

MERCATUS WORKING PAPER



# **CUTTING ZONING DOWN TO SIZE**

## REEVALUATING THE LEGAL VULNERABILITY OF URBAN MINIMUM LOT SIZES

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#### **ABSTRACT**

Minimum lot sizes are among the most common form of land use regulation in the United States, existing even in those jurisdictions that have not adopted traditional use-based zoning. Although scholarly and judicial attention has focused on the minimums of an acre or more that are typically found in suburban areas, recent research has identified substantial economic benefits to reforming and reducing the lower minimums present in city neighborhoods. This article argues that these minimums, often requiring 5,000 square feet or more per home in areas served by city sewer and water, may be vulnerable to litigation on the basis of principles of uniformity, arbitrariness, and noncompliance with increasingly prescriptive state zoning enabling acts. In doing so, this article reviews the history and case law surrounding minimum lot sizes and proposes a new legal standard for evaluating lot size requirements linked to quantifiable public health and safety criteria. The author also proposes recommendations for state and local legislative reform.

#### **METADATA**

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# Cutting Zoning Down to Size: Reevaluating the Legal Vulnerability of Urban Minimum Lot Sizes

## I. INTRODUCTION

What can be said for the attorney? As much as the bar as a whole has ignored zoning or treated it as an annoyance, it is the lawyer who invented this device and it probably will be the job of the lawyer to rescue zoning from its dismal state.<sup>1</sup>

How much land does one house reasonably require? As of 2021, the median new detached single-family home in the United States contained approximately 2,270 square feet of living space,<sup>2</sup> but jurisdictions across the country have mandates that require that home to sit on as many as three acres of land or more, or more than 120,000 square feet.<sup>3</sup> Despite these mandates, buyer demand for small lots has continued to increase, with the percentage of new homes built on lots of less than 7,000 square feet rising from 25 percent in 2009 to 36 percent in 2022.<sup>4</sup> Long accepted as an integral part of the landscape of American zoning regulations, minimum lot sizes have come under increasing scrutiny in recent years as an impediment to home ownership, an enabler of exclusion by municipalities, and a contributor to decreasing housing affordability.<sup>5</sup>

Legal challenges to lot size minimums, which began as early as the 1940s, have met with mixed success.<sup>6</sup> The broadly deferential posture of the courts toward mandated lot sizes for homes would appear to limit the usefulness of litigation as an option for those seeking reform of these

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<sup>1</sup> RICHARD F. BABCOCK, *THE ZONING GAME*, 184 (1966).

<sup>2</sup> U.S. Census Bureau, *Highlights of 2022 Characteristics of New Housing*, <https://www.census.gov/construction/charts/highlights.html> (last visited Aug. 14, 2023).

<sup>3</sup> See, e.g., TOWN OF EASTHAM, MASS., ZONING BYLAWS §§ 7.1.5 and 7.1.6 (2023); CODE OF ORDINANCES OF PLUMAS CNTY., CAL., § 9-2.1602 (2022); CODE OF THE CNTY. OF STAFFORD, VA., § 28-35 (2023); TOWN OF LITCHFIELD, CONN., PLAN. AND ZONING COMM., LITCHFIELD ZONING REGULATIONS (2023), at 7.

<sup>4</sup> U.S. Census Bureau, *Annual Characteristics Tables: Lot Size of New Single-Family Units Completed*, <https://www.census.gov/construction/charts/current.html> (last visited Aug. 14, 2023).

<sup>5</sup> For a sampling of this writing and research on minimum lot sizes and on exclusionary zoning as a whole, see, e.g., Robert Ellickson, *The Zoning Straitjacket: The Freezing of American Neighborhoods of Single-Family Houses*, 96 IND. L.J. 395 (2021); ROBERT C. ELICKSON, *AMERICA'S FROZEN NEIGHBORHOODS: THE ABUSE OF ZONING* (2022); M. NOLAN GRAY, *ARBITRARY LINES: HOW ZONING BROKE THE AMERICAN CITY AND HOW TO FIX IT* (2022); Amrita Kulka, *Sorting into Neighborhoods: The Role of Minimum Lot Sizes* (Univ. Wisc.-Madison, Working Paper, 2019), <https://drive.google.com/open?id=1Wr8T687wz-jVVMEVWoZCQXB53pxCM5hK>; Joseph Shortell, *The Effect of a Minimum Lot Size Reduction on Residential Property Values: The Case of Houston* (2022) (M.A. thesis, Univ. Barcelona), <http://hdl.handle.net/2445/187972>; ASHLEE TZIGANUK ET AL., *EXCLUSIONARY ZONING: A LEGAL BARRIER TO AFFORDABLE HOUSING* (2022), [https://morrisoninstitute.asu.edu/sites/default/files/exclusionary\\_zoning\\_legal\\_barrier\\_to\\_affordable\\_housing.pdf](https://morrisoninstitute.asu.edu/sites/default/files/exclusionary_zoning_legal_barrier_to_affordable_housing.pdf); Hans R. Isakson, *Analysis of the Effects of Large Lot Zoning*, 26 J. REAL ESTATE RSCH. 4 (2004); Alex Anas, Richard Arnott & Kenneth A. Small, *Urban Spatial Structure*, 36 J. OF ECON. LITERATURE 1426 (1998); Marin V. Geshkov & Joseph S. DeSalvo, *The Effect of Land-Use Controls on the Spatial Size of U.S. Urbanized Areas*, 52 J. OF REG'L SCI. 648 (2012); Jeffrey Zabel & Maurice Dalton, *The Impact of Minimum Lot Size Regulations on House Prices in Eastern Massachusetts*, 41 REG. SCI. & URB. ECON., no. 6, 2011, at 571; Andrew Paciorenk, *Supply Constraints and Housing Market Dynamics*, 77 J. OF URBAN ECON. 11 (2013).

<sup>6</sup> The first reported case addressing the constitutionality of minimum lot sizes appears to be *Simon v. Needham*, 311 Mass. 560 (1942), in which the Supreme Judicial Court of Massachusetts upheld a minimum lot size of one acre. As detailed in section II, the minimum lot size jurisprudence that came afterwards followed a winding course, with courts initially following *Needham's* reasoning to uphold most minimum lot size regulations and later changing course to invalidate many such regulations. Even within decisions at the state appellate and supreme court levels, unanimity is often lacking among judges, with minimum lot size opinions often including numerous strident dissents.

regulations, but a review of the extant case law, much of it dating to the mid-20th century and founded on assumptions and justifications now suspect or discredited, leaves the door open to new legal strategies. In particular, challengers argue that minimums in urban areas—often requiring 5,000 square feet or more per home where infrastructure can accommodate far higher densities—have received little attention in minimum lot size literature despite having legal vulnerabilities not shared by minimums in agricultural or suburban areas. Courts more closely attuned to the proliferation of exclusionary zoning methods and the motivations underlying these methods may, in turn, be more receptive to robust, well-supported arguments by property owners seeking to subdivide scarce urban land beyond what current zoning regulations will allow.

