's development. *See Del Monte Dunes*, 920 F.2d at 1501 (stating that a governmental agency subjecting a landowner to "unfair procedures" supports a finding of futility). The statements of City representatives in relation to 180 Land's attempts to develop the land bolster our futility conclusion. Indeed, the emails and text messages from councilpersons demonstrated a general hostility towards 180 Land's attempts to develop

its land.[12] *See Ad Am.*, 131 at 420, 351 P.3d at 742 (considering the statement of a councilperson when resolving an allegation of futility in a takings case). Having determined 180 Land's property rights, ascertained the relevant scope of the property at issue, and deemed the takings claim ripe, we now address the district court's conclusion that a taking occurred.

Per se regulatory taking

A per se regulatory taking occurs when government regulation "completely deprives an owner of all economical beneficial use of [the] property." *Sisolak*, 122 Nev. at 662, 137 P.3d at 1122; *see also Boulder City v. Cinnamon Hills Assocs.*, 110 Nev. 238, 245-46, 871 P.2d 320, 324-35 (1994) (finding no violation of the Fifth Amendment where the denial of a permit to develop senior citizen housing "did not destroy all viable economic value of the prospective development property"). When resolving this variant of a takings claim, there is no need to "inquir[e] into the public interest advanced in support of the restraint." *Lucas*, 505 U.S. at 1015. That is because "the Fifth Amendment is violated when land-use regulation 'does not substantially advance legitimate state interests *or denies an owner economically viable use of his land.*'" *Id.* at 1016 (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)). Moreover, when governmental actions deprive an owner of all economically beneficial use of their property, "it is less realistic to indulge [the Court's] usual assumption that the

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[12]To the extent the City argues that we cannot consider such statements in a futility analysis, we reject that argument. In *Ad America*, we considered a councilperson's statement that the developer offered as evidence of futility without stating it was improper, instead concluding that the statement from "only one of seven City Council members" was insufficient to demonstrate futility in light of the contrary evidence. 131 at 420, 351 P.3d at 742.

[governmental body] is simply 'adjusting the benefits and burdens of economic life' in a manner that secures an 'average reciprocity of advantage' to everyone concerned." *Id.* at 1017-18 (quoting *Penn Cent.*, 438 U.S. at 124, and *Penn. Coal*, 260 U.S. at 415).

The City's denials of 180 Land's applications and the discussion of those applications at various city council meetings show no meaningful indication that the City would allow any development on the 35 acres. As noted above, the City's denials stated it was rejecting the applications based on strong public opposition and that 180 Land had not provided a cohesive plan for the entire golf course acreage. But the City provided no regulatory basis for the denials[13] that would allow 180 Land to seek a variance or submit an amended application that would resolve any such issues. The City similarly rejected 180 Land's Master Plan application that provided a cohesive plan for the golf course acreage. That these denials occurred despite the City's planning office working with 180 Land on at least one of the proposals and repeatedly recommending that the City approve the applications underscores an unwillingness to allow any development. And the City did not provide 180 Land with any viable alternatives for it to reap economic benefit from the 35 acres when denying its applications. In short, the City's actions demonstrate that it would not approve any development on the 35 acres. Further, we discern no error in the district court adopting 180 Land's expert's opinion that, without the ability to develop the 35 acres,

[13]This is especially true considering our conclusion that the PR-OS land designation does not trump the R-PD7 zoning.

it had no economic value.[14] *See Waldman v. Maini*, 124 Nev. 1121, 1129, 195 P.3d 850, 856 (2008) (providing that a court will only disturb factual findings if they are not supported by substantial evidence). We therefore agree with the district court that a taking occurred because the City's actions deprived 180 Land of all of the economic value of the 35 acres at issue in this case.

Just compensation

Having determined that a taking occurred, we turn to the just compensation owed for that taking. Before addressing the amount of the award entered by the district court, we address the City's assertions that the district court improperly excluded evidence and used the wrong date of valuation.

Exclusion of evidence

The City challenges the district court's exclusion of the PR-OS designation and the $7.5 million purchase contract regarding the acquisition of Fore Stars and its assets from the just compensation trial. Reviewing these decisions for an abuse of discretion, we find none. *See Cox v. Copperfield*, 138 Nev., Adv. Op. 27, 507 P.3d 1216, 1222 (2022) (reviewing the exclusion of evidence for an abuse of discretion). As to evidence regarding the PR-OS designation or any general/master plans showing such a land use designation for the 35 acres at issue, the district court had already concluded, in the first phase of the trial, that R-PD7 zoning trumped the PR-OS designation. As we agree with that conclusion, we necessarily

[14]This included evidence that continuing to operate a golf course would result in an economic loss rather than provide economic value.

find no abuse of discretion in the district court's decision to exclude that evidence from the just compensation portion of the trial.

As to the purchase contract, the district court noted that the City failed to provide an expert to contravene 180 Land's expert's opinion that it was irrelevant. The court found that the transaction was for much more than the 35 acres and that the 2005 start date of that transaction was too remote to aid in properly determining the property's value. Moreover, as discussed more in the damages analysis below, just compensation is determined by looking at a property's value at its "highest and best use." Nev. Const. art. 1, § 22(3); *see also Clark County v. Alper*, 100 Nev. 382, 391, 685 P.2d 943, 949 (1984) ("Inverse condemnation proceedings are the constitutional equivalent to eminent domain actions and are governed by the same rules and principles that are applied to formal condemnation proceedings."). As the contract did not identify what portion of the purchase price was attributable to the 35 acres, and because the City failed to show how the purchase price was relevant to determining the 35 acres' value at its highest and best use, we conclude that the district court did not abuse its discretion in excluding this evidence.

Date of value

The district court set the "date of value" for the property's valuation as September 14, 2017, the day of the issuance of the first summons in the underlying matter. The court relied on NRS 37.120(1), which addresses eminent domain and provides that "the date of the first service of the summons is the date of valuation," unless the matter is not taken to trial in two years. The City argues that NRS 37.120 only applies in eminent domain actions and that the district court's ruling was otherwise arbitrary because the City denied the application regarding the 35 acres on

June 21, 2017, not September 14. It asserts that the fact that the district court used a different date from which to calculate the property tax and prejudgment interest award (August 2, 2017) further shows the arbitrary nature of using September 14, 2017, as the date of value.[15]

We have previously rejected the argument that NRS 37.120 does not apply in inverse condemnation proceedings. In *Alper*, an inverse condemnation case, we held that NRS 37.120 provided the date of value and rejected the County's argument that the statute was "applicable only to eminent domain proceedings brought by the condemnor under the authority of NRS Chapter 37 and [was] not applicable to inverse condemnation suits." 100 Nev. at 391, 685 P.2d at 949. Deeming no error in the district court's application of NRS 37.120 to find the September 14, 2017, valuation date, we necessarily decline to impose a different date.

Amount awarded for just compensation

"The landowner . . . has the burden of establishing the value of the land . . . taken." *City of Las Vegas v. Bustos*, 119 Nev. 360, 362, 75 P.3d 351, 352 (2003). The appropriate value for just compensation "is determined by the property's market value 'by reference to the highest and best use for which the land is available and for which it is plainly adaptable.'" *Id.* (quoting *Alper*, 100 Nev. at 386-87, 685 P.2d at 946). The highest and best use must still, however, "be reasonably probable." *Id.*

Here, 180 Land met its burden by providing an expert to opine on the land's value at its highest and best use. The expert submitted a detailed report that stated a golf course was no longer profitable and that

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[15]The City does not present an alternative date of value for our consideration.

the highest and best use for the land was residential development, making comparisons to five similar vacant properties sold between 2015 and 2017. The expert report also provided detailed analyses supporting the opinions contained therein, citing relevant literature and attaching exhibits in support. The City presented no contrary evidence, did not depose the expert, and made no attempt to rebut the expert report. Instead, the City noted that, given the district court's rulings on the motions in limine that barred the City from presenting certain evidence, it had "no evidence to admit at the bench trial in rebuttal of [180 Land's expert's] valuation." In light of 180 Land's uncontradicted evidence, we find no error in the district court adopting 180 Land's expert's determination that the value of the 35 acres at its highest and best use was $34,135,000.

Additional awards of damages

The City's final arguments challenge the district court's award of property taxes and attorney fees to 180 Land. We also consider 180 Land's challenge to the district court's prejudgment interest award.

Property taxes

The district court ordered the City to reimburse 180 Land for its property taxes on the 35 acres starting from the date the court found the City had dispossessed 180 Land of the property, August 2, 2017, totaling $976,889.38.[16] The City argues that the caselaw relied on by the district court does not apply because it involved eminent domain rather than inverse condemnation action. It claims that it did not physically dispossess

[16]We reject the City's argument that 180 Land caused the increased taxes by not appealing the assessor's conclusion that the land was residential rather than open space.

the property from 180 Land and that the just compensation award already made 180 Land whole.

Our caselaw recognizes that "[a]n owner who is dispossessed from [their] land when it is taken for public use is no longer obligated to pay taxes." *Alper*, 100 Nev. at 395, 685 P.2d at 951. As noted, *Alper* also holds that inverse condemnation and eminent domain proceedings are "constitutional equivalents." *Id.* at 391, 685 P.2d at 949. Thus, the district court did not err in ordering reimbursement to 180 Land for the taxes it paid. And we decline to consider the City's challenge to the date the district court used, as the date was reasonable and the City provides no alternative date for this court to evaluate. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (holding that the court need not consider arguments that a party does not argue cogently or support with relevant authority).

Attorney fees

The City next challenges the district court's award of $2,468,751.50 in attorney fees to 180 Land. The district court may only award attorney fees where a statute, rule, or contract allows it, and we review such an award for an abuse of discretion. *Albios v. Horizon Cmtys., Inc.*, 122 Nev. 409, 417, 132 P.3d 1022, 1027-28 (2006). The district court concluded an award was proper under (1) the federal Uniform Relocation Assistance and Real Property Acquisition Act, per NRS 342.105; (2) Article 1, Section 22(4), of the Nevada Constitution; and (3) NRS 18.010(2)(b).

We conclude that an award was proper under NRS 342.105. NRS 342.105(1) makes any "political subdivision of the State" subject to the Relocation Act's regulations, and 49 C.F.R. § 24.107(c) provides:

> The owner of the real property [whose property is taken] shall be reimbursed for any reasonable

> expenses, including reasonable attorney . . . fees, which the owner actually incurred because of a condemnation proceeding, if . . . [t]he court having jurisdiction renders a judgment in favor of the owner in an inverse condemnation proceeding . . . .

And we have already held that the Relocation Act's "plain terms" support such an award when "a property owner . . . was successful in [their] inverse condemnation action."[17] *Sisolak*, 122 Nev. at 675, 137 P.3d at 1130.

The City's final argument is a single sentence that the fee amount was not supported by billing statements and, without such statements, the district court cannot find the fees to be reasonable. But the City fails to cite the record or to salient authority and does not make any further argument; therefore, we need not consider it. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38; NRCP 54(d)(2)(A) (setting out the procedure to seek attorney fees). Based on the foregoing, we will not disturb the district court's attorney fees award.

Prejudgment interest

Below, 180 Land requested a prejudgment interest rate of 23-percent per year for the period bookended by the taking and the entry of the prejudgment interest award, approximately 4.5 years. 180 Land based this request on two experts who calculated the rate of return on vacant residential properties in Las Vegas between 2017 and 2021. The district court rejected 180 Land's request and set the prejudgment interest rate at prime plus 2 percent, for a total of $10,258,953.30. We review a district

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[17]Because we conclude that the award of fees was proper under the Relocation Act, we need not consider whether an award was proper under the Nevada Constitution or NRS 18.010(2)(b).

court's ruling on prejudgment interest for an abuse of discretion. *Sisolak*, 122 Nev. at 675, 137 P.3d at 1130.

The district court did not abuse its discretion in setting the prejudgment interest rate at prime plus 2 percent. "The purpose of awarding interest is to compensate the landowner for the delay in the monetary payment that occurred after the property had been taken." *Alper*, 100 Nev. at 392, 685 P.2d at 950 (citing *Refining Co. v. Dir. of Pub. Works*, 244 A.2d 853, 855 (R.I. 1968)). And "[t]he statutory interest rate establishes at least a *prima facie* basis for determining a fair rate." *Id.* at 394, 685 P.2d at 951. Here, rather than seeking compensation for the delay in payment, 180 Land seeks an interest rate that would reimburse it for the purported profit it lost had it been able to develop the land. This is not the purpose of a prejudgment interest award. *See Interest, Black's Law Dictionary* (11th ed. 2019) (defining "interest" as "[t]he compensation . . . allowed by law for the use or detention of money, or for the loss of money by one who is entitled to its use"). We therefore decline to overturn the district court's prejudgment interest award.

CONCLUSION

When a governmental agency acts in a manner that removes all the economic value from privately owned land, just compensation must be paid. Here, the City's actions demonstrated a refusal to allow any development on the 35-acre parcel owned by 180 Land such that the parcel no longer had any economic value. The district court therefore did not err in finding that a taking occurred. Nor did the district court err in its just compensation award, as it based that decision on uncontroverted evidence from a duly admitted expert witness. Finally, because we find no error in

the district court's other awards, we affirm the orders appealed in both Docket Nos. 84345 and 84640 in their entirety.[18]

_____, J.
Herndon

We concur:

_____, C.J.
Cadish

_____, J.
Stiglich

_____, J.
Parraguirre

_____, J.
Bell

_____, Sr. J.
Silver

_____, D.J.
Walker

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[18]Recognizing that the parcels making up the remainder of the golf course acreage are, or may become, the subject of similar litigation, we emphasize that our decision here is based only on the specific facts and circumstances surrounding 180 Land's attempts to develop the 35-acre parcel.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

DEVILLIER ET AL. *v.* TEXAS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 22–913. Argued January 16, 2024—Decided April 16, 2024

Richard DeVillier and more than 120 other petitioners own property north of U. S. Interstate Highway 10 between Houston and Beaumont, Texas. The dispute here arose after the State of Texas took action to use portions of I–10 as a flood evacuation route, installing a roughly 3-foot-tall barrier along the highway median to act as a dam. When subsequent hurricanes and storms brought heavy rainfall, the median barrier performed as intended, keeping the south side of the highway open. But it also flooded petitioners' land to the north, causing significant damage to their property. DeVillier filed suit in Texas state court. He alleged that by building the median barrier and using his property to store stormwater, Texas had effected a taking of his property for which the State must pay just compensation. Other property owners filed similar suits. Texas removed the cases to federal court, where they were consolidated into a single proceeding with one operative complaint. The operative complaint includes inverse-condemnation claims under both the Texas Constitution and the Takings Clause of the Fifth Amendment. As relevant, Texas moved to dismiss the federal inverse-condemnation claim, arguing that a plaintiff has no cause of action arising directly under the Takings Clause. The District Court denied Texas' motion, concluding that a property owner may sue a State directly under the Takings Clause. The Fifth Circuit reversed, holding "that the Fifth Amendment Takings Clause as applied to the states through the Fourteenth Amendment does not provide a right of action for takings claims against a state." 53 F. 4th 904 (*per curiam*).

Held: DeVillier and the other property owners should be permitted to pursue their claims under the Takings Clause through the cause of action available under Texas law. The Takings Clause of the Fifth

Syllabus

Amendment states: "nor shall private property be taken for public use, without just compensation." The Court has explained that "a property owner acquires an irrevocable right to just compensation immediately upon a taking" "[b]ecause of 'the self-executing character' of the Takings Clause 'with respect to compensation.'" *Knick* v. *Township of Scott*, 588 U. S. 180, 192 (quoting *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U. S. 304, 315). The question here concerns the procedural vehicle by which a property owner may seek to vindicate that right. Constitutional rights do not typically come with a built-in cause of action to allow for private enforcement in courts, see *Egbert* v. *Boule*, 596 U. S. 482, 490–491, and so they are asserted offensively pursuant to an independent cause of action designed for that purpose, see, *e.g.*, 42 U. S. C. §1983. DeVillier relies on *First English* and other cases to argue that the Takings Clause creates by its own force a cause of action authorizing suits for just compensation. But those cases do not directly confront whether the Takings Clause provides a cause of action. It would be imprudent to decide that question without first establishing the premise in the question presented that no other cause of action exists to vindicate the property owner's rights under the Takings Clause. Texas state law does provide an inverse-condemnation cause of action by which property owners may seek just compensation against the State based on both the Texas Constitution and the Takings Clause. This case therefore does not present the circumstance in which a property owner has no cause of action to seek just compensation. The Court therefore remands so that DeVillier and the other property owners may proceed through the cause of action available under Texas law. Pp. 4–7.

53 F. 4th 904, vacated and remanded.

THOMAS, J., delivered the opinion for a unanimous Court.

SUPREME COURT OF THE UNITED STATES

No. 22–913

RICHARD DEVILLIER, ET AL., PETITIONERS *v.* TEXAS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[April 16, 2024]

JUSTICE THOMAS delivered the opinion of the Court.

Richard DeVillier alleges that the State of Texas took his property for stormwater storage. He sought just compensation under the Takings Clause of the Fifth Amendment, arguing that the Constitution itself authorized him to bring suit. We granted certiorari to decide whether "a person whose property is taken without compensation [may] seek redress under the self-executing Takings Clause even if the legislature has not affirmatively provided them with a cause of action." Pet. for Cert. i. That question assumes the property owner has no separate cause of action under which to bring a claim based on the Takings Clause. But, that is not the case here. Texas law provides a cause of action that allows property owners to vindicate their rights under the Takings Clause. We therefore vacate and remand so that DeVillier's claims may proceed under Texas' state-law cause of action.

I

Richard DeVillier and more than 120 other petitioners own property north of U. S. Interstate Highway 10 between

Houston and Beaumont, Texas.[1] The State of Texas undertook several projects to facilitate the use of that portion of the highway as a flood-evacuation route. It installed a roughly 3-foot-tall barrier along the highway median to act as a dam, preventing stormwater from covering the south side of the road.

In August 2017, Hurricane Harvey brought heavy rainfall to southeast Texas. The new median barrier performed as intended, keeping the south side of the highway open. But, it also flooded petitioners' land to the north, displacing them from their homes, damaging businesses, ruining crops, killing livestock, and destroying family heirlooms. The same thing happened during Tropical Storm Imelda in 2019. As depicted, the median barrier kept the south side of the highway open (on the left side of both pictures) by holding back stormwater, which then submerged property north of the highway (on the right side of both pictures):

Figure 1

[1] Because this case comes to us at the pleading stage, we assume the truth of the facts alleged in the operative complaint. See, *e.g.*, *Swierkiewicz* v. *Sorema N. A.*, 534 U. S. 506, 508, n. 1 (2002).

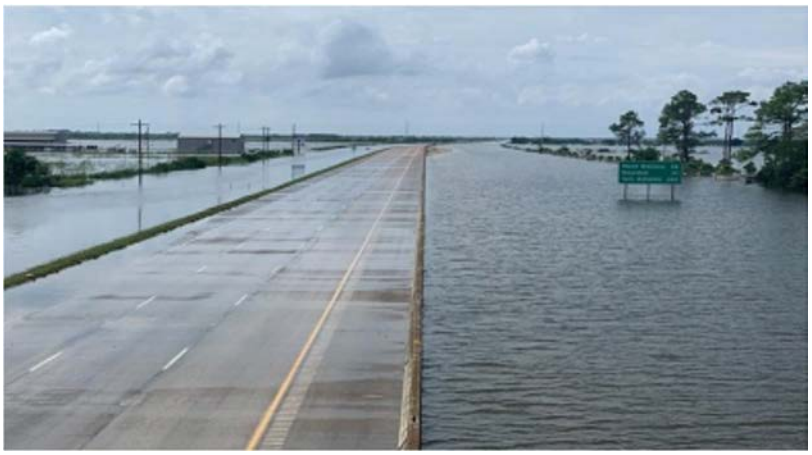

Figure 2

Because heavy rainfall is not uncommon in southeast Texas, the median barrier will continue to cause flooding on DeVillier's land during future storms.

DeVillier filed suit in Texas state court. He alleged that, by building the median barrier and using his property to store stormwater, Texas had effected a taking of his property. DeVillier argued that he was therefore entitled to just compensation under both the United States and Texas Constitutions. Other property owners filed similar suits. Texas removed the cases to federal court, where they were consolidated into a single proceeding with one operative complaint. The operative complaint includes inverse-condemnation claims under both the Texas Constitution and the Takings Clause of the Fifth Amendment. See *Knick* v. *Township of Scott*, 588 U. S. 180, 186 (2019) ("Inverse condemnation is a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant" (internal quotation marks omitted)).

As relevant, Texas moved to dismiss the federal inverse-condemnation claim, arguing that a plaintiff has no cause

of action arising directly under the Takings Clause. It contended that only Rev. Stat. §1979, 42 U. S. C. §1983, provides a vehicle to assert constitutional violations, and §1983 does not authorize claims against a State. DeVillier did not dispute that he intended to bring his federal claim directly under the Fifth Amendment. Instead, he responded that the Takings Clause is "self-executing," which, he argued, means that the Clause itself provides a cause of action for just compensation.

The District Court denied Texas' motion, concluding that a property owner may sue a State directly under the Takings Clause. The Court of Appeals disagreed. In a one-paragraph opinion, it "h[eld] that the Fifth Amendment Takings Clause as applied to the states through the Fourteenth Amendment does not provide a right of action for takings claims against a state." 53 F. 4th 904 (CA5 2023) (*per curiam*).

We granted certiorari to decide whether a property owner may sue for just compensation directly under the Takings Clause. 600 U. S. ___ (2023). We now vacate and remand for further proceedings.

II

The Takings Clause of the Fifth Amendment states: "nor shall private property be taken for public use, without just compensation." We have explained that "a property owner acquires an irrevocable right to just compensation immediately upon a taking" "[b]ecause of 'the self-executing character' of the Takings Clause 'with respect to compensation.'" *Knick*, 588 U. S., at 192 (quoting *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U. S. 304, 315 (1987)). Texas does not dispute the nature of the substantive right to just compensation. This case presents only a question regarding the procedural vehicle by which a property owner may seek to vindicate that right.

Constitutional rights do not typically come with a built-in cause of action to allow for private enforcement in courts. See *Egbert* v. *Boule*, 596 U. S. 482, 490–491 (2022). Instead, constitutional rights are generally invoked defensively in cases arising under other sources of law, or asserted offensively pursuant to an independent cause of action designed for that purpose, see, *e.g.*, 42 U. S. C. §1983. DeVillier argues that the Takings Clause is an exception. He relies on *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles* to assert that the just-compensation requirement of the Takings Clause is "self-executing" and that "[s]tatutory recognition [is] not necessary" for takings claims because they "are grounded in the Constitution itself." 482 U. S., at 315 (internal quotation marks omitted). In other words, the Takings Clause creates by its own force a cause of action authorizing suits for just compensation.

The cases that DeVillier cites do not directly confront whether the Takings Clause provides a cause of action for just compensation. *First English* itself proceeded under a state-law cause of action. *Id.*, at 313–314, n. 8. DeVillier also points to several takings cases where property owners sought injunctions to prevent the Government from interfering with their property rights, such as by obtaining easements or imposing zoning regulations. See *Dohany* v. *Rogers*, 281 U. S. 362, 364 (1930); *Delaware, L. & W. R. Co.* v. *Morristown*, 276 U. S. 182, 188 (1928); *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 384 (1926); *Cuyahoga River Power Co.* v. *Akron*, 240 U. S. 462, 463 (1916); *Norwood* v. *Baker*, 172 U. S. 269, 276 (1898). Because none of those cases relied on §1983 for a cause of action, he reasons that those cases must have proceeded directly under the Constitution. But, the mere fact that the Takings Clause provided the substantive rule of decision for the equitable claims in those cases does not establish that it creates a

cause of action for damages, a remedy that is legal, not equitable, in nature.[2] That said, the absence of a case relying on the Takings Clause for a cause of action does not by itself prove there is no cause of action. It demonstrates only that constitutional concerns do not arise when property owners have other ways to seek just compensation. Our precedents do not cleanly answer the question whether a plaintiff has a cause of action arising directly under the Takings Clause.

But, this case does not require us to resolve that question. The question presented asks what would happen if a property owner had no cause of action to vindicate his rights under the Takings Clause. It would be imprudent to decide that question without satisfying ourselves of the premise that there is no cause of action. Our constitutional system assigns to state officers "a coordinate responsibility to enforce [the Constitution] according to their regular modes of procedure." *Howlett* v. *Rose*, 496 U. S. 356, 367 (1990). It therefore looks to "[t]he good faith of the States [to] provid[e] an important assurance that 'this Constitution, and the Laws of the United States which shall be made in Pursuance thereof shall be the supreme Law of the Land.'" *Alden* v. *Maine*, 527 U. S. 706, 755 (1999) (quoting U. S. Const., Art. VI; original alterations omitted). We should not "assume the States will refuse to honor the Constitution," including the Takings Clause, because "States and their officers are [also] bound by obligations imposed by the Constitution." 527 U. S., at 755.

The premise that Texas left DeVillier with no cause of action to obtain the just compensation guaranteed by the Takings Clause does not hold. Texas state law provides a cause

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[2] The significance of DeVillier's equitable cases is further obscured by fundamental changes to the law of equity that postdate those decisions. Compare Fed. Rule Civ. Proc. 2 with A. Bellia & B. Clark, The Original Source of the Cause of Action in Federal Courts, 101 Va. L. Rev. 609, 653 (2015).

of action by which property owners may seek just compensation against the State. As Texas explained at oral argument, its state-law inverse-condemnation cause of action provides a vehicle for takings claims based on both the Texas Constitution and the Takings Clause. Tr. of Oral Arg. 38; *id.*, at 40 (citing *Baytown* v. *Schrock*, 645 S. W. 3d 174 (Tex. 2022)); Tr. of Oral Arg. 59–60. And, although Texas asserted that proceeding under the state-law cause of action would require an amendment to the complaint, it also assured the Court that it would not oppose any attempt by DeVillier and the other petitioners to seek one. *Id.*, at 41, 61, 64. This case therefore does not present the circumstance in which a property owner has no cause of action to seek just compensation. On remand, DeVillier and the other property owners should be permitted to pursue their claims under the Takings Clause through the cause of action available under Texas law.

III

The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

SHEETZ *v.* COUNTY OF EL DORADO, CALIFORNIA

CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, THIRD APPELLATE DISTRICT

No. 22–1074. Argued January 9, 2024—Decided April 12, 2024

As a condition of receiving a residential building permit, petitioner George Sheetz was required by the County of El Dorado to pay a $23,420 traffic impact fee. The fee was part of a "General Plan" enacted by the County's Board of Supervisors to address increasing demand for public services spurred by new development. The fee amount was not based on the costs of traffic impacts specifically attributable to Sheetz's particular project, but rather was assessed according to a rate schedule that took into account the type of development and its location within the County. Sheetz paid the fee under protest and obtained the permit. He later sought relief in state court, claiming that conditioning the building permit on the payment of a traffic impact fee constituted an unlawful "exaction" of money in violation of the Takings Clause. In Sheetz's view, the Court's decisions in *Nollan* v. *California Coastal Comm'n*, 483 U. S. 825, and *Dolan* v. *City of Tigard*, 512 U. S. 374, required the County to make an individualized determination that the fee imposed on him was necessary to offset traffic congestion attributable to his project. The courts below ruled against Sheetz based on their view that *Nollan* and *Dolan* apply only to permit conditions imposed on an ad hoc basis by administrators, not to a fee like this one imposed on a class of property owners by Board-enacted legislation. 84 Cal. App. 5th 394, 402, 300 Cal. Rptr. 3d 308, 312.

Held: The Takings Clause does not distinguish between legislative and administrative land-use permit conditions. Pp. 4–11.

(a) When the government wants to take private property for a public purpose, the Fifth Amendment's Takings Clause requires the government to provide the owner "just compensation." The Takings Clause saves individual property owners from bearing "public burdens which, in all fairness and justice, should be borne by the public as a

whole." *Armstrong* v. *United States*, 364 U. S. 40, 49. Even so, the States have substantial authority to regulate land use, see *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, and a State law that merely restricts land use in a way "reasonably necessary to the effectuation of a substantial government purpose" is not a taking unless it saps too much of the property's value or frustrates the owner's investment-backed expectations. *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104, 123, 127. Similarly, when the government can deny a building permit to further a "legitimate police-power purpose," it can also place conditions on the permit that serve the same end. *Nollan*, 483 U. S., at 836. For example, if a proposed development will "substantially increase traffic congestion," the government may condition the building permit on the owner's willingness "to deed over the land needed to widen a public road." *Koontz* v. *St. Johns River Water Management Dist.*, 570 U. S. 595, 605. But when the government withholds or conditions a building permit for reasons unrelated to its legitimate land-use interests, those actions amount to extortion. See *Nollan*, 483 U. S., at 837.

The Court's decisions in *Nollan* and *Dolan* address the potential abuse of the permitting process by setting out a two-part test modeled on the unconstitutional conditions doctrine. See *Perry* v. *Sindermann*, 408 U. S. 593, 597. First, permit conditions must have an "essential nexus" to the government's land-use interest, ensuring that the government is acting to further its stated purpose, not leveraging its permitting monopoly to exact private property without paying for it. See *Nollan*, 483 U. S., at 837, 841. Second, permit conditions must have "rough proportionality" to the development's impact on the land-use interest and may not require a landowner to give up (or pay) more than is necessary to mitigate harms resulting from new development. See *Dolan*, 512 U. S., at 391, 393; *Koontz*, 570 U. S., at 612–615. Pp. 4–6.

(b) The County's traffic impact fee was upheld below based on the view that the *Nollan*/*Dolan* test does not apply to monetary fees imposed by a legislature, but nothing in constitutional text, history, or precedent supports exempting legislatures from ordinary takings rules. The Constitution provides "no textual justification for saying that the existence or the scope of a State's power to expropriate private property without just compensation varies according to the branch of government effecting the expropriation." *Stop the Beach Renourishment, Inc.* v. *Florida Dept. of Environmental Protection*, 560 U. S. 702, 714 (plurality opinion). Historical practice similarly shows that legislation was the conventional way that governments at the state and national levels exercised their eminent domain power to obtain land for various governmental purposes, and to provide compensation to dispossessed landowners. The Fifth Amendment enshrined this long

standing practice. Precedent points the same way as text and history. A legislative exception to the *Nollan*/*Dolan* test "conflicts with the rest of [the Court's] takings jurisprudence," which does not otherwise distinguish between legislation and other official acts. *Knick* v. *Township of Scott*, 588 U. S. 180, 185. That is true of precedents involving physical takings, regulatory takings, and the unconstitutional conditions doctrine which underlies the *Nollan*/*Dolan* test. Pp. 7–10.

(c) As the parties now agree, conditions on building permits are not exempt from scrutiny under *Nollan* and *Dolan* just because a legislative body imposed them. Whether a permit condition imposed on a class of properties must be tailored with the same degree of specificity as a permit condition that targets a particular development is an issue for the state courts to consider in the first instance, as are issues concerning whether the parties' other arguments are preserved and how those arguments bear on Sheetz's legal challenge. Pp. 10–11.

84 Cal. App. 5th 394, 300 Cal. Rptr. 3d 308, vacated and remanded.

BARRETT, J., delivered the opinion for a unanimous Court. SOTOMAYOR, J., filed a concurring opinion, in which JACKSON, J., joined. GORSUCH, J., filed a concurring opinion. KAVANAUGH, J., filed a concurring opinion, in which KAGAN and JACKSON, JJ., joined.

SUPREME COURT OF THE UNITED STATES

No. 22–1074

GEORGE SHEETZ, PETITIONER *v.* COUNTY OF EL DORADO, CALIFORNIA

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, THIRD APPELLATE DISTRICT

[April 12, 2024]

JUSTICE BARRETT delivered the opinion of the Court.

George Sheetz wanted to build a small, prefabricated home on his residential parcel of land. To obtain a permit, though, he had to pay a substantial fee to mitigate local traffic congestion. Relying on this Court's decisions in *Nollan* v. *California Coastal Comm'n*, 483 U. S. 825 (1987), and *Dolan* v. *City of Tigard*, 512 U. S. 374 (1994), Sheetz challenged the fee as an unlawful "exaction" of money under the Takings Clause. The California Court of Appeal rejected that argument because the traffic impact fee was imposed by legislation, and, according to the court, *Nollan* and *Dolan* apply only to permit conditions imposed on an ad hoc basis by administrators. That is incorrect. The Takings Clause does not distinguish between legislative and administrative permit conditions.

I

A

El Dorado County, California is a rural jurisdiction that lies east of Sacramento and extends to the Nevada border. Much of the County's 1,700 square miles is backcountry. It

is home to the Sierra Nevada mountain range and the Eldorado National Forest. Those areas, composed mainly of public lands, are sparsely populated. Visitors from around the world use the natural areas for fishing, backpacking, and other recreational activities.

Most of the County's residents are concentrated in the west and east regions. In the west, the towns of El Dorado Hills, Cameron Park, and Shingle Springs form the outer reaches of Sacramento's suburbs. Placerville, the county seat, lies just beyond them. In the east, residents live along the south shores of Lake Tahoe. Highway 50 connects these population centers and divides the County into north and south portions.

In recent decades, the County has experienced significant population growth, and with it an increase in new development. To account for the new demand on public services, the County's Board of Supervisors adopted a planning document, which it calls the General Plan, to address issues ranging from wastewater collection to land-use restrictions.[1] The Board of Supervisors is a legislative body under state law, and the adoption of its General Plan is a legislative act. See Cal. Govt. Code Ann. §65300 *et seq.* (West 2024).

To address traffic congestion, the General Plan requires developers to pay a traffic impact fee as a condition of receiving a building permit. The County uses proceeds from these fees to fund improvements to its road system. The fee amount is determined by a rate schedule, which takes into account the type of development (commercial, residential, and so on) and its location within the County. The amount is not based on "the cost specifically attributable to the particular project on which the fee is imposed." 84 Cal. App. 5th 394, 402, 300 Cal. Rptr. 3d 308, 312 (2022).

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[1] See County of El Dorado Adopted General Plan, https://edcgov.us/Government/planning/Pages/adopted_general_plan.aspx.

B

George Sheetz owns property in the center of the County near Highway 50, which the General Plan classifies as "Low Density Residential."[2] Sheetz and his wife applied for a permit to build a modest prefabricated house on the parcel, with plans to raise their grandson there. As a condition of receiving the permit, the County required Sheetz to pay a traffic impact fee of $23,420, as dictated by the General Plan's rate schedule. Sheetz paid the fee under protest and obtained the permit. The County did not respond to his request for a refund.

Sheetz sought relief in state court. He claimed, among other things, that conditioning the building permit on the payment of a traffic impact fee constituted an unlawful "exaction" of money in violation of the Takings Clause. In Sheetz's view, our decisions in *Nollan* v. *California Coastal Comm'n*, 483 U. S. 825, and *Dolan* v. *City of Tigard*, 512 U. S. 374, required the County to make an individualized determination that the fee amount was necessary to offset traffic congestion attributable to his specific development. The County's predetermined fee schedule, Sheetz argued, failed to meet that requirement.

The trial court rejected Sheetz's claim and the California Court of Appeal affirmed. Relying on precedent from the California Supreme Court, the Court of Appeal asserted that the *Nollan*/*Dolan* test applies only to permit conditions imposed "'on an individual and discretionary basis.'" 84 Cal. App. 5th, at 406, 300 Cal. Rptr. 3d, at 316 (quoting *San Remo Hotel L. P.* v. *City and Cty. of San Francisco*, 27 Cal. 4th 643, 666–670, 41 P. 3d 87, 102–105 (2002)). Fees imposed on "a broad class of property owners through legislative action," it said, need not satisfy that test. 84 Cal. App.

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[2] See Figure LU–1: Land Use Diagram, https://edcgov.us/government/planning/adoptedgeneralplan/figures/documents/LU-1.pdf.

5th, at 407, 300 Cal. Rptr. 3d, at 316. The California Supreme Court denied review.

State courts have reached different conclusions on the question whether the Takings Clause recognizes a distinction between legislative and administrative conditions on land-use permits.[3] We granted certiorari to resolve the split. 600 U. S. ___ (2023).

II

A

When the government wants to take private property to build roads, courthouses, or other public projects, it must compensate the owner at fair market value. The just compensation requirement comes from the Fifth Amendment's Takings Clause, which provides: "nor shall private property be taken for public use, without just compensation." By requiring the government to pay for what it takes, the Takings Clause saves individual property owners from bearing "public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U. S. 40, 49 (1960).

The Takings Clause's right to just compensation coexists with the States' police power to engage in land-use planning. (Though at times the two seem more like in-laws than soulmates.) While States have substantial authority to regulate land use, see *Village of Euclid* v. *Amber Realty Co.*, 272 U. S. 365 (1926), the right to compensation is triggered if they "physically appropriat[e]" property or otherwise in-

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[3] Compare, *e.g.*, *Home Builders Assn. of Dayton and Miami Valley* v. *Beavercreek*, 89 Ohio St. 3d 121, 128, 729 N. E. 2d 349, 356 (2000); *Northern Ill. Home Builders Assn.* v. *County of Du Page*, 165 Ill. 2d 25, 32–33, 649 N. E. 2d 384, 389 (1995) (applying the *Nollan*/*Dolan* test to legislative permit conditions), with, *e.g.*, *St. Clair Cty. Home Builders Assn.* v. *Pell City*, 61 So. 3d 992, 1007 (Ala. 2010); *Home Builders Assn. of Central Ariz.* v. *Scottsdale*, 187 Ariz. 479, 486, 930 P. 2d 993, 1000 (1997) (following California's approach).

terfere with the owner's right to exclude others from it, *Cedar Point Nursery* v. *Hassid*, 594 U. S. 139, 149–152 (2021). That sort of intrusion on property rights is a *per se* taking. *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419, 426 (1982). Different rules apply to State laws that merely restrict how land is used. A use restriction that is "reasonably necessary to the effectuation of a substantial government purpose" is not a taking unless it saps too much of the property's value or frustrates the owner's investment-backed expectations. *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104, 123, 127 (1978); see also *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003, 1016 (1992) ("[T]he Fifth Amendment is violated when land-use regulation does not substantially advance legitimate state interests *or denies an owner economically viable use of his land*" (internal quotation marks omitted)).

Permit conditions are more complicated. If the government can deny a building permit to further a "legitimate police-power purpose," then it can also place conditions on the permit that serve the same end. *Nollan*, 483 U. S., at 836. Such conditions do not entitle the landowner to compensation even if they require her to convey a portion of her property to the government. *Ibid.* Thus, if a proposed development will "substantially increase traffic congestion," the government may condition the building permit on the owner's willingness "to deed over the land needed to widen a public road." *Koontz* v. *St. Johns River Water Management Dist.*, 570 U. S. 595, 605 (2013). We have described permit conditions of this nature as "a hallmark of responsible land-use policy." *Ibid.* The government is entitled to put the landowner to the choice of accepting the bargain or abandoning the proposed development. See R. Epstein, Bargaining With the State 188 (1993).

The bargain takes on a different character when the government withholds or conditions a building permit for rea-

sons unrelated to its land-use interests. Imagine that a local planning commission denies the owner of a vacant lot a building permit unless she allows the commission to host its annual holiday party in her backyard (in propertyspeak, granting it a limited-access easement). The landowner is "likely to accede to the government's demand, no matter how unreasonable," so long as she values the building permit more. *Koontz*, 570 U. S., at 605. So too if the commission gives the landowner the option of bankrolling the party at a local pub instead of hosting it on her land. See *id.*, at 612–615. Because such conditions lack a sufficient connection to a legitimate land-use interest, they amount to "an out-and-out plan of extortion." *Nollan*, 483 U. S., at 837 (internal quotation marks omitted).

Our decisions in *Nollan* and *Dolan* address this potential abuse of the permitting process. There, we set out a two-part test modeled on the unconstitutional conditions doctrine. See *Perry* v. *Sindermann*, 408 U. S. 593, 597 (1972) (government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests"). First, permit conditions must have an "essential nexus" to the government's land-use interest. *Nollan*, 483 U. S., at 837. The nexus requirement ensures that the government is acting to further its stated purpose, not leveraging its permitting monopoly to exact private property without paying for it. See *id.*, at 841. Second, permit conditions must have "'rough proportionality'" to the development's impact on the land-use interest. *Dolan*, 512 U. S., at 391. A permit condition that requires a landowner to give up more than is necessary to mitigate harms resulting from new development has the same potential for abuse as a condition that is unrelated to that purpose. See *id.*, at 393. This test applies regardless of whether the condition requires the landowner to relinquish property or requires her to pay a "monetary exactio[n]" instead of relinquishing the property. *Koontz,* 570 U. S., at 612–615.

B

The California Court of Appeal declined to assess the County's traffic impact fee for an essential nexus and rough proportionality based on its view that the *Nollan*/*Dolan* test does not apply to "legislatively prescribed monetary fees." 84 Cal. App. 5th, at 407, 300 Cal. Rptr. 3d, at 316 (internal quotation marks omitted). That was error. Nothing in constitutional text, history, or precedent supports exempting legislatures from ordinary takings rules.

The Constitution's text does not limit the Takings Clause to a particular branch of government. The Clause itself, which speaks in the passive voice, "focuses on (and prohibits) a certain 'act': the taking of private property without just compensation." *Knight* v. *Metropolitan Govt. of Nashville & Davidson Cty.*, 67 F. 4th 816, 829 (CA6 2023). It does not single out legislative acts for special treatment. Nor does the Fourteenth Amendment, which incorporates the Takings Clause against the States. On the contrary, the Amendment constrains the power of each "State" as an undivided whole. §1. Thus, there is "no textual justification for saying that the existence or the scope of a State's power to expropriate private property without just compensation varies according to the branch of government effecting the expropriation." *Stop the Beach Renourishment, Inc.* v. *Florida Dept. of Environmental Protection*, 560 U. S. 702, 714 (2010) (plurality opinion). Just as the Takings Clause "protects 'private property' without any distinction between different types," *Horne* v. *Department of Agriculture*, 576 U. S. 351, 358 (2015), it constrains the government without any distinction between legislation and other official acts. So far as the Constitution's text is concerned, permit conditions imposed by the legislature and other branches stand on equal footing.

The same goes for history. In fact, special deference for legislative takings would have made little sense historically, because legislation was the conventional way that

governments exercised their eminent domain power. Before the founding, colonial governments passed statutes to secure land for courthouses, prisons, and other public buildings. See, *e.g.*, 4 Statutes at Large of South Carolina 319 (T. Cooper ed. 1838) (Act of 1770) (Cooper); 6 Statutes at Large, Laws of Virginia 283 (W. Hening ed. 1819) (Act of 1752) (Hening). These statutes "invariably required the award of compensation to the owners when land was taken." J. Ely, "That Due Satisfaction May Be Made:" the Fifth Amendment and the Origins of the Compensation Principle, 36 Am. J. Legal Hist. 1, 5 (1992). Colonial practice thus echoed English law, which vested Parliament alone with the eminent domain power and required that property owners receive "full indemnification . . . for a reasonable price." 1 W. Blackstone, Commentaries on the Laws of England 139 (1768).

During and after the Revolution, governments continued to exercise their eminent domain power through legislation. States passed statutes to obtain private land for their new capitals and provided compensation to the landowners. See, *e.g.*, 4 Cooper 751–752 (Act of 1786); 10 Hening 85–87 (1822 ed.) (Act of 1779). At the national level, Congress passed legislation to settle the Northwest Territory, which likewise required the payment of compensation to dispossessed property owners. Northwest Ordinance of 1789, 1 Stat. 52. Two years later, the Fifth Amendment enshrined this longstanding practice. Against this background, it is little surprise that early constitutional theorists understood the Takings Clause to bind the legislature specifically. See, *e.g.*, 3 J. Story, Commentaries on the Constitution of the United States §1784, p. 661 (1833); 2 J. Kent, Commentaries on American Law 275–276 (1827). Far from supporting a deferential view, history shows that legislation was a prime target for scrutiny under the Takings Clause.

Precedent points the same way as text and history. A

legislative exception to the *Nollan*/*Dolan* test "conflicts with the rest of our takings jurisprudence," which does not otherwise distinguish between legislation and other official acts. *Knick* v. *Township of Scott,* 588 U. S. 180, 185 (2019). That is true of physical takings, regulatory takings, and the unconstitutional conditions doctrine in which the *Nollan*/*Dolan* test is rooted.

Start with our physical takings cases. We have applied the *per se* rule requiring just compensation to both legislation and administrative action. In *Loretto*, we held that a state statute effected a taking because it authorized cable companies to install equipment on private property without the owner's consent. 458 U. S., at 438. In *Horne*, we held that an administrative order effected a taking because it required farmers to give the Federal Government a portion of their crop to stabilize market prices. 576 U. S., at 361. The branch of government that authorized the appropriation did not matter to the analysis in either case. Nor should it have. As we have explained: "The essential question is not . . . whether the government action at issue comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree). It is whether the government has physically taken property for itself or someone else." *Cedar Point*, 594 U. S., at 149.

This principle is evident in our regulatory takings cases too. We have examined land-use restrictions imposed by both legislatures and administrative agencies to determine whether the restriction amounted to a taking. In *Pennsylvania Coal Co.* v. *Mahon*, we held a state statute effected a taking because it prohibited the owner of mineral rights from mining coal beneath the surface estate, thus depriving the mineral rights of practically all economic value. 260 U. S. 393, 414 (1922). And in *Palazzolo* v. *Rhode Island*, we remanded for the lower courts to determine whether an agency decision effected a taking when it denied the owner permission to build a beach club on the wetland portion of

his property but allowed him to build a home on the upland portion. 533 U. S. 606, 631 (2001). Here again, our decisions did not suggest that the outcome turned on which branch of government imposed the restrictions.

Excusing legislation from the *Nollan*/*Dolan* test would also conflict with precedent applying the unconstitutional conditions doctrine in other contexts. We have applied that doctrine to scrutinize legislation that placed conditions on the right to free speech, *Agency for Int'l Development* v. *Alliance for Open Society Int'l, Inc.*, 570 U. S. 205 (2013), free exercise of religion, *Sherbert* v. *Verner*, 374 U. S. 398 (1963), and access to federal courts, *Terral* v. *Burke Constr. Co.*, 257 U. S. 529 (1922), among others, *e.g.*, *Memorial Hospital* v. *Maricopa County*, 415 U. S. 250 (1974) (right to travel). Failing to give like treatment to legislative conditions on building permits would thus "relegat[e the just compensation requirement] to the status of a poor relation" to other constitutional rights. *Dolan*, 512 U. S., at 392.

In sum, there is no basis for affording property rights less protection in the hands of legislators than administrators. The Takings Clause applies equally to both—which means that it prohibits legislatures and agencies alike from imposing unconstitutional conditions on land-use permits.

III

The County no longer contends otherwise. In fact, at oral argument, the parties expressed "radical agreement" that conditions on building permits are not exempt from scrutiny under *Nollan* and *Dolan* just because a legislature imposed them. Tr. of Oral Arg. 4, 73–74. The County was wise to distance itself from the rule applied by the California Court of Appeal, because, as we have explained, a legislative exception to the ordinary takings rules finds no support in constitutional text, history, or precedent.

We do not address the parties' other disputes over the validity of the traffic impact fee, including whether a permit

condition imposed on a class of properties must be tailored with the same degree of specificity as a permit condition that targets a particular development. The California Court of Appeal did not consider this point—or any of the parties' other nuanced arguments—because it proceeded from the erroneous premise that legislative permit conditions are categorically exempt from the requirements of *Nollan* and *Dolan*. Whether the parties' other arguments are preserved and how they bear on Sheetz's legal challenge are for the state courts to consider in the first instance.

* * *

The judgment of the California Court of Appeal is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 22–1074

GEORGE SHEETZ, PETITIONER *v.* COUNTY OF EL DORADO, CALIFORNIA

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, THIRD APPELLATE DISTRICT

[April 12, 2024]

JUSTICE SOTOMAYOR, with whom JUSTICE JACKSON joins, concurring.

I join the Court's resolution of the limited question presented in this case, that conditions on building permits are "not exempt from scrutiny under *Nollan* and *Dolan* just because a legislature imposed them." *Ante*, at 10; see *Nollan* v. *California Coastal Comm'n*, 483 U. S. 825 (1987); *Dolan* v. *City of Tigard*, 512 U. S. 374 (1994). There is, however, an important threshold question to any application of *Nollan*/*Dolan* scrutiny: whether the permit condition would be a compensable taking if imposed outside the permitting context.

