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Missing Middle Housing: Accelerating America's Transition from Single-Family Zoning

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Cover Page Footnote

This Article was researched and written under the supervision and guidance of Professor Troy A. Rule as part of the Sandra Day O'Connor College of Law's Sustainability Law Research Fellowships initiative. The authors wish to thank other Fellows within the initiative for their invaluable input on early stages of this Article.

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MISSING MIDDLE HOUSING: ACCELERATING AMERICA'S TRANSITION FROM SINGLE-FAMILY ZONING

ABSTRACT

As housing unaffordability and climate change impose increasingly greater costs on American cities and towns, there is a growing sense that single-family residential zoning ordinances are partly to blame for these challenges. Many Americans remain unwilling to address these difficulties by welcoming large apartment buildings into their neighborhoods. Fortunately, policies designed to promote “middle housing” development—visually attractive duplexes and townhome projects—tend to be more politically feasible than policies that drive apartment development. Further, such policies do much to improve the affordability and environmental sustainability of residential neighborhoods. This Article describes how promoting greater middle housing development in the United States would help the nation to accelerate its transition to more affordable and sustainable housing and identifies some specific policy strategies for driving middle housing development across the country.

INTRODUCTION

During the COVID-19 pandemic, thousands of Americans discovered Spokane, Washington, as a desirable place for remote work.¹ A quieter alternative to Seattle, Spokane offered a high quality of life while maintaining a low cost of living.² Within a year, the city's housing prices skyrocketed, and apartments grew much less affordable, causing the city's unhoused population to balloon well above historical levels.³ After the government lifted pandemic-related restrictions, rental rates in the city rose beyond the reach of many residents. The median home price rose to a

**Both authors are Sustainability Law Student Research Fellows within the Program on Law and Sustainability at Arizona State University's Sandra Day O'Connor College of Law. This Article was researched and written under the supervision and guidance of Professor Troy A. Rule as part of the Sandra Day O'Connor College of Law's Sustainability Law Research Fellowships initiative. The authors wish to thank other Fellows within the initiative for their invaluable input on early stages of this Article.

1. See Joshua McNichols, *Spokane's embrace of missing middle housing sets up competition with Seattle*, KUOW (July 29, 2022, 5:37 PM), <https://www.kuow.org/stories/spokane-s-embrace-of-missing-middle-housing-sets-up-competition-with-seattle> (discussing the housing conditions in Spokane that led, in part, to missing middle housing reform in Spokane).

2. *Id.*

3. *Id.*

record-breaking \$450,000, marking a 55% increase over just two years,⁴ and the median rent for a two-bedroom apartment grew from \$795 in early 2017 to over \$1300 in January 2022.⁵

To help mitigate the city's worsening housing affordability problem, Spokane officials unanimously adopted aggressive new zoning reforms in July of 2022.⁶ For the first time, these reforms permitted the development of middle housing, including attached homes, duplexes, triplexes, and quadplexes, in single-family-only zoned areas.⁷ While the definition of middle housing differs depending on the particular policy provision, middle housing is denser than single-family-detached homes, but less dense than the traditional large apartment complex. Spokane's zoning reforms are quickly becoming a model for other cities in search of ways to address housing and climate crises in Washington state and beyond.⁸

Housing affordability challenges like those impacting Spokane have recently affected numerous cities across the United States. The U.S. Department of Housing and Urban Development (HUD) defines affordable housing as housing "accessible to a household for 30% or less of its income."⁹ By this standard, as of early 2022, there was no major city in the country where full-time minimum-wage earners could afford a two-bedroom apartment.¹⁰ Housing unaffordability impacts cities from large metropolises like New York City to smaller cities like Lincoln, Nebraska.¹¹

Many states and cities are passing single-family-only (SFZ) zoning reforms to mitigate housing unaffordability, promoting middle housing in neighborhoods previously zoned single-family-only.¹² Zoning ordinances that create single-family residential zones prohibit multi-family housing development. Once lauded as means of protecting the "American Dream" of spacious suburban neighborhoods, these

4. See Jay Stange, *Spokane Opens the Door for Middle Housing Expansion*, STRONG TOWNS (July 27, 2022), <https://www.strongtowns.org/journal/2022/7/27/spokane-opens-the-door-for-middle-housing-expansion>.

5. More details about studio through four-bedroom apartments are available online starting in 2014 with weekly data points. *Spokane Washington Rent Prices*, ZUMPER, <https://www.zumper.com/rent-research/spokane-wa> (last visited Apr. 10, 2023).

6. See Lisa Gardner, *Council Votes Unanimously On Interim Zoning Ordinance*, SPOKANE CITY, (July 21, 2022), <https://my.spokanecity.org/news/releases/2022/07/21/council-votes-unanimously-on-interim-zoning-ordinance/>; see also SPOKANE, WASH., ORDINANCE no. C36232.

7. *Id.*

8. See McNichols, *supra* note 1.

9. See *Reimagining the Possibilities for Affordable Housing in a Climate Risk Environment*, ARCHDAILY (Feb. 18, 2022), <https://www.archdaily.com/976344/reimagining-the-possibilities-for-affordable-housing-in-a-climate-risk-environment> ("The US Department of Housing and Urban Development (HUD) refers to affordable housing as homes that are accessible to a household for 30% or less of its income. By this standard, full-time minimum wage earners cannot afford a two-bedroom apartment in any major U.S. city.")

10. *Id.*

11. Katherine Shaeffer, *A Growing Share of Americans Say Affordable Housing is a Major Problem Where They Live*, PEW RESEARCH CENTER (Jan. 18, 2022), <https://www.pewresearch.org/short-reads/2022/01/18/a-growing-share-of-americans-say-affordable-housing-is-a-major-problem-where-they-live/>.

12. Jake Vasa, *Why Missing Middle Housing is An Emerging Trend in Multi-Family Development*, SEH, <https://www.sehinc.com/news/why-missing-middle-housing-emerging-trend-multi-family-development> (last visited Aug. 18, 2023).

ordinance provisions contribute to the nation's housing affordability challenges. SFZ harms vulnerable Americans by constraining the development of smaller and more affordable homes and helps drive suburban sprawl and its many environmental harms. Suburban sprawl is the tendency for rural areas surrounding cities to become low-density housing developments.¹³ This type of development creates a reliance on automobiles and deteriorates agricultural land, while the products used in the lawn care of such homes lead to water pollution.¹⁴ Unfortunately, affluent landowners are unlikely to support the rapid growth of dense apartment complexes in their neighborhoods to address these problems.

A politically palatable approach would enable the United States to transition toward more sustainable residential land development patterns; this Article argues that middle housing policies are currently the most politically feasible and viable path to a transition from SFZ. Transitioning from single-family-only living will advance housing affordability and help reduce suburban sprawl in many U.S. cities. Such policies aimed at driving the buildout of townhomes, duplexes, and similar residential development have promise in many of the nation's youngest and fastest-growing cities and towns, where urban infrastructure is still quickly expanding and could be more easily tailored to support middle housing projects. Part I of this Article provides a general overview of single-family zoning, its emergence within the United States, and SFZ's evolving impacts and increased criticism. Part II outlines missing middle housing across the country and compares future paths of U.S. housing. Part III outlines specific policy strategies capable of helping accelerate middle housing growth to transition from SFZ and propel a more sustainable future in the United States.

I. ZONING IN THE UNITED STATES

Across their relatively short history, zoning ordinances have significantly impacted land development patterns throughout the United States. As the virtues of zoning helped it rapidly spread across the United States during the early twentieth century, it also gave cities potent new tools for exclusion and racial and socioeconomic segregation. Accordingly, over the past century, courts and state legislatures have occasionally imposed new constraints on municipal zoning powers to reduce its misuse while preserving its many benefits. Although zoning laws arguably promote greater efficiency and order in communities' land use, they also reduce housing affordability and contribute to climate change through suburban sprawl.

A. History of Zoning

Zoning has evolved significantly in the United States due to social and technological changes over the past century. Zoning laws originated in Frankfurt,

13. Jaclyn Pahl, *The Detrimental Impact Of Suburban Sprawl On The Environment*, THE ORGANIZATION FOR WORLD PEACE (Oct. 26, 2020), <https://theowp.org/reports/the-detrimental-impact-of-suburban-sprawl-on-the-environment/>.

