

# THE ECONOMICS OF EXCLUSIONARY ZONING AND AFFORDABLE HOUSING

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## I. INTRODUCTION

The President of the United States created a Commission to study local zoning regulations and their impact on housing costs.<sup>1</sup> After two years of intense research, the Commission submitted its much-anticipated report to the President.<sup>2</sup> The 504-page report concluded:

Zoning affects land values in a number of ways. *First*, by protecting development against the encroachment of undesirable uses, it can help to maintain and enhance property values. Indeed, much of the interest and concern in the zoning system by homeowners is based on this desire to preserve their investment. *Second*, zoning may raise the price of land designated for certain uses by restricting the supply of such land.<sup>3</sup>

The report specifically concluded that such zoning regulations greatly increase the price of land for housing, and that rising land prices “further explain[ ] the squeeze on low-income families seeking decent housing.”<sup>4</sup> The report noted that communities were particularly hostile to high-density housing;<sup>5</sup> to mitigate this hostility, the report recommended that local governments discourage

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1. Time.com, *Why U.S. Housing Costs Too Much*, <http://www.time.com/time/magazine/article/0,9171,838452-1,00.html>. (June 7, 1968) (noting that Senator Paul Douglas was the chairman of President Johnson’s commission).

2. *Building the American City: Report of the National Commission on Urban Problems to the Congress and to the President of the United States*, H.R. Doc. No. 91-34, at vii (1968).

3. *Id.* at 225.

4. *Id.* at 18.

5. *Id.* at 242.

citizen involvement in the overall planning process.<sup>6</sup> In response to the landmark report, affordable housing activists launched a coordinated, national campaign to repeal pernicious zoning regulations that restricted the supply of land for housing.<sup>7</sup>

A paradigm shift for affordable housing policy? Hope at last? No, it is a flashback to 1968, when the Douglas Commission submitted its report to President Lyndon Johnson,<sup>8</sup> except affordable housing activists did not respond with a coordinated, nationwide campaign to repeal the zoning regulations that have driven low-income housing prices to unaffordable levels. Instead, zoning regulations that restrict the supply of developable land have proliferated,<sup>9</sup> creating an artificial scarcity of land for new housing and driving up the price of housing.<sup>10</sup> This has resulted in 82% of households in the bottom quintile of the income distribution not being able to afford median-priced housing in their area.<sup>11</sup> Even worse, (according to the U.S. Census Bureau) 71% of households in the bottom quintile cannot afford modestly-priced housing.<sup>12</sup>

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6. *Id.* at 238–239.

7. Kevin Fox Gotham, *Separate and Unequal: The Housing Act of 1968 and the Section 235 Program*, 15 *Sociological Forum* 1, 20 (Mar. 2000) (commenting on the demands of housing activists to revive the stock of housing available to “poor people” and nonwhites).

8. *Id.*

9. See William A. Fischel, *An Economic History of Zoning and a Cure for Its Exclusionary Effects*, 41 *Urb. Stud.* 317, 328–333 (2004) (tracing the rapid rise of exclusionary zoning regulations after 1970).

10. Edward Glaeser, Jenny Schuetz & Bryce Ward, *The Price Is (Not) Right: Large Lots and Other Requirements Drive Up the Cost of Bay State Homes*, *Commonwealth: Growth & Development Extra* 99 (2006); William K. Jaeger, *The Effects of Land-Use Regulations on Property Values*, 36 *Env'tl. L.* 105, 110 (2006).

11. U.S. Census Bureau, *Affordability Status of Families and Unrelated Individuals for a Median-Priced Home*, <http://www.census.gov/hhes/www/housing/hsgaffrd/afford2k2/TAB02508FX24.xls> (accessed May 1, 2009). The collapse of the U.S. housing bubble has led to a massive oversupply of housing, but this oversupply is overwhelmingly comprised of single-family houses. As discussed below, low-income families predominantly live in multi-family housing developments. Low-income families tend to upgrade their housing through a process of filtering, in which middle-income families move into houses vacated by wealthy families, and low-income families move into the houses vacated by middle-income families. The large overhang of single-family housing inventory will dramatically slow the filtering process, as it will take years to sell off the excess inventory of single-family houses.

12. U.S. Census Bureau, *Affordability Status of Families and Unrelated Individuals for a Modestly-Priced Home*, <http://www.census.gov/hhes/www/housing/hsgaffrd/afford2k2/TAB02508FX34.xls> (accessed May 1, 2009). “Modestly-priced” housing is housing that is priced so that 25% of all housing in the particular area is below this value and 75% is above. U.S. Census Bureau, *Who Could Afford to Buy a Home in 2002?* 2 (Washington D.C., July 2007).

Since 1970, despite spending hundreds of billions of dollars on housing policies,<sup>13</sup> the proportion of the housing stock that is considered affordable to households in the bottom quintile has actually *decreased*.<sup>14</sup>

As a preliminary matter, a definition of terms is necessary. “Affordable housing” is generally defined as housing that costs no more than 30% of a household’s income.<sup>15</sup> Because “affordability” necessarily depends on the buyer’s ability to pay, which in turn depends on the buyer’s income,<sup>16</sup> “affordable housing” is a poor catch-all for housing for the poor. This Article, therefore, refers to housing for the poor as “low-income housing.”<sup>17</sup> This Article also uses the term “community” as shorthand for all other types of local governing bodies (e.g., municipalities, counties, and townships). Furthermore, the line between zoning and other land-use law is often imprecise—as a leading treatise on land-use law notes, “the planning process, building codes, subdivision control law, and growth management systems, are so often intertwined with zoning that drawing a clear distinction between them is difficult.”<sup>18</sup> For the sake of simplicity, this Article follows the convention of using “zoning” as shorthand for all forms of land-use regulations.<sup>19</sup> Finally, while not everyone agrees on the definition

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13. U.S. Census Bureau, *Statistical Abstract of the United States: 2008*, 307 tbl. 458 (127th ed., 2007).

14. John M. Quigley & Steven Raphael, *Is Housing Unaffordable? Why Isn't It More Affordable?* 18 *J. Econ. Perspectives* 191, 199 (2004). For example, 13% of all rental housing units were affordable to households in the bottom fifth of the income distribution. *Id.* In 2000, only 7% of rental housing units were affordable to those households. *Id.*

15. 42 U.S.C. § 12745(a) (2006); Fla. Stat. § 420.602(3) (2006).

16. See *Merriam-Webster's Online Dictionary*, <http://www.merriam-webster.com/dictionary/affordable> (accessed May 1, 2009) (defining “afford” as “to be able to bear the cost of”).

17. See 42 U.S.C. § 1437a(b)(1) (2006) (defining “low-income housing” as “decent, safe, and sanitary dwellings [available to low-income families]”).

18. Julian Conrad Juergensmeyer & Thomas E. Roberts, *Land Use Planning and Control Law* 41 (West 1998).

19. See e.g. William A. Fischel, *Zoning and Land Use Regulation*, in *Encyclopedia of Law and Economics: Civil Law and Economics* vol. 2, 403 (Boudewijn Bouckaert & Gerrit De Geest, eds., Edward Elgar 1999) (conflating zoning and other land-use regulations); Juergensmeyer & Roberts, *supra* n. 18, at 41 (treating land-use controls as part of zoning); David E. Mills, *Is Zoning a Negative-Sum Game?* 65 *Land. Econ.* 1, 1 (1989) (stating that “[z]oning is the primary tool used by localities to regulate land use”); Norman Williams & John M. Taylor, *American Land Planning Law: Land Use and The Police Power* § 17.3 (West 2003) (defining “zoning” “to include various nonzoning controls, covering the same subject matter but in fact embodied in free-standing ordinances”).

of “exclusionary zoning,”<sup>20</sup> this Article uses the term “exclusionary zoning” to refer to zoning regulations that directly or indirectly prohibit new low-income housing.

Any discussion of affordable housing policy must revolve around two questions. First, why is housing unaffordable to the poor? Second, what should affordable housing policy do about it? The answer to the first question must guide the answer to the second question because devising a solution without sufficient regard for the nature of the problem is unlikely to yield positive results.

Why is housing unaffordable to the poor? The current high prices for low-income housing are not only the natural result of cruel market forces; they are the result of supply restrictions distorting the market.<sup>21</sup> Zoning regulations prescribe the permissible uses of land and thus control the supply of developable land.<sup>22</sup> As demand for housing increases—and it must, due to sheer population growth—zoning regulations that restrict the supply of developable land will increase housing prices.<sup>23</sup> To be sure, there are other factors that make housing unaffordable to the poor,<sup>24</sup> but the focus of this Article is the distorting effect that exclusionary zoning regulations have on low-income housing. Moreover, strong empirical evidence shows that housing is unaffordable to the poor primarily because of an insufficient supply of low-income housing.<sup>25</sup>

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20. J. R. Kemper, *Comment Note—Exclusionary Zoning*, 48 A.L.R.3d 1210 (1973); see Lawrence Gene Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent*, 21 Stan. L. Rev. 767, 781 (1969) (coining the phrase “exclusionary zoning” and defining it as zoning regulations that “exclude a class of potential residents whose income thresholds are exceeded because of the cost increment attributable to the ordinances”).

21. Bruce W. Hamilton, *Zoning and the Exercise of Monopoly Power*, 5 J. Urb. Econ. 116, 117 (1978).

22. Juergensmeyer & Roberts, *supra* n. 18, at 22.

23. Glaeser, Schuetz & Ward, *supra* n. 10, at 99; see *supra* n. 11, at 5 tbls. 1–2 (showing U.S. population data since 1790). Population growth has proceeded at an annual rate of roughly 1% for the past 50 years, and with a current population of just over 300 million, we can expect to gain roughly 3 million new U.S. citizens each year. *Id.* at 5 tbl. 2.

