

BOULDER IS FOR PEOPLE: ZONING REFORM AND THE FIGHT FOR AFFORDABLE HOUSING

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The city of Boulder and the Colorado state legislature are both examining potential housing policies to address the growing housing affordability crisis, which reflect similar discussions in other cities and states. Zoning reform must be a central aspect of these housing policy reforms because of its impact on affordability, environmental sustainability, racial desegregation, and the economic stability of cities and states. However, passing zoning reform measures is complicated by local political opposition and the potential for unintended consequences. The best approach to pass zoning reform while ensuring that cities and states truly address housing affordability is to craft zoning reform policy that will mitigate potential negative impacts, and to pass this reform in conjunction with other housing policies. This Comment will examine why zoning reform is necessary and identify combinations of housing policies that cities and states can enact to meet their housing goals, with a focus on zoning reform possibilities in Boulder, Colorado that other cities can emulate.

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INTRODUCTION

Boulder’s housing affordability crisis is growing more desperate every year, as more employers and residents are attracted to Boulder without a corresponding increase in available homes or protections for renters to lower the cost of housing.¹ As a result, affordable housing is out of reach for many renters, and many would-be Boulder residents are forced to choose between spending a large portion of their income on housing or living outside of the city and commuting in, resulting in environmental and social consequences.² Boulder’s zoning laws are restrictive, limiting the number and types of homes that can be built, posing significant barriers to Colorado achieving housing affordability and environmental sustainability. However, Colorado housing policy reform must involve a multipronged solution to truly protect affordability, environmental health, social cohesion, and neighborhood character.

Boulder should follow the lead of cities in California and Oregon by passing zoning reforms to allow more housing, and denser housing types, to be built within the city.³ It should also allow for a greater number of people to live in existing housing by reforming occupancy limits, similar to the Bedrooms Are for People ballot initiative that failed in 2020.⁴ These reforms must be coupled with affordability protections for renters, like rent control or investment in public housing, to ensure true affordability. Zoning reform, increasing occupancy limits, and

1. Michael Hendrix, *Boulder’s Challenge*, CITY J. (2021), <https://www.city-journal.org/boulder-colorado-affordable-living> [<https://perma.cc/V2FD-SR9U>].

2. *Id.*

3. *Id.*

4. *See* BEDROOMS ARE FOR PEOPLE, <https://www.bedroomsareforpeople.com> [<https://perma.cc/5PXU-YG8H>].

implementing complementary protections for renters are necessary prongs to address the acute housing crisis in Boulder, which would expand housing options and availability in the short and long term while protecting lower-income renters. These policies would also have positive environmental and social impacts—because Boulder has many of the same issues and policies as other cities, Boulder’s zoning reform possibilities can be a useful case study for other cities.

In Part I, this Comment will discuss the origins of zoning in Boulder and the United States more broadly. Part II will discuss the negative effects of restrictive zoning codes on housing affordability, environmental sustainability, desegregation initiatives, and economic growth, while Part III will discuss possible policy solutions. Part IV will argue for implementing these solutions in conjunction.

I. ORIGINS OF ZONING

A. *Zoning in the United States*

Zoning in its most basic form has been around for centuries; municipal codes have regulated development related to public health, like construction materials for fire safety and the location of polluting industries like brickmaking, since the Middle Ages.⁵ These codes then developed into restrictive covenants placed on properties, particularly to disallow certain activities considered nuisances.⁶ Zoning in the United States came into its modern form in the early twentieth century, starting with New York City’s 1916 code.⁷ The 1916 code separated the city into zones that allowed different uses, designating three types of use districts: residential, business, and unrestricted.⁸ Similar codes spread across the country throughout the twentieth century.⁹

5. Sonia Hirt, *Home Sweet Home: American Residential Zoning in Comparative Perspective*, 33 J. PLAN. EDUC. & RSCH. 292, 294 (2013).

6. *Id.* at 3.

7. *Id.* at 5; CITY N.Y. BD. OF ESTIMATE & APPORTIONMENT, BUILDING ZONE RESOLUTION (N.Y. 1916), <https://www1.nyc.gov/assets/planning/download/pdf/about/city-planning-history/zr1916.pdf> [<https://perma.cc/5TT8-PRFV>].

8. Hirt, *supra* note 5, at 5.

9. *Id.* at 2.

Zoning in the United States is unique because it emphasizes the strict separation of uses, with “monofunctionality [as] the ideal landscape.”¹⁰ Originally, monofunctionality was thought to protect health and safety by separating uses that were thought to be incompatible, like industrial and residential uses. Later, however, interpretations of this theory outstripped its justification by encouraging separation of all uses.¹¹ U.S. zoning codes also have a unique, hierarchical structure that places residential uses, especially detached single-family homes, at the pinnacle of desired land use.¹² The 1916 New York code, for example, was hierarchical in that it allowed residences to be located in any zone, while businesses could only be located in the business zone and the unrestricted zone, and manufacturing only in the unrestricted zone.¹³ This established a hierarchy with the residential zone given the most protection, indicating that it was most valued.

In the mid-twentieth century, zoning became more restrictive. The United States embarked on its suburban experiment, building new neighborhoods with only detached single-family homes built to a finished state and not intended to change.¹⁴ Simultaneously, many cities “downzoned” their neighborhoods to only allow detached single-family homes.¹⁵ This combination resulted in the vast majority of land in cities being exclusively zoned for this type of home.¹⁶ In Denver, for example, 77 percent of land is zoned exclusively for single-family homes.¹⁷ This pattern repeated itself across the United States.¹⁸ Early on, single-family zoning was intended to be exclusive—

10. *Id.* at 6.

11. *Id.*

12. *Id.* at 5.

13. *Id.*

14. Daniel Herriges, *Making Normal Neighborhoods Legal Again*, STRONG TOWNS (July 3, 2019), <https://www.strongtowns.org/journal/2019/7/3/making-normal-neighborhoods-legal-again> [<https://perma.cc/6T5Z-69E8>].

15. *Id.*

16. *Group Living Text Amendment*, CITY & CNTY. DENV. 6 (Sept. 2020), https://www.denvergov.org/content/dam/denvergov/Portals/646/documents/Zoning/text_amendments/Group_Living/Group_Living_Zoning_History_Equity.pdf [<https://perma.cc/VTB2-YQ8Y>].

17. *Id.*

18. Eric Jaffe, *Is It Time to End Single-Family Zoning?*, MEDIUM (Feb. 6, 2020), <https://medium.com/sidewalk-talk/is-it-time-to-end-single-family-zoning-56233d69a25a> [<https://perma.cc/3SNH-PWJY>].

both in the type of buildings and the people it allowed.¹⁹ Single-family zoning often corresponded with racial redlining; zones for single-family homes were highly correlated with “green-zoned” areas that did not allow Black people to purchase or rent homes.²⁰

The Supreme Court cemented the ideal of the separated, residential zone into law with the seminal zoning case, *Euclid v. Ambler*.²¹ In 1922, the appellee challenged the Ohio city of Euclid’s new zoning ordinance that restricted what uses were allowed in what areas, as well as other building requirements like the allowable size and height of buildings.²² Like New York’s code, this ordinance had cumulative, hierarchical uses—single-family homes were allowed in each of the zoning areas, while industry was more restricted.²³ The appellee argued that the code amounted to a violation of the Fourteenth Amendment because it deprived him of his property without due process; it limited the available uses for his property, thus destroying some of the value.²⁴

However, the Court rejected this argument, upholding the municipality’s police power to enact zoning codes to protect the “health and safety of the community.”²⁵ It also upheld the hierarchy in building forms that it established, with single-family as the most desirable, in stark terms:

[V]ery often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district . . . [interfering] with the free circulation of air and monopolizing the rays of the sun . . . [bringing] disturbing noises incident to increased traffic . . . and parked automobiles . . . thus detracting from their safety and

19. Brian An et al., *The Physical Legacy of Racism: How Redlining Cemented the Modern Built Environment* 3 (Sept. 1, 2019) (conference paper for the Am. Real Estate and Urb. Econ. Assoc.), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3500612 [<https://perma.cc/D5CG-2RBX>].

20. *Id.* at 2–3.

21. *Village of Euclid v. Ambler Realty*, 272 U.S. 365 (1926).

22. *Id.* at 380–81.

23. *Id.*

24. *Id.* at 385.

25. *Id.* at 391.

depriving children of the privilege of quiet and open spaces for play.²⁶

In a nod to zoning codes' evolution from the common law of nuisances, the court concluded that “[u]nder these circumstances, apartment houses . . . come very near to being nuisances.”²⁷ This statement exemplifies the exclusionary sentiment, borne of bias and still lingering today, against apartment buildings and their occupants—a bias that has classist and racist implications, as will be discussed below.

After *Euclid*, the U.S. Department of Commerce published the Standard State Zoning Enabling Act of 1926, a model statute that states could adopt to require development in “accordance with a comprehensive plan.”²⁸ Such plans should consider fire safety and street congestion, both traditional notions of public interest, as well as new notions, like providing adequate light, avoiding overconcentration of population, and promoting aesthetics.²⁹ In accordance with these goals, the model act envisioned providing municipalities with additional regulatory tools, like determining open space requirements and the percentage of a lot that could be developed.³⁰ It also solidified the practice of using zones to assign uses to particular areas.³¹ The shift from common law nuisance to municipal regulation “transformed the orientation of property rights [from] what used to be a negative liberty into a positive entitlement.”³² The shift created “a legal guarantee that neighbors would use their lots consistently with tastes, standards and economic goals set by the control group.”³³ Many progressives at the time advocated for this shift as enabling public safety, health, and the common good.³⁴

Zoning codes are ubiquitous in the United States, and they have largely remained restrictive.³⁵ Zoning codes are useful

26. *Id.* at 394.

27. *Id.* at 394–95.

28. Eric R. Claeys, *Euclid Lives? The Uneasy Legacy of Progressivism in Zoning*, 73 *FORDHAM L. REV.* 731, 740 (2004).

29. *Id.* at 740.

30. *Id.* at 740–41.

31. *Id.* at 741.

32. *Id.*

33. *Id.*

34. *Id.* at 742.

35. See generally Solomon Greene & Ingrid Gould Ellen, *Breaking Barriers, Boosting Supply: How the Federal Government Can Help Eliminate Exclusionary*

tools for cities to reduce the negative effects of development in a way that gives people the ability to influence how their community develops, and zoning ensures that truly incompatible uses are separated.³⁶ However, overly restrictive zoning codes come with problems.³⁷ Part of the reason that zoning codes have largely remained restrictive is that narrow political interests have an outsized influence over local housing policies.³⁸ Homeowners who want to maintain their property value have no incentive to increase the supply of housing because more abundant, cheaper housing will lower the value of their homes.³⁹ There is also the more insidious concern that the inclusion—or intrusion—of cheaper housing into a neighborhood will lower property values by changing the character of the neighborhood, or by allowing people who have lower incomes or are of different races to live in the neighborhood.⁴⁰ Because homes are many Americans' most valuable asset, they have an incentive to protect home values in a way that can be detrimental to many societal interests.⁴¹

B. The History of Zoning in Boulder

Boulder's development patterns and historical housing policies, like those of other cities that developed similarly, have contributed to its current housing and social issues. Boulder began as a small settlement during Colorado's Gold Rush in the

Zoning, URB. INST. (2020), https://www.urban.org/sites/default/files/publication/102963/breaking-barriers-boosting-supply_0.pdf [<https://perma.cc/72JG-9BNA>].

36. See, e.g., *Land Use Codes*, COLO. DEP'T OF LOC. AFFS. (2023), <https://cdola.colorado.gov/community-development-planning/land-use-codes> [<https://perma.cc/L2N4-LG2Y>]; Joseph Schilling, *The Public Health Roots of Zoning: In Search of Active Living's Legal Genealogy*, 28 AM. J. PREVENTIVE MED. 96 (2005) (discussing the public health effects of zoning).

37. Jenny Schuetz, *Is Zoning a Useful Tool or a Regulatory Barrier?*, BROOKINGS INST. (Oct. 31, 2019), <https://www.brookings.edu/research/is-zoning-a-useful-tool-or-a-regulatory-barrier> [<https://perma.cc/KU9Y-8BGC>].