14. *Id.*

Germany, and were imported into this country in the early 1900s.¹⁵ Although many American cities had long engaged in urban planning before the arrival of zoning laws, zoning ordinances marked a significant increase in local oversight of land use activities.¹⁶

Zoning ordinances generally use maps to assign zoning designations to parcels throughout a municipality, and each zoning type will have different restrictions.¹⁷ These ordinances typically specify permitted uses of the parcel, such as for residential, commercial, or industrial uses, and may divide permitted uses into subcategories such as “R1” or “single-family residential” —meaning that developers may build only a single-family home on the parcel.¹⁸ Zoning also usually employs setback requirements, height restrictions, minimum lot size requirements, and various other provisions to limit the density and height of buildings in different zones.¹⁹

Advancements in building construction techniques contributed to the adoption of zoning laws in the United States. The steel frame construction in the 1880s, followed by elevator technologies between 1890 and 1920, accelerated urbanization and crowding in cities across the country.²⁰ From 1890 to 1920, the populations of Cleveland and Los Angeles each grew by over 50%.²¹ Floods of immigrants arriving in the United States during that period exacerbated urban crowding.²²

Transportation-related innovations in the early twentieth century further impacted land use patterns in that period.²³ Most notably, the growing affordability of automobiles made suburban living more attainable for the middle class due to the ability for workers to commute from suburbs to inner cities.²⁴ As uniform-looking residential neighborhoods sprouted up a few miles outside the downtown cores of major cities, they introduced a host of challenges that stretched the capabilities of existing laws.²⁵

15. See EMILY TALEN, *CITY RULES: HOW REGULATIONS AFFECT URBAN FORM* 22–36 (Island Press 2011).

16. See William A. Fischel, *An Economic History of Zoning and a Cure for its Exclusionary Effects*, 41 *URBAN STUDIES* 317, 319 (2004).

17. See e.g., *Seattle Zoning Maps*, SEATTLE DEPARTMENT OF CONSTRUCTION & INSPECTIONS, <https://www.seattle.gov/sdci/resources/zoning-map-books> (last visited Aug. 18, 2023).

18. See Michael Manville et al., *It’s Time to End Single Family Zoning*, 86 *J. AMER. PLANNING ASS’N* 106, 107 (2019).

19. See Robert C. Ellickson, *Zoning And The Cost Of Housing: Evidence From Silicon Valley, Greater New Haven, And Greater Austin*, 42 *CARDOZO L. REV.* 1611, 1614 (2020).

20. See M. NOLAN GRAY, *ARBITRARY LINES: HOW ZONING BROKE THE AMERICAN CITY AND HOW TO FIX IT*, 17 (Island Press 2022).

21. See *id.* at 18.

22. See Charles Hirschman and Elizabeth Mogford, *Immigration and the Industrial Revolution from 1880 to 1920*, 38 *SOC. SCI. RES.* 897, 898 (Dec. 1, 2009) (noting that the number of Americans born outside the country increased from 7 million to over 13 million from 1880 to 1920).

23. See NATIONAL MUSEUM OF AMERICAN HISTORY, *The Trolley and Daily Life*, <https://americanhistory.si.edu/america-on-the-move/streetcar-city> (last visited Aug. 18, 2023).

24. See Fischel, *supra* note 16, at 320.

25. *Id.*

By 1920, America's population had become primarily urban for the first time, and cities were searching for ways to adapt to decades of rapid urbanization.²⁶ More Americans lived in cities than on farms, and those cities were increasingly dirty and unhealthy places to live.²⁷ In the absence of zoning laws, cities imposed various restrictions to better shield urban populations from the pollutive impacts of modern industry with limited success.²⁸ Then, in 1916, New York City adopted the country's first zoning code.²⁹ Berkeley, California, followed in that same year with a zoning ordinance of its own.³⁰ Drafters of these early zoning laws were also driven by influxes of immigrants: Eastern European Jewish immigrants in New York City and Chinese immigrants in California.³¹ Interest in zoning laws quickly spread, and there were eight zoned municipalities in the country by the end of 1916.³²

Soon after zoning's initial adoption in the U.S., local officials started zoning certain areas within their cities and towns for single-family residential uses only. In 1917, *Buchanan v. Warley* cemented that the use of zoning laws to overtly "attempt to prevent the alienation of the property in question to a person of color was not a legitimate exercise of the police power of the State, and [was] in direct violation of . . . the Fourteenth Amendment of the Constitution."³³ Unfortunately, cities discovered that they could skirt *Buchanan's* prohibitions by using SFZ, often known as "R-1" zoning,³⁴ to indirectly exclude most racial minorities from large areas without any explicit mention of race.³⁵ Requiring large lot sizes and single-family homes in neighborhoods facilitated de facto segregation by precluding lower-income, majority non-White citizens from those areas.³⁶ In the 1920s, former president Herbert Hoover, as Secretary of Commerce, drafted and aggressively promoted state-level enabling legislation allowing municipalities to adopt zoning, and 218 municipalities adopted zoning.³⁷

The Supreme Court's upholding of zoning laws as constitutional in *Euclid v. Ambler* in 1926 further accelerated the proliferation of zoning across the country.³⁸

26. See GRAY, *supra* note 20, at 11.

27. OLIVER GILLHAM, *THE LIMITLESS CITY: A PRIMER ON THE URBAN SPRAWL DEBATE* 25 (Island Press 2022).

28. See GRAY, *supra* note 20, at 12.

29. See Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1081 (1996).

30. Berkeley has since voted to eliminate single-family-only zoning. James Brasuell, *History (Un)made: Berkeley City Council Votes to Eliminate SFZ*, PLANETIZEN (Feb. 24, 2021), <https://www.planetizen.com/news/2021/02/112396-history-unmade-berkeley-city-council-votes-eliminate-single-family-zoning#:~:text=%22In%201916%2C%20single%2Dfamily,one%20home%20on%20each%20lot>.

31. See GRAY, *supra* note 20, at 13.

32. See *id.* at 26.

33. See *Buchanan v. Warley*, 245 U.S. 60, 82 (1917).

34. Other zoning codes may use names other than R1.

35. See Manville, *supra* note 11, at 107 ("*Buchanan* made single-family mandates appealing because they maintained racial segregation without racial language.>").

36. See *id.*

37. See GRAY, *supra* note 20, at 13.

38. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

Euclid acknowledged a municipality's right to exclude undesirable uses,³⁹ recognizing it as a valid exercise of regulatory authority under states' police power.⁴⁰ Race and socioeconomic status influenced the determination of those uses, employing explicit classism to reinforce implicit racism.⁴¹ State courts had previously split on the question of zoning's constitutionality, so after *Euclid*, zoning spread even more rapidly, appearing on the books in more than 1,000 U.S. municipalities by 1936.⁴²

After World War II, federal policies and various economic and demographic factors further drove the nation's adoption of zoning ordinances.⁴³ SFZ boomed in American suburbia after the war.⁴⁴ Major road infrastructure investments funded under the Federal Aid Highway Act enabled Americans to more quickly and affordably commute from sprawling suburbs to downtown employment centers.⁴⁵ The greater energy and consumer demands of suburbia assisted in feeding the industry base of the post-war.⁴⁶ Suburbanites' growing appetites for energy and goods helped to fuel economic expansion in post-war America.⁴⁷ Optimism about the possibilities of automobile-centered suburbia helped to persuade some cities to ban single-room occupancies during this era—a change that continues to contribute to the country's housing crisis.⁴⁸ As early as 1953, scholars were already noting the exclusionary impacts of zoning measures such as minimum house size.⁴⁹ Courts nonetheless upheld such provisions, and countless cities continued to use them.⁵⁰ Most of the nation's municipalities had adopted zoning laws—including single-family zoning—by the 1970s, and most continue to use them today.⁵¹

39. *See id.* at 397 (“Under these circumstances, therefore, it is enough for us to determine, as we do, that the ordinance, in its general scope and dominant features, so far as its provisions are here involved, is a valid exercise of authority, leaving other provisions to be dealt with as cases arise directly involving them.”).

40. *State Preemption of Local Zoning Laws as Intersectional Climate Policy*, 135 HARV. L. REV. 1592, 1595 (2022); *Euclid*, U.S. 365 at 397 (“This process applies with peculiar force to the solution of questions arising under the due process clause of the Constitution as applied to the exercise of the flexible powers of police, with which we are here concerned.”).

41. *See Euclid*, U.S. 365 at 397; Alexander Von Hoffman, *Single Family Zoning: Can History Be Reversed?*, JOINT CTR. FOR HOUS. STUD. AT HARV. UNIV. (Oct. 5, 2021), <https://www.jchs.harvard.edu/blog/single-family-zoning-can-history-be-reversed> (“parasite” apartments and Buchanan’s prohibition on race zoning).

42. *See* Fischel, *supra* note 16 (explaining that state courts were previously split on zoning, but *Euclid* green-lit zoning practices in the United States); *see also Euclid* at 394; GRAY, *supra* note 20, at 26–29.

43. *See* GRAY, *supra* note 20, at 29–30.

44. *See* Rachel Medina & A. Dan Tarlock, *Addressing Climate Change at the State and Local Level: Using Land Use Controls to Reduce Automobile Emissions*, 2 SUSTAINABILITY 1742, 1745–46 (2010).

45. *See* Hoffman, *supra* note 41, at 1595 (“In the 1950s and 1960s, laws like the Federal Aid Highway Act enabled city dwellers with means to relocate further from their places of work.”); Frug, *supra* note 29, at 1068.