24. See Maria Cristiano Anderson & Paula A. Franzese, *Solutions to the Crisis in Affordable Housing: A Proposed Model for New York City*, 3 Rutgers J. L. & Urb. Policy 84, 90 (2005) (discussing the disparity between housing prices and income levels).

25. See e.g. John M. Quigley & Larry A. Rosenthal, *The Effects of Land Use Regulation on the Price of Housing: What Do We Know? What Can We Learn?* 8 Cityscape 69 (2005) (reviewing the extensive empirical literature on the link between zoning regulations and housing prices).

Turning to the second question: What should affordable housing policy do about the high cost of low-income housing? This Article argues that affordable housing policy should alter communities' incentives to discourage them from adopting exclusionary zoning regulations. Exclusionary zoning regulations impose costs on non-community residents; but when communities adopt exclusionary zoning regulations, they only consider the costs that the regulations will impose on community residents.<sup>26</sup> Affordable housing policy should force communities to bear the full costs of exclusionary zoning regulations.<sup>27</sup> Increasing the cost to the community of excluding low-income housing will discourage communities from adopting exclusionary zoning regulations.<sup>28</sup> Fewer exclusionary zoning regulations will mean fewer restrictions on the supply of low-income housing, which in turn will lead to increasing supply and decreasing prices for low-income housing.<sup>29</sup>

Therefore, to reduce the number of exclusionary zoning regulations, this Article proposes a tax on exclusionary zoning regulations, creatively called the Exclusionary Zoning Tax. Under the Exclusionary Zoning Tax, a developer who wants to build low-income housing on a particular parcel of property will first file an application to the state rather than the community. Once a developer files an application, the state will essentially conduct a private auction between the community and the developer for the right to build low-income housing on that parcel of property. The community will submit its bid, which will be unsealed to the state

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26. William A. Fischel, *Externalities and Zoning*, 35 *Pub. Choice* 37, 39 (1980); William A. Fischel, *A Property Rights Approach to Municipal Zoning*, 54 *Land Econ.* 64, 64–65 (1978); Christopher J. Webster, *Public Choice, Pigouvian and Coasian Planning Theory*, 35 *Urb. Stud.* 53, 70 (1998).

27. See William M. Landes & Richard A. Posner, *The Positive Economic Theory of Tort Law*, 15 *Ga. L. Rev.* 851, 871–877 (1981) (explaining that internalization of harmful externalities results in an efficient level of harmful activities); Steven Shavell, *Foundations of Economic Analysis of Law* 55 (Belknap Press 2004) (noting that the law should encourage internalization of costs when “the sale of property would result, directly or indirectly, in harm to people not involved in the transaction itself”); see also Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 *U. Chi. L. Rev.* 681, 684 (1973) (observing that “harmful externalities [must] be ‘internalized’ to eliminate excessive amounts of nuisance activity”).

28. Cf. N. Gregory Mankiw, *Principles of Economics* 67–71 (3d ed., Thomson 2004) (establishing that raising the price of a product will lead a given consumer to buy less of that product).

29. When restrictions on the supply of a high-demand product are dropped, supply will increase, and the price of the product will come down to equilibrium. *Id.* at 71.

first. To prevent the community from stalling, it will have 30 days to submit its bid after the developer files an application. After the community submits its bid, the developer then has a choice: either match the community's bid, or withdraw the application to build the low-income housing. If the developer matches the community's bid, the state will approve the developer's application to build the low-income housing. In effect, the developer will buy the right to build low-income housing from the community.<sup>30</sup> However, if the developer does not match the community's bid, the community must pay a tax equal to its bid for excluding the low-income housing. The revenues from this tax will be diverted into a statewide fund that will be used to subsidize impact fees for low-income housing developments, also creatively called the Impact Fee Fund. For example, suppose that the community submits a bid of \$100,000. The developer can either pay the community \$100,000 and build the low-income housing, or withdraw its application. If the developer withdraws its application, the community will have to pay a \$100,000 tax for excluding low-income housing, and that \$100,000 will be diverted into the Impact Fee Fund.

## II. THE LEGAL LANDSCAPE

Zoning, as its name suggests, separates land in a jurisdiction into zones and prescribes permissible land uses within each zone.<sup>31</sup> Zoning is an exercise of the police power—it encompasses the authority to regulate the use of land to protect the public health, safety, and welfare.<sup>32</sup> State legislatures have largely delegated the zoning authority to communities.<sup>33</sup> In 1922, the United States Department of Commerce issued a model zoning enabling

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30. Cf. Robert Cooter, *Prices and Sanctions*, 84 Colum. L. Rev. 1523, 1525 (1984) (stating that “[a] price is payment of money which is required in order to do [something]”); Bradley C. Karkkainen, *Zoning: A Reply to the Critics*, 10 J. Land Use & Env. L. 45, 78 (1994) (observing that “[z]oning . . . can be seen as a peculiar kind of property rule—one in which developers can in limited ways ‘buy’ the rights to develop contrary to the zoning entitlement”).

31. Juergensmeyer & Roberts, *supra* n. 18, at 22.

32. *Id.* at 45.

33. *Id.* at 45; *The Legal Guide to Affordable Housing Development* 5 (Tim Iglesias & Rochelle E. Lento eds., ABA 2005).

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act, entitled the Standard State Zoning Enabling Act.<sup>34</sup> Four years later, the U.S. Supreme Court ruled in *Euclid v. Ambler Realty Company*<sup>35</sup> that zoning was a constitutional exercise of the police power. The Court held that zoning was rationally related to legitimate governmental interests in preventing congestion and separating incompatible land uses.<sup>36</sup> All 50 states have adopted zoning enabling acts modeled after the Standard State Zoning Enabling Act.<sup>37</sup>

Zoning regulations must foster a legitimate public purpose, but because zoning is an exercise of the police power, this simply means that it must foster the public health, safety, morals, and general welfare.<sup>38</sup> Courts will defer to legislative determinations as to what constitutes a legitimate public purpose unless it is “palpably without reasonable foundation.”<sup>39</sup> A zoning regulation must have a reasonable connection to the particular public purpose it seeks to foster,<sup>40</sup> but courts similarly defer to the legislature on the proper means. As the Supreme Court stated in *Berman v. Parker*:<sup>41</sup>

Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.<sup>42</sup>

With the chosen means subject to minimal judicial interference, communities are generally free to adopt zoning regulations as long as the link between the zoning regulation and the public

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34. A Standard State Zoning Enabling Act (1926) (reprinted in *Model Development Code* 210–221 (Tent. Draft No. 1, 1968)).

35. 272 U.S. 365 (1926).

36. *Id.* at 397.

37. Juergensmeyer & Roberts, *supra* n. 18, at 46.

38. Peter W. Salsich, Jr. & Timothy J. Tryniecki, *Land Use Regulation: A Legal and Practical Application of Land Use Law* 8 (2nd ed., ABA 2003) (noting that what constitutes a proper public purpose is “coterminous with the scope of a sovereign’s police powers”).

39. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984) (quoting *Gettysburg Elec.*, 160 U.S. at 680).

40. *Nollan v. Cal. Coastal Commn.*, 483 U.S. 825, 861 (1987) (requiring a “reasonable relationship” between the land-use regulation and the public purpose being advanced).

41. 348 U.S. 26 (1954).

42. *Id.* at 35–36.

health, safety, morals, and general welfare, is not “palpably without reasonable foundation.”<sup>43</sup>

### A. Zoning and Nuisance

Zoning is best viewed as an extension of nuisance law.<sup>44</sup> In fact, when the Supreme Court upheld the constitutionality of zoning in *Euclid*, it explicitly analogized zoning to nuisance law.<sup>45</sup> Nuisance law resolves land use disputes in which one person engages in an activity that injures a neighbor in a continuing way.<sup>46</sup> Nuisance disputes generally involve land uses that generate negative externalities—land uses that have harmful spillover effects on neighboring property.<sup>47</sup> The standard example of a nuisance dispute involves an owner of a polluting factory and a nearby resident.<sup>48</sup> Broadly speaking, nuisance law evolved to internalize these negative externalities.<sup>49</sup>

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43. See Salsich & Tryniecki, *supra* n. 38, at 10 (noting the extremely broad authority to regulate land use given to local governments).

44. See Ellickson, *supra* n. 27, at 691–699 (evaluating zoning as a mechanism for controlling nuisances); see also William A. Fischel, *The Economics of Zoning Laws* 27 (Johns Hopkins U. Press 1985) (noting that “[t]he law of nuisance was a predecessor of zoning”); Juergensmeyer & Roberts, *supra* n. 18, at 634 (noting that nuisance law is sometimes called “judicial zoning”); Williams & Taylor, *supra* n. 19, at § 17.1 (noting that nuisance law and zoning are both methods of regulating land use, and that zoning has evolved into the most dominant form of land-use control).

45. See *Euclid*, 272 U.S. at 387–388 (observing that “the law of nuisances . . . may be consulted, not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of, the power”).

46. Juergensmeyer & Roberts, *supra* n. 18, at 634.

47. See Ellickson, *supra* n. 27, at 686 (classifying nuisance law as a system designed to internalize externalities); Timothy Swanson & Andreas Kontoleon, *Nuisance*, in *Encyclopedia of Law and Economics: Civil Law and Economics*, *supra* n. 19, at 380 (noting that nuisance disputes are often the result of externalities).