38. Greene & Ellen, *supra* note 35, at 3.

39. See *id.*

40. John Eligon, *Residents Feared Low-Income Housing Would Ruin Their Suburb. It Didn't.*, N.Y. TIMES, <https://www.nytimes.com/2020/11/05/us/affordable-housing-suburbs.html> [<https://perma.cc/EH8Z-V3XB>] (June 16, 2021).

41. *Chapter 5: Which Assets Are Most Important?*, PEW RSCH. CTR. (July 26, 2011), <https://www.pewresearch.org/social-trends/2011/07/26/chapter-5-which-assets-are-most-important> [<https://perma.cc/N3PA-UBN9>].

1850s and was incorporated as a town in 1871.⁴² By 1900, Boulder had a population of around 6,150 and had acquired its first parks and open space areas, establishing its reputation as a city prioritizing nature.⁴³

During the 1950s, Boulder experienced significant population growth, and by 1970, Boulder's population had tripled to nearly 67,000 residents.⁴⁴ During that time, the city began discussing means to maintain Boulder's character and property values in the face of population growth and passed a variety of regulations to restrict growth and its impacts. For instance, in 1959, the city passed "Blue Line" regulations that restricted city water services above 5,750 feet with the intention of keeping the mountainous area undeveloped.⁴⁵ The Blue Line was later extended to include sewer services for the same purpose.⁴⁶ In 1967, the city passed a tax to purchase and preserve open space.⁴⁷ To protect the city's iconic views of the mountains, a city charter amendment was passed in 1971 to impose a height limit of fifty-five feet on new construction, with some exceptions.⁴⁸ In 1970, Boulder implemented its urban growth boundary, also known as the "greenbelt," which created a boundary beyond which the city could not extend water and sewer services and limited new subdivisions that would require "urban" levels of services.⁴⁹ Land outside of this urban boundary remains at a rural density and cannot be incorporated into the city without an express act from both the city and county of Boulder.⁵⁰ The aim was to limit urban sprawl and to conserve

42. *Boulder History*, VISIT BOULDER, <https://www.bouldercoloradousa.com/about-boulder/boulder-history> [https://perma.cc/H6UL-SVZL].

43. *Id.*

44. *The Boulder Timeline*, MUSEUM OF BOULDER, <https://museumofboulder.org/time> [https://perma.cc/AUX9-KHQM]. Boulder's population growth was largely due to the construction of the nearby Rocky Flats Nuclear Weapons Factory and the U.S. 36 Denver-Boulder Turnpike.

45. BOULDER, COLO., MUN. CODE art. VIII, § 128A; *The Boulder Timeline*, *supra* note 44.

46. Peter Pollock, *Controlling Sprawl in Boulder: Benefits and Pitfalls*, 10 LAND LINES 1, 1 (1998), <https://www.lincolnst.edu/publications/articles/controlling-sprawl-boulder> [https://perma.cc/NJ9E-BY8Q].

47. *The Boulder Timeline*, *supra* note 44.

48. *Id.*; BOULDER, COLO., MUN. CODE art. 5, § V, § 84 (2022) (effective Nov. 2, 1971).

49. Pollock, *supra* note 46.

50. *Id.*

both farmland and undeveloped open space around the city, while in theory focusing development within city boundaries.⁵¹ These are laudable policies that effectively protected the open space around Boulder and may have increased density by concentrating development within city boundaries.

However, in 1976, voters passed the Danish Plan, a cap that limited the city's growth rate to 2 percent annually.⁵² Often characterized as a "slow-growth" ordinance, the Danish Plan placed a limit on the number of residential buildings that could be constructed in a given year.⁵³ Only 450 units could be built per year, which averaged to about a 1.5 percent annual increase in the city's housing stock.⁵⁴ After the original bill sunset, Boulder passed new versions of the slow-growth ordinance.⁵⁵ The later versions lowered the growth rate from 2 percent to 1 percent of the current housing stock.⁵⁶

Today, 80 percent of Boulder is zoned for detached single-family homes, meaning that no dense housing or mixed-use building can be built in the vast majority of the city.⁵⁷ Boulder also enacted occupancy limits to restrict the number of people who could live in a home.⁵⁸ Boulder's current occupancy limits were put in place in 1981, allowing up to three unrelated persons to reside together in low-density residential districts and up to four in medium and high-density districts.⁵⁹ In essence, starting

51. *Id.*

52. The growth limit worked by limiting building permits to the approved percentages per year. *Boulder Timeline*, *supra* note 44.

53. Paul Danish, *The Danish Plan Recalled*, BOULDER WEEKLY (Apr. 30, 2015), <https://www.boulderweekly.com/opinion/danish-plan/the-danish-plan-recalled> [<https://perma.cc/EC8T-3JLP>].

54. The ordinance included four exceptions: single-family homes on a single lot if the lot existed in 1976, a multifamily structure of four units or less on a single lot if the lot existed in 1976, new subdivisions of four units or less, and projects constructed by the housing authority. The ordinance had a five-year sunset and originally included merit-based permit awards and preference for development within central Boulder. Later versions did not include these exceptions but did include exemptions for certain neighborhoods where dense development is intended to be concentrated, such as around 28th and 30th streets. *Id.*

55. *See* BOULDER, COLO., MUN. CODE tit. 9, ch. 14 (2022).

56. *Id.*

57. Hendrix, *supra* note 1.

58. *Occupancy Limits*, CITY OF BOULDER (2023), <https://bouldercolorado.gov/occupancy-limits> [<https://perma.cc/H5DC-G556>].

59. There are limited exceptions to the occupancy limits, including for approved cooperative housing after Boulder passed an ordinance allowing co-op, or cooperative, housing in 2017. The rationale for passing the co-op ordinance was that it allowed for more housing choices, greater affordability for tenants, and reduced impacts on the environment by reducing per-person heating and cooling costs—all

in the late 1950s, Boulder passed a variety of restrictions on housing construction: first restricting growth into the foothills, then restricting building height, then restricting outward growth to preserve farmland and open space, and finally restricting internal growth with the growth cap, single-family zoning, and occupancy limits.⁶⁰ The result today is a severe shortage of housing. For instance, in 2019, only ninety-three additional housing units were built in the entire city while Boulder's population increased by around four thousand people.⁶¹

It is important to distinguish between Boulder's various housing restrictions to determine which have the most significant impact on reducing housing construction and which primarily function to preserve open space.⁶² The point of this Comment is not to criticize all these measures, particularly because the outward growth restrictions have significant environmental benefits in reducing sprawl, preserving open space, and theoretically concentrating construction within the city. However, the outward growth restrictions—combined with the height restriction, the slow-growth ordinance, the occupancy limits, and the zoning code that only allows detached single-family homes in the majority of Boulder—have created a housing crisis.⁶³

similar to rationales for zoning reform. *Id.*; BOULDER, COLO., MUN. CODE tit. 4, ch. 20, §§ 69 (1981); *Co-op Housing*, CITY OF BOULDER, <https://bouldercolorado.gov/services/co-op-housing> [<https://perma.cc/55QU-5NJV>]; Jordan Mann, *Inside Boulder's Growing (and Illegal) Cooperative Housing Movement*, SHAREABLE (Feb. 17, 2015), <https://www.shareable.net/inside-boulders-growing-and-illegal-cooperative-housing-movement> [<https://perma.cc/JF8L-3KKP>].

60. See discussion *supra* Section I.B; BOULDER, COLO., MUN. CODE tit. 9, ch. 8 (1981).

61. *About Us Boulder Community Profile*, CITY OF BOULDER (2023), <https://bouldercolorado.gov/boulder-measures/about-us-boulder-community-profile> [<https://perma.cc/4QG4-NKUX>]; *Boulder, Colorado Population 2022*, WORLD POPULATION REV. (2022), <https://worldpopulationreview.com/us-cities/boulder-co-population> [<https://perma.cc/Q4DE-NK62>].

62. Hendrix, *supra* note 1.

63. Obed Manuel, *Colorado's Housing Crisis Explained. CPR News Is Exploring the Issue by Meeting the People Living Through It*, CPR NEWS (Oct. 11, 2021), <https://www.cpr.org/2021/10/11/colorado-affordable-housing-crisis-explained> [<https://perma.cc/3FAJ-DYQL>].

II. PROBLEMS WITH MODERN ZONING CODES

While zoning has created many benefits, there are significant problems that have resulted from overly restrictive zoning codes. This Part will discuss four of those impacts: unaffordable housing, environmental degradation, economic and racial segregation, and economic stagnation.

A. *Unaffordable Housing*

Colorado is facing an affordable housing crisis.⁶⁴ Housing is considered affordable if people spend less than 30 percent of their income towards rent; renters spending above 30 percent are considered “rent burdened,” and those spending above 50 percent are considered “severely cost burdened.”⁶⁵ In Colorado, spending less than 30 percent and renting a two-bedroom apartment at the median rate, requires making \$27.50 an hour.⁶⁶ Of the renters in Colorado that are considered extremely low-income, 74 percent are severely cost burdened.⁶⁷ About 150,000 households in Colorado were considered rent burdened in January 2020.⁶⁸ Not only do rent increases cause housing instability as larger percentages of income go toward rent, but rent increases also correlate with increases in the number of people experiencing homelessness.⁶⁹

Part of the affordability issue is a mismatch between housing supply and demand, resulting in a general shortage of housing. About one million people have moved to Colorado in the past decade, and housing construction has not kept pace. In the same decade, there were only around 225,000 homes built—a decline of 40 percent in home production from the decade

64. *Id.*

65. *Id.*

66. *Id.*

67. *Housing Needs by State: Colorado*, NAT'L LOW INCOME HOUS. COAL. (2022), <https://nlihc.org/housing-needs-by-state/Colorado> [<https://perma.cc/7JUQ-4VF7>].

68. ROOT POL'Y RSCH., STATE OF COLORADO: FINDINGS OF THE SPECIAL EVICTION PREVENTION TASK FORCE 8 (2020), https://www.coloradorpm.com/wp-content/uploads/2020/10/CO_Special_Eviction_Prevention_Task_Force_Report_.pdf [<https://perma.cc/JCN4-UNU8>].

69. Kristin Toombs, *Homelessness in Colorado*, COLO. DEPT OF LOC. AFFS. (Sept. 21, 2021), https://leg.colorado.gov/sites/default/files/images/doh_ahttf_presentation_9-21-21.pdf [<https://perma.cc/S5GE-WUNP>].

before.⁷⁰ Meanwhile, affordable housing units for people making less than \$45,000 (where they would pay less than 30 percent of their income on rent) have fallen in the past decade from 410,000 units to 224,000.⁷¹ For extremely low-income renters, the shortage is about 113,000 homes.⁷²

Another aspect is a mismatch in housing type. Only one in five U.S. households comprises a nuclear family, yet the vast majority of new housing consists of detached single-family homes designed for this group.⁷³ Additionally, there is not enough affordable housing built to account for the decrease in naturally occurring affordable housing supply.⁷⁴ The solution should therefore involve both increasing the amount of housing overall and increasing the variety of housing so that people have choices available to fit their personal needs, in terms of number of bedrooms, style, and cost.

Boulder in particular is facing an acute shortage of affordable housing. Boulder has the most expensive housing to rent in Colorado,⁷⁵ where the average monthly rent for a one-bedroom apartment as of July 2022 was \$2,347.⁷⁶ Forty percent of Boulder's renters are severely cost burdened.⁷⁷ Boulder has the most expensive real estate market in Colorado as well, where the "typical" house price in July 2022 was \$1,100,773.⁷⁸ The

70. Nathaniel Minor et al., *Census: Front Range Cities and Suburbs Surge as Colorado's Population Booms by Nearly 750,000 Over Last Decade*, CPR NEWS (Aug. 12, 2021), <https://www.cpr.org/2021/08/12/census-colorado-population-growth-front-range> [<https://perma.cc/LW8Q-7TY7>].

71. Toombs, *supra* note 69.

72. *Housing Needs by State: Colorado*, NAT'L LOW INCOME HOUS. COAL. (2023), <https://nlihc.org/housing-needs-by-state/Colorado> [<https://perma.cc/VQ83-693J>]; *2021 Colorado Housing Profile*, NAT'L LOW INCOME HOUS. COAL., https://nlihc.org/sites/default/files/SHP_CO.pdf [<https://perma.cc/8G3H-J9US>] (July 26, 2022).

