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Affordable Housing: Three Roadblocks to Regulatory Reform

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AFFORDABLE HOUSING THREE ROADBLOCKS TO REGULATORY REFORM

Dwight Merriam

ABSTRACT

This article focuses on techniques, initiatives, and regulatory reforms that may help improve affordability in housing, and thereby serve the need for economic, social, and racial equity. It focuses especially on three impediments standing in the way of affordability: the myth of Home Rule, limitations of the Fair Housing Act, and the pervasive use of private covenants and restrictions. Those roadblocks deserve the closest attention and concerted action and must be knocked down, once and for all, to get the housing we so desperately need.

INTRODUCTION

A central theme in the scholarship and consulting work of Prof. Chris Nelson¹ has been his abiding concern for diversity, equity, and inclusion, particularly in the field of impact fees. His forthcoming book as lead author with others, *IMPACT FEES: PRINCIPLES AND PRACTICE OF PROPORTIONATE SHARE DEVELOPMENT IMPACT MITIGATION*, is his most recent effort to align practice with scholarship, all within the overarching quest for equity.

I have always admired Chris Nelson for what he does and for the passion he brings to planning. There are widely recognized great scholars, outstanding classroom teachers who can guide the most advanced students through the thicket of cutting-edge theory and equally able to help a local land use commissioner appreciate the foundations of their routine decision making out there, though there are not many. Consultants abound, but those who are most sought out because they get great results are few. Planners who feel to their very core the need to make the world a better place for everyone exemplify what we value most.

Chris Nelson is one of the few in planning who is all that: scholar, teacher, consultant, and exemplar.

When we talked about this Festschrift, I thought that one small way in which I might advance his work would be to identify where we ought to seek change to enable more affordable housing that would improve equity. Thus, this modest issue

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¹ While his full name is Arthur Christian Nelson and he publishes as Arthur C. Nelson, he is known among friends and colleagues as Chris.

spotting piece, first conceptualized for the American College of Real Estate Lawyers.

This article focuses on techniques, initiatives, and regulatory reforms that may help improve affordability in housing, and thereby serve the need for economic, social, and racial equity.

There are numerous impediments standing in the way of affordability. Three of those roadblocks deserve the closest attention and concerted action and must be knocked down, once and for all, to get the housing we so desperately need: the myth of Home Rule, limitations of the Fair Housing Act, and the pervasive use of private covenants and restrictions.

1. THE HOME RULE MYTH

To understand the myth of Home Rule, one must start with the basics. The authority to plan and regulate land use is fundamentally the exercise of the police power to protect and promote the public's health, safety, and general welfare. Chief Justice Marshall described the police power as "that immense mass of legislation, which embraces everything within the territory of a State, not surrendered to the general government."²

The 9th and 10th Amendments of the U.S. Constitution reserve to the states all those powers not previously delegated or prohibited to the states and the people. That gives the states the individual and exclusive responsibility for granting to local governments the authority to regulate, including regulations promoting affordable housing. Local land use regulation is an exercise of the police power.

Essential to understanding the extent of any form of the grant of powers to local government requires a refresher course in Home Rule, the Dillon Rule, and the Cooley Doctrine. Anyone who wants to help remove the roadblocks to affordable housing needs a grasp of these concepts.

Home Rule

Most simply stated, Home Rule fundamentally defines the degree to which state police powers have been delegated to local governments, including the authority to regulate land use. How Home Rule power is so delegated varies from state to state ranging from self-executing constitutional provisions, to statutes adopted by state legislatures as authorized by their constitutions, to powers included in state granted municipal charters. How broadly these delegated powers are interpreted by the courts also varies from state to state.³

² *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 202 (1824).

³ My thanks to John Nolon for this concise description.

Home Rule might be viewed as a long continuum, extending from the extreme of the Dillon Rule for strong state legislative control over local governance at one end to the further extreme of the Cooley Doctrine of unfettered, independent local authority at the other end. Along this ragged continuum, many states fall in a great, ambiguous, and increasingly ill-defined, middle ground.

Spoiler alert. Herein lies the fundamental problem of the Home Rule myth: as to most local land use regulation, there has been no immutable delegation of exclusive authority to regulate land use at the local level. Those who are opposed to affordable housing are wrong to continue to invoke Home Rule as a shield to any state law changes that might override what has been wrongly perceived to be the exclusive province of local governments. The untenable use of Home Rule has resulted in the segregative effects that drive advocates to seek social, economic, and racial equity in our land use system.

The Dillon Rule

In *Clinton v. Cedar Rapids & Missouri Railroad Co.*,⁴ Iowa Supreme Court Justice John F. Dillon famously saw local governments as mere creatures of the state, subject to the limitations of the grant of authority to them by the state. The case was about the right of a railroad company to use the city streets for their trackage. The railroad company had its own authority from the state to expand trackage. The city objected to the railroad using the dedicated city streets and challenged whether the railroad had the right to use them under the law and, if it did, whether the city should be compensated for what it alleged was a taking of the city's property interest. Of course, the railroad argued that it had been given all the authority it needed directly by the state.

The court held for the railroad, and in doing so Judge Dillon created the rule that came to bear his name:

The true view is this: Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so may it destroy.... [T]he legislature might, by a single act...sweep from existence all of the municipal corporations in the State, and the corporation could not prevent it. We know of no limitation on this right so far as the corporations themselves are concerned. They are, so to phrase it, the mere tenants at will of the legislature.⁵

⁴ *Clinton v. Cedar Rapids & Missouri Railroad Co.*, 24 Iowa 455 (1868).

⁵ *Id.* at 477-78.

John R. Nolon, the Distinguished Professor of Law Emeritus and Counsel, Land Use Law Center at the Elisabeth Haub School of Law, Pace University, has recently written a definitive analysis of what he sees as the end of Dillon's Rule.⁶

In his analysis, Professor Nolon points to an important nuance in Dillon's Rule, namely, that it has two parts. The first was that created in the Clinton case, which Professor Nolan describes as the "servient entity rule," whereby municipalities are mere "tenants at will," whose powers may be taken back or changed at the will of the state legislature.

