28 Post-Neoliberal Housing Policy Ideas

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Table of Contents

Introduction

Housing affordability and supply is a significant policy issue. To address the extraordinary scope and multicausal character of the housing challenge, we need a comprehensive approach, one that will address the deeper, structural roots of the housing crisis that we discuss in our forthcoming paper, *Post-Neoliberal Housing Policy*.[1] This includes a more explicit industrial policy for housing, public options for housing production and financing, Pigouvian tax policies to address property hoarding, and, finally, market-shaping regulations – including antimonopoly and consumer regulations, especially in rental markets; supply-side zoning policies; and macro-level regulatory policies that distribute economic growth. This is a broad and ambitious agenda.

In this white paper, we briefly sketch out each conceptual category and then offer some specific policy ideas. Not all of these proposals are appropriate in all places. A well-targeted approach requires a nuanced understanding of the housing dynamics of any particular place. Our goal here is also not to supply a detailed blueprint for reform, but instead to offer a list of ideas that policymakers can consider, debate, and develop.

An Industrial Policy for Housing

An industrial policy is "any government policy that encourages resources to shift from one industry or sector to another, by changing input costs, output prices, or other regulatory treatment."[2] Industrial policy has been part of the American tradition since the founding of the country,[3] with policymakers regularly designing laws and policies to benefit specific domestic industries. While the parlance of industrial policy went out of vogue in the neoliberal era, it has come roaring back in

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[1] This white paper is drawn from Christopher Serkin & Ganesh Sitaraman, *Post-Neoliberal Housing Policy*, U. PA. L. REV. (forthcoming), some minor edits.

[2] Todd Tucker, *Industrial Policy and Planning*, ROOSEVELT INST. (July 2020), https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI_Industrial-Policy-and-Planning-201707.pdf.

[3] Ganesh Sitaraman, *Industrial Revolutionaries: Franklin, Hamilton, Madison, and Jackson*, AM. PROSPECT (Sept. 10, 2020), https://prospect.org/economy/industrial-revolutionaries-franklin-hamilton-madison-jackson/; STEPHEN S. COHEN & J. BRADFORD DELONG, CONCRETE ECONOMICS: THE HAMILTON APPROACH TO ECONOMIC GROWTH AND POLICY (2016).

the last few years.[4] Policymakers in both parties have embraced industrial policy, from leading officials in the Biden Administration[5] to then-Senator and now-Secretary of State Marco Rubio.[6] Business scholars have declared that "the new era of industrial policy is here."[7] The tools of industrial policy are wide-ranging – from influencing supply through subsidies, tariffs, labor training, and public spending; to spurring demand via procurement and consumer subsidies; to coordination policies, like standard-setting regulations that improve interoperability.[8] In the housing context, an industrial policy for the housing sector would apply a range of tools to spur home construction and reduce the costs of development. Housing costs are typically comprised of three distinct elements: construction costs, land costs, and profits.[9] The first two are appropriate targets of an industrial policy for housing. In particular, industrial policy could drive down construction prices, broadly construed, by promoting innovation in building technologies and reducing the inputs to construction costs, including land value.

1. Market Making for Modular Construction

There are many promising technological innovations in the construction industry, but construction has often fallen behind other industries in uptake of new

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[4] V. Millot & Ł. Rawdanowicz, *The Return of Industrial Policies: Policy Considerations in the Current Context*, OECD ECON. POL'Y PAPERS NO. 34 (2024), https://doi.org/10.1787/051ce36d-en.
[5] *See* Brian Deese, *Remarks on Executing a Modern American Industrial Strategy by NEC Director Brian Deese,* WHITE HOUSE (Oct. 13, 2022), https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/10/13/remarks-on-executing-a-modern-american-industrial-strategy-by-nec-director-brian-deese/; Jake Sullivan, *Remarks by National Security Advisor Jake Sullivan on Renewing American Economic Leadership at the Brookings Institution,* WHITE HOUSE (Apr. 27, 2023), https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/04/27/remarks-by-national-security-advisor-jake-sullivan-on-renewing-american-economic-leadership-at-the-brookings-institution/.
[6] *See* Marco Rubio, *Industrial Policy, Right and Wrong,* NAT'L AFF. (Spring 2024), https://www.nationalaffairs.com/publications/detail/industrial-policy-right-and-wrong.
[7] *See* Willy Shih, *The New Era of Industrial Policy Is Here,* HARV. BUS. REV. (Sept. - Oct. 2023), https://hbr.org/2023/09/the-new-era-of-industrial-policy-is-here.
[8] *See* Tucker, supra note 2.
[9] *See* Andrew Justus & Alex Armlovich, *Eliminating the Chassis Requirement to Free Manufactured Homes from Local Discrimination and Regulatory Dead Weight,* FED'N AM. SCI. (Feb. 21, 2024), https://fas.org/publication/manufactured-home-chassis-requirement/ ("Even in metropolitan areas, most U.S. metros still have median home prices within 125% of construction costs—meaning that construction costs matter more than growth controls and land prices for home prices there.").

technologies.[10] Nevertheless, new technologies can reduce costs and speed up the pace of construction.[11] Consider, for example, innovations in modular, offsite construction for both single-family and also for high-rise construction.[12] Building housing offsite increases efficiencies and reduces carbon emissions.[13] An analysis from the consulting firm McKinsey & Co. shows that modular construction could speed up building times by 20-50 percent while reducing the cost of construction 20 percent.[14]

But there have been a number of barriers to the widespread adoption of modular construction methods in the United States. The first is financial. Modular construction tends to require significant up-front capital investments, unlike traditional construction, which is funded as the project develops.[15] Lenders see this as higher risk and are less interested in funding such projects.[16] Governments at all levels could find ways to financially support modular construction. Just as the Federal

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[10] *See, e.g.*, Mark Erlich, *Can the Construction Industry Be Disrupted?,* HARV. BUS. REV. (July 10, 2023), https://hbr.org/2023/07/can-the-construction-industry-be-disrupted ("[I]ndustry observers routinely deride the lack of technological sophistication in the construction industry, and have pigeon-holed it as old-fashioned and lagging behind more forward-looking and purposeful industries such as manufacturing."); Kasia Borowska, *The Slow Revolution—Five Technology Trends in Construction 2020,* FORBES (Nov. 19, 2020), https://www.forbes.com/sites/kasiaborowska/2020/11/19/the-slow-revolutionfive-technology-trends-in-construction-2020/("Despite the huge potential that these new technologies bring to the construction industry, its growth has been slower than expected, with roughly 1% growth year on year compared to industries such as manufacturing, growing at a far quicker rate of 3.6%."); Khaled Mouasher, *A Long Overdue Disruption in the Construction Industry,* HARV. TECH. & OPERATIONS MGMT. (Nov. 15, 2017), https://d3.harvard.edu/platform-rctom/submission/a-long-overdue-disruption-in-the-construction-industry/ ("The construction industry is famously inefficient, plagued by a declining productivity index and what Thomas Kuhn might call a 'puzzle-solving' approach.").

[11] E. Sarah Slaughter, *Models of Construction Innovation,* 124 J. CONSTR. ENG'G & MGMT. 173 (1998) (surveying different forms of innovation).

[12] *See, e.g.*, Ryan E. Smith & Ivan Rupnik, *Productivity, Innovation and Disruption,* in OFFSITE PRODUCTION AND MANUFACTURING FOR INNOVATIVE CONSTRUCTION (2019); Huu-Tai Thai et al., *A Review on Modular Construction for High-Rise Buildings,* 28 STRUCTURES 1265 (2020).

[13] *See, e.g.*, Joseph K. Ofori-Kuragu & Robert Osei-Kyei, *Mainstreaming Pre-Manufactured Offsite Processes in Construction—Are We Nearly There?,* 21 CONSTR. INNOVATION 743 (2020) (reviewing literature).

[14] Jose Luis Blanco, Dave Dauphinais, Garo Hovnanian, & Rob Palter, *Making Modular Construction Fit,* MCKINSEY & CO. (May 10, 2023), https://www.mckinsey.com/capabilities/operations/our-insights/making-modular-construction-fit.

[15] Michela Zonta, *Increasing Affordable Housing Stock Through Modular Building,* CTR. FOR AM. PROGRESS (Feb. 6, 2024), https://www.americanprogress.org/article/increasing-affordable-housing-stock-through-modular-building/.

[16] *See id*.

Housing Administration has created specific support for mobile homes, it could extend similar support for modular construction.[17]

Innovations only produce their most significant savings when they are deployed at scale. Here too there are challenges. An impediment is the lack of "repeatability of end products in the construction industry."[18] Governments could act as market makers by committing to acquire significant quantities of new housing constructed using the most promising new technologies, allowing offsite construction providers to scale up, so as to then provide significant savings to the market more broadly. Government orders for housing would also help construction firms justify the capital investments required to invest in new technologies.[19] The same is true of other innovations, like 3D-printed housing, implementation of robots and autonomous construction equipment, and new forms of building information modelling (BIM). Acting as a purchaser, the government could drive adoption of these and other new construction technologies. This policy would work well in conjunction with public option policies for housing we discuss below.[20]

2. Standard-Setting for Modular Construction

Standardization is another issue. Without standardized designs, the cost of production and deployment of modular construction remains high. Standardizing building components could streamline construction and introduce more opportunities for off-site manufacturing as a part of the construction process.[21] For example, self-contained bathroom and kitchen units can simply be dropped into a housing unit, either on-site or as part of off-site construction. These are often the most expensive rooms to build and so this kind of modular construction comes with the possibility of significant savings, as well as greater efficiency in the design-and-build phase of construction. One significant impediment, however, is the absence of interconnection standards. Plumbing and electrical systems must work together, allowing them to connect to other modules in the building, and also to the building itself. The Center for Offsite Construction has detailed plans for increasing

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[17] National Housing Act, Title I, 12 U.S.C. §§ 1702–1706d.

[18] *See id.* at 747.

[19] *See* Erlich, *supra* note 10 ("Robots and other forms of automation are costly and require an extended time frame before offering a satisfactory return on capital.").