48. See *Restatement (Second) of Torts* § 826 cmt. e (using “noise and smoke from a factory” as an example of a nuisance); see also *Signal Mt. Portland Cement Co. v. Brown*, 141 F.2d 471 (6th Cir. 1944) (holding that the operation of a cement factory constituted a nuisance because the factory emitted dust and smoke that settled on neighboring residential properties); *Lunda v. Matthews*, 46 Or. App. 701 (Or. App. 1980) (holding that a cement factory that produced “clouds of dust,” “substantial noise at all hours, and noxious fumes” was a nuisance even though the owner operated the factory just like any other cement factory); cf. A. Mitchell Polinsky, *Controlling Externalities and Protecting Entitlements: Property Right, Liability Rule, and Tax-Subsidy Approaches*, 8 J. Leg. Stud. 1, 5 (1979) (noting that the “classic example” of a nuisance involves a “smoke-belching factory next to an otherwise unpolluted . . . outdoor laundry”).

49. See Thomas J. Miceli, *Property*, in *The Elgar Companion to Law and Economics* 250 (Jürgen G. Backhaus ed., 2d ed., Edward Elgar 2005) (stating that nuisance law is the “principal common law remed[y] for externalities”); Shavell, *supra* n. 27, at 82 (noting that



Zoning was also designed to regulate land uses that generate negative externalities.<sup>50</sup> However, such negative externalities differ from those that nuisance law regulates because zoning encompasses the much broader right to regulate the use of land to protect the public health, safety, and welfare.<sup>51</sup> Zoning can regulate land uses that do not amount to nuisances, whereas nuisance law can, quite obviously, only regulate land uses that amount to nuisances.<sup>52</sup> As shown in Figure 1, the police power authorizes much greater interference with a landowner's property rights than nuisance law.<sup>53</sup> To that end, an important purpose of zoning, if not the *most* important purpose, has become the protection of property values.<sup>54</sup> Zoning can be employed to prohibit a land use that,

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nuisance law promotes the internalization of negative externalities); Frank H. Stephens, *Land Development Controls*, in *The New Palgrave Dictionary of Economics and the Law* vol. 2, 429 (Peter Newman, ed., Macmillan Reference Limited 1998) (noting that nuisance law is one of the "private solutions to externality problems").

50. Robert H. Nelson, *Private Neighborhoods and the Transformation of Local Government* 144 (Urb. Inst. 2005); see Richard A. Epstein, *How to Create—or Destroy—Wealth in Real Property*, 58 Ala. L. Rev. 741, 758 (2007) (noting that zoning originated as "a way to prevent various kinds of nuisances"); see also Ellickson, *supra* n. 27, at 687 (classifying zoning as the most centralized system for internalizing negative externalities arising from land uses); Mills, *supra* n. 19, at 1 (observing that "[t]he economic purpose of zoning is to remedy market failure stemming from externalities among urban land uses").

51. Nelson, *supra* n. 50, at 144. Additionally, nuisance law differs from zoning because a nuisance suit is a *remedy*, and thus is necessarily backward-looking; zoning, on the other hand, is proscriptive in nature, and thus is necessarily forward-looking. See Stephens, *supra* n. 49, at 429 (observing that nuisance law "only come[s] into play after the externality has occurred," whereas zoning "lay[s] out in advance what types of development will be permitted in a particular area and what types will not").

52. See Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 Iowa L. Rev. 1, 61 (2000) (noting that zoning does not "encompass only uses that generate negative externalities"). *Id.* at 17 (noting that "[w]hile traditional notions of nuisance grant the community some power to limit land use, zoning shifts certain additional property rights from the landowner to the community"); William A. Fischel, *Equity and Efficiency Aspects of Zoning Reform*, 27 Pub. Policy 301, 318 (1979) (explaining that the difference between nuisance law and zoning is that "nuisance law is defined as activities, whereas zoning is defined on a necessary input to those activities").

53. Nelson, *supra* n. 50, at 144.

54. See Katia Brener, *Belle Terre and the Single-Family Home Regulations: Judicial Perceptions of Local Government and the Presumption of Validity*, 74 N.Y.U. L. Rev. 447, 448, 466–467 (1999) (observing that one of the original purposes of zoning was to protect property values); Martha A. Lees, *Preserving Property Values? Preserving Proper Homes? Preserving Privilege?: The Pre-Euclid Debate Over Zoning For Exclusively Private Residential Areas, 1916–1926*, 56 U. Pitt. L. Rev. 367, 404–406 (1994) (describing the preservation of property values as a primary motivation for zoning); see also Juergensmeyer & Roberts, *supra* n. 18, at 52–53 (observing that the protection of property values is often regarded as the primary purpose of zoning); Mills, *supra* n. 19, at 1 (noting that most experts consider the protection of property values to be the primary purpose of zoning).

while generating no other negative externalities, will simultaneously reduce property values.<sup>55</sup> In 1974, the U.S. Supreme Court, in its *Village of Belle Terre v. Boraas*<sup>56</sup> decision, wholeheartedly endorsed the use of zoning to prohibit low-income housing on the basis of, among other things, the preservation of property values. In upholding a zoning regulation that limited housing to one-family dwellings, the Court stated:

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one . . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.<sup>57</sup>

Since *Belle Terre*, at least fifteen other states have upheld the constitutionality of single-family home regulations.<sup>58</sup>

### B. Regulatory Takings

If the police power represents one end of the spectrum of permissible government regulations of private property, the regulatory takings doctrine represents the other end.<sup>59</sup> Under the regulatory takings doctrine, a regulation of property that is otherwise a valid exercise of the police power constitutes a compensable taking when, in the words of Justice Holmes, it “goes too

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55. Brener, *supra* n. 54, at 466–467; Lees, *supra* n. 54, at 404–406; see e.g. *City of Fargo v. Harwood Township*, 256 N.W.2d 694, 697 (N.D. 1977) (stating that “the essential purpose of zoning . . . [is] to rationally coordinate land-use planning to promote orderly development and *preservation of property values*”) (emphasis added); *Lantos v. Zoning Hrg. Bd. of Haverford Township*, 621 A.2d 1208, 1211–1212 (Pa. Commw. Ct. 1993) (listing the preservation of property values as within the legitimate scope of the police power); *State v. Wieland*, 69 N.W.2d 217, 222 (Wis. 1955) (stating that “[a]nything that tends to destroy property values of the inhabitants of the village necessarily adversely affects the prosperity, and therefore the general welfare, of the entire village”).

56. 416 U.S. 1 (1974).

57. *Id.* at 9.

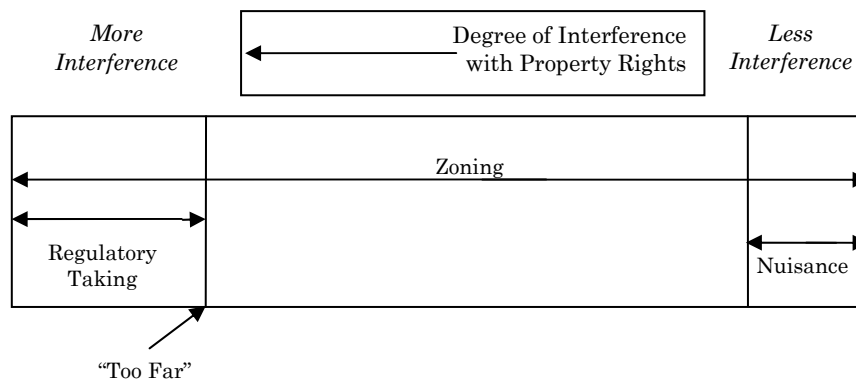
58. Brener, *supra* n. 54, at 454 n. 39.

59. The Fifth Amendment requires the government to provide just compensation to property owners when it “takes” the private property through its power of eminent domain. U.S. Const. amend. V.

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far.”<sup>60</sup> Whether a particular regulation has gone “too far” is ultimately decided on a case-by-case basis and is beyond the scope of this Article.<sup>61</sup> However, suffice it to say that the most common exclusionary zoning regulations—large-lot zoning, growth controls, etc.—are probably not compensable takings.<sup>62</sup>

FIGURE 1



### III. WHY IS HOUSING UNAFFORDABLE?

The principle underlying the exclusionary zoning view of affordable housing is simple: when demand for housing rises but the supply of developable land remains the same, housing prices

60. *Pa. Coal v. Mahon*, 260 U.S. 393, 415 (1922). The purpose of the regulatory takings doctrine is to prevent the government “from forcing some people to alone bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

61. There is no “set formula” for determining when a regulation crosses over from an ordinary exercise of the police power to a compensable taking. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regl. Plan. Agency*, 535 U.S. 302, 326 (2002). While a regulation that deprives an owner of “all economically beneficial uses” of his property is a compensable taking, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992), “[m]ere fluctuations in value” do not establish a compensable taking. *Danforth v. United States*, 308 U.S. 271, 285 (1939). The Court has stated that a regulation that causes a diminution in value of 75% is not a compensable taking. *Concrete Pipe and Prods. of Cal., Inc. v. Constr. Laborers Pen. Trust for S. Cal.*, 508 U.S. 602, 645 (1993); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 131 (1978).