46. *See* GEORGE A. GONZALEZ, *URBAN SPRAWL, GLOBAL WARMING, AND THE EMPIRE OF CAPITAL* 1 (State Univ. of N.Y. Press, 2009).

47. *See id.*

48. *See* GRAY, *supra* note 20, at 54–56; *see also* GILLHAM, *supra* note 26, at 26 (describing the City Beautiful Movement, which was a reaction to the dirt and crowding of industrial cities in the 19th century).

49. *See* Fischel, *supra* note 16, at 328.

50. *See id.*

51. *See* Ellickson, *supra* note 19, at 1614.

B. The Merits and Costs of Zoning Laws

In recent years, debate has grown about the merits of certain aspects of zoning including SFZ. Defenders of zoning emphasize its ability to regulate the pace and the public costs of land development within a community, thereby facilitating more orderly and manageable growth.⁵² Zoning restrictions also promote greater certainty and stability, enhance property values, and allocate the broader costs of land development.⁵³ Although it restricts land use development, zoning is an effective means of communicating land use restrictions to landowners.⁵⁴ By controlling land use density, zoning helps to ensure that land development patterns match available infrastructure.⁵⁵

Despite its virtues, critics note the numerous costs and the potential and actualized misuse of zoning. SFZ, in particular, can impose substantial costs on communities by reducing housing supplies and affordability.⁵⁶ As highlighted above, zoning can intentionally or unintentionally facilitate segregation by race and class, exacerbating class divides and related social problems.⁵⁷ To the extent that zoning restrictions reduce housing supplies within a community, they can exclude lower-income citizens and lead to longer commute times, more congested roads, and additional sprawl.⁵⁸ And because zoning laws are so restrictive and lack precision, they may sometimes excessively constrain land uses in ways that reduce the overall productivity of some land.⁵⁹

C. The Growing Debate Over SFZ

Although zoning has long been controversial generally, there is an unprecedented concern today about zoning ordinance provisions that allow only detached single-family homes.⁶⁰ SFZ is prevalent throughout the country, occupying roughly three-quarters of the land in most U.S. cities.⁶¹ Minimum lot size requirements, manufactured home bans, or other provisions imposed within these vast zoning districts often further constrain more affordable forms of development.⁶²

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

53. See *id.* at 754.

54. See Lane Kendig, *Eliminating Existing Single-Family Zoning is a Mistake*, 86 J. AM. PLAN. ASS'N 124, 124 (2020).

55. See Serkin, *supra* note 52, at 754.

56. See John Infranca, *The New State Zoning: Land Use Preemption and a Housing Crisis*, 60 B.C. L. REV. 823, 885 (Mar. 2019).

57. See GRAY, *supra* note 20, at 67.

58. See *id.* at 68.

59. See Chang-Tai Hsieh & Enrico Moretti, *Housing Constraints and Spatial Misallocation*, 11 AM. ECON. J.: MACROECONOMICS 1 (2019) (estimating that land use regulations reduced U.S. growth by as much as 36% between 1964 and 2009); Kyle F. Herkenhoff et al., *Tarnishing the Golden and Empire States: Land-Use Restrictions and the U.S. Economic Slowdown*, 93 J. MONETARY ECON. 89, 90 (2018) (estimating that asserted labor productivity could increase by about 12.4% through additional land use deregulation).

60. See Frug, *supra* note 29.

61. See GRAY, *supra* note 20, at 41.

62. See *id.* at 51.

SFZ can significantly impact housing affordability within a city or town. Allowing only one single-family home per lot, SFZ lowers the supply of homes in an area and can thus increase housing prices. One recent study estimated that land use regulations generally reduced U.S. productivity growth by 36% between 1964 and 2009.⁶³ A growing literature supports the notion that SFZ comes at enormous costs compared to its perceived benefit. For example, this restrictive land use prevents the migration of workers from poorer states to wealthier states, which contributes to a misallocated workforce and greater inequality, which compounds existing forces of class segregation.⁶⁴ Even where restrictive land use may have perceived environmental benefits, there is still generally a net harm.⁶⁵ These costs will continue unless the U.S. reforms its current zoning practices. Critics of major zoning reform argue that it tends to come at a high price and its benefits are somewhat uncertain.⁶⁶ At least one recent study concluded that eliminating SFZ would have minimal economic benefits and would not substantially reduce housing prices.⁶⁷ Still, there is growing concern that SFZ serves only a few Americans' best interests.

II. MIDDLE HOUSING POLICIES

Policies that promote middle housing development have gained traction across the country in recent years as potentially valuable tools to aid a nationwide transition away from SFZ. Historically, the American dream has included a single-family home with a white picket fence. Still, this ideal seems to be shifting as younger generations increasingly seek to reside in denser urban neighborhoods with short walking distances to amenities. While there is no singular cause for this trend, housing affordability helped drive the shift. Even before record inflation, many cities were becoming unaffordable, and some families were torn between wanting to leave their apartments and not being able to afford a house. The duplexes, triplexes, townhomes, and other similar housing styles typically considered middle housing offer more units per acre than single-family homes without the crowded feeling of larger apartment complexes. States and cities are increasingly considering policies that would allow for more middle housing development to increase density while maintaining a streetscape conducive to existing single-family-only communities.⁶⁸

A. Potential for Middle Housing

The relatively dense nature of middle housing development makes it an advantageous residential land development strategy in many contexts over the

63. See Hsieh & Moretti, *supra* note 59.

64. See Peter Ganong & Daniel Shoag, *Why Has Regional Income Convergence in the U.S. Declined?*, 102 J. URB. ECON. 1, 1 (2017); see also Ellickson, *supra* note 19, at 1617–18.

65. See Paul Boudreaux, *Lotting Large: The Phenomenon of Minimum Lot Size Laws*, 68 ME. L. REV. 1, 12–28 (2016).

66. See Richard C. Schragger, *The Perils of Land Use Deregulation*, 170 UNIV. PA. L. REV. 125, 132 (2022).

67. See Kendig, *supra* note 54, at 125.

68. See *What is the "Missing Middle" of Housing?*, NAT'L ASS'N OF HOMEBUILDERS (Aug. 1, 2023), <https://www.nahb.org/advocacy/industry-issues/land-use-101/tools-and-research/tools-pages/what-is-the-missing-middle-of-housing>.

coming years. Although urbanization continues in the United States, the nation's largest urban centers are not presently the locales seeing the highest growth rates. Cities with populations over 250,000 saw decreased growth in the 2010s, with cities over 1 million experiencing population decline from 2017 to 2019.⁶⁹ By contrast, many of the nation's fastest-growing cities are suburbs of larger cities. In 2023, 14 of the 15 fastest-growing cities have current populations under 150,000.⁷⁰ Much of the nation's recent population growth is also concentrated more in the western and southern regions of the country in states such as Arizona, Texas, Idaho, and Utah.⁷¹ Younger individuals, in particular,⁷² are increasingly seeking out housing within walking distance of desirable amenities.⁷³ For example, a recent survey of metro Houston residents found that many preferred smaller dwelling units with easy access to restaurants over single-family homes with yards in unwalkable communities.⁷⁴ Broader studies have revealed a similar shift in preferences toward denser residential environments, even in car-friendly regions.⁷⁵

U.S. housing markets have responded slowly to Americans' growing affinity for more middle housing. One 2020 paper noted that 56% of millennials and 46% of baby boomers want to live in more walkable communities, with 59% of millennials and 27% of baby boomers looking for middle housing options.⁷⁶ Americans' growing desire for middle housing aligns with younger

69. This article cites to 2010-2019 population data to prevent reliance on population changes from the dreadful impacts of the COVID-19 pandemic. William H. Frey, *American cities saw uneven growth last decade, new census data show*, BROOKINGS (May 26, 2020), <https://www.brookings.edu/research/new-census-data-show-an-uneven-decade-of-growth-for-us-cities/> (citing annual Census Bureau estimates from 2010–2019).

70. See Daniel Ruby, *15 Fastest Growing Cities in the U.S. (2023 Demographics Data)*, DEMANDSAGE (Aug. 5, 2023), <https://www.demandsage.com/fastest-growing-cities-in-the-us/> (citing U.S. Census Bureau data).

71. See *Fastest Growing Cities Are Still in the West and South*, U.S. CENSUS BUREAU (Mar. 26, 2022), <https://www.census.gov/newsroom/press-releases/2022/fastest-growing-cities-population-estimates.html>.

72. The desire for middle housing parallels the “youthification” trend. Youthification refers to the increased number of young adults in higher-density cities and neighborhoods. Cities such as Salt Lake City, Austin, Houston, Washington, D.C., Seattle, and Las Vegas are among the cities seeing the greatest change from youthification. Youthification is not new; young adults want to move to big cities, but the U.S. is experiencing this trend at unprecedented rates. Richard Florida, *Is Your Neighborhood Changing? It Might Be Youthification, Not Gentrification*, CITYLAB (Feb. 5, 2015), <https://www.bloomberg.com/news/articles/2015-02-05/is-your-neighborhood-changing-it-might-be-youthification-not-gentrification>.

