

**DANIEL R. MANDELKER, THE TRAGEDY OF LOW-DENSITY, LARGE-LOT ZONING
60 Real Prop. Tr. & Est. L.J. 1 (2025)**

Synopsis: Low-density, large-lot residential zoning of more than three acres perpetuates economic and racial inequality, constrains housing supply and housing markets, and makes housing costs unaffordable. It covers much of suburban America, contributing to a litany of harms in our housing system, but it has survived judicial challenges with few exceptions. This Article considers the judicial treatment of large-lot residential zoning and suggests how it can be reformed.

I. The Legality of Large-Lot Zoning and Its Adverse Social Impacts	2
A. Definition and Extent of Large-Lot Zoning	2
B. Legal Basis and Treatment of Large-Lot Zoning	7
C. The Judicial Response to Large-Lot Zoning	9
D. Social and Racial Segregation	12
E. Character of the Area	19
II. Supply and Price Effects	24
A. Constraints on Supply and Price	24
B. The Effect of Increasing Density on Increasing Housing Supply	29
C. Justifications for Large-Lot Zoning.	30
1. Managing Growth	30
2. Onsite Wells and Septic Systems	31
3. Environmental and Ecological Preservation	34
4. Agricultural Zoning	37
III. The Path to Reform	39
A. Judicial Reform	39
B. Statutory Reform	44
IV. Conclusion	45

THE TRAGEDY OF LOW-DENSITY, LARGE-LOT ZONING, 60 Real Prop. Tr. & Est....

***2** A common zoning feature restriction in the United States perpetuates economic and racial inequality, constrains housing supply, and makes housing costs unaffordable. Low-density, large-lot residential zoning (“Large-Lot Zoning”) does all this, and yet it remains ubiquitous across the country. Because Large-Lot Zoning contributes to a litany of harms in our housing system and because its costs outweigh its plausible benefits, the question is: why does it persist and how can we rid ourselves of it?

Although exclusionary zoning recently has come under fire, scant attention has been paid to Large-Lot Zoning and the damage it does to housing markets. This Article zeroes in on the tragedy of Large-Lot Zoning in the American suburbs and recommends needed reform.

Part I discusses the legal and social origins of Large-Lot Zoning and its many adverse social impacts, intended and inadvertent. Part II explores the economic and environmental impacts of Large-Lot Zoning as well as its assumed justifications. Part III considers the path to reform.

I. The Legality of Large-Lot Zoning and Its Adverse Social Impacts

A. Definition and Extent of Large-Lot Zoning

“Exclusionary zoning is traditionally discussed in terms of minimum lot requirements, crafted to create economically homogenous suburban communities.”¹ Minimum lot requirements have been called the dominant form of residential exclusion,² and they attract local political support as an effective way to stop housing development.³ Large-Lot Zoning is low- ***3** density residential zoning. There is no consensus on the density at which low-density residential zoning becomes Large-Lot Zoning,⁴ but there is support for one-acre residential density as the breakpoint after which Large-Lot Zoning begins.⁵

Large-Lot Zoning is a suburban exclusionary zoning problem.⁶ The problem is made worse because two-thirds of the population lives in the suburbs, the share of the population living in the suburbs increased significantly in recent decades,⁷ and a majority of the Black, Hispanic, and Asian population lives in the suburbs.⁸ The average Black and Hispanic households earn about half as much as the average white household and ***4** own only about 15 to 20% as much net wealth.⁹ Lower incomes and lower net wealth give exclusionary Large-Lot Zoning a more negative effect on Black and Hispanic housing availability than it does on white housing availability.¹⁰

Limiting the minimum density of residential lots defines Large-Lot Zoning, but the acceptable size of minimum-density lots has received little judicial attention. In an early Massachusetts case, without supporting evidence, the court relied on the dubious benefits of density minimums to uphold a one-acre minimum lot size.¹¹ These benefits included freedom ***5** from noise and traffic, a reduction in danger from fire from outside sources, a better opportunity for rest and relaxation, and greater facilities for children to play on the premises and not in the streets. In a later Massachusetts case, the court held that “the law of diminishing returns will set in at some point,” and rejected a 2.35-acre minimum lot size.¹² A Pennsylvania court¹³ similarly held that a point comes when the size of lots “ceases to be a concern” because they become simply a matter of private preference, that this point varies with the land and the circumstances of each case, and that a four-acre lot requirement was invalid.¹⁴ The cases do not explain when this point comes.

Large-Lot Zoning covers large areas and reinforces the exclusionary and racially motivated purposes of exclusive single-family zoning.¹⁵ A survey of over 29,000 municipalities across the United States found that 39% had extremely high minimum lot areas of more than one acre in at ***6** least one district.¹⁶ Neighborhoods with high minimum lot areas accounted “for 40% of the residential land and 16% of existing single-family homes.”¹⁷ Another national survey from 2006 to 2018 found that communities that raised their largest minimum lot size were double those that lowered them.¹⁸ And an extensive national study of land use regulations found that low-density-only municipalities account for 19% of metropolitan land areas.¹⁹

THE TRAGEDY OF LOW-DENSITY, LARGE-LOT ZONING, 60 Real Prop. Tr. & Est....

Regions vary.²⁰ Northeastern metropolitan areas are the most restrictive and most likely have Large-Lot Zoning.²¹ A 2023 statewide study of zoning in Connecticut found that Large-Lot Zoning was a dominant presence in zoning districts.²² Eighty-one percent of the state in both *7 residential and nonresidential areas required lots that exceeded 0.92 acres, while 49% of the state required lots that exceeded 1.84 acres for single-family housing.²³

B. Legal Basis and Treatment of Large-Lot Zoning

Statutory authority for zoning is modeled on the facially neutral Standard State Enabling Act proposed by the U.S. Department of Commerce in 1926,²⁴ which many states adopted.²⁵ The Act neither expressly prohibits nor requires exclusionary zoning.²⁶ Rather, it delegates zoning authority to local governments and authorizes them to adopt zoning districts.²⁷ This delegation of zoning authority is broad and unencumbered by criteria for the adoption of zoning ordinances or significant guidance on their scope and content.²⁸ Local governments are thus empowered to adopt zoning ordinances that create adverse social impacts. For example, the 1926 model zoning act allows a municipality to adopt zoning ordinances that create racial segregation.²⁹

Legislative freedom to impose land use restrictions was intentional and may have been racially motivated. Early zoning ordinances that explicitly separated populations by race were declared unconstitutional by the Supreme Court in 1917 in the case of *Buchanan v. Warley*.³⁰ Shortly after the *Buchanan* decision, then-Secretary of Commerce Herbert Hoover *8 appointed an Advisory Committee on Zoning that drafted the Standard State Zoning Enabling Act. Members of the Advisory Committee were outspoken segregationists.³¹ Although the Supreme Court proscribed expressly racial zoning, it did not outlaw zoning that created racially disparate impacts that cemented the geography of segregation. Zoning quickly evolved to include such impacts.

In a leading 1926 U.S. Supreme Court case, *Village of Euclid v. Ambler Realty*,³² the Court upheld exclusive single-family residential zoning on a major thoroughfare in a Cleveland suburb.³³ Racially inspired ordinances in the Cleveland area and elsewhere provided a model for the ordinance,³⁴ and even its draftsman admitted it was arbitrary.³⁵ Justice Sutherland, a conservative Justice,³⁶ applied rational basis judicial review to hold the ordinance constitutional.³⁷ He explained that “the common law of nuisance may be consulted, not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of the power,”³⁸ and he added that “[t]he crux of the more recent zoning legislation,” which was the creation of exclusive residential districts, was the “serious question” in the case.³⁹

*9 In a famous and much-quoted phrase, Justice Sutherland upheld the exclusion of apartments from single-family residential districts. They were a “mere parasite, constructed to take advantage of the open spaces and attractive surroundings created by the residential character of the district.”⁴⁰ They “greatly retarded” and “destroyed” residential areas, interfering “by their height and bulk with the free circulation of air and monopolizing the rays of the sun,” and “come very near to being nuisances.”⁴¹ As Professor Adams-Schoen explains, “*Euclid*’s minimum rationality standard greenlit widespread adoption of the barely veiled racial zoning promoted nationally by prominent zoning advocates and white supremacists.”⁴²

C. The Judicial Response to Large-Lot Zoning

The judicial response to Large-Lot Zoning in the state courts occurs in litigation in which a landowner challenges a Large-Lot Zoning restriction,⁴³ and a deferential standard of judicial review protects Large- *10 Lot Zoning in most courts.⁴⁴ It presumes that a zoning ordinance is constitutional, that the party challenging an ordinance has the burden of showing that the ordinance is not rationally related to a legitimate governmental interest, or that the ordinance is an unreasonable means of advancing that interest. A court must decide that the ordinance attacked is arbitrary and that there is no room for a legitimate difference of opinion concerning its reasonableness.⁴⁵

The Massachusetts court takes the opposite view by shifting the burden to the government by giving it the burden of proof to uphold Large-Lot Zoning.⁴⁶ “A municipality’s reliance on generalities concerning the public benefit of Large-Lot Zoning will not carry the day,” and the government has the burden of coming forward with something tangible to justify its zoning

THE TRAGEDY OF LOW-DENSITY, LARGE-LOT ZONING, 60 Real Prop. Tr. & Est....

restriction.⁴⁷ This decision has the welcome effect of a presumption reversal.

***11** Statutory authority for Large-Lot Zoning is one issue the courts have considered, but they hold that the zoning purposes authorized by state zoning legislation authorize Large-Lot Zoning.⁴⁸ Taking of property is another issue, but the courts do not usually find a taking because a decrease in a landowner's property value and her inability to put a property to its most profitable use is not enough.⁴⁹ Whether Large-Lot Zoning complies ***12** with a municipality's comprehensive plan can create a problem,⁵⁰ but the problem is curable by a plan revision.

The issue most litigated is whether the purposes served by Large-Lot Zoning satisfy constitutional substantive due process.⁵¹ These purposes are vague, judicial consideration is disorganized, and the courts do not provide a logical explanation for why these purposes are selected or why they are relevant. The courts reject Large-Lot Zoning when a municipality does not provide a legitimate or any reason for adopting it.⁵² They have not considered the damaging effects of Large-Lot Zoning on housing markets.

D. Social and Racial Segregation

Large-Lot Zoning aggravates social and racial segregation in the zoning system in which the Large-Lot Zoning is embedded. As one observer explains, "Prior to the mid-20th century, social segregation was a principal and often explicit goal of land use zoning schemes,"⁵³ and is part of an ***13** exclusionary system now that keeps lower-income households from finding adequate housing⁵⁴ by separating multi-family from single-family housing.⁵⁵

Racism is deep-seated. Several cities in the early twentieth century adopted explicit racially exclusionary zoning,⁵⁶ which the Supreme Court ended in 1917 in *Buchanan v. Warley*.⁵⁷ Cities avoided the *Buchanan* decision by adopting class-based zoning motivated by a desire to maintain neighborhood racial demographics that included minimum lot size requirements, the exclusion of multi-family dwellings, and other exclusionary requirements.⁵⁸ A white supremacist structure supported by an accommodating statutory framework dominates land use regulation as "the strict residential use taxonomy and related land use regulations successfully segregated most US cities by race."⁵⁹ "[S]ubstantial levels of neighborhood segregation persist for Black residents and--to a sizable, though lesser extent--for Latino or Hispanic and Asian Americans."⁶⁰

***14** The Saint Louis, Missouri suburbs are an example, where a study found that "[s]egregation was abetted by local zoning."⁶¹ Exclusionary zoning emerged as the dominant pattern by the mid-twentieth century. It ensured "a pattern of predominantly low-density, single-family settlement" through a combination of restrictions including prohibitions on manufactured housing, refusal to zone land for multifamily housing, and area and density standards such as lot size requirements, setbacks, and building size.⁶² Another Saint Louis study found that an inner suburb used zoning and other strategies to eliminate an African-American settlement that predated incorporation.⁶³ Boston is another example of zoning for race, class, and family exclusion.⁶⁴

This historic trend continues. One study found that cities that were whiter than their metropolitan area in 1970 had significantly more restrictive land use regimes in 2006.⁶⁵ Restrictive land use regulations found more support in white neighborhoods.⁶⁶

Minimum lot size causes social segregation. A Wake County, North Carolina study found that minimum lot size sorts households by income ***15** into differently regulated neighborhoods.⁶⁷ A density decrease of one dwelling unit per acre increases average neighborhood income by 4.5%. Lots on average are 19% larger and houses are 7.5% more expensive where residential densities are lower.⁶⁸

Another study of density restrictions in large metropolitan areas found that they increased the average price of units in affluent neighborhoods, which excluded lower-income people by prohibiting high-density, multifamily housing.⁶⁹ Less segregation occurred at higher densities.⁷⁰ Another study found that density restrictions are associated with higher-income ***16** segregation but appear to segregate affluent households, not poor households.⁷¹

Social segregation by income is indefensible. Income diversity is essential in local economies, and segregated concentrations

THE TRAGEDY OF LOW-DENSITY, LARGE-LOT ZONING, 60 Real Prop. Tr. & Est....

of poverty and wealth create unequal access to jobs and schools, unsafe neighborhoods, and negative life outcomes for low-income households.⁷²

Numerous studies find that low residential densities cause racial segregation. One study estimated minimum lot area requirements for over 16,000 municipalities across the United States that covered a universe of urban and suburban communities.⁷³ It found that white households are far more likely to buy homes in neighborhoods with large minimum lot areas.⁷⁴

Another study surveyed 49 metropolitan areas with about 56% of the country's population.⁷⁵ Using density categories from less than four units per acre to 16-30 units per acre,⁷⁶ it found "that restrictive density zoning produces higher housing prices in white areas and limits opportunities for people with modest incomes to leave segregated areas, a perspective in accordance with a great deal of research."⁷⁷ A metropolitan area's relative openness to housing construction, as indicated by residential density, strongly predicted Black segregation and isolation; the greater the allowable density, the lower the level of racial segregation.⁷⁸ Other studies reached similar conclusions.

Racial segregation caused by Large-Lot Zoning can violate the federal Fair Housing Act. The Act provides that "it shall be unlawful to ... make *17 unavailable or deny ... a dwelling to any person because of race, color, religion, sex, ... or national origin."⁷⁹ It does not mention zoning, but the courts hold that racial discrimination by zoning violates the act because it makes housing "unavailable."⁸⁰

In *Texas Department of Housing & Community Affairs. v. Inclusive Communities Project, Inc.*,⁸¹ the Supreme Court held that racially discriminatory impact is enough to violate the federal Fair Housing Act.⁸² *Inclusive Communities* means that Large-Lot Zoning can violate the Fair Housing Act because it has a racially discriminatory impact. Justice Kennedy's remand, however, added dicta that provide defenses to liability.⁸³ "Valid governmental and private priorities," he held, must not be displaced, and defendants in fair housing cases must be able to "state and explain the valid interest served by their policies."⁸⁴ He explained that zoning officials must often make decisions based on an objective and subjective "mix of factors," which are "legitimate concerns," and that the Act includes "[a] robust causality requirement."⁸⁵

A dictum in *Inclusive Communities* indicates that Large-Lot Zoning can violate the Fair Housing Act. The Court said that "unlawful practices include zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient *18 justification. Suits targeting such practices reside at the heartland of disparate-impact liability."⁸⁶ Large-Lot Zoning excludes minorities from certain neighborhoods without sufficient justification.⁸⁷

Courts since *Inclusive Communities* have held that restrictive zoning violates the Fair Housing Act if it disparately affects minorities. The Second Circuit, for example, held that a county's refusal to adopt rezoning for a 300-unit, mixed-income development where several minorities would likely be tenants created a disparate racial impact when the county adopted single-family and town housing zoning as an alternative.⁸⁸ This decision could apply if a municipality⁸⁹ refuses to replace low-density with higher-density zoning.⁹⁰

*19 E. Character of the Area

Character of the area is another factor courts consider. Using character as the basis for upholding Large-Lot Zoning ratifies exclusion when the character of an area consists of low-density zoning that has serious supply and price effects. In one case, a court upheld a five-acre "estate district" for "substantial" people of "more than ample" financial resources. It used as excuses that it covered only 6.7% of a small county expected to grow only 25% in 10 years, and strong affirmative evidence that showed fair and reasonable provision for different kinds of required housing.⁹¹ Not all courts have been as agreeable. In another case a town threatened with rapid development increased minimum lot sizes from one to two acres, motivated by a demand to keep a rural community and keep undesirable businesses out.⁹²

*20 Courts also uphold Large-Lot Zoning for a specific lot when they find that zoning protects the character of the area and

THE TRAGEDY OF LOW-DENSITY, LARGE-LOT ZONING, 60 Real Prop. Tr. & Est....

property values.⁹³ In *Flora Realty & Investment Company v. City of Ladue*,⁹⁴ which is typical, the court blatantly upheld three-acre zoning in an affluent Saint Louis suburb where existing residential development near the zoned property was almost entirely on three acres or more. The court held that three acres were required because “the district cannot maintain its character if sections *21 here and there are developed with smaller lots.”⁹⁵ An intrusion of smaller lots into such an area would materially impair the value of buildings already constructed.⁹⁶

