

Adaptive Rezoning for Social Equity, Affordability and Resilience

*Shelby D. Green**

I. INTRODUCTION	1326
II. “THEM THAT’S GOT SHALL GET, THEM THAT’S NOT SHALL LOSE”: THE LEGACIES	1327
III. THE TRANSMOGRIFICATION OF ZONING.....	1329
A. The Zoning Subtexts.....	1331
B. Racial Zoning Becomes Overt.....	1332
C. Racial Zones by Official Federal Mortgage Policies: Mapping out People of Color.....	1333
1. Color Coding Neighborhoods.....	1333
D. Racial Zones Under Federal Rental Housing Programs.....	1335
E. Zones and Separation by Urban Renewal Operating as “People Removal”	1335
1. Neighborhoods to Highways.....	1336
2. Private Zoning by Deed Restrictions	1337
IV. EVOLUTION AND ENLIGHTENMENT	1337
A. Racist and Idiosyncratic Zoning as the Root Causes of the Legacy of Inequity.....	1338
1. Reducing Supply and Increasing Costs	1339
2. Wealth Gaps.....	1340
3. Health Gaps.....	1341
4. Physical Inactivity and Chronic Disease.....	1342
5. Disproportionate Effects of Climate Change	1342
V. “ADAPTIVE REZONING”: A RADICAL OVERHAUL OF EUCLIDEAN ZONING ..	1343
A. Designing the Inclusive and Healthy Community.....	1344
1. Planning at the Core.....	1346
B. Prescriptive Measures for Creating Community.....	1347
C. Adaptive Reuse	1348
1. Community Spaces for Building Community	1349
2. Street and Transportation Design and Highways.....	1349
VI. CONCLUSION	1350

* Susan Taxer Research Professor of Law, Elisabeth Haub School of Law, White Plains, N.Y.

I. INTRODUCTION

There is much inequity in our society—in economic opportunity, in health care, in education, in the enjoyment of the amenities of social life. The most glaring manifestation of this inequity is in access to housing. “Housing is an essential predicate for” human flourishing, economic and social power, establishing a place in the community, fostering social relations, nurturing children, encouraging norms, self-realization, and self-fulfillment.¹ Yet, disparities continue because of the legacies of legal discrimination from racist laws and policies and also because current facially-neutral zoning laws and land use policies continue to operate perniciously in the background.

Shortages of housing have been persistent, particularly for low-income households. When economic conditions deteriorate, so do the resources of low-income families and other property owners. The 2008 Housing Crisis led to millions of foreclosures,² and these losses fell disproportionately on poorer households—communities declined, property values of neighboring properties suffered, and all were demoralized by the woeful auction signs in front yards.

In this Article, I will show how the legacies of the institutional barriers to housing still persist to deprive many of the predicates for economic thriving and personal flourishing and how existing zoning philosophy cannot be justified by the need to protect health and safety. Righting the inequities of the past and of the present will require dismantling some of the institutions, apparently legitimate and well-meaning, but operating devilishly to create and perpetuate hardship and exclusion. This will require laying bare the institutions to reveal their ignoble essence. We need a radical overhaul of the historic zoning regime from one that excludes to one that is prescriptive of inclusion. We must imagine and construct a new world, one that is open and sustainable for living and against the looming impacts of climate change. We can do this by what I call *adaptive rezoning*. In laying out the contours of this concept, I will offer comment on the various initiatives around the country for inclusive and sustainable cities (including those that pertain to the impacts of climate change) and offer my own ideas for a plan for social and economic justice.

¹ Shelby D. Green, *Imagining a Right to Housing, Lying in the Interstices*, 19 GEO. J. ON POVERTY L. & POL’Y 393, 435 (2012).

² Shelby D. Green, *Disquiet on the Home Front: Disturbing Crises in the Nation’s Markets and Institutions*, 30 PACE L. REV. 7, 12 (2009).

2022]

ADAPTIVE REZONING

1327

II. “THEM THAT’S GOT SHALL GET, THEM THAT’S NOT SHALL LOSE”:³ THE LEGACIES

“So the Bible said and it still is news . . . God bless the child that’s got his own.”⁴ So says Billie Holiday in her very sorrowful lament about hardship and inequity. The lyrics seem aptly to describe the historic and present lot of a huge segment of society, going back to the very origins of our nation. We are now seeing that the lofty proclamations of justice and rights of the Declaration of Independence and the grand promises of the Constitution and Bill of Rights were not spoken to all, but to those who had. Early on, rights—to vote, to acquire property, to use the public libraries—were limited to persons of a certain stature (and race).⁵

Opportunities to acquire property, whether to rent or to buy, have long been intertwined with racist and classist preferences.⁶ So many households do not have or pay an inordinate amount to get housing. If a household spends more than 30 percent of its income on the cost of rent and utilities, it has a housing cost burden, and if it spends more than 50 percent on these costs, it has a severe housing cost burden.⁷ Here is the rub: in 2019, there were only 37 affordable and available homes for every 100 extremely low-income renter households nationwide.⁸ Perversely, home prices have been surging, up by as much as 28 percent

³ BILLIE HOLIDAY & ARTHUR HERZOG, JR., *GOD BLESS THE CHILD* (Columbia Studio A 1942), So the Bible said and it still is news, Mama may have, Papa may have, but God bless the child that’s got his own, that’s got his own, yes, the strong gets more, while the weak ones fade, empty pockets don’t ever make the grade, Mama may have, Papa may have, but God bless the child that’s got his own, that’s got his own, money, you’ve got lots of friends, crowding round the door, when you’re gone, and spending ends . . .

⁴ *Id.*

⁵ Green, *Imagining a Right to Housing, Lying in the Interstices*, *supra* note 1, at 400; see also Douglas Steven Massey, *The Past & Future of American Civil Rights*, 2 *DAEDALUS: J. AM. ACAD. ARTS & SCIS.* 37 (2011), <https://www.amacad.org/publication/past-future-american-civil-rights#fo>; DIGIT. PUB. LIBR. OF AM., *A History of US Public Libraries*, <https://dp.la/exhibitions/history-us-public-libraries/segregated-libraries/> desegregation (last visited Apr. 4, 2022); Patterson Toby Graham, *Public Librarians and the Civil Rights Movement: Alabama, 1955-1965*, 71 *LIBR. Q.* 1, 1–27 (2001). See generally *Shelby County v. Holder*, 570 U.S. 529 (2013), on the barriers to voting put up by governments through our history.

⁶ See, e.g., JESSICA TROUNSTINE, *SEGREGATION BY DESIGN: LOCAL POLITICS AND INEQUALITY IN AMERICAN CITIES* 19 (Cambridge Univ. Press 2018) (arguing that “white property owners turned to suburbanization as their primary mechanism for protecting property values”).

⁷ See generally JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV., *THE STATE OF THE NATION’S HOUSING* 4 (2021) [hereinafter JOINT CENTER].

⁸ NAT’L LOW INCOME HOUS. COAL., *THE GAP: A SHORTAGE OF AFFORDABLE HOMES* 2 (2021); *Id.* at 32–33.

in some areas in the last year.⁹ During the same time, here is how this access/affordability mismatch was revealed:

- “Nearly half of all renter households (20.4 million) and a fifth of homeowner households (16.7 million) spent more than 30 percent of their incomes on housing.”¹⁰
- “Of these 37.1 million households, 17.6 million spent more than 50 percent of their incomes on housing.”¹¹
- “Households with low-incomes were the most likely to face a severe cost burden.”¹²
- “More than three-fifths of renters and nearly half of homeowners earning less than \$25,000 were severely cost burdened, along with one in six renters and one in eight of homeowners earning \$25,000-49,999, respectively.”
- “In contrast, less than 2 percent of all households earning \$50,000 or more had severe burdens.”¹³
- “Within the low-income group, cost burden rates were disproportionately high among households of color. While 82 percent of all renters earning less than \$25,000 were cost burdened in 2019, the shares of Hispanic (86 percent), Black (83 percent) and Asian (84 percent) households all exceeded the share for white households (80 percent).”¹⁴
- “In addition, some 69 percent of low-income homeowners were cost-burdened, but the shares for Hispanic (72 percent), Black (74 percent) and Asian (81 percent) households were also higher than for white households (68 percent).”¹⁵

Some of the more obvious and concerning consequences of housing cost burdens is that there is no cushion in the budget; no available funds for other necessities. Often these households are relegated to substandard, unhealthy, unsafe units, far from social and health services, jobs, and transportation. The pandemic forced many poorer households and households of color to double-up to hold up in

⁹ JOINT CENTER, *supra* note 7, at 1–2.