[20] *See infra.*

[21] *See* COMM. ON ADVANCING THE COMPETITIVENESS & EFFICIENCY OF THE U.S. CONSTR. INDUS., ADVANCING THE COMPETITIVENESS & EFFICIENCY OF THE U.S. CONSTRUCTION INDUSTRY 32–33 (2009).

interoperability of housing elements, creating interface standards for physical interfaces and communications protocols between building elements, allowing for modular construction at varying scales.[22] The federal government or state governments could adopt these or similar standards to help reduce construction costs.

3. Pre-Approved Building Designs and Pattern Books

Industrial policy could also influence building design by increasing standardization in building codes and thereby reducing compliance costs. Building codes are essential for ensuring that housing is safe. We are long past the Code of Hammurabi, which simply imposed the death penalty for any builders whose buildings collapsed on their owners.[23] But complying with building codes is difficult because they are often adopted at the municipal level and so require local knowledge. There are, therefore, considerable information barriers to entering a new market. States and the federal government could make it easier for developers to navigate building codes by promulgating or adopting pre-approved building designs that *per se* satisfy building code requirements. In effect, creating these designs amounts to a kind of pre-approval. It allows developers to scale up production of housing in these specific forms, with fewer regulatory hurdles. But it also frees up time and resources for the officials who would have to approve these projects, and this should, in turn, speed up the review process for people who want to design their own housing.[24] Of course, states and the federal government could simply preempt local building codes, but this is both less likely politically, and less effective, than creating safe-harbor building designs.[25] Some cities have already embraced this approach. South Bend, Indiana, has recently adopted pre-approved designs to help address the problem of vacant infill lots while expanding housing supply.[26] Nashville, Tennessee, recently proposed asking city departments to

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[22] Ctr. for Offsite Construction, *Modular 2.0,* N.Y. INST. OF TECH. (2024), https://site.nyit.edu/files/architecture/Modular_2.0.pdf.
[23] J. Dyneley Prince, *The Code of Hammurabi,* AM. J. THEOLOGY 601, 607 (1903)
[24] Robert Steuteville, *Cities Moving Ahead with Pre-Approved House Plans,* CNU PUBLIC SQUARE (Feb. 7, 2024), https://www.cnu.org/publicsquare/2024/02/07/cities-moving-ahead-pre-approved-house-plans.
[25] *But see* Alexandra B. Klass, *State Standards for Nationwide Products Revisited: Federalism, Green Building Codes, and Appliance Efficiency Standards,* 34 HARV. ENVTL. L. REV. 335 (2010) (arguing for federal green building codes to require minimum efficiency standards).
[26] Daniel Herrigs, *Pre-Approved House Designs Jump-Start Infill Development in South Bend,* STRONG TOWNS (Oct. 6, 2022), https://www.strongtowns.org/journal/2022/10/6/pre-approved-house-designs-

collaborate on "pattern books" with designs that would not require further, specific building approvals.[27] At the federal level, one newly-proposed bill in Congress directs HUD to directly fund the creation of pre-approved building plans to reduce the soft costs of development.[28]

4. Equal Treatment for Manufactured Housing

Importantly, many of these same approaches could be adopted to target and promote manufactured housing—mobile homes—more specifically. Manufactured housing is a significant source of affordable housing in the United States. A recent study reports 18 million residents living in manufactured housing, making it "the largest source of unsubsidized affordable housing in the United States."[29] There are, however, a number of headwinds standing in the way of even more widespread deployment of this housing option. Most obviously, the pervasive stigma against manufactured housing has resulted in many local governments enacting regulatory hurdles for siting mobile homes in their jurisdiction.[30] Zoning is sometimes the culprit here, with local governments zoning only small areas of land—if any—for mobile homes.[31] Federal or state regulators could adopt a non-discrimination rule, effectively allowing manufactured housing anywhere that is zoned for single-family residential use. It could go further, too, and preempt aesthetic requirements—including architectural review—for manufactured housing. Daniel Mandelker has proposed just such a change.[32] But zoning is only the most obvious problem; others are at least as important.

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jump-start-infill-development-in-south-bend; *City of South Bend, Pre-Approved Residential Plans,* SOUTH BEND GOV'T, https://southbendin.gov/bsb/preapprovedplans/.

[27] *See* Stephen Elliott*, 'Missing Middle' Housing Targeted in Nashville Zoning Reform Push,* NASHVILLE SCENE, Jan. 30, 2024, https://www.nashvillescene.com/news/pithinthewind/nashville-zoning-reform-push/article_f2b9588b-4c17-5caa-a584-bc8f15ccc720.html.

[28] *See* Reducing Regulatory Barriers to Housing Act, H.R. 8604, 118TH CONG. (2024).

[29] Noah J. Durst & Esther Sullivan, *The Contribution of Manufactured Housing to Affordable Housing in the United States: Assessing Variation Among Manufactured Housing Tenures and Community Types*, 29 HOUS. POL'Y DEBATE 880 (2019).

[30] *See, e.g.*, Julia Okerman, *Preserving Manufactured Housing Communities in an Affordable Housing Crisis: How Resident Ownership Offers the Solution,* 50 MITCHELL HAMLINE L. REV. 774, 784 (2024) (discussing stigma).

[31] *See* Daniel R. Mandelker, *Zoning Barriers to Manufactured Housing,* 48 URB. LAW. 233, 236–37 (2016) (describing zoning challenges); *see also* Casey J. Dawkins & Theodore Koebel, *Overcoming Barriers to Placing Manufactured Housing in Metropolitan Communities,* 75 J. AM. PLAN. ASS'N 73 (2009) (same).

[32] *See* Mandelker, *supra* note 31, at 277–78.

5. Mortgage Support for Manufactured Homes

Financing for manufactured homes is also a challenge. Most owners of manufactured homes own them as chattel, not real estate. Indeed, to be eligible for a standard mortgage, the owner must own both their home and the land on which it is sited, place it on a permanent foundation, and title the land as real estate.[33] As a practical matter, more than half of loan applicants for manufactured homes are denied.[34] This is also partly the result of complex titling rules for manufactured homes, which vary state by state in terms of when a mobile home can be treated as real estate instead of chattel.[35] Increased federal support, through the Federal Housing Administration or other mechanism, could increase demand, especially if keyed exclusively to the nature of the structure and not to the nature of the title.

6. Workforce Development in Construction and the Building Trades

At a broader level, industrial policy could address one of the key inputs into construction costs: the cost of skilled labor. A pervasive labor shortage, especially in the building trades, drives up the costs of new housing. The number of workers in construction has not bounced back since the 2007 financial crisis and the slowdown in the housing market that it precipitated.[36] Current projections suggest that the construction industry needs at least another 500,000 workers.[37] At the same time, applications for trade schools for skilled carpenters, electricians and plumbers is down nearly 50%.[38] That gap puts pressure on labor costs, as well as the timing and

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[33] Maryam Kouhirostami et al., *Investigation of Current Industry Strategies to Reduce the Cost of Financing a Manufactured Home,* 29 J. ARCH. ENG'G 03123002-1 (2023).

[34] Linlin Liang et al., *Data Shows Lack of Manufactured Home Financing Shuts Out Many Prospective Buyers,* PEW(Dec. 7, 2022), https://www.pewtrusts.org/en/research-and-analysis/articles/2022/12/07/data-shows-lack-of-manufactured-home-financing-shuts-out-many-prospective-buyers.

[35] *See* Nat'l Conf. of State Legislatures, *Manufactured Homes: An Underutilized Source of Affordable Housing?* (Dec. 4, 2023), https://www.ncsl.org/human-services/manufactured-homes-an-underutilized-source-of-affordable-housing.

[36] Sophie Huang, *Rebuilding the Construction Trades Workforce,* JOINT CTR. FOR HOUS. STUD. HARV. UNIV. (June 5, 2024), https://www.jchs.harvard.edu/blog/rebuilding-construction-trades-workforce.

[37] Zachary Phillips, *Do People Not Want to Work (In Construction) Anymore?,* CONSTRUCTION DIVE (Nov. 28, 2022), https://www.constructiondive.com/news/round-table-do-people-not-want-to-work-construction-anymore/636271/.

[38] Mary Yang, *America Needs Carpenters and Plumbers. Try Telling That to Gen Z,* NPR (Jan. 5, 2023), https://www.npr.org/2023/01/05/1142817339/america-needs-carpenters-and-plumbers-try-telling-that-to-gen-z.

speed of construction. In the modular housing context specifically, there is another challenge: many contractors and workers do not have experience installing modularly constructed homes.[39]

To address these challenges, Congress—or individual states—could invest more in existing workforce development programs. But these programs are many, varied, and complex – and critically, not focused on construction.[40] Governments could create and fund a program to invest in developing skills in the construction sectors. The program would allocate funds to organizations that engage in training and skill-building in the building trades. Program funds could go either to lower the cost of providing such training (e.g. by hiring more trainers, developing facilities) or to scholarships and financial incentives to enable trainees to start and complete the training programs. Such a program could also work with industry organizations to fund training of contractors and workers in modular construction techniques.

7. Land Assembly

In addition to construction costs, land costs are key inputs into housing costs. The more developers must pay for land, the higher the eventual housing costs to consumers. Often, land costs are driven by zoning and land use regulations. But they can also be affected by the difficulty of assembling large parcels, especially for the development of multi-family housing and apartment buildings and especially in the urban core. The government can reduce the costs of land assembly by using its power of eminent domain. This has become unpopular since the Supreme Court ruled for expansive government authority under the Constitution to take property for public use, but it remains an available option for making larger-scale development viable and affordable.[41] Scholars have proposed smart innovations to reduce the burdens of eminent domain, such as Michael Heller and Rick Hills' proposal to create "Land Assembly Districts," that effectively allow neighborhoods to put themselves up for sale with a profit-sharing mechanism, instead of making

[39] Jose Luis Blanco, Dave Dauphinais, Garo Hovnanian & Rob Palter, *Making Modular Construction Fit,* McKinsey & Co. (May 10, 2023), https://www.mckinsey.com/capabilities/operations/our-insights/making-modular-construction-fit.