"A predicate for any unconstitutional conditions claim is that the government could not have constitutionally ordered the person asserting the claim to do what it attempted to pressure that person into doing." *Koontz* v. *St. Johns River Water Management Dist.*, 570 U. S. 595, 612 (2013). In the takings context, *Nollan*/*Dolan* scrutiny therefore applies only when the condition at issue would have been a compensable taking if imposed outside the permitting process. See *Koontz*, 570 U. S., at 612 ("[W]e began our analysis in both *Nollan* and *Dolan* by observing that if the government had directly seized the easements it sought to obtain through the permitting process, it would have committed a *per se* taking").

The question presented in this case did not include that antecedent question: whether the traffic impact fee would be a compensable taking if imposed outside the permitting context and therefore could trigger *Nollan*/*Dolan* scrutiny. The California Court of Appeal did not consider that question and the Court does not resolve it. See *ante,* at 10–11. With this understanding, I join the Court's opinion.

SUPREME COURT OF THE UNITED STATES

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[April 12, 2024]

JUSTICE GORSUCH, concurring.

George Sheetz sued El Dorado County, alleging that the county's actions violated the Takings Clause under the test this Court set forth in *Nollan* v. *California Coastal Comm'n*, 483 U. S. 825 (1987), and *Dolan* v. *City of Tigard*, 512 U. S. 374 (1994). State courts dismissed Mr. Sheetz's suit, holding that the *Nollan/Dolan* test applies only in challenges to administrative, not legislative, actions. Today, the county essentially confesses error, and the Court corrects the state courts' mistake. It does so because our Constitution deals in substance, not form. However the government chooses to act, whether by way of regulation "'or statute, or ordinance, or miscellaneous decree,'" it must follow the same constitutional rules. *Ante,* at 9 (quoting *Cedar Point Nursery* v. *Hassid*, 594 U. S. 139, 149 (2021)).

The Court notes but does not address a separate question: whether the *Nollan/Dolan* test operates differently when an alleged taking affects a "class of properties" rather than "a particular development." *Ante,* at 11. But how could it? To assess whether a government has engaged in a taking by imposing a condition on the development of land, the *Nollan/Dolan* test asks whether the condition in question bears an "'essential nexus'" to the government's land-use interest and has "'rough proportionality'" to a property's impact on that interest. *Ante,* at 6. Nothing about that test

depends on whether the government imposes the challenged condition on a large class of properties or a single tract or something in between. Once more, how the government acts may vary but the Constitution's standard for assessing those actions does not.

Our precedents confirm as much. In *Nollan*, the California Coastal Commission told the plaintiffs that they could build a home on their land only if they accepted an easement allowing public access across their property along the beach. The plaintiffs argued that the commission's demand amounted to a taking without just compensation, and the Court agreed. In doing so, the Court acknowledged that the commission hadn't singled out the plaintiffs' particular property for special treatment but "had similarly conditioned" dozens of other building projects. 483 U. S., at 829. It acknowledged, too, that the commission's demand of the plaintiffs came about only because of a "'comprehensive program'" demanding similar public access easements up and down the California coast. *Id.,* at 841. But none of that made any difference in the Court's analysis, the test it applied, or the conclusion it reached. All that mattered was whether the government's action amounted to an uncompensated taking of the property of the plaintiffs whose case was actually before the Court. *Id.,* at 838.

In *Dolan*, the Court faced a similar situation and reached a similar conclusion. There, an Oregon municipality conditioned a building permit on the plaintiff's agreement to dedicate part of her land to "flood control and traffic improvements." 512 U. S., at 377. No one suggested that the city had targeted the plaintiff's development for special treatment; everyone agreed that the city's challenged action was the result of a "comprehensive land use pla[n]," one developed to meet "statewide planning goals." *Ibid.* Even so, the Court held an "individualized determination" necessary to determine whether an unconstitutional taking had occurred under the same test the Court applied in *Nollan*.

512 U. S., at 393.

The logic of today's decision is entirely consistent with these conclusions. The Takings Clause, the Court stresses, is no "'poor relation' to other constitutional rights." *Ante,* at 10 (quoting *Dolan*, 512 U. S., at 392). And the government rarely mitigates a constitutional problem by multiplying it. A governmentally imposed condition on the freedom of speech, the right to assemble, or the right to confront one's accuser, for example, is no more permissible when enforced against a large "class" of persons than it is when enforced against a "particular" group. If takings claims must receive "like treatment," *ante,* at 10, whether the government owes just compensation for taking your property cannot depend on whether it has taken your neighbors' property too.

In short, nothing in *Nollan*, *Dolan*, or today's decision supports distinguishing between government actions against the many and the few any more than it supports distinguishing between legislative and administrative actions. In all these settings, the same constitutional rules apply. With that understanding, I am pleased to join the Court's opinion.

SUPREME COURT OF THE UNITED STATES

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[April 12, 2024]

JUSTICE KAVANAUGH, with whom JUSTICE KAGAN and JUSTICE JACKSON join, concurring.

I join the Court's opinion. I write separately to underscore that the Court has not previously decided—and today explicitly declines to decide—whether "a permit condition imposed on a class of properties must be tailored with the same degree of specificity as a permit condition that targets a particular development." *Ante*, at 10–11. Importantly, therefore, today's decision does not address or prohibit the common government practice of imposing permit conditions, such as impact fees, on new developments through reasonable formulas or schedules that assess the impact of classes of development rather than the impact of specific parcels of property. Moreover, as is apparent from the fact that today's decision expressly leaves the question open, no prior decision of this Court has addressed or prohibited that longstanding government practice. Both *Nollan* and *Dolan* considered permit conditions tailored to specific parcels of property. See *Dolan* v. *City of Tigard*, 512 U. S. 374, 379–381, 393 (1994); *Nollan* v. *California Coastal Comm'n*, 483 U. S. 825, 828–829 (1987). Those decisions had no occasion to address permit conditions, such as impact fees, that are imposed on permit applicants based on reasonable formulas or schedules that assess the impact of classes of development.

American College of Real Estate Lawyers

Short-Term Rentals:
Risks and Rewards to Consider in Counseling Clients

Dwight H. Merriam
Of the Hartford, Connecticut Bar

The Gig Economy

Short-term rentals (STR), most notably exemplified by Airbnb, are part and parcel of the gig economy. The gig economy, as described in a recent Forbes article, is:

> [A] term that refers to the increased tendency for businesses to hire independent contractors and short-term workers, and the increased availability of workers for these short-term arrangements. Due in part to the popularity of the internet (and with it, the capability for remote work) and in part due to the nature of new apps like Uber and Airbnb (which give more power to independent contractors and open up new opportunities for gig-based work), the gig economy has flourished in recent years.[1]

The power of independent contractors is all about economics, just as the keystone to President Bill Clinton's 1992 campaign was the slogan James Carville dreamed up: "it's the economy, stupid." For all of us in the world of real estate today, thanks to the entirely new perspective brought to us by the Millennials, who have a much different relationship with things and owning than prior generations had, our theme must now be "it's the sharing economy, stupid." It is called variously collaborative consumption, the peer economy, and the sharing economy. More than half of the Millennials have used sharing services. It is permeating our daily lives in many ways.

This article is based in part on research in 2014 and 2015, published as an article: Merriam, D., "Peering into the Peer Economy: Short-Term Rental Regulation." American Planning Association, *Zoning Practice*, October 2015. Much has changed since then, with the issue for real estate lawyers spreading out over a much broader landscape. The challenges in counseling clients are many, because the operations are typically small scale and there is little precedent in many areas.

[1] L. Alton, Why The Gig Economy Is The Best And Worst Development For Workers Under 30, Forbes, Jan. 24, 2018. https://www.forbes.com/sites/larryalton/2018/01/24/why-the-gig-economy-is-the-best-and-worst-development-for-workers-under-30/#129e0f006d76 see also N. Heller, Is the Gig Economy Working? The New Yorker, January 15, 2017. https://www.newyorker.com/magazine/2017/05/15/is-the-gig-economy-working

This new ethic about our relationship to all manner of objects, to transportation, to where we bed down, and even to other people, has taken us away from owning and exclusively using, to not owning, not possessing, and not using alone. While our focus here is on STR, it helps to see where STR fits the larger context.

Ridesharing Revolution

We see the sharing economy in three broad spheres – transportation, goods and services, and housing. Transportation may be the most obvious and most pervasive. Millennials own fewer automobiles than other age cohorts. The AAA Foundation for Traffic Safety reports that Millennials purchased almost 30 percent fewer cars from 2007 to 2011. Why? Because they use short-term car rentals, public transportation, and ridesharing. They are less likely to get drivers licenses. One-third of Millennials 16-24 years old do not have a driver's license, the lowest percentage in over 50 years. At the same, so we don't get too carried away with this trend, as the Millennials age they will buy more cars. Forty-three percent said they are likely to buy a car in the next five years.[2] The trend is shifting slightly in favor of more vehicle ownership as we have come out of the recession and Millennials have aged into the time in their lives when they have families.[3] Still, the attitude shift away from driving has been remarkable, as reported in a comprehensive study in 2014.[4]

Ridesharing as a generic term encompasses short-term rentals, making your car available to others, sharing rides, and driving or riding in the Uber-style taxi-like service.

Instead of owning a car, you can rent one on a short-term basis from Zipcar,[5] and car2go in Austin, Columbus, Denver, New York City, Portland, Seattle, Washington, Calgary, Montreal, Toronto, and Vancouver.[6] Why own a car when you can conveniently pick one up curbside and use it for a short-term?

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[2] Millennials Don't Care About Owning Cars, And Car Makers Can't Figure Out Why, Fast Company, March 26, 2014. https://www.fastcompany.com/3027876/millennials-dont-care-about-owning-cars-and-car-makers-cant-figure-out-why

[3] How Ride Sharing is Eclipsing Millennial Car-Ownership, Millennial, September 26, 2017. https://millennialmagazine.com/2017/09/26/how-ride-sharing-is-eclipsing-millennial-car-ownership/

[4] Millennials in Motion Changing Travel Habits of Young Americans and the Implications for Public Policy, U.S. PIRG, October 2014, https://uspirg.org/sites/pirg/files/reports/Millennials%20in%20Motion%20USPIRG.pdf

[5] https://www2.zipcar.com/ a subsidiary of Avis Budget Group.

[6] https://www.car2go.com/US/en/

AAA has seen the light and is reported to be developing its own ridesharing program, Gig Car share. It is a one-way car-sharing service, with a start up in San Francisco. Users can take a car one-way in the region and drop it off in a so-called HomeZone.[7]

Sharing a ride and splitting the cost is made easier with services like Zimride by Enterprise Rent-A-Car, which links drivers with riders at universities and businesses.[8] The boomers among you will remember the rideshare bulletin boards on campus. Same thing.

Got a car, not getting much use out of it, and interested in making some money? You can make it available to others on a short-term basis through peer-to-peer car sharing services like Getaround, which presently operates in Portland, San Francisco, Berkeley, Washington, DC, San Diego, Austin, and Chicago.[9] They will rent your car for you while you are away. Cars are covered with a $1 million policy and Getaround even cleans it for you. Turo connects neighbors to let them rent cars by the hour or the day. The company claims over 800 models of cars that rent at 35% less than conventional rentals. You can even do it for boats with Boatsetter.[10] With the help of Spinlister, you can connect with others and rent a bicycle, surfboard, or snowboard.[11]

Want to make some money by driving others around in your car, or are you a rider who wants to be driven? Just about everyone has heard of Uber, the leader in this form of ridesharing, which includes other services like Lyft and now HopSkipDrive for ferrying children around:

> We wouldn't trust our kids with just anyone, and neither should you. That's why we developed a solution that makes scheduling rides with experienced caregivers easy and convenient, with built-in stringent safety features to give you real peace of mind. We fingerprint every CareDriver, monitor every ride in real time, and you can follow along on your app too.[12]

And we have Roadie delivering packages, claiming "over 80,000 pre-screened, verified drivers across all 50 states …in more than 9,000 cities nationwide — a larger footprint than Amazon Prime."[13] Wireless communications, the Internet, and smart phones have made ridesharing and

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[7] Commentary: End of the road for car ownership? It starts with AAA's car-sharing, Orlando Sentinel, June 8, 2017. http://www.orlandosentinel.com/opinion/os-ed-future-without-cars-begins-with-car-sharing-aaa-interview-20170608-story.html

[8] https://zimride.com/

[9] https://www.getaround.com

[10] https://www.boatsetter.com

[11] https://www.spinlister.com

[12] https://www.hopskipdrive.com

[13] https://www.roadie.com

delivery services possible. This is a big deal. Lyft is worth $11 billion[14] and Uber is valued at $72 billion[15] (not a typo; more than FedEx and 405 companies in the S&P 500). Do you want to be a driver but don't have a car? You can rent one from HyerCar just for that purpose or list your own car with them for some passive income.[16]

Goods and Services Peer-to-Peer

Beyond transportation the sharing economy extends to relationships between people and service providers. There is peer-to-peer or collaborative consumption through services like TaskRabbit with 60,000 workers[17] and Skillshare with access to over 21,000 lessons[18] which provide help, paid or bartered, or sometimes free. Instacart will grocery shop for you and claims it will deliver to your door in an hour. You can be a shopper and delivery person for them, making up to $25 an hour.[19]

There are services to connect workers with those needing help. If you live in Denver, Kansas City, Minneapolis or Northern Virginia, Zaarly seeks to create a marketplace to help small business home service workers connect with homeowner.[20]

There seems no end to the sharing. Fon, touting over 35 million members, lets you share your home WiFi in exchange for access. The Lending Club connects borrowers and investors enabling, so they say, better rates than credit cards and more return for lenders than what banks offer.[21] Over $35 billion has been borrowed by over 2.4 million customers since it started in July 2007, with investors earning a median of 4%.[22] Poshmark lets you show your unneeded fashion clothing in a virtual closet and get linked with people who share your sense of style. You can even share your dog, or become a sitter, with DogVacay and Rover helping you find a local dog sitter to care for your dog at your home or theirs.

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[14] Lyft Valued at $11B After Alphabet Investment, Bloomberg, October 19, 2018. https://www.bloomberg.com/news/videos/2017-10-19/alphabet-funding-pushes-lyft-value-to-11-billion-video

[15] Uber's latest valuation: $72 billion, Recode, February 9, 2018. https://www.recode.net/2018/2/9/16996834/uber-latest-valuation-72-billion-waymo-lawsuit-settlement

[16] https://www.hyrecar.com

[17] https://www.taskrabbit.com

[18] https://www.skillshare.com

[19] https://www.instacart.com ; for insights into what this job entails, see https://www.indeed.com/cmp/Instacart/reviews?fjobtitle=Personal+Shopper

[20] https://www.zaarly.com

[21] www.lendingclub.com

[22] www.lendingclub.com/info/statistics-performance.action

The power of the internet in facilitating collaborative consumption was probably best evidenced first when eBay and craigslist provided an on-line marketplace never experienced before. Today, we have web-based services like Freecycle where people can post things they don't want, the remnants of our overconsumption, and others can take that flotsam and jetsam for free. Yes, for free. It solves the donor's solid waste disposal problem and provides free goods for the takers.

Sharing the Roof over Our Heads

That brings us to the gig economy subject matter of greatest interest to real estate lawyers -- the sharing of space. Maybe it began with the sale of timeshares in the U.S. in 1974. The fractional interests proved difficult to sell. Short-term vacation rentals emerged as a better way for linking property owners with vacationers through companies like HomeAway and its numerous related entities, claiming over 2 million listings in 190 countries.[23] Flip Key, part of TripAdvisor Rentals, has 830,000 properties in 190 countries, and does much the same.[24]

But Airbnb goes beyond vacation rentals. You can rent a room for a night, a whole house, an apartment for your exclusive use for a week, a British castle (Airbnb says it has 1,400+ castles), a tipi for $45/night,[25] an igloo,[26] a caboose,[27] or a treehouse in New York ($195 a night)[28] if you wish. Maybe try hippy camping at $15/night in New Sweden, Maine.[29] You can even use Airbnb to store your luggage near JFK/LGA at $10/night.[30]

The company, originally "AirBed & Breakfast", was founded in 2008 by Brian Chesky, Joe Gebbia, and later Nathan Blecharczyk. It began when Chesky and Gebbia, to help pay their rent, rented sleeping accommodations on three air mattresses in their San Francisco apartment living room and made breakfast for the guests. The company is now worth $3 billion and joins the ranks of the rest of the great ideas we all note with "I wished I had thought of that."[31]

True to its origins, Airbnb notes on its website that you can also rent a shared room:

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[23] www.homeaway.com
[24] www.flipkey.com
[25] www.airbnb.com/rooms/4615980
[26] www.airbnb.com/rooms/9386477
[27] www.airbnb.com/rooms/7846081
[28] www.airbnb.com/rooms/13460229
[29] www.airbnb.com/rooms/13169691
[30] www.airbnb.com/rooms/16579094
[31] www.investopedia.com/articles/investing/112414/how-airbnb-makes-money.asp

> Shared rooms are for when you don't mind sharing a space with others. When you book a shared room, you'll be sleeping in a space that is shared with others and share the entire space with other people. Shared rooms are popular among flexible travelers looking for new friends and budget-friendly stays.[32]

Good or Bad?

Are short-term rentals good or bad for your real estate clients and your community? Like so many things, it depends.

-Affordable Housing

There is an unresolved debate over whether STRs promote or reduce affordable housing. The argument on the side of promoting affordability is that STRs increase the stock of available housing, particularly for furnished, short-term accommodations. Because many of the rentals are essentially house sharing by renting a room in an owner-occupied dwelling, they are inexpensive. They benefit the homeowner by providing some additional income. The same goes for long-term tenants who also host STR guests. This income enables people to stay in the homes they own and for long-term tenants to pay their rent.

One example of how this can work is described in a Fast Company article about Nesterly,[33] a web-based operation that matches people for multi-generational living.[34] The article describes one example of the arrangement:

> Brenda Atchison's home in the Boston suburb of Roxbury has been in her family since 1946, and she's lived there for nearly her entire life. At 66 years old, she's an empty nester–she describes her house as rooms that are collecting dust. But expenses are rising and her ability to earn is dwindling. She knew she wanted to stay in her home, but she wasn't sure how to host someone to bring in some extra cash.
>
> Then she heard of Nesterly. The brainchild of Noelle Marcus and Rachel Goor, two recent graduates of MIT's masters program in urban planning, it's a simple enough idea: You match younger people who need affordable housing with older adults who charge affordable prices–including help around the house–for the extra rooms of their homes.

[32] www.airbnb.com/help/article/5/what-does-the-room-type-of-a-listing-mean
[33] https://www.nesterly.io
[34] "The Airbnb for Affordable Housing Is Here," Fast Company, November 21, 2017. www.fastcompany.com/90151804/the-airbnb-for-affordable-housing-is-here

Nesterly describes what it provides:

> Nesterly is a trusted service for intergenerational homesharing.
>
> We connect households with spare space to younger people seeking a place to stay for over a month. In a twist that's unique to Nesterly, young people can also exchange help around the house for lower rent.
>
> With Nesterly, you can:
>
> Make Money
> Turn your spare room into monthly income
> Get help around the house
> Find someone happy to help you with those pesky chores
> Build New Friendships
> Connect with interesting people from another generation

This does sound good and almost certainly will be mutually-beneficial to young and old households seeking shelter in expensive housing markets. An internet search, however, reveals no scholarly studies with any empirical analysis.

A hybrid approach to multi-generational house sharing is to retrofit established neighborhoods with accessory dwelling units (ADUs). Accessory apartments can increase density in terms of dwelling units per acre and provide smaller units more fitting for households today, all in the context of older neighborhoods with houses that are physically, functionally, and economically obsolescent.[35] But the literature suggest a mixed result with ADUs. The Portland Tribune reports that ADUs can be affordable, but that 25% of the ADUs there are used for higher-priced short-term rentals.[36] Some communities are now limiting short-term rental of ADUs to preserve affordability.[37]

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[35] L. Bliss, "Portland's 'Granny Flats' Get an Affordable Boost," CityLab, March 12, 2018. www.citylab.com/equity/2018/03/portlands-granny-flats-get-an-affordable-boost/555083/ ; "Do ADUs Provide Affordable Housing?" Accessory Dwellings, undated. https://accessorydwellings.org/2014/08/07/do-adus-provide-affordable-housing/

[36] S. Law, "ADUs often more affordable, except when short-term rentals," Portland Tribune, July 2, 2018. https://portlandtribune.com/pt/9-news/399876-294987-adus-often-more-affordable-except-when-short-term-rentals-

[37] P. Hastings, "Accessory dwelling units: Housing help or hazard?: Supporters say 'granny flats' could help ease dwelling crunch; others fear degradation of neighborhoods," The Columbian, June 25, 2017. www.columbian.com/news/2017/jun/25/accessory-dwelling-units-housing-help-or-hazard/

One possible negative is that by providing an alternative to long-term affordable housing in a community, STRs may decrease demand for that housing and create a problem where occupancy levels for existing affordable housing are lower than desired. The availability of Airbnb rentals is not permanent and cannot be a long-term solution to affordability. The mix of Airbnb units is also not likely to meet the mix of affordable units needed. There is nothing in the literature that appears to support the notion that STRs decrease demand for affordable housing.

On the negative side, expressing concern about the adverse effects on affordability, is a recent study by the Jane Place Neighborhood Sustainability Initiative in New Orleans finding, for that city, that:

> [T]he City's approach to STR regulation accelerates gentrification and the displacement of residents by permitting the limitless removal of homes from the housing market for conversion into STRs and ignoring the inflation of overall housing costs to which STRs contribute.[38]

The Jane Place Neighborhood Sustainability Initiative is an advocacy organization which describes itself as:

> [A] ten-year old Community Land Trust (CLT) and housing rights organization committed to creating sustainable, democratic, and economically-just neighborhoods and communities in New Orleans. We work to transform unjust housing policies, discriminatory practices, and predatory development schemes by engaging in strategies that create permanently-affordable housing, expand housing security, and uphold equitable housing patterns and land-use planning. We are celebrating our tenth anniversary with a series of programs and projects of which this report is a part.

The report details these findings as to New Orleans:

> *The Dominance of Whole-Home Rentals*
>
> Eighty-two percent of Airbnb listings are for whole-homes, single units of housing as opposed to accommodations within an operator's residence, with the average of such listings being available 174 nights per year. Most Airbnb listings are exclusively used as vacation housing for tourists, as the units are off-market for over half of the year and, therefore, unavailable to residents.

[38] www.documentcloud.org/documents/4421169-Short-Term-Rentals-Long-Term-Impacts-the.html; see also www.bizneworleans.com/March-2018/Housing-Rights-Organization-To-Release-Report-On-Impacts-Of-Short-Term-Rentals

Single Operators with Multiple Listings

Large-scale STR operators, many of whom are based outside of New Orleans, are essentially running scattered-site hotels. Just over 16% of STR operators control nearly half of all permitted STRs in the city. Administrative flaws allow STR operators to register permits under different names or the names of employees, making it difficult for the City or independent researchers to track their footprint within the market.

The Oversaturation of STRs in Residential Neighborhoods

City Council has placed no limits on the number of rooms or homes per block that can be converted into full- or part-time STRs, leading to extreme concentrations of STRs in certain blocks, particularly in neighborhoods that are close to amenities that tourists want but residents need, such as access to public transportation, public parks and greenspace, and the restaurants and bars of the French Quarter that provide thousands of jobs for residents. Over the past two years, the geographic concentration of STRs has shifted away from neighborhoods more commonly associated with tourism (such as the French Quarter and the Marigny), towards the CBD and many working-class Black neighborhoods that are close to downtown, particularly the Seventh Ward, Treme, and Central City.

STRs are capitalizing on and contributing to the displacement of Black communities, making it more difficult for families to remain in or return to their neighborhoods as more and more housing units are dedicated away from housing and towards tourist use, causing overall housing prices for both renters and homeowners in the neighborhood to rise.

The Inflation of Overall Housing Costs

The proliferation of whole-home rentals in residential and commercially-zoned neighborhoods is making it more difficult for families to return to or remain in their neighborhoods as more housing units are dedicated away from residents and towards tourist use, causing overall housing prices to rise. Rent has increased in the nine neighborhoods with the highest concentration of STRs, including rent increases of 30% for a two-bedroom unit in the Seventh Ward, a 27.95% increase in a two bedroom in MidCity, and a 71.93% increase for a three-bedroom unit in Bywater.

The Prioritization of Tourists over Residents

> The City's STR policy offers property owners a high economic incentive to remove housing from the residential market in order to offer it to tourists who, attracted to the year-round festivals and other event calendar, will pay many times more per night than the resident laborers who provide services. The policy included measures that the City claimed would offset the impact of STRs by exacting $1.00 per rental night from Airbnb alone for affordable housing development. Airbnb reported that between January 1 and September 30, 2017 only $230,000 in funding for affordable housing was generated through legal STRs - enough for one unit of housing to be produced.

A similar view that STRs adversely affect affordability in Los Angeles is offered in a law review article:

> Airbnb likely reduces the affordable housing supply by distorting the housing market in two interconnected mechanisms. The first such mechanism is one of simple conversion: any housing unit that was previously occupied by a city resident, but is now listed on Airbnb year round, is a unit that has been removed from the rental market and has essentially been added to Los Angeles's supply of hotel rooms. This leads to a real, but likely mild, increase in citywide rents, an effect that is concentrated in affluent or gentrifying neighborhoods along the city's central core. More disconcertingly, conversion reduces Los Angeles's already-limited supply of affordable housing. The second mechanism is "hotelization." So long as a property owner or leaseholder can rent out a room on Airbnb for cheaper than the price of a hotel room, while earning a substantial premium over the residential market or rent-controlled rent, there is an overpowering incentive to list each unit in a building on Airbnb rather than rent to Los Angeles residents, thereby creating "cottage hotels." This decreases the supply of housing and spurs displacement, gentrification, and segregation.[39]

On the other hand (and isn't there almost always an "on the other hand" when it comes to real estate?), some argue there is no impact on affordability. Zillow Research surveyed 111 experts and only 5% said they believed STRs have a large impact on affordability.[40]

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[39] D. Lee, How Airbnb Short-Term Rentals Exacerbate Los Angeles's Affordable Housing Crisis: Analysis and Policy Recommendations, 10 Harvard Law & Policy Review 230, February 2, 2016. http://blogs.ubc.ca/canadianliteratureparkinson/files/2016/06/How-Airbnb-Short-term-rentals-disrupted.pdf

[40] C. Hopkins, Experts: Short-Term Home Rentals Have Little to No Impact on Housing Affordability, December 6, 2016, https://www.zillow.com/research/short-term-home-rentals-zhpe-13927/. See also Zillow Research, Press Releases, Experts: Short-Term Home Rentals Have Little to No Impact on Housing Affordability December 6, 2016. http://zillow.mediaroom.com/2016-12-06-Experts-Short-Term-Home-Rentals-Have-Little-to-No-Impact-on-Housing-Affordability

The problem seems to be focused on the renting of entire affordable homes or units, taking those out of the market. Austin has attempted to address this by regulation prohibiting and phasing out by 2022 all STRs of dwellings where the owner is not on site. The state is challenging the ban. The Texas Attorney General says the ban: "[takes] away its citizens' property right to lease their homes as they see fit." [41]

-Aging in Place

Short-term rentals of rooms in homes and apartments not only generate additional revenue for those aging in place but they provide an opportunity for sharing of chores and bartering for services. This can enable older people to stayhome longer before transitioning to an independent or assisted living facility. AARP cites with approval an Airbnb report on how aging in place can be facilitated by STR:[42]

> The key findings of this report
>
> As Americans age, housing cost burdens can become excessive.
>
> > Older Americans experience a median household income drop of 25 percent upon reaching age 65, compared to their income at ages 55-64. Income drops another 37 percent for adults over age 75.
> >
> > With this drop in income, housing burdens rise. A typical family's monthly mortgage payment of $1,500 represents 49 percent of income for American adults age 65 to 75, and an astounding 63 percent of income for adults over age 75.
> >
> > On average, severely cost-burdened households—those spending more than half their income on housing—spend 43 percent less on food and 59 percent less on healthcare than less cost-burdened peers.
> >
> > As America ages, housing costs will burden an ever-widening swath of the population.

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[41] Widner, C., State challenges Austin's short-term rental laws
Texas AG takes aim in appeals court, CurbedAustin, April 2, 2018.
https://austin.curbed.com/2018/4/2/17189530/austin-short-term-rental-laws-suit

[42] https://www.aarp.org/livable-communities/housing/info-2016/home-sharing-report.html; Report: Home Sharing: A Powerful Option To Help Older Americans Stay In Their Homes, November 21, 2016
https://www.aarp.org/content/dam/aarp/livable-communities/documents-2016/Airbnb-HomeSharing-OlderAmericans-Report-11-2016.pdf

Supplemental income from home sharing can make the difference between whether aging in place is affordable or a financial hardship. The average American Airbnb host over the age of 65 earns $8,350 in supplemental income annually for a single listing. For the typical host, this income could:

> [L]ower housing/mortgage costs from 49 percent of gross income to an affordable 26 percent of income. ○ represent a full 52-percent increase over typical Social Security fixed income. ○ cover more than two years' worth of real estate taxes, repairs, insurance and other housing expenses.

Older Americans are embracing home sharing at record rates.

> Hosts aged 60 and older have earned a collective $747 million from home sharing on Airbnb.
>
> The fastest-growing age demographic of US Airbnb hosts is people age 60 or over.
>
> Older women hosts in particular are growing faster than any other Airbnb host demographic and are rated the best Airbnb hosts in the US.
>
> > 63 percent of US Airbnb trips hosted by older women resulted in a 5-star review.
>
> Older Americans report both financial and social benefits data from home sharing.
>
> > 58 percent of older adults report that income from Airbnb hosting has helped them stay in their homes.
> >
> > 13 percent report that hosting has helped them avoid foreclosure.
> >
> > 35 percent report that hosting has helped them avoid eviction.
> >
> > 64 percent of older adults report that hosting has positively changed the way they think, and 45 percent say that hosting has positively affected the way they interact with their community.

AARP offers this guidance in addition:

The benefits of home sharing and the ability to be a host can vary by individual and community.

Hosting can have tax implications for the hosts and some cities do regulate or prohibit short-term home share rentals operated by commercial entities or properties in which the owner does not reside.

Also, hosting is work. A host should be able to provide clean, well-maintained accommodations.

Hosts also need to be mindful of their own safety and security and that of their guests.

-Commercial Lodging

The only possible benefit of STRs with regard to existing commercial lodging is that it may stimulate competition and lower prices for the consumer. The negatives are several. Short-term rentals may reduce commercial lodging revenues.[43] In many situations STRs have an advantage over commercial lodging because STRs sometimes do not pay the occupancy tax paid by commercial lodging. One report is that less than 15% of STR hosts in Austin pay hotel taxes.[44] Short-term rentals generally do not need the service workers employed in commercial lodging. Unions and service workers often oppose STRs.[45]

-State and Local Government

[43] Showley, R., Rise of short-term rentals: Will hotels suffer? The Sand Diego Union-Tribune, November 11, 2016. www.sandiegouniontribune.com/business/economy/sd-fi-econometer13nov-20161110-htmlstory.html

[44] Dimmick, I., Fewer Than 15% of SA Short-Term Rental Owners Pay Hotel Taxes, The Rivard Report, April 24, 2018. https://therivardreport.com/fewer-than-15-of-sa-short-term-rental-owners-pay-hotel-taxes/

[45] In Los Angeles, Unite Here Local 11, the service industry union, advocated for regulation of short-term rentals, ostensibly on the issue of the impact on affordability, but it was suspected that the union had other interest in mind:

> In a statement to Curbed, Airbnb spokesperson Charlie Urbancic agreed that the city's short-term rental industry requires regulation, but suggested union leaders may have ulterior motives for pushing the city to adopt restrictions.
>
> "We ... don't support the notion that hotel industry front groups should determine how thousands of Angelenos use their homes to pay the bills," said Urbancic.

Chiland, E., Protestors ask city to crack down on Airbnb rentals: A local labor union says short-term rental sites are taking away affordable apartments, L.A. Curbed, March 8, 2018 https://la.curbed.com/2018/3/8/17096772/los-angeles-airbnb-rules-protests

Revenues to state and local government may go down as a result of STRs because, as noted, such rentals usually do not pay the occupancy and other taxes levied on commercial lodging. In Massachusetts, for example, the uncollected taxes are estimated at over $18 million annually.[46] Airbnb does provide 1099 forms to hosts to report their income and it has begun collecting and remitting hotel and tourist taxes in over 400 municipalities and other jurisdictions worldwide.[47]

-Health and Safety

Much of the STR market today is unregulated. Those who rent typically do not have their premises inspected to determine compliance with health, building, housing, and safety codes. The Commonwealth of Massachusetts Department of Public Health "has determined that lodging provided through Airbnb or similar online services is subject to local licensure or permitting as a lodging house or bed and breakfast in the same manner as traditional lodging houses and bed and breakfast establishments are licensed or permitted."[48] Airbnb recognizes this possibility full well and states on its website:

> Some cities have laws that restrict your ability to host paying guests for short periods. These laws are often part of a city's zoning or administrative codes. In many cities, you must register, get a permit, or obtain a license before you list your property or accept guests. Certain types of short-term bookings may be prohibited altogether. Local governments vary greatly in how they enforce these laws. Penalties may include fines or other enforcement.
>
> These rules can be confusing. We're working with governments around the world to clarify these rules so that everyone has a clear understanding of what the laws are.[49]

Airbnb tries to cover all the issues for hosts on its website and what they do address is good guidance for local real estate professionals and regulators, and thus worth reading.[50] How many hosts read and follow up on the suggestions is another matter. Airbnb's list is a good starting point for local action.

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[46] Murphy, M., Mass. Leaving millions on the table in short-term rental revenue, Worcester Telegram, November 19, 2017.www.telegram.com/news/20171119/mass-leaving-millions-on-table-in-short-term-rental-revenue

[47] J. Sclafani, Airbnb agrees to collect tax for vacation rentals in El Dorado County, Sacramento Bee, June 20, 2018. https://www.sacbee.com/news/business/article213470974.html ; www.airbnb.com/help/article/653/in-what-areas-is-occupancy-tax-collection-and-remittance-by-airbnb-available

[48] Licensing of Online Home Rental Services, May 16, 2014. www.mass.gov/files/documents/2016/07/wv/hsg-licensing-online-home-rental-services.docx

[49] "Airbnb, What legal and regulatory issues should I consider before hosting on Airbnb?" www.airbnb.com/help/article/376/what-legal-and-regulatory-issues-should-i-consider-before-hosting-on-airbnb

[50] www.airbnb.com/help/article/1376/responsible-hosting-in-the-united-states

-Insurance

Many STR hosts do not have homeowners and liability insurance to cover losses that may result from occupancy. Some STR companies, like Airbnb, have some coverage.[51] There are limits and exclusions, of course.[52] Chinese drywall, believe it or not, is one, example.

Allstate has offered some guidance. The take-aways are these. Check with your agent. A one-time rental may be covered under the existing policy (though the host may need to give notice to the insurer), but ongoing, multiple rentals will likely require an endorsement and may put the homeowner into a commercial operations category. A landlord policy might be required. Guests' belongings are probably not covered by the host's typical homeowner's policy and the homeowner won't be covered if the guests walk off with the host's property or damages it. As expected, Allstate has a product line to cover that, Allstate HostAdvantage[SM] at a cost of $50 or so a year. Finally, Allstate suggests hosts might have the guests provide their own insurance, something that seems impractical. [53]

As a USAA spokesperson said as well: "If you're conducting a business, on a full- or part-time basis, by renting out your home or apartment (or a room in your home or apartment) as a way to earn money, your homeowner's or renter's insurance policy probably would not provide liability coverage."[54] Some companies offer insurance just for short-term rentals.[55]

There is a life safety issue here and in the event of death, injury, or property damage, there may not be insurance coverage and there may not be sufficient assets available to cover the liability.

-Mortgages and Leases

As Jack Levey points out in the appended article, it is important to consider mortgage and lease provisions. Borrowers need to be careful to be truthful in their representations to lenders as to the use of their properties. Some lenders may not allow the rental income to be considered with a

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[51] www.airbnb.com/host-protection-insurance
[52] www.airbnb.com/users/hpi_program_summary_pdf
[53] "Is Home Sharing Covered By Homeowners Insurance?' January 2018. www.allstate.com/tools-and-resources/home-insurance/home-sharing.aspx
[54] Lieber, R., "A Liability Risk for Airbnb Hosts, New York Times, December 5, 2014. www.nytimes.com/2014/12/06/your-money/airbnb-offers-homeowner-liability-coverage-but-hosts-still-have-risks.html
[55] http://cbizspecialtyinsurance.com/ ; at Progressive, insurance can be purchased on-line for just the days of the rental. https://www.progressive.com/homeshare-insurance/ ; a company called Slice sells STR insurance on-line at $7/night https://www.slice.is/homeshare/ .

Home Equity Line of Credit. It may be a better practice to report STR income on Schedule E (normal rental income for an investment property) rather than Schedule C (small business income).[56]

Lenders may not always be able to consider income from short-term rentals in rates for refinancing a residential property because the income is commercial, but there may be some hybrid approaches to gaining the advantage of that rental income.[57] Airbnb has a program set up with three lenders (Quicken Loans, Citizens Bank, or Better Mortgage) that will consider STR income in refinancings.[58]

A tenant who rents out an apartment may be in default with dire consequences including eviction.[59] And, yes, there can be problems with holdover guests, who do not pay their bill and will not leave.[60]

Closely related to the lease restrictions are condominium covenants, restrictions, and bylaws, many of which prohibit or limit rentals.[61] The same holds true with typical single-family and noncommercial subdivision covenants and negative easements. A Houston home presently on the market is promoted with these selling points: "MOTIVATED SELLER Endless opportunities with LIVE/WORK... AIRBNB/VRBO NOT FLOODED DURING HARVEY! … No HOA nor deed restriction making this property ideal for Airbnb and Vacation rental models."[62]

-Discrimination

Another of the exclusions from coverage is this:

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[56] M. Wells, Short-term rentals and your home mortgage, blog post, March 1, 2017. http://preferredfinancialgreenville.com/short-term-rentals-home-mortgage/

[57] Taylor, S., What Airbnb Means for Your Mortgage: Using a spare room or your house as a rental? Consider the impact on your mortgage or refinance, US News & World Report, December 20, 2017.

[58] https://www.airbnb.com/help/article/2193/mortgage-refinancing ; see also Kusisto, L., Gig Economy Grows Up as Lenders Allow Airbnb Income on Mortgage Applications: Initiative will let anyone renting out property on the service for a year or longer to count that money as income, The Wall Street Journal, February 8, 2018. https://www.wsj.com/articles/gig-economy-grows-up-as-lenders-allow-airbnb-income-on-mortgage-applications-1518094800

[51] Dannen, C., My Airbnb Biz Got Me Evicted; Here's What I Learned, Fast Company, June 19, 2012. https://www.fastcompany.com/1840715/my-airbnb-biz-got-me-evicted-heres-what-i-learned

[60] Thompson, C., 'Professional scammers' refuse to leave Airbnb host's house, CNN, July 24, 2014. https://www.cnn.com/travel/article/airbnb-squatters/index.html

[61] Kass, B., Your condo probably has a rule against renting your unit out on Airbnb, The Washington Post, January 13, 2017. https://www.washingtonpost.com/realestate/your-condo-probably-has-a-rule-against-renting-your-unit-out-on-airbnb/2017/01/12/74844e78-d41a-11e6-945a-76f69a399dd5_story.html?utm_term=.5da2ddd45b72

[62] http://www.urbanliving.com/listing/89836901-2506-la-branch-st-houston-texas-77004-1028/

> Employment Related Practices – any bodily Injury arising out of refusal to employ a person; termination of a person's employment; or and employment-related practices, policies, acts or omissions, such as coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation, discrimination or malicious prosecution directed at that person. This exclusion applies whether the injury-causing event occurs before employment, during employment or after employment of that person, and whether the insured may be liable as an employer or in any other capacity.

A word search reveals that here is no other reference to "discrimination" in the Airbnb insurance summary. Discrimination in STRs is an issue and real estate lawyers may find themselves counseling clients on this issue.[63] Airbnb engaged former Attorney General Holder in 2016 to assist in drafting rules to prevent discrimination[64] following a report, later published, on the extent of discrimination:

> In an experiment on Airbnb, we find that applications from guests with distinctively African American names are 16 percent less likely to be accepted relative to identical guests with distinctively white names. Discrimination occurs among landlords of all sizes, including small landlords sharing the property and larger landlords with multiple properties. It is most pronounced among hosts who have never had an African American guest, suggesting only a subset of hosts discriminate. While rental markets have achieved significant reductions in discrimination in recent decades, our results suggest that Airbnb's current design choices facilitate discrimination and raise the possibility of erasing some of these civil rights gains.[65]

This report is well-done and worth the read. The authors acknowledge the difficulty in reducing discrimination by hosts, but offer much guidance for STR companies like Airbnb.

Not only did Airbnb adopt rules, but it undertook in partnership with the NAACP to recruit more black hosts.[66]

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[63] See also, D. Smith, Renting Diversity: Airbnb as the Modern Form of Housing Discrimination, 67 DePaul L. Rev. 3, Spring 2018, Article 6. http://via.library.depaul.edu/cgi/viewcontent.cgi?article=4059&context=law-review

[64] Benner, K. Airbnb Adopts Rules to Fight Discrimination by Its Hosts, New York Times, September 8, 2016. www.nytimes.com/2016/09/09/technology/airbnb-anti-discrimination-rules.html**;** Airbnb's Nondiscrimination Policy: Our Commitment to Inclusion and Respect. https://www.airbnb.com/help/article/1405/airbnb-s-nondiscrimination-policy--our-commitment-to-inclusion-and-respect;

[65] B. Edelman et al., Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment, American Economic Journal: Applied Economics 2017, 9(2): 1–22. https://doi.org/10.1257/app.20160213 and www.aeaweb.org/articles?id=10.1257/app.20160213

[66] Jan, T., Faced with complaints of discrimination, Airbnb partners with NAACP to recruit black hosts, The Washington Post, July 26, 2017. www.washingtonpost.com/news/wonk/wp/2017/07/26/faced-with-complaints-of-discrimination-airbnb-partners-with-naacp-to-recruit-black-hosts/?utm_term=.789e84339765

-Privacy

Real estate lawyers ought to be concerned for their clients, whether they be hosts or guests in STRs, about privacy. Do regulations potentially require disclosure of guests? Do hosts have security cameras monitoring their properties that record the coming and goings of guests? The issue has surfaced in many areas, most recently in Charleston, South Carolina, where proposed regulations have raised concerns.[67] The city is seeking a consultant to set up monitoring software that will provide for:

1. Creation and maintenance of a database of short term rental units
   Physical Address Identification
   - Listing of all jurisdiction's active STR listings
   - High resolution screenshots of all active listings (captured weekly or at the request of the City)
   - Full address and contact information for identifiable STRs in jurisdiction
   - All available listing and contact information for non-identifiable STRs in jurisdiction

2. Compliance Monitoring

3. Assist the City with court cases when necessary.[68]

As to cameras, at least 13 states have some laws regarding video and audio recordings.[69] It is important to understand what cameras and other recording devices may be installed, what recordings may be retained, and what disclosure may be required.

Local Regulation: An Ounce of Prevention Is Worth a Pound of Cure

So said Benjamin Franklin and it is apt here. Real estate lawyers need to be activists in local regulation. You need only take a few, relatively easy steps to get out ahead of the potential problems with STRs and capitalize on the good that such rentals can provide your community.

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[67] Manno, A., Could Charleston's short-term rental enforcement tactics pose privacy concerns? R U Hosting? The Charleston City Paper, May 16, 2018. https://www.charlestoncitypaper.com/charleston/could-charlestons-short-term-rental-enforcement-tactics-pose-privacy-concerns/Content?oid=18589342

[68] https://www.charlestoncitypaper.com/media/pdf/18-p021r_short_term_rental_software_final.pdf

[69] Reporters Committee for Freedom of the Press, Introduction: Recording -- State hidden camera statutes, undated https://www.rcfp.org/first-amendment-handbook/introduction-recording-state-hidden-camera-statutes referencing The First amendment Handbook, 2011. https://www.rcfp.org/rcfp/orders/docs/FAHB.pdf

-Moratorium

This is not a recommendation, but something worth considering. As you work down this list of steps you will have the sense that you need to do six things at once. You do. One way to get a grip on it is take a "planning pause" moratorium on all STRs for, say, six months during which time no one can rent. However, given that the number of such rentals in many places is still relatively small, it is unlikely that much harm will come from letting them continue while you plan and prepare to regulate. It may not be worth the effort to have a moratorium. A moratorium takes time, drafting, maybe some legal advice, and the expenditure of political capital in most cases, and may cause some pushback from those already renting, all of which may cost more than the planning pause is worth. Moratoria sometimes serve only to delay the inevitable hard work and are often extended. Back to Ben Franklin: "Don't put off until tomorrow what you can do today."

-Education

Learn what is available out there now by going to all of the websites and services that you can find, many of which are identified here. Look online to see what STRs are being offered in your community. You may be surprised at how many of your friends and neighbors are already in the STR business. Don't forget to check craigslist as well and use one of the online search engines such as Google with a few key terms, like "rentals Anytown" and "house sharing Anytown", to find other STR activity.

Conduct educational sessions in your community ("Everything You Need To Know About Short-Term Rentals"), even before trying to regulate, to sensitize present and potential hosts to the need for proper code compliance, fire prevention, emergency response, following rules for rent controlled units, first aid, protecting privacy (disclose security cameras), insurance coverage, parking, noise, smoking, pets, childproofing, operation of heating and ventilating systems including fireplaces and heating stoves, safe access, occupancy limits, deciding what to tell neighbors, homeowners association approval, tax obligations, and any required zoning approvals. These sessions may also provide an opportunity to learn who is renting and to connect with them. Consider establishing a section of your municipal website as a resource portal. You will not have all the answers to all the questions as you start, but you need to start.

-Planning

Yes, planning. The rational planning model in its simplest terms is what do you have, what do you want, and how do you get it. Local regulators need to know who is renting, and what is being rented to whom for how long. They need to determine what to expect in the future. What

will be the demand for STRs, in what mix of accommodations, and for what length of tenancy? This will prove useful to deciding whether it is appropriate to limit the number of units available for STR and decide whether there needs to be any regulation of the length of occupancy.

-Regulate

Regulation seems to be coming in two forms: licensing of individual hosts to insure code compliance, and general regulation as to location, number of units, and terms of tenancy; probably through zoning, but possibly through regulation independent of zoning, including bundling it with the licensing process. It is necessary to draw the line somewhere as to what is an STR and what is simply an unregulated rental. Is an STR 30 days or less, or three months or less, and everything else is just an unregulated rental? It is for you to decide. You will also want to consider whether STRs with owner occupancy might be regulated less strictly given that the owner is present during the STR.

Austin, Texas, has a robust program with licensing.[70] Austin carves out three types of STR:

Type 1 - owner-occupied (single-family, multifamily or duplex),
Type 2 - not owner-occupied (single or duplex), and
Type 3 - not owner-occupied (multifamily).

There is a 3% limit by census tract on the Type 2 single-family and duplex STR and "applicable geographic caps" on Type 3 STRs.[71]

Austin's Type 1 registration form includes information on the owner and property, but it also requires insurance information, number of sleeping rooms, occupancy limit, and average charge per structure.[72]

The form for the rental of a primary structure declares: "(owner-occupied) short-term rental primary structures are (1) rented for periods of less than 30 consecutive days, (2) owner-occupied at least 51% of the time, (3) an entire dwelling unit, and (4) recorded with Travis County Appraisal District as a homestead."[73]

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[70] http://austintexas.gov/str
[71] https://www.biggerpockets.com/forums/759/topics/524552-austin-2018-neighborhoods-short-term-rentals
[72] http://www.austintexas.gov/page/short-term-rental-types
[73] http://www.austintexas.gov/sites/default/files/files/Code_Compliance/STRs/STR_Type_1_Primary_revised_Dec._8_v2.pdf

For a secondary structure it declares: "(owner-occupied) short-term rental secondary structures are (1) rented for periods of less than 30 consecutive days, (2) associated with an owner-occupied principal residential unit, and (3) an entire dwelling unit."[74]

For a partial unit, namely a room rental, the form declares: "(owner-occupied) short-term rental partial units (one) must include the exclusive use of a sleeping room and shared use of the full bathroom, (two) the owners generally present at the licensed short-term rental property for the duration of any short-term rental of a partial unit, (three) not more than one partial unit at the property is simultaneously rented for any less than 30 consecutive days and (four) limited to a single party of individuals."[75]

To register the STR in Austin the fee is $443.