The second part of Dillon's Rule is found in *Merriam v. Moody's Executors*,⁷ decided a month after Clinton, in which the court established a rule of construction:

[I]t must be taken for settled law, that a municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily implied or necessarily incident to the powers expressly granted; third, those absolutely essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable; fourth, any fair doubt as to the existence of a power is resolved by the courts against the corporation—against the existence of the power.⁸

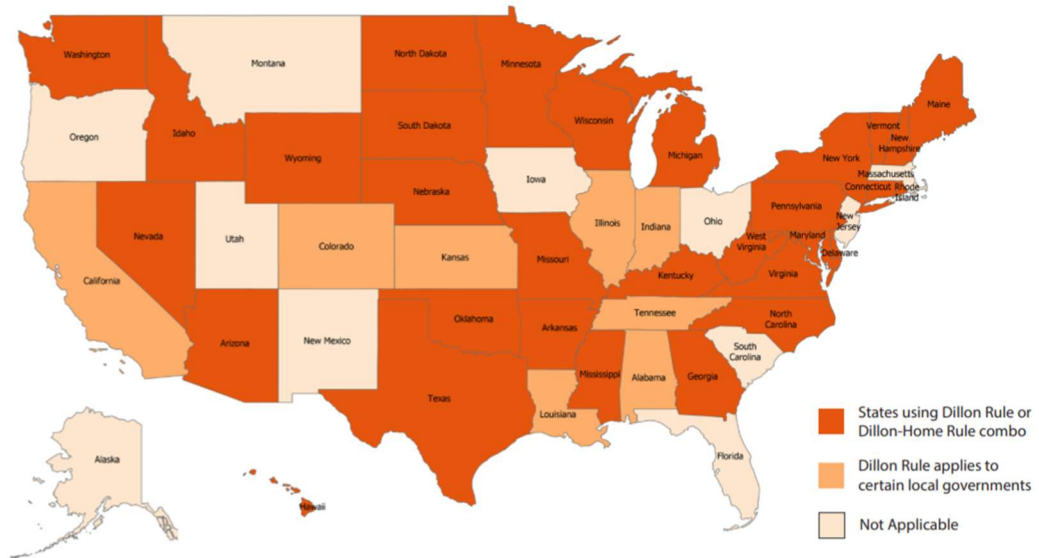
Most people speak of the Dillon Rule as a monolithic rule and not one of two parts. A consequence of this rule of construction is that the Dillon Rule states apply the Dillon Rule in varying fashion. In some states, eight of them, the Dillon Rule is limited, such as in Indiana where it applies only to townships. Elsewhere, in 32 states, Home Rule is provided for in the state's constitution with 20 of those recognizing it as self-executing and 11 requiring enabling legislation. Finally, eight states enable home rule by statute, not by their state constitutions, and limit to varying degrees what governments may be able to use Home Rule powers. (See figures 1 and 2.)

⁶ John R. Nolon, *Death of Dillon's Rule: Local Autonomy to Control Land Use*, SSRN (Oct. 11, 2020), <https://ssrn.com/abstract=3709379> or <http://dx.doi.org/10.2139/ssrn.3709379>.

⁷ *Merriam v. Moody's Executors*, 25 Iowa 163 (1868).

⁸ *Id.* at 170.

Dillon Rule and Dillon-Home Rule States



States providing for Home Rule via Constitution or Statute

Figure 1. Dillon Rule and Dillon-Home Rule States

Source: Travis Moore, *Dillon Rule and Home Rule: Principles of Local Governance*, Nebraska Legislative Research Office (Feb. 2020).⁹

⁹ Retrieved from https://nebraskalegislature.gov/pdf/reports/research/snapshot_localgov_2020.pdf

States providing for Home Rule via Constitution or Statute

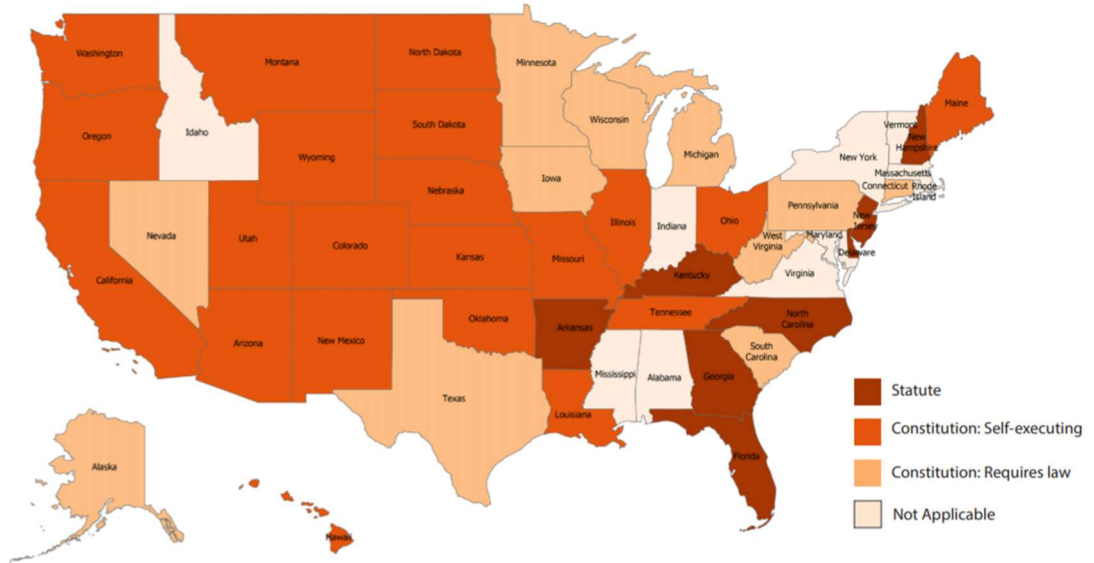


Figure 2. Source of Home Rule Authority

Source: Travis Moore, *Dillon Rule and Home Rule: Principles of Local Governance*, Nebraska Legislative Research Office (Feb. 2020).¹⁰

¹⁰ *Id*

Another useful resource with graphics and lists of states is available on the American City County Exchange website.¹¹

The U.S. Supreme Court took up the matter in 1907 in *Hunter v. Pittsburgh*.¹² There, the Court made clear that local governments were very much the subordinates of the state:

Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the state within the meaning of the Federal Constitution. The state, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may, by such changes, suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right, by contract or otherwise, in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the state, and

¹¹ Hon. John D. Russell & Aaron Bostrom, *White Paper: Federalism, Dillon Rule, and Home Rule*, AM. CITY COUNTY EXCHANGE (Jan. 2016). <https://www.alec.org/app/uploads/2016/01/2016-ACCE-White-Paper-Dillon-House-Rule-Final.pdf>.

¹² *Hunter v. Pittsburgh*, 207 U.S. 161.

those who legislate for the state are alone responsible for any unjust or oppressive exercise of it.¹³

The Cooley Doctrine

Michigan Supreme Court Justice Thomas M. Dooley wrote a concurring opinion in *People ex rel. Le Roy v. Hurlbut* in 1871,¹⁴ arguing that because local governments were in existence before the states were organized that they have powers of their own, independent of the states, and that those powers were not abridged when the union was formed:

But when we recur to the history of the country, and consider the nature of our institutions, and of the government provided for by this constitution, the vital importance which in all the states has so long been attached to local municipal governments by the people of such localities, and their rights of self-government, as well as the general sentiment of hostility to everything in the nature of control by a distant central power in the mere administration of such local affairs, and ask ourselves the question, whether it was probably the intention of the convention in framing, or the people in adopting, the constitution, to vest in the legislature the appointment of all local officers, or to authorize them to vest it elsewhere than in some of the authorities of such municipalities, and to be exercised without the consent, and even in defiance of the wishes of the proper officers who would be accountable' rather to the central power than to the people over whose interests they are to preside, – thus depriving the people of such localities of the most essential benefits of self-government enjoyed by other political divisions of the state – when we take all these matters into consideration, the conclusion becomes very strong that nothing of this kind could have been intended by the provision. And this conviction becomes stronger when we consider the fact that this constitution went far in advance of the old one, in giving power to the people which had formerly been exercised by the executive, and in vesting or authorizing the legislature to vest, in municipal organizations a further power of local legislation than had before been given to them. We cannot, therefore, suppose it was intended to deprive cities and villages of

¹³ *Id.* at 178-79.

