

*Using Disparate Impact
to Restore Housing
Affordability
and Property Rights*

by Randal O'Toole
October 2016

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EXECUTIVE SUMMARY

Portland, Bend, Medford, and to a lesser degree other Oregon cities are in the midst of a housing crisis. Median home prices have rapidly grown and are now four or more times greater than median family incomes. As recently as 1990, median prices were only twice median incomes; housing starts to become unaffordable when median prices are more than three times median incomes.

The Oregon legislature and various cities have applied band-aid solutions to this problem; but none of them will work and some, such as inclusionary zoning, will actually make housing less affordable. That is because none of these solutions address the real problem, which is that the urban growth boundaries and other land-use restrictions imposed by the Land Conservation and Development Commission, Metro, and city and county governments have made it impossible for builders to keep up with the demand for new housing.

Growth boundaries and similar restrictions have three negative effects on low-income minorities. First, they make housing more expensive. Second, they make housing prices more volatile, which makes buying a home riskier than in places that do not have such restrictions. Third, they are a major—if not the major—contributor to growing wealth inequality as barriers to homeownership have dramatically increased the share of families who cannot afford or must go deeply into debt to buy their own homes.

Fortunately, a June 2015 Supreme Court decision offers a legal remedy to this problem. This decision authorized the use of disparate-impact considerations in judging whether government agencies are following the Fair Housing Act. That act specifically forbids the *disparate treatment* of minorities—that is, intentional discrimination in housing sales and rentals. The disparate-impact doctrine asserts that policies such as zoning and land-use regulation that make it more difficult for minorities to obtain housing—even if the policies are not intended to do so—are equally in violation of the law unless the policies can be “justified by a legitimate rationale.”

According to disparate-impact regulations published by the Department of Housing and Urban Development in February 2013, prohibited conduct includes “enacting or implementing land-use rules, ordinances, policies, or procedures that restrict or deny housing opportunities or otherwise make unavailable or deny dwellings to persons because of race, color, religion, sex, handicap, familial status, or national origin.” Numerous land-use rules,

ordinances, and policies increase housing costs. Since some protected minorities, such as blacks, are more likely to have lower-than-average incomes, any such rules or policies reduce their housing opportunities and therefore potentially violate the Fair Housing Act.

HUD's implementation, known as Affirmatively Furthering Fair Housing, focuses on ending income segregation of communities as a means of ending racial segregation. However, this will be a costly policy that will do little to make housing more affordable to most low-income minority families.

As an alternative, fair-housing advocates should question policies that increase housing costs by intruding on private property rights. These include growth-management tools such as urban growth boundaries, the use of eminent domain for economic development, rent control, inclusionary zoning, and excessive impact fees, all of which benefit a few at everyone else's expense. In approving the disparate-impact doctrine, the Supreme Court has offered a tool to both affordable-housing advocates and property-rights advocates for undoing these rules and policies that make housing less affordable.

INTRODUCTION

Over the past 50 years, owners of private property have seen their rights steadily eroded by state and local land-use laws that increasingly restrict how both rural and urban property owners can use their land. On one hand, California, Hawaii, Oregon, and several other states have told rural property owners that they cannot use their land for anything but farming and forestry even though the nation has a surplus of both farms and forest lands. On the other hand, some large cities have told urban property owners that they cannot charge rents at fair market value, and other cities have told



urban homebuilders that they must sell 15 to 20 percent of the homes they build for less than cost in order to provide a few lucky people with “affordable” housing.

Unfortunately, the Supreme Court has granted local and state governments the right to impose such restrictions on property rights. In *Penn Central v. New York City*, the court ruled that a city could regulate away much of the value of someone's land solely for the benefit of others even though the proposed private use of that land would have no negative effects on their neighbors.¹ Although the issue in question was the modification of a historic building in Manhattan, the ruling has been used to justify the taking of property rights away from rural landowners to develop their land for urban or suburban uses.

Other Supreme Court rulings have further eroded property rights. In *Kelo v. City of New London*, the court ruled that a city could take land by eminent domain from one set of private landowners and give it to other private owners on the premise that the new owners would provide “public benefits” by paying more taxes for the land.² Fortunately, a new Supreme Court ruling offers the opportunity to reverse all of those losses of property rights.

THE SUPREME COURT'S DISPARATE IMPACT DECISION

On June 25, 2015, the Supreme Court released its decision in *Texas Department of Housing v. Inclusive Communities Project*.³ This decision authorized the use of “disparate impact” in judging the fair housing policies of cities and suburbs. While some people still believe that the 5–4 majority decided the case wrongly, the decision offers a way of restoring property rights in many states and regions where such restrictions have reduced housing affordability.

The Fair Housing Act of 1968 made it illegal for anyone to “refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.” Such discrimination is known as “disparate treatment.” The doctrine of disparate impact goes a step further. As the majority Supreme Court opinion written by Justice Anthony Kennedy noted, “In contrast to a disparate-treatment case, where a 'plaintiff must establish that the defendant had a discriminatory intent or motive,' a plaintiff bringing a disparate-impact claim challenges practices that have a 'disproportionately adverse effect on minorities' and are otherwise unjustified by a legitimate rationale.”⁴ In other words, a government body or other entity may have no intention of discriminating against minorities, yet still be guilty of unfair housing if the result of its policy adversely affects minorities.

