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FEAR AND LOATHING: COMBATING SPECULATION IN LOCAL COMMUNITIES

Ngai Pindell*

Local governments commonly respond to economic and social pressures on property by using their legal power to regulate land uses. These local entities enact regulations that limit property development and use to maintain attractive communities and orderly growth. This Article argues that government entities should employ their expansive land use powers to limit investor speculation in local markets by restricting the resale of residential housing for three years. Investor speculation, and the upward pressure it places on housing prices, threatens the availability of affordable housing as well as the development of stable neighborhoods. Government regulation of investor speculation mirrors existing, privately imposed restrictions that prevent individual purchasers from appropriating property value that rightfully belongs to surrounding neighbors. This progressive allocation of property value is supported by earlier urban theorists like Henry George and Ebenezer Howard, and is consistent with modern land use legal decisions and policy.

I. INTRODUCTION

Recent activity in the residential housing market has moved property discussions from law school classrooms to newspapers and internet chat rooms. Within the last couple of years, countless articles have discussed rising housing prices,[1] the availability of affordable housing,[2] low interest rates,[3] increasing access to creative home finance products,[4] and speculative purchases by investors

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1. *See, e.g.*, Jennifer Bayot, *April Sales of New Homes Show a Surge*, N.Y. TIMES, May 26, 2005, at C3 (discussing record housing price increases reported by the National Association of Realtors).

2. *See, e.g.*, David Leonhardt & Motoko Rich, *Twenty Years Later, Buying a House Is Less of a Bite*, N.Y. TIMES, Dec. 29, 2005, at A1 (comparing housing affordability among different cities and regions of the country).

3. *See, e.g.*, Nancy Sarnoff, *A Place of Their Own*, HOUSTON CHRON., June 26, 2005, at Business 1 ("Experts said low interest rates and the lure of homeownership are causing this group [those born between 1977 and 1994] to buy homes earlier than their baby boomer parents and Generation X.").

4. *See, e.g.*, Dean Foust, *Housing the Mortgage Trap*, BUS. WK., June 27, 2005, at 32, 34 ("[N]othing screams 'frenzy' louder than the huge popularity of innovative—and

who believe housing values will continue to rise.[5] Economists, recognizing these same trends, ponder how long increasing real estate prices will last,[6] how the national economy would react to falling real estate prices,[7] and which local housing markets are ripe for housing value free falls or long-term appreciation.[8]

Musings over housing price appreciation and fears of speculative bubbles in 2004 and most of 2005 yielded to discussions of rising interest rates and cooling housing markets in 2006.[9] The rise and fall of housing markets is not a new phenomenon, but the effects of housing frenzies and slowdowns merit examination under local governments' power to regulate land use. Historically, these housing market vacillations were left to the private market to address. In the future, local governments could consider legislation to stem pernicious effects of rapid housing price appreciation on orderly land use planning, affordable housing development, and the availability of housing opportunities for families and local employees.

Runaway housing prices in residential real estate markets raise important questions concerning local regulation of property. As prices rise, housing within the nation's cities becomes increasingly out of reach for those who live and work in those cities. For example, a 2002 study in Las Vegas, Nevada concluded that for each incremental $1000 rise in housing prices in Clark County, Nevada,

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risky—mortgage products that allow buyers to stretch for those million-dollar studios and multimillion-dollar suburban colonials .... [S]uch loans now account for 20% of all new mortgages, up from under 5% two years ago."). One of these products, the option adjustable rate mortgage (ARM), allows a purchaser to choose each month to make an interest-only payment, an amortizing payment (interest plus principal), or a minimum payment that can be lower than the monthly interest amount.

5. *See, e.g.*, Virginia Heffernan, *For Armchair Flippers, Speculation as Spectator Sport*, N.Y. TIMES, Aug. 4, 2005, at F1.

6. *See generally* ROBERT J. SHILLER, IRRATIONAL EXUBERANCE PART TWO (Princeton Univ. Press 2005) (2001) (discussing the residential real estate bubble and drawing comparisons to the stock market bubble at the beginning of the decade); Daryl Kelley, *Housing May Be Fillmore's Biggest Cash Crop*, L.A. TIMES, Feb. 11, 2005, at B1 (discussing impact of federal budget on economic markets and mortgage rates).

7. *See, e.g.*, Anna Bernasek, *Hear a Pop? Watch Out*, N.Y. Times, May 29, 2005, § 3, at 6 ("Adding it all up, it's easy to see how a drop in real estate prices would spell trouble for the economy.... Reviewing the experience in the United States and 13 other industrialized countries, the I.M.F. [International Monetary Fund] found that a real estate bust is far more dangerous to the economy than a stock market bust.").

8. *See, e.g.*, Matthew Haggman, *Lennar Builds Sturdy Profits*, MIAMI HERALD, June 22, 2005, at 1C (stating that high employment rates and increasing incomes in Miami, Florida will mitigate a housing value downturn); Shawn Tully, *Is It Time to Cash Out?*, FORTUNE, July 11, 2005, at 54 (discussing the most overpriced and underpriced housing markets in the country).

9. *See, e.g.*, Tomoeh Murakami Tse, *New-Home Sales Fell in Feb.; Inventories Rose to New Record*, WASH. POST, Mar. 25, 2006, at D01 (describing declines in the pace of housing sales and the price of housing, and an increasing number of houses waiting to be sold).

1,528 families were unable to purchase a home.[10] From 2000 to 2002, the median sales price of homes climbed $55,000 without a corresponding increase in incomes, meaning approximately 84,000 additional families were unable to purchase homes.[11]

The first part of the title of this Article, "fear and loathing," conjures images of Las Vegas[12]—one site of speculative investment and a rapidly appreciating real estate market. But more than that, "fear and loathing" represents two aspects of the typical response to speculation. Taking the words in reverse order, "loathing" reflects the many negative perceptions of the effects of property speculation.[13] In particular, speculators are often blamed for the inability of local residents to attain affordable housing. In one instance, a local resident who had been outbid by an investor ran crying from the home she had hoped to purchase. Investors are often aware of this effect on affordable housing:

> [The investor in this instance] said she is uncomfortable choosing between guilt and easy investment profits. Still, she is considering buying a fifth home here. "I can't say, 'Oh, those Californians,' and then say, 'Don't point at me,' because that's hypocritical," she said. "Do I consider myself one of the people ruining it? Realistically, yes, I'm personally responsible for home prices rising there."[14]

Regarding fear, local governments are generally afraid to aggressively address housing speculation for several reasons: (1) the risk of courts striking down innovative efforts, (2) the possibility of political repercussions for appearing not to value individual property rights, (3) the costs of interfering with investment capital inflow into a community that, at least for the short term, will likely raise overall property values and, consequently, property tax revenue,[15]

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10. J.M. Kalil, *Hot Market: Chasing the Dream*, LAS VEGAS REV.-J., Aug. 1, 2004, at 23A.

11. *Id.*

12. *See* HUNTER S. THOMPSON, FEAR AND LOATHING IN LAS VEGAS: A SAVAGE JOURNEY TO THE HEART OF THE AMERICAN DREAM (1971).

13. To say that most people "loathe" speculators seems a bit of a hyperbole, but given the quantity of discussions in internet sites as well as in the print and television media over the pernicious effects of speculators, perhaps "loathe" is an apt word. Certainly the title of one article supports this contention. Lynn A. Stout, *Why the Law Hates Speculators: Regulation and Private Ordering in the Market for OTC Derivatives*, 48 DUKE L.J. 701 (1999).

14. J.M. Kalil, *California Investor Calls Valley Market an "Interesting Ride,"* LAS VEGAS REV.-J., Aug. 2, 2004, at 8A.

15. Addressing affordability concerns through regulation might also create additional affordability burdens. Some critiques of affordable housing programs argue that excessive land use regulation often contributes to higher housing prices due to higher costs of compliance.

and (4) the difficulty in isolating speculative investment from other forms of investment and also from other causes of rising housing prices such as low interest rates or the overall supply of housing.[16]

This Article addresses the above justifications for local governments' relative inaction against speculation by exploring the development of an anti-speculation measure applicable to residential property. This anti-speculation measure could be a zoning district designation containing anti-speculation requirements in addition to the more traditional requirements of permissible densities, housing types and the like. Local governments could also incorporate anti-speculation measures into an overlay zoning district.[17] This Article considers the implementation of anti-speculation measures within a legislatively enacted "anti-speculation ordinance."[18]

The core of the proposed anti-speculation zoning ordinance is a requirement that first purchasers of residential property in newly constructed developments of a certain size be restricted in their ability to sell the property for three years.[19] Anti-speculation measures ideally would be implemented in medium and large-scale communities of approximately twenty or more units. The ordinance would apply to both attached and detached single-family housing.[20]

A three-year resale limitation period is long enough to discourage speculative purchases and flipping, but not so long as to curb significant numbers of people intending to employ a "buy and

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See, e.g., Michael H. Schill, *Privatizing Federal Low Income Housing Assistance: The Case of Public Housing*, 75 CORNELL L. REV. 878, 891–99 (1990).

16. Significant housing appreciation also can be caused by housing purchases influenced by long-term goals like education quality. *See* Jasper Kim, *Anti-Speculation Laws and Their Impact on the Real Estate and Financial Markets: The Korean Case*, 18 COLUM. J. ASIAN L. 47, 52 (2004).

17. For a description of overlay zoning, see MORTON GITELMAN ET AL., LAND USE, CASES, MATERIALS AND PROBLEMS 687 (6th ed. 2004) ("Overlay zoning is a flexible alternative to traditional zoning. To create an overlay zone, a mapped district is superimposed on one or more established zoning districts. Property within the overlay district is then subject to two sets of regulations and stipulations: those contained in the underlying zoning district provisions and those provided for by the overlay zone itself.").

18. For alternatives to this approach, see *infra* Part V.B–C.

19. This anti-speculation ordinance might also be useful in redevelopment areas to the extent these areas experience substantial new construction or rehabilitation. Currently, public and private redevelopment funds targeting affordable housing construction may be conditioned on the adoption of resale restrictions to preserve their ongoing affordability.

20. This Article assumes no difference between multi-family housing and detached, single-family housing in respect to general housing affordability as a result of speculation. It is possible, however, that investment in different structures of housing would affect housing markets differently. *See, e.g.*, Zhong Yi Tong & John L. Glascock, *Price Dynamics of Owner-Occupied Housing in the Baltimore-Washington Area: Does Structure Type Matter?*, 11 J. HOUSING RES. 29, 31 (2000) (finding differences in housing values, appreciation rates and price volatility among condominiums, townhouses and single-family, detached homes).

hold" or "buy and occupy" housing strategy.[21] In the event that a purchaser desires to sell within three years because of hardship, job changes, and similar situations, the purchaser would be protected through full and partial relief provisions included in the zoning ordinance. Conversations at the local level should determine the exact content of these relief provisions. The relief provisions would aim to provide exceptions to the ordinance for those purchasers truly intending to hold the property for three years, but unable to complete the period because of extenuating circumstances. The inclusions of such exceptions to the ordinance would likely necessitate an administrative system to evaluate the merit of waiver claims, monitor compliance, and conduct enforcement through civil or perhaps criminal penalties.[22]

The anti-speculation ordinance is primarily designed for use in communities experiencing housing affordability pressures, perhaps as a result of rapid population growth.[23] Some details of the implementation of the ordinance, such as the appropriate resale limitation period, the appropriate punishment for violations, and the exact conditions allowing full or partial relief, will be difficult to determine and could vary from region to region. These difficulties need not prevent a critical examination of anti-speculation possibilities, nor eliminate the chance that an anti-speculation ordinance might be enacted.

The next part of this Article, Part II, explores rising property values and speculative bubbles as a cause for an anti-speculation ordinance. Part III discusses policy justifications for anti-speculation measures as well as the obstacles and opportunities facing governments attempting to address speculation at the local level. Part IV examines possible legal challenges to implementing such an ordinance and, in Part V, the Article presents some of the

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21. Speculative purchases can encourage abusive practices such as predatory lending, fraudulent appraisals, suspect construction work, and flipping. An investor might purchase property looking to quickly resell to a less sophisticated or financially vulnerable buyer at an inflated price. *See* Elizabeth Renuart, *An Overview of the Predatory Mortgage Lending Process*, 15 HOUSING POL'Y DEBATE 467, 481 (2004).

22. For some initial thoughts on an administrative structure, see *infra* Part V. The administration of the ordinance is not costless, but local governments can weigh the cost of enforcing compliance with the costs of speculative investment.

23. Cities in the Southwest and in Florida will experience the most population growth, according to the U.S. Census. California, Florida and Texas will account for 46% of the nation's growth between 2000 and 2030, gaining a total of about twelve million people. Robert Bernstein, *Florida, California and Texas to Dominate Future Population Growth, Census Bureau Reports*, U.S. CENSUS BUREAU NEWS, Apr. 21, 2005, http://www.census.gov/Press-Release/www/releases/archives/population/004704.html. During this time period, Nevada is projected to have the highest rate of growth at 114%, followed by Arizona at 109%. *Id.*

major practical and political obstacles to implementing an anti-speculation ordinance. Part VI is a brief conclusion.

II. DIMENSIONS OF THE ISSUE

A. *Considering Resistance To Regulation—Social and Individual Views of Property*

Property restrictions provoke strong reactions from many. Defenders of private property rights criticize a perceived increase in the number and magnitude of property restrictions and incursions. The Supreme Court's decision in *Kelo v. City of New London*,[24] affirming the use of eminent domain to further economic development goals, sparked particular outrage[25] and legislative responses.[26]

Residential real estate has long been viewed as a commodity similar to stocks and bonds that can be leveraged, purchased and sold with limited restrictions.[27] Moreover the commodification of property has benefited a broad range of people. The very wealthy, and those of much more modest means, have made fortunes or supplemented wage incomes through the buying and selling of residential real estate. A few fortunate homeowners make more money in a year from the increased value of their homes than from their jobs.[28] In addition to directly benefiting those who own property, investment capital can revitalize and gentrify distressed

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24. Kelo v. City of New London, 125 S. Ct. 2655 (2005). For further discussion of *Kelo*, see *infra* notes 86–90 and accompanying text.

25. *See, e.g.*, John G. Edwards, *2005 Legislature Limited Eminent Domain Actions*, LAS VEGAS REV.-J., June 24, 2005, at 10A ("Harry Pappas, whose family battled the city of Las Vegas for 11 years to stop the condemnation of its downtown shopping center . . . remains angry that the city forced the sale of the real estate. . . . 'America now is just like the Nazi countries or the communist countries. . . . When they come to take your property, kill them . . . .' "); David D. Kirkpatrick, *Ruling on Property Seizure Case Rallies Christian Groups*, N.Y. TIMES, July 11, 2005, at A13 (discussing the convergence of concern by the religious and political right over eminent domain).

26. *See, e.g.*, H.R. 4128, 109th Cong. § 2(a) (2005) (barring states and local governments receiving federal economic development funds from using eminent domain for economic development, which passed by a vote of 376–38); *see also* Timothy Egan, *Ruling Sets Off Tug of War over Private Property*, N.Y. TIMES, July 30, 2005, at A1 (discussing city and state responses to the *Kelo* decision).

27. The category of commodifiable "property" interests is expansive. *See, e.g.*, Michael Abramowicz, *On the Alienability of Legal Claims*, 114 YALE L.J. 697, 703–51 (2005) (evaluating relative economic and non-economic arguments for selling legal claims).

28. *See* Hubble Smith, *Home Appreciation Rates: Homeowners Hit Jackpot*, LAS VEGAS REV.-J., Feb. 20, 2005, at 34A.

housing, and non-owner occupied housing provides a valuable source of rental housing.

However, deleterious effects also accompany the increasing commodification of property. Rapidly increasing housing values driven more by short-term, speculator investors than by occupying or "buy and hold" owners can create negative impacts on communities.[29] Housing becomes increasingly out of reach for those who live and work within the community, forcing many of them to commute long distances, live in overcrowded situations, or leave the community altogether.[30] These high real estate costs are a frequent obstacle to attracting and retaining workers in essential services like nursing, elementary and secondary education, fire fighting and law enforcement.[31] Property values, bid higher as a result of speculation, can decrease rapidly in such a market as speculators move quickly to unload properties when prices fall.