San Francisco has an Office of Short-Term Rentals.[76] The city adopted major revisions to its Planning Codes in 2014 for STRs.[77] The current codification includes some useful definitions of hosting platform, primary residence, residential unit, short-term residential rental, and tourist or transient use.[78] The code requires registration, occupancy of the unit by the owner not less than 275 days a year, maintenance of records for two years, certain insurance coverage, payment of transient occupancy taxes, compliance with the housing code; posting the registration number on the hosting platform's listing; and a clearly printed sign inside of the front door with the location of all fire extinguishers in the unit and building, gas shut off valves, fire exits, and pull fire alarms. The application fee and renewal fee every two years is $50. The hosting platform has numerous responsibilities and there are fines for violations. It is a good model from which to start.

The amount of the application fee, $443 in Austin and just $50 in San Francisco, could be an issue. The economic incentive to not register, and risk a fine, logically seems to be greater when the fee is high. Even San Francisco with its modest fee, apparently had only 15% of its hosts registered in late 2016, a situation that changed dramatically for the better when litigation between the city and Airbnb was settled with Airbnb agreeing to de-list any properties that were

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74 http://www.austintexas.gov/sites/default/files/files/Code_Compliance/STRs/STR___Hotel_Occupancy_Tax_Registration_Form.pdf

75 http://www.austintexas.gov/sites/default/files/files/Code_Compliance/STRs/STR_Type_1-A_Partial.pdf

76 https://shorttermrentals.sfgov.org

77 http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/ordinances14/o0218-14.pdf

78 http://library.amlegal.com/nxt/gateway.dll/California/administrative/chapter41aresidentialunitconversionandde?f=templates$fn=default.htm$3.0$vid=amlegal:sanfrancisco_ca$anc=JD_Chapter41A

not registered The result was that Airbnb de-listed 4,760 properties leaving just 6,300[79]. Still, on-line, low-cost registration may facilitate registration and avoid litigation and enforcement problems.[80]

The City of Isle of Palms, South Carolina, imposes STR regulation through zoning, defining an STR to be three months or less, and limiting the numbers of occupants overnight to six and oddly 40 during the day (Sec. 5-4-203; can we assume a wedding party or the like?), minimum floor area per occupant, and certain parking spaces.[81] A placard is required to be posted on an STR setting limits on the number of overnight guests and cars that can be parked, along with other rules.[82] One of them, 610 Ocean Boulevard, allows 29 people overnight and 12 cars. The code limits the total to 40 people.

Here is 610 Ocean Boulevard, on the ocean, for you and 28 of your closest friends:

[79] Bowles, J., Can San Francisco and Airbnb Finally Get Along?, Bay City Beacon, March 13, 2018. www.thebaycitybeacon.com/politics/can-san-francisco-and-airbnb-finally-get-along/article_c0ebb7ee-271e-11e8-b606-cbcb32f3e23b.html

[80] Brinklaw, A., Airbnb says online registration will legalize all SF hosts, San Francisco Curbed, September 6, 2017. https://sf.curbed.com/2017/9/6/16263986/airbnb-online-registration-san-francisco; finding the unregistered rental units may be difficult. Villa, E., Unregistered Vacation Rentals in Palm Springs: How Many Exist and Are They a Serious Issue, March 8, 2018. http://www.evillapalmsprings.com/unregistered-vacation-rentals-in-palm-springs-article.html

[81] https://library.municode.com/sc/isle_of_palms/codes/code_of_ordinances?nodeId=COOR_TIT5PLDE_CH4ZO_ART9SHRMRE

[82] https://www.iop.net/Data/Sites/1/media/short%20term%20rental%20placard%208.17.09.pdf

Monterey County, California also regulates STRs in its zoning, defining STRs as not less than seven and not more than 30 consecutive calendar days, which by implication disallows an STR of less than seven days. It also only allows registration of properties in transient use the day the ordinance was adopted with the burden on the owner/registration to prove it. The number of days per year and the length of the rental are limited to those established by the owner/registrant. In short, they are perpetuating the status quo, nothing more and nothing less.[83]

San Bernardino County, California, permits STRs, defined as rentals of less than 30 days (and not to be used for a wedding, fraternity party, or the like…). The development standards include code compliance, maximum occupancy based on floor area per occupant and the number of beds, parking, and signage. Conditions of operations address the contents of the rental agreement, posting of the property within the unit with all the conditions of use, and details of fire safety and maintenance.[84] Notice is required to "potentially affected property owners", for example, those within 300 feet for STR parcels of 20 acres or less.

Miami Beach has struggled with enforcing its STR regulations and now promises to crack down on violators.[85] Short-term rentals are prohibited in large areas of the city.[86]

Registering all these STRs can be burdensome. Nashville has had its share of problems with unregistered STRs and frustrated hosts who want to comply.[87] The result is that half of the STRs are not registered.

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[83] https://library.municode.com/ca/monterey_county/codes/code_of_ordinances?nodeId=TIT21ZO_CH21.64SPRE_21.64.280ADPETRUSREPRRE ; http://www.co.monterey.ca.us/government/departments-i-z/resource-management-agency-rma-/building-services/divisions/permit-center/short-term-rentals-transient-occupancy ; http://www.co.monterey.ca.us/government/departments-i-z/resource-management-agency-rma-/planning/short-term-rental-ordinances-coastal-ref130043-inland-ref100042

[84] http://cms.sbcounty.gov/lus/CodeEnforcement/ShortTermRentals.aspx ; http://cms.sbcounty.gov/Portals/5/CodeEnforcement/STR%20Ordinance%20070117.pdf?ver=2017-07-25-110907-313

[85] Miami Beach proposes major crackdown on short-term rental platforms, CNBC, June 4, 2018. https://www.cnbc.com/2018/06/04/miami-beach-proposes-major-crackdown-on-short-term-rental-platforms.html Unwelcome guests: Airbnb, cities battle over illegal short-term rentals, CNBC, May 24, 2018. https://www.cnbc.com/2018/05/23/unwelcome-guests-airbnb-cities-battle-over-illegal-short-term-rentals.html

[86] https://www.miamibeachfl.gov/wp-content/uploads/2017/12/Short-Term-Rentals-3.pdf ; see Sec. 142-1111. - Short-term rental of apartment units or townhomes. https://library.municode.com/fl/miami_beach/codes/code_of_ordinances?nodeId=SPBLADERE_CH142ZODIRE_ARTIVSUDIRE_DIV3SUUSRE_S142-1111SHRMREAPUNTO

[87] Junewicz, N., Metro Codes: Nearly half of short term rentals operate illegally in Nashville, Fox17, August 2, 2017. http://fox17.com/news/local/metro-codes-report-nearly-half-of-short-term-rentals-operated-illegally

Montgomery County, Maryland, has one of the most recently-adopted STR programs.[88] It defines an STR as less than 30 consecutive days and limits the number of guests to six, with no more than two over age 18 in a bedroom. There must be a designated representative of the applicant owner with 15 miles of the property.

The Makings of Workable Program

Overarching issues to consider are:

-What is the nature of the activity you will regulate?

Presumably, STR is a private enterprise and almost certainly not a commercial lodging business. It is a type of lodging that is largely advertised on-line, through social media, and on bulletin boards. How do you draw the line between that modest, private activity and a commercial operation?

-How is it managed?

Does the host have to be the owner and does the host need to be occupying at the same time? If not, will the regulations be different in terms of numbers of units allowed, number of days per year, terms of occupancy?

-What is the limit of use?

Will the host be required to live in the residence at least some minimum number of days per year? Will rentals be limited to some maximum number of days per year? Will STR be defined as a rental of 30 consecutive days or less and longer rentals not regulated in any way? Will whole-house, exclusive-use rentals be regulated differently, for example by only regulating when the house is rented for less than a week or two weeks? And will the renting of rooms be regulated on a different schedule, for example by including room rentals only if they are less than one month and otherwise not regulating longer room rentals, which may be covered by zoning anyway, possibly under the definition of a rooming house? There are so many questions to be answered and so many lines to be drawn.

A checklist of considerations for real estate lawyers advising hosts, guests, and public officials, for planning, regulation, and operation might include:

[88] http://apps.montgomerycountymd.gov/ccllims/bill_details.aspx?doc=1003&hl=3235

- Current zoning requirements
- Applicable codes (sanitation, health, building, occupancy among many)
- Business licensing
- Business organization (none, limited liability company, corporation, general or limited liability partnership, etc.)
- Homeowners' association covenants and restrictions
- Other easements, covenants, restrictions on the land
- Lodging to be offered (room, whole house, host-occupied, length of stay)
- 911 marking at the street
- Placarding of the residence
- Emergency notifications
- Food service (permitted? licensed?)
- Federal, state, and local taxes
- Safety inspections
- Fire, smoke, CO, and other detectors
- Fire extinguishers
- Child safety
- Parking
- Insurance
- Emergency notifications
- Water and septic
- Safe hot water temperature
- Electrical and plumbing in good repair
- Pest/vermin-free, especially bed bugs
- Ventilation, heat, air conditioning adequate
- No hazards
- No mold or excessive moisture
- Working doors, windows, screens
- Adequate means of egress
- Linen sanitation
- Pool and spa maintenance

"You've made your bed, now lie in it."

So goes the idiom from the French as early as 1590: "Comme on faict son lict, on le treuve" (As one makes one's bed, so one finds it). In advising on STRs, and in joining in the planning for and regulation of STRs, you will indeed be the ones making the bed and you will have to lie in it. There are benefits and burdens in how we permit STRs and many considerations to be weighed. If we start with life safety issues first, we can be quite certain the most important aspect of this

rapidly emerging sharing economy phenomenon will be addressed. After that, it is the usual planning and politics.

APPENDIX

Jack S. Levey of Plunkett Cooney in Columbus, Ohio, has generously permitted us to include his article on STRs:

7 THINGS TO CHECK BEFORE LISTING WITH AIRBNB

Jack S. Levey, Plunkett Cooney

Home-sharing for short-term rental has become a major industry. Even in today's informal sharing economy, renting your property can have legal consequences. A little bit of homework can help prevent serious problems. Here are a few things to check before listing your property with Airbnb or similar online platforms.

1. **Zoning law and other local regulations.**

Make sure you know how your property is zoned, and that short-term rentals are permitted in that zone. Find out what other regulations your city has in place. For example, the city of Columbus, Ohio is planning to regulate short-term rentals. Early discussions suggested that Columbus may limit each property to 90 days of rental each year. As of Jan. 19, City Council member Mike Stinziano said "Everything remains on the table," and Columbus' regulations may include a longer or shorter limit, or none. Cleveland, Ohio's 2016 ordinance allows home-sharing arrangements in single family districts, and sets a series of requirements on such topics as smoke and carbon monoxide detectors, maintenance, trash collection, and furnishing the renter with the owner's contact information. Click here [http://www.clevelandcitycouncil.org/ClevelandCityCouncil/media/CCCMedia/Documents/City-Planning-Comm-of-Whole-6-6-16.pdf] to learn more about Cleveland's requirements.

2. **Is there an occupancy tax?**

The state of Ohio levies a sales tax on hotel stays of less than 30 days. Your house is not a hotel, right? Don't be too sure. If you have five or more sleeping rooms listed for home-sharing, Ohio sales tax law considers your property a hotel, even if the rooms are in several structures. Even one room can make your property a hotel for purposes of city or local sales tax, since local

jurisdictions can set their own definition. The city of Cleveland, taxes all short-term rentals, even if only one room is held out for rent. Airbnb has agreements with some cities, including Cleveland, calling for Airbnb to collect the taxes for the owner and remit the taxes to the city. But as the owner, you would still be responsible for paying any state or county taxes on the transaction.

3. **Do you need to register?**

If five or more rooms are made available for short-term rental, Ohio sales tax law may consider your property a hotel, and you may need to register with the Department of Taxation as a vendor. Cleveland requires owners to register with the city if the property is rented more than 90 days in any year, regardless of the number of rooms. Columbus has not yet decided what registration to require. Be sure to comply with any registration requirements in your city. In counties with a population of 200,000 or more, landlords must also register with the county auditor. Does your county consider home-sharing to be within the definition of a landlord?

4. **Will your insurance protect you if someone is injured?**

Remember that you can be sued for personal injury or property damage to your home-sharing guest. Even if you were not at fault, you'll still have to pay the cost of defending the lawsuit, which can be substantial. Your homeowner's insurance might not cover claims resulting from business activities. Find out whether you need special coverage. While you're at it, make sure that the policy limits are high enough to give you the protection you need.

5. **Is your property up to code?**

If your property does not meet local building codes, you may be opening yourself to liability if your renter is hurt as a result.

6. **Are you risking your lease or mortgage?**

What about your owners' association? Most residential leases prohibit subletting. Make sure you have any necessary prior written consent from your landlord. If your lease has special provisions for home-sharing arrangements, make sure that you comply with them. Most home mortgages give the lender the power to declare the loan due if there is a transfer of ownership or any interest in the property. A home-sharing rental may fall within that definition. Some mortgages allow the borrower to grant leases for terms of up to three years, which would permit the short-term rental. Make sure that nothing in your mortgage gives the lender the right to declare the loan due for whatever rental you are planning. If you live in a condominium, a planned unit development, or a community with a homeowners' association, the association documents may restrict your ability

to rent to others. Make sure to review the association documents and comply with any restrictions.

7. **Review the fair housing and anti-discrimination laws.**

In addition to federal and Ohio laws against housing discrimination, many cities have their own antidiscrimination laws protecting additional categories of people. It should go without saying, but don't reject, discourage or discriminate against a qualified prospect. Home-sharing can be a great way to earn extra cash and to meet interesting people. Doing some homework in advance can help prevent unpleasant meetings with the enforcement authorities.

Jack S. Levey *is a senior attorney in the Columbus, Ohio office of Plunkett Cooney, one of the Midwest's oldest and largest law firms. Mr. Levey has extensive expertise in the negotiation and closing of commercial leases and multi-million dollar real estate and business transactions. His practice also includes all facets of corporate aircraft purchasing, sales and financing.*

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2021 WL 1146283
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United States District Court, N.D. New York.

Douglas P. CALVEY, Stephen Kyle Norman, Huda Scheidelman, Carol Torrance Hoffman, and Neil Sullivan, Plaintiffs,

v.

TOWN BOARD OF NORTH ELBA, Town of North Elba, Village of Lake Placid Board of Trustees, and Village of Lake Placid, Defendants.

8:20-CV-711 (TJM/CFH)
|
Signed 03/25/2021

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DECISION & ORDER

THOMAS J. McAVOY, Sr. U. S. District Judge

***1** Before the Court is Defendants' motion to dismiss this case where Plaintiffs allege Defendants violated their constitutional rights by regulating short-term rentals of homes in the Lake Placid, New York area. See dkt. # 7. The parties have briefed the issues and the Court has determined to resolve the matter without oral argument.

I. BACKGROUND

Plaintiffs filed a Complaint in the Supreme Court of Essex County, New York. See Complaint ("Complt.") dkt. # 2. Defendants removed the case to this Court on June 26, 2020. See dkt. # 1.

Plaintiffs Douglas P. Calvey, Stephen Kyle Korman, Huda Sheidelman, Carol Torrance Hoffman, and Neil Schuman live in various parts of New York but own real property in Lake Placid, New York. Complt. at ¶¶ 1-5. Plaintiffs allege in their Complaint that the Village of Lake Placid and the Town of North Elba are resort communities, "known for hosting sporting events like the Winter Olympic Games in 1932 and 1980," as well as other athletic competitions and other outdoor events. Id. at ¶ 18. North Elba and Lake Placid also attract tourists "to participate in recreational activities such as downhill and cross-country skiing, ice skating, hockey, year-round hiking, cycling, swimming, fishing, and kayaking." Id. at ¶ 19. The area around the Defendant Village and Town has a history of hosting tourists that began in the nineteenth century, gained momentum with the 1930s, and continues today. Id. at ¶ 20-24. Plaintiffs allege that "[u]pon information and belief, during the last 100 years, short-term rentals of citizens' homes in the Lake Placid during times when the property owners were not using the same, have provided a supply of accommodations commensurate with that would or could not be met by local hotels." Id. at 23.

Plaintiffs allege that "significant demand" now exists for short term rentals. Id. at ¶ 25. The Lake Placid economy, they contend, "is driven by tourism." Id. at ¶ 26. As demand for short-term rentals in Lake Placid has increased, so has the number of citizens' homes offered to meet that demand. Id. at ¶ 27.

During the past decade, a number of internet-based home-sharing services such as Airbnb, homeaway.com, and vrbo.com have appeared. Id. at ¶ 28. These services permit "all manner of property owners to rent out their spare rooms or their whole homes to vacationers" in Lake Placid. Id. Services like Airbnb and Homeway allow "homeowners to rent their homes to make money and help pay their mortgages and taxes to afford the vacation home that they could not otherwise afford." Id. at ¶ 29. This sort of sharing of one's home–"sometimes for money"–Plaintiffs allege, "is a long-standing American tradition." Id. at ¶ 30. Airbnb and other services are often less expensive and offer "a more unique experience" than a traditional hotel. Id. at ¶ 31. Persons who use Airbnb, Plaintiffs claim, can "[stay] in a traditional, residential neighborhood" and enjoy "more space including a kitchen for cooking[.]" Id. Short-term rentals booked through internet services "have grown dramatically more popular among travelers" in the past few years. Id. at ¶ 32. "U.S. Millennials" particularly make use of those services. Id. at ¶ 33.

***2** Plaintiffs report that the Lake Placid short-term rental market contained 620 available rentals in December 2019. Id.

at ¶ 34. The average number of days rented by any short-term property is 126. Id. at ¶ 35. Plaintiffs allege that "the median monthly revenue for short-term rental properties is $2,950 with an annual median revenue of $34,500." Id. at ¶ 36.

The Town of North Elba "encompasses" the Village of Lake Placid. Id. at ¶ 38. Together, the two municipalities "offer tourists shopping and dining experiences, cultural activities and festivals." Id. at ¶ 37. The population of Lake Placid and the Town of Elba together amounted to 8,957 persons in the 2010 census. Id. at ¶ 38. T he two entities require tourism to support their economies. Id. at ¶ 39. Short-term rentals of homes provide "[o]ne of the principal ways" to accommodate tourists in Lake Placid and North Elba. Id. at ¶ 40.

Plaintiffs allege that the character of Lake Placid is shifting more towards a community or vacation and second homes. Id. at ¶ 41. The Plaintiffs point to a housing assessment of North Elba that indicates that the community has a "declining year-round population, fewer families, and fewer workers" who live "in the community." Id. at ¶ 42. The number of vacation and seasonal homes has increased at the same time, "with a greater number of residential property owners living out of town and out-of-state." Id. Plaintiffs contend that short-term rentals provide "as much as $32 million dollars of economic benefit" each year "to the Lake Placid region." Id. at ¶ 43. Such rental homes also provide North Elba, Lake Placid, and the County of Essex "hundreds of thousands" of dollars in yearly taxes, "employ local contractors, housekeepers, and other employees," and improve "the local real estate market for larger or older homes in need of renovation or those larger than most single family homeowners want to purchase." Id. A 2014 study of housing needs in the community showed increasing second-home ownership and increasing short-term rentals in the community. Id. at ¶¶ 44-45. The presence of such forms of use and ownership, the study found, "had the potential to exacerbate existing housing affordability and availability issues for the workforce, which" had to be "balanced with the positive benefits short-term rentals provide the community." Id. at ¶ 47.

In March, 2020, the Town Board of North Elba and the Village of Lake Placid passed local legislation amending their land use codes to address short-term rentals. Id. at ¶¶ 48-52. This legislation became effective on or about March 17, 2020. Id. at ¶ 50-52. The Defendants delayed enforcement of the short-term rental legislation to permit the Enforcement Officer to process applications and arrange for enforcement. Id. at ¶¶ 53-54.

Defendants allege that the short-term rental law states as its purpose " 'to regulate the short-term rental dwelling units within the Village of Lake Placid and Town of North Elba and to establish comprehensive registration and licensing regulations' " to prevent "extensive short-term rentals that 'endanger' the historical and residential character of the 'resident resort community.' " Id. at ¶ 55. The law requires property owners to acquire a "revocable short-term rental permit" to use a "dwelling unit ... for short-term rental purposes." Id. at ¶ 56. An owner must pay a fee for such a permit. Id. The law defines as short-term rental as:

> ***3** A dwelling unit that is rented, in whole or in part, to any person or entity for a period less than 30 consecutive nights, and includes any residential building or apartment, single-or two-family dwelling, condominium, townhouse, guest house, cottage, cabin, or accessory dwelling which is rented as living quarters with a kitchen for any period less than 30 consecutive nights. This definition expressly includes [a] Rooming/Boarding house as that term is defined in Section 10.2 of the Village of Lake Placid/Town of North Elba Land Use Code. This definition excludes timeshare, hotels, bed and breakfast establishments and school or non-profit dormitories. "Rental" means an agreement granting use or possession of a residence, in whole or in part, to a person or group in exchange for consideration valued in money, good, labor, credits, or other valuable consideration. Use of a short-term rental by a record owner of a property shall not be considered to be a rental under this section.

Id. at ¶ 57.

A short-term rental property may not be rented more than ninety days in calendar year. Id. at ¶ 58. The law does not apply to:

> a. Hosted short-term rental units which are those in which the host is a resident and an owner who lives at the property for at least 184 days per calendar year and is home overnight during the term of each rental,
>
> b. Condominium projects and town house projects which have an active homeowners' association,
>
> c. And rental units on Main Street and Sentinel Road in the Village Center District (VC) and Wilmington Road, Cascade Road and Saranac Avenue in the Gateway Corridor District (GC), which rental units shall also be exempt from Section 11.2A(5).

Id. at ¶ 58.

The law also requires that "a copy of the short-term rental permit be online." Id. at ¶ 59. A copy of the permit is also available for public review in the Codes office. Id. Another copy of the permit must be "prominently displayed near the front entrance of" the rental property. Id. The rental permits must "state the names, addresses and phone numbers of every person or entity that has an ownership interest in the short-term rental property and of a primary contact person who shall be available to investigate complaints during the entire time (24 hours per day) the short-term rental property is being rented." Id. at ¶ 61.

The short-term rental law gives an Enforcement Officer or a person designated by the Officer a "right to inspect the short-term rental property to ensure it complies with" provisions of the local law titled " 'Compliance, Hearings and Penalties,' at any reasonable time of day upon giving notice to the owner or occupant of said unit." Id. at ¶ 62. The short-term rental law provides penalties for violations of the statute, as follows:

> a. By a fine or penalty of not less than $350.00 and not exceeding $1,000.00 for a first offense or, if greater, the maximum amount allowed under the Municipal Home Rule Law, the Town Law, or the Village Law.
>
> b. By a fine or penalty of not less than $1,000.00 not exceeding $3,000.00 for a second offense, both of which were committed within a period of five (5) years or, if greater, the maximum allowed under the Municipal Home Rule Law, the Town Law or the Village Law.
>
> c. Each week's continued violation constitutes a separate additional violation.

Id. at ¶ 63. The law also provides that property owners sued for injunctive or other form of relief by the Town of North Elba or the Village of Lake Placid must pay the legal fees and costs of the municipalities for undertaking such proceedings. Id. at ¶ 64.

The law mandates that owners provide renters a packet of information the Town and the Village have prepared. Id. at ¶ 65. That information "summariz[es] the restrictions, guidelines, and requirements applicable to short-term use." Id. The packet includes a set of "Good Neighbor Guidelines." Id.

The law also requires that short-term rental properties have off-street parking equal to the number of bedrooms on the property. Id. at ¶ 66.

***4** Plaintiffs' Complaint contains Thirteen Causes of Action. Court One alleges a violation of Plaintiffs' right to equal protection of the law under the United States and New York constitutions because the short-term rental law treats similarly situated landowners differently without a rational basis in the law. Count Two alleges that the short-term rental law violates Plaintiffs' right to be free of unreasonable search and seizure under the federal and New York constitutions by permitting the Enforcement Officer to enter and search any short-term rental for inspection without a warrant, justification, or chance to protest. Count Three alleges that, by requiring that landowners obtain a permit before engaging in short-term rentals, the law arbitrarily interferes with a property right and thus violates Plaintiffs' right to substantive due process under the state and federal constitutions. Count Four alleges that the short-term rental law violates Plaintiffs' substantive due process rights by preventing them from renting their homes for more than 90 days per year, a restriction that Plaintiffs' claim is arbitrary. Count Five is also a substantive due process claim, alleging that the permitting system "prohibits and curtails existing uses to which plaintiffs' properties were devoted and permitted at the time" the Defendants enacted the short-term rental law. Complt. at ¶ 178. Count Six alleges that the short-term rental law violates Plaintiffs' substantive due process rights by requiring that landowners provide the name of a contact person for the property, subjecting Plaintiffs to liability for violation of that requirement, and defining the requirements for a contact person in a "vague, arbitrary[,] and irrational" way. Id. at ¶ 193. Count Seven alleges a due process violation because, as written, enforcement of the short-term rental law "is sure to be arbitrary." Id. at 203. Count Eight alleges that the short-term rental law violates Plaintiffs' due process rights by permitting Enforcement Officers "unilaterally" to "impose any conditions when [they issue] a short-term rental permit." Id. at ¶ 211. Count Nine alleges the short-term rental law violates Plaintiffs' due process rights by imposing strict liability and by making landowners responsible for violations by their designated contact persons or short-term tenants. Count Ten alleges that the short-term rental law violates Plaintiffs' procedural due process rights by permitting the Enforcement Officer to take action against Plaintiffs' right to rent their property without "sufficient due process protections." Id. at ¶ 242. Count Eleven alleges an unconstitutional taking of Plaintiff's

property through the 90-day cap on the number of days they can rent to short-term renters. Count Twelve alleges unconstitutional violation of the contract clauses in the New York and federal constitutions. Count Thirteen alleges a violation of Plaintiffs' First Amendment rights. Plaintiffs seek damages, declaratory and injunctive relief, and attorneys' fees and costs.

After Plaintiffs served Defendants with the Complaint, they removed the case to this court. Defendants thereafter filed the instant motion to dismiss. The parties have briefed the issues, bringing the case to its present posture.

II. LEGAL STANDARD

Defendants have filed a motion to dismiss Plaintiff's claims pursuant to Federal Rule of Civil Procedure 12(b)(6). Defendant argues that Plaintiff has not stated a claim upon which relief could be granted, even if all factual allegations in the complaint were proved true. In addressing such motions, the Court must accept "all factual allegations in the complaint as true, and draw[ ] all reasonable inferences in the plaintiff's favor." Holmes v. Grubman, 568 F.3d 329, 335 (2d Cir. 2009). This tenet does not apply to legal conclusions. Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. at 678, 129 S.Ct. 1937. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Id. (quoting Bell Atl. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). When, as here, the Plaintiff proceeds pro se, the Court must " 'construe [the complaint] broadly, and interpret [it] to raise the strongest arguments that [it] suggests.' " Weixel v. Bd. of Educ. of N.Y., 287 F.3d 138, 146 (2d Cir. 2002) (quoting Cruz v. Gomez, 202 F.3d 593, 597 (2d Cir. 2000)).[1]

III. ANALYSIS

Defendants seeks dismissal on several grounds, which the Court will address in turn.

A. Ripeness

Defendants first argue that Plaintiffs' claims (1) regarding financial loss from the 90-day cap on short-term rentals, (2) fear of loss of their permits under the law, (3) potential for criminal penalties under the law, and (4) alleged arbitrary, unlawful intrusion on property rights, including their ability to advertise and rent their property on a short-term basis are unripe and therefore not justiciable by the Court. They argue that Plaintiffs have not taken advantage of the procedures available to them under State law to address their complaints with the legislation and therefore cannot seek relief in this Court for their federal claims. They seek dismissal of Counts One and Four through Eleven on this basis. Plaintiffs respond that, to the extent that their challenges are facial challenges to the constitutionality of the regulations, they are ripe. Moreover, Plaintiffs argue that they are not required to exhaust their administrative remedies under law recently clarified by the United States Supreme Court.

Defendants cite to law from the Supreme Court and in this Circuit that required a plaintiff to use available state procedures before bringing a federal claim related to government regulation that undermined property rights. The rule had been that a plaintiff cannot bring a takings claims without showing "that (1) the state regulatory entity has rendered a 'final decision' on the matter, and (2) the plaintiff has sought just compensation by means of an available state procedure." Doughterty v. Town of N. Hempsted Bd. of Zoning Appeals, 282 F.3d 83, 88 (2d Cir. 2002) (citing Williamson Cty. Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985)).

***5** Recently, however, the Supreme Court concluded that "a property owner may bring a takings claim under § 1983 upon the taking of his property without just compensation by a local government." Knick v. Twp. of Scott, —— U.S. ——, 139 S.Ct. 2162, 2179, 204 L.Ed.2d 558 (2019). Thus, "[a] plaintiff is no longer required to exhaust state procedures for obtaining just compensation before bringing her takings claim to federal court." Martell v. City of St. Albans, 441 F.Supp.3d 6, 21 (D. Vt. 2020). As the Second Circuit has explained, "*Knick* eliminated the state exhaustion requirement," but still requires that a plaintiff prove the first element, a showing "that a state regulatory agency ... render[ed] a final decision on the matter before a taking claims can proceed." Sagaponack Realty, LLC v. Vill. of Sagaponack, 778 Fed.Appx. 63, 64 (2d Cir. 2020).

That standard provides that "a takings claim 'is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.' " Sunrise Detox V, LLC v. City of White Plains, 769 F.3d 118, 122 (2d Cir. 2014) (quoting Williamson Cnty., 473 U.S. at 186, 105 S.Ct. 3108). That requirement applies as well to

"zoning challenges based on substantive due process." Id. The rule, however, " 'is not mechanically applied' and will not be found to bar a suit when further appeals would be futile or when the relevant town board 'sits purely as a remedial body.' " Islamic Cmty. Ctr. for Mid Westchester v. City of Yonkers Landmark Pres. Bd., 742 Fed.Appx. 521, 524 (2d Cir. 2018) (quoting Murphy v. New Milford Zoning Comm'n, 402 F.3d 342, 349 (2d Cir. 2005)).

As such, when it comes to the Plaintiffs' challenges to the law on due process, takings, and equal protection claims, Plaintiffs do not need to show that they sought just compensation by an available state procedure to bring suit. They must, however, show that an appropriate agency rendered a final decision on their applications.

To the extent that the Plaintiffs claims are facial challenges to the constitutionality of the short-term rental law, those claims are surely ripe. " 'The ripeness doctrine serves 'to determine whether a party has brought an action prematurely and counsels abstention until such time as a dispute is sufficiently concrete to satisfy the constitutional and prudential requirements of the doctrine.' " County Concrete Corp. v. Twp. of Roxbury, 442 F.3d 159, 164 (2d Cir. 2006) (quoting Khodara Envt. Inc. v. Blakey, 376 F.3d 187, 196 (3d Cir. 2004)). In the context of a land-use decision, a facial challenge alleges "that the mere enactment of a regulation either constitutes a taking without just compensation, or a substantive violation of due process or equal protection[.]" Id. No "final decision" is necessary in that setting because " 'when a landowner makes a facial challenge, he or she argues that *any* application of the regulation is unconstitutional[.]' " Id. (quoting Eide v. Sarasota County, 908 F.2d 716, 724 n.14 (11th Cir. 1990) (emphasis in original)). The motion will therefore be denied with respect to any facial challenges Plaintiffs make that allege the short-term rental law violates their rights to due process, equal protection, or to be free from an unconstitutional taking.

In reply to Plaintiffs' briefing, Defendants contend that "Plaintiffs' opposition papers acquiesce that their as-applied equal protection, due process and takings claims are unripe[.]" Defendants appear to misread Plaintiffs' argument. Plaintiffs contend that their "federal claims (save for Plaintiffs' third cause of action discussed below), both facially and as applied, are ripe for adjudication." Count Three alleges a substantive due process violation because property owners who seek to engage in short term rentals must obtain permits "to which any number of conditions could be" attached "by the Enforcement Officer." Plaintiffs agree that these conditions have not yet been attached to any particular permit and the claims are therefore unripe. The Court will therefore dismiss the third count without prejudice. The Court will address the ripeness of other claims where appropriate. As a general matter, the Court finds that facial claims are ripe, but that Plaintiffs must allege a final decision for any as-applied claims to be ripe.

B. Equal Protection

***6** Defendants argue that the Court must dismiss Plaintiffs' equal protection claim, which alleges that the short-term rental law treats them differently from similarly situated homeowners. Defendants contend that dismissal is required whether Plaintiffs proceed on a class-of-one or a selective enforcement equal protection theory. Plaintiffs respond that they state a claim under a class-of-one theory.

While the Equal Protection Clause usually applies "to governmental classifications that treat certain groups ... differently than others," courts also apply "a class-of-one theory" that holds that "a single individual can claim a violation of her Equal Protection rights based on arbitrary disparate treatment." Fortress Bible Church v. Feiner, 694 F.3d 208, 221 (2d Cir. 2012). Such a claim exists when a plaintiff " 'has been intentionally treated differently from others similarly situated and ... there is no rational basis for the difference." Id. (quoting Village of Willowbrook v. Olech, 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000)). " '[C]lass of one plaintiffs must show an extremely high degree of similarity between themselves and the persons to whom they compare themselves.' " Ruston v. Town Bd. for the Town of Skeneateles, 610 F.3d 55, 59 (2d Cir. 2010) (quoting Clubside, Inc. v. Valentin, 468 F.3d 144, 159 (2d Cir. 2006)). A plaintiff advancing a class-of-one claim must show: " 'that (i) no rational person could regard the circumstances of the plaintiff to differ from those of a comparator to a degree that would justify the differential treatment on the basis of a legitimate government policy; and (ii) the similarity of circumstances and difference of treatment are sufficient to exclude the possibility that the defendants acted on the basis of a mistake.' " Id. (quoting Clubside, 468 F.3d at 159).

Plaintiffs point to studies that indicate around 620 properties in Lake Placid and North Elba engage in short-term rentals, and that their properties are a sub-set of these 620 properties, making them substantially similar. The short-term rental law exempts some properties from the law's prohibition on rentals for more than 90 nights per year. The law provides:

> Other than the safety regulations provided herein and in the New York State Building Code, the short-term rental standards set forth in Section 11.2A(2)[2] shall not be applicable to: (i) hosted short-term rental units which are those in which the host is resident and an owner who lives at the property for at least 184 days per calendar year and is home overnight during the term of each rental, (ii) condominium projects and town house projects which have an active homeowners' association, (iii) rental units on Main Street and Sentinel Road in the Village Center District (VC) and Wilmington Road, Cascade Road and Saranac Avenue in the Gateway Corridor District (GC), which rental units shall also be exempt from Section 11.2A(5).[3]

Exhibit A to Plaintiffs' Complaint, dkt. # 2, at § 11.6(C). Plaintiffs allege that they do not fit into any of these exempt classes of property owners, but that they are nevertheless substantially similar. Plaintiffs also allege that the Defendants have no rational basis for treating these property owners differently than they treat them. See Complt. ¶¶ 76-77, 80-83, 85-92.

***7** Defendants argue that these comparators are not substantially similar because they "either 1) reside within complexes maintaining a homeowners associations [sic]; 2) are located adjacent to the more heavily populated business districts; or 3) have a residential owner 'on site' for the vast majority of the year." Plaintiffs allege that they and the "owners of property located on Main Street and Sentinel Road in the Village Center District (VC) and Wilmington Road, Cascade Road and Saranac Avenue in the Gateway Corridor District (GC) all own property in areas zoned for residential use." Complt. at ¶ 89. They also allege that they "pay property taxes and occupancy taxes upon any short-term rental at rates identical to owners of" such properties. Id. at ¶ 88. Similarly, they pay the same taxes as owner-occupiers who also provide short-term rentals. Id. at ¶ 82. They also point out that the short-term rental law does not attempt to define an "active homeowner's association." Id. at ¶ 75.

While the Court recognizes that Plaintiffs must produce evidence of "an extremely high degree of similarity between themselves and persons to whom they compare themselves," courts also emphasize that "whether parties are similarly situated is a fact-intensive inquiry" best resolved after the parties engage in discovery. Clubside, Inc. v. Valentin, 468 F.3d 144, 159 (2d Cir. 2016). "The purpose of requiring sufficient similarity is to make sure that no legitimate factor could explain the disparate treatment." Fortress Bible Church, 694 F.3d at 222. In the pleading context, a plaintiff must offer "factual allegations ... sufficient to support the necessary legal conclusions," in this case that the similarity between the various parties offering short-term rentals is sufficient to support a "class of one" claim. Ruston, 610 F.3d at 59. Sufficient factual allegations must explain in detail how the comparators are similar and how the defendants treated them differently. Id.

In Ruston, the Court of Appeals concluded that the trial court properly dismissed a class of one claim that alleged, in part, that plaintiffs faced "class of one" discrimination because the defendant village refused their request to connect new homes they planned to build on property they owned to the village's sewer system. 610 F.3d at 57. The plaintiff alleged that the village had permitted other structures to connect to the sewer system, and that those properties were substantially similar. The court disagreed that "a house built in 1987; a country club that was renovated in the 'the early 1990s'; two neighboring properties–'connected to the Village sewer system for decades'–that are not further described; a house built 'in or around 2004'; a 'luxury spa' built 'in the late 1990s; and a 'large commercial building' " were "similar to" plaintiffs' "proposed 14-home development, let alone so similar that no rational person could see them as different[.]" Id. at 60. The court noted that "some are commercial properties versus the residential properties at issue ... and the residential connections were single homes, not a new development as proposed by the" plaintiffs. Id.

This case is different from Ruston. Here, Plaintiffs' complaint includes allegations that other homes in the municipalities, owned by individuals, offered for short-term rental, located in areas zoned for the same purpose as their homes, and taxed at the same rate, are substantially similar to properties that do not have the same restrictions on use that theirs do under the short-term rental ordinance. Plaintiffs also allege that the distinctions between which homes can have short-term rentals for ninety days and which cannot are arbitrary, and not based on rational calculations. These allegations make plausible Plaintiffs' claim that the short-term rental law creates distinctions between similarly situated owners of short-term rental property without a rational basis. At this preliminary stage in the litigation, such factual allegations are sufficient to state a "class of one" equal protection cause of action. The Court will deny the motion in this respect.

C. Unreasonable Search and Seizure

***8** Defendants next seek dismissal of Plaintiffs' claim in Count Two that the short-term rental law violates their right to be free of unreasonable search and seizure. Defendants argue that the law does not require a search, but only provides that property owners consent to a search of the property as a condition of a permit. Because permit-holders consent to the search, they claim, no violation of Fourth Amendment rights occurs.

Defendants contend that the law does not violate Plaintiffs' Fourth Amendment rights because, as a condition of receiving a short-term rental permit, Plaintiffs "voluntarily and expressly consent to: 1) posting the permit for inspection; and 2) ... an inspection of the rental space by the Enforcement Officer[.]" The short-term rental law provides that as part of the procedure upon filing an application:

> In reviewing the application, if [sic] the Enforcement Officer shall have the right to inspect the short-term rental property for purposes of ensuring compliance with this section If an inspection authorized herein is conducted, the Enforcement Officer shall use the results of such inspection in determining whether to issue the permit, with or without conditions, or to not issue the permit.

§ 11.2(D)(2).

Once the owner of the short-term property receives a permit, the law provides that:

> The Enforcement Officer or his designee shall have the right to inspect the short-term rental property to ensure it complies with the provisions of this section at any reasonable time of day upon giving reasonable notice to the owner or occupant of said unit.

§ 11.2(F)(9). The law also requires that "[a] hard copy of the short-term rental permit shall be prominently displayed near the front entrance of the short-term rental unit. The Enforcement Officer may also require that other information must be on prominent display in the short-term rental unit." § 11.2(E)(2)(C). The Village and Town "may ... initiate enforcement proceedings under the Village of Lake Placid/ Town of North Elba Land Use Code at any time following receipt of a complaint" and "[a]ny property owner found in willful violation of the provisions of this local law shall be required to reimburse the Town for its reasonable costs of enforcement, including reimbursement for staff time and reasonable attorney's fees." §§ 11.2(F)(6), 11.2(F)(8).

At issue here is the Fourth Amendment. That Amendment establishes "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. The Supreme "Court has repeatedly held that 'searches conducted outside the judicial process, without prior approval by [a] judge or [a] magistrate [judge] are *per se* unreasonable ... subject only to a few specifically established and well-delineated exceptions.' " City of Los Angeles v. Patel, 576 U.S. 409, 135 S.Ct. 2443, 2451-52, 192 L.Ed.2d 435 (2015) (quoting Arizona v. Gant, 556 U.S. 332, 338, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009)). The search contemplated in the short-term rental law comes pursuant to local regulations. Under those circumstances "absent consent, exigent circumstances, or the like, in order for an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker." Id. "A warrantless inspection of a private dwelling by a municipal administrative officer without the consent of the owner is generally unreasonable absent specifically demonstrated circumstances." Palmieri v. Lynch, 392 F.3d 73, 78-79 (2d Cir. 2004).

***9** The Court finds that the Plaintiffs have, at this stage in the litigation, stated a claim that the short-term rental ordinance violates their Fourth Amendment rights. As explained above, the legislation compels them to allow warrantless searches of their property as a condition of obtaining and maintaining permits to rent their property. Defendants argue that any searches performed pursuant to the short-term rental law are excused because property owners consent to them. This consent, however, is not a choice, but a legal requirement. The permission to search that the property owner provides as a condition to obtaining a permit does not make a warrantless search a consensual one. As the New York Court of Appeals concluded in finding that an ordinance that required a landlord to consent to search as a condition of obtaining a rental permit: "[a] property owner cannot be regarded as voluntarily giving his consent to a search where the price he must pay to enjoy his rights under the Constitution is the effective deprivation of any economic benefit from his rental property." Sokolov v. Freeport, 52 N.Y.2d 341, 346, 438 N.Y.S.2d 257, 420 N.E.2d 55 (1981). While discovery may reveal defenses to Plaintiffs' claim about the invalidity of the law, such as circumstances that compel the need to search without waiting for warrants, the Court must deny the motion at this point.

This case is like Weisenberg v. Town Bd. of Shelter Island, 404 F.Supp.3d 720 (E.D.N.Y. 2019). There, the plaintiffs claimed a violation of their Fourth Amendment rights by a local short-term rental ordinance that "requir[ed]

vacation-rental owners to maintain their rental registries 'for examination by the Town, if requested,' subject to automatic fines and potential revocation of their rental licenses for non-compliance." Id. at 735. The court found that the plaintiffs had stated a claim and denied the motion to dismiss. Id. at 736. The court concluded that "[f]or an administrative-search regime like this one to comply with the Fourth Amendment, the government must also show that 'special needs ... make the warrant and probable-cause requirements impracticable' and that the 'primary purpose' of the searches regime is '[d]istinguishable from the general interest in crime control.' " Id. (quoting Patel, 135 S.Ct. at 2452). The Court will therefore deny the Defendants' motion in this respect as well.

D. Due Process

Defendants next seek dismissal of Plaintiffs' due process claims, which Plaintiffs allege in Counts Three through Ten. Defendants contend that Plaintiffs' causes of action fail to state a claim, whether considered as facial or as-applied challenges. Plaintiffs admit that their claim in Count Three is not ripe, and the Court will grant Defendants' motion in that respect as unopposed. The Court will address the other counts in turn, as necessary, addressing ripeness where appropriate and the substance of the claims as well.

i. Count Four

Count Four alleges that the 90-day cap on Plaintiffs' rentals established by the short-term rental law violates Plaintiffs' substantive due process rights.

"In assessing a substantive due process claim in the context of land use regulation," a court must be " 'mindful of the general proscription that federal courts should not become zoning boards of appeal to review nonconstitutional land-use determinations by the Circuit's many local legislative and administrative agencies.' " Crowley v. Courville, 76 F.3d 47, 52 (2d Cir. 1996) (quoting Zahra v. Town of Southold, 48 F.3d 674, 679-80 (2d Cir. 1995) (internal citations omitted)). A party alleging a substantive due process violation in this context "must first establish a valid property interest within the meaning of the Constitution" and then show "that the defendant acted in an arbitrary or irrational manner in depriving him of that property interest." Id.

The first question for the Court, then, is whether the regulations in question interfere with a valid property interest. "Property interests protected by due process are neither created nor defined by the Constitution, 'rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law–rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.' " Martz v. Incorporated Village of Valley Stream, 22 F.3d 26, 29 (2d Cir. 1994) (quoting Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)). The Court of Appeals has not determined whether an interest in rental income constitutes a protected property interest. See Karol v. City of New York, 396 F.Supp.3d 309, 322 (S.D.N.Y. 2019). Courts in this Circuit have been reluctant to reach that conclusion. As the Court in Weisenberg explained:

> ***10** Here, Plaintiffs argue that they have established their 'fundamental property right to rent out their homes under New York law. (Pls. Opp'n 15.) In support of this argument, Plaintiffs rely on cases standing for the simple, yet separate, hornbook principle that ownership of real property includes a bundle of rights, one of which is the right to lease. However, "New York zoning law appears to take into account the somewhat intuitive concept that 'a property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers.' " DLC Mgmt. [Corp. v. Town of Hyde Park, 163 F.3d 124, 130 (2d Cir. 1998)] (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992)). Accordingly, under New York law, a landowner has no vested right to the existing zoning status of her property unless she has made substantial expenditures in reliance on such zoning status. Although cases applying this standard typically involve requests for residential-construction permits, the Court sees no reason why the same principle should not apply to a broad-based zoning restriction on temporary rentals. Here, Plaintiffs do not allege that they made any such expenditures. As Plaintiffs have failed to adequately allege a federally protectable property interest in the unlicensed renting of their homes for periods less than fourteen days, their substantive-due-process claim is dismissed.
>
> Weisenberg, 404 F.Supp.3d at 733-34.

As a general matter, Plaintiffs allege that short-term rentals have long been an expected and accepted use for property in the region and the Defendant municipalities. Complt. at ¶ 141. They also allege that they purchased their properties with the expectation that they could use short-term rental income so that they could afford to maintain those properties, and were

engaging in such uses when the Defendants enacted the short-term rental law. Id. at ¶¶ 151, 153. The 90-day rental cap lacks a rational basis, they claim, because that cap "economically idles a large portion of a property in a municipality with year round tourist marketability thereby depriving Plaintiffs, and others similarly situated, of income from property purchased and priced with rental income in mind." Id. at ¶ 155.

Plaintiffs' position, then, is that limits on short-term rentals deprives them of a property interest because they purchased their properties with an understanding that there would be no limits on the number of days they could offer them as short-term rentals. Preventing them from using the properties for that purpose for more than 90 days in a year would prevent them from using the property as intended. Like the plaintiffs in Weisenberg, they point to general principles of property ownership and use long established in New York law to argue that they have a protected property interest in short-term rentals without limitation. They do not allege that they made specific improvements or changes to the properties in anticipation of renting on a short-term basis. They do allege, however, that they relied on a long-term practice in the region of short-term rentals in deciding to purchase the properties, and that the short-term rental law undermined those calculations.

The Court concludes that discovery would be necessary to determine whether Plaintiffs have a protected property interest in short-term rental income, and in that sense Plaintiffs have alleged facts that make plausible their right to relief in this respect. The Court recognizes that courts in this Circuit have not determined that the right to rental income is a protected property interest. The Court notes that the purchase and ownership of property does not immediately convey an unassailable set of rights that are immune to regulation. A plaintiff certainly cannot claim a property right in using a property in a way that regulation and custom did not allow at the time of purchase. Making all inferences in the Plaintiffs' favor, however, the Court finds that Plaintiffs have alleged that they purchased property that had customarily been used for the very purposes which they intended to utilize it, and that Defendants subsequently instituted regulations which undermined their ability to make use of the property in the intended way. The Court must therefore find that Plaintiffs have alleged sufficient facts to make plausible that the short-term rental law implicated a protected property interest.