The “character” of an area is not a legitimate reason for Large-Lot Zoning. As a Harvard Law Review article explained: “[C]haracter” is an ambiguous self-defining term that can justify the use of Large-Lot Zoning for illegitimate zoning purposes.⁹⁷ Social or economic stereotypes may subtly and incorrectly influence a community’s self-definition, such as incorrect stereotypes about manufactured housing or the tendency to exaggerate the virtues of suburban life.⁹⁸ Character can also be a pretext for racial discrimination.⁹⁹ Character is a vague and ill-defined term that can justify zoning measures directed at locally unpopular groups or individuals or significantly injure people living outside the municipality.¹⁰⁰ Giving a local majority limitless power to determine the character of a community may produce stifling and oppressive homogeneity.¹⁰¹

*22 Courts also uphold Large-Lot Zoning to protect “rural character,”¹⁰² to protect a “rural residential area,” to “maintain the natural and rural qualities of the land,”¹⁰³ or to protect a “rural atmosphere.”¹⁰⁴ A few courts rejected “rural community” or “rural character.”¹⁰⁵ A stereotype like “rural *23 character” is suspect. As Debra Lyn Bassett clearly explains, “The use of rural stereotypes in law tends to shortchange the review and determination of the facts, the depth and quality of the analysis, and the integrity of the conclusion.”¹⁰⁶

Alternatives exist for preserving rural character. Municipalities can include a “rural element” in their local comprehensive plans, a requirement included in the Washington State Growth Management Act.¹⁰⁷ The Act provides guidance for the rural element.¹⁰⁸ The Act provides, “The rural element shall include measures that apply to rural development and protect the rural character of the area, as established by the county.”¹⁰⁹ The Act also provides that the rural element shall “provide for a variety of rural densities, uses, essential public facilities, and rural governmental services needed to serve the permitted densities and uses.”¹¹⁰

*24 II. Supply and Price Effects

A. Constraints on Supply and Price

All zoning is inherently exclusionary and limits the housing supply.¹¹¹ Supply limitations generally drive prices up.¹¹² Today, the nation faces a severe housing affordability crisis, making it increasingly difficult to justify exclusionary zoning practices and their inflationary effects. A substantial percentage of the population is severely burdened by housing costs, and this burden increased substantially in recent years.¹¹³

Minimum lot size directly impacts the number of housing units that can be built in a given area, reducing the housing supply.¹¹⁴ Large-Lot *25 Zoning therefore raises housing prices.¹¹⁵ A Greater Boston study found that minimum lot size had a robust negative effect on the number of buildings, which means that about 50% fewer building permits during the study period between 1980 and 2002 were associated with each extra acre per lot.¹¹⁶

*26 Large-Lot Zoning not only aggravates the inflationary effects of exclusionary zoning generally, but also causes lower-density development patterns with their harmful side effects. Large-Lot Zoning forces new housing development to expand ever outward, creating low-density sprawl.¹¹⁷ By decreasing the area available for new development, new housing development is forced into neighboring municipalities. Sprawl increases road, utility, and school construction and maintenance costs¹¹⁸ and therefore causes infrastructure costs to increase.¹¹⁹ It also increases air pollution and related health care costs by requiring more motor vehicle travel time.¹²⁰ Courts have not considered the harmful costs of urban sprawl in Large-Lot Zoning cases.

Supply restrictions and low density make housing significantly more expensive.¹²¹ A national study of Large-Lot Zoning found

THE TRAGEDY OF LOW-DENSITY, LARGE-LOT ZONING, 60 Real Prop. Tr. & Est....

that Large-Lot *27 Zoning prices large segments of the population out of housing markets.¹²² Local studies confirm this finding. A Massachusetts study found that minimum lot restrictions have a significant impact economically and statistically and would raise house prices up to 20%, that this impact increases over time, and that intra-town and inter-town spillover effects existed.¹²³

The courts examined supply restrictions when they considered the constitutionality of a single Large-Lot Zoning restriction.¹²⁴ Courts dismissed claims that a failure to provide lower-income housing violated equal protection or statutory requirements¹²⁵ and claimed that Large-Lot *28 Zoning in an area of rural character or a rural and agricultural land was exclusionary.¹²⁶ They did not find Large-Lot Zoning unconstitutional when it did not exclude a reasonable amount of development and when housing needs were met or unaffected.¹²⁷ Other courts found that Large-Lot Zoning was inimical to growth needs in the surrounding region or practically prevented people in low-income brackets from living in the western area of a county.¹²⁸

*29 B. The Effect of Increasing Density on Increasing Housing Supply

Studies find that housing supply increases when density increases.¹²⁹ A counterfactual model of zoning reform in Connecticut halved minimum lot areas statewide and found that this reform increased the housing supply.¹³⁰ A cross-city analysis of actual zoning reforms in 1136 cities in eight U.S. metropolitan regions from 2000 to 2019 that included low-density zoning found that increased housing density produced a statistically significant increase in housing supply as compared to cities that did not increase density.¹³¹ Another study found that easing land use restrictions *30 on a broad scale generally leads to housing supply increases if demand exists.¹³²

Supply increases take time, however, and provide only a fraction of the housing capacity created because other factors also decide what gets built.¹³³ Downward market filtering can help with this problem. Supply increases at the medium or higher end of the market over the longer run should increase supply in lower-priced markets because less valuable older units will find their way down to lower-priced submarkets.¹³⁴

C. Justifications for Large-Lot Zoning

1. *Managing Growth*

Courts have given limited approval to Large-Lot Zoning for managing growth.¹³⁵ Saint Louis County, Missouri adopted an interesting growth management experiment in the mid-1960s. It adopted a three-acre Non-Urban zone as a stopgap growth management measure “to guide and coordinate development in the unincorporated portions of St. Louis *31 County to secure the appropriate development of the physical environment.”¹³⁶ The county was able to use Non-Urban zoning to manage growth by rezoning to higher densities when rezoning met the growth management purposes of the ordinance, though adjoining residents often objected.¹³⁷ Court decisions were mixed.¹³⁸ The Non-Urban zone now permits uses such as group homes and schools, usually on lots of three or four acres,¹³⁹ and single-family dwellings on lots of less than three acres.¹⁴⁰

2. *Onsite Wells and Septic Systems*

Residential development requires an adequate water supply and sewage disposal, which can be provided by onsite wells and septic systems. They require a lot large enough to produce an adequate water supply and a septic system that does not endanger water sources. A consensus does not exist on the necessary lot size. Some municipalities require one acre, *32 some 40,000 square feet, and some 20,000 or 22,500 square feet.¹⁴¹ One opinion suggests that one acre has replaced 20,000 square feet as the safe rule-of-thumb for local planners,¹⁴² and a court-approved one-acre zoning to prevent the use of more densely located septic systems.¹⁴³ Courts also approved lots of more than one acre to provide enough land for an adequate water supply and to avoid water pollution from septic systems.¹⁴⁴

Notwithstanding these asserted justifications, Large-Lot Zoning is not required for onsite systems. Wells can fail or provide an

THE TRAGEDY OF LOW-DENSITY, LARGE-LOT ZONING, 60 Real Prop. Tr. & Est....

inadequate water supply. Septic systems endanger ground and surface waters if not designed, installed, maintained, or used properly,¹⁴⁵ and one study found *33 a high failure rate for onsite septic systems.¹⁴⁶ Courts should also reject Large-Lot Zoning for onsite systems when public water and sewage systems are available as a less environmentally dangerous alternative.¹⁴⁷ The court in *National Land & Investment Company v. Kohn*¹⁴⁸ rejected four-acre zoning because the township code provided for sanitary regulations and the installation and maintenance of sewer systems, although the township had not made plans for either and expected to rely on onsite *34 systems.¹⁴⁹ Developer-built water and sewage systems with offsite facilities are another option.¹⁵⁰

3. Environmental and Ecological Preservation

Large-Lot Zoning is needed for environmental and ecological preservation.¹⁵¹ Forest and mountain preservation zoning, which prevents the fragmentation of forest and mountain areas, is an example. The New Hampshire Supreme Court upheld a 50-acre lot minimum for a mountain and forest district because it encouraged the continuation of large tracts of forest land, encouraged forestry and timber harvesting, protected wildlife habitat and natural areas, and made forestry profitable.¹⁵² Large-Lot Zoning is not appropriate for environmental and ecological preservation, *35 however, when Large-Lot Zoning is not an appropriate response to the environmental problems that they present, and when an alternative regulation can consider these problems.¹⁵³

Hillsides are an example. Land disturbance is a major issue on hillsides.¹⁵⁴ Building structures create inherent problems because they inevitably create land disturbance by placing level structures on sloping surfaces.¹⁵⁵ These structures experience a gravitational force that creates landslides through downhill movement.¹⁵⁶ Uniform Large-Lot Zoning on hillsides does not remedy this problem. Slope/density regulation can remedy this problem by decreasing density as the slope increases.¹⁵⁷ The Colorado court upheld a special hillside low-density residential zone that included an equation to calculate minimum lot sizes for different areas of steeply graded property.¹⁵⁸

Protecting groundwater and surface water sources from upland and adjacent stormwater pollution caused by development on impervious surfaces is another example.¹⁵⁹ Large-Lot Zoning that uniformly reduces density throughout impervious surface areas is neither appropriate nor *36 effective because surface water flows and groundwater tables vary significantly.¹⁶⁰ The courts nevertheless uphold Large-Lot Zoning when Large-Lot Zoning is adopted for groundwater and surface water protection.¹⁶¹

A water source protection ordinance is a substitute that is more effective and appropriate. It can include land use controls in overlay districts that require new development to minimize impervious or partially pervious surface coverage, direct stormwater away from surface waters, incorporate Best Management Practices (BMPs) to minimize water quality impacts, and minimize transport stormwater runoff by vegetated conveyances, and that include variable density limits.¹⁶²

*37 4. Agricultural Zoning

Exclusive agricultural zoning,¹⁶³ which some statutes authorize,¹⁶⁴ is a widely accepted method for preserving agricultural land that can require low-density Large-Lot Zoning.¹⁶⁵ Although their reasons vary, courts unanimously uphold Large-Lot Zoning for agricultural preservation *38 because it protects agricultural character, the feasibility of farming,¹⁶⁶ and the fragmentation of agricultural areas.¹⁶⁷

A Pennsylvania case is an example.¹⁶⁸ The court upheld 50-acre agricultural zoning because the size of farmland tracts is directly related to the economic viability of farming operations that use modern machinery, soil conservation, and the ability to dispose of agricultural byproducts.¹⁶⁹ Soils require strip cropping or contour farming, diversion terraces and ditches, and remedies for erosion problems, which are more easily done on larger agricultural tracts.¹⁷⁰

There are limitations. Courts reject Large-Lot Zoning for agricultural preservation if Large-Lot Zoning is applied to an area that is not suitable *39 for agriculture,¹⁷¹ if the agricultural use restrictions are arbitrary,¹⁷² if agricultural zoning is exclusionary,

THE TRAGEDY OF LOW-DENSITY, LARGE-LOT ZONING, 60 Real Prop. Tr. & Est....

or if it does not balance the need for reasonable growth and agricultural uses, a limitation that can prevent the use of agricultural zoning to create urban sprawl.¹⁷³

III. The Path to Reform

A. Judicial Reform

The judicial response to Large-Lot Zoning requires reform because the reasons for accepting Large-Lot Zoning, with a few exceptions, are unacceptable.¹⁷⁴ There are several possibilities. One important possibility *40 is for courts to reject these reasons except when Large-Lot Zoning is appropriately used for agricultural, environmental, or ecological protection. ““Character of the area,” for example, is not an acceptable reason for upholding Large-Lot Zoning.¹⁷⁵

A judicial presumption that Large-Lot Zoning is unconstitutional is another possibility.¹⁷⁶ I have argued with Professor Dan Tarlock that courts should consider a presumption against constitutionality because judicial concern reflects increasing public unease with processes and results in the land use system.¹⁷⁷ One example is that “[l]ocal units of government possess ... the power ... to do great mischief by distorting regional social inequities and by shifting spillovers from one jurisdiction to another.”¹⁷⁸ Exclusionary zoning, including Large-Lot Zoning, can do great mischief. Reversing the presumption of constitutionality reverses the burden on a municipality to show it has not adopted restrictions that distort regional social inequities or shift spillovers.¹⁷⁹

*41 Political malfunction that dominates local decision-making is another reason for shifting the presumption of constitutionality. Political malfunction occurs when a dominant homogenous group in a community supports legislation that does not represent the pluralist character of the larger metropolitan area.¹⁸⁰ Large-Lot Zoning can create an environment for political malfunction. It can create a municipality dominated by a homogenous affluent group that can obtain the adoption of restrictive regulation by the local legislative body that does not represent the pluralist character of the larger metropolitan area.¹⁸¹ Shifting the presumption of constitutionality will again shift the burden to the municipality to show that political malfunction has not distorted the local legislative process.

Courts should refuse to approve Large-Lot Zoning when a less restrictive alternative is available, such as public services as an alternative to onsite water and sewer systems. Courts adopted this rule in free speech cases when they held that free speech law requires a less restrictive alternative to content-based speech.¹⁸² Free speech is a fundamental constitutional right, and courts adopted the least restrictive alternative rule to protect this right. Zoning is not a fundamental constitutional right, but the importance of fair and reasonable zoning also requires the adoption of the least restrictive alternative rule.¹⁸³

Reform must address procedural difficulties in Large-Lot Zoning litigation. Litigation is limited to the landowner and the municipality because courts do not give standing to third parties, who are more likely to introduce wider public interest concerns such as the effect of Large-Lot Zoning on housing markets.¹⁸⁴ Potential residential developers and homebuyers who are excluded from housing markets by Large-Lot Zoning and *42 neighboring municipalities damaged by spillover effects are third-party beneficiaries who will benefit when Large-Lot Zoning is held invalid.¹⁸⁵ They rarely appear in the case law because they do not have standing but may be affected more severely by Large-Lot Zoning restrictions.¹⁸⁶ Legislation and judicial decisions can remedy this problem by granting standing to third parties to intervene in litigation so that they can produce evidence and argue for issues that are relevant to their interests.¹⁸⁷

Litigation is imperfect even if courts correct procedural problems. If a court holds a Large-Lot Zoning density restriction unconstitutional, a municipality can adopt a residential density that is marginally higher than the density held unconstitutional but that still blocks the landowner’s development. A court will not provide mandatory relief for the landowner that requires a municipality to adopt a density that will allow his development.¹⁸⁸ The landowner can bring successive lawsuits to force a municipality eventually to adopt an acceptable density, but this strategy is costly, time-consuming, and may not be effective. Most municipalities also have Large-Lot Zoning at more than one density level, so that *43 successful litigation against one

THE TRAGEDY OF LOW-DENSITY, LARGE-LOT ZONING, 60 Real Prop. Tr. & Est....

low residential density will leave other low residential densities unaffected.

Judicial reform of Large-Lot Zoning requires a bright line rule that eliminates the problems of case-by-case litigation. Legislation at the state and local levels should adopt a minimum density cap for Large-Lot Zoning, except when low densities for agricultural, environmental, and ecological preservation are appropriate. A minimum density cap will vary because housing markets vary in different areas of the country.¹⁸⁹

The minimum density level for urban residential development in housing markets is one possibility. Four to six dwelling units per acre for single-family housing is typical, and guidance is available that visualizes development possibilities that can occur at these densities.¹⁹⁰ The comprehensive plan is another option. It can provide guidance for growth and development that sets allowable residential densities and includes residential densities for undeveloped areas.¹⁹¹

An additional remedy is required. After a municipality adopts a residential minimum density cap, any zoning above this minimum density will be nonconforming. A municipality could but may not rezone nonconforming minimum densities so that they comply with the minimum density cap. A court can remedy this problem by providing that rezoning to the new minimum density level is a ministerial act by the municipality, which requires only administrative approval, and is enforceable by a landowner in court.¹⁹²

*44 B. Statutory Reform

Statutory reform of Large-lot Zoning can cover all the municipalities in the state and is protected by a presumption of constitutionality. It has several options.¹⁹³ Statutes have limited lot size,¹⁹⁴ restricted the adoption of lot size requirements,¹⁹⁵ required the elimination or reduction in the size *45 of Large-Lot Zoning as an optional zoning strategy,¹⁹⁶ and required that “a substandard lot of record shall not be required to seek any zoning relief based solely on the failure to meet minimum lot size requirements of the district in which such lot is located.”¹⁹⁷ Statutes can also define the situations in which Large-Lot Zoning can be used. For example, they can specify when it can be used for agricultural and environmental preservation purposes.

IV. Conclusion

Decades of judicial neglect created a Large-Lot Zoning regime that covers large sections of suburban areas, raises housing prices, aggravates economic and racial segregation, and creates urban sprawl. This Article explains how Large-Lot Zoning is embedded in single-family residential zoning that is based on racial origins, is allowed without restriction by zoning legislation, and is sanctioned by the Supreme Court. Courts and legislatures should remove the tragedy of Large-Lot Zoning from our zoning system.