73. See Aly Perkins, *Missing middle housing could be the solution to the Phoenix housing inventory crisis*, PHOENIX AGENT MAGAZINE (July 4, 2022), <https://phoenixagentmagazine.com/2022/07/04/missing-middle-housing-could-be-the-solution-to-the-phoenix-housing-inventory-crisis/> (“Over three-quarters of [the 800] respondents acknowledged affordability as a very or fairly big problem, while 56% expressed a similar sentiment in regard to availability. [Fifty-three percent] of respondents prefer[ed] to add more dense development”).

74. See Jake Wegmann, *Death to Single Family Zoning . . . and New Life to the Missing Middle*, 86 J. AMER. PLANNING ASS'N 113, 113 (2020).

75. See Eric Jaffe, *Is it time to end single-family zoning?*, MEDIUM (Feb. 6, 2020), <https://medium.com/sidewalk-talk/is-it-time-to-end-single-family-zoning-56233d69a25a>.

76. Opticos Design, Inc., *Missing Middle Housing in Your Community: Why + How to Offer MMH Choices* (Dec. 2020), <https://unitedwaytucson.org/wp-content/uploads/sites/2/2022/10/Missing-Middle-Housing-in-Your-Community-Reduced.pdf>.

environmentalists' focus on embracing denser urbanized development, whereas earlier environmentalists focused on decelerating new development.⁷⁷ Smart growth is increasingly taking the place of growth management, and it is often possible to make middle housing development a part of that smarter growth.⁷⁸

B. Middle Housing Development's Advantages

Middle housing is increasingly appealing because it pairs political palatability with progress toward a greener future. Particularly in regions experiencing high population growth, a greater focus on middle housing development would enable cities and towns to build more affordable housing without radically altering the look and feel of their communities.

1. Middle Housing as a Better Alternative Than the Status Quo of Single-Family-Only Residential Development

Thoughtfully structured middle housing zoning policies provide valuable advantages over SFZ as the nation faces growing climate change and housing affordability crises. While single-family homeowners favor SFZ's ability to increase and preserve their home values, limit nuisances, and promote safety and security, the potential costs of such zoning are high: reduced labor productivity and economic growth, widespread social injustice, and locked-in contributions to global warming.⁷⁹ Many of these adverse effects are visible in the nation's most recent housing affordability crisis, which has been more severe in large cities with abundant SFZ.⁸⁰ SFZ can also help perpetuate racial and social injustices plaguing much of the United States.

Allowing middle housing development in SFZ across the country would help address many of the nation's housing-related problems. Zoning can play either a valuable role or significant obstacle in the nation's sustainability transition,⁸¹ and eliminating SFZ is unlikely to significantly increase the nation's housing stock anytime soon. However, a greater emphasis on allowing middle housing in more areas is a valuable part of a larger reform encompassing other common zoning provisions such as height restrictions and minimum lot size requirements.⁸² In short, while introducing middle housing into SFZ areas introduce multiple types of public policy benefits, it is not a panacea for the nation's broader societal challenges.⁸³ Proponents of middle housing should thus be cautious not to overstate its ability to

77. See Infranca, *supra* note 56, at 829.

78. See *id.*

79. See Ellickson, *supra* note 19, at 1616–18. See also the above discussion on the growing costs of SFZ.

80. See *Reimagining the Possibilities for Affordable Housing in a Climate Risk Environment*, ARCHDAILY (Feb. 18, 2022), <https://www.archdaily.com/976344/reimagining-the-possibilities-for-affordable-housing-in-a-climate-risk-environment>.

81. See Harvard, *supra* note 40, at 1601 (stating that the zoning reform, while not “magic” are still “crucial” to the sustainability transition).

82. See Von Hoffman, *supra* note 41.

83. See Schragger, *supra* note 66, at 129.

promote social justice goals such as fair wages and hours, broad health care access, and labor rights.⁸⁴

Nonetheless, introducing middle housing into single-family-only-zoned areas can help advance broader social and racial justice goals. Zoning has a checkered history as a tool for marginalizing and segregating vulnerable groups of Americans. While eliminating SFZ would not repair all social injustice from discriminatory zoning practices,⁸⁵ it would facilitate access to many neighborhoods that have long been out of reach for marginalized citizens.

Because middle housing is generally more energy-efficient than detached single-family housing, policies promoting middle housing also serve to combat the climate crisis. Middle housing frequently features shared walls, and shared wall housing boosts a home's heating and cooling efficiency.⁸⁶ Shared wall energy efficiency is not only good for the planet; it also helps reduce landowners' energy bills and better protect residents during extreme weather events that are more common with climate change.⁸⁷ These merits of middle housing would benefit lower-income Americans, who are more likely to be living in relatively unhealthy environments due to affordability constraints.⁸⁸

Middle housing policies are flexible, and policymakers can easily integrate middle housing into existing green zone initiatives. Green zones “promote clean energy, expand food access, improve air quality, create environmentally safe affordable housing, and support economic growth” through land use policies.⁸⁹ Minneapolis now has a green zone program founded on six principles, one of which is “affordable, available, green housing” —an ideal that middle housing development can help to advance.⁹⁰ Such programs promote urban development patterns that feature higher population density, walkability, green spaces, mixed-use development, and better public transportation, and cultivating communities that promote mental, physical, and financial health.⁹¹

84. *Id.* at 131.

85. “Eliminating SFZ alone won’t automatically lead to greater racial equity, [Sanchez] says. Increasing development runs the risk of gentrification and displacement, so housing justice advocates say there needs to be strong affordable housing policies and tenant protections, as well as ensuring that communities of color are directly part of the planning process.” Lauren Sommer, *Why Sprawl Could Be The Next Big Climate Change Battle*, NPR (Aug. 6, 2020), <https://www.npr.org/2020/08/06/812199726/why-sprawl-could-be-the-next-big-climate-change-battle>.

86. See Harvard, *supra* note 40, at 1599 (citing a study that shows that detached homes use “54% more energy to heat their homes and 26% more energy to cool their homes” than otherwise comparable multifamily units).

87. See Mary C. Sheehan, *2021 Climate and Health Review – Uncharted Territory: Extreme Weather Events and Morbidity*, 52 INT’L J. SOC. DETERMINANTS OF HEALTH & HEALTH SVCS. 189, 189 (2022).

88. Lauren A. Taylor, *Housing And Health: An Overview Of The Literature*, HEALTH POLICY BRIEF (June 7, 2018), <https://www.healthaffairs.org/doi/10.1377/hpb20180313.396577/>.

89. See Gabi Valesco & Oriya Cohen, *Three Ways Zoning Can Advance Housing and Climate Justice*, HOUSING MATTERS: AN URBAN INSTITUTE INITIATIVE (Mar. 2, 2022), <https://housingmatters.urban.org/articles/three-ways-zoning-can-advance-housing-and-climate-justice>.

90. *Id.*

91. See Benjamin Noy, *The Role of Zoning Policies on Sustainable Development and Climate Change*, APSA CONFERENCE PAPER (Sep. 6, 2022), <https://preprints.apsanet.org/engage/api-gateway/apsa/assets/orp/resource/item/6316b84803e27d3e91ca7cb3/original/the-role-of-zoning-policies-on-sustainable-development-and-climate-change.pdf>.

Middle housing development can likewise help to reduce per capita carbon dioxide emissions, an undesirable byproduct of SFZ and urban sprawl. Today, due partly to such sprawl, transportation accounts for more than 29% of U.S. carbon emissions.⁹² Residents in the suburbs near large cities produce roughly 50% higher transportation emissions per capita than city residents.⁹³ In fact, locations and forms of land development—including urban sprawl—relate directly to an estimated excess of 66% of net CO₂ emissions in the U.S.⁹⁴ Characteristic features of suburban zoning and planning such as large lots, heavy reliance on cars, and the segregation of residential and commercial uses all tend to increase transportation emissions.⁹⁵ Super commuters, who live potentially hours from their places of employment, drive up emissions further.⁹⁶ Increasing the nation's stock of middle housing could help to mitigate these problems by assisting local land use planners in reshaping neighborhoods toward greater walkability, bike-ability, and access to public transportation.⁹⁷ Research supports the notion that relaxing zoning restrictions tends to lead to denser housing over the long-term and can thereby help to reduce greenhouse gas emissions.⁹⁸

2. Middle Housing as a More Viable Alternative than Apartment Housing

Although multi-story apartment buildings in former single-family-only-zoned areas would be the most effective at slowing climate change and improving housing affordability,⁹⁹ middle housing policies are more politically and practically feasible. Middle housing-friendly policies draw less local resistance than apartments-friendly policies, and middle housing development also tend to place less strain on existing urban and community infrastructure than high rise apartments.