***11** The next question for the Court is whether Plaintiffs have plausibly alleged that Defendants acted in an arbitrary and irrational way in depriving them of their property interest. To meet that standard when the challenge to the ordinance is a facial one, Plaintiffs must demonstrate that "the regulation lacks any relationship to a legitimate government interest." Kittay v. Giuliani, 112 F.Supp.2d 342, 352 (S.D.N.Y. 2000). Plaintiffs contend that the short-term rental ordinance does not meet this standard.

Plaintiffs' Complaint alleges that

> 44. The Lake Placid/North Elba Development Commission was created by the Village of Lake Placid and Town of North Elba Municipal boards in August of 2014.
>
> 45. The Commission obtained two studies from Camoin 310 including a Community Housing Needs Assessment and Short-term Rental Study.
>
> 46. The Community Housing Needs Assessment found that second-home ownership levels are trending upwards along with a growing number of short-term rentals in the community (Id.)
>
> 47. In turn, the same consultant analysis determined that short-term rentals had the potential to exacerbate existing housing affordability and availability issues for the workforce, which must be balanced with the positive benefits short-term rentals provide community (Id.).

Complt. at ¶¶ 44-47. The Complaint then goes on to describe the process of passing the short-term rental law, which the Complaint abbreviates as the "STR Law." Id. at 48-54. Plaintiffs then allege that:

> 55. As set forth in the STR Law, the purpose of the local law is "to regulate the short-term rental dwelling units within the Village of Lake Placid and Town of North Elba and to establish comprehensive and licensing regulations" against extensive short-term rentals that "endanger" the historical and residential character of the "residential resort community."
>
> ...
>
> 58. The STR Law prohibits a short-term rental property to be rented greater than ninety (90) days in any given calendar year. However, this greater than ninety (90) day restriction is not applicable to the following:
>
> a. Hosted short-term rental units which are those in which the host is a resident and an owner who lives

at the property for at least 184 days per calendar year and is home overnight during the term of each rental,

b. Condominium projects and town house projects which have an active homeowners' association,

c. And rental units on Main Street and Sentinel Road in the Village Center District (VC) and Wilmington Road, Cascade Road and Saranac Avenue in the Gateway Corridor District (GC), which rental units shall also be exempt from Section 11.2A(5).

Id. at ¶¶ 55, 58.

Plaintiffs argue that:

> The 90 total rental days cap does not rationally serve to 'establish comprehensive registration and licensing regulations' of short-term rental properties, "applicable to all properties in all districts within the Village of Lake Placid and Town of North Elba" safeguarding the public health, safety and welfare by regulating nor does the cap rationally serve "achieving a balance between those that rent for short-terms and those that do not." The 90-day cap as alleged throughout Plaintiffs Complaint, does not apply to all properties and districts of Defendants locales; that provision is excluded for certain streets, and "active" homeowner's [sic] associations. The 90-day cap, and its resultant economic damage, as alleged in Plaintiff's Complaint is not commensurately linked to demand (Complaint Para. 23, 25, 27), or past allowed use including the average number of rental days across the spectrum of short-term rentals.

***12** Plaintiffs' Brief, dkt. # 10, at 12-13.

The Court finds that Plaintiffs have failed to allege that Defendants' ordinance is not rationally related to a legitimate governmental interest. Plaintiffs here contend that the ordinance is not applicable to all properties and districts in the Village of Lake Placid and the Town of North Elba because only some properties are subject to the 90-day cap on short-term rentals. They also complain that the 90-day cap fails to account for past uses or demand for such short-term rentals, and that limiting such rentals fails to achieve the ordinance's aim of finding a balance between different types of rentals. Plaintiffs are correct that the ordinance does not treat all properties and districts the sam e, but that does not mean that the ordinance in question fails to create a scheme that addresses the entire jurisdiction, nor does treating properties in different locations differently indicate that the restrictions in the statute fail to bear a rational relation to legislator's aim of finding a way to balance the demand for short-term rentals from visitors and homeowners in the community with the interests of others in the community in affordable housing and more stable residencies. Moreover, they implicitly acknowledge that Defendants had a legitimate state interest in attempting to balance the interests of those living in, working in, and visiting the area in obtaining and maintaining housing.

In the end, Plaintiffs argue that the decisions that community planners made regarding the use of properties in Lake Pacid and North Elba were bad ones that failed to account properly for the interests of those who would like to rent their properties on a short-term basis for more than ninety nights in a year. They may be right, and they may also be correct that limiting such uses will not eliminate the problems that town planners hope to address. The Court's role here, however, is not to resolve the dispute between the Plaintiffs and the town officials about what the best zoning policy would be; to do so would be to turn the Court into the sort of zoning appeals board prohibited by the case law. The question for the Court is whether the short-term rental ordinance is rationally related to a legitimate government interest. The Court finds that Plaintiffs have alleged facts which admit that the ordinance is rationally related to the Defendants' interest in planning how to use land in a way that balances the interests of homeowners, renters, and short-term visitors. That Plaintiffs have alleged that the Defendants made a bad choice in their ordinance is not an allegation that their choice was irrational and unrelated to a legitimate state interest. The Court will grant the motion with respect to this claim.

To the extent that the claim is an as-applied one that argues that the 90-day limit has been applied in an unconstitutional manner to their properties, the Court will also grant the motion to dismiss. First, Plaintiffs have not alleged that "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the propert[ies] at issue[.]" Sunrise Detox, 769 F.3d at 122. Even if Plaintiffs had alleged such a final judgment, they have not alleged conduct that would constitute a substantive due process violation. " 'Substantive due process protects against government action that is arbitrary, conscience-shocking, or oppressive in a constitutional sense, but not against government action that is incorrect or ill-advised.' " Cunney v. Bd. of Trs. of Grand View, 660 F.3d 612, 626 (2d Cir. 2011) (quoting Kaluczky v. City of White Plains, 57 F.3d 202, 211 (2d Cir. 1995)). In the context of a zoning dispute, a plaintiff alleging a substantive due

process violation must "show that the [defendant's] action in depriving it of that interest was 'so outrageously arbitrary as to be a gross abuse of governmental authority.' " Lisa's Party City, Inc. v. Town of Henrietta, 185 F.3d 12, 17 (2d Cir. 1999) (quoting Natale v. Town of Ridgefield, 170 F.3d 258, 263 (2d Cir. 1999)). Plaintiffs' allegations here are that the conduct was ill-advised, not conscience-shocking. The Court will grant the motion with respect to this count.

ii. Count Five

***13** Count Five alleges that Defendants violate Plaintiffs' substantive due process rights by limiting their ability to rent their properties and then conditioning any rental on improvements to the properties that Plaintiffs cannot recover during the limited periods in which they can rent their properties.

Plaintiffs allege that:

> 170. The STR law allows in Section 11.2(D)(30 and (D)(5)(h0), discretionary placement of conditions, including building enhancement, by the zoning enforcement officer ZEO [sic] to any short-term rental permit.
>
> 171. Upon information and belief, the Town of North Elba and Village of Lake Placid zoning officer has placed conditions onto properties including the installation of fire escapes, evacuation egress windows, second sets of stairs, the cost of which greatly exceeds $10,000 (see Exhibit C).
>
> 172. Upon information and belief, the Enforcement Officer has unilaterally reclassified properties seeking to engage in short-term rentals as R-1 structures relative to the New York State Building Code, outside of legislative action, pursuant to the NYS Building Code thereby preventing the issuance of a short-term rental permit and continuance of previously allowable use.

Complt. at ¶¶ 170-172. Plaintiffs also complain that they purchased their homes with the expectation that they could use them for short-term rentals, and that the limit of 90 days per year of rentals undermines their ability to afford those homes. In that way, they claim, "the STR law violates Plaintiffs' rights to substantive due process, both on its face and as applied, to the extent ti extinguishes or irrationally interferes with Plaintiffs' investment backed expectations in acquiring their properties and previously permitted uses at the time of acquisition."

To the extent that Plaintiff's claim is a facial substantive due process challenge to the ordinance's limitation on the number of days that Plaintiffs can rent their property on a short-term basis, this claim fails for the same reasons as explained in Count Four.

To the extent that this claim is an "as applied" challenge to the ordinance, the claim is not ripe. Plaintiffs have not alleged that the decision of the zoning officer was final, or described any zoning appeals they undertook. The claim will be denied as unripe. Even if the claim was ripe in this respect, the Court would grant the motion. Plaintiffs allege that the enforcement has either placed conditions on use that prevent them from renting their properties or reclassified their properties in ways that make them ineligible for short-term rental. The allegations here are that the zoning officer exercised authority and reclassified properties in a way that may have been contrary to New York law. The Complaint does not allege that the zoning officer engaged in any outrageous or arbitrary behavior or grossly abused the office. The Plaintiffs simply complain that the officer's decision cost them money and was in error. Such allegations do not make a violation of Plaintiffs' substantive due process rights plausible, and the Court would grant the motion in this respect as well.

Plaintiffs also allege that the ordinance's:

> 179.... 90 day stay of enforcement as measured from the effective date is an unreasonable, irrational, and insufficient amortization period; accordingly, the STR law prohibits or irrationally curtails existing uses to which Plaintiffs' properties were lawfully devoted and permitted at the time of the STR law's enactment all in violation of Plaintiffs' substantive due process rights, both facially and as applied.
>
> ***14** 180. The Town of North Elba and Village of Lake Placid have no rational basis for the absence of grandfathering provisions in the STR law and resulting immediate extinguishment of rights relative to the Plaintiffs' previously permitted uses of their properties as short-term rentals.

Comptl. at ¶¶ 179-180.

This claim also fails to allege a facial violation of Plaintiff's substantive due process rights. The allegation that there was no rational basis for the provisions is merely conclusory, and Plaintiffs connect no facts to this claim. The Court will grant the motion to dismiss in this respect as well.

iii. Counts Six, Seven and Eight

Plaintiffs argue that they have plausibly alleged that different sections of the ordinance are void for vagueness in Counts Six, Seven, and Eight.

"A component of the Due Process Clause, 'the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.' " Copeland v. Vance, 893 F.3d 101, 110 (quoting Kolender v. Lawson, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983)). To prove unconstitutional vagueness, a plaintiff must show "that the statute either 'fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits' or 'authorizes or even encourages arbitrary and discriminatory enforcement.' " Id. (quoting Hill v. Colorado, 530 U.S. 703, 732, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000)). While most void-for-vagueness challenges address how officials applied the statute to an individual, "a party may also challenge a statute as vague *on its face* asserting that it is 'so fatally indefinite that it cannot constitutionally be applied to anyone." United States v. Requena, 980 F.3d 29, 39 (2d Cir. 2020) (quoting Copeland, 893 F.3d at 110) (emphasis in original); see also, Sanitation & Recycling Indus. v. City of New York, 107 F.3d 985, 992 (2d Cir. 1997) (quoting New York State Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 11, 108 S.Ct. 2225, 101 L.Ed.2d 1 (1988) (a successful facial challenge requires a showing "that the challenged law 'could never be applied in a valid manner.' ")). Because of this requirement, "a facial challenge to a legislative enactment is 'the most difficult challenge to mount successfully.' " New York State Rifle & Pistol Ass'n v. Cuomo 804 F.3d 242, 265 (2d Cir. 2015) (quoting United States v. Salerno, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987)).

Count Six alleges that Defendants violate Plaintiffs' substantive due process rights by a requirement that Plaintiffs "designate a 'contact person' who 'must be located within sixty minutes distance by car' and 'be available 24 hours per day, 7 days a week' " because such a requirement "is vague, arbitrary and irrational on its face and as applied to Plaintiffs." Complt. at ¶ 193. Plaintiffs complain that this the requirement "fails to define 'available,' lacks context regarding the measurement of 'sixty minutes by car,' unreasonably restricts the movements of the 'contact person[']' and deflates the availability of those citizens ... entitled to be eligible thereby allowing arbitrary enforcement in the nature of criminal penalties[.]"

The Court will grant the motion to dismiss with respect to Court Six. A reasonable person would understand that "available" means in this context "readily obtainable; accessible." Random House Dictionary of the English Language, Unabridged Ed. (1979). A contact person for the property must be capable of being reached to address any problems with the property. To be within sixty minutes by car means that the contact person must be able to get in a car and drive to the property in question in an hour or less. While Plaintiffs may find such requirements onerous, they have not alleged that the statute is so vague that a reasonable person could not understand what conduct the ordinance prohibits. Nothing about the allegations in the Complaint indicates that the statute could never be applied in a constitutional manner, and Plaintiffs' void-for-vagueness claim fails on this count. The statute also does not create a danger of arbitrary enforcement in this respect. An enforcement officer who could not reach the contact person by telephone or email would find that the contact person was unavailable in violation of the statute. If the enforcement officer reached that person by those means, no violation of the statute would occur. Similarly, if the contact person could not drive to the property within an hour when the enforcement officer requested, the officer would find a violation. If the contact person arrived within an hour, the officer would not find a violation. Plaintiffs have failed to state a facial void-for-vagueness claim on this Count.

***15** Count Seven alleges that the short-term rental law violates Plaintiffs' due process rights because, as written, the statute permits or encourages arbitrary enforcement. Plaintiffs point to Section 11.2 of the ordinance, and allege that:

> 198 .... anyone may complain that a property engaged in short-term rentals is in violation of the STR law or property's STR law permit by contacting the "contact person designated on the permit, a law enforcement agency, the code enforcement officer or any other person or entity which could assist in resolving [a] complaint, describe the problem from which the complaint arises and indicate the desired remedy."
>
> 199. The STR law, in turn, provides that the contact person shall within sixty minutes of receiving the complaint, respond to the complaint and remedy as

soon as reasonably possible any situation that is out of compliance with these regulations or with the permit for the property.

200. The STR law then also provides: "If the response is not satisfactory to the complaining party the complaining party may file a complaint with the enforcement officer."

201. Further, Section 11.2(A)(6) of the STR law stated: "If the terms of the short-term rental permit are not followed, or these regulations or those subsequently adopted are not followed, the short-term rental permit may be revoked and the owner shall be subject to the penalties provided in Section 9 of the Village of Lake Placid/Town of North Elba Land Use Code."

202. [enforcement includes criminal penalties of fines not to exceed $350 and up to six months imprisonment for the first offense, a fine of $350-$700 and up to six months imprisonment for a second offense within five years, a fine of $700-$1000 and up to six months imprisonment for a third or subsequent offense within 5 years. That matters will be treated as misdemeanors "for the purpose of conferring jurisdiction upon courts and judicial officers generally.").

Complt. at ¶¶ 198-202. Plaintiffs contend that the language of the statute guarantees that "enforcement of the" ordinance "is sure to be arbitrary in violation of Plaintiffs' due process rights. Id. at ¶ 203. They argue that the requirement of a "satisfactory" response within sixty minutes to any complaint "is a vague, arbitrary and irrational statutory requirement involving subjective definitions not rationally related to any legitimate government interest[.]" Id. at ¶ 204. Requiring that the response be "satisfactory to the complaining party" also allegedly "delegates policy matters" and violates Plaintiffs' due process rights. Id. at ¶ 206.

Plaintiffs explain their complaint here is that the requirement that a property owner respond to a complaint in a "satisfactory manner" or face action from the zoning officer "authorizes or even encourages arbitrary enforcement in violation of due process pursuant to the void for vagueness doctrine." The Court is not persuaded that there are no circumstances where the statute could operate constitutionally. First, while the statute does not make clear what responding to a complaint in a "satisfactory" manner entails, such language itself does not prevent the property owner from understanding how to comply with the law. The property owner must know from this language that a complainant can raise an issue and demand that the owner fix the problem to the complainant's satisfaction. Given the myriad of problems that might occur with a property, the law necessarily leaves space for different issues and lets the renter and the owner determine when a particular problem has been resolved. As an example, if a tenant complains that a faucet leaks, a property owner could reasonably understand that a satisfactory resolution of the problem would be stopping the leak. In any case, the enforcement scheme in the statute, laid out above, indicates that a failure to resolve the problem in a satisfactory way does not lead to an automatic penalty, but to the involvement of the enforcement officer. An automatic violation does not follow in every instance, and the enforcement officer does not need to accept a complaint's claim of a less-than-satisfactory response. Under those circumstances, the Court finds that Plaintiff has not alleged that the ordinance could never be enforced in a constitutional manner. The motion will be granted with respect to Count 7.

***16** Court Eight alleges that the short-term rental law violates Plaintiffs' due process rights by permitting the "delegation of enforcement to a private entity with proprietary internal rules, regulations and procedures," which then "permits or encourages arbitrary and erratic enforcement by placing virtually unfettered discretion in the hands of the enforcement officer, or private entity, to either permit or deny a citizen and property owner the right to engage in short term rentals[.]" Plaintiffs' briefing does not explain how this delegation is unconstitutionally vague, and alleges that the language permits arbitrary enforcement in only a conclusory way. In any case, the Court cannot find that permitting discretion to an enforcement officer to investigate and initiate proceedings related to a variety of property violations permits arbitrary enforcement. The ordinance defines the requirements for property maintenance, property conditions, and notices that short-term rentals must provide. That gives guidance and limits to enforcement officers, despite the obvious need to provide flexibility in enforcement. Under those circumstances, the Court cannot find that Plaintiffs have alleged that the statute permits such arbitrary enforcement that enforcing the ordinance would be unconstitutional under all circumstances. The Court will grant the motion to dismiss with respect to Count Eight as well.

vi. Count Nine

Count Nine alleges that the short-term rental law establishes strict criminal liability for violations of the statute by the property owner or another person acting for the property

owner. Plaintiffs claim that these provisions violate their due process rights by imposing vicarious criminal liability.

The provision about which Plaintiffs complain provides the following:

> If the terms of the short term rental permit are not followed, or these regulations or those subsequently adopted are not followed, the short-term rental permit may be revoked and the owner shall be subject to the penalties provided in Section 9 of the Village of Lake/Placid Town of North Elba Land Use Code, as well as the penalties set forth below.

Ordinance at § 11.2(A)(6). According to the Plaintiffs, Section 9 of the Land Use Code provides that "[a] violation of this Code is hereby declared to be an offense, punishable by a fine not exceeding three hundred fifty dollars ($350) or imprisonment for a period not to exceed six months, or both for conviction of a first offense[.]" Plaintiffs' Brief, dkt. # 10, at 17 (quoting Land Use Code at Section 9).

Plaintiffs cite to People v. Byrne, 77 N.Y.2d 460, 568 N.Y.S.2d 717, 570 N.E.2d 1066 (1991), to argue that the ordinance violates their due-process rights by imposing vicarious liability on them. There, the Court of Appeals addressed whether the owner of a liquor store could be liable under a New York laws that imposed strict liability for the sale of alcoholic beverages to minors; "proof of the accused's knowledge or intent is not required[.]" Id. at 463, 568 N.Y.S.2d 717, 570 N.E.2d 1066. Under those circumstances, the court asked 'whether these statutes also create a crime of 'vicarious liability,' permitting conviction of a natural person for the acts of another solely because of the parties' business relationship." Id. The court concluded that vicarious liability was not available under the statute in question since "where the Legislature has not clearly and specifically mandated otherwise, statutes defining criminally punishable offenses should ... be construed to require some personal participation by the accused in the prescribed act." Id. at 467, 568 N.Y.S.2d 717, 570 N.E.2d 1066. The court noted, however, that "we stress that our decision in this case does not represent a policy-based rejection of the use of vicarious liability theories in criminal prosecutions[.]" Id. The wisdom of passing such laws, the court emphasized, lay "within the purview of the Legislature's judgment, provided, of course, that the constraints of due process are observed." Id.

The Court is unpersuaded by the Plaintiffs' argument in this respect. The Court notes that Plaintiffs' challenge here is a facial one. A party raising a facial due process challenge to a government policy " 'bears [the] heavy burden' of demonstrating that, as written, the Policy 'could never be applied' in a manner that would afford claimants constitutionally adequate" procedures. N.Y. State NOW v. Pataki, 261 F.3d 156, 171 (2d Cir. 2001) (quoting Sanitation & Recycling Indus., Inc. v. City of New York, 107 F.3d 985, 992 (2d Cir. 1997) (alterations and emphasis in original)). Even assuming the Plaintiffs are correct that the statute imposes vicarious liability on property owners, the case the Defendants cites establishes that the mere imposition of such liability does not violate an accused's due process rights in every instance. Byrne simply finds that a statute that imposes vicarious liability may not be enforced under some circumstances. As such, Plaintiffs have not alleged facts making a facial due process challenge plausible under the circumstances, and the Court will grant the motion with respect to this claim.

vii. Count Ten

***17** Count Ten alleges that the short-term rental law violates Plaintiffs' procedural due process rights by permitting the revocation of Plaintiffs' right to lease their properties on a short-term basis while their appeals of Enforcement Officers' decisions are pending. Plaintiffs describe this claim as a "facial challenge," since the ordinance has not yet been applied. They contend that the statute is unconstitutional because the ordinance "purports to allow the zoning enforcement officer the power to unilaterally suspend a short-term rental permit, revoke a short-term rental permit, or place additional conditions upon his or her subjective finding of a violation of a rental permit or the" ordinance. Plaintiffs argue that the law is invalid because their "opportunity to be heard" on the permit revocation comes "after the zoning enforcement officer had already interfered with Plaintiffs' vested property rights." While a property owner has an opportunity in the law to contest the suspension, that suspension "would remain in effect in addition to the prospect of significant criminal penalties" during the appeal. That sort of suspension represents a deprivation of a significant property interest without a hearing and violates the procedural portion of the due process clause.

A procedural due process claim has two elements: " '1) whether plaintiffs possess a liberty or property interest protected by the Due Process Clause: and, if so, 2) whether existing state procedures are constitutionally adequate.' " Ford Motor Credit Co v. N.Y. City Police Dep't, 503 F.3d

186, 190 (2d Cir. 2007) (quoting Kapps v. Wing, 404 F.3d 105, 112 (2d Cir. 2005)). "The Due Process Clause does not demand that the government provide the same kind of procedural protections for every deprivation of a property or liberty interest." Weinstein v. Albright, 261 F.3d 127, 134 (2d Cir. 2001). "At a minimum, due process requires that the government provide 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' " Id. (quoting Mullane v. Central Hannover Bank Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950)).

The ordinance provides the following enforcement procedures:

> F. Compliance, Hearings and Penalties. Owners of short-term rental units shall obey all applicable laws, ordinances and regulations of the Village of Lake Placid, Town of North Elba, Essex County, New York State and the United States of America, and shall be subject to the enforcement and penalty provisions contained in the Village of Lake Placid/Town of North Elba Land Use Code and any other state or local law.
>
> The following process shall be followed in the event of a complaint alleging a violation of these regulations or a permit issued under these regulations:
>
> (1) The complaining party may contact the contact person designated on the permit, a law enforcement agency, the Code Enforcement Officer or any other person or entity which could assist in resolving the complaint, and describe the problem from which the complaint arises and the desired remedy.
>
> (2) The contact person shall, within sixty minutes of receiving the complaint, respond to the complaint and remedy as soon as reasonably possible any situation that is out of compliance with these regulations or with the permit for the property. the First Dispatch will have the names and contact information for each contact person to provide to a complaining party.
>
> (3) If the response is not satisfactory to the complaining party (including the inability to promptly reach the contact person), the complaining party may file a complaint with the Enforcement Officer by submitting a written complaint. The form of the complaint shall be established by the Enforcement Officer and may be filed in person, by mail, by email or online. The complaint shall provide pertinent information including the date, time and nature of the alleged violation as well as a statement that complainant either unsuccessfully attempted to contact the person or did contact the contact person but the complaint was not adequately resolved. A failure to attempt to contact the contact person will not excuse a violation.
>
> (4) If the Enforcement Officer finds a violation of the permit or of this section, the Enforcement Officer may do any of the following depending on the circumstances:
>
> ***18** (a) Attach reasonable conditions to the existing short-term rental permit;
>
> (b) Suspend the short-term rental permit;
>
> (c) Revoke the short-term rental permit; or
>
> (d) Issue a violation or warning.
>
> (5) Should a permit be revoked, none of the owners of the short-term rental property may obtain any short-term rental permit sooner than one year after the date of revocation.
>
> (6) The Village of Lake Placid or the Town of North Elba may also initiate enforcement proceedings under the Village of Lake Placid/Town of North Elba Land Use Code at any time following receipt of a complaint.
>
> (7) Decisions of the Enforcement Officer will be provided to the parties and may be appealed, within 30 days of receipt of the decision, by the owner or by the complainant in accordance with Section 11.3.
>
> (8) Any property owner found in willful violation of the provisions of this local law shall be required to reimburse the Town for its reasonable costs of enforcement, including reimbursement for staff time and reasonable attorney's fees.
>
> (9) The Enforcement Officer or his designee shall have the right to inspect the short-term rental property to ensure it complies with the provisions of this section at any reasonable time of day upon giving reasonable notice to the owner or occupant of said unit.

Short Term Ordinance, Exh. B to Complaint, dkt. # 2, at § 11.2(F). The ordinance also describes the appeals procedures for disputes about short term rentals. See Id. at § 11.3. That section provides, in relevant part, that "[d]ecisions

and determinations made by the Enforcement Officer under Section 11 shall be made in writing and provided to the owner and complainant, if any." Id. at § 11.31(D). "Said decision/determination may be appealed to the STR Appeals Board within thirty (30) days of receipt of the decision." Id. The statute also provides that a decision of the Enforcement Officer may be "stayed" if "the STR Appeals Board agrees to grant appellant a stay upon his/her/its application for such stay." Id.

Even assuming that Plaintiffs have a protected property interest in short-term rental income, the ordinance has enforcement procedures in place that attempt to address the requirement of notice and an opportunity to be heard. Plaintiffs claim that they suffer a deprivation without due process when the Enforcement Officer suspends their rental permit and they have to wait to appeal that decision to the Appeals Board. The ordinance, as described above, has a clearly delineated procedure for identifying violations. Any complaint about a property, however raised, results in notification of the contact person listed on the permit. The contact person then has an opportunity to rectify the condition before any enforcement action occurs. A formal complaint appears only if the contact person fails to respond or fails to respond to the satisfaction of the complaining party. The formal complaint provides information on the nature of the alleged violation. The Enforcement Officer can take action that includes revocation of the permit, but the ordinance has an appeals process in place. A property owner can seek a stay on any enforcement action while this appeal goes forward.

***19** The Court finds that Plaintiffs fail to state a claim in their Complaint that the Enforcement Officer may suspend their rental permit upon finding a violation. First, the ordinance makes clear that notice procedures are in place before any initial enforcement action. Indeed, the procedures provide a property owner with an opportunity to rectify any non-conforming condition before the Enforcement Officer takes any action. While Plaintiffs may complain that they have too little time to solve a problem and that the use of a contact person may not be practical under the circumstances, this challenge is facial, and not an as-applied one. Plaintiffs must show that the ordinance " 'could never be applied' in a manner that would afford claimants constitutionally adequate" procedures. N.Y. State NOW, 261 F.3d at 171 (2d Cir. 2001) (quoting Sanitation & Recycling Indus., Inc., 107 F.3d 985, 992). The Court cannot find that here. Moreover, a property owner facing any sort of an enforcement action has the ability to challenge any sanction assigned to the Appeals Board within thirty days of the action. Such a property owner can also seek a stay of the enforcement action until resolution of the appeal. Under the circumstances, the Court finds that the procedures in question provide reasonable notice and an opportunity to be heard before the deprivation occurs. The fact that the deprivation might occur pending resolution of the appeal is not unreasonable under the circumstances. The ordinance regulates the condition of rental properties and thus implicates public safety. Under some circumstances, quick and decisive action is necessary to protect renters from unsafe conditions. The ordinance balances that need for quick action with appellate procedures that include stays on enforcement. The Court must find that there are conditions under which the law could be applied in a constitutional manner and will dismiss the facial procedural due-process challenge to the ordinance.

E. Takings Claim

Defendants also seek dismissal of Plaintiffs' Fifth Amendment "takings clause" claim. They argue that Plaintiffs have failed to plead a takings claim because they have not alleged a loss that constitutes a taking within the meaning of that clause.

"The Takings Clause of the Fifth Amendment provides that no 'private property shall be taken for public use, without just compensation.' " Buffalo Teachers Fed'n v. Tobe, 464 F.3d 362, 373 (2d Cir. 2006) (quoting U.S. Const. amend. V). "The clause applies to the states through the Fourteenth Amendment." Id. At issue here is a "regulatory taking," where a "state regulation goes too far and in essence effects a taking." Sherman v. Town of Chester, 752 F.3d 554, 564 (2d Cir. 2014) (internal quotations omitted). Two types of regulatory takings exist: " 'categorical and non-categorical takings.' " Id. (quoting Huntleigh USA Corp. v. United States, 525 F.3d 1370, 1378 n.2 (Fed. Cir, 2008)). T his case involves a non-categorical taking, which involves " '[a]nything less than a complete elimination of value, or a total loss.' " Id. (quoting Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 330, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002)). Analysis of such a taking " 'requires an intensive *ad hoc* inquiry into the circumstances of each particular case.' " Id. (quoting Buffalo Teachers Fed'n, 464 F.3d at 375). Courts " 'weigh three factors' " in deciding whether a taking occurred. Id. (quoting Buffalo Teachers Fed'n, 464 F.3d at 375). They examine: " '(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the

governmental action.' " Id. (quoting Buffalo Teachers Fed'n, 464 F.3d at 375).

Plaintiffs contend that the ordinance causes them a strong economic impact by limiting their ability to obtain short-term rental income to half the number of days previously available. Economic harm, they claim, comes to more than $10,000 annually. This regulation has undermined their expectations on investing in the properties; they expected the short-term rental income to make their Lake Placid homes affordable. The character of the government action, particularly in capping the rental days, is arbitrary, as is the time period permitted for amortization. Defendants respond that the amount of Plaintiffs' loss is insufficient for a takings claim.

As to the first factor, the economic impact of the regulation, Plaintiffs allege that the regulatory scheme Defendants implemented will prevent them from earning as much from short-term rentals as they had expected when they purchased their properties. "[I]t is well settled that a 'taking' does not occur merely because a property owner is prevented from making the most financially beneficial use of a property." Kabrovski v. City of Rochester, 149 F.Supp.3d 413, 425 (W.D.N.Y. 2015). Instead, "where a landowner alleges that certain land-use regulations effect a facial taking, he must show that the very language of the regulations 'denies the owner of essentially all economically viable use of his land.' " Kittay v. Giuliani, 112 F.Supp.2d 342, 350-51 (S.D.N.Y. 2000) (quoting Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 295-96, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981)). Here, making all inferences in Plaintiffs' favor, they allege that the regulations prevent them from maintaining ownership in the property and thus making economic use of that property. The regulations will force them to sell the property. At this stage of the litigation, before any discovery, the Court must conclude that this factor favors the Plaintiffs.

***20** As to the second factor, the Plaintiffs have alleged that the purchased the properties in question with the expectation that they would be able to recoup their investment through short-term rentals. When they purchased the properties, no limits existed on the number of days per year that the properties could be rented. The regulation limiting the number of days of short-term rental interfered with this reasonable investment-backed expectation. This factor favors a finding of regulatory taking. The Plaintiffs "could not have expected" the ordinance's interference with short-term rentals, which "pushed them to the brink of" losing their homes. Sherman, 752 F.3d at 565.

As to the third factor, courts find that " '[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.' " Id. (quoting Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978)). As to this factor, Plaintiffs argue that "the imposition of a 90-day cap upon Plaintiffs–a subset of the short-term rental market involves [an] arbitrarily set number and [is] not rationally related to Defendants[']s stated interest in passing the" ordinance. That argument appears to concede, in part, that the Defendants had a legitimate governmental interest in instituting short-term rental regulations. At the same time, the Plaintiffs insist that the Defendants had no legitimate interest in limiting only some properties to 90 days of short term rental. At this point in the litigation, the Court finds that this factor weighs neither for nor against a finding of a regulatory taking. Discovery is necessary to determine the nature of the governmental action about which Plaintiffs complain.

Having considered the relevant factors, the Court concludes that the Defendants have alleged enough facts to make plausible their regulatory takings claim. The Court will deny the motion in this respect.

F. Contracts Claim

Defendants also seek dismissal of Plaintiffs' contracts clause claim. They argue that the ordinance does not substantially impact the Plaintiffs because they can still rent their properties on a short term basis, just not for as many nights as they would like. Moreover, the ordinance's restrictions on such short-term rentals serve the significant public purpose of curtailing public nuisances such as noise and parking shortages, protecting public health, and keeping the character of neighborhoods. Finally, Defendants claim, the ordinance uses reasonable and appropriate means to achieve this purpose.

"Article I, Section 10 of the Constitution provides in pertinent part: 'No State shall ... pass any ... Law impairing the Obligation of Contracts.' " Sal Tinnerello & Sons, Inc. v. Town of Stonington, 141 F.3d 46, 52 (2d Cir. 1998). "Though the Contract Clause is phrased in absolute terms, the Supreme Court has not interpreted the Clause absolutely to proscribe any impairment of either private or government contracts."

Id. Because the government may use state power to protect citizens, "the Clause is not violated unless the impairment is a substantial one." Id. In deciding whether a statute violates the contracts clause, courts "pose three questions to be answered in succession: (1) is the contractual impairment substantial and, if so, (2) does the law serve a legitimate public purpose such as remedying a general social or economic problem and, if such purpose is demonstrated, (3) are the means chosen to accomplish this purpose reasonable and necessary." Buffalo Teachers, 464 F.3d at 368. Thus, to establish a Contract Clause violation, Plaintiffs must show not just an impairment to a contract, but also "that the impairment was unconstitutional, meaning that it was substantial and was not reasonable and necessary to a legitimate public purpose." Donohue v. Cuomo, 980 F.3d 53, 82 (2d Cir. 2020).

***21** Plaintiffs contend that they have alleged that they have contracts to let their property on a short-term basis for more than 90 days per year, and that these contracts are set "months and even years in advance." The law would force them to cancel such contracts, and thus substantially impairs them. Plaintiffs also contend that Defendants have not used a reasonable and necessary means to achieve the ordinance's purpose because the law does not apply in the same way to all districts in Lake Placid and North Elba, and the amortization period in the statute is insufficient to allow rentals already contracted to go forward.

The parties first dispute whether the ordinance causes a substantial impairment to Plaintiffs' contractual rights. "To assess whether an impairment is substantial," a court looks to " 'the extent to which reasonable expectations under the contract have been disrupted.' " Buffalo Teachers, 464 F.3d at 368 (quoting Sanitation & Recyling Indus. Inc. v. City of New York, 107 F.3d 985, 993 (2d Cir. 1997)). Further, " 'the reasonableness of expectations depends, in part, on whether legislative action was foreseeable.' " Donohue, 980 F.3d at 82 (quoting Sullivan v. Nassau Cty. Interim Fin. Auth, 959 F.3d 54, 65 (2d Cir. 2020)). An " '[i]mpairment is greatest where the challenged government legislation was wholly unexpected.' " Id. (quoting Sanitation & Recycling Indus., 107 F.3d at 993). "In evaluating 'the degree of impairment' we also consider 'the extent to which the challenged provision provides for gradual applicability of grace periods.' " Id. (quoting Sanitation & Recycling Indus., 107 F.3d at 393).

Here, Plaintiffs allege that the they entered into contracts to rent out their properties on a short-term basis throughout 2020. Complt. at ¶ 265. Those contracts, "some entered into months and even years in advance of March 17, 2020," when the Defendants enacted their ordinance, "obligate Plaintiffs to rent their properties in excess of 90 days throughout" 2020. Id. at ¶ 266. Plaintiffs allege that the ordinance "impairs" their "contractual relationships" by "creat[ing] unanticipated losses and potential claims against" them "not contemplated at the time of offering their property for short-term rental." Id. at ¶ 267. The ordinance further "upsets Plaintiffs' settled contractual expectations concerning their future revenue and income." Id. at ¶ 268. Plaintiffs claim they could not reasonably have foreseen the 90-day cap when they entered into their agreements to rent. Id. at ¶ 270. The statute, Plaintiffs claim, does not permit these previously contracted uses to continue. Id. at ¶ 271.

The Court finds that Plaintiffs have alleged facts which make it plausible that the ordinance substantially impairs contractual relationships. While discovery will be necessary to determine the type and extent of Plaintiffs' losses, if any, because of the short-term rental law, they have alleged that they signed contracts to let their property on a short term basis which the 90-day limit prevents them from fulfilling. They allege that they could not have anticipated such losses, and that the ordinance does not provide a sufficient means for them to limit their losses with a grace period. The ordinance does not fully exempt contracts already signed. Under those conditions, Plaintiffs have stated a claim on the first element.

Plaintiffs do not appear to dispute that the Defendants had a legitimate public purpose for their ordinance. They could not, as promoting public safety, preventing public nuisances, and promoting affordable housing are all legitimate governmental concerns. Plaintiffs claim, instead, that the regulations used to achieve these public aims are neither reasonable or necessary. A court reviewing the reasonableness of a legitimate government action "must accord substantial deference to the Town's conclusion that its approach reasonably promotes the public purposes for which the ordinance was enacted." Sal Tinnerello & Sons, 141 F.3d at 54. "It is not the province of [the Court] to substitute its judgment for that of ... a legislative body ... by determining that there might have been a more appropriate method by which" to achieve the legislature's end. Id. at 54-55. Similarly, a municipality "need not prove its choice the best among the available alternatives[.]" Id. at 55. Instead, a plaintiff "must prove that there is no rational relationship between the [municipality's] ends and its means." Id. If the law "impairs a private contract," the court provides "substantial deference" to the legislature's decisions. Buffalo Teachers Fed'n, 464 F.3d at 369.

***22** Plaintiffs argue that "their Complaint plausibly alleges that the" ordinance "is not drawn in an appropriate and reasonable way to advance the Defendants' stated interest of 'establishing comprehensive registration and licensing regulations' of short-term rental properties, 'applicable to all properties in all districts within the Village of Lake Placid and Town of North Elba,' " that safeguard the public health, safety and welfare by regulating while 'achiev[ing] a balance between those that rent for short-terms and those that do not.' " The statute too lacks a sufficient amortization period and covers too few properties with the 90-day cap. Thus, Plaintiffs contend "it is more than plausible that the appropriate and reasonable way to advance the Defendants' stated interests in the" ordinance "required protection of Plaintiffs[']s contractual obligations."

This argument does not even attempt to contend that no rational relationship exists between the aim of the ordinance to provide regulations for short-term rental properties and the provisions that limit the number of days that certain properties can provide a short-term rental. Instead, the Plaintiffs' complaint is that there were better ways to achieve the regulation of such properties than the ones that the Defendants chose. That allegation fails to satisfy the requirements of a contract clause claim and instead asks the Court to set aside deference for the Defendants' choices required in the law. Further, the Court must conclude that a limit on the number of days which a property can be rented on a short-term basis bears a rational relationship to the aims the Plaintiffs describe above, whether that limit is 90 days, or the 120 days of the proposed amended to the ordinance introduced before the North Elba Town Board and provided to the Court.[4] Likewise, a failure to provide a grace period for previous contracts is a choice for which the Court will not substitute its judgement. For those reasons, the Court will grant the motion to dismiss with respect to this claim as well.

G. First Amendment Claims

Plaintiffs agree with the Defendants that they have failed to state a claim upon which relief could be granted in Count 13, which alleges a First Amendment violation. Defendants' motion will be granted in that respect as well.

H. Municipal Liability

Defendants also seek dismissal of any municipal liability claims that Plaintiff may attempt to allege in the Complaint. To state a Section 1983 claim against a municipality, a plaintiff must allege that his rights were violated "pursuant to a governmental custom, policy, ordinance, regulation, or decision." Batista v. Rodriguez, 702 F.2d 393, 397 (2d Cir. 1983). That plaintiff must allege "(1) an official policy or custom that (2) causes the plaintiff to be subjected to (3) a denial of a constitutional right." Id.

Here, the Plaintiffs claim that they have been injured by a local law passed by the Defendants. A local ordinance surely represents an official policy or custom, and the Plaintiffs have therefore alleged municipal liability sufficient to survive a motion to dismiss. The motion to dismiss will be denied in this respect.

I. State Law Claims

Defendants also seek dismissal of any state-law claims. They argue that Plaintiffs have not filed a notice of claim as required by New York law and therefore cannot maintain any claims for damages, either as part of their claims or as incidental to their claims for equitable relief. Plaintiffs have also, Defendants claim, failed to exhaust their administrative remedies and cannot bring any state-law claims. In any case, since the state-law claims are redundant of the federal constitutional claims, they should be dismissed.

The Court will grant the motion and dismiss the state-law claims. The Complaint does not distinguish between the state-law claims and the federal constitutional claims, and does not plead any separate state-law claims. "Where claims are brought pursuant to the New York State Constitution and mirror claims brought under Section 1983, courts in this Circuit have held that there is no private right of action on the state constitutional claims." Wright v. City of Syracuse, No. 10cv661, 2014 WL 1293527 at *18, 2014 U.S. Dist. LEXIS 44524 at *54 (N.D.N.Y. Mar. 31, 2014) (citing Canzoneri v Incorporated Vill. of Rockville Ctr. 986 F.Supp.2d 194, 2013 U.S. Dist. LEXIS 171698, 2013 WL 6330671, at *11 (E.D.N.Y. Dec. 5, 2013), and collecting cases). The Court agrees, and will dismiss Plaintiff's state law claims, "[b]ecause all state constitutional law claims are also asserted as Section 1983 claims." Krug v. County of Rennselaer, 559 F.2d 223, 248 (2d Cir. 2008).

IV. CONCLUSION

***23** For the reasons stated above, Defendants' motion to dismiss, dkt. # 7, is hereby GRANTED in part and DENIED in part, as follows:

1. The motion is GRANTED as unripe with respect to any as-applied due-process challenges to the ordinance;

2. The motion is GRANTED without prejudice with respect to the Third Count of the claim;

3. The motion is GRANTED with respect to Plaintiffs' state-law claims;

4. The motion is GRANTED with respect to Plaintiffs' First-Amendment claims;

5. The motion is GRANTED with respect to Plaintiffs' facial substantive and procedural due process claims;

6. The motion is GRANTED with respect to Plaintiffs' Contract Claus claim; and

7. The motion is DENIED in all other respects.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2021 WL 1146283

Footnotes

1 Defendants' briefing includes a discussion of the standard the Court is to use in deciding whether to grant a preliminary injunction. While Plaintiffs seek declaratory and injunctive relief in their Complaint, no motion for a preliminary injunction is currently before the Court.

2 Section 11.2A(2) of the law provides that "[n]o short-term rental property may be rented for greater than (90) days in any given calendar year." See Exh. A to Plaintiff's Complaint, dkt. # 2 at § 11.2A(2).

3 Section 11.2A(5) provides: "[t]here shall be only one short-term rental permit issued per property. Thus if a property has more than one dwelling unit the permit issued shall be limited for one dwelling unit only." Exh. A to Plaintiff's Complaint, dkt. # 2, at § 11.2A(5).

4 See dkt. # 7-4.

46 F.4th 317
United States Court of Appeals, Fifth Circuit.

Samantha HIGNELL-STARK; White Spider Rental Concierge, L.L.C.; Garett Majoue; Russell Frank; Samantha McRaney; Bob McRaney; Jimmie Taylor, Plaintiffs—Appellants/Cross-Appellees,

v.

The CITY OF NEW ORLEANS, Defendant—Appellee/Cross-Appellant.

No. 21-30643
|
FILED August 22, 2022

Synopsis

Background: Homeowners who sought to operate short term rentals and company providing services for short term rental owners brought § 1983 action against city, alleging violations of the dormant Commerce Clause, the Takings Clause of the Fifth Amendment, and the First Amendment right to free speech, based on the city's ordinance requiring licenses to operate short term rentals. The United States District Court for the Eastern District of Louisiana, Ivan L.R. Lemelle, Senior District Judge, 476 F.Supp.3d 369, and 2021 WL 2886213, granted summary judgment in favor of city, in part, and denied city's motion, in part. Parties cross-appealed.

Holdings: The Court of Appeals, Smith, Circuit Judge, held that:

[1] homeowners had no protected property interest in the renewal of their short term rental licenses, as required to support Takings Clause claim for nonrenewals;

[2] ordinance's residency requirement violated dormant Commerce Clause; and

[3] Court of Appeals lacked jurisdiction to review District Court's decision on the homeowners' First Amendment claim.

Affirmed in part, vacated in part, and dismissed in part.

West Headnotes (28)

[1] **Eminent Domain** Property and Rights Subject of Compensation

The Takings Clause protects property interests but does not create them; instead, the existence of a protected property interest is determined by reference to existing rules or understandings that stem from independent source such as state law. U.S. Const. Amend. 5.

2 Cases that cite this headnote

[2] **Eminent Domain** Property and Rights Subject of Compensation

A court deciding a claim under the Takings Clause usually treats, as dispositive, the existence, or absence, of a protected property interest under state law. U.S. Const. Amend. 5.

1 Case that cites this headnote

[3] **Constitutional Law** Property Rights and Interests

Constitutional Law Factors considered; flexibility and balancing

Protected property for purposes of procedural due process merely obligates a governmental entity to provide an owner with procedural protections, and only when cost-benefit analysis shows that those procedures are worth the cost. U.S. Const. Amend. 14.

[4] **Eminent Domain** Necessity of making compensation in general

A taking of protected property in violation of the Takings Clause means that the government must pay damages. U.S. Const. Amend. 5.

[5] **Constitutional Law** Benefits, rights and interests in

The test for property interest protected by procedural due process is quite broad: a person's interest in a benefit is a property interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit. U.S. Const. Amend. 14.

1 Case that cites this headnote

[6] **Eminent Domain** Property and Rights Subject of Compensation

Some mutually explicit understandings can create property interests protected by the Takings Clause. U.S. Const. Amend. 5.

2 Cases that cite this headnote

[7] **Eminent Domain** Property and Rights Subject of Compensation

A property interest for purposes of procedural due process does not automatically qualify as a property interest protected by the Takings Clause. U.S. Const. Amends. 5, 14.

1 Case that cites this headnote

[8] **Eminent Domain** Property and Rights Subject of Compensation

To be a protected property interest, for purpose of a Takings Clause claim, the interest must be so deeply rooted in custom that "just compensation" for appropriating the interest necessarily includes money damages. U.S. Const. Amend. 5.

1 Case that cites this headnote

[9] **Eminent Domain** Property and Rights Subject of Compensation

Homeowners who sought to operate short term rentals had no protected property interest in the renewal of their short term rental licenses, as required to support Takings Clause claim against city for nonrenewals; the original licensing ordinance stated expressly that a short term rental license was a privilege, not a right, and that the license could be revoked or not renewed for non-compliance with the ordinance, and homeowners only held prior licenses for a couple of years, so that they were not firmly established in custom and practice. U.S. Const. Amend. 5.

2 Cases that cite this headnote

[10] **Commerce** Powers Remaining in States, and Limitations Thereon

Implicit restraints on state authority to regulate interstate commerce under the Commerce Clause apply to municipalities. U.S. Const. art. 1, § 8, cl. 3.

[11] **Commerce** Nonexercise of power by Congress

Commerce Powers Remaining in States, and Limitations Thereon

The dormant Commerce Clause is an implicit restraint on state authority to regulate interstate commerce, even in the absence of a conflicting federal statute. U.S. Const. art. 1, § 8, cl. 3.

[12] **Commerce** Powers Remaining in States, and Limitations Thereon

Two primary principles mark the boundaries of a state's authority to regulate interstate commerce under the dormant Commerce Clause: a state may not discriminate against interstate commerce and may not impose undue burdens on interstate commerce. U.S. Const. art. 1, § 8, cl. 3.

1 Case that cites this headnote

[13] **Commerce** Powers Remaining in States, and Limitations Thereon

If a state law discriminates against interstate commerce, it is in big trouble because a discriminatory law is virtually per se invalid under the dormant Commerce Clause. U.S. Const. art. 1, § 8, cl. 3.