73. Daniel Herriges, *Only 1 in 5 U.S. Households Is a Nuclear Family. Our Housing Stock Hasn't Caught Up*, STRONG TOWNS (Feb. 26, 2019), <https://www.strongtowns.org/journal/2019/2/26/only-1-in-5-us-households-is-a-nuclear-family-our-housing-stock-hasnt-caught-up> [<https://perma.cc/S2GR-3PSV>].

74. *Id.*

75. Toombs, *supra* note 69.

76. *Boulder, CO Rental Market Trends*, RENT CAFÉ, <https://www.rentcafe.com/average-rent-market-trends/us/co/boulder> [<https://perma.cc/3WK7-F4QC>] (July 2022).

77. *Renter Cost Burdens, Metropolitan and Micropolitan Areas*, JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV. (2023), https://www.jchs.harvard.edu/ARH_2017_cost_burdens_by_metro [<https://perma.cc/2D4G-TZYT>].

78. *Boulder Home Values*, ZILLOW, <https://www.zillow.com/boulder-co/home-values> [<https://perma.cc/TZC7-LVW8>] (Aug. 2022).

mismatch between supply and demand for housing is particularly clear in Boulder, with four times as many jobs as houses being added to Boulder every year.⁷⁹ One result is that many people work in Boulder but cannot afford to live there.⁸⁰ For these people, there are increased commuting costs and opportunity costs from the commuting time.⁸¹ These people are also excluded from Boulder's land use decision-making processes because they are not residents, which distorts the decision-making process by excluding the interests of would-be residents.⁸²

The effect of zoning reform on housing affordability is a complicated—and contentious—area of analysis. There is much debate about whether upzoning, particularly to allow large multifamily developments, increases affordability.⁸³ Many

79. See generally ABIGAIL BRADFORD ET AL., *GROWING GREENER: THE ENVIRONMENTAL BENEFITS OF A COMPACT AND CONNECTED BOULDER* (2019), <https://frontiergroup.org/reports/fg/growing-greener-0> [<https://perma.cc/BE5B-SB2L>].

80. Boulder Daily Camera, *Heavy Commuting into Boulder Drives Challenges for City*, DENVER POST (Apr. 1, 2019, 6:00 AM), <https://www.denverpost.com/2019/04/01/boulder-commuting-climate-change> [<https://perma.cc/PQ4N-P24F>].

81. *Id.*

82. See Anika Singh Lemar, *The Public Hearing Process for New Housing Is Broken. Here's How to Fix It.*, BROOKINGS (May 4, 2022), <https://www.brookings.edu/blog/the-avenue/2022/05/04/the-public-hearing-process-for-new-housing-is-broken-heres-how-to-fix-it> [<https://perma.cc/G2BE-XK9M>] (discussing the importance of “equitable and effective” public participation at hearings related to housing).

83. See Andrés Rodríguez-Pose & Michael Storper, *Housing Urban Growth and Inequalities: The Limits to Deregulation and Upzoning in Reducing Economic and Spatial Inequality*, 57 SAGE JS. 223 (2019); TOM ANGOTTI ET AL., *ZONED OUT! RACE, DISPLACEMENT, AND CITY PLANNING IN NEW YORK CITY* (Tom Angotti & Sylvia Morse eds., 2016); Patrick Range McDonald, *Inside Game: California YIMBY, Scott Weiner, and Big Tech's Troubling Housing Push*, HOUS. IS A HUM. RIGHT (Jan. 13, 2020), <https://www.housinghumanright.org/inside-game-california-yimby-scott-wiener-and-big-tech-troubling-housing-push> [<https://perma.cc/7SJU-YVPW>]; Yonah Freemark, *Upzoning Chicago: Impacts of a Zoning Reform on Property Values and Housing Construction*, 56 URB. AFFS. REV. 758 (2019). But see Evan Mast, *The Effect of New Market-Rate Housing Construction on the Low-Income Housing Market* (W.E. Upjohn Inst. for Emp. Rsch., Working Paper No. 19-307, 2019); Hongwei Dong, *Exploring the Impacts of Zoning and Upzoning on Housing Development: A Quasi-Experimental Analysis at the Parcel Level*, J. PLAN. EDUC. & RSCH., Feb. 1, 2021; Joe Cortright, *Will Upzoning Ease Housing Supply Problems?*, CITY COMMENT. (May 15, 2019), <https://cityobservatory.org/will-upzoning-ease-affordability> [<https://perma.cc/C3DZ-ML7T>]; Alex Baca & Hana Lebovits, *No, Zoning Reform Isn't Magic. But It's Crucial.*, BLOOMBERG: CITYLAB (Feb. 5, 2019), <https://www.bloomberg.com/news/articles/2019-02-05/why-that-new-zoning-study-shouldn-t-deter-yimbys> [<https://perma.cc/9XX3-PQ77>].

scholars contend that reforming zoning codes to allow more dense construction increases affordability because it increases supply to match demand.⁸⁴ Others contend that it does not because it increases gentrification and eliminates naturally-occurring affordable housing.⁸⁵ Upzoning may also cause land speculation and may not lead to increases in construction depending on how the policy is crafted.⁸⁶ The debate is characterized as a choice between increasing the supply of housing or avoiding gentrification—a question that has no easy answer and has prompted fierce debate.⁸⁷ One reason for the debate is that the existing studies are difficult to compare, as each study considers different areas and policies that have different protections in addition to the zoning reform.⁸⁸

Recently, a consensus has grown that upzoning at a city-wide or regional level decreases the cost of housing overall.⁸⁹ Because there are so many wrinkles to the basic premise that housing supply increases affordability, this debate is beyond the scope of this Comment. Instead, this Comment will accept the consensus that, generally, increased housing construction lowers housing costs while also emphasizing the importance of crafting policies that minimize the legitimate concerns of the “supply skeptics.”⁹⁰ For example, an ideal zoning reform policy would include specific measures to avoid land speculation and gentrification, spread the zoning change out across entire cities or regions, and incorporate measures to construct new affordable housing.⁹¹ Additionally, the fact that the effects on affordability are not well established should not be a barrier to adopting zoning reform because of the numerous other demonstrated positive impacts of reform.

84. Vanessa Brown Calder, *Zoning, Land-Use Planning, and Housing Affordability*, CATO INST., Oct. 18, 2017, at 1, 4–5.

85. Rodríguez-Pose & Storper, *supra* note 83.

86. Yonah Freemark, *Housing Arguments Over SB 50 Distort My Upzoning Study. Here’s How to Get Zoning Changes Right*, FRISC (May 22, 2019), <https://thefrisc.com/housing-arguments-over-sb-50-distort-my-upzoning-study-heres-how-to-get-zoning-changes-right-40daf85b74dc> [https://perma.cc/44N2-DTQT].

87. McDonald, *supra* note 83.

88. *See Housing Needs By State: Colorado*, *supra* note 67.

89. Vicki Been et al., *Supply Skepticism: Housing Supply and Affordability*, 29 HOUS. POL’Y DEBATE 25 (2018).

90. *See generally id.* (presenting and responding to common “supply skeptic” arguments and reviewing literature on both sides of the debate, then concluding that increasing housing supply lowers prices).

91. Freemark, *supra* note 83.

Partly because of the disagreement over the effects on affordability, zoning reform can be politically complicated to pass.⁹² The issue does not tend to track traditional political divides; opposition to zoning reform is typically bipartisan. For example, homeownership is correlated with opposition to new development regardless of the homeowner's political ideology.⁹³ But the political support can be equally bipartisan. Many liberal organizations have advocated for zoning reform as an affordability tool, with additional benefits of environmental health and desegregation.⁹⁴ Free-market and conservative organizations, particularly those that tout free market principles and personal property rights, also advocate for zoning reform as a means of increasing affordability while furthering their values of deregulating the market and reducing limitations on personal property.⁹⁵ The conservative rationale is that these limitations drive up housing prices and restrict property owners' rights to develop their land.⁹⁶ As an example of potential bipartisan collaboration, Colorado Republicans introduced a bill in 2022 that would ban cities from enacting slow-growth ordinances such as Boulder's Danish Plan.⁹⁷ That bill united conservatives advocating deregulation with progressives advocating housing desegregation and affordability. While it did not pass, the coalition it formed will likely continue work in future sessions.⁹⁸ Because of the uncertainties around how zoning affects housing affordability and the possibilities of bipartisan coalition building, it is important to emphasize

92. See, e.g., *infra* p. 892–893 (discussing Oregon and California's challenges in passing reform laws). That Oregon and California are the only states to pass zoning reform laws also indicates the difficulty of passing such legislation.

93. William Marble & Clayton Nall, *Where Self-Interest Trumps Ideology: Liberal Homeowners and Local Opposition to Housing Development*, 83 J. POL. 1747, 1753 (2021).

94. See, e.g., *infra* p. 892–893 (discussing the liberal political organizations that supported Oregon's zoning reform laws).

95. *From Conflict to Compassion: A Colorado Housing Development Blueprint for Transformational Change*, COMMON SENSE INST. (June 24, 2021), <https://commonsenseinstituteco.org/co-housing-blueprint> [<https://perma.cc/7DZJ-69CS>].

96. Vanessa Brown Calder, *Zoning Reform Is for Conservatives Too*, CATO INST. (Feb. 28, 2019, 1:04 PM), <https://www.cato.org/blog/zoning-reform-conservatives-too> [<https://perma.cc/F74S-95E2>].

97. S.B. 22-063, 73d Gen. Assemb., 2d Reg. Sess. (Colo. 2022).

98. Andrew Kenney, *Anti-'Slow Growth' Bill Fails at Capitol After Democrats Reshuffle Committees*, CPR NEWS (Mar. 1, 2022, 6:35 PM), <https://www.cpr.org/2022/03/01/anti-slow-growth-bill-fails-colorado-legislature> [<https://perma.cc/9ATJ-ZSN3>].

zoning reform's affordability benefits along with its other benefits.

B. Environmental Considerations

One of the main problems with Boulder's restrictive zoning code is that it contributes to environmental problems.⁹⁹ The environmental costs of single-family zoning and the resultant sprawl in surrounding suburbs are significant and include pollution from car use and the conversion of wilderness and farmland to suburban construction.¹⁰⁰ In fact, restrictive zoning has such a harmful impact on the environment that some commentators have noted that "[t]here is no other area in environmental law where the goals of the regulatory program are not just indifferent, but actively hostile, to the best thinking in the field."¹⁰¹ Of course, some of Boulder's zoning measures have positive environmental effects, like the Blue Line and greenbelt policies that have limited Boulder's outward sprawl and contributed to the conservation of open space. However, these environmental benefits are undercut by the environmental harms of restrictive zoning measures, particularly those that restrict denser infill development, like single family zoning and the growth cap.

In demanding low-density, spread-out uses, modern restrictive zoning increases car use, which increases pollution.¹⁰² Denser environments allow people to get around without a car because they create closer proximity between destinations, and they create a wider variety of destinations within a smaller distance to where people live.¹⁰³ Higher density populations also support more robust public transportation networks.¹⁰⁴ Multiple studies have supported these conclusions—that people who live in denser areas own fewer cars, drive them less often, and travel more often by foot, bike,

99. G.S. Kleppel, *Urbanization and Environmental Quality: Implications of Alternative Development Scenarios*, 8 ALB. L. ENV'T OUTLOOK J. 37, 40 (2002).

100. *Id.*

101. Jay Wickersham, *Jane Jacob's Critique of Zoning: From Euclid to Portland and Beyond*, 28 B.C. ENV'T L. REV. 547, 554 (2001).

102. Keith Bartholomew, *Cities and Accessibility: The Potential for Carbon Reductions and the Need for National Leadership*, 36 FORDHAM URB. L.J. 2, 192–95 (2009).

103. Herbert S. Levinson & F. Houston Wynn, *Effects of Density on Urban Transportation Requirements*, HIGHWAY RSCH. REC., 1963, at 38.

