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## **Emerging consensus recognizes importance of removing regulatory barriers to housing affordability**

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A virtual consensus has emerged recently—among housing policy experts, economists, and even Presidents of the United States, across the political spectrum—that land use regulations often include major barriers to housing affordability. It also is generally recognized that the adverse effects of those barriers on low- and moderate-income Americans are so serious that broad-based reforms of those regulations are needed.

The barriers consist of provisions of many local zoning and subdivision codes, and other regulations restricting housing development, which deprive low- and moderate-income Americans of the opportunity to live reasonably near their jobs. Such land use regulations also interfere with the opportunity for low- and moderate-income Americans to live in safe, wholesome neighborhoods with high-quality public schools, health care facilities, and other key services.

The emerging consensus on the need for reform is very gratifying to the Institute (EHI), because EHI has been advocating the removal of regulatory barriers to housing affordability, and has been taking action locally to remove them, since its formation in 2008. *EHI is the only national organization focused primarily on removing those barriers for the benefit of all low- and moderate-income Americans.*

No consensus has emerged yet as to which reforms will effectively control and minimize those barriers. Recent studies have concluded that reform efforts at the local, state and federal levels have had very limited effects to date. EHI is preparing an analysis of lessons learned from those efforts, including recommendations for more effective methods of removing those barriers.

### **Recent indications of the emerging consensus**

An online debate in July 2017 among housing policy experts from across the political spectrum indicated a consensus on the need for serious reform in the nation's system of land use regulation, in order to allow housing supply to increase to meet the demand. The debate was co-facilitated by the liberal-leaning Urban Institute and the conservative-leaning Cato Institute. Rolf Pendall and Vanessa Brown Calder, *Finding Common Ground for Land-Use Regulation Reform*, (Aug. 2, 2017), posted at

<https://www.cato.org/blog/finding-common-ground-land-use-regulation-reform>  
 (“Common Ground”).

The participants were housing experts from major think tanks, advocacy organizations, a major home builders association, and academia.<sup>1</sup> The jointly-prepared summary of that event stated:

The debaters, whose ideological perspectives varied broadly, agreed that, sometimes, land-use regulations are too rigid, limit growth too much, and create too much uncertainty. Results include higher housing costs, racial and economic segregation, constrained economic opportunity and innovation, and slower economic growth.

Even supporters of regulation conceded that regulations fail to work as advertised. They often expose people to harms instead of protecting them; diminish, rather than enhance, aesthetic and environmental quality; and aggravate public service degradation instead of preventing it.

(Common Ground). The joint summary emphasized the problems of renters:

Across the country, many people are finding it harder and harder to pay their rent. Among the leading reasons for rising rents is that housing supply isn’t growing fast enough to keep up with demand. The shortage of affordable rental housing has generated surging interest in regulatory reform, especially in California.

(*Id.*) The debaters agreed that: “Given the breadth of support for restrictions from various corners, any efforts to reform regulation must be correspondingly broad.”

The participants put forward various ideas about how to reform parts of the land use regulatory system. We will summarize those ideas below (“Toward more effective remedies”). The entire debate is posted at <https://www.urban.org/debates/land-use-regulation-whats-it-worth-anyway>.

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<sup>1</sup> The debaters were:

- Rolf Pendall, Co-director, Metropolitan Housing and Communities Policy Center, Urban Institute
- Vanessa Brown Calder, Policy Analyst, Cato Institute
- Dana Berliner, Senior Vice President & Litigation Director, Institute for Justice
- Emily Talen, Professor of Urbanism, University of Chicago
- Robert Dietz, Chief Economist, National Association of Home Builders (NAHB)
- Tony Arnold, Boehl Chair in Property and Land Use, University of Louisville
- Lance M. Freeman Professor of Urban Planning, Columbia University
- Richard Rothstein, Research Associate, Economic Policy Institute
- Derek Hyra, Associate Professor and Founding Director of the Metropolitan Policy Center, American University

The emerging consensus on the need for reform had been noted previously by land use law experts, including:

- Prof. David Schleicher, who documented the “growing consensus” that harsh residential land-use restrictions in metropolitan areas across the Nation since at least the early 1990’s “have come at a substantial cost to the affordability of housing and the vibrancy of local and regional economies (and even the national economy).” *City Unplanning*, 122 *Yale Law Journal* 1670, 1676 (2013); and
- Prof. Ilya Somin, who discussed the views of prominent economists, commentators, and public policy advocates, whose views span the ideological spectrum, but who all now recognize the need to reform exclusionary land use regulations. *The emerging cross-ideological consensus on zoning*, *Wash. Post* (Dec. 5, 2015).

Recent Presidents of both major parties, and the U.S. Congress, have recognized the serious, adverse effects of regulatory barriers to housing affordability. Most recently:

- President Trump favors major reductions in regulations that restrict homebuilding. During the 2016 campaign he said, for example: “There’s no industry, other than probably the energy industry that is more overregulated than the housing industry. . . . Twenty-five percent of costs to build a house are regulations.” For more, click on [TRUMP ON REGULATORY BARRIERS TO HOUSING DEVELOPMENT](#).
- President Obama’s White House issued a Housing Development Toolkit in 2016, which was focused on the devastating impacts of regulatory barriers, and discussing various action steps that states and local jurisdictions can take to reverse those impacts. For more, click on [2016 WHITE HOUSE TOOLKIT](#).
- President George W. Bush’s Dept. of Housing and Urban Development prioritized attention to those problems, including its report “Why Not in Our Community” (2005).
- Previous Federal commissions created by a previous President of each major party, and by Congress, found that exclusionary zoning adds a steep price to housing and is a major barrier to production of housing affordable to low- and moderate-income Americans.<sup>2</sup>