The article first provides a brief history and background of minimum lot sizes in the United States, dividing them into three primary analytical categories of agricultural, suburban, and urban. Second, the article examines court decisions on the constitutionality of minimum lot sizes issued from the 1940s to the present day, with particular attention to the application of differing legal standards to lot size mandates depending on the available infrastructure or the relation of the specific lot size required to a municipality's stated policy objectives. Finally, the article examines prospects for future legal challenges to minimum lot size regulations in light of the shortcomings of applicable case law, increasing awareness of the deleterious effects of these regulations on the public welfare and growing recognition that local zoning powers are in every case constrained by the enabling statutes enacted by state governments, which in certain cases have now added affirmative obligations to provide affordable housing options not present when courts first confronted lot size minimums. The article also proposes state zoning legislation as a complement to a litigation approach.

## **II. THE HISTORICAL EVOLUTION OF MINIMUM LOT SIZES AS AN EXCLUSIONARY TOOL**

The practice of mandating a minimum lot size on which a home can be built may be the most common element of municipal zoning ordinances in the United States, existing even in the handful of jurisdictions that do not practice segregation by use or by density. The town of Bethlehem, Connecticut, which is one of only two towns in that state to lack formal zoning ordinances or a zoning commission, nonetheless imposes a minimum lot acreage.<sup>7</sup> The city of Houston, Texas, which has on several occasions rejected proposals to introduce use-based zoning, maintains minimum lot size requirements for single-family homes.<sup>8</sup>

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<sup>7</sup> BETHLEHEM, CONN., SUBDIVISION REGULS. § 3.7.3 (March 13, 1955). <https://bethlehemct.org/vertical/sites/%7B5308EA3E-1589-494E-AA0B-0BABEF8025FD%7D/uploads/Subdivision-Regulations.pdf> (last visited Aug. 14, 2023).

<sup>8</sup> HOUSTON CODE OF ORDINANCES §§ 42-182 to 42-183 (2023).

**FIGURE 1.** Single-Family Forms of Bethlehem, Connecticut (left), and Houston, Texas (right), at the Same Scale



Source: Microsoft Bing Maps. © 2023 Microsoft

That these requirements can have a major effect on urban form is evident from the disparity between Bethlehem's requirements, which mandate at least 76,230 square feet per home, and Houston's requirements, which permit lots as small as 1,400 square feet (see figure 1). Even without including multifamily or attached homes, and setting aside areas dedicated to streets, Houston's regulations permit a residential density more than 50 times greater than in Bethlehem, representing the difference between a car-dependent exurban environment and an urban one compatible with mass transportation.<sup>9</sup> Perhaps more than any other residential regulation, these requirements shape the way in which American cities—where the majority of land is typically zoned for single-family homes—are physically constituted.<sup>10</sup>

### **A. A Brief History of Minimum Lot Sizes**

At the time that the Supreme Court issued the *Euclid v. Ambler* decision, certain municipalities had adopted minimum lot size requirements, but those mandates rarely required more than a

<sup>9</sup> See, e.g., Robert Cervero & Erick Guerra, *Urban Densities and Transit: A Multi-dimensional Perspective* (Univ. Cal., Berkeley, Inst. of Transp. Stud., Working Paper no. UCB-ITS-VWP-2011-6, 2011), <https://escholarship.org/uc/item/3mb598qr>; Murtaza Haider, *Diminishing Returns to Density and Public Transit*, TRANSP. FINDINGS (Oct. 2019), <https://doi.org/10.32866/10679>. Cervero and Guerra find that a density of about 30 people per gross acre can justify light rail transit, consistent with the density level achievable with single-family homes on 1,400-square-foot lots (approximately 20–25 units per acre).

<sup>10</sup> For example, the greater Los Angeles region, comprising six counties and nearly 20 million people, has 78 percent of its residential land reserved for single-family detached homes. See STEPHEN MENENDIAN, SAMIR GAMBHIR & CHIH-WEI HSU, SINGLE-FAMILY ZONING IN GREATER LOS ANGELES (March 2, 2022), <https://belonging.berkeley.edu/single-family-zoning-greater-los-angeles>. In Cuyahoga County, Ohio, home to the City of Cleveland, 58 percent of land is zoned to allow single-family homes exclusively, and 16.9 percent allows two-family homes or larger. See Michael Lepley & Lenore Mangiarelli, *Exclusionary Zoning in Cuyahoga County*, FAIR HOUSING CTR. FOR RTS. & RSCH. (Jan. 2020), <https://www.thehousingcenter.org/wp-content/uploads/2020/01/Exclusionary-Zoning-in-Cuyahoga-County.pdf>. On the statewide level, the numbers are even more stark: the Connecticut Zoning Atlas found that single-family housing is allowed on 90.6 percent of land in Connecticut, whereas structures with four or more units are allowed on only 2.2 percent of land. See National Zoning Atlas, *Connecticut Zoning Atlas*, <https://www.zoningatlas.org/connecticut> (last visited Aug. 14, 2023). See also the detailed discussion of Connecticut's minimum lot size zoning practices in Sara C. Bronin, *Zoning by a Thousand Cuts*, 50 Pepperdine L. Rev. 764 (2023).

fraction of an acre of land for a single home. For example, although minimum lot size requirements were not at issue in the litigation, the Village of Euclid, Ohio, imposed lot minimums ranging from 900 square feet to a maximum of 5,000 square feet.<sup>11</sup> Until the late 1940s, lot size minimums significantly greater were uncommon in suburban areas; one of the earliest known examples was the town of Carlisle, Massachusetts, which, in 1933, adopted one-acre zoning.<sup>12</sup> In the cities, too, although experimentation with more modest lot minimums had begun in the 1920s and 1930s, its widespread adoption did not occur until the late 1940s.<sup>13</sup> One detailed study of property tax data from 1925 to 2010 estimated that approximately 20 percent of American municipalities had adopted minimum lot size regulations by 1940, but that an additional 59 percent adopted them between 1940 and 1970.<sup>14</sup> With respect to minimum lot sizes exceeding 10,000 square feet, only 13 percent of municipalities had such minimums before 1940, and another 44 percent adopted them from 1940 to 1970, with the adoption of minimums in localities that did not previously have them tapering off after 1975.<sup>15</sup> Nearly 80 percent of all jurisdictions with minimum lot sizes were found to have a sliding scale of minimums, with an average of 3.7 different lot minimums per municipality.<sup>16</sup> An estimated 13.5 percent of all new homes built from 1940 to 1970 were found to be “bunched” around a presumed minimum lot size, rising to 13.7 percent from 1970 to 2010.<sup>17</sup>

### *1. Suburban Lot Minimums*

Whereas use-based zoning emerged in the 1920s for a variety of reasons, the proliferation of residential minimum lot sizes starting in the late 1940s seems to have had economic and social explanations that were somewhat more straightforward.<sup>18</sup> Towns in outlying areas of large metropolitan regions became increasingly accessible to more city dwellers due to the growing availability of automobiles after 1945.<sup>19</sup> Consequently, those towns faced intense residential development pressures at the very time when the number of school-age children was soaring due

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<sup>11</sup> *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 381–82 (1926).