[40] Lucy McMillan, Harin Contractor & Anthony D'Andrea, *Guide to the American Workforce System,* Nexight Group (Mar. 2023), https://nexightgroup.com/wp-content/uploads/2023/03/GuidetotheAmericanWorkforceSystem.pdf.

[41] *See* Kelo v. City of New London, 545 U.S. 469 (2005).

neighborhoods the target of government condemnation.[42] Regardless of the specific form, government-assisted land assembly can overcome strategic holdouts that can drive up the costs of land acquisition.

8. Invest in Infrastructure

Finally, infrastructure development should be seen as a form of industrial policy for housing. Significant new development often burdens local infrastructure like roads, transit, schools, parking, and water systems. In some places, where infrastructure is at or near capacity, the addition of new housing units may impose real costs, either in congestion of existing infrastructure or the fiscal costs of expanding it—building new roads, new schools, and so forth. Directly investing in infrastructure expansion therefore creates the conditions for unlocking growth. New York City's significant housing reform effort, dubbed "City of Yes," recognizes this explicitly. Proponents added $2 billion to the slate of reforms for infrastructure improvements.[43] In other places, there are significant amounts of affordable housing that available reasonably nearby to major urban centers – but no cheap, convenient, reasonably quick mode of transportation to get to them. In New England, for example, housing is much more affordable in Providence, Rhode Island, and New Bedford and Worcester, Massachusetts, than it is in Boston – and those other cities are only 40-60 miles from downtown Boston.[44] Affordable rail service could connect these places, expanding access to existing affordable housing, while perhaps also spurring economic growth and development in those further away cities.

This is an even more effective form of industrial policy when adopted at the state or federal level. Many municipalities currently rely on the development process to fund infrastructure expansion through the use of development impact fees and other development exactions.[45] These are demands that municipalities make of developers as a condition for granting land approvals. For example, a developer may be required to install sidewalks, widen streets, or otherwise pay for the street

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[42] *See* Michael A. Heller & Roderick M. Hills Jr., *Land Assembly Districts,* 121 HARV. L. REV. 1465 (2008).

[43] *See* Emma G. Fitzsimmons & Mihir Zaveri*, N.Y.C. Housing Plan Moves Forward With an Unexpected $5 Billion Boost,* N.Y. TIMES, (Nov. 21, 2024), at A20 ("Half of the $4 billion in new city money will go toward capital expenses over the next five years for sewers, flood protection, streets, and 'open space' investments, according to the mayor's office.").

[44] Robert Kuttner, *Solving the Housing Crisis Requires More Than YIMBY,* AM. PROSPECT (Dec. 17, 2024), https://prospect.org/infrastructure/housing/2024-12-17-solving-housing-crisis-more-than-yimby/.

[45] *See* Christopher Serkin, *Exacting Assessments: Sheetz and the Problem of Stategraft,* 2024 Wis. L. Rev. 641, 646–47.

improvements to mitigate traffic. While these have come under constitutional pressure in the last few years, impact fees remain widespread.[46] They also have an obvious economic rationale. Development exactions are a straightforward mechanism for forcing developers to bear the costs that growth will impose on a municipality. Those higher costs, however, can be passed on to housing consumers, resulting in higher housing costs.[47] If the costs are absorbed by in place property owners, either through longer commute times or increased property taxes, they are likely to object and create political opposition to growth. If the costs are shifted to newcomers through developer exactions, housing prices will increase accordingly.

States and the federal government are therefore well positioned to break this zero-sum game. By investing directly in local infrastructure expansion, states can shield in-place property owners from the costs of growth while keeping newcomers from having to pay for the marginal costs they represent. Ideally, federal and state support for municipal infrastructure will be used as an inducement to new development. For example, Congress should more aggressively fund municipal infrastructure expansion—in particular, for local roads, transit, and water—specifically to places that are accommodating growth and density. Not only would this channel infrastructure funding to places that need it, it would also incentivize places to accommodate growth in order to attract these funds.

Public Options for Housing

Privatization was one of the touchstones of neoliberal economic policy. The idea was that private companies would do better than the government at ensuring society had certain goods and services.[48] In many areas, this strategy has been a disaster, as corporations undermine public goals in search of higher profits.[49] Indeed, when provision of essential services is at issue, the profit motive is in tension with affordable, universal access. Companies will seek to increase prices, reduce supply, monopolize markets, reduce the quality of service, abandon high-cost users, and do other things that make them money – even if it undermines the public goals of access and affordability. In such cases, public provision of goods and services can help ensure access, increase affordability, and expand competition.

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[46] *See* Sheetz v. County of El Dorado, 143 S. CT. 1486 (2024).

[47] *See* Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473 (1991).

[48] E.S. SAVAS, PRIVATIZATION: THE KEY TO BETTER GOVERNMENT (1987).

[49] ELLIOT D. COHEN & HASSAN MIKAELIAN, THE PRIVATIZATION OF EVERYTHING (2022).

A public option is the public provision of a good or service at a controlled price, where the public option coexists with private market provision.[50] Public options are often talked about in the context of health care policy, but they exist everywhere in American society: public swimming pools coexist with private ones; public playgrounds and private ones; public golf courses, public transportation, the list goes on.[51] Public options given individuals the choice of another option in the marketplace: one that is usually cheaper, even if it more limited. But increasing access to basic goods and services has significant benefits: it can increase opportunity, reduce inequality, and improve economic conditions – including for businesses that don't have to provide the service to workers.[52] It can also increase competition in concentrated markets by adding an additional player into the sector.[53]

9. Public Options for Housing

The most direct form of creating a public option for housing is for the government to build more housing itself. Public housing projects first started in the United States in 1937, and they were focused on lower income residents.[54] After a shift toward housing for wartime workers, the post-World War II public housing regime shifted focused primarily to the poor.[55] Over time, examples of housing projects from the 1950s and 1960s reshaped public perceptions to see public housing as linked to concentrated poverty, dilapidated building conditions, and rampant crime.[56] Starting in the 1970s, federal policy shifted significantly: the federal government increasingly

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[50] *See* GANESH SITARAMAN & ANNE L. ALSTOTT, THE PUBLIC OPTION 44 (2019).
[51] ID. at 97-129.
[52] ID. at 24-43.
[53] ID. at 38-39.
[54] Maggie McCarty, *Introduction to Public Housing*, CONG. RSCH. SERV., R41654, (updated Feb. 13, 2014), https://crsreports.congress.gov/product/pdf/R/R41654.
[55] *Id*.
[56] For one example, see Colin Marshall, *Pruitt-Igoe: The Troubled High-Rise that Came to Define Urban America*, THE GUARDIAN (Apr. 22, 2015), https://www.theguardian.com/cities/2015/apr/22/pruitt-igoe-high-rise-urban-america-history-cities; U.S. Dep't of Hous. & Urban Dev., *Why Did Pruitt-Igoe Fail*, PD&R EDGE (Nov. 3, 2014), https://www.huduser.gov/portal/pdredge/pdr_edge_featd_article_110314.html; Jackie Dana, *The Failed Promise of Pruitt-Igoe,* UNSEEN ST. LOUIS (Feb. 10. 2022), https://unseenstlouis.substack.com/p/the-failed-promise-of-pruitt-igoe.

withdrew from developing new housing and instead actively tried to demolish or privatize public housing.[57]

The history of public housing, however, need not define the future of a public option for housing. As other countries have demonstrated, public housing can be well-designed and well-run and can provide important alternatives to private housing development. Vienna, Austria, in particular, has a large stock of mixed-income affordable housing that has helped to keep prices low throughout the city.[58] When governments design and build housing, they can make different choices than profit-oriented developers, or even than affordable housing developers who still need projects to be financially viable. Governments can make location and design decisions based on maximizing numbers of units, density, and other non-financial considerations. Instead of trying to incentivize private developers to create socially desirable housing options, governments can just build it themselves. A well-designed public-built housing development will most likely be dense, near transit, and include mixed-income options. It might not be limited to rental housing, either. Governments could build condominiums and other multi-family housing options at different price points than private developers.

It is worth stressing: this is not how public housing has generally been built in the United States. Rather, public housing has historically been focused on providing housing to the poor, rather than simply providing a public option for housing to the general public. But as former Health, Education, and Welfare Secretary Wilbur Cohen once remarked, "a program for the poor is a poor program,"[59] in part because it will never have the political support to be sustainable at a high quality. Taking this insight seriously, along with evidence from other jurisdictions, such as Vienna, Austria, one possibility is for public housing authorities to invest in public options for housing that are available to everyone, not just the poor.

Building public options for housing has significant benefits. From a financing perspective, it is more likely to be easier to fund: the housing units would be available

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[57] McCarty, *supra* note 54; Abdallah Fayyad, *Public Housing Didn't Fail in the US. But it was Sabotaged.*, VOX (Dec. 8, 2024), https://www.vox.com/policy/390082/public-housing-america-policy-failure-poverty.

[58] Francesca Mari, *Lessons From a Renters' Utopia,* N.Y. TIMES, (May 23, 2023), https://www.nytimes.com/2023/12/16/opinion/lessons-from-a-renters-utopia.html.

[59] Milton Friedman, *"Programs for the Poor are Poor Programs,"* in A CHOICE FOR OUR CHILDREN: CURING THE CRISIS IN AMERICA'S SCHOOLS (Alan Bonsteel & Carlos A. Bonilla, eds.) (1997), available at https://miltonfriedman.hoover.org/internal/media/dispatcher/271021/full.

to anyone, which means that the return on investment from rents would likely be more reliable and not exclusively dependent on those with uncertain or extremely low incomes. From an affordability perspective, rental rates could be designed through a public utility-style system of rate regulation, in which rents are set at a price that ensures the housing authority covers its invested capital plus operating expenses.[60] In other words, rent could be set on a cost-basis, rather than a market-price basis. This could bring down prices significantly for these units – and indirectly for units in the area.[61] Importantly, the public entity would not necessarily need an additional return on invested capital, though it could perhaps allow for some modest return to reinvest into new construction. This approach would also improve affordability in a few ways: first, it would increase the housing supply but do so in a way that keeps rents low. Second, even though anyone at any income would be eligible, the lack of need for profit would keep prices down. Third, legacy programs like Section 8 vouchers could still be used by those who are eligible to bring down the cost of these rents further. Importantly, vouchers used in this context would not lead to higher prices because the public option's rental prices would be set by cost, not by market-demand.

