The Future of Exclusionary Zoning and Land Use in Colorado

BY AMY BRIMAH

This article discusses the origins of zoning laws and the effects of zoning on various societal issues.

Editors' Note: *This article contains author opinion. Any statements of opinion are the author's own and do not necessarily reflect the views of* Colorado Lawyer *editors or the Colorado Bar Association.*

Initially introduced in the early 20th century, zoning laws were designed to regulate land use and create distinct areas for residential, commercial, and industrial purposes. But exclusionary zoning—preventing certain types of land use in certain areas—has numerous negative societal consequences. This article traces the history of zoning laws; discusses how zoning has affected issues such as affordable housing, racial segregation, economic growth, and climate change; and describes some potential solutions for addressing the negative effects of exclusionary zoning.

What Is Zoning?

Zoning ordinances categorize land use into three broad uses—residential, commercial, and industrial—along with various subcategories to regulate land use by zone districts. Exclusionary zoning ordinances also regulate density, minimum lot size, setbacks, minimum structure size, minimum off-street parking spaces, and other structures. Planned unit developments (PUDs) are another example of zoning.[1] Governmental means of regulation other than zoning include comprehensive or master land use plans, building codes, historic designations, development and subdivision agreements, and environmental regulations. The impact of zoning regulations on housing supply and affordability, regional and national economic growth, social mobility, economic equality, racial integration, and the environment and climate change is being recognized across the country.[2] In most major US cities, including those in Colorado, the vast majority of land is zoned to permit only single-family homes.[3] For example, approximately 77% of land in Denver is zoned for single-unit residential use.[4] Across Colorado, land-use policies restrict the majority of land to a single use—as a single-family home.[5]

The Origins of Zoning Laws: *Buchanan, Euclid*, and Hoover

Zoning laws affect access to housing, open space, transportation, jobs, schools, food, water, and other necessities and amenities. Cities existed for thousands of years without zoning, and comprehensive zoning laws did not exist before the 20th century. In 1916, New York City became the first municipality to enact a comprehensive zoning law.[6] But for the most part, prior to the 1920s, there was widespread resistance to limiting the use of private land, and governmental regulation was minimal. Land use restrictions were largely imposed by private owners and enforced through the common law of nuisance. Nuisance claims were the primary way to restrict land use before the concept of zoning and are still used for that purpose in cities such as Houston that do not have zoning regulations.[7] Although *Buchanan v. Warley* prohibited restriction of property sales based on race, the later decision in *Village of Euclid v. Ambler Realty Co.*, along with an effort led by Herbert Hoover, paved the way for many discriminatory local zoning ordinances.[8] The law evolved to uphold zoning as a permissible exercise of police power to exclude nuisances and regulate matters of local concern.

Buchanan v. Warley

The resistance to regulating private land use changed after the US Supreme Court's ruling in *Buchanan v. Warley* in 1917,[9] which addressed a Louisville, Kentucky, city ordinance prohibiting the sale of real property to Black people in white-majority neighborhoods or buildings and vice versa. The Court unanimously held that the ordinance violated the Fourteenth Amendment's

freedom to contract clause. But the right to own property without regard to race articulated in *Buchanan* was never fully realized because subsequent federal and local exclusionary zoning measures were upheld and fostered economic and racial segregation. Although local governments are required to comply with the Fourteenth Amendment,[10] many evaded this requirement through exclusionary zoning measures.[11]

Village of Euclid v. Ambler Realty Co.

The US Supreme Court first upheld a zoning ordinance in 1926 in *Village of Euclid v. Ambler Realty*,[12] when it recognized the legitimacy of state action to exclude certain types of land use from certain areas.[13] In *Euclid*, the Village of Euclid (village) had passed a zoning ordinance restricting land use in an attempt to prevent business development in nearby Cleveland, Ohio, including apartment buildings, from encroaching into Euclid and destroying the "rural character" of the village.[14] The ordinance excluded certain types of development, including apartments, from single-family residential areas.[15] Ambler Realty owned unimproved land in the village and argued that because the building restrictions prevented it from building apartments on its land, the ordinance reduced the normal value of its property and deprived it of liberty and property without due process of law under the Fourteenth Amendment.

The lower court extensively reviewed the existing case law on the exercise of police powers, the regulation of nuisances, and takings law and determined that the ordinance was an unconstitutional taking and found in favor of Ambler Realty, stating:

> The plain truth is that the true object of the ordinance in question is to place all the property in an undeveloped area of 16 square miles in a strait-jacket. The purpose to be accomplished is really to regulate the mode of living of persons who may hereafter inhabit it. In the last analysis, the result to be accomplished is to classify the population and segregate them according to their income or situation in life.[16]

The Supreme Court, however, found no taking and described an apartment building as a "mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district."[17] The Court noted that apartments in certain residential areas are "very near to being nuisances" because they cause increased traffic and noise and take up desirable open space.[18] Accordingly, the Court concluded that, like regulating nuisances, regulating where apartments could be built was a valid exercise of the state's police power.[19] The Supreme Court therefore reversed and held that a government's police power allowed it to separate land for different types of uses.[20]

Because the Supreme Court decision in *Euclid* failed to reference *Buchanan*, many scholars have opined that *Euclid* ratified racist exclusionary zoning policies enacted by local governments that evaded *Buchanan*'s prohibition of explicit racial zoning ordinances.[21] Scholars likewise have suggested that the Court's language throughout the *Euclid* opinion—that apartments are "mere parasites," that one apartment brings others, and that apartments detract from the safety of single-family home areas until the "residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed"—conveyed an underlying attitude of excluding poor people and people of color from suburban life.[22] However, *Euclid* did not overturn or affect the opinion in *Buchanan* because no Fourteenth Amendment violations were alleged in *Euclid*, and the Supreme Court made no reference to *Buchanan* despite the analysis of *Buchanan* by the lower court.[23] Thus, *Euclid* gave local governments an avenue for implementing zoning regulations under police powers without running afoul of *Buchanan*.