“...[F]air-housing advocates should question policies that increase housing costs by intruding on private property rights.”

In reaching this conclusion, the court relied on a precedent set by *Griggs v. Duke Power*, a fair employment case. Prior to 1964, Duke Power Co. had a policy of discriminating against hiring blacks for manual labor jobs. When the Civil Rights Act of 1964 made such discrimination illegal, Duke Power began requiring that manual laborers have high school diplomas and pass two intelligence tests—requirements that hadn't been imposed on its existing white laborers. Without finding that this policy was intended to discriminate against blacks, the court concluded that it had a disparate impact because blacks were less likely to have high school diplomas and there was no “business necessity” for laborers to have such diplomas.

Opponents of the disparate-impact doctrine, including the four dissenting members of the Court, argue that disparate impact opens the door to endless litigation. To use an example cited by Justice Samuel Alito's dissenting opinion, the City of St. Paul, Minnesota passed an ordinance requiring landlords to deal with rodent infestations. Housing advocates argued that this would increase the price of housing, and since minorities were more likely to be poor, they would be disproportionately affected by the resulting rent increases. “No one wants to live in a rat's nest,” wrote Alito, yet under the disparate impact theory, “a city can't even make slumlords kill rats without fear of a lawsuit.”⁵ In fact it can, under the disparate-impact doctrine, if it can prove that it has a legitimate rationale for doing so, such as showing that rodent control reduces the spread of disease.

In the case that was actually before the court, the Texas Department of Housing allocated low-income housing tax credits to developers in various neighborhoods around the state. The Inclusive Communities Project (ICP) found that more than 90 percent of such credits in the city of Dallas “were located in census tracts with less than 50% Caucasian residents,” and argued that this was an example of disparate impact because it promoted existing patterns of segregated housing. Based on ICP's statistical evidence, the District Court for the Northern District of Texas agreed.

On appeal, the Fifth Circuit Court of Appeals agreed that disparate impacts were *cognizable*, that is, subject to legal review, but reversed the lower court's decision, saying that ICP had failed to prove that an alternative method of allocating tax credits would have a less discriminatory effect. Despite winning the case, the Texas Department of Housing asked the Supreme Court to review the contention that disparate impacts were cognizable in the first place.



While the majority agreed that they were, Alito's dissent pointed out that this ruling opens up a rat's nest for public and private housing providers because any policy can be construed as having a negative effect on low-income minorities. For example, ICP challenged the Texas Department of Housing's allocation of tax credits to low-income neighborhoods, but if it had allocated more credits to high-income neighborhoods, as ICP wanted, the higher costs of providing housing in those upscale neighborhoods would result in fewer housing units for a fixed amount of tax credits, which in itself would have a disparate effect on low-income minorities.⁶

Alito's dissent didn't rule out disparate impact entirely. "Disparate impact can be *evidence* of disparate treatment," agreed Alito. For example, the facts in the *Griggs v. Duke Power* case "created a strong inference of discriminatory intent," and "federal judges have decades of experience sniffing out pretext."⁷

Another part of the rat's nest is in determining which disparate impacts can be "justified by a legitimate rationale." The Texas Department of Housing, for example, argued that federal law requires that it give "preference" to giving tax credits in census tracts populated predominately by low-income residents.⁸ At what point does the legal requirement for such a preference become illegitimate because of the overriding need to desegregate housing?

Some guidance is provided by a disparate-impact rule published by the Department of Housing and Urban Development (HUD) two years before the Supreme Court decision. The rule applies to just two classes of parties. First are banks and other financial firms offering loans or other financial assistance to prospective homeowners.⁹ Second

are government agencies "Enacting or implementing land-use rules, ordinances, policies, or procedures that restrict or deny housing opportunities or otherwise make unavailable or deny dwellings to persons because of race, color, religion, sex, handicap, familial status, or national origin."¹⁰ While there is no guarantee that other parties won't use disparate impact to challenge private landlord or homebuilder policies, HUD appears to be solely interested in the impact government land-use regulation and lenders' mortgage policies have on protected groups of people.

The Supreme Court's disparate impact ruling could effectively overturn numerous state and local laws, ordinances, and regulations that make housing more expensive. Since some protected classes, such as African Americans, are more likely than average to have lower incomes, anything that increases housing prices would have disparate impacts on these groups. To keep these laws and rules in place, state and local governments would have to prove that their laws and rules serve some other social value and that there is no other way of achieving that value that doesn't have an impact on low-income minorities.

HUD's disparate-impact rules explicitly prohibit "enacting or implementing land-use rules, ordinances, policies, or procedures that restrict or deny housing opportunities or otherwise make unavailable or deny dwellings to persons because of race, color, religion, sex, handicap, familial status, or national origin."¹¹ The rules add that, "A practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin."¹²

HUD's rule on disparate impacts outlines a process to determine whether minorities may be suffering from illegal disparate impacts of state or regional land-use regulations. The process requires three steps:

1. A challenger must prove that a "practice results in, or would predictably result in, a discriminatory effect." This can often be done using statistics and analyses showing a causal relationship behind those statistics.
2. Once such proof is made, the defendant must "prove that the challenged practice is necessary to achieve one or more of its substantial, legitimate, nondiscriminatory interests."
3. Even if such proof is offered, the challenger "may still establish liability by proving that the substantial, legitimate, nondiscriminatory interest could be served by a practice that has a less discriminatory effect."¹³

Critics of disparate impact, including the dissenters in the Supreme Court case, believe that challengers must meet a

fourth test showing that there was a discriminatory intent or motive behind the policies that led to unfair housing; in other words, that the policies are an example of disparate treatment, not just disparate impact. While this test might be more difficult to prove, many regional land-use policies meet all four tests.