¹⁰ *Id.* at 32.

¹¹ *Id.*

¹² *Id.* at 32.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ JOINT CENTER, *supra* note 7, at 32.

2022]

ADAPTIVE REZONING

1329

congested spaces; often spaces that contained lead-based paint, causing other sorts of ills.

Housing availability and affordability issues have been exacerbated in the recent years by the threats and impacts of climate change. Millions of properties have been lost to more frequent and severe weather events—from flooding to wildfires.¹⁶

As I show below, this housing access paradigm is not the natural evolution of social and economic forces, but emerged from laws and deliberate government policy, some well-meaning and some not so.

III. THE TRANSMOGRIFICATION OF ZONING

The housing access paradigm has deep roots in the concept of zoning. Who could argue against a law that banned soap factories from operating in a residential community? Zoning was necessitated by increased urbanization and industrialization in the mid- to late-nineteenth century that made city life challenging—navigating the crowded streets and breathing the dirty air from the factories.¹⁷ Yet, city governments were slow to respond with measures to control industry’s throw-offs, even that which promised larger societal health impacts, like tuberculosis and cholera.¹⁸ Social reformers stood up to push for systems of land use to control these conditions.¹⁹ From their own selfish concerns, classes sought separation—retailers from factories; the rich

¹⁶ TOM LARSEN ET AL., CORELOGIC, 2021 HURRICANE REPORT (2021), https://www.corelogic.com/wp-content/uploads/sites/4/2021/06/Hurricane-Report_V2WEB062921.pdf.

¹⁷ DUKEMINIER ET AL., PROPERTY 968–69 (8th ed. 2014).

¹⁸ See Charles M. Haar, *Reflections on Euclid: Social Contract and Private Purpose*, in ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP 333, 339 (Charles M. Haar & Jerold S. Kayden eds., 1989) (explaining that advocates of the “City Beautiful” movement sought “purposeful intervention of government to achieve urban beautification”). In 1866, New York adopted the Metropolitan Health Act to regulate unsanitary conditions on private property at the urging of architects, seeking more aesthetics in building construction. The first city to enact a comprehensive zoning ordinance was Los Angeles, California, in 1909. The ordinance divided the city into districts—one residential and seven industrial. Seven years later, in 1916, New York City enacted an ordinance that regulated uses by zones and imposed size and height limits for buildings. *Id.*

¹⁹ *Id.* at 339–40 (explaining that “a ragtag grouping of idealists and special interest groups” believed that zoning would allow the poor to live amid “plenitudes of fresh air and sunlight” by “keeping industry and trade from residential sections”).

from the poor.²⁰ Zoning's original and surely innocent claim was that certain uses are just incompatible in the same area.²¹

For most of our history, separation of uses was accomplished, if at all, through private covenants²² and the law of nuisance. But, apart from the city of Houston, which lacks zoning regulations, these land use devices proved to be ineffective and inefficient. Covenants needed enforcement and could be terminated. Nuisance laws, described as “a jungle,”²³ purport to mediate between two competing claims: property owners asserting the right to control their land and use it in their own selfish and narrow interests on one hand and on the other hand, the public and that property owner's neighbors claiming the right to prevent unreasonable uses that substantially invade the peaceful use and enjoyment of public space and adjoining private land. In mediation, the rights of one will be curtailed or that of the other will suffer the assaults of the first. The conflict could not be addressed before the noxious use, and its resolution could not be predicted by any straight line, and that is what gives nuisance its jungle-like character.²⁴

Something more was necessary to predictably protect the health and safety and economic concerns bound up with detrimental and unwise land use. Landowners' rights as a universal proposition needed to be curtailed. Zoning served this purpose with prospective prohibitions. One could not without civil liability or injunction build whatever and wherever one chose. Instead, permission must be had for most kinds of land uses. But these legal constraints are not remarkable:

²⁰ Michael Lewyn, *New Urbanist Zoning for Dummies*, 58 ALA. L. REV. 257, 261–62 (2006).

²¹ John R. Nolon, *Zoning's Centennial: A Complete Account of the Evolution of Zoning into a Robust System of Land Use Laws—1916-2016 (Part I)*, ZONING & PLAN. L. REP., Oct. 2016, at 1.

²² That is still the principal method of land use in one the nation's largest cities, Houston, Texas. Real covenants, along with municipal regulations on building height and footprint, seems to have worked well enough to result in discernable separations. See DUKEMINIER ET AL., *supra* note 17; Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 716–719 (1973); Timothy Stoltzfus Jost, *The Defeasible Fee and the Birth of the Modern Residential Subdivision*, 49 MO. L. REV. 695, 703–705 (1984).

²³ “There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word ‘nuisance.’” W. PAGE KEETON ET. AL., PROSSER AND KEETON ON THE LAW OF TORTS § 86, at 616 (5th ed. 1984). The aim of nuisance law is said “to achieve efficient and equitable solutions to problems created by discordant land uses. *Carroll v. Absolute Tank Removal, LLC*, 834 A.2d 823, 825 (Conn. Super. Ct. 2003).

²⁴ See *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870 (N.Y. 1970) (finding a private nuisance in the harmful emissions from factory, but refusing to enjoin the operations, instead, awarding permanent damages).

2022]

ADAPTIVE REZONING

1331

we have long since abandoned Blackstone's concept of property as that "despotic dominion . . ." ²⁵ In fact, it is doubtful that the idea was ever seen in its fullest measure.

By the mid-1920's, nearly 1,000 cities had adopted comprehensive zoning laws. These laws were enacted pursuant to state enabling acts, many based on the Standard State Zoning Enabling Act ("SSZEA") created by the Department of Commerce in 1920.²⁶ The state enabling acts delegate to local governments control over the use of private land, usually requiring land use plans and creating zoning districts.²⁷ SSZEA contemplated the delegation to cities the power to restrict building size and height, the size of yards and other open spaces, the density of population, and the location and use of buildings.²⁸ The stated aim of the model act was "to prevent the overcrowding of land and to avoid undue concentration of population."²⁹ The legal predicate for these land use regulations was police powers inherent in all governments, which are lawfully used to protect "the public health, safety, morals and general welfare."³⁰

A. *The Zoning Subtexts*

It was the prospective prohibition of particularly threatening uses in certain areas that was the basis for a challenge in the U.S. Supreme Court. In *Village of Euclid v. Ambler Realty Co.*,³¹ the Supreme Court ruled that it was a lawful use of police power to adopt an ordinance to protect the public against nuisance-like conditions from nearby land, even though no noxious uses were at issue. The court ruled that so long as the rationality of the relationship between the ordinance and its purposes is "fairly debatable," the court will defer to the legislative

²⁵ 2 WILLIAM BLACKSTONE, COMMENTARIES *2.

²⁶ Lewyn, *supra* note 20, at 262 (citing ADVISORY COMM. ON ZONING, U.S. DEP'T OF COM., A STANDARD STATE ZONING ENABLING ACT (rev. ed. 1926), <http://www.planning.org/growingsmart/pdf/SZEnablingAct1926.pdf>).

²⁷ *See id.*

²⁸ *Id.* (citing ADVISORY COMM. ON ZONING, U.S. DEP'T OF COM., A STANDARD STATE ZONING ENABLING ACT § 1 (rev. ed. 1926), <http://www.planning.org/growingsmart/pdf/SZEnablingAct1926.pdf>).

²⁹ *Id.* (quoting ADVISORY COMM. ON ZONING, U.S. DEP'T OF COM., A STANDARD STATE ZONING ENABLING ACT § 3 (rev. ed. 1926), <http://www.planning.org/growingsmart/pdf/SZEnablingAct1926.pdf>).