¹⁴ *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44 (1871) <https://cite.case.law/mich/24/44/>

the like benefit of the principle of local self-government enjoyed by other political divisions of the state.¹⁵

So, why does all this somewhat arcane doctrinal history of local government law matter in the context of trying to promote affordable housing?

First, those who are opposed to state and substate regional approaches that potentially override local zoning are quick to throw up the shield of Home Rule. Sometimes, it is just that locals do not want to give up local control. Sometimes, it is more sinister, seeking to continue exclusionary land use practices.

Second, whether Professor Nolon is right or not in believing that the Dillon Rule has faded, it is important to recognize that in those states that have constitutional Home Rule, Home Rule may be implemented, and limited, by statute. Connecticut, where I live, is one of those states. The Connecticut Constitution provides “[t]he general assembly shall by general law delegate such legislative authority as from time to time it deems appropriate to towns, cities and boroughs relative to the powers, organization, and form of government of such political subdivisions.”¹⁶

Opponents of the state taking back a bit of its delegated authority over certain aspects of land use regulation that impede the development of affordable housing are quick to throw down the Home Rule card. For example, consider this from Connecticut State Senator Tony Hwang in opposition to recent affordable housing initiatives proposed for the state’s enabling legislation, as posted on his official website:

Senator Hwang said, “I am deeply concerned about how this bill has been misleadingly purported to ‘empower’ local zoning and land use rules. In reality, this bill does not offer data proof toward improving social equity, segregation, or even affect the affordability of living in Connecticut, all concepts which I strongly believe in and support. If the legislature truly wanted to implement visionary solutions in affordable housing regulations, then we should re-explore CT General Statute section 8-30g which has not been examined since 1989. The partisan Democratic vote further raises the alarming fear of the camel’s nose under the tent regarding expansive zoning, land use legislative mandates evident by the multiple overreaching bills

¹⁵ *Id.* at 66-67. See also Brett A. Stroud, *Preserving Home Rule: The Text, Purpose, and Political Theory of California’s Municipal Affairs Clause*, 41 PEPP. L. REV. 587 (2013), <https://digitalcommons.pepperdine.edu/plr/vol41/iss3/3>.

¹⁶ Conn. Const. art. 10, § 1.

passed out of committees throughout the CT General Assembly this session.”

During the discussion, Senator Hwang offered two amendments, both of which failed along a party line vote. One was to prevent a one-size fits all mandate, but instead preserve “home rule” and “local control” on not only land use and zoning but also on education, local finances and taxation, and environmental protection. The second proposed amendment hoped to provide a better balance between the represented stakeholders on the newly created working group ensuring that local experts and members of all political backgrounds had a voice in the future of zoning and land use in the state.¹⁷

The former mayor of Norwalk, Connecticut, a proponent of affordable housing, described the problem in this way:

Our Home Rule law pretty much allows towns to “maintain their character” by strictly controlling multifamily housing if they so desire. Most of the rich ones do so. This is one reason our cherished state is so “leafy.” People who cannot afford to own property with trees are invited to live somewhere else. Where? Don’t ask.¹⁸

One proposal to promote affordable housing in Connecticut was to eliminate “character of the district” as a proper basis for zoning under the state’s enabling statute. “Character of the district” has been a rationale to support zoning that is exclusionary. Typical of the opposition to this reform was this from a resident of Fairfield, Connecticut, with an average home value of \$662,000¹⁹ and an African American population of 2.1 percent²⁰:

Today, considering “character of the district” in land use decisions continues to be fundamental as towns modify their plans and zoning regulations. By eliminating this language, our zoning boards will no longer be allowed to consider the existing built environment and the

¹⁷ *Sen. Hwang Offers Amendments and Passionate Senate Debate to Preserve Local Zoning, Land Use and Affordable Housing “Home Rule” Decision-Making*, Conn. Senate Republicans. Comm. (May 28, 2021), <https://ctsenaterepublicans.com/2021/05/sen-hwang-offers-amendments-and-passionate-senate-debate-to-preserve-local-zoning-land-use-and-affordable-housing-home-rule-decision-making/>.

¹⁸ Bill Collins, *Another Scheme for Affordable Housing*, CT. MIRROR (Jan. 10, 2020), <https://ctmirror.org/category/ct-viewpoints/another-scheme-for-affordable-housing/>.

¹⁹ <https://www.zillow.com/fairfield-ct/home-values/>.

²⁰ <https://www.census.gov/quickfacts/fairfieldtownfairfieldcountyconnecticut>

“character of the district” when they render decisions. This won’t be good for our communities.²¹

The state legislature, in the end, did adopt the amendment.

Professor David Schleicher of Yale Law School has written a scathing critique of the National League of Cities’ proposed new Model Constitutional Home Rule Article, which would strengthen the ability of local governments to fend off efforts by the state to create affordable housing.²² His critique is also to be published in a forthcoming issue of the Ohio State Law Journal and as a forthcoming Yale Law School Public Law Research Paper. In it, he lays bare the ways in which the Home Rule myth has been used to perpetuate exclusion:

Through the 1970s or 1980s, the central political challenge to zoning was that it was economically exclusive at the level of the individual town. Rich suburbs used zoning to reduce construction and to ensure high per capita property values, keeping outsiders from accessing the high-quality services paid for with taxes on those high per capita property values. There were well-known legal and political challenges to exclusionary zoning in the suburbs, from the Mt. Laurel cases to the Fair Housing Act’s requirement that federal agencies administer programs in order to “affirmatively further fair housing.” Well-known legal scholar Charles Haar famously argued that there should be a “constitutional right to live in the suburbs.”

But no one thought zoning had effects at the regional level. Big cities, a few pro-growth suburbs and exurban areas allowed for enough construction of new housing such that people could be housed and access regional job markets.

But, starting in the 1970s and 1980s, this changed. As demand to live in them increased, big cities in our richest and most innovative metropolitan areas became less hospitable to growth, and sprawl hit some natural limits (and the few pro-growth suburbs changed their tune). Each town and city excluded new development and, in so doing, created limits on growth at the metropolitan level. When

²¹ Alexis Harrison, *Zoning Reform Must Consider the Character of Each Town*, CT. MIRROR (Dec. 17, 2020),

<https://ctmirror.org/category/ct-viewpoints/zoning-reform-must-consider-the-character-of-each-town/>.