104. *Id.*

and public transport.¹⁰⁵ However, low-density development also encourages urban sprawl, which reduces the amount of land available for open space, wilderness, and agriculture.¹⁰⁶ One study showed that, between 2000 and 2025, sprawl would consume 4.7 million more acres of land than compact development would have consumed.¹⁰⁷ As Jay Wickersham writes, “By fostering or requiring low density development with a high separation of uses, Euclidean zoning is one of the great generators of suburban sprawl, with all of its environmental, economic, and social costs.”¹⁰⁸

The unique conditions of Boulder’s growth limits, combined with the fact that the city is growing jobs at a rate four times as high as it is building houses, means that many people who work in Boulder are forced to commute from other cities like Longmont or Denver.¹⁰⁹ While there is some public transportation for commuters to and from Boulder, particularly the bus routes along the US-36 corridor, by far most commuters drive personal vehicles into the city.¹¹⁰ Inbound commuters to Boulder drive an average of around thirty miles a day to and from Boulder, and 77 percent drive alone.¹¹¹ While Boulder’s population is around 100,000, an additional 60,000 commute into Boulder every day.¹¹² These commuters drive 245 million miles more annually than they would if they lived in Boulder, which creates around 99,000 metric tons of carbon dioxide emissions.¹¹³ Boulder also has particularly high emissions from automobiles because so much of the city is zoned for single-family use.¹¹⁴ Separating housing from employment and retail in low-density developments causes people to drive more.¹¹⁵ Boulder residents who live in detached single-family homes are twice as likely to drive to work alone as Boulder residents who

105. Daniel Baldwin Hess & Paul M. Ong, *Traditional Neighborhoods and Automobile Ownership*, 1805 TRANSP. RES. REC. 35, 42 (2002).

106. *See generally* ROBERT W. BURCHELL ET AL., COSTS OF SPRAWL—2000, at 20 (Eileen P. Delaney & Beth Hatch eds., Nat’l Acad. Press 2002).

107. *Id.* at 8.

108. Wickersham, *supra* note 101, at 557.

109. Bradford et al., *supra* note 79; *see supra* notes 42–63 and accompanying text.

110. Bradford et al., *supra* note 79.

111. *Id.*

112. Hendrix, *supra* note 1. These numbers are from before the COVID-19 pandemic.

113. Bradford et al., *supra* note 79.

114. *Id.*

115. *Id.*

live in multifamily dwelling units, like apartment buildings or townhomes.¹¹⁶

Single-family homes are also more resource-intensive to heat, cool, and live in than multifamily homes.¹¹⁷ One study estimates that, if federal housing policy changed to favor multifamily housing construction and fourteen million homes were multifamily rather than single-family, energy demand would be reduced by 27–47 percent per household, while total urban residential energy use would decrease by 4.6–8.3 percent.¹¹⁸ Detached single-family homes consume more energy than other housing types, even controlling for variables like housing size, climate, and income, partly because of the energy efficiencies of sharing walls.¹¹⁹ When considering household size as well—a significant factor because detached single-family homes tend to be larger—the difference between single-family and multifamily homes is even more pronounced.¹²⁰

The average household carbon footprint of urban core cities is consistently lower than in suburbs. Population density negatively correlates with household carbon footprint.¹²¹ In aggregate, suburbs account for about 50 percent of the United States' total household carbon footprint.¹²² The energy used in constructing and maintaining single-family homes is higher than for duplexes, triplexes, and fourplexes as well.¹²³ In one study, if three old single-family homes are replaced by a duplex, triplex, and fourplex, the carbon emissions per household would be 20 percent lower than if they were replaced by three larger

116. *Id.*

117. Peter Berrill et al., *Linking Housing Policy, Housing Typology, and Residential Energy Demand in the United States*, 55 ENV'T SCI. & TECH. 2224, 2230 (2021).

118. *Id.* at 2224; Christopher Jones & Daniel M. Kammen, *Spatial Distribution of U.S. Household Carbon Footprints Reveals Suburbanization Undermines Greenhouse Gas Benefits of Urban Population Density*, 48 ENV'T SCI. & TECH. 895 (2013).

119. Berrill et al., *supra* note 117, at 2225; Lisa Prevost, *Co-housing Project Rethinks Residential Energy Use with Shared Walls, Amenities* (Apr. 2, 2020), <https://energynews.us/2020/04/02/co-housing-project-rethinks-residential-energy-use-with-shared-walls-amenities> [<https://perma.cc/M9T2-V89V>].

120. *Id.*

121. *See generally* Jones & Kammen, *supra* note 118.

122. *Id.*

123. Michael Andersen, *A Duplex, a Triplex, and a Fourplex Can Cut a Block's Carbon Impact 20%*, SIGHTLINE INST. (June 7, 2019, 5:00 AM), <https://www.sightline.org/2019/06/07/a-duplex-a-triplex-and-a-fourplex-can-cut-a-blocks-carbon-impact-20> [<https://perma.cc/LMC4-5DCH>].

detached single-family homes, largely because the new homes are smaller and attached, resulting in greater efficiencies.¹²⁴ The National Resources Defense Council stated that residential energy efficiency is the largest source of potential carbon dioxide reduction, which can amount to around 550 million metric tons of carbon dioxide in annual reductions.¹²⁵ This finding highlights the potential for huge emissions reductions that could occur by building more efficient housing, like smaller, attached duplexes or other ‘plexes. An accessory dwelling unit or other small house emits significantly less carbon dioxide than a medium-sized detached single-family home, averaging 20 to 40 percent fewer emissions over its lifetime.¹²⁶ Because of the environmental impacts of car dependency, land consumption, and the high energy consumption of single-family homes, there are many environmental benefits to reforming zoning codes.

C. *De Facto Segregation*

Euclidean zoning also perpetuates segregation because zoning originated partly as a legal alternative to redlining. Many of the racialized impacts of zoning remain.¹²⁷ One of the reasons that zoning became ubiquitous was that it allowed cities and housing developments to enforce economic and racial segregation without courts deeming it to infringe on anyone’s constitutional rights.¹²⁸ Many cities, before enacting race-neutral zoning codes, enacted racial zoning ordinances that restricted Black home buyers from buying in certain areas.¹²⁹ The Supreme Court struck down this practice in 1917 with

124. *Id.* The size of the houses in this study is based on Oregon’s House Bill 2001, which still has maximum home sizes for new ‘plexes. The triplexes are required to be smaller than fourplexes.

125. Khalil Shahyd, *Residential Energy Efficiency is Largest Source of CO2 Reduction Potential*, NAT’L RES. DEF. COUNCIL (Oct. 5, 2017), <https://www.nrdc.org/experts/khalil-shahyd/residential-energy-efficiency-largest-source-co2-reduction-potential> [https://perma.cc/69EA-E3UV].

126. QUANTIS ET AL., A LIFE CYCLE APPROACH TO PRIORITIZING METHODS OF PREVENTING WASTE FROM THE RESIDENTIAL CONSTRUCTION SECTOR IN THE STATE OF OREGON 5 (2010), <https://www.oregon.gov/deq/FilterDocs/ADU-ResBldgLCA-Report.pdf> [https://perma.cc/7J8S-MUD4].

127. *See, e.g.*, Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1048 (1996) (discussing how local zoning and development policies perpetuate segregated communities).

128. RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017).

129. *See, e.g.*, *Buchanan v. Warley*, 245 U.S. 60 (1917).

Buchanan v. Warley,¹³⁰ on the basis that the racially exclusive ordinances infringed on property owners' right to alienate their property by selling to whomever they wished, rather than on an equal protection basis.¹³¹ After *Buchanan*, many cities shifted to race-neutral zoning ordinances but kept the same segregationist purpose.¹³² It was assumed that individuals and families with lower incomes were more likely to be people of color, so excluding lower-income housing from wealthy, White neighborhoods would, de facto, exclude people of color as well.¹³³ In some cities, neighborhoods with largely single-family homes, especially those that had deed restrictions against resale to Black buyers, were typically designated as single-family zoned homes, while areas with large Black populations were deemed suitable for industrial development.¹³⁴ Code writers have even explicitly stated that the purpose of enacting zoning codes was to uphold racial segregation.¹³⁵ Even after racial deed restrictions were deemed unconstitutional, these neighborhood classifications largely persisted. In Boulder, for example, the city's housing policies have contributed to racial and socioeconomic segregation, which is still visible in the city today.¹³⁶

130. *Id.*

131. *Id.*

132. Richard Rothstein, *The Making of Ferguson: Public Policies at the Root of its Troubles*, ECON. POL'Y INST. (Oct. 15, 2014), <https://www.epi.org/publication/making-ferguson/#epi-toc-5%29> [<https://perma.cc/TLR3-WPCR>].

133. This is often true because of systemic racism and discriminatory government policies. Only 4.1 percent of majority-White neighborhoods were classified as high poverty, whereas 30 percent of majority-Hispanic and 43 percent of majority-Black neighborhoods were high poverty in 2010. *Addressing Segregation by Income, Race, and Ethnicity*, LOC. HOUS. SOLS. (2023), <https://localhousingsolutions.org/plan/addressing-segregation-by-income-race-and-ethnicity> [<https://perma.cc/PER5-4Z7Y>].

134. Rothstein, *supra* note 132. St. Louis is given as one example where this occurred.

135. Mike Eliason, *This Is How You Slow-Walk into a Housing Shortage*, SIGHTLINE INST. (May 23, 2018, 6:30 AM), <https://www.sightline.org/2018/05/23/this-is-how-you-slow-walk-into-a-housing-shortage> [<https://perma.cc/8FKH-KVLP>].

136. Shay Castle, *Housing, Land Use Policy References Retained in Boulder's Racial Equity Plan*, BOULDER BEAT (Feb. 11, 2021), <https://boulderbeat.news/2021/02/11/racial-equity-plan-zoning> [<https://perma.cc/S3YM-6FPH>]; see also Carol Taylor, *History: The Little Rectangle Was Early Boulder's Black Neighborhood*, DAILY CAMERA (Feb. 13, 2012, 12:54 PM), <https://www.dailycamera.com/2012/02/13/history-the-little-rectangle-was-early-boulders-black-neighborhood> [<https://perma.cc/6AEV-KEWW>].

Federal policies also contributed to racial housing segregation. For example, federal subsidies for suburban housing developments were conditioned on the exclusion of Black people; many segregated public housing projects replaced integrated neighborhoods; and many housing policies required restrictive racial covenants, which required resale of homes to only White people.¹³⁷ Additionally, banking and real estate regulations supported, and in many cases required, racial segregation. Federal housing policies, like the Federal Housing Administration underwriting principles, conditioned mortgage issuance on having racial covenants. Urban renewal plans also destroyed neighborhoods predominantly occupied by people of color.¹³⁸ For example, a federal appeals court stated that “segregated housing in the St. Louis metropolitan area was . . . in large measure the result of deliberate racial discrimination in the housing market by the real estate industry and by agencies of the federal, state, and local governments.”¹³⁹ Because the policies that led to this situation in St. Louis were duplicated across most municipalities in the United States, this statement describes the situation in most of the United States as well. Even though the policies that led to this segregation are not still around, and the overtly racist and classist motivations of the early zoning codes are likely not the primary motivations anymore, they still affect the current housing landscape.¹⁴⁰ *Euclid’s* holding still persists, along with the legacy of the sentiment that “the apartment house is a mere parasite.”¹⁴¹ While many policy remedies are needed to undo housing segregation, one important step is repealing zoning codes that bar development of diverse, affordable housing types in desirable neighborhoods that are accessible to everyone.

137. These racial covenants were held unconstitutional in 1948. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

138. Rothstein, *supra* note 132.

139. Rothstein, *supra* note 132 (quoting *United States v. City of Black Jack*, 508 F.2d 1179, 1186 (8th Cir. 1974)).

140. See Michael Andersen, *Maps: Portland’s 1924 Rezone Legacy Is ‘A Century of Exclusion’*, SIGHTLINE INST. (May 25, 2018, 12:10 PM), <https://www.sightline.org/2018/05/25/a-century-of-exclusion-portlands-1924-rezone-is-still-coded-on-its-streets> [<https://perma.cc/5M7C-V4D7>].

141. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394 (1926).