1 Case that cites this headnote

[14] **Commerce** Local matters affecting commerce

A state law that discriminates against interstate commerce may be upheld, in a challenge under the dormant Commerce Clause, only if it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives; if there are any available alternative methods for enforcing the state's legitimate policy goals, the law is unconstitutional. U.S. Const. art. 1, § 8, cl. 3.

5 Cases that cite this headnote

[15] **Commerce** Local matters affecting commerce

If a law merely imposes incidental burden on interstate commerce, it will be upheld as valid, in a dormant Commerce Clause challenge, unless the burden imposed on interstate commerce is clearly excessive in relation to putative local benefits. U.S. Const. art. 1, § 8, cl. 3.

2 Cases that cite this headnote

[16] **Commerce** Subjects and regulations in general

Landlord and Tenant Property which may be leased

Residency requirement of city ordinance governing licenses for short term rentals, providing that no homeowner could obtain license to operate short term rental unless property was also homeowner's primary residence and owner had homestead exemption for that property, violated dormant Commerce Clause; requirement discriminated on its face against interstate commerce, as it completely prohibited out-of-state residents who owned property in city from obtaining short term rental licenses, and legitimate local purposes of requirement, including preventing nuisances and promoting affordable housing, could adequately be served by reasonable nondiscriminatory alternatives, such as enforcement efforts to address nuisances, and reducing housing regulations. U.S. Const. art. 1, § 8, cl. 3.

6 Cases that cite this headnote

[17] **Commerce** Regulation and conduct in general; particular businesses

A law is "discriminatory," for purposes of the dormant Commerce Clause, when it produces differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. U.S. Const. art. 1, § 8, cl. 3.

1 Case that cites this headnote

[18] **Commerce** Powers Remaining in States, and Limitations Thereon

A law may discriminate against interstate commerce on its face, in purpose, or in effect, for purposes of the dormant Commerce Clause. U.S. Const. art. 1, § 8, cl. 3.

1 Case that cites this headnote

[19] **Commerce** Preferences and Discriminations

The only form of discrimination against interstate commerce that implicates the dormant Commerce Clause is discrimination between substantially similar entities. U.S. Const. art. 1, § 8, cl. 3.

3 Cases that cite this headnote

[20] **Commerce** Powers Remaining in States, and Limitations Thereon

Commerce Regulation and conduct in general; particular businesses

The dormant Commerce Clause prohibits more than laws with protectionist purposes; it also prohibits laws that discriminate against interstate commerce on their face. U.S. Const. art. 1, § 8, cl. 3.

[21] **Commerce** Powers Remaining in States, and Limitations Thereon

The purpose of, or justification for, a state law has no bearing on whether it is facially discriminatory against interstate commerce under the dormant Commerce Clause. U.S. Const. art. 1, § 8, cl. 3.

4 Cases that cite this headnote

[22] **Commerce** Powers Remaining in States, and Limitations Thereon

Local ordinances that discriminate against interstate commerce are not valid under the dormant Commerce Clause simply because they also discriminate against intrastate commerce. U.S. Const. art. 1, § 8, cl. 3.

5 Cases that cite this headnote

[23] **Federal Courts** Particular Decisions, Matters, or Questions as Reviewable

The Court of Appeals lacked jurisdiction to review District Court's determination that homeowners' First Amendment claim, alleging that city ordinance requiring homeowners to obtain licenses to operate short term rentals was a prior restraint on free speech, was viable; finding that claim was viable was not "final, appealable judgment," as determination did not resolve all of homeowners' claims for relief. U.S. Const. Amend. 1; 28 U.S.C.A. § 1291.

[24] **Federal Courts** What constitutes finality in general

A "final decision," for purpose of appellate jurisdiction, is one by which district court disassociates itself from case and terminates action. 28 U.S.C.A. § 1291.

1 Case that cites this headnote

[25] **Federal Courts** What constitutes finality in general

To be appealable, a "final order" must specify the remedies that the victorious party will receive. 28 U.S.C.A. § 1291.

[26] **Federal Courts** Multiple claims

For claim to be final and appealable after being severed from other unresolved claims under rule governing judgments on multiple claims, a district court must have disposed of that claim entirely. 28 U.S.C.A. § 1291; Fed. R. Civ. P. 54(b).

[27] **Courts** Previous Decisions as Controlling or as Precedents

Courts Dicta

Alternative holdings are binding precedents and not obiter dicta.

[28] **Federal Courts** Jurisdiction, venue, and forum non conveniens

The Court of Appeals has no interlocutory appellate jurisdiction for policing a district court's jurisdictional holdings beyond what the Court of Appeals or the United States Supreme Court has already recognized.

***320** Appeal from the United States District Court for the Eastern District of Louisiana, No. 2:19-CV-13773, Ivan L. R. Lemelle, U.S. District Judge

Attorneys and Law Firms

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Before Smith, Wiener, and Southwick, Circuit Judges.

Opinion

Jerry E. Smith, Circuit Judge:

This case involves three constitutional challenges to New Orleans's regulation of short-term rentals ("STRs")—the City's term for the type of lodging offered on platforms such

as Airbnb and Vrbo. The district court granted summary judgment to the City on two of those challenges but held that the third was "viable." Both sides appealed. We affirm in part, vacate in part, ***321** and dismiss the City's cross-appeal for lack of jurisdiction.

I.

A.

Before STRs became a major phenomenon, the City forbade property owners in residential neighborhoods from renting their homes for less than thirty days. In 2016, however, the City decided to offer licenses for such property owners to do so for shorter periods. That licensing regime went into effect on April 1, 2017.

That initial regime made clear that an STR license was "a privilege, not a right."[1] It provided only that the City "*may* issue" an STR license—even to someone who met all the statutory requirements for one. *Id.* § 26-615 (emphasis added). STR licenses also expired after one year. *Id.* §§ 26-613(a), 26-616. And while the City promised that "[r]enewal permits shall be issued in the same manner as initial permits," *id.* § 26-616, that assurance was made subject to its limitations on issuing permits in the first place.

One year into the initial regime, the City commissioned a study from its Planning Commission to reevaluate the STR policies. The study found that the rapid proliferation of STRs had brought nuisances to the City. Specifically, it discovered that STRs in residential neighborhoods had lowered residents' quality of life. Many visitors to the City who stayed in STRs were loud and did not clean up after themselves. The study also determined that the expansion of STRs into residential neighborhoods had led to a "loss of neighborhood character." And it collected "anecdotal evidence" that the booming STR market had made housing less affordable for residents.

Because of the study and other efforts to examine the STR market, the City substantially revised its STR licensing regime in 2019. Only two of those changes are relevant to this appeal.

First, the City imposed a residency requirement for STRs in residential neighborhoods. Its new policy provided that no person could obtain a license to own such an STR unless the property was also "the owner's primary residence."[2] At oral argument, the City explained that it enforces this restriction by requiring applicants to show that they have a homestead exemption for the property they wish to rent.[3] Under Louisiana law, a homeowner may receive a homestead exemption only for his principal residence. *See* La. Const. art. 7, § 20.

Second, the City imposed new advertising restrictions on STR license holders. Those restrictions prohibited them from (1) advertising illegal STRs and (2) advertising legal STRs with greater capacities than permitted by their licenses. *See* New Code § 26-618(b)(1)–(4).

B.

The plaintiffs are a group of property owners who wish to obtain STR licenses for their homes.[4] Many acquired STR licenses ***322** under initial regimes that were not renewed, and several were denied STR licenses under the new regime on account of the City's new residency requirement.

In November 2019, the plaintiffs sued the City under 42 U.S.C. § 1983 for violating a litany of their constitutional rights. Three of their claims are relevant here. *First*, they said the City's failure to renew their STR licenses violated the Takings Clause because they had a property interest in the renewal of their licenses. *Second*, they maintained the residency requirement violated the dormant Commerce Clause because it discriminated against interstate commerce. *Third*, they contended that the advertising restrictions violated the First Amendment as a prior restraint on their protected speech. For remedies, the plaintiffs requested a declaration that the City's policies were unconstitutional and a permanent injunction against their enforcement. They also asked for attorneys' fees under 42 U.S.C. § 1988.

The plaintiffs moved for summary judgment on their Takings Clause claim. The City cross-moved for summary judgment on that claim plus the dormant Commerce Clause claim. The district court granted the City's motion in full. It held that the plaintiffs' Takings Clause claim failed because they had no property interest in the renewal of their licenses. It also rejected their dormant Commerce Clause challenge. Although it acknowledged that the residency requirement discriminated against interstate commerce, it held that the policy was constitutional because the burden it imposed was not "clearly

excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970)

The district court then instructed the parties to brief the plaintiffs' prior-restraint claim. Based on that briefing, it held that the prior-restraint claim was "viable." The court reasoned that the ordinances gave the City too much discretion in approving and denying STRs—and therefore, the plaintiffs' ability to advertise STRs.

The plaintiffs appeal the summary judgment on the dormant Commerce Clause claim and the Takings Clause claim. The City cross-appeals the "holding"—its term, not ours—that the prior-restraint claim is "viable."

II.

The plaintiffs claim that the City violated the Takings Clause by refusing to renew their STR licenses. In their telling, they enjoyed property interests in the renewal of their licenses that the City took away from them without just compensation. We disagree. The district court correctly held that the plaintiffs have no such interests.[5]

[1] **[2]** The Takings Clause protects property interests but does not create them. Instead, "the existence of a property interest is determined by reference to existing rules or understandings that stem from an independent source such as state law." *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164, 118 S.Ct. 1925, 141 L.Ed.2d 174 (1998) (quotation omitted). Accordingly, we usually treat, as dispositive, the existence—or absence—of a property interest under state law.[6]

***323** The plaintiffs, however, do not claim that Louisiana law recognizes that they have a property interest in the renewal of their licenses. They maintain that they have such an interest because this court has recognized that business licenses qualify as property for purposes of procedural due process. They rely on *Bowlby v. City of Aberdeen*, 681 F.3d 215 (5th Cir. 2012). There, we held that "[p]rivileges, licenses, certificates, and franchises qualify as property interests for purposes of procedural due process." *Id.* at 220 (alteration adopted) (quoting *Wells Fargo Armored Serv. Corp. v. Ga. Pub. Serv. Comm'n*, 547 F.2d 938, 941 (5th Cir. 1977)).

[3] **[4]** **[5]** But there's a big difference between saying that something is property for purposes of procedural due process and saying that it is property for purposes of the Takings Clause. The former merely obligates a governmental entity to provide the "owner" with procedural protections—and only when a cost-benefit analysis shows that those procedures are worth the cost. *See generally Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). But the latter means that the government must pay damages. And the test for a property interest protected by procedural due process is quite broad: "A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit ...." *Perry v. Sindermann*, 408 U.S. 593, 601, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); *accord Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577–78, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

[6] This court's rule of orderliness, however, requires us to recognize that some "mutually explicit understandings" can create property interests protected by the Takings Clause. The relevant case is *Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262 (5th Cir. 2012). The *Melancon* plaintiffs claimed that an ordinance imposing new restrictions on their taxi licenses enacted a regulatory taking. *Id.* at 266. The ordinance restricted the ability of cab drivers to sell their licenses and declared that those licenses were "privileges and not rights." *Ibid.*

Ultimately, we rejected the *Melancon* plaintiffs' claim that they had a property interest in their licenses for purposes of the Takings Clause. *Id.* at 272–75. But we also indicated that some rights recognized by custom alone could qualify as property for purposes of the Takings Clause. We acknowledged that "state law generally defines what constitutes a property interest," but we maintained that " 'unwritten common law' or 'policies and practices' also can rise to the level of creating 'property interests.' " *Id.* at 269 (quoting *Perry*, 408 U.S. at 602–03, 92 S.Ct. 2694). We thus concluded that "the Fifth Amendment protects expectations arising not just from legislation or judicial precedent, but also those springing from custom and practice." *Id.* (alteration adopted and quotation omitted).

[7] Even so, *Melancon* did not hold that customary property rights under the Due Process Clause and Takings Clause are coextensive. Instead, we recognized the opposite. We appeared to acknowledge that the taxi licenses likely qualified as property for purposes of procedural due process under

Fifth Circuit precedent. *See id.* at 273 n.7 (citing *Wells Fargo*, 547 F.2d at 941). But we rejected the Takings Clause claims all the same. *Id.* at 272–75. Although *Melancon* cited many procedural-due-process ***324** cases[7] in holding that some customary rights can qualify as property under the Takings Clause, the decision is unequivocal: A property interest for purposes of procedural due process does *not* automatically qualify as a property interest protected by the Takings Clause.

[8] With that in mind, we thus clarify *Melancon*'s test for determining whether a customary interest is protected as property by the Takings Clause. Because property interests under the Due Process Clause and the Takings Clause are not the same, that test is not the same as the one for determining whether an interest qualifies as property for procedural due process. Instead, a property interest must be so deeply rooted in custom that "just compensation" for appropriating necessarily includes money damages. U.S. Const. amend. V. Surmounting that hurdle should be quite difficult. And when we analyze the facts of this case, we have no difficulty in concluding that the plaintiffs had no property interest in the renewal of their STR licenses.

[9] *First*, the original licensing regime was explicit: An STR license is "a privilege, not a right."[8] Even an applicant who met the statutory requirements for a license was not entitled to one.[9] The ordinance also stated that STR licenses "may be revoked or not renewed based on non-compliance with the requirements of the Comprehensive Zoning Ordinance, or the requirements provided" in the ordinance itself.[10] The plaintiffs thus lacked the sort of ownership in their STR licenses that could support a "legitimate claim of entitlement" to money damages when their licenses were not renewed. *Melancon*, 703 F.3d at 270 (quoting *Roth*, 408 U.S. at 577, 92 S.Ct. 2701).

The plaintiffs object on the ground that the original licensing scheme promises that "[r]enewal permits shall be issued in the same manner as initial permits." Old Code § 26-616. That's true, but it doesn't help their case. Remember: The original regime didn't require the City to issue a permit, even if the statutory requirements were met. *Id.* § 26-615. The plaintiffs also observe that the Constitution "limit[s] state power to terminate an entitlement whether the entitlement is denominated a 'right' or a 'privilege.' " *Bell v. Burson*, 402 U.S. 535, 539, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971). But asserting that principle begs the question—the plaintiffs have not demonstrated that they had an entitlement.

Second, the plaintiffs' interests in their licenses were not so longstanding that they can plausibly claim custom had elevated them to property interests.[11] STR licenses did not exist until 2017, when the City adopted its original licensing regime. And that regime existed for only a year before the City made temporary changes to its policies, anticipating the major changes enacted in 2019. The short lifespan of the original regime shows that the plaintiffs' ***325** licenses were not so rooted in custom and practice that they amounted to property.

Together, those two factors yield one conclusion: The plaintiffs didn't have property interests in the renewal of their licenses. We thus affirm the summary judgment on this claim.

III.

Next, the plaintiffs say the district court erred in granting summary judgment to the City on their challenge to the residency requirement. They say that the requirement violates the dormant Commerce Clause because it discriminates against interstate commerce. We agree.[12]

[10] **[11]** The Commerce Clause authorizes Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art I, § 8, cl. 3. "Although the Constitution does not in terms limit the power of States to regulate commerce," the Supreme Court has "long interpreted the Commerce Clause as an implicit restraint on state authority, even in the absence of a conflicting federal statute."[13] Those implicit restraints apply to municipalities, too. *See, e.g., C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994).

[12] "[T]wo primary principles ... mark the boundaries of a [s]tate's authority to regulate interstate commerce": A state (1) "may not discriminate against interstate commerce" and (2) may not "impose undue burdens on interstate commerce." *South Dakota v. Wayfair, Inc.*, —— U.S. ——, 138 S. Ct. 2080, 2090, 201 L.Ed.2d 403 (2018). But those principles do not apply with equal force.

[13] **[14]** If a law discriminates against interstate commerce, it is in big trouble because "[a] discriminatory law is virtually *per se* invalid." *Dep't of Revenue v. Davis*, 553 U.S. 328, 338, 128 S.Ct. 1801, 170 L.Ed.2d 685 (2008)

(quotation omitted). It may be upheld "only if it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Ibid.* (quotation omitted). If there are "*any* available alternative methods for enforcing [the government's] legitimate policy goals," the law is unconstitutional. *Dickerson v. Bailey*, 336 F.3d 388, 402 (5th Cir. 2003) (emphasis added).

[15] In contrast, if a law merely imposes an incidental burden on interstate commerce, it faces much smoother sailing. Under *Pike v. Bruce Church, Inc.*, such a law will be upheld "unless the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits." *United Haulers*, 550 U.S. at 346, 127 S.Ct. 1786 (plurality opinion) (alteration adopted) (quoting *Pike*, 397 U.S. at 142, 90 S.Ct. 844). "State laws frequently survive this *Pike* scrutiny, though not always, as in *Pike* itself." *Davis*, 553 U.S. at 339, 128 S.Ct. 1801 (citations omitted).

***326** **[16]** The district court held that the residency requirement discriminated against interstate commerce. That was the right call. But the court then applied the *Pike* test to uphold the law. That was a mistake; it should have asked whether the City had reasonable nondiscriminatory alternatives to achieve its policy goals. Because there are many such alternatives, the residency requirement is unconstitutional under the dormant Commerce Clause.

A.

[17] **[18]** **[19]** The City's residency requirement discriminates against interstate commerce. A law is discriminatory when it produces "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *United Haulers*, 550 U.S. at 338, 127 S.Ct. 1786 (quotation omitted). A law may discriminate on its face, in purpose, or in effect. *See Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n*, 945 F.3d 206, 213 (5th Cir. 2019); *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 160 (5th Cir. 2007). But the only form of discrimination that implicates the dormant Commerce Clause is discrimination between "substantially similar entities." *Davis*, 553 U.S. at 342, 128 S.Ct. 1801 (quotation omitted).

The residency requirement discriminates on its face against out-of-state property owners. The City doesn't just make it more difficult for them to compete in the market for STRs in residential neighborhoods; it forbids them from participating altogether. The City prohibits anyone from using a property as an STR unless the owner has a permit.[14] And the City does not offer permits for STRs in residential neighborhoods unless the STR is "located on the same lot of record as the owner's primary residence" and the owner has a homestead exemption for that property.[15] The upshot is that only residents of the City may enter the market for STRs in residential neighborhoods.[16]

Residents and out-of-state property owners are also "substantially similar." *Davis*, 553 U.S. at 342, 128 S.Ct. 1801 (quotation omitted). Both are private businesses, not public entities carrying out traditional government functions. *See id.* at 341–43, 128 S.Ct. 1801; *United Haulers*, 550 U.S. at 342–45, 127 S.Ct. 1786. And both seek to compete in the market for lodging in the City's residential neighborhoods. *See Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 299, 117 S.Ct. 811, 136 L.Ed.2d 761 (1997). Out-of-staters want to offer the same services to the same customers in the same locations as the City's residents. The only difference between them is that one group doesn't live in the City. That means the residency requirement discriminates against interstate commerce for purposes of the dormant Commerce Clause.

The City objects to that conclusion on three grounds, but none is persuasive.

[20] **[21]** *First*, the City maintains that it did not adopt the residency requirement to protect its residents from interstate ***327** competition. Instead, it wanted to address the nuisances created by STRs by making sure that a responsible adult lived on the property full-time. But even if that account is true, the dormant Commerce Clause prohibits more than laws with protectionist purposes. It also prohibits laws that discriminate against interstate commerce on their face. *Wal-Mart*, 945 F.3d at 213. And "the purpose of, or justification for, a law has no bearing on whether it is facially discriminatory." *Or. Waste Sys., Inc. v. Dep't of Env't Quality of Or.*, 511 U.S. 93, 100, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994). As we have already explained, the residency requirement is just such a law.

Second, the City observes that it allows out-of staters to own STRs in nonresidential neighborhoods. From there, it reasons that the residency requirement does not "entirely prohibit interstate commerce" in the *citywide* market for temporary lodging. There is good reason to reject the City's market definition. Its own study recognized that residential STRs offer guests unique opportunities to immerse

themselves in the City and have an authentic "New Orleans" experience. As the saying goes, "location, location, location" is what really matters in property markets. But in any event, even if the residency requirement merely imposes a discriminatory burden on interstate commerce, it still qualifies as discriminatory. *See, e.g., Or. Waste Sys.*, 511 U.S. at 99–100, 114 S.Ct. 1345.

[22] *Finally*, the City emphasizes that the residency requirement discriminates against other Louisianans, not just out-of-staters. Residents of Baton Rouge and Shreveport are just as forbidden from participating in the STR market as are residents of Houston and Jackson. Indeed, the residency requirement even discriminates against *other residents of the City*—specifically, those who live in non-residential zones. But none of that matters. As the Supreme Court has repeatedly held, local ordinances that discriminate against interstate commerce are not valid simply because they also discriminate against intrastate commerce.[17]

C & A Carbone provides the most recent example. That case involved a municipality that sought to finance the construction of a new waste-transfer station. *C & A Carbone*, 511 U.S. at 386, 114 S.Ct. 1677. To do so, the town let the builder run the station for five years while charging above-market prices. *Id.* at 387, 114 S.Ct. 1677. The town guaranteed that the station would continue to receive waste despite the uncompetitive prices by passing a "flow control ordinance" that "require[d] all nonhazardous solid waste within the town to be deposited at the [new] transfer station." *Ibid.*

A legal battle between the town and a waste-processing firm that violated the ordinance ultimately made its way to the Supreme Court. *Id.* at 387–89, 114 S.Ct. 1677. The Court held that the flow ordinance violated the dormant Commerce Clause because it "deprive[d] out-of-state businesses of access to a local market"—*i.e.*, the market for processing the town's trash—and thus "discriminate[d] against interstate commerce." *Id.* at 389–90, 114 S.Ct. 1677. The Court didn't care that the flow ordinance also discriminated against nonlocal trash facilities within the same state. "The ordinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition." *Id.* at 391, 114 S.Ct. 1677.

***328** Thus, the fact that the residency requirement also discriminates against intrastate interests doesn't change a thing. The residency requirement still discriminates on its face against interstate commerce. That means it can be upheld only if it satisfies the dormant Commerce Clause's stringent test for discriminatory laws, not the *Pike* test.

B.

Our conclusion that the residency requirement is discriminatory puts it on death's doorstep. Recall that "[a] discriminatory law is virtually *per se* invalid." *Davis*, 553 U.S. at 338, 128 S.Ct. 1801 (quotation omitted). This case is no exception. The residency requirement can "survive only if it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Id.* (quotation omitted).

On appeal, the City offers three interests served by the residency requirement: preventing nuisances, promoting affordable housing, and protecting neighborhoods' residential character. There's no question that those are legitimate local purposes. But all those objectives can adequately be served by reasonable nondiscriminatory alternatives, so none of them can justify the requirement.

First, the City claims that the homestead requirement is necessary to address the nuisances that were associated with STRs under the initial regime. The homestead requirement targets those problems by requiring an STR's owner to live on the premises, thus increasing the chance that nuisances are nipped in the bud and encouraging owners to rent to quieter guests in the first place.

The residency requirement might help the City achieve that goal, but there are many other reasonable alternatives that the City could adopt. Take enforcement policies. The City could step up its enforcement efforts, increasing the chance that owners face punishment for disorderly guests and strengthening their incentive to monitor their rentals. It could also increase the magnitude of penalties it imposes on owners for guests who violate quality-of-life regulations. That would similarly give owners stronger incentives to prevent nuisances and help to fund increased enforcement. The City could even strip repeat offenders of their STR licenses, thus eliminating the STRs most likely to negatively impact their neighbors.

There are also several other options beyond enforcement. For example, the City could increase taxes on STRs. That would discourage younger—and rowdier—guests from renting them and provide additional funds that could also be used to

mitigate nuisances. The City could give STR owners the alternative of having an operator stay on the property during the night—thus acting as the "adult supervision" that the City ostensibly hopes live-in owners will provide.

Second, the City says that the residency requirement helps to preserve affordable housing. That might be true, given that the provision reduces demand—and therefore the price—for housing by restricting the number of persons who can participate in the STR market. But the City could reduce the demand for housing in other ways, such as increasing the price of an STR license for owners or capping the number of licenses available for any given neighborhood. Moreover, if the City is serious about protecting affordable housing, there's an obvious alternative to reducing demand: increasing supply. The City could eliminate price controls, reduce housing regulations, and provide additional incentives for homebuilders to construct more housing.

***329** Indeed, given the fact that the City itself found that "[t]here are a number of broader factors which have affected the housing market over the past decade which have led to increased costs," it's difficult to believe that it could show that residency requirement is *necessary* to address affordable housing problems. Remember that if there are "*any* available alternative methods for [achieving the government's] legitimate policy goals," the residency requirement is invalid. *Dickerson v. Bailey*, 336 F.3d 388, 402 (5th Cir. 2003). Because the City has many other options to promote affordable housing, that objective can't sustain the residency requirement.

Finally, the City appears to claim that the homestead requirement is necessary to preserve neighborhood character. The City's position appears to be that the old regulatory regime permitted too many housing units to be converted into rental units—thus beginning to change the residential character of some neighborhoods. But once again, there's an obvious and straightforward alternative to discrimination: cap the share of housing units that can be used as STRs. That would achieve the City's objective without engaging in discrimination, so the residency requirement is unconstitutional.

* * * *

The City has many options to address the problems caused by STRs in residential neighborhoods. But it chose one the Constitution forbids. So we vacate the summary judgment for the City on this claim.[18]

IV.

[23] That leaves the City's cross-appeal. It challenges the district court's "holding" that the plaintiffs' prior-restraint claim is "viable." But we lack jurisdiction to resolve it because that "holding" is not a final judgment.

Recall that the plaintiffs requested a declaration and a permanent injunction in connection with their prior-restraint claim. When they did not move for summary judgment on that claim, the district court *sua sponte* instructed the parties to brief it. Based on that briefing, it held that the prior restraint claim was "viable."

The plaintiffs then moved for partial entry of judgment under Rule 54(b) on all their claims, save their requests for attorneys' fees under 42 U.S.C. § 1988. The district court granted that motion in an order that stated that it had "decided" the plaintiffs' prior restraint claims. The court also entered a "judgment" that "dismissed" all of their claims "except for any 42 U.S.C. [§] 1988 claims arising from First Amendment prior restraint violations." But that judgment did not grant the plaintiffs a declaration or a permanent injunction, as they had requested in their complaint.

[24] **[25]** As relevant here, we have jurisdiction to review only "final decisions of the district courts." 28 U.S.C. § 1291. Although the district court called its order a "judgment," its label does not determine finality. *Sullivan v. Finkelstein*, 496 U.S. 617, 628 n.7, 110 S.Ct. 2658, 110 L.Ed.2d 563 (1990). Instead, "[a] final decision is one by which a district court disassociates itself from a case" and "terminate[s] an action." *Gelboim v. Bank of Am. Corp.*, 574 U.S. 405, 408–09, 135 S.Ct. 897, 190 L.Ed.2d 789 (2015) (quotations omitted). Accordingly, a final order must also specify the *remedies* that the victorious plaintiffs ***330** will receive.[19] Because the judgment did not resolve the plaintiffs' requests for a declaration or permanent injunction, it is not final for purposes of § 1291.

[26] **[27]** The story is the same even if we generously construed the district court's "holding" as a declaration. The plaintiffs' request for a permanent injunction would still remain. For a claim to be final after being severed under Rule 54(b), a district court must have "disposed of that claim

entirely."[20] And that means that if some of the plaintiff's requests for relief are "left unresolved," the district court's order is not yet final.[21] Hence, we previously have rejected claims of finality when a district court granted a declaration but failed to resolve the plaintiff's requests for other relief.[22] So too here.

Given our suspicions that we lacked jurisdiction, we asked the parties to be prepared to discuss this issue at oral argument. There, the City appeared to concede that the district court's order was not final because it had not resolved the plaintiffs' requests for relief. So far, so good.

[28] But the City then claimed that even if the district court's holding were not final, we nonetheless have appellate jurisdiction to review whether it had jurisdiction over the case. It maintained that we have recognized as much in *International Association of Machinists, Local 2121 v. Goodrich Corp.*, 410 F.3d 204 (5th Cir. 2005). But that case said no such thing. *Goodrich* noted that even if we "[a]rguably" had that sort of appellate jurisdiction, it was not implicated in that case because the district court did not "wholly lack[ ] jurisdiction." *See id.* at 211–14. Because that case merely assumed, for the sake of argument, that such jurisdiction existed, its discussion is *dicta.* Today, we ***331** hold that we have no interlocutory appellate jurisdiction for policing a district court's jurisdictional holdings beyond what this court or the Supreme Court has already recognized.[23] And that means we do not have jurisdiction over the City's cross-appeal.

The judgment is AFFIRMED in part and VACATED in part. The cross-appeal is DISMISSED for want of jurisdiction.

All Citations

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Footnotes

1 Code of the City of New Orleans, La. ("Old Code") § 26-613(a) (April 28, 2017), https://library.municode.com/la/new_orleans/codes/code_of_ordinances/292015.

2 Code of the City of New Orleans, La. ("New Code") § 26-617(c)(6)(v) (2022), https://library.municode.com/la/new_orleans/codes/code_of_ordinances.

3 Oral Argument at 26:39–27:21; New Code § 26-617(c)(6)(v); New Orleans Comprehensive Zoning Ordinance ("CZO") § 20.3.LLL.3(h) (2022), https://czo.nola.gov/home.

4 The sole exception is White Spider, which "provid[es] services to [STR] owners in connection with [renting] their houses and apartments."

5 In addition, we dismiss White Spider at the outset for lack of standing. It does not claim to own property, so it cannot have received an STR license under the initial regime. It thus never had even a purported property interest that was taken by the City.

6 *See, e.g., Degan v. Bd. of Trs. of Dall. Police & Fire Pension Sys.*, 956 F.3d 813, 815 (5th Cir.), *cert. denied*, —— U.S. ——, 141 S. Ct. 375, 208 L.Ed.2d 97 (2020); *Van Houten v. City of Fort Worth*, 827 F.3d 530, 539–40 (5th Cir. 2016); *United States v. 0.073 Acres of Land*, 705 F.3d 540, 544 (5th Cir. 2013) (per curiam).

7 *See* 703 F.3d at 269–70 (citing *Roth*, 408 U.S. at 577, 92 S.Ct. 2701; *Perry*, 408 U.S. at 602–03, 92 S.Ct. 2694; *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 465, 101 S.Ct. 2460, 69 L.Ed.2d 158 (1981)).

8 Old Code § 26-613(a); *cf. Melancon*, 703 F.3d at 273–74 (holding a taxi license was not a property interest under the Takings Clause because it was understood as a "privilege").

9 Old Code §§ 26-614 (stating requirements for a STR licenses), 26-615 (providing that licenses "may issue" after the requirements were satisfied).

10 *Id.* § 26-613(a).

11 *Cf. Phillips*, 524 U.S. at 167, 118 S.Ct. 1925 ("[A] State may not sidestep the Takings Clause by disavowing traditional property interests *long recognized* under state law." (emphasis added)).

12 Once again, we must dismiss five of the plaintiffs—White Spider, Garrett Majoue, Russell Frank, Samantha McRaney, and Bob McRaney—because they lack standing. White Spider doesn't claim to own rentable property and hasn't alleged that the residency requirement injures it in other ways. Majoue, Frank, and the McRaneys have homestead exceptions, so the residency requirement isn't what caused their injuries.

13 *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338, 127 S.Ct. 1786, 167 L.Ed.2d 655 (2007); *see also Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, —— U.S. ——, 139 S. Ct. 2449, 2461, 204 L.Ed.2d 801 (2019) ("reiterat[ing] that the Commerce Clause by its own force restricts state protectionism").

14 New Code §§ 26-615(a), 26-617(a); CZO § 20.3.LLL.1(b), (f). In this context, "owner" means the person who owns at least 50% of an STR. *See* New Code § 26-614; CZO § 20.3.LLL.3(h).

15 New Code § 26-617(c)(6)(v); CZO § 20.3.LLL.3(h).

16 That makes *Rosenblatt v. City of Santa Monica*, 940 F.3d 439 (9th Cir. 2019), inapposite. That case upheld an STR regulation requiring someone to live on the property full time, but that person did not need to be the owner of the property. *Id.* at 450–51. Thus, the challenged regulation permitted out-of staters to enter Santa Monica's STR market on equal terms as residents.

17 *C & A Carbone*, 511 U.S. at 391, 114 S.Ct. 1677; *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Nat. Res.*, 504 U.S. 353, 361, 112 S.Ct. 2019, 119 L.Ed.2d 139 (1992); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 n.4, 71 S.Ct. 295, 95 L.Ed. 329 (1951); *cf. Brimmer v. Rebman*, 138 U.S. 78, 82–83, 11 S.Ct. 213, 34 L.Ed. 862 (1891).

18 We do not reverse the judgment because the plaintiffs did not move for summary judgment in the district court.

19 *See Riley v. Kennedy*, 553 U.S. 406, 419, 128 S.Ct. 1970, 170 L.Ed.2d 837 (2008) ("We have long held that an order resolving liability without addressing a plaintiff's requests for relief is not final."); *see also* 15B Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 3914.28 (2d ed.), Westlaw (Apr. 2022 update) ("[A] summary judgment that determines liability but leaves damages or other relief open for further proceedings is not final.").

20 *Tetra Techs., Inc. v. Cont'l Ins. Co.*, 755 F.3d 222, 228 (5th Cir. 2014) (quotation omitted and alteration adopted). Note, however, that a plaintiff's request for costs and attorneys' fees "does not prevent ... [a] judgment from becoming final for purposes of appeal." *See Ray Haluch Gravel Co. v. Cent. Pension Fund of Int'l Union of Operating Eng'rs*, 571 U.S. 177, 179, 134 S.Ct. 773, 187 L.Ed.2d 669 (2014).

21 *Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737, 740–42, 96 S.Ct. 1202, 47 L.Ed.2d 435 (1976); *see also* 15B Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 3915.2 (2d ed.), Westlaw (Apr. 2022 update) ("Partial determinations of relief do not establish finality any more than a determination of liability alone."). Granted, *Wetzel*'s discussion of that issue is only *dicta* under binding precedent. *See United States v. Miss. Power & Light Co.*, 638 F.2d 899, 904 (5th Cir. Unit A Mar. 1981). Still, as *dicta* from a unanimous Supreme Court, it is entitled to great weight. *Cf. Campaign for S. Equal. v. Bryant*, 791 F.3d 625, 627 n.1 (5th Cir. 2015).

22 *See Lucas v. Bolivar Cnty.*, 756 F.2d 1230, 1234–35 (5th Cir. 1985) (per curiam). A later case suggests that a declaration can be immediately reviewable even when a district court has not addressed all forms of relief requested by the parties. *See St. Paul Mercury Ins. Co. v. Fair Grounds Corp.*, 123 F.3d 336, 338 & nn.5, 9 (5th Cir. 1997). But *Lucas* predates that case and therefore controls. *Newman v. Plains All Am. Pipeline, L.P.*, 23 F.4th 393, 400 n.28 (5th Cir. 2022). And although *Lucas*'s analysis of that issue is an alternative holding, "[t]his circuit follows the rule that alternative holdings are binding precedent and not obiter dictum." *Texas v. United States*, 809 F.3d 134, 178 n.158 (5th Cir. 2015) (quotation omitted), *aff'd by an equally divided Court*, 579 U.S. 547, 136 S.Ct. 2271, 195 L.Ed.2d 638 (2016).

23 *See, e.g.*, *Shepherd v. Int'l Paper Co.*, 372 F.3d 326, 328–29 (5th Cir. 2004) (citing *Phillips v. Negley*, 117 U.S. 665, 671–72, 6 S.Ct. 901, 29 L.Ed. 1013 (1886), for the rule that we have jurisdiction to review whether a district court had jurisdiction to vacate a judgment).

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In the

United States Court of Appeals

For the Seventh Circuit

No. 22-2801

MICHAEL MOGAN,

Plaintiff-Appellant,

v.

CITY OF CHICAGO, a Municipal Corporation, and
ROSCOE VILLAGE LOFTS CONDOMINIUM ASSOCIATION,
a Corporation,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 1:21-cv-01846 — **Sara L. Ellis,** *Judge*.

ARGUED NOVEMBER 8, 2023 — DECIDED SEPTEMBER 20, 2024

Before ROVNER, JACKSON-AKIWUMI, and PRYOR, *Circuit Judges*.

ROVNER, *Circuit Judge*. This case involves a challenge to the application of Chicago's Shared Housing Ordinance (the "Ordinance"). Michael Mogan, the owner of a condominium, brought claims against the City of Chicago and the homeowners association for his condominium unit, the

Roscoe Village Lofts Association ("the Roscoe Association"). He argued that he purchased and renovated his condominium unit, #307, with the intention of renting it through the shared-housing rental platform Airbnb, and that the Ordinance prevented him from listing it on Airbnb or other short term residential intermediary platforms. Mogan alleged that application of the Ordinance to Unit 307 constituted an unconstitutional taking and similarly was an inverse condemnation in violation of Illinois law. He also sought a declaratory judgment against the City and the Roscoe Association establishing that Roscoe Village Lofts and the City have a duty to allow him to lease Unit 307 on a weekly, monthly or annual basis on Airbnb, HomeAway or other home sharing websites. The district court dismissed the takings and inverse condemnation claims and declined to exercise jurisdiction over any remaining state law claim, and he now appeals. We hold that the district court properly dismissed the case and did not abuse its discretion in declining to exercise supplemental jurisdiction over remaining state law claims.

The Ordinance at issue in this case provides, in relevant part, that condominium homeowners associations may determine that no licensed vacation rentals or shared housing units (defined as short term rentals) are permitted to operate anywhere within the building, and the association may notify the Commissioner of Business Affairs and Consumer Protection of that decision. Municipal Code of Chicago (MCC) § 4-13-260(a)(9). When that occurs, the building is added to the "prohibited buildings list," and units in the building may not be registered with the City as shared housing units or vacation rentals or listed on intermediary platforms such as Airbnb. *Id*. at §§ 4-14-050(i), 4-6-300(h)(4), 4-13-260(a)(9). A

party can request a hearing to contest a unit's ineligibility and can appeal the final determination. *Id*. at § 4-13-260(b). If a host rents a unit that is on the prohibited buildings list 28 days after the final notice of ineligibility, the host can be subjected to a $5,000 fine per day that the violation continues. *Id*. at §§ 4-14-050(i), 4-6-300(h)(4). And if a host fails to remove an ineligible listing from a platform such as Airbnb after receiving the final ineligibility determination from the City, the host can be fined $5,000 per day that the violation continues. *Id*. at §§ 4-6-300(h)(4), 4-14-030(c). The City amended the Ordinance in 2020, adding a prohibition on rentals of less than ten hours, severely restricting single-night rentals, and limiting the maximum occupancy of shared housing units to two adults per guest room and one person per 125 feet of floor area of the unit. *Id*. at §§ 4-6-300(g)(5), 4-14-050(b).

The Roscoe Village Loft condominiums are managed by Property Solutions Chicago, and Pamela Chianelli is the secretary and shareholder of Property Solutions. In August 2016, the Roscoe Association and Chianelli sought the inclusion of the Roscoe Lofts on the City's prohibited buildings list, and the City added the building to the list that same month. Mogan argues that there was never a vote held by the Roscoe Association to authorize the placement of the building on that prohibited list.

By definition, "vacation rentals" and "shared housing units" under the Ordinance are units which are rented to transient guests, which in turn are defined as guests who rent the unit for less than 31 days. *Id*. at §§ 4-14-010, 4-6-300(a), 4-6-290(a). The Ordinance therefore applies to short term rentals of a month or less. Mogan argues that he purchased

the unit with the intent to lease it, and that he painted and carpeted his condominium unit, and spent thousands of dollars to furnish it, in order to generate leasing revenue. He contends that he rented his unit in the past, and that he intends to list his unit on Airbnb or other home sharing sites in the future so that he can lease or license his entire unit to guests on a nightly, weekly, monthly or annual basis. He also maintains that the value of the condominium on the sales market is significantly lower if it cannot be used as a short-term rental. In addition, he argues that prior to passage of the Ordinance and the placement of the building on the Prohibited Building List, he was able to conduct short term rentals of the unit, and that ability was a major part of his decision to purchase the property. Mogan further asserts that Chianelli has told him in the past that placing his unit on Airbnb is not permitted under the declarations and bylaws, and has threatened him with the possibility of fines being imposed by the City of Chicago for running ads on Airbnb's website.

Mogan brought claims against the City arguing that its Ordinance violates the takings clause of the Fifth Amendment and constitutes an inverse condemnation under the Illinois Constitution. He argues that the City's actions in prohibiting short-term rentals constituted a regulatory taking. The City contends that Mogan lacks standing for his claims against it, and in the alternative that the court properly found that he failed to state a valid claim.

In support of its claim that Mogan lacks standing to challenge the Ordinance, the City points to our decision in *Keep Chicago Livable v. City of Chicago*, 913 F.3d 618 (7th Cir. 2019), in which we held that each of the plaintiffs challenging

that same Ordinance lacked standing. In order to establish the "'irreducible constitutional minimum'" of standing, "[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016), quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Keep Chicago Livable*, 913 F.3d at 622. At the pleading stage, such as in this case, the plaintiff has the burden of clearly alleging facts that are sufficient to demonstrate each of those elements. *Keep Chicago Livable*, 913 F.3d at 623; *Spokeo*, 578 U.S. at 338. "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized,' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo*, 578 U.S. at 339, quoting *Lujan*, 504 U.S. at 560.

In *Keep Chicago Livable*, we noted that standing must be present at all points in litigation, and the individual plaintiffs in that case failed to meet that standard. 913 F.3d at 622. One of the plaintiffs in that case, who had used Airbnb to rent his home, had then moved out of state and sold that home. *Id*. at 623. Other individual plaintiffs provided only a conclusory allegation that because of the Ordinance, they had ceased participating in home-sharing activities on Airbnb. *Id*. at 623–24. We held that the claim by the first person was moot, and the claims of the others failed to allege with any particularity how the Ordinance, and not some other factor, prevented their own home-sharing activities. *Id*.

In contrast, Mogan's allegations in his Second Amended Complaint include far more detail as to the adverse impact the Ordinance has had on him in the past and continues to

have on him presently. In that complaint, Mogan alleged an infringement on his ability to profitably rent his unit as a short-term rental and that he would rent his unit through home-sharing websites such as Airbnb absent the excessive fines imposed by the Ordinance. Mogan alleged that he purchased the unit to rent it, including on a short-term basis, and that he had already engaged in profitable short-term rentals at Unit 307 on a limited basis and would have continued to do so but for the Ordinance. In fact, he alleged that the ability to list Unit 307 on all available online platforms was a major part of his decision to purchase the property, and that he had relied on rental income to pay for Unit 307 in the past. He alleged that using Unit 307 as a short-term rental on online platforms such as Airbnb benefitted him by allowing him to use Unit 307 as a second, vacation, home while collecting short-term rental income to pay for the unit.

He asserted that the property had lost significant value because the ability to rent short-term on online platforms such as Airbnb enabled him to obtain a premium price. Specifically, he noted that in the past, for rental terms of one month, six months, or a year, on websites such as Craigslist he could only rent Unit 307 for $1600 per month, whereas the average monthly rental for a similar unit on Airbnb's website was $3200 and the average nightly rate was $120. Accordingly, he alleged that he lost approximately $1600 a month between December 2019 and January 2022, or $41,600, because the City would not permit him to rent on online platforms such as Airbnb, and that the lost profits continue daily and monthly. He also alleged that the possible rental of Unit 307 on other online platforms for the lower amount would not justify the price he paid for Unit 307, whereas rental through Airbnb is a profitable venture. He stated that

his fixed mortgage was scheduled to be paid off in 26 years, but that if permitted to earn the higher daily and monthly rental income used by Airbnb users, he would have been able to pay off the principal balance in less than seven years, with substantial savings in interest paid. Furthermore, he asserted that the ability to list a rental on Airbnb increases the property value of a unit, and the City's prohibition of short-term leasing on online platforms such as Airbnb decreased the value of Unit 307. He stated that the fair market value of Unit 307 is approximately 50% higher if short-term rentals are permitted on online platforms such as Airbnb, and specified that Unit 307 is worth $270,000 and would be worth $400,000 based on the ability to rent Unit 307 on a short-term basis on Airbnb.

He also detailed the impact of the fines imposed by the Ordinance. He explained that the Ordinance requires the owner of a shared housing unit to register annually with the City and that the registration is a prerequisite to the ability of the person to establish and maintain a listing of a "Shared Housing Unit" on internet platforms such as Airbnb and HomeAway. Any person who fails to list a registration number in his short term rental listing online is at risk of being deemed ineligible to be a shared housing host and is subject to fines from a minimum of $1500 to $3000 for each offense—where each day of a violation constitutes a separate offense. Moreover, he noted that the failure to remove a listing for a unit in a building on a prohibited building list can subject an owner to inordinate fines of up to $5000 per day for each day that the listing is online, even if the condominium instruments allow such activity. He noted that the risk of the fine is real, and that Chianelli threatened him with the possibilities of fines being imposed by the City for allegedly running ads on

Airbnb's website. Finally, he alleged that, but for the City's prohibition on short-term rentals and extremely high fines, he would conduct short-term rentals at Unit 307.

Those allegations demonstrate standing to challenge the Ordinance. Mogan establishes that he rented his unit in the past and will do so in the future, that the profitability of short-term renting is directly impacted by the ability to list on platforms such as Airbnb, that the excessive fines provided for in the Ordinance have deterred him from listing his unit currently, and that he would conduct short-term rentals of his unit on platforms such as Airbnb absent that Ordinance. He also demonstrates that the inability to list his unit on Airbnb under the Ordinance has an impact on the market value of his unit. Those allegations are sufficient to allege an injury in fact fairly traceable to the challenged conduct of the defendant and likely to be redressed by a favorable judicial decision.

We turn, then, to the merits of the claims asserted in his Second Amended Complaint, which included claims against the City alleging a taking in violation of the Fifth Amendment and inverse condemnation under Illinois law, and a claim for declaratory judgment against the City and the Roscoe Association. Mogan argues that the district court erred in holding that prohibiting short term rentals denied only one bundle of property rights and did not rise to the level of a regulatory taking, and in rejecting his takings and inverse condemnation claims on that basis. He then reasons that because the court erred in dismissing those claims, it also improperly determined that there was no basis remaining for a declaratory judgment against the City and declined to exercise supplemental jurisdiction over the remaining state law claims.

Mogan argues that he cannot afford Unit 307 without short term rental income because it is impossible to sustainably lease Unit 307 under long-term leases and long-term rental income is much lower than short-term rental income. He describes the property right at stake here as including his right to use and rent Unit 307 for less than 30 days, and challenges the City's authority to interfere with or restrict that right when, according to Mogan, such rentals are permitted under the Roscoe Village Lofts bylaws and Declaration and the City had not regulated short term rentals for over 180 years. He contends that the City's restrictions on short-term rentals and its penalties for such rentals constitute an unlawful regulatory taking.

The Takings Clause of the Fifth Amendment, made applicable to the States through the Fourteenth Amendment, ensures that private property not be taken for public use without just compensation. *Murr v. Wisconsin*, 582 U.S. 383, 392 (2017). That language does not directly address the situation in which property is not directly taken but where significant regulatory burdens are imposed on private property that impede its use. *Id*. The Supreme Court has long recognized, however, that "'while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.'" *Id*. at 393, quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Accordingly, subject to certain exceptions, "a regulation which denies all economically beneficial or productive use of land will require compensation under the Takings Clause." *Id*. at 393 (internal quotations marks omitted). Moreover, "when a regulation impedes the use of property without depriving the owner of all economically beneficial use, a taking still may be found based on 'a complex of factors,' including (1) the economic

impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." *Id*. That test for regulatory taking necessarily requires a comparison of the value that has been taken from the property with the value that remains in it, and therefore a critical question is to define the unit of property and the extent that a portion has been taken. *Id*. at 395.

