Regulations and Housing Development: What We Know

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Abstract

Informed public debate on the issue of regulatory barriers to housing development is impeded both by the lack of precision concerning the concept of regulatory barriers and the absence of sophisticated research on the impact of regulations on the supply and cost of housing. Existing research suggests that a wide range of federal, state, and local regulations, including building codes, environmental laws, land use regulations, and impact fees, as well as the government procedures to administer these regulations, reduces the supply of housing and generates substantial costs.

Nevertheless, not all of these regulations can be fairly condemned as "barriers." To the contrary, some costly regulations can be justified because they promote public health or safety. Others increase price because they generate amenities and, thereby, increase the demand for housing. Many forms of federal, state, and local regulation, however, are neither necessary nor efficient. Others may be efficient, but still generate unacceptable affordability problems for low- and moderate-income households.

Existing research on the effects of government regulation on the supply and cost of housing is insufficient to guide public policy. Current studies either ignore entire categories of relevant rules or employ poorly designed methodologies that cannot separate the independent effects of demand and supply. Along with political constraints, this lack of research has contributed to insufficient efforts at all levels of government to remove regulatory barriers.

Introduction

In recent years, policymakers and academics have paid increasing attention to the costs of federal, state, and local regulations. Perhaps nowhere is this research more important than in the area of housing. From 1990 to 2002, the median sales price of new homes rose by 52 percent, outpacing the change in the Consumer Price Index by a substantial margin (National Association of Homebuilders, 2004). At least part of this increase in price is attributable to increased land costs caused by government regulation (Quigley and Raphael, 2004). Inflated land and construction costs, in turn, reduce total housing supply and, in many jurisdictions, contribute to affordability problems.[1] In some municipalities, the high cost of housing may even retard economic growth.

This article will assess the current state of knowledge about the impacts of federal, state, and local regulations on the supply and cost of housing. As the other articles in this volume indicate, we know very little about the effect of many forms of government intervention, such as building codes and environmental regulations, on housing prices in general, let alone the impact on affordable housing. Even where the literature is most abundant (that is, zoning and land use regulation), we have wide gaps in our knowledge.

Part 1 of this article briefly explores the concept of regulatory barriers to development. In common parlance, *regulatory barrier* is used to refer to something negative, a rule that rational lawmakers should seek to repeal or eliminate. Defining a regulatory barrier precisely, however, is difficult and often value laden.

Studies that seek to estimate the costs and benefits of regulations, while perhaps not the final word on whether a given regulation should be rejected or modified, do have an important role to play in helping policymakers analyze the tradeoffs involved. Part 2 summarizes the existing state of knowledge about the effects building codes, land use regulations, impact fees, environmental regulations, and administrative delays have on the cost and supply of housing, in general, and affordable housing, in particular.

The ambiguity of the concept of regulatory barriers and the gaps of knowledge concerning the impacts of regulations are two reasons why proposals to eliminate expensive government red tape and regulatory requirements have had only limited success in the United States. Part 3 describes these efforts and presents reasons for why the problem is so impervious to solution.

Part 1. What Are Regulatory Barriers?

Many regulations that increase the cost of housing or reduce its supply typically are not characterized as regulatory barriers. For example, many municipalities enact building codes that mandate the use of fire-retardant materials or zoning laws that prohibit housing in close proximity to chemical plants. These laws make housing less affordable, but we think of this effect as an unfortunate byproduct of rules necessary to promote health and safety, not as a barrier to be removed. In his 1990 request to former U.S. Department of Housing and Urban Development (HUD) Secretary Jack Kemp to create what came to be known as the Advisory Commission on Regulatory Barriers to Affordable Housing, President George H.W. Bush characterized the problem as "excessive rules, regulations, and red tape that add unnecessarily to the cost of housing…" (Advisory Commission on Regulatory Barriers to Affordable Housing, 1991: 1).