THE DISPARATE IMPACT OF GROWTH MANAGEMENT

California, Hawaii, Oregon, Washington, and several other states have passed laws aimed at managing growth, usually by controlling whether growth takes place at the urban fringe or by increasing densities inside existing developed areas. These laws work by taking developmental rights away from existing landowners. For example, Oregon has zoned some 96 percent of the state “rural” and allows people to build homes in rural areas only if they own 80 acres, actually farm it, and (depending on soil productivity) actually earned \$40,000 to \$80,000 a year farming it in two of the previous three years.¹⁴ California growth-management rules are so strict that 95 percent of the state's population is confined to 5.3 percent of the state's land, and residents are packed into those urban areas so tightly that the average density of California urban areas is nearly twice the average density of urban areas in the other 49 states.¹⁵

There is no doubt in the minds of economists who have studied these rules that they make housing less affordable.

- “Government regulation is responsible for high housing costs where they exist,” say Harvard economist Edward Glaeser and Wharton economist Joseph Gyourko.¹⁶
- University of North Carolina real-estate economists Donald Jud and Daniel Winkler found that rapid growth in housing prices is strongly “correlated with restrictive growth management policies and limitations on land availability.”¹⁷
- Canadian real-estate analysts Tsuriel Somerville and Christopher Mayer found that “Metropolitan areas with more extensive regulation can have up to 45 percent fewer [housing] starts and price elasticities that are more than 20 percent lower than those in less-regulated markets.”¹⁸
- Federal Reserve economist Raven Molloy found that “in places with relatively few barriers to construction, an increase in housing demand leads to a large number of new housing units and only a moderate increase in housing prices,” while “places with more regulation experience a 17 percent smaller expansion of the housing stock and

almost double the increase in housing prices.”¹⁹

- Research by economists Henry Pollakowski and Susan Wachter concluded that “land-use regulations raise housing and developed land prices.”²⁰
- Three economists from the University of California, Berkeley found that “regulatory stringency is consistently associated with higher costs for construction, longer delays in completing projects, and greater uncertainty about the elapsed time to completion of residential developments.”²¹
- University of Washington economist Theo Eicher compared a database of land-use regulations with housing prices and found that high housing prices are “associated with cost-increasing land-use regulations (approval delays) and statewide growth management.”²²

“More restrictive residential land use regulations and geographic land constraints are linked to larger booms and busts in housing prices.”

Growth-management and other land-use regulation has several other negative impacts on low-income families. First, the “reduction in price elasticities” mentioned by Somerville and Mayer mean that regulation makes housing prices more volatile, in turn making homeownership a riskier investment. Supply price elasticity measures the response of supply to a change in demand; a low elasticity means the supply does not respond as much, so small increases in demand can lead to large increases in price while small decreases in demand can lead to large decreases in price.

As a result, confirm economists Haifang Huang and Yao Tang, “More restrictive residential land use regulations and geographic land constraints are linked to larger booms and busts in housing prices.” Their comparison of land-use regulations and housing prices in more than 300 cities in the United States found that, “The natural and man-made constraints also amplify price responses to an initial positive mortgage-credit supply shock, leading to greater price increases in the boom and subsequently bigger losses,” in other words, a bigger bubble.²³

Second, high housing costs have been associated with higher unemployment rates. In regions where housing is affordable, neighborhoods with high homeownership rates tend to have lower unemployment rates than neighborhoods with high renter rates. The reverse is true in regions where housing is unaffordable because people who own their own homes have a harder time moving when they become unemployed.²⁴ This is partly because of the volatility of housing prices (which means that conditions likely to render someone unemployed are also likely to reduce their home value) and partly because higher home prices mean the transaction costs of moving are higher. The realtor fee for selling a home may be about 5 percent and the down payment on a new home may be 10 to 20 percent. Both of these are far more affordable if median home prices are about \$100,000 than if they are about \$300,000.

A third effect of land-use regulation is rising wealth inequality. Thomas Piketty's book, *Capital in the Twenty-First Century*, finds that inequality is growing because returns on capital are greater than the rate of economic growth. But a refinement of Piketty's work by MIT researcher Matthew Rognlie reveals that housing is the main source of growing inequality.

Looking closely at Piketty's and other data, Rognlie found that "a single component of the capital stock—housing—accounts for nearly 100 percent of the long-term increase in the capital/income ratio, and more than 100 percent of the long-term increase in the net capital share of income."²⁵ In other words, were it not for housing, inequality would not be growing.

Moreover, the reason why housing capital stock is growing is that urban areas in most developed nations, including nearly every country in Europe, Australia, and many states, provinces, and major urban areas in the United States and Canada, have adopted policies intended to limit urban sprawl.

It may be no coincidence that American inequality (as measured by the Gini index) reached its lowest level in

1968, before urban areas outside Hawaii had adopted growth-management plans.²⁶ American homeownership rates rapidly grew between 1940 and 1970, after which they leveled off. California and Oregon adopted growth-management planning in the early 1970s, leading homeownership rates in those cities to decline after that time. Over the next three decades, more states would adopt some form of growth-management planning including Washington, Florida, New Jersey, and most New England states. This was followed by the stifling of homeownership and growing income inequality.