Before addressing the legal issues, there is a factual issue that needs to be highlighted because it is important to the resolution of the claims. When Mogan purchased his condominium unit in the building in 2004, his rights with respect to the unit were subject to the Declaration of Condominium Ownership ("Declaration") and by-laws of the Roscoe Association, which were recorded with the Cook County Recorder of Deeds in 1993. Therefore, from the time of his purchase of that property, his ability to rent out his unit was subject to any restrictions in those documents. Mogan's original complaint, First Amended Complaint, and Second Amended Complaint, all misrepresented the language in the Declaration, and the district court used that inaccurate language in its Opinion and Order. Mogan attached the actual Declaration to his original complaint, and the difference in the language is apparent when comparing that with the quote in the complaint. Mogan in his complaints set forth the relevant section from the Declaration, entitled "Lease of Units or Sublease or Assignment of Lease thereof," quoting it in whole, but misquoting the controlling sentence. The Declaration begins by stating that "[a]ny Unit Owner shall have the right to lease … his Unit, upon such terms and conditions as the Unit Owner may deem acceptable," but then

qualifies that right with an exception. Mogan quoted the Declaration's exception as follows:

> except that no Unit shall be leased, subleased or assigned for transient or hotel purposes, which are hereby defined as being for a period of less than thirty (30) days where hotel services normally furnished by a hotel (such as room service and maid service) are furnished.

Mogan then argued to the district court that he never provided room service or maid service, and therefore that under the terms of the Declaration he had an expectation that he would be allowed to pursue short-term rentals of his unit. But the actual language in the Declaration is materially different, and eviscerates his claim of an expectation of engaging in short-term rentals. The Declaration, which was attached as an exhibit to his original complaint, sets forth the leasing exception as follows:

> except that no Unit shall be leased, subleased or assigned for transient or hotel purposes, which are hereby defined as being for a period of less than thirty (30) days **or for a period of more than thirty (30) days** where hotels services normally furnished by a hotel (such as room service and maid service) are furnished.

(emphasis added).

The bolded language is missing from the body of the complaints, and no ellipsis is used to indicate its omission. The district court's order then tracked the erroneous language in the complaints, but that omitted language changes the meaning significantly. Under Mogan's versions, leases for

less than 30 days are allowed unless hotel services are provided. He then alleged in the complaints that he had not provided in the past such services normally provided by hotels, nor did he intend to do so in the future.

But the actual language of the Declaration provides that no leases of less than 30 days are allowed, and no leases for more than 30 days are allowed where hotel services are furnished. The "hotel services" language clearly modifies only the leases of more than 30 days, because otherwise the distinction between leases of less than 30 days and more than 30 days would have no meaning. Transient leases and hotel leases are prohibited, and that includes: (a) any leases of less than 30 days; and (b) any leases of more than 30 days where hotel services are provided. "Transient" rentals are similarly defined in the Ordinance in this case as rentals for less than a month. Based on the plain language of the Declaration, which controlled the rights and expectations of persons purchasing a condominium unit in that building, Mogan was aware from the time that he purchased Unit 307 that he had no right to lease the unit for periods of less than 30 days, and in fact was prohibited from doing so.

And that defeats his claims under the takings clause or inverse condemnation. Considering the factors for a regulatory taking, in light of the language in the Declaration prohibiting short-term rentals of less than 30 days, Mogan cannot demonstrate any economic impact of the Ordinance on him, nor can he demonstrate that the Ordinance has interfered with any reasonable investment-backed expectations. In fact, not only did he lack any such reasonable expectation, he would have been on actual notice before purchasing the property that leases of less than 30 days are

not allowed. And the Ordinance challenged here, and the prohibited buildings list, applies only to short-term leases of less than 31 days.

Mogan argues that he in fact rented the unit on a short-term basis, but that does not change the nature of the property interest he possessed. We need not consider whether the Roscoe Association "allowed" such short-term rentals to occur because of ignorance, indifference, incompetence, or tacit acceptance. Even if Mogan was able to pursue such short-term rentals of Unit 307 for a time, the Declaration at the time of the purchase made clear that the unit could not be rented for periods of less than 30 days. Therefore, the property interest that he obtained in the unit never included the right of short-term rentals, and in fact expressly excluded that right. Because the property was restricted in that manner from the outset and the Declaration was never changed, he never experienced any adverse economic impact from the Ordinance, nor any interference with distinct investment-backed expectation because he never had any reasonable expectation that the property could be used for short-term rentals. Accordingly, the district court properly dismissed his takings clause claim. Mogan raises no independent argument as to the inverse condemnation claim, conceding that the inverse condemnation claim applies the same standard as the takings clause claim and therefore that claim was properly dismissed as well. The district court did not abuse its discretion in declining to exercise supplemental jurisdiction over the remaining state law claim, given its dismissal of the federal claims. See *Carlsbad Technology, Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 639–40 (2009) (recognizing that a district court's

decision as to whether to exercise supplemental jurisdiction is purely discretionary and is reviewed for abuse of discretion).

The decision of the district court is AFFIRMED.

45 F.4th 662
United States Court of Appeals, Third Circuit.

Gennadiy NEKRILOV; Eugene Nekrilov; Kwan Ho Tang; Jayu Jen; Alan Suen, Appellants

v.

CITY OF JERSEY CITY

No. 21-1786
|
Argued: November 18, 2021
|
(Filed: August 16, 2022)

Synopsis

Background: Individuals who invested in and operated short-term rentals filed § 1983 action alleging that city ordinance limiting short-term rentals violated their rights under Takings, Contracts, and Due Process Clauses. The United States District Court for the District of New Jersey, Kevin McNulty, J., 528 F.Supp.3d 252, dismissed complaint, and plaintiffs appealed.

Holdings: The Court of Appeals, Chagares, Circuit Judge, held that:

[1] plaintiffs' forward-looking right to pursue their short-term rental businesses was not property right cognizable under Takings Clause;

[2] ordinance did not result in total taking or taking per se;

[3] ordinance did not effect partial taking;

[4] ordinance did not violate Contracts Clause; and

[5] ordinance did not violate plaintiffs' substantive due process rights.

Affirmed.

Bibas, Circuit Judge, concurred and filed opinion.

West Headnotes (29)

[1] **Federal Courts** Pleading

Federal Courts Dismissal for failure to state a claim

Court of Appeals exercises plenary review over district court's dismissal of complaint for failure to state claim, accepting all well-pled factual allegations as true and drawing all reasonable inferences in plaintiffs' favor. Fed. R. Civ. P. 12(b)(6).

11 Cases that cite this headnote

[2] **Federal Civil Procedure** Insufficiency in general

Federal Civil Procedure Matters deemed admitted; acceptance as true of allegations in complaint

To survive motion to dismiss for failure to state claim, complaint must contain sufficient factual allegations, taken as true, to state claim to relief that is plausible on its face. Fed. R. Civ. P. 12(b)(6).

11 Cases that cite this headnote

[3] **Constitutional Law** Fifth Amendment

Takings Clause applies to state and local governments through Fourteenth Amendment. U.S. Const. Amends. 5, 14.

1 Case that cites this headnote

[4] **Eminent Domain** Property and Rights Subject of Compensation

Threshold determination in any takings case is whether plaintiff has asserted legally cognizable property interest; without legally cognizable property interest, plaintiff has no cognizable takings claim. U.S. Const. Amend. 5.

5 Cases that cite this headnote

[5] **Eminent Domain** What Constitutes a Taking; Police and Other Powers Distinguished

There are two types of regulatory takings: (1) takings per se or total takings, where regulation denies all economically beneficial productive use of property; and (2) partial takings that, though not rendering property idle, require compensation under test set forth in *Penn Central*. U.S. Const. Amend. 5.

3 Cases that cite this headnote

[6] **Constitutional Law** Source of right or interest

While Constitution protects property interests, it does not create property interests; whether plaintiff has property interest is determined by reference to existing rules or understandings that stem from independent source such as state law. U.S. Const. Amend. 5.

4 Cases that cite this headnote

[7] **Eminent Domain** Property and Rights Subject of Compensation

General right to do business is not property interest cognizable under Takings Clause. U.S. Const. Amend. 5.

7 Cases that cite this headnote

[8] **Eminent Domain** Property and Rights Subject of Compensation

Investors' and operators' forward-looking right to pursue their short-term rental businesses was not property right cognizable under Takings Clause. U.S. Const. Amend. 5.

2 Cases that cite this headnote

[9] **Eminent Domain** What Constitutes a Taking; Police and Other Powers Distinguished

Total takings or takings per se are those that deny property owner all economically beneficial use of property. U.S. Const. Amend. 5.

3 Cases that cite this headnote

[10] **Eminent Domain** What Constitutes a Taking; Police and Other Powers Distinguished

Taking has not occurred simply because plaintiff has been denied the most profitable use of property; rather, total taking is one that renders property essentially idle. U.S. Const. Amend. 5.

3 Cases that cite this headnote

[11] **Eminent Domain** Particular cases

City ordinance limiting short-term rentals did not deprive properties formerly used as short-term rentals of all economically viable use, and thus did not result in total taking or taking per se, even though individuals who invested in and operated short-term rentals could not expect same profits from long-term leases as from short-term rentals; ordinance did not entirely ban short-term rentals, and investors could still make economically viable use of properties by occupying properties or sub-leasing them on long-term basis. U.S. Const. Amend. 5.

3 Cases that cite this headnote

[12] **Eminent Domain** What Constitutes a Taking; Police and Other Powers Distinguished

One whose property has not been deprived of all economically beneficial use may still be entitled to compensation if government action constitutes partial taking under *Penn Central* factors, which are: (1) economic impact of regulation on claimant; (2) extent to which regulation has interfered with distinct investment-backed expectations; and (3) character of governmental action. U.S. Const. Amend. 5.

7 Cases that cite this headnote

[13] **Eminent Domain** Particular cases

City's enactment of ordinance limiting short-term rentals did not effect partial taking, even though owners and lessees of properties previously used as short-term rentals may have lost between 50% and 66% of their potential

revenue, and city officials had encouraged them to invest in short-term rentals; ordinance was general zoning regulation restricting permissible uses of residential housing with goals of protecting residential housing market and promoting public safety, values of underlying properties or leases had not decreased, lost-profit claims failed to account for other potential uses of properties, prior ordinance placed qualifications on operation of short-term rentals, and amended ordinance permitted lessees to use properties for short term rentals for majority of lease term. U.S. Const. Amend. 5.

1 Case that cites this headnote

[14] **Eminent Domain** What Constitutes a Taking; Police and Other Powers Distinguished

When evaluating takings claim under *Penn Central* factors, regulation's economic impact is usually measured in terms of its effect on property's value. U.S. Const. Amend. 5.

[15] **Eminent Domain** Zoning, Planning, or Land Use; Building Codes

Governmental investment-backed expectations are reasonable only if they take into account power of state to regulate in public interest, for purposes of determining whether governmental interference with land use has effected taking. U.S. Const. Amend. 5.

3 Cases that cite this headnote

[16] **Eminent Domain** What Constitutes a Taking; Police and Other Powers Distinguished

Takings Clause does not mean that once property has been devoted to particular use, owner has reasonable expectation of being able to continue with that use absent payment of compensation. U.S. Const. Amend. 5.

1 Case that cites this headnote

[17] **Eminent Domain** Zoning and Permits

Zoning regulations are classic example of permissible regulations that do not require compensation even where they prohibit property's most beneficial use. U.S. Const. Amend. 5.

4 Cases that cite this headnote

[18] **Federal Civil Procedure** Matters considered in general

Summary Judgment Motion to dismiss

Courts may consider in deciding motion to dismiss for failure to state claim documents that are integral to or explicitly relied upon in complaint without converting motion to motion for summary judgment. Fed. R. Civ. P. 12(b)(6).

3 Cases that cite this headnote

[19] **Eminent Domain** What Constitutes a Taking; Police and Other Powers Distinguished

Taking is more readily found when interference with property can be characterized as physical invasion by government than when interference arises from some public program adjusting benefits and burdens of economic life to promote common good, especially when regulation concerns housing. U.S. Const. Amend. 5.

1 Case that cites this headnote

[20] **Constitutional Law** Police power; purpose of regulation

Despite its broad language, Contracts Clause does not disrupt state's ability to exercise its police powers in service of public interest, even if it affects existing contracts. U.S. Const. art. 1, § 10, cl. 1.

1 Case that cites this headnote

[21] **Constitutional Law** Existence and extent of impairment

Constitutional Law Police power; purpose of regulation

To decide whether legislation violates Contracts Clause, court first determines whether legislation has substantially impaired contractual relationship; if so, court then turns to means

and ends of legislation and evaluates whether legislation (1) has significant and legitimate public purpose, and (2) is drawn in appropriate and reasonable way to advance that public purpose. U.S. Const. art. 1, § 10, cl. 1.

1 Case that cites this headnote

[22] **Constitutional Law** Police power; purpose of regulation

When determining whether legislation that substantially impairs contractual relationship is drawn in necessary and reasonable way under Contracts Clause, and where state is not itself party to affected contract, state is ordinarily entitled to deference in its legislative judgment. U.S. Const. art. 1, § 10, cl. 1.

1 Case that cites this headnote

[23] **Constitutional Law** Application to state and local laws and regulations

Contracts Clause applies equally to municipal ordinances as it does to state legislation. U.S. Const. art. 1, § 10, cl. 1.

[24] **Constitutional Law** Leases in general

Zoning and Planning Hotels, lodging, and short-term rentals

City had substantial public purpose in passing ordinance limiting short-term rentals, and thus ordinance did not violate Contracts Clause, even if it substantially impaired long-term leases that investors had entered into for purpose of offering short-term rentals, and mayor was subjectively motivated by his dissatisfaction with online short-term rental platform over campaign donations; city was not party to long-term leases, and ordinance articulated multiple public purposes, including desire to protect residential character of neighborhoods and reduce nuisance activity associated with short-term rentals. U.S. Const. art. 1, § 10, cl. 1.

3 Cases that cite this headnote

[25] **Constitutional Law** Existence and extent of impairment

To determine whether regulation has substantially impaired existing contract, in violation of Contracts Clause, court considers extent to which law undermines contractual bargain, interferes with party's reasonable expectations, and prevents party from safeguarding or reinstating his rights. U.S. Const. art. 1, § 10, cl. 1.

2 Cases that cite this headnote

[26] **Constitutional Law** Substantive Due Process in General

Constitutional Law Rights and interests protected; fundamental rights

Substantive due process is component of Fourteenth Amendment that protects individual liberty against certain government actions regardless of fairness of procedures used to implement them. U.S. Const. Amend. 14, § 1.

9 Cases that cite this headnote

[27] **Constitutional Law** Substantive Due Process in General

Non-legislative state action violates substantive due process if arbitrary, irrational, or tainted by improper motive, or if so egregious that it shocks conscience. U.S. Const. Amend. 14, § 1.

2 Cases that cite this headnote

[28] **Constitutional Law** Reasonableness, rationality, and relationship to object

For legislative act challenged on substantive due process grounds to withstand rational basis review, state must demonstrate (1) existence of legitimate state interest that (2) could be rationally furthered by statute. U.S. Const. Amend. 14, § 1.

2 Cases that cite this headnote

[29] **Constitutional Law** Particular issues and applications

Zoning and Planning Hotels, lodging, and short-term rentals

City ordinance limiting short-term rentals did not violate substantive due process rights of individuals who invested in and operated short-term rentals, even if mayor was subjectively motivated by his dissatisfaction with online short-term rental platform over campaign donations; ordinance articulated several legitimate state interests furthered by change in regulation, including protecting long-term housing supply, reducing deleterious effects on neighborhoods caused by short-term rentals, and protecting residential character and density of neighborhoods. U.S. Const. Amend. 14, § 1.

1 Case that cites this headnote

***665** On Appeal from the United States District Court for the District of New Jersey (D.C. Civil No. 2-19-cv-22182), District Judge: Honorable Kevin McNulty

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Before: CHAGARES, Chief Judge, BIBAS and FUENTES, Circuit Judges

OPINION OF THE COURT

CHAGARES, Chief Judge.

Gennadiy and Eugene Nekrilov, Kwan Ho Tang, Jayu Jen, and Alan Suen (together, the "plaintiffs") filed this lawsuit under 42 U.S.C. § 1983 challenging a Jersey ***666** City ordinance curtailing the ability of property owners and lease holders to operate short-term rentals. The plaintiffs alleged that, having passed an earlier zoning ordinance legalizing short-term rentals in Jersey City (the "City"), which enticed them to invest in properties and long-term leases, the City violated their constitutional rights under the Takings Clause of the Fifth Amendment, the Contract Clause of Article I, and the Due Process Clauses of the Fifth and Fourteenth Amendments by passing the new ordinance. The new ordinance, they allege, undermined their legitimate, investment-backed expectations and injured their short-term rental businesses. The plaintiffs also moved for a preliminary injunction against the enforcement of the new ordinance. The City moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). The District Court granted the motion, dismissed the complaint with prejudice, and denied the preliminary injunction motion as moot. For the reasons that follow, we will affirm the judgment of the District Court.

I.

The plaintiffs are individuals who invest in and operate short-term rentals in Jersey City using online home-sharing platforms. Home-sharing platforms, such as Airbnb, provide a residential alternative to traditional hotels for travelers seeking to rent a spare room or property on a nightly, weekly, or monthly basis.

Steven Fulop was elected Mayor of Jersey City in 2013.[1] One of Mayor Fulop's priorities was to incentivize investment and development in Jersey City. As a part of that effort, in 2015, Mayor Fulop supported the passage of a zoning ordinance, Ordinance 15.137, that affirmatively legalized short-term rentals in Jersey City. Ordinance 15.137 was the first of its kind in the state of New Jersey.

Ordinance 15.137 provided, in relevant part:

> 1. Short Term Rentals are permitted as an accessory use to a permitted principal residential use in all zoning districts and redevelopment plan areas where residential uses are permitted.
>
> a. The person offering a Dwelling Unit for Short-Term Rental use must be the owner or lessee of the residence in which the Short-Term Rental activity occurs. Short-Term Rental activity may occur in a habitable accessory building located on the same premises as the residence.
>
> b. No person offering a Dwelling Unit for Short-Term Rental use shall be required to obtain any license for such use ... unless such person offers more than 5 separate

> Dwelling Units for Short-Term Rental use in the City. Any person offering more than 5 separate Dwelling Units for Short-Term Rental use in the City must:
>
> > i. obtain a license pursuant to Section 254-82 to offer each Dwelling Unit for Short-Term Rental....
> >
> > ii. ensure that the Short-Term Rental use is clearly incidental to the principal residential uses permitted in the zone where each such Dwelling United is located....

Appendix ("App.") 161–62. Ordinance 15.137 also mandated that short-term uses of residential properties "shall be conducted in a manner that does not materially disrupt the residential character of the neighborhood." App. 162.

Jersey City issued a press release outlining the goals of the proposed ordinance. The press release explained that although ***667** the ordinance would "allow[ ] residents to rent homes for less than 30 days," it also "include[d] several commonsense protections" that would prevent short-term rental operators from "changing the character of the neighborhood." App. 167 (quotation marks omitted). To prevent the formation of informal "Airbnb hotels," the ordinance would also limit the number of properties one user could rent to five.

Mayor Fulop was quoted in the press release and made other public statements in support of the ordinance, describing companies that participate in the "sharing economy" as the "future." App. 102. He also authored an article in the Huffington Post explaining the purposes and benefits of the ordinance. Mayor Fulop noted that home-sharing platforms allow "middle-class folks [to] earn a bit of extra income by renting out their apartments." Id. The ordinance had the support of other Jersey City public officials, several of whom made statements in support of the ordinance. The Jersey City Council unanimously approved the ordinance, and on October 30, 2015, Mayor Fulop signed the ordinance into law.

Following the passage of Ordinance 15.137, Mayor Fulop's relationship with Airbnb purportedly began to deteriorate. In 2016, Mayor Fulop allegedly sought a donation from Airbnb to his reelection campaign. Mayor Fulop attended a fundraiser at Airbnb's San Francisco headquarters in 2017 but still did not receive a donation. In May 2017, Mayor Fulop allegedly sent a number of emails to Airbnb expressing his frustration, and, in response, Airbnb sent a $10,172 contribution to his reelection campaign. Airbnb represented that, following the delay in the donation, the relationship "fractured," and Mayor Fulop began receiving donations from the hotel industry. App. 231.

Two years later, Mayor Fulop's office introduced Ordinance 19-077. Ordinance 19-077 was a significant policy change from Ordinance 15.137. Although it did not ban short-term rentals entirely, it imposed a number of new restrictions. First, short-term rentals in non-owner-occupied rentals were limited to sixty nights per year. If, as of the date the ordinance was adopted, an owner operated two properties, the owner could appoint an agent to reside at the second property without being subject to the sixty-day limit on that property. Second, Ordinance 19-077 banned the subleasing of properties by tenants on a short-term basis. As a result, only those who owned properties could rent on a short-term basis in Jersey City. To facilitate a transition period of approximately eighteen months, Ordinance 19-077 included certain exceptions. It exempted through January 1, 2021, for instance, any short-term rental reservations or bookings that were made before June 25, 2019, the date the ordinance was adopted. In addition, tenants who were subleasing their properties on a short-term basis as of the date of adoption could continue to do so through January 1, 2021, or through the end of the lease, whichever came first.

On June 25, 2019, the Jersey City Council held a special meeting to vote on Ordinance 19-077. Operators of short-term rentals spoke against the ordinance, and Councilman James Solomon and Councilman Jermaine Robinson spoke in favor of the ordinance. Councilman Solomon acknowledged that the ordinance may have a negative financial impact on short-term rental operators but also explained that short-term rentals had a negative impact on union workers in Jersey City. Councilman Robinson expressed hope that investors could recoup some of the money they would lose as a result of the ordinance. The City Council voted 7–2 in favor of adopting the ordinance. On June 28, 2019, ***668** Mayor Fulop signed Ordinance 19-077 into law.

Between the passage of Ordinance 15.137 and Ordinance 19-077, the plaintiffs invested in properties in Jersey City to conduct short-term rental businesses. The Nekrilovs purchased two properties, which have monthly mortgage payments of $2,500 and $1,725. The Nekrilovs earned $9,500 and $5,183 per month, respectively, in short-term rental revenue, and allege that they would earn only $3,800 and $1,800 per month in long-term rental revenue. They also invested a total of $100,000 in renovating these properties. The Nekrilovs also entered into seventeen long-term leases

with the intention of subleasing on a short-term basis. Tang and Jen purchased one property, which has a monthly mortgage payment of $3,300, and which Tang and Jen spent $40,000 to renovate and furnish. The property earned $4,500 per month in short-term rental revenue and would earn $2,600 in long-term rental revenue. Tang and Jen also entered into two long-term leases and spent $6,600 and $8,900 to furnish the properties. Suen purchased two properties, which have monthly mortgage payments of $2,500 and $3,500. Suen and his mother invested approximately $383,000 into renovating the properties, $40,000 into furnishing the properties, and $130,000 in other costs for the properties. Suen and his mother earned approximately $30,000 in monthly short-term rental revenues from the two properties. At the time of filing the complaint, Suen and his mother had not turned a profit, but they estimated that they would become profitable in the near future.

In December 2019, the plaintiffs filed a complaint seeking a declaratory judgment providing that Ordinance 19-077 is unconstitutional, injunctive relief against enforcement of the ordinance, monetary damages, and attorneys' fees. The complaint asserted four claims: (1) violations of the Takings Clause of the Fifth Amendment; (2) violations of the Contract Clause of Article I; (3) Fifth and Fourteenth Amendments substantive due process claims; and (4) Fifth and Fourteenth Amendments procedural due process claims. The plaintiffs simultaneously filed a motion for a temporary restraining order ("TRO") and preliminary injunction. The City moved to dismiss the complaint for failure to state a claim under Rule 12(b)(6). The District Court dismissed the complaint and denied as moot the motion for a TRO and preliminary injunction. The plaintiffs timely appealed.

II.

[1] **[2]** The District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331. This Court has jurisdiction over the District Court's final order dismissing the complaint under 28 U.S.C. § 1291. We exercise plenary review over the District Court's dismissal of the complaint, accepting all well-pled factual allegations as true and drawing all reasonable inferences in the plaintiffs' favor. See Phila. Taxi Ass'n v. Uber Techs., Inc., 886 F.3d 332, 338 (3d Cir. 2018). "To survive a motion to dismiss, a complaint must contain sufficient factual allegations, taken as true, to 'state a claim to relief that is plausible on its face.' " Fleisher v. Standard Ins. Co., 679 F.3d 116, 120 (3d Cir. 2012) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

III.

The plaintiffs argue that the District Court erred in holding that the plaintiffs had not stated a regulatory takings claim. Relatedly, the plaintiffs argue that the court erroneously failed to recognize the plaintiffs' forward-looking rights to conduct their short-term rental businesses as ***669** cognizable property interests for purposes of their takings claim. The plaintiffs next argue that the District Court erred in dismissing their Contract Clause claim, which they allege impaired both short-and long-term rental contracts. Finally, the plaintiffs argue that the District Court erred in concluding that the plaintiffs failed to state a claim for a substantive due process violation.[2]

A.

[3] **[4]** The Takings Clause of the Fifth Amendment of the United States Constitution prohibits the taking of private property "for public use, without just compensation." U.S. Const. amend. V. The Takings Clause applies to state and local governments through the Fourteenth Amendment. Newark Cab Ass'n v. City of Newark, 901 F.3d 146, 151 (3d Cir. 2018). A threshold determination in any takings case is whether the plaintiff has asserted a legally cognizable property interest. See In re Trustees of Conneaut Lake Park, Inc., 855 F.3d 519, 526 (3d Cir. 2017). "Without a legally cognizable property interest, [the plaintiff] has no cognizable takings claim." Id. Once a legally cognizable property interest has been identified, we examine whether there has been a taking of that property interest for public use without just compensation. Id. at 525.

[5] Because there has been no physical taking of the plaintiffs' property, this case concerns an alleged regulatory taking. There are two types of regulatory takings: (1) takings per se or total takings, where the regulation denies all economically beneficial productive use of the property, see Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992); and (2) partial takings that, though not rendering the property idle, require compensation under the test set forth in Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).

1.

We must first determine what, if any, legally cognizable interests are at issue. As the District Court observed, plaintiffs assert three "uncontroversial" property rights: (1) plaintiffs' use and enjoyment of their purchased properties; (2) the long-term leases; and (3) the plaintiffs' short-term rental contracts. But the plaintiffs also assert another property interest: their forward-looking right to pursue their short-term rental businesses. Framed this way, the plaintiffs allege that they have lost "the entire businesses they were *expressly invited* by Jersey City to open and operate." Nekrilov Br. 40 (emphasis in original). The District Court rejected the argument that this constituted a legally cognizable property interest for the purposes of a takings claim.

[6] While the Constitution protects property interests, it does not create property interests. See Phillips v. Wash. Legal Found., 524 U.S. 156, 164, 118 S.Ct. 1925, 141 L.Ed.2d 174 (1998). Whether a plaintiff has a property interest is "determined by reference to 'existing rules or understandings that stem from an independent source such as state law.' " Id. (quoting Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)).

[7] That does not mean that every municipal act legalizing a business activity vests the business owner with a cognizable property right. The Supreme Court has explained that "business in the sense of *the activity of doing business*, or *the activity* ***670** *of making a profit* is not property in the ordinary sense." Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 675, 119 S.Ct. 2219, 144 L.Ed.2d 605 (1999) (emphasis in original). Consistent with this principle, we decline to recognize a general right to do business as a property interest cognizable under the Takings Clause. As the District Court recognized, to hold otherwise would broaden the scope of the Takings Clause such that any business regulation could constitute a taking.

The plaintiffs point to several decisions in which, in the context of New Jersey tort law, courts recognized that the "[i]nvasion of 'the right to pursue one's business, calling or occupation free from undue interference or molestation' is an 'actionable infringement of a property right.' " Longo v. Reilly, 35 N.J.Super. 405, 114 A.2d 302, 305 (N.J. App. Div. 1955) (quoting Louis Kamm, Inc., v. Flink, 113 N.J.L. 582, 175 A. 62, 66 (N.J. 1934)); see also Di Cristofaro v. Laurel Grove Mem'l Park, 43 N.J.Super. 244, 128 A.2d 281, 285 (N.J. App. Div. 1957) (same); Zenith Lab'ys, Inc. v. Abbott Lab'ys, No. Civ. A. 96-1661, 1996 WL 33344963, at *5 (D.N.J. Aug. 7, 1996) (same). These are tort decisions. These decisions recognize a property right to pursue one's business in the context of unfair competition or tortious interference claims. As such, they are not applicable to the plaintiffs' takings claim. The plaintiffs do not cite any takings or due process decisions in which a federal court has recognized a cognizable property interest in the right to pursue one's business.

This does not mean that we disregard the impact that Ordinance 19-077 has had on the plaintiffs' businesses. To the extent that the ordinance has affected the economic value or use of the properties, we address that issue in the takings analysis. Moreover, we will consider the impact of the change in policy on the plaintiffs' reasonable, investment-backed expectations. We need not recognize a free-standing property right to pursue one's business in order to account for the effect that Ordinance 19-077 has had on the plaintiffs' short-term rental businesses.

[8] The plaintiffs' forward-looking right to pursue their short-term rental businesses is not cognizable under the Takings Clause, but the plaintiffs have articulated three cognizable property rights: (1) use and enjoyment of their purchased properties; (2) long-term leases, see U.S. Tr. Co. of N.Y. v. New Jersey, 431 U.S. 1, 19 n.16, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977) ("Contract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid."); and (3) short-term rental contracts, see id. We next examine whether the passage of Ordinance 19-077 constitutes a taking of any of those property rights.

2.

[9] **[10]** Total takings or takings per se are those that deny the property owner all economically beneficial use of the property. See Murr v. Wisconsin, —— U.S. ——, 137 S. Ct. 1933, 1942–43, 198 L.Ed.2d 497 (2017); Lucas, 505 U.S. at 1030, 112 S.Ct. 2886. A taking has not occurred simply because a plaintiff has been denied the most profitable use of the property. See Andrus v. Allard, 444 U.S. 51, 66, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979). Rather, a total taking is one that renders the property essentially idle. See Lucas, 505 U.S. at 1030, 112 S.Ct. 2886.

[11] The plaintiffs first allege that, as a result of Ordinance 19-077, they have lost all beneficial use of their purchased properties. The District Court held that because the properties retain numerous beneficial uses, they have not been rendered ***671** economically idle. We agree. The plaintiffs can lease the properties on a long-term basis, live at the properties, or sell the properties.[3] There is no total taking where the government seizes only one strand in the "bundle" of property rights. Andrus, 444 U.S. at 66, 100 S.Ct. 318. Here, that single strand is use of the properties for short-term rentals.

The plaintiffs argue that they cannot afford to keep the purchased properties without short-term rental income because "it is impossible to sustainably lease them under long-term leases." Nekrilov Br. 39 n.12. The plaintiffs cannot sustainably lease them on a long-term basis because "long-term rental income is much lower than short-term rental income, and thus would render [the plaintiffs'] investments unaffordable," App. 95, a fact that the plaintiffs considered in deciding not to enter the long-term rental market. If forced to rent the properties on a long-term basis, the plaintiffs claim that they would barely make enough to cover their mortgages and other costs, and in some cases, not enough to cover "related debt and expenses." App. 138.

The comparative disadvantage of long-term rentals does not amount to an allegation that long-term rentals are not an economically beneficial use of the property. The plaintiffs are, as the District Court recognized, attempting to argue that without the benefit of short-term rentals, they have been denied all profitable use of their properties. But the central question for a total taking is not "whether the regulation allows operation of the property as 'a profitable enterprise' for the owners, but whether others 'might be interested in purchasing all or part of the land' for permitted uses." Park Ave. Tower Assocs. v. City of New York, 746 F.2d 135, 139 (2d Cir. 1984) (quoting Pompa Const. Corp. v. City of Saratoga Springs, 706 F.2d 418, 424 (2d Cir. 1983)). The plaintiffs do not allege that, across all potential purchasers, long-term leases are not an economically viable use of these properties. As the District Court observed, the extent to which Ordinance 19-077 has impacted the plaintiffs' anticipated return on their investments may be relevant to the partial takings analysis under Penn Central, but it has no relevance here. Because the purchased properties may still be put to multiple economically viable uses, there has been no total taking of the purchased properties.

The plaintiffs further argue that they have lost all economically beneficial use of the long-term leases. The District Court similarly rejected this argument, explaining that although the plaintiffs may no longer expect the same profits from short-term rentals, they may still make economically viable use of the properties by occupying the properties or sub-leasing the properties on a long-term basis. We agree. Because these leases may be put to other uses, there has not been a total taking of ***672** any long-term lease.[4]

Finally, the District Court concluded that there had been no total taking of any of the preexisting short-term rental reservations. The District Court reasoned that Ordinance 19-077 did not entirely ban short-term rentals; it provided for a transition period for tenants and a limit of sixty nights per year for owners. The ordinance also provided an exception for short-term rental contracts that existed at the time the ordinance passed and that concluded before January 1, 2021. The complaint did not plead that these preexisting reservations did not qualify for any exception, and so the District Court concluded that there had been no total takings of the short-term reservations. Following oral argument on appeal, the plaintiffs submitted a letter to this Court indicating that "no formal short-term bookings through AirBnB or similar service were cancelled solely as a result of Ord. 19-077." Doc. 43. Accordingly, there has been no total taking of any of the plaintiffs' short-term rental contracts.

Because neither the purchased properties nor the long-term leases have been deprived of all economically viable use, the District Court properly concluded that the plaintiffs had not stated a claim for a total taking or taking per se.

3.

[12] One whose property has not been deprived of all economically beneficial use may still be entitled to compensation if the government action constitutes a partial taking under the Penn Central factors. The factors are: "(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." Murr, 137 S. Ct. at 1943. Although the test is flexible, the Penn Central "inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests." Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 540, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005).

[13] The District Court held that all three Penn Central factors weighed against a taking and dismissed the plaintiffs' partial takings claim. For the reasons that follow, we agree.

a.

We first consider the economic impact of Ordinance 19-077 on the plaintiffs. It is undisputed that Ordinance 19-077 has impacted the plaintiffs' short-term rental businesses. In Appendix A of its opinion, the District Court summarized the effects, as alleged in the complaint. The court roughly estimated that plaintiffs may have lost between 50% and 66% of their potential revenue from short-term rentals. The court concluded that, even treating this loss of potential revenue as a loss in the "value" of the property, this factor weighed against the plaintiffs because they did not account for alternative ways to exploit the properties. The District Court also declined to adopt lost profits as a measure of economic impact because the ***673** plaintiffs' projected lost profits were speculative. The plaintiffs allege that the District Court engaged in improper factfinding in holding that their lost profits were too speculative.

[14] When evaluating a takings claim under the Penn Central factors, the economic impact of a regulation is usually measured in terms of its effect on the value of the property. See Rose Acre Farms, Inc. v. United States, 559 F.3d 1260, 1268–69 (Fed. Cir. 2009) (collecting cases); see also United States v. 68.94 Acres of Land, 918 F.2d 389, 393 n.3 (3d Cir. 1990). Here, the plaintiffs do not argue that the values of the underlying properties or leases have decreased; they instead argue that they have been denied the opportunity to profit from and to obtain a "reasonable return" on their investments. Nekrilov Br. 42 (quoting Penn Cent., 438 U.S. at 136, 98 S.Ct. 2646). The loss of profitable uses of property is occasionally considered in takings cases as a measure of economic impact, see, e.g., Pace Res., Inc. v. Shrewsbury Twp., 808 F.2d 1023, 1031 (3d Cir. 1987), but as the Supreme Court explained:

> [L]oss of future profits-unaccompanied by any physical property restriction—provides a slender reed upon which to rest a takings claim. Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform. Further, perhaps because of its very uncertainty, the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests.

Andrus, 444 U.S. at 66, 100 S.Ct. 318.

As to the purchased properties, we agree with the District Court that lost profits are not an appropriate a measure of economic impact. First, not all of the plaintiffs were profitable as of the filing of the complaint. Suen, who purchased two properties, had not turned a profit on either property, although he considered himself "at a point where [the investments] will become profitable in the near future," based on his assumption that he would be able to continue operating his short-term rental business "indefinitely." App. 137. His alleged lost profits are entirely speculative. Second, the Nekrilovs, Tang, and Jen, who have profited from their short-term rental businesses, do not allege that they could not profitably sell their purchased properties. As the District Court explained, their lost-profit claims fail to account for other potentially profitable uses of the properties, the most obvious of which is to sell the properties. Suen alone alleges that he would be forced to sell his two purchased properties at a net loss, accounting for "two down payments, the two mortgage payments, and the costs of renovations, etc." App. 138–39. But the complaint does not quantify that estimated loss, and it bases this claim at least in part on a prediction that Ordinance 19-077 "will likely deflate prices" of residences in Jersey City. App. 139. There is nothing in the complaint to suggest that the value of the plaintiffs' purchased properties have declined as a result of Ordinance 19-077 or otherwise. See Fowler v. UPMC Shadyside, 578 F.3d 203, 210 (3d Cir. 2009) ("[C]onclusory or 'bare-bones' allegations will [not] survive a motion to dismiss....").

But even if we considered the loss of potential short-term rental revenue as a decrease in the underlying value of the properties, that too would be insufficient. The plaintiffs do not allege that the market values for any of the purchased properties have decreased or that market values for long-term rents have decreased as a result of Ordinance 19-077. Accordingly, the only alleged loss in "value" is the lost revenue ***674** from short-term leases that cannot be recouped from long-term leases or from selling the properties. The complaint does not specify the value of this loss, but the District Court estimated that, where both long-and short-term market rents are provided in the complaint, the plaintiffs stand to lose between approximately 50% and 66% of their rental revenue, which is a fraction of the properties' value. As this Court has observed, the Supreme Court "has required compensation only in cases in which the value of the property was reduced drastically." Rogin v. Bensalem Twp., 616 F.2d 680, 692 (3d Cir. 1980). The plaintiffs have undeniably lost

potential future profits as a result of Jersey City's change in policy. But the plaintiffs' inability to continue to operate their short-term rental businesses profitably does not equate to a "drastic[ ]" reduction in the value of the property so as to require compensation, especially as the properties retain multiple economically beneficial uses.

As to the long-term leases, the complaint indicates that those leases ended in 2020 or 2021. Ordinance 19-077 permitted tenants to continue to sublease on a short-term basis through January 1, 2021. The complaint identifies four leases that extended past this transition period: two leases ending on June 30, 2021, and two leases ending on August 31, 2021. The complaint is not clear as to precisely when the leases started, but the plaintiffs were paying rent on the affected leases prior to the filing of the complaint in December 2019. Accordingly, the Nekrilovs, Tang, and Jen were able to use the leased properties for the most profitable use — short term rentals — for the majority of the lease term. Moreover, as with the purchased properties, the leased properties retain multiple beneficial uses. The plaintiffs can live in the properties or sublet them on a long-term basis. Long-term rental rates are indisputably lower than short-term rates, but the plaintiffs acknowledge that they pay "market rent." App. 116, 119–21, 126–27. The District Court properly recognized that the plaintiffs have not alleged why their losses would be "drastic" if they can sublet the properties at market rate on a long-term basis.

"Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." Penn. Coal Co. v. Mahon, 260 U.S. 393, 413, 43 S.Ct. 158, 67 L.Ed. 322 (1922). To govern effectively, governments must be able to "execute laws or programs that adversely affect recognized economic values." Penn Cent., 438 U.S. at 124, 98 S.Ct. 2646. The plaintiffs have unquestionably been negatively affected by the City's change in residential zoning laws, but the plaintiffs' inability to continue to profit at the same levels from their investments is insufficient to state a takings claim.

For the foregoing reasons, we conclude that this factor weighs against finding a taking of plaintiffs' purchased properties or long-term leases.[5]

b.

[15] **[16]** We next turn to the second factor — the extent to which Ordinance 19-077 has interfered with the plaintiffs' distinct, investment-backed expectations. "[D]istinct, investment-backed expectations are reasonable only if they take into account the power of the state to regulate ***675** in the public interest." Pace Res., 808 F.2d at 1033. The plaintiffs do not suffer a taking requiring compensation merely because "they have been denied the ability to exploit a property interest that they heretofore had believed was available for development." Penn Cent., 438 U.S. at 130, 98 S.Ct. 2646. Nor does the Takings Clause mean that "once a property has been devoted to a particular use, the owner has a reasonable expectation of being able to continue with that use absent the payment of compensation." Pace Res., 808 F.2d at 1032.

[17] Zoning regulations are the "classic example" of permissible regulations that do not require compensation even where they "prohibit[ ] the most beneficial use of the property." Penn Cent., 438 U.S. at 125, 98 S.Ct. 2646. And even though zoning laws "generally do not affect existing uses of real property," the Supreme Court has rejected takings claims "when the challenged governmental actions prohibited a beneficial use to which individual parcels had previously been devoted and thus caused substantial individualized harm." Id. at 125–27, 98 S.Ct. 2646 (collecting cases). However, the actions of the state can impact the analysis, in particular, where the state invited the activity with promises to protect property rights. See, e.g., Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1010–11, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984).

The District Court held that, although a closer question, this factor ultimately weighed against finding a taking because the plaintiffs had failed to consider the City's power to regulate residential housing in the public interest. We concur.

The plaintiffs make three arguments that Ordinance 19-077 undermines their distinct, investment-backed expectations. First, the plaintiffs argue that this case differs from Penn Central and Pace in that the applicable statutes in both of those decisions affected prospective uses of the properties. Here, Ordinance 19-077 affects an already-existing use of the purchased properties and long-term leases. But this Court has made clear that disruption of a present use is not enough. See Pace Res., 808 F.2d at 1032–34.

[18] Second, the plaintiffs emphasize that this case is unique because Ordinance 15.137 and the statements made by Jersey

City officials invited and encouraged them to invest in Jersey City real estate for the purpose of exploiting the properties as short-term rentals. These actions, the plaintiffs argue, established an expectation that they could continue to lease their properties indefinitely on a short-term basis. The plaintiffs point to various statements made by Mayor Fulop and City Council members encouraging investors to come to Jersey City.[6] By affirmatively legalizing short-term rentals — and advertising that legalization — the City communicated to the plaintiffs that their short-term rental businesses were welcome there. That does not mean that the plaintiffs' expectations that they could run those businesses, indefinitely, without additional restrictions, were reasonable. As the District Court noted, Ordinance 15.137 and the very articles cited by plaintiffs also contain statements that qualify the legalization of short-term rentals.[7] Mayor Fulop ***676** cautioned that lessors could not "rent out so many rooms as to create an informal hotel" or "change the nature of the neighborhood." App. 223. Jersey City did not want to be "in the business of disallowing a service like Airbnb ... that lets middle-class folks earn a bit of extra income by renting out their apartments." Id. And Ordinance 15.137 provided that short-term rentals may not "materially disrupt the residential character of the neighborhood." App. 162.

Third, plaintiffs argue that "where the government itself *affirmatively engenders* the property owner's investment-backed expectation, its subsequent subversion of that expectation can be so overwhelming as to dispose of the takings question entirely." Nekrilov Br. 31 (emphasis in original). The plaintiffs point to two decisions in which courts found takings where the state made explicit promises to property owners. See Ruckelshaus, 467 U.S. at 1005, 1010–11, 104 S.Ct. 2862; Kaiser Aetna v. United States, 444 U.S. 164, 179–80, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979). Both decisions involve explicit promises that are not present here. In Ruckelshaus, the plaintiff, Monsanto Co., submitted trade secret data to the Environmental Protection Agency ("EPA") based on "explicit assurance[s]" that the data would not be publicly disclosed. 467 U.S. at 1011, 104 S.Ct. 2862. After the EPA later disclosed the data, the Supreme Court held that Monsanto had a reasonable expectation that its data would not be published and that a taking had occurred. See id. at 1011–13, 104 S.Ct. 2862. In Kaiser, the plaintiff owned a private pond and received permission from government officials to connect the pond to navigable waters, permission that was not conditioned on public access to the pond. See 444 U.S. at 179, 100 S.Ct. 383. The government subsequently attempted to require the pond owner to permit public access to the pond on the basis that it was connected to navigable waters, imposing a navigable servitude on the former pond. See id. at 179–80, 100 S.Ct. 383. Although consent of a government official cannot estop the government, the Supreme Court held that it can "lead to the fruition of a number of expectancies embodied in the concept of 'property'—expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over." Kaiser, 444 U.S. at 179, 100 S.Ct. 383. The Court acknowledged that "the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests." Id. at 179–80, 100 S.Ct. 383. The Court concluded that if the government wanted public access to the former pond "after petitioners [had] proceeded as far as they [had] ..., it may not, without invoking its eminent domain power and paying just compensation, require them to allow free access to the dredged pond." Id. at 180, 100 S.Ct. 383.

Both decisions rest on explicit assurances that are not present in this case.[8] ***677** Ordinance 15.137 placed qualifications on the operation of short-term rentals, including that such rentals could not change the character of the neighborhood and a limit on the number of rentals an investor could operate without obtaining a license. Mayor Fulop publicly explained that the purpose of Ordinance 15.137 was to permit the middle-class to earn additional income by renting out their homes but not to permit investors to create "informal hotel[s]." App. 224. And as this Court has explained, "[t]he general expectation of regulatory change is no less present where the value of the property interest is derived from the regulation itself." Newark Cab Ass'n, 901 F.3d at 153 (quoting Minneapolis Taxi Owners Coal., Inc. v. City of Minneapolis, 572 F.3d 502, 509 (8th Cir. 2009)) (alteration in original).

The plaintiffs may have relied on Ordinance 15.137 in deciding to invest in short-term rentals in Jersey City, but they failed to take into account the restrictions in place in the original ordinance and the City's strong interest in regulating residential housing. On balance, this factor weighs against the plaintiffs.

c.

[19] Finally, we turn to the character of Ordinance 19-077. As the District Court observed, a taking is more "readily ... found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program

adjusting the benefits and burdens of economic life to promote the common good." Penn. Cent., 438 U.S. at 124, 98 S.Ct. 2646 (quotation marks omitted). This is especially true when the regulation concerns housing. The Supreme Court has "consistently affirmed that States have broad power to regulate housing conditions in general." Yee v. City of Escondido, 503 U.S. 519, 528, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992) (citation omitted). In particular, courts are more likely to uphold a regulation that "applies generally to a broad class of properties." Rogin, 616 F.2d at 690. However, a regulation that "substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking.' " Penn Cent., 438 U.S. at 127, 98 S.Ct. 2646 (citing Mahon, 260 U.S. at 414, 43 S.Ct. 158); see also Mahon, 260 U.S. at 414–16, 43 S.Ct. 158 (holding that a regulation banning mining that caused subsistence of the surface property was a taking of the plaintiffs' mining rights where the regulation merely "shift[ed] the damages" from the plaintiffs to the surface owners).

The plaintiffs contend that the City, Mayor Fulop, and the City Council did not act in good faith in passing Ordinance 19-077. They argue that Mayor Fulop, after deliberately enticing investors to come to Jersey City, turned on short-term rentals as a result of his personal frustrations with Airbnb. But as the District Court observed, regardless of Mayor Fulop's subjective motivations, the council members voted 7-2 for the regulation, and the complaint does not attribute bad faith motives to these council members.

The plaintiffs next argue that Councilman Solomon admitted to voting for the 2019 Ordinance to benefit those in hotel trade unions and that "alone is sufficient for a finding of a taking." Nekrilov Br. 47. The plaintiffs rely on Arkansas Game & Fish Commission v. United States, 736 F.3d 1364 (Fed. Cir. 2013), for the proposition that where the government legislates to benefit a certain industry or trade group, there has been a taking. Arkansas Game concerned a physical taking, which is not subject to the Penn Central analysis. In Arkansas Game, the government temporarily flooded an area in response to ***678** requests from agricultural interests. See id. at 1370. Ordinance 19-077 by contrast is targeted at residential housing generally, regardless of Councilman Solomon's subjective intentions. The plaintiffs also ignore the larger context of Councilman Solomon's statement. Councilman Solomon expressed support for hotel union workers, but he also commented on the harmful effects that short-term rentals had on the residential housing market and on the potential benefits of more long-term residents in Jersey City.[9] Councilman Solomon's statements reflect the same public purposes articulated in Ordinance 19-077.

Ordinance 19-077 is a general zoning regulation restricting the permissible uses of residential housing with the goals of protecting the residential housing market in Jersey City and promoting public safety by reducing the nuisance behavior associated with short-term rentals. We agree with the District Court's conclusion that this factor weighs against a taking.

* * * * *

The Penn Central takings test serves to "identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." Lingle, 544 U.S. at 539, 125 S.Ct. 2074. The ordinance effects neither a taking per se nor its functional equivalent of the plaintiffs' property. The plaintiffs have certainly suffered losses as a result of Ordinance 19-077, but they have not been denied all economically beneficial use of their properties and therefore have not suffered a total taking. Nor have the plaintiffs stated a partial takings claim under the Penn Central factors. Accordingly, we will affirm the District Court's dismissal of the plaintiffs' takings claim.