Distinguishing between unnecessary regulatory barriers that should be removed and necessary or useful regulation that should be preserved is an extraordinarily difficult task. Governments frequently enact regulations for a variety of reasons that directly and indirectly affect the supply and cost of housing. In many instances, the regulations are deemed necessary to promote the health and well-being of either the residents of buildings or the community as a whole. For example, housing codes were promulgated in the late 19th century to prevent disease and unhealthful conditions by setting minimum requirements for sanitary facilities, light, and air (Lubove, 1962). Building codes were enacted to prevent fire and ensure the safety of adjacent buildings and their residents, as well as firefighters (Wermiel, 2000).

Many other regulations are justified on the grounds of externalities that might be less immediately threatening. For example, in 1926, when the U.S. Supreme Court ruled in *Euclid v. Ambler Realty* (272 U.S. 365 [1926]) that zoning was a constitutional exercise of the police power, it did so expressly on the ground that zoning would prevent nuisances. The prohibited activity need not be something illegal but might be "merely a right thing

in the wrong place—like a pig in the parlor instead of the barnyard." Large lot zoning, minimum setbacks, and required architectural standards all fit within this set of purposes.

A wide variety of environmental regulations also fits, ranging from federal and state laws to preserve wetland habitats to those that limit development that would endanger certain species of animals. More recently, efforts to limit suburban sprawl also may be thought of as efforts to internalize externalities such as automobile pollution and traffic congestion.

Governments also enact regulations to fund needed or desired facilities and public services. Subdivision regulations typically require developers to set aside land for roadways, schools, and parks. Impact fees, at least in theory, are imposed to charge developers the marginal costs of services that arise from new housing and its occupants.

Each of these regulations serves an important public purpose. Their potentially negative impact on the supply and cost of housing is a secondary byproduct of the government action. Of course, these same regulations can be adopted by governments for the primary purpose of inhibiting the supply of housing built in a jurisdiction and/or increasing its price. Such regulations could promote scarcity, thereby increasing the values of existing homes and the wealth of residents (Thorson, 1996).

More commonly, local governments will seek to limit housing development for fiscal reasons. Because local governments must raise taxes to fund schools and other needed public services, they typically are under pressure to promote certain types of development over others. Commercial uses and large homes that generate substantial tax collections (known as "fiscal zoning") are favored; dense housing developments and low-cost housing that increase demand for schools and social services beyond the tax revenues they generate are disfavored. Large lot zoning, expensive subdivision regulations, excessive building codes, and prohibitions on multifamily housing can effectively ensure that the price of housing is so expensive as to prevent cross-subsidization (Hamilton, 1978).

While sometimes difficult to distinguish from fiscal zoning, many of these same regulations can be used by municipalities to promote social or racial homogeneity. In some instances, residents of a town will be concerned with the disamenities that could arguably arise from close proximity with people who are different from themselves. In other instances, residents may be motivated by racist or classist impulses.

Indeed, the difficulty of distinguishing an economically valid use of government regulation from a less acceptable use is exemplified by the *Euclid* case itself. Much of the court's opinion in *Euclid* was devoted to a defense of efforts to separate apartment buildings from single-family homes, even though that issue was not implicated by the facts of the case. This defense has led many to believe that the decision is less a case about externality prevention than a case about the use of government regulation to preserve income homogeneity.[2]

In seeking to separate "bad" regulations (that is, regulatory barriers) from "good" ones, it is extremely perilous to look solely at the effects of these regulations on the price of housing. Many regulations may increase the price of housing by affecting the desirability of the neighborhood where it is located or the quality of the structure. Increased demand induced by the greater amenities required by the laws may generate price increases (Fischel, 1990).

Thus, one is immediately drawn to the concept of economic efficiency. To the extent that the social costs of a regulation exceed its social benefits, it would seem that the rule or ordinance would meet President Bush's criteria of excessive and unnecessary. A more

difficult question surrounds those regulations that are efficient but generate unsatisfactory distributional results. For example, some regulations may generate a surplus of benefits over costs, but the benefits will primarily inure to higher income families and the costs to low- and moderate-income families. This problem is highlighted in Vicki Been's article on impact fees (2005). Theoretically, impact fees could be imposed in such a way as to promote an economically efficient level of development activity in a jurisdiction if they were set at an amount that reflected the marginal cost of development to that community. At the same time, to the extent that the impact fees were to be passed forward to future owners of housing or were to cause an owner of land to substitute other, more expensive housing types for dense, moderate-income housing, this gain in economic efficiency might be achieved at the cost of affordability.[3] Is the impact fee a barrier to affordable housing, or is affordable housing an inefficient use of land in this community?