³⁰ *Berman v. Parker*, 348 U.S. 26 (1954). But this authority is broader than the language suggests. This power is not limited to merely clearing blight but can be used to achieve beauty. *Id.* at 33.

³¹ 272 U.S. 365 (1926).

judgment.³² Emerging from the case was the concept of Euclidean zoning, involving the rigid separation of what is deemed incompatible uses, in that case, even justifying the separation of single-family housing from apartment buildings.³³ The subtext of the ordinance upheld in *Euclid* was that the most important land use in the community was for single-family homes. As such, the sanctity of families depended upon the protection of single-family homes from threats from all other land uses. The perceived threats were found not solely on activities that were noxious *per se*, but also from uses that were innocent, such as for churches and schools. Apartment buildings, which typically housed people with lesser means, could not be allowed to “monopoliz[e] the rays of the sun which otherwise would fall upon the smaller homes.”³⁴ Apartment buildings were “parasite[s] constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district.”³⁵

B. Racial Zoning Becomes Overt

Justice Sutherland’s truly gratuitous comments were revealing—about a deep hostility on the mixing of classes as cast by their housing opportunities. Zoning ordinances allowed only certain kinds of communities to be created and occupied in parts of cities. The zoning techniques of large lots and detached homes had the effect of separating people by their means, which historically was synonymous with race. In some communities, racial zoning occurred in the open with intention. In the early twentieth century, several cities determined through municipal zoning laws to prevent Blacks from living in white neighborhoods. The Supreme Court struck down one such ordinance in *Buchanan v. Warley* in 1917.³⁶ As recounted below, although not nominally the same, racial zoning lived on under cover by other names, and the legacies of this separation continue more than a century later.

³² *Id.* at 388.

³³ *Id.* at 394.

³⁴ *Id.*

³⁵ *Id.* Justice Sutherland, in labeling apartment homes (or their dwellers) as “parasites,” went on to explain the threat: “[T]hat the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes.” *Id.*

³⁶ *Buchanan v. Warley*, 245 U.S. 60, 82 (1917); *Jackson v. State*, 103 A. 910, 910 (Md. 1918). Some Southern cities ignored the Supreme Court’s ruling altogether, while others attempted to circumvent the ruling by enacting ordinances that segregated neighborhoods based on the race of the residents who lived on a particular city block. MECHELE DICKERSON, HOMEOWNERSHIP AND AMERICA’S FINANCIAL UNDERCLASS: FLAWED PREMISES, BROKEN PROMISES, NEW PRESCRIPTIONS 191 (2014).

2022]

ADAPTIVE REZONING

1333

C. *Racial Zones by Official Federal Mortgage Policies: Mapping out People of Color*

Before the Great Depression, most Americans were renters.³⁷ Under the National Housing Act, Congress declared that homeownership should be made available to the greatest number of citizens.³⁸ But not all citizens were included in this dream.

1. Color Coding Neighborhoods

During the Great Depression, when roughly half of home mortgages were in default, the Home Owners' Loan Corporation ("HOLC"), an agency of the New Deal, refinanced more than \$3 billion in mortgages—equivalent to roughly \$1 trillion as a share of the economy today, from 1933 to 1936.³⁹ Prudently, mortgages were extended only to those who, suffering from the setbacks of the economy collapse, still showed the best prospects of repaying or whose collateral was adequate.⁴⁰ But that determination was not based upon objective criteria; instead largely on the basis of the homeowner's race and where the homeowner lived.⁴¹ The HOLC developed color-coded maps of cities that determined who got and did not get loans. At the extremes, red zones indicated "hazardous" neighborhoods where lending was discouraged, because the area had been "infiltrated" by black people, while green indicated the "best" places, because they were entirely segregated. Yellow and blue were in between with varying threats of "infiltration." Black or racially mixed neighborhoods were deemed unsafe on the basis of color alone, and not on objective appraisals of the value of the homes or the creditworthiness of the borrowers.⁴²

As HOLC allowed existing, *colored* mortgages to be foreclosed, other federal agencies set up barriers to homeownership for this same cohort on the same racist policies. The Federal Housing Administration ("FHA")⁴³ was created to provide mortgage insurance for new

³⁷ See DICKERSON, *supra* note 36, at 39–40 (describing features of the pre-Depression housing market that "made homeownership high-risk and high-cost for most potential home buyers").

³⁸ See generally 12 U.S.C. § 1701.

³⁹ MAPPING INEQUALITY: REDLINING IN NEW DEAL AMERICA, <https://dsl.richmond.edu/panorama/redlining/#loc=5/39.1/-94.58&text=intro> (last visited Apr. 4, 2022).

⁴⁰ *Id.*

⁴¹ *Id.*; see also Helen Ryan, *Were the HOLC Residential Security Maps the Origin of Redlining*, 119 OR. HIST. Q. 538, 540–41 (2018).

⁴² See DICKERSON, *supra* note 36, at 13.

⁴³ The FHA was created as part of the National Housing Act of 1934. See National Housing Act of 1934, Pub. L. No. 73-479, 48 Stat. 1246 (1934).

mortgages to encourage lenders to make loans to households with modest income.⁴⁴ In exchange for this insurance, the traditional short-term (typically five years) mortgage with a balloon payment was transformed into a fully self-amortizing twenty-five-year mortgage.⁴⁵ The Veterans Administration (“VA”) mortgage program (part of the GI Bill) was created in turn to help returning veterans buy homes.⁴⁶ At the core of both programs was race as a component for eligibility.⁴⁷ The official FHA policy was to use the racial composition of neighborhoods to estimate home values and to require racial covenants as a condition for mortgage insurance;⁴⁸ homes in neighborhoods deemed dangerous or high-risk would be denied access to government-backed loans and to the wealth-generating power of homeownership.⁴⁹

Similar disparate treatment occurred in the response to the Great Recession, when the federal government saved the financial industry by infusing trillions of dollars of liquidity into investment banks under the Troubled Asset Relief Program,⁵⁰ but engaged in asset preservation practices, aggressively foreclosing on defaulted government-backed loans, with little appetite for foreclosure avoidance or redemption schemes.⁵¹

⁴⁴ *Id.*

⁴⁵ “Pre-Depression mortgage loans were onerous: they contained adjustable interest rates and balloon payments. Because these loans did not self-amortize and had relatively short (five-to ten-year) repayment periods, even when borrowers repaid the loans, they had a final (and often substantial) ‘balloon’ payment that they had to make before they owned their homes outright.” Mechele Dickerson, *Systemic Racism And Housing*, 70 EMORY L.J. 1535, 1538–39 (2021).

⁴⁶ Veterans Administration (now Department of Veteran Affairs) loans, which carried longer terms, were self-amortizing, had fixed interest rates, and allowed eligible veterans to buy homes with relatively small down payments (approximately 20 percent). See Servicemen’s Readjustment Act of 1944 (G.I. Bill of Rights), Pub. L. No. 78-346, 58 Stat. 284 (1944).

⁴⁷ DICKERSON, *supra* note 36, at 146.

⁴⁸ FED. HOUS. ADMIN., UNDERWRITING MANUAL, para. 980(3)g (1938) (stating that restrictive covenants should prohibit “the occupancy of properties except by the race for which they are intended”); see Shelby D. Green, *The Search for a National Land Use Policy: For the Cities Sake*, 26 FORDHAM URB. L.J. 69, 86 (1998).

⁴⁹ DICKERSON, *supra* note 36, at 146.

⁵⁰ Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765 (2008). See generally U.S. Dep’t of Treasury, *Troubled Assets Relief Program (TARP)*, <https://home.treasury.gov/data/troubled-assets-relief-program> (last visited Apr. 4, 2022); U.S. GOV’T ACCOUNTABILITY OFF., TROUBLED ASSET RELIEF PROGRAM: STATUS OF TWO REMAINING ACTIVE INVESTMENT PROGRAMS (2021), <https://www.gao.gov/products/gao-22-105240>.