Footnotes

^{a1} Daniel R. Mandelker, Stamper Professor Law Emeritus, Washington University School of Law. I would like to thank Salim Furth, Charles Gardner, Ed Sullivan, and Dan Tarlock for their help in finding references, and Billy Gutierrez for his editorial help. Andrea Boyak, Salim Furth, Charles Gardner, and Dan Tarlock read the Article and made helpful comments. Citations to statutes were current on the date this Article was submitted for publication.

¹ Christopher Serkin & Leslie Wellington, *Putting Exclusionary Zoning in Its Place: Affordable Housing and Geographical Scale*, 40 *Fordham Urb. L.J.* 1667, 1695 n.43 (2013); see also Charles Gardner, *Cutting Zoning Down to Size: Reevaluating the Legal Vulnerability of Urban Minimum Lot Sizes*, 61 *San Diego L. Rev.* 231, 236-46 (2024) (discussing the history of Large-Lot Zoning).

THE TRAGEDY OF LOW-DENSITY, LARGE-LOT ZONING, 60 Real Prop. Tr. & Est....

- ² 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, 1624 (2021) (“Drafters of zoning ordinances typically regard minimum lot-size requirements as the most salient of their zoning controls.”); Alan Tarr & Russell S. Harrison, *Legitimacy and Capacity in State Supreme Court Policymaking: The New Jersey Court and Exclusionary Zoning*, 15 *Rutgers L.J.* 513, 531 (1984) (large-lot zoning is the dominant form of residential exclusion); see also Paul Boudreaux, *Lotting Large: The Phenomenon of Minimum Lot Size Laws*, 68 *Me. L. Rev.* 1, 8 (2016) (“[T]he practice of large-lot zoning is best explained by the desire of existing homeowners to restrain population density.”).
- ³ See Michael Sasso & Shelly Hogan, *‘I Live in Hell’: Anti-Growth Fervor Grips U.S. South After Pandemic Boom*, *Bloomberg News* (June 18, 2024), <https://shorturl.at/dPFFN> [<https://perma.cc/S442-KVPH>] (“At a planning board meeting in May, the pressing agenda item was whether to boost minimum lot sizes in rural areas to at least 2.3 acres; big enough to ward off housing developers who need more density.”).
- ⁴ See Urb. Land Inst., *The Effects of Large-lot Size on Residential Dev.* 11 (1958) (suggesting selection of optimum related to community costs is not possible, but middle range of lot sizes greater than those for which public sewerage is needed but below the point where the cost curve commences its more noticeable rise is the most lot area for the least cost to the community); see also Haw. Rev. Stat. Ann. § 205-5 (2012) (“[M]inimum lot size for any low-density residential use shall be one-half acre and there shall be but one dwelling house per one-half acre”).
- ⁵ See Ellickson, *supra* note 2, at 1627 (“A focal choice is a minimum lot of one-acre, a size that obviates the presence of sidewalks and trick-or-treaters.”); Urb. Land Inst., *The Effects of Large-lot Size on Residential Development* 7 (1958) (describing large lots as lots of one acre or more).
- ⁶ See Serkin & Wellington, *supra* note 1, at 1682 (“Traditional exclusionary zoning at the local scale consists, generally, of large-lot zoning in outer-ring suburbs.”); A. Dan Tarlock, *Zoning Not Planned*, 13 *Plan. Theory* 99, 103-05 (2014) (discussing America’s love affair with suburbia); see also John Ottensmann, *Suburbs Defined Using Density*, *Urban Patterns* (Nov. 28, 2020), <https://shorturl.at/QNID7> [<https://perma.cc/CU3X-BEMV>].
- ⁷ See Daniel T. Lichter et al., *Racial Diversity and Segregation: Comparing Principal Cities, Inner-Ring Suburbs, Outlying Suburbs, and the Urban Fringe*, 9 *RSF: Russell Sage Found. J. Soc. Scis.* 26, 34-35 (2023), <https://tinyurl.com/orag22> [<https://perma.cc/3QLD-AKEK>] (“suburban population share increased by 6.9 percentage points between 1990 and 2020, from 59.1 to 66.0 percent,” and noting that suburbanization had noticeably slowed in the last decade); see also Thomas B. Edsall, *As the Suburbs Go, So Goes America*, *N.Y. Times* (June 7, 2023), (reviewing articles discussing trends in suburban areas), <https://shorturl.at/OJS08> [<https://perma.cc/WC8H-K84D>].
- ⁸ The Black suburban population exceeded 50% (51.1%) for the first time in 2020. This population was least suburbanized but experienced a 17.2 percentage point increase in suburban share, the largest of any ethnoracial group. The Hispanic share was 57.8%.

THE TRAGEDY OF LOW-DENSITY, LARGE-LOT ZONING, 60 Real Prop. Tr. & Est....

the Asian share was 62.5%, and the non-Hispanic white share was 73.1%. Racial minority suburbanization far exceeded the 7.2 percentage point increase for non-Hispanic whites. Extraordinary increases in Black, Hispanic, and Asian suburbanization since 1990 changed suburban racial makeup overall. *See* Lichter, *supra* note 7, at 34.

⁹ *See, e.g.*, Aditya Aladangady & Akila Forde, *Wealth Inequality and the Racial Wealth Gap*, FEDS Notes (Oct. 22, 2021), <https://shorturl.at/AkYq0> [<https://perma.cc/ML22-N8DU>]; *see also* Tonantzin Carmona & Noreen M. Sugrue, *Closing the Latino Wealth Gap: Exploring Regional Differences and Lived Experiences*, Brookings Inst. (Oct. 24, 2023), <https://bit.ly/3Xg8wys> [<https://perma.cc/2ZDK-8RFB>]. (“Wealth disparities between Latino and white households are partly driven by differences in asset ownership, which vary by state.”); Shelley Stewart et al., *The Economic State of Black America: What Is and What Could Be* (June 17, 2021), <https://shorturl.at/l6Ho4> [<https://perma.cc/6X64-GD2N>] (discussing occupational underrepresentation and pay gaps faced by Black workers); Palash Ghosh, *Black Americans Earn 30% Less Than White Americans, While Black Households Have Just One-Eighth Wealth of White Households*, *Forbes* (Dec 10, 2021), <https://shorturl.at/2adMe> [<https://perma.cc/7B88-56JN>] (discussing economic status of Blacks and noting that “[T]he economic status of Black Americans remains far behind their white counterparts in terms of income, net worth, home ownership, stock ownership, business entrepreneurship and other metrics ... ”); Tami Luhby, *These Charts Show Economic Progress Has Stalled for Black Americans Since the Civil Rights Era*, *CNN* (July 5, 2020), <https://shorturl.at/aNnr> [<https://perma.cc/SQ9J-HL2D>] (“income gap between Black and White families is almost the same as 1968”; includes charts showing how economic progress has stalled for Black Americans since the Civil Rights era); Andre M. Perry et al., *Black Wealth Is Increasing, but So Is the Racial Wealth Gap*, *Brookings Inst.* (Jan. 9, 2024), <https://shorturl.at/q3IWn> [<https://perma.cc/K9EW-ZD5S>].

¹⁰ “[I]ncreased Black income segregation has largely occurred through suburbanization and changes within the suburbs.” Alexander W. Bartik & Evan Mast, *Black Suburbanization: Causes and Consequences of a Transformation of American Cities* 10 (W.E. UpJohn Inst. For Emp. Rsch., Working Paper No. 21-355, 2021), <https://tinyurl.com/trans3820> [<https://perma.cc/EL9W-KTKA>].

¹¹ *See* *Simon v. Needham*, 42 N.E.2d 516, 518 (Mass. 1942) (noting that the “advantages enjoyed by those living in one family dwellings located upon an acre lot might be thought to exceed those possessed by persons living upon a lot of ten thousand square feet”); *see also* *Boudreaux*, *supra* note 2, at 24 (holding that “*Needham* set a template for courts in the second half of the twentieth century.”).

The court also held that there would be more inducement to attempt the cultivation of flowers, a dubious assumption. *See Needham*, 42 N.E.2d at 518. It also relied on the prevalence of similar Large-Lot Zoning in nearby communities. This evidence was not decisive, but was persuasive, that many nearby communities faced with apparently similar problems decided that the adoption of identical or nearly identical restrictions was in the public interest. *See id.* The court should have recognized that widespread prevalence of Large-Lot Zoning is evidence of exclusion. It did suggest that a zoning ordinance cannot be an exclusionary barrier. *See id.* at 519.

¹² *Aronson v. Town of Sharon*, 195 N.E.2d 341, 345 (Mass. 1964); *see also* *Wilson v. Town of Sherborn*, 326 N.E.2d 922, 924 (Mass. App. Ct. 1975) (holding that there “must appear from the record that there is ‘a reasonable basis for the judgment of the town meeting’ that there are special needs that are met by two-acre zoning”).

¹³ *See* *National Land & Inv. Co. v. Kohn*, 215 A.2d 597 (Pa. 1965). The court also held that four-acre zoning greatly restricted marketability and that “[z]oning provisions may not be used ... to avoid the increased responsibilities and economic burdens which time and natural growth invariably bring.” *Id.* at 610; *see also* *In re Application of Wetherill*, 406 A.2d 827, 829 (Pa. Commw. Ct.

THE TRAGEDY OF LOW-DENSITY, LARGE-LOT ZONING, 60 Real Prop. Tr. & Est....

1979) (noting the board cited lack of public water, sewer or transportation facilities as its reason for regulating high-density development, precisely the types of justification the Supreme Court found untenable in *National Land*).

¹⁴ *Id.* at 608.

¹⁵ An early New Jersey survey found that the number of municipalities with minimum lot size zoning increased in every county by 30% over fifteen years; the survey period extended from 1967 to 1981. *See* Alan Tarr & Russel S. Harrison, *Legitimacy and Capacity in State Supreme Court Policymaking: The New Jersey Court and Exclusionary Zoning*, 15 Rutgers L.J. 513, 531 (1984). Another early study found that a substantial number of municipalities had minimum lot sizes of 20,000 square feet or more. *See* American Soc’y of Plan. Officials, Plan. Advisory Serv. Info. Rep. No. 37: Minimum Requirements for lot and Building Size at 5-6 (1952), <https://rb.gy/0meiq0> [<https://perma.cc/X25B-CGTH>] (table listing substantial number of municipalities with minimum lot sizes of 20,000 square feet or more); *see also* Rolf Pendall et al., *Shifts Toward the Extremes: Zoning Change in Major U.S. Metropolitan Areas From 2003 to 2019*, 88 J. Am. Plan. Ass’n 5 (2022).

¹⁶ *See* Jaehee Song, *The Effects of Residential Zoning In U.S. Housing Markets* 19 (2021), <https://rb.gy/t0hmhb> [<https://perma.cc/ND46-NGV6>].

¹⁷ *Id.* (discussing results of study). The main focus of the paper is on minimum lot-area regulations applied to single-family homes, but the implications apply to zoning reforms on single-family zoning and other density restrictions. *See id.* at 13; *see also* Joseph Gyourko et al., *The Local Residential Land Use Regulatory Environment Across U.S. Housing Markets: Evidence from a New Wharton Index* 33 (2019), <https://rebrand.ly/95hgqkf> [<https://perma.cc/JEY2-J6US>] (studying 2,450 primarily suburban communities across the U.S.; one-quarter of the study group adopted minimum lot sizes for the first time or adopted a larger minimum since the first survey).

¹⁸ *See* Song, *supra* note 16, at 19 (discussing results of study).

¹⁹ *See* Gyourko et al., *supra* note 17 (noting that “the share of communities experiencing an increase in their largest minimum lot size was double that which saw a decline”).

²⁰ *See* Ellickson, *supra* note 2, at 1627, Table 1. Greater New Haven in the restrictive Northeast was the most restrictive, while Austin, Texas was the least restrictive. Zoning practices varied. Each metro had at least one suburb that required one-acre lots for over 99% of its residentially zoned land, and one or more suburbs never required a one-acre lot. *See id.* at 1629, Table 2.

²¹ *See* Rolf Pendall et al., *From Traditional to Reformed: A Review of the Land Use Regulations in the Nation’s 50 largest Metropolitan*

THE TRAGEDY OF LOW-DENSITY, LARGE-LOT ZONING, 60 Real Prop. Tr. & Est....

Areas (2006), <https://shorturl.at/GCza5> [<https://perma.cc/EDK7-FJJ9>] (finding suburbs of Boston in southern New Hampshire were the most exclusionary of all the three zoning families the study identified, where 84% of the municipalities, 47% of the population, and 81% of the land area had low density-only zoning). The study covered the fifty largest metropolitan areas with over 160 million residents with 57% of the population in the United States and about 300,000 square miles of land. *See id.*; *see also* Jeffrey Zabel & Maurice Dalton, *The Impact of Minimum Lot Size Regulations on House Prices in Eastern Massachusetts*, 41 Reg'l Sci. and Urb. Econ. 571, 577 (2011) (providing a chart showing increase in minimum lot size zoning; slight reversal at end of time period attributed to adoption of cluster zoning, which reduces lot sizes).

²² *See* Sara C. Bronin, *Zoning by A Thousand Cuts*, 50 Pepp. L. Rev. 719 (2023). Professor Bronin states that this study is the only one that covers zoning districts at the state level and that combines two rounds of textual analysis with review from zoning authority officials of collected information. *See id.* at 749.

²³ *See id.* at 765-67. For a study of one city, see Nicholas Abbott, *How Restrictive Zoning Shut the Middle Class Out of Greenwich, Conn.*, Brookings Inst. (2021), <https://shorturl.at/7wXkG> [<https://perma.cc/M3XW-HCQS>] (discussing adoption of Large-Lot Zoning).

²⁴ *See* U.S. Dep't of Com., A Standard State Zoning Enabling Act (1926), <https://shorturl.at/UFW5c> [<https://perma.cc/J3DL-R6Q9>].

²⁵ *See* American Plan. Ass'n, *Growing Smart Legis. Guidebook* xli (Stuart Meck ed., 2002), <https://shorturl.at/jGEe8> [<https://perma.cc/APK6-2KVM>] (explaining in a sidebar that for many states the State Standard Zoning Enabling Act still supplies the institutional structure).

²⁶ *See id.* ch. 7 at 55.

²⁷ *See id.* at xli.

²⁸ *See id.* ch. 2 at 3.

²⁹ *See* Sarah J. Adams-Schoen, *The White Supremacist Structure of American Zoning Law*, 88 Brook. L. Rev. 1225, 1272 (2023). This delegation included “the authority to regulate the percentage of a lot available for development, the minimum size of yards, and the density of the population.” *Id.*; *see also* John Infranca, *Singling Out Single-Family Zoning*, 111 Geo. L.J. 659, 661 (2023).

THE TRAGEDY OF LOW-DENSITY, LARGE-LOT ZONING, 60 Real Prop. Tr. & Est....

30 245 U.S. 60, 82 (1917).

31 See Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* 51 (2017). President Harding's specific charge to the Advisory Committee called for maintaining segregation and racially segregated neighborhoods without directly violating *Buchanan* by referencing race. See *id.* at 53.

32 272 U.S. 365 (1926). For a discussion of the case and the arguments before the Court, see Richard H. Chused, *Euclid's Historical Imagery*, 51 Case W. Rsrv. L. Rev. 597 (2001). The Court has never decided a case on Large-Lot Zoning.

33 The residential district in *Euclid* was a two-family rather than a single-family residential district. See *Euclid*, 277 U.S. at 380.

34 See Adams-Schoen, *supra* note 29, at 1277 ("codes were drafted by the planning consultant and outspoken white supremacist Robert H. Whitten").

35 See *id.* at 1280.

36 See Barry Cushman, Essay, *The Secret Lives of the Four Horsemen*, 83 Va. L. Rev. 559, 559 (1997).

37 This decision is consistent with earlier Supreme Court cases that upheld restrictions on the use of land. See Joseph Gordon Hylton, *Prelude to Euclid: The Supreme Court and the Constitutionality of Land Use Regulation, 1900-1920*, 3 Wash. U. J. L. & Pol'y 1, 2 (2000) ("Time after time, and with only one dissenting vote in two decades, the Court found that the police power was sufficiently broad to warrant restrictions on the use of land.").

38 *Euclid*, 277 U.S. at 387-88.

39 *Id.* at 390. Justice Sutherland also held that the "the bad fades into the good" by insensible degrees, and that "[i]t cannot be said that the ordinance in this respect 'passes the bounds of reason and assumes the character of a merely arbitrary fiat.'" *Id.* at 389. He easily

THE TRAGEDY OF LOW-DENSITY, LARGE-LOT ZONING, 60 Real Prop. Tr. & Est....

upheld the exclusion of commercial uses from residential districts. *See id.* at 391. It “bears a rational relation to the health and safety of the community,” which included the “excluding from residential areas the confusion and danger of fire, contagion, and disorder, which in greater or less degree attach to the location of stores, shops, and factories[.]” *Id.*; *see also id.* at 392-93.

⁴⁰ *Id.* State zoning decisions have relied on the “parasite” language. *See, e.g.,* Kropf v. City of Sterling Heights, 215 N.W.2d 179, 187 (Mich. 1974); Filister v. City of Minneapolis, 133 N.W.2d 500, 505 (Minn. 1964); Yanow v. Seven Oaks Park, Inc., 94 A.2d 482, 488 (N.J. 1953).