Hoover's Standard State Zoning Enabling Act

By 1923, zoning ordinances existed in fewer than 300 municipalities and towns[24] and were primarily used to regulate traditional nuisances such as slaughterhouses and polluting factories. In the early 1920s, Department of Commerce Secretary Herbert Hoover led the federal government's push to adopt "A Standard State Zoning Enabling Act"[25] (SSZEA), which rapidly changed the prior limited regulation of land use and began to allow land use restrictions that resulted in excluding certain races, income classes, and occupations from desirable areas and areas zoned for single-family homes. Many scholars agree that Hoover's commission to draft the SSZEA and the rapid spread of zoning laws arose in response to *Buchanan*.[26]

Following the *Euclid* decision and Hoover's push to adopt the SSZEA, by 1930, 35 of the then 48 states had enacted SSZEA model legislation, allowing local governments the power to implement zoning. By 1936, over 1,000 local governments had adopted zoning regulations.[27] In the explanatory notes to the SSZEA, Hoover emphasized the desirability of permitting retroactive application of the act to address "local conditions of a peculiar character."[28] The SSZEA's footnotes pointed out that referring to the power to regulate "the density of population" in legislation would allow local governments to create and regulate single-family zone districts.[29] By 1925, Colorado had adopted a form of the SSZEA.[30]

Experts have maintained that local governments nationwide were empowered through *Euclid* and SSZEA to use zoning to achieve racial segregation[31] that they could not impose through direct bans[32] or by simply ignoring the ruling in *Buchanan* (even though many Jim Crow southern cities blatantly ignored *Buchanan*).[33] Prioritizing single-family homes and banning many uses, including apartments, from single-family home districts are the pillars of zoning ordinances that continue to promote income and racial segregation today.[34]

The Evolution of Zoning as a Police Power

The power to adopt zoning regulations using police power is rooted in jurisprudence and not the text of the Colorado Constitution. Local home-rule municipalities and counties derive their powers from the Colorado Constitution. Article XX, § 6, of the Colorado Constitution grants eight enumerated powers to local governments, and it generally grants "all other powers necessary" for administration of local matters.[35] Because article XX, § 6, became effective on January 22, 1913, and pre-dated

zoning in Colorado, it does not designate zoning among local government matters or address zoning in any aspect.[36]

Statutory municipalities and counties (as opposed to home-rule) do not have such constitutional delegation to regulate matters of local control and instead derive their powers solely from statutes (e.g., CRS § 31-23-315), which the legislature may amend at any time.[37] Similarly, PUDs, which are not based in *Euclidean* police power zoning, also rely on authority delegated from the legislature, which is subject to amendment.[38]

Colorado courts did not recognize zoning as a police power until 1927 in *Colby v. Denver Board of Adjustment*.[39] Just one year earlier, *Euclid* recognized zoning as a police power[40] and switched the analysis from the common law of nuisance to one of police powers[41] to regulate health, safety, and general welfare.[42] Relying directly on the *Euclid* decision and with no reference to the Colorado Constitution, the Colorado Supreme Court in *Colby* held: "Reasonable zoning regulations have long been held to be a valid exercise of the police power."[43] As the first court decision upholding zoning in Colorado, *Colby* shows the dramatic shift toward increased land use restrictions following *Euclid*. By contrast, pre-*Euclid* cases found setback and height restrictions, among others, to be invalid and without a public purpose.[44]

The general police power recognized in *Colby* and based on *Euclid*[45] was the primary basis for courts' recognition of zoning regulations until the 1970s, when Colorado courts began to recognize zoning as a "local matter" stemming from constitutional police powers,[46] giving home-rule cities legislative authority to draft and implement zoning ordinances.[47] It is only through these later courts decisions that zoning was deemed a "local matter" under article XX, § 6, of the Colorado Constitution.[48]

Notably, police powers of local governments are limited to use for the benefit of the general welfare.[49] To be a constitutionally valid exercise of police power, zoning ordinances must be reasonably related to public health, safety, or general welfare.[50] The state's power to set public policy acts as an additional limit on local police power. To the extent public policy is implicated, the state, not the local government, retains the power to declare public policy.[51]

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The Colorado Supreme Court has also held that in Colorado, a person has the right to acquire a home unfettered by discrimination.[52] The Court upheld the right to acquire housing based on the principle of general welfare, noting that

> the entire world is engulfed in a struggle to determine whether the American concept of freedom with equality of opportunity shall survive; when tyrannical dictators arrayed against this nation in the struggle proclaim throughout the world, with some justification, that we do not practice what we preach, and that "equality of opportunity" is a sham and a pretense, a hollow shell without substance in this nation; we would be blind to stark realities if we should hold that the public safety and the welfare of this nation were not being protected by the [Colorado Fair Housing Act of 1959] in question. Indeed, whether the struggle is won or lost might well depend upon the ability of our people to attain the objectives which the Act in question is designed to serve.[53]

In *Colorado Springs v. Securcare Self Storage*,[54] the Court further refined the relationship of zoning to the Colorado Constitution when it held that Colorado Springs may adopt and draft its zoning code as it chooses "so long as it conforms with constitutional limitations."[55] Specifically, article XX, § 6, of the Colorado Constitution only confers legislative authority to draft ordinances concerning "local and municipal matters."[56]

What Is a Matter of "Local Concern"?

Whether a matter is one of state or local concern is a legal issue.[57] The Colorado Supreme Court has held that when an issue is both a state and local interest, it is properly characterized as a "mixed" concern. When a local ordinance regarding a matter of mixed concern conflicts with a state statute, the local ordinance must yield.[58] The Court has employed a four-part test[59] to determine whether an issue is of mixed local and statewide concern: (1) the need for statewide uniformity of regulation, (2)

the impact of the measure on individuals living outside the municipality, (3) historical considerations concerning whether the subject matter is one traditionally governed by state or local government, and (4) whether the Colorado Constitution specifically commits the particular matter to state or local regulation.[60] This four-part test is determined on an ad hoc basis considering the totality of the circumstances.[61] The Court has also stated that the analysis is governed by two general propositions: (1) courts do not make legislative policy and if the court determines that the issue is legitimately one over which the General Assembly has authority, the court's inquiry ends, and (2) when the General Assembly announces that a matter is of statewide concern, such pronouncement is instructive to its analysis.[62]