D. Economic Stagnation

Restrictive zoning also strains the economy. From a municipality's standpoint, low-density development creates liability in the form of significant infrastructure that becomes the city's responsibility to maintain.¹⁴² Car dependency increases the need for infrastructure by causing buildings to be farther apart, which in turn requires more roads and plumbing to connect them.¹⁴³ The increased cost of infrastructure is combined with a lower density of taxpayers to support that infrastructure, resulting in a large fiscal burden for municipalities, which then need to make tradeoffs on spending for other governmental services.¹⁴⁴ The American Society of Civil Engineers estimates that the cost of maintaining existing major infrastructure—which is currently unfunded liability—is \$5 trillion, meaning that needed repairs for highways have no current funding source.¹⁴⁵ This does not count minor infrastructure like small streets and sidewalks.¹⁴⁶ The results are a significant financial burden on both municipalities and taxpayers, reduced spending on important municipal services, crumbling infrastructure, and economic instability when the bill eventually comes due.¹⁴⁷

Cities also lose the production of land consumed by sprawl.¹⁴⁸ In Colorado, most of the land converted to suburban development is farmland or open space that could be used for

142. Christopher Goodman, *Why Your Sprawling, Low-Density Suburb May Be Costing Your Government Money*, LONDON SCH. OF ECON.: U.S. POL. & POL'Y (Oct. 18, 2019), <https://blogs.lse.ac.uk/usappblog/2019/10/18/why-your-sprawling-low-density-suburb-may-be-costing-your-local-government-money> [<https://perma.cc/G4HX-ZFL2>].

143. *Economic Benefits of Smart Growth and Costs of Sprawl*, WECONSERVEPA (Apr. 6, 2012), <https://conservationtools.org/guides/96-economic-benefits-of-smart-growth-and-costs-of-sprawl> [<https://perma.cc/BR5Y-3MKB>] [hereinafter *Smart Growth and Costs of Sprawl*].

144. Charles Marohn, *The Growth Ponzi Scheme*, STRONG TOWNS (May 18, 2020), <https://www.strongtowns.org/the-growth-ponzi-scheme> [<https://perma.cc/5JRU-7EEG>].

145. *Id.*

146. *Id.*

147. *Id.*

148. See, e.g., Christopher Bren d'Amour et al., *Future Urban Land Expansion and Implications for Global Croplands*, 114 PROC. NAT'L ACAD. SCIS. 8939 (2017) (projecting cropland loss resulting from urban sprawl); Maeve Conran, *Colorado's Rapid Urban Growth Is Encroaching on Weld County's Ag Roots*, KUNC (Aug. 11, 2015, 7:22 AM), <https://www.kunc.org/business/2015-08-11/colorados-rapid-urban-growth-is-encroaching-on-weld-countys-ag-roots> [<https://perma.cc/7ZVG-SUNC>].

recreation.¹⁴⁹ This loss also has direct economic costs from lost production as well as indirect and noneconomic costs, like the loss of beauty and ecosystem services.¹⁵⁰ For example, the increased asphalt from the roads and parking lots necessary to support low-density developments is much less impervious to rain than undeveloped meadow, causing an increase in runoff that then increases water treatment costs.¹⁵¹ Lost productivity and value from this land is a significant economic harm.¹⁵²

Low-density zoning also harms economic development.¹⁵³ One study focused on the spatial misallocation of labor between cities caused by zoning, particularly the externalities caused by restricted housing supply in very productive cities.¹⁵⁴ The authors cite studies showing that the productivity of labor—meaning wages—varies drastically between cities, partly because of constraints on the housing supply like zoning regulations that make it difficult to build new housing.¹⁵⁵ The authors claim that “[i]nstead of increasing local employment, productivity growth in housing-constrained cities primarily pushes up housing prices and nominal wages. The resulting misallocation of workers lowers aggregate output and welfare of workers in all U.S. cities.”¹⁵⁶ The study posited that constrained housing supply, which is caused by restrictive zoning codes and similar constraints and which leads to spatial misallocation of labor, has resulted in 36 percent lower economic growth in the United States aggregated between 1964 and 2009, and that the housing costs had externalities beyond the high-productivity cities in question.¹⁵⁷ The study concluded that “[i]ncumbent homeowners in high productivity cities have a private incentive to restrict housing supply. By doing so, these voters de facto limit the number of U.S. workers who have access to the most

149. Hendrix, *supra* note 1.

150. *Smart Growth and Costs of Sprawl*, *supra* note 143.

151. *Id.*

152. See, e.g., Jenna Narducci et al., *Implications of Urban Growth and Farmland Loss for Ecosystem Services in the Western United States*, 86 LAND USE POL’Y 1 (2019) (discussing costs of urbanization).

153. Chang-Tai Hsieh & Enrico Moretti, *Housing Constraints and Spatial Misallocation*, 11 AM. ECON. J.: MACROECONOMICS 1 (2019).

154. *Id.*

155. *Id.*

156. *Id.* at 2.

157. *Id.*

productive of American cities. In general equilibrium, this lowers income and welfare of all U.S. workers.”¹⁵⁸

Finally, sprawl has economic costs for individual people. Many have to spend more money on transportation because of the necessity of driving, and many also bear the higher costs of housing caused by restrictive zoning.¹⁵⁹ The costs of lower economic development and higher municipal fiscal burdens are also passed along to individuals living in those cities.¹⁶⁰

III. POSSIBLE POLICY CHANGES

Zoning change can occur and be incentivized at the local, state, and federal level.¹⁶¹ There are benefits and drawbacks of each. Policymakers must choose how to craft a zoning reform policy with other housing reforms to best address the issues and avoid potential negative effects. This Part will focus on how policymakers might do so at the municipal and state levels.

A. *Municipal Level Policy Changes*

Zoning and land use regulation is largely a municipal function.¹⁶² Cities and towns historically have the power to determine what is allowed where—largely because they are in

158. *Id.* at 3.

159. John Garner, *The Cost of Driving Is Way Higher Than You Think*, MILLENNIAL CITIES (Dec. 16, 2021), <https://millennialcities.com/the-cost-of-driving-is-way-higher-than-you-think> [<https://perma.cc/ZEQ5-TZXU>]; see discussion *supra* Section II.A.

160. Marohn, *supra* note 144.

161. While this Comment focuses on municipal and state level changes, federal policies could also encourage states and municipalities to adjust their zoning codes, most likely through cooperative federalism and tying funding to achieving zoning reform. Federal agencies could also more robustly enforce fair housing laws and shift the incentives in federal policies towards supporting multifamily housing, like by increasing funding for public housing, adjusting tax and loan policy to make multifamily housing a better investment, and changing highway subsidies to make the landscape more favorable to multifamily housing. See Solomon Greene & Ingrid Gould Ellen, *supra* note 35; Romina Ruiz-Goiriena, *Biden’s Infrastructure Plan Calls for Cities to Limit Single-Family Zoning and Instead Build Affordable Housing*, USA TODAY (Apr. 14, 2021, 4:36 AM), <https://www.usatoday.com/in-depth/news/nation/2021/04/14/zoning-biden-infrastructure-bill-would-curb-single-family-housing/7097434002> [<https://perma.cc/SL2K-WHQ5>]; Berrill, *supra* note 117, at 2230.

162. See COLO. REV. STAT. ANN. § 31-23-301 (West 2022) (granting municipalities the power to regulate zoning).

the best position to respond to local needs.¹⁶³ They also have general police power to regulate for the health, safety, and welfare of their citizens, similar to the states' police power upheld in *Euclid*. Their power to enact zoning codes is most likely to be upheld, whereas it is unclear whether the federal government has the power to enact zoning.¹⁶⁴ Because of this existing power, cities are in the best position to change their own zoning codes to allow for more housing choice, increased density, and the resultant environmental and economic benefits for its residents.¹⁶⁵

This Section will examine Boulder's recent housing reform proposals, as well as backlash to them, to understand the arguments against these policies and the efforts to craft policies that avoid local opposition. Boulder's measures to allow denser housing are promising, although the proposals discussed in this Section are currently in their infancy. This Section will focus on Boulder's efforts to reform its group living ordinances—a form of zoning code that determines how many people can live in one home in a certain area because of the city's current focus on these efforts. Boulder's efforts also reflect similar debates in other cities, so Boulder can serve as a useful case study.

1. Measures to Increase Housing Density

The most obvious reform for cities to enact would be to change their zoning codes to allow for more housing on lots currently zoned for single-family homes, like Portland recently did.¹⁶⁶ Boulder should consider changing its zoning codes to allow more multifamily housing, possibly by allowing duplexes to be built on all lots in the city. While Boulder is not currently considering these changes, there are some council priorities for 2022–2023 that would further these goals. For example, city council is considering updating its accessory dwelling unit (ADU) ordinance to remove saturation limits within a certain

163. Hirt, *supra* note 5, at 294.

164. § 31-23-301.

165. *See id.*

166. Doug Trumm, *Portland Passes Sweeping Zoning Reform*, URBANIST (Aug. 12, 2020), <https://www.theurbanist.org/2020/08/12/portland-passes-sweeping-zoning-reform> [<https://perma.cc/V6NT-VK52>].

radius, which would allow more ADUs to be built.¹⁶⁷ ADUs gently increase density because they are allowed in single-family zones, so building an ADU doubles the number of homes on a lot without demolishing the existing house. The current regulations limit the percentage of ADUs that can be built within a certain radius.¹⁶⁸

Another way to allow denser housing to be built is to change density calculations. Boulder's city council is considering adjusting its land use code to allow for higher densities in certain areas through more technical fixes, including reducing parking requirements and reducing the required open space per dwelling unit on a parcel of land.¹⁶⁹ These measures would adjust how density is calculated to allow more housing to be built on individual parcels without changing how many units are technically allowed on each lot. The project will also examine changing zoning laws to incentivize building smaller units. Reducing technical restrictions is an essential component of zoning reform, so this project is worth watching as it progresses.¹⁷⁰

2. Group Living Ordinances

Boulder is currently considering changing its occupancy limits, both through ballot initiatives and through city council initiatives.¹⁷¹ Occupancy limits determine how many unrelated people can legally live together in one home. While occupancy limits are not the same as other zoning changes in that they do not affect the built environment, they similarly determine the number of people who can live in an area, and adjusting occupancy limits has many of the same benefits as building more

167. *Accessory Dwelling Unit Updates*, CITY OF BOULDER (2023), <https://bouldercolorado.gov/projects/accessory-dwelling-unit-updates> [<https://perma.cc/V9PR-MNGR>].

168. *Id.*

169. *Zoning Affordable Housing*, CITY OF BOULDER (2023), <https://bouldercolorado.gov/projects/zoning-affordable-housing#section-19718> [<https://perma.cc/87RP-7LHG>].

170. Reducing parking requirements is arguably the most important of these technical changes because parking requirements incentivize car dependency and spread destinations apart from each other.

171. *Nov. 2, 2021 Boulder Election Ballot Measures and Candidates*, CITY OF BOULDER (2023), <https://bouldercolorado.gov/nov-2-2021-boulder-election-ballot-measures-and-candidates> [<https://perma.cc/G8TQ-CF8P>]; BEDROOMS ARE FOR PEOPLE, *supra* note 4.

housing. Increasing occupancy limits also provides more housing options for people; people can choose to live with more unrelated roommates, which can have social benefits of decreasing isolation and allowing individuals more choice to live how they desire.¹⁷² Reforming occupancy limits also has the unique benefit of legalizing already-existing housing formations.¹⁷³ Because over occupancy is largely enforced by complaint and people who live in over-occupied homes are reluctant to self-report in surveys, it is difficult to calculate the number of people who live in over-occupied homes. However, estimates suggest that there are thousands of people in Boulder living with more people in a home than the occupancy limits allow.¹⁷⁴

Raising occupancy limits has affordability benefits: a four-bedroom house that previously could only house three people would cost less in rent per person by adding a fourth person, while also decreasing the per-person utility costs associated with heating, cooling, and maintaining the house.¹⁷⁵ It also increases density without any effect on the built environment, thereby increasing the viability of transit and the associated environmental benefits without the environmental harms caused by construction, including resource consumption and pollution, or the political backlash to neighborhood change.¹⁷⁶

Voters in Boulder recently rejected a ballot measure that would have reformed its occupancy limits through a citizen-led ballot initiative, popularly called the “Bedrooms Are for People” initiative.¹⁷⁷ This proposal, which will likely resurface in some form in coming elections and city council initiatives, would eliminate hard caps on the number of people allowed in a home

172. See BEDROOMS ARE FOR PEOPLE, *supra* note 4.

173. *Id.*

174. Lucy Haggard, “Bedrooms Are for People,” *Say Boulder Housing Activists Working to Reimagine Occupancy Limits*, COLO. SUN (May 27, 2021, 3:10 AM), <https://coloradosun.com/2021/05/27/bedrooms-are-for-people-housing-occupancy-limits> [<https://perma.cc/DA89-QLPU>].