To some degree, the answer to both of these questions is "yes." The question of whether a regulation constitutes a barrier that needs to be removed may sometimes depend on how much housing is valued compared to other social objectives. Research may not provide a clear answer to a question that is inexorably intermixed with politics and difficult moral and social questions. Social science, however, can still be helpful. Cost/benefit analyses of regulations can be useful in identifying which laws do little except drive up the cost of housing. Presumably, those regulations in which economic costs exceed their benefits, and which reduce affordable housing, would be prime candidates for removal. Even in instances when economic efficiency and equity concerns point in different directions, careful theoretical and empirical research can help us understand the relevant tradeoffs and identify which regulations are least beneficial and/or most problematic. Such research also may provide us with information to modify existing regulations to reduce their negative effects on affordable housing.

Part 2. Regulations and Housing: An Assessment of the Literature

The articles prepared for this volume extensively review the theoretical and empirical literature on the effects of regulation on the supply and cost of housing. One of the most consistent findings of the articles is how little we know about the subject. For some regulations, such as building codes and environmental regulations, the literature barely exists. For others, such as land use regulations and impact fees, many studies exist, but the results are often contradictory and difficult to interpret.

Building Codes

Building codes set forth the minimum standards that developers are required to meet when they construct housing. There is consensus that building codes are both a legitimate and necessary exercise of government's police powers. The fact that codes may raise the price of housing is unsurprising because, in many instances, the housing built under the codes is of a higher quality than would be constructed otherwise.

Building codes, however, also can become regulatory barriers under certain circumstances (Downs, 1991). For example, some codes require the use of materials or production processes that go well beyond minimum health and safety requirements. Sometimes, the reason for this is benign, such as legislative delays in revising a code to keep current with new technology. States and municipalities also might mandate redundant, or "belt and suspenders," regulations out of an overabundance of caution. In other instances, however, expense-generating code provisions might result from lobbying by building materials manufacturers or labor unions. Alternatively, building codes may be a covert way to exclude housing that is affordable to low- and moderate-income families.

In recent years, we have made tremendous progress in promoting the adoption of model building codes throughout the nation. Most recently, three regional codes have been supplanted by two national/international codes. Yet, a few jurisdictions have not adopted either of the model codes. Many more have made significant changes to the model code provisions. The ability of states and municipalities to customize codes can serve important public purposes, especially when the type of construction in a jurisdiction or the jurisdiction's soil or seismic conditions are sufficiently different from those in the rest of the country. As building codes become less uniform because of these jurisdictional changes, however, more complexity is introduced, and the likelihood increases that they could serve as barriers to entry for national developers. Each of these factors could lead to higher production costs. Complexity also can create delay because of the greater need for discretionary approvals or explanations from government officials.

The literature on the impact of building codes on the price of housing is extremely thin. Much of it is so old as to be useful only for historic interest. Among the handful of studies completed after 1980, almost all are based on anecdotal accounts or poorly specified models. According to Listokin and Hattis (2005), the more quantitative studies suggest that the impact of building codes on price is no more than 5 percent.

Depreciation reduces the quantity of housing services a given housing unit provides over time. Building codes, therefore, also can affect housing supply by hindering the rehabilitation of buildings. In many jurisdictions, rehabilitation is subject to the same minimum standards as new construction. Therefore, to meet the requirements imposed by newer technologies, entire systems will have to be replaced at great expense. In an effort to overcome those costs, some states have enacted "smart codes" specifically geared toward rehabilitation. For example, according to Listokin and Hattis (2005), the adoption of a rehabilitation code by the state of New Jersey may have reduced rehabilitation costs by between 10 and 40 percent and increased the amount of building renovation activity substantially.