²² David Schleicher, *Constitutional Law for NIMBYs: A Review of “Principles of Home Rule for the 21st Century” by the National League of Cities*, SSRN (March 14, 2020), <https://ssrn.com/abstract=3554119>.

paired with strong demand, zoning restrictions started to drive up prices at the regional level in places like San Francisco and New York. This process has even stalled national economic convergence. In the hundred or so years before the 1980s, the poorest and richest states were getting closer together in per capita economic performance, as capital flowed to poor states and workers moved to richer ones. But, among strictly zoned states, this process slowed in the 1980s and has now stopped completely.²³

To illustrate how bad this can get, here is a resolution by a small-town land use agency, with final legislative authority as to zoning, holding up Home Rule as a rampart, a veritable Hadrian's Wall that should stop the state from messing with their local control:

A RESOLUTION IN SUPPORT OF "HOME RULE" IN MUNICIPAL ZONING DECISION MAKING

WHEREAS Connecticut's towns and cities successfully use local zoning and planning processes to balance private property rights, the community's interests, demands on infrastructure, housing needs, and economic growth; and

WHEREAS local control and decision making empowers the residents and taxpayers of each town and city to carefully tailor zoning policies that reflect its unique geography, economy, and housing market; and

WHEREAS localized decision making ensures the greatest level of accountability while allowing affected community members the greatest level of input and the platform through a public hearing to provide specific, relevant information on potential impacts that only they would have knowledge of; and

WHEREAS local control and local input enable neighbors and the local community to provide beneficial suggestions, identify errors and maximize community buy-in on zoning proposals; and

WHEREAS proposals have been introduced in the General Assembly to strip local planning and zoning processes from towns and cities; and

WHEREAS proposals have been introduced in the General Assembly to allow BY RIGHT market value multi-family

²³ *Id.* [citations omitted].

development that will not generate any new affordable housing units; and

WHEREAS proposals have been introduced in the General Assembly to allow outside Housing Authorities within 15 miles radius to develop affordable housing projects within our town; and

WHEREAS BY RIGHT multi-family development can lead to exponential market value overbuilding and can cause adverse impacts to town infrastructure; and

WHEREAS BY RIGHT development gives outsized rights to builders over all other property owners and prevents local Planning and Zoning Commissions from identifying the potential impacts of their project and imposing conditions upon a developer to address those direct impacts; and

WHEREAS, eliminating public hearings and community input on zoning matters would have unintended consequences such as increased infrastructure costs, increased local property taxes, and reduced home and business values which will be borne by the town residents; and

WHEREAS each town and city already have the choice to modify or abolish its zoning ordinances if the elected town or city government decides it best serves the community's interests; and

NOW BE IT RESOLVED the Planning and Zoning Commission of the Town of Winchester opposes State Mandated one size fits all Zoning Legislation and the ability of any outside housing authority to have jurisdiction on our town's Affordable Housing plan and any similar legislation that would further overrule, remove, or diminish local control and decision making related to planning and zoning or affordable housing from the Town of Winchester; and

BE IT FURTHER RESOLVED that a copy of this resolution shall be sent to all State Representatives and State Senators representing this town, to all members of the State Legislature's Planning and Development, Finance, and Housing Committees, and to all legislators sponsoring bills that remove local control of planning and zoning and affordable housing.²⁴

²⁴ Winchester, Conn. Planning and Zoning Commission Ordinance (Mar. 8, 2021), This resolution was unanimously approved at the Town of Winchester Planning and Zoning Commission March

What To Do?

The doctrinal chaos of Home Rule, spread along that continuum of the Dillon Rule and the Cooley Doctrine, and rendered ambiguous in many places by the common law interpreting state constitutions and statutes, demands that states reform Home Rule, at least as to local land use regulation, especially for affordable housing. The plain fact is that many state and local governments simply do not know the limits of their authority and, consequently, almost comically, Home Rule is held up as both a sword and a shield. Mostly, when the locals invoke Home Rule, they do so with little or no basis in the law. And the states are wary about how far they can go. When they do attempt to promote affordable housing, they may lose, as Ohio did in *City of Canton v. State*²⁵ where the court rejected the state's attempt to promote affordable housing with mobile, manufactured housing because it could not meet the four-part test as a general law:

To constitute a general law for purposes of home-rule analysis, a statute must (1) be part of a statewide and comprehensive legislative enactment, (2) apply to all parts of the state alike and operate uniformly throughout the state, (3) set forth police, sanitary, or similar regulations, rather than purport only to grant or limit legislative power of a municipal corporation to set forth police, sanitary, or similar regulations, and (4) prescribe a rule of conduct upon citizens generally.

Perhaps of greater concern is, as Professor Schleicher warns us, the potential for back peddling from where we are now to a more Cooley-esque position where local governments are given greater, unbridled authority, at the very time the needs of affordable housing dictate statewide and substate regional mandates.

Reform of Home Rule that makes clear the state may take back some of its authority might include prohibiting certain local regulations that hinder affordable housing development. California did that with accessory dwelling units, essentially requiring local governments to allow them.

In 2021, the Governor of California signed into law Senate Bill 9 which, among other things, allows lot splits in many circumstances to create opportunities for ownership and the building of generational wealth.²⁶ In the late 1970's, the Connecticut state legislature did something similar, but more targeted, with an

8, 2021, regular meeting (by George Closson, Craig Sanden, Jerry Martinez, Peter Marchand, and Willard Platt).

²⁵ *City of Canton v. State*, 95 Ohio St. 3d 149, 766 N.E.2d 963, 2002 Ohio 2005 (2002).

²⁶ https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB9

amendment to the enabling statute that took away the right of local governments to zone out certain types of group homes of six or fewer persons when the state legislature found the exclusion intolerable:

Regulation of community residences for persons with intellectual disability, child-care residential facilities, community residences for persons receiving mental health or addiction services and hospice facilities. (a) No zoning regulation shall treat the following in a manner different from any single family residence: (1) Any community residence that houses six or fewer persons with intellectual disability and necessary staff persons and that is licensed under the provisions of section 17a-227.²⁷

Call it “creeping incrementalism,” if you will, but creeping may be better than standing still.

Reform might also be had through education, helping people understand the extent of the problem through analysis, outreach, and graphics. Desegregate Connecticut, a nonprofit advocacy organization that promoted legislative reforms during the 2021 session in Connecticut, has done a remarkably great job in identifying the extensive exclusionary zoning in the state. It is a model for what others can do.²⁸

Figures 3 and 4 are two illustrations from the town where I live, the first with land zoned for single-family use (everything but the light gray and green areas, which are public lands), and second with the areas zoned for four-family and more multi-family uses (only the two dark areas):

²⁷ Conn. Gen. Stat. § 8-3e (effective Oct. 1, 2016).

²⁸ Desegregate Conn., *Connecticut Zoning Atlas*, <https://www.desegregatect.org/atlas> (last visited November 27, 2021). See Sara C. Bronin, *Zoning by a Thousand Cuts*, SSRN (Feb. 24, 2021), <https://ssrn.com/abstract=3792544> or <http://dx.doi.org/10.2139/ssrn.3792544>.