<sup>12</sup> COMMONWEALTH OF MASS., DEP’T OF PUB. WELFARE, DIV. OF HOUS. AND TOWN PLAN., ANNUAL REP. FOR THE YEAR ENDING NOVEMBER 30, 1933 (1933). According to the report, Carlisle’s lot size minimum of one acre was intended to preserve a pseudo-agricultural aesthetic and, perhaps more importantly, to exclude what the authors colorfully characterized as “warty, wen-like, goiterous, cancerous development.”

<sup>13</sup> See *infra* discussion in subsection II.A.3.

<sup>14</sup> Tianfang Cui, *The Emergence of Exclusionary Zoning Across American Cities* 20 (Univ. Penn., Wharton School, Working Paper, 2023), [https://www.tom-cui.com/assets/pdfs/LotsEZ\\_Latest.pdf](https://www.tom-cui.com/assets/pdfs/LotsEZ_Latest.pdf).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 21.

<sup>17</sup> *Id.*

<sup>18</sup> Although a full accounting of those reasons is beyond the scope of this article, the initial adoption of single-family zoning was in part motivated by concerns over school funding mirroring those that would arise two decades later over lot size. See, e.g., *Arguments for and Against Zoning at Meeting in Atlantic M.E. Church, Quincy*, BOSTON GLOBE, April 27, 1926, at A4 (quoting Quincy Zoning Commissioner Thomas J. McCarthy as stating at a zoning debate that “[t]wo family houses are undesirable because they mean more children, and children mean more schools”). For a more detailed treatment of the local economics behind exclusionary zoning in general, see, e.g., William A. Fischel, *An Economic History of Zoning and a Cure for Its Exclusionary Effects*, 41 URBAN STUD. 317 (2004), and other works by Fischel, including *THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS* (1985); and *ZONING RULES! THE ECONOMICS OF LAND USE REGULATION* (2015).

<sup>19</sup> *An Economic History of Zoning and a Cure for its Exclusionary Effects*, Fischel, *supra* note 18, at 329–30.

to an unprecedented baby boom.<sup>20</sup> With little preexisting business or industrial tax base, local governments feared that blue-collar home buyers, seeking modest homes on small lots, would fail to pay sufficient property tax to account for the cost of educating their growing families.<sup>21</sup> A minimum lot size, by setting a floor for land costs, was intended specifically to slow—if not exclude entirely—the entry of such families and thereby preserve the economic feasibility of a bedroom community.<sup>22</sup> Towns also perceived that large lots, which could accommodate on-site wastewater disposal, would avoid the considerable cost of expanding sanitary sewers or upgrading wastewater treatment facilities. Preservation of a rural or undeveloped character and aesthetic, although a concern, was of secondary importance and, in any event, was inconsistent with a one-acre minimum, which would *increase* the rate at which farmland or nature was consumed for development. In addition, one study found that the timing of the adoption of lot size minimums in cities outside the American South is correlated with the arrival of Black Americans into those cities during the so-called Second Great Migration and with school desegregation, suggesting that exclusionary motives behind minimum lot sizes were racial as well as fiscal.<sup>23</sup>

With those concerns in mind, municipalities across the United States reacted by hastily adopting large lot sizes for both developed and undeveloped land during the late 1940s and 1950s.<sup>24</sup> Those requirements, as observers at the time noted, were largely reactive measures intended to halt urbanization by restricting the density of population growth rather than the outcome of a carefully considered planning process.<sup>25</sup> Perceived alternative outcomes were a ruinous increase in the property tax burden or a large-scale embrace of nonresidential uses, neither of which was politically palatable. It is perhaps no coincidence that so many of the court challenges to minimum lot sizes occurred in the long-incorporated suburbs of East Coast cities

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<sup>20</sup> Births to American women, which had totaled 2,355,000 in 1936, rose to 3,411,000 in 1946 and 4,218,000 in 1956. Wikipedia, *Demographics of the United States*, *Vital Statistics*, [https://en.wikipedia.org/wiki/Demographics\\_of\\_the\\_United\\_States#Vital\\_statistics](https://en.wikipedia.org/wiki/Demographics_of_the_United_States#Vital_statistics) (last visited Aug. 14, 2023).

<sup>21</sup> See *Simon v. Needham*, 311 Mass. 560, 42 N.E.2d 516 (1942). As an example, residents of the Connecticut town of Newtown were told in 1955 that if 500 factory employees from the nearby city of Danbury moved to Newtown, they would pay taxes of \$27,636, and their 255 children would attend the local schools at a cost of \$51,000 (*Speaker Links Newtown with Growth of Danbury*, NEWTOWN BEE, Feb. 4, 1955, at 1). After some consideration of how to attract industry, the town ultimately adopted a town-wide one-acre minimum lot size in 1958, which was then expanded to a mix of one-, two-, and three-acre zoning in 1959. *Map Adopted to Show Areas for Lot Sizes*, NEWTOWN BEE, June 26, 1959, at 1 (noting that the town planning and zoning commission adopted a revised map “providing areas of varying lot sizes in town, ranging from 1–2 acre to 3 or more acres. This new map showing amendments to the zone boundaries replaces a blanket, one-acre lot size requirement for the whole town”).

<sup>22</sup> Whether this so-called fiscal zoning achieves its intended objectives has been a vigorous subject of debate for many years. See Frederick C. Mezey, *Beyond Exclusionary Zoning: A Practitioner’s View of the New Zoning*, 5 URB. LAWYER 56, 63 (1973) (arguing that the “zoning power, not designed as a fiscal device actually becomes self-destructive when applied to taxes”).

<sup>23</sup> Cui, *supra* note 14, at 2, 3.

<sup>24</sup> See David M. Becker, *The Police Power and Minimum Lot Size Zoning*, 1969 WASH. UNIV. L. QUARTERLY, no. 3, at 263 (noting that “[t]he extension of urban communities far beyond core cities has been one of the most dramatic developments of the past twenty years,” and that “[t]he impact has been greatest on the older, established suburban communities which lie in the path of the new growth. Communities consisting of large estates and inhabited by people of considerable means have suddenly witnessed the arrival of new neighbors who want, and are able to pay for, unpretentious, inexpensive homes. The residents of these older suburbs have been largely unprepared for these events—unprepared to accept the psychological and economic consequences of this development.”).