⁴¹ *Euclid*, 277 U.S., at 394-95. Justice Sutherland was describing the high-rise apartment buildings typical of Washington, D.C. at that time that did not have onsite parking and may have blocked the rays of the sun. For examples, see Norman Williams, Jr. & John M. Taylor, American Land Planning Law, Illustrations Plate 6 (2002 Cum. Supp.) (including photos of apartment buildings in Washington, D.C. at that time). *See also* Zoning and the American Dream (Charles M. Haar & Jerold S. Kayden eds., 1989) (discussing *Euclid* decision).

Justice Sutherland piled on other objections. Apartment houses created “disturbing noises incident to increased traffic and business,” and moving and parked automobiles in larger portions of the streets” that detracted from their safety and deprived children of “quiet and open spaces for play” enjoyed in more favored localities. *Euclid*, 277 U.S. at 394.

⁴² Adams-Schoen, *supra* note 29, at 1233.

⁴³ The number of decided cases has diminished in recent decades. *See* Boudreaux, *supra* note 2, at 25. One commentator found that the courts replaced judicial acceptance of Large-Lot Zoning with a property rights counteroffensive from 1950 to 1970, followed by judicial acceptance motivated by environmental concerns. *See* Gardner, *supra* note 1, at 243-44.

A court may provide multiple reasons for approving Large-Lot Zoning. *See, e.g.,* Town of Lebanon v. Woods, 215 A2d 112, 116 (Conn. 1965) (explaining that a one acre zoning regulation objective is “to prevent the overcrowding of land, to allow space for adequate private water and sewerage systems, and, in the case of residence properties, to provide for adequate living area.”); Conlin v. Scio Twp., 686 N.W.2d 16, 26 (Mich. Ct. App. 2004) (holding in case with density restrictions of 7.5 and 5.2 acres “that avoiding overcrowding and preserving open space are ‘legitimate governmental interests’D’ and that “[d]ensity restrictions advance those goals.”).

⁴⁴ *See* Boudreaux, *supra* note 2, at 24 (arguing that courts usually hold that Large-Lot Zoning “serves the public welfare by restraining congestion, limiting public infrastructure costs, offering a pleasant environment, and propping up local property values.”). Most of these cases arose in affluent suburbs facing significant population growth. *See also* Gardner, *supra* note 1, at 237-47 (discussing suburban low-density zoning and academic commentary on lot minimums); David S. Schoenbrod, Note, *Large Lot Zoning*, 78 Yale L.J. 1418, 1436 (1969) (“The gentle treatment of Large-Lot Zoning results partly from courts’ misconception of what is at stake,” as only a suburb and a developer are brought before a judge); Susan Ellenberg, *Judicial Acquiescence in Large Lot Zoning: Is It Time to Rethink the Trend?*, 16 Colum. J. Env’t. L. 183, 183-200 (1991) (discussing cases).

THE TRAGEDY OF LOW-DENSITY, LARGE-LOT ZONING, 60 Real Prop. Tr. & Est....

- ⁴⁵ See *Zeercro Mgmt. Corp. v. Chippewa Twp.*, No. 238800, 2003 WL 22017795, at *2-3 (Mich. Ct. App. Aug. 26, 2003) (explaining standard of judicial review); see also *C & M Devs., Inc. v. Bedminster Twp. Zoning Hearing Bd.*, 820 A.2d 143, 154 (Pa. 2002) (holding zoning requiring minimum lot sizes of two acres or more need not be supported by extraordinary justification).
- ⁴⁶ See *Johnson v. Town of Edgartown*, 680 N.E.2d 37 (Mass. 1997).
- ⁴⁷ *Id.* at 41 (relying on *Aronson v. Town of Sharon*, 195 N.E.2d 341 (Mass. 1964)); see also *Wilson v. Town of Sherborn*, 326 N.E.2d 922, 924 (Mass. App. Ct. 1975) (adding that a reasonable basis for special needs that are met by two-acre zoning must appear from the record). In *Nat'l Land & Inv. Co. v. Kohn*, 215 A.2d 597, 607 (Pa. 1965), the court held that although it has recognized a presumption of constitutionality, the court has also ““appreciated” that zoning restricts a landowner’s constitutional right to use his property, and that “[t]he time must never come when, because of frustration with concepts foreign to their legal training, courts abdicate their judicial responsibility to protect the constitutional rights of individual citizens.” *Id.* The court added that “the burden of proof imposed upon one who challenges the validity of a zoning regulation must never be made so onerous as to foreclose, for all practical purposes, a landowner’s avenue of redress against the infringement of constitutionally protected rights.” *Id.*
- ⁴⁸ See, e.g., *Nopro Co. v. Town of Cherry Hills Vill.*, 504 P.2d 344 (Colo. 1972) (holding two and one-half acre zoning authorized by statutory comprehensive plan purposes “of preventing overcrowding of land, avoiding undue concentration of population, conserving property values, and encouraging the most appropriate use of the land throughout the village”); *Simon v. Town of Needham*, 42 N.E.2d 516 (Mass. 1942) (holding statute expressly empowering zoning ordinances or bylaws “for the purpose of promoting the health, safety, convenience, morals or welfare of the inhabitants” and to “regulate ... the size and width of lots,” authorized one acre lot size); *Flora Realty & Inv. Co. v. City of Ladue*, 246 S.W.2d 771 (Mo. 1952) (upholding three acre minimum lot size as authorized by statute authorizing a municipality to regulate and restrict the size of yards, courts, and other open spaces, the percentage of lots that could be occupied, the density of population, and the use of the land for any purpose); *Sanderson v. Town of Greenland* 453 A.2d 1285 (N.H. 1982) (holding lot sizes of twenty thousand to sixty thousand square feet were authorized by statute because those lot sizes promoted the accepted purpose of preventing overcrowding of the land and localities have broad authority to zone); see also Gavin L. Phillips., Annotation, *Validity of Zoning Laws Setting Minimum Lot Size Requirements*, 1 A.L.R.5th 622, §§ 14, 15 (1992) (discussing cases).
- ⁴⁹ See, e.g. *Steel Hill Dev., Inc. v. Town of Sanbornton*, 469 F.2d 956, 963 (1st Cir. 1972) (finding in case with three to six acre lots that the value of the tract decreased considerably but was not worthless or useless so as to constitute a taking); *Wilson v. Town of Sherborn*, 326 N.E.2d 922, 927 (Mass. App. Ct. 1975) (upholding two-acre zoning because not being able to put land to its most profitable use is not sufficient reason to invalidate zoning by-law); *Zeercro Mgmt. Corp. v. Chippewa Twp.*, No. 238800, 2003 WL 22017795, at *8 (Mich. Ct. App. Aug. 26, 2003) (discussing in case with one acre lots U.S. Supreme Court takings tests and finding “no evidence that the zoning ordinance had a detrimental economic impact on the value of the property or that the ordinance interfered with distinct, investment-based expectations”); *Freundshuh v. City of Blaine*, 385 N.W.2d 6, 11 (Minn. Ct. App. 1986) (finding in four acres lot case no evidence that the land’s value was diminished in any amount and that the landowner had not demonstrated he was deprived of all reasonable uses of land); see also Paul Boudreaux, *supra* note 2, at 35 (arguing that courts are not likely to find a taking under the Supreme Court’s *Lucas* decision). *But see Zeltig Land Dev. Corp. v. Bainbridge Twp. Bd. of Trs*, 599 N.E.2d 383 (Ohio App. 1991) (holding development not economically feasible at five-acre lot size because bedrock made public sewers necessary).

THE TRAGEDY OF LOW-DENSITY, LARGE-LOT ZONING, 60 Real Prop. Tr. & Est....

- ⁵⁰ See Edward J. Sullivan, *The Evolving Role of the Comprehensive Plan*, 32 Urb. Law. 813 (2000). Compare *Zeerco Mgmt. Corp. v. Chippewa Twp.*, No. 238800, 2003 WL 22017795, at *4 (Mich. Ct. App. Aug. 26, 2003) (finding one acre zoning is not totally inconsistent with township’s master plan that contemplates low density development), with *Dunk v. Twp. of Brighton*, 216 N.W.2d 455, 457 (Mich. Ct. App. 1974) (deciding forty thousand square foot minimum lot size not in conformity with township’s formally adopted master plan).
- ⁵¹ See U.S. Const. Art. XIV, § 1 (“No State shall ... deprive any person of life, liberty or property, without due process of law.”).
- ⁵² See *Rasmussen v. City of Lake Forest*, 404 F. Supp. 148, 151 (N.D. Ill. 1975) (finding in one and one-half acres lot size case no answer as to what, if any, legitimate function the ordinance served); *Dunk v. Twp. of Brighton*, 216 N.W.2d 455, 457 (Mich. Ct. App. 1974) (concluding testimony and evidence presented at trial conclusively showed no legitimate reason for forty thousand square foot minimum lot size); *C & M Devs., Inc. v. Bedminster Twp. Zoning Hearing Bd.*, 820 A.2d 143, 158 (Pa. 2002) (finding an exclusionary purpose when board did not articulate any reasons for requiring minimum size of one acre except that one acre was a “good number” that would forestall the development of large houses on small lots). Courts could have but did not identify these cases as a violation of substantive due process.
- ⁵³ Andrew H. Whittemore, *Exclusionary Zoning: Origins, Open Suburbs, and Contemporary Debates*, 87 J. Am. Plan. Ass’n 167, 168 (2020).
- ⁵⁴ “*Exclusionary zoning* refers to local land use zoning practices that effectively bar low- and moderate-income households from finding adequate housing.” *Id.*
- ⁵⁵ See *id.* (tracing history of exclusionary zoning and effort through zoning to separate multi-family from single family housing); see also NAHB Research Center, *Study of Subdivision Requirements as a Regulatory Barrier* (2007) (noting that the cost of subdivision requirements is a significant share of new housing cost and can reasonably be considered “regulatory barriers” to affordable housing if requirements are more costly than necessary to achieve health and safety requirements in the community).
- ⁵⁶ See Michael Kim, *Exclusionary Economic Zoning: How the United States Government Circumvented Prohibitions on Racial Zoning Through the Standard State Zoning Enabling Act*, 48 J. Legis. 124, 126-29 (2021).
- ⁵⁷ 245 U.S. 60, 81 (1917).
- ⁵⁸ See Frank Aloï & Arthur Abba Goldberg, *Racial and Economic Exclusionary Zoning: The Beginning of the End?*, Urb. L. Ann. 9,

THE TRAGEDY OF LOW-DENSITY, LARGE-LOT ZONING, 60 Real Prop. Tr. & Est....

11 (1971) (describing Large-Lot Zoning and other exclusionary zoning restrictions that “erected an impenetrable exclusionary wall”).

⁵⁹ Adams-Schoen, *supra* note 29, at 1233; *see also id.* at 1302 (“[A]lthough racial segregation is no longer an express justification for most zoning classifications, government officials, courts, and citizens continue to justify exclusively single-family detached residential zones with the coded narratives devised a century ago to inflame racist fears and render invisible the white supremacist objectives of American zoning law.”). *See generally* Christopher Silver, *The Racial Origins of Zoning in American Cities*, in *Urban Planning and the African American Community: In the Shadows* (June Manning Thomas & Marsha Ritzdorf, eds., 1997).

⁶⁰ William H. Frey, *Neighborhood Segregation Persists for Black, Latino or Hispanic, and Asian Americans*, Brookings Inst. (Apr. 6, 2021), <https://rb.gy/kbo6a8> [<https://perma.cc/DZG3-QVH7>].

⁶¹ Colin Gordon, *Citizen Brown* 123 (Univ. of Chicago Press 2019) (Saint Louis study). The City of Saint Louis adopted a racial zoning ordinance in 1916, which was in limbo until the U.S. Supreme Court struck down racial zoning in 1917 in *Buchanan v. Worley*, 245 U.S. 60, 81 (1917). Reliance on racially restrictive covenants ended when the Court held them unconstitutional in a Saint Louis case. *See Shelley v. Kraemer*, 334 U.S. 1, 20 (1948) (holding racial covenants, which restrict the race of purchasers or occupants of the property, unenforceable under the Equal Protection Clause of the Fourteenth Amendment).

⁶² Gordon, *supra* note 61, at 123. The author could have added that street frontages are a key element of the exclusionary scheme because they are an important contributor to increasing costs by increasing the linear feet of infrastructure needed for each home.

⁶³ *See* Kennedy Moehrs Gardner & Colin Gordon, *Zoned Out: Creve Coeur, Malcolm Terrace, and the Struggle for Affordable Housing in the St. Louis Suburbs*, 30 J. Affordable Hous. & Cmty. Dev. L. 403 (2022).

⁶⁴ *See* Amy Dain, *Exclusionary by Design: An Investigation of Zoning’s Use as a Tool of Race, Class, and Family Exclusion in Boston’s Suburbs, 1920 to Today* (Theodore C. Landsmark, Luc Schuster & Sandy Kendall, eds., 2023), <https://bit.ly/43evXfd> [<https://perma.cc/S2YN-XVCZ>] (discussing the history of zoning in the Boston area with case studies).

⁶⁵ *See* Jessica Trounstein, *The Geography of Inequality: How Land Use Regulation Produces Segregation*, 114 Am. Pol. Sci. Rev. 443, 448 (2020). The study also found that “cities with more restrictive land use regimes remained whiter between 1970 and 2011 than cities with less restrictive policies.” *Id.* at 449. For discussion, *see New Study Finds Local Land Use Policies Perpetuate Segregation*, Nat’l Low Income Hous. Coal. (June 1, 2020), <https://tinyurl.com/perppet> [<https://perma.cc/JR9M-F7XV>].

THE TRAGEDY OF LOW-DENSITY, LARGE-LOT ZONING, 60 Real Prop. Tr. & Est....

⁶⁶ See Trounstone, *supra* note 65, at 452.

⁶⁷ See Amrita Kulka, *Sorting into Neighborhoods: The Role of Minimum Lot Sizes* 1, 4 (Dec. 30, 2019), <https://shorturl.at/BB16F> [<https://perma.cc/62HA-JWSD>]. The author states that “Wake County can be classified as being representative of a moderately regulated metropolitan area with a central city and surrounding suburbs.” *Id.* at 9. She concludes that “[h]ouseholds of different incomes sort into neighborhoods due to housing expenditures that are in part determined by the minimum lot size imposing a floor on land consumption.” *Id.* at 33; see also Ajay Garde & Qi Song, *Housing Affordability Crisis and Inequities of Land Use Change*, 88 J. Am. Plan. Ass’n 67 (2022) (analyzing a study of land use portfolios using land-use-based cluster analysis for 180 cities in five urban counties in a six-county Southern California metropolitan region; found sorting of the population by income, race and ethnicity, and distribution of multifamily land across the region; low-density green city clusters had high proportions of non-Hispanic white populations).

⁶⁸ Minimum lot size has a greater effect on sorting households by income into differently regulated neighborhoods than other variables. See Kulka, *supra* note 67; see also E-mail from Charles Gardner, Rsch. Fellow, Mercatus Ctr. at George Mason Univ., to author (Aug. 14, 2024, 1:47 p.m. CDT) (“Regarding the relationship between lot size and housing costs, my own research into Newtown, Connecticut (pop. 27,173 as of the 2020 Census), shows that among single-family houses built from 2014-2023, homes on lots under .25 acres are as of 2024 appraised by the tax assessor at an average of \$453k, homes on lots of .25-.49 acres are appraised at an average of \$569k, homes on lots of .50 to .99 are appraised at an average of \$687k, homes on lots of 1.00-1.99 are appraised at an average of \$694k, homes on lots of 2.00-2.99 are appraised at an average of \$786k, and homes on lots 3.00 and over are appraised at an average of \$833k. This is only one town, but it does suggest to me that whether a noticeable price effect of lot size is found may depend on the granularity of the lot size data.”).

⁶⁹ See Jonathan T. Rothwell & Douglas S. Massey, *Density Zoning and Class Segregation in U.S. Metropolitan Areas*, 91 Soc. Sci. Q. 1123, 1134-35 (2010), <https://rebrand.ly/n10whn2> [<https://perma.cc/6GB4-QT3A>]. The study covered the fifty largest metropolitan areas, and one-third of the municipalities in those areas. See *id.* at 1125-26. The most restrictive of the five density categories the study used was less than four units to the acre. See *id.* at 1126.

⁷⁰ See *id.* at 1133-34.

⁷¹ See Michael C. Lens & Paavo Monkkonen, *Do Strict Land Use Regulations Make Metropolitan Areas More Segregated by Income?*, 82 J. Am. Plan. Ass’n at 6 (2016) (applying Wharton Residential Land Use Regulation Index, which has eleven categories of land use regulations in the ninety-five biggest metropolitan statistical areas; study identified “minimum lot size” as a land use category but did not define minimum lot size density).

⁷² See Alissa Walker, *Why U.S. Cities Need More Multi-Racial, Mixed-Income Neighborhoods*, *Curbed* (Aug. 21, 2018), <https://shorturl.at/649NE> [<https://perma.cc/GKZ9-DUQR>].

THE TRAGEDY OF LOW-DENSITY, LARGE-LOT ZONING, 60 Real Prop. Tr. & Est....

⁷³ See Song, *supra* note 16, at 16.