62. The Court has held that a zoning regulation restricting “the use of only limited portions of the parcel, such as setback ordinances,” does not constitute a compensable taking. *Tahoe-Sierra*, 535 U.S. at 327.

increase.<sup>63</sup> The empirical literature convincingly demonstrates that restrictive zoning regulations raise housing prices.<sup>64</sup> In 1990, Dartmouth economist William Fischel conducted an exhaustive critique of the empirical literature on restrictive zoning regulations and housing prices, concluding the following:

Land-use controls, especially overall growth control programs, are important constraints on the land market. This in turn affects housing values, especially in suburban and exurban communities . . . . Growth controls and other aggressive extensions of land use regulations probably impose costs on society that are larger than the benefits they provide. The higher housing prices associated with communities that impose growth controls are more likely the result of wasteful supply constraints than benign amenity production.<sup>65</sup>

Subsequent empirical research has confirmed Fischel's conclusions and has also more fully revealed the intimate connection between zoning regulations and housing prices.<sup>66</sup>

In a 2005 study, Richard Green, Stephen Malpezzi, and Stephen Mayo found that restrictive zoning regulations make the supply of housing inelastic—that is, less responsive to demand.<sup>67</sup> In one of the most revealing studies, Harvard economists Edward Glaeser and Bryce Ward examined the effects of zoning regulations in the Boston metropolitan area.<sup>68</sup> They found that each ex-

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63. Glaeser, Schuetz & Ward, *supra* n. 10, at 99; Jaeger, *supra* n. 10, at 110; see Morris A. Davis & Michael G. Palumbo, *The Price of Residential Land in Large U.S. Cities*, 63 *J. Urb. Econ.* 352, 352 (2008) (showing that residential land values account for roughly 50% of the total market value of housing). This is simply an application of the law of supply and demand. Mankiw, *supra* n. 28, at 75–80.

64. See William A. Fischel, *Do Growth Controls Matter? A Review of Empirical Evidence on the Effectiveness and Efficiency of Local Government Land Use Regulations*, in *Perspectives on Property Law* 466 (Robert C. Ellickson, Carol M. Rose & Bruce A. Ackerman, eds., Little, Brown and Co. 1990) (reviewing the research on restrictive zoning and housing prices and concluding that restrictive zoning regulations undoubtedly inflate housing prices).

65. *Id.* at 53.

66. See Quigley & Rosenthal, *supra* n. 25, at 69–72 (reviewing, in detail, the extensive research on the link between zoning regulations and housing prices).

67. Richard K. Green, Stephen Malpezzi & Stephen K. Mayo, *Metropolitan-Specific Estimates of the Price Elasticity of Supply of Housing, and Their Sources*, 49 *AEA Papers & Proceedings* 334, 338 (2005).

68. Edward L. Glaeser & Bryce A. Ward, *The Causes and Consequences of Land Use*

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tra zoning regulation decreases new construction by roughly 10%, and increases housing prices by roughly 10%.<sup>69</sup> Glaeser and Ward were also able to isolate the effect of large-lot zoning regulations—that is, zoning regulations that mandate a minimum lot size.<sup>70</sup> They found that each extra acre of minimum lot size decreases new construction by roughly 40% and increases housing prices by roughly 10%.<sup>71</sup> In short, the empirical evidence is overwhelming—restrictive zoning regulations artificially constrain the supply of housing, thus driving housing prices up.<sup>72</sup>

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*Regulation: Evidence from Greater Boston*, NBER Working Paper 12601 (Oct. 2006).

69. *Id.* at 17.

70. *Id.* at 2–3.

71. *Id.* at 13.

72. See e.g. Theo S. Eicher, *Municipal and Statewide Land Use Regulations and Housing Prices across 250 Major US Cities* 3, [http://depts.washington.edu/teclass/landuse/housing\\_020408.pdf](http://depts.washington.edu/teclass/landuse/housing_020408.pdf) (Jan. 14, 2008) (examining data from 250 metropolitan areas across the country and finding that both statewide and local regulations significantly impact housing prices); Edward L. Glaeser, Joseph Gyourko & Raven Saks, *Why Is Manhattan So Expensive? Regulation and the Rise in Housing Prices*, 48 *J.L. & Econ.* 331, 366 (2005) (observing that restrictive land-use regulations restrict the supply of housing across the country, especially in Manhattan); Min Hwang & John M. Quigley, *Economic Fundamentals in Local Housing Markets: Evidence from U.S. Metropolitan Regions*, 46 *J. Regl. Sci.* 425, 443–445 (2006) (finding that new construction is substantially less responsive to changes in demand in communities with restrictive zoning regulations relative to communities without restrictive zoning regulations); Keith R. Ihlanfeldt, *The Effect of Land Use Regulation on Housing and Land Prices*, 61 *J. Urb. Econ.* 420, 432 (2007) (finding that large-lot zoning and open-space zoning increased housing prices in surrounding communities, especially when the number of competing jurisdictions was small); Ned Levine, *The Effects of Local Growth Controls on Regional Housing Production and Population Redistribution in California*, 36 *Urb. Stud.* 2047, 2065 (1999) (finding that land-use regulations removing land from development or requiring less intense development increased housing prices in surrounding jurisdictions); Randal O'Toole, *The Planning Tax: The Case against Regional Growth-Management Planning*, Policy Analysis No. 606, at 1 (Cato Inst. Dec. 6, 2007) (finding that housing prices in the ten states with mandatory growth management planning are significantly higher than housing prices in other states); Quigley & Raphael, *supra* n. 14, at 210 (reviewing the empirical literature and concluding that high housing prices are a result of supply restrictions and not demand-side factors); John M. Quigley, *Regulation and Property Values: The High Cost of Monopoly* 61–62 (Fischer Ctr. for Real Estate & Urb. Econ. Working Paper No. W06–004, August 2006) (concluding that “[h]ousing prices are much higher in areas with more stringent land-use regulation” and that “[h]ousing supply is much less responsive to economic incentives in such areas . . .”); C. Tsurriel Somerville & Christopher J. Mayer, *Government Regulation and Changes in the Affordable Housing Stock*, 9 *Fed. Reserve Bank of N.Y. Econ. Policy Rev.* 45, 53 (June 2003) (finding that “regulation does matter: when new construction is more constrained, as measured either by a lower supply elasticity or the presence of certain regulations, affordable units are more likely to filter up and become unaffordable, relative to remaining in the affordable stock”).

### A. Exclusionary Dominos

One community's adoption of exclusionary zoning regulations can spark a domino effect, which can eventually result in every community in a metropolitan area adopting exclusionary zoning regulations.<sup>73</sup> This domino effect is analogous to a trade war: automakers in the U.S. complain to Congress about low-cost Japanese cars, so the U.S. imposes a tariff on Japanese cars; Japan responds with a tariff on U.S. steel; the U.S. responds to Japan's steel tariff with a tariff on Japanese electronics; and so on.<sup>74</sup> When one community adopts exclusionary zoning regulations to protect its property values, the demand for low-income housing in that community shifts to neighboring communities.<sup>75</sup> In response to the increased demand, the neighboring communities, also wanting to protect their property values, adopt exclusionary zoning regulations as well.<sup>76</sup> This shifts the demand for low-income housing to yet more communities, which then also adopt exclusionary zoning regulations, and so on. This can eventually result in an entire metropolitan area in which no suburban community allows low-income housing.<sup>77</sup>

### B. The Affordable Socks Crisis

To bridge the gap between identifying the problem and devising a solution, consider the story of the Affordable Socks Crisis. The fictional story may seem trivial and irrelevant, but it is a powerful tool for understanding both the nature of the affordable housing crisis and the problem with many existing affordable housing policies.

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73. Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 *Stan. L. Rev.* 1115, 1134 (1996); see also Henry O. Pollakowski & Susan M. Wachter, *The Effects of Land-Use Constraints on Housing Prices*, 66 *Land Econ.* 315, 323 (1990) (showing that restrictive zoning regulations have external effects on surrounding communities).

74. See Timothy Taylor, *Principles of Economics: Economics and the Economy* 562–564 (FreeLoad Press 2008) (describing how one protectionist tariff can lead to an escalating trade war that ultimately harms both countries).

75. See Jaeger, *supra* n. 10, at 110 (explaining that zoning regulations that prohibit particular land uses shift demand for those land uses to surrounding communities).

76. Briffault, *supra* n. 73, at 1134.

77. *Id.*

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The Affordable Socks Crisis began when all the clothing manufacturers conspired to restrict the number of socks they manufacture. As the output of socks slowed to a trickle and socks became scarce, retailers bid up the price of available socks, and the retail price of a pair of socks increased from \$1 to \$50.<sup>78</sup> Retailers, aware that demand for socks far outpaced supply, begged the manufacturers to make more socks, but the manufacturers resisted. Newspaper editorials condemned the retailers for only selling socks to the rich; affordable socks advocates, outraged at sight of poor people walking barefoot in the winter, demanded government action. Congress was sympathetic, though bitterly divided. After much partisan wrangling, Congress finally passed the Socks Availability Act, a three-prong plan to fight the affordable socks crisis. First, the Act provided \$49 subsidies to people who were too poor to buy \$50 socks; second, the Act offered tax credits to retailers who sold socks at affordable prices; and third, the Act created a new agency, the Federal Socks Authority, to manufacture cheap socks for the poor. Affordable socks advocates lauded the Act, and newspaper editorials across the country declared victory in the affordable socks crisis.