<sup>25</sup> *Id.* at 279, n.26 (noting that “[m]inimum lot and house size requirements have been adopted nearly always in the light of an increasing and immediate need for moderately priced housing; a need which surpasses the demand for expensive housing, and a need for which there is seldom adequate provision,” and “the decision to impose low density requirements appears nearly always to have been made in the light of a growing market for less rather than more expensive homes”). See also Peter J. Adang, *Snob Zoning: A Look at the Economic and Social Impact of Low Density Zoning*, 15 SYRACUSE L. REV. no. 3, 1964, at 514–18; *Needham*, 311 Mass. at 563–64.



such as Boston, New York, Washington, DC, and Philadelphia, where local governments had the authority to employ zoning power as a bulwark against a rising tide of urbanization. Challenges were comparatively rare in states where cities were surrounded by unincorporated land and often lacked the legal authority to zone or to resist annexation, such as Texas.<sup>26</sup>

The rapid and widespread adoption of minimum lot sizes by suburban and exurban towns eventually made its mark on even the largest metropolitan regions. By 1960, 80 percent of the undeveloped land zoned for residential use within 50 miles of Manhattan's Times Square required at least one-half acre for the construction of a home. More than 50 percent required at least one acre for a single-family dwelling, with some minimums ranging as high as five acres.<sup>27</sup> Less than 10 years later, areas requiring at least one acre for a home were approaching two-thirds of this same land area due to increases in minimum lot sizes.<sup>28</sup> Lot size minimums have generally continued to increase since that time.<sup>29</sup> So long as abundant undeveloped land remained on the urban fringe, the economic effects of these land use regulations could be delayed for a time; but with large lot minimums causing land to be consumed for residential development at rapid rates, that reckoning came for some metropolitan areas as early as the 1970s. By then, the regional effects of each municipality seeking to shift the burden of growth onto the next town over were becoming too obvious to be ignored any longer.<sup>30</sup>

## 2. Agricultural Minimums

The notion of zoning for lots large enough to be practical for cultivating crops or keeping livestock evolved somewhat later than zoning for the suburban large lot and, in some cases, in reaction to public alarm during the 1960s and 1970s over the rapid consumption of agricultural land that resulted from large lot requirements.<sup>31</sup> Although those minimums, usually of 10 acres or more, were seen as legally dubious at first, they received a degree of vindication from the holding in *Penn Central Transp. Co. v. New York City* (1978) that landowners do not suffer a taking unless effectively deprived of all economically reasonable use or value of their property.<sup>32</sup> Viewed by the courts in a different light than large lot zoning, and as perhaps essential to the establishment of urban services boundaries or greenbelts that serve legitimate planning purposes, they are not the focus of this article and will be addressed only briefly in section III.A.

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<sup>26</sup> For example, Texas counties generally lack the authority to zone. See TEX. LOCAL GOV'T CODE § 211 (2023), which grants the power to zone to municipalities only.

<sup>27</sup> David Schoenbrod, *Large Lot Zoning*, 78 YALE L. J., Vol. 8, July 1969, at 1418.

<sup>28</sup> *Id.* at 1418, n.3.

<sup>29</sup> According to a study of Connecticut towns, the town of Guilford increased the minimum lot size for the northern section of the town from 10,000 square feet in 1953 to 40,000 in 1955, to 60,000 in 1969, and to 160,000 in 1978. In Woodbridge, Connecticut, lot minimums in its most common residential zone increased from 20,000 square feet in 1932 to 60,000 in 1938, to 65,000 in 1966, and to 87,000 in 2001. Robert C. Ellickson, *Zoning and the Cost of Housing: Evidence from Silicon Valley, Greater New Haven, and Greater Austin*, 42:5 CARDOZO L. REV. 1611, 1626, n.59 (2021).

<sup>30</sup> New Jersey's Mount Laurel series of cases, in which suburban zoning collided with an acute need for affordable housing, which had been caused in part by that zoning, began in the mid-1970s (see *S. Burlington Cnty. NAACP v. Mount Laurel Twp.*, 67 N.J. 151, 336 A.2d 713 (1975)).

<sup>31</sup> Chengri Ding, Gerrit J. Knaap & Lewis D. Hopkins, *Managing Urban Growth with Urban Growth Boundaries: A Theoretical Analysis*, 46 J. URBAN ECON., 53, at 53–54 (1999). The first noteworthy use of large-lot zoning to serve conservationist purposes was in Lexington, Kentucky, in 1958, before the emergence of the modern environmental movement, but the concept came to prominence in 1973 in Oregon, when the state required all cities to include urban growth boundaries as part of their comprehensive plans. Since that time, planners have increasingly recognized and emphasized the complementarity between compact and contiguous urban growth and the conservation of agricultural or natural landscapes.

<sup>32</sup> *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 98 S. Ct. 2646 (1978).



### 3. Lot Minimums in Urban Areas

The use of minimum lot sizes was emphatically not limited to undeveloped suburban or exurban areas, although urban regulations have received comparatively little attention in the literature. As outlying towns adopted lot sizes of an acre or more, cities likewise adopted their own minimums for built-up areas, and, by 1950, the largest minimum lot size permitted in the suburb of Euclid in 1926, 5,000 square feet, had become typical of the smallest permissible lot size in the central neighborhoods of some of the United States' major cities. Austin, Texas, adopted a 3,000-square-foot minimum lot size in 1931, which was increased to 5,750 square feet in 1946, where it remains to this day.<sup>33</sup> In 1946, Los Angeles, California, adopted a minimum lot size of 5,000 square feet despite having previously built a multitude of freestanding cottage homes in bungalow courts, where dwellings could average less than 1,000 square feet of land apiece.<sup>34</sup> Portland, Oregon, adopted a 4,000-square-foot minimum lot size in 1959, which was later increased to 5,000 square feet, even though the city contained numerous 2,500-square-foot and 3,300-square-foot lots, which had been platted and developed as early as the 19th century.<sup>35</sup>

The result of those changes was to render large numbers of preexisting urban lots noncompliant with city zoning and to outlaw subdivision of urban lots into even smaller parcels that might accommodate smaller and lower-cost owner-occupied homes. In that way, the cities acted to protect themselves from the perceived financial scourge of the low-cost single-family home on a small lot. Although certain cities, such as Houston and Los Angeles, have more recently reformed their zoning to allow smaller lots in certain areas, most cities retain the minimums adopted in the 1940s and 1950s even as their populations have grown dramatically and the demand to live in central city areas has surged, leaving supply unable to meet the growing demand for urban living.<sup>36</sup> Lot size minimums have also served to set a cap on single-family home ownership in cities by, in effect, prohibiting the creation of new lots for single-family detached houses in built-up areas—even if existing lots have abundant space to do so. Instead, most new housing is in multifamily forms, which are more likely to be offered for rent, while increasing cost pressure on remaining single-family dwellings pushes home ownership out of the reach of all but the wealthiest residents. The example of Houston, as discussed in the next section, and the experience of cities lacking minimum lot sizes altogether, such as Tokyo, Japan, and other

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<sup>33</sup> AUSTIN, TEX. ZONING ORDINANCE § 12 (1931), <https://www.austincontrarian.com/files/1931-zoning-ordinance.pdf>; Andra Lim, *Should Austin Block or Welcome Development of New Homes on Tiny Lots?*, AUSTIN AMERICAN-STATESMAN, Sept. 4, 2016, <https://www.statesman.com/story/news/2016/09/04/should-austin-block-or-welcome-development-of-new-homes-on-tiny-lots/10109943007/>.