⁷⁴ See *id.* at 21. Song found that higher minimum lot size caused racial sorting that caused homeowners to be more likely to be white and less likely to be Asian, Black, or Hispanic. See *id.* at 24.

⁷⁵ See Jonathan Rothwell & Douglas S. Massey, *The Effect of Density Zoning on Racial Segregation in U.S. Urban Areas*, 44 Urb. Aff. Rev. 779, 783 (2009).

⁷⁶ See *id.* at 783.

⁷⁷ *Id.* at 801.

⁷⁸ See *id.*

⁷⁹ 42 U.S.C. § 3604(a).

⁸⁰ See, e.g., *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1498 (10th Cir. 1995) (quoting House committee report).

⁸¹ 576 U.S. 519 (2015).

⁸² See David L. Callies & Derek B. Simon, *Fair Housing and Discrimination After Inclusive Communities*, Prob. & Prop., May/June 2019, at 43; Stacy Seicshnaydre, *Disparate Impact and the Limits of Local Discretion After Inclusive Communities*, 24 Geo. Mason L. Rev. 663 (2017).

⁸³ See *Inclusive Cmty.*, 576 U.S. at 541-44.

THE TRAGEDY OF LOW-DENSITY, LARGE-LOT ZONING, 60 Real Prop. Tr. & Est....

84 *Id.* at 542.

85 *Id.* at 541-44. The lower court did not find causation on remand. The plaintiff's claim that the agency's exercise of discretion in awarding tax credits violated the act did not isolate or identify the "specific practice" that caused a disparity in locating low-income housing. *See Inclusive Cmty. Project, Inc. v. Texas Dep't of Hous. & Cmty. Affs.*, No. 3:08-CV-0546-D, 2016 WL 4494322 (N.D. Tex. Aug. 26, 2016). For criticism of the causality requirement, see Claire Williams, *Inclusive Communities and Robust Causality: The Constant Struggle to Balance Access to the Courts with Protection for Defendants*, 102 Minn. L. Rev. 969 (2017).

86 *Inclusive Cmty.*, 576 U.S. at 539. The Court distinguished one-time land use decisions suggesting that they might not be enough to establish disparate impact liability. *See id.* at 540-43.

87 *See* Robert G. Schwemm & Calvin Bradford, *Proving Disparate Impact in Fair Housing Cases After Inclusive Communities*, 19 N.Y.U. J. Legis. & Pub. Pol'y 685, 759 (2016). One hypothetical study found a significant racial disparity ratio between Blacks and whites when house prices were increased by a rezoning of a large undeveloped parcel of land zoned for single-family housing to larger lot sizes. *See id.* The data indicated "that 319 (31.77%) of the black loans and 5,023 (21.19%) of the white loans were for home prices estimated to be in the lower range of \$170,000-\$225,000." *Id.* This range was the housing price range before Large-Lot Zoning increased lot size. *See id.* "These differences are statistically significant at more than the 99% level." *Id.*

88 *See Mhany Mgmt., Inc. v. Cnty. of Nassau*, 819 F.3d 581, 616-21 (2d Cir. 2016). On remand, the trial court rejected the county's claim that its legitimate interests could not be achieved by a "less discriminatory alternative" and held for the plaintiffs on this issue. *MHANY Mgmt., Inc. v. Cnty. of Nassau*, 05-CV-2301, 2017 WL 4174787, at *1-2 (E.D.N.Y. Sept. 19, 2017); *see also Recent Settlements*, Fair Housing-Fair Lending Rep., at ¶ 4.7 (Apr. 2019).

The Department of Housing and Urban Development regulation has a three-part test for determining disparate impact. The department readopted the regulation rejecting modifications by the Trump Administration. *See Reinstatement of HUD's Discriminatory Effects Standard*, 88 Fed. Reg. 19450-01 (Mar. 31, 2023) (to be codified at 24 C.F.R. pt. 100). The court in *Mhany* discussed the effect of this regulation on the disparate impact rules adopted in *Inclusive Communities*. *See Mhany*, 819 F.2d at 618-20; *see also* Schwemm & Bradford, *supra* note 87.

89 In this Article the term "municipality" includes cities, counties, villages, towns, townships, and boroughs.

90 In *Avenue 6E Investments, LLC v. City of Yuma, Ariz.*, 818 F.3d 493, 509 (9th Cir. 2016), the city rejected a rezoning request from a lower to a higher density. The court denied the city summary judgment based on its argument that "similarly-priced and similarly-modelled housing" was available in other parts of the city. *See id.* The court suggested that housing in close proximity is relevant to whether a plaintiff proved disparate impact. *See id.* at 512. The court followed *Inclusive Communities* and held that the city could support an action that created an adverse effect on minorities if it had adequate justification. *See id.*

On remand, the trial court denied the defendant's motion for summary judgment on the plaintiff's disparate impact claim. *See Ave. 6E Invs., LLC v. City of Yuma*, 217 F. Supp. 3d 1040, 1058 (D. Ariz. 2017). The case was settled. *See Conditional Settlement and*

THE TRAGEDY OF LOW-DENSITY, LARGE-LOT ZONING, 60 Real Prop. Tr. & Est....

Release Agreement at 2, 4, Ave. 6E Investments v. City of Yuma, No. 2:09-CV-00297-JJT (D. Ariz. June 11, 2019), ECF 343-1.

- ⁹¹ See *Cnty. Comrs. of Queen Anne's Cnty. v. Miles*, 228 A.2d 450 (Md. 1967). The ordinance also endeavored to shape the future within the general framework of existing conditions. See also *Johnson v. Town of Edgartown*, 680 N.E.2d 37, 39-40 (Mass. 1997) (upholding three acre minimum residential lot requirement, reasoning the town was on an island, not a rural or suburban municipality lying in path of suburban growth, and there was no proof that people were excluded from town by three-acre zoning in approximately half the town); *Robert E. Kurzius, Inc. v. Upper Brookville*, 414 N.E.2d 680, 684 (N.Y. 1980) (providing the record clearly showed that legitimate purpose of ordinance was to preserve open-space areas of village, noncompliance with comprehensive master plan was not demonstrated nor that pressing regional needs were ignored; no proof that persons of low or moderate incomes were foreclosed from housing in general region because of unavailability of properly zoned land; no showing of need for lots of less than five acres).
- ⁹² *Kavanewsky v. Zoning Bd. of Appeals of Town of Warren*, 279 A.2d 567, 570-71 (Conn. 1971) (deciding goal not within general welfare where town, when threatened with rapid development, increased minimum lot size requirements from one to two acres, an increase found by a “demand of the people to keep Warren a rural community with open spaces and keep undesirable businesses out”); see also *Scots Ventures v. Hayes Twp.*, 537 N.W.2d 610, 612 (Mich. 1995) (deciding agricultural classification requiring ten acres for single-family residential use denied owner substantive due process when preserving “‘farmland’ interest more accurately characterized as interest in preventing further development of area already used for golf course and residential purposes; real motivations behind facade of “public health and welfare” appeared to be aesthetics, retention of “rural character,” and desire to exclude new homeowners from township); *Grant v. Washington Twp.*, 203 N.E.2d 859, 862 (Ohio Ct. App. 1963) (deciding 80,000 square feet on fringe of large population center was unreasonable when no expert opinion related growth to general conditions, ten percent of township zoned R-1, no substantial demand for 80,000 square feet residential lots, development cost for R-1 lots extremely high and greatly lessens probability of successful development, and primary basis for classification to accommodate a number of individual property owners rather than needs of township as a whole).
- ⁹³ See *Cnty. Comm'rs of Queen Anne's County v. Miles*, 228 A.2d 450 (Md. 1967) (upholding five-acre minimum lot size comprising 6.7% of county area, distinguishing cases holding Large-Lot Zoning invalid in other municipalities because of distinctive nature of waterfront county and many historic sites, deciding ordinance makes fair and reasonable provision for all different kinds of housing, benefit to estate owners incidental, presumption of constitutionality and statutory authority); *Johnson v. Town of Edgartown*, 680 N.E.2d 37, 38-39 (Mass. 1997) (upholding three acre minimum lots for about one-half of town when legislature “recognized ‘a regional and statewide interest in preserving and enhancing’ Martha’s Vineyard’s ‘unique natural, historical, ecological, scientific, cultural, and other values,’ values that may be irreversibly damaged by inappropriate uses of land[,]” as this blunts any claim that town is acting only in support of parochial interests when protecting its environment); *Fischer v. Bedminster Twp.*, 93 A.2d 378, 379-80, 384 (N.J. 1952) (upholding five acre minimum lot size when township consisted of rolling countryside divided into naturally wooded area, farms, and country establishments, included only 457 families in township, surrounding municipalities were likewise rural in character, providing ample justification in preserving the character of community, maintaining value of property, and devoting land for its most appropriate use); *Dilliard v. Vill. of N. Hills*, 94 N.Y.S.2d 715, 716 (N.Y. App. Div. 1950) (upholding two-acre restriction was justifiable as elastic application of police power in absence of proof of superior public need in light of location and character of village); see also E-mail from Peter Buchsbaum, Retired N.J. Att’y and Trial J., to author (Jan. 28, 2023, 10:28 p.m.) (*Bedminster* superseded by cases requiring municipalities to meet fair share housing obligation, but Large-Lot Zoning allowed if fair share met).

Courts do not cite The Standard State Zoning Enabling Act that many states adopted and that provides as a zoning “[p]urposes in view” that “regulations shall be made with reasonable consideration ... to the character of the district.” A Standard State Zoning Enabling Act, *supra* note 24, at § 3.

THE TRAGEDY OF LOW-DENSITY, LARGE-LOT ZONING, 60 Real Prop. Tr. & Est....

⁹⁴ 246 S.W.2d 771, 776 (1952). The ordinance had a presumption of constitutionality, and the party attacking it had the burden of proof to show unreasonableness; loss sustained through depreciation of the property if court held the ordinance valid is not controlling, and city had statutory authority. *See id.* at 778-79.

⁹⁵ *Id.* at 776. The court also held, “The topography of the land, the character of the buildings and many other considerations entered into determining the location of the several districts, and the division lines between the districts, so that one district will not be materially affected by districts of a different classification.” *Id.*

⁹⁶ The Standard State Zoning Enabling Act also states that one purpose of the Act is to “conserv[e] the value of buildings.” A Standard State Zoning Enabling Act, *supra* note 24, at § 3. A footnote states, however, that this language is not intended to enhance the value of buildings but to conserve their value by preventing the deterioration of value that comes in blighted districts, and that it is to “encourage the most appropriate use of land.” *Id.* at 7 n.25.

⁹⁷ *See Developments in the Law--Zoning: The Legitimate Objectives of Zoning*, 91 Harv. L. Rev. 1443, 1452 (1978); *see also* Norman Williams Jr., *Planning Law and Democratic Living*, 20 L. & Contemp. Probs. 317, 334 (1955) (“Actually the phrase ‘the character of a neighborhood’ is usually used to refer to one of two things--either aesthetic characteristics, or those social characteristics which create some local opposition and thus fall into the category of ‘psychological nuisances.’ In other words, use of this phrase is usually a warning that either aesthetic zoning or snob zoning is involved.”).

⁹⁸ *See Developments in the Law--Zoning*, *supra* note 97, at 1452.

⁹⁹ *See id.*

¹⁰⁰ *See id.*

¹⁰¹ *See id.*; *see also* Conn. Gen. Stat. § 8-2(d)(10) (“Zoning regulations adopted pursuant to subsection (a) of this section shall not ... [b]e applied to deny any land use application, including for any site plan approval, special permit, special exception or other zoning approval, on the basis of (A) a district’s character, unless such character is expressly articulated in such regulations by clear and explicit physical standards for site work and structures”).

THE TRAGEDY OF LOW-DENSITY, LARGE-LOT ZONING, 60 Real Prop. Tr. & Est....

- ¹⁰² See *Steel Hill Dev., Inc. v. Town of Sanbornton*, 469 F.2d 956, 961 (1st Cir. 1972) (upholding a six-acre minimum lot size requirement to prevent the construction of new homes that would “significantly change the rural character of this small town”); *Scots Ventures, Inc. v. Hayes Twp.*, 537 N.W.2d 610, 611-12 (Mich. Ct. App. 1995) (finding that a five-acre minimum rather than a ten-acre minimum “is capable of achieving the township’s goal of preserving the rural character of the community”); *Sod Farm Assocs. v. Springfield Twp. Plan. Bd.*, 688 A.2d 1058, 1060 (N.J. Super. Ct. App. Div. 1996) (holding three-acre zoning not inherently unreasonable given rural character of Springfield; the zoning did not deny opportunities for low and moderate income housing, and land had economically viable use); *Manke Lumber Co., Inc. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 53 P.3d 1011, 1016 (Wash. Ct. App. 2002) (holding a twenty-acre minimum lot size in comprehensive plan not arbitrary or capricious when county’s goal was to “retain rural character” outside urban areas by providing a variety of densities and preserving resource-based activities).
- ¹⁰³ See *Levitt v. Inc. Vill. of Sands Point*, 160 N.E.2d 501, 502 (N.Y. 1959) (holding a two-acre minimum lot area requirement is a legitimate exercise of police power to maintain “rolling and partly wooded land in an attractive rural residential community”); *Curtiss-Wright Corp. v. Town of E. Hampton*, 442 N.Y.S.2d 125, 129 (N.Y. App. Div. 1981) (upholding a zoning ordinance implemented to “maintain the natural and rural qualities of the land and control urbanization and to conserve and protect the town’s water supply”); *Gignoux v. Vill. of Kings Point*, 99 N.Y.S.2d 280, 286 (N.Y. Sup. Ct. 1950) (upholding a 40,000 square foot zoning ordinance in the A-2 zone, aimed at preserving exclusive high class and rural aspects of community and ensuring further development along the lines of present development).
- ¹⁰⁴ See *Nopro Co. v. Cherry Hills Vill.*, 504 P.2d 344, 349 (Colo. 1972) (upholding a two-and-a-half-acre zoning restriction in which the village “was incorporated with the express purpose of protecting the inhabitants in the maintenance of a rural atmosphere consisting of small farms and large residential tracts”); see also *Conlin v. Scio Twp.*, 686 N.W.2d 16, 23 (Mich. Ct. App. 2004) (holding 7.5- and 5.2-acre ordinances reasonable because “avoiding overcrowding and preserving open space are ‘legitimate governmental interests’ ... [and] density restrictions advance those goals Thus, the zoning ordinance passes rational basis scrutiny.” (quoting *Landon Holdings, Inc. v. Grattan Twp.*, 667 N.W.2d 93, 106 (Mich. Ct. App. 2003))).
- ¹⁰⁵ See *Kavanewsky v. Zoning Bd. of Apps*, 279 A.2d 567, 570-71 (Conn. 1971) (upgrading of lot area requirements from one to two acres “made in demand of the people to keep Warren a rural community with open spaces and keep undesirable businesses out” held not to comply with statutory requirements); *Nat’l Land & Invest. Co. v. Kohn*, 215 A.2d 597, 611-12 (Pa. 1965) (rejecting the argument that “rural character of the area must be preserved,” and arguing that it “could not be seriously contended that the land would retain its rural character” if developed at four acre zoning because the area “would simply be dotted with larger homes on larger lots”); see also *Johnson v. Town of Edgartown*, 680 N.E.2d 37, 41 (Mass. 1997) (“Neither the provision of open space nor the protection of plant and animal life, for example, would singly justify [L]arge[-][L]ot [Z]oning.”).
- ¹⁰⁶ Debra Lyn Bassett, *The Rural Venue*, 57 Ala. L. Rev. 941, 974 (2006) (discussing use of rural character in land use cases); see Lisa R. Pruitt, *Rural Rhetoric*, 39 Conn. L. Rev. 159, 217-21 (2006) (discussing the use of rural character in other zoning contexts); see also Urb. Land. Inst., *supra* note 4, at 10 (arguing that lot size is not the most significant rural appearance factor and that spacing, which is most affected by lot frontage, and that the presence or absence of urban-type improvements, natural or finished landscaping, and the architectural design of buildings are the most important elements of rural visual character).
- ¹⁰⁷ See Eric S. Laschever, *An Overview of Washington’s Growth Management Act*, 7 Pac. Rim L. & Pol’y J. 657 (1998). The Act mandates statewide local comprehensive planning and also requires counties to adopt urban growth boundaries that geographically

THE TRAGEDY OF LOW-DENSITY, LARGE-LOT ZONING, 60 Real Prop. Tr. & Est....

limit where growth can occur. *See also* Vt. Stat. Ann. tit. 24, § 4302(c)(1) (2024) (“To plan development so as to maintain the historic settlement pattern of compact village and urban centers separated by rural countryside.”).

¹⁰⁸ *See* Wash. Rev. Code § 36.70A.070(5)(c).

¹⁰⁹ *Id.*; *see* Puget Sound Regional Council, Issue Paper on Rural Areas (2005), <https://rebrand.ly/ypfdutb> [<https://perma.cc/75Y3-NRSU>]; *see also* Clark County, Clark County Comprehensive Growth Management Plan 2015-2035 80, <https://bit.ly/4jiki42> [<https://perma.cc/QL3P-4DT6>]. Citations to statutes were current on the date this Article was submitted for publication.