All of these effects lend special urgency to the need to repeal the land-use regulations that have made housing unaffordable in the first place. These regulations have had a particularly dramatic effect on minorities in Hawaii and California, the first two states to begin practicing growth management in the 1960s and 1970s.

Between 2000 and 2010, the population of the San Francisco Bay Area grew by 9.5 percent, yet the number of black residents in the area declined by 14.2 percent. Similarly, the overall population of the Honolulu urban area grew by 11.7 percent, yet the black population declined by 3.6 percent. Similar disparities are found in the Los Angeles, San Diego, and San Jose urbanized areas.²⁷

High housing prices have similarly harmed low-income blacks and other minorities in Oregon. As of 2013, when measured by comparing median home prices with median family incomes, Oregon was the fifth least-affordable state in the nation, following Hawaii, California, New York, and Massachusetts. Relative to incomes, Oregon housing prices are 40 percent more than the national average, but that is still much more affordable than California, where housing prices are 210 percent more than the national average. As a result, Oregon has become a refuge for low-income populations fleeing unaffordable housing in California. Partly, as a result of this, between 2000 and 2010, the population of blacks and other minorities grew despite Oregon's high housing costs relative to the rest of the nation.

Still, the impacts of those housing costs are discernible. Between 2000 and 2010, the white population of the Portland urban area grew by 37.1 percent, while the black population grew by only 21.5 percent. In the city of Portland itself, the white population grew by 7.8 percent while the black population grew by only 4.5 percent.

Conditions worsened for low-income blacks after 2010. According to Census Bureau estimates, the black population of both the city of Portland and the Portland urbanized area declined between 2010 and 2014. While white populations grew by 6.8 percent in the city and 6.5 percent in the urban area, black populations fell by 11.5 percent in the city and by 5.3 percent in the urban area.²⁸



Even before 2010, high housing costs affected the type of housing occupied by Portland-area residents. Portland's push for denser development has led to a decrease in the share of households living in single-family homes, but this hit low-income populations hardest. Between 2000 and 2010, the share of households headed by whites living in single-family detached homes declined by 3.3 percent, but the share of households headed by blacks living in such homes declined 16.1 percent.²⁹ Housing prices also affected tenure: People living in single-family homes are more likely to own their own homes. Between 2000 and 2010, the share of whites living in their own homes fell by 2.2 percent, but the share of blacks (which was already well below the white share) fell by 12.6 percent.³⁰

In short, Portland's housing affordability crisis forced some low-income people to leave the region and others into lower-quality housing. This process has led some to charge the region with "economic apartheid." Yet, planners defend the region's housing prices, one saying, "This is capitalism; how do you fight it?"³¹

In fact, Portland's high housing prices are not a result of capitalism; they are due to government land-use restrictions. Portland planners celebrate the fact that the region's urban growth boundary has forced the population to "grow up, not out" as the region's population has grown by 60 percent since the boundary was first drawn in 1979, yet expansions have increased the amount of land inside the boundary by just 14 percent.³² As a result, the population density of the Portland-Vancouver urbanized area grew from 2,940 people per square mile in 1980 to 3,528 people per square mile in 2010.³³

Such increased densities are a prescription for increased land and housing costs. In 1990, an acre of land suitable for home construction inside the growth boundary cost about \$25,000.³⁴ Today, a similar acre, if you can find it, would generally cost about \$300,000.³⁵

Higher land prices are accompanied by increased regulation, as Portland-area governments know that homebuyers have few alternatives if they do not want to endure long commutes. In 1999, the Portland City Council approved a comprehensive design ordinance despite warnings from the Home Builders Association of Metropolitan Portland that the new rules would make housing more expensive.³⁶ Portland and other Oregon cities also have stiff system development charges that can add \$20,000 to \$40,000 to the cost of a new home.³⁷ By comparison, similar charges in Houston, one of the nation's most affordable housing markets, are less than \$2,000 for homes of up to 3,000 square feet.³⁸

When such regulation and development fees increase the cost of new homes, they also increase the cost of existing homes. Sellers of existing homes know that their

competition includes new homes, so when the price of new homes increases, they can increase their asking price as well. The sellers enjoy windfall profits, but buyers end up going further into debt or are denied the ability to own a home.

Table 1: State Value-to-Income Ratios in 1969 and 2013

STATE	1969	2013	STATE	1969	2013
Alabama	1.7	2.3	Montana	1.6	3.2
Alaska	1.8	3.1	Nebraska	1.4	2.0
Arizona	1.8	3.0	Nevada	2.1	3.2
Arkansas	1.7	2.2	New Hampshire	1.7	2.9
California	2.2	5.8	New Jersey	2.1	3.5
Colorado	1.8	3.4	New Mexico	1.7	2.9
Connecticut	2.2	3.0	New York	2.1	3.9
Delaware	2.1	3.2	North Carolina	1.6	2.7
D.C.	1.8	5.8	North Dakota	1.7	2.2
Florida	1.8	2.8	Ohio	1.7	2.1
Georgia	1.8	2.5	Oklahoma	1.4	2.0
Hawaii	3.0	6.7	Oregon	1.6	3.8
Idaho	1.7	2.8	Pennsylvania	1.4	2.4
Illinois	1.8	2.4	Rhode Island	1.9	3.3
Indiana	1.4	2.0	South Carolina	1.7	2.5
Iowa	1.5	2.0	South Dakota	1.5	2.1
Kansas	1.4	2.0	Tennessee	1.7	2.6
Kentucky	1.7	2.3	Texas	1.4	2.2
Louisiana	1.9	2.5	Utah	1.8	3.2
Maine	1.6	2.8	Vermont	1.8	3.2
Maryland	1.7	3.2	Virginia	1.9	3.2
Massachusetts	1.9	3.9	Washington	1.8	3.6
Michigan	1.6	2.0	West Virginia	1.5	2.0
Minnesota	1.8	2.4	Wisconsin	1.7	2.5
Mississippi	2.4	2.1	Wyoming	1.7	2.8
Missouri	1.3	2.3	United States	1.8	2.7