<sup>34</sup> Todd Gish, *Bungalow Court Housing in Los Angeles, 1900–1930: Top-down Innovation? Or Bottom-up Reform?*, 91 S. CAL. QUARTERLY, no. 4, 2010, 384 (noting that “by 1924, more than 23,000 dwelling units in the city of Los Angeles—more than 7 percent—were situated in house courts of all kinds”). In the case of *Clemons v. City of Los Angeles*, 36 Cal. 2d 95, 222 P.2d 439 (1950), an owner of a typical bungalow court with nine homes on a single property unsuccessfully sought to subdivide the lot so that each of the homes would sit on its own 925-square-foot parcel.

<sup>35</sup> *Portland's Historically Narrow Lots*, CITY OF PORTLAND, OR. (Oct. 2017), [https://www.portland.gov/sites/default/files/2019-12/vol\\_3\\_appendix\\_g\\_historicallynarrowlots.pdf](https://www.portland.gov/sites/default/files/2019-12/vol_3_appendix_g_historicallynarrowlots.pdf).

<sup>36</sup> See CITY OF HOUSTON CODE OF ORDINANCES, § 42-1 et seq. (2023) and LOS ANGELES MUNICIPAL CODE § 12.22 C.27 (2018). The Los Angeles ordinance, enacted in 2005, legalized residential lots as small as 600 square feet but did so only in areas zoned for multifamily and commercial uses, exempting all areas zoned for single-family use. The ordinance further imposed a burdensome special permitting process for small lot subdivisions and complex design standards, which limited the usefulness of the ordinance.

Japanese cities, shows that this result is not the inevitable result of market forces but rather the product of regulations that unjustifiably interfere with residents' preferences.<sup>37</sup>

### **B. Academic Study of Lot Minimums**

The legal basis for minimum lot size regulations and the economic effect they have on the housing markets of metropolitan areas received widespread scholarly attention from the late 1950s to about 1970. The general conclusions of those research efforts were that minimum lot sizes failed to achieve their purported objectives of preserving open spaces and protecting the character of the community and, in fact, were even counterproductive to those goals; that they adversely affected housing affordability; that they promoted automobile dependence; and finally, that their constitutionality—even under a rational basis standard of review—was open to question.<sup>38</sup> After 1970, in response to a series of litigation setbacks,<sup>39</sup> defenders of large minimum lot sizes proposed the use of ecological rationales to assuage the concerns of skeptical courts and to serve as a plausible general welfare justification for regulations requiring an acre or more of land for each single-family home.<sup>40</sup> Environmental legislation was also proposed as a more politically acceptable alternative to exclusionary zoning that was capable of achieving the same results.<sup>41</sup> With the ascendance of the modern environmental movement during the 1970s lending credence to those contentions, litigation challenging minimum lot sizes dwindled, and the subject received limited attention from legal scholars in the four decades following.<sup>42</sup>

Economics research into the effects of minimum lot sizes on housing prices and urban form continued, however, and by the 2010s, in conjunction with a growing movement for liberalizing zoning regulations, minimum lot size regulations had begun to generate renewed academic interest among both economists and legal scholars. The conclusions of those studies generally mirrored those of the research performed several decades earlier, finding that large lot size minimums hinder affordability, assist exclusionary objectives, encourage automobile dependency,

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<sup>37</sup> See *Introduction of Urban Land Use Planning System in Japan*, CITY PLAN. DIV., CITY & REG'L DEV. BUREAU, MIN. OF LAND, INF. & TRANS. (2003), <https://www.mlit.go.jp/common/001050453.pdf>. According to these regulations, all that is required is two meters of street frontage per lot. Floor area ratio is prescribed on the basis of zone, lot size, and street width, but lot size itself is not regulated in any zone, and the number of units per structure is likewise not limited. Notwithstanding those regulations, which are highly permissive by American standards, Tokyo's urban landscape is dominated by single-family detached homes. The homeownership rate in Japan of approximately 61 percent as of the late 2010s was only slightly less than the rate in the United States despite Japan having 10 times the population density of the United States.

<sup>38</sup> For a sampling of this research, which presents many thoughtful and well-reasoned arguments, see *Zoning Against the Public Welfare: Judicial Limitations on Municipal Parochialism*, 71 YALE L.J., no. 4, 1962, at 720; Peter Ames Eveleth, *An Appraisal of Techniques to Preserve Open Space*, 9 VILLANOVA L. REV. 559 (1964); *The Police Power and Minimum Lot Size Zoning*, Becker, *supra* note 24; Schoenbrod, *supra* note 27.

<sup>39</sup> See discussion at section II.C.

<sup>40</sup> See, e.g., John Anderson, *Environmental Considerations: New Arguments for Large-Lot Zoning*, 7 URB. L. ANN. 370 (1974) (stating that "multi-acre zoning will be permitted where it is necessary to preserve the natural resources of the area and prevent ecological harm"), and Dwight Preston, *Zoning—Rural America: A New Lease on Life?*, 10 SAN DIEGO L. REV. 887, 899–900 (1973) (contending that "the rural character of a community is a valuable asset in today's environmental revolution. As such, it should be a protectible asset, and the residents of these communities have a right to preserve it, even when the means used to achieve this end is through exclusionary zoning.").

<sup>41</sup> See Frank F. Skillern, *Environmental Legislation—An Alternative to Minimum Acreage Zoning*, 6 TEX. TECH. L. REV. 4 (1975) (noting that "environmental legislation . . . may be an alternative to traditional zoning that achieves basically similar objectives in a less controversial manner").