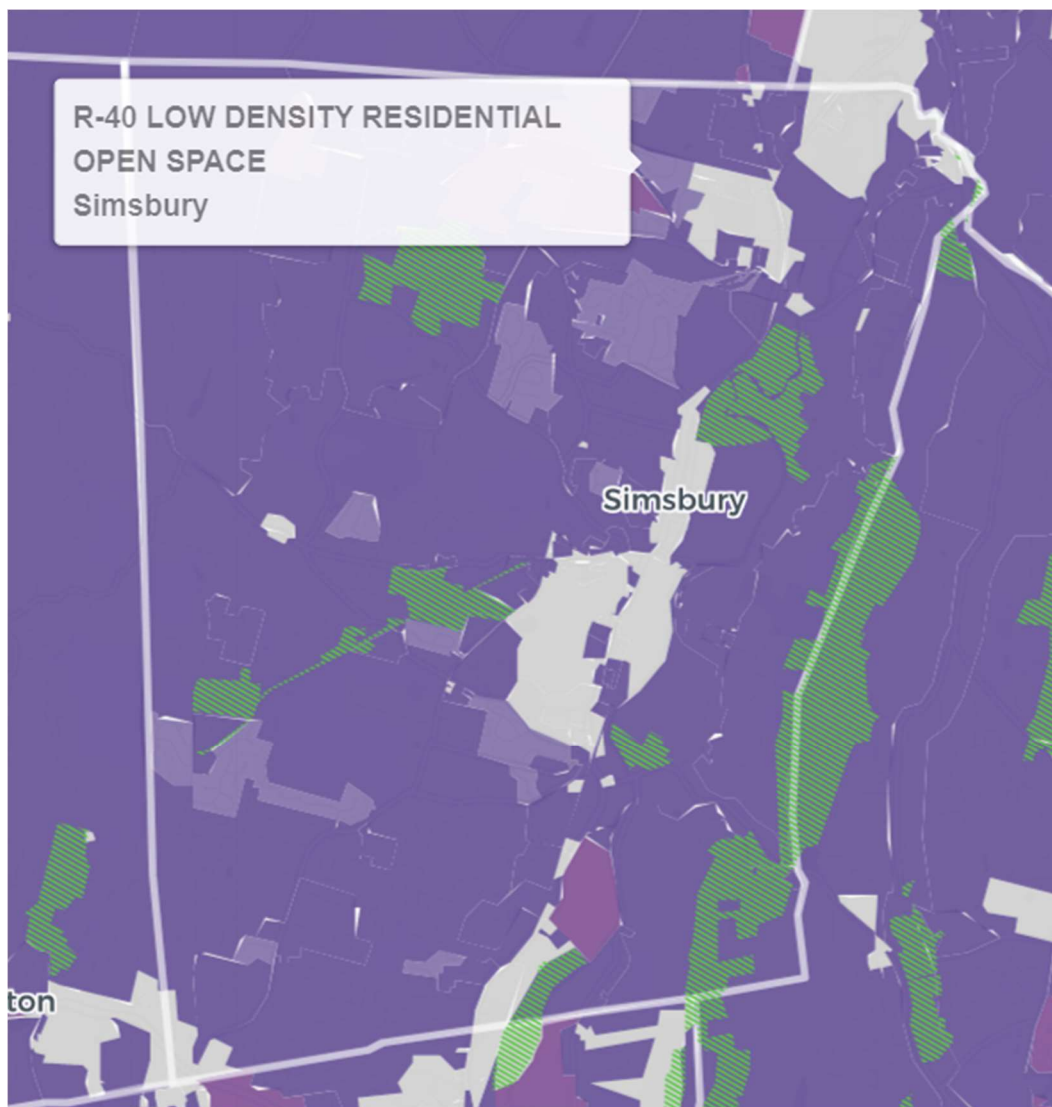


Figure 3. R-40 is single-family zoning for lots of 40,000 square feet and larger
Source: DesegregateCT, Connecticut Zoning Atlas, desegregatect.org/atlas (last accessed Dec. 30, 2021). Used with permission.

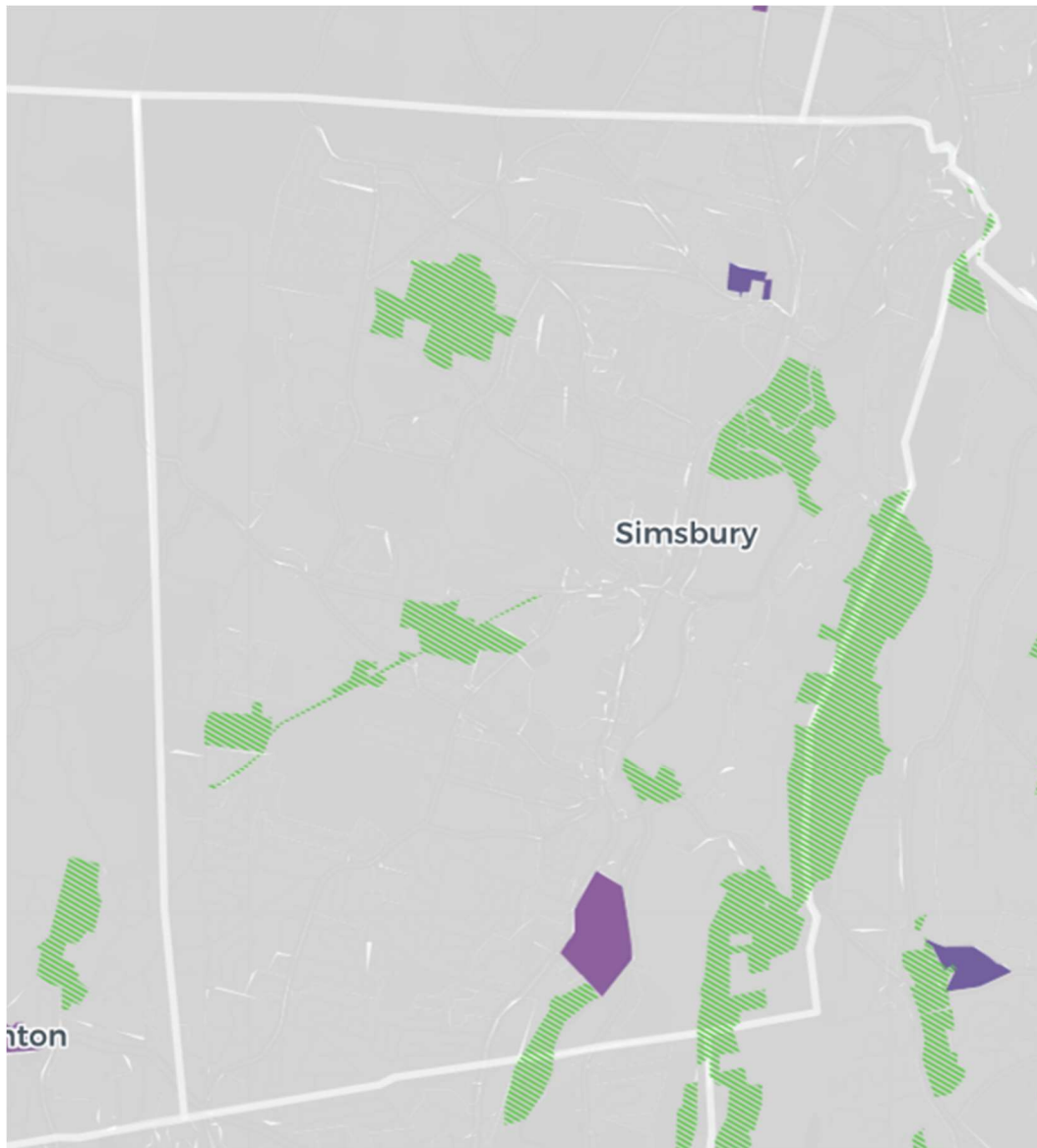


Figure 4

The implications of picture are easy to see as it is the epitome of sprawl with one acre lots mostly in excess of local market demand

Source: DesegregateCT, Connecticut Zoning Atlas, desegregatect.org/atlas (last accessed Dec. 30, 2021). Used with permission.