### *1. Socks and Housing*

The story of the Affordable Socks Crisis, while obviously absurd, is useful because it is a simplified version of the affordable housing crisis; and the Socks Availability Act is, unfortunately, a simplified version of existing affordable housing policies. Replace “socks” with “housing,” “retailers” with “developers,” and “clothing manufacturers” with “suburban communities,” and you more or less have the affordable housing crisis. Suburban communities use zoning regulations to restrict the supply of housing—new housing necessarily requires developable land, so restricting the supply of developable land restricts the supply of housing. As developable land becomes scarce, developers bid up the price of the

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78. Cf. Harrison Hong, Jose Scheinkman & Wei Xiong, *Asset Float and Speculative Bubbles*, 61 J. Fin. 1073, 1076 (2006) (explaining that when an asset’s “float” (i.e., tradable shares) is small relative to its total shares, the buying and selling of the float is confined to only the most optimistic investors, who bid up the price of the asset).

developable land that is available, which then increases the price of housing.<sup>79</sup>

## 2. *The Lesson of the Affordable Socks Crisis*

The story of the Affordable Socks Crisis holds important lessons for how to deal with the affordable housing crisis, and, perhaps more importantly, how *not* to deal with the affordable housing crisis. Why did socks become unaffordable to the poor? It was not because greedy retailers were willfully forsaking the poor; retailers increased prices because the cost of acquiring socks from the manufacturers rose. Nor was it because lower-class incomes had failed to keep pace with the price of socks. While lower-class income levels are a legitimate concern, they do not explain why socks that were previously affordable to the poor suddenly became unaffordable. The problem was that the clothing manufacturers created an artificial scarcity of socks when they restricted the supply, which pushed up the price of socks to an unaffordable level. In fact, the problem in the Affordable Socks Crisis seems so painfully obvious that one might wonder how anyone could possibly miss it—but miss it they did.

The Socks Availability Act, though enacted with good intentions, was fundamentally misguided because it assumed that \$50 was the proper market price for a pair of socks—that is, it assumed the market for socks was operating efficiently. Instead of focusing on why the price of socks had gone from \$1 to \$50, the Act focused on making sure that poor people could afford \$50 socks. Similarly, instead of focusing on why the price of low-income housing is so high,<sup>80</sup> affordable housing policy seems to focus on: (1) ensuring that the poor have enough money to pay the inflated low-income housing prices;<sup>81</sup> (2) ensuring that developers

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79. Benjamin Powell & Edward Stringham, *"The Economics of Inclusionary Zoning Reclaimed": How Effective Are Price Controls?* 33 Fla. St. U. L. Rev. 471, 491 (2005); cf. Hong, Scheinkman & Xiong, *supra* n. 78, at 1076 (explaining that when an asset's "float" (i.e. tradable shares) is small relative to its total shares, the buying and selling of the float is confined to the most optimistic investors, who consequently bid up the price of the asset).

80. 42 U.S.C. § 1437 ("Declaration of Policy and Public Housing Agency Organization").

81. See e.g. Department of Housing and Community Development Act of 1987, 42 U.S.C. § 1437f (establishing the "Section 8" rental housing vouchers program, a means-



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have enough money to pay the inflated prices for the land they need to build low-income housing;<sup>82</sup> and (3) having the government build low-income housing directly.<sup>83</sup> The Housing Choice Voucher Program (“Section 8”) ensures that the poor can live in market-rate housing,<sup>84</sup> but why is market-rate housing unaffordable to the poor in the first place? The Low-Income Housing Tax Credit (LIHTC) ensures that developers can profitably build affordable low-income housing,<sup>85</sup> but why does it cost developers so much to build affordable low-income housing on their own? The government, through public housing programs, builds low-income housing directly,<sup>86</sup> but why has it become necessary for the government to step in at the bottom of the housing market? Failing to address these fundamental questions is akin to ignoring the role of the clothing manufacturers in the Affordable Socks Crisis.

#### IV. WHAT SHOULD AFFORDABLE HOUSING POLICY DO?

Low-income housing is unaffordable because exclusionary zoning regulations restrict the supply of low-income housing.<sup>87</sup> Reducing the number of exclusionary zoning regulations will increase the supply of low-income housing, thereby lowering the price of low-income housing.<sup>88</sup> Therefore, the primary goal of affordable housing policy should be, and must be, to reduce the number of exclusionary zoning regulations.<sup>89</sup>

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tested program in which qualifying low-income individuals can live in market-rate housing and only pay 30% of their income on rent, with the federal government paying the difference).

82. *See e.g.* Tax Reform Act of 1986, 26 U.S.C. § 42 (establishing the Low-Income Housing Tax Credit, which provides tax incentives to developers to build low-income housing).

83. *See e.g.* Wagner-Steagall Housing Act, 42 U.S.C. §§ 1437–1440 (permitting federal and state public housing agencies to construct low-income housing); United States Housing Act of 1949, 42 U.S.C. §§ 1441–1446 (providing for new public housing construction to replace urban slums).

84. *Id.* at § 1437f.

85. 26 U.S.C. § 42.

86. 42 U.S.C. §§ 1437–1446.

87. Fischel, *supra* n. 64, at 53.

88. *Cf.* Mankiw, *supra* n. 28, at 71–73 (discussing how shifts in the supply curve affect price).

89. *Id.* at 71.

Communities adopt exclusionary zoning regulations because homeowners, who dominate local government politics,<sup>90</sup> fear that allowing low-income housing in their community will lower their property values.<sup>91</sup> A home is an investment to most homeowners, so they have an incentive to ensure that their home “will continue to prove attractive to others on the resale market.”<sup>92</sup> The current zoning regime allows communities to act on this fear regardless of whether the fear is justified.<sup>93</sup> Moreover, the current zoning regime does not give communities an incentive to find out whether their fears of falling residential property values is justified.<sup>94</sup>

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90. William A. Fischel, *The Homevoter Hypothesis: How Home Values Influence Local Government Taxation, School Finance, and Land-Use Policies* 30 (Harv. U. Press 2001); Lee Anne Fennell, *Contracting Communities*, 2004 U. Ill. L. Rev. 829, 870 (2004). Denise DiPasquale and Ed Glaeser conducted a study of local government politics and found that 77% of homeowners vote in local elections, while only 52% of renters do so. Denise DiPasquale & Edward L. Glaeser, *Incentives and Social Capital: Are Homeowners Better Citizens?* 45 J. Urb. Econ. 354, 365 (1999). They also found that 40% of homeowners report having actively participated in trying to solve local problems, while only 24% of renters do so, and that homeowners are significantly more likely to know the names of their local political leaders. *Id.*

91. Fischel, *supra* n. 9, at 327.

92. Lee Anne Fennell, *Exclusion's Attraction: Land Use Controls in Tieboutian Perspective*, in *The Tiebout Model at Fifty: Essays in Public Economics in Honor of Wallace Oates* 9 (William A. Fischel, ed., Lincoln Institute of Land Policy 2006).

93. Abraham Bell & Gideon Parchomovsky, *Taking Compensation Private*, 59 Stan. L. Rev. 871, 882 (2006); Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 Yale L.J. 385, 458 (1977). Whether low-income housing does, in fact, lower residential property values is a controversial question that is beyond the scope of this Article. However, it is important to note that there is some evidence that, contrary to conventional wisdom, low-income housing does not depress property values. See Ingrid Gould Ellen, Michael H. Schill, Amy Ellen Schwartz & Ioan Voicu, *Does Federally Subsidized Rental Housing Depress Neighborhood Property Values?* 29–30 (Furman Ctr. for Real Estate & Urb. Policy Working Paper 05–03 2005) (finding that the presence of federally-subsidized housing does not depress property values, but in some circumstances can actually increase property values); George C. Galster, Jackie M. Cutsinger & Ron Malega, *The Social Costs of Concentrated Poverty: Externalities to Neighboring Households and Property Owners and the Dynamics of Decline*, 41 (Jt. Ctr. for Hous. Stud. Working Paper RR07-4, March 2007) (finding that “there is no substantial relationship between neighborhood poverty changes and property values or rents when poverty rates stay below ten (10) percent”). In reality, though, whether low-income housing actually depresses property values is irrelevant; it is a self-fulfilling prophecy. Residential property values are determined by the amount that a buyer would be willing to pay; if buyers believe that low-income housing depresses residential property values, then they will not be willing to pay as much for property near low-income housing. So the mere belief that low-income housing depresses residential property values guarantees that low-income housing will, in fact, depress property values.

94. Bell & Parchomovsky, *supra* n. 93, at 882; William A. Fischel, *Zoning and Land Use Reform: A Property Rights Perspective*, 1 Va. J. Nat. Resources L. 69, 76–77 (1980).

Even when a low-income housing development will lower residential property values, communities do not have an incentive to determine whether the developer and the prospective residents of the low-income housing are willing to compensate the community for the drop in property values.<sup>95</sup>

Exclusionary zoning regulations impose costs on non-community residents because they restrict the area-wide supply of low-income housing<sup>96</sup>—in economic terms, they have negative externalities.<sup>97</sup> Exclusionary zoning regulations impose costs on non-community residents in two ways. First, they restrict the total supply of low-income housing in the surrounding area, thus raising low-income housing prices in other communities in the area.<sup>98</sup> Second, they prevent would-be residents from moving into the new low-income housing that the exclusionary zoning regulations blocked. When a community decides whether to adopt exclusionary zoning regulations, or whether to block a particular low-income housing development, the community does not have an incentive to consider the costs that its decision will impose on non-community residents because the community will not bear any of those costs.<sup>99</sup> In short, communities adopt exclusionary zoning regulations because they reap the benefits without bearing all of the costs.<sup>100</sup> It follows then, that forcing communities to bear all the costs of exclusionary zoning regulations will reduce the amount of exclusionary zoning regulations—after all, consumers buy less of a product when it is more expensive.<sup>101</sup> Raising the

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95. Fischel, *supra* n. 94, at 76–77; Christopher Serkin, *Big Differences for Small Governments: Local Governments and the Takings Clause*, 81 N.Y.U. L. Rev. 1624, 1634 (2006).