<sup>42</sup> An internet search for law review articles that addressed minimum lot sizes in the context of Euclidean zoning showed that such articles were most common in the 1970s, with 292 articles published in that decade, declining to 125 in the 1980s and 83 in the 1990s. The number rose to 103 in the 2000s before declining to 58 in the 2010s.

and increase the rate at which undeveloped land is consumed for housing.<sup>43</sup> The amount of revenue lost to cities from forbidding lot subdivision in the face of intense demand may be extraordinarily high: one 2021 study estimated that the city of Vancouver, Canada, was forfeiting \$43 billion in land value by failing to allow lot splits and forfeiting a staggering \$146 billion by forbidding lots from being split into four, which could be accommodated by using Vancouver's alleys.<sup>44</sup> This would represent approximately 10 percent of the entire 2021 assessed value of British Columbia's Lower Mainland Region, which encompasses the greater Vancouver metropolitan area and surrounding areas.<sup>45</sup>

In addition, the minimum lot size reductions enacted by Houston in 1998 furnished a real-life case study of the consequences of reform in the context of an already developed urban area. Houston, which had rejected use-based zoning in a 1993 referendum, cut lot size minimums in central city neighborhoods by more than two-thirds and, in response, witnessed a wave of market-led investment and development that reinvigorated an aging housing stock and strengthened the city's tax base.<sup>46</sup> The success of the initial reform led the city in 2013 to expand the area to which the reduced lot minimums applied.<sup>47</sup> In Tennessee, the passage of a major reform to condominium law in 2008<sup>48</sup>—which, among other changes, simplified the process for creating small condominium associations—resulted in single-family homes on lots zoned for two-family structures being redeveloped into two units under condominium ownership at a scale that transformed entire neighborhoods.<sup>49</sup>

One of the first papers in many years to exclusively address minimum lot size regulations from a legal perspective proposed, among other things, the enactment of state laws that would preempt municipal ordinances regarding lot minimums rather than direct challenge of land use ordinances through litigation.<sup>50</sup> Such legislation has in recent years been proposed in several

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<sup>43</sup> See, e.g., Paul Boudreaux, *Lotting Large: The Phenomenon of Minimum Lot Size Laws*, 68 ME. L. REV. 1 (2016); M. Nolan Gray & Salim Furth, *Do Minimum Lot Size Regulations Limit Housing Supply in Texas?*, MERCATUS CTR., GEO. MASON UNIV. (May 1, 2019); Weihua Zhao, *The Long-Run Effects of Minimum Lot Size on Housing Redevelopment*, 55 J. HOUS. ECON. (2022); Jake Wegmann, *Bayou City Townhouse Boom: Does Houston Have Something to Teach Us About Pro-climate Urban Transformation?*, PLATFORM (Oct. 29, 2020); Mike Mei, *House Size and Household Size: The Distributional Effects of the Minimum Lot Size Regulation* (Univ. Mich., Working Paper, Oct. 17, 2022), [http://mikemei.com/uploads/1/3/7/2/137207430/mei\\_mike\\_2022\\_jmp.pdf](http://mikemei.com/uploads/1/3/7/2/137207430/mei_mike_2022_jmp.pdf).

<sup>44</sup> Jens von Bergman & Nathan Lauster, *Lots of Opportunity: Estimating the Zoning Tax in Vancouver*, MOUNTAIN DOODLES (July 25, 2021), <https://doodles.mountainmath.ca/blog/2021/07/25/lots-of-opportunity-estimating-the-zoning-tax-in-vancouver/>.

<sup>45</sup> *Homes in Some B.C. Suburbs Jump by More Than 40% in Assessed Value on 2022 Notices*, CBC NEWS, Jan. 4, 2022, <https://www.cbc.ca/news/canada/british-columbia/b-c-property-assessments-2021-1.6303403#:~:text=B.C.%20Assessment%20said%20that%20for,and%20property%20rezoning%2C%20it%20said.>

<sup>46</sup> Houston adjusted its minimum lot size for single-family homes in certain areas from 5,000 square feet to 1,400 square feet in 1998. See M. Nolan Gray & Adam A. Millsap, *Subdividing the Unzoned City: An Analysis of the Causes and Effects of Houston's 1998 Subdivision Reform*, MERCATUS CTR., GEO. MASON UNIV. (July 15, 2020); and M. Nolan Gray & Jessica McBirney, *Liberalizing Land Use Regulations: The Case of Houston*, MERCATUS CTR., GEO. MASON UNIV. (Aug. 17, 2020). Houston's reforms were exceptional in both the degree to which minimums were relaxed and the size of the area to which the reforms applied; however, Houston has been imitated by few, if any, other American cities.

<sup>47</sup> Gray & McBirney, *supra* note 46.

<sup>48</sup> Tennessee Condominium Act of 2008, codified at TENN. CODE ANN. § 66-27-201 et seq. (2023).

<sup>49</sup> Mike Reicher, *Tall Skinny Takeover: Which Nashville Neighborhoods Are Doubling Up After Demolition*, THE TENNESSEAN, Oct. 12, 2017, <https://www.tennessean.com/story/news/2017/10/12/nashville-housing-boom-redevelopment-strains-neighborhoods/694979001/>. The article notes that Nashville issued 962 residential demolition permits in 2015 and 1,035 in 2016 that were heavily concentrated in select neighborhoods undergoing conversion, predominantly from one to two homes on each lot.

<sup>50</sup> Boudreaux, *supra* note 43 at 40–42.

states, including Vermont, Texas, and Washington.<sup>51</sup> This article proposes that urban minimum lot size regulations also remain vulnerable to court challenges. Not only do the court decisions reached in earlier decades stand on shaky ground given subsequent land use litigation, research, and understanding of the effects of exclusionary zoning, but in recent years, states have been amending their zoning enabling statutes to require municipalities to embrace a broader range of considerations, including affordability and regional housing demand, in promulgating zoning ordinances. These findings and changes provide a fresh basis for potential litigation.

### III. EVALUATION OF CASE LAW AND STATUTES

#### A. *The Needham Case*

The first collision between the courts and municipal lot size regulations seems to have occurred in 1942 in Needham, Massachusetts, a town approximately 10 miles west of the city of Boston that was at that time directly in the path of suburban expansion. Rapid growth was not a new phenomenon for Needham, where passenger rail service had opened as early as 1853, helping to boost the town's population from 1,944 in 1850 to 5,252 in 1880.<sup>52</sup> Despite that experience with growth and change in what had for centuries been a modest farming community, single-family zoning did not arrive in Needham until 1925.<sup>53</sup>

With increasing housing demand from a growing population of automobile owners, Needham adopted a 7,000-square-foot minimum lot size for single-family homes in the largely undeveloped south side of town in 1931. That minimum was increased to 10,000 square feet in 1939. In June 1941, one Philip Simon entered into an agreement to purchase approximately 24 acres of land in the southern portion of the town, which he proposed to subdivide into 58 house lots of between 13,500 and 27,000 square feet. The town planning board, following a hearing on the proposed subdivision, rezoned Simon's land to require 43,560 square feet (one acre) per home in July 1941, then disapproved his subdivision plan in August 1941 for failing to comply with the new minimum lot size regulations. The sole documented basis for the rezoning, as reported by the Needham planning board, was that the south side of town was then yielding a hefty tax profit due to being predominantly undeveloped. Were the district developed with homes on smaller lots, the town contended, the result would be a need for costly additional services, which would cause a decline in net tax receipts.<sup>54</sup>