Education also includes training the public decision-makers. Some states are especially effective in that. North Carolina is one that comes to mind. The legislation adopted this year in Connecticut includes a provision mandating training land-use commissioners.

2. LIMITATIONS OF THE FAIR HOUSING ACT

There is a little-known provision in the Fair Housing Act, commonly known as the “Mrs. Murphy Exemption,” which precludes enforcement to overcome discrimination in dwellings intended to be occupied by four families or fewer, so long as the property owner lives there:

Nothing in section 3604 of this title ...shall apply to ...rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence.²⁹

The Mrs. Murphy Exemption was a necessary compromise to get the legislation through in 1968. It seems anachronistic today.

There is another exemption for the sale of single-family homes if the owner does not own more than three, limited to one sale in every 24 months for the homes in which the owner does not live.³⁰

A state may expand or contract the federal exemption under certain circumstances. Here is an example from Oregon:

Discrimination in selling, renting or leasing real property prohibited.
(8) The provisions of subsection (2)(a) to (d) and (f) of this section that prohibit actions based upon sex, sexual orientation or familial status do not apply to the renting of space within a single-family residence if the owner actually maintains and occupies the residence as the owner’s primary residence and all occupants share some common space within the residence.³¹

Overcoming the Exemption

Nothing says you cannot have state and local protections that go beyond the federal, including taking the wind out of the sails of the exemption. Some states

²⁹ 42 U.S.C. §3603(b)(2).

³⁰ *Id.* §3603(b)(1).

³¹ Or. Rev. Stat. § 659A. 421.

have limited or eliminated the exceptions.³² Local governments can and should remove their Mrs. Murphy Exemption, if they have them in local fair housing codes. They need not wait for the state to act. In 2019, the City of Shaker Heights, Ohio removed its Mrs. Murphy Exemption.³³

The states have an important role to play here. Connecticut this session was the first state to include the requirement to “affirmatively further fair housing” in its zoning enabling statute.

(b) Zoning regulations adopted pursuant to subsection (a) of this section shall:

... (2) Be designed to...

(J) affirmatively further the purposes of the federal Fair Housing Act, 42 USC 3601 et seq., as amended from time to time.³⁴

The Policy Surveillance Program, A Law Atlas Project at the Center for Public Health Law Research at Temple University Beasley School of Law, has an interactive website where you can see what every state has as to fair housing protections.³⁵

Yes, we need federal action to amend the Fair Housing Act to get rid of the Mrs. Murphy Exemption, and yes, we need state action to adopt fair housing laws that encourage affordable housing, but every big and small local government can

³² A list of parallel state exemption laws has been compiled by Scott Badami of Fox Rothschild LLP. Scott M. Badami, *United States: The FHA’s “Mrs. Murphy Exemption” – A 50 State Guide*, MONDAQ (Apr. 23, 2013), <https://www.mondaq.com/unitedstates/real-estate/235406/the-fhas-mrs-murphy-exemption--a-50-state-guide>.

³³ Codified Ordinance of the City of Shaker Heights, Ohio Ordinance 19-49, § 515 (passed July 22, 2019).

³⁴ Substitute H.B. 6107, Conn. Pub. Act. No. 21-29, AN ACT CONCERNING THE ZONING ENABLING ACT, ACCESSORY APARTMENTS, TRAINING FOR CERTAIN LAND USE OFFICIALS, MUNICIPAL AFFORDABLE HOUSING PLANS AND A COMMISSION ON CONNECTICUT’S DEVELOPMENT AND FUTURE. <https://legiscan.com/CT/text/HB06107/2021>.

³⁵ See The Policy Surveillance Program, *State Fair Housing Protections*, [https://lawatlas.org/datasets/state-fair-housing-protections-1498143743#:~:text=The%20federal%20Fair%20Housing%20Act,%2C%20familial%20status%2C%20and%20disability](https://lawatlas.org/datasets/state-fair-housing-protections-1498143743#:~:text=The%20federal%20Fair%20Housing%20Act,%2C%20familial%20status%2C%20and%20disability.). (last updated Aug. 1, 2019).

act. Eugene, Oregon, has done just that in adopting an action-forcing analysis of fair housing choice.³⁶

The latest development in promoting housing equity through impact analysis is from New York City where the City Council on June 17, 2021, adopted a local law requiring that developers assess the impacts on racial equity of their proposals, including stating “how the proposed project relates to the goals and strategies to affirmatively further fair housing and promote equitable access to opportunity identified within the city’s fair housing plan...” The law amends the Uniform Land Use Review Procedure and is described on the Council’s website:

This bill would require an online citywide equitable development data tool with citywide, borough wide, and where statistically reliable data is available, neighborhood level and community district level data. Data would be provided for six specific categories, and be disaggregated by race and ethnicity, where available. Racial equity reports on housing and opportunity would be required for certain land use applications, using data from the equitable development data tool. The substance of racial equity reports would vary by application type, but all would include a statement of how the proposed project relates to the goals and strategies to affirmatively further fair housing and promote equitable access to opportunity. Residential projects would state the expected rents for market rate and affordable units and the incomes needed to afford them without incurring housing cost burden. The equitable development data tool would provide the race/ethnicity for such households.³⁷

³⁶ *Eugene Analysis of Impediments to Fair Housing Choice 2020-2024*, Eugene-Or. Gov., <https://www.eugene-or.gov/DocumentCenter/View/55253/Eugene-Analysis-of-Impediments-Summary-4-20-2020-> (last visited November 27, 2021).

³⁷ The legislation is available at <https://tinyurl.com/NYCequity>.