⁵¹ See Shelby D. Green, *Testing Fannie Mae’s and Freddie Mac’s Post-Crisis Self-Preservation Policies Under the Fair Housing Act*, 66 CLEV. STATE L. REV. 477 (2018) (on

2022]

ADAPTIVE REZONING

1335

D. Racial Zones Under Federal Rental Housing Programs

Not only did federal policies on home ownership act to exclude on the basis of race, so did rental housing programs. The saga of such discrimination, which culminated in *Gautreaux v. Romney*,⁵² revealed the practice of deliberate racial segregation in the siting of public housing complexes. The Seventh Circuit found that HUD's knowing acquiescence in the Chicago Housing Authority's admittedly discriminatory housing program violated the Due Process Clause of the Fifth Amendment and Section 601 of the Civil Rights Act of 1964.⁵³

E. Zones and Separation by Urban Renewal Operating as "People Removal"

The Great Depression revealed the very worrisome plight of the poor, and FDR's New Deal set up a host of programs designed to rehabilitate the economy and improve the lives of those most impacted. FDR put people to work building roads, bridges, national park trails, and painting murals in public buildings. Urban Renewal—the elimination of slums and redevelopment of central cities—was at the center of the New Deal. While the goal of building new housing for the displaced was pronounced, what went up in place of the cleared "slums" was commercial development or homes for wealthier families. The urban renewal program was officially abandoned in 1974 with the enactment of the Housing and Community Development Act ("HCDA").⁵⁴ It was only then, some three decades after the renewal began, long after the Great Depression had resolved, that we began to see what urban renewal had wrought. The poor lost more housing than they gained⁵⁵—more than 700,000 families, primarily low-income and minority

the disparate treatment of borrowers of color in the time leading up to the crisis and the aftermath in the rate of foreclosures).

⁵² 448 F.2d 731 (7th Cir. 1971); *see also* Alexander Polikoff, *Gautreaux and Institutional Litigation*, 64 CHI.-KENT L. REV. 451 (1988) (discussing the two-decades old litigation and the role of courts in fashioning effective remedial actions for long-standing injustice).

⁵³ 42 U.S.C. § 3601; *Gautreaux v. Romney*, 448 F.2d 731 (7th Cir. 1971) (finding funding housing only in segregated communities unlawful).

⁵⁴ Housing and Community Development Act of 1974, 42 U.S.C. § 5301 (1974).

⁵⁵ *See* Amy Lavine, *Urban Renewal and the Story of Berman v. Parker*, 42 URB. LAW. 423, 469 (2010); JOHN R. LOGAN & HARVEY L. MOLOTCH, *URBAN FORTUNES: THE POLITICAL ECONOMY OF PLACE* 167–69 (2007); William Alonso, *Cities, Planners, & Urban Renewal*, in *URBAN RENEWAL: THE RECORD AND THE CONTROVERSY* 437, 442–43 (James Q. Wilson ed. 1966).

residents, had been *removed* and permanently displaced.⁵⁶ While the HCDA substituted block grants to cities, giving them wide discretion as to how to build communities, other than by slum clearance,⁵⁷ the communities that had been erased would not be rebuilt.

1. Neighborhoods to Highways

Federal highway policy began under the Eisenhower administration with the Federal-Aid Highway Act of 1956.⁵⁸ The program had dual ends—one laudable and overt, the other insidious, but *sub silento*. A system of limited access highways connected the country. But to do so, the program pushed multi-lane highways through neighborhoods, uprooting thousands of individuals and destroying entire communities and much scenic beauty along the way.⁵⁹ Highways physically segregated neighbors from each other and from the economic mainstream.⁶⁰ In cleaving these neighborhoods, it was necessary to take and demolish the homes of hundreds of thousands of people, largely of color, to make way. Highways in the neighborhoods can be blamed for deteriorating life outcomes for those who are forced to live near them. We are now seeing the environmental and social burdens from this destructive highway policy—from the effects of pollution from car exhausts and noise, to the loss of walkable access to neighbors, cultural institutions, and grocery stores.

⁵⁶ BERNARD J. FRIEDEN & LYNNE B. SAGALYN, *DOWNTOWN, INC.: HOW AMERICA REBUILDS CITIES* 29 (1989); see also William J. Collins & Katharine L. Shester, *Slum Clearance and Urban Renewal in the United States* 5 (Nat'l Bureau of Econ. Rsch., Working Paper No. 17458, 2012), <http://www.nber.org/papers/w17458>; Henry W. McGee, Jr. & Donald C. Bryant, Jr., *Gentrification and the Law: Combatting Urban Displacement*, 25 WASH. U. J. URB. & CONTEMP. L. 43 (1983) (citing D. MANDELKER, C. DAYE, O. HETZEL, J. KUSHNER, H. MCGEE, & R., WASHBURN, *HOUSING AND COMMUNITY DEVELOPMENT* 520 (1981)); Chester W. Hartman, *Relocation: Illusory Promises and No Relief*, 57 VA. L. REV. 745, 745 (1971) (offering similar assessments based on data from the National Commission on Urban Problems and National Association of Home Builders).

⁵⁷ JAMES A. KUSHNER ET AL., *HOUSING AND COMMUNITY DEVELOPMENT* 408–410 (2011).

⁵⁸ 16 U.S.C. § 503.

⁵⁹ Kathleen McCormick, *Deconstruction Ahead: How Urban Highway Removal Is Changing Our Cities*, *LAND LINES* (LINCOLN INST. OF LAND POL'Y), Apr. 2020, at 22–25.

⁶⁰ In Minneapolis–St. Paul, federal planners and local officials decided in the 1950's to drive I-94 through the heart of Rondo, the social, cultural, and historic center of the area's Black and immigrant communities, rather than use a nearby abandoned rail corridor. The project displaced 600 Black families and shuttered 300 businesses. Dozens of cross streets were turned into cul-de-sacs, denying children direct access to their schools and parishioners their churches.

2022]

ADAPTIVE REZONING

1337

2. Private Zoning by Deed Restrictions

Working alongside federal government exclusionary and displacement policies were private restrictive covenants—promises between white landowners who agreed that neither the current owner, nor their successors, would sell, lease, or give their homes to Blacks.⁶¹ While the Supreme Court ruled in *Shelley v. Kraemer*,⁶² that such discriminatory devices could not be enforced in court, their continued imprint on the ground is indelible.

IV. EVOLUTION AND ENLIGHTENMENT

Over the centuries, there has been an evolution of rights, from negative prohibitions to positive conferral, but the movement has been slow and non-linear. Indeed, it has been described by Justice Scalia as a “mysterious” process, depending on “whether the right bears some resemblance to the fundamental interests that previously have been viewed as implicitly protected by the Constitution.”⁶³ The Fair Housing Act of 1968 is one such step in our evolution, and it covers a host of acts and practices that interfere with access and retention of housing, including lending, brokerage services, insurance services, decisions by municipalities on land use, including allowing affordable, multi-unit housing. Yet, until the Supreme Court ruling in *Texas Department of Housing & Community Affairs v. Inclusive Communities, Inc.*,⁶⁴ in the absence of an overt intent to discriminate based on race, religion, and gender, many facially neutral government policies and laws had been upheld.⁶⁵ But, intent by municipalities to exclude based upon race is

⁶¹ In fact, such restrictions were encouraged by the FHA by implicitly basing official lending policy on them. See Green, *supra* note 48, at 86.

⁶² 334 U.S. 1, 20 (1948).

⁶³ *Gonzalez v. United States*, 553 U.S. 242, 256 (2008) (finding that Defendant’s right to have Art. III judge preside over jury selection did not require defendant’s, as opposed to his counsel’s, consent to have a magistrate preside). Laws have been enacted to create rights to be free of discrimination. Civil Rights Act of 1866, 42 U.S.C. § 1981 (1866) (guaranteeing the right to enter contracts as other citizens); 42 U.S.C. § 1982 (guaranteeing the right to hold, lease, own property as other citizens); Civil Rights Act of 1964, 42 U.S.C. § 2000d (1964) (prohibiting discrimination under federally assisted programs); Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 (1968) (codified as amended at 42 U.S.C. §§ 3601–31 (1988)) (specifically prohibiting against discrimination in housing).

⁶⁴ 576 U.S. 519 (2015) (affirming disparate impact theory for establishing discrimination under the Fair Housing Act of 1968).