Environmental Regulations

Over the past 25 years, the scope and quantity of environmental protection regulations have grown tremendously. Many of these laws have a direct or indirect impact on housing development. Among the two most important laws are the federal Clean Water Act, which limits development in wetlands, and the Endangered Species Act, which restricts development in areas where more than 600 species live. Many states also have enacted environmental protection laws limiting where and how development can take place. In addition, governments at all levels often require developers who need discretionary government approvals or who build on government land to undertake extensive environmental impact analyses, sometimes culminating in the preparation of voluminous environmental impact statements.

More recently, states and municipalities have enacted additional regulations under the banner of "smart growth." Smart growth is a catchall phrase that typically encompasses a variety of policies to limit growth at the periphery of metropolitan areas and, in some formulations, incentives to increase density in more central areas. Municipalities, most often those located in the outer suburban rings, have reduced permitted densities or begun to ration building permits. A few jurisdictions, most notably in the state of Oregon, have adopted urban growth boundaries—severe restrictions on residential construction at the periphery. The stated purpose of these regulations is to preserve greenfields, reduce traffic congestion, and, occasionally, promote reinvestment and development in more dense, urbanized areas.

Economic theory unambiguously predicts that environmental regulations will increase the price of housing. For example, regulations could affect the price of developable land. Assuming constant demand, as the supply of land available for development decreases, the price of land should increase. In addition, at least some environmental protection statutes should generate amenities that may increase demand, thereby further intensifying the price effect.

Government rules requiring developers and/or public entities to undertake environmental impact analyses also are likely to generate higher costs and lead to a diminished supply of housing for two reasons. First, the review itself and the possible resulting environmental impact statement could be very costly. Second, potential lawsuits from neighbors or environmental activists challenging the review could be even more problematic. In addition to assuming the costs of defending the case, the developer would have to factor into the project the costs of delay and settlement. In some instances, this uncertainty actually may deter builders from undertaking projects, thereby reducing the overall supply of housing and increasing price.

Surprisingly, very few academic studies have investigated the relationship between environmental protection statutes and housing supply and prices. As Kiel (2005) indicates, the few studies that have been completed tend to show that, as expected, the value of land that is restricted falls and demand for land nearby tends to increase. The most relevant study by Frech and Lafferty (1984) of land preservation regulations implemented by the California Coastal Commission found that the prices of homes close to restricted areas increased by between $2,882 and $5,040 in 1975 dollars, and that those further inland went up by $989 to $1,700. The difference between these two sets of numbers captures the amenity effect, whereas the increases further away capture the supply effects of the regulations.

Portland, Oregon’s urban growth boundary, while not technically an environmental regulation, has been the subject of much debate and recent analysis. Some studies have suggested that the restrictions on development imposed by the greenbelt increased housing prices (Staley and Mildner, 1999). Other studies have argued that any increase in housing prices in Portland was more attributable to increased demand for living in the city and other demographic factors (Downs, 2002; Phillips and Goodstein, 2000).

Zoning and Land Use

Zoning and land use regulations are ubiquitous in the United States. Traditionally, zoning sought to separate uses that might be incompatible—industrial uses were to be located in certain portions of a municipality and residential uses in another. Over time, ordinances made finer distinctions within each type of use (for example, single-family versus multifamily) and imposed an array of requirements on the permitted size and bulk of the buildings allowed (for example, height restrictions and minimum floor area requirements). In addition to promulgating traditional zoning requirements, municipalities enacted requirements for developers who sought to subdivide their properties. Oftentimes, developers would need to provide roads, schools, and other public facilities to the municipality in return for the privilege of being able to develop and sell the housing. Over time, the variety of land use regulations has mushroomed. Today, many jurisdictions have implemented growth control ordinances that ration the number of building permits that will be granted in any particular year. In addition, many municipalities prescribe and enforce architectural standards through their land use and subdivision regulations.