96. Fischel, *supra* n. 64, at 53; *see also* Fischel, *supra* n. 44, at 85–86 (explaining how intra-community activities can have external effects).

97. A “negative externality” is the uncompensated cost that one party’s actions impose on a nonconsenting party. Mankiw, *supra* n. 28, at 830. A negative externality arises whenever the social costs of an activity exceed its private costs. *Id.* at 830.

98. Pollakowski & Wachter, *supra* n. 73, at 323 (presenting evidence that restrictive zoning regulations in one community raises housing prices in surrounding communities as well).

99. Fischel, *supra* n. 26, at 39; Webster, *supra* n. 26, at 70.

100. Fischel, *supra* n. 44, at 98–100; *see* Briffault, *supra* n. 73, at 1134 (discussing the external effects of zoning out particular land uses); Amnon Lehavi, *Intergovernmental Liability Rules*, 92 Va. L. Rev. 929, 940 (2006) (noting that zoning creates externalities whenever a zoning regulation has extraterritorial impacts).

101. *See* Mankiw, *supra* n. 28, at 67–71 (establishing that raising the price of a product will lead a given consumer to buy less of that product).

cost to communities of adopting exclusionary zoning regulations is the equivalent of raising the price of exclusionary zoning regulations.<sup>102</sup> To raise the price of exclusionary zoning regulations, we must understand how communities price zoning regulations.<sup>103</sup> In other words, we must examine how communities weigh the costs and benefits of zoning regulations.<sup>104</sup>

### A. Entitlements and Externalities

In land use, an “entitlement” represents the right to engage in a particular land use on a particular parcel of property.<sup>105</sup> Zoning regulations are collective property rights held by the community.<sup>106</sup> Landowners enjoy a bundle of property rights, which includes limited rights to use their property and to exclude others from it.<sup>107</sup> The traditional Blackstonian bundle of property rights included absolute rights to use the land, to exclude others from using the land, and to transfer the entire bundle of property rights.<sup>108</sup> However, the modern bundle of property rights does not include an absolute right to use the land, because some land uses have spillover effects.<sup>109</sup> The owner of a polluting factory and his neighbor cannot both have absolute rights to use their land—the polluting factory’s preferred land use (i.e., pollution) would inter-

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102. Edwin Woerdman, *Tradable Emission Rights*, in *The Elgar Companion to Law and Economics* 372 (Jürgen G. Backhaus, ed., 2d ed., Edward Elgar 2005).

103. Lawrence Blume, Daniel L. Rubinfeld & Perry Shapiro, *The Taking of Land: When Should Compensation Be Paid?* 99 Q. J. Econ. 71, 72 (1984); Serkin, *supra* n. 95, at 1634.

104. Karkkainen, *supra* n. 30, at 78; Thomas C. Schelling, *Prices as Regulatory Instruments*, in *Perspectives on Property Law* 536 (Robert C. Ellickson, Carol M. Rose & Bruce A. Ackerman, eds., Little, Brown & Co. 1995).

105. Fennell, *supra* n. 52, at 16–17.

106. Fennell, *supra* n. 52, at 16–17; Fischel, *supra* n. 19, at 404.

107. Robert C. Ellickson, *Property in Land*, 102 Yale L.J. 1315, 1363 (1993).

108. William Blackstone, *Commentaries on the Laws of England* vol. 3, 212–214 (Oceana Publications 1967); *see also* Ellickson, *supra* n. 107, at 1362–1363 (summarizing the Blackstonian bundle of rights); Thomas J. Miceli, *The Economic Approach to Law* 162 (Stan. U. Press 2004) (noting that the typical bundle of property rights includes the rights of use, exclusion, and disposal).

109. *See* Lee Anne Fennell, *Common Interest Tragedies*, 98 Nw. U. L. Rev. 907, 967 (2004) (explaining that all landowners have the right to be free of certain spillovers from neighboring land uses); Elinor Ostrom, *Private and Common Property Rights*, in *Encyclopedia of Law and Economics: Civil Law and Economics*, *supra* n. 19, at 342 (observing that “[e]ven private [property] owners have responsibilities not to generate particular kinds of harms for others”); Francesco Parisi, *The Asymmetric Coase Theorem: Dual Remedies for Unified Property* 8 (Geo. Mason U., L. & Econ. Working Paper No. 01-13, 2001).

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ferre with the resident's preferred land use (i.e., live pollution-free).<sup>110</sup> To resolve such land-use disputes, zoning takes certain entitlements from individual landowners and transfers them to the community, creating collective property rights.<sup>111</sup> In other words, when a community enacts a zoning regulation prohibiting polluting factories, it transfers one "stick" in the bundle of property rights—the right to operate a polluting factory—from each individual landowner to the community.<sup>112</sup> Thus, a zoning regulation is a community property right.<sup>113</sup>

### 1. Externalities and Zoning

When a landowner wants to engage in a land use that has spillover effects on a neighboring property, the law must step in to resolve the dispute.<sup>114</sup> The resolution of a dispute involving land uses with negative externalities involves two steps: (1) the initial allocation of entitlements; and (2) the choice of protection for the entitlement.<sup>115</sup> In allocating the entitlement, the state decides who is entitled to prevail. In the polluting factory example, the state can grant the polluter the right to pollute, or it can grant the resident the right to be free of pollution.<sup>116</sup> In choosing how to protect the entitlement, the state generally chooses between a property rule (i.e., an injunction) and a liability rule (i.e., damages).<sup>117</sup> Under a property rule, no one can take the entitle-

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110. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089, 1115–1116 (1972) (providing as the classic example of incompatible land uses the right to pollute versus the right to clean air).

111. Robert H. Nelson, *Zoning and Property Rights: An Analysis of the American System of Land-Use Regulation* 16 (MIT Press 1977); Fennell, *supra* n. 52, at 16.

112. See Stephens, *supra* n. 49, at 430 (noting that "[a]ny system of land-use controls can be seen as withdrawing from the bundle of property rights, which constitute the ownership of land, the stick which represents the 'right to develop'").

113. Fischel, *supra* n. 19, at 403–404.

114. Calabresi & Melamed, *supra* n. 110, at 1090.

115. *Id.* The Supreme Court recently acknowledged this distinction when it stated that "the creation of a right is distinct from the provision of remedies for violations of that right." *eBay Inc. v. MercExchange, L.L.C.*, 126 S. Ct. 1837, 1840 (2006).

116. Calabresi & Melamed, *supra* n. 110, at 1090.

117. *Id.* at 1092; see A. Mitchell Polinsky, *Resolving Nuisance Disputes: The Simple Economics of Injunctive and Damage Remedies*, 32 Stan. L. Rev. 1075, 1076 (1980) (noting that a property rule grants the entitlement holder the right to injunctive relief, while a liability rule grants the holder the right to damages).

ment from the entitlement holder unless the holder sells it in a voluntary transaction.<sup>118</sup> Under a liability rule, someone may take the entitlement, but the taker must pay an objectively determined price to compensate the holder for the loss of the entitlement.<sup>119</sup>

In a perfect world, the state's initial allocation of property entitlements would ensure that landowners fully internalize the costs of their activities.<sup>120</sup> However, a perfectly efficient initial allocation of entitlements is clearly unrealistic.<sup>121</sup> Whenever the state has inefficiently allocated an entitlement—for example, granting the resident the right to be free of pollution when it would be more efficient for the factory to pollute and pay the resident damages—rearranging the allocation of entitlements can increase efficiency.<sup>122</sup> The Coase theorem holds that if transaction costs are zero and all parties have perfect information, bargaining will *always* lead to an efficient allocation of entitlements, regardless of how the state initially allocates entitlements.<sup>123</sup> In other words, when transaction costs are zero and all parties have perfect information, bargaining will always lead to the internalization of negative externalities.<sup>124</sup>

## 2. Transaction Costs

In reality, however, transaction costs—the costs that parties incur in identifying the relevant parties, bargaining, and enforcing agreements<sup>125</sup>—are never zero.<sup>126</sup> When the transaction costs

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118. Calabresi & Melamed, *supra* n. 110, at 1092.

119. *Id.* A classic example of an entitlement protected by a liability rule is *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870 (1970). In *Boomer*, a group of neighboring landowners sought an injunction barring the owner of a cement plant from emitting harmful dirt and smoke. *Id.* at 871. The Court found that the plant's harmful emissions constituted a nuisance, but allowed the plant owner to pay the neighboring landowners permanent damages in exchange for the right to continue to emit dirt and smoke. *Id.* at 873.

120. Fennell, *supra* n. 52, at 21.

121. *Id.* at 20.

122. Guido Calabresi, *Transaction Costs, Resource Allocation and Liability Rules*, 11 J.L. & Econs. 67, 68 (1968).

123. Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & Econs. 1, 15 (1960).

124. *Id.*

125. Jerry Ellig, *The Economics of Regulatory Takings*, 46 S.C. L. Rev. 595, 607 (1995). Coase described transaction costs as follows:

In order to carry out a market transaction it is necessary to discover who it is that one wishes to deal with, to inform people that one wishes to deal and on what terms, to conduct negotiations leading up to a bargain, to draw up the contract, to under-

are higher than the potential gains from an exchange, an otherwise efficient exchange will not occur.<sup>127</sup> For example, suppose that Mr. Burns owns a polluting factory, and that Marge, the owner of land near the factory, wishes to use her land free of pollution. Mr. Burns holds the entitlement to pollute, which is protected by a property rule. Operating the polluting factory imposes a cost of \$20 on Marge, and it would cost Mr. Burns \$15 to install a filter that would abate the pollution. If transaction costs are zero, Marge would pay Mr. Burns to install the filter, and both parties would benefit from the exchange. The outcome changes, however, when transaction costs are high. Assume now that it would cost Marge \$10 to locate a manufacturer who makes the filter—in other words, the transaction costs are \$10. Marge would now have to spend a total of \$25 to abate the pollution (\$10 to find the manufacturer, and \$15 to install the filter). However, because the harm to Marge of allowing the polluting factory to operate is only \$20, she will not spend \$25 to abate the pollution—no exchange will occur.