Finally, conceiving of residential real estate primarily as a commodified asset rather than as a shelter or social asset affects society's approach to urban property questions. The public's view of property influences what new housing is built, how communities address affordable housing issues, and how society evaluates the terms upon which an individual or a family becomes more deserving of shelter.[32] Some legal mechanisms already do exist that indirectly affect speculation, such as the tax code and its differential taxation on the sale of property based on duration of ownership and whether the property is a primary residence,[33] but society's continued anxiety over the effects of speculation on housing markets suggests that more direct measures are required.

Competing and contradictory conceptions of property limit the ability of land use regulation to confront speculation. At times, property represents a path to wealth and independence. Advocates in this tradition emphasize wealth-building strategies for the poor

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29. Those able to purchase homes in a rising housing market may borrow against that equity during harder times. *See, e.g.*, Ford Fessenden, *Where Home Prices Rise Steeply, Bankruptcies Fall*, N.Y. TIMES, Oct. 9, 2005, § 4, at 14.

30. JOINT CTR. FOR HOUSING STUDIES OF HARVARD UNIV., THE STATE OF THE NATION'S HOUSING: 2005, at 1 (2005), *available at* http://www.jchs.harvard.edu/publications/markets/son2005/son2005.pdf (discussing housing affordability problems in light of escalating housing prices).

31. Jennifer Shubinski, *Fewer in LV Can Afford to Buy Home*, LAS VEGAS SUN, Nov. 11, 2004, at 1A ("Teachers, nurses and hotel workers are being left out in the cold as the ability to buy a home becomes more out of reach for many in the Las Vegas Valley.").

32. *See, e.g.*, Gerald Torres, *The New Property*, 56 STAN. L. REV. 741, 753–54 (2003) ("[I]deas of property are intimately tied to ideas of self and community and to the idea of a polity itself.").

33. *See* I.R.C. § 121 (2000); IRS, PUBLICATION 523: SELLING YOUR HOME 3, 9 (2005), *available at* http://www.irs.gov/publications/p523/.

so that they too may participate in mainstream wealth creation.[34] At other times, the social functions of property are accentuated, such as property's role in providing shelter, building community, facilitating participation, and creating personal identity.[35] Popular reaction to the *Kelo* decision illustrates the passion of some Americans for "private" property rights with minimal government interference.[36] At the same time, popular reaction to the effects of speculation on residential real estate, particularly its role in pushing the prices of houses beyond the reach of many modest home purchasers, suggests frustration with the problem and open-mindedness toward addressing it through regulation.[37]

This anti-speculation ordinance is not a traditional affordable housing proposal in that it does not incorporate the provision of subsidies, the inclusion of a certain number of designated affordable housing units, or measures to target any specific lower income purchaser. Instead, its goals are broader. It would minimize the component of housing price inflation due solely or significantly to investor expectations of even higher prices. This expectation component of housing price fuels speculative purchasing and limits the ability of lower income buyers to enter the housing market. Additionally, the ordinance would enable people to conceive of property in a different way than usual. Through the ordinance, market-rate property is brought within the ambit of a broader meaning of property still defined by *exchange* value concepts, but also infused with valuations based on property's *use* value and importance as shelter for individuals and families.

Another affordable housing approach, inclusionary zoning, provides a useful comparison to the theorization and application of an anti-speculation ordinance. The two approaches are similar in that they both attempt to connect market-rate development with the development of affordable housing. However, they differ in methods of implementation. The term "inclusionary zoning" generally describes a number of techniques connecting affordable housing production to the creation of market-rate housing while also striving to achieve income integration within communities.[38]

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34. *See, e.g.*, Susan R. Jones, *Small Business and Community Economic Development: Transactional Lawyering for Social Change and Economic Justice*, 4 CLINICAL L. REV. 195, 195–234 (1997).

35. *See, e.g.*, GREGORY ALEXANDER, COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776–1970, at 311–77 (1997); JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 95–140 (2000).

36. *See supra* notes 24–26 and accompanying text.

37. *See* examples discussed *supra* notes 2–8.

38. *See infra* Part IV (discussing inclusionary zoning methods and cases). For additional treatments of inclusionary zoning, see generally Nico Calavita et al., *Inclusionary Housing in*

Inclusionary zoning creates subsidized, affordable housing units with income restrictions on occupancy. Typically, developers elect either to build the housing units themselves or to contribute an equivalent dollar amount to an affordable housing fund for the local construction of affordable housing elsewhere.

An anti-speculation ordinance, on the other hand, would have more of an indirect effect on the production of affordable housing. It would not designate specific units as affordable housing units subject to restrictions on occupancy and sales price. Instead, the ordinance intervenes in the market at a more general level to eliminate short-term "expectation" values and therefore keep housing prices within the reach of households just able to afford homeownership opportunities.[39]

Land speculation generally has not been a focus of affordable housing scholarship, although commentators have sometimes mentioned the harm that speculation brings to communities.[40] Scholars have discussed anti-speculation measures within discrete areas such as land trusts, cooperative housing and subsidized affordable housing.[41] Affordable housing proponents have also identified the power of local government land use policies to

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California and New Jersey: A Comparative Analysis, 8 HOUSING POL'Y DEBATE 109 (1997); Laura M. Padilla, *Reflections on Inclusionary Zoning and a Renewed Look at its Viability*, 23 HOFSTRA L. REV. 539 (1995); Barbara Ehrlich Kautz, Comment, *In Defense of Inclusionary Zoning: Successfully Creating Affordable Housing*, 36 U.S.F. L. REV. 971 (2002).

39. By focusing on increased opportunities for homeownership, an anti-speculation ordinance may be more effective in providing or maintaining affordable housing for a higher income group of households that find attainable housing difficult to secure but do not qualify for most heavily-subsidized affordable housing units.

40. *See, e.g.*, WILLIAM H. SIMON, THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT 45 (2001) (describing speculative bubbles as the opposite of community decline). *But see* William H. Simon, *Social-Republican Property*, 38 UCLA L. REV. 1335, 1336 (1991) ("The distinctive feature of social-republican property is that it is held by private individuals subject to two types of conditions—one requiring that the holder bear a relation of potential active participation in a group or community constituted by the property, and another designed to limit inequality among the members of a group or community.").

41. Sponsors of affordable housing regularly include purchase, transfer, and accumulation restrictions to preserve a unit's affordability for future purchasers or to ensure repayment of the subsidy. *See generally* David M. Abramowitz, *Community Land Trusts and Ground Leases*, 1 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 5 (1992) (discussing the utility of a community land trust model to preserve affordable housing); Michael F. Keeley & Peter B. Manzo, *Resale Restrictions and Leverage Controls*, 1 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 9 (1992) (discussing strategies to create and preserve affordable housing including deed restrictions, affordability covenants, options, and specialized mortgages); Deborah Kenn, *Paradise Unfound: The American Dream of Housing Justice for All*, 5 B.U. PUB. INT. L.J. 69 (1995) (discussing community land trusts, limited equity cooperatives, and mutual housing associations); David H. Kirkpatrick, *Cooperatives and Mutual Housing Associations*, 1 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 7 (1992) (comparing cooperatives and mutual housing associations to other ownership structures designed to create and preserve affordable housing).

create, as well as frustrate, affordable housing opportunities.[42] This land use scholarship does not generally apply anti-speculation measures to the broader housing market nor does this scholarship evaluate the possibility of addressing speculation through the government's general power to enact local land use legislation.[43]

Policymakers and commentators should continue the discussion of more effective ways to implement existing affordable housing approaches. At the same time, new approaches, like an anti-speculation ordinance, provide alternatives to the persistent scramble to capture scarce, ever-deeper subsidies from public and private sources in order to increase housing opportunities for lower income households. An anti-speculation ordinance that restricts resales offers local communities a better strategy—both theoretically sound and practical to implement—to address the serious social problems caused by speculation in residential property.

B. Magnitude of Housing Appreciation

Increasing home prices over the last several years may indicate the presence of a speculative bubble[44] within the real estate market. Similarly, scholars and economists are concerned with the effects of a steep decline in real estate values on the macroeconomy and on individuals.[45] The potential effects of a sharp decline are par-

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42. *See generally* GROWTH MANAGEMENT AND AFFORDABLE HOUSING: DO THEY CONFLICT? (Anthony Downs ed., 2004) (including several studies that analyze the connections between growth management programs and the cost of housing); PETER W. SALSICH, JR. & TIMOTHY J. TRYNIECKI, LAND USE REGULATION: A LEGAL ANALYSIS AND PRACTICAL APPLICATION OF LAND USE LAW 377–420 (Am. Bar Assoc. 2003) (1991) (discussing municipal barriers to affordable housing).

43. Limiting the alienability of property in order to preserve affordable housing is also implicated in discussions of rent control and condominium conversion. *See, e.g.*, Victoria A. Judson, *Defining Property Rights: The Constitutionality of Protecting Tenants from Condominium Conversion*, 18 HARV. C.R.-C.L. L. REV. 179, 213 (1983) (suggesting "a unified theory of takings doctrine applicable to condominium conversion regulation in which non-economic interests in occupancy of property, specifically the ability to use property as a base for political participation and for the creation of an identity, limit protection of classic economic investment interests in property, i.e. the ability to use property to generate income").

44. Indicators of a bubble include when prices of assets rise out of step with underlying fundamentals and buyers purchase, in large part based on their expectations of future price increases. Jonathan McCarthy & Richard W. Peach, *Are Home Prices the Next "Bubble"?*, FED. RES. BANK N.Y. ECON. POL'Y REV., Dec. 2004, at 4.

45. *See, e.g.*, *In Come the Waves*, ECONOMIST, June 16, 2005, at 66 ("Never before have real house prices risen so fast, for so long, in so many countries. Property markets have been frothing from America, Britain and Australia to France, Spain and China. Rising property

ticularly worrisome considering the significant proportion of individual household wealth held in real estate across income and class levels. For example, households held $14.6 trillion in real estate assets at the end of 2003, comprising about twenty-eight percent of individual household assets.[46] Comparatively, at the peak of the stock market in 2000, households held $12.8 trillion in corporate equities and mutual funds.[47] A discussion of whether real estate values are heading toward the same steep fall as equity values during the most recent stock market downturn is largely beyond the scope of this Article.[48] It is enough to note that real property ownership is deep and broad; it comprises a significant portion of individual household wealth and this ownership extends across multiple income classes.

Housing appreciation rates have approached unprecedented levels. The Office of Federal Housing Enterprise Oversight (OFHEO) is a federal agency charged with ensuring the safety of the Federal Home Loan Mortgage Corporation (Freddie Mac) and the Federal National Mortgage Association (Fannie Mae).[49] The OFHEO publishes a quarterly report on housing values across the nation.[50] For the quarter ending March 31, 2005, Nevada led the nation with a one-year housing appreciation rate of thirty-one percent.[51] California's one-year average was second at twenty-five percent and Hawaii, Washington D.C., Florida, and Maryland

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prices helped to prop up the world economy after the stockmarket bubble burst in 2000. What if the housing boom now turns to bust?").

46. McCarthy & Peach, *supra* note 44, at 2.

47. *Id.*

48. *See generally* Karl E. Case & Robert J. Shiller, *Is There a Bubble in the Housing Market?*, 2 BROOKINGS PAPERS ON ECON. ACTIVITY 299 (2003).

49. The OFHEO was established by the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, Pub. L. No. 102-550, § 1311, 106 Stat. 3941, 3944 (1992) (codified at 12 U.S.C. 4511 (2000)).

50. The OFHEO calculates a Housing Price Index

> based on transactions involving conforming, conventional mortgages purchased or securitized by Fannie Mae or Freddie Mac. Only mortgage transactions on single-family properties are included. "Conforming" refers to a mortgage that both meets the underwriting guidelines of Fannie Mae or Freddie Mac and that doesn't exceed the conforming loan limit, a figure linked to an index published by the Federal Housing Finance Board. The conforming mortgage loan limit for single-family homes in 2005 increased to $359,650 from $337,000 in 2004. "Conventional" means that the mortgages are neither insured nor guaranteed by the FHA, VA, or other federal government entity. . . . Mortgage transactions on condominiums or multi-unit properties are also excluded.

Press Release, Office of Fed. Hous. Enter. Oversight, U.S. House Prices Continue to Rise Rapidly: OFHEO's House Price Index Shows a 12.5 Percent Increase Over the Past Year, at 12 (June 1, 2005), *available at* http://www.ofheo.gov/media/pdf/1q05hpi.pdf.

51. *Id.* at 8.

respectively rounded out the states whose one-year appreciation rates exceeded twenty percent.[52] The average one-year appreciation rate across the country was 12.5%.[53] This appreciation rate was higher than the appreciation rate in 2004, the highest rate in twenty-five years.[54] Of the twenty metropolitan statistical areas (MSAs) with the highest rates of housing price appreciation, the area with the highest rate was Bakersfield, California at 33.7%.[55] The Las Vegas, Nevada MSA and the Reno, Nevada MSA followed at 33.2% and 31.8% respectively.[56]

Historically low interest rates, strong income growth, and investor speculation have fueled rising home prices. In Clark County, Nevada, where housing prices have risen more steeply than any other area in the nation except one (Bakersfield, California), the share of investor purchases in the residential real estate market increased from below twenty percent in 2002 to sometimes over forty percent in 2004 and 2005.[57] Nationally, residential loans to non-owner occupied housing purchasers increased from seven to eleven percent between 1998 and 2003.[58] Similarly, a study by the National Association of Realtors found that twenty-three percent of houses purchased in 2004 were for investment and not for owner occupation.[59]

This pattern of investment suggests two areas of further inquiry. First, what happens to individuals and communities when the housing "bubble" bursts?[60] Second, can and should local governments attempt to manage speculative investment in order to preserve housing affordability, healthy housing markets, and sus-

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52. *Id.*

53. *Id.*

54. *Id.* at 1.

55. *Id.* at 19.

56. *See id.* at 19 (finding that of the top twenty MSAs, fourteen are in California, two are in Nevada, and four are in Florida).

57. CLARK COUNTY COMM'N, CLARK COUNTY COMMUNITY GROWTH TASK FORCE REPORT APPENDICES app. 4, at 19 (2005), *available at* http://www.co.clark.nv.us/clark_county/Growth_TaskForce/community_growth.htm (follow "Report Appendixes" hyperlink). Las Vegas' fifty-two percent increase in prices for resale homes in one quarter set a national record. Hubble Smith, *LV Median Home Price Increase Sets Record*, LAS VEGAS REV.-J., Aug. 17, 2004, at A1.

58. JOINT CTR. FOR HOUSING STUDIES OF HARVARD UNIV., *supra* note 30, at 4.

59. Nat'l Ass'n of Realtors, Second-Home Market Surges, Bigger Than Shown in Earlier Studies (Mar. 1, 2005), http://www.realtor.org/PublicAffairsWeb.nsf/Pages/SecongHomeMktSurges05.

60. *See, e.g.*, Hubble Smith, *Report Asks: What Trouble, Housing Bubble?*, LAS VEGAS REV.-J., Oct. 11, 2005, at D1 (noting dangers posed by riskier loan products). *See generally* Frank Partnoy, *Why Markets Crash and What Can Law Do About It*, 61 U. PITT. L. REV. 741 (2000) (discussing bubble concerns in other market sectors).

tainable communities?[61] It is the second inquiry that this Article addresses.

C. Identification and Efficiency of Speculation

Investors, using their particular knowledge of local real estate patterns, may place their money in real estate in anticipation of future development. Seeking the best rates of return on their capital, individuals living in one state can invest in real estate in other states with relative ease.[62] International investors likewise conduct these transactions from afar; they often view American real estate as a more stable and higher performing investment opportunity than other assets, including real estate, in their home countries. As a result, international investment is one component of the growth of upscale condominiums in cities like Miami and Las Vegas, as well as the proliferation of "phantom" units purchased by investors from the United States and abroad that remain largely unoccupied.[63]

Differentiating speculative investment from other forms of investment is not easy. The buyer who purchases a townhouse for $135,000 in a rapidly increasing market and sells it fifty-five days later for $169,000 is commonly identified as a speculator.[64] Other investment patterns are not so clear. The anti-speculation zoning ordinance solves this difficulty through its three-year resale requirement. This requirement deters purchasers with shorter time horizons from purchasing, or at least limits their ability to profit upon early resale.