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<sup>2</sup> E.g., William A. Fischel, *Does the American Way of Zoning Cause the Suburbs of Metropolitan Areas to Be Too Spread Out?* 151, in ALAN ALTSHULER, ET AL., *GOVERNANCE AND OPPORTUNITY IN METROPOLITAN AMERICA* (National Academies Press, 1999). Those commissions include:

- National Commission on Urban Problems (“Douglas Commission”) (1969), appointed by President Lyndon Johnson (Democrat);
- Advisory Commission on Regulatory Barriers to Affordable Housing (1991), appointed by President George H. W. Bush (Republican);
- Millennial Housing Commission (2002), appointed by the U. S. Congress.

## Recent analyses of results of remedial efforts to date

The federal role in regulating land use in states and localities has been minimal, despite the general recognition at the federal level of the extent of regulatory barriers to housing affordability. As to efforts at the state and local levels, an updated analysis of the results of affordable housing programs to date was produced in 2017 by the Principal Economist of the Federal Reserve Board and a Professor of Planning at Columbia University. Lance Freeman & Jenny Schuetz, *Producing Affordable Housing in Rising Markets: What Works?*, 19 *Cityscape* 217 (2017). The authors conclude:

Unfortunately, most state and local programs have produced relatively small numbers of affordable units, and so are unlikely to substantially meet the demand for below-market-rate housing. Moreover, low-cost housing tends to be built where land is cheap and political opposition is muted, which in practice limits the ability of low-income families to move into neighborhoods with more employment opportunities, better schools, lower crime, and higher-quality public and private services.

*Id.* at 228. Similarly, leading housing economists Ed Glaeser and Joe Gyourko recently observed: “There have been some attempts at the state level to soften severe local land use restrictions, but they have not been successful.” Ed Glaeser and Joe Gyourko, *The Economic Implications of Housing Supply* (NBER Working Paper 23833, posted at <http://www.nber.org/papers/w23833>).

But although the “politics of zoning reform may be hard, . . . our land use regulations are badly in need of rethinking.” Ed Glaeser, *Reforming land use regulations*, Brookings Inst. Report, April 24, 2017 (posted at <https://www.brookings.edu/research/reforming-land-use-regulations/amp/>).

## Toward more effective remedies

The participants in the recent Cato/Urban Institute debate put forth many suggestions for reform, such as:

- Robust cost-benefit analysis requirements for local land use controls
- Expedited approval processes for development plans that facilitate affordable for-sale and rental housing
- Lower impact fees on such developments
- Greater reliance on local revenue that comes about due to growth caused by new development
- More inclusionary zoning requirements or incentives (to produce some affordable units in large, new housing developments)
- “Fair share” housing requirements to cause each local jurisdiction to provide housing opportunities for a portion of their area’s low- and moderate-income people

- Increased federal and state governmental incentives for local governments to reform their land-use regulations
- Reduction of the mortgage interest deduction for luxury homes, and
- Revision of housing programs to reverse the lingering effects of past racial and other unlawful discrimination<sup>3</sup>

The Century Foundation issued a report on August 3, 2017, entitled *An Economic Fair Housing Act* (posted at <https://tcf.org/content/report/economic-fair-housing-act/>). The report, authored by Richard D. Kahlenberg, states:

To complete the unfinished business of the civil rights movement—and to address rising segregation by income—we need a new set of policies to update the 1968 [federal Fair Housing Act]. Such a new Economic Fair Housing Act would help the vast majority of Americans—of all races—who are excluded from resource-rich neighborhoods not merely by market forces, but also by government regulation. This new Economic Fair Housing Act would curtail government zoning policies that discriminate based on economic status. In its strongest form, it would entirely ban unnecessary exclusionary zoning at the local level. In the alternative, it could impose a penalty on municipalities that insist on maintaining discriminatory zoning, either by withholding infrastructure funds or limiting the tax deduction that homeowners can take for mortgage interest.

The extensive report analyzes the history of both racial and economic discrimination in housing in America, and it proposes a policy strategy for better addressing both types of discrimination.

EHI is preparing an analysis of potentially effective legal remedies for regulatory barriers to housing affordability. Among the many strategies EHI is studying is an analogy on a recent statute that protects religious groups from exclusionary land-use practices. Religious Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”), 42 U.S.C. §§ 2000cc et seq. RLUIPA is a federal statute, but a similar approach could be taken in a state or locality (and in fact has been, in numerous states).

Religious groups have scored some major successes in settlements as well as judicial decisions under RLUIPA. A key appears to be that—unlike reform measures generally—those who prove they have been subjected to exclusionary land-use practices in violation of RLUIPA are entitled to reimbursement of the sometimes enormous costs (attorneys’ fees, etc.) that they must incur to win their cases. The governments that impose those exclusionary regulations are responsible for paying those costs. That requirement appears to be a major disincentive to governments imposing such regulations on religious groups.

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<sup>3</sup> See Part 2 of Cato/Urban Institute debate, posted at <https://www.urban.org/debates/land-use-regulation-whats-it-worth-anyway> (August 2, 2017).

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Effective legal reform of regulatory barriers to housing affordability is crucial to alleviating poverty and many associated problems of low- and moderate-income Americans. EHI is working to produce well-thought-out recommendations for an effective strategy to bring about that reform.