In the presence of positive transaction costs, the efficiency of the final allocation of entitlements depends on both the initial allocation of entitlements and the form of protection.<sup>128</sup> For in-

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take the inspection needed to make sure that the terms of the contract are being observed, and so on.

Coase, *supra* n. 123, at 15. Transaction costs are zero when market transactions in entitlements are costless. *Id.* at 15–16.

126. *See id.* at 16 (acknowledging that an assumption of zero transaction costs is “a very unrealistic assumption”). Over twenty years after publishing his foundational article, Coase himself stated, “while consideration of what would happen in a world of zero transaction costs can give us valuable insights, these insights are, in my view, without value except as steps on the way to the analysis of the real world of positive transaction costs.” Ronald H. Coase, *The Coase Theorem and the Empty Core: A Comment*, 24 *J.L. & Econ.* 183, 187 (1981).

127. Ellig, *supra* n. 125, at 607; Michael G. Faure, *Environmental Regulation*, in *Encyclopedia of Law and Economics: Civil Law and Economics*, *supra* n. 19, at 447.

128. Parisi, *supra* n. 109, at 2; *see* Coase, *supra* n. 123, at 27 (noting that “[i]n a world in which there are costs of rearranging the rights established by the legal system, the courts . . . are, in effect, . . . determining how resources are to be employed”). The relative efficiency of property rules and liability rules has long been the subject of intense academic debate. *See e.g.* Ian Ayres & J.M. Balkin, *Legal Entitlements as Auctions: Property Rules, Liability Rules, and Beyond*, 106 *Yale L.J.* 703, 704 (1996) (arguing that “higher-order” liability rules, which allow for successive and reciprocal options to take, are more efficient than both property rules and normal liability rules); Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade*, 104 *Yale L.J.* 1027, 1037–1038 (1995) (asserting that liability rules are more efficient when information is

stance, transaction costs of \$10 prohibited Marge from paying Mr. Burns for his entitlement to pollute, even though an exchange would have been efficient. Suppose that instead of a property rule, Mr. Burns' entitlement to pollute is protected by a liability rule. Under a liability rule, Marge can force Mr. Burns to install the filter and pay damages equal to the cost of installing the filter—\$15.<sup>129</sup> Because the damage amount under a liability rule does not include the transaction costs, Marge will force Mr. Burns to install the filter. Thus, protecting Mr. Burns' entitlement with a liability rule facilitated an efficient exchange that transaction costs would have prevented under a property rule.<sup>130</sup>

Protecting zoning entitlements with a property rule means that a landowner cannot obtain the right to use his property in a manner prohibited by a zoning regulation unless the community sells the zoning entitlement to the landowner in a voluntary transaction—for example, granting a zoning variance or a rezoning.<sup>131</sup> Protecting a community's zoning entitlements with a liability rule means that a landowner can acquire the right to use his land in a manner prohibited by a zoning regulation if he pays an

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asymmetric, regardless of whether transaction costs are also low); Calabresi & Melamed, *supra* n. 110, 1106–1110 (arguing that property rules are more efficient when transaction costs are low, and that liability rules are more efficient when transaction costs are high); Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 Harv. L. Rev. 713, 715 (1996) (contending that property rules are the most efficient form of protection for possessory interests, and that liability rules are the most efficient form of protection for interests in not suffering from harmful externalities).

129. This assumes, however, that the court has perfect information about the cost of installing the filter. If the court did not have perfect information, it would have to spend time figuring out how much it would cost Mr. Burns to install the filter, and the time spent obtaining that information simply adds to the transaction costs. Ellig, *supra* n. 125, at 607.

130. The traditional view of property rules and liability rules, first advanced by Calabresi and Melamed, was that property rules are more efficient when transaction costs are low, and that liability rules are more efficient when transaction costs are high. Calabresi & Melamed, *supra* n. 110, at 1106–1110; Miceli, *supra* n. 108, at 179. However, this traditional view has been shown not to be applicable to all, or even many, exchanges. See e.g. Ayres & Balkin, *supra* n. 128, at 704 (arguing that “higher-order” liability rules, which allow for successive and reciprocal options to take, are more efficient than both property rules and normal liability rules); Ayres & Talley, *supra* n. 128, at 1037–1038 (asserting that liability rules are more efficient when information is asymmetric, regardless of whether transaction costs are also low); Kaplow & Shavell, *supra* n. 128, at 715 (contending that property rules are the most efficient form of protection for possessory interests, and that liability rules are the most efficient form of protection for interests in not suffering from harmful externalities).

131. Fischel, *supra* n. 44, at 22.



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objectively determined amount in damages.<sup>132</sup> States typically protect communities' zoning entitlements with a property rule.<sup>133</sup>

### B. The Price Is Wrong, Bob Barker

Communities adopt exclusionary zoning regulations because they do not have to bear the full cost of the regulations—that is, the price of the exclusionary zoning regulation is too low.<sup>134</sup> The “price” of an exclusionary zoning entitlement is its opportunity cost,<sup>135</sup> which is the value of the foregone alternative.<sup>136</sup> To a community, the opportunity cost of an exclusionary zoning entitlement is the revenue foregone by not selling its right to prohibit low-income housing to the developer.<sup>137</sup> The opportunity cost of an exclusionary zoning entitlement represents the private cost to the community of prohibiting low-income housing.<sup>138</sup> Because the goal of affordable housing policy should be to raise the price of adopting exclusionary zoning regulations, any policy must raise the opportunity cost of exclusionary zoning entitlements.<sup>139</sup> If the community is aware that it is foregoing the full amount of potential revenues when it adopts an exclusionary zoning regulation, then it is paying the full price for the exclusionary zoning regulation.<sup>140</sup> So raising the opportunity cost of an exclusionary zoning entitlement is simply a matter of making a community aware of

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132. See Fennell, *supra* n. 52, at 17 (noting that a landowner cannot pay for a nonconforming use without first obtaining permission from the community).

133. Fischel, *supra* n. 44, at 187–189.

134. Fischel, *supra* n. 26, at 39; Webster, *supra* n. 26, at 70.

135. See Coase, *supra* n. 123, at 43 (stating that it might be preferable to use the opportunity cost concept “to compare the total product yielded by alternative social arrangements”).

136. Mankiw, *supra* n. 28, at 832. For example, the opportunity cost of a person's decision to attend college for four years is the amount that he would have earned in the job market during those four years. *Id.* at 51.

137. See Richard A. Posner, *Economic Analysis of Law* 6 (7th ed., Aspen 2007) (stating that the opportunity cost is “the price at which the resources could have been sold to the next highest bidder”); Woerdman, *supra* n. 102, at 372 (noting that the opportunity cost of a good is the revenue foregone by not selling the good).

138. *Id.* at 372.

139. See Hannah Jacobs, *Searching for Balance in the Aftermath of the 2006 Takings Initiatives*, 116 Yale L.J. 1518, 1539 (2007) (observing that “governments determine whether they should ‘purchase’ (i.e., enact or enforce) a given regulation after investigating the ‘price’ of enacting or enforcing it (i.e., the amount that they and their constituents would pay) and the opportunity costs of not doing so”).

140. *Id.* at 1518.

the revenues it is foregoing when it adopts an exclusionary zoning regulation.<sup>141</sup>

A combination of property rule protection and “fiscal illusion” causes communities to underprice exclusionary zoning regulations. Fiscal illusion is a community’s practice of underestimating costs that do not require a budgetary outlay.<sup>142</sup> Fiscal illusion causes community officials to systematically overestimate the benefits of an action relative to its costs when the action does not require a budgetary outlay.<sup>143</sup> Exclusionary zoning regulations involve no budgetary costs, so communities fail to recognize the full opportunity cost of an exclusionary zoning regulation.<sup>144</sup> Moreover, because exclusionary zoning regulations are protected by a property rule, nothing forces communities to conduct anything beyond a cursory examination of the costs and benefits of adopting exclusionary zoning regulations.<sup>145</sup> When a community is deciding whether to adopt an exclusionary zoning regulation, fiscal illusion first leads the community to underestimate the cost of the zoning regulation, and then property rule protection for zoning regulations deters the community from re-examining its faulty decision.<sup>146</sup> Thus, to discourage communities from adopting exclusionary zoning regulation, we must translate the cost of adopting exclusionary zoning regulations into budgetary costs.<sup>147</sup>

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141. Posner, *supra* n. 137, at 6.

142. See Blume, Rubinfeld & Shapiro, *supra* n. 103, at 72 (developing the concept of fiscal illusion, in which “only dollar outlays are included as costs in its benefit-cost calculation”); see also Bell & Parchomovsky, *supra* n. 93, at 881–882 (discussing fiscal illusion in the context of takings); Serkin, *supra* n. 95, at 1634 (explaining that if no budgetary outlay is required, “the government could ignore the costs its actions impose on property owners”).

143. Bell & Parchomovsky, *supra* n. 93, at 882 (“[G]overnment actors suffering from fiscal illusion see most of the benefits engendered by uncompensated takings, but few of the costs.”); Ellickson, *supra* n. 93, at 458 (“When municipal officials do not charge for services, they have no clear evidence of how their constituents value public programs.”).