Eugene Analysis of Impediments to Fair Housing Choice 2020-2024

Impediment	Strategies				
Lack of Affordable Housing	<p>The City recognizes the impact of high housing costs on residents, working on several initiatives expanding affordable housing stock throughout the City and is taking multiple actions including creation of the Affordable Housing Trust Fund and retooling the ADU policy to increase development.</p> <p>The City should continue to monitor and promote these and other activities that support development of additional affordable housing options. Continue to allocate and further leverage Federal grants to preserve affordable housing.</p>				
Community Education	<table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="background-color: #4CAF50; color: white;">Resident Education</th> <th style="background-color: #4CAF50; color: white;">Provider Education</th> </tr> </thead> <tbody> <tr> <td>Both the <i>Renters Experience Survey</i> and the survey conducted for the development of the AI indicate that many residents are not aware of the fair housing protections provided to them. The City should continue to partner with the Fair Housing Council of Oregon (FHCO) in facilitating trainings and workshops marketed to residents, which provide education on fair housing issues.</td> <td>Service providers that directly interact with any individual from a protected class (to include low-income in this instance) should be knowledgeable on fair housing policies that impact the communities they serve. Providers need not deeply understand fair housing regulation but should be able to facilitate the process with a client or community they believe to be impacted.</td> </tr> </tbody> </table>	Resident Education	Provider Education	Both the <i>Renters Experience Survey</i> and the survey conducted for the development of the AI indicate that many residents are not aware of the fair housing protections provided to them. The City should continue to partner with the Fair Housing Council of Oregon (FHCO) in facilitating trainings and workshops marketed to residents, which provide education on fair housing issues.	Service providers that directly interact with any individual from a protected class (to include low-income in this instance) should be knowledgeable on fair housing policies that impact the communities they serve. Providers need not deeply understand fair housing regulation but should be able to facilitate the process with a client or community they believe to be impacted.
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Landlord Education	Ensure landlords with limited portfolios fully understand their fair housing obligations. The City is encouraged to research feasibility of developing a policy mechanism, such as an annual certification, that would ensure that landlords understand their role. Similarly, the City can help ensure that large property management companies understand their fair housing obligations.				
Discrimination in Renting	Continue to work with FHCO on enforcement of fair housing allegations. Consider supporting FHCO to conduct regular fair housing testing throughout the community; both administrative and audit testing. Administrative testing is a review of a landlord's or property management company's lease agreement terms. Audit testing is having someone from a protected class go through the process of renting a unit with the purpose of identifying potentially problematic procedures.				
Planning, Land Use, and Zoning Practices	Review definition of "family" in the City's Municipal Code related to number of persons living in a single housekeeping unit. The City is encouraged to continue to integrate equity and impact assessments into the policy and planning process; particularly how proposed changes or regulatory efforts will impact protected classes (to include low-income in this instance).				
Lending/Sale Discrimination	The current lending and mortgage data are limited in scope and has small sample sizes of protected classes. The City is encouraged to consider outreach to local banks and lending institutions to review their practices and acquire data that could supplement the data within the AI. Data within the AI suggests Hispanic populations originate loans at a lesser rate than do White households. The State of Oregon has established the Task Force on Addressing Racial Disparities in Home Ownership, the City is encouraged to consider dedicating staff time/resources to identify a point of contact for this task force, staying abreast of key findings and associated actions/strategies.				

Figure 5
Eugene, Oregon analysis of impediment to fair housing
Source: City of Eugene, Oregon

3. PRIVATE COVENANTS

Over seven million people in the United States live in gated communities. Many others, perhaps as many as 40% of them, live in homes where there are restrictive covenants, conditions, and restrictions of various types, some of which preclude the development of affordable housing. Covenants are now found in 61% of all new dwellings according to the Community Associations Institute.

Professor Robert C. Ellickson of Yale Law School recently published an article on the subject, with suggestions on how “stale” covenants might be addressed.³⁸

Of course, racial covenants are unenforceable,³⁹ but they remain in the chain of title. Many people, understandably, find it disturbing to see the covenant in a title report. They do not want it to be part of the record of their ownership of their property. This is something states can act on and some have. There is a recent decision in the Court of Appeals of the State of Washington regarding the state law on removing certain provisions from deeds.⁴⁰

The law was enacted over 30 years ago but has been subject to little interpretation. In this decision the court held that the offending language did not have to be “physically and permanently removed from existing records,” but that it would be sufficient to declare the “language stricken, thereby removing the language as a matter of law.” The effect of this interpretation of the particular statute is to eliminate the offending language as a matter of law so that does not need to be perpetuated in recitations of the title, but the original, physical documents remain unaltered. As the court explained its reasoning:

By its plain terms, RCW 49.60.227 provides a method for repudiating racially restrictive covenants while still preserving the historical record and integrity of a property’s chain of title. This balance makes good sense. Real estate documents with racially restrictive provisions are “offensive, morally reprehensible, and repugnant.” *Mason v. Adams County Recorder*, 901 F.3d 753, 757 (6th Cir. 2018). But such documents are part of “our living history.” *Id.* A policy of whitewashing public records and erasing historical evidence of racism would be dangerous. It would risk forgetting and ultimately denying the ugly truths of racism and racist housing practices. Such an outcome cannot be squared with the antidiscrimination purposes of Washington’s Law Against Discrimination. See RCW 49.60.010.

If the objective of the statute and of this interpretation by the court is to preserve for future generations an accurate record of the shameful history and how people later worked to right the wrong, then this is good approach.

Still, covenants generally are widely respected. The Boston Zoning Code, for example, provides:

³⁸ Robert C. Ellickson, *Stale Real Estate Covenants*, Yale Law & Economics Research Paper, SSRN (Aug. 21, 2020), <https://ssrn.com/abstract=3678927> or <http://dx.doi.org/10.2139/ssrn.3678927>.

³⁹ See *Shelley v. Kraemer*, 334 U.S. 1, 23, 68 S. Ct. 836, 92 L. Ed. 1161 (1948).

⁴⁰ “See Laws of 1987, ch. 56, §§ 1-2, which provides a method for property owners and others to “petition to strike racially discriminatory provisions from real property contracts.” *May v. Spokane Cty.*, No. 37179-4-III (Wash. Ct. App. Feb. 23, 2021), https://www.courts.wa.gov/opinions/pdf/371794_pub.pdf.

In their interpretation and application, the provisions of this code shall not be construed to repeal, abrogate, annul or in any way impair or interfere with the provisions of other regulations, laws or ordinances except Chapter 488 of the Acts of 1924, as amended, which is repealed on the effective date of this code, or with provisions of private restrictions placed upon property by covenant, deed or other private agreement, or with provisions of restrictive covenants running with the land to which the City is a party. Where this code imposes a greater restriction than is imposed or required by any of the aforesaid provisions, the provisions of this code shall prevail.⁴¹

Another example of a state statute creating a procedure for redacting covenants is in Delaware:

§ 9628. Redaction of unlawful restrictive covenant.

(a) An owner of real property that is subject to an instrument that contains a provision that is in violation of § 9605(b) of this title, including a governing document of a common interest community, may request that the recorder for the county in which the instrument is recorded redact and strike the provision from the instrument.

(b)(1) Before granting a request made under subsection (a) of this section, a recorder must submit the request and the instrument at issue to the county attorney.

a. The county attorney shall determine whether the instrument contains an unlawful restrictive covenant in violation of § 9605(b) of this title.

b. The county attorney shall inform the recorder of the county attorney's decision within 90 days of receipt of the request and the instrument from the recorder, unless extraordinary circumstances apply, then the county attorney has 60 additional days to inform the recorder of the county attorney's decision.

c. The recorder shall deny a request made under subsection (a) of this section if the county attorney determines that the instrument does not contain an unlawful restrictive covenant in violation of § 9605(b) of this title.