⁶⁵ *Id.* at 522. This was so, even where the impact on certain groups or classes was disproportionate, *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–65 (1976), and even where racial animus in the community is overt. *City of Cayuhoga Falls, Ohio v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 192 (2003) (citizens

rarely overt; as racism more often operates covertly, subliminally, unconsciously, even by well-meaning people. Intentional and unintentional discrimination in housing does not simply affect one individual; it can have an impact on how an entire community is perceived; racial meaning attaches to residential segregation. In *Jones v. Alfred Mayer Co.*, the Supreme Court declared that “[w]hen racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.”⁶⁶

A. *Racist and Idiosyncratic Zoning as the Root Causes of the Legacy of Inequity*

The legacies of land use laws and policies live on as they helped create the American suburbs. While some claim that zoning continues to serve the important societal functions that go beyond controlling externalities from incompatible uses, to regulating the pace and costs of community change,⁶⁷ there remains a dark and wicked side. Certain zoning classifications are designed to maintain community character and by this I am not speaking about the style of improvements on lots, but instead the racial and ethnic character of neighborhoods.⁶⁸ Cities employed effective, indirect ways to promote racial segregation—discretionary review of housing construction proposals, low-density zoning, permit caps, large lots and set backs, and single-family zones—to facilitate segregation.⁶⁹ This is *exclusionary zoning*, ironically operated in tandem with what is called *expulsive zoning*, the use of zoning to place industrial and commercial uses in existing residential areas occupied by communities of color, relegating those communities to all manner of deprivation and social harms.⁷⁰

expressing concerns in referendum process about low- to moderate-income housing, that it would attract a population similar to the one in the town’s only African American neighborhood).

⁶⁶ *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 442–43 (1968) (construing the Civil Rights Act of 1866, enacted under the Thirteenth Amendment).

⁶⁷ Christopher Serkin, *A Case for Zoning*, 96 NOTRE DAME L. REV. 749, 752 (2020).

⁶⁸ See *Buchanan v. Warley*, 245 U.S. 60, 73–74 (1917). Lower courts heard challenges to zoning ordinances that explicitly segregated by race well into the 1940s. See, e.g., *Baker v. City of Kissimmee*, 645 F. Supp. 571, 579 (M.D. Fla. 1986) (noting that racial zoning was enforced well into the 1940s); *Monk v. City of Birmingham*, 87 F. Supp. 538, 544 (N.D. Ala. 1949), *aff’d*, 185 F.2d 859 (5th Cir. 1950) (invalidating Birmingham racial-zoning statutes enacted in 1926).

⁶⁹ See generally Jonathan Rothwell & Douglas S. Massey, *The Effect of Density Zoning on Racial Segregation in U.S. Urban Areas*, 44 URB. AFFS. REV. 779 (2009); Rolf Pendall, *Local Land Use Regulation and the Chain of Exclusion*, 66 J. AM. PLAN. ASS’N 125 (2000).

⁷⁰ See Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L.J. 1383, 1385, 1399 (1994).

1. Reducing Supply and Increasing Costs

The evidence is profound that local governments use their zoning powers to price out low-income families, bowing to pressure from upper-middle-income households to preserve or increase home values.⁷¹ The economic costs of zoning regulations is quantifiable.⁷² A study by the National Association of Home Builders estimates that government regulations account for nearly a quarter of the price of a home, with approximately 15 percent of the price attributable to land use regulations and 10 percent that apply after a builder has acquired land.⁷³ In particular, regulations that limit density, impose design standards, or shift cost burdens to developers—essentially, regulations that limit where and how housing is built—decreases the supply and greatly affects total costs of land and construction.⁷⁴ Single-family zoning and large lot zoning drive up the cost of housing,⁷⁵ as they limit

⁷¹ Richard V. Reeves & Dimitrios Hilikias, *How Land Use Regulations Are Zoning Out Low-Income Families*, BROOKINGS INST. 16 (Aug. 16, 2016), <https://www.brookings.edu/blog/social-mobility-memos/2016/08/16/zoning-as-opportunity-hoarding/>. The number of regulatory approvals for new residential development is highly correlated with income segregation; specifically, regulations on density, result in high levels of income segregation. Michael C. Lens & Paaavo Monkkonen, *Do Strict Land Use Regulations Make Metropolitan Areas More Segregated by Income?*, 82 J. AM. PLAN. ASS'N 1, 8 (2016); see also Vanessa Brown Calder, *Zoning, Land Use Planning, and Housing Affordability*, CATO INST. 1–15 (Oct. 18, 2017), <https://www.cato.org/policy-analysis/zoning-land-use-planning-housing-affordability> (finding zoning regulations are associated with increased average housing prices in thirty-six states, thus limiting housing options for low-and middle-income families and increasing those families' reliance on federal rental subsidies).

⁷² Joseph Gyourko & Raven Malloy, *Regulation and Housing Supply*, in 5 HANDBOOK OF REGIONAL AND URBAN ECONOMICS 1289–337 (Gilles Duranton, J. Vernon Henderson & William C. Strange eds., 2015).

⁷³ PAUL EMRATH, NAT'L ASS'N OF HOME BUILDERS, GOVERNMENT REGULATION IN THE PRICE OF A NEW HOME: SPECIAL STUDY FOR HOUSING ECONOMICS 1 (2016).

⁷⁴ See Joseph Gyourko & Albert Saiz, *Construction Costs and the Supply of Housing Structures*, 46 J. REG'L SCI. 661–80, 672 (2006); SANFORD IKEDA & EMILY WASHINGTON, MERCATUS CTR., HOW LAND-USE REGULATION UNDERMINES AFFORDABLE HOUSING (2015); C.J. Gabbe, *Looking Through the Lens of Size: Land Use Regulation and Micro-Apartment in San Fran.*, 17 CITYSCAPE: J. POL'Y DEV. & RSCH. 223, 224–25 (2015).

⁷⁵ See, e.g., Robert C. Ellickson, *Zoning and the Cost of Housing: Evidence From Silicon Valley, Greater New Haven, And Greater Austin*, 42 CARDOZO L. REV. 1611, 1611–18 (2021); Michael H. Schill, *Regulations and Housing Development: What We Know*, 8 CITYSCAPE: J. POL'Y DEV. & RSCH. 5 (2005) (reporting a 52 percent rise in housing costs between 1992–2002, attributable to regulations); John Quigley & Steven Raphael, *Regulations and the High Cost of Housing in California*, 95 AM. ECON. REV. 323, 323–28 (2005); Edward L. Glaeser & Bryce A. Ward, *The Causes and Consequences of Land Use Regulation: Evidence for Greater Boston*, 65 J. URB. ECON. 265, 265–78 (2009); IKEDA & WASHINGTON, *supra* note 74.

the available housing choices for low and moderate-income families.⁷⁶ Impact fees that are greater than actual costs, limits on infill development, obsolete building codes, and slow permitting systems,⁷⁷ all contribute to the cost of housing.⁷⁸ More regulation leads to less developable land, which leads to higher housing costs.⁷⁹

2. Wealth Gaps

Focusing on the most common poles of the housing access paradigm, Blacks and whites, Blacks are decidedly poorer. The wealth gap is persistent and growing—ranging from \$106,900 in 1992 to \$185,400 in 2007 (both adjusted for inflation to 2019 dollars).⁸⁰ The Brookings Institute reported that in the second quarter of 2020, “white households—who account for 60 percent of the U.S. population—held 84 percent (\$94 trillion) of total household wealth in the U.S.”⁸¹ In contrast, “Black households—who account for 13.4 percent of the U.S. population—held just 4 percent (\$4.6 trillion) of total household wealth.”⁸² The report noted that the impacts from the Great Recession widened the gap, leaving Black households more vulnerable to the current COVID-19 recession.⁸³ Racial disparities in wealth are not isolated conditions; instead, they determine the ability of households to manage other life stressors, such as a job loss, abrupt labor market changes or sharp inflationary rises. The Brookings study reports that “the average value of liquid assets among white households was \$8,100 in 2019 compared to \$1,500 for Black households.” Although the median value of retirement equity for households with a household head under the age of thirty-five in 2019 was \$5,000 for Black

⁷⁶ Quigley & Raphael, *supra* note 75; Edward L. Glaeser, Joseph Gyourko & Raven Saks, *Why Is Manhattan So Expensive? Regulation and the Rise of Housing Prices*, 48 J.L. & ECON. 331, 333 (2005).