Several court decisions illustrate how this test has been applied in Colorado courts. The Colorado Supreme Court concluded in *National Advertising Co. v. Department of Highways* that despite a local ordinance related to outdoor advertising signs, regulation was a "matter of mixed statewide and local concern . . . " and the state statute had preference over the local zoning ordinance to regulate such matters.[63] Although the Court in *Securcare Self Storage* noted the "local matter" requirement, it provided no analysis of whether the zoning ordinance was a local matter. The Colorado Supreme Court declared zoning a "local concern" in *Roosevelt v. City of Englewood*,[64] where residents of Arapahoe County and Cherry Hills Village challenged an Englewood upzoning[65] from single-family to commercial (to include a shopping center and multifamily residences). The Court upheld the upzoning, stating that "zoning under Colorado constitution, art, XX, § 6, is a local and municipal matter."[66]

The issue of a "local" land use matter was the primary issue in *Town of Telluride v. Lot Thirty-Four Venture LLC*,[67] where the Colorado Supreme Court held that matters of mixed state and local concern do not have constitutional deference to home-rule authority. In *Town of Vail v. Village Inn Plaza-Phase V Condominium Ass'n*,[68] the Colorado Court of Appeals held that a local zoning ordinance conflicted with the Colorado Common Interest Ownership Act (CCIOA),[69] and that the regulation of common interest communities was of mixed statewide and local concern. Because of the conflict with CCIOA, the local ordinance was held invalid, despite Vail's home-rule authority.[70]

Telluride addressed the issue of whether a home-rule municipality may regulate rents using its authority over matters of local concern, despite the state rent control statute.[71] The Court held that a local regulation violated a state statute and thus was not a valid exercise of authority over a local matter.[72] The statute was found to be constitutional and the local ordinance was not within the local government's authority over local concerns.[73] The discussion below illustrates how the courts in *Telluride* and *Town of Vail* applied aspects of the four-part test to determine mixed or local concern.

In analyzing the first factor, the Court in *Telluride* found that both the municipality and the state had significant interests in maintaining the quality and quantity of affordable housing in the state. However, the Court held that when local ordinances change the dynamics of supply and demand in an important sector of the economy such as the housing market, the local ordinance must yield to statutory authority when the legislature has enacted a uniform regulation as a matter of public policy even if economic conditions vary in housing markets across the state.[74] The courts have been consistent that there is clear statewide interest in regulating local ordinances to ensure that they do not have a strong extraterritorial impact on the housing market.[75]

To determine the second factor, the Court examined whether the extraterritorial impact is one involving state residents outside the municipality. When the potential impact of a local ordinance is beyond the municipality's borders, the ordinance is a matter of mixed local and statewide concern. The Court noted:

> Managing population and development growth is among the most pressing problems currently facing communities throughout the state. Restricting the operation of the free market with respect to housing in one area may well cause housing investment and population to migrate to other communities already facing their own growth problems . . . the growth of the one community is tied to the growth of the next, thereby buttressing the need for a regional or even statewide approach.[76]

The court of appeals took a similar approach in *Vail* and noted that the "ordinance here restricts the operation of the free housing market in a way that could have an extra-territorial ripple effect."[77]

In evaluating the third factor, a court determines whether the matter traditionally has been regulated at the state or the local level. Before *Telluride*, the Supreme Court had not previously reviewed the issue of rent control; therefore, the Court focused its analysis primarily on how other courts viewed the issue, and it concluded that rent control was not a local-level concern. In *Vail*, the court of appeals found no precedent that the regulation of common interest communities was "purely a local concern" and that "there is an interest in ensuring that local ordinances don't have a strong extra-territorial impact on the housing market."[78]

The fourth factor examines whether the constitution commits the matter to state or local regulation. The Court in *Telluride* noted that the constitution does not generally assign the issues of rent control or economic regulation to either state or local governments. In its ruling, the Court found that the state has a legitimate interest in ensuring stable quantity and quality of housing and that the municipality had a valid interest in controlling land use. As a result, the ordinance at issue was an area of mixed state and local concern, and because the local ordinance conflicted with the state statute, the local ordinance must yield to the state statute, and the state may regulate in such area. The overturning of a local ordinance does not violate the constitution.[79]

Externalities of Zoning

The externalities of local zoning regulations and the exclusionary policies of local zoning that disadvantage certain groups have been in place since *Euclid*. The effects on various policy issues related to the externalities created by zoning regulations are not new, and the negative effects from exclusionary zoning range from inequality

in access to housing to environmental concerns created by suburban sprawl. In the early 1970s, some state governments attempted to change exclusionary zoning and other zoning regulations from a matter of local concern regulated by local governments to a matter of statewide concern to be regulated by state governments, though the efforts were largely unrealized.[80] The federal government attempted through bipartisan efforts to end exclusionary zoning, but such efforts failed.[81] Colorado is not the only state in which advocates are arguing for state intervention in local land use policies to curb the external effects created by local policies.[82] This call for state preemption in local land use as a way to address the negative externalities created by local zoning is not new but is now prevalent and widespread.[83] Some states have passed measures to preempt local laws and address matters of statewide concern related to mandating inclusionary zoning, short-term rentals,[84] housing development, land use related to oil and gas production,[85] group homes, daycare, rent control, incentives for passing certain forms of zoning, and permitting the use and development of accessory dwelling units (ADUs).[86] The externalities of zoning raise fundamental questions about whether zoning is still a "local matter."

Impact on Affordable Housing

Exclusionary zoning has a demonstrated detrimental effect on housing supply and affordability.[87] Residential rents have increased faster in cities with exclusionary zoning when compared to cities with reformed zoning laws.[88] Exclusionary zoning regulations increase the cost of housing production.[89] Minimum acreage requirements, minimum square footage requirements, and outright bans on multiunit or multifamily housing are common strategies to limit development in suburbs. A movement known as YIMBY (Yes in My Back Yard)[90] addresses the lack of affordability and housing shortages and counters the NIMBY (Not in My Back Yard) approach from homeowners who oppose new development in their or neighboring communities, particularly anything other than single-family housing with minimum lot sizes.[91] Zoning regulations that limit density through minimum lot sizes, height restrictions, parking requirements, and restrictions on multifamily housing such as stacked or side-by-side units all reduce the supply of housing. When the supply of housing is unable to keep up with demand, prices increase, making it difficult, in most cities, to purchase housing.[92] In places that have embraced ADUs as a use by right,[93] ADUs are fulfilling a housing need for people who desire a different type of product. ADUs make housing more affordable for both the single-family unit with the ADU and the resident of the ADU. Although ADUs are often opposed,[94] they provide the most immediate and plausible mechanism to increase housing supply without tearing down and replacing existing homes with multifamily units.[95] ADUs add density at a fraction of the cost and with less impact on the environment than larger developments.