Policies aimed at promoting middle housing may draw opposition in many communities, but that opposition would be greater against policies promoting major expansions of multi-story apartment housing. As the Tiebout hypothesis suggests, individuals tend to migrate to communities with an optimal mix of tax policies and public amenities, and adding middle housing to a community may often make it more difficult for local officials to offer that mix.¹⁰⁰ It's therefore not surprising that policy efforts aimed at promoting middle housing have faced significant resistance over the

92. See Harvard, *supra* note 40, at 1599.

93. See Sommer, *supra* note 85.

94. See Dorothy Ives-Dewey, *Zoning for Climate Change: Learning From Leader Suburbs in Pennsylvania*, 52 MIDDLE STATES GEOGRAPHER 60, 60 (2019).

95. *Id.* at 61 (“[L]arge individual lots, separation between residential and commercial uses, and limited public transportation . . .”).

96. See Sommer, *supra* note 85.

97. See Ellickson, *supra* note 19, at 1617.

98. See Harvard, *supra* note 40, at 1599 (discussing effects of denser housing over the long term); Ives-Dewey, *supra* note 93 (discussing climate mitigation).

99. Denser development corresponds to lower emissions, and traditional apartment complexes are denser than conventional middle housing like duplexes or townhomes. See generally Harvard, *supra* note 40.

100. See Mitchell Howell-Moroney, *The Tiebout Hypothesis 50 Years Later: Lessons and Lingering Challenges for Metropolitan Governance in the 21st Century*, 68 PUB. ADMIN. REV. 97 (2008).

past few years.¹⁰¹ Accordingly, in much of the country, the prospects for allowing larger apartment buildings—with greater land use density—in former single-family-only zones is less realistic.

Increasing middle housing in communities that have historically been comprised almost solely of single-family homes can improve housing affordability without introducing unwanted apartment buildings into established single-family neighborhoods. Recognizing this potential, the city of Minneapolis, Minnesota, has established a pilot program aimed at using middle housing development and related policies to promote affordability.¹⁰² Such policies are beginning to illustrate the role that middle housing can play in advancing housing affordability goals, even in communities that do not yet have sufficient citizen support for major increases in apartment housing development.

It is likewise typically easier for a city's existing urban infrastructure to accommodate new middle housing than it is to accommodate new multi-story apartment buildings. Denser land use patterns tend to require more infrastructure and resources than less-dense land use patterns.¹⁰³ Aside from the potential pressures that large new apartment developments can place on water, electric, sewer, and road systems,¹⁰⁴ such development can also create significant demand for public services such as fire protection, police protection, hospitals, and schools. Increased residential density can also attract additional retail business to an area, further exacerbating these effects.¹⁰⁵ Oregon's HB 2001 expects cities and developers to bear these infrastructure costs, and the reform gave cities until June 30, 2021, to identify areas of deficient infrastructure.¹⁰⁶ Cities could seek an extension for identified areas, though any extension was contingent on an approved plan to remedy the deficiency.¹⁰⁷ However, insufficient infrastructure is a legitimate and significant concern. An option for encouraging middle housing development where there are infrastructure concerns is Junior Accessory Dwelling Units (JADUs) from California's legislation.¹⁰⁸ "JADUs are typically bedrooms in a single-family home

101. Arizona's negative reaction to and subsequent changes in HB 2674 and Washington's middle housing attempts failing to pass are two examples of resistance to progress in middle housing legislation. *A potential solution to Arizona's lack of affordable housing*, ARIZONA PBS (Apr. 6, 2022), <https://azpbs.org/horizon/2022/04/a-potential-solution-to-azs-inaffordable-housing/>; Natalie Bicknell Argerious & Doug Trumm, *Missing Middle Housing Dies in House, but Statewide Backyard Cottage Reform Remains in Play*, THE URBANIST (Feb. 16, 2022), <https://www.theurbanist.org/2022/02/16/missing-middle-bill-dies-in-house/>.

102. See CITY OF MINNEAPOLIS, *Missing Middle Rental Pilot Program Guidelines*, <https://lims.minneapolismn.gov/Download/RCAV2/13922/Missing-Middle-Rental-Pilot-Program-Guidelines.pdf> (May 19, 2022) (describing the program's goal of increasing middle housing access for households with less than 50% of the city's median income).

103. See Glen Searle & Peter Phibbs, *Ending Single Family Zoning: Is There a Plan B?*, 86 J. AMER. PLANNING ASS'N 121, 122 (2020).

104. CITY OF CORVALLIS, OREGON, *House Bill 2001 Frequently Asked Questions*, <https://www.corvallisoregon.gov/cd/page/house-bill-2001-frequently-asked-questions> (last visited Apr. 11, 2023) (discussing the stresses on infrastructure resulting from increased density).

105. See Searle, *supra* note 103.

106. See CITY OF CORVALLIS, OREGON, *supra* note 104.

107. *Id.*

108. See CAL. DEP'T OF HOUS. & CMTY. DEV., *infra* note 128.

that have their own private entrance.¹⁰⁹ Repeated small living spaces as accessories offer opportunities for denser housing in single-family neighborhoods with less of an impact on infrastructure.¹¹⁰ Middle housing development or ADUs can increase demand for such infrastructure and public services as well, but those effects are more manageable for middle housing than large apartment development projects.

The increased demand for local services resulting from middle housing introduced in formerly single-family-only zones can create financial pressure for municipal governments, whose property tax revenues per citizen could decline after such changes. However, the potential for such new fiscal challenges does not justify ignoring housing affordability or climate change concerns.¹¹¹ Other options such as municipal bond issues and supplemental local sales or income taxes are often available to fill in funding gaps where needed.¹¹²

3. New Middle Housing Development as a More Impactful Alternative to Middle Housing Redevelopment

Although middle housing projects within existing single-family neighborhoods can contribute to valuable change, policies that support new middle housing development are more impactful and politically feasible. The status quo bias, a phenomenon in which people desire the status quo rather than change, is one factor that can influence neighborhoods to retain SFZ.¹¹³ This bias can contribute to the “straitjacket” phenomenon, freezing current zoning practice into place that effectively prevents the types of new land use development demanded by the marketplace.¹¹⁴ Middle housing development projects in undeveloped areas can circumvent challenges as compared to projects surrounded by established single-family-only neighborhoods.

New neighborhood development is more politically feasible; encouraging new middle-housing neighborhoods can serve to avoid resistance in well-established and wealthy neighborhoods. New neighborhood development better avoids the obstacles of common interest communities (CICs) and homeowners’ associations (HOAs) than renovation in established single-family neighborhoods.¹¹⁵ CICs are

109. See *Accessory Dwelling Units*, CAL. DEP’T OF HOUS. & CMTY. DEV., <https://www.hcd.ca.gov/policy-and-research/accessory-dwelling-units>.

110. *Id.*

111. For example, state funding, which is often expected to “make up the difference” from local taxes, is often unreliable. See Mark Liberman, *Property Taxes Fuel K-12 Budgets. How Well Does That Work?*, EDUCATIONWEEK: BUDGET & FINANCE (Nov. 28, 2022), <https://www.edweek.org/leadership/property-taxes-fuel-k-12-budgets-how-well-does-that-work/2022/11#:~:text=Property%20taxes%20aren't%20the%20revenue%20for%20K%2D12%20schools>.

112. *See id.*

113. See generally Patrick Devine-Wright, *Rethinking NIMBYism: The Role of Place Attachment and Place Identity in Explaining Place-Protective Action*, 19 J.CMTY. & APPLIED SOC. PSYCH. 426, (2009).

114. See Robert Ellickson, *The Zoning Straitjacket: The Freezing of American Neighborhoods of Single Family Houses*, 96 IND. L. J. 395, 395 (2021).

115. HOAs are categorized as a governing body of some common interest communities. For this reason and readability, this article uses HOA when referring to an enforcing body and common interest community for the community as a whole. See, CORNELL LAW SCHOOL, *Homeowners Associations (HOAs)*, https://www.law.cornell.edu/wex/homeowners%27_associations_%28hoas%29#:~:text=Home

becoming the new normal in U.S. homeownership, and they have significant political power, evidenced in part by middle housing legislation which exempts localities governed by HOA agreements.¹¹⁶ Additionally, HOAs may become a new avenue to achieve the similar exclusionary effects of SFZ under the guise of “neighborhood character.” Since HOAs are not state actors, the Constitution does not bind HOAs in the same way as local zoning authorities.¹¹⁷ Courts are highly deferential to HOA actions, often citing a contractarian framework: purchasing a parcel within a CIC is consent to the HOA’s regulations.¹¹⁸ While the extent to which current or future HOA policies obstruct middle housing development is unknown, new development with middle housing as a distinct neighborhood characteristic will help circumvent CIC resistance.