(2) The county attorney may compile a list of phrases identified as unlawful restrictive covenants in violation of § 9605(b) of this title. Notwithstanding paragraph (b)(1) of this section, a recorder may grant a request made under subsection (a) of this section without further review by the county attorney if the request is in compliance with the list compiled by the county attorney.

(c) A recorder may prescribe the form and required contents of a request under subsection (a) of this section, but the request must include at least the following information:

(1) The legal description of the property subject to the provision in violation of § 9605(b) of this title.

⁴¹ Boston, Mass. Zoning Code § 1-3,
https://library.municode.com/ma/boston/codes/redevelopment_authority?nodeId=ART1TIPUSC.

- (2) The type of instrument that is subject to the provision in violation of § 9605(b) of this title and the instrument's book and page number or instrument number.
- (3) A clear description of the provision claimed to be in violation of § 9605(b) of this title.
- (d) (1) This section applies to an owner of real property that is part of a common interest community under Chapter 81 of Title 25.
- (2) Notwithstanding any other law or contractual provision to the contrary, an owner of real property that is part of a common interest community under Chapter 81 of Title 25 may make a request under subsection (a) of this section that the recorder for the county in which the instrument is recorded redact and strike a provision that is in violation of § 9605(b) of this title from all instruments affecting real property that is part of the common interest community.
- (e) (1) Upon request for inspection, copying, or any other public disclosure of an instrument that has had an unlawful restrictive covenant in violation of § 9605(b) of this title redacted from it under this section, a recorder shall make available only the redacted version of that instrument.
- (2) A recorder may disclose the unredacted version of an instrument that has had an unlawful restrictive covenant in violation of § 9605(b) of this title redacted from it under this section only in response to a subpoena or order of a court of competent jurisdiction.⁴²

Note the involvement of the county attorney.

An important decision illustrating the difficulties in removing covenants that roadblock affordable housing is *Viking Properties, Inc. v. Holm*.⁴³ There the court severed a racial covenant and declared it void. That was easy. But then it had to deal with a covenant limiting development to one dwelling on one-half acre or more. Because it was able to sever the racial restriction, the court then turned to the density restriction. Although no affordable housing claim was made, the Growth Management Act was alleged to mandate densification in the developed areas. The court rejected the argument and firmly held that the density restrictions did not violate public policy:

Quite separate from the racial restriction, the last two sentences provide that only one dwelling may be built on each one-half acre of land. Not only is this the logical, common-sense construction of the covenant's language, it is also the construction that best guards "the homeowners' collective interests."⁴⁴ It has been so understood for over 50 years.⁴⁵

The instant case is an appropriate vehicle to illustrate the effect of public policy. In contrast with the racial restriction, it cannot be maintained that the density

⁴² Del. Code Ann. tit. 9, § 9628, <https://delcode.delaware.gov/title9/c096/index.html>. Section 9628 provides:

⁴³ *Viking Properties, Inc. v. Holm*, 118 P.3d 322, 155 Wash. 2d 112 (2005).

⁴⁴ Riss, 131 Wash.2d at 624, 934 P.2d 669 (quoting Lakes at Mercer Island Homeowners Ass'n, 61 Wash.App. at 181, 810 P.2d 27).

⁴⁵ *Id.* at 328.

limitation has a "tendency to evil," nor has the legislature explicitly expressed an intent to override contractual property rights, let alone invalidate those that predate the GMA. The legislature has expressly determined that racial restrictions like that contained in the instant covenant are "void." RCW 49.60.224. The GMA neither states nor implies such an effect with respect to the density limitation.⁴⁶

Third, although the City's zoning regulations call for a minimum density of four dwelling units per acre, nothing in the regulations compels property owners to develop their parcels to any particular minimum density. Indeed, assuming without deciding that the Homeowners' and Viking's lots constitute nonconformities under the zoning regulations, the regulations provide that they may be maintained indefinitely. See SMC 20.10.040(B), SMC 20.30.280. Moreover, the City has correctly conceded that it "has no authority" to enforce or invalidate restrictive covenants, CP at 201, and explicitly accounted for the existence of such covenants in its comprehensive plan by forecasting that areas subject to covenants would experience less future growth than other areas within the City. Finally, the city's planning manager, on advice of the city attorney, determined that the covenant was not in irremediable conflict with city policy, and that the City "would process building permits on a lot with area that exceeded the minimum densities under the code for the land use district as a nonconforming lot." CP at 310. Accordingly, the density limitation does not violate public policy.⁴⁷

In 2021, the Governor of California signed into law legislation that enables setting aside of certain private covenants that preclude affordable housing developments:

This bill would make any recorded covenants, conditions, restrictions, or limits on the use of private or publicly owned land contained in any deed, contract, security instrument, or other instrument affecting the transfer or sale that restricts the number, size, or location of the residences that may be built on the property, or that restricts the number of persons or families who may reside on the property, unenforceable against the owner of an affordable housing development, as defined.⁴⁸

If someone pays a premium for property in Phase 1 of a development that is exclusive, restricted, and gated, and then the developer sells off the proposed later three phases and they are stripped of the covenants as to density and house size, resulting in a significant loss of value, is that a compensable taking? Perhaps this is a variation of *Bormann v. Board of Supervisors in and for Kossuth County*⁴⁹ in which the Iowa Supreme Court invalidated a right-to-farm law because by eliminating the right of those living close to farms to bring nuisance actions. It imposed a kind of easement on their property, which could only be done if just compensation were paid. That is something to ponder.

⁴⁶ *Id.* at 330.

⁴⁷ *Id.* at 331.

⁴⁸ AB 721, "[a]n act to add Section 714.6 to the Civil Code, relating to real property." A.B. 721, Reg., Sess. (Cal. 2021-22), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB721

⁴⁹ *Bormann v. Board of Supervisors in and for Kossuth County*, 584 N.W.2d 309 (Iowa 1998).

CONCLUSION

There is so much we can do and so much that must be done to promote affordable housing. We will not get where we need to be if we do not remove unnecessary roadblocks. A careful review of state constitutional and statutory law with the view to amending them as necessary to bring order to the chaos that currently exists as to Home Rule is critical. Eliminating unacceptable exemptions from federal, state, and local fair housing laws will advance the cause of diversity, inclusion, and social, economic, and racial equity. Eliminating private covenants and other restrictions that create and perpetuate social silos is important. People have the right to manage their private property in concert with others through private restrictions. At the same time, we have the legal and moral responsibility to do what we can to promote development of more affordable housing. It is, and will continue to be, a difficult balancing problem and to some extent a zero-sum game. In the context of controls on the use of land we sometimes use the theory of the “average reciprocity of advantage,” wherein we may suffer some disadvantage by subjecting ourselves to the common interest but at the same time when working together we get the reciprocal advantage of a better community. That applies here as to removing the roadblocks.