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Racial Segregation

Land use regulation and zoning arose primarily to restrict land use in single-family residential areas. Metropolitan areas with suburbs that restrict the density of residential construction are more segregated, which further exacerbates race and class inequities.[96] Denver's first zoning code dates to 1925 when, under Mayor Stapleton, the city adopted an ordinance to promote the "health, safety, morals, or general welfare."[97] The political influence of the Ku Klux Klan under Mayor Stapleton prevented geographic migration and integration in Denver.[98] Hoover, at the national level, and local officials, understood that zoning regulations that did not specifically reference race would be and were legally sustainable.[99] As discussed above, zoning laws enabled segregation that was otherwise impermissible under *Buchanan*. In *Euclid*, the Supreme Court overruled the lower court findings that police powers for zoning created racial segregation. In *Euclid*, the lower court had found that

> the exercise of this police power would be to apply similar restrictions for the purpose of segregating in like manner various groups of newly arrived immigrants. The blighting of property values and the congesting of population, whenever the colored or certain foreign races invade a residential section, are so well known as to be within the judicial cognizance.[100]

The *Euclid* decision, along with Hoover's influence, supported the adoption of exclusionary zoning ordinances in predominately white towns across the county.[101] The US Supreme Court continued to uphold discriminatory zoning regulations through its decision in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[102] where it overturned the Seventh Circuit's findings that the municipal authority had a duty to alleviate the problem of the discriminatory effect of

zoning regulations.[103] The Court required the "intent to discriminate standard" to support a Fourteenth Amendment equal protection violation. The Seventh Circuit emphasized in *Village of Arlington* that local governments should not be permitted to practice de facto segregation within their borders because this perpetuates racial segregation.[104] By overturning the Seventh Circuit, the Supreme Court failed to uphold the protections of equal protection set forth in *Buchanan*. The *Arlington* ruling provided a basis for courts to uphold exclusionary zoning regulations that perpetuate racial segregation.

Further, such exclusionary zoning policies result in environmental racism, with hazardous waste facilities being disproportionately located adjacent to Black communities. A Government Accountability Office report found that race was such a strong predictor of the location of hazardous waste facilities that there was only a 1 in 10,000 chance that racial distribution of such sites occurred randomly.[105] Spot rezoning for various industrial uses was common in Black communities to allow what the *Euclid* court considered to be undesirable uses.[106]

Some localities are trying to remedy the effects of discriminatory zoning ordinances by eliminating exclusionary zoning. Berkeley's city council recently adopted a measure that acknowledges the racist history of single-family zoning and began a process to eliminate exclusionary zoning.[107] Minneapolis's city council also eliminated single-family zoning (and it previously legalized ADUs) to address its history of segregation.[108]

Impact of Economic Growth

Land use controls that restrict new housing lowered the aggregate US economic growth by more than 50% between 1964 and 2009 because they reduced the number of workers who could live in high-productivity cities like New York and San Francisco.[109] To overcome the lack of housing supply, statewide preemption is desirable because individual municipalities make decisions that impose costs on other municipalities that have no reason to internalize such costs. Such costs create obstacles to voluntary regional cooperation. Furthermore, those who own single-family homes are unlikely to vote against their perceived interests to increase the supply of housing in their communities. These voters are overrepresented in local governments and tend to oppose any action that may be perceived to endanger home values, such as the construction of multifamily housing. This classic problem impedes economic growth.

Impact on Climate Change

The environmental community now largely supports higher density, transit-oriented development and public transportation to address climate change, in contrast to environmentalists of the 1970s who pushed for no-growth initiatives. As the negative impacts of exclusionary zoning on the environment increase, along with the negative impacts on economic growth, a convergence of interests between environmentalists, housing advocates, and business interests has emerged. Exclusionary zoning policies have statewide spillover effects, particularly regarding climate change, due to the direct relationship between miles traveled and greenhouse gas emissions.[110] Because it is unlikely that individual municipalities will change the status quo to prevent climate change, the result is a collective action problem. When municipalities are not forced to internalize the negative consequences of their actions or refuse to coordinate action at the regional level, states may intervene and preempt exclusionary zoning ordinances. Some experts say this change in statewide policy would have a direct impact on climate change and in turn on greenhouse gases by reducing miles traveled and increasing the efficiencies of higher-density design.[111] Suburban sprawl has a direct effect on greenhouse gas emissions due to vehicle miles traveled.[112] Part of the solution endorsed by the environmental community is to develop housing that reduces driving and decreases energy consumption by allowing greater density (upzoning) and ADUs.[113] Multifamily units consume less energy and are more efficient than single-family homes.

Solutions

Solutions to the problems created by the externalities of exclusionary zoning exist at the state and local level, and potentially at the federal level. The City and County of Denver has several pending bills for ordinances related to expanding exceptions for affordable housing and allowing greater flexibility for ADUs.[114] The City of Grand Junction has adopted an ordinance that established an "ADU Production Program" to incentivize and support the construction of ADUs.[115] The comprehensive land use planning bill proposed in the 2023 legislative session, SB 23-213, attempted to address affordable housing and climate change by modifying current exclusionary zoning practices; however, it did not pass. Successful state and local legislation ending exclusionary zoning and providing solutions to affordable housing and climate change in other cities and states often required several attempts before being passed.

In the US Congress, Representative Kilmer introduced HR 3198—the Yes In My Backyard Act[116]—in 2021. If passed, it would require certain Community Development Block Grant program recipients to submit information to the Department of Housing and Urban Development regarding their implementation of certain land use policies, such as policies for expanding high-density single-family and multifamily zoning. The purpose of the act is to discourage the use of discriminatory land use policies and remove barriers to making housing more affordable to further the original intent of the Community Development Block Grant program. Exclusionary zoning policies have substantial effects on the local, state, and national economy, and Congress arguably has authority under the Commerce Clause[117] to enact sweeping changes at the national level, if it desires to do so.