As described in part 1, municipalities have a variety of motives for imposing limitations on the use and density of new housing, including the desire to reduce negative externalities,

keep tax rates low, achieve monopoly profits, and promote racial and economic homogeneity. Just as with environmental regulations, typical zoning and land use regulations, if enforced, are likely to increase the price of housing. Limitations on density or requirements that developers provide costly amenities to a community, if not capitalized into the price of land, will be passed forward to the ultimate purchasers or renters of housing. Even if the cost of the regulations is passed back to the owners of vacant land, density restrictions (and growth controls) of the type imposed by most towns and cities will lead to lower levels of production, and, therefore, higher prices for existing housing. At the same time, to the extent that land use regulations successfully protect against negative externalities, housing prices will go up because of increased demand.

In contrast to building codes and environmental regulations, many studies examine the impact of land use regulations on the price and quantity of housing. According to Quigley and Rosenthal (2005: 69), "[c]aps on development, restrictive zoning limits on allowable densities, urban growth boundaries, and long permit-processing delays have all been associated with increased housing prices." With the exception of a few studies suggesting that some municipalities use zoning as a way to achieve monopoly pricing, however, the research largely fails to sort out whether the supply effect or the amenity effect predominates.

Impact Fees

In addition to, or in lieu of, subdivision exactions, many jurisdictions levy impact fees on the developers of new housing. The purpose of these fees, at least in theory, is to promote efficient development by requiring developers or consumers of new housing to absorb the marginal cost of the development to the municipality. A second related purpose is to shift the financial burden of new development away from existing residents. Of course, as with zoning, land use regulations, and subdivision controls, impact fees also can intentionally be used to discourage new development by raising its cost.

As Been (2005) demonstrates, economic theory does not provide us with a clear answer to the question of whether impact fees lead to more or less expensive housing in a given jurisdiction. In the end, much will depend upon who bears the fee. If the impact fee is passed back to the owner of vacant land, then it should not affect either the quantity of housing produced or its price, unless the owner is permitted under applicable zoning to substitute different and less costly (from the perspective of the impact fee) forms of housing or other uses. For example, if a municipality imposes a flat fee based upon the number of apartments or homes built, a developer might choose to build larger homes, thereby leading to less overall supply and higher prices. A similar result could occur if the landowner could choose to build a commercial development in place of the housing. If the fee is not passed back to the owner of the land or is borne by the developer, then it will fall upon the ultimate consumer of the housing. This will cause the housing to be more expensive and likely lead to less overall supply.

Been (2005) adds two additional complications to the difficult issue of how impact fees affect the price and quantity of housing. The adoption of an impact fee by a municipality is endogenous to its other land use regulatory decisions. In other words, a municipality's decision to adopt an impact fee will be affected by its other land use regulations. For example, if the municipality were not to adopt an impact fee, it might instead choose to restrict housing construction with large lot zoning or growth controls because it wishes to avoid having to raise taxes to pay for the incremental costs of the development. Thus, it is possible that the ability to impose an impact fee might make a municipality more—not less—willing to permit housing to locate within its borders. Second, some impact fees will selectively exempt affordable housing from the fee, and, thus, actually may be neutral or positive regarding this type of accommodation.

Several studies have examined the effect of impact fees. These studies generally show that impact fees are associated with higher housing prices for newly constructed housing, as well as existing housing. In many instances, researchers have found that the increase in price is significantly higher than the fee itself. Once again, as was the case with each of the regulations discussed so far, increased prices for housing do not necessarily mean that an impact fee is a barrier that should be removed. To the extent that the impact fee is calculated in such a way that housing consumers value the amenities it pays for, the price increase may reflect only increased demand. Nevertheless, while the impact fee might be efficient under this scenario, it effectively may make housing in the jurisdiction unaffordable to low- and moderate-income families. Furthermore, the empirical result showing that impact fees seem to have a positive impact on existing housing, as well as newly constructed housing, may be attributable to the fact that fees are structured in such a way as to exceed the marginal cost of the new development, thereby providing a cross-subsidy to existing homeowners.

Administrative Processes

According to the academic literature, each of the regulations discussed so far (building codes, environmental regulations, zoning and land use regulations, and impact fees) is likely to increase housing prices. These price increases are ambiguous in terms of social welfare because increased housing prices might reflect the benefits (not just the burdens) the regulations generate. The final regulatory barrier to be covered in this part of the article, however, is unambiguous. In many municipalities throughout the nation, the costs of regulation are multiplied as a result of inefficient and duplicative government administrative processes.