The market-based argument for adopting alienation restrictions calls for correcting the market distortions associated with speculative investment on supply and demand signals in the housing market.[65] Speculative investment activity does not

61. *See infra* Parts III–IV (exploring legal and policy theories justifying government intervention).

62. Websites like www.CondoFlip.com facilitate speculation in the condominium market by making it easier to purchase condominium units without the need to physically inspect the property.

63. *See* Jesse M. Keenan, *Affordable Housing Policy in Miami: Inclusionary Zoning and the Median-Income Demographic*, 14 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 110, 111 (2005); *see also* Jennifer Robison, *Just Who Is Buying Luxury Condos?*, LAS VEGAS REV.-J., Oct. 13, 2005, at D1 ("[M]ore than 95 percent of luxury condo buyers in the local market aren't actually from the local market.").

64. *See* J.M. Kalil, *supra* note 10, at 23A.

65. Michael Schill discusses market imperfections and artificial supply constraints as one possible justification for government intervention in the housing market through

necessarily correspond to an increased demand for rental or owner occupied housing.[66] Developers responding to false market demand signals overproduce housing, which leads to an oversupply and falling prices. During the production phase, housing prices are bid up in expectation of future, higher prices. Also contributing to this distortion are speculative purchases fueled by the increasingly innovative mortgage products that require less cash upfront or during the first few years of payment than conventional thirty-year fixed-rate mortgages.[67] At some point, the oversupply limits the upward trend in housing prices and the growth levels off, or the bubble bursts. Those holding property purely for investment purposes are likely to sell quickly, thereby steepening price declines.

Speculation may not be an efficient market phenomenon. Professor Lynn Stout demonstrates that the heterogeneous expectations model of speculation reveals market inefficiencies that other theories of speculation, such as risk hedging[68] and information arbitrage[69] models, cannot account for. The key assumption of the heterogenous expectations model is that two speculators may have different expectations of the future.[70] When

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public housing. Michael H. Schill, *Privatizing Federal Low Income Housing Assistance: The Case of Public Housing*, 75 CORNELL L. REV. 878, 891–92 (1990).

66. The condominium market in some cities reflects a difference between demand signals and housing supply. *See* Keenan, *supra* note 63, at 111 ("[B]ecause the absorption rates for these [investment condominium] projects are artificially skewed, the market uses these numbers to modify its own price adjustments. That is to say, the rates are artificially skewed to the extent that the numbers do not accurately reflect the actual housing need.").

67. These innovative finance products increase the liquidity within the real estate market, helping to make a traditionally illiquid investment more easily transferable by increasing the number of buyers and the relative ease with which they acquire these properties. *See, e.g.*, *Federal Reserve Board's Semiannual Monetary Policy Report to the Congress: Hearing Before the Comm. on Financial Servs.*, 109th Cong. (2005) (statement of Alan Greenspan, Chairman of the Federal Reserve Board), *available at* http://www.federalreserve.gov/boarddocs/hh/2005/july/testimony.htm ("The apparent froth in housing markets appears to have interacted with evolving practices in mortgage markets. The increase in the prevalence of interest-only loans and the introduction of more-exotic forms of adjustable-rate mortgages are developments of particular concern."); Eduardo Porter, *Good News, Bad News: Your Loan's Approved*, N.Y. TIMES, Aug. 28, 2005, § 3, at 1 (describing creative financing techniques in rising housing market).

68. Under risk hedging, speculators "profit by accepting risk from more risk-averse 'hedgers' . . . ." Stout, *supra* note 13, at 708. Economic theory says that this improves allocative efficiency by increasing net welfare. *Id.*

69. In information arbitrage, "speculators invest in predictive information that allows them to trade at an advantage with less well informed consumers and producers." *Id.* Economic theory says this improves allocative efficiency through improving the accuracy of market prices. *Id.*

70. *Id.* at 742 ("[T]raders who share identical risk preferences and willingness to invest in information nevertheless may trade voluntarily in assets they neither produce nor consume if they make differing estimates of the probability distribution of future prices. In

speculators trade with other speculators based on disagreement, the result is a zero sum game in which one person's gain is another's loss. With transaction costs, Stout argues that speculation reduces average trader welfare and creates inefficiency.[71]

Additionally, optimistic investors who believe prices will rise have an easier time entering the market than those investors who think prices will fall. In other words, it is easier in housing markets to go long (purchase assets for future sale betting that prices will rise) than to sell short (obtaining profit on assets an investor does not yet own on the expectation that prices will fall in the future). Therefore, a greater number of optimistic, bullish speculators enter the market putting upward pressure on asset prices.[72] This upward price pressure departs from the average price expectation of the market, which may be a more accurate reflection of true asset value than speculative expectations. The gap between speculative and average price expectations contributes to market inefficiency.

III. LOCAL GOVERNMENT AND SPECULATION

A. Addressing the Problem at the Local Level

Land use regulation is a local affair. City councils, local planning boards, and citizen task forces discuss and enact land use regulations responsive to local needs. These regulations, in turn, impact the development and purchasing decisions of local, national, and international constituencies alike. While local governments have little control over national and international capital markets, local governments have a much greater voice in how this capital is deployed within a particular community. Additionally, local governments increasingly have been left with the responsibility to deal with regional and national affordable housing issues.[73] Federal involvement in affordable housing efforts has decreased over recent decades, forcing state and local governments to shoulder more of the burden of affordable housing creation and

effect, [heterogeneous expectations] speculation is a form of wagering where the gamblers bet on market prices, rather than on the outcome of a card game or sporting contest.") (emphasis omitted).

71. *Id.* at 745.

72. *Id.* at 759.

73. For a discussion of the interconnections between federal, state, and local affordable housing efforts, see generally Peter W. Salsich, Jr., *Saving Our Cities: What Role Should the Federal Government Play?*, 36 URB. LAW. 475 (2004).

maintenance.[74] To the extent that local governments are on the front lines of the affordable housing problem, they must employ innovative and effective solutions.[75]

A local approach may generate externalities that could be minimized by regional, statewide, or national coordination.[76] For example, anti-speculation measures could be adopted at a higher level by a regional land use agency, or through the coordination of local jurisdictions. Regional action in this sense would face different legal challenges than action by a local government. In particular, a court would employ a slightly different analysis to determine whether the regional agency has the authority to implement such measures.[77] Even though there are differences, an analysis of anti-speculation measures based on local municipal implementation could still inform the creation of regional efforts.

An advantage of local municipal adoption of anti-speculation measures is the opportunity for local governments to be the catalysts for larger geographic implementations of these measures. Nearby jurisdictions will feel the impact of any anti-speculation ordinance. For example, speculators deterred from investing in a municipality covered by the ordinance may shift their investment to nearby communities. It may then be advantageous for nearby communities to adopt similar speculation restrictions. Eventually, a more coordinated regional effort may develop to address these and other housing policy externalities.

Critiques of local governments' efforts to facilitate the construction of affordable housing understandably recognize local parochialism and NIMBY[78] sentiments as barriers to affordable

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74. *See* Minor Myers III, *A Redistributive Role for Local Government*, 36 URB. LAW. 753, 754–56 (2004) (describing devolution of welfare authority to states and proposing a greater role for local government); *see also* Katherine M. O'Regan & John M. Quigley, *Federal Policy and the Rise of Nonprofit Housing Providers*, 11 J. HOUSING RES. 297, 297 (2000) (describing the low income housing tax credit and the HOME programs). *But see* Otto Hetzel, *Asserted Federal Devolution of Public Housing Policy and Administration: Myth or Reality*, 3 WASH. U. J.L. & POL'Y 415, 420 (2003) (noting that the federal government retains authority over many aspects of public housing programs).

75. Myers argues that local governments should be allowed more redistributive responsibility. States are suboptimal redistributors due to their inability to exclude. Myers, *supra* note 74, at 755–56.

76. For a discussion of tensions between local government policies and regional effects, see generally David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255 (2003); Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985 (2000).

77. For more discussion on legal authority, see *infra* Part IV. A regional agency would likely be more limited by express grants of authority within a state statute than cities.

78. NIMBY, an acronym for "Not In My Back Yard," describes local homeowners' general tolerance for affordable housing as long as it is not near existing neighborhoods.

housing production.[79] Some studies suggest stronger regional and state planning efforts to counter the tendencies of local jurisdictions to advance their particular land use self-interest, at the potential expense of neighboring jurisdictions or poor people generally.[80] For this reason, an anti-speculation ordinance ideally would begin as state legislation authorizing or requiring, in certain instances, the local adoption of an anti-speculation ordinance. A local jurisdiction's obligation to consider anti-speculation measures could be a component of the jurisdiction's comprehensive planning process.

Local governments generally have broad authority to enact legislation regulating property in light of emerging social and economic needs.[81] Two recent examples illustrate the depth and breadth of property controversies engendered by local government decisions. In one example, owners of a residential hotel in San Francisco unsuccessfully asserted a takings claim against a city ordinance requiring a $567,000 conversion fee in exchange for allowing the owners to convert the residential hotel into a tourist hotel.[82] The ordinance was designed to address the loss of valuable affordable housing in a city with an extreme affordable housing shortage.[83] The Court found that a sufficient relationship existed between the means (provision of replacement housing or a payment in lieu) and the ends (preservation of affordable housing

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79. *See generally* NAT'L LOW INCOME HOUSING COAL., GETTING TO YIMBY: LESSONS IN YES IN MY BACK YARD (2003), *available at* http://www.nlihc.org/nimby/2003-1.pdf; U.S. DEP'T OF HOUS. & URBAN DEV., "WHY NOT IN OUR COMMUNITY?" REMOVING BARRIERS TO AFFORDABLE HOUSING (2005), *available at* http://www.huduser.org/Publications/pdf/wnioc.pdf (describing state and local efforts to reduce regulatory barriers to affordable housing); Tim Iglesias, *Housing Impact Assessments: Opening New Doors for State Housing Regulation While Localism Persists*, 82 OR. L. REV. 433, 455–58 (2003) (describing local governments' nonconsideration of the external impacts of land use regulation). Iglesias observes that "[f]undamentally, housing suffers from not being consistently integrated into the whole range of local governments' policy and decision making." *Id.* at 451.

80. *See, e.g.*, STUART MECK ET AL., AM. PLANNING ASS'N, REGIONAL APPROACHES TO AFFORDABLE HOUSING 187–97 (2003) (evaluating possible regional approaches to planning for affordable housing).

81. The Court in *Kelo* twice noted the importance of responding to the evolving needs of society. *See* Kelo v. City of New London, 125 S. Ct. 2655, 2664 (2005) ("[O]ur jurisprudence has recognized that the needs of society have varied between different parts of the Nation, just as they have evolved over time in response to changed circumstances."); *see also id.* at 2662 (considering the "always evolving needs of society").

82. San Remo Hotel v. San Francisco, 41 P.3d 87, 91–92 (Cal. 2002). On appeal to the U.S. Supreme Court, a unanimous Court refused to recognize an exception to the full faith and credit statute for federal courts to hear takings claims issues litigated in state courts. San Remo Hotel v. San Francisco, 125 S. Ct. 2491, 2495 (2005).

83. *San Remo*, 41 P.3d at 92.

stock) of the statute.[84] Regarding the fairness of inflicting such a regulation on residential hotel owners when they personally did not contribute to the poverty in San Francisco, the court noted that "[a] use not in itself noxious or harmful, such as the operation of a tourist hotel, may nonetheless call for mitigation when the change of property to that use results in the loss of an existing use of public importance."[85]

In the second example, the local government in New London, Connecticut attempted to use eminent domain authorized by a state statute to acquire individual properties pursuant to a comprehensive economic development plan.[86] In doing so, the City of New London sparred not only with local constituents, but also with national opponents who perceived this action as overreaching into the sphere of individual property rights. The U.S. Supreme Court, in *Kelo v. City of New London*, upheld the local government's use of eminent domain by a five to four vote.[87]

Although the dissent in *Kelo* was concerned with the protection of individual property rights generally, both Justice Sandra Day O'Connor and Justice Clarence Thomas chose rhetoric that described homeowners and occupied homes rather than homes owned for investment. O'Connor focused on Wilhemina Dery and her husband as long-term occupants of one house and their son living next door in a house he received as a wedding present.[88] Similarly, Thomas focused on the danger of "uprooting" people from their homes, particularly in "poor communities."[89] Thus the harm to property the dissent was truly concerned about may not be the harm to property rights generally, but instead the threat to a

84. *Id.* at 107. The Supreme Court recently invalidated this method of analyzing takings claims. *See* discussion *infra* notes 204–205 and accompanying text.

85. *San Remo*, 41 P.3d at 110.

86. The opinion contains at least six separate references to a development plan. *See Kelo*, 125 S. Ct. at 2658–59, 2661–62, 2665, 2667; *see also* Brief of the Am. Planning Ass'n et al. as Amici Curiae Supporting Respondents at 25–26, Kelo v. City of New London, 125 S. Ct. 2655 (2005) (No. 04-108) (arguing that the Supreme Court should consider eminent domain as one component of sound land use planning). Although the Supreme Court ruled that economic development is a sufficient public purpose to justify eminent domain, the publicity and delay associated with the litigation has apparently harmed the viability of the project. *See* William Yardley, *After Eminent Domain Victory, Disputed Project Goes Nowhere*, N.Y. TIMES, Nov. 21, 2005, at A1C ("With so many complications, some people are unsure whether the city's initial vision for the property—a mix of housing, hotel and office space intended to transform part of its riverfront and bolster a declining tax base—is even realistic anymore.").

87. *Kelo*, 125 S. Ct. at 2668.

88. *Id.* at 2671 (O'Connor, J., dissenting).

89. *Id.* at 2677 (Thomas, J., dissenting).

particular type of property—people's *homes*.[90] Anti-speculation measures can tap into a similar rhetoric of home protection by defending the occupation of one's home against the negative economic and social effects of speculators.[91]

B. Responding to Private Market Activity

Affordable housing is a primary goal of the anti-speculation ordinance, but it is not the only goal. Preexisting private market activity suggests justifications for anti-speculation measures outside of affordable housing. Increasingly, private developers creating detached, single-family housing communities have employed restrictions on renting and resale to limit speculation.[92] Developers may include provisions restricting the rental of property, may require buyers selling their property within a certain time period to sell to the developer at a set price, or may require buyers selling property to remit a percentage of the sales profit to the developer.[93]

Developers' motives for such restrictions vary. Some developers may not want to compete with new owners for buyers in a particular community. Another reason to adopt restrictions concerns the crafting of the character of the neighborhood. Developers may have an interest in promoting an image of long-term, stable homeownership. This is subverted by a proliferation of "for sale" signs and the uncertain upkeep of short-term rentals or homes owned by absent investors.[94] Similarly, developers may have an interest in building a neighborhood or community, particularly considering the popularity of New Urbanism and its emphasis on

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90. The amicus brief of the American Planning Association and the National Congress for Community Economic Development asked the Supreme Court to consider adjusting, for occupied dwellings, the calculation of just compensation required under eminent domain to account for traditionally uncompensated losses such as an owner's subjective value and consequential costs of relocation. Brief of the Am. Planning Ass'n. et al., *supra* note 86, at 27–30.

91. For a discussion of the meaning of "home" in the law, see generally Lorna Fox, *The Meaning of Home: A Chimerical Concept or a Legal Challenge?*, 29 J.L. & SOC'Y 580 (2002).

92. *See, e.g.*, Daniela Deane, *Developers Try to Limit Speculative 'Flipping,'* WASH. POST, May 21, 2005, at F1.

93. *See, e.g.*, Jennifer Shubinski, *Pulte Buyers in Escrow Must Sign Addendum for Reduced Prices*, LAS VEGAS SUN, Nov. 3, 2004, at 5C ("A handful of homebuilders throughout the Las Vegas Valley have added the forms [restricting resales within twelve months] in an attempt to curb investor purchases and in what many said was a move to protect true homeowners.").