New middle housing development would also facilitate greater private investment in environmentally friendly housing. New housing tends to be much more energy- and water-efficient than older housing stock.¹¹⁹ The weatherization methods, modern temperature control systems, and better insulation found in newer homes can be particularly valuable in warmer regions of the United States that have been experiencing significant population growth.¹²⁰

C. Existing and Proposed State-Level Middle Housing Policies

Several states have pursued middle housing-related policy reforms in recent years with varying degrees of success. A few states, such as Utah, are pursuing ways to promote middle housing development. Legislation enacted in that state in 2021 establishes a modest fund to incentivize people to develop low-income housing. It also places express responsibility on municipalities to promote “moderate-income housing growth.”¹²¹ A pilot program under the legislation even guarantees loans to finance the construction of ADUs for low-income individuals.¹²²

Despite strong public support for confronting climate change and addressing housing affordability in much of the country, modern middle housing policies have faced resistance in some states. For example, Washington’s state legislature proposed two companion middle housing bills in 2021: SB 5670¹²³ and

owners’%20Associations%20(HOAs)%20are,and%20interests%20of%20the%20community (last visited Aug. 28, 2023).

116. See Heidi Groover, *Single-Family Home Neighborhoods Could See Duplexes, Sixplexes in Bills Pushed by WA Lawmakers*, SEATTLE TIMES (Feb. 1, 2022), <https://www.seattletimes.com/business/real-estate/wa-lawmakers-advance-proposals-to-allow-duplexes-fourplexes-in-some-single-family-neighborhoods/>.

117. See Ryan McCarl, *When Homeowners Associations Go Too Far: Political Responses to Unpopular Rules in Common Interest Communities*, 43 REAL EST. L.J. 453, 462 (2015).

118. *Id.*

119. See N. Casquero-Modrego et al, *Getting to Scale for Decarbonizing Homes in the US: An Industry Survey*, 1085 IOP CONF. SERIES EARTH ENV’T SCI. 12036, 12036 (2022).

120. See Sarah Kaplan, *How to Stop Your House’s Expensive Drafts - and Save the Planet*, WASH. POST (Jan. 27, 2021), <https://www.washingtonpost.com/climate-solutions/2021/01/27/climate-curious-weatherization/>.

121. 8 S. B. 164, 64th Leg., Gen. Sess. § 2 (Utah 2021).

122. *Id.*

123. S.B. 5670, 2021 Leg., Reg. Sess. (Wash. 2021).

HB 1782,¹²⁴ neither of which was successful. Particularly notable was Washington's failure despite a proposed exemption for areas covered by CICs or homeowner association agreements, effectively exempting multiple of Seattle's wealthiest neighborhoods.¹²⁵ Arizona HB 2674, proposed in February 2022, would have facilitated more middle housing development but ultimately stirred controversy,¹²⁶ prompting that state's legislature to refer the bill to a committee and not advance it.¹²⁷

Provisions allowing landowners to build accessory dwelling units (ADUs) on their lots are one way that some states have facilitated some new middle housing development. Multiple states across the political spectrum have enacted measures to protect landowners' rights to build ADUs. California's SB 10 allows up to two accessory dwelling units (ADUs)¹²⁸ or JADUs¹²⁹ on each parcel.¹³⁰ Section 4364-B in Maine's LD 2003 requires municipalities to allow an ADU on the same lot as a single-family home in any area in single-family-only areas.¹³¹ A recently-enacted Utah statute bars the over-regulation or the prohibition of ADU by municipalities and counties.¹³² Protecting ADU and JADU construction provides one means of helping communities to transition away from single-family-only neighborhoods.

Successful state-level middle housing reforms often feature provisions that preempt localities' restrictions on the number of developable units per land parcel. California's SB 9 effectively allows up to four housing units to be built in place of one single-family detached home.¹³³ Oregon's HB 2001 encourages both cottage clusters and townhomes, defining a cottage cluster as a "grouping of no fewer than four detached housing units per acre with a footprint of less than 900 square feet each and includes a common courtyard."¹³⁴ The legislation defines a townhome as a "dwelling unit constructed in a row of two or more attached units, where each

124. H.B. 1782, 2021 Leg., Reg. Sess. (Wash. 2021).

125. See Groover, *supra* note 116.

126. See *A Potential Solution to Arizona's Lack of Affordable Housing*, ARIZONA PBS (April 6, 2022), <https://azpbs.org/horizon/2022/04/a-potential-solution-to-azs-inaffordable-housing/>; Jay Taylor, *State House Bill Would Strip Local Zoning Authority*, IN MARICOPA (Feb. 12, 2022), <https://www.inmaricopa.com/state-house-bill-would-strip-local-zoning-authority/>.

127. H.B. 2674, 2022 Leg., 55th Sess. (Ariz. 2022).

128. ADUs are also known as granny flats, in-law units, backyard cottages, or secondary units. California characterizes ADUs as affordable dwelling units which are added onto an existing home or parcel. *Accessory Dwelling Units*, CAL. DEP'T OF HOUS. & CMTY. DEV., <https://www.hcd.ca.gov/policy-and-research/accessory-dwelling-units> (last visited Aug. 28, 2023).

129. In California, JADUs are "allowed to be created within the walls of a proposed or existing single-family residence and shall contain no more than 500 square feet . . . JADUs present no additional stress on utility services or infrastructure because they simply repurpose existing space within the residence and do not expand the dwellings planned occupancy." *Id.*

130. See Ryan Michael Leaderman et al., *SB 10 to Facilitate Upzonings, But Does Not Include CEQA Exemption for Corresponding Projects*, HOLLAND & KNIGHT (Sep. 20, 2021), <https://www.hklaw.com/en/insights/publications/2021/09/sb-10-to-facilitate-upzonings>.

131. ME. STAT. ANN. tit. 30-A § 4364-B.

132. H.B. 82, 64th Leg., Gen. Sess. §§ 4, 12 (Utah 2021).

133. See S.B. 9, 2021 Leg., Reg. Sess. (Cal. 2021).

134. H.B. 2001, 2019 leg., 80th Sess. §2(2) (Or. 2019) ("Except as provided in subsection (4) of this section, each city with a population of 25,000 or more and each county or city within a metropolitan service district shall allow [middle housing] development.").

dwelling unit is located on an individual lot or parcel and shares at least one common wall with an adjacent unit.”¹³⁵

Multiple relatively recently enacted middle housing reforms also feature specific provisions specifically aimed at promoting development in transit-rich or rapidly-developing areas. For instance, California’s SB 10 authorizes local governments to adopt ordinances allowing 10-unit development in transit-rich areas¹³⁶ or urban infill sites.¹³⁷ Maine’s LD 2003 states that developers or individuals may construct four-unit buildings in designated “growth areas.”¹³⁸ Oregon’s HB 2001 preempts many density restrictions by localities within a “metropolitan service district” or with populations of 25,000 or more.¹³⁹

To help make them more palatable to local voters, many middle housing policies contain various carveouts that can unfortunately weaken these policies’ impacts. For example, SB 10 allows exemptions for “parcels in open space, park or recreational lands approved by the voters,” which could keep middle housing out of some single-family-only neighborhoods that might otherwise benefit from it.¹⁴⁰ California law also still allows for local owner occupancy restrictions, which can likewise create obstacles for middle housing development.¹⁴¹ Maine’s LD 2003 still permits localities to impose various other zoning requirements such as setbacks and height restrictions that can impede some middle housing growth as well.¹⁴²

D. Local Middle Housing Policies

Land use planning and zoning activities have historically been conducted primarily at the local government level in the United States, and many U.S. cities that have long relied heavily on SFZ are beginning to promote more middle housing development. Particularly in states where there is insufficient state-level support for middle housing-promoting policy reforms, municipal governments can do much to move the middle housing movement forward.

Recent policy developments in the state of Washington illustrate the potential for local governments to play major roles in promoting middle housing development. In 2022, shortly after attempts at statewide reform failed in the Washington legislature, the city of Spokane unanimously adopted a plan it called “Shaping Spokane Housing.” This comprehensive housing plan allows for duplexes citywide, with triplexes and fourplexes permitted almost anywhere within a quarter mile of frequent transit.¹⁴³ The ordinance also provides for more townhouse units per lot and shrinks the required lot size for single-family homes.¹⁴⁴ Spokane also reduced

135. *Id.* at 2(1)(c).

136. CAL. CODE REGS. tit. 7, § 65913.5(a)(1)(A) (2022) (defining transit-rich areas).

137. *Id.* at § 65913.5(a)(1)(B) (definition of urban infill sites); S.B. 10, 2021 Leg., Reg. Sess. (Cal. 2021).

138. *Id.*

139. H.B. 2001, 2019 Leg., 80th Sess. (Or. 2019).

140. S.B. 9, 2021 Leg., Reg. Sess. (Ca. 2021).

141. *See* Von Hoffman, *supra* note 41.

142. *See* L.D. 2003, 2022 Leg., 130th Sess. (Me. 2022).

143. Stange, *supra* note 4; *see also* *Shaping Spokane Housing*, CITY OF SPOKANE, <https://my.spokane city.org/projects/shaping-spokane-housing/> (last visited Nov. 6, 2023).