As government regulations become more complex, housing developers and government officials must interact more frequently. These contacts might take place at the approval stage for a project when the developer must negotiate a zoning change or variance, satisfy an environmental review, or obtain a building permit. Long, costly delays frequently occur and may be attributable to insufficient staffing of governmental agencies, long backlogs in processing, and antiquated procedures. The problems are multiplied when, as often happens, the developer must deal with multiple agencies, and even multiple governments, to obtain permits and approvals.

In addition, the more times a developer must come into contact with government, the greater the opportunity for politics to intervene. Much development will require discretionary government approvals, which frequently will be influenced by public pressure, sometimes from community residents or other developers threatened with increased competition. In addition, each government approval provides citizens with the opportunity to raise concerns, voice opposition, and bring lawsuits against a project. In many instances, the uncertainty generated can be more detrimental to a project than any of the substantive regulations described in this article.

Research on administrative processes affecting the development process is truly embryonic. Most estimates of the impact of administrative inefficiency and delay on development come from anecdotal accounts or surveys of developers, which may be biased. Most of these studies, as described by May (2005), suggest that administrative roadblocks add significantly to the cost of housing and truly constitute barriers to development. This finding is further supported by the findings from a recent analysis by Glaeser and Gyourko (2003) in which the relationship among several measures of housing and land cost and an index based on the average length of time between an application for rezoning and the issuance of a building permit was studied. The authors found that the increase in time to obtain a permit is strongly associated with rising land and housing prices.[4]

Overall Impacts

The articles prepared for this volume describe research that seeks to estimate the impacts that individual sets of regulations have on housing development. Importantly, though, a housing developer is likely to encounter many of these regulations (and others) simultaneously. For example, to successfully complete one development in the suburbs, a typical builder will need to apply for subdivision approval, pay an impact fee, obtain a building permit and a certificate of occupancy and, if he is unlucky enough, apply for a rezoning or a variance. Thus, the costs generated by government regulations and their impacts on housing are cumulative.

Several studies have sought to examine the cumulative impact of different types of local development regulations on the cost of housing, and each found it to be quite substantial. For example, the National Association of Home Builders (NAHB) (1998) surveyed builders in 42 metropolitan areas in 1998 and asked them to provide a detailed breakdown of the cost of constructing a 2,150-square-foot house on a 7,500- to 10,000-square-foot lot. The average sales price of such a home was estimated to be $226,668. Of this total, the builders estimated that approximately 10 percent could be shaved off "if unnecessary government regulations, delays, and fees were eliminated."

Luger and Temkin (2000) also used survey data from developers, engineers, and planners to estimate the impact of "discretionary" or "excessive" costs imposed by regulation in New Jersey municipalities. They found these costs to be sizable, albeit somewhat more modest than those reported in the NAHB study, ranging from $10,000 to $20,000 per unit on a home with a median sales price of $236,000. The authors further concluded that the impact of those regulations is more likely to be felt at the lower end of the market.

Two recent studies used indices of regulatory restrictiveness to estimate the impact of varying levels of land development regulation across metropolitan areas. According to estimates by Green and Malpezzi (2003), moving from a lightly regulated environment to a heavily regulated environment would raise rents by 17 percent, increase house values by 51 percent, and lower homeownership rates by 10 percentage points. According to Mayer and Somerville (2000), a metropolitan area with a 4.5-month delay in approval and two different types of growth-control restrictions would have an estimated 45 percent less construction than a metropolitan area with a 1.5-month delay and no growth management policy.

Part 3. Removing Regulatory Barriers to Housing: A Short History

Concerns about the impact of regulatory barriers on the housing market have existed for decades. For example, in 1968, the National Commission on Urban Problems described how different building code standards impeded the development of housing in the United States. The proposition that regulation stood in the way of affordable housing was echoed by the President's Commission on Housing in 1982 and found its fullest exposition in the report of the 1991 Advisory Commission on Regulatory Barriers to Affordable Housing. In its report entitled "Not in My Back Yard: Removing Barriers to Affordable Housing," the Commission set forth a comprehensive program for deregulation with state governments playing pivotal roles. The approach of using states as a fulcrum was justified because local governments derive their regulatory powers from the states. In addition, states were thought to be in a better position than the federal government to take into account interregional variations, while at the same time being sufficiently centralized to take into account the extra-municipal effects of local actions.