144. Blume, Daniel & Shapiro, *supra* n. 103, at 72; Serkin, *supra* n. 95, at 1634.

145. See Ayres & Talley, *supra* n. 128, at 1045 (noting that property rules do not give the entitlement-holder an incentive to reveal his preferences).

146. A landowner cannot simply force the community to repeal a zoning regulation by making a payment, but is instead relegated to beseeching the community to reconsider its own faulty decision, which it is unlikely to ever do. Fennell, *supra* n. 52, at 17.

147. Bell & Parchomovsky, *supra* n. 93, at 882; Ellickson, *supra* n. 93, at 458; Serkin, *supra* n. 95, at 1634.

### V. THE EXCLUSIONARY ZONING TAX

The Exclusionary Zoning Tax will raise the price of excluding low-income housing and thus will discourage communities from adopting exclusionary zoning regulations. Fewer exclusionary zoning regulations will lead to fewer restrictions on the supply of low-income housing,<sup>148</sup> which, in turn, will bring low-income housing prices back down from their artificially inflated level.<sup>149</sup> A tax on exclusionary zoning regulations then goes a long way toward solving the affordable housing crisis.

Under the Exclusionary Zoning Tax, a developer who wants to build low-income housing on a parcel of property where zoning regulations currently prohibit new low-income housing can submit an application for rezoning to the state. Once the state notifies the community of the developer's application, the community has 30 days to submit a bid. After the community submits its bid and the state notifies the developer of the bid, the developer must decide whether to match the community's bid—in effect, the community's bid serves as the price of the exclusionary zoning entitlement. If the developer matches the community's bid, the developer pays the community the amount of the bid, and the developer's application is automatically approved. If the developer chooses not to purchase the community's exclusionary zoning entitlement—because, for example, the bid amount is more than the developer is willing to pay—then the developer's application for rezoning is rejected. However, because the community has prohibited new low-income housing, the community must pay a tax in an amount equal to the bid. This tax is essentially a penalty for restricting the supply of low-income housing. Finally, the revenues from the Exclusionary Zoning Tax will be diverted into a state fund that will be used to subsidize impact fees for low-income housing developments—called the Impact Fee Fund.

To illustrate how the Exclusionary Zoning Tax would work, assume that Lisa, a developer, wants to build a 45-unit low-income apartment building on a parcel of property in Springfield,

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148. Green, Malpezzi & Mayo, *supra* n. 67, at 338; Quigley & Raphael, *supra* n. 14, at 205–206.

149. Glaeser, Gyourko & Saks, *supra* n. 72, at 22.

a wealthy suburban community with a zoning regulation prohibiting multifamily housing with over 20 units.

- *Scenario #1:* Lisa submits an application to build low-income housing in Springfield to the state. Twenty days later, Springfield submits a bid of \$100,000 to the state. Lisa pays the \$100,000, and her application for rezoning is approved.
- *Scenario #2:* Lisa submits an application to build low-income housing in Springfield to the state. Twenty days later, Springfield submits a bid of \$100,000 to the AHC. Lisa declines to match the \$100,000 bid, her application is denied, and Springfield has to pay \$100,000 in Exclusionary Zoning Taxes.
- *Scenario #3:* Lisa submits an application to build low-income housing in Springfield to the state. Springfield declines to submit a bid. Lisa's application is approved, and the state pays Springfield an impact fee for the 45-unit apartment building from the statewide Impact Fee Fund.

One of the main problems in devising an affordable housing policy to combat exclusionary zoning regulations is the difficulty of isolating exclusionary zoning regulations from other more benign zoning regulations.<sup>150</sup> A study of 443 communities in California identified 907 different types of zoning regulations that restricted residential development.<sup>151</sup> Some exclusionary zoning regulations are largely symbolic<sup>152</sup>—a community with nominally exclusionary zoning regulations may always grant rezonings for new low-income housing.<sup>153</sup> Moreover, lengthy regulatory delays

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150. See Quigley & Rosenthal, *supra* n. 25, at 72 (noting that “[t]he sheer variety of local land-use enactments makes it difficult to untangle the link between regulation and its economic effects”).

151. Madelyn Glickfield & Ned Levine, *Regional Growth . . . Local Reaction: The Enactment and Effects of Local Growth Control Management Measures in California* 7–10 (Lincoln Inst. of Land Policy 1992).

152. See e.g. Vicki Been, *Impact Fees and Housing Affordability*, 8 *Cityscape* 139, 146 (2005) (noting that communities “may use impact fees in an attempt to exclude people who do not share the same race, class, or other characteristics as the community’s existing (and preferred) demographic profile”).

153. Glickfield & Levine, *Regional Growth*, *supra* n. 151, at 16.

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in securing the necessary permits to build low-income housing often prohibit low-income housing because longer regulatory delays raise the cost of the project, which sometimes makes building low-income housing prohibitively expensive. To sidestep this problem, this Article defines an “exclusionary zoning regulation” in terms of its effect—that is, a zoning regulation that directly or indirectly prohibits new low-income housing.<sup>154</sup> This has the advantage of minimal interference with existing zoning regulations. The only zoning regulations that the Exclusionary Zoning Tax will eliminate are those that *actually* exclude low-income housing because the Exclusionary Zoning Tax is only triggered when a developer submits an application to build low-income housing on a parcel that currently prohibits low-income housing.<sup>155</sup> With the Exclusionary Zoning Tax, every exclusionary zoning regulation will become presumptively symbolic. Developers who want to build low-income housing can force a community to reveal whether its exclusionary zoning regulations are serious or merely symbolic.

Forcing a community to price its own Exclusionary Zoning Tax avoids having to estimate the effect that exclusionary zoning regulations have on other communities. More importantly, forcing a community to pay the amount of its own bid in taxes if the developer does not match the bid will force the community to reveal exactly how much it is willing to pay to exclude low-income housing.<sup>156</sup> A community cannot bid more than it is willing to pay to exclude low-income housing because if the developer does not match the community’s bid, the community must pay the amount of its own bid in taxes.<sup>157</sup> For example, suppose that Lisa, a developer, is willing to pay \$50,000 for the right to build low-income housing in Springfield, and that Springfield is also willing to pay \$50,000 for the right to exclude low-income housing. If Springfield submits a bid of \$100,000, then Lisa will not match the bid, and

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154. *Supra* Part I.

155. Robert Ellickson first argued in 1977 that communities should have to pay for the negative externalities that their exclusionary land-use regulations caused, though he favored civil liability rather than a Pigovian tax. See Ellickson, *supra* n. 93, at 437 (arguing that “someone should be entitled to recover the damages suffered by the consumers who refuse to buy because of monopoly [housing] prices”).

156. Bell & Parchomovsky, *supra* n. 93, at 891.

157. *Id.* at 892; Lee Anne Fennell, *Revealing Options*, 118 Harv. L. Rev. 1401, 1446–1468 (2005).

Springfield will be forced to pay \$50,000 more than it was willing to pay to exclude the low-income housing. Springfield does not know how much Lisa is willing to pay before it submits its bid, so Springfield cannot submit a bid that exceeds its true willingness to pay because it may end up having to pay the amount of its bid in taxes. Further, a community cannot bid less than it is willing to pay.<sup>158</sup> If Springfield submits a bid of \$25,000, then Lisa will match the bid, and Springfield will only receive \$25,000 for a right that it valued at \$50,000. This kind of self-assessed tax has proven remarkably effective at eliciting accurate subjective valuations.<sup>159</sup>

Finally, diverting the revenues from the Exclusionary Zoning Tax to the Impact Fee Fund will also help to increase the supply of low-income housing.<sup>160</sup> With sufficient revenues, the Impact Fee Fund will lower the cost of building low-income housing by the amount that the developer would otherwise have to pay in impact fees.<sup>161</sup> If the cost of building low-income housing, including a \$12,000 impact fee, is \$112,000, then the Impact Fee Fund will essentially lower the cost of building the low-income housing to \$100,000. Lowering the cost of building low-income housing can only serve to hasten the decline of low-income housing prices.<sup>162</sup>

## VI. CONCLUSION

Affordable housing has been a conspicuous and devastating problem for over 40 years. A close examination of the bottom of the housing market reveals that the task of making low-income housing more affordable is far less daunting than the scope of the affordable housing problem might suggest. The proliferation of exclusionary zoning regulations has constrained, and continues to constrain, the supply of low-income housing. Such supply restrictions drive up the price of low-income housing, leaving the im-

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158. Fennell, *supra* n. 157, at 1466–1468; Bell & Parchomovsky, *supra* n. 93, at 892.

159. See Fennell, *supra* n. 157, at 1411–1414 (discussing the success of call options in finance).

160. Vicki Been, *supra* n. 152, at 151 (noting that when developers are not able to pass the cost of impact fees onto consumers—which is generally the case with low-income housing—impact fees will restrict the supply of housing).

161. *Id.* at 150.

162. *Id.*

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pression that the housing market has simply left the poor behind. It is true that the current housing market has decoupled from the poor, but this trend is not irreversible. In fact, treating this trend as irreversible only makes the trend harder to reverse because the longer policymakers wait to address exclusionary zoning regulations, the more exclusionary zoning regulations will proliferate. Shifting the focus of affordable housing policy to exclusionary zoning regulations will cut off the affordable housing problem at its knees. Eliminating the restrictions on the supply of low-income housing can spark a virtuous cycle of increasing supply, falling housing costs, and improving quality. Affordable housing policy deserves a frank assessment and a fresh approach.