144. *See* SPOKANE *supra* note 142.

parking minimums and increased the height limits to further promote middle housing development within its boundaries.¹⁴⁵ Spokane also offers potential tax exemptions for multi-family and single-family developments.¹⁴⁶ Collectively, these numerous policies would increase middle housing development within that rapidly growing city.

Arlington County, Virginia, has recently been examining its existing policies impacting middle housing.¹⁴⁷ Rapidly rising housing prices in the county prompted county planners to consider whether existing SFZ policies were still the best fit for the county and its residents.¹⁴⁸ On December 7, 2022, Arlington County published a draft of a Staff Report for the Arlington County Board's Missing Middle Housing Study.¹⁴⁹ Included with the Report were a General Land Use Plan booklet amendment ("GLUP Booklet") and an Arlington County Zoning Ordinance ("ACZO") amendment aimed at confronting these issues.¹⁵⁰ The GLUP Booklet highlighted how SFZ contributed to segregation and racial and social injustice within that community. Among other things, it points out that its areas zoned as single-family-only overlapped with census areas where 70% or more of the population was white.¹⁵¹ The GLUP Booklet then outlines goals such as reduced parking requirements, compact building design, and walkability aimed at making the community more affordable and sustainable.¹⁵² Arlington County's ACZO Proposal likewise has nine options for policy changes,¹⁵³ five of which directly relate to middle housing development.¹⁵⁴ The flexibility of the options can allow for both a tailored approach and flexibility for any necessary future modifications. The multiple-option format may be a useful model for cities to experiment with which regulations are causing the most significant restriction in their communities. The weakness of this structure is that options favored or accepted by residents may not be the reform necessary to create change.

The city of Minneapolis, Minnesota, has stayed on the cutting edge for initiatives that seek to develop a greener community. This desire to evolve led to the

145. *See id.*

146. *Id.*

147. *See* Teo Armus, *In Arlington, Advocates and Critics of 'Missing Middle' Housing Face Off*, WASH. POST, (Jul. 11, 2022, 7:36 PM), <https://www.washingtonpost.com/dc-md-va/2022/07/11/arlington-missing-middle-housing-zoning/>.

148. *See id.*

149. *See* ARLINGTON CNTY. VA., MISSING MIDDLE HOUSING STUDY: DOCUMENTS (2022).

150. *See* ARLINGTON CNTY. VA., CNTY. BOARD AGENDA ITEM MEETING OF JANUARY 21, 2023 (2022).

151. *See id.* at 29.

152. *See id.* at 30.

153. *See id.* at 31–32.

154. Option 1 has 6-unit and 8-unit maximum frameworks. Option 3 is the option to include or omit a provision for special exception approvals for expanding housing development at larger sites. Option 7 considers whether or not to limit the number of expanded housing option development permits that can be issued per calendar year. Option 8 proposes a provision where one or two-family dwellings converted to certain types of middle housing through interior alterations would not require a special exception permit. Option 9 proposes an option to change the definition of a duplex to include a dwelling unit with two front entrances. *See Id.* at 34, 36–37, 41, 47–49.

December 2018 approval of the 2040 plan.¹⁵⁵ The new plan sought to create more housing opportunities to fit the population's demand, emphasizing affordable housing units. One of the items this comprehensive plan looked to tackle was SFZ. As of 2018, Minneapolis only allowed single-family homes on 70% of the land zoned for residential use.¹⁵⁶

Minneapolis, Minnesota, adopted SFZ reforms that took effect in January 2020, accelerating middle housing development in that city.¹⁵⁷ Since adopting those ordinances, Minneapolis has approved proposals for dozens of new duplexes and triplexes in areas formerly zoned only for single-family homes.¹⁵⁸ While Minneapolis's 2040 Plan is relatively modest, it may already be helping to make housing more affordable for the city's residents.¹⁵⁹ Three-bedroom apartments are only going for 2% higher rents despite the national inflation the county has seen in the past five years.¹⁶⁰

The disproportionate approval of single-family units to middle housing units in the wake of the progressive 2040 Plan suggests that Minneapolis has not addressed a crucial limited factor in housing development. Minneapolis has left some regulations in place which constrain lot sizes.¹⁶¹ These types of leftover regulations could be restraining middle housing development. If the lot size makes a property unaffordable, the cost issues of SFZ will simply remain in middle housing development.

Unfortunately, local zoning reforms promoting middle housing have yet to materialize in many fast-growing U.S. cities that would benefit from such reform. For example, the city of Gainesville, Florida, which had experienced a 13.5% population increase from 2010 to 2020,¹⁶² recently became one of the nation's first cities to repeal its own up-zoning reforms.¹⁶³ In August 2022, the Gainesville City Commission adopted ordinance provisions that would have ended SFZ within the

155. Daniel Kuhlmann, *Upzoning and Single-Family Housing Prices*, 87 J. AM. PLAN. ASS'N, 383, 383 (2021).

156. *See id.* at 383.

157. *See* Christian Britschgi, *Eliminating SFZ Isn't the Reason Minneapolis Is a YIMBY Success Story*, REASON, (May 11, 2022), <https://reason.com/2022/05/11/eliminating-single-family-zoning-isnt-the-reason-minneapolis-is-a-yimby-success-story/>.

158. *See id.* ("Minneapolis approved 62 duplexes and 17 triplexes, according to data collected by the city's Department of Community Planning and Economic Development (CPED). Exactly half of the duplexes and 14 of the triplexes were built on lots that were once zoned for exclusively single-family development.")

159. *See id.* (noting that, since 2018, rental rates for one- and two-bedroom apartments in the city had slightly decreased, and rents for three-bedroom apartments had only increased by about 2%, despite high national rates of inflation during that period).

160. *See id.*

161. *See id.*

162. *See* Jason Sanchez, *As Gainesville's Population Grows, More Density Is Needed to Prevent Sprawl*, THE GAINESVILLE SUN (Apr. 15, 2022), <https://www.gainesville.com/story/opinion/2022/04/15/jason-sanchez-more-density-less-sprawl-needed-gainesville-grows/7280283001/>.

163. *See* Patrick Spauster, *How Backlash Reversed a Florida City's Reforms to Allow Denser Housing*, BLOOMBERG (Feb. 2, 2023), <https://www.bloomberg.com/news/articles/2023-02-02/how-gainesville-s-yimby-zoning-reform-was-undone>.

city.¹⁶⁴ Specifically, the ordinance would have rezoned SFZ districts into “neighborhood residential” districts wherein residential structures with up to four units per parcel were allowed.¹⁶⁵ However, under the threat of state preemption and after facing pressure from conservative state leaders, local officials repealed the reform in February of 2023.¹⁶⁶ In short, much more reform is still needed to enable middle housing to advance housing affordability and climate mitigation goals across most of the country.

III. ACCELERATING MIDDLE HOUSING GROWTH

Innovative new middle housing development policies would promote greater housing affordability and reduce greenhouse gas emissions across the United States. To the extent they are politically feasible, state and federal middle housing policies in particular would do much to help drive middle housing growth. In states with political environments that are less favorable for middle housing policies, city governments would also play important roles by adopting middle housing-promoting ordinances within their own jurisdictions. Collectively, proactive, and innovative policymaking efforts at the federal, state, and local levels would accelerate the development of middle housing in cities and towns throughout the nation.

A. Opportunities at the State and Federal Government Levels

A diverse array of possible statutory reforms enacted at the federal and state government levels would impact middle housing development in the United States. The federal government’s vast financial resources create opportunities to encourage private investment in middle housing through funding grants and other incentive programs and to prompt local governments to support such projects. State governments can likewise promote middle housing through legislation that preempts municipalities’ ability to restrict such development.

1. Grant Programs for Middle Housing-Friendly Zoning Reforms

Enacting new federal grant programs and other federal subsidy programs would be one powerful way for Congress to incentivize municipalities to phase out SFZ within their jurisdictions. The federal government has long used various funding programs to encourage policy changes at the state and local government levels.¹⁶⁷ Unfortunately, despite the federal government’s lengthy history of using grants to fund affordable housing generally, it has heretofore offered very few programs aimed

164. See John Henderson, *Fla. Town Considers End to Single-Family Zoning*, ASSURANCE REALTY OF NWFL (Aug. 11, 2022), <https://nwfl4sale.com/fla-town-considers-end-to-single-family-zoning/>.

165. *Id.*

166. See Spauster, *supra* note 162 (“[T]he zoning plan drew the ire of many local residents and caught the attention of Republican state leaders, who threatened state preemption and legal challenges in the wake of its passage late last year.”).