94. *See, e.g.*, Glen Creno, *Builders Toughening Rules with Investors*, ARIZ. REPUBLIC, Mar. 13, 2005, at HV2; Glen Creno & Catherine Reagor Burrough, *Valley Builders Shoo Buyers Looking for a Quick Buck*, ARIZ. REPUBLIC, Aug. 1, 2004, at D1 (discussing responses to speculation by home builders).

neighborhood design.[95] These "neighborhood builders" may resent those buyers who frustrate the carefully designed community image that was promised to local government officials and sold to the public.

Private developer restrictions that capture gains on sales, such as provisions requiring a mandatory fee on subsequent sales of homes to be paid to the developer, suggest an alternative administrative structure to a government imposed sales restraint.[96] An anti-speculation ordinance might also take some percentage of subsequent sales receipts from future sellers and use that money for some general community purpose. The calculation of the appropriate percentage could be based on some idea of a reasonable return on investment or perhaps the general market return on housing across the nation or across the state. The underlying rationale of a percentage calculation is to divert gains obtained due to surrounding community development away from individual sellers and back into the community.[97]

Even without government involvement, developer resale restrictions are worth examining given the increasing privatization of city and suburban spaces.[98] Comprehensively planned common interest communities, sometimes characterized by gates controlling public entry and exit, as well as privately owned roadways within, continue to increase in popularity. As these communities grow in number and size, privately-imposed, anti-speculation restrictions could have

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95. New Urbanism is a planning and development movement that emphasizes pedestrian activity, neighbor interaction, and the integration of housing and commercial uses. For further discussions of New Urbanism, see generally Congress for the New Urbanism, Charter of the New Urbanism (2001), http://www.cnu.org/cnu_reports/Charter.pdf; Charles C. Bohl, *New Urbanism and the City: Potential Applications and Implications for Distressed Inner-City Neighborhoods*, 11 HOUSING POL'Y DEBATE 761 (2000); Emily Talen, *The Social Goals of New Urbanism*, 13 HOUSING POL'Y DEBATE 165 (2002); Congress for the New Urbanism, http://www.cnu.org/aboutcnu (last visited Apr. 2, 2006).

96. The National Association of Home Builders surveyed its members in April 2005. The survey solicited information about the scope of investor and speculator activity in different cities, as well as builders' responses. Builders reported the following responses to investor activity: 82% said they would sell only to buyers for owner occupancy; 64% said the buyer cannot sell the home or "nominate" the contract before closing; 55% said the buyer cannot sell during the first year after purchase; 36% said the buyer must give the builder the first right to buy back if the home is sold within the first year; 36% said the home cannot be rented within the first year; 36% said they were limiting the number of investor sales per lot release; 27% said they would not provide sales incentives to investors; 18% said they would not sell more than one home to buyers with the same last names; 18% used a variety of measures, including charging a fee (often $50,000) if homes are resold within the first year. NAT'L ASSOC. OF HOME BUILDERS, THE SEIDERS' REPORT: JULY 11, 2005, at 11 (2005).

97. *See* discussion *infra* Part III.C.

98. *See generally* EVAN MCKENZIE, PRIVATOPIA: HOMEOWNERS ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT (1994) (chronicling increasing numbers of private common interest communities).

a similar effect on local land use patterns as publicly-imposed restrictions.[99]

C. Capturing the Gains of Speculative Investment

The theory that speculation gains on residential property create harmful effects explains the rationale for an anti-speculation ordinance. Anti-speculation measures do not go so far as to characterize speculation gains as "windfalls" or "unearned" profits.[100] Indeed, significant planning and investment of resources may accompany an individual investor's decision to speculate on rising housing values in a particular area. Instead, this anti-speculation ordinance works as a compromise, balancing private and public interests by allowing speculators to ultimately keep gains, but defer recognition of these gains (in the form of a sale of the asset) for three years.[101]

This "compromise" approach is far less reaching than the approaches described by Ebenezer Howard and Henry George. Nevertheless, these urban reformers describe a model of urban and suburban life that is helpful in formulating a context for anti-speculation efforts. An anti-speculation ordinance would not, and need not, embrace the economic foundation of Henry George's single tax proposal *in toto.* But George's perspective on the distinctions between speculative investors and owner occupants remains useful today.

These two urban reformers of the late 1800s and early 1900s envisioned a city life and structure quite different from the one we have today.[102] Howard's *To-morrow: A Peaceful Path to Real*

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99. Particularly because of their effects on nonmembers, some argue that private residential associations should be treated as state actors. *See, e.g.*, David J. Kennedy, Note, *Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers*, 105 YALE L.J. 761, 763 (1995). A New Jersey court recently found a residential association to be a constitutional actor under the New Jersey Constitution and therefore required to respect its members' freedom of speech. Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n, 890 A.2d 947 (N.J. Super. Ct. App. Div. 2006).

100. *See* Eric Kades, *Windfalls*, 108 YALE L.J. 1489, 1505 (1999) (distinguishing profits derived from speculation from windfalls, noting "real estate speculators often look like fortuitous beneficiaries of regional population movements . . . [but] land speculators closely study growth patterns and commit resources to assembling parcels of useful size and shape in desirable locations").

101. An alternative application of the ordinance could require that new purchasers be owner occupants. This approach would keep speculators out of the market altogether. For a discussion of this approach, see Part V.

102. For early city reform struggles, see generally JON C. TEAFORD, THE UNHERALDED TRIUMPH: CITY GOVERNMENT IN AMERICA 1870–1900 (1983).

Reform[103] presents an economic and social rationale for the physical design of a social city in which the public owns the "unearned increment" of land—that part of property value associated with surrounding activity rather than the activity of the owner of the property.[104] This theory of urban reform echoed the work of Henry George.[105] George is perhaps most remembered for his proposal of a single tax on land,[106] a tax on land values themselves without regard to the improvements made on that land.[107] The increased value of land due to surrounding activities and the provision of public services would belong to the public instead of a private landowner. This "unearned increment," defined as increases in land value independent of owner effort and due to factors such as "general community development, government investment in schools, streets, parks, population growth, and rising incomes" would be used as local government revenue.[108] This form of taxation is different from the well-known property tax that combines taxation of both the value of underlying land and the value of improvements on the land.

Two key ideas underlie George's land value taxation proposal. One idea is that land is different from other kinds of property. George believed that property such as "houses, crops, money, furniture, capital or wealth"[109] belongs to an individual as the result of

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103. *See generally* EBENEZER HOWARD, GARDEN CITIES OF TO-MORROW (1902).

104. *See* ALAN RABINOWITZ, URBAN ECONOMICS AND LAND USE IN AMERICA 19 (2004).

105. HENRY GEORGE, PROGRESS AND POVERTY (Robert Schalkenbach Foundation 1960) (1879).

106. *See id.* at 434–36. George's proposal would make land value taxation the sole means of financing government activity and is therefore commonly referred to as the "single tax." Besides deterring land speculation, an additional benefit of this form of financing is that it would avoid taxation on labor (in the form of income tax) and therefore decrease the financial burden on the labor class, a class George championed. George also believed in the decommodification of cities, under which monopolies such as telegraph lines and streetcars should be heavily regulated or owned by the government rather than by private companies who would encounter no competition. *Id.* at 412.

107. Land value taxation has been used in New Zealand; parts of Australia; Johannesburg, South Africa; and parts of Pennsylvania, among other places. William Vickrey, *Simplification, Progression, and a Level Playing Field*, *in* LAND-VALUE TAXATION: THE EQUITABLE AND EFFICIENT SOURCE OF PUBLIC FINANCE 17, 18 (Kenneth C. Wenzer ed., 1999) [hereinafter LAND-VALUE TAXATION]; *see also* RHODA HELLMAN, HENRY GEORGE RECONSIDERED 120–21 (1987) (discussing taxation reforms in Pennsylvania). Several varying applications of the land tax are possible. For details of different possible applications and counterarguments, see generally HELLMAN, *supra*, at 158–68; LAND-VALUE TAXATION, *supra*; Stewart E. Sterk, *Nollan, Henry George, and Exactions*, 88 COLUM. L. REV. 1731 (1988) (discussing Henry George's economic ideas within the context of land use exactions).

108. C. Lowell Harriss, *Fundamental and Feasible Improvements of Property Taxation*, *in* LAND-VALUE TAXATION, *supra* note 107, at 100, 105.

109. KENNETH C. WENZER, AN ANTHOLOGY OF HENRY GEORGE'S THOUGHT 68 (1997) (quoting HENRY GEORGE, THE SINGLE TAX: WHAT IT IS AND WHY WE URGE IT (Christian Advocate 1890)).

his "individual exertion,"[110] and to tax this property amounted to "robbery."[111] But land was a different sort of property. "It has no reference to the cost of production, as has the value of houses, horses, ships, clothes, or other things produced by labor, for land is not produced by man, it was created by God."[112] He later adds, "the value of land only arises with the growth and improvement of the community, and therefore properly belongs to the community. It is not because of what its owners have done, but because of the presence of the whole great population, that land in New York is worth millions an acre."[113]

Whether the unearned increment arose through divine design or secular neighborhood activity, George did not believe that the entire increment belonged to any individual landowner.

The second idea is that land value taxation deters speculation on vacant land by taxing that land more heavily than under traditional property taxation principles.[114] Under this view, speculation in land causes economic waste by encouraging leapfrog development and sprawl, and causes users to over-develop existing land by limiting the overall availability of land.[115]

George's land taxation ideas garnered a small but loyal following in the United States.[116] Some commentators attribute the lack of popular support for his proposals to a lack of class consciousness, especially in an era witnessing the emergence of America as a

110. *Id.* at 68.

111. *Id.*

112. *Id.*

113. *Id.*

114. George believed that the right tax policy could deter land speculation. GEORGE, *supra* note 105, at 436 ("For under this system no one would care to hold land unless to use it, and land now withheld from use would everywhere be thrown open to improvement.... [L]and speculation would receive its death blow . . . ."). *See also* KEVIN MATTSON, CREATING A DEMOCRATIC PUBLIC 33 (1998) (discussing the fight of Progressive social reformer and former mayor of Cleveland, Tom Johnson, against private ownership of street railways and the subsequent commodification of Cleveland).

115. Harry Gunnison Brown, *Land Speculation and Land-Value Taxation, in* LAND-VALUE TAXATION, *supra* note 107, at 46; *see also* T. Nicholaus Tideman, *Taxing Land is Better Than Neutral: Land Taxes, Land Speculation, and the Timing of Development, in* LAND-VALUE TAXATION, *supra* note 107, at 124–31 ("[A]llocative improvements from taxing land arise because land taxes mitigate market imperfections.").

116. George's book, *Progress and Poverty*, was widely read. Indeed, one commentator notes that the book "probably had the greatest circulation of any non-fiction book in the English language before 1900 except for the Bible." JACOB OSER, HENRY GEORGE 68 (1974). *See also* EDWARD J. ROSE, HENRY GEORGE 7 (1968) ("There was a time, not long ago, when Henry George's name was a household word. Once known to men in every walk of life, Henry George has now passed into relative obscurity . . . ."). For a history of the land value taxation movement in the United States, see HELLMAN, *supra* note 107, at 105–23, 133–57.

world industrial power.[117] Though individual wealth remained hard to come by, the country as a whole could buy into the ethos and idealism of capitalism as a means to propel America forward.[118] Another commentator notes that people misunderstood George's argument for funneling land rents to the public to mean a proposal for the confiscation and nationalization of land itself under common, public ownership.[119] Additionally, critics proposed counterarguments to George's proposal including the difficulty in distinguishing intrinsic land value from improvements, the justice of appropriating land rents for the public, and the incentive to overbuild.[120]

However, the underlying force of George's argument remains true: there is a tension between public and private allocations of land value not directly attributable to landowner labor. To the extent that this value allocation remains contested, the distribution of wealth in a city remains contested. Put another way, there can be merit in limiting the private appropriation of this property wealth, even if there is less support for appropriating the entirety of it for public use.

George's focus on land speculation raises one last issue. To the extent that land speculation is harmful, it is harmful in large part because the supply of land is inelastic. No one will produce more land in response to higher prices caused by speculation. Housing is different. Builders can respond to rising housing prices by increasing production which will increase the supply of housing and, according to conventional economic theory, bring prices down. But this additional supply may not be costless. If speculation has

117. Kenneth C. Wenzer, *Some Reasons That Americans Do Not Listen to Henry George*, *in* LAND-VALUE TAXATION, *supra* note 107, at 3, 5; RABINOWITZ, *supra* note 104, at 19–20.

118. Wenzer, *supra* note 117, at 9 ("The unstated new formula went something like this: egalitarian democracy means private acquisition, which means inequality of wealth, which means a legitimated hierarchy of privilege, which is good.").

119. HELLMAN, *supra* note 107, at 31 ("This, then, is the remedy for the unjust and unequal distribution of wealth apparent in modern civilization, and for all the evils which flow from it: *We must make land common property*." (quoting GEORGE, *supra* note 105, at 328)).

120. HELLMAN, *supra* note 107, at 225. *See generally* CRITICS OF HENRY GEORGE (Robert V. Andelson ed., 1979). While George's ideas were ahead of the mainstream Progressive movement, George was not a proponent of socialism manifested as government ownership. George remained "[m]ore centrist than the socialists, [and he] could see virtue in a restructured, ethically inspired market economy." Wenzer, *supra* note 117, at 8. Moreover George did not believe that the modern state could handle socialism "except by retrogression that would involve anarchy and perhaps barbarism." GEORGE, *supra* note 105, at 321. Although George was not a socialist, a strong sense of civic idealism clearly pervades his writing. For example, he writes, "[c]ivilization, as it progresses, *requires* a higher conscience, a keener sense of justice, a warmer brotherhood, a wider, loftier, truer public spirit. Failing these, civilization must pass into destruction." HENRY GEORGE, SOCIAL PROBLEMS 241 (Robert Shalkenberg Foundation 1953) (1883).

bid up values within developed areas, builders may push for housing on the undeveloped outskirts of communities. New construction on the outer edges of communities, often called "sprawl," is a topic of much concern to communities wrestling with the effects of growth on the environment, traffic, and public services.[121]

IV. LEGAL CHALLENGES

A. State Legislation

Local legal authority to legislate against speculation is clearest when the state has passed specific enabling legislation granting such authority. Such a statute might be broadly worded, merely authorizing municipalities to engage in anti-speculation legislation without detailing the specifics of the ordinance. A legitimate grant of authority also could be included within a statute giving municipalities the power to address affordable housing issues.[122] Additionally, some states require municipalities to engage in comprehensive land use planning efforts.[123] This comprehensive plan sometimes requires a municipality to describe the specific efforts it plans to undertake to remove existing barriers to affordable housing and to create new affordable housing units.[124] Within the comprehensive planning statute, state legislators could specifically authorize municipalities to use anti-speculation measures, among other tools, to further affordable housing goals.

A state statute specifically dedicated to governing this authority could also guide municipalities more clearly. It could detail the

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121. *See, e.g.*, Michael Lewyn, *Suburban Sprawl: Not Just an Environmental Issue*, 84 MARQ. L. REV. 301, 301–04 (2000) (defining sprawl and suggesting solutions).

122. *See, e.g.*, CONN. GEN. STAT. § 8-2 (2004) ("The zoning commission of each city, town or borough is authorized to regulate, within the limits of such municipality, the height, number of stories and size of buildings and other structures . . . . Such regulations shall also promote housing choice and economic diversity in housing, including housing for both low and moderate income households."); FLA. STAT. ANN. § 166.04151 (West 2004) (authorizing the use of inclusionary zoning to create affordable housing); FLA. STAT. ANN. § 163.3202 (West 2004) (encouraging the use of innovative land development regulations); N.Y. GEN. CITY LAW § 28-a (McKinney 2003) ("It is the intent of the legislature to encourage, but not to require, the preparation and adoption of a comprehensive plan . . . . The city comprehensive plan may include the following topics at the level of detail adapted to the special requirements of the city: . . . [e]xisting housing resources and future housing needs, including affordable housing.").

123. CAL. GOV'T CODE § 65350 (West 1997).

124. *See, e.g.*, CAL. GOV'T CODE § 65583(a)(1)–(8) (West 1997); FLA. STAT. ANN. § 163.3177(6)(f)(1) (West 2004).

scope and limitations of local legislation on the issue, and provide the sole means of dispute resolution resulting from the legislation's application. An existing state agency, such as an agency currently involved in comprehensive land use planning, economic development, or even the state real estate division, could monitor and enforce the statute's provisions.