One of the biggest constraints on new publicly-constructed housing is funding. Congress could address this easily by appropriating more funds to programs along these lines. It could also condition this funding on new, innovative models of public housing—such as those discussed above—to prevent new public housing from falling into the traps that have plagued public housing historically.

10. Repeal the Faircloth Limit

Congress could repeal the Faircloth Limit. Passed in 1998, the Faircloth Limit is a ban on the net increase of any public housing—capped at 1999 levels. That means that as the U.S. population increases, public housing authorities are prohibited from building more housing. They can only replace existing units. A number of members of Congress have proposed repealing the limit,[62] but the topic has yet to become a

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[60] *See* MORGAN RICKS, GANESH SITARAMAN, SHELLEY WELTON & LEV MENAND, NETWORKS, PLATFORMS, AND UTILITIES: LAW AND POLICY 147-80 (2022) (discussing rate regulation).

[61] Notably, public housing projects in the United States were designed in order to *prevent* competition with private options. *See* McCarty, *supra* note 54.

[62] For a list, *see* National Coalition for the Homeless, *Repeal the Faircloth Amendment*, https://nationalhomeless.org/repeal-faircloth-amendment/.

cause celebre amongst supply-side housing advocates. Indeed, some supply-side advocates oppose repealing the Faircloth Limit and taking additional steps to expand public options for housing, calling it a "red herring" and "distraction" from loosening zoning.[63] While many places have not reached their limit yet,[64] repealing the limit would, in conjunction with other reforms proposed here, help enable new building—and more experimentation with new kinds of public options for housing. At a minimum, it would send a strong signal that local governments should be in the business of expanding housing stock in their communities.

11. Portable and Assumable Mortgages

Mortgage policy debates often have a characteristically neoliberal flavor to them. Some commentators and policymakers pretend that mortgages markets are driven entirely by private lending decisions—that rates are determined by the market, and terms created by private agreements between borrowers and lenders.[65] This, of course, ignores the nearly century-long federal intervention into mortgage markets. The federal government has created de facto standardization in mortgage practices in many sectors, first by establishing criteria for federal mortgage insurance, and then by specifying the terms of loans that could be securitized as "conforming loans" through the federally chartered government sponsored enterprises (GSEs), Fannie Mae and Freddie Mac.[66] Combined with banking regulation and the favorable tax treatment of mortgage interest, the federal government is directly involved in housing finance. In many ways, this involvement is akin to a public option – it is a version of a public option for housing finance, in which the GSEs create markets and support for certain mortgage products.[67]

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[63] Jenny Scheutz, *Four Reasons Why More Public Housing Isn't the Solution to Affordability Concerns*, BROOKINGS (Jan. 14, 2021), https://www.brookings.edu/articles/four-reasons-why-more-public-housing-isnt-the-solution-to-affordability-concerns/.

[64] Jared Brey, *What Is the Faircloth Amendment?,* NEXT CITY (Feb. 9, 2021), https://nextcity.org/urbanist-news/what-is-the-faircloth-amendment.

[65] *See, e.g.,* Michael Simkovic, Competition and Crisis in Mortgage Securitization, 88 IND. L.J 249 (2013) (describing Treasury Department's efforts to rely on private mortgage markets).

[66] Joseph C. Shenker & Anthony J. Colletta, *Asset Securitization: Evolution, Current Issues and New Frontiers*, 69 TEX. L. REV. 1369, 1383 (1991) (describing history of Fannie Mae and Freddie Mac); Julia Patterson Forrester, *Fannie Mae/Freddie Mac Uniform Mortgage Instruments: The Forgotten Benefit to Homeowners*, 72 MO. L. REV. 1077, 1085 (2007) (describing operation of Fannie and Freddie).

[67] *See generally* Adam J. Levitin & Susan M. Wachter, *The Public Option in Housing Finance*, 46 U.C. DAVIS L. REV.1111 (2013) (describing federal intervention in mortgage markets as providing a kind of public option).

Bankers and regulators have often worried about placing too many risks on financial institutions, and conversely not placing sufficient risk on individuals. A fear, going back to the origins of mortgage finance, is that individuals will act recklessly, and that banks should not bear significant risks to enable lending.[68] In fact, however, securitization of mortgages by Fannie Mae and Freddie Mac, plus implicit government backing, means that financial institutions take on comparatively little risk in the current system.[69] Mortgage policies could do more to help homeowners without adding too much downside to financial institutions in either interest-rate or credit risk. Even modestly shifting the balance of risk leads to some specific proposals for mortgage policies and products.

The first is portable mortgages. Mortgage origination practices manage the risk of default—credit risk—in two distinct ways. First, lenders risk-rate borrowers, charging higher interest rates for riskier borrowers. Second, lenders require an adequate equity cushion, often capping mortgages at an 80% loan-to-value ratio (LTV). That way, if the borrower defaults, the property value can still drop by 20% and the bank will still be able to recoup the loan.[70] Of course, that equity cushion increases over time as the loan is repaid so that lender risk decreases over the life of the mortgage.

Because underwriting standards depend on both the creditworthiness of the borrower and the value of the underlying property, mortgages are traditionally not portable. If mortgagors want to sell, they have to pay off the balance of the outstanding mortgage, often at the time of the closing. New buyers must then obtain their own mortgages. Likewise, mortgagors cannot take their existing mortgages to a new property. It is as if the mortgages are tied to both the borrower and the land. Sever either, and the loan must be repaid immediately.

The lack of portability of mortgages can have perverse consequences, especially when interest rates are increasing, as they have been over the past few years. For one, mortgagors benefiting from low interest rates may be disincentivized from

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[68] *See, e.g.,* W. Scott Frame & Lawrence J. White, *Charter Value, Risk-Taking Incentives, and Emerging Competition for Fannie Mae and Freddie Mac*, 39 J. MONEY, CREDIT & BANKING 83 (2007) (describing risks of securitization).

[69] *See* Viral V. Acharya et al., *Guaranteed to Fail: Fannie Mae, Freddie Mac, and the Debacle of Mortgage Finance* (2011) (describing history of Fannie Mae and Freddie Mac and the risks they incurred).

[70] *See, e.g.,* Robert B. Avery et al., *Credit Risk, Credit Scoring, and the Performance of Home Mortgages*, FED. RES. BULL., July 1996, at 621 (describing risk management practices).

selling their property. If you have a $400,000 mortgage at 3% on a house worth $600,000, you may not be able to afford to sell and buy a different $600,000 house if your new interest rate would be 7.5%.[71] At the same time, many potential sellers may not be willing to sell in such a market, unless forced to do so. The result is fewer moves and a less liquid housing market in times of rising interest rates. Portability of mortgages could result in more housing for sale in an adverse interest rate environment, increasing housing options for buyers.[72]

The sale of property subject to a low-interest mortgage will also result in a kind of windfall for the bank. If the property had not been sold, the bank would only have been able to continue collecting the existing low interest rate. The sale, though, accelerates the repayment, allowing the bank to lend money out again at a higher interest rate. At least part of that interest rate difference will be capitalized into property values, meaning that sellers effectively have to disgorge some of the value of their homes to banks. Neither would happen if mortgages were portable.

Mortgages could be made portable in one of two ways. They could run with the land, allowing a mortgagor to sell the property subject to the existing mortgage at its current interest rate. This is known as an assumable mortgage. Assumable mortgages were popular in the 1980s, but have become less common since.[73] Where the interest rate is lower than current rates, the effect of an assumable mortgage would be to increase somewhat the value of the property. A buyer will pay more for a house with 20 years left on an existing 3% mortgage, than for a house with a new 30-year mortgage at 7.5%. Alternatively, the mortgage could be portable in the sense that the mortgagor could apply the same mortgage to a different house. Instead of repaying the outstanding balance on a mortgage when the property is sold, the borrower could transfer the mortgage to a new property, keeping the payments the same. In either case, the buyer might need to finance the difference in the purchase price.

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[71] In theory, those higher interest rates may be reflected in housing costs, meaning that what had been a $600,000 house may now be worth only $450,000, for example. In the current context, of course, housing prices have increased and remain high despite high interest rates – perhaps because few want to sell.

[72] *See* Peter Coy, *The Case for Letting Mortgages Move With Us*, N.Y. TIMES (May 6, 2024) (proposing portable mortgages). Jiawei Zhang et al., *How Making Agency Mortgage-Backed Securities Portable May Impact Housing and Mortgage-Backed Securities Investors*, 33 J. FIXED INCOME 114 (2024) (same).

[73] *See, e.g., Assumable Mortgages Popular in the 1980s Back as Way to Beat High Interest Rates*, STAR TRIBUNE (2024), https://www.startribune.com/assumable-mortgages-popular-in-the-1980s-back-as-way-to-beat-high-interest-rates/600374788.

Making mortgages portable obviously creates additional interest rate and credit risk for lenders. The CFPB or other regulator could help to manage those risks by allowing portability only where the substitute borrower or the substitute property presents substantially the same credit risks, i.e., has the same or better credit rating, and the same or better appraised value, respectively. Regardless, the current system is anti-homeowner and constrains the market. Since most mortgages are securitized and held by Fannie Mae or Freddie Mac, the interest rate and credit risks are actually borne by their investors and not by the loan originators, so this proposal really is about shifting risk away from homeowners and to Wall Street—a tradeoff that will benefit housing markets.