Median home values of owner-occupied homes divided by median family incomes. Sources: 1969 median home values from *1970 Census: Housing Characteristics for States, Cities, and Counties, Volume 1, Part 1 United States*, table 1; 1969 median family incomes from "Historical Income Tables," table S2, "Median Family Income by State, 1959, 1969, 1979, and 1989," Census Bureau, tinyurl.com/StateMFI59-89; 2013 median family incomes from table B19133 and median home values from table B25077 of the 2014 American Community Survey.

Growth-management supporters often claim that it is demand, not supply, that has made housing expensive. This is belied by the relative equality of housing affordability across the continental United States in 1969, when few states or regions were practicing growth management and developers and homebuilders could meet any demand for

new housing (Table 1). Hawaii was the only state to implement growth-management planning before 1970, and not coincidentally it also had the least-affordable housing in 1969. Every other state had fairly affordable housing.

Outside Hawaii, zoning before 1970 was almost non-existent outside city limits, and even in cities that had zoning, the time required to get construction permits was fairly brief. San Jose remained very affordable in 1969 despite having been the nation's fastest-growing urban area for two decades, while Atlanta, Denver, Los Angeles, Miami, Orlando, Phoenix, and other urban areas doubled or even tripled in population between 1950 and 1970 without any stress on housing prices.

“Owners of land outside urban growth boundaries...find that it is almost impossible to develop their land.”

Since 1970, California, Oregon, Washington, and most states in New England and on the eastern seaboard, except Georgia and the Carolinas, have implemented some form of growth management, either regionally or on a statewide basis. While housing affordability has declined everywhere, it has declined the most in growth-management states. Oregon was slightly more affordable than average in 1969; today, it is far less affordable. The nation's fastest-growing urban areas over the past two decades have been Houston, Dallas-Ft. Worth, and Atlanta; and they remain affordable because of a lack of growth management.

In response to housing affordability problems, many cities have either promoted the construction of more multifamily housing or subsidized such housing. According to the state of California, such subsidies have added no more than about 7,000 new housing units per year, or just 5 percent of all new housing built in the state.³⁹ Since at least some of those 7,000 units would have been built even without the subsidies, the impacts of those programs on the general level of housing affordability have been negligible. Nor is there any guarantee that those programs particularly benefit low-income minorities, as the housing units they provide are often open to half the households in a region, that is, to anyone whose income is no higher than median household incomes for their city or region.

LACK OF JUSTIFICATION

Under HUD's disparate impact rule, growth-management policies that make housing less affordable can still be justified if they are “necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent . . . or defendant.”⁴⁰ The entity imposing those rules has the burden of proof to show that they are legally justified, and such justification “must be supported by evidence and may not be hypothetical or speculative.”⁴¹

When Hawaii, California, Oregon, and other states adopted these policies, they initially justified them based on the supposed need to protect farms and open spaces. More recently, they have focused on the alleged benefits in the form of reduced driving, pollution, and energy consumption. Close scrutiny reveals that these purported justifications are either imaginary or provide too few benefits to justify the huge impacts on housing affordability and protected classes.

Growth boundaries are hardly needed to protect prime farm lands. Nationwide, says the Department of Agriculture, the contiguous 48 states have more than 900 million acres of agricultural land (including cropland, pastureland, and rangeland), not counting lands owned by the federal government. Less than 40 percent of those acres are used for growing crops.⁴² Oregon has nearly 15 million acres of private agricultural lands, only 3.5 million of which are used for growing crops.⁴³ Less than 1.5 million acres of the state have been developed, including urban developments, rural roads, and other rural developments more than a quarter-acre in size.⁴⁴

Moreover, the number of acres needed for crop production has been declining because the per-acre productivities of most major crops, including barley, canola, corn, cotton, flax seed, peanuts, potatoes, rice, sorghum, soybeans, sugar beets, sunflowers, sweet potatoes, and wheat, have been growing faster than the nation's population.⁴⁵

In short, growth boundaries and other growth-management policies are hardly needed to protect farms. Considering that the nation has such an abundance of farmland and uses only a third of it for growing crops, the protection of such lands cannot justify policies that cause housing prices to rise by 50 to 300 percent or more, making housing unaffordable to many protected minorities. As the Department of Agriculture itself concludes, “urbanization is not considered a threat to the nation's food production.”⁴⁶

Most state and local land-use policies aimed at protecting farms and open spaces depend on taking property rights away from private landowners. Owners of land outside urban growth boundaries in California, Hawaii, Oregon, and other states find that it is almost impossible to develop their land. Growth management thus takes property rights

from rural land owners mainly to protect scenic views for upper-class urban residents. Rural property owners and low-income urban residents both lose from these policies.