Future of Exclusionary Zoning

Colby established zoning in Colorado and recognized that zoning is not static and must instead reflect the conditions of the time.[118] Zoning regulations have mostly avoided the scrutiny of the courts on the basis of equal protection because the litigated cases focus on the impact on individuals rather than challenge the entire system on the basis that the local police powers are not being exercised to promote the general welfare as required.[119] Targeting the externalities caused by zoning and demonstrating their impact on the general

welfare is one strategy to reign in the multiple negative impacts of zoning regulations because it frames these issues as matters of mixed or statewide policy concern. The negative externalities created by exclusionary zoning, including insufficient housing supply, lack of affordable housing, economic disparity, racial segregation, lack of equal protection, and climate change are all issues affecting the state and national economy. As a result, successful solutions will likely require a combination of local, state, and federal efforts, either through the courts or through the legislative process. CL

Amy Brimah is the founding attorney of Brimah LLP in Denver. Her practice includes assisting owners, developers, and investors with their commercial real estate interests—amy@brimahlaw.com.

Coordinating Editor: Christopher D. Bryan, cbryan@garfieldhecht.com

NOTES

1. Colorado adopted the Planned Unit Development Act of 1972 with the legislative intent to foster integrated planning. CRS §§ 24-67-101 et seq. The PUD Act enables municipalities to authorize PUDs by enacting a resolution or ordinance in accordance with certain standards.

2. Infranca, "The New State Zoning: Land Use Preemption Among a Housing Crisis," 60 *B.C. L. Rev.* 824, 825–26 (2019).

3. Badger and Bui, "Cities Start to Question an American Ideal: A House With a Yard on Every Lot," *N.Y. Times* (June 18, 2019), https://www.nytimes.com/interactive/2019/06/18/upshot/cities-across-america-question-single-family-zoning.html. *See generally* Gray, *Arbitrary Lines: How Zoning Broke the American City and How to Fix It* (Island Press 2022).

4. City and County of Denver, *Group Living Text Amendment* 6, https://www.denvergov.org/content/dam/denvergov/Portals/646/documents/Zoning/text_amendments/Group_Living/Group_Living_Zoning_History_Equity.pdf.

5. Horowitz and Canavan, "Rigid Zoning Rules Are Helping to Drive Up Rents in Colorado," Pew, https://www.pewtrusts.org/en/research-and-analysis/articles/2023/04/27/rigid-zoning-rules-are-helping-to-drive-up-rents-in-colorado.

6. *Wright v. City of Littleton*, 483 P.2d 953 (Colo. 1971).

7. Even though Houston does not have a zoning ordinance, land use there is similar to other cities; however, rents in Houston are cheaper, compared to most other cities of similar size, since without zoning restrictions the supply of housing keeps up with demand. *See* Horowitz and Canavan, *supra* note 5. *See generally* Gray, *supra* note 3.

8. Gray, *supra* note 3 at 27–30.

9. *Buchanan v. Warley*, 245 U.S. 60 (1917).

10. The actions of local government are state actions. "A city, town, or county may no more deny the equal protection of the laws than it may abridge freedom of speech, establish an official religion, arrest without probable cause, or deny due process of the law." *Hartman v. City and Cnty. of Denver*, 440 P.2d 778 (Colo. 1968).

11. Equal protection claims in Colorado are related to enforcement of the ordinance against the party. *Zavala v. City and Cnty. of Denver*, 759 P.2d 664 (Colo. 1988), addressed whether an ordinance was enforced in a discriminatory manner. However, the Court made no findings about whether the underlying ordinance itself was unconstitutional on equal protection grounds. ("The record does not support the appellants' claims that their rights to due process of law and equal protection of the law were infringed by the manner in which the ordinances were enforced against them."). *Id.* at 669.

12. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

13. The term "*Euclidean* zoning" derives from this case.

14. *Vill. of Euclid v. Ambler Realty Co.,* 1926 U.S. LEXIS 8, *11 (Nov. 22, 1926) (appellee's argument).

15. *Euclid*, 272 U.S. at 390. ("The serious question in the case arises over the provisions of the ordinance excluding from residential districts apartment houses, business houses, retail stores and shops, and other like establishments. This question involves the validity of what is really the crux of the more recent zoning legislation, namely, the creation and maintenance of residential districts, from which business and trade of every sort, including hotels and apartment houses, are excluded.").

16. *Ambler Realty Co. v. Vill. of Euclid,* 297 F. 307, 316 (N.D. Ohio 1924).

17. *Euclid*, 272 U.S. at 397.

18. The Court noted:

> With particular reference to apartment houses . . . , it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities—until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances.

Id. at 394–95.

19. *Id.* at 395–97.

20. *Id.* at 388–90.

21. *See, e.g.*, Trounstine, "The Geography of Inequality: How Land Use Regulation Produces Segregation," 114 *Am. Pol. Sci. Rev.*, 443 (2020); Lens and Monkkonen, "Do Strict Land Use Regulations Make Metropolitan Areas More Segregated by Income?," 82 *J. Am. Plan. Ass'n* 6, 12 (2016); Rothwell, "Racial Enclaves and Density Zoning: The Institutionalized Segregation of Racial Minorities in the United States," 13 *Am. L. & Econ. Rev.* 290, 291 (2011). *See generally* Rothstein, *The Color of Law* (Liverlight 2017).

22. *Euclid*, 272 U.S. at 394. *See also id* at 397. The Court's reference that a nuisance "may be merely a right thing in the wrong place—like a pig in the parlor" is seen by some as a metaphor for exclusionary zoning policies, like ones that prohibit apartments in single-family suburbs. *See id.* at 388.

23. The lower court noted, "And no gift of second sight is required to foresee that if this Kentucky statute had been sustained, its provisions would have spread from city to city throughout the length and breadth of the land." *Ambler Realty Co.*, 297 F. at 312.

24. SSZEA, Foreword, https://www.govinfo.gov/content/pkg/GOVPUB-C13-18b3b6e632119b6d94779f558b9d3873/pdf/GOVPUB-C13-18b3b6e632119b6d94779f558b9d3873.pdf.