12. The 40- and 50-year Mortgage

Another possibility is to adjust the term of mortgages. Until the New Deal, most mortgages in the United States were for either 10 or 15 years, and usually had adjustable rates. During the Great Depression, the Federal Government created the Home Owners Loan Corporation (HOLC), which bought up the then-popular but increasingly risky short-term adjustable rate mortgages and converted them into 20-year fixed rate mortgages.[74] Following World War II, Congress authorized Fannie Mae and Freddie Mac to purchase 30-year fixed rate mortgages, which then became the industry standard.[75] In both instances, there was nothing magical about the 20-year or the 30–year period. Rather, extending the duration of the mortgage was designed to lower the monthly payments by spreading the principal payments over a longer period.

The same tool can be deployed again, redefining conforming mortgages to include 40-year or 50-year mortgages. A 30-year mortgage for $400,000 at 5% will cost the borrower approximately $2,147 per month. The same 50-year mortgage would cost the borrower only $1,816 per month simply because the equity repayment is spread over a longer time. In fact, in California, the 40-year mortgage is becoming popular,

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[74] *See, e.g.,* Dan Cooper & Brian Grinder, *Financing the American Dream: A History of the Fully-Amortized 30-Year Mortgage*, 113 FIN. HIST. 10 (2015).

[75] *See id.; see also* FREDDIE MAC, *Why America's Homebuyers & Communities Rely on the 30-Year Fixed-Rate Mortgage*, FREDDIE MAC INSIGHTS (Apr. 10, 2017), https://sf.freddiemac.com/articles/insights/why-americas-homebuyers-communities-rely-on-the-30-year-fixed-rate-mortgage (providing history).

presumably in response to the rising housing costs.[76] Making 40-year and 50-year mortgages more common could significantly increase buyer's purchasing power.[77]

There are downsides, of course. The longer loan term creates greater interest rate risk.[78] Lenders would presumably charge higher interest rates up front to mitigate those risks, just as banks today have lower interest rates for 15-year than for 30-year mortgages. But those higher rates still result in lower monthly payments in most cases. That is, 30-year mortgages cost borrowers less per month than a 15-year mortgage. Of course, more interest will be paid over the life of the 30-year mortgage than the 15-year mortgage, and this is a tradeoff that almost every homebuyer has weighed. It always involves balancing monthly carrying costs against interest rates and total payments. Expanding those options to include an even longer term, at lower monthly payments, will help make housing more affordable.

13. Perpetual, Interest-Only Mortgages

An even more aggressive product is a perpetual interest-only mortgage. This vehicle—originated either at purchase or, more likely, as a kind of construction loan—would never require the borrower to pay off principal. The interest-only payments would dramatically reduce the monthly costs of ownership. A key feature, however, would be assumability. The mortgage would run with the property, and so any buyer would acquire the same monthly obligation, still without paying down principal.

This product would effectively create a new form of tenure, a hybrid between owning and renting. It would provide the stability of ownership, because the monthly cost would never increase. But it would create the economic interests of renting, because the buyer would never pay down the equity on the loan. The buyer would, however, acquire any equity as a result of appreciation. If the original buyer sold the property,

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[76] *See* Gregory Wilcox, *40-Year Home Loan Soaring in Popularity*, L.A. DAILY NEWS (Aug. 29, 2017), https://www.dailynews.com/2005/12/13/40-year-home-loan-soaring-in-popularity/; see also Shane Hickey, *The 40-Year Mortgage—Solution to Rising Property Values or Too High a Price to Pay?*, THE GUARDIAN (Sept. 16, 2024), https://www.theguardian.com/business/2024/sep/16/the-40-year-mortgage-solution-to-rising-property-values-or-too-high-a-price-to-pay (describing rising use in England, noting that "In June, 22% of loans taken out by first-time buyers were for 35 to 40 years.").

[77] *See* Alena Botros, *Forget the 30-Year Mortgage: The 40-Year Mortgage Needs to Become the New American Standard, Former Obama Advisor Says*, FORTUNE (Aug. 21, 2024).

[78] *See, e.g.,* Robert C. Merton, *On the Pricing of Corporate Debt: The Structure of Interest Rates*, 29 J. FIN. 449 (1973) (describing the nature of interest rate risk).

he or she could capture that equity. For example, an interest-only mortgage of $400,000 at 5% would cost approximately $1,666 per month. If a buyer was willing to pay, say, $2,000 per month for the ability to live in a house that cost only $1,666 per month, that "extra" value would be captured by the seller. In this example, a buyer would be willing to pay up to approximately $80,000 to acquire the interest-only mortgage.

This product, too, would create significant interest rate risk. Prepayment penalties—or even prohibitions on prepayments—could help alleviate those risks, as could other structural innovations.[79] But it would likely require the government to create this product and hold that risk. Whether through the FHA, the VA, or Fannie and Freddie, the government could create the market for this innovative new low-cost form of ownership. Implementation aside, the insight is that a new form of financing could dramatically increase how much house buyers could afford to buy.

Tax Policies for Affordability

In the neoliberal era, tax policy largely focused on cuts – and especially tax cuts for the wealthiest people and corporations in the United States.[80] The theory was that tax breaks for the wealthy would "trickle down" and benefit everyone else,[81] but the theory was incorrect and evidence shows it has not had these effects.[82] Rather than focus on reducing taxes to the wealthy and capital holders, housing tax policy could be designed to discourage socially undesirable practices and encourage socially desirable ones. All taxes are market shaping tools. In tax theory, Pigouvian taxes, named after the English economist Arthur Pigou, are taxes on firms that create negative externalities.[83] Classic examples of Pigouvian taxes are taxes on pollution or alcohol.[84] At a high level of generality, Pigouvian taxes both require firms to internalize externalities and also discourage behavior by raising their cost.[85] Many

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[79] *See* Andrea Beltratti, et al., *The Role of Prepayment Penalties in Mortgage Loans,* 82 J. BANKING & FIN. 165 (2017) (describing operation of prepayment penalties).

[80] MONICA PRASAD, THE POPULAR ORIGINS OF NEOLIBERALISM IN THE REAGAN TAX CUT OF 1981, 24 J. POL. HIST. 351 (2012).

[81] *Trickle-Down Theory,* INVESTOPEDIA (2024), https://www.investopedia.com/terms/t/trickledowntheory.asp.

[82] David Hope & Julian Limberg, *The Economic Consequences of Major Tax Cuts for the Rich*, 20 SOCIO-ECONOMIC REV. 539 (2022).

[83] *Pigouvian Tax,* TAX FOUND. (2024), https://taxfoundation.org/taxedu/glossary/pigouvian-tax/.

[84] *Id.*

[85] Gary M. Lucas, Jr., *Shaping Preferences with Pigouvian Taxes*, 27 N.Y.U. J.L. & PUB. POL'Y 69 (2024), https://nyujlpp.org/wp-content/uploads/2024/12/JLPP-27-1-Lucas.pdf.

economists thus see them as an efficient mode of regulation.[86] Policymakers could take inspiration from this form of taxation and consider taxes in the housing context that would discourage behaviors that reduce supply and increase prices. In other words, rather than focusing on reducing taxes and hoping development trickles down, taxing certain behaviors could make it less expensive to use housing for shelter and therefore increase supply and affordability.

14. Taxes on Second Homes

Second homes are one possible target. Tax policy can provide tools for states and local governments to discourage second homes and investor-owned properties without prohibiting them.[87] Some states, like Vermont, tax second homes at a lower rate than primary homes.[88] The rationale is that second-home owners do not consume public services, and especially public schools, to the same extent as permanent residents, and that second-home owners contribute to the economy.[89] But at the same time, this tax structure – and the housing stock that comes along with it – means that housing is less affordable for primary residents. Taxing second homes at a higher rate would inject a measure of progressivity into the property tax system. People who can afford second homes should pay more in taxes for them. To the extent this disincentivizes ownership of second homes, that is a feature not a bug, as it will reduce demand and free up housing for primary residences. Of course, some communities might *want* more second homes in order to attract vacationers. Those communities might prefer a tax regime like Vermont's.

A mirror-image version of the tax on second homes already exists in states that provide a homestead exemption. Instead of a higher tax for second homes, a homestead exemption provides a tax benefit for owner-occupied primary

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[86] For overviews and interesting proposals in the legal literature, see Jonathan S. Masur & Eric A. Posner, *The Pigouvian State*, 164 U. PA. L. REV. 93 (2015); Peter Salib, *The Pigouvian Constitution*, 130 YALE L.J. 2180 (2021). For a skeptical account, under certain conditions, see Victor Fleischer, *Curb Your Enthusiasm for Pigouvian Taxes*, 91 TEX. L. REV. 1377 (2013).
[87] *See* Andrew T. Hayashi & Richard M. Hynes, *Protectionist Property Taxes*, 106 IOWA L. REV. 1091, 1110-1111 (2021) (giving examples of jurisdictions with taxes on second homes).
[88] Ethan Weinstein, *Many Second Homeowners Pay a Lower Rate Than Residents. Will the Legislature Change That?,* VT DIGGER, Jan 13, 2023 (describing tax system).
[89] *See id.* ("As of now, if a town spends more per pupil on education than a certain state-determined number, primary homeowners shoulder the burden, causing them to pay a higher relative rate than second homeowners.").

residences.[90] This is implicitly a higher tax on non-primary residences. Homestead exemptions have a long pedigree, dating back at least to the Great Depression, as a way of helping income-constrained homeowners to stay in their homes.[91] States take very different approaches to the homestead exemption. Most exempt a fixed dollar amount from the taxable value of a homestead—say $20,000.[92] Others exempt a percentage of the property value. Some have income caps. Some require an affirmative application and documentation by the property owner.[93] Details aside, the effect is to impose a higher tax burden on property that is not the owner's primary residence. A more focused second-home tax would be distinct and have some advantages compared to the homestead exemption. For one, a homestead exemption results in an implicit tax on all property other than primary residences, including commercial property. Moreover, an explicit second-home tax could be greater than the implicit tax of a homestead exemption. The objective is instead to force second-home owners to bear the opportunity costs of consuming housing for something other than a primary residence, which in many communities could be quite high.