B. Local or Regional Level Legislation

Municipalities within the same state may experience different levels of speculative investment resulting in different economic, social, and political pressures. Depending on the level of speculation in a community, a local task force might publish a report outlining measures to address increased growth and limited access to affordable housing.[125] Similarly, local workers and advocacy groups might pressure city and county politicians to address local affordable housing needs. As a result of particular city needs, a city could enact anti-speculation measures before, or with the purpose of encouraging, the development of state legislative attention to the issue.

Cities have relatively limited legal authority under our system of local government.[126] Cities are created by states, and are consequently limited by state power.[127] Those cities enjoying the broadest degree of legal autonomy, home rule cities, are generally able to freely legislate on issues of purely local concern.[128] The procedure

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125. *See, e.g.*, Home Builders Ass'n of N. Cal. v. Napa, 108 Cal. Rptr. 2d 60, 62 (Ct. App. 2001) (noting that the city affordable housing task force proposed an inclusionary zoning ordinance to address affordable housing).

126. Cities do not have any independent legal status. They are creatures of the state that exercise delegated power or administer power where needed at the local, rather than state, level. *See* Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 7–8 (1990). Dillon's Rule, a rule of statutory construction in determining the scope of city power, limits city power to those powers expressly granted, powers that can be implied from express powers, and powers essential to city purposes. *Id.* at 8. Briffault notes that Dillon's Rule has been abolished in many states. *Id.*

127. For discussions of cities' relative powerlessness, see generally Gerald E. Frug, *City as a Legal Concept*, 93 HARV. L. REV. 1059, 1062 (1980); Joan C. Williams, *The Invention of the Municipal Corporation: A Case Study in Legal Change*, 34 AM. U. L. REV. 369 (1985). Frug suggests regional governments might address the relative powerlessness of cities to decide housing policy in the face of rapidly escalating development. Gerald E. Frug, *Beyond Regional Government*, 115 HARV. L. REV. 1763, 1832 (2002).

128. Local laws generally prevail over state laws on purely local issues. *See, e.g.*, COLO. CONST. art. XX, § 6. Cities may legislate on issues of mixed local and statewide concern so long as there is no conflicting state statute or constitutional prohibition. *See, e.g.*, Northglenn v. Ibarra, 62 P.3d 151, 156 (Colo. 2003). For recent assessments and critiques of home rule,

for obtaining home rule status is usually described in statutory and constitutional provisions, and commonly involves the drafting of a home rule city charter.[129] How cities are able to exercise home rule powers differs among states. In states that do not authorize home rule powers, city powers are limited to express and implied grants of authority from the state.[130]

In theory, it should be easier for cities enjoying home rule powers than those that do not to pass such legislation even in the absence of state statutory authority. However some courts have been hostile to home rule cities' efforts to address local housing issues in innovative ways.[131] Consequently, the authority of home rule cities to enact anti-speculation measures is not clear. The ability of non-home rule cities to enact anti-speculation legislation is likewise uncertain without express statutory authorization.

In general, a court evaluating a city's authority to enact such measures will be more likely to uphold those ordinances it interprets to be applications of a municipality's traditional land use authority. If a court considers anti-speculation measures to be examples of economic legislation, or otherwise different from traditional land use regulation, the measures will likely be struck down. Courts have not yet had the opportunity to consider the legality of an anti-speculation ordinance. However, judicial review of other local efforts to create or maintain affordable housing, involving inclusionary zoning and rent control, suggest insight into the issues central to the success of an anti-speculation ordinance.

In *Town of Telluride v. Lot Thirty-Four Venture, L.L.C*,[132] the Colorado Supreme Court struck down a locally enacted ordinance requiring developers to provide affordable housing for forty percent of new employees generated by new developments. The court concluded that the ordinance reached issues of mixed state and local concern, and therefore was preempted by a state statute on rent control restricting legislation by local municipalities.[133] Not only did the court broadly interpret the state rent control statute, but it also characterized this affordable housing ordinance as "economic legislation" rather than as an exercise of traditional land use regulation.[134] By characterizing it as economic legislation,

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see generally David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255 (2003); Richard Briffault, *Home Rule for the Twenty-first Century*, 36 URB. LAW. 253 (2004).

129. *See, e.g.*, CAL. CONST. art. XI, §§ 3–5.

130. *See supra* note 126.

131. *See infra* notes 132–149 and accompanying text.

132. Town of Telluride v. Lot Thirty-Four Venture, L.L.C, 3 P.3d 30 (Colo. 2000).

133. *Id.* at 33–34.

134. *Id.* at 39 n.9.

the court shifted the scope of the ordinance from the traditional, purely local purview of land use regulation to a much broader category of general economic relationships.

The court accomplished this shift by concluding that the ordinance "does not dictate permissible uses of real property; rather, it dictates the rate at which the property may be used for a permissible purpose."[135] Though developers could satisfy the inclusionary housing ordinance without creating on-site affordable units, when developers chose to build on-site affordable units the ordinance required that tenants in those units be charged less than the market rent.[136] Even if the ordinance arguably conflicted with the state rent control statute,[137] the ordinance might have been saved if the issue of affordable housing in *Telluride* was viewed as a purely local concern. The court characterized affordable housing as having mixed state and local components.

> [T]he state has a legitimate interest in preserving investment capital in the rental market, ensuring stable quantity and quality of housing, maintaining tax revenues generated by rental properties, and protecting the state's overall economic health. Telluride, on the other hand, has a valid interest in controlling land use, reducing regional traffic congestion and air pollution, containing sprawl, preserving a sense of community, and improving the quality of life of the Town's employees.[138]

Although the basic characterization of affordable housing as both a state and local issue is not inconsistent with the views of affordable housing supporters, the court's characterization subverts attempts by local governments to be involved in affordable housing efforts. States should indeed engage in affirmative efforts to create and coordinate affordable housing opportunities. But state efforts should supplement and enhance local efforts, not thwart them.

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135. *Id.*

136. Developers could dedicate land to the town of Telluride to be used for affordable housing, or developers could pay fees for affordable housing elsewhere in lieu of reserving affordable units on site. *Id.* at 33–34.

137. The dissent argued that the Telluride ordinance was enacted for entirely different public policy considerations than traditional rent control ordinances, and that the two apply in different manners. For example, the Telluride ordinance only applied to new construction and responded to growth pressures caused by increased capital investment. Rent control, on the other hand, typically exempted new construction and responded to concerns of decreased capital investment. *Id.* at 40–43 (Mullarkey, M., dissenting).

138. *Id.* at 39 (majority opinion).

The court in *Telluride* was concerned about the removal of housing from the "competitive marketplace"[139] and the ripple effect on adjacent jurisdictions caused by local interventions in the housing market.[140] Although state planning efforts should be attentive to the interrelationships among jurisdictions, the dissent in *Telluride* rightly argues that focusing on this so-called ripple effect "strikes at the fundamental premise of land use planning, zoning, and development regulations by exalting free operation of the housing market over the police power of local government to shape the design of a community."[141]

One implication of the approach of the *Telluride* court is that states containing statutes regulating rent control might be more difficult sites for locally initiated anti-speculation legislation.[142] Other state courts may be tempted to compare the restrictions in a local anti-speculation ordinance to the restrictions on property use and resale typically created by a local rent control ordinance.[143] On its face, an anti-speculation ordinance does not require the rental of property, or regulate the rate at which an owner chooses to rent her property. But an anti-speculation ordinance does require that an owner temporarily forego some market value that, without the regulation, the owner could immediately capture.

In addition to the specter of rent control, another obstacle raised by the reasoning of the court in *Telluride* is the transformation of a land use regulation, which is almost universally perceived as a local power, into a regulation affecting important state interests beyond the local sphere. In contrast, a New York court avoided this transformation and found that a town's ordinance requiring owner occupancy as a prerequisite for permission to rent accessory apartments was within the town's home rule powers.[144] This ordinance, which was designed to increase affordable housing and

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139. *Id.* at 36.

140. *Id.* at 38 ("Ordinances like Telluride's can change the dynamics of supply and demand in an important sector of the economy—the housing market. A consistent prohibition on rent control encourages investment in the rental market and the maintenance of high quality rental units.").

141. *Id.* at 46 (Mullarkey, M., dissenting).

142. *Id.* at 39 (majority opinion). The *Telluride* court points to Arizona, Massachusetts, and Oregon as states that have prohibited cities from imposing rent control ordinances and declared rent control to be a statewide concern. *Id.* (citing ARIZ. REV. STAT. ANN. § 33-1329 (2000); MASS. GEN. LAWS ANN. ch. 40P, § 5 (2005); OR. REV. STAT. § 91.225 (2003)). These statutes do not prevent cities from imposing rental restrictions when they have contributed some subsidy amount to the project.

143. Rent control statutes generally are permissible exercises of government authority. Pennell v. San Jose, 485 U.S. 1, 13–15 (1987).

144. Kasper v. Brookhaven, 535 N.Y.S.2d 621, 622–23 (App. Div. 1988); *see also infra* notes 188–195 and accompanying text (discussing *Kasper*).

maintain a certain community character, fell within the town's traditional land use powers of zoning.[145] An individual city's allowance of accessory units for some homes and not others certainly has an effect on the overall rental market and the rental market of nearby jurisdictions. Unlike the court in *Telluride*, however, this court was not overly concerned with pernicious statewide effects.[146]

The owner occupancy restriction, however, arguably affects a more traditional land use issue—the use of property—and the economic effects of the regulation are secondary. This suggests that an anti-speculation ordinance would also be defensible by references to its promotion of a certain community character. Such an ordinance would arguably promote community stability and protect against the harms caused by large numbers of vacant houses awaiting rental.

In some instances, this transformation may not be fatal. A Colorado court upheld an over-occupancy ordinance, fining landlords for renting houses to too many students at one time, as valid under Boulder's home rule power.[147] The court generally considered the ordinance to be an expression of the city's zoning power, but the court also analyzed the ordinance under the assumption that it implicated broader statewide issues of criminal punishment.[148] Landlords argued that statewide issues were involved insofar as the ordinance required findings of a landlord's level of culpability, and that this determination should rest on state statutes, rather than local definitions.[149] This potential for transformation from local to statewide concern could create conflicts with preexisting state statutes, as is seen in *Telluride*, or suggest that a municipality has not been granted the power in the first instance. The latter suggestion, that the municipality lacks an express statutory grant of power, is of more concern in non-home rule states.

This fear is well founded given the Virginia case, *Board of Supervisors v. DeGroff Enterprises*.[150] In *DeGroff*, the Supreme Court of Virginia found that the City of Fairfax had exceeded its police power authority in enacting an ordinance requiring that fifteen percent of housing units in a new development be made affordable

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145. *Kasper*, 535 N.Y.S.2d at 622–23.

146. *See supra* notes 140–141 and accompanying text.

147. Boulder County Apartment Ass'n v. Boulder, 97 P.3d 332, 337 (Colo. Ct. App. 2004).

148. The court found that the ordinance did not conflict with state criminal statutes. *Id.* at 336–37.

149. *Id.*

150. Bd. of Supervisors v. DeGroff Enters., 198 S.E.2d 600, 602 (Va. 1973). The Virginia Supreme Court stated that it was more concerned that the ordinance constituted a taking under state law. *Id.* For a discussion of takings issues, see *infra* Part IV.E.

to persons of lower income.[151] The court found the city "exceed[ed] the authority granted by the enabling act to the local governing body because [the ordinance] is socio-economic zoning and attempts to control the compensation for the use of land and the improvements thereon."[152] Other language in the decision suggests that the court would be hostile to locally enacted anti-speculation legislation to the extent that it aimed to "include [or] exclude any particular socio-economic group."[153]

An anti-speculation ordinance, in its defense, would not target any particular population, and would instead impose general housing restrictions on any number of socio-economic groups. Furthermore, some states have embraced inclusionary zoning schemes, giving hope to the possibility that an anti-speculation ordinance would be similarly accepted. New Jersey has long employed a well-known inclusionary zoning regime based on its decisions in the *Mount Laurel* series of cases.[154] Other states and cities have conducted their own inclusionary zoning experiments as well.[155] For example, twenty percent of the localities in California have implemented some type of inclusionary zoning.[156]

C. Due Process

The Fourteenth Amendment of the U.S. Constitution declares that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[157] This amendment requires the provision of both procedural and substantive due

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151. *DeGroff Enters.*, 198 S.E.2d at 602.

152. *Id.*

153. *Id.*

154. The *Mount Laurel* litigation involved several cases: S. Burlington County NAACP v. Mount Laurel, 336 A.2d 713 (N.J. 1975) (Mount Laurel I); S. Burlington County NAACP v. Mount Laurel, 456 A.2d 390 (N.J. 1983) (Mount Laurel II); and Hills Dev. Co. v. Bernard, 510 A.2d 621 (N.J. 1986). Following the *Mount Laurel* litigation, the New Jersey Fair Housing Act of 1985 created the Council on Affordable Housing to administer affordable housing fair share requirements. N.J. STAT. ANN. § 52:27D-301 to -329 (West 2001). *See generally* Nico Calavita et al., *supra* note 38 (comparing the inclusionary zoning approaches of California and New Jersey); John M. Payne, *Reconstructing the Constitutional Theory of Mount Laurel II*, 3 WASH. U. J.L. & POL'Y 555 (2000) (exploring connections between the *Mount Laurel* doctrine and a state constitutional right to shelter).

155. *See* Cecily T. Talbert & Nadia L. Costa, *Current Issues in Inclusionary Zoning*, 36 URB. LAW. 557, 558 (2004); Ehrlich, *supra* note 38, at 972–73 (citing examples in Maryland, Massachusetts, Illinois and several other states). *See generally* Padilla, *supra* note 38.

156. Talbert & Costa, *supra* note 155, at 558.

157. U.S. CONST. amend. XIV, § 1.

process. A local government should be able to satisfy procedural due process, including notice and hearing, by complying with state or local procedures for enacting valid local legislation. A local government would violate substantive due process principles by enacting an ordinance that is arbitrary, unreasonable or capricious.[158] Similarly, an ordinance that bears no substantial relation to public health, safety, morals or the general welfare will fail under substantive due process analysis.[159]

State cases sometimes invalidated early attempts at zoning on substantive due process grounds, concluding that zoning itself represented an arbitrary interference in the housing market.[160] However the U.S. Supreme Court in *Village of Euclid v. Ambler Realty Co.*[161] validated zoning generally under due process.

Federal courts, hesitant to become a sort of super zoning board, have increasingly limited their review of due process challenges of state land use legislation.[162] In assessing due process violations, federal courts give substantial deference to legislative determinations, overturning these determinations only in instances of bad faith, arbitrary and capricious application, or absence of a rational relationship to health, safety, morals or general welfare.[163] Local governments are given wide latitude in the exercise of the police power.[164]

158. *See* Allen v. North Hempstead, 478 N.Y.S.2d 919, 923 (App. Div. 1984) (striking down an ordinance requiring one year of town residency to qualify for housing in the "Golden Age Residence District" because it excluded neighboring elderly residents).

159. *See* Fox v. Bay Harbor Islands, 450 So. 2d 559, 561 (Fla. Dist. Ct. App. 1984) (holding that an ordinance requiring the ground floor apartment of an apartment building be occupied by a maintenance person bears no relationship to public health, safety, morals or public welfare).

160. *See, e.g.*, Goldman v. Crowther, 128 A. 50, 60 (Md. 1925).

161. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926). The *Euclid* Court noted that applications of land use restrictions to particular landowners might run afoul of due process principles, and made good on that warning several years later. *See* Nectow v. Cambridge, 277 U.S. 183 (1928).

162. *See, e.g.*, Brian W. Blaesser, *Substantive Due Process Protection at the Outer Margins of Municipal Behavior*, 3 WASH. U. J.L. & POL'Y 583, 594–95 (2000) (discussing varying approaches of circuits); Parna A. Mehrbani, Comment, *Substantive Due Process Claims in the Land-Use Context: The Need for a Simple and Intelligent Standard of Review*, 35 ENVTL. L. 209, 213 (2005).