B.

The plaintiffs next argue that the District Court erred in dismissing their Contract Clause claim. We disagree and will affirm the District Court's dismissal of this claim.

[20] [21] [22] [23] The Contract Clause of Article I of the Constitution provides that "[n]o State shall ... pass any ... Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10, cl. 1. Despite its broad language, the Contract Clause does not disrupt a state's ability to exercise its police powers in service of the public interest, even if it affects existing contracts. See Watters v. Bd. of Sch. Dirs. of Scranton, 975 F.3d 406, 412 (3d Cir. 2020). To decide whether legislation violates the Contract Clause, the court first determines whether the legislation has substantially impaired the contractual relationship. See Sveen v. Melin, —— U.S. ——, 138 S. Ct. 1815, 1821–22, 201 L.Ed.2d 180 (2018). If so, the court then "turns to the means and ends of the legislation" and evaluates whether the legislation (1) has "a significant and legitimate public purpose," and (2)

"is drawn in an appropriate and reasonable way to advance" that public purpose. Id. at 1822 (quotation marks omitted); see also United Steel Paper & Forestry Rubber Mfg. Allied Indus. & Serv. Workers Int'l Union AFL-CIO-CLC v. Gov't of Virgin Islands, 842 F.3d 201, 211 (3d Cir. 2016). When determining whether legislation is drawn in a necessary and reasonable way, and where the state is not itself a party to the affected contract, "the State is ordinarily entitled to deference in its legislative judgment." United Steel, 842 F.3d at 212. The Contract Clause "applies ***679** equally to municipal ordinances" as it does to state legislation. Alarm Detection Sys., Inc. v. Village of Schaumburg, 930 F.3d 812, 822 (7th Cir. 2019).

[24] The District Court dismissed the plaintiffs' Contract Clause claim based on both the long-term leases and the short-term contracts. The court concluded that the plaintiffs had not alleged facts sufficient to show that the City did not have a substantial public purpose in passing Ordinance 19-077. The Contract Clause claim must therefore fail regardless of whether Ordinance 19-077 had substantially impaired any existing contract.

The plaintiffs originally alleged that Ordinance 19-077 impaired both short-term rental contracts and the long-term leases into which the Nekrilovs, Tang, and Jen entered. However, as discussed before, the plaintiffs submitted a letter following oral argument to this Court indicating that the plaintiffs did not cancel any existing short-term rentals solely due to Ordinance 19-077. Because the Contract Clause protects only existing contracts, see Bray v. Ins. Co. of Pa., 917 F.2d 130, 135 (4th Cir. 1990) ("To violate the [C]ontracts [C]lause the legislature must alter an existing contract."); see also Sveen, 138 S. Ct. at 1821; Watters, 975 F.3d at 412, contracts entered into after the passage of Ordinance 19-077 are not impaired within the meaning of the Contract Clause, see Easthampton Sav. Bank v. City of Springfield, 736 F.3d 46, 50 n.5 (1st Cir. 2013) ("[A] state law with only prospective effect will not violate the Contracts Clause because it will not impair an existing contractual relationship."). The District Court therefore did not err in dismissing the plaintiffs' Contract Clause claim to the extent that it was based on the alleged impairment of any short-term rental contracts.

[25] The plaintiffs further argue that Ordinance 19-077 impaired the long-term leases. To determine whether a regulation has substantially impaired an existing contract, we "consider[ ] the extent to which the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights." Sveen, 138 S. Ct. at 1817. The plaintiffs have not articulated how Ordinance 19-077 has substantially impaired the contractual relationships between the lessors and the plaintiffs. Ordinance 19-077 has no effect on the plaintiffs' obligations to pay rent to the long-term landlords or the landlords' obligations to provide the plaintiffs with access to the property. Ordinance 19-077 does not negate the plaintiffs' ability to sublet but limits the plaintiffs to long-term sublets. The plaintiffs suggest that because unlimited short-term rentals were legal at the time they entered into the long-term leases, Ordinance 19-077 undermines their legitimate expectations that they could indefinitely conduct short-term sublets. As we have explained, it is not reasonable for the plaintiffs to conclude from the passage of Ordinance 15.137 that they could continue to conduct short-term rentals indefinitely without additional restrictions. The plaintiffs do not articulate any other way in which Ordinance 19-077 has impaired their long-term leases.

But as the District Court observed, even assuming Ordinance 19-077 substantially impaired the long-term leases, the plaintiffs have still failed to plead a Contract Clause claim because the City has articulated a legitimate public purpose for the Ordinance, which was drawn in an appropriate and reasonable manner. A legitimate public purpose is one that is "aimed at remedying a broad and general social or economic problem." United Steel, 842 F.3d at 211. Ordinance 19-077 articulates multiple public purposes, including the desire to protect the residential character of neighborhoods ***680** and reduce nuisance activity associated with short-term rentals. The plaintiffs suggest that these purposes are not legitimate because of Mayor Fulop's personal dissatisfaction with Airbnb. The plaintiffs do not cite any decision which would permit this Court to take into account the subjective intent of the individual legislators.

That there is a significant and legitimate public purpose for Ordinance 19-077 does not end our inquiry. See id. We must next decide whether the ordinance is "both necessary and reasonable to meet the purpose advanced by the [City] in justification." Id. But as the Supreme Court has repeatedly held, where the state is not itself a party to the affected contract, "courts should properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 505, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987) (quotation marks omitted). The City is not a

party to any of the long-term leases and therefore is entitled to deference in its judgments regarding the necessity and reasonableness of Ordinance 19-077. The City has expressed in Ordinance 19-077 that short-term rentals can negatively affect the long-term housing supply, have "deleterious" affects on residential neighborhoods, and impact the character of residential neighborhoods and determined that restrictions on such rentals are necessary. App. 147. We therefore "refuse to second-guess the [the City's] determinations" that restrictions on short-term rentals "are the most appropriate ways of dealing with the problem." DeBenedictis, 480 U.S. at 505, 107 S.Ct. 1232.

Accordingly, we will affirm the District Court's dismissal of the plaintiffs' Contract Clause claim.

C.

[26] **[27]** **[28]** The plaintiffs next argue that the District Court erred in dismissing their substantive due process claim. The Fourteenth Amendment provides that "[n]o State shall ... deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Substantive due process is a "component of the [Fourteenth Amendment] that protects individual liberty against 'certain government actions regardless of the fairness of the procedures used to implement them.' " Collins v. City of Harker Heights, 503 U.S. 115, 125, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992) (quoting Daniels v. Williams, 474 U.S. 327, 331, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986)). There exist two "threads" of substantive due process actions: "substantive due process relating to legislative action and substantive due process relating to non-legislative action." Newark Cab Ass'n, 901 F.3d at 155. Legislative acts are subjected to rational basis review. See Am. Exp. Travel Related Servs., Inc. v. Sidamon-Eristoff, 669 F.3d 359, 366 (3d Cir. 2012).[10] The City must demonstrate "(1) the existence of a legitimate state interest that (2) could be rationally furthered by the statute." Id. This Court has held that where a New Jersey municipal body votes for " 'a change in the permitted uses in a zoning district,' the act is legislative in character." Cnty. Concrete Corp., 442 F.3d at 169 (quoting Timber Props., Inc. v. Chester Twp., 205 N.J.Super. 273, 500 A.2d 757, 763 (N.J. Super. Ct. App. Div. 1984)).

[29] The test is easily satisfied here. As the District Court observed, Ordinance 19-077 articulates several legitimate state ***681** interests furthered by the change in regulation: (1) protecting the long-term housing supply; (2) reducing "deleterious effects" on neighborhoods caused by short-term rentals; and (3) protecting the residential character and density of neighborhoods. App. 147. This Court has reversed a grant of a motion to dismiss substantive due process claims related to zoning changes where the complaint contained no facts "that would indicate any possible motivation for the enactment of the Ordinance other than a desire to prevent appellants from continuing to operate and expand their ... business." Cnty. Concrete Corp., 442 F.3d at 170. But here, the face of the ordinance articulates the very state interests that the ordinance furthers.

The plaintiffs argue that Mayor Fulop was subjectively motivated by his dissatisfaction with Airbnb over campaign donations. But the subjective intentions of the legislators are "constitutionally irrelevant." Flemming v. Nestor, 363 U.S. 603, 612, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (1960). And the plaintiffs do not make any other legal arguments in support of their substantive due process claim.

For these reasons, we will affirm the District Court's dismissal of the substantive due process claim.[11]

IV.

For the foregoing reasons, we will affirm the judgment of the District Court.

BIBAS, Circuit Judge, concurring.

I join the majority's excellent opinion in full. And I write separately only to offer thoughts on a question that the majority need not resolve today: what should be the test for regulatory takings?

Modern regulatory-takings doctrine has a laudable goal: protecting property owners against novel, potent, and intrusive regulations. To make that happen, the Supreme Court has given us a few different tests. But they overlap and are notoriously hard to apply. Worse, they are unmoored from the Constitution's text.

The better solution is to go back to the Takings Clause's original public meaning. Under that standard, the government would have to compensate the owner whenever it takes a *property right* and presses it into public use—even if the taking did not involve a physical invasion.

I. The Lay of the Land: Takings Doctrine Today

The Takings Clause bans "tak[ing]" "private property ... for public use, without just compensation." U.S. Const. amend. V. A century ago, the Supreme Court suggested that not only confiscations, but also regulations, can be takings if they "go[ ] too far." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 67 L.Ed. 322 (1922).

But regulatory-takings doctrine is a mess. To identify regulations that "go[ ] too far," we apply various tests. Regulations that authorize even a temporary physical invasion are per se takings, regardless of their economic impact. *Cedar Point Nursery v. Hassid*, —— U.S. ——, 141 S. Ct. 2063, 2073–74, 210 L.Ed.2d 369 (2021). So are regulations that leave land "without economically beneficial or productive options for its use." ***682** *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1018–19, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992).

But for all other regulations, we conduct an "essentially ad hoc, factual inquir[y]." *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). As with the other tests, we ask whether the regulation can be characterized as a "physical invasion." *Id.* (also describing this prong as the "character of the governmental action"). But we look at its "economic impact" as well, especially how much it "interfere[s] with distinct investment-backed expectations." *Id.* And we may weigh other unidentified, "relevant" factors too. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 322, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002) (internal quotation marks omitted).

Applying the *Penn Central* factors is challenging. For one, they are hard to define and thus hard to meet. *See Bridge Aina Le'a, LLC v. Hawaii Land Use Comm'n*, —— U.S. ——, 141 S. Ct. 731, 731– 32, 209 L.Ed.2d 163 (2021) (Thomas, J., dissenting from denial of certiorari); Steven J. Eagle, *The Four-Factor* Penn Central *Regulatory Takings Test*, 118 Penn. St. L. Rev. 601, 605 (2014).

This case highlights some of the difficulties. Take "economic impact." The investors argue that the city's regulation destroyed two thirds of their properties' profitability. But precedent is muddy on whether lost profits count as an economic burden. *Compare Penn Cent.*, 438 U.S. at 127, 129 n.26, 98 S.Ct. 2646 (considering the property owners' "ability to profit"), *and Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 499, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987) (same), *with Andrus v. Allard*, 444 U.S. 51, 66, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979) (suggesting that lost profits "provide[ ] a slender reed upon which to rest a takings claim").

Plus, we do not know how severe an economic loss must be to satisfy that factor. Indeed, the Supreme Court has declined to spell out a "mathematically precise" formula. *Tahoe-Sierra*, 535 U.S. at 326 & n.23, 122 S.Ct. 1465 (internal quotation marks omitted). Precedent suggests that very few regulatory takings suffice. Though wiping out almost all of a property's value might count, other severe devaluations do not. *Compare Lucas*, 505 U.S. at 1016–19 nn.7–8, 112 S.Ct. 2886 (suggesting that 95% reduction in value might suffice), *with Penn Cent.*, 438 U.S. at 131, 98 S.Ct. 2646 (cataloguing rejected claims for 75% and 87.5% reductions), *and Pace Res., Inc. v. Shrewsbury Twp.*, 808 F.2d 1023, 1031 (3d Cir. 1987) (rejecting 90% reduction). And that calculation is tricky for another reason: it is "unclear" whether total deprivations of one use of land should be treated as deprivations of one property right or "a mere diminution in the value of the tract as a whole." *Lucas*, 505 U.S. at 1016 n.7, 112 S.Ct. 2886.

Or consider "investment-backed expectations." Here, the investors argue that city officials' statements led them to reasonably expect that they could keep short-term leasing. But "investment-backed expectations are reasonable only if they take into account the power of the state to regulate in the public interest." *Pace Res.*, 808 F.2d at 1033; *see also Good v. United States*, 189 F.3d 1355, 1361–62 (Fed. Cir. 1999). Perhaps the investors must point to something close to a promise that their property interests would be protected. *See, e.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1008–10, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984). If so, it is unclear where "investment-backed expectations" fall in the gray area between expected regulations and formal contracts.

Even considering these issues, this case is clear. The investors have not shown a ***683** regulatory taking. But in closer cases, the lack of rules and guidance invites chaos.

Applying *Penn Central* can be hard for a second reason: we do not know how much weight to give each factor. Courts often knock out regulatory-takings claims for lacking one factor. *See, e.g., Palazzolo v. Rhode Island*, 533 U.S. 606, 634–35, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001) (O'Connor,

J., concurring) (chiding lower court for giving "investment-backed expectations ... exclusive significance"); *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1123 (9th Cir. 2010) (en banc) (Bea, J., dissenting) (objecting that the majority "converts a three-factor balancing test into a 'one-strike-you're-out' checklist"); Adam R. Pomeroy, Penn Central *After 35 Years: A Three Part Balancing Test or a One Strike Rule?*, 22 Fed. Cir. Bar J. 677, 689 (2013) (empirical study "show[ing] that the actual practice of the courts is to use the *Penn Central* test not as a balancing test but as a checklist, ... habitually failing to utilize or analyze all three factors").

This one-strike-you're-out practice is especially troubling because *Penn Central* overlaps with per se regulatory takings claims. The first *Penn Central* factor considers whether the regulation can be characterized as a physical invasion. But physical invasions are also per se takings. *Cedar Point*, 141 S. Ct. at 2073–74. Smart lawyers will frame their challenges as per se takings if they can. But where does that leave *Penn Central*?

Perhaps most importantly, *Penn Central* is hard to apply because it is not "ground[ed] ... in the Constitution as it was originally understood." *Murr v. Wisconsin*, —— U.S. ——, 137 S. Ct. 1933, 1957, 198 L.Ed.2d 497 (2017) (Thomas, J., dissenting). Thus, rather than look to history for answers to regulatory-takings questions, we must puzzle through *Penn Central*'s factors. Recognizing these problems, Justice Thomas recently encouraged his colleagues to clarify whether there is any "such thing as a regulatory taking" and "if there is, ... make clear when one occurs." *Bridge Aina*, 141 S. Ct. at 732.

Though I am bound by Supreme Court precedent, I can still take up part of Justice Thomas's challenge. I suggest that the Takings Clause, originally understood, would have allowed regulatory-takings claims for regulations that take a state-law property right and press it into public use.

II. Regulatory Takings and the Original Public Meaning

To discern the Constitution's original public meaning, we start with its text. The Fifth Amendment bars the government from "tak[ing]" "private property" "for public use, without just compensation." U.S. Const. amend. V. That spare clause holds three key textual puzzles: What counts as "private property"? When is it "taken"? And when is that taking "for public use"? The answers reveal that the Constitution requires compensating regulatory takings only when a law takes a recognized property right.

First comes "property." At the Founding, "property" included more than just the right to exclude. Blackstone's *Commentaries*, for example, had a "broad" conception of property that extended beyond physical possession. *See* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 827 (1995) (summarizing Blackstone). It defined the right to property as consisting in the "free use, enjoyment, and disposal of all of [one's] acquisitions, without any control or diminution." 1 William Blackstone, *Commentaries* *134.

The Founders shared this broad conception. *See* Treanor at 827 & n.234 (describing ***684** the Founders' definitions). James Madison, for instance, approvingly quoted Blackstone's understanding that property included the whole "dominion which one man claims and exercises over the external things of the world." James Madison, *Property*, National Gazette (Mar. 27, 1792), https://perma.cc/WN9Q-X3F.E (Indeed, he would have gone further and defined property as anything of "value" or any "right." *Id.*) This approach treats "property" broadly enough to include rights beyond physical possession of land or chattels.

Second is "taken." Dictionaries of the time defined "to take" in many ways. But because property encompassed both physical and intangible rights, the "aptest, most likely sense[ ]" covered both physical seizure and non-physical deprivation. Antonin Scalia & Bryan Garner, *Reading Law* 418 (2012); *see Take* (defs. 2, 67), Samuel Johnson, *A Dictionary of the English Language* (1755) (defining "take" to cover both physical seizure ("[t]o seize what is not given") and intangible deprivations ("[t]o deprive of")); *To Take*, Thomas Sheridan, *A Complete Dictionary of the English Language* (5th ed. 1789) (same).

Indeed, in other contexts, the Framers used "take" to refer to non-physical deprivations. In *Federalist* No. 44, for example, James Madison discussed "tak[ing]" the "right of coining money" from the states. *The Federalist* No. 44, at 231 (James Madison) (George W. Carey & James McClellan eds., Gideon ed. 2001). A few essays later, he mentioned the rights "taken away" from slaves. *The Federalist* No. 54, at 283 (James Madison). And at the Constitutional Convention, delegates discussed "tak[ing]" sovereignty and authority over the militia from the states and "tak[ing]" responsibility from the executive branch. 1 *The Records of the Federal Convention of*

1787, at 42, 545 (Max Farrand ed. 1911); 2 *Records* at 331. So at the Founding, deprivations of property rights would have been takings, regardless of whether they involved physical intrusions.

Last is "for public use." In the eighteenth century, that would have signified "*employing*" the taken property interest "to any purpose" for the "good of the community." *Use* (def. 1) and *Publick* (def. 4), Samuel Johnson, *A Dictionary of the English Language* (1755) (emphasis added). "Employing" property means more than just regulating the owner's chosen use. It means pressing property into a government-approved use instead. *See* Jed Rubenfeld, *Usings*, 102 Yale L.J. 1077, 1150 (1993). Grammatically, the clause limits only "use[s]" for the public, not bans or limits. *Id.* at 1114–18. So preventing a nuisance is not "us[ing]" the property and does not require just compensation. *See Kelo v. City of New London*, 545 U.S. 469, 510, 125 S.Ct. 2655, 162 L.Ed.2d 439 (2005) (Thomas, J., dissenting) ("Blackstone and Kent, for instance, both carefully distinguished the law of nuisance from the power of eminent domain.").

The text of the Takings Clause naturally reads broadly enough to reach not only physical seizures, but also deprivations of any property right to serve a governmental use. And cases leading up to the Fourteenth Amendment—which may well be relevant to the meaning of the Clause as incorporated against the states—confirm that reading. *See generally* Michael B. Rappaport, *Originalism and Regulatory Takings: Why the Fifth Amendment May Not Protect Against Regulatory Takings, but the Fourteenth Amendment May*, 45 San Diego L. Rev. 729 (2008). *But cf. N.Y. State Rifle & Pistol Ass'n v. Bruen*, —— U.S. ——, 142 S. Ct. 2111, 2163, 213 L.Ed.2d 387 (2022) (Barrett, J., concurring) (noting the open question whether, for rights incorporated against the states, ***685** courts should consider the original public meaning as of 1791 or 1868).

True, there are not many cases from the Founding to Reconstruction. At the Founding, a handful of state constitutions did not limit takings, and those with takings clauses did not require compensation. Steven G. Calabresi, Sarah E. Agudo & Kathryn L. Dore, *State Bills of Rights in 1787 and 1791: What Individual Rights Are Really Deeply Rooted in American History and Tradition?*, 85 S. Cal. L. Rev. 1451, 1505–06 (2012). And the federal government sometimes relied on states to condemn property for federal use. *See Kohl v. United States*, 91 U.S. 367, 373, 23 L.Ed. 449 (1875). But the cases that exist show that takings were not limited to physical invasions. Regulations could count if they deprived owners of a valid property right for some public use.

In *Gardner v. Trustees of Newburgh*, for instance, a New York law empowered a village to divert a stream to supply itself with water. 2 Johns. Ch. 162, 163–64 (N.Y. Ch. 1816). In doing so, the village cut off the flow of water to Gardner's land. *Id.* The Chancery Court held that this was a taking because Gardner's "right to a stream of water is as sacred as a right to the soil over which it flows." *Id.* at 165–66; *accord Cooper v. Williams*, 5 Ohio 391, 392 (1832); *see also Stevens v. Proprietors of the Middlesex Canal*, 12 Mass. 466, 468 (1815). *See generally* Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 Utah L. Rev. 1211, 1234–45 (discussing *Gardner, Cooper*, and other riparian cases).

Or consider *Patterson v. City of Boston*, 37 Mass. 159 (1838). There, the city widened a street. *Id.* at 163. For two years, the construction prevented a store owner from accessing his shop. *Id.* at 165. Even though the city never occupied the premises, it had to compensate the store owner. *Id.* at 164–66. As Chief Justice Lemuel Shaw recognized, the construction deprived him of his "paramount right of occupation and enjoyment." *Id.* at 164.

Intangible rights were likewise property protected from takings. The revocation of a franchise, for instance, was treated as a compensable taking "on the theory that the revocation was a seizure of intangible property." Treanor at 792 n.54; *see W. River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507, 523, 533–34, 12 L.Ed. 535 (1848); *id.* at 543 (Woodbury, J., concurring); 2 James Kent, *Commentaries on American Law* 340 n.a (4th ed. 1840). Since property need not be physical, takings need not be physical either.

In short, when the government takes a property right for some governmental use, it must compensate the owner. I now turn to how that rule squares with current doctrine.

III. Applying Originalism to Modern Regulatory Takings

Courts must identify both a property right that has been taken and a public use into which that right has been pressed. If we look at takings that way, only the first *Penn Central* factor aligns closely with the original meaning of the Takings Clause.

1. The character of the government's invasion. Penn Central reasoned that courts should more readily find physical invasions to be takings "than when interference arises from some public program adjusting the benefits and burdens of economic life." 438 U.S. at 124, 98 S.Ct. 2646. As early takings practice shows, we should read this factor to ask whether the government has taken a property right from the "collection of individual rights" that "constitute property." *United States v. Craft*, 535 U.S. 274, 278, 122 S.Ct. 1414, 152 L.Ed.2d 437 (2002).

***686** To define each right, we look to state property law. Classically, the central right is the right to exclude others. *See* 2 Blackstone *2; *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979). Another is the right to occupy your property. 2 Blackstone *8, *10. Current per se takings doctrine properly secures these rights. *See Cedar Point*, 141 S. Ct. at 2073–74.

But these are not the only property rights. Property law historically includes the rights to dig or mine below the land and to keep others from building into the airspace above it. 2 Blackstone *18. It also includes the rights to graze, to fish, and to draw water. *Id.* at *32–36. There is the right to pass property on to one's heirs. *Id.* at *11; *see Hodel v. Irving*, 481 U.S. 704, 716, 107 S.Ct. 2076, 95 L.Ed.2d 668 (1987). And there are easements, like rights of way and access to light and air. Restatement (Third) of Property (Servitudes) § 1.2; J.A. Robinson, *Implied Easements of Light and Air*, 4 Yale L.J. 190 (1895).

If the state deprives property owners of one of these rights, it may commit a taking. Existing doctrine hints as much. For example, the government may not ban all economically valuable use without paying compensation. *Lucas*, 505 U.S. at 1019, 112 S.Ct. 2886. Nor can it ban bequests and devises to one's heirs. *Hodel*, 481 U.S. at 716–18, 107 S.Ct. 2076. Nor may it demand a right of way over private property without paying for the easement. *Nollan v. Calif. Coastal Comm'n*, 483 U.S. 825, 827, 841–42, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987). It can regulate coal mining without paying compensation, but it may well have to pay if it bans mining entirely (at least if it does so for a public use). *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 268–72, 295–97, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981); *Pa. Coal Co.*, 260 U.S. at 412–13, 43 S.Ct. 158 (holding that a ban on coal mining below homes to prevent their collapse is a taking).

Here, Jersey City's regulation did not *take over* the owners' right to rent. Indeed, they could still lease out their property as long as they followed the duration limits. And maintaining those use restrictions is within the state's ordinary police power. *See, e.g., Sobel v. Higgins*, 188 A.D.2d 286, 590 N.Y.S.2d 883, 884 (N.Y. App. Div. 1992) ("The regulation of rental housing ... has long been upheld ... as a valid exercise of the government's police power to protect the public health, safety, and general welfare.").

Of course, not all burdens on these rights amount to takings. *See, e.g., Penn Central*, 438 U.S. at 124–27, 98 S.Ct. 2646. To draw the line between impermissible deprivations and permissible regulation, we should look to the historical common law. *Cf. Bruen*, 142 S. Ct. at 2127 (courts may assess the scope of rights by examining the "historical tradition that delimits the outer bounds of the right"). Historically, states have been able to regulate "for the protection of the health, morals, and safety of the people" without "directly encroaching upon private property." *Mugler v. Kansas*, 123 U.S. 623, 668, 8 S.Ct. 273, 31 L.Ed. 205 (1887). Indeed, as far back as the Founding, states have forbidden nuisances and imposed regulatory burdens on land use that stop short of confiscating property rights. *See generally* John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 Nw. U. L. Rev. 1099 (2000).

2. Economic impact & investment-backed expectations. Though the first *Penn Central* factor fits with the original understanding of the Takings Clause, the rest of the test is hard to square with the Constitution's text and history. The second and third factors look to "[t]he economic ***687** impact of the regulation on the claimant and, particularly, the extent to which the regulation had interfered with distinct investment-backed expectations." *Penn Cent.*, 438 U.S. at 124, 98 S.Ct. 2646. These expectations must be more than mere hopes or mental plans. *See id.* at 130, 98 S.Ct. 2646. But *Penn Central* stopped short of tying those expectations to actual property rights.

Yet it is hard to see how merely diminishing something's value amounts to taking property. An owner has no right to have his property hold a specific economic value. Its value often fluctuates with the market or the neighborhood. Indeed, current precedent already recognizes as much. *See Lucas*, 505 U.S. at 1016 n.7, 112 S.Ct. 2886 (leaving open whether a 90% diminution in value would suffice).

Similarly, the *Penn Central* test fails to ground "investment-backed expectations" in an owner's recognized property rights. This is not to say that property owners do not enjoy any protections. If the expectation arises from a contract with the government, then the owner can pursue contract remedies. *See, e.g.*, 41 U.S.C. §§ 7101–09. Plus, the Contracts Clause prevents states from "impairing the Obligation of Contracts." U.S. Const. art. I, § 10, cl. 1. That bar applies to contracts with a state as well as those between private parties. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 137, 3 L.Ed. 162 (1810); *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 652, 664, 712, 4 L.Ed. 629 (1819). Thus, states may not defeat the "reasonable expectations" of a party to a contract. *Sveen v. Melin*, —— U.S. ——, 138 S. Ct. 1815, 1822, 201 L.Ed.2d 180 (2018). The investors here never explain how the short-term rental policy harms a "*contractual* relationship." *United Steel Paper & Forestry Rubber Mfg. Allied Indus. & Serv. Workers Int'l Union v. Virgin Islands*, 842 F.3d 201, 210 (3d Cir. 2016) (emphasis added). So they have no contractual claim. But the Contracts Clause, not the Takings Clause, provides a better guide for analysis here.

* * * * *

We properly reject the investors' takings claim today, but only after applying a fuzzy test. The Takings Clause's text and history focus cleanly on whether a state has taken a property right and pressed it into public use. Of course, the Supreme Court's precedent binds us. But if the Court reconsiders, going back to the Clause's text and historical understanding will provide not only a surer constitutional footing but also needed clarity.

All Citations

45 F.4th 662

Footnotes

1 At all relevant times, Fulop was Mayor of Jersey City.

2 The plaintiffs did not appeal the dismissal of the procedural due process claim.

3 The plaintiffs argue that because they will be forced to sell the properties to avoid foreclosure, selling the properties should not count as a beneficial use. The plaintiffs are correct that the ability to sell a property does not always constitute an economically beneficial use. See Lost Tree Vill. Corp. v. United States, 787 F.3d 1111, 1117 (Fed. Cir. 2015). Specifically, "[w]hen there are no underlying economic uses, it is unreasonable to define land *use* as including the sale of the land." Id. (emphasis in original). Such was the case in Lost Tree, where the regulated parcel had essentially no uses other than speculative land sale based on the trivial value that the parcel retained. But here, there are other underlying economic uses — the plaintiffs (or anyone else) could live in or rent the properties on a long-term basis. We may therefore consider the plaintiffs' ability to sell the properties in determining whether there has been a total taking.

4 In any event, the complaint alleges that only four of the long-term leases extended past January 1, 2021. Any lease that ended prior to that date was unaffected by Ordinance 19-077, which provides that tenants may continue to host unlimited short-term subleases until January 1, 2021 or the end of the lease, whichever came first. Although the complaint does not specify the exact terms for each affected lease, in each case, the plaintiffs were paying rent and subleasing the affected properties at the time they filed the complaint in December 2019. The plaintiffs were able to continue using these leases for short-term rentals between, at a minimum, December 2019 and January 1, 2021.

5 The complaint initially pled that Ordinance 19-077 constituted a taking of existing reservations, but the plaintiffs subsequently informed this Court that no existing short-term rentals were cancelled due to the ordinance.

6 Some of these articles, as the District Court noted, quote city officials but were not written or specifically endorsed by anyone associated with the City. The complaint does not allege that the City approved the broader contents of these articles.

7 Courts may consider in deciding a motion to dismiss documents that are "integral to or explicitly relied upon in the complaint" without converting the motion to a motion for summary judgment. Schmidt v. Skolas, 770 F.3d 241, 249 (3d Cir. 2014) (quoting In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1426 (3d Cir. 1997)) (emphasis omitted).

8 The plaintiffs also cite to Washington Market Enterprises, Inc. v. City of Trenton, 68 N.J. 107, 343 A.2d 408, 409 (1975). That decision is inapplicable. As the first step in an urban renewal project, Trenton first declared the plaintiff's property "blighted." Id. at 410. That designation had a negative effect on the property, and the plaintiff could no longer find tenants. Trenton subsequently abandoned the project without condemning and acquiring the property, and therefore without paying the plaintiff. Id. at 410. That was the source of the unfairness identified by the New Jersey Supreme Court. This decision is, therefore, inapposite.

9 The complaint relies on and incorporates by reference the remarks made at the special council meeting held on June 25, 2019.

10 A non-legislative action "violates substantive due process if arbitrary, irrational, or tainted by improper motive, or if so egregious that it shocks the conscience." Cnty. Concrete Corp. v. Town of Roxbury, 442 F.3d 159, 169 (3d Cir. 2006) (quotations omitted).

11 Finally, the plaintiffs challenge the District Court's denial of their motion for a preliminary injunction. The District Court, having dismissed the complaint, denied the motion as moot. Because we will affirm the District Court's dismissal of the complaint, this issue is moot, and we will affirm the District Court's denial of the plaintiffs' injunction motion.

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228 A.D.3d 48
Supreme Court, Appellate Division,
Third Department, New York.

WEST MOUNTAIN ASSETS LLC, Appellant,

v.

James DOBKOWSKI et al., Respondents.

(And a Third-Party Action.)

CV–23–0610
|
Calendar Date: February 13, 2024
|
Decided and Entered: May 2, 2024

Synopsis

Background: Owner of real property located in subdivision, which owner utilized as short-term rental property, brought against action owners of adjacent property, alleging that adjacent owners interfered with plaintiff-owner's use and enjoyment of its property. Adjacent owners counterclaimed, seeking declaration that plaintiff-owner's use of its property for short-term rentals was in violation of restrictive covenant requiring that use of parcels within subdivision be limited to single-family residential purposes, and to enjoin that use. The Supreme Court, Warren County, Martin D. Auffredou, J., 78 Misc.3d 963, 186 N.Y.S.3d 553, partially granted adjacent owners' motion for summary judgment, and plaintiff-owner appealed.

[Holding:] The Supreme Court, Appellate Division, Powers, J., held that use of parcel of land to allow short-term rentals violated restrictive covenant.

Affirmed.

West Headnotes (3)

[1] Covenants Covenants as to Use of Property

Property owner's use of parcel of land located in subdivision to allow short-term rentals violated restrictive covenant requiring that use of parcels within subdivision be limited to single-family residential purposes, where short-term renters did not utilize property as residence.

[2] Covenants Weight and sufficiency

The party seeking to enforce a restrictive covenant bears the burden of establishing its applicability by clear and convincing evidence.

[3] Covenants Nature and operation in general

Because the law favors the free and unencumbered use of real property, courts must adopt the less restrictive interpretation when a restrictive covenant is equally susceptible of two interpretations.

Attorneys and Law Firms

****532** Bartlett, Pontiff, Stewart & Rhodes, PC, Glens Falls (Malcolm B. O'Hara of counsel), for appellant.

FitzGerald Morris Baker Firth, PC, Glens Falls (Michael Crowe of counsel), for respondents.

Before: Garry, P.J., Aarons, Reynolds Fitzgerald, Fisher and Powers, JJ.

OPINION AND ORDER

Powers, J.

***49** Appeal from that part of an order of the Supreme Court (Martin D. Auffredou, J.), entered March 7, 2023, in Warren County, which partially granted defendants' motion for summary judgment on their first and third counterclaims.

Plaintiff is the owner of a parcel of real property located in the Town of Queensbury, Warren County, which is part of the Northwest Village subdivision. Plaintiff's parcel is improved with a single-family residence which plaintiff utilizes as a short-term rental property through Airbnb, with stays ranging in duration from a few days to a couple of weeks. Defendants own an adjacent parcel where they reside full time. Both parcels abut a third parcel owned by plaintiff and

defendants as cotenants on which is located a gravel access road providing access to their separate parcels. All parcels within the subdivision descend from a common grantor who imposed a number of restrictive covenants for the benefit of all grantees. Among other restrictions, permissible use of properties within the subdivision is limited to only single-family residential purposes.

Plaintiff commenced this action in October 2020 raising various claims based in allegations that defendants had interfered ***50** with its use and enjoyment of its property. Defendants answered and counterclaimed ****533** seeking, in relevant part, a declaratory judgment that plaintiff's use of its parcel for short-term rentals was in violation of the restrictive covenant and to enjoin that use. Defendants subsequently moved for summary judgment on this counterclaim, as well as another not germane to this appeal. Supreme Court partially granted summary judgment to defendants, declared that plaintiff's use of its parcel as a short-term rental property violated the restrictive covenant prohibiting all uses other than single-family residential and enjoined this improper use. Plaintiff appeals.

[1] **[2]** **[3]** "The party seeking to enforce a restrictive covenant bears the burden of establishing its applicability by clear and convincing evidence" (*Tedeschi v. Hopper,* 167 A.D.3d 1129, 1131, 90 N.Y.S.3d 322 [3d Dept. 2018] [citations omitted]; *see Kumar v. Franco,* 211 A.D.3d 1437, 1439, 182 N.Y.S.3d 304 [3d Dept. 2022]). In addition, because the law favors the free and unencumbered use of real property, "courts must adopt the less restrictive interpretation when a restrictive covenant is equally susceptible of two interpretations" (*County of Schuyler v. Hetrick,* 178 A.D.3d 1163, 1165, 114 N.Y.S.3d 516 [3d Dept. 2019]; *see Ford v. Rifenburg,* 94 A.D.3d 1285, 1287, 942 N.Y.S.2d 285 [3d Dept. 2012]). As contained in both chains of title, the restriction sets forth that "[t]he land herein conveyed shall be used only for single family residential purposes." Among other prohibitions, "noxious, dangerous, offensive or unduly noisy" activities, as well as "manufacturing, commercial or mercantile service[s] or activit[ies]" are expressly prohibited within the subdivision. The types of permissible structures that may be built within the subdivision are also limited and the only signs that may be erected are "For Sale" or "For Rent" signs of a permissible size. Plaintiff does not dispute that it uses its parcel for short-term rentals; therefore, the question distills to whether defendants provided clear and convincing evidence in support of their motion for summary judgment that the restrictive covenant prohibits this use.

Though owners of properties within the subdivision are permitted to rent pursuant to the express language of the deed restrictions, the restrictive covenant limits the permissible use to only "single[-]family residential purposes." This phrase unambiguously directs that all properties within the subdivision must be used for only residential purposes, and, thus, any and all rentals must be to those who would utilize the property for residential purposes – i.e., as a residence. A residence is the location ***51** where an individual "actually lives" and is established by "[t]he act or fact of living in a given place for some time" (Black's Law Dictionary [11th ed 2019], residence). Although there is no express durational requirement, a stay in a short-term rental property does not meet this definition (*cf. Turner v. Caesar,* 291 A.D.2d 650, 650–651, 737 N.Y.S.2d 426 [3d Dept. 2002]; *but cf. Matter of Friedman v. Town of Dunkirk,* 221 A.D.3d 1581, 1582–1583, 199 N.Y.S.3d 777 [4th Dept. 2023]; *Matter of Cradit v. Southold Town Zoning Bd. of Appeals,* 179 A.D.3d 1058, 1060, 117 N.Y.S.3d 675 [2d Dept. 2020]). Lodgers in short-term rental properties do not live on the premises but are instead on a short trip and often maintain a residence elsewhere where they "actually live[ ]" (Black's Law Dictionary [11th ed 2019], residence). This is true even though lodgers may have access to the entirety of the property and may use it in the same manner as a resident, including by cooking meals and sleeping as plaintiff highlighted.

Plaintiff's use of its parcel for short-term rentals does not fit the definition of a residence as is necessary to establish that ****534** the property is being used solely for residential purposes. Contrary to plaintiff's argument, this interpretation reflects the plain meaning of the terms of the restriction and does not "extend[ ] beyond the clear meaning of [its] terms" (*Tedeschi v. Hopper,* 167 A.D.3d at 1131, 90 N.Y.S.3d 322 [internal quotation marks and citation omitted]). Thus, defendants established the applicability of the restriction by clear and convincing evidence, and the burden shifted to plaintiff to raise a triable issue of fact in opposition, which its submissions failed to do (*see Ford v. Rifenburg,* 94 A.D.3d at 1287, 942 N.Y.S.2d 285; *Irish v. Besten,* 158 A.D.2d 867, 868, 551 N.Y.S.2d 659 [3d Dept. 1990]; *cf. Rugby Rd. Corp. v. Doane Bldrs., Inc.,* 61 A.D.3d 1157, 1158, 876 N.Y.S.2d 749 [3d Dept. 2009]; *compare Kumar v. Franco,* 211 A.D.3d at 1441, 182 N.Y.S.3d 304; *Dever v. DeVito,* 84 A.D.3d 1539, 1543, 922 N.Y.S.2d 646 [3d Dept. 2011], *lv dismissed* 18 N.Y.3d 864, 938 N.Y.S.2d 846, 962 N.E.2d 269 [2012], *lv denied* 21 N.Y.3d 861, 2013 WL 4459301 [2013]; *Van Schaick v. Trustees of Union Coll.,* 285 A.D.2d 859, 862,

728 N.Y.S.2d 275 [3d Dept. 2001], *lv denied* 97 N.Y.2d 607, 738 N.Y.S.2d 291, 764 N.E.2d 395 [2001]). Accordingly, Supreme Court properly granted summary judgment to defendants on their first counterclaim seeking enforcement of the restrictive covenant against plaintiff.

Garry, P.J., Aarons, Reynolds Fitzgerald and Fisher, JJ., concur.

ORDERED that the order is affirmed, with costs.

All Citations

228 A.D.3d 48, 211 N.Y.S.3d 531, 2024 N.Y. Slip Op. 02355

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350 Conn. 87
Supreme Court of Connecticut.

Frances WIHBEY
v.
ZONING BOARD OF APPEALS OF
the PINE ORCHARD ASSOCIATION

(SC 20839)
|
Argued March 27, 2024
|
Officially Released July 29, 2024*

Synopsis

Background: Owner of single-family home appealed decision of the municipal subdivision zoning board of appeals upholding a cease and desist order prohibiting owner from using his home for short-term rentals. The Superior Court, Judicial District of New Haven, Sizemore, J., granted neighbors' motion to intervene, and thereafter the Court, Rosen, J., sustained the appeal. Board appealed, and the Appellate Court, 218 Conn. App. 356, 292 A.3d 21, affirmed in part and reversed in part. The Supreme Court granted petition for certification to appeal.

[Holding:] The Supreme Court, Alexander, J., held that zoning regulation did not exclude the use of single-family home for short-term vacation rentals.

Affirmed.

McDonald, J., issued dissenting opinion in which Ecker, J., joined.

West Headnotes (3)

[1] **Zoning and Planning** Strict or liberal construction in general

Because zoning regulations are in derogation of common-law property rights, they must be strictly construed and not extended by implication.

[2] **Zoning and Planning** Hotels, lodging, and short-term rentals

Zoning regulation, which allowed long-term rentals of single-family dwellings and defined "single-family dwelling" as a dwelling "occupied exclusively as a home or residence for not more than one family." did not exclude the use of single-family home for short-term vacation rentals; definition of "single-family dwelling" did not clearly and unambiguously mean that only long-term rentals of such dwellings were permitted, but reasonably could be interpreted to mean that only structures designed and used as houses or dwellings for occupation by a single family at a given time were permitted.

[3] **Zoning and Planning** Free or unrestricted use of property

A zoning regulation that is susceptible to multiple, reasonable interpretations will be construed in favor of the landowner.

Attorneys and Law Firms

****325** Peter A. Berdon, New Haven, for the appellant (defendant).

Marc J. Kurzman, Stamford, with whom were David S. Hardy, New Haven, and, on the brief, Damian K. Gunningsmith, New Haven, for the appellants (intervening defendants).

Franklin G. Pilicy, Watertown, with whom was Daniel J. Mahaney, Waterbury, for the appellee (plaintiff).

Robinson, C. J., and McDonald, D'Auria, Mullins, Ecker, Alexander and Dannehy, Js.

Opinion

ALEXANDER, J.

***89** In this certified appeal, we must decide whether a zoning regulation that permitted the use of a property as a single-family dwelling allowed the owner to rent the property on a short-term basis. The plaintiff, Frances Wihbey, was ordered to cease and desist from renting his property to guests on a short-term basis by the Pine Orchard Association zoning enforcement officer. The plaintiff appealed to the defendant, the Zoning Board of Appeals of the Pine Orchard Association (board), which upheld the cease and desist order. The plaintiff then appealed to the trial court, which reversed the board's decision. The board and the intervening defendants, Michael B. Hopkins and Jacqueline C. Wolff,[1] appealed from the trial court's judgment to the Appellate Court, which affirmed in part and reversed in part the trial court's judgment. See *Wihbey* v. *Zoning Board of Appeals*, 218 Conn. App. 356, 396, 292 A.3d 21 (2023). We then granted the defendants' petition for certification to appeal, limited to the following issue: "Did the Appellate Court correctly conclude that short-term rentals of a single-family dwelling constituted a permissible use of the subject property under the 1994 Pine Orchard Association zoning regulations?" *Wihbey* v. *Zoning Board of Appeals*, 346 Conn. 1019, 1020, 292 A.3d 1254 (2023). We affirm the judgment of the Appellate Court.

The record reveals the following facts that were found by the trial court. The Pine Orchard Association (Pine Orchard) is an incorporated borough and municipal subdivision of the town of Branford and has jurisdiction ***90** to enact planning and zoning regulations. Its executive board enforces those regulations and employs a zoning enforcement officer to assist in that function.

The plaintiff purchased the residence located at 3 Crescent Bluff Avenue in Pine Orchard (property) in 2005. The property is located in a zoning district in which several uses were permitted at the time of the purchase, including use of a property as "[a] single-family dwelling." Pine Orchard Assn. Zoning Regs., § IV (4.1) (1994) (1994 regulations).[2] Since 2005, the plaintiff ****326** has rented the property through Vrbo.[3] On average, the plaintiff rented the property for more than fifty days per year for periods of three days to one week. The plaintiff does not use the property as his primary residence.

In 2018, in response to complaints from several Pine Orchard residents concerning disruptions caused by short-term vacation rentals, Pine Orchard adopted several amendments to its zoning regulations, including one prohibiting the rental of a single-family dwelling for less than thirty days.[4] In August, 2019, Pine Orchard's ***91** zoning enforcement officer issued a letter to the plaintiff alleging that he had violated that regulation and ordering him to cease and desist from using the property for short-term rentals. The plaintiff appealed from the cease and desist order to the board, claiming that his use of the property for short-term rentals was permitted under the 1994 regulations, which were in place when he purchased the property, and was a protected nonconforming use. After conducting a public hearing, the board upheld the cease and desist order.

The plaintiff then appealed to the trial court pursuant to General Statutes § 8-8 (b). The trial court concluded that the plaintiff's use of the property for short-term rentals was permitted under the 1994 regulations. It therefore sustained the plaintiff's appeal and reversed the board's decision. The defendants appealed to the Appellate Court after that court granted their petition for certification to appeal pursuant to General Statutes § 8-9. See *Wihbey* v. *Zoning Board of Appeals*, supra, 218 Conn. App. at 367, 292 A.3d 21. The Appellate Court concluded that the trial court correctly had determined that the 1994 regulations permitted short-term rentals but that it incorrectly had determined that the plaintiff established a preexisting, nonconforming use of the property when the board had not made any findings about the nature and scope of the preexisting use.[5] Id. at 394–95, 292 A.3d 21. Accordingly, the Appellate Court affirmed in part and reversed in part the trial court's judgment, and remanded the case to the trial court with direction to remand the case to the board for a factual determination on the issue of whether the plaintiff had established a lawful, nonconforming use. Id. at 396, 292 A.3d 21.

This certified appeal followed. The defendants claim that the Appellate Court incorrectly determined that the language of the 1994 regulations is ambiguous and ***92** should be interpreted to mean that short-term rentals of the property were permitted. The defendants also claim that the Appellate Court made a number of ****327** other errors in interpreting the 1994 regulations. We disagree and affirm the judgment of the Appellate Court.

[1] We begin with the defendants' claim that the 1994 regulations are unambiguous and do not permit the short-

term rental of residential property. We are not persuaded. This issue presents a question of law subject to plenary review in accordance with the principles set forth in General Statutes § 1-2z. See, e.g., *Heim* v. *Zoning Board of Appeals,* 289 Conn. 709, 715, 960 A.2d 1018 (2008); see also id.at 716 n.7, 960 A.2d 1018 (under § 1-2z, court is required to make threshold determination as to whether zoning regulation is ambiguous). See generally *Moon* v. *Zoning Board of Appeals*, 291 Conn. 16, 21, 966 A.2d 722 (2009) (§ 1-2z applies to zoning regulations). "Because zoning regulations are in derogation of common-law property rights, they must be strictly construed and not extended by implication." *Graff* v. *Zoning Board of Appeals*, 277 Conn. 645, 653, 894 A.2d 285 (2006); see also *Smith Bros. Woodland Management, LLC* v. *Planning & Zoning Commission,* 88 Conn. App. 79, 86, 868 A.2d 749 (2005) ("[when] more than one interpretation of language is permissible, restrictions [on] the use of lands are not to be extended by implication ... [and] doubtful language will be construed against rather than in favor of a [restriction]" (internal quotation marks omitted)).

The 1994 regulations provide in relevant part that "no building or land shall be used and no building shall be erected or altered which is arranged, intended or designed to be used respectively for other than one or more of [certain enumerated] uses ...." Pine Orchard Assn. Zoning Regs., § IV (1994). Section IV (4.1) of the 1994 regulations permits the erection of a "single-family dwelling." Id., § IV (4.1). A "single-family dwelling" is ***93** defined as "[a] building designed for and occupied exclusively as a home or residence for not more than one family." Id., § XIII. "Family" is defined as "[o]ne or more persons related by blood, marriage or adoption, and in addition, any domestic servants or gratuitous guests. A roomer, boarder or lodger, shall not be considered a member of a family." Id. The 1994 regulations permit the posting of "[a] sign not more than five square feet in area when placed in connection with the sale, *rental*, construction or improvement of the premises ...." (Emphasis added.) Id., § IV (4.4).