⁷⁷ The permitting process may require interacting with multiple public agencies and take years. ABT ASSOCIATES, NAT’L ASS’N OF HOME BUILDERS, *DEVELOPMENT PROCESS EFFICIENCY: CUTTING THROUGH THE RED TAPE* 1, 7 (2015).

⁷⁸ Quigley & Raphael, *supra* note 75, at 325 (noting an increase of up to 5 percent for homes and 2.5 percent for rental properties).

⁷⁹ See Christian A. L.Hilber & Frédéric Robert-Nicoud, *On the Origins of Land Use Regulations: Theory and Evidence from US Metro Areas*, 75 J. URB. ECON. 29 (2013).

⁸⁰ Emily Moss, Kriston McIntosh, Wendy Edelberg & Kristen Broady, *The Black-White Wealth Gap Left Black Households More Vulnerable*, BROOKINGS INST. (Dec. 8, 2020), <https://www.brookings.edu/blog/up-front/2020/12/08/the-black-white-wealth-gap-left-black-households-more-vulnerable/>.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

2022]

ADAPTIVE REZONING

1341

Americans compared to \$7,500 for white Americans, Blacks were more likely to have to resort to these resources to stay afloat in times of distress. Perhaps the starkest disparity relates to the rate of homeownership in 2019—73 percent of white families owned a home, while only 42 percent of Black families did. The rate of homeownership among all groups rose meaningfully in the years leading up to the Housing Crisis of 2008, but the drop in that rate among Black families was precipitous. This drop can be attributed to disparate levels of risky mortgage products offered to Blacks, even to those with the same credit risks as whites.⁸⁴ Even as to those Black families with homes, the value was much lower than those of white families—\$150,000 compared to \$230,000. Some of the differences might be explained by disparate appraisals of value given to homes owned by Black families.⁸⁵

3. Health Gaps

Blacks and people of color have suffered more profound health risks than the larger society. The health disparities are related to disparities in access to safe and decent housing and greater exposure to environmental toxins and poor air quality from where they live. The poor and people of color communities are disproportionately located near industrial and waste disposal sites. These communities are likely to be exposed to indirect contamination risks from floodwaters, residual contaminated sediments, and debris disposal.⁸⁶ This proximity is not the result of choice by the residents to move near noxious operations; instead, by the deliberate siting of them in poor neighborhoods.⁸⁷

⁸⁴ Green, *Testing Fannie Mae's and Freddie Mac's Post-Crisis Self-Preservation Policies Under the Fair Housing Act*, *supra* note 51, at 523.

⁸⁵ The recently adopted California Fair Appraisal Act, prohibits appraisers from determining the market value of a property on the basis of race, color, religion, gender, and other impermissible grounds prohibited by the federal Fair Housing Act, and it requires appraisers to complete at least one hour of instruction in cultural competency. 2021 Cal. Stat. ch. 352; Troy McMullen, *For Black Homeowners, a Common Conundrum with Appraisals*, WASH. POST (Jan. 21, 2021), https://www.washingtonpost.com/real-estate/for-black-homeowners-a-common-conundrum-with-appraisals/2021/01/20/80fbfb50-543c-11eb-a817-e5e7f8a406d6_story.html.

⁸⁶ U.S. GLOB. CHANGE RSCH. PROGRAM, *THE IMPACTS OF CLIMATE CHANGE ON HUMAN HEALTH IN THE UNITED STATES: A SCIENTIFIC ASSESSMENT* 107, 115, 161, 173, 197, 253–254 (2016), <http://dx.doi.org/10.7930/J0R49NQX>.

⁸⁷ The Commission on Racial Justice found that race was the strongest variable in predicting the location of waste facilities. These findings led to action by the Congressional Black Caucus and the EPA to adopt measures to address what became known as environmental racism. COMM'N FOR RACIAL JUST., *TOXIC WASTES AND RACE IN THE UNITED STATES* (1987), <https://www.nrc.gov/docs/ML1310/ML13109A339.pdf>.

All the reports have shown that Blacks were 2.4 times more likely to die from COVID-19 than whites, and this higher mortality rate could not be explained based on underlying health conditions. Even so, underlying health conditions making this cohort more susceptible may be due in significant part to a general lack of access to and disparate health care. Life expectancy between “hazardous poorer, segregated neighborhoods and more affluent white suburbs varied by as much as 20 years.”⁸⁸

4. Physical Inactivity and Chronic Disease

Research indicates that low-income and minority populations engage in lower levels of physical activity than the general population. This disparity is related in part to how communities and streets are designed—poorer communities are less likely to have access to parks and green spaces.⁸⁹ Many such communities lack sidewalks and crosswalks. Streetlights are often not functioning. Often there are no stores or social amenities within walking distance of homes. Many communities lack access to fresh foods, relegating residents to unhealthy pre-packaged foods, often sold at the ubiquitous “Dollar Store” or fast-food restaurants.

5. Disproportionate Effects of Climate Change

Climate change, which portends more frequent and intense storms, rising sea levels, and higher storm surges, threatens more flooding, which in turn leads to the increased threat of fugitive chemicals being released into communities, producing increased rates of asthma and other respiratory problems due to greater concentrations of air pollutants.⁹⁰ These conditions disproportionately affect the nation’s most vulnerable populations who live near industrial facilities. Climate

⁸⁸ Malo A. Hutson et al., *Metropolitan Fragmentation and Health Disparities: Is There a Link?*, 90 MILBANK Q. 187, 201 (2012) (observing that “where individuals live and grow up can determine their access to health care, economic opportunities, and lack of such critical resources as quality housing and educational opportunities, all of which can directly or indirectly influence their health [citations omitted]” and finding that metropolitan areas with higher levels of fragmentation are associated with higher morbidity and mortality among African American working-age adults and children).

⁸⁹ Ian Leahy & Yaryna Serkez, *Since When Have Trees Existed Only for Rich Americans?*, N.Y. TIMES (June 30, 2021), <https://www.nytimes.com/interactive/2021/06/30/opinion/environmental-inequity-trees-critical-infrastructure.html>.

⁹⁰ See e.g., Aneesh Patnaik et al., *Racial Disparities and Climate Change*, PRINCETON STUDENT CLIMATE INITIATIVE (Aug. 15, 2020), <https://psci.princeton.edu/tips/2020/8/15/racial-disparities-and-climate-change>; James Krieger & Donna L. Higgins, *Housing and Health: Time Again for Public Health Action*, 92 AM. J. PUB. HEALTH 758 (2002), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1447157/>.

2022]

ADAPTIVE REZONING

1343

change has brought rising ambient air temperatures, leading to heat stress and heat exhaustion. Low-income households are less likely to have air conditioning in their homes and often live in neighborhoods that are urban heat islands without cooling sites.

Climate change destruction is reducing the supply of affordable housing across the county. Affordable housing apartments are often located in flood zones, where land is cheaper; they are built with substandard materials that cannot withstand extreme weather; and the buildings are already old and in need of repair. Low-income residents are unable to fortify their homes and are less likely to have emergency supplies or web-based communications to evacuate in case of impending severe weather. If their homes are destroyed, they might not be able to afford to rebuild or move to a safer location. When damaged by disasters, rental units are less likely to be rebuilt.⁹¹ During the severe flooding of the Mississippi River in 2008, Cedar Falls, Iowa, lost a significant number of affordable homes, many of which were located in the river's floodplain.⁹²

More extreme temperatures and unpredictable energy prices can also raise energy costs for low-income families, who already spend a greater average share of their household incomes on energy than higher-income households. As states and cities adopt sometimes costly climate mitigation and adaptation measures, the "high performance" home may be out of reach for many.