163. Applying the anti-speculation ordinance to some purchasers and not others may raise state or federal equal protections concerns in addition to due process concerns. Facially, the ordinance does not trigger strict scrutiny review by making distinctions based on suspect classifications. Additionally, the ordinance does not likely burden a fundamental interest. Lindsey v. Normet, 405 U.S. 56, 73–74 (1972).

164. *See, e.g.*, Berman v. Parker, 348 U.S. 26, 33 (1954) (noting that the public welfare considerations of the police power are "broad and inclusive" and "[t]he values it represents are spiritual as well as physical").

While most states use a "rational relationship" standard to evaluate due process land use claims,[165] other state courts impose a more exacting standard, even if the legislation in question does not affect a suspect classification or fundamental interest. These courts look for a "real and substantial" relationship between the legislation and the exercise of police power.[166] Some courts may even impose a balancing test weighing the public benefit of the legislation with the private burden suffered by a particular landowner.[167]

Anti-speculation measures are more likely to be upheld if they are supported by substantial findings tying speculative purchases to harms of residential character. Evidence supporting such a connection could include a proliferation of rental and vacant houses within traditionally owner occupied neighborhoods caused by speculators looking for tenants. While affordable housing remains a goal of the ordinance, the promotion of residential character, a more standard purpose of traditional land use regulation, is an additional purpose. The promotion of residential character may provide stronger grounds for responding to due process concerns.

It is often said that land use regulations legitimately address the *use* rather than the *user* of property, so courts are generally suspicious of laws attempting to regulate *who* may occupy property rather than what uses may be made of certain property.[168]

165. *See* Zuckerman v. Hadley, 813 N.E.2d 843, 848 (Mass. 2004) ("[D]ue process requires that a zoning bylaw bear a rational relation to a legitimate zoning purpose."); Dow v. Effingham, 803 A.2d 1059, 1064 (N.H. 2002) (declining to impose a "fair and substantial relationship" standard in a due process claim where the landowner claimed that "the right to own, use, and enjoy one's property is considered a fundamental personal right"); Laughter v. Bd. of County Comm'rs for Sweetwater County, 110 P.3d 875, 887–88 (Wyo. 2005) (sustaining regulation if it is of debatable reasonableness or bears a rational relationship to a legitimate public purpose).

166. *See* Tyrone v. Tyrone, L.L.C., 565 S.E.2d 806 (Ga. 2002); Hanna v. Chicago, 771 N.E.2d 13, 22 (Ill. App. Ct. 2002). In *Hanna*, the court listed six factors used to determine whether an ordinance violates substantive due process principles:

> (1) the existing uses and zoning of nearby property; (2) the extent to which property values are diminished by the particular zoning restrictions; (3) the extent to which the destruction of property values of the plaintiff promotes the health, safety, morals or general welfare of the public; (4) the relative gain to the public as compared to the hardship imposed upon the individual property owner; (5) the suitability of the subject property for the zoned purposes; and (6) the length of time the property has been vacant as zoned considered in the context of land development in the area in the vicinity of the subject property.

Hanna, 771 N.E.2d at 22. *See also* ARDEN H. RATHKOPF & DOREN A. RATHKOPF, RATHKOPF'S THE LAW OF ZONING AND PLANNING § 3.16, at 3-41 to 3-50 (Edward H. Ziegler ed., 2005) (discussing cases employing a "real and substantial relationship" test).

167. *See, e.g.*, *Dow*, 803 A.2d at 1065–67 (stating that a balancing test is appropriate in "as applied" due process claims but the instant case did not present an "as applied" issue).

168. *See, e.g.*, Kasper v. Brookhaven, 535 N.Y.S.2d 621 (App. Div. 1988).

Anti-speculation provisions regulating sales do not directly affect the user of the property, given that a particular owner is permitted to occupy the property herself, rent it to others, or let the property lie vacant. However, anti-speculation measures employing owner occupancy restrictions might affect the user of the property and thus be subject to higher scrutiny.[169]

D. Restraints on Alienation

The Restatement (Third) of Property focuses on reasonableness as a standard for determining whether a direct restraint on alienation is valid, weighing the utility of the restraint against any injurious consequences arising from the enforcement of the restraint.[170] Common uses of restraints on alienation outlined in the Comments to the Restatement include preserving affordable housing, keeping land within families, controlling entry into cooperatives, condominiums, subsidized housing, and retirement communities that have financial and other special qualifications for entry, maintaining land for conservation and charitable purposes, and maintaining a level of owner occupancy for certain financing requirements.[171] An overarching concern of alienability restrictions is the effect of any limitation on the operation of a free market in land ownership and development. Restraints can adversely impact the development and improvement of land, impede owners' mobility, and subjugate current ambitions to those of past owners.[172]

After beginning with a rather broad review of the validity of restraints on alienation, the Restatement goes on to note the importance of an individual restraint's qualities, such as the restraint's nature, extent, and duration.[173] The Restatement also notes the context in which the restraint appears. A restraint on alienation in a condominium development may require a different evaluation than an equivalent restraint appearing in a neighborhood of single-family detached housing. Similarly, restraints are more likely to be upheld in certain housing subsets, such as in the preservation of affordability in publicly or privately subsidized

169. *See infra* Part V (discussing an owner occupancy alternative).
170. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.4 (2000).
171. *Id.*
172. *Id.* at cmt. c.
173. *Id.*

housing,[174] or to achieve certain goals within condominium communities.[175]

One general conclusion of the following discussion is that restrictions on what courts consider more primary characteristics of homeownership will be more closely scrutinized than restrictions on activities considered supplementary to ownership. There is also broad judicial deference to the preservation of the residential character of neighborhoods, to a particular city's aversion to outside investment interests and their effects on the residential character, and deference to local legislative decisions generally.

Gangemi v. Zoning Board of Appeals of Fairfield[176] provides one example of the factors a court considers in determining the validity of a restraint on alienation. *Gangemi* involved a restraint on alienation narrowly applied to a single house. Homeowners successfully challenged a local zoning board's decision to grant a variance on the condition that a house remain owner occupied. In overturning the no-rental condition, the court reiterated the long-standing values of free alienability of property.[177] The court emphasized that surrounding property owners were not similarly restricted, thereby undermining any strong public purpose rationales of the ordinance and heightening the magnitude of devaluation to the subject property.[178] The court noted that the economic choices incident to property ownership consist of occupying, renting, or selling, and thus the no-rental condition deprived the owners of one incident (renting) and significantly impaired another incident

174. *See, e.g.*, Oceanside v. McKenna, 264 Cal. Rptr. 275, 280–81 (Ct. App. 1989) (upholding resale restrictions on a locally subsidized, low-income unit); *id.* at 279 ("We can take judicial notice that over the past two decades . . . real estate prices in California have been rising rapidly and the market has attracted a wide range of investments. . . . Thus, the disputed restrictions . . . maintain[] a stabilized community of low and moderate income residents and discourag[e] speculation by real estate investors."); Martin v. Villa Roma, Inc., 182 Cal. Rptr. 382, 383–84 (Ct. App. 1982) (upholding resale restrictions on federally subsidized units in a low-income cooperative).

175. A condominium association's right of first refusal on the sale of units to ensure "a community of congenial residents" was upheld in *Chianese v. Culley*, 397 F. Supp. 1344, 1346 (S.D. Fla. 1975). *See also* Franklin v. Spadafora, 447 N.E.2d 1244, 1247 (Mass. 1983) (declaring the promotion of owner occupancy a proper purpose of a condominium provision restricting the number of units any one person could own). *But see* Aquarian Foundation, Inc. v. Sholom House, Inc., 448 So. 2d 1166, 1169 (Fla. Dist. Ct. App. 1984) (invalidating a clause permitting condominium association to withhold approval of buyer without corresponding obligation to purchase unit or provide alternate buyer).

176. Gangemi v. Zoning Bd. of Appeals of Fairfield, 763 A.2d 1011 (Conn. 2001).

177. *Id.* at 1015 ("[T]he rule against direct restraints on alienation is an old one, going back to the fifteenth century or perhaps even earlier." (citing JESSE DUKEMINIER & JAMES KRIER, PROPERTY 223 (3d ed. 1993))).

178. *Gangemi*, 763 A.2d at 1011, 1017.

(selling) due to the limited number of buyers of an occupancy restricted unit.[179]

On the other hand, the dissent argued for a broad reading of the general principle that zoning regulates the use of land and not the user. From this perspective, a "no-rental" condition is a legitimate exercise of the police power because it applies to the use of the land and not to particular occupants.[180]

The restriction on an individual homeowner in *Gangemi* can be contrasted with a generally applied city ordinance like one introduced in Provo, Utah. Like many other university towns, Provo struggles with the balance between providing student housing and maintaining the residential character of the surrounding community. A zoning overlay ordinance in Provo allowed owners to rent homes as well as adjacent, accessory apartments to university students.[181] There was no restriction on the number of homes a person could own. Under fear of outside investors purchasing homes and turning them into chiefly rental housing for students, local homeowners successfully encouraged the Provo City Municipal Council to enact a new ordinance requiring owner occupancy of a primary home in order to rent out an accessory dwelling.[182]

The court, in *Anderson v. Provo City Corp.*, upheld the validity of this ordinance under summary judgment.[183] Discussing the general principle that a zoning ordinance may regulate only land use, not the ownership of land or a particular user, the court concluded that the "no-rental" condition regulated an owner's supplementary use of her property rather than a primary use, and therefore was a permissible exercise of the city's land use police powers.[184] Non-

179. *Id.* at 1016.

180. *Id.* at 1023–25. The dissent noted that jurisdictions are split on the question of whether a "no-rental" condition is valid. *Id.* at 1023–24 (Sullivan, J., dissenting). *Compare* Ewing v. Carmel-by-the-Sea, 286 Cal. Rptr. 382, 383, 393 (Ct. App. 1991) (upholding ordinance restricting rental of residential property under thirty days), *with* United Prop. Owners Ass'n of Belmar v. Belmar, 447 A.2d 933 (N.J. Super. Ct. App. Div. 1982) (invalidating ordinance restricting temporary and seasonal rentals).

The *Gangemi* dissent also discussed discrimination against renters and unlawful restraints on alienation arguing that the plaintiffs did not have standing to address rental discrimination claims and that any alienation restraints are outweighed by important public policy considerations. *Gangemi*, 763 A.2d at 1028–30 (Sullivan, J., dissenting).

181. Anderson v. Provo City Corp., 108 P.3d 701, 704 (Utah 2005).

182. *Id.* at 704–05. The ordinance contained an exception to owner occupancy for "a bona fide, temporary absence of three years or less for activities such as temporary job assignments, sabbaticals, or voluntary service." *Id.* at 709. The court acknowledged that though this exception may be based on consideration of the missionary service of members of the Church of Jesus Christ of Latter-day Saints, it is generally applicable and did not constitute any discriminatory religious tailoring. *Id.*

183. *Id.* at 710.

184. *Id.* at 706.

occupying owners were free to rent out the primary premises, but they could not engage in the supplementary activity of renting out an accessory dwelling. The court upheld the restriction in spite of arguments that the ordinance impermissibly subjected owner and non-owner classes to different treatment,[185] was an impermissible indirect restraint on alienation,[186] and violated the right to travel under the U.S. Constitution.[187]

Similarly, the court in *Kasper v. Town of Brookhaven*[188] upheld an owner occupancy requirement for accessory rental apartments, like the one in Provo, against arguments that the ordinance exceeded the town's land use powers, created impermissible distinctions between owners and non-owners, and impermissibly regulated the users of property rather than the uses.[189] This ordinance was intended to create housing opportunities for persons of low and moderate income and to generate additional economic support for existing residents of the town with limited incomes.[190]

The town struggled between two competing interests when implementing this ordinance. On the one hand, the town sought to preserve the residential, single-family character of the affected zoning districts.[191] On the other hand, the ordinance had an explicit goal of aiding economically limited homeowner occupants.[192] The court reasoned that it was permissible for the town to draw a line between homeowner occupants and investor owners on the theory that if investor owners were permitted to take advantage of the same accessory apartment opportunity, they might do so in large numbers and preclude homeowner occupants from doing the same due to the concentration restrictions of the ordinance.[193]

Choosing between resident and non-resident owners in this situation might have been accomplished on a first-come,

185. *Id.* at 707–10. The court analyzed the restriction under the uniform operation of laws provision of article I, section 24 of the Utah Constitution, which forbids classifications under the law based on insufficient justifications. *Id.* The court concluded that preserving the character of a single family neighborhood by restricting absentee landlords was a legitimate rationale. *Id.* at 708.

186. Acknowledging that the restraint may affect property values, the court concluded that non-occupying owners could still rent their primary residence and that the city's interest in preserving the residential character of the neighborhood prevailed over any alienation restraints. *Id.* at 710.

187. The court quickly concluded that the restriction had little impact on interstate travel. *Id.*

188. Kasper v. Town of Brookhaven, 535 N.Y.S.2d 621 (App. Div. 1998).

189. *Id.* at 623.

190. *Id.* at 622.

191. *Id.* at 624.

192. *Id.*

193. *Id.*

first-served basis, by lottery, or by some other "neutral" means. The ordinance, however, need only bear a rational relationship to a legitimate governmental goal. The court emphasized that it is not for courts to determine whether a particular ordinance is the best or most efficient means of achieving a certain goal.[194] Similarly, no factual determination at trial was required to test the likelihood or reasonableness of the town's conclusion that owner occupancy would produce more favorable results for the community.[195]

Laws facilitating the construction of accessory units often increase affordable housing opportunities through the provision of relatively inexpensive rental units. Communities sometimes fear the increased population density caused by accessory units and the potential changes to neighborhood character. The California legislature balanced these competing interests in a statute encouraging local governments to accept accessory homes under appropriate local regulation, or requiring local governments to grant a conditional use permit for accessory units under certain statutory conditions.[196] The statute requires owner occupancy of the primary unit "to protect neighborhood stability and the character of existing family neighborhoods and to discourage speculation and absentee ownership."[197]

Anti-speculation measures attempt to achieve a similar balance between maintaining affordable housing and maintaining the character of family neighborhoods. The differences between *Gangemi* and *Provo City Corp.* suggest that a generally applicable restraint on alienation will be more successful than one targeted at a particular home. Furthermore, the courts approved of local efforts to treat outside investors less favorably than owner occupants for fear of speculation and attendant consequences to the residential character of neighborhoods.

Prohibiting an outside investor who owns both a house and an accessory dwelling from renting one of the properties is not an in-

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194. *Id.* at 625; *see also* Spilka v. Inlet, 778 N.Y.S.2d 222, 225 (App. Div. 2004) (finding an ordinance amendment requiring a special use permit to rent non-owner occupied residences for four or more months, rationally related to a legitimate governmental goal and not arbitrary, discriminatory or illegal: "The amendment identified many legitimate governmental purposes for its enactment, including preserving aesthetic integrity in residential neighborhoods, encouraging residential property maintenance, prevention of neighborhood blight, protecting residential property values, permitting efficient use of defendant's dwellings to provide economic support to residents, and enhancing the quality of life in residential neighborhoods").

195. *Kasper*, 535 N.Y.S.2d at 627.

196. CAL. GOV'T CODE § 65852.2 (West 1997).

197. Sounhein v. San Dimas, 55 Cal. Rptr. 2d 290, 295 (Ct. App. 1996) (interpreting the statute to require ongoing owner occupancy, and not merely owner occupancy at the time of application for the conditional permit).

significant restraint. The accessory dwelling is rendered valueless if the investor cannot move into one of the other units.[198] Under an anti-speculation ordinance, on the other hand, an investor would always retain some significant value in the underlying house. It can be lived in or rented. Although it cannot be sold immediately, the three-year resale limitation does not on its face appear to be an unreasonable restriction according to the Restatement. Lastly, the restriction would be for a very important purpose—the promotion of affordable housing. Under these circumstances, an anti-speculation ordinance seems likely to survive an attack as an impermissible restraint on alienation.