In contrast to the farmland justification for growth-management policies, air pollution, energy consumption, and traffic congestion are real issues. Yet, growth management has minimal impact on these issues. Thanks to urban growth boundaries imposed in the 1970s, for example, the average population densities of the San Francisco-Oakland and San Jose urban areas have increased by more than 60 percent since 1980. Despite that increase, per capita transit ridership has fallen by a third and per capita driving has increased.

In 2008, the Transportation Research Board asked University of California, Irvine, economist David Brownstone to review claims that growth management would reduce energy consumption and greenhouse gas emissions. After a thorough review of the literature, he found that there is a “statistically significant link” between urban form and driving, but that “the size of this link is too small to be useful” in reducing energy consumption or greenhouse gas emissions.⁴⁷

ALTERNATIVE, LESS DISCRIMINATORY PRACTICES

To the extent that there is a link between growth management and measures of environmental quality such as air emissions and energy consumption, other policies, such as more stringent air pollution standards and (because most pollution takes place in congested traffic) measures to relieve congestion such as traffic signal coordination, can be far more effective at saving energy and reducing pollution while having no disparate impacts on protected classes of people. HUD's disparate impact rule states that, even if a defendant can prove that the challenged rules or policies might be justified based on other considerations, such policies may still violate fair housing rules if “the challenged practice could be served by another practice that has a less discriminatory effect.”⁴⁸

Rules that reduce the energy consumption and emissions of individual cars can have a far greater effect on the environment than rules that attempt to reduce per capita driving by manipulating urban form. In 1970, many American cities had serious air quality problems, leading Congress to pass the Clean Air Act and create the Environmental Protection Agency (EPA). The EPA attempted to address air quality issues using a two-pronged approach: first, by requiring auto manufacturers to build new cars that would meet increasingly stringent emissions rules; and second, by encouraging cities to invest in urban transit and reshape themselves to favor alternatives to driving.

Since then, total transportation-related emissions have declined by more than 80 percent. Virtually all of this decline was due to reduced emissions from new cars. Today, many new cars produce as little as one percent as much toxic emissions as new cars in 1970, and the average car on the road produces less than eight percent as much as the average in 1970. On the other hand, efforts to promote transit and change urban form have had almost no effect. Despite spending hundreds of billions of dollars subsidizing transit since 1970, transit ridership has declined from about 50 trips per urban resident per year in 1970 to 40 trips per year today. As already noted, large increases in urban densities in the San Francisco Bay Area have failed to reduce per capita driving.



INTENT

Oregon growth-management policies clearly meet the disparate-impact tests set by the Supreme Court majority. But at least some of those policies also meet the test set by the minority, as city officials have openly stated that they adopted the policies in order to attract high-income people to their region. Thus, these policies are actually examples of *disparate treatment*, since they are discriminating against low-income people who are disproportionately black or other protected minorities. However, proving intent may be much more difficult than proving disparate impacts, which may be one reason why the Supreme Court majority believed that no such proof was needed.

Zoning and land-use regulation have always been a way of excluding undesirable people and uses from some neighborhoods. “The basic purpose of suburban zoning was to keep Them where They belonged—Out,” says Rutgers planning professor Frank Popper. “If They had already gotten in, then its purpose was to confine Them to limited areas. The exact identity of Them varied a bit around the country. Blacks, Latinos, and poor people always qualified. Catholics, Jews, and Orientals were targets in many places.”⁴⁹

In general, zoning was a tool used by the middle class to create neighborhoods suitable for middle-class homeownership. Before the development of zoning, working-class families in American cities were actually more likely to own their own homes than middle-class families; the middle class preferred to rent so they could easily move if any working-class families moved in next door.⁵⁰ In this context, *middle class* refers to college-educated people with knowledge-oriented jobs while *working class* refers to non-college-educated people with labor-oriented jobs. Currently, about 30 percent of working-age Americans have bachelor's degrees or better, suggesting that about 30 percent of American families are in the middle or upper classes while 70 percent are in the working or lower classes.

After Henry Ford made mass-produced automobiles affordable to the working class, working-class families priced out of housing in the cities by zoning could find low-cost land and build homes in unincorporated areas outside the cities. When states began allowing, and in some cases requiring, counties to zone land, housing affordability again became a problem for many working-class families. It is worth noting that no one complained about urban sprawl when wealthy families began moving to the suburbs in the mid-19th century or when middle-class families began moving to the suburbs around 1890. It was only when working-class families began moving to the suburbs in large numbers after World War II that urban sprawl became an issue and middle-class planners began promoting urban growth boundaries and other policies to curb such sprawl by making single-family homes unaffordable to low-income and working-class families.

The Rise of the Creative Class, a 2002 book by urbanologist Richard Florida, argued that cities should promote economic growth by attracting members of the “creative class,” which he defined to include scientists, engineers, artists, and other “creative professionals.” Florida estimated that about 30 percent of working-age Americans were members of the creative class.⁵¹ Not coincidentally,



this happens to equal the percentage of working-age Americans with college degrees. In other words, Florida's creative class is identical to the middle class, and Florida's prescription calls for cities to attract a higher percentage of middle-class workers than the national average, to the exclusion of working-class workers. His book might have been far less popular if he had used to terms middle class and working class instead of creative class and (by implication) non-creative class.