Instead of higher tax rates, states could also impose higher transfer taxes on the sale of second homes and investor-owned properties. This creates less of an ongoing burden for owning a second home, while slightly reducing the attractiveness of buying housing for investment purposes. For a transfer tax to work, however, it would need to exempt developers, or else it would disincentivize development of new housing. But a transfer tax could apply to property flippers and others who are using property primarily as an investment vehicle instead of as housing itself.

15. Vacancy Taxes

Unoccupied property can also restrict housing supply in some markets. When rents start to falter in a market, property owners will sometimes prefer to keep property

[90] *See, e.g.,* Adam H. Langley & Joan Youngman, *Property Tax Relief for Homeowners*, LINCOLN INST. OF LAND POL'Y (Mar. 2022), https://www.lincolninst.edu/app/uploads/legacy-files/pubfiles/property-tax-relief-homeowners-brief-full.pdf.

[91] *See* Keith Ihlanfeldt & Luke P. Rodgers, *Homestead Exemptions, Heterogeneous Assessment, and Property Tax Progressivity*, 75 NAT'L TAX J. 7, 12 (2022) (describing the history of Florida's homestead exemption).

[92] *Id.*

[93] *See* Ihlanfeldt & Rodgers, *supra* note 91, at 14 ("[In Florida] eligible homeowners must apply for the exemption, which involves providing documentation that they use the property as their primary residence.").

vacant in hopes that rents will stabilize. For large commercial landlords holding many units in a market, they may prefer some amount of vacancy to a wider reset of rental rates that might happen if they start entering into leases at lower prices. The same is true of sellers, who might prefer to hold empty property in order to try to time the market. The effect of both is that housing is under-used. Tax policy can address this problem, imposing an escalating tax on vacancies.[94] By making it more expensive for property owners to hold units off the market, they will be incentivized to price units at the lower, market-clearing rent level or the lower purchase price in order to avoid the vacancy tax.[95] Such a tax would put downward pressure on price in two related ways: first, it would make it more difficult for owners to try to manipulate the market by keeping contract prices artificially high, and second, it would increase the supply of available housing. Henry George proposed a version of this approach in the Nineteenth Century, an approach still championed by the Lincoln Institute of Land Policy.[96]

16. Taxes on Unoccupied Foreign-Owned Investment Homes

In some markets, non-resident foreigners looking for investment opportunities can also take property off the market. The U.S. real estate market has been an attractive destination for foreign investment. It often features high returns, and for those from countries with unpredictable governance, a high degree of stability and property protection.[97] In recent years, foreign investment has increased, and in the process, captured supply and reduced affordability – with units often remaining vacant because the foreigners do not seek to rent them out. A recent study from a Federal Reserve economist showed that since 2008, when China relaxed some of its

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[94] Hayashi & Hynes, *supra* note 87, at 1111 (discussing vacancy taxes); *see also* Noah Smith, Zoning Reform Alone Won't Make Housing More Affordable, BLOOMBERG, Feb. 4, 2019, available at https://www.bloomberg.com/view/articles/2019-02-04/zoning-reform-alone-won-t-make-housing-more-affordable. (proposing land value tax).

[95] Indeed, some jurisdictions have tried just this. *See, e.g.,* Charles Gallmeyer, Note: *Vancouver Empty Home Tax: An Analysis of Taxation as a Solution to a Housing Crunch*, 18 PITT. TAX. REV. 191 (2020); Tonya Mosley, *Vacancy Taxes: The Next Frontier in Housing Policy?*, WBUR (Jan. 27, 2020).

[96] *See* History of the Lincoln Institute, Lincoln Institute of Land Policy, *available at* https://www.lincolninst.edu/about-lincoln-institute/history/. For a discussion of George, see CHRISTOPHER W. ENGLAND, LAND & LIBERTY: HENRY GEORGE AND THE CRAFTING OF MODERN LIBERALISM (2023); *see also* Donald G. Hagman, The Single Tax and Land-Use Planning: Henry George Updated, 12 UCLA L. REV. 762 (1965) (imagining Henry George on Mars).

[97] Heidi Przybyla & Christine Haughney, *Russian Money Flows into U.S. Real Estate,* NBC NEWS (Mar. 2, 2022), https://www.nbcnews.com/business/real-estate/russian-money-flows-us-real-estate-rcna17723.

capital export controls, investment flooded into the United States – but without additional migration.[98] The result was higher home prices and lower-income people being pushed out of neighborhoods, while homes were used for foreigners to park their assets and gain a return. Placing a tax on unoccupied homes owned by non-resident foreigners would prevent this use of the U.S. real estate market as a foreign bank account and further unlock either rental or ownership opportunities.[99]

17. Taxes on Undeveloped Land

Similar dynamics arise around undeveloped land. Between the 1990s and 2010s a series of mergers has concentrated a large share of homebuilding into the hands of a few companies. These companies rarely engage in any homebuilding themselves, but instead operate as financial middlemen that hold undeveloped land (or interests in undeveloped land), until prices are so high that they can develop the land at great profit.[100] But because of their market power, these firms need not develop the land even if smaller firms would have – and even if the community needs more housing. One possibility to get at this problem is a tax on undeveloped land held by corporate investors. Such a tax could be designed at the local level, or at the state or federal level but applied only to areas with significant lack of housing stock or potential for development. The tax would increase the cost of sitting on those parcels, and thus encourage the start of development. A potential downside of this approach is to discourage more complex land assemblies. Developers and corporate investors can sometimes take years to put together parcels of land for some large-scale project. Taxing the early-acquired parcels at some higher rate would make that land assembly more expensive. Tax rules could try to exempt these land assemblies from higher taxes. Better yet, governments could help with the land assembly problem through more aggressive use of eminent domain (as noted above).

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[98] Leslie Shen, *China's Massive U.S. Real Estate Investment and Housing Shock: Major Impacts,* FED. RESERVE BANK OF BOS. NEWS (Nov. 2023), https://www.bostonfed.org/news-and-events/news/2023/11/china-massive-us-real-estate-investment-housing-shock-major-impacts-leslie-shen-boston-fed.aspx.

[99] For a discussion of the constitutionality of such a proposal, and similar proposals, see Hayashi & Hynes, *supra* note 87.

[100] Matt Stoller, *It's the Land, Stupid: How the Homebuilder Cartel Drives High Housing Prices,* BIG NEWSLETTER (2024); Cameron Murray, *Time Is Money: How Landbanking Constrains Housing Supply,* 49 J. HOUS. ECON. 101708 (2020).

18. Taxes on Institutional Investors Properties

Tax policy can also be used to tackle another, growing problem with housing markets: the rise of institutional investors in residential rental markets. In recent years, private equity and hedge fund investors have increasingly been purchasing single family homes – in some areas amounting to half of all home sales.[101] Economic research shows that investor ownership of this type has increased prices and reduced affordability – and especially does so when there is greater concentration in ownership.[102] Some of this shift has also been a function of government policy, as Freddie Mac has offered low interest loans to private equity firms. Meanwhile, renters in private equity owned apartments have seen prices go up and maintenance declines.[103] To address these problems, Congress could pass the End Hedge Fund Control of Homes Act, which would require divestment of housing by big investors over a period of years.[104] The Federal Housing Finance Agency could also reduce its funding of private equity housing deals, or, at a minimum, impose rent regulations and quality of service mandates as a condition on federal funding. In addition, Congress could prohibit Fannie Mae and Freddie Mac from purchasing mortgages from housing developments owned by private equity firms. According to a report from ProPublica, Freddie Mac's biggest financing deals were with private equity firms.[105] Given the problems with private equity-run housing developments – including higher rental prices, lower quality of service – federal policy should not enable this mode of ownership.

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[101] *See* Hal Singer, *Are Hedge Funds and Private Equity Firms Driving Up the Cost of Housing?,* THE SLING, July 12, 2024, https://www.thesling.org/are-hedge-funds-and-private-equity-firms-driving-up-the-cost-of-housing-2/.

[102] *See id.* (reviewing literature).

[103] Heather Vogell, *When Private Equity Becomes Your Landlord,* PROPUBLICA (Feb. 7, 2022), https://www.propublica.org/article/when-private-equity-becomes-your-landlord; Gretchen Morgenson, *A New Study Reveals the States where Private Equity Has the Most Influence on Housing, Health Care, Jobs, and Pensions*, NBC NEWS (Apr. 9, 2024), https://www.nbcnews.com/news/us-news/states-rank-private-equity-influence-housing-health-care-jobs-pensions-rcna146818.

[104] *End Hedge Fund Control of American Homes Act:* BILL SUMMARY, OFFICE OF SEN. JEFF MERKLEY (2024), https://www.merkley.senate.gov/wp-content/uploads/imo/media/doc/end_hedge_fund_control_of_american_homes_act_bill_summary.pdf.

[105] *See* Vogell, *supra* note 103.

Market-Shaping Regulations

As we have noted, one of the signal failures of de-zoning advocates is embracing the fact that regulations can be market-shaping. This basic insight leads to a very different policy conclusion than the one that de-zoning advocates proffer. Rather than simply eliminate problematic regulations and assume that the market will produce the housing stock society needs in a fair, affordable, and accessible manner, the aim would be to use regulatory policy to ensure that market actors deliver the housing society needs. Focusing on regulatory design, not deregulation, is therefore critical.

In this section, we discuss three ways in which regulatory policy can influence housing markets and affordability. The first is by embracing antimonopoly and consumer regulatory tools, which we illustrate with a discussion of regulating rental prices and landlord abuses. The second is by embracing zoning, but turning it toward affordability. In other words, it is possible to use zoning regulations as a tool to increase supply and expand affordability. We call this "supply-side zoning." Finally, we shift from the micro-level within jurisdictions to the macro-level nationally. Historically, regulation of critical infrastructure dispersed economic growth across the country. Deregulation coincided with a period of severe economic concentration, with increased geographic divergences and the rise of superstar cities. Regulation, in other words, shapes the broader marketplace of demand for where people live—and thereby for housing.