¹¹⁰ Wash. Rev. Code § 36.70A.070(5)(b). The rural element must also contain measures for “[r]educing the inappropriate conversion of undeveloped land into sprawling, low-density development in the rural area.” Wash. Rev. Code § 70A.070(5)(c)(iii).

¹¹¹ *See* Brendan Shanks, *Land Use Regulations and Housing Development* 33 (Feb. 10, 2021), <https://shorturl.at/1QCm1> [<https://perma.cc/K7LN-RENQ>] (“My findings suggest that land use regulations encourage less dense development on larger parcels of land, without the compensation of allocating more land to residential use overall, effectively limiting the supply of housing available.”); Serkin, *supra* note 1, at 1682 (“There is a sense in which zoning is always and inherently exclusionary. To the extent it restricts supply--and that, after all, is what zoning primarily does--it should have the effect of increasing prices, at least as compared to the alternative of no density controls.”).

¹¹² Housing price studies must solve methodology problems, such as the selection of study areas, data collection, model building, selection of variables, and endogeneity, but study findings are generally consistent. For discussion, *see*, for example, Bronin, *supra* note 22, at 732-41 (discussing unreliable survey data, incomplete textual analysis); Jenny Schuetz, *Is Zoning a Useful Tool or a Regulatory Barrier?*, Brookings Inst. (2019), <https://rebrand.ly/2e5897> [<https://perma.cc/WFN5-NHQF>] (criticizing surveys, reliance on zoning text, technological tools, failure to consider implementation, and location differences). There has been improvement. *See* Robert W. Wassmer & Joshua A. Williams, *The Influence of Regulation on Residential Land Prices in United States Metropolitan Areas*, 14 *Cityscape* 9 (2021), <https://rebrand.ly/qmun9zi> [<https://perma.cc/LL9B-9YXB>] (discussing methodology problems in studies but noting corrections in recent work).

For examples of studies that explain methodology, *see*, for example, Song, *supra* note 16 (abstract) (discussing data set and model design selected for study); Jeffrey Zabel & Maurice Dalton, *supra* note 21, at 574-78 (showing hedonic model including changes in minimum lot size regulation at the zoning-district level, a measure of Community Zoning Power, variables for possible spillover effects in the same town and nearby towns, and zoning district fixed effects).

¹¹³ *See* Joint Center for Housing Studies of Harvard Univ., *The State of the Nation’s Housing 2024*, at 2 (noting that the number of homeowners who are cost-burdened because they spend more than 30% of their household income on housing and utilities, grew by three million to 19.7 million between 2019 and 2022, and that nearly one in four homeowner households (23.2%) are worryingly stretched thin), <https://tinyurl.com/houshar> [<https://perma.cc/JG3U-PH2T>].

THE TRAGEDY OF LOW-DENSITY, LARGE-LOT ZONING, 60 Real Prop. Tr. & Est....

- ¹¹⁴ See Arnab Chakraborty et al., *The Effects of High-density Zoning on Multifamily Housing Construction in the Suburbs of Six US Metropolitan Areas*, 47 *Urb. Studies* 437, 447 (2010) (“[Z]oning impedes the development of multifamily housing in suburbs across the country”); Keith R. Ihlenfeldt, *Exclusionary Land Use Regulations within Suburban Communities: A Review of the Evidence and Policy Prescriptions*, 41 *Urb. Studies* 261, 264-69 (2004) (discussing studies on cost effects and whether higher housing prices that result from regulations are caused by reduction in housing supply).
- ¹¹⁵ See Vicki Been et al., *Supply Skepticism: Housing Supply and Affordability*, 29 *Hous. Pol’y Debate* 25, 27 (2019), <https://tinyurl.com/terorg> [<https://perma.cc/CF89-M5SC>] (“[P]reponderance of the evidence shows that restricting supply increases housing prices and that adding supply would help to make housing more affordable.”); Vanessa Brown Calder, *Zoning, Land-Use Planning, and Housing Affordability 1* (Cato Institute, 2017), <https://tinyurl.com/catoaff> [<https://perma.cc/KD9Z-W8FN>] (“The statistical results show that rising land-use regulation is associated with rising real average home prices in [forty-four] states and that rising zoning regulation is associated with rising real average home prices in [thirty-six] states. In general, the states that have increased the number of rules and restrictions on land use the most have higher housing prices.”); Edward L. Glaeser & Joseph Gyourko, *The Impact of Zoning on Housing Affordability 6* (Nat’l Bureau of Econ. Rsch., Working Paper 8835, 2002), <https://rebrand.ly/fonyc1r> [<https://perma.cc/52QQ-Q34H>] (“[Z]oning and other land use controls, play the dominant role in making housing expensive.”); Ihlenfeldt, *supra* note 114; Raven Molloy, *The Effect of Housing Supply Regulation on Housing Affordability: A Review*, 80 *Regional Science and Urb. Econ.* 103350, at 1-2 (2020) (discussing effect of zoning regulation on housing costs; good review of literature); Brian N. Jansen & Edwin S. Mills, *Distortions Resulting from Residential Land Use Controls in Metropolitan Areas*, 46 *Real Est. Fin. Econ.* 193, 196 (2013), <https://rebrand.ly/w2vlghj> [<https://perma.cc/DG2A-ZGC5>] (“Stringent land use controls raised house values, and high house prices depressed population, real incomes and employment.”); see also Alex Horowitz & Tushar Kansal, *Restrictive Zoning Is Raising Housing Costs and Homelessness in Arizona*, *Pew* (Dec. 7, 2023), <https://rebrand.ly/21d6m2k> [<https://perma.cc/CCY7-8MDL>].
- ¹¹⁶ See Edward L. Glaeser & Bryce A. Ward, *The Causes and Consequences of Land Use Regulation: Evidence from Greater Boston*, 65 *J. Urb. Econ.* 265, 267, 278 (2009), <https://rebrand.ly/evnq17h> [<https://perma.cc/CZ7T-URRG>] (noting price increases and decline in units). Rising land costs have played a key role in rising housing costs. See Alexander Hermann, *Increasing Land Prices Make Housing Less Affordable*, *Joint Center for Housing Studies* (2019), <https://tinyurl.com/lndhou> [<https://perma.cc/W2MC-FPTB>]. Between 2012 and 2017, the value of land used for single-family housing increased almost four times faster than inflation. See *id.* Housing prices increased 29% while land costs increase 27%. See *id.*; see also Kristoffer Jackson, *Do Land Use Regulations Stifle Residential Development? Evidence From California Cities*, 91 *J. Urb. Econ.* 45, 46 (2016) (discussing that land use regulation, including low density zoning, reduces the number of permits issued for single family and multi-family housing). Rolf Pendall surveyed a substantial number of municipalities in the largest metropolitan areas and found that communities with low-density-only zoning grew more slowly, shifted further from multi-family to single-family units, and shifted further away from renter occupancy. Rolf Pendall, *Local Land Use Regulation and the Chain of Exclusion*, 66 *J. Am. Plan. Ass’n*, 125, 134 (2000). The study classified zoning as “low density only” if it prohibited housing construction at a gross density higher than eight dwelling units per acre. *Id.* at 138.
- ¹¹⁷ Eric Biber et al., *Small Suburbs, Large Lots: How the Scale of Land-Use Regulation Affects Housing Affordability, Equity, and the Climate*, 2022 *Utah L. Rev.* 1, 5 (2022) (“Research has found evidence that highly fragmented local government structures facilitate sprawling, low-density patterns of growth.”).

THE TRAGEDY OF LOW-DENSITY, LARGE-LOT ZONING, 60 Real Prop. Tr. & Est....

- ¹¹⁸ See, generally, Robert W. Burchell et al., *The Costs of Sprawl--Revisited* (TCRP Report 39) (1998), <https://rebrand.ly/2tx32is> [<https://perma.cc/UU43-2HEZ>]; Reid Ewing & Shima Hamidi, *Costs of Sprawl* (2017).
- ¹¹⁹ See Robert W. Burchell et al., *Sprawl Costs: Economic Impacts of Unchecked Development* 63 (2005) (ebook) (significant savings from 2000 to 2025 from compact as compared with sprawl development; compact growth would save over 4 million acres of land and, in prices at that time, \$126 billion or nearly 11% on water, sewer and road infrastructure).
- ¹²⁰ See Been, *supra* note 115, at 32 (“Restrictions on supply often are associated with lower density and less-compact development because they divert housing demand to lower density suburban or rural areas, leading to longer commutes and more driving, which results in increased air pollution and greenhouse gas emissions.”); see also Desegregate Conn., *Small Lots in Smart Places: A Right-Sized Solution for CT* (n.d.), <https://rebrand.ly/e4vmedn> [<https://perma.cc/WBJ8-WJCT>] (finding that towns with enormous lots had 28.1% higher annual transportation- and housing-related carbon emissions). The costs of sprawl also include increased travel costs, the decreased economic vitality of urban centers, the loss of productive farm and timberland, the loss of natural lands supporting tourism and wildlife-related industries, and the loss of a rural environment.
- ¹²¹ See Biber et. al., *supra* note 117, at 18 (concluding Large-Lot Zoning makes single-family houses significantly more expensive by requiring purchase of a substantial amount of undevelopable land with the house and restricts supply in high-demand, job-rich areas by limiting the amount of housing that can be produced on a given amount of land can produce; “These two factors combine to raise housing costs”); see also Been et al., *supra* note 115, at 27 (reviewing housing affordability studies and concluding that the “preponderance of the evidence” shows that restricting supply increases housing prices while adding to the housing supply would help to make housing more affordable).
- ¹²² See Kaitlyn Pacheco, *The 2022 U.S. Lot Size Index*, Angi (2022), <https://www.angi.com/articles/lot-size-index.htm> [<https://perma.cc/VVU7-R74Y>]. The study is based on 393,312 listings of houses for sale from the real estate marketplace Zillow and concludes that “[l]arge-lot sizes can price people out of the housing market and create affordability issues for potential homebuyers, even in areas with relatively cheap land.” The study includes diagrams for states and cities nationally and adds that “[m]any of the cities with the most expensive land are fast-growing metro areas where the demand for new housing is high and supply is limited.” Four states have typical lot sizes in excess of one acre.
- ¹²³ Studies in Massachusetts and Connecticut reached different results. See Glaeser & Ward, *supra* note 116, at 275 (noting a Greater Boston study discussing regression, finding that both acres per lot and the regulation index have a positive effect on prices; impact of the regulation index on prices is statistically significant; impact of minimum lot sizes is not) (criticized by Jeffrey Zabel & Maurice Dalton, *supra* note 21, at 573); Steven P. Lanza, *Zoning in on Minimum Lot Sizes: Causes and Consequences of Minimum Lot Size Zoning in Connecticut*, 18 Conn. Econ., Spring 2010 at 8, 10, <https://tinyurl.com/lanzamin> [<https://perma.cc/72U3-VR8Y>] (discussing a Connecticut study showing that increasing large-lot size associated with lower home prices after controlling for median home prices); Urb. Land Inst., *The Effects of Large-lot Size on Residential Development* 15 (1958) (discussing a Massachusetts study; “variation in area alone does not affect costs substantially;” total development costs increase in a curve as area increases with constant 150 ft. frontage; raw land and landscaping costs are variables, off site costs and house connections are constant, cost curve tends to level off).

THE TRAGEDY OF LOW-DENSITY, LARGE-LOT ZONING, 60 Real Prop. Tr. & Est....

- ¹²⁴ See *Simon v. Town of Needham*, 42 N.E.2d 516, 519 (Mass. 1942) (explaining that “[a] zoning by-law cannot be adopted for the purpose of setting up a barrier against the influx of thrifty and respectable citizens who desire to live there and who are able and willing to erect homes upon lots upon which fair and reasonable restrictions have been imposed.”).
- ¹²⁵ See *Ybarra v. Los Altos Hills*, 503 F.2d 250 (9th Cir. 1974) (concluding equal protection not violated by one acre zoning when poverty discrimination not shown, did not show lack of “meaningful opportunity” to obtain low-cost housing, no poor people live or work in Los Altos, failure to show that adequate low-cost housing was unavailable elsewhere in Santa Clara County in areas accessible to appellants’ jobs and social services); *S. Burlington Cnty. NAACP v. Mt. Laurel*, 456 A.2d 390, 471 (N.J. 1983) (holding five-acre lots do not necessarily violate obligation to provide fair share of low- and moderate-income housing if municipality can satisfy obligation in spite of apparently “exclusionary devices;” not obliged to allow maximum density of construction that environmental factors permit in other zones).
- ¹²⁶ See *Sod Farm Assoc. v. Springfield Twp. Planning Bd.*, 688 A.2d 1058, 1060 (N.J. App. Div. 1996) (deciding three-acre zoning for residential development not inherently unreasonable given rural character of township; ordinance not being used to deny opportunities for low and moderate income housing, and economically viable use of land permitted); *Bilbar Constr. Co. v. Easttown Twp. Bd. of Adjustment*, 141 A.2d 851, 858 (Pa. 1958) (“[R]esidence lot area of one acre in a rural and agricultural locality such as Easttown Township cannot justifiably be adjudged zoning for exclusiveness”); see also *Robert E. Kurzius, Inc. v. Upper Brookville*, 414 N.E.2d 680, 684 (N.Y. 1980) (concluding record clearly showed that legitimate purpose of ordinance was to preserve open-space areas of village).
- ¹²⁷ See *Senior v. Zoning Comm’n of New Canaan*, 153 A.2d 415, 418 (Conn. 1959) (upholding four-acre minimum zoning when sites were available at higher densities and the effect of upgrading the zone did not limit ownership of new homes in town to wealthy considering population under 16,000); *Wilson v. Town of Sherborn*, 326 N.E.2d 922, 926 (Mass. App. Ct. 1975) (deciding a two-acre minimum zoning does not have “any real effect on the housing needs of low and moderate income groups”); *Conlin v. Scio Twp.*, 686 N.W.2d 16, 26 (Mich. Ct. App. 2004) (upholding 7.5 and 5.2 acres restriction on lot sizes; may be a need for additional housing and the restrictions may result in some inequity but plaintiffs could not show that density restrictions were based “solely on reasons totally unrelated to the pursuit of the State’s goals,” nor “negative every conceivable basis which might support” the restrictions; zoning ordinance passed rational basis scrutiny); *Penn St., L.P. v. E. Lampeter Twp. Zoning Hearing Bd.*, 84 A.3d 1114, 1143 (Pa. Commw. Ct. 2014) (upholding township’s zoning ordinance when there was no indication that effect of the zoning ordinance was so unduly restrictive that it created *de facto* agricultural zone that precluded reasonable development throughout the township).
- ¹²⁸ See *Rasmussen v. City of Lake Forest*, 404 F. Supp. 148, 151 (N.D. Ill. 1975) (considering a zoning ordinance prohibiting the sale of lots less than one-and-one-half acres; upholding complaint at pleading stage that zoning ordinances were unconstitutional as inimical to the needs of growth of the surrounding region); *Bd. of Cnty. Supervisors of Fairfax Cnty. v. Carper*, 107 S.E.2d 390, 396 (Va. 1959) (considering a zoning ordinance that required a minimum of two acres in western part of county; the court concluded the ordinance had an intentional and exclusionary purpose; the practical effect would prevent people in low-income bracket from living in western area and would force them into eastern area, reserving western area for those who could afford to build houses on two acres or more; served private interests).
- ¹²⁹ See Simon Buchler & Elena Catharina Lutz, *The Local Effects of Relaxing Land Use Regulation on Housing Supply and Rents* (MIT

THE TRAGEDY OF LOW-DENSITY, LARGE-LOT ZONING, 60 Real Prop. Tr. & Est....

Ctr. for Real Est. Rsch., Working Paper No. 21/18, 2021), <https://shorturl.at/bZ4dy> [<https://perma.cc/J6VQ-YXK7>] (upzoning of floor area ratios in Zurich, Switzerland increased local housing supply and lowered rents across the entire city); Jake Wegmann et al., *Here Come the Tall Skinny Houses: Assessing Single-Family to Townhouse Redevelopment in Houston, 2007-2020*, 25 *Cityscape* 171 (2023), <https://rebrand.ly/ovfwnjd> [<https://perma.cc/TJK7-UHXX>] (noting substantially increased townhouse development when reducing required minimum lot size for detached single-family houses from 5,000 to 3,500 square feet and to 1,400 square feet when developers provided compensating open space); see also Molly Bolan, *Do Land-Use Reforms Spur Housing Development? You Betcha*, *Route Fifty* (Jan. 8, 2024), <https://rebrand.ly/g2uypz7> [<https://perma.cc/S85G-JJ7Q>] (noting substantially slowed rent increases when Minneapolis zoning reform reduced parking requirements, streamlined the zoning process and allowed higher densities along commercial corridors and near public transit, as compared with other Minnesota cities); Alex Horowitz & Ryan Canavan, *More Flexible Zoning Helps Contain Rising Rents*, The Pew Charitable Trusts (2023), <https://rebrand.ly/iarg8xf> [<https://perma.cc/XBL7-96NG>] (discussing four jurisdictions that allowed more housing, which sharply slowed rent growth).