25. *Id.*

26. *See* Rothstein, *supra* note 21 at 75. *See also* Ellickson and Been, *Land Use Controls* 109–10, 635–37 (Aspen Casebooks 2005) (describing the use of zoning to promote racial segregation). *See also* Brady, "Turning Neighbors Into Nuisances," 134 *Harv. L. Rev.* 1609, 1613 (Mar. 2021).

27. Millsap, "Time to Abolish Zoning? New Book Makes the Case," *Forbes* (July 29, 2022), https://www.forbes.com/sites/adammillsap/2022/07/29/time-to-abolish-zoning-new-book-makes-the-case/?sh=337006f55a9a. *See also* Gray, *supra* note 3, ch 1.

28. SSZEA, *supra* note 24 at 2.

29. *Id.* at 5.

30. Kurtz, "Recent Developments in Zoning Law in Colorado," 39 *Dicta* 211 (1962).

31. Ellickson, *America's Frozen Neighborhoods: The Abuse of Zoning*, ch. 1 (Yale Univ. Press 2022). *See also* Rothstein, *supra* note 21, ch. 3.

32. *See generally* Ellickson, *supra* note 31.

33. Rothstein, *supra* note 21 at 46. This section outlines the history of Atlanta and one of its foremost city planners, Robert Whitten, who wrote that "colored residence districts have removed one of the most potent causes of race conflict." Despite being rejected by the Georgia Supreme Court as unconstitutional, Atlanta continued to use its racially based zoning map. Rothstein outlines how other cities defied *Buchanan*, including Atlanta, Austin, Birmingham, Indianapolis, Kansas City, New Orleans, Norfolk, Orlando, Richmond, and West Palm Beach. *Id.* at 46–48.

34. Apartments and other forms of multifamily housing such as duplexes and condominiums continue to be the primary debate in zoning laws. *See* Brady, *supra* note 26 at 1611.

35. Colo. Const., art. XX, § 6.

36. *Nat'l Advert. Co. v. Dep't of Highways*, 751 P.2d 632, 635 (Colo. 1988) ("Although 'zoning' is not expressly enumerated in Article XX of the Colorado Constitution as a specific power of municipal self-government . . . zoning legislation is a matter of local concern.").

37. *Glennon Heights, Inc. v. Cent. Bank & Tr.*, 658 P.2d 872, 877 (Colo. 1983).

38. *S. Creek Assocs. v. Bixby & Assocs.*, 781 P.2d 1027 (Colo. 1989).

39. *Colby v. Denver Bd. of Adjustment*, 255 P. 443 (Colo. 1927).

40. *Euclid*, 272 U.S. at 386.

41. Brady, *supra* note 26 at 1612.

42. *Euclid*, 272 U.S. at 383, 391–95.

43. *Levy v. Bd. of Adjustment of Arapahoe Cnty.*, 369 P.2d 991, 995 (Colo. 1962).

44. Kurtz, *supra* note 30 at 214.

45. *Colby*, 255 P. at 445 ("[*Euclid*] is applicable to the Denver charter amendment and the comprehensive zoning ordinance thereby authorized.").

46. *See, e.g., Roosevelt v. City of Englewood*, 492 P.2d 65, 70 (Colo. 1971).

47. This is in contrast to matters of statewide concern, in which home-rule cities may act only when authorized by the constitution or state statute. *R.E.N. v. City of Colo. Springs*, 823 P.2d 1359 (Colo. 1992); *Town of Telluride v. Lot Thirty-Four Venture, L.L.C.*, 3 P.3d 30 (Colo. 2000); *City & Cnty. of Denver v. Qwest Corp.*, 18 P.3d 748 (Colo. 2001); *Boulder Cnty. Apt. Ass'n v. City of Boulder*, 97 P.3d 332 (Colo.App. 2004).

48. "[W]e have typically categorized zoning-related matters as local for purposes of article XX, section 6." *Town of Vail v. Vill. Inn Plaza-Phase V Condo. Ass'n.*, 498 P.3d 1123, 1133 (Colo. App. 2021).

49. Kurtz, *supra* note 30 at 214.

50. *Wright v. City of Littleton*, 483 P.2d 953, 955 (Colo. 1971) (citing *Euclid*, 272 U.S. 365). However, the Court did not review the constitutionality of the zoning ordinance, but rather its application to plaintiff, as plaintiff did not challenge the underlying ordinance.

51. *City & County of Denver v. Tihen*, 235 P. 777 (Colo. 1925) ("We do not believe the people in adopting Article XX . . . ever intended to surrender or relinquish any portion of its police power to declare the public policy of the state . . . ."), *overruled on other grounds* by *State Farm Mut. Auto Ins. Co. v. Temple*, 491 P.2d 1371 (Colo. 1971).

52. *Colo. Anti-Discrimination Comm'n v. Case*, 380 P.2d 34 (Colo. 1962).

53. *Id.* at 42.

54. *Colo. Springs v. Securcare Self Storage*, 10 P.3d 1244 (Colo. 2000).

55. *Id.* at 1251.

56. *Id.* at 1247 (discussing Court's history of categorizing zoning as a local matter) (citing *Voss v. Lundvall Bros.*, 830 P.2d 1061, 1064 (Colo. 1992) (recognizing that the exercise of zoning authority within a home rule city's municipal borders is a matter of local concern); *City of Greeley v. Ells*, 527 P.2d 538, 541 (Colo. 1974) (same); and *Roosevelt*, 492 P.2d at 70 (same)).

57. *Telluride*, 3 P.3d at 37.

58. *Id.* at 33.

59. *City of Northglenn v. Ibarra*, 62 P.3d 151 (Colo. 2003). *See also City & Cnty. of Denver v. State*, 788 P.2d 764 (Colo. 1990); *Lundvall Bros. Inc. v. Voss*, 812 P.2d 693 (Colo.App. 1990), *aff'd in part and rev'd in part on other grounds*, 830 P.2d 1061 (Colo. 1992); *City & Cnty. of Denver v. Qwest Corp.*, 18 P.3d 748 (Colo. 2001).

60. *Telluride*, 3 P.3d at 37.

61. *Northglenn*, 62 P.3d 151.

62. *Telluride*, 3 P.3d at 38.