167. See *generally Grant Policies*, GRANTS.GOV, <https://www.grants.gov/learn-grants/grant-policies.html> (last visited Nov. 1, 2023).

at promoting middle housing development.¹⁶⁸ New grant programs targeting localities could help to overcome this challenge and prompt municipal governments to become more welcoming of middle housing projects.¹⁶⁹

2. State Preemption of Localities' SFZ Powers

At the state government level, statutes that preempt SFZ ordinance provisions and compel municipalities to accommodate duplexes in places formerly zoned for single-family-only could also greatly accelerate middle housing growth. Because middle housing is relatively similar to single-family home residential development, allowing it within former single-family-only areas would represent a relatively modest policy change and may thus be more politically acceptable in many states than imposing requirements that cities accommodate large quantities of new apartment housing. State policies requiring cities to accommodate middle housing would promote somewhat greater land use density in urban areas while preserving most visual and other aspects of single-family residential neighborhoods. Such laws would preempt municipalities' authority to create single-family-only districts altogether or preempt and invalidate certain types of uses of that authority.¹⁷⁰ In states where such statutes are politically feasible, enacting them can have sweeping impacts.

B. Promoting Middle Housing at the Municipal Level

Even in states that take a less favorable overall view of middle housing, progressively-minded cities with local voters who are amenable to middle housing development can take meaningful actions to promote such growth. The following are brief descriptions of some potential strategies for accelerating middle housing development at the local level.

1. Introducing Middle Housing in Former Single-family Only Zoning Districts

Municipal zoning ordinance amendments that redefine SFZ districts to allow duplexes or other middle housing are the most straightforward means of quickly accelerating middle housing development within a community. Where they

168. See generally, U.S. DEP'T OF HOUS. & URB. DEV., <https://www.grants.gov/learn-grants/grant-making-agencies/departments-of-housing-and-urban-development.html> (highlighting the Department's grant programs).

169. See Devine-Wright, *supra* note 112. The Kahneman-Tversky theory supports the use of subsidies or other funding to overcome status quo bias. When starting from a familiar reference point, people give more weight to losses than to objectively equivalent gains. See also Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 *ECONOMETRICA* 263, 279 (1979); Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 *J. ECON. PERSP.* 193, 199 (1991). Grants and other subsidies can help to eliminate or mitigate such perceived future costs.

170. See Harvard, *supra* note 39, at 1601 ("The most aggressive of these laws fully preempt municipalities from prohibiting multifamily housing in areas zoned for single-family housing. Oregon, California, Virginia, and Washington have all proposed or passed this variety of law. Weaker zoning preemption bills bar cities from prohibiting multifamily housing in certain locations, such as near transit stations, permit structures like accessory dwelling units.").

are politically feasible, such zoning reforms can immediately open up areas across a city or town to middle housing projects. Because middle housing's ability to increase strain on most types of local infrastructure servicing single-family residential communities is relatively modest, many municipalities could also accommodate significant increases in middle housing in such areas without triggering a need for major infrastructure upgrades. Introducing middle housing into more single-family residential areas—including established areas—can thus be an effective way of adding relatively affordable and relatively climate-friendly housing units to a neighborhood.

2. Requiring More Middle Housing in Master-Planned Community Projects

Ordinances requiring developers to incorporate more middle housing into master-planned and large mixed-use development projects would be one tool for promoting more middle housing construction at the local level—especially in fast-growing cities. Master-planned development projects that enable residents to live near their place of employment or popular retail businesses can create vibrant living environments and new economic development, particularly as demographic shifts in the United States lead to greater demand for such communities.¹⁷¹ Projects of this type often feature a mix of commercial, office, retail, institutional, and residential,¹⁷² satisfying the nation's growing demand for walkable neighborhoods near amenities.¹⁷³ Such projects tend to be most successful in areas already experiencing rapid large-scale development.¹⁷⁴ Several localities have adopted mixed-use land development reforms, sometimes featuring additional complimentary provisions that encourage more sustainable communities.¹⁷⁵ For example, such reforms in St. Anthony, Idaho, now require principle buildings in certain zones to have main entrances facing the sidewalk to facilitate more walkable neighborhoods.¹⁷⁶ Mixed-use land development ordinances can promote more cohesive projects that increase walkability and public transit and reduce the stress on roadway infrastructure with lesser reliance on automobiles.¹⁷⁷ Mixed-use development also often complements middle housing development in ways that can reduce stress on local infrastructure while introducing significant new affordable housing into a community.

3. Loosening Height Restrictions

Loosening municipal height restrictions in residentially zoned areas to allow at least three stories is another potential means of promoting middle housing

171. See Jill Grant, *Mixed Use in Theory and Practice: Canadian Experience with Implementing a Planning Principle*, 68 J. AM. PLAN. ASS'N, 73 (2002).

172. See *id.* at 74.

173. See, e.g., Wegmann, *supra* note 73.

174. See Hans R.A. Koster & Jan Rouwendal, *The Impact of Mixed Land Use on Residential Property Values*, 52 J. REG'L SCI. 733, 734 (2012).

175. See Tyler Adams, *Mixed-Use Zoning*, SUSTAINABLE CITY CODE, <https://sustainablecitycode.org/brief/mixed-use-zoning/#edn8> (last visited Apr. 10, 2023) (localities include Baltimore, Maryland; St. Anthony, Idaho; Madison, Wisconsin; Mt. Dora, Florida; and Fort Lauderdale, Florida).

176. See ST. ANTHONY, IDAHO, MUNI. CODE, §§ 17.06.110-17.06.120 (2015).

177. See Adams, *supra* note 174 (citing a variety of benefits to mixed-use zoning).

growth. Zoning height restrictions that limit structure heights to two stories tend to lead to less middle housing development.¹⁷⁸ Proposals to ease height restrictions to allow three- or four-story structures may be more politically palatable than proposals to remove height restrictions altogether but would still promote more middle housing projects in affected areas. Loosened height restrictions could be tested by first loosening height restrictions in transit or urban corridors, such as Spokane’s “Centers and Corridors.”¹⁷⁹ Although height limits are not the primary limiting factor for middle housing development in many communities,¹⁸⁰ removing this potential constraint is one additional way to help encourage such projects.

4. *Loosening Minimum Lot Size and Setback Requirements*

Softening local minimum lot size and setback requirements is yet another potential strategy for promoting more middle housing development within a city or town. Minimum lot size requirements are often relatively arbitrary and do not necessarily promote health and safety but can be an impediment to middle housing development.¹⁸¹ Laws that restrict parcel subdivisions, such as California’s SB 9,¹⁸² can similarly obstruct denser development in ways that can be difficult to justify. These types of restrictions and excessive residential building setback requirements can also result in large, manicured lawns that waste precious freshwater resources.¹⁸³ Reforming such restrictions—particularly in former single-family residential zoning districts—can remove one more common obstacle to middle housing development.

CONCLUSION

As concerns about climate change and housing affordability grow in cities and towns across the United States, opposition to SFZ is growing as well. Increasing urban land use density promotes reductions in greenhouse gas emissions and simultaneously improves housing affordability,¹⁸⁴ and SFZ has long constrained such development patterns. Although voters in much of the country seem unwilling

178. See GRAY, *supra* note 20, at 41. Height caps limit the feasibility of middle housing, even where middle housing is already permitted.

179. See Stange, *supra* note 4.

180. See Amrita Kula et al., *How to Increase Housing Affordability? Understanding Local Deterrents to Building Multifamily Housing*, FED. RES. BANK OF BOS. (March 17, 2023), <https://www.bostonfed.org/publications/research-department-working-paper/2022/how-to-increase-housing-affordability-understanding-local-deterrents-to-building-multifamily-housing.aspx>.

181. Minimum lot sizes are often based on health concerns in communities that rely on septic systems instead of a city’s sewer or water systems. See Charles Gardner, *Urban Minimum Lot Sizes: Their Background, Effects, and Avenues to Reform*, GEORGE MASON U. MERCATUS CTR. (August 2023), <https://www.mercatus.org/research/policy-briefs/urban-minimum-lot-sizes-their-background-effects-and-avenues-reform>.

182. CAL. GOV. CODE § 66411.7 (2021) (“shall ministerially approve . . . [a division of] an existing parcel to create no more than two new parcels of approximately equal lot area provided that one parcel shall not be smaller than 40 percent of the lot area of the original parcel proposed for subdivision . . .”).

183. There are, of course, other ways to address the wasteful water usage associated with grass lawns in arid climates. See generally Benjamin Longbottom & Alexandria Gordon, *Beyond All Drought: Improving Urban Water Conservation in the West through Integrative Water and Land Use Policy*, 63 NAT. RES. J. 88 (2023).

184. See generally Sommer, *supra* note 85.

to forfeit suburban lifestyles to address these challenges, middle housing development could be a politically feasible means of progressing toward more sustainable and affordable communities in many cities. Duplexes, triplexes, quadplexes, and townhomes furnish many of the desirable attributes of single-family housing while also providing more of the benefits of dense development.

A greater focus among policymakers on promoting new middle housing development—especially in fast-growing cities across the country—can be a valuable means of bringing sustainable, attractive housing into the reach of more Americans.