Among other things, one of the factors that Florida believes can attract members of the creative class is density. Based on an analysis showing that “creative” workers tend to work in dense areas (but without showing any causal relationships), Florida concludes that “density is a key component of knowledge spillovers and a key component of innovation.”⁵²

The problem is that policies that promote density also make housing less affordable. As Harvard economist Edward Glaeser observes, such policies will make a region “less diverse and instead evolve into a boutique city catering only to a small, highly educated elite.”⁵³

Florida's ideas have become popular among urban planners and city officials who want to increase local tax revenues by attracting higher-income residents. Numerous cities, including Austin, El Paso, Miami, Newark, and Seattle, have hired Florida to help them attract more creative workers. Florida has influenced even more cities by his work for the United States Conference of Mayors, National League of Cities, and various chambers of commerce and economic development groups.⁵⁴

Florida himself has admitted that his policies harm low-income and working-class families. “Talent clustering provides little in the way of trickle-down benefits,” he says. He specifically points to higher housing costs eroding away any wage benefits enjoyed by working-class workers living in regions that have tailored themselves for the creative class. “There is a rising tide of sorts,” says Florida, “but it only lifts about the most advantaged third of the workforce, leaving the other 66 percent much further behind.” One result of such high housing costs, he continues, is that lower-income workers are often forced to migrate away from “knowledge-based metros.”⁵⁵

The difficulty for those concerned about disparate treatment is in proving that the policies cities or regions adopt are aimed at attracting creative workers at the expense of others. While city officials may listen to, quote, and even hire Florida for his advice, their written plans usually contain more generic terms and only mention Florida's ideas indirectly. According to the disparate-impact doctrine, such proof isn't necessary to show that cities, metropolitan regions, and states may be guilty of policies that have disparate impacts on low-income minorities. But, for those

who believe such proof should be required, in many cases there may be enough circumstantial evidence to allow Justice Alito and other judges to “sniff out pretext.”

INCLUSIONARY ZONING: MAKING THE PROBLEM WORSE

In 2016, in response to Oregon's housing crisis, the state legislature passed a law authorizing cities to use *inclusionary zoning*, that is, require that homebuilders build more affordable housing. Under the law, cities could require any builder that is building more than 20 homes to sell or rent up to 20 percent of them at below-market rates to people who earn less than 80 percent of the median family income.⁵⁶

While a few lucky people will benefit from inclusionary zoning, such ordinances have been proven to harm all other renters and homebuyers. First, inclusionary zoning leads builders to build fewer new homes overall. Second, it forces builders to charge more for the market-rate units they build. This in turn leads sellers of existing homes to raise their prices, thus reducing overall housing affordability.⁵⁷ Even if these were not true, the fact that less than 20 percent of new homes would be sold or rented at “affordable” rates means there will never be enough affordable housing to go around, as census data show that about 40 percent of Portland-area families earned less than 80 percent of the region's median family income.⁵⁸

Similarly, for years Bend, Oregon has had a policy of charging developers a fee of one-third of a percent of the value of all new construction and using that revenue to build affordable housing.⁵⁹ Again, the result is that a few lucky people get more affordable homes, while housing in general becomes more expensive for everyone else, including buyers of existing homes.

In short, inclusionary zoning and similar measures that impose added costs on homebuilders, like the growth-management policies whose impacts they are supposed to remedy, actually have their own disparate impacts on low-income minorities. As such, they violate the Fair Housing Act just as much as the state's urban growth boundaries.

REMEDIES

While individual communities can subsidize (or force others to subsidize) the construction of a limited number of units of affordable housing, this won't help most low-income families. Instead, the key to maintaining housing affordability is to allow builders unlimited access to vacant lands near the urban fringe. As soon as such access is limited, through growth boundaries, urban service boundaries, inflexible large-lot zoning, or other policies,

housing prices climb even if there is supposedly plenty of vacant land within the urban area. This is because developing vacant parcels within the urban area is often more expensive with lengthy permitting processes, and because when access is limited builders quickly buy all lands available for future development, thus driving up land prices within the urban area.

“...[T]he fact that less than 20 percent of new homes would be sold or rented at 'affordable' rates means there will never be enough affordable housing to go around....”

Simply expanding urban growth boundaries is not sufficient to make housing affordable. The purpose of an urban growth boundary is to prevent “leap-frog development” in which a new development is built several miles away from the urban fringe. Supposedly, such development is inefficient because services must be extended further than to a development closer in. Yet, in many cases, leapfrog development is actually more efficient than development next to the urban fringe because large parcels of land are easiest to develop, while land parcels near the urban fringe tend to be small and more expensive to develop.

In addition, the very existence of a boundary is going to keep land prices high, so a small expansion is not going to lead those prices to fall to what they were before the boundary was put in place. Finally, small expansions of a boundary do not necessarily allow developers to escape from the stringent regulation and high system development charges imposed by cities within the boundary.

For these reasons, the only way to truly make Oregon housing affordable again is to eliminate all urban growth boundaries. Giving landowners outside the urban areas the freedom to develop their land with minimal regulation would put pressure on cities inside the current boundaries to reduce their regulation as well.

CHALLENGING LAND-USE POLICIES

Numerous state and local laws, ordinances, regulations, and policies make housing less affordable, and in most if not all cases there is no legitimate rationale for those policies.