175. This hypothetical assumes that rents will not increase—which is a big assumption. This example further illustrates the complexity of housing policies and the difficulty of determining the impact of specific, isolated policies, which underscores the importance of implementing multiple simultaneous reforms.

176. Modern Co-Living, *The Environmental Benefits of Co-Living*, MEDIUM (May 15, 2020), <https://medium.com/@alcove.affiliateblog/the-environmental-benefits-of-co-living-c14d2f6b5903> [<https://perma.cc/D87S-V8F7>].

177. *City of Boulder November 2021 Election Results*, CITY OF BOULDER (Nov. 3, 2021), <https://bouldercolorado.gov/news/city-boulder-november-2021-election-results> [<https://perma.cc/2DA9-8GV6>]. See generally BEDROOMS ARE FOR PEOPLE, *supra* note 4.

determined by the zoned density and instead allow one person per bedroom, plus one person per household, in every home in Boulder.¹⁷⁸ The result would be that in a four-bedroom house in any neighborhood, five unrelated roommates would be legal; in a two-bedroom house, the occupancy limit would be three people.

This initiative has a variety of unique proposals. The cap does not vary based on the density of the area, meaning that every neighborhood in Boulder could see greater density through increased occupancy overnight, with no neighborhood feeling the pressure especially acutely.¹⁷⁹ This avoids the “fire hose effect,” where development and increased density is contained to a few neighborhoods that allow for change, causing rapid, intense development and the resulting gentrification, displacement, and neighborhood change that housing justice advocates rightfully scorn.¹⁸⁰ Instead, every neighborhood could see mild, incremental change—without any impact on the built environment—by allowing more people to live in existing homes.

There is significant backlash to Boulder’s occupancy limit reform proposal. The main contention is that it only helps landlords, not tenants, and would not increase affordability.¹⁸¹ The rationale is that landlords currently price rents based on occupancy limits and will just increase rents once the number of potential renters increases.¹⁸² For example, consider a hypothetical four-bedroom house in a medium-density area that is rented to three unrelated people for \$3,000 a month. When five people are allowed to live in the house, the argument goes, there is nothing stopping the landlord from increasing the rent to \$5,000 a month knowing the per-person costs would be the same as before.¹⁸³ The effect is even more significant for renters currently over occupying a house: if four people lived in that four-bedroom house for \$3,000 a month, their rent could jump significantly with their legalized housing status if the landlord

178. BEDROOMS ARE FOR PEOPLE, *supra* note 4.

179. *Id.*

180. Daniel Herriges, *Two Simple Rules for Healthy Neighborhood Change*, STRONG TOWNS (Mar. 4, 2020), <https://www.strongtowns.org/journal/2020/3/4/two-simple-rules-for-healthy-neighborhood-change> [<https://perma.cc/LSF3-U82P>].

181. John Tayer, *Bedrooms Are for People: Where the Boulder Chamber Lies*, BIZWEST (Sept. 2, 2021), <https://bizwest.com/2021/09/02/tayer-bedrooms-are-for-people-where-the-boulder-chamber-lies> [<https://perma.cc/3P5R-XXHY>].

182. *See id.*

183. *See generally id.*

decides to increase the rent, especially if landlords assume that the additional occupants will be wage earners.

Some Boulder politicians have used this argument to oppose changing the occupancy limits themselves.¹⁸⁴ Former mayor Sam Weaver, for example, stated that he would prefer occupancy limit changes to be linked with affordability measures to avoid drastic rent increases and the possibility of pricing families, with fewer wage earners per household, out of the market.¹⁸⁵ However, given the political reality of passing affordable housing measures in Colorado, especially in conjunction with a controversial bill like the housing occupancy limit reform, many of these arguments are potentially just cover to oppose the measure.¹⁸⁶ Additionally, the counterargument is that many landlords already price their homes to fill every bedroom, regardless of the legality.¹⁸⁷ A four-bedroom house is more valuable than a three-bedroom house regardless of how many people are legally allowed to rent it, particularly since there is no occupancy limit for family members. A landlord seeking to rent to a four-member family would likely not decrease the rent for three unrelated people.¹⁸⁸

One challenge with this debate is that there is not much data about how occupancy limits affect affordability in Boulder. Instead, much of the debate relies on speculation. The actual impacts depend on the specific motivations of landlords, owners, and renters along with other city policies that affect enforcement and housing availability, which in turn affect how desperate renters may be to over occupy.¹⁸⁹ If there is very little

184. Haggard, *supra* note 174. *But see* Deborah Swearingen, *Boulder City Council Likely to Give Nod of Five on Suspending Occupancy Limit Enforcement*, BOULDER DAILY CAMERA (Nov. 17, 2021), <https://www.dailycamera.com/2021/11/17/boulder-city-council-likely-to-give-nod-of-five-on-suspending-occupancy-limit-enforcement> [https://perma.cc/9DML-W4U8] (providing statements from opponents of Bedrooms Are for People expressing their desire to work with the measure's proponents on alternative solutions).

185. *See* Haggard, *supra* note 174.

186. Shay Castle, *Boulderites Rejected Occupancy Limit Reform. It May Happen Anyway*, BOULDER BEAT (Nov. 6, 2021), <https://boulderbeat.news/2021/11/06/bedrooms-defeated> [https://perma.cc/UD2K-9VAA].

187. *See* Shannon Young, *The Brink: Occupancy Limits and Housing Costs in Boulder*, KGNU (Feb. 14, 2022), <https://news.kgnu.org/2022/02/the-brink-occupancy-limits-and-housing-costs-in-boulder> [https://perma.cc/LR4A-PQK3].

188. *See id.*

189. BEDROOMS ARE FOR PEOPLE, *supra* note 4.

enforcement, landlords might be more inclined to over occupy the home for a higher rent, and there may be more demand for this type of housing situation because renters know it will likely not be enforced.¹⁹⁰ Between 2018 and May 2021, there were ninety-nine reports of over occupancy with fifty-nine enforcement actions in Boulder. It is hard to characterize this number as being high relative to the number of over-occupied households, since that number is unknown, and it is difficult to know whether these enforcements have had any deterrent effects.¹⁹¹ In 2020, there were fifteen complaint-based occupancy violations. About half of those complaints resulted in evictions.¹⁹²

There is also concern that landlords will be incentivized to replace existing single-family homes with mansions for renters—replacing, for example, a two-bedroom house with a twelve-bedroom house in order to get the most value for the land.¹⁹³ Some consider this especially worrisome in a university town where housing dynamics are different and landlords expect to charge by the bedroom.¹⁹⁴ One counterargument is that the measure applies to all of Boulder, so the redevelopment pressure will not be felt too starkly in any one neighborhood.¹⁹⁵ Another is that there are only so many students and others who want to live in this type of housing arrangement, so mansion dorms will not take over neighborhoods because the demand is not infinite.¹⁹⁶ Additionally, new homes must still pass Boulder's other, stringent zoning codes that require houses to have certain

190. See Young, *supra* note 187.

191. Haggard, *supra* note 174.

192. Shay Castle, *Boulder Will Keep Evicting Unrelated Renters During COVID Pandemic, Ignoring Governor's Request*, BOULDER BEAT (Sept. 19, 2020), <https://boulderbeat.news/2020/09/19/boulder-will-evict-renters-during-pandemic> [<https://perma.cc/NN9Y-9DNG>].

193. See Young, *supra* note 187.

194. Shay Castle, *Ballot Question 300 – Bedrooms Are for People*, BOULDER BEAT (Sept. 24, 2021), <https://boulderbeat.news/2021/09/24/ballot-question-300-occupancy-limits> [<https://perma.cc/352C-MAMK>].

195. See Herriges, *supra* note 180.

196. The counterargument is that the unmet demand from future students and commuting workers is so high that there will be significant impacts before this demand peters out. Additional student housing on the University of Colorado's campus would be a helpful pairing with occupancy limit reforms to counter this concern. See Amy Phillips, *Bedrooms Are for People Divides Boulder, But Both Sides Agree Change Is Necessary*, BOLD (Oct. 31, 2021), <https://theboldcu.com/2021/10/bedrooms-are-for-people-divides-boulder-but-both-sides-agree-change-is-necessary> [<https://perma.cc/JBY8-B96A>].

setbacks, height restrictions, open space per lot, and massing requirements, making it difficult to build enormous housing on most lots.¹⁹⁷ This could also be solved by keeping some hard cap on the number of occupants, while still raising it from current levels.¹⁹⁸ Denver’s city council, for example, recently amended its occupancy limits to allow up to five people to live in a home, regardless of house size.¹⁹⁹ The change was upheld in the November 2021 elections after a citizen’s initiative got a measure on the ballot that would have repealed it.²⁰⁰

Some of the language against the Bedrooms Are for People ballot measure also mimics the language against upzoning in general: change in neighborhood character, more traffic, less available parking, and more loud neighbors.²⁰¹ One article about the new zoning law in California aptly described the aversion: “Suddenly there are more cars parked on the street, more little kids screaming and more dogs leaving gifts on my lawn . . . I just don’t want a fourplex next door to me. But I also want my grandkids to be able to afford to live in California.”²⁰² These are issues with no easy fix, and it is important to recognize that some of these concerns are legitimate and connected to perceived quality of life. However, many of these concerns can be mitigated by Boulder’s stringent building codes and design standards, like massing, setback, and parking requirements for buildings.²⁰³

197. See generally BOULDER, COLO., LAND USE CODE, art. 4 (2022). Changing these types of zoning regulations is also a goal of zoning reform advocates because they are barriers to building denser housing, indicating the complicated relationships between housing policies and the need for coordination. See discussion *supra* note 196. Massing regulations require buildings to be within certain shape and size parameters, like requiring tall buildings to be narrower at the top than at the base so they appear less bulky and let sunlight reach the street. Setback regulations require buildings to be a certain distance from the street or from other buildings.

198. See *Group Living Text Amendment*, CITY AND CNTY. OF DENV., <https://www.denvergov.org/Government/Agencies-Departments-Offices/Community-Planning-and-Development/Denver-Zoning-Code/Text-Amendments/Group-Living> [https://perma.cc/B27K-EWEG].

199. *Id.*

200. Desiree Mathurin, *Denver 2F – The One About Group Living – Results: Initiative Backers Concede*, DENVERITE (Nov. 2, 2021), <https://denverite.com/2021/11/02/denver-2f-the-one-about-group-living-results> [https://perma.cc/L4LU-C6LM].

201. See Phillips, *supra* note 196.

202. George Skelton, *Don’t Be Fooled: California’s New Housing Laws Make Significant Changes to Zoning*, L.A. TIMES (Sept. 22, 2021), <https://www.latimes.com/california/story/2021-09-22/skelton-sb9-housing-single-family-zoning> [https://perma.cc/78R7-TNEV].

203. Hendrix, *supra* note 1.

Additionally, future policies should be crafted with these concerns in mind to mitigate specific neighborhoods' concerns, like making it more difficult to demolish existing housing, keeping some cap on the number of bedrooms allowed in neighborhoods closest to the university, or spreading the reforms across large areas to avoid concentrating the change in one neighborhood, which would encourage gentle density increases and incremental change. Perhaps truly meaningful zoning reform will require a mindset shift: accepting that viable transit, walkable neighborhoods, more neighbors, and sustainable cities are more valuable than the lost parking spaces and lawns.