V. "ADAPTIVE REZONING": A RADICAL OVERHAUL OF EUCLIDEAN ZONING

Much of the above discussion aimed to convey the idea related by the noted urban planner, Witold Rybczynski, in his highly celebrated work, *City Life*, that "cities are artifacts"⁹³ and they have conscious impact.⁹⁴ As we recounted above, city design has been driven by the felt need to segregate people based on what they looked like and how they made their living. But these were irrational and consequential drivers. What resulted was a deep physical and psychological division in society, where access to its benefits was unfairly denied to many, where the

⁹¹ See Shelby D. Green, *Building Resilient Communities in the Wake of Climate Change While Keeping Affordable Housing Safe from Sea Changes in Nature and Policy*, 54 WASHBURN L.J. 527, 539 (2014).

⁹² CEDAR RIVER, CEDAR RAPIDS, IOWA, FLOOD RISK MANAGEMENT PROJECT, FEASIBILITY STUDY REPORT WITH INTEGRATED ENVIRONMENTAL ASSESSMENT 110 (2011), <https://usace.contentdm.oclc.org/digital/collection/p16021coll7/id/11571/>.

⁹³ WITOLD RYBCZYNSKI, *CITY LIFE: URBAN EXPECTATIONS IN A NEW WORLD* 35 (Scribner 1995).

⁹⁴ *Id.*

physical environment was allowed to degrade. Yet, none of these motivations should constrain us now: industrial buildings can be converted to housing; highways can be removed, tumble-down houses can be fortified; trees can be planted; and streets can be made to be traversable on foot or on two-wheeled vehicles. There will be costs, but the cost of not doing these things is so much greater.

A. Designing the Inclusive and Healthy Community

“The first thing we do, let’s kill all the [Euclidean zoning].”⁹⁵ Not only is Euclidean zoning not required to achieve the health and safety of citizens, it is anathema. Instead, policymakers and planners need to use their powers to remedy spatial inequality and social isolation of people of color by abandoning this pernicious concept to create and advance environments for thriving and that eliminate the exclusionary and inefficient historic land use patterns for all time.⁹⁶ Existing communities can be reconfigured, and new communities can be designed to be climate cognizant—with mechanisms for sustainability and equity. Not only must physical systems be adapted to climate change, but so must our systems of rights and duties. The aims and limits of law must be allowed to flex to confront the new realities of the physical and political world. The goals of zoning should be expanded beyond keeping out harmful or noxious uses, but to broaden compatible and sympathetic uses for community building. This means designing communities with intent.

We cannot proceed by halves, but must be all in. There are many tools already available for building an equitable community—ones that aim for an equitable distribution of land and an equitable access to society’s goods, services, clean air, and economic opportunities. Adaptive rezoning will mean moving away from denial as a matter of course, to allowance as a matter of right as to housing choices.

Specifically:

- All housing types—single-family, multi-unit, Accessory Dwelling Units, tiny homes, cottage homes, mobile homes, and manufactured homes—must be allowed in all areas as a matter of right.⁹⁷ As residents define their neighborhood

⁹⁵ WILLIAM SHAKESPEARE, *THE SECOND PART OF KING HENRY THE SIXTH* act 4, sc. 2.

⁹⁶ See *Berman v. Parker*, 348 U.S. 26, 33 (1954) (Police powers are protean; they can be used for forward-thinking measures and not just reaction to nuisances.).

⁹⁷ Housing development and housing needs have often been out of sync—developers preferring to build large, expensive homes for greater profit, while the needy poor desiring affordable housing on a smaller scale. Other recent innovations include “cottage housing,” which are modestly sized homes on smaller lots that are either used

2022]

ADAPTIVE REZONING

1345

geographically, they should be allowed to adopt aesthetic guidelines for the array of permitted housing types.

- Landowners should be allowed to subdivide lots as of right.⁹⁸ Lot sizes can be determined by the design of the community and proximity to transit.⁹⁹
- Single-family dwellings should be allowed to be converted to multi-family use as of right.
- All uses should be allowed in all areas, except heavy industrial facilities may not be situated near residential areas. Planners may design compatible corridors or avenues for aesthetic, privacy, and comfort ends.
- Energy efficiency devices should be allowed as a matter of right, including the construction of solar panel arrays in yards.¹⁰⁰
- Parking ratios should be calibrated to changing modes of living and travel.¹⁰¹
- Any use or housing type can be prohibited only upon a finding of substantial adverse effects on health, safety, and

as infill development or clustered with other cottage homes around a common area. A few cities, including Kirkland and Lakewood, Washington, have adopted codes or ordinances for this type of housing development. See *Missing Middle Housing*, MUN. RSCH. & SERVS. CTR., mrsc.org/Home/Explore-Topics/Planning/Specific-Planning-Subjects,-Plan-Elements/Cottage-Housing.aspx (last visited Feb. 21, 2022). The city of Portland allows “tandem housing”—two detached homes on a lot. To facilitate this concept, the city allows lot sizes that are less than 36 feet wide on which developers can build homes with preapproved “permit-ready” plans. See OFF. OF POL’Y DEV. & RSCH., U.S. DEP’T OF HOUS. & URB. DEV., PORTLAND, OR.: LIVING SMART PROGRAM, https://www.huduser.gov/portal/casestudies/study_101711_1.html (last visited Feb. 21, 2022).

⁹⁸ California allows property owners to split single-family lots. For lots of at least 2,400 square feet, an owner may divide the lot into four units. Applications to split are reviewed and approved ministerially and must be granted if the applicant meets specific objective criteria. 2021 Cal. Stat. ch. 162.

⁹⁹ California allows cities to up-zone properties. Up to ten dwelling units per property may be built in areas in transit-rich areas or urban infill sites. Dwellings may be built without the need to conduct an environmental quality review. 2021 Cal. Stat. ch. 163.

¹⁰⁰ The City of Hartford, Connecticut, allows free standing solar panels on historic properties. CITY OF HARTFORD, GUIDELINES FOR SOLAR ON HISTORIC PROPERTIES (2017), <https://hartfordclimate.files.wordpress.com/2016/12/historic-properties-guidelines.pdf>.

¹⁰¹ Seattle reduces minimum parking requirements by up to 50 percent for developments in multifamily zones that are within 1,320 feet of a street with frequent transit service. Seattle Mun. Code Tit. 23—Land Use Code, Subtit. III—Land Use Regulations, ch. 23.54 Quantity and Design Standards for Access, Off-Street Parking, and Solid Waste Storage. Section 020—Parking Quantity Exceptions.

community well-being. The burden of making this showing should rest with the government.

1. Planning at the Core

Adaptive rezoning begins with planning. It portends the deliberate creation and nurturing of cultural zones to enrich and support low-income and disadvantaged families and communities as discerned from the views and sentiments of all its residents; all must be encouraged to participate in all decision-making spaces to the highest level of public policy formulation and implementation. Meaningful community engagement in planning and land use decisions can produce development that meets the needs of the diversity of the residents, garners support for projects, and leads to better assessments of community needs.

Specifically:

- Decision-making must be democratized through engagement of both elected and unelected participants.¹⁰² The vision for the community must be that of the residents and not politicians.
- Comprehensive plans must be developed only after listening sessions, workshops, or town halls with groups of residents and organizations to develop a vision and goals for a community and surveys to ascertain the housing, infrastructure, cultural, and educational needs of the community.
- Neighborhood impact assessments—an evaluation of the social and economic effects—must be made in advance of any regulatory or budgetary decision affecting land use. These assessments will determine how different racial and ethnic groups will likely be affected by a proposed action or decision and to minimize unanticipated adverse consequences. They will help to move racial equity to the conscious level and cause decisionmakers and planners to consider the range of alternatives that might be more beneficial or less impactful as the case might be.

¹⁰² Studies have shown that “policymakers implement most zoning regulations in response to political pressure to keep taxes low and to meet the communities’ demands for public goods and amenities. These pressures have resulted in negative externalities, including the unequal distribution of public services and increased housing costs, that adversely affect low-income families.” Maurice Dalton & Jeffrey Zabel, *The Impact of Minimum Lot Size Regulations on House Prices in Eastern Massachusetts*, 41 REG’L SCI. & URB. ECON. 571 (2011).