19. Cost-Based Rent Regulation

One of the problems in the housing market is concentration: monopoly or oligopoly in different aspects of the sector: homebuilding and rental ownership, for example. Significant supply constraints also lead to scarcity, which, like monopoly or oligopoly, gives owners of the supply the ability to earn monopoly rents – by charging higher prices and reducing the quality of the product. These dynamics are evident in the housing market, and are readily addressed with tools from antimonopoly policy, including regulatory and competition policies. Some problems ripe for an antimonopoly treatment include regulations on rents, algorithmic pricing, and junk fees, and the problem of hidden and unresponsive landlords. Consider each in turn.

Economists have generally been opposed to regulations capping rent increases because they can perversely lead to higher prices. They point to the example of New

York City, which adopted rent control in the 1940s and has maintained it for some buildings—with modifications—since then. The orthodox view is that rent regulations increase costs of unregulated units by decreasing supply.[106] Rent regulations reduce the incentive to build new rental units, shifting development to condominiums and potentially decreasing development activity altogether. Others find that rent controls reduce housing quality by disincentivizing landlords from maintaining or improving their units.[107] Furthermore, the primary beneficiaries of rent regulation over time tend to be middle-class tenants, and not the lower-income households that rent regulation is ostensibly intended to help.[108]

But the economic literature is largely focused on first-generation rent controls that imposed strict price caps. There is less empirical work studying the impact of more sophisticated rent regulations that are designed to allow developers and landlords to obtain a reasonable return on their investments.[109] More sophisticated rent regulation ordinances may be able to address some of the downsides of the older rent control approach. Vicki Been and her co-authors have provided a useful survey of the forms of modern rent regulations, recognizing that local governments are likely to face increasing pressure to adopt them.[110] That survey shows that there are many different ways to design rent regulations–and much depends on these design choices.

More sophisticated rent regulation can, for example, take a page from the history of antimonopoly policy, and in particular, from public utility rate design.[111] Public

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[106] *See, e.g.,* Richard A. Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 BROOK. L. REV. 741, 759-60 (1988) ("In general, economists, unlike urban planners, are well nigh unanimous in their condemnation of rent control statutes.").

[107] *See* Choon-Geol Moon & Janet G. Stotsky, *The Effect of Rent Control on Housing Quality Change: A Longitudinal Analysis,* 101 J. POL. ECON. 1114 (1993); Joseph Gyourko & Peter Linneman, *Rent Controls and Rental Housing Quality: A Note on the Effects of New York City's Old Controls,* 27 J. URB. ECON. 398 (1990).

[108] *See* Prasanna Rajasekaran et al., *Rent Control: What Does the Research Tell Us About the Effectiveness of Local Action*, URB. INST. (Jan. 2019), https://www.urban.org/research/publication/rent-control-what-does-research-tell-us-about-effectiveness-local-action (surveying literature and summarizing arguments).

[109] There is, however, some sophisticated empirical work on modern rent regulation. *See, e.g.,* Richard Arnott, *Time for Revisionism on Rent Control?,* 9 J. ECON. PERSPECTIVES 99 (1995); *see also* Dirk W. Early, *Rent Control, Rental Housing Supply, and the Distribution of Tenant Benefits,* 48 J. URB. ECON. 185, 185 (2000) (citing sources defending modern rent regulations).

[110] *See* Vicki Been et al., *Laboratories of Regulation: Understanding the Diversity of Rent Regulation Laws*, 46 URB. L.J.1041 (2019).

[111] *See, e.g.,* Emily P. Achtenberg, *The Social Utility of Rent Control in Housing in Urban America* (2d ed. 1980).

utility rate regulation seeks to encourage both capital investment and affordability for users, goals shared in the housing context. To achieve this goal, utility rates are set by assessing capital expenditures and operating and maintenance costs, and then adding to that a fixed rate of return.[112] This approach has some benefits (and, of course, drawbacks) that in the housing context may prove to be net beneficial when compared to older versions of rent regulation or no regulation. First, the approach ensures that owners get a return on their investment, and this guaranteed return encourages development. Second, because the guaranteed return is on top of operating expenses and capital expenditures, owners are not penalized for ongoing upkeep or improvements to the facilities – they are, in fact, encouraged to do so, because their return is usually a percentage of these expenditures. This would help address the problem of landlords allowing units to fall into disrepair.[113] The return on investment, however, is regulated – and capped – which means that landlords can't exploit housing shortages, the unavailability of land, or other market failures to increase their profits. This keeps overall prices down. Indeed, if done right, it would mean that prices will be lower over time if ownership stays in the same hands, because once the initial capital outlays are recovered, the landlord's costs decrease; with that comes a decrease in rent. The downside, of course, is that this approach might encourage landlords to spend too much on capital improvements, in order to increase their returns, or that rates of return are set at levels that are either underprotective of tenants or that drive landlords out of the market. But rent increases for such major capital improvements can also be capped or spread out over time. Moreover, if utility-style rent regulation is adopted in conjunction with other antimonopoly provisions, the dynamics may differ. Smaller scale owners (e.g. individuals, rather than big corporations) will face higher transaction costs to make continuous unnecessary improvements, and likely would be deterred from doing so unless truly important.

20. Ban Algorithmic Pricing in Rental Markets

In recent years, for example, there have been news reports and lawsuits against RealPage, a firm that engages in price consultation and coordination for corporate

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[112] *See* Ricks et al., *supra* note 60, at 147-80.

[113] *See, e.g.,* Richard M. Alston, J.R. Kearl, Michael B. Vaughan, *Is there a Global Consensus Among Economicsts in the 1990s?,* 82 AM . ECON. REV. 203, 204 (1992) (reporting strong consensus view among economists that "[a] ceiling on rents reduces the quantity and quality of housing available.").

rental properties.[114] The allegations are that RealPage works with corporate rental properties to help them set their prices – and that by doing so, it effectively operates as a cartel that is price-fixing at higher rates than would exist in a competitive market. For markets to work, landlords need to make uncoordinated decisions about prices. While antitrust cases against RealPage proceed apace, they operate on a case-by-case basis, can take years, and only apply to RealPage. A more direct solution would be for Congress to simply ban algorithmic pricing in rental markets – and to ban the practice of price consulting and related services for rental markets where the consultant works for more than one firm.

21. Ban Junk Fees in Rental Markets

In addition to problems of collusive rent-setting through algorithms, renters often face hidden and surprise fees. In addition to application fees and security deposits, corporate rental firms have started adding a wide range of questionable junk fees on top of the cost of rent. For example, the FTC recently sued Invitation Homes for a range of abusive practices against renters, including adopting junk fees like their "lease easy fee," "utility management fee," and "smart home technology fee." [115] Executives wanted to "juice this hog" using these extra fees.[116] Banning junk fees and adopting all-in pricing, in which the advertised rental price covers all fees, would make this market more transparent, allow renters to compare prices in an apples-to-apples way, and prevent renters from having to choose whether to pay extra beyond what they anticipated or lose their application fee and start from scratch.

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[114] Heather Kelly, *RealPage Lawsuit: How an Algorithm May Have Pushed Rent Prices Higher,* WASH. POST (Jan. 8, 2025), https://www.washingtonpost.com/business/interactive/2025/realpage-lawsuit-rent-map/; Press Release, U.S. Dep't of Just., *Justice Department Sues RealPage: Algorithmic Pricing Scheme Harms Millions of American Renters* (Aug. 23, 2024), https://www.justice.gov/opa/pr/justice-department-sues-realpage-algorithmic-pricing-scheme-harms-millions-american-renters.

[115] Press Release, Fed. Trade Comm'n, FTC Takes Action Against Invitation Homes for Deceiving Renters, Charging Junk Fees, Withholding Security Deposits, and Employing Unfair Eviction Practices (Sept. 24,2024), https://www.ftc.gov/news-events/news/press-releases/2024/09/ftc-takes-action-against-invitation-homes-deceiving-renters-charging-junk-fees-withholding-security; Matt Stoller, *Monopoly Round-Up: Corporate Slumlords and Housing Cartels*, Substack (Sept. 29, 2024), https://www.thebignewsletter.com/p/monopoly-round-up-corporate-slumlords.

[116] *Id.*

22. Establish Landlord Registries

Across the board, bad behavior in the rental market can fly under the radar because landlords are not always identifiable because they are limited liability corporations (LLCs).[117] A number of states have begun to address this problem by creating landlord registries, which ensure that property owners, including LLCs, are identifiable and have contact information on the books.[118] More states or the federal government could create a landlord registry (at the federal level run perhaps by HUD or the CFPB), in which landlords' identities would be disclosed. This would prevent landlords from hiding behind corporations – whether to shield themselves from tax liabilities, the blowback from disinvestment in their properties, or monopolization in a region.[119] The result would be that both renters and the public – the press, legislators, regulators, and citizens – would know who is responsible in the event of poor conditions and high prices. Such a registry would also enable better data collection on concentration in rental markets.

23. Density Minimum Zoning

Density minimums are one example. Most traditional zoning is a constraint on density. Minimum lot sizes, height limits, and floor area ratio (FAR) requirements define a specific developable envelope that limits how much housing can be built per acre of land. But there is no reason this approach cannot be reversed. Local governments can impose density *minimums* on new developments. This approach is

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[117] Brian Mykulyn & Elora Raymond, *When Landlords Hide Behind LLCs*, SHELTERFORCE (Aug. 23, 2022), https://shelterforce.org/2022/08/23/when-landlords-hide-behind-llcs/; Julia Carrie Wong, *Hidden Landlords: How Limited Liability Companies Shape the Rental Market,* THE GUARDIAN (Nov. 16, 2023), https://www.theguardian.com/us-news/2023/nov/16/hidden-landlords-limited-liability-companies-llcs-rental-property; Emily Badger, *Why It Has Become So Easy to Hide in the Housing Market,* N.Y. TIMES, (Apr. 30, 2018), https://www.nytimes.com/2018/04/30/upshot/anonymous-owner-llc-why-it-has-become-so-easy-to-hide-in-the-housing-market.html.

[118] Tim Henderson, *States Try to Ferret Out Hidden Property Owners,* HERALD NEWS (Nov. 7, 2019), https://www.heraldnews.com/story/news/2019/11/07/states-try-to-ferret-out/2345302007.