Importantly, one significant concern with occupancy limits, and with zoning reform more generally, is its potential to cause gentrification: the idea that new investment in a lower-income neighborhood will just increase its desirability, leading to higher prices and displacement as the previous renters are outpriced by wealthier newcomers. Gentrification is a crucial, complicated issue with housing development, and much of the discussion of gentrification is beyond the scope of this Comment because the causes are multifaceted and often unclear. Nonetheless, it is crucial to consider how to mitigate possible gentrification pressures whenever discussing or forming housing policy. With zoning reform, for example, advocates and opponents of reform can both cite to gentrification: if no new housing is built, current residents will be displaced by those that can pay more; but also, new development will make surrounding land more valuable, causing price increases and thus displacement.²⁰⁴ Both statements are to some extent true. Because of the positive impacts of zoning reform on affordability, this Comment will assume that it is possible to craft policies that mitigate

204. See, e.g., affordability discussion *supra* Section II.A; see also Susan Leguizamon & David Christafore, *The Influence of Land Use Regulation on the Probability that Low-Income Neighborhoods Will Gentrify*, 58 URB. STUD. 993 (2021); Jenna Davis, *The Double Edge Sword of Upzoning*, BROOKINGS (July 15, 2021), <https://www.brookings.edu/blog/how-we-rise/2021/07/15/the-double-edged-sword-of-upzoning> [<https://perma.cc/TR4T-282B>]; Anne Olson, *Gentrification: Remedies and Consequences*, GREEN L. (Jan. 13, 2021), <https://greenlaw.blogs.pace.edu/2022/01/13/gentrification-remedies-and-consequences> [<https://perma.cc/ZDP9-WEMY>]. See generally PETER MOSKOWITZ, *HOW TO KILL A CITY: GENTRIFICATION, INEQUALITY, AND THE FIGHT FOR THE NEIGHBORHOOD* (2017); ALAN MALLACH, *THE DIVIDED CITY: POVERTY AND PROSPERITY IN URBAN AMERICA* (2018); John Mangin, *The New Exclusionary Zoning*, 25 STAN L. & POL'Y. REV. 91 (2018); David Price, *7 Policies That Could Prevent Gentrification*, SHELTERFORCE (May 23, 2014), <https://shelterforce.org/2014/05/23/7> [<https://perma.cc/Z6E4-YR6N>].

gentrification while still allowing development and densification, and will identify possible features that can mitigate gentrification.²⁰⁵

One possible path to minimize gentrification is to implement zoning reform while ensuring that the people who live in the neighborhoods have a controlling stake in it. Some have characterized gentrification as the result of disinvestment-reinvestment cycles caused by financing mechanisms that encourage “cataclysmic money” over incremental investment.²⁰⁶ The solution would be to encourage individual neighborhood stakeholders and incremental investment.²⁰⁷ In this line of thinking, allowing for the construction of ‘plexes and accessory dwelling units by individual homeowners could be one step to counter gentrification.²⁰⁸ Such a policy would give small homeowners the ability to invest in their properties and increase the ownership stake in land, allowing small developments that benefit the people who live there rather than big developers.²⁰⁹ Single-family zoning is one of many regulatory barriers to small-scale development that, some contend, creates the dynamics that make neighborhoods susceptible to gentrification.²¹⁰ The impact of concentrated development is well described by the following: “That the burden of development is often borne by centrally located, formally redlined communities of color is a product of the current system, in which social capital and political connections determine who gets to keep their neighborhood the same.”²¹¹ Increasing small ownership stakes in a neighborhood can help change this dynamic.

Another possible way to avoid gentrification while enacting zoning reform is to conduct widespread reform, which lessens the gentrification pressures on certain neighborhoods since all

205. See Rodríguez-Pose & Storper, *supra* note 83.

206. Daniel Herriges, *Rough Waters: Gentrification and Cataclysmic Money*, STRONG TOWNS (Jan. 30, 2018), <https://www.strongtowns.org/journal/2018/1/30/rough-waters-gentrification-and-cataclysmic-money> [<https://perma.cc/7KHQ-2MDZ>].

207. *Id.*

208. See *id.*; Daniel Herriges, *Calming the Waters: How to Address Both Gentrification AND Concentrated Poverty*, STRONG TOWNS (Feb. 26, 2018), <https://www.strongtowns.org/journal/2018/2/23/calming-the-waters> [<https://perma.cc/Z3UU-83RS>].

209. *Id.*

210. *Id.*

211. Henry Grabar, *Legalize It*, SLATE (July 2, 2019), <https://slate.com/business/2019/07/oregon-single-family-zoning-apartments-housing.html> [<https://perma.cc/D7FS-4Q8L>].

areas can develop.²¹² This development pattern is in contrast to the fire hose effect described previously.²¹³ And of course, because it is reflective of a broader issue of income inequality, wider economic reforms would also take the pressures off gentrification.²¹⁴ Colorado's Division of Housing, for instance, recommended reforming zoning codes as part of a long-term fix on evictions and housing insecurity because of the benefits of lower housing costs and increased individual ownership stakes.²¹⁵ It is impossible to ignore the connection between housing policies and other wealth-building methods—bottom-up economic development should also be prioritized to reduce housing inequality and gentrification.²¹⁶

B. At the State Level

States also have the ability to enact zoning reform.²¹⁷ Rather than directly changing municipal zoning codes, state reform typically occurs by changing the types of zones that cities can designate, like eliminating the single-family zoning category.²¹⁸ State reform is important because the problems caused by restrictive zoning are statewide.²¹⁹ Because the problems are statewide, the benefits of local zoning reform are likely to be less significant, in terms of lower housing costs and the environmental benefits, than if the entire state conducts reforms.²²⁰ Most housing markets are regional. The Denver metro area, for example, is comprised of many different cities,

212. See Herriges, *supra* note 180.

213. *Id.*

214. See generally U.S. DEP'T OF HOUS. & URB. DEV., DISPLACEMENT OF LOWER-INCOME FAMILIES IN URBAN AREAS REPORT (2018).

215. DOLA's *Division of Housing*, COLO. DEP'T OF LOC. AFF. 8 (2021), https://leg.colorado.gov/sites/default/files/images/dola_2021_housing_taskforce_docs_8-19-21.pdf [<https://perma.cc/UD64-ZC4V>].

216. See generally Brett Theodos et al., *Community Wealth Building Models*, URBAN INSTITUTE (2021).

217. *Zoning Reform at the State Level*, U.S. DEP'T OF HOUS. & URB. DEV. (Oct. 26, 2021), <https://www.huduser.gov/portal/pdredge/pdr-edge-featd-article-102621.html> [<https://perma.cc/KVD5-WMZM>].

218. *Id.*

219. *Id.*; see discussion *supra* p. 892–893 (regarding Oregon and California's zoning reform laws).

220. Michael Andersen, *States Must Reform Zoning Because No City Can End a Shortage Alone*, SIGHTLINE INST. (July 29, 2021), <https://www.sightline.org/2021/07/29/states-must-reform-zoning-because-no-city-can-end-a-shortage-alone> [<https://perma.cc/DGG6-9A8U>].

all of which have high housing costs.²²¹ Reforming the zoning in one city is helpful, but would not be as impactful as reforms in all cities.

It is also extremely controversial at a local level to enact zoning reforms, for all the reasons discussed in Section III.A. This combination—localities seeing all of the political downsides of zoning reform, without the benefits—makes most municipalities hesitant to act.²²² This is less true of bigger cities, like Denver, where zoning reform would produce more visible city-wide benefits, but statewide reforms would still have greater impact.²²³ From an advocate’s standpoint, the political effort it takes to pass state, instead of local, zoning reform is about the same, which may make politicians’ time and energy better spent on state reform to achieve a greater impact.²²⁴ Statewide upzoning measures can also balance development levels across the state, avoiding concentrations of new, dense development and investment in a few particular neighborhoods or towns.²²⁵

There are two instances of successful major statewide reforms: California’s Senate Bill 9 and Oregon’s House Bill 2001.²²⁶ Oregon’s bill, passed in 2019, eliminated single-family zoning across the state.²²⁷ In areas previously zoned for detached single-family homes, the replacement zoning depends on the city size. In cities with more than 25,000 residents, those plots allow duplexes, triplexes, fourplexes, and cottage clusters. In cities with between 10,000 and 25,000 residents, duplexes are

221. Aldo Svaldi, *Metro Denver the Second Most Competitive Housing Market in Country After Bay Area*, DENV. POST, <https://www.denverpost.com/2022/05/14/metro-denver-second-most-competitive-housing-market-in-country> [https://perma.cc/U7J8-AHF5] (May 14, 2022, 2:37 PM).

222. *Id.*

223. See Andersen, *supra* note 220.

224. See Michael Andersen, *The Path to Good Local Reform Is State and Federal Zoning Reform*, SIGHTLINE INST. (Sept. 23, 2020, 12:06 PM), <https://www.sightline.org/2020/09/23/the-path-to-good-local-zoning-reform-is-state-and-federal-zoning-reform> [https://perma.cc/87L5-3LDB].

225. Herriges, *supra* note 14. This effect is analogous to the fire hose development pattern of neighborhoods: if one city upzones while its neighbor does not, the first city would likely absorb all the regional demand for development while the second city has none. If both upzone, the regional demand will more likely split between the two cities.

226. S.B. 9, 2021–2022 Reg. Sess. (Cal. 2021); H.B. 2001, 80th Legis. Assemb., Reg. Sess. (Or. 2019).

227. Or. H.B. 2001.

allowed on every plot.²²⁸ The zoning reforms were accompanied by other land use reforms that removed other barriers to building these types of housing, like reducing minimum parking requirements.²²⁹

The Oregon bill's passage was bipartisan and was supported by a wide coalition of nonprofits, indicating the wide swath of issues that zoning reform addresses.²³⁰ Sunrise PDX and other environmental groups supported the bill, as did transportation advocacy groups.²³¹ The local NAACP and school board supported it as a means to reduce housing and school segregation, and the AARP of Oregon supported it because it allows for construction of housing types that make it easier to age in place.²³² One of the reasons that the bill is expected to help ease housing affordability issues is that it increases the supply of housing in gradual ways, without threatening a lot of existing affordable housing, as is the case when a block of affordable homes is scrapped to build a large apartment building.²³³ It also encourages cheaper forms of housing. Current zoning codes favor single-family homes on large lots and apartments in tall, block-large apartment buildings, both of which are expensive forms of housing.²³⁴ Duplexes, fourplexes, and cottage clusters can be added on to lots without tearing down the existing housing and can increase density and supply gradually and cheaply.²³⁵

228. Laura Bliss, *Oregon's Single-Family Zoning Ban Was a 'Long Time Coming'*, CITYLAB (July 2, 2019), <https://www.bloomberg.com/news/articles/2019-07-02/upzoning-rising-oregon-bans-single-family-zoning> [https://perma.cc/N9GY-V7G9]; OR. REV. STAT. ANN. § 197.758 (West 2022).

229. Parking minimums should be abolished for many of the same reasons that zoning should be reformed—parking is expensive and increases the cost of housing, it requires buildings to be farther apart, which creates sprawl, encourages driving, makes cities ugly, and increases social isolation, among many other ills. See DONALD SHOUP, *THE HIGH COST OF FREE PARKING* (2020).

230. *Oregon 2019 Regular Session: HB 2001 Measure Overview*, OR. STATE LEGIS. (2019), <https://olis.oregonlegislature.gov/liz/2019R1/Measures/Overview/HB2001> [https://perma.cc/MT6Y-HBEW].

231. Michael Andersen, *Oregon Just Voted to Legalize Duplexes on Almost Every City*, SIGHTLINE INST. (June 30, 2019), <https://www.sightline.org/2019/06/30/oregon-just-voted-to-legalize-duplexes-on-almost-every-city-lot> [https://perma.cc/Z8M8-QV94].

232. *Id.*

233. *Id.*

234. Andersen, *supra* note 123.

235. *Id.*

California's Senate Bill 9 passed in 2021.²³⁶ This bill legalizes up to four homes on all lots, with some exceptions, and allows lots to be split, meaning that one single-family home could be split into two lots, each of which could have a duplex. This lot splitting aspect may be especially impactful in creating new housing, partly because single-family homes on separate lots are easier for banks to value, and thus to finance.²³⁷ Both the Oregon and California bills were accompanied by other housing reforms to emphasize affordability and attempt to avoid gentrification, highlighting the potency of state-wide housing reforms as a package.