2022]

ADAPTIVE REZONING

1347

- Applications for development permits must contain an assessment of demographic growth and composition, housing and economic needs, infrastructure needs, and school needs and must contain plans for mitigating climate change and racial impacts.
- Citizen auditors, informed and aided by experts (attorneys, social scientists, businesspeople), should be appointed to gather data and render periodic reports and recommendations on the social and economic health of the community.

Easing Administrative Processes and Updating Building Codes

- Permitting should be streamlined, with fast-track processes as incentives to develop projects with desirable goals of affordability.¹⁰³
- Building codes should be updated and evaluated for efficacy and cost.

B. Prescriptive Measures for Creating Community

The dismantling of the existing regime cannot be the end of new thinking on zoning. Instead, adaptive rezoning requires prescriptions for the equitable and accessible community. The *adaptive zone* embraces goals for housing supply and limits on cost, minimum standards of quality, and protections against the effects of climate change:

Supply and Costs

- Developers must be required to build a quantity of permanently affordable housing to meet housing needs. A growing number of cities are requiring inclusionary housing policies, offering a range of incentives—increased density, or fee waivers, for example.
- As a condition for doing business or for any type of permit, developers may be required to build an array of homes, styles, and price levels to meet the demonstrated needs of the community.
- As a condition for a permit for commercial campuses near homes, the owner must commit to including on the site, a

¹⁰³ San Diego, California, expedites permitting for projects meeting specified standards of sustainability or affordability, waiving fees in the case of projects that are 100 percent affordable. CITY OF SAN DIEGO DEV. SERVS. DEP'T, INFO BULL. 538, AFFORDABLE, IN-FILL HOUSING, AND SUSTAINABLE BUILDINGS EXPEDITE PROGRAM (2022), <https://www.sandiego.gov/sites/default/files/dsdb538.pdf>.

park, nature preserve, biking or walking trails, all open to the public.

Quality and Climate Resilience

- Builders must meet minimum standards of energy efficiency and climate resilience, which includes the orientation of structures that best captures solar values.
- Building codes must be integrated into planning and permitting decisions to require efficient water and energy use and waste disposal.
- Green infrastructure (e.g., pervious surfaces, vegetated swales, rain gardens) should be required, as well as cool and green roofs and tree canopies.
- Site selection and house placement should consider the appropriateness of new residences and other such uses near existing municipal services facilities and measures to mitigate any conflicts.
- Buffers, ventilation systems, and other measures to ensure healthy indoor air quality, including limiting hours of operation of certain facilities to reduce emissions exposure, and prescribing alternate truck routes that avoid residential areas, should be required.

C. Adaptive Reuse

Adaptive reuse should be supported and encouraged. Abandoned industrial buildings can be purchased at relatively low cost, and when combined with available incentives and credits (including federal historic preservation tax credits), their repurposing can save the cost of excavation, foundation, footings, and erection of the structural systems for new buildings. Adaptive reuse provides an opportunity to bring a building up to current codes, and to make the layout and building systems much more appropriate and efficient. Adaptive reuse can incorporate universal design. It can work to revitalize a community as built heritage and historic character are preserved.

To be effective, it will be imperative to eliminate some existing barriers—in particular, use limitations—to allow the conversion of older structures to alternative or mixed uses within a single building. Requirements for setbacks, unit sizes, and open space should be revised and classifications, such as that structures that do not meet current development standards as “non-conforming,” should be eliminated because they discourage investment and block rehabilitation of existing structures. Parking minimums should be context-sensitive. Building

2022]

ADAPTIVE REZONING

1349

codes should be revised so as not to trigger full code compliance with every rehabilitation, so long as life safety is not at risk.

1. Community Spaces for Building Community

Land must be set aside for community gardens and community parks. Individual urban agriculture should be allowed as of right. The urban heat island effect can be tackled by land development policies that increase and preserve vegetated land and requiring and/or offering incentives for the installation of energy-reflective technologies. Trees must be planted¹⁰⁴ and urban forests should be cultivated.¹⁰⁵

2. Street and Transportation Design and Highways

The inter-state highways that have long divided communities can and are being removed.¹⁰⁶ Roads that impede pedestrian movement

¹⁰⁴ BLOOMBERG PHILANTHROPIES, AMERICA'S PLEDGE (PHASE 1 REPORT): STATES, CITIES, AND BUSINESSES IN THE UNITED STATES ARE STEPPING UP ON CLIMATE ACTION (2017), <https://www.bbhub.io/dotorg/sites/28/2017/11/AmericasPledgePhaseOneReportWeb.pdf>. “[M]ore than 3,400 communities are committed to implementing basic urban forestry standards through Tree City USA, including maintaining a tree board or department, and having a community tree ordinance.” *Id.*

¹⁰⁵ Many cities have adopted programs for the creation and nurturing of urban forests. See *i-Tree Ecosystem Analysis – Milwaukee, Urban Forest Effects and Values*, September 2008. Urban forests serve to sequester atmospheric CO₂ and are long-term carbon sinks. DAVID J. NOWAK ET AL., U.S. DEP'T OF AGRIC., *ASSESSING URBAN FOREST EFFECTS AND VALUES: SAN FRANCISCO'S URBAN FOREST 8* (2007), https://www.nrs.fs.fed.us/pubs/rb/rb_nrs008.pdf. In 2016, San Francisco voters approved Proposition E to amend the City Charter to transfer responsibility for the care of the City's 124,000-plus trees and surrounding sidewalks from property owners to Public Works. The ballot measure took effect July 1, 2017. CITY & CNTY. OF S.F. PLAN. DEP'T, *Urban Forest Plan*, SFGOV.ORG, <https://sfgov.org/sfplanningarchive/urban-forest-plan> (last visited Apr. 4, 2022); see also THE CITY OF COLUMBUS, *Urban Forestry*, www.columbus.gov/recreationandparks/urban-forestry (last visited Apr. 4, 2022); THE CITY OF ORLANDO, *2018 Community Action Plan* (June 4, 2019), <https://www.orlando.gov/Initiatives/2018-Community-Action-Plan>; N.Y.C. DEP'T OF PARKS & RECREATION, *New York City's Urban Forest*, <https://www.nycgovparks.org/trees> (last visited Apr. 4, 2022); see also Thomas Elmquist et al., *Benefits of Restoring Ecosystem Services in Urban Areas*, 14 CURRENT OP. ENV'T SUSTAINABILITY 101, 101–08 (2015); Abbey N. Driscoll et al., *Needs and Barriers to Expanding Urban Forestry Programs: An Assessment of Community Officials and Program Managers in the Portland-Vancouver Metropolitan Region*, 14 URB. FORESTRY & URB. GREENING 48, 48–55 (2015).

¹⁰⁶ Kathleen McCormick, *Deconstruction Ahead: How Urban Highway Removal Is Changing Our Cities*, LINCOLN INST. (Apr. 14, 2020), <https://www.lincolninst.edu/publications/articles/2020-03-deconstruction-ahead-urban-highway-removal-changing-cities>.

and street play can be closed to automobile traffic and pedestrian-only thoroughfare zones should be created.¹⁰⁷

VI. CONCLUSION

An equitable, affordable, and climate-cognizant community requires rethinking what we do on the ground and in our policies. The shaping and reshaping of the built world is not a new adventure, but something that has occurred both organically and deliberately since the beginning of time, at first by bare want, then by creative vision, and now it must change out of necessity. Affordability and resiliency need not be viewed antithetically, but instead as twins serving a common mission of the survival of community. Creating physical zones to manage physical threats serves to achieve an urban land ethic that makes for resilient communities in all respects.

As our society faces the arduous task of reconciling grand principles of equality with the reality of social and economic exclusion based on race and social status, we are enjoined to rectify systemic racism formalized by past policymakers. Narrow and half-hearted overtures, those that have been bantered about for so long, will not work anymore. Instead, competing conditions—inequity, deprivation, and climate change—portend widespread upheaval, social, economic, and ecological. And they are not abstract risks, but existential. Averting them requires a bold commitment of resources and policy—creativity and perseverance.

¹⁰⁷ Public transit and safe routes for walking and bicycling are critical links to regional employment and educational opportunities that help residents improve their lives. Providing equitable and affordable transportation options improves mobility and access to jobs, services, and other daily necessities for all residents, including those who do not own cars.