In deciding which analytical standard to apply to this ordinance, the court cited the statement in *Euclid v. Ambler Realty*, which held that deference was due where the validity of a zoning

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<sup>51</sup> See Vermont's Senate Bill 237 (Act 179) from the 2019–2020 session, which before amendment would have required minimum lot sizes of no greater than 5,400 square feet in areas served by city water and sewer and no greater than 10,890 square feet in areas served by city water only; Texas' S.B. 1787/H.B. 3921 from the 2023 session, which would set a minimum lot size of 2,500 square feet in certain counties (up from 1,400 square feet in the original bill); and Washington's S.B. 5346/H.B. 1245 from the 2023–2024 session, which would set a minimum lot size of 2,000 square feet (up from 1,500 square feet in the original bill). Notably, in the case of the Texas and Washington bills, the proposed allowable minimums would prohibit not only large lot zoning but also the smaller lots of about 5,000 square feet commonly found in existing city neighborhoods.

<sup>52</sup> Wikipedia, *Needham, Massachusetts, Demographics*, [https://en.wikipedia.org/wiki/Needham,\\_Massachusetts#Demographics](https://en.wikipedia.org/wiki/Needham,_Massachusetts#Demographics) (last visited Aug. 14, 2023).

<sup>53</sup> *Simon v. Needham*, 311 Mass. 560, 561 (1942).

<sup>54</sup> *Id.* at 565–66. Although the court rejected without analysis the maintenance of low tax rates as a legally sufficient basis for exercise of local zoning powers (“[w]e assume in favor of the petitioner that a zoning by-law cannot be used primarily as a device to maintain a low tax rate”), apparently no evidence was presented as to the financial impact on the town of development of lots on one acre versus on lots of 10,000 square feet.

classification was fairly debatable, but without mentioning *Nectow v. City of Cambridge*, a case in which the Supreme Court required a municipality to show that a specific zoning regulation had a *substantial* relationship to the general welfare, not merely *any* relationship.<sup>55</sup> In doing so, the court adopted the position that any local zoning ordinance, no matter how dubious its motivations or deleterious its impacts, would receive the utmost solicitude.<sup>56</sup> Under that test, which has been characterized as an “anything goes” version of the fairly debatable rule, scrutiny of the facts is superfluous, and any justification, real or hypothetical, will suffice.<sup>57</sup> In the case before it, the court volunteered its own speculative justifications for Needham’s minimum lot size ordinance, musing that lots of 43,560 square feet, when compared with those of 10,000 square feet, might offer “more freedom from noise and traffic,” “greater facilities for children to play on the premises and not in the streets,” and “more inducement for one to attempt something in the way of the cultivation of flowers, shrubs and vegetables.”<sup>58</sup> No data or statistics of any kind were presented in support of those claims, which had not been raised by the parties or their experts, and the court did not support them with any citations. The mere belief that those claims might have merit was reasonable, the court held, and therefore sufficient to uphold the ordinance.<sup>59</sup>

The court also proposed—but did not adopt—a heightened level of scrutiny, citing *Euclid* for the proposition that “[a] zoning by-law cannot be adopted for the purpose of setting up a barrier against the influx of thrifty and respectable citizens who desire to live there,” and that “[t]he strictly local interests of the town must yield if it appears that they are plainly in conflict with the general interests of the public at large.”<sup>60</sup> Recognizing but failing to heed *Euclid*’s direction that the courts were to apply a balancing test rather than a supplicating deference would have momentous consequences.<sup>61</sup> Had the court applied that test, it would likely have been challenging for the town of Needham to demonstrate how responding to an increasing need for housing by decreasing the capacity of the town to accommodate homes was in the interest of Massachusetts residents. By adopting a deferential standard, the court evaded the thorny but consequential

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<sup>55</sup> *Id.* at 564–65; *Nectow v. City of Cambridge*, 277 U.S. 183, 188, 48 S. Ct. 447, 448 (1928).

<sup>56</sup> *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926). *See also* Ashira Ostrow, *Judicial Review of Local Land Use Decisions: Lessons from RLUIPA*, 31 HARV. J.L. & PUB. POL’Y 717 (2008). Ostrow notes that under the *Euclid* and *Nectow* decisions, “facial challenges to zoning ordinances are reviewed under *Euclid*’s highly deferential standard, while as-applied land use challenges are reviewed under *Nectow*’s less deferential, fact-oriented approach. Despite these precedents, most courts ignore the facial/as-applied dichotomy and review both facial and as-applied challenges deferentially.”

<sup>57</sup> Charles L. Siemon & Julie P. Kendig, *Judicial Review of Local Government Decisions: “Midnight in the Garden of Good and Evil,”* 20 NOVA L. REV. 707, 710 (1996). Siemon and Kendig discuss the origin of the “anything goes” epithet and how it “so badly imbalanced public and private interests in regard to the use of land that it is practically impossible to redress even outrageous abuses of the zoning power.” The authors also capture the insidious legalism entrenched in the American practice of zoning to which Richard Babcock alluded in the introductory quotation to this article, observing that “American planning has not lived up to its capability, not because planners were unable to anticipate the terrible social and economic cost of mindless sprawl, but because planning was made irrelevant in a society that takes [its] cues from legal institutions.”

<sup>58</sup> *Needham*, 311 Mass. at *supra* note 5 at 563–64.

<sup>59</sup> *Id.* at 564. The court stressed that its holding was narrow, stating that “[w]e make no intimation that, if the lots were required to be larger than an acre or if the circumstances were even slightly different, the same result would be reached. It will be time enough to determine that question when it is presented.” How the test established by the court could possibly result in a different outcome, however, even under a substantially different set of facts, is difficult to see. *Id.* at 567.

<sup>60</sup> *Id.* at 565–66.

<sup>61</sup> *Euclid v. Ambler*, 272 U.S. at 381–82: “It is not meant by this, however, to exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way.” What can such a statement mean if not to say that courts considering zoning matters must apply a balancing test, and that interests on the part of the municipality—even if valid or at least fairly debatable—would not always suffice to uphold an ordinance?

question of whether the general public interest in increasing housing supply to meet demand outweighed the supposed fiscal interests of the town of Needham in avoiding the natural effects of accommodating population growth.