63. *Nat'l Advert. Co.*, 751 P.2d at 638.

64. *Roosevelt,* 492 P.2d 65.

65. Upzoning increases allowable uses or density, as opposed to downzoning, which decreases allowable uses or density. *See, e.g., Amwest Inv. v. Aurora*, 701 F.Supp. 1508 (D.Colo. 1988).

66. *Roosevelt*, 492 P.2d at 60.

67. *Telluride*, 3 P.3d 30.

68. *Vail*, 498 P.3d 1123.

69. CRS §§ 38-33.3-101 et seq.

70. *Vail*, 498 P.3d at 1131 ("Applying the four factors, we conclude that the enforcement or non-enforcement of the Town's 1987 ordinance is a matter of mixed local and state concern and that, because the ordinance conflicts with the CCIOA, the CCIOA preempts it."). The court also held that CCIOA applied retroactively.

71. *Telluride*, 3 P.3d at 32.

72. *Id.* at 40.

73. The Court reasoned:

> Home rule cities are granted plenary authority by the constitution to regulate issues of local concern. If a home rule city takes action on a matter of local concern, and that ordinance conflicts with a state statute, the home rule provision takes precedence over the state statute . . . . If the matter is one of statewide concern, however, home rule cities may legislate in that area only if the constitution or a statute authorizes the legislation . . . . Otherwise, state statutes take precedence over home rule actions . . . . If the matter is one of mixed local and statewide concern, a home rule provision and a state statute may coexist, as long as the measures can be harmonized. If the home rule action conflicts with the state legislature's action, however, the state statute supersedes the home rule authority.

Id. at 37 (internal citations omitted).

74. *Id.* at 38.

75. *Vail*, 498 P.3d at 1132.

76. *Telluride*, 3 P.3d at 38.

77. *Vail*, 498 P.3d at 1132.

78. *Id.* at 1132–33.

79. *Telluride*, 3 P.3d at 40.

80. Examples include New Jersey's *Mount Laurel* doctrine (*S. Burlington Cnty. NAACP v. Mount Laurel Twp.*, 336 A.2d 713 (N.J. 1975)); Massachusetts's Chapter 40B (Mass. Ann. Laws ch. 40B); and California's Housing Element Law (Cal. Gov. Code §§ 65580 et seq.).

81. Gray, "When the Federal Government Takes on Local Zoning," Bloomberg (Aug. 20, 2018), https://www.bloomberg.com/news/articles/2018-08-20/a-bipartisan-push-against-exclusionary-zoning-is-overdue.

82. Lemar, "The Role of States in Liberalizing Land Use Regulations," 97 *N.C. L. Rev.* 293, 294 (2019) (stating that "there are widespread calls for states to intervene in local land use regulation").

83. *Id.*

84. Arizona, Florida, Idaho, Indiana, New York, Tennessee, and Utah have all passed state laws to preempt local laws related to regulating short-term rentals and have preempted local regulations.

85. While the Oil and Gas Conservation Act does not totally preempt a home-rule city's exercise of land-use authority over oil and gas development and operations within the territorial limits of the city, the statewide interests prevent a home-rule city from exercising its land-use authority so as to completely ban the drilling of oil, gas, or hydrocarbon wells within the city. *Voss v. Lundvall Bros.*, 830 P.2d 1061 (Colo. 1992); *Ft. Collins v. Colo. Oil & Gas Ass'n*, 369 P.3d 586 (Colo. 2016).

86. An ADU is generally defined as a separate and self-contained housing unit located on the property of a single-family home, but it cannot be separately sold from the primary home.

87. *See generally, e.g.*, Calder, "Zoning, Land-Use Planning, and Housing Affordability," *Cato Inst. Pol'y Analysis No. 823* at 1, 4 (Oct. 18, 2017), https://object.cato.org/sites/cato.org/files/pubs/pdf/pa-823.pdf (discussing empirical research suggesting that zoning regulations—including minimum lot size requirements—"reduce supply, which in turn increases prices"); Glaeser et al., "Why Have Housing Prices Gone Up?," 95 *Amer. Econ. Rev.* 329 (May 2005); Glaeser and Gyourko, "The Impact of Building Restrictions on Housing Affordability," *FRBNY Econ. Pol'y Rev.* (June

2003); Gyourko et al., "A New Measure of the Local Regulatory Environment for Housing Markets," 45 *Urb. Stud.* 693 (2008) (analyzing regulations on housing markets in different US jurisdictions); Paciorek, "Supply Constraints and Housing Market Dynamics," Federal Reserve Board, Finance and Economics Discussion Series (working paper 2012-01) (Dec. 1, 2011), https://www.federalreserve.gov/pubs/feds/2012/201201/201201pap.pdf (exploring housing market dynamics).

88. Specifically, in Colorado, rents statewide increased 31% between January 2017 and January 2023. *See* Horowitz and Canavan, "Rigid Zoning Rules Are Helping to Drive Up Rents in Colorado," Pew (Apr. 27, 2023), https://www.pewtrusts.org/en/research-and-analysis/articles/2023/04/27/rigid-zoning-rules-are-helping-to-drive-up-rents-in-colorado.

89. Infranca, *supra* note 2 at 828.

90. Stahl, "'Yes in My Backyard': Can a New Pro-housing Movement Overcome the Power of NIMBYs?," 41 *Zoning & Plan. L. Rep.* 1 (Dec. 1, 2018) (discussing the pro-housing YIMBY movement).

91. Homeowners often object to developments based on the desire to preserve their neighborhood character or protect their home values. *See Stahl*, "The Challenge of Inclusion," 89 *Temple L. Rev.* 487, 491 (Spring 2017). These arguments are often successful with local authorities due to the homeowners' own political influence. *See* Been et al., "Urban Land-Use Regulation: Are Homevoters Overtaking the Growth Machine?," 11 *J. Emperical Legal Stud.* 227 (2014). *See also* Schuetz, "Who's to Blame for High Housing Costs? It's More Complicated Than You Think," Brookings (Jan. 17, 2020), https://www.brookings.edu/research/whos-to-blame-for-high-housing-costs-its-more-complicated-than-you-think ("Homeowners who were lucky enough to purchase their houses in earlier periods have enjoyed substantial wealth gains, most of which are exempt from taxation. Small wonder that homeowners exert their political muscle to continue restricting new housing supply."); Foster, "The Limits of Mobility and the Persistence of Urban Inequality," 127 *Yale. L.J. F.* 481, 485 (2017), https://www.yalelawjournal.org/pdf/Foster_styrqpy4.pdf ("Part of the reason for such restrictive land policies . . . is the vested interest of existing homeowners who favor policies that preserve the status quo and minimize the negative externalities of urban agglomeration, thus maintaining their home values.").