¹³⁰ See Song, *supra* note 16, at 41-47 (noting zoning reforms would induce the development of 122% more single-family homes in partial equilibrium and 25% in general equilibrium); see also Kulka, *supra* note 67, at 55 (“[S]mall, localized reductions in the minimum lot size can lead to desirable neighborhoods being more affordable to lower income households that value amenities highly” and adding that “households with household income below \$45,000 do not benefit from this policy, but households with median income (\$75,000) value it at \$900 annually and households with household income of \$85,000 value it at \$2,500 annually”); Horowitz & Canavan, *supra* note 129, at 28 (noting more flexible zoning added new housing faster than households formed or moved in to fill the homes, which helped to slow rents).

¹³¹ See Christina Stacy et al., *Land-Use Reforms and Housing Costs: Does Allowing for Increased Density Lead to Greater Affordability?*, *Urb. Stud. J. Ltd.* (2023), <https://journals.sagepub.com/doi/10.1177/00420980231159500> [<https://perma.cc/DJ3S-MU96>]. Unlike studies that use surveys to identify regulatory stringency, this study focused on actual reforms in individual municipalities and on rent levels rather than home sales. See *id.* at 6. The study does not have data to measure reforms across an entire metropolitan area. See *id.* The increase predominantly benefited rental units for higher-than-middle income households during the short and medium-term after reform. See *id.* at 14.

¹³² See Vicki Been et al., *Supply Skepticism Revisited* 36 (N.Y.U., Working Paper No. 24-12, 2023), <https://tinyurl.com/suppvi> [<https://perma.cc/PYN4-ZH9X>] (noting that relaxing restrictions will not create new development unless demand exists).

¹³³ See *id.* at 44.

¹³⁴ See *id.* at 28-34; see also Tyler Boesch et al., *How New Apartments Create Opportunities for All*, Fed. Rsv. Bank of Minneapolis (Mar. 4, 2024), <https://shorturl.at/VwEXP> [<https://perma.cc/TCR4-2DLF>]; Evan Mast, *The Effect of New Market-Rate Housing Construction on the Low-Income Housing Market*, 133 *J. Urb. Econ.* (2023), <https://shorturl.at/8Ewxy> [<https://perma.cc/ATY7-SD57>] (finding that new market-rate construction of housing loosens the market for low-quality and low-income housing through migration).

¹³⁵ See *Steel Hill Dev., Inc. v. Town of Sanbornton*, 469 F.2d 956, 962 (1st Cir. 1972) (stating that ordinance that severely restricted

THE TRAGEDY OF LOW-DENSITY, LARGE-LOT ZONING, 60 Real Prop. Tr. & Est....

development “may properly stand for the present as a legitimate stop-gap measure”); *see also* *Wilson v. Cnty. of McHenry*, 416 N.E.2d 426, 432 (Ill. App. Ct. 1981) (upholding objective in agricultural zoning ordinance to promote the public interest by preserving prime farmland and funneling residential development toward existing urban centers).

¹³⁶ The Missouri Court of Appeals quoted what was then Saint Louis zoning ordinance section 1003.107:

The ‘NU’ Non-Urban District of St. Louis County encompasses areas within which rough natural topography, geological conditions, or location in relation to urbanized areas creates practical difficulties in providing and maintaining public roads and public or public-utility services and facilities, and also encompasses areas in which significant non-urban uses have been established.

Herman Glick Realty Co. v. St. Louis Cnty., 545 S.W.2d 320, 322 (Mo. Ct. App. 1976) (quoting Saint Louis, Mo., Rev. Ordinances § 1003.107). The Planning Director testified “that the classification had been referred to as placing land in ‘cold storage’ or as a ‘holding zone.’”^D *Id.* A Zoning Technical Advisory Committee of which I was a member and was appointed by the planning department to recommend changes to the county zoning ordinance recommended the non-urban zone because specialized growth management measures were not available at that time.

¹³⁷ Telephone Interview with Dee Joyner, former Saint Louis County, Mo., planning director, April 9, 2024.

¹³⁸ *See Palmer v. St. Louis Cnty.*, 591 S.W.2d 39 (Mo. Ct. App. 1979) (denying standing to property owner 1.2 to 1.5 miles from property rezoned to C-8-Planned Commercial District from Non-Urban zone because no financial, special aesthetic, or environmental damage found); *Herman Glick Realty Co.*, 545 S.W.2d at 325 (holding Non-Urban zone had no substantial relationship to the public health, safety, morals, or general welfare; that maintaining Non-Urban zone outweighed by demonstrated detriment to appellant; and that it infringed upon property owner’s rights under federal and state due process clauses when property owner planned commercial use in area developed commercially and change in county plan proposed commercial use).

¹³⁹ *See* Saint Louis County, Mo. Ordinances, § 1003.107(7)(1)(a), <https://rebrand.ly/kfoxfg6> [<https://perma.cc/5SJ3-CLDK>].

¹⁴⁰ *See id.* § 107(7)(1)(b).

¹⁴¹ *See id.* Missouri has a table of minimum lot sizes based on soil depth and slope, but the required lot sizes range from 0.92 to five acres (if you happen to live on a cliff). *See* Mo. Code Regs. Ann. tit. 10, § 20-6.010, Table 1 (2023). However, Georgia recommends an acre but leaves regulation to locals. *See* Ga. Dep’t of Pub. Health, Manual For on-Site Sewage Management Systems 1, 223 (2019).

¹⁴² *See* Email from Salim Furth, Senior Rsch. Fellow and Dir., Urbanity Project, Mercatus Ctr. George Mason Univ., to author (June 6, 2024, 12:55 p.m. CDT) (on file with author) (“My sense is that today, one acre has replaced 20,000 square feet as the safe rule-of-

THE TRAGEDY OF LOW-DENSITY, LARGE-LOT ZONING, 60 Real Prop. Tr. & Est....

thumb for local planners”). He adds, “Some states seem to have no area requirements, instead using site-specific conditions and setbacks. And many/most of the states [that are cited] also have site-testing requirements and additional limits near bodies of water.”
Id.

¹⁴³ See *Zeerco Mgmt. Corp. v. Chippewa Twp.*, No. 238800, 2003 WL 22017795, at *4 (Mich. Ct. App. Aug. 26, 2003) (noting reason for one acre minimum was lack of sewer system, and water table cannot support more densely located septic systems; “some bad experiences” with water table issues in two other subdivisions and concerns that more densely located septic systems on plaintiff’s property would cause septic problems and would adversely affect the public safety, health, and welfare).

¹⁴⁴ See *Wilson v. Town of Sherborn*, 326 N.E.2d 922, 924-25 (Mass. App. Ct. 1975) (considering zoning bylaw that included two acre lot minimums; concluded acute unresolved sewerage problem, the town’s lack of a public water supply or sewage system, and the necessity of wells and onsite septic systems necessary for residential construction, created a need for sufficient land area to physically accommodate well and septic system structural elements and sufficient land area with soil type that allowed septic system and well to operate without possibility of eventual pollution of well water; some additional land area necessary if system required repair, relocation or expansion, and concern about environmental degradation because of numerous, though safely functioning, sewerage and water supply systems); *Zygmunt v. Plan. & Zoning Comm’n of Town of Greenwich*, 210 A.2d 172, 174 (Conn. 1965) (upholding denial of zoning change from four acres to higher density; evidence before commission indicated that good judgment dictated that more than the 20,000-square-foot minimum legal area be available for wells in case water supply inadequate and subsoil conditions not satisfactory to accommodate adequate leaching fields without endangering underground water supply).

¹⁴⁵ See U.S. Env’t. Prot. Agency, *Septic System Impacts on Water Resources*, <https://tinyurl.com/EPAsources> [<https://perma.cc/SG2S-YLBB>] (July 16, 2024) (noting the “extent of this impact depends on how well your septic system is designed, installed, maintained and if it is used properly;” also noting that “most serious documented problems involve contamination of surface waters and ground water with disease-causing pathogens and nitrates”); Lisa J. Huriash, *Before Septic Tanks Fail, More S. Florida Homes Are Switching to Sewers*, *Orlando Sentinel* (Apr. 26, 2024), <https://rebrand.ly/c2k6voj> [<https://perma.cc/TGC5-9DUV>].

¹⁴⁶ See Robert A. Schultheis, *Septic Tank/Absorption Field Systems: A Homeowner’s Guide to Installation and Maintenance* (U. Mo. Extension Division, 2001), <https://tinyurl.com/moextend> [<https://perma.cc/32QQ-GENE>] (“A septic tank/absorption field is the most common onsite sewage treatment system in use in Missouri. Nearly 30 percent of all housing units in Missouri use onsite wastewater treatment systems. Most of these are septic tank/absorption field systems. Several surveys throughout the state have shown that 70 percent, or 150,000, of these systems are not functioning properly Human contact with sewage is a serious public health risk.”).

¹⁴⁷ An urban service area is another alternative that provides an incentive for public services.

An Urban Service Area (USA) is a defined area in which a municipality provides access to public services, such as water, sewer, and transit. These areas are typically established in a local government’s comprehensive plan and implemented in the zoning or other land use codes. Ordinances enforcing USA’s effectively create a legal boundary, outside of which the local government is not obligated to provide public services and may refuse to do so. Developers are still permitted to construct beyond the boundary, but may be required to create their own connections to utilities and may also be refused the right to access those utilities.

Alec Leshner, *Sustainable Development Code*, Chapter 3.1, *Development Patterns and Infill: Urban Service Areas* (Jonathan Rosenbloom & Christopher Duerksen eds.), <https://tinyurl.com/urbserv> [<https://perma.cc/TLN7-7DGC>] (discussing urban service

THE TRAGEDY OF LOW-DENSITY, LARGE-LOT ZONING, 60 Real Prop. Tr. & Est....

boundaries and providing links to municipalities where they have been adopted). The urban service area can be extended to allow more development or restrained to contain urban sprawl.

¹⁴⁸ 215 A.2d 597, 609 (Pa. 1965).

¹⁴⁹ Courts should reject *Zygmunt v. Plan. & Zoning Commission of Town of Greenwich*, 210 A.2d 172, 174 (Conn. 1965), which dismissed a public service alternative because “there was no evidence of any planned extension of municipal water or sewer lines into the area” to relieve problems from onsite systems. *See also* Stephen Clowney, *Nationalize Zoning*, 72 U. Kan. L. Rev. 565, 582 (2024) (“Congress could prohibit lot size minimums above 5,000 square feet (0.11 acres) in areas served by municipal water and sewer connections.”).

¹⁵⁰ A municipality can require a developer to provide these facilities through an impact fee, which is a type of exaction. “Exactions require that developers provide, or pay for, some public facility or other amenity as a condition for receiving permission for a land use that the local government could otherwise prohibit.” Vicki Been, “Exit” as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 Colum. L. Rev. 473, 478-79 (1991). For discussion of the Supreme Court’s tests for exactions, see *Sheetz v. Cnty. of El Dorado*, 144 S. Ct. 893 (2024). For an example of how impact fees are calculated under a state law authorizing impact fees, see *Home Builders Assn. of Tulare/Kings Cntys., Inc. v. City of Lemoore*, 112 Cal. Rptr. 3d 7 (Cal. Ct. App. 2010).

¹⁵¹ *See* *S. Burlington Cnty. N.A.A.C.P. v. Mount Laurel Twp.*, 336 A.2d 713, 731 (N.J. 1975) (holding in a case adopting fair share housing rule, “This is not to say that land use regulations should not take due account of ecological or environmental factors or problems. Quite the contrary. Their importance, at last being recognized, should always be considered,” but adding that regulations cannot be used to thwart growth but must be only those reasonably necessary for public protection of a vital interest); *see also* John Anderson, *Environmental Considerations: New Arguments for Large-Lot Zoning*, 7 Urb. L. Ann. 370 (1974) (discussing early cases).

¹⁵² *See* *Caspersen v. Town of Lyme*, 661 A.2d 759, 764 (N.H. 1995). An expert in forestry testified that small lots create access problems to abutting lots, and that there are more opportunities for harvesting on fifty acres, which is the minimum lot size where forestry becomes profitable. The evidence supported a finding that a fifty-acre minimum lot size was rationally related to the town’s legitimate goals of encouraging forestry and timber harvesting in that district. The record did not support an argument that the fifty-acre minimum was unreasonable when considered in a regional context. An analysis of least restrictive alternatives is not part of a rational basis analysis.

¹⁵³ *See* Anderson, *supra* note 151, at 375.

¹⁵⁴ *See* Robert B. Olshansky, *Planning for Hillside Development* 9, 11-12 (Am. Plan. Ass’n, Plan. Advisory Serv. Rep. No. 466, 1996).

THE TRAGEDY OF LOW-DENSITY, LARGE-LOT ZONING, 60 Real Prop. Tr. & Est....

¹⁵⁵ *See id.*

¹⁵⁶ *See id.*

¹⁵⁷ *See id.* at 8-9; *see, e.g.*, Rancho Cucamonga, Development Code § 17.52.020 (2022) (establishing slope density regulations).

¹⁵⁸ *See Sellon v. City of Manitou Springs*, 745 P.2d 229, 233 (Colo. 1987) (considering evidence that problems developed after improvements made to property containing relatively steep slopes; city forced to deal with erosion, drainage, maintenance and emergency access issues; question is not whether other solutions are feasible or superior); *accord*, *Fisher v. Viola*, 789 A.2d 782, 787 (Pa. Commw. Ct. 2001) (holding steep slope and impermeability restrictions reasonable because they promote preservation of environmentally sensitive areas, decrease possible landslide and erosion problems and public infrastructure servicing problems, and provide enhanced green space).

¹⁵⁹ “Surface water flows within the watershed occur as overland runoff and as stream flow. Overland flow, or stormwater as it is commonly called, is generated when the capacity of the soils and vegetation to absorb water from precipitation is exceeded and water runs across the surface of the land in diffuse ‘sheet flow.’” Sanjay Jeer et al., *Nonpoint Source Pollution: A Handbook for Local Government* 6 (Am. Plan. Ass’n, Plan. Advisory Serv. Rep. 476, 1977). Overland runoff and stream flow can vary across watersheds as soil and vegetation absorption capacity can vary. Some states authorize the protection of water sources. *See* N.J. Stat. Ann. § 40:55D-38(b)(13) (authorizing “[p]rotection of potable water supply reservoirs from pollution or other degradation of water quality resulting from the development or other uses of surrounding land areas.”).

¹⁶⁰ *See* Jeer, et al., *supra* note 159, at 17 (“The portion of the subsurface that is saturated with groundwater is known as the zone of saturation. The top of the zone of saturation is the water table (or phreatic surface). The soils between the top of the water table and the ground surface comprise the zone of aeration or unsaturated zone.”).

¹⁶¹ *See* *Sec. Mgmt. Corp. v. Baltimore Cnty.*, 655 A.2d 1326, 1328, 1333 (Md. 1995) (prohibiting dense residential development substantially related to protection of watershed when five acre watershed protection zone needed for water supplies of metropolitan Baltimore and neighboring municipalities); *Johnson v. Town of Edgartown*, 680 N.E.2d 37, 42 (Mass. 1997) (considering a three-acre zoning ordinance that covered half of the island of Martha’s Vineyard from stormwater pollution that protected coastal pond from pollution; the court concluded this zoning was not exclusionary and regional and statewide interests in the preservation of the unique quality of Martha’s Vineyard justified conservative assumptions about the consequences of land uses, even if protection of those interests standing alone might not support three-acre zoning); *Albano v. Mayor & Twp. Comm. of Washington Twp.*, 476 A.2d 852, 857 (N.J. Super. Ct. App. Div. 1984) (holding zoning restrictions not overly burdensome and necessary to protect lake from further pollution that had previously been polluted by development of upstream property not as environmentally sensitive; reasonable in view of streams flowing through property; sewerage treatment capacity filled).

THE TRAGEDY OF LOW-DENSITY, LARGE-LOT ZONING, 60 Real Prop. Tr. & Est....