The 1991 Commission report proposed that the federal government "inspire" state and local governments to reform their regulations using a "carrot and stick" approach. All states and localities that received federal assistance would be required to include in annual reports to the government a description of what they were doing to reduce regulatory barriers. HUD would have the power to condition assistance on satisfactory barrier removal strategies. A state that failed to adequately remove regulatory barriers to housing development would lose its ability to issue tax-exempt bonds for housing and its authority to allocate tax credits to developers of low- and moderate-income housing.

Congress never adopted the Commission's proposals, despite praise from some quarters (Schill, 1992). Instead, Congress required that jurisdictions that receive federal housing submit a comprehensive housing affordability strategy that would include an explanation of whether the cost of housing in the jurisdiction was affected by policies such as land use controls, zoning ordinances, building codes, and growth limits.[5] The existence of these regulations, however, would not justify HUD disapproval of assistance.[6] In 1992, Congress passed a minor piece of legislation authorizing HUD to make grants to states and localities to develop removal strategies for regulatory barriers, including drafting model legislation and simplifying and consolidating administrative procedures. In addition, HUD created the Regulatory Barriers Clearinghouse to facilitate the dissemination of best practices about barrier removal strategies. Several years later, an even more modest effort to require the federal government to publish a cost impact statement when it imposes regulations that would drive up the cost of housing was not passed by Congress despite being proposed several times.

At the federal level, the issue of regulatory barriers to development was dormant throughout the Clinton administration but has been revitalized by the George W. Bush administration. HUD has established a new departmentwide initiative, America's Affordable Communities Initiative, to tackle the problem. Thus far, HUD has set aside funds for research on regulatory barriers and sought to build coalitions to address the problem. More tangibly, in 2004, the Department published a Federal Notice announcing its intent to include in most of its competitive fiscal year 2004 funding opportunities (Notice of Funding Availability) a series of questions on the local regulatory environment (U.S. Department of Housing and Urban Development, 2004). Applicants for HUD funds have an opportunity, if they desire, to respond to these questions; those applicants who meet the requisite minimum criteria for regulatory reform can receive additional "points," which can assist them in the competitive selection process.

In addition, a number of states and cities have shown renewed interest in the issue of regulatory barriers. For example, several jurisdictions have sponsored studies that outline strategies for barrier removal (Colorado Department of Local Affairs, 1999; Commonwealth of Massachusetts, 2000; Salama, Schill, and Stark, 1999). A few have even implemented the proposals. For example, California, Florida, and New Jersey require municipalities to plan for affordable housing.[7] Other states have taken steps to expedite permitting procedures for affordable housing[8] or to exempt some affordable housing projects from environmental impact requirements.[9] New York City, long known for chronic housing shortages exacerbated by cumbersome development rules, also has seemingly changed its approach. In 2002, Mayor Michael Bloomberg announced an ambitious agenda to rezone manufacturing land for housing development and adopt a model building code (New York City Department of Housing Preservation and Development, 2002).

Nevertheless, most states and municipalities do business as usual. With the exception of a handful of states that either have passed statutes or had activist courts require fair share housing plans (Schill, 2002), regulatory barriers abound and may even be intensifying. The persistence of regulatory barriers in the United States, despite the prevalence of rising

housing prices and extraordinary rent-to-income burdens among many renters, can be explained by many factors. The simplest and most important of these factors is that in our federal system, states have traditionally vested the police power in municipalities. Because each city or town pursues its own parochial interest, it is not forced to consider the cumulative impact of regulation on housing in the metropolitan area or region. Indeed, each municipality has strong fiscal incentives to erect regulatory barriers to avoid tax increases to pay for needed services. In addition, direct participation by citizens tends to be most intense and effective with respect to local governments. Many existing residents would prefer to avoid development because they want to preserve the status quo, are concerned about congestion, or want to maintain racial or economic homogeneity. Although some states have shown interest in statewide planning, many more are interested in responding to the desires of their suburban constituents. Thus, instead of reducing regulatory barriers, many states have clamped down on development, sometimes under the banner of smart growth.