E. Takings

A property owner subject to an anti-speculation ordinance may claim that her property has been taken for public use without just compensation that is required by the Fifth Amendment of the U.S. Constitution and similar provisions in state constitutions.[199] An owner should not be able to invoke the heightened scrutiny of federal takings claims developed in *Nollan v. California Coastal Commission*[200] and *Dolan v. City of Tigard*[201] to address an anti-speculation ordinance. These exactions[202] cases are applicable when local governments impose conditions on individual development applications. For example, the California Court of Appeal refused to apply the heightened scrutiny of *Nollan* and *Dolan* in a

198. It is possible that the investor could sell the accessory unit separately, presumably to an owner occupier neighbor, if local land use regulations permit such a transfer.

199. U.S. CONST. amend. V.

200. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987). In *Nollan*, the Court concluded that a government-imposed lateral easement running along the adjacent beachfront of homeowners attempting to construct a larger home did not meet a sufficient relationship, or nexus, between the imposed condition and the problem to be alleviated. *Id.* at 836.

201. Dolan v. City of Tigrad, 512 U.S. 374 (1992). In *Dolan*, the local government sought unsuccessfully to condition the razing and enlargement of a plumbing and supply store on the dedication of two portions of the owner's land: one portion that lay within a floodplain and a second portion for the benefit of a bicycle path. The Court held that, in addition to *Nollan* nexus requirements, local governments must also demonstrate a "rough proportionality" between the benefit of the imposed condition and the harm caused by the new development. *Id.* at 391. Between the tests of nexus and rough proportionality, local governments would find it difficult to require developers to dedicate land for uses such as parks and schools.

202. The term "exaction" describes a condition or set of conditions a local government imposes on a landowner before the local government will grant a specific land use approval. These conditions are not generally outlined in local regulations, but instead are imposed ad hoc on landowners.

facial challenge to an inclusionary zoning ordinance, determining that heightened scrutiny is inappropriate for "legislation that is generally applicable."[203] Similarly, anti-speculation measures are generally enacted legislation applying to an entire community instead of ad hoc requirements faced only by one individual.

Since the Supreme Court's decision in *Lingle v. Chevron*, an anti-speculation ordinance is no longer vulnerable to a takings claim based on the argument that its methods of achieving affordable housing do not substantially advance a legitimate state interest.[204] Before *Lingle*, an anti-speculation ordinance could be considered too circumlocutory a method to permissibly achieve affordable housing goals.[205]

A takings challenge under an anti-speculation ordinance is also not likely to fall within the categorical takings described by a physical appropriation or a loss of all economic use.[206] Substantial value remains in a property containing a resale restriction. Renting, for example, constitutes significant value, as does living on the property. Similarly, nothing in the ordinance constitutes a physical appropriation of property.

Although significant economic value may remain in property subject to regulation (thus failing the *Lucas* categorical taking test), a court could nevertheless conclude that property owners are entitled to compensation by evaluating the ordinance under the balancing test articulated in *Penn Central Transportation Co. v. City of New York*.[207] Much of the justification for compensating partial regu-

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203. Home Builders Ass'n of N. Cal. v. Napa, 108 Cal. Rptr. 2d 60, 66 (Ct. App. 2001); *see also* San Remo Hotel v. San Francisco, 41 P.3d 87, 103 (2002) (declining to apply heightened scrutiny to a hotel conversion restriction).

204. Lingle v. Chevron, 125 S. Ct. 2074, 2087 (2005). The "substantially advancing a legitimate state interest" takings test invalidated in *Lingle* had developed from dicta in *Agins v. Tiburon*, 447 U.S. 255 (1980). *See also* Edward J. Sullivan, *Emperors and Clothes: The Genealogy and Operation of the* Agins' *Tests*, 33 URB. LAW. 343 (2001) (questioning the origin and application of *Agins* to takings claims).

205. The "substantially advancing a legitimate state interest" takings test sometimes proved fatal for rent control ordinances. *See, e.g.*, Cashman v. Cotati, 374 F.3d 887 (9th Cir. 2004) (finding the rent control ordinance a taking because it did not substantially advance a legitimate state interest), *withdrawn on grant of reh'g*, 415 F.3d 1027 (9th Cir. 2005).

206. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

207. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978); *see also* Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001) ("Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action."); Florida Rock Indus. v. United States, 18 F.3d 1560, 1568 (Fed. Cir. 1994) ("Nothing in the language of the Fifth Amendment compels a court to find a taking *only* when the Government divests the total

latory takings derives from the idea that "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," is unfair.[208] Property rights proponents have seized on this feeling of inequity and unfairness to advocate for compensable partial takings in judicial and legislative forums.[209]

Courts have no exact formula for evaluating when the *Armstrong* concepts of "fairness and justice" have been satisfied; they instead rely on a case-by-case analysis.[210] In this analysis, courts may consider whether a regulation impermissibly burdens a limited number of property owners when the public at large is benefited and should contribute to the cost of regulation.[211] In addition, regulatory takings are governed by the multi-factor balancing test articulated in *Penn Central* under which courts examine the economic impact of the regulation, the character of the government activity, and the reasonable investment-backed expectations of the property owner.[212]

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ownership of the property; the Fifth Amendment prohibits the uncompensated taking of private property without reference to the owner's remaining property interests.").

208. Armstrong v. United States, 364 U.S. 40, 49 (1960). Justice Oliver Wendell Holmes often is cited for an earlier statement of the comparison between public and private benefit. In 1922, he wrote, "while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking." Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). Determining when regulation has gone too far has turned out to be difficult to explain.

209. For examples of legislative attempts at the federal and state level to address takings claims, see George Charles Homsy, *The Land Use Planning Impacts of Moving "Partial Takings" from Political Theory to Legal Reality*, 37 URB. LAW. 269, 278–82 (2005). *See also* FLA. STAT. ANN. § 70.001 (West 2005) (allowing the Legislature to provide "relief, or payment of compensation, when a new law, rule, regulation, or ordinance of the state or a political entity in the state, as applied, unfairly affects real property"); TEX. GOV'T CODE ANN. §§ 2007.001–.045 (Vernon 2005) (restricting takings which devalue land by twenty-five percent but exempting most municipal actions).

210. *See, e.g.*, Cienega Gardens v. United States, 67 Fed. Cl. 434, 474 (2005) ("There is no *per se* numerical limitation below which compensation is impermissible; courts must weigh the economic impact with the other *Penn Central* factors to determine whether justice and fairness require that a claimant be compensated.").

211. *See* Edward H. Ziegler, *Partial Taking Claims, Ownership Rights in Land and Urban Planning Practice: The Emerging Dichotomy Between Uncompensated Regulation and Compensable Benefit Extraction Under the Fifth Amendment Taking Clause*, 22 J. LAND RESOURCES & ENVTL. L. 1, 4 (2002) (discussing the unfairness of singling out particular landowners to bear a disproportionate cost burden for the benefit of the public).

212. *Penn Cent.*, 439 U.S. at 124; *see also* Maritrans Inc. v. United States, 342 F.3d 1344, 1359 (Fed. Cir. 2003) (finding decline in property value of 13.1% due to Oil Pollution Act of 1990 insufficient to establish a taking because Maritrans was able to sell its tank barges for substantially what they paid for them in addition to deriving income from them during the phase-out period); Conti v. United States, 291 F.3d 1334, 1344–45 (Fed. Cir. 2002) (finding alternative uses for the affected property precluded finding a regulatory taking related to the government's ban on swordfishing).

The approach by the Court of Federal Claims in *Cienega Gardens v. United States*[213] illustrates one approach that would make an anti-speculation ordinance most vulnerable to a takings claim. In *Cienega Gardens*, the Court of Federal Claims found that the application of two federal statutes, the Emergency Low Income Housing Preservation Act of 1987 (ELIHPA)[214] and the Low-Income Housing Preservation and Resident Homeownership Act of 1990 (LIHPRHA),[215] caused a compensable taking by preventing the owners of multifamily low-income housing buildings from pre-paying federally subsidized mortgages.[216]

In applying the three-factor *Penn Central* balancing test, the court first examined the character of the governmental action. The court worried whether ELIHPA and LIHPRHA unfairly singled out "specific property owners of low-income housing who had rights to prepay and exit the program, and not all owners of rental properties or all taxpayers."[217] The Court found that the administration of these statutes, which denied a realistic opportunity to obtain the requisite HUD approval to prepay the mortgages and exit the program, "establish[ed] a character consistent with that of a taking."[218] Moreover, the *Cienega Gardens* court expressed discomfort with the fact that ELIHPA and LIHPRHA did not regulate rental housing generally.[219]

In contrast, an anti-speculation ordinance would be generally applicable to all residential housing in designated areas. Courts could consider these ordinances either a part of the comprehensive zoning scheme or a part of a local government's general approach to affordable housing. Jurisdictions enacting such an ordinance should carefully develop full and partial waiver opportunities given the concerns of the court in *Cienega Gardens* regarding the realistic satisfaction of waiver provisions in the low-income housing context.

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213. *Cienega Gardens*, 67 Fed. Cl. 434.

214. Emergency Low Income Housing Preservation Act (ELIHPA) of 1987, Pub. L. No. 100-242, § 202(a)(1), 101 Stat. 1877, 1877 (1988) (codified as amended at 12 U.S.C. § 17151 (2000)).

215. Low-Income Housing Preservation and Resident Act (LIHPRHA) of 1990, Pub. L. No. 101-625, tit. VI, 104 Stat. 4249 (codified as amended in scattered sections of 12 U.S.C.).

216. These statutes required owners to solicit permission from the Department of Housing and Urban Development (HUD) in order to prepay mortgages and release properties from limitations on occupant income and similar restrictions. The owners complained that this permission was virtually impossible to obtain, thus preventing owners from exercising the prepayment option available to them at the beginning of their investment.

217. *Cienega Gardens*, 67 Fed. Cl. at 467.

218. *Id.* at 469.

219. *Id.*

Under the second prong of the *Penn Central* test, a court determining a property owner's distinct investment-backed expectations will consider the owner's actual expectations in addition to the reasonableness of those expectations.[220] The highly regulated field of low-income housing arguably creates strong expectations of future administrative and legislative restrictions on an owner's use of property.[221] However, the *Cienega Gardens* court focused on the expectations of property owners participating in this particular low-income housing program rather than those participating in low-income housing productions generally. Under this view, changes to the terms of the program resulted in substantial interference with the owners' investment-backed expectations.

A court could view an anti-speculation ordinance as being more like a temporary development moratorium.[222] Under this view, a local government would be permitted to adopt temporary restrictions in order to better study growth management devices to address speculation. An outright development moratorium rather than a resale restriction would seem the more appropriate strategy under this argument.

The final prong of the *Penn Central* test examines the magnitude of the economic impact of the restriction on property owners. In addition to the categorical taking articulated in *Lucas*, courts may also find a taking in instances where the diminution in value is less than one hundred percent.[223] To evaluate this diminution, the *Cienega Gardens* court articulated three measures of economic impact:[224] comparing a claimant's return on equity with and without the restriction,[225] evaluating a claimant's opportunity to recoup or better his investment,[226] and comparing the value taken from the

220. *Id.* at 471.

221. *See* Rith Energy, Inc. v. United States, 270 F.3d 1347, 1351 (Fed. Cir. 2001) ("In this case, which involves a business engaged in a highly regulated industry, the plaintiff's reasonable investment-backed expectations are an especially important consideration in the takings calculus. A party in Rith's position necessarily understands that it can expect the regulatory regime to impose some restraints on its right[s] . . . .").

222. *See, e.g.*, Tahoe-Sierra Pres., Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 342 (2002) (holding local development moratorium valid against per se takings claim).

223. *See, e.g.*, *Cienega Gardens*, 67 Fed. Cl. at 474 ("There is no per se numerical limitation below which compensation is impermissible . . . .") (emphasis omitted); *see also* Yancey v. United States, 915 F.2d 1534, 1542 (Fed. Cir. 1990) (finding a compensable taking in a seventy-seven percent reduction in the value of a turkey flock due to a federal government quarantine to control avian influenza).

224. *Cienega Gardens*, 67 Fed. Cl. at 474–75.

225. *Id.* at 475 (citing Rose Acre Farms, Inc. v. United States, 373 F.3d 1177, 1188–89 (Fed. Cir. 2004)).

226. *Id.* (citing Florida Rock Indus. v. United States, 18 F.3d 1560, 1567 (Fed. Cir. 1994)).

property with the value remaining in the property.[227] Under each of these measurements, a property owner affected by an anti-speculation ordinance may incur significant economic detriment during the three-year restriction period.

In a market with rapidly appreciating housing values, a property owner may temporarily lose the opportunity to sell her unit at a significant premium over her initial investment if she wishes to sell within the first three years. As a result, her return on her initial investment will be lower during the restriction period. Similarly, she may be temporarily restricted from liquidating her investment to recoup its cost. Finally, in a heated market, the gains from selling property may far exceed income derived from renting the same property during the three-year period. An occupying homeowner may come close to the potential monetary gain from selling the property by refinancing, extracting the increased equity from the property, and investing it elsewhere.

Under each of the three prongs of the *Penn Central* takings analysis, as interpreted by *Cienega Gardens*, a property owner affected by an anti-speculation ordinance may claim significant harm. This analysis rests heavily on a weighing of public benefits and private harms. To the extent that courts view the ordinance as providing a benefit to property owners generally by regulating the pernicious social and market effects of speculative residential investment, then an ordinance would likely confer both benefits and burdens to property owners sufficient to satisfy questions of the average reciprocity of advantage provided by the ordinance.[228] In the alternative, a court may view the ordinance as securing a social benefit (affordable housing) for one group at the expense of another group (property owners desiring to realize market gains through sale). As Professor Edward Ziegler writes, "[w]hile owners and others burdened by these regulatory schemes may be conven-

227. Courts have struggled to determine the appropriate segment of property affected by a given regulation. *See, e.g.*, *Tahoe-Sierra*, 535 U.S. at 330–32 (rejecting the adoption of a categorical rule requiring compensation when regulations temporarily restrict property development); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130–31 (1978) (emphasizing the economic value remaining in the terminal building); Appolo Fuels, Inc. v. United States, 381 F.3d 1338, 1345–47 (Fed. Cir. 2004) (concluding that a mining company retained value in leases unaffected by regulation). *See generally* Robert H. Freilich, *Time, Space, and Value in Inverse Condemnation: A Unified Theory for Partial Takings Analysis*, 24 U. HAW. L. REV. 589 (2002).

228. A seemingly burdensome property regulation that simultaneously confers some benefit may provide an average reciprocity of advantage, making a takings claim inappropriate. In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), Justice Oliver Wendell Holmes noted that a regulation requiring a coal company to leave pillars of coal in the mine for workers' safety simultaneously benefited the coal company and therefore secured an average reciprocity of advantage. *Id.* at 415.

ient targets of opportunity for dealing with the problems of persons with low or moderate incomes, they appear to be no more a distinct cause of their economic plight than the butcher, the baker, or the candlestick maker."[229]

The harm of the approach in *Cienega Gardens* is that it dramatically broadens the class of regulations subject to takings analysis. Many regulations based on legislative determinations of overall social or public benefit create groups of people who are more or less burdened by the regulation than other groups of people. A court should not have to review each legislative decision to see if burdens are "fairly" allocated through a *takings* analysis which involves the balancing of many complex factors. Instead, a court's review should be limited to identifying those cases where burdens are allocated so "unfairly" that the legislation is a violation of due process because it is arbitrary or not rationally related to legitimate exercises of the local government's police power.[230]

V. THOUGHTS ON IMPLEMENTATION

A. Monitoring and Enforcement

Community supporters, community opponents, and politicians are all likely to raise concerns regarding the implementation of an anti-speculation ordinance. In some ways, merely enacting such an ordinance conveys a significant and important message about property relationships and the appropriate balance between public and private interests. The enforcement of such an ordinance may be secondary to its symbolism. This is not to suggest that the ordinance be toothless. Several frameworks, all with different advantages and disadvantages, can be used to monitor and enforce its provisions.

In one framework, a private entity, such as the developer of the community or a common interest community association, could have primary responsibility for monitoring and enforcement. Recorded covenants could include enforceable sale restrictions. An advantage of this approach is that a private entity such as a community association is closely situated to the housing affected by the ordinance, and has a relatively smaller stock of housing to monitor.

229. Ziegler, *supra* note 211, at 14. One response to this argument may lie in further developing goals of speculation restrictions in residential housing markets beyond their potential for maintaining affordable housing.

230. *See supra* notes 157–169 and accompanying text.