- ¹⁶² See Wake County, NC. Code § 3-74-5 (2005), <https://rebrand.ly/ybvfoqh> [<https://perma.cc/96UT-EYA2>] (“All development within WSO overlay districts must, to the maximum extent practicable, minimize impervious or partially pervious surface coverage, direct stormwater away from surface waters, incorporate Best Management Practices (BMPs) to minimize water quality impacts, and transport stormwater runoff from the development by vegetated conveyances”; can include density limits).
- ¹⁶³ See Mark W. Cordes, *Agricultural Zoning: Impacts and Future Directions*, 22 N. Ill. U. L. Rev. 419 (2002) (discussing effectiveness of agricultural zoning); Edward Thompson, Jr., “Hybrid” *Farmland Protection Programs: A New Paradigm for Growth Management?*, 23 Wm. & Mary Env’t. L. & Pol’y Rev. 831 (1999) (discussing examples where regulation has been used successfully with other programs). The American Farmland Trust has extensive information on farmland preservation at <https://tinyurl.com/landfarm> [<https://perma.cc/RP5V-SMTK>]. For a comprehensive review, see Alec LeSher, *Large-Lot and Preservation Zoning in Rural Areas* (n.d.), <https://shorturl.at/cz9gC> [<https://perma.cc/8F7K-2MAA>]. For an example of an ordinance, see Skagit Cnty., Wash. Code § 14.16.400 (2024) (establishing “agricultural-natural resource” zones with minimum 40 acre lots and allowing only agricultural uses).
- ¹⁶⁴ See, e.g. Ind. Code Ann. § 36-7-4-601(d)(1) (1995) (may establish agricultural districts); Minn. Stat. Ann. § 394.25 (Subd.2) (2019) (establishing the same); 53 Pa. Stat. and Cons. Stat. Ann. § 10604(3) (1988) (“To preserve prime agriculture and farmland considering topography, soil type and classification, and present use”); see also *Kirk v. Zoning Hearing Bd. of Honey Brook Twp.*, 713 A.2d 1226, 1230 (Pa. Commw. Ct. 1998) (upholding zoning for 60,000 square foot density that complied with statutory requirements).
- ¹⁶⁵ See *C & M Devs., Inc. v. Bedminster Twp. Zoning Hearing Bd.*, 820 A.2d 143, 155 (Pa. 2002), *superseded by statute* (noting the law is well-established that zoning may protect prime agricultural land and encourage agricultural activity).
- ¹⁶⁶ See *Gisler v. Cnty. of Madera*, 112 Cal. Rptr. 919, 921-22 (Cal. Ct. App. 1974) (finding the county determined a minimum eighteen-acre parcel size necessary for preservation of agricultural character of area, and the court should not interfere with legislative determination since reasonable minds might differ); *Wilson v. Cnty. of McHenry*, 416 N.E.2d 426, 430-32 (Ill. App. Ct. 1981) (finding a 160-acre lot size minimum was not arbitrary when the predominant factors were the predominantly agricultural nature of the surrounding area, objective of preserving prime farm land, and funneling residential development towards existing urban centers); *Whitmore Lake 23/LLC v. Ann Arbor Charter Twp.*, No. 06-000513-CZ, 2011 WL 1600507, at *5-8 (Mich. Ct. App. Apr. 28, 2011) (finding zoning ordinance requiring minimum ten-acre lot size rationally related to advancing numerous legitimate governmental interests including preserving farmland); *N.J. Farm Bureau, Inc. v. Twp. of E. Amwell*, 882 A.2d 388 (N.J. Super. Ct. App. Div. 2005) (finding large-lot zoning ordinance in agricultural district increasing minimum lot size from three acres to ten acres does not create exclusionary zoning under court’s housing fair-share rule); *Mays v. Bd. of Trs. of Miami Twp.*, No. 18997, 2002 WL 1396008, at *2 (Ohio Ct. App. June 28, 2002) (upholding twenty-acre minimum lot zoning ordinance that preserves agricultural use through feasibility of farming is mixed); *Thompson v. Land Conservation and Dev. Comm’n*, 204 P.3d 808 (Or. Ct. App. 2009) (finding defendant commission entitled to deference when approving zoning, and reducing 160 acres to forty acres to promote viticulture rather than only wheat farming has evidentiary basis and appropriate for subject area); *Penn St., L.P. v. E. Lampeter Twp. Zoning Hearing Bd.*, 84 A.3d 1114, 1140 (Pa. Commw. Ct. 2014) (upholding zoning ordinance exception involving lots less than ten acres when new uses are restricted by minimum lot area depending on availability of public sewer and water because consistent with intent to preserve prime agriculture and farmland).

THE TRAGEDY OF LOW-DENSITY, LARGE-LOT ZONING, 60 Real Prop. Tr. & Est....

¹⁶⁷ See *McGonigle v. Lower Heidelberg Twp. Zoning Hearing Bd.*, 858 A.2d 663 (Pa. Commw. Ct. 2004) (upholding zoning due to land expert stating forty-acre minimum lot size requirement protected township's agricultural lands by preventing them from being subdivided into lots that were too small for farming).

¹⁶⁸ See *Codorus Twp. v. Rodgers*, 492 A.2d 73, 86-87 (Pa. Commw. Ct. 1985).

¹⁶⁹ See *id.*

¹⁷⁰ See *id.*

¹⁷¹ See *Pettee v. Cnty. of DeKalb*, 376 N.E.2d 720, 725 (Ill. App. Ct. 1978) (rejecting zoning where subject property largely unsuitable for farming or at best marginal farmland because of serious drainage problem of twenty-five acres); *Smeja v. Cnty. of Boone*, 339 N.E.2d 452, 455 (Ill. App. Ct. 1975) (finding zoning ordinance unconstitutional where subject property composed of fifteen acres of submarginal land and thirty-five acres of woods, raising concern over suitability of property for farming).

¹⁷² *C & M Devs., Inc. v. Bedminster Twp. Zoning Hearing Bd.*, 820 A.2d 143, 156-59 (Pa. 2002) (finding ordinance unconstitutional where board set one-acre minimum lot size in attempt to exclude people from area); *Hopewell Twp. Bd. of Supervisors v. Golla*, 452 A.2d 1337, 1343 (Pa. 1982) (finding ordinance unreasonably severe where it limited residential subdivisions to a maximum of five 1.5-acre plots regardless of size of original tract).

¹⁷³ The Pennsylvania Supreme Court invalidated large-lot one-acre agricultural zoning because it was based on belief in a "good number" that would forestall the development of large houses on small lots and held that it "improperly attempt[ed] to exclude people from the area." *C & M Devs., Inc.*, 820 A.2d at 158 (holding also that the court is "compelled to ascribe an exclusionary purpose to that requirement," and "[b]y also limiting a landowner to developing homes on one-acre minimum lots on the buildable site area, however, the Township is no longer attempting to preserve agriculture, but rather, is improperly attempting to exclude people from the area and in so doing, is unreasonably restricting the property rights of the landowner," quoting *National Land*); see also *Main St. Dev. Grp., Inc. v. Tincum Twp. Bd. of Supervisors*, 19 A.3d 21, 28 (Pa. Commw. Ct. 2011) ("Simply put, a zoning ordinance that requires between 95% and 97% of the land in the Township to be used for agricultural purposes simply does not balance the need for development and agricultural uses.").

¹⁷⁴ See Christopher Serkin, *Creating Density: The Limits of Zoning Reform*, 11 Prop. Rts. J. 183, 213 (2022) (arguing for incremental approach that "looks simply to identify and correct pathologies in land use decision-making whenever and wherever possible); see also Serkin & Wellington, *supra* note 1, at 1688 (explaining that restricting density and constraining supply of developable land boosts local land values, translating directly into higher housing prices, but adding that density is no longer a universal solution and that regional and subregional effects must be considered).

THE TRAGEDY OF LOW-DENSITY, LARGE-LOT ZONING, 60 Real Prop. Tr. & Est....

Large-Lot Zoning reform is part of a growing zoning reform movement. See Anthony Flint, *The State of Local Zoning: Reforming a Century-Old Approach to Land Use*, Land Lines 24, Jan. 2023 at 24, <https://rebrand.ly/6vc5hr2> [<https://perma.cc/RNQ4-BP7D>]; Michele Lerner, *Zoning Reforms to Mitigate America's Affordable Housing Crisis*, Urban Land (May 21, 2024), <https://rebrand.ly/8mfy1cu> [<https://perma.cc/5GUV-6HEV>]. Compare Michael Allan Wolf, *Zoning Reformed*, 70 Univ. Kan. L. Rev. 171, 236-41 (2021) (recommending zoning reforms), with Daniel R. Mandelker, *A Comment on Professor Wolf's Zoning Reformed*, 71 Univ. Kan. L. Rev. 275 (2022) (remarking on *Zoning Reformed* and recommending additional changes to zoning procedures).

¹⁷⁵ See Mandelker, *supra* note 174, at 280-81.

¹⁷⁶ Commentators recommend shifting the presumption of constitutionality against Large-Lot Zoning. See Jeffrey M. Lehmann, *Reversing Judicial Deference Toward Exclusionary Zoning: A Suggested Approach*, J. Affordable Hous. & Cmty. Dev. L., 229, 247, 251 (Winter 2003) (“[W]hen confronted with a zoning ordinance that requires a minimum lot size greater than one acre, courts should assume that such large lots are not related to the health, safety, and welfare of the community and declare the ordinance invalid unless the municipality can show otherwise.” Additionally, “[c]ourts should be willing to accept agricultural, environmental, and rural justifications but should carefully scrutinize whether low-density requirements are actually promoting those purposes.”). But see Gardner, *supra* note 1, at 26 (arguing that a court should give a presumption of validity to a plan for home construction that meets all public health requirements, and a municipality denying an application has the burden of presenting a countervailing rationale founded on genuine, nonspeculative health and safety concerns sufficient to outweigh the initial presumption).

¹⁷⁷ See Daniel R. Mandelker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land-Use Law*, 24 Urb. Law. 1, 3 (1992). Shifting the presumption places the burden on government to justify Large-Lot Zoning. See *id.* at 24.

¹⁷⁸ *Id.* at 4.

¹⁷⁹ See *id.*

¹⁸⁰ See *id.* at 40.

¹⁸¹ See *id.*

¹⁸² See *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 816 (2000) (“When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government’s obligation to prove that the alternative will be ineffective to achieve its goals.”). For discussion of content-based speech as applied to signs, see Daniel R. Mandelker, *Free Speech Law for On-Premise*

THE TRAGEDY OF LOW-DENSITY, LARGE-LOT ZONING, 60 Real Prop. Tr. & Est....

Signs § 2:4 (4th ed. 2022 & Supp. 2023), <https://tinyurl.com/signfr> [<https://perma.cc/75Q4-V39G>]; see also Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) (“This commonsense meaning of the phrase ‘content based’ requires a court to consider whether a regulation of speech ‘on its face’ draws distinctions based on the message a speaker conveys.”).

183 Courts should reject *Caspersen v. Town of Lyme*, 661 A.2d 759, 764 (N.H. 1995). The court upheld Large-Lot Zoning in a mountain and forest district and held that “[a]n analysis of least restrictive alternatives is not part of a rational basis analysis.” *Id.*

184 I discuss the third-party standing issue in *Standing to Sue in Land Use Litigation*, 56 Real Prop. Tr. & Est. L.J. 237 (2021).

185 Norman Williams first discussed the importance of parties in interest in land use litigation. See Norman Williams, *American Land Planning Law* § 2:1 (Aug. 2024 Update) (the result is the first type of zoning case-- often referred to below as a “developer’s case”).

186 See *id.* § 2:2 (“However, there are often potential third parties in land use conflicts, who rarely appear in the case law--but whose interests may in fact sometimes be affected more severely than either of the other two.”).

187 New Jersey has a liberal approach to third party standing in land use cases, relying in part on a statute granting standing in land use cases to nonresidents. See N.J. Stat. Ann. § 40:55D-4 (West 2021) (“any person, whether residing within or without the municipality”). New Jersey courts at various times granted standing to a trade organization; “the public,” represented by the New Jersey Public Advocate; and several advocacy organizations. They found, in the words of one court, that they had “a sufficient stake and real adversariness ... [to achieve] individual justice, along with the public interest ... [without] procedural frustrations.” *Home Builders League of S. Jersey, Inc. v. Berlin Twp.*, 405 A.2d 381, 384 (N.J. 1979). New York granted standing to a wide variety of individuals and groups in land use cases. See *Suffolk Hous. Servs. v. Town of Brookhaven*, 405 N.Y.S.2d 302 (N.Y. App. Div. 1978) (granting standing to residents of town).

188 See *City of Conway v. Housing Auth.*, 584 S.W.2d 10, 13 (Ark. 1979) (discussing judicial authority). The focus of the litigation is on the zoning ordinance, not the proposed development. See *Jaylin Invs., Inc. v. Vill. of Moreland Hills*, 839 N.E.2d 903, 908 (Ohio 2006) (“[Z]oning ordinance is the focal point of the analysis, not the property owner’s proposed use”). Specific relief is not available to a developer because the typical relief is a preliminary injunction that enjoins the municipality from enforcing the zoning ordinance against the plaintiff. Most courts will not affirmatively order a rezoning to allow a development the plaintiff has proposed to proceed.

189 See Matthew Resseger, *The Impact of Land Use Regulation on Racial Segregation: Evidence From Massachusetts* (Mercatus Working Paper 2022), <https://bit.ly/3XOVJDL> [<https://perma.cc/TDT6-5343>] (“[E]ffects of zoning measured throughout this paper are specific to the context of residence patterns of Black and Hispanic residents in Massachusetts as they evolved through the late 20th and early 21st century. They may differ from what would be observed in another place or time.”).

THE TRAGEDY OF LOW-DENSITY, LARGE-LOT ZONING, 60 Real Prop. Tr. & Est....

¹⁹⁰ See Bob Bengford, Visualizing Compatible Density, *Urbanist* (May 4, 2017), <https://tinyurl.com/compden> [https://perma.cc/QM65-8NQQ] (visual presentations of residential development at approximately these density levels).

¹⁹¹ See *Howard Cnty., Md., PlanHoward 2030* (2021), <https://tinyurl.com/planhoward> [https://perma.cc/KGC4-79TN]; see also *City of Sioux Falls, Shape Sioux Falls 2040*, at 23-38 (2016), <https://tinyurl.com/sxplan> [https://perma.cc/PB3E-BFKG] (discussing growth policy for Sioux Falls, South Dakota).

¹⁹² Mandamus is an extraordinary remedy that a landowner can use if a municipality refuses to approve a rezoning administratively. Mandamus lies to compel a public official or agency to do a ministerial act, such as the administrative approval of a rezoning, if a plaintiff shows a clear legal right to have the duty performed because she has complied with all the requirements for the exercise of that duty. See *Furlong Cos. v. City of Kansas City*, 189 S.W.3d 157 (Mo. 2006) (conditions for approval of subdivision met).

Rezoning at higher densities may create an infill problem. For a comprehensive review of infill development with citations to resources, see *Mun. Rsch. And Servs. Ctr., Infill Development* (2024), <https://rebrand.ly/z0nwuds> [https://perma.cc/K8J2-R5WH]. For examples of guidelines, standards, and zoning, see *Cmty. & Econ. Dev. Dep't Plan. Div., City of Modesto, Calif., Neighborhood Compatibility Guidelines* (2009), <https://bit.ly/4bwvRlv> [https://perma.cc/H6XR-CZVY]; *Auburn, Wash. City Code ch. 18.25* (2024), <https://tinyurl.com/aubmun> [https://perma.cc/XER9-MSZG] (Residential Infill Standards); *Jenkintown, Pa. Code ch. 181* (2024), <https://tinyurl.com/jenkod> [https://perma.cc/78A6-WXRD].

¹⁹³ See William Fulton et al., *New Pathways to Encourage Housing Production: A Review of California's Recent Housing Legislation* (Turner Ctr., 2023), <http://tinyurl.com/22hprk2> [https://perma.cc/2TB5-7FQ5]; Eli Kahn & Salim Furth, *Breaking Ground: An Examination of Effective State Housing Reforms in 2023* (Mercatus Ctr., 2023), <http://tinyurl.com/2tw252x9> [https://perma.cc/6MC3-E6TZ].

Cities have also reduced the size of oversized urban lots. Houston is a classic case. See Salim Furth, *Resources for Reformers: Houston's Minimum Lot Sizes*, *Market Urbanism* (Jan. 11, 2024), <https://tinyurl.com/yc6283dm> [https://perma.cc/AVC2-PMJW].

¹⁹⁴ See *Vt. Stat. Ann. tit. 24, § 4412(12)* (2024), which states:

In any area served by municipal sewer and water infrastructure that allows residential development, bylaws shall establish lot and building dimensional standards that allow five or more dwelling units per acre for each allowed residential use, density and minimum lot size standards for multiunit dwellings shall not be more restrictive than those required for single-family dwellings.

Additionally, the statute states, "In any area served by municipal sewer and water infrastructure that allows residential development, bylaws shall permit any affordable housing development, ... including mixed-use development, to exceed density limitations for residential developments by an additional 40 percent." *Id.* at § 4412(13).

¹⁹⁵ See *Mont. Code Ann. § 76-2-212* (2024), which states:

THE TRAGEDY OF LOW-DENSITY, LARGE-LOT ZONING, 60 Real Prop. Tr. & Est....

A board of county commissioners may not adopt zoning regulations under this part that require minimum lot sizes in an area zoned for residential use unless: (1) the zoning regulation requiring minimum lot sizes is applied to land that is within 3 miles of the limits of an incorporated municipality; or (2) the county has adopted a land use map in its growth policy pursuant to 76-1-601(5) that sets forth projected population densities and recommended minimum lot sizes.

¹⁹⁶ See Mont. Code Ann. § 76-25-302(1)(h), which states: “The zoning regulations authorized in 76-25-301 must include a minimum of five of the following housing strategies, applicable to the majority of the area, where residential development is permitted in the jurisdictional area ... eliminate minimum lot sizes or reduce the existing minimum lot size required by at least 25%.”

¹⁹⁷ R.I. Gen. Laws Ann. § 45-24-38(b) (2024). The statute also states, “Provisions may be made for the merger of contiguous unimproved, or improved and unimproved, substandard lots of record in the same ownership to create dimensionally conforming lots or to reduce the extent of dimensional nonconformance.” *Id.* at § 45-24-38(c).

60 RPTELJ 1