92. Millsap, "Time to Abolish Zoning? New Book Makes the Case," *Forbes* (July 29, 2022), https://www.forbes.com/sites/adammillsap/2022/07/29/time-to-abolish-zoning-new-book-makes-the-case/?sh=dee9d805a9a5. *See also* Kenney and Minor, "The Year That Could Change How Colorado Grows," CPR News (Apr. 21, 2023), https://www.cpr.org/podcast-episode/the-year-that-could-change-how-colorado-grows (summary of inflated home prices and lack of housing due to zoning regulations).

93. California, New Hampshire, Oregon, Rhode Island, Vermont, and Washington all permit some type of ADU as a use by right through state preemption of local land use regulations.

94. Homeowners often oppose ADUs on their concerns of density, neighborhood character, and parking, but some research suggests these concerns are unfounded. *See* City of Seattle, *Accessory Dwelling Units, Draft Environmental Statement* (May 10, 2018), http://www.seattle.gov/Documents/Departments/Council/ADU_DEIS_2018.pdf (finding that a proposal to liberalize ADU laws would have no significant adverse impacts on building and population density, parking, public services, and utilities).

95. *See id.*

96. Rothwell and Massey, "Density Zoning and Class Segregation in U.S. Metropolitan Areas," 91 *Soc. Sci. Q.* 1123, 1123 (2010), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3632084.

97. *See* Kung, "Zoning Codes—Tools for Segregation of Creating Complete Neighborhoods?," DenverUrbanism (Feb. 18, 2019), https://denverurbanism.com/2019/02/zoning-codes-segregation-or-complete-neighborhoods.html.

98. *Id.*

99. Rothstein, *supra* note 21 at 52.

100. *Ambler Realty Co.*, 297 F. at 313.

101. Rothstein, *supra* note 21 at 53.

102. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

103. The Seventh Circuit stated, "In the instant case Arlington Heights has been ignoring what is essentially the same basic problem. Indeed, it has been exploiting the problem by allowing itself to become an almost one hundred percent white community." *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 517 F.2d 409, 414 (7th Cir. 1975).

104. "We have no doubt that if Lincoln Green were built, it, unlike the rest of the village, would be an integrated community. Though the building of this project might have only minimal effects in terms of alleviating the segregative housing problem for the entire Chicago area, it might well result in increasing Arlington Heights' minority population by over one thousand percent. What is even more crucial is that this suburb has not sponsored nor participated in any low-income housing developments, nor does the record reflect any such plans for the future. Realistically, Lincoln Green appears to be the only contemplated proposal for Arlington Heights that would be a step in the direction of easing the problem of de facto segregated housing. Thus the rejection of Lincoln Green has the effect of perpetuating both this residential segregation and Arlington Heights' failure to accept any responsibility for helping to solve this problem." *Id.* at 414.

105. Rothstein, *supra* note 21 at 55.

106. Rothstein outlines a number of communities that permitted this. *See* Rothstein, *supra* note 21 at 54–57.

107. Berkeley's establishment of single-family zoning in 1916 "would become one of America's most enduring systems of racial inequity—a soft apartheid of zoning." Manjoo, "How Berkeley Beat Back NIMBYs," *N.Y. Times* (Mar. 4, 2021).

108. *See* Grabar, "Minneapolis Confronts Its History of Housing Segregation," *Slate* (Dec. 7, 2018), https://slate.com/business/2018/12/minneapolis-single-family-zoning-housing-racism.htm.

109. Hsieh and Moretti, "Housing Constraints and Spatial Misallocation," *Nat'l Bureau of Econ. Rsch.* (working paper no. 21154) (2015).

110. *See* Tomer et al, "We Can't Beat the Climate Crisis Without Rethinking Land Use," Brookings (May 12, 2021), https://www.brookings.edu/research/we-cant-beat-the-climate-crisis-without-rethinking-land-use.

111. *Id.*

112. *Id.*

113. *See generally* Infranca, *supra* note 2.

114. *See* Bills 23-0374, 23-0375, 23-0415, 23-0416, City and County of Denver.

115. Ordinance 5136, City of Grand Junction.

116. H.R. 3198, 117th Congress (2021), https://www.congress.gov/bill/117th-congress/house-bill/3198/text.

117. *See Gonzales v. Raich*, 545 U.S. 1 (2005).

118. In *Colby*, the Court quoted another Supreme Court case in addition to *Euclid* to justify its position: "[A] vested interest on the ground of conditions once obtained cannot be asserted against the proper exercise of the police power—to so hold would preclude development." *Colby* 255 P. at 352 (citing *Hadacheck v. L.A.*, 239 U.S. 394 (1915)); "'There must be progress, and if in its march private interests are in the way, they must yield to the good of the community.'" *Id.* at 351 (quoting *Hadacheck*, 239 U.S. at 410).

119. *Colby*, 255 P. at 446. Zoning powers delegated to local authorities remain subject to the same restrictions as the state. *See S. Burlington Cnty. NAACP*, 336 A.2d at 726 (emphasizing that zoning regulations, as an exercise of police power, must promote the general welfare) (When a regulation has a "substantial external impact, the welfare of the state's citizen beyond the borders of the particular municipality cannot be disregarded and must be recognized and served."). The court recognized the external effects of zoning on the general welfare and criticized the restrictions on the broader housing supply for "all categories of people." *Id.* at 727–28. In 2015, the Supreme Court of New Jersey held it would enforce the local government obligations under the *Mount Laurel* decision due to the lack of enforcement by local government: "[W]e conclude that towns must subject themselves to judicial review for constitutional compliance . . . ." *In re Adoption of N.J.A.C. 5:96 & 5:97 N.J. Council on Affordable Hous.*, 110 A.3d 31, 42 (N.J. 2015).