[119] David Wachsmuth & Alexander Weis, *The Eviction Economy: How Landlords Profit from Housing Insecurity,* 55 URBAN AFFS. REV. 1291 (2020), https://journals.sagepub.com/doi/full/10.1177/0003122418821339; Daniel De Visé, *How Landlords Are Evading Taxes and Fueling the Housing Crisis,* THE HILL (Aug. 23, 2023), https://thehill.com/policy/3585336-how-landlords-are-evading-taxes-and-fueling-the-housing-crisis/.

uncommon but not unprecedented.[120] A number of cities, from Portland, Oregon, to Charlotte, North Carolina, and places in between, have adopted some version of density minimums, at least in some areas, often to maximize the impact of public transit.[121] Supply-siders often assume that zoning regulations are what prevent density and that an unregulated market will produce many more, smaller units. But this is not necessarily true. Without regulation, developers in many places will prefer to build large houses on large lots to maximize profits.[122] Density minimums will instead require them to build many units on a single tract, producing more housing than profit-motivated developers might build on their own. Density minimums need to be designed carefully in order to work. If they are not designed well, then developers may choose not to develop at all because they do not have the financing to build at the required density levels. The result can be less housing, not more dense housing. Density levels must also be aligned with consumer preferences in order to be successful, and those preferences will vary by locality. Nevertheless, density minimums have the potential to result in a greater number of housing units, instead of fewer, larger houses.

24. Maximum Home Size Zoning

Maximum house sizes are another example.[123] The average size of single-family homes has increased by more than sixty percent over the last fifty years. Expanding the developable envelope of land will not necessarily produce more housing units if developers fill it with a single McMansion, or with other large luxury housing. Supply side advocates argue that even this form of development will indirectly and eventually help reduce prices through "filtering," as once high-end housing ages and filters down to become more affordable over time, putting downward pressure on prices throughout the housing market. Nevertheless, these ever-expanding building patterns represent a missed opportunity of producing more units per acre when property is developed—especially in places where density is most desirable and land

[120] *See* Michael Lewyn & Judd Schechtman, *No Parking Anytime: The Legality and Wisdom of Maximum Parking and Minimum Density Requirements,* 54 WASHBURN L.J. 285, 286 (2015).
[121] *See* Christopher Serkin, *Climate Zoning,* 99 NOTRE DAME L. REV. 1143 (2024)
[122] *Cf.* Paul Emrath, *Economies of Scale in Single-Family Home Construction*, NAT'L ASSOC. HOME BUILDERS (Sept. 3, 2024), https://eyeonhousing.org/2024/09/economies-of-scale-in-single-family-home-construction/.
[123] Alec LeSher, Jonathan Rosenbloom, & Christopher Duerksen, *Establish Maximum Size of Single-Family Residences, Sustainable City Code,* SUSTAINABLE DEVELOPMENT CODE, https://sustainablecitycode.org/brief/establish-maximum-size-of-single-family-residences-7/.

is scarce. Maximum unit sizes, on the other hand, would channel new construction into smaller and more affordable housing directly, instead of relying on filtering. Indeed, a number of cities have already adopted maximum sizes, using a variety of specific mechanisms.[124] As with minimum density requirements, the maximum unit sizes must be adopted carefully and contextually. If they require a development form that consumers do not want, they will act as a barrier to development.

25. Primary Residence Zoning

Zoning traditionally targets buildings' use as well as its form and bulk. Use restrictions can also be used to promote affordability by, for example, targeting uses that compete with housing as a primary residence. In many places, property held as second homes constitute a significant portion of the housing market. Data on second-home ownership rates are scarce and contested.[125] But where second homes are widespread, they reduce the housing available for full-time residents. One zoning strategy, then, is to define permissible uses in an area as including only primary residences. The term "primary residence" is itself often contested, focusing sometimes on a standard like "habitual residence," and sometimes on a strict "presence time," that specifies some number of days per year of occupancy. However defined, requiring only primary residences in a place will help to ensure that all of the housing in the zone is actually occupied most of the time. Notice that this does not exclude long-term renters. Nor does it exclude short-term rentals for the time that the primary resident is not occupying the property. Primary residence zones would need to include a provision grandfathering existing second-home owners, to prevent unfairness. Note also that primary residence zones need not be an all-or-nothing proposition: a second home could be allowed as a conditional use, but subject to different and heightened zoning requirements, for example a limit on the total number of second homes in the zone.

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[124] *See id*.

[125] *See, e.g.,* Zhiwei Gao, Michael Sockin & Wei Xiong, *Economic Consequences of Housing Speculation,* NBER WORKING PAPER NO. 26457, NAT'L BUREAU OF ECON. RSCH. (2019) (identifying non-owner-occupied home purchases at 15% of mortgage originations in 2005); Daniel I. Garcia, *Second-Home Buying and the Housing Boom and Bust,* 50 REAL EST. ECON. 33 (2022) (proposing alternative methodology for identifying second-home purchases).

26. Minimum Occupancy Zoning

There are many places where second-homes are welcomed, and where summer houses may be routinely and appropriately shuttered for the winter. But there are other places, like New York City, where persistently vacant units impose real opportunity costs for housing supply. One solution to this problem is minimum occupancy zoning – a rule requiring that any housing unit actually be occupied for a certain number of days per year. This would be both more and less strict than primary residence zoning rules, discussed above. For example, someone using the housing as a primary residence might still not meet occupancy requirements in a minimum occupancy zone, which might demand the units to be occupied for a certain number of days that is more than is required for a primary residence. At the same time, minimum occupancy rules might allow successive short-term rentals without anyone using the property as a primary residence, so long as the unit is occupied for enough days of the year. Primary residence zones and minimum occupancy rules could be alternatives or work in conjunction, and their appropriateness would depend on local housing conditions and the persistence of vacant housing units.

27. Institutional Investor Free Zones

Zoning typically restricts the use and form of development, and not the owner. But housing in some markets is coming under increasing pressure by large institutional investors. It has been commonplace in this country for large multi-family apartment buildings to be owned and managed by commercial landlords, who benefit from expertise and economies of scale. This ownership form also has some benefits, as it can both reduce discrimination and increase professionalization of building operations.[126]

But the single-family rental market is quite different. Traditionally, the rental market for single-family homes has been dominated by small landlords—owners of one or two houses who are entering into long-term rentals with individual tenants. That has been changing in the last decade as large firms, like Blackstone, have aggressively entered into the single-family market. These institutional investors have been acquiring a significant percentage of single-family homes in some markets, relying

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[126] *See, e.g.,* Erling R. Larsen & Dag Sommervoll, *The Impact on Rent from Tenant and Landlord Characteristic Interaction,* 39 REG'L SCI. & URB. ECON. 316 (2009) (summarizing data from Norway).

on sophisticated algorithms for both house pricing and then property management. The results for investors are encouraging – but for tenants and housing markets, not so much. Early research suggests that single-family homes owned and managed by large institutional investors have much higher tenant turnover, worse housing conditions, and higher rents than other single-family rental properties.[127] In other places, investors are also buying up single-family homes for use as short-term rentals through companies like AirBnB, again outcompeting many residents looking for long-term, stable housing.[128]

A municipality could address both problems by prohibiting institutional-investor-owned properties. Primary residence zones would address an aspect of these issues, but again may be more restrictive than a particular municipality wants. In some places, a municipality might want to allow second homes, but not institutional-investor-owned properties, for example. Institutional investor-free zones would face some legal challenges. In some states, zoning may not be allowed to regulate ownership. But state enabling legislation, where required, would free up municipalities to address this growing phenomenon of Wall Street invading Main Street housing. Specific alternatives are also possible to imagine: a city could bar a single investor (whether individual or institutional) from owning more than a certain number of properties, or owning a number of properties in a particular class (e.g. apartments, homes).

28. Limits on Homeowners Associations

When zoning does not provide sufficient stability and control over community character, housing consumers are likely to seek private substitutes primarily in the form of homeowner associations (HOAs).[129] Housing units in HOAs usually sell for a premium. That premium is inversely related to the restrictiveness of local zoning. The looser the zoning, the higher the premium, indicating that consumers view HOAs as a kind of substitute for public land use regulations.[130] The private covenants

[127] Nadiyah J. Humber, *Corporate-Tech Landlordism—The New Era,* STAN. TECH. L. REV. (FORTHCOMING).
[128] Cameron Ehrlich, Tim McDonald, L. David Vertz & Sage Computing Staff, *Institutional Investors Outbid Individual Homebuyers*, EVIDENCE MATTERS (Winter 2023), https://www.huduser.gov/portal/periodicals/em/winter23/highlight1.html#title.
[129] Christopher Serkin, *Creating Density: The Limits of Zoning Reform,* 11 BRIGHAM-KANNER PROP. RTS. J. 183, 185–86 (2022).
[130] Wyatt Clarke & Matthew Freedman, *The Rise and Effect of Homeowners Associations,* 112 J. URB. ECON. 1, 13 (2019).

regulating HOAs are often much more restrictive than any municipal zoning. They also can ignore public policy pressures and are much more difficult to change than local zoning codes.[131] The impact of zoning innovations may be blunted by the constraints of restrictive covenants in HOAs unless the regulatory reforms apply to them, too. Already, California has preempted both zoning and HOA covenants that restrict accessory dwelling units, effectively allowing accessory dwelling units throughout the state, even in HOAs that prohibit them.[132] Where governments adopt the other kinds of reforms suggested in this section, like density minimums, those could also apply to HOAs.

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[131] Robert C. Ellickson, *The Zoning Straitjacket: The Freezing of American Neighborhoods of Single-Family Houses,* 96 IND. L.J. 395 (2021); *cf.* Robert C. Ellickson, *Stale Real Estate Covenants,* 63 WM. & MARY L. REV. 1831 (2022).

[132] Ken Stahl, *The Power of State Legislatures to Invalidate Private Deed Restrictions: Is It an Unconstitutional Taking?,* 50 PEPP. L. REV. 579 (2023).