Smart growth presents both an opportunity and a hazard for those who wish to remove regulatory barriers to development. In many ways, smart growth is more of a political slogan than a coherent set of proposals. To suburban residents, it represents an opportunity to erect barriers to development, slow demographic change, and reduce congestion on the roads. To environmentalists, it means the preservation of greenfields and the reduction of air pollution. To urban advocates, it holds out the promise for renewed interest in dense development as options in the suburbs are restricted.

Smart growth, however, is a risky strategy for those who would like to see increased production of affordable housing. Because cities and suburbs are politically independent, there is no guarantee that restrictions at the periphery would be matched by increased development in the city. City dwellers may wonder why they should have to shoulder the burden of increased development, both in terms of increased service costs and congestion. In the absence of some form of regional or state authority, smart growth could merely exacerbate current inequities and make affordable housing even scarcer for low- and moderate-income Americans.[10]

At the federal level, Congress has never strongly supported the removal of regulatory barriers, partly because members of Congress, like state legislators, are ultimately responsive to their increasingly suburban constituencies. In addition, advocates for reducing regulatory barriers have repeatedly failed to form effective coalitions among natural allies. Unfortunately, the only vocal groups consistently advocating for barrier removal are the homebuilding and real estate industries. Traditional low-income housing advocates, with the exception of some groups dedicated to the fight against exclusionary zoning, are—at best—generally silent, or—at worst—hostile when the debate turns to deregulation. One explanation for this reaction may be sympathy with the purposes underlying many of the regulations that so negatively affect housing production, such as environmental protection.

An additional impediment to effective mobilization on the issue of regulatory barriers is the simple fact, described in detail above, that we know too little about the subject. The articles that follow emphatically illustrate this paucity of high-quality research and definitive empirical studies.

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Notes

1. Many households pay extremely high proportions of their incomes for housing, leaving little at the end of the month for other necessities. For example, according to the American Housing Survey (U.S. Department of Commerce, 2002), in 2001, 23.2 percent of all renter and 9.8 percent of all homeowner households in the United States paid more than half their incomes for housing.

2. This interpretation of the function of the village's zoning ordinance was offered by the lower court judge in a decision that would have invalidated the ordinance: "The purpose to be accomplished is to classify the population and segregate them according to their income or situation in life." 297 F. 307, 316 (N.D. Ohio 1924).

3. One possible way to resolve the conflict between efficient regulations and affordability concerns might be to increase levels of housing subsidies. In today's fiscal environment, however, it is doubtful that the amount of public resources devoted to housing will be substantially augmented.

4. Glaeser and Gyourko regress two dependent variables over the index values, the log of median family income and percentage population growth. The first dependent variable is the fraction of units in a metropolitan area that are valued at or above 140 percent of construction costs. The second is an "implied zoning tax" that is derived by subtracting the cost of land estimated by a nonlinear hedonic equation from the cost of land obtained by subtracting the structure cost from total home value.

5. See 42 U.S.C. sec. 12705(b)(4).

6. "[T]he adoption of a public policy identified pursuant to subsection (b)(4) of this section shall not be a basis for the Secretary's disapproval of a housing strategy." 42 U.S.C. sec. 12705(c)(1).

7. See Cal. Gov. Code sec. 65580 et seq.; Fla. Stat. Ann. Sec. 163.3191; N.J. Stat. sec. 52:27D-301–334.

8. See Fla. Stat. Ann. Sec. 373.4141 (requiring expedited permitting procedures for affordable housing developments).

9. See, for example, Cal. Pub. Res. Code sec. 21080.14 (exempting from CEQA affordable housing of up to 100 units).

10. Smart growth also can be criticized for restricting opportunities for minority households to live in suburban locations and for infringing on property rights. See Schill (2003).

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