The parties agree that, because the 1994 regulations are permissive, a use that is not expressly authorized is not permitted. See, e.g., *Heim* v. *Zoning Board of Appeals*, supra, 289 Conn. at 716 n.8, 960 A.2d 1018 (when zoning regulations are permissive, "[a]ny use that is not permitted is automatically excluded" (internal quotation marks omitted)). The parties further agree that long-term rentals are permitted, which the defendants suggest includes rentals of thirty days or longer.[6] The parties disagree, however, as to whether the 1994 regulations permit short-term rentals. The plaintiff contends that, ****328** because nothing in the 1994 regulations clearly differentiates between long-term rentals, which the defendants acknowledge are permitted, and short-term rentals, both are permitted. The defendants contend that the language defining "single-family dwelling" as a dwelling ***94** "occupied exclusively as a home or residence for not more than one family" unambiguously excludes the use of the property for "short-term rentals for profit ...."

In support of their interpretation, the defendants rely on several dictionary definitions of the terms "home" and "residence." See Cambridge Dictionary, available at https://dictionary.cambridge.org/us/dictionary/english/home (last visited July 26, 2024) (defining "home" as "the house, apartment, etc. where you live, especially with your family"); Merriam-Webster Online Dictionary, available at https://www.merriam-webster.com/dictionary/home (last visited July 26, 2024) (defining "home" in relevant part as "one's place of residence; domicile" and "the social unit formed by a family living together"); Merriam-Webster Online Dictionary, available at https://www.merriam-webster.com/dictionary/residence (last visited July 26, 2024) (defining "residence" in relevant part as "the act or fact of dwelling in a place for some time" and "the place where one actually lives as distinguished from one's domicile or a place of temporary sojourn").[7] The defendants contend that these definitions establish that a "home" or "residence" is "a place where a person lives with a degree of permanency as distinguished from temporariness ...."[8]

***95** Although we agree with the defendants that this characteristic *can* be attributed to a "home" and a "residence," we do not agree that those terms *necessarily* refer to places where an individual will live for any particular length of time. For example, as the Appellate Court noted, the terms "home" and "residence" can denote a specific type of structure, i.e., a structure that is used primarily as a house or dwelling. See *Wihbey* v. *Zoning Board of Appeals*, supra, 218 Conn. App. at 374–76, 292 A.3d 21, citing The American Heritage Dictionary of the English Language (5th Ed. 2011) p. 840 (defining "home" as, among other things, "[t]he physical structure within which one lives, such as a house or apartment"), Webster's Third New International Dictionary (1993) p. 1082 (defining "home" as, among other things, "a private dwelling: house"), and Webster's Third New International Dictionary (1993) p. 1931 (defining "residence" as, among other things, "a building used as a home: dwelling"). Under these definitions, the language of the 1994

regulations permitting a "single-family dwelling" defined as "[a] building designed for and occupied exclusively as a home or residence for not more than one family"; Pine Orchard Assn. Zoning Regs., §§ IV (4.1) and XIII (1994); would mean that the primary structure on the property must be **329 designed and used as a house or dwelling for occupation by only one family at a given time. In contrast, structures that are designed to be or are in fact occupied by multiple families at the same time, or by commercial enterprises other than those expressly allowed, are not permitted.[9] This definition *96 focuses not on the length of time that a particular family occupies the structure but on the nature and use of the structure at any given time.

The cases cited by the Appellate Court in support of its determination that "so long as one family dwells in the property, *any* amount of time ... [is] sufficient to make the property the family's residence"; (emphasis in original) *Wihbey* v. *Zoning Board of Appeals*, supra, 218 Conn. App. at 384, 292 A.3d 21; bolster our conclusion that this interpretation is reasonable in this context.[10] See id. at 384–85, 292 A.3d 21. Although the defendants may be correct that "no group of college buddies (or even a family) renting the [plaintiff's] property for a long weekend would consider *97 it *their* 'residence' "; (emphasis added); a reasonable person certainly would consider it *a* residence, i.e., a place used as a house or dwelling.

The fact that, as the defendants acknowledge, the 1994 regulations allow owners to rent single-family dwellings also supports this interpretation. If renting a single-family dwelling is allowed under the **330 1994 regulations, the right to use a property as a "home" or "residence" must encompass the right to rent the property, as nothing else in the regulations expressly permits renting, and, as the Appellate Court emphasized, nothing in the regulations restricts the length of time that a family renting a property must occupy it.[11] See *Wihbey* v. *Zoning Board of Appeals*, supra, 218 Conn. App. at 382–83, 292 A.3d 21. Indeed, the defendants' interpretation would lead to the anomalous result that, if the plaintiff occupied the property only on alternate weekends, leaving it vacant the rest of the time, the use would be illegal because the plaintiff would not be occupying the property "with a degree of permanency ...." Cf. *Slaby* v. *Mountain River Estates Residential Assn., Inc.*, 100 So. 3d 569, 579–80 (Ala. Civ. App. 2012) (rejecting interpretation of "residential purposes" that would mean that owner's intermittent use of property as vacation home was in violation of restrictive covenant).

*98 [2] We therefore reject the defendants' claim that the definition of "single-family dwelling" in § XIII of the 1994 regulations clearly and unambiguously means that a family must occupy the home or residence "with a degree of permanency" and that short-term rentals are not permitted. Rather, the language allowing the erection of "[a] building designed for and occupied exclusively as a home or residence for not more than one family"; Pine Orchard Assn. Zoning Regs., § XIII (1994); is ambiguous and reasonably can be interpreted as permitting the erection of houses or dwellings that are designed for occupation and used by only one family at any given time, without any temporal occupation requirement. We therefore conclude that the Appellate Court correctly determined that the 1994 regulations permit short-term rentals of the property. See, e.g., *Smith Bros. Woodland Management, LLC* v. *Planning & Zoning Commission,* supra, 88 Conn. App. at 86, 868 A.2d 749 ("[when] more than one interpretation of language is permissible, restrictions [on] the use of lands are not to be extended by implication ... [and] doubtful language will be construed against rather than in favor of a [restriction]" (internal quotation marks omitted)).

The defendants contend that this interpretation is inconsistent with this court's holding in *State* v. *Drupals*, 306 Conn. 149, 49 A.3d 962 (2012). In that case, we interpreted the provisions of General Statutes (Rev. to 2011) § 54-251 (a)[12] requiring a convicted sex offender to register his residence address without undue delay. See id. at 161–69, 49 A.3d 962. We held that "residence means the act or fact of living in a given place for some time, and the term does not apply to temporary stays." Id. at 163, 49 A.3d 962. The Appellate Court addressed the defendants' contention at some length; see **331 *Wihbey* v. *Zoning Board of Appeals*, supra, 218 Conn. App. at 378–82, 292 A.3d 21; and there is no need to *99 repeat its cogent analysis here. With respect to the defendants' claim that the Appellate Court incorrectly determined that this court's interpretation of "residence" in *Drupals* was based on the rule of lenity in the criminal context, we acknowledge that, after setting forth that rule in *Drupals*, this court never expressly stated that it applied because the term "residence," as used in § 54-251 (a), is ambiguous. See *State* v. *Drupals,* supra, at 160, 49 A.3d 962; see also *Wihbey* v. *Zoning Board of Appeals*, supra, at 381, 292 A.3d 21 (concluding that "[t]he rule of strict construction in *Drupals* led to a narrower definition of residence because the narrower definition benefited the accused"). Even if we were to assume that the Appellate Court gave undue weight to this distinction between *Drupals* and the present case,

its reasoning that a definition of "residence" that included places where a person lives only briefly would have led to absurd results in *Drupals*, but not in the present case, remains valid. Similarly, we agree with the Appellate Court that the term "residence" may have different meanings in different contexts. See *Wihbey* v. *Zoning Board of Appeals*, supra, at 382, 292 A.3d 21. Indeed, this court acknowledged in *Drupals* that, under certain circumstances that were not present in that case, the term "residence" as used in § 54-251 can mean "wherever [an individual] was dwelling, no matter how temporary [the] situation," including "under a bridge ...." (Internal quotation marks omitted.) *State* v. *Drupals*, supra, at 164, 49 A.3d 962. Therefore, we conclude that the 1994 regulations permit the rental of the plaintiff's property without any temporal restriction.

The defendants also claim that the Appellate Court made a number of other errors in interpreting the 1994 regulations. First, they contend that the Appellate Court incorrectly treated the regulations as prohibitory—i.e., as permitting whatever was not prohibited—rather than permissive—i.e., as prohibiting whatever was not permitted—when it concluded that, "in the absence of clear ***100** language ... imposing some restriction on the rental of property as a permissible use, we may not impose such a restriction." *Wihbey* v. *Zoning Board of Appeals*, supra, 218 Conn. App. at 372, 292 A.3d 21. We disagree. The Appellate Court merely observed that the ability to rent property is "one third of [an owner's] bundle of economically productive rights constituting ownership"; (internal quotation marks omitted) id.; and the intent to deprive land-owners of that right cannot be assumed in the absence of clear language evincing such an intent. See id. After observing that "the defendants agreed that the 1994 regulations permitted long-term rentals of residential properties," presumably because renting a property is one of the rights constituting ownership; id.; the Appellate Court went on to conclude that, because there was no evidence that the drafters had any intent to permit *only* long-term rentals, short-term rentals were permitted. Id. at 391–92, 292 A.3d 21.

Second, the defendants contend that the Appellate Court incorrectly determined that "interpreting 'residence' to exclude temporary stays would render it duplicative of 'home' and therefore 'essentially meaningless.' " They argue that, although the term "home" connotes a greater degree of permanence, the term "residence" implies a temporal occupation requirement of significant duration. We have concluded that, as used in the 1994 regulations, the terms "home" and "residence" both reasonably can be interpreted to mean a structure that is designed for use as a house or dwelling, regardless of the length of time that it is occupied. We cannot ****332** conclude that the Appellate Court's interpretation of "residence" is unreasonable simply because it determined that the term "home" is somewhat less susceptible of this interpretation. We therefore reject this claim.

Third, the defendants contend that the Appellate Court incorrectly determined that short-term rentals are permitted because the 1994 regulations allowed ***101** owners to rent single-family dwellings and did not differentiate between long-term and short-term rentals. The defendants argue that the Appellate Court failed to recognize that the drafters could not have anticipated the "relatively recent practice of short-term rentals facilitated by technological innovation." (Internal quotation marks omitted.) They further argue that the Appellate Court failed to recognize that the family occupancy requirement shows that "a residence is for occupation by individuals who share a common bond of significant duration, [and] it naturally follows that a residence would be intended to include a degree of permanence ...." (Emphasis omitted.) Again, we disagree. It does not follow that, because the drafters failed to anticipate online rental platforms like Vrbo, they therefore intended to permit only rentals for more than thirty days. Nor does it follow from the fact that family members ordinarily share a common bond of significant duration that the drafters intended that a particular family's occupation of a single-family dwelling must have a similarly significant duration. Instead, as we explained, it is reasonable to conclude that the drafters intended that a single-family dwelling would be occupied by only a single family at any given time, not by multiple families or commercial enterprises other than those expressly permitted.

Fourth, the defendants contend that the Appellate Court incorrectly determined that the cases from other jurisdictions that support its interpretation of the 1994 regulations are persuasive and that the cases supporting the defendants' position are distinguishable. With respect to the authorities supporting the Appellate Court's interpretation, the defendants contend that the cases construing the terms "residential use" or "residential purposes" are not persuasive because those terms involve "different concepts from what is a 'residence.' " See ***102** *Lowden* v. *Bosley*, 395 Md. 58, 68, 909 A.2d 261 (2006); *Tarr* v. *Timberwood Park Owners Assn., Inc.*, 556 S.W.3d 274, 291 and n.14 (Tex. 2018); *Wilkinson* v. *Chiwawa Communities Assn.*, 180 Wash. 2d 241, 252, 327 P.3d 614 (2014). We disagree. Nothing in these cases suggests

that the terms "residential use" and "residential purposes" involve "different concepts" than those pertaining to the term "residence," and the defendants have not explained why they believe that to be the case. For the reasons that we already stated, the term "residence" reasonably can be interpreted to mean a place subject to "residential use" or used for "residential purposes."[13] Indeed, the phrases "for residential purposes" or "for residential use" could be substituted for the phrase "as a home or residence" in the definition of "single-family dwelling" without changing the meaning. See Pine Orchard Assn. Zoning Regs., § XIII (1994) (defining "single-family ****333** dwelling" as "[a] building designed for and occupied exclusively as a home or residence for not more than one family"). We conclude, therefore, that the reasoning of these cases construing the terms "residential use" and "residential purposes" to mean use as a house or dwelling, without any temporal occupation requirement, is equally applicable to the term "residence."

We also reject the defendants' claim that the Appellate Court incorrectly determined that the cases that they rely on in support of their position are not persuasive. See *Wihbey* v. *Zoning Board of Appeals*, supra, 218 Conn. App. at 385–86, 292 A.3d 21 (distinguishing *Styller* v. *Zoning Board of Appeals*, 487 Mass. 588, 169 N.E.3d 160 (2021), ***103** and *Slice of Life, LLC* v. *Hamilton Township Zoning Hearing Board*, 652 Pa. 224, 207 A.3d 886 (2019)). The Appellate Court distinguished these cases because, unlike in the present case, the regulations at issue in both of those cases defined "family" as a "single housekeeping unit." (Internal quotation marks omitted.) *Wihbey* v. *Zoning Board of Appeals*, supra, at 385, 292 A.3d 21; see *Styller* v. *Zoning Board of Appeals*, supra, at 600, 169 N.E.3d 160 (regulation defined "family" as "single housekeeping unit, as distinguished from a group occupying a boarding house, lodging house, or hotel" (internal quotation marks omitted)); *Slice of Life, LLC* v. *Hamilton Township Zoning Hearing Board*, supra, at 233–34, 207 A.3d 886 (regulation defined "family" as "[o]ne or more persons, occupying a dwelling unit, related by blood, marriage, or adoption, living together as a single housekeeping unit and using cooking facilities and certain rooms in common" (internal quotation marks omitted)). As the court in *Slice of Life, LLC*, observed, however, the phrase "single housekeeping unit" has been widely construed to be " 'the plain and ordinary meaning of "family" in the zoning context.' " *Slice of Life, LLC* v. *Hamilton Township Zoning Hearing Board*, supra, at 232, 207 A.3d 886. Because there is nothing inherent in the definition of "family" as a "single housekeeping unit" that connotes a significantly greater degree of coherence or permanence than that inherent in the term "family," as defined in the 1994 regulations; see Pine Orchard Assn. Zoning Regs., § XIII (1994); we are compelled to conclude that, contrary to the Appellate Court's determination, the variance between these definitions constitutes a distinction without a difference.

Even though we conclude that *Styller* and *Slice of Life, LLC*, are not distinguishable on this ground, we nevertheless find that they are not persuasive. In *Styller*, the Massachusetts Supreme Judicial Court concluded that a zoning regulation that permitted a "one family detached house" did not permit a short-term rental ***104** because such a use was "inconsistent with the zoning purpose of the single-residence zoning district in which it [was] situated, i.e., to preserve the residential character of the neighborhood." *Styller* v. *Zoning Board of Appeals*, supra, 487 Mass. at 599, 169 N.E.3d 160. The court further concluded that "[u]se of zoning regulation[s] to foster stability and permanence is compatible with long-term property rentals because long-term inhabitants have the opportunity to develop a sense of community and a shared commitment to the common good of that community .... [When] short-term rentals are at issue, however, there is an absence of stability and permanence of the individuals residing in those districts, [and] the goal is necessarily subverted ...." (Citation omitted; internal quotation marks omitted.) Id.

Similarly, in *Slice of Life, LLC*, the zoning regulation at issue permitted single-family detached dwellings. See ****334** *Slice of Life, LLC* v. *Hamilton Township Zoning Hearing Board,* supra, 652 Pa. at 252, 207 A.3d 886. The Pennsylvania Supreme Court concluded that, because "short-term rentals of homes located in a single-family residential zoning district undoubtedly affect the essential character of a neighborhood and the stability of a community"; (internal quotation marks omitted) id. at 246, 207 A.3d 886; short-term rentals were not permitted. Id. at 252, 207 A.3d 886.

[3] As we explained previously, zoning regulations "must be strictly construed and not extended by implication"; *Graff* v. *Zoning Board of Appeals*, supra, 277 Conn. at 653, 894 A.2d 285; and a zoning regulation that is susceptible to multiple, reasonable interpretations will be construed in favor of the landowner. See, e.g., *Smith Bros. Woodland Management, LLC v. Planning & Zoning Commission,* supra, 88 Conn. App. at 86, 868 A.2d 749. The definition of "single-family dwelling" in the 1994 regulations does not clearly and unambiguously mean that only long-term rentals of such

dwellings are permitted but reasonably can be interpreted to mean that only structures designed and used as ***105** houses or dwellings for occupation by a single family at a given time are permitted. Again, the defendants concede that renting a single-family dwelling is a permitted use, and nothing in the 1994 regulations differentiates between long-term rentals and short-term rentals. Although zoning authorities are free to adopt regulations that permit only long-term rentals in an effort to promote stability and a sense of community within a single-family residential zone—as the Pine Orchard zoning authority did in 2018—we do not agree with the courts in *Styller* and *Slice of Life, LLC*, that a regulation that permits single-family dwellings ipso facto prohibits the rental of a dwelling for less than a particular period of time. Rather, there must be specific evidence of such an intent. We therefore conclude that these cases are not persuasive.

For the foregoing reasons, we conclude that the Appellate Court correctly determined that the short-term rental of a single-family dwelling constitutes a permissible use of the property under the 1994 regulations.

The judgment of the Appellate Court is affirmed.

In this opinion ROBINSON, C. J., and D'AURIA, MULLINS and DANNEHY, Js., concurred.

McDONALD, J., with whom ECKER, J., joins, dissenting.

This appeal centers on whether the zoning regulations governing a residential neighborhood designated for "single-family" homes permit the short-term occupancy of those structures by transient travelers.[1] This court has recognized that "[t]he purpose of zoning is to serve the interests of *the community as a whole* ***106** ...." (Emphasis added.) *Malafronte* v. *Planning & Zoning Board*, 155 Conn. 205, 212, 230 A.2d 606 (1967). Today, the majority of this court discounts both the importance of zoning regulations to the interests of the community as a whole and the plain meaning of the terms included in the applicable residential zoning regulations and holds that the short-term occupancy of a single-family home by transient travelers, which undermines the very purpose of the applicable zoning regulations, nevertheless is permitted by those regulations.

****335** The plaintiff, Frances Wihbey, was ordered by the zoning enforcement officer (zoning officer) of the Pine Orchard Association (POA), an incorporated borough and municipal subdivision of the town of Branford, to cease and desist from engaging in the short-term rental of a single-family property the plaintiff owned in the POA. The plaintiff appealed to the defendant, the Zoning Board of Appeals of the Pine Orchard Association (board), which upheld the cease and desist order. The plaintiff then appealed from the board's decision to the trial court, which reversed that decision. The board and the intervening defendants, Michael B. Hopkins and Jacqueline C. Wolff,[2] appealed, on the granting of certification, from the trial court's judgment to the Appellate Court, which affirmed in part and reversed in part the trial court's judgment. *Wihbey* v. *Zoning Board of Appeals*, 218 Conn. App. 356, 359, 396, 292 A.3d 21 (2023). This court granted certification to determine whether short-term occupancy of a single-family dwelling by transient travelers constitutes a permissible use of the subject property under the 1994 POA zoning regulations (1994 regulations).[3] See ***107** *Wihbey* v. *Zoning Board of Appeals*, 346 Conn. 1019, 1019–20, 292 A.3d 1254 (2023). Because I conclude that the short-term occupancy of the plaintiff's property by transient travelers was impermissible under the 1994 regulations, I would reverse in part the judgment of the Appellate Court. Accordingly, I respectfully dissent.

In 2005, the plaintiff purchased property in the POA. The property consists of a single-family home subject to the POA's zoning regulations. Since purchasing the property, the plaintiff has consistently allowed travelers to book the property on a short-term basis, typically for periods of three days to one week, on the Vrbo[4] website. Importantly, in the last ten years, these transient travelers have never stayed at the property for more than thirty days at a time.[5]

Relevant to this appeal, the 1994 regulations state that the purpose of the regulations is to "provid[e] a comprehensive plan which will promote the health, safety, and general welfare of the community" and that the regulations "shall be made with ****336** reasonable consideration as to the character of the community ...." ***108** Pine Orchard Assn. Zoning Regs., § I (1994). Section IV (4.1) of the 1994 regulations, which lists the permitted uses of properties, provides one permitted use to be as "[a] single-family dwelling"; id., § IV (4.1); which is defined in § XIII as "[a] building designed for and occupied exclusively as a home or residence for not more than one family." Id., § XIII. Section XIII of the 1994 regulations further defines "family" as "[o]ne or more persons related by blood, marriage or adoption, and in addition, any domestic servants or gratuitous guests. A

roomer, boarder or lodger, shall not be considered a member of a family."[6] Id. The 1994 regulations do not expressly permit the renting of single-family homes but do provide that "[a] sign not more than five square feet in area when placed in connection with the sale, *rental*, construction or improvement of the premises and for no other purpose" is permitted. (Emphasis added.) Id., § IV (4.4).

In 2018, the POA adopted recommended amendments to its 1994 regulations, which included a specific provision prohibiting the short-term rental of properties subject to the regulations. Specifically, § 4 (4.1) of the 2018 zoning regulations (2018 regulations) states that "[a] single-family dwelling may not be used or offered for use as a [s]hort-[t]erm [r]ental [p]roperty." Pine Orchard Assn. Zoning Regs., § 4 (4.1) (2018). The 2018 regulations define "short-term rental property" as "[a] residential dwelling unit that is used and/or advertised for rent for occupancy by guests for consideration for a period of less than thirty ... continuous days." Id., § 16.

***109** In 2019, the POA, acting through its zoning officer, issued a cease and desist order to the plaintiff for violations of the short-term rental ordinance and stated that the plaintiff's use of his property violated § 13 (13.3.2) of the 2018 regulations prohibiting short-term rentals. The plaintiff appealed from this order to the board, and, after public hearings on the matter, the appeal was denied. The plaintiff then appealed to the trial court, which concluded that, because the plaintiff's use of the property was permitted under the 1994 regulations, the plaintiff could not be prohibited from using his property for short-term rentals under the 2018 regulations. Accordingly, the trial court reversed the board's decision. The defendants thereafter appealed, and the Appellate Court affirmed in part the trial court's judgment, concluding that the short-term rental of a single-family dwelling was permissible under the 1994 regulations. *Wihbey* v. *Zoning Board of Appeals*, supra, 218 Conn. App. at 359, 391–92, 396, 292 A.3d 21. The Appellate Court, however, also reversed in part the trial court's judgment, concluding that the trial court incorrectly determined that the plaintiff had established a preexisting, nonconforming use of the property.[7] Id. at 359, 392–96, 292 A.3d 21. This certified appeal followed.

On appeal, the defendants argue that the Appellate Court erred in concluding ****337** that short-term rentals of a single-family dwelling constitute a permissible use under the 1994 regulations. In support of this contention, the defendants point to the language of the 1994 regulations that provides that the only relevant permissible use of the property was as "[a] single-family dwelling"; Pine Orchard Assn. Zoning Regs., § IV (4.1) (1994); which is defined as a property "occupied exclusively as a home or residence for not more than one family." Id., § XIII. ***110** The defendants contend that the Appellate Court's interpretation of the word "residence" in the 1994 regulations was incorrect because "residence" cannot refer to temporary stays of only a few days to one week. For his part, the plaintiff argues that the Appellate Court correctly concluded that short-term rentals of a single-family dwelling are permitted under the 1994 regulations. Because I agree with the defendants' interpretation of "residence," I conclude that the majority's interpretation of the applicable zoning regulations is flawed. Despite clear support to the contrary, the majority concludes that the "definition of 'single-family dwelling' in the 1994 regulations does not clearly and unambiguously mean that only long-term rentals of such dwellings are permitted but reasonably can be interpreted to mean that only structures designed and used as houses or dwellings for occupation by a single family at a given time are permitted."

The interpretation of the applicable zoning regulations presents a question of law over which this court's review is plenary. See, e.g., *Heim* v. *Zoning Board of Appeals*, 289 Conn. 709, 715, 960 A.2d 1018 (2008). "[Z]oning regulations are local legislative enactments ... and, therefore, their interpretation is governed by the same principles that apply to the construction of statutes." (Citation omitted; internal quotation marks omitted.) *Enfield* v. *Enfield Shade Tobacco, LLC*, 265 Conn. 376, 380, 828 A.2d 596 (2003). Our interpretation of the 1994 regulations is therefore guided by the principles set forth in General Statutes § 1-2z. I am mindful that, "[b]ecause zoning regulations are in derogation of common-law property rights, they must be strictly construed and not extended by implication. ... Whenever possible, the language of zoning regulations will be construed so that no clause is deemed superfluous, void or insignificant. ... The regulations must be interpreted so as to reconcile their provisions and ***111** make them operative so far as possible. ... When more than one construction is possible, [this court] adopt[s] the one that renders the enactment effective and workable and reject[s] any that might lead to unreasonable or bizarre results." (Internal quotation marks omitted.) *Kraiza* v. *Planning & Zoning Commission*, 304 Conn. 447, 453–54, 41 A.3d 258 (2012).

The parties agree that the 1994 regulations are the governing regulations in this case. The parties also agree that the 1994

regulations are permissive, and, thus, "[a]ny use that is not permitted is automatically excluded." (Internal quotation marks omitted.) *Heim* v. *Zoning Board of Appeals*, supra, 289 Conn. at 716 n.8, 960 A.2d 1018. I begin with the text of the 1994 regulations. See General Statutes § 1-2z. The 1994 regulations provide that no building or land shall be used for anything other than eight specified uses, including, as relevant to this case, "[a] single-family dwelling." Pine Orchard Assn. Zoning Regs., § IV (4.1) (1994). That term is defined as "[a] building designed for and occupied exclusively as a home or residence for not more than one family." Id., § XIII. A "family," in turn, is defined as "[o]ne or more persons related by blood, marriage or adoption, and in addition, any domestic servants or gratuitous guests. A ****338** roomer, boarder or lodger, shall not be considered a member of a family." Id.

Whether the short-term use of the plaintiff's property by transient travelers is permitted by the 1994 regulations turns on the meaning of the terms "home" and "residence." These terms are not defined in the regulations. It is well settled that, "[i]f a ... regulation does not sufficiently define a term, it is appropriate to look to the common understanding of the term as expressed in a dictionary." (Internal quotation marks omitted.) *Heim* v. *Zoning Board of Appeals*, supra, 289 Conn. at 717, 960 A.2d 1018. "Home" is consistently defined as a place that is fixed. See, e.g., Ballentine's Law Dictionary (3d Ed. ***112** 1969) pp. 563–64 (Describing "home" as "[a] word so suggestive of love, affection, and security as to be one of the most pleasantly sounding words in the English language. A place where a [couple] may live in the enjoyment of each other's society and rear their offspring. ... The place where a family lives in the close relation of people who enjoy the company of each other and the comfort and security of abiding together ...." (Citations omitted.)); 7 Oxford English Dictionary (2d Ed. 1998) p. 322 (defining "home" as "[a dwelling place], house, abode; the *fixed* residence of a family or household; the *seat* of domestic life and interests; one's own house; the dwelling in which one *habitually lives*, or which one regards as one's proper abode" (emphasis added)); The American Heritage College Dictionary (4th Ed. 2007) p. 662 (Defining "home" as "[a] place where one lives; a residence. ... A dwelling place together with the social unit that occupies it; a household.").

The definitions of "residence" similarly connote a degree of permanency that does not apply to the nature of transient, short-term occupancy. See, e.g., Black's Law Dictionary (2d Ed. 1910) p. 1026 (Defining "residence" as "[l]iving or dwelling in a certain place permanently or for a considerable length of time. The place where a man makes his home, or where he dwells permanently or for an extended period of time."); 13 Oxford English Dictionary, supra, p. 707 (defining "residence" as "hav[ing] one's usual [dwelling place] or abode; to reside ... to take up one's residence, to establish oneself; to settle," and "[t]he circumstance ... of having one's permanent or usual abode in or at a certain place" (emphasis omitted)); The American Heritage College Dictionary, supra, p. 1183 (defining "residence" as "[t]he place in which one lives; a dwelling").

These dictionary definitions lead me to conclude that the plain meanings of both "home" and "residence" imply a degree of permanence and connection to community ***113** that could hardly be used, accurately or with a measure of precision, to refer to a short-term occupancy by a transient traveler for a few days.[8] At the same time, ****339** "[i]t is a fundamental tenet of statutory construction that [t]he use of ... different terms ... within the same statute suggests that the legislature acted with complete awareness of their different meanings ... and that it intended the terms to have different meanings ...." (Internal quotation marks omitted.) *Celentano* v. *Oaks Condominium Assn.*, 265 Conn. 579, 609, 830 A.2d 164 (2003); see also, e.g., *Enfield* v. *Enfield Shade Tobacco, LLC*, supra, 265 Conn. at 380, 828 A.2d 596 (interpretation of zoning regulations is governed by same principles that apply to construction of statutes). However, simply because the terms "home" and "residence" necessarily have different meanings within the 1994 regulations does not mean that the terms must lie on totally different ends of the spectrum regarding their respective meanings related to housing. It is entirely possible, and indeed the only appropriate interpretation in my view, that the two terms, when read in the context of the regulations, were intended to encompass two types ***114** of acceptable uses of the property that imply some degree of permanence. For example, a "residence" could refer to a Vermont vacation property used by the property owners and their family on winter weekends to ski or to celebrate certain holidays. Similarly, it is not at all uncommon in Connecticut for a family to have its "home" in Florida for six months and one day for tax purposes but simultaneously maintain a "residence" in Connecticut where the family spends five months and twenty-nine days in the spring and summer months. See, e.g., *9 Pettipaug, LLC* v. *Planning & Zoning Commission*, 349 Conn. 268, 273, 316 A.3d 318 (2024) (borough of Fenwick has fourteen year-round households and "an additional sixty-seven homes that serve as summer residences"). Often these second "residences" are summer retreats along the coastline,

handed down from generation to generation, speaking to their permanence for the family's benefit. Such a use is very different from the transient nature of a short-term traveler, who may use a property once for a few days and never return again. It is hard to imagine a person claiming with a straight face that he or she made a reservation at a local hotel when visiting a family member for a weekend and properly characterizing it as his or her "residence" for the thirty-six hours that the person was in town. A seasonal vacation property, on the other hand, is still utilized with a sense of permanence, as the owner typically has an intention to come and go over time, and, usually, it would bear the hallmarks of permanence, appointed with the owner's furnishings and closets filled with his or her clothes.[9] Thus, although a vacation property may not be an individual's "home," it may well ***115** be characterized as a "residence." The majority claims that "the defendants' interpretation would lead to the anomalous result that, if the plaintiff occupied the property only on alternate weekends, leaving it vacant the rest of the time, the use would be illegal because the plaintiff would not be occupying the property 'with a degree of permanency ....' " This claim ignores the spectrum of possibilities that comes with property ownership and erroneously ****340** equates the use of one's vacation property throughout the year with that of inconsistent and detached short-term renters. I do not see the 1994 regulations in such binary terms.

The majority concludes that *both* "residence" and "home" can refer to transient uses of property. See text accompanying footnote 9 of the majority opinion ("Under these definitions, the language of the 1994 regulations permitting a 'single-family dwelling' defined as '[a] building designed for and occupied exclusively as a home or residence for not more than one family' ... would mean that the primary structure on the property must be designed and used as a house or dwelling for occupation by only one family at a given time. ... This definition focuses not on the length of time that a particular family occupies the structure but on the nature and use of the structure at any given time." (Citation omitted; footnote omitted.)); see also footnote 9 of the majority opinion ("[i]n our view, both the terms 'home' and 'residence' reasonably can be interpreted to refer to a structure that is used as a dwelling"). This interpretation of the word "home" extends far beyond the common meaning and finds no support in the regulations at issue here. Indeed, an interpretation of both "home" and "residence" that implies a sense of permanency is in keeping with the purpose of the 1994 regulations when read in their entirety. See General Statutes § 1-2z (plain meaning of statute is ascertained from text itself and its relationship to other statutes). At the ***116** outset, the 1994 regulations provide that they are "made for the purpose of providing a comprehensive plan which will promote the health, safety, and general welfare of the community ...." Pine Orchard Assn. Zoning Regs., § I (1994). The interpretation advanced by the majority fails to consider, much less promote, the "general welfare of the community ...." Id. At a hearing conducted before the board, residents described the plaintiff's property as a "Motel 6," a "revolving weekend party house," an "absolute horror," a "frat [house]," "very destructive," and "very loud ...." One resident spoke about the numerous emails and texts he sent to the plaintiff to complain about the trespassing that had occurred on his property and stated his intention to sell his own property if the activities on the plaintiff's property continued. Another resident urged the board to consider the "negative impact that [the plaintiff's short-term rentals have] on our neighborhood and our residential communities' character ...."

Other courts, when faced with the question of whether short-term occupancies by transient travelers are permitted by the applicable zoning regulations, have looked at the impact that such rentals have had on the community as a whole. See, e.g., *Ewing* v. *Carmel-By-The-Sea*, 234 Cal. App. 3d 1579, 1591, 286 Cal. Rptr. 382 (1991) (finding that short-term rentals of homes in single-family residential zoning districts "undoubtedly affect the essential character of a neighborhood and the stability of a community"), review denied, California Supreme Court, Docket No. S023822 (January 8, 1992), cert. denied, 504 U.S. 914, 112 S. Ct. 1950, 118 L. Ed. 2d 554 (1992). Short-term occupancies of single-family homes by transient travelers directly upend the purpose of the 1994 regulations because they do not serve the "general welfare of the community ...." Pine Orchard Assn. Zoning Regs., § I (1994). This is because "[s]hortterm tenants have little interest in public agencies or ***117** in the welfare of the citizenry. They do not participate in local government, coach [L]ittle [L]eague, or join the hospital guild. They do not lead a scout troop, volunteer at the library, or keep an eye on an elderly neighbor. Literally, they are ****341** here today and gone tomorrow—without engaging in the sort of activities that weld and strengthen a community." *Ewing* v. *Carmel-By-The-Sea*, supra, at 1591, 286 Cal.Rptr. 382. Interpreting the 1994 regulations as prohibiting short-term occupancies, on the other hand, directly serves the general welfare of the community and, therefore, is in keeping with both the common dictionary definitions of the terms "home" and "residence" and the express purpose of the 1994 regulations. "The permanence and stability of people

living in single-family residential zoning districts [create] a sense of community, [cultivate] and [foster] relationships, and [provide] an overall quality of a place where people are invested and engaged in their neighborhood and care about each other." *Slice of Life, LLC* v. *Hamilton Township Zoning Hearing Board*, 652 Pa. 224, 246, 207 A.3d 886 (2019).

Furthermore, the 1994 regulations specifically exclude "roomer[s], boarder[s] or lodger[s]" from the definition of "family" and, therefore, from being appropriate users of the single-family homes in the district. Pine Orchard Assn. Zoning Regs., § XIII (1994). The parties agree that, in this case, the travelers do not qualify as "roomer[s], boarder[s] or lodger[s] ...." Id. "The ordinary meaning of all three terms is someone who pays to live either in a [single] room of another's property or with a family in that property and who may receive regular meals while staying with the family. See [Merriam-Webster's Collegiate Dictionary (11th Ed. 2003)] p. 1082 (defining 'roomer' as 'one who occupies a rented room in another's house'); id., p. 137 ('boarder' is 'one that boards; [especially]: one that is provided with regular meals or regular meals and lodging'); id., p. 731 ('lodger' is ***118** defined as 'roomer'); [Black's Law Dictionary (11th Ed. 2019)] p. 214 (defining 'boarder' as '[s]omeone who lives in another's house and receives food and lodging in return either for regular payments or for services provided'); [Black's Law Dictionary (11th Ed. 2019)] p. 1128 ('lodger' is '[s]omeone who rents and occupies a room in another's house'). If a family rents the entire property from a landowner and is not living with the landowner, the family members are, by definition, not roomers, boarders or lodgers." *Wihbey* v. *Zoning Board of Appeals*, supra, 218 Conn. App. at 390, 292 A.3d 21. This specific exclusion, however, provides additional support for the conclusion that the 1994 regulations did not intend to allow for short-term, transient uses of the properties subject to the regulations. There would be no purpose in excluding the short-term use of one *room* in a home but allowing for the short-term use of the home itself. A more sensible reading of the 1994 regulations, then, is that they prohibit both types of transient uses in favor of uses that have a degree of permanence and stability that is in keeping with the whole community or district.

When the terms "home" and "residence" are read in the context of the POA's entire zoning regulatory scheme, it is clear that, as used in the 1994 regulations, both terms unambiguously mandate that the property be used with some degree of permanence. Such a conclusion does not render either word meaningless because, as I explained, those words lie at different points on the spectrum of permissible uses. This interpretation is in keeping with the common understanding of the terms "home" and "residence" and, importantly, with the overall purpose of the zoning regulations. I would therefore reverse in part the Appellate Court's judgment and hold that the 1994 regulations do not permit short-term transient uses of single-family dwellings.

Accordingly, I respectfully dissent.

All Citations

350 Conn. 87, 323 A.3d 324

Footnotes

* July 29, 2024, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

1 Hopkins and Wolff are owners of real property located at 6 Halstead Lane in Branford, which abuts the plaintiff's property. The trial court granted their motion to intervene as defendants in this administrative appeal. See *Wihbey* v. *Zoning Board of Appeals*, 218 Conn. App. 356, 359 n.4, 292 A.3d 21 (2023). We refer to the board, Hopkins, and Wolff collectively as the defendants.

2 Although Pine Orchard refers to its zoning regulations collectively as the Pine Orchard Association Zoning Ordinance, we refer to this body of regulations as regulations in the interest of consistency.

3 "Vrbo, formerly Vacation Rentals by Owner, is a website on which owners can advertise their houses and other properties for rent." (Internal quotation marks omitted.) *Wihbey* v. *Zoning Board of Appeals*, supra, 218 Conn. App. at 358 n.1, 292 A.3d 21.

4 Section 4 of the 2018 Pine Orchard Association zoning regulations (2018 regulations) provides in relevant part that, in the zoning district in which the property is located, "no building or land shall be used and no building shall be erected or altered which is arranged, intended or designed to be used respectively for other than one or more of the following uses:

"4.1 A single-family dwelling ... A single-family dwelling may not be used or offered for use as a [s]hort-[t]erm [r]ental [p]roperty. ..."

Section 16 of the 2018 regulations defines "[short-term] rental property" as "[a] residential dwelling unit that is used and/or advertised for rent for occupancy by guests for consideration for a period of less than thirty ... continuous days." Pine Orchard Assn. Zoning Regs., § 16 (2018).

5 This portion of the Appellate Court's ruling is not at issue in this appeal.

6 Nothing in the 1994 regulations expressly permits owners to rent a single-family dwelling. Although § IV (4.4) of the 1994 regulations permits an owner to post a rental sign, that regulation does not itself permit renting but incorporates the given fact that renting is permitted. Thus, as we discuss more fully subsequently in this opinion, the defendants implicitly concede that the plaintiff's right to use the property as a single-family dwelling includes the right to rent the property. Although the defendants never expressly state what, in their view, constitutes a "long-term" rental for purposes of the 1994 regulations, the board's counsel contended at oral argument before this court that the definition of "single-family dwelling" creates a "presumption" that the 1994 regulations do not permit a rental of less than thirty days.

7 The defendants cite a number of other online dictionaries for definitions of the terms "home" and "residence," but the provided website addresses or URLs are nonfunctional.

8 The defendants also claim that the definitions place "an emphasis on familial (i.e., stable) connection between the persons residing at the place." The plaintiff does not dispute that the 1994 regulations require that a single-family dwelling be occupied by only a single family, as defined by the regulations, at any given time. The question of whether the plaintiff's short-term rentals of the property before the adoption of the 2018 regulations were in compliance with this requirement, thereby establishing a lawful, nonconforming use, is not before this court, but is to be determined on remand. We therefore focus our analysis on the defendants' claim that the definitions of "home" and "residence" establish that they are places where a family lives with "a degree of permanency ...."

9 The 1994 regulations expressly allow a single-family dwelling to be used as the "[o]ffice of a physician, surgeon, lawyer, architect, insurance agent, accountant, engineer, land surveyor, or real estate broker, when located in the dwelling used by such person as his private residence ...." Pine Orchard Assn. Zoning Regs., § IV (4.2) (1994). These uses are consistent with the interpretation of the definition of "single-family dwelling" as permitting structures that are designed and used as a house or dwelling for occupation by one family.

The Appellate Court concluded that the drafters' use of both the term "home" and the term "residence" should be interpreted to mean that they "intended to attach different meanings to those terms." *Wihbey* v. *Zoning Board of Appeals*, supra, 218 Conn. App. at 376, 292 A.3d 21; see id. (quoting *Celentano* v. *Oaks Condominium Assn.*, 265 Conn. 579, 609, 830 A.2d 164 (2003), for proposition that "[t]he use of ... different terms ... within the same statute suggests that the legislature acted with complete awareness of their different meanings ... and that it intended the terms to have different meanings" (internal quotation marks omitted)). The Appellate Court also acknowledged, however, that there is significant overlap in the definitions of these terms. See *Wihbey* v. *Zoning Board of Appeals*, supra, at 376, 292 A.3d 21. In our view, both the terms "home" and "residence" reasonably can be interpreted to refer to a structure that is used as a dwelling.

10 See *Slaby* v. *Mountain River Estates Residential Assn., Inc.* 100 So. 3d 569, 579 (Ala. Civ. App. 2012) (property is used for " 'residential purposes' anytime it is used as a place of abode"); *Lowden* v. *Bosley*, 395 Md. 58, 68, 909 A.2d 261 (2006) (" '[r]esidential use,' without more, has been consistently interpreted as meaning that the use of the property is for living purposes, or a dwelling, or a place of abode"); *Wilson* v. *Maynard*, 961 N.W.2d 596, 602 (S.D. 2021) (" 'residential purposes' may be plainly understood to include the occupation of a home or dwelling for an indefinite length of time"); *Tarr* v. *Timberwood Park Owners Assn., Inc.,* 556 S.W.3d 274, 292 n. 14 (Tex. 2018) ("property is used for residential purposes when those occupying it do so for ordinary living purposes" (internal quotation marks omitted)); *Wilkinson* v. *Chiwawa Communities Assn.,* 180 Wash. 2d 241, 252, 327 P.3d 614 (2014) ("[i]f a vacation renter uses a home for the

purposes of eating, sleeping, and other residential purposes, this use is residential, not commercial" (internal quotation marks omitted)); *Heef Realty & Investments, LLP* v. *Cedarburg Board of Appeals*, 361 Wis. 2d 185, 194, 861 N.W.2d 797 (App.) ("[W]hat makes a home a residence is its use to sleep, eat, shower, relax, things of that nature. What matters is residential use, not the duration of the use." (Internal quotation marks omitted.)), review denied, 865 N.W.2d 503 (Wis. 2015).

11 The defendants repeatedly insist that "[t]his case does not involve the need to 'draw lines' between long-term rentals and short-term rentals. It involves the interpretation of the term[s] 'home' and 'residence' ...." Thus, they claim that those terms, in and of themselves, and without the need for any interpolative judicial line drawing, distinguish between rentals for thirty days or more (permitted in their view) and rentals for less than thirty days (not permitted). Unlike the dissent, we are not persuaded. The dissent claims that there is "overwhelming support for the plain meaning of 'residence' to require a degree of permanence ...." We disagree. We cannot conclude that a zoning scheme that permits the rental of single-family homes and residences, by virtue of that fact alone, provides notice to a reasonable person that a rental of thirty days would have a sufficient degree of "permanency," whereas a rental of three weeks would not.

12 All references in this opinion to § 54-251 are to the 2011 revision of the statute.

13 Of course, a place that is used for residential purposes would not necessarily qualify as a "single-family dwelling," as defined in § XIII of the 1994 regulations. See Pine Orchard Assn. Zoning Regs., § XIII (1994) (defining "single-family dwelling" as "[a] *building designed for* and *occupied exclusively* as a home or residence *for not more than one family*" (emphasis added)). That does not indicate that the term "residence" cannot reasonably be interpreted to mean a place used "for residential purposes" or subject to "residential use."

1 The Vrbo terms and conditions expressly refer to the party paying for use of the property as a "traveler." Vrbo, Terms and Conditions (last updated July 6, 2023), available at https://www.vrbo.com/lp/b/terms-of-service?msockid=1592f2630ba46bf63156e0c10a5a6a5e (last visited July 26, 2024).

2 The intervening defendants are owners of real property that abuts the plaintiff's property. For convenience, I hereafter refer to the board and the intervening defendants collectively as the defendants.

3 Although the POA refers to the 1994 regulations collectively as the 1994 Pine Orchard Association Zoning Ordinance, I refer to this body of regulations as regulations in the interest of simplicity.

4 Vrbo is a web-based platform that allows property owners to connect with potential short-term travelers. Vrbo, Terms and Conditions (last updated July 6, 2023), available at https://www.vrbo.com/lp/b/terms-of-service?msockid=1592f2630ba46bf63156e0c10a5a6a5e (last visited July 26, 2024) (stating that "[t]he [s]ite is a [v]enue and [w]e are [n]ot a [p]arty to any [r]ental [a]greement or other [t]ransaction [b]etween [u]sers of the [s]ite"). Vrbo does not provide "rental agreements," but property owners are permitted to separately enter into these agreements with renters. See Vrbo, Upload Your Rental Agreement, available at https://help.vrbo.com/articles/How-to-upload-my-rentalagreement (last visited July 26, 2024) ("[r]ental agreements are optional documents you can add to your listing to expand on your house rules and set expectations with guests").

5 A period of less than thirty days is widely considered transient and insufficient to establish an individual's dwelling. See, e.g., General Statutes § 47a-2 (c) (1) ("[o]ccupancy in a hotel, motel or similar lodging for less than thirty days is transient"); Americans with Disabilities Act Accessibility Guidelines, 28 C.F.R. pt. 36, app. A (2023) (local laws and common real estate practices "treat stays of [thirty] days or less as transient rather than residential use").

6 It is not clear that the property was always rented to a family within the meaning of the 1994 regulations. The record reflects that the property was sometimes used to accommodate groups of "thirty or forty people going late into the night ...." It is probable that some of the plaintiff's uses were not permitted under the regulations, but it is also likely that, on at least one occasion, he did rent to a "family" for purposes of the regulations. Nonetheless, I recognize that the issue has been remanded to the trial court for factual findings.

7 Whether the Appellate Court correctly concluded that the trial court incorrectly determined that the plaintiff had established a preexisting, nonconforming use of the property is not before this court.

8 The Appellate Court agreed that the term "home" signals a level of permanence. See *Wihbey* v. *Zoning Board of Appeals*, supra, 218 Conn. App. at 376, 292 A.3d 21 ("the essence of the definitions of 'home' indicate that a home is a 'domicile,' i.e., 'a person's fixed, permanent, and principal home for legal purposes' "). However, despite the overwhelming support for the plain meaning of "residence" to require a degree of permanence, the Appellate Court concluded that "it can also mean a place where someone lives for some period of time without the same sense of permanence associated with a home." Id. The Appellate Court found support for this conclusion in the word "or" separating "home" and "residence ...." (Internal quotation marks omitted.) Id. The Appellate Court correctly concluded that the use of this conjunction suggests that the drafters of the regulations intended to attach different meanings to the two terms. See id. The Appellate Court then concluded that, because "home" necessarily implies some sense of permanence, to interpret "residence" as also referring to a dwelling with a sense of permanence, as opposed to "a place of temporary sojourn," would render the term duplicative of "home" and, thus, "essentially meaningless." (Internal quotation marks omitted.) Id.

9 This is not to suggest that a person's second "residence" is always a vacation or seasonal home. In today's economy, it is not unusual for individuals to work for a company based in Connecticut while, for example, maintaining a home in Atlanta, Chicago or Dallas, and occupying another residence near the company's headquarters in Connecticut, where they live for part of the week and fly home to their family on weekends.

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