Developers or members of a community association have experience in enforcing other covenant restrictions. Moreover, community members may have a personal interest in making sure speculation restrictions are complied with, creating effective enforcement incentives.

A common interest community association may, however, change its position on speculation restrictions, especially resale restrictions, if the gains from violating the restrictions outweigh the benefit of maintaining the restriction. Many covenant restrictions can be changed by majority or two-thirds vote of the association members or its board of directors. A board may come under intense pressure to repeal restrictions, or a community may elect board members with that specific agenda in mind. The developer of the community may be an insufficient check on this potential change of perspective. While a developer has a relatively strong incentive to maintain the image of a stable community of long-term residents during the initial sales period, a developer may not relish long-term involvement. However, it is possible that a developer's relatively short-term interest in a community might be tempered by the adverse impact on a developer's overall reputation that might result from accounts of particular developments harmed by speculative activity. Furthermore, developers may view a three-year restriction as a short-term rather than long-term commitment.

In a second framework, local government assumes primary responsibility for monitoring and enforcement.[231] The local government could require that an affidavit of compliance be included with the sales contract or other aspects of the purchase process. A person making a false statement on the affidavit or failing to comply with the instructions of the affidavit would be subject to civil or criminal proceedings. Local government might monitor buyer activity through property tax payments or deed recordings.

It is possible, and not unprecedented, for state or local government to distinguish between owner occupied and investment housing. Nevada, for example, imposed a different cap on property tax rate increases based on whether the property was owner occupied property or investment property.[232] The State distinguished between the two based on a postcard mailed to all

231. Government could also delegate this task to a community non-profit. For example, the Community Law Center in Baltimore, Maryland was designated attorney general power by the city to bring nuisance actions against offending property owners.

232. Sean Whaley, *Panel Aims to Close Tax Cap Loopholes*, LAS VEGAS REV.-J., May 4, 2005, at 5B (discussing a cap on property tax increases of three percent for owner occupied single family homes and eight percent for investment property).

property owners on which an owner, under penalty of perjury, indicated the property's ownership status.

Although governments are currently less active in enforcing private covenant restrictions within communities, an anti-speculation regime would provide a new avenue for involvement. A central premise of the anti-speculation regime is that local government recognizes speculation as a problem worthy of more comprehensive attention. Traditionally, covenants have been viewed primarily as private agreements among developers and common interest community residents. State and local government may legislate to address or prevent abuses, but primary enforcement and monitoring of covenants is usually a private affair. The impact of speculation in local communities, particularly rapidly increasing housing values, should be considered an issue of public concern. As a result, government will face costs associated with monitoring and enforcement. These costs can be mitigated by combining monitoring and enforcement activity with other regulatory activities, such as tax collection and deed recordation processes.

A third framework combines public and private elements. A private association might identify violations, or report general information to the local government for public enforcement. A combination of the two approaches merges the private association's advantages of proximity and interest with the government's potentially broader enforcement capabilities. Additionally, incorporating a public component could limit the association's ability to unilaterally change the terms of the speculation restriction.

B. Renting and Homeownership

An alternative anti-speculation approach could involve owner occupancy requirements instead of a three-year sale restriction. An ordinance could require owner occupancy of residential housing for a three-year period, subject to a percentage of overall units that would be eligible to rent (but not to intentionally hold vacant). This provision would place an obligation on the landowner similar to the duty of the landlord to mitigate in the landlord-tenant context. The owner would be required to use reasonable methods to advertise and otherwise make the unit available for rental purposes.[233]

233. Sommer v. Kridel, 378 A.2d 767, 773 (N.J. 1977).

An owner occupancy requirement addresses speculation in that it deters speculators from purchasing in areas they do not intend to live. It does not, however, prevent owner occupants from buying and selling frequently to take advantage of significant price increases, nor does it adequately address the speculator-disguised-as-owner-occupant who buys and sells under the fiction of owner occupancy. In the speculator-disguised-as-owner-occupant example, identification costs are high. It would be necessary to determine what actions or what time period constitutes owner occupation. Monitoring costs are particularly high as some entity would be responsible for verifying vague and indeterminate occupancy facts.[234]

An anti-speculation ordinance requiring owner occupancy forces purchasers to live in the state where they purchase property. This requirement does not prevent purchases at the outset. Both in-state and out-of-state individuals may freely buy property. However, the ordinance would then mandate that the purchaser move in to the home, which requires moving to the state where the property is located.

This requirement discriminates against nonresidents and implicates the Privileges and Immunities Clause of the U.S. Constitution.[235] Assuming discrimination exists and that this discrimination burdens one of the privileges or immunities protected by the Clause, a local government must demonstrate a "substantial reason" for the discrimination.[236] As part of the substantial reason, a local government can demonstrate that nonresidents "constitute a peculiar source of the evil at which the statute is aimed."[237] A lo-

234. For example, entities might need to verify the length of time purchasers stayed on the premises, whether they moved any furniture in, or whether they registered to vote in the new jurisdiction.

235. U.S. CONST. art. IV, § 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."). A municipal level ordinance may fall within the reach of the Privileges and Immunities Clause. *See* United Bldg. & Constr. Trades Council v. Mayor & Council of Camden, 465 U.S. 208, 214–18 (1984) (stating that a municipality derives authority from the state and the fact that some in-state residents are similarly affected by an ordinance limiting out-of-state residents does not confer immunity from constitutional review). The Dormant Commerce Clause has a similar scope. *See* Hicklin v. Orbeck, 437 U.S. 518, 531–32 (1978) (finding unconstitutional an Alaska law creating preference for Alaska residents). Under the Dormant Commerce Clause, an ordinance that is deemed nondiscriminatory against out-of-state persons is subject to a balancing test weighing the burdens of the law on interstate commerce against its benefits. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (striking down an Arizona statute requiring fruit grown in Arizona to be packed within the State before export). If an ordinance is considered discriminatory, the court will consider whether the law is protectionist, and if it is, the least restrictive means of regulation. *See* C&A Carbone, Inc. v. Clarkstown, 511 U.S. 383, 392–93 (1994) (striking down a town ordinance requiring solid waste to be processed at town transfer station).

236. *United Bldg.*, 465 U.S. at 222.

237. Toomer v. Witsell, 334 U.S. 385, 398 (1948).

cal government enacting anti-speculation measures can cite housing affordability concerns, evidence of vacant housing purchased by speculators remaining unrented, and a need to preserve the residential community character of neighborhoods as reasons for the measures. The latter need for protection of community character may be a particularly strong argument given that it is a key element of a local government's traditional land use regulatory role.

A weakness of the owner occupancy approach, but less of a problem for the three-year resale limitation approach, is the perception of the ordinance as a veiled attempt by more affluent, owner occupied neighborhoods to exclude lower income renters. Policies curbing speculation could be viewed as anti-rental.[238] Certainly renters could be long-term residents of communities. An ordinance limiting the resale of homes does not necessarily require owner occupancy throughout the limitation period. Owners would retain the ability to rent the property, and this could provide a valuable source of affordable rental housing. Nevertheless, proponents of a resale limitation need to be attentive to these concerns.

Although a restriction on resale may limit rampant, uncontrolled price appreciation in some housing markets, it is not clear what effect such an approach would have on the overall supply of affordable housing. For example, would such a policy increase or decrease the supply of housing that filters down from higher to lower income families?[239] Would an anti-speculation ordinance, as additional housing regulation in the jurisdiction, contribute to increasing housing prices? Would a resale restriction limit opportunities for new buyers to purchase houses for occupancy? Those investors purchasing homes and renting them would be temporarily restricted in their ability to sell, even at a premium, to other purchasers intending to live in the homes themselves. An owner occupancy restriction would address this possibility, but raise other concerns.

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238. *See* Keenan, *supra* note 63, at 111 (noting anti-rental clauses in condominium declarations limit overall supply of rental housing and, consequently, raise rents). The literature on community and municipal efforts to exclude lower income residents through land use regulations is voluminous. *See generally* Henry A. Span, *How the Courts Should Fight Exclusionary Zoning*, 32 SETON HALL L. REV. 1 (2001); CHARLES M. HAAR, SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES (1996). To the extent anti-speculation measures limit the supply of rental housing, a city could provide rental opportunities by lottery but lotteries carry limitations. *See* Carol Necole Brown, *Casting Lots: The Illusion of Justice and Accountability in Property Allocation*, 53 BUFF. L. REV. 65, 73 (2005) (finding that a lottery system "frequently results in unjust distributions of property [and] obscures the decision to avoid making difficult choices").

239. *See generally* C. Tsuriel et al., *Dynamics of Affordable Housing Stock: Microdata Analysis of Filtering*, 12 J. HOUSING RES. 115 (2001).

Lastly, an effective approach to providing affordable housing requires attention to both promoting homeownership for low income families as well as promoting affordable rental opportunities for those families who still need access to shelter but cannot afford to be homeowners. An anti-speculation ordinance would likely benefit potential homeowner households at, or just below, the median area income who are adversely affected by rising housing prices. Lower income households will still require more targeted subsidy programs to create rental and ownership opportunities. Anti-speculation measures should be used in conjunction with existing subsidy programs, such as the Low Income Housing Tax Credit program, that may address the needs of residents at lower income levels.[240] The argument for an anti-speculation ordinance does not address what the appropriate ratio of homeowners to renters in a particular neighborhood should be, nor does the argument necessarily value homeownership and the contributions of homeowners to communities more than renters and their contributions.[241]

C. Public and Private Agreements

The discussion of an anti-speculation ordinance thus far has centered on the challenges and effects of government regulation to combat speculation. The government could also obtain similar anti-speculation benefits through negotiated development agreements.[242] In exchange for density bonuses and related incentives,

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240. The Low Income Housing Tax Credit program (LIHTC) is codified at I.R.C. § 42. The LIHTC awards tax credits to owners of newly constructed or rehabilitated rental properties meeting certain affordable housing standards. I.R.C. § 42(g)(1) (2000).

241. *See, e.g.*, Donald R. Haurin et al., *The Impact of Neighborhood Homeownership Rates: A Review of the Theoretical and Empirical Literature*, 13 J. HOUSING RES. 119, 144 (2002) (finding that relatively few studies exist on how homeownership affects the behavior of individuals living in, and near to, a particular community); Joseph Harkness & Sandra J. Newman, *Homeownership for the Poor in Distressed Neighborhoods: Does This Make Sense?*, 13 HOUSING POL'Y DEBATE 597, 598 (2002) (comparing benefits of homeownership in distressed and stable neighborhoods).

242. Development agreements typically provide developers regulatory certainty protecting the significant time and monetary investment put into a new project that unfolds over many years. Development agreements also permit local governments to extract more benefits from developers than might otherwise be lawfully permitted. For discussions of development agreements generally, see DAVID L. CALLIES ET AL., BARGAINING FOR DEVELOPMENT: A HANDBOOK ON DEVELOPMENT AGREEMENTS, ANNEXATION AGREEMENTS, LAND DEVELOPMENT CONDITIONS, VESTED RIGHTS, AND THE PROVISION OF PUBLIC FACILITIES 91 (2003); Michael H. Crew, *Development Agreements After* Nollan v. California Coastal Commission, *483 U.S. 825 (1987)*, 22 URB. LAW 23, 27–31 (1990); John J. Delaney, *Development*

developers could agree to include resale restrictions within sales contracts in new developments. Ostensibly, the developer would then be responsible for monitoring and enforcing the restrictions, and the local government could use the terms of the development agreement to monitor the developer's compliance.

Development agreements present the opportunity to address speculation using a methodology that embraces private market principles. To be successful, an anti-speculation measure must resonate with individual interests or with private property rhetoric and ideals such as the preservation of residential community character and community stability. Gerald Frug notes that suburban communities have been much more successful than cities in avoiding accusations of acting in manners inimical to individual property rights.[243] Suburban governments are often viewed as protectors or enhancers of individual property rights. Common interest communities, despite their myriad of rules and restrictions, also successfully appropriate private values of "home and family, private property, and community solidarity."[244]

Development agreements allow local governments and developers to contract for their specific interests. The advantage of using development agreements to implement anti-speculation measures is that the measures can presumably be tailored to address the specific needs of each new development. Moreover, a city's use of development agreements to implement anti-speculation measures reflects that city's conclusion that speculation is harmful without committing the city to pass binding (and perhaps overly rigid) legislation to implement that view. The disadvantage of relying on development agreements is that since each agreement is separately negotiated, cities may be inconsistent in their inclusion of anti-speculation measures due to pressure by developers or other constituencies. This could give rise to a legal claim similar to that in *Gangemi*.[245]

Alternatively, neighborhood-based or interest-group organizations could negotiate a similar agreement with developers in return for support of the developer's project through the land use approval process. Grassroots community economic development

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Agreements: The Road from Prohibition to "Let's Make a Deal!," 25 URB. LAW. 49 (1993); Judith Welch Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals*, 65 N.C. L. REV. 957, 1000–03 (1987).

243. GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 56–58 (1999).

244. *Id.* at 59.

245. *See supra* notes 176–180 and accompanying text.

organizations negotiated an enforceable community benefits agreement with developers in the Figueroa Corridor in Los Angeles promising affordable housing, jobs, and other benefits.[246] In the context of speculation, community groups could require that a developer include resale restrictions in new development as a condition of that community's support of the project.[247]

The terms of an anti-speculation development agreement between a local government and a developer might be outside the scope of a jurisdiction's police power. Some local governments may be able to enter into these sorts of agreements because of state provisions giving local jurisdictions the power to adopt procedures and requirements concerning development agreements.[248] Other local governments could rely on broad provisions contained in statutes like Hawaii's, which states that "[t]he development agreement also may cover any other matter not inconsistent with this chapter, nor prohibited by law."[249] Finally, a statute may contain more detailed language. Washington's statute includes a number of "development standards" that may be incorporated in development agreements. Anti-speculation provisions arguably fall within provisions governing permitted uses,[250] affordable housing,[251] or "[a]ny other appropriate development requirement or procedure."[252]

VI. CONCLUSION

At first glance, the idea of local governments regulating the resale of property may appear rather fanciful. The free alienation of property is commonly deemed an essential component of property ownership that would likely not be surrendered casually. In addi-

246. Scott L. Cummings, *Community Economic Development as Progressive Politics: Towards a Grassroots Movement for Economic Justice*, 54 STAN. L. REV. 399, 480 (2001) (critiquing market-based community economic development theory and describing alternative examples of legal advocacy and community organizing).

247. Community groups often have political and legal leverage in the land use approval process. Land use decision makers are sensitive to the concerns of their electorate. Also, some land use regulations require community participation. *See, e.g.*, FLA. STAT. ANN. § 163.3181 (West 2000) (requiring community participation in the comprehensive planning process). An unsatisfied community organization can create delays in the approval process, which can cost a developer significant amounts of money or possibly prevent the completion of the project altogether.

248. *See, e.g.*, FLA. STAT. ANN. § 163.3223 (West 2000).

249. HAW. REV. STAT. § 46-126(c) (2003).

250. WASH. REV. CODE § 36.70B.170(3)(a) (2003).

251. *Id.* at (3)(e).

252. *Id.* at (3)(j).

tion, exceptions to an anti-speculation measure threaten to swallow the rule as local governments would face understandable pressure to approve individual or categorical exceptions to the application of the ordinance for hardship and similar unforeseen occurrences. The number of people entitled to exceptions could outnumber those not entitled to exceptions, and the administrative burden of identifying bona fide cases for exception could be overwhelming and threaten to outweigh the benefits of the legislation.

A local government's failure to address the effects of speculation through public regulation, however, is not costless. Unregulated speculation imposes economic and social costs on families searching for affordable housing, places the long-term stability of residential communities at risk, and reinforces the primacy of an unfettered market conception of property over other conceptions of property reflecting social and community values. An anti-speculation ordinance recognizes that a person's home is more than just another market instrument to be bartered, leveraged and hedged. Real property serves a much deeper purpose in our community. It provides shelter for individuals and families and it constitutes neighborhoods with identities and history. These characteristics of real property are intuitively felt by many, but often forgotten in individualistic pursuits of profit within speculation frenzies. A responsible vision of local government would respond to this tension between individual pursuit and collective good by adopting measures that recognize the unique, special status of homes.