States can also enact housing reforms by restricting cities' anti-growth policies. For example, in the 2022 Colorado legislative session, a Republican-led bill was proposed that would have banned cities from imposing growth restrictions such as Boulder's Danish Plan.²³⁸ While this bill did not pass, it prompted discussion about the state's role in housing policy and formed a unique housing coalition that will likely introduce similar bills in future legislative sessions.²³⁹

IV. COMPREHENSIVE HOUSING REFORM

It is also necessary to pass zoning reform in conjunction with other housing reforms to ensure true affordability and to mitigate the potential negative impacts. Rent control and inclusionary zoning are examples of such policies to protect renters and solidify affordability. For example, in 2020, the Colorado legislature passed an inclusionary zoning bill to clarify the state's prohibition on rent control, stating that municipalities can enact inclusive zoning requirements without running afoul of the rent control ban.²⁴⁰ Now cities can require

236. S.B. 9, 2021–2022 Reg. Sess. (Cal. 2021).

237. Daniel Herriges, *The Secret Sauce (Maybe) of California's Zoning Reform*, STRONG TOWNS (Sept. 29, 2021), <https://www.strongtowns.org/journal/2021/9/29/the-secret-sauce-maybe-of-californias-zoning-reform> [<https://perma.cc/F27F-PZ7X>].

238. See discussion *supra* p. 865; Kenney, *supra* note 98; BOULDER, COLO., MUN. CODE tit. 9, ch. 14 (2022).

239. SB22-063: *Property Ownership Fairness*, COLO. GEN. ASSEMB. (2022), <https://leg.colorado.gov/bills/sb22-063> [<https://perma.cc/2VRG-5RXG>]. See generally Kenney, *supra* note 98 (discussing bipartisan task forces' efforts to address affordable housing).

240. COLO. REV. STAT. § 29-20-104(1)(e) (West, Westlaw through Second Reg. Sess. 2022); Kyle Harris, *Denver Wants to Push Developers to Help Build Affordable*

developers to build more affordable housing in new developments.²⁴¹ Developers building more than eight units can either make a certain percentage of their development affordable, pay higher linkage fees to fund the construction of affordable housing elsewhere, or negotiate an agreement with the city to increase affordable housing some other way.²⁴² The more affordable housing a project has, the more perks the developers receive as well, including reduced parking requirements, reduced fees, and waivers on height limits.²⁴³ The act clarifies an interpretation of the state's existing rent control statute: the statute does not restrict municipalities from enacting land use regulations that restrict rent on new developments, as long as the regulation allows for choice and alternatives to constructing affordable units.²⁴⁴ This is essentially a legislative override of a Colorado Supreme Court decision, *Town of Telluride v. Lot Thirty-Four Venture LLC*, which held that a Telluride ordinance promoting affordable housing in new developments violated the state's rent control ban.²⁴⁵ While the rent control ban still exists, it is reinterpreted to not apply to affordable housing requirements in new developments.

Boulder has an inclusionary housing ordinance that requires 25 percent of housing units within a development of five or more units to be permanently affordable.²⁴⁶ Developers have options of how to meet this requirement: the affordable units can be located on-site, the affordable units can be designated off-site, or the developer can contribute to the Affordable Housing Fund. The ordinance incentivizes developers to build the units on-site. City Council is currently considering updating this ordinance to

Housing. Here's How the Plan Would Work and How the Public Can Weigh In, DENVERITE (Oct. 20, 2021), https://denverite.com/2021/10/20/denver-affordable-housing-developers-cost-plan/?utm_medium=email&utm_source=denverite&utm_campaign=denverite20211020 [https://perma.cc/ZUC2-6GTQ].

241. Harris, *supra* note 240.

242. § 29-20-104(1)(e) (West).

243. *Id.*; Harris, *supra* note 240.

244. Harris, *supra* note 240.

245. 3 P.3d 30 (Colo. 2000).

246. BOULDER, COLO., MUN. CODE tit. 9, ch. 13, art. 3 (2022).

further incentivize on-site and ownership units and to include middle income housing as well as lower income housing.²⁴⁷

However, some have criticized the act for potentially making the housing crisis worse.²⁴⁸ Some claim that the higher fees and affordability requirements create more hoops for developers to jump through, and thus more barriers to creating any new housing, and that the other units will become more expensive to cover the costs of the affordable units.²⁴⁹ The result could be a chill on new housing construction, including naturally-occurring affordable housing.²⁵⁰ This argument assumes the simple “supply and demand” of housing argument—that increased supply of housing will lower costs, so reducing construction of all housing would exacerbate the gap between supply and demand for housing, thus raising prices.²⁵¹

Some studies have found that inclusionary zoning policies do, in fact, raise overall housing costs because of this chilling effect.²⁵² The new Colorado law recognizes this possibility and includes a provision that requires the municipality to take steps to increase the overall number and density of housing, or promote new affordable housing units.²⁵³ These steps include changing zoning regulations to increase the number of units allowed on a lot or allow housing in commercial areas, increasing

247. *Inclusionary Housing*, CITY OF BOULDER (2022), <https://bouldercolorado.gov/services/inclusionary-housing> [<https://perma.cc/X8HL-EYZ2>].

248. See Andrew Kenney, *Colorado Cities Can Now Require Affordable Housing in New Developments – With a Catch*, CPR NEWS (June 2, 2021, 11:37 AM), <https://www.cpr.org/2021/06/02/colorado-affordable-housing-new-developments-requirements> [<https://perma.cc/VR6U-3CJQ>].

249. Conor McCormick-Cavanagh, *Lawmakers Could Lift Court Ban on Affordable-Housing Requirement*, WESTWORD (Mar. 1, 2021, 5:14 AM), <https://www.westword.com/news/colorado-lawmakers-want-to-end-prohibition-on-inclusionary-zoning-11910171> [<https://perma.cc/XPK7-R85Y>].

250. Kyle Harris, *Big Denver Housing Construction Proposals Slowed Way Down When a New Affordable Housing Rule Kicked In*, DENVERITE (July 8, 2022, 3:43 PM) <https://denverite.com/2022/07/08/denver-housing-costs-construction-slow> [<https://perma.cc/ME75-JC9L>].

251. See *id.*

252. Kriti Ramakrishnan et al., *Inclusionary Zoning: What Does the Research Tell Us About the Effectiveness of Local Action?*, URB. INST. (2019), https://www.urban.org/sites/default/files/publication/99647/inclusionary_zoning_what_does_the_research_tell_us_about_the_effectiveness_of_local_action_2.pdf [<https://perma.cc/CL2H-GM4U>].

253. COLO. REV. STAT. § 29-20-104(1)(e) (West, Westlaw through Second Reg. Sess. 2022)

the occupancy limits, reducing parking minimums, and other measures.²⁵⁴

The debate over this law reveals a typical divide between pro-housing development and pro-rent control groups who disagree on whether increased supply makes housing more affordable.²⁵⁵ Studies show impacts both ways, depending on how the policies are crafted.²⁵⁶ Thus, each side touts affordability and treats the issue as a zero-sum game: for the pro-development side, any regulation making development harder will increase housing costs; for the pro-affordability regulation side, any development that is not affordable causes surrounding home prices to increase.²⁵⁷ Some affordable housing advocates have even proposed a moratorium on building market rate units until affordable housing construction fills the current deficit.²⁵⁸ While upzoning at a citywide or regional level decreases housing costs, the dynamics of gentrification, land speculation, and development economics at a more granular level complicate the impacts of such a requirement.²⁵⁹ While there is no consensus on which of these views is correct, it seems like the extreme of both is incorrect—both of these are factors affecting affordability, so both supply shortages and gentrification must be addressed in conjunction.²⁶⁰

Some have also criticized the act for simply passing the cost of affordable housing onto market rate renters—the developers will simply increase the price of their new units to account for the fees or the reduced profit from the new affordable units, whatever option the developer chooses.²⁶¹ The studies on the impacts of inclusionary zoning policies are mixed on the impact of those policies on raising prices or chilling new unit development.²⁶² The impact depends on the policy design—especially if it is coupled with zoning reforms to increase the overall construction of housing—as well as the area implemented and its particular housing market.²⁶³ One

254. *Id.*

255. See affordability discussion *supra* Section II.A.

256. See affordability discussion *supra* Section II.A.

257. See McCormick-Cavanagh, *supra* note 249.

258. Harris, *supra* note 240.

259. Been et al., *supra* note 89.

260. See affordability discussion *supra* Section II.A.

261. McCormick-Cavanagh, *supra* note 249.

262. See affordability discussion *supra* Section II.A.

263. Ramakrishnan et al., *supra* note 252; Kenney, *supra* note 248.

alternative is to invest in public housing and community land ownership, which pairs permanent affordability with new development without the risks of chilling development.²⁶⁴ There is also dispute over inclusionary zoning policies' effectiveness; these policies typically target moderately low-income families, those who earn between 60 and 120 percent of the area median income, and some are not crafted to ensure lasting affordability.²⁶⁵ The rent-burdened population is much more diverse than this demographic, both in terms of income and household composition, indicating that inclusionary zoning cannot be the only solution as it only targets a narrow segment of the need.²⁶⁶ Some policies also did not produce many new affordable units because the chilling effect of the policy on developers outweighed any of the incentives for creating affordable units, like the waiver of height restrictions.²⁶⁷

Colorado could also combine zoning reform with rent control to ensure protections for existing renters while also increasing the supply of housing. This would require repealing Colorado's ban on rent control.²⁶⁸ In Oregon, for example, in addition to passing House Bill 2001, the legislature passed a number of complimentary housing measures, including rental assistance and more investment in affordable housing.²⁶⁹ Including caps on the percentage that rent can increase would provide both short- and long-term protections for renters, which would help avoid the potential negative impacts of zoning reform.²⁷⁰ Another option would be programs to subsidize rent for more income groups or subsidize down payments. Boulder is currently looking to implement the Middle Income Down Payment Pilot Program, which would assist middle income earners in affording a down

264. Herriges, *supra* note 206.

265. See, e.g., McCormick-Cavanagh, *supra* note 249.

266. See Herriges, *supra* note 208; *Housing Needs by State: Colorado*, NAT'L LOW INCOME HOUS. COAL. (2022), <https://nlihc.org/housing-needs-by-state/Colorado> [https://perma.cc/X8TV-WJNQ].

267. McCormick-Cavanagh, *supra* note 249.

268. See Virginia Sargent, *Let Cities Decide: End Colorado's Prohibition on Rent Regulation*, 92 COLO. L. REV. 337 (2020).

269. Herriges, *supra* note 212; H.B. 2001, 80th Legis. Assemb., Reg. Sess. (Or. 2019); *2019 Summary of Legislation*, OR. LEGIS. POL'Y & RSCH. OFF. (2019), <https://www.oregonlegislature.gov/lpro/SMLByChapter/2019%20-%20Housing.pdf> [https://perma.cc/U9TK-FEG7].

270. Mark Fearer, *Rent Control: Why or Why Not?*, BOULDER WEEKLY (Mar. 24, 2022), <https://www.boulderweekly.com/opinion/rent-control-why-or-why-not> [https://perma.cc/K953-7FZM].

payment.²⁷¹ Such initiatives could be helpful if paired with zoning reform measures to ensure affordability. Because individual housing reform policies have potential negative effects, and because no one policy on its own is sufficient to address the scale and variety of the housing crisis, zoning reform should be considered in conjunction with other housing policies.

CONCLUSION

Housing policy is exceedingly complicated and affects peoples' lives and the social issues that cities and states care about. The benefits of reforming zoning codes are clear, but reform must be combined with additional housing policies to combat the potential negative side effects. A combination of policies is necessary in part because the scholarship around the actual impacts of reform is not conclusive; there have not been many zoning reforms in the United States, and most of the policies are different in key aspects, so it is difficult for scholars to draw conclusions on the general impact of zoning reform. A package of housing policies would also reduce the political opposition to zoning reform by ensuring that the policies focus on affordability and avoid gentrification. Ideally, Boulder and Colorado should pass a variety of policies: a new investment in building public housing, re-legalizing rent control policies or increasing the use of inclusionary zoning policies, and crafting zoning reform policies to maximize the benefits while mitigating some of the potential downsides. The issues that cities face are complicated, and zoning reform is one of many necessary policies that political bodies should examine to begin to address them.

271. *Middle Income Down Payment Pilot*, CITY OF BOULDER (2023), <https://bouldercolorado.gov/projects/middle-income-down-payment-pilot> [<https://perma.cc/C697-XRQW>].