Many of the reasons used to justify these policies, such as farmland preservation, are not legitimate because, for example, there is no shortage of farmland and urbanization does not present a threat to farm productivity. Other justifications, such as the need to save energy or reduce pollution, fail the “alternative practice” test, in that an alternative policy could serve those needs just as well without having disparate impacts on minorities.

As such, Oregon land-use rules that require urban growth boundaries around every city should be repealed. Cities and counties must apply minimal land-use regulation and impact fees to undeveloped lands in their jurisdictions. The inclusionary zoning law should also be repealed.



If the legislature and other legislative bodies are unlikely to do this themselves, those who support more affordable housing must turn to the courts. The first step would be to file a complaint with the Department of Housing and Urban Development. The department then would have 100 days to investigate the complaint. If the department took no action after that time, the challenger could go to court.⁶⁰

A primary target of such a complaint and lawsuit would be the Land Conservation and Development Commission, whose rules require urban growth boundaries and whose transportation planning rule promotes the “build up, not out” policy. A second target could be Metro, which delineates the urban growth boundary for the Portland area, for failing to expand the boundary despite rising housing costs. Individual cities could be targeted for their excessive system development fees, design ordinances, and other rules that make new developments more expensive.

Normally, only people who are harmed by a policy that has disparate impacts on low-income minorities or other protected classes would have standing to sue under the Fair Housing Act. Generally, that means members of those protected classes would have to be plaintiffs in such a lawsuit. However, the Supreme Court has granted standing to whites who argue that policies that have disparate results

affect “the very quality of their daily lives.”⁶¹ The court has also granted standing to local residents who are presumably white but who believe that discriminatory policies “injure the stability” of their community.⁶² This means that practically anyone who is concerned about housing affordability could bring a disparate-impact case to court, though certainly a challenge would be stronger if one or more plaintiffs were members of a protected class. Winners of fair housing cases are eligible to receive attorney fees.⁶³

In addition to bringing a lawsuit based on fair housing laws, challengers could also bring a *qui tam* claim under the Federal False Claims Act. Under the False Claims Act, anyone who has accepted federal funding under false pretenses would be subject to double or even triple damages. *Qui tam* is short for the Latin phrase, *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, meaning “he who sues in this matter for the king as well as for himself.” A private party who made a winning *qui tam* claim would be eligible for up to 25 percent of the damages paid by the defendant who committed fraud.⁶⁴

The fraud in this case would be perpetrated by government agencies that accept federal housing funds. In order to be eligible for the funds, these agencies must declare that none of their policies violate fair housing rules. Both the state of Oregon and several Oregon cities have received federal housing grants, and the state mandate for urban growth boundaries and city design codes, impact fees, or other policies that make housing more expensive may undermine claims that the state or cities did not violate the disparate impact rule.

To be eligible for the *qui tam* award, the person bringing the lawsuit must be an “original source” of information showing that the city or other unit of government has defrauded the federal government.⁶⁵ That could be satisfied either by finding previously undisclosed documents showing that the city or other entity was aware that its policies were making housing more expensive, or by submitting original proof of that claim. If the evidence that the policies were increasing housing prices were publicly known, then the suit could not be a *qui tam* suit.

CONCLUSION

Thanks to urban growth boundaries and other land-use regulations, Oregon has gone from being one of the most affordable housing markets in the nation in 1969 to one of the five least affordable in 2013. The laws, ordinances, and rules that have made housing unaffordable have disparate impacts on low-income blacks and other low-income minorities, and these impacts have been revealed by declining populations of blacks in the city of Portland and the Portland urban area since 2010, plus a decline in the quality of housing enjoyed by blacks and other low-income

families since 2000. Far from solving the problem, the state's recent approval of inclusionary zoning will only make housing even less affordable for most people.

While expansion of urban growth boundaries could provide some relief, the only real relief would come from complete elimination of those boundaries and repeal of local ordinances that make housing more expensive. If the state and local governments are not willing to do that, then fair housing advocates should file a complaint with the Department of Housing and Urban Development and be prepared to follow that complaint with a lawsuit.

A successful challenge to the land-use laws that have made housing unaffordable could impose a large cost on people who already own or are buying homes, as they likely would see the value of their homes fall. This is an unavoidable result of correcting the artificial shortages imposed by misguided laws and regulations. The ones who would be hurt the most would be recent buyers who paid significantly more than homes should really cost. While it is tempting to argue that the government that caused the problem should offer some sort of compensation, the reality is that anyone who purchased a home did so knowing that there is no guarantee that home prices would be stable or growing.

Against this cost, the benefits of holding the state accountable for housing affordability problems would be enormous. Housing prices would fall and thus would take a much smaller share of the incomes of both renters and future homebuyers. Low-income families would especially benefit by gaining access to better quality housing at a lower cost. Moreover, housing is a bellwether for other sectors of the economy, so businesses also would see their rents decline. Homeownership would rise, giving more people access to the equity that comes with homeownership—equity that is often used to start new businesses. Between that equity and the lower cost of renting business properties, fixing Oregon's housing affordability problems would lead to a surge in economic growth. Income inequality would tend to decline, partly because most of the costs would fall on relatively wealthy people, while many of the benefits would be enjoyed by the less well off. All in all, these benefits vastly outweigh the costs.

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