### ***B. Early Deference: 1950–1959***

Following the decision in *Needham*, courts deployed a highly deferential standard to uphold lot minimums even larger than one acre in which regional housing demand was ignored and exclusionary motives were passed over or even embraced as a legitimate municipal objective. In 1950, New York’s Second Department Appellate Division upheld a two-acre minimum lot size in a wealthy Nassau County suburb under what the court characterized as an “elastic” application of the police power.<sup>62</sup> Two years later, the Missouri Supreme Court upheld a three-acre lot size minimum in the city of Ladue, an inner suburb of St. Louis then under intense development pressure as the city expanded and suburbanized.<sup>63</sup> Also in 1952, the New Jersey Supreme Court upheld a five-acre minimum lot size in Bedminster, New Jersey, a largely agricultural Somerset County town 35 miles west of Manhattan.<sup>64</sup> Lot minimums larger than two acres were subsequently approved even in suburban contexts, however. In 1957, the Illinois Supreme Court upheld a five-acre lot size minimum in a Chicago suburb under a “fairly debatable” standard.<sup>65</sup> In 1959, the Connecticut Supreme Court upheld a rezoning from two- to four-acre lot minimums in a wealthy commuter town served by passenger rail in a decision that gave the court’s blessing to the preservation of elite economic status as a permissible basis for exercise of the zoning power.<sup>66</sup>

During an era in which suburbanization was proceeding apace and urban areas were facing disinvestment and population loss, it should come as no surprise that most minimum lot size challenges arose in the outskirts of metropolitan areas, where the great majority of land subdivision was occurring. Those areas often lacked sanitary sewers and city water, lending a facially plausible health rationale for large lot size minimums, which courts had begun to incorporate into their decisions by the late 1950s.<sup>67</sup>

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<sup>62</sup> *Dilliard v. Vill. of North Hills*, 276 App. Div. 969, 94 N.Y.S.2d 715 (App. Div. 1950). *See also* *Gignoux v. Vill. of Kings Point*, 199 Misc. 485, 487, 99 N.Y.S.2d 280, 282 (Sup. Ct. 1950), and *Levitt v. Inc. Vill. of Sands Point*, 6 N.Y.2d 269, 189 N.Y.S.2d 212, 160 N.E.2d 501 (App. Div. 1958), in which the court upheld a 40,000-square-foot minimum lot size and a two-acre minimum lot size in affluent waterfront communities by appealing to anti-urban sentiment and by describing a suburb two miles from a Long Island Rail Road station as a “rural” area.

<sup>63</sup> *Flora Realty and Inv. Co. v. Ladue*, 246 S.V.2d 771 (Mo. 1952). The Ladue court, like the Needham court, recognized that housing and development was of regional concern, not merely a question for the municipality, but ultimately applied the same “fairly debatable” test in upholding the three-acre minimum lot size ordinance.

<sup>64</sup> *Fischer v. Bedminster Twp.*, 11 N.J. 194, 198, 93 A.2d 378, 383 (1952). The court in Bedminster was one of the first to identify an environmentalist, or at least conservationist, purpose for large minimum lot sizes, observing that “[a]s much foresight is now required to preserve the countryside for its best use as has been needed to save what could be salvaged of our cities.” In the court’s view, the five-acre minimum was justifiable not simply for enhancement of residents’ quality of life, but as a means of establishing a semblance of a greenbelt around the vast perimeter of the New York metropolitan area.

<sup>65</sup> *Honeck v. County of Cook*, 12 Ill.2d 257, 146 N.E.2d 35 (1957).

<sup>66</sup> *Senior v. New Canaan*, 146 Conn. 531, 535, 153 A.2d 415, 417–18 (1959). The court noted that “New Canaan, as of the 1950 census, had the highest per capita income of any town, village or city in the United States. This fact . . . was certainly a proper fact for it to consider in deciding whether the establishment of a superior residential district would be the most appropriate use of this unspoiled area.”

<sup>67</sup> In 1955, the Connecticut Supreme Court opined that increasing lot size minimums to one acre in the town of Bolton, Connecticut, was justified as a means of providing greater distance between septic systems and residential water supply in an area lacking sanitary sewers. *Demars v. Zoning Commission*, 142 Conn. 580, 115 A.2d 653 (1955). A New Jersey court further developed that doctrine in 1956, holding that a 20,000-square-foot minimum lot size, in an area adjacent to homes on much

One notable exception to that trend occurred in Los Angeles in 1948, when the owner of a cluster of nine cottage homes built as rentals subdivided his property so that each cottage stood on its own 925-square-foot lot. He then proceeded to sell eight of the properties, all of which were served by sanitary sewers, to individual owners.<sup>68</sup> The subdivision and sale entailed no physical change to the property, with the only notable difference being that the city of Los Angeles had eight new homeowners where it formerly had eight tenants. For that action, the original owner was threatened with arrest and prosecution for violating the city's 5,000-square-foot minimum lot size for single-family homes, and the sales transactions, which had been recorded pursuant to state property law, were deemed null and void by the trial court pursuant to municipal zoning law.<sup>69</sup>

In what must be one of the most egregiously classist and paternalistic decisions in the annals of zoning jurisprudence, the Supreme Court of California in 1950 ruled 5–2 in *Clemons v. City of Los Angeles* to uphold the trial court's decision, reasoning that turning rental units into owner-occupied homes “tends to create slum conditions . . . because it would be unlikely that a uniform state of repair would be maintained by the various owners and a ‘hodge-podge appearance’ would result.”<sup>70</sup> The court also stated that “disturbing tensions” might arise over common areas and that residents would be more likely to overcrowd their homes if not policed by a landlord.<sup>71</sup> As discussed further below, *Clemons* represents an underexplored but vulnerable category of minimum lot size regulations that are deployed in areas where the full range of municipal services, including sewer and water, are already provided and where defenses of such regulations must therefore fall back on concerns that are less quantifiable and potentially less justifiable.

### **C. The Property Rights Counteroffensive: 1959–1970**

The turning point in the judicial consideration of minimum lot sizes began not with a court victory over a lot size regulation but with a dissenting opinion, issued by Justice John C. Bell, in response to a 1958 Pennsylvania Supreme Court decision upholding a one-acre lot size minimum promulgated by Easttown Township in Pennsylvania's Chester County (*Bilbar Construction Co. v. Easttown Township Board of Adjustment*). Bell criticized the majority opinion for distinguishing a 1954 decision in which the court struck down minimum square footage requirements for homes and noted that even the township conceded that much less than an acre was sufficient for on-site wastewater disposal. Bell took up the more searching standard that the *Needham* court had declined to apply, observing that lot size minimums such as Easttown Township's “effectually block the expansion of our country's rapidly growing population into any suburban township or county, or would herd the poor and medium income people into specified areas and effectually and intentionally limit parts or all of a county to the rich or well-to-do.”<sup>72</sup> Signaling a shift in prevailing winds that was reinforced with the better-known dissent of New Jersey Supreme Court Justice Frederick Wilson Hall from 1962 addressing exclusionary zoning as

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smaller lots, was justifiable as a means to better permit soil absorption of wastewater. *Clary v. Borough of Eatontown*, 41 N.J. Super. 47, 124 A.2d 54 (1956).

<sup>68</sup> *Clemons v. City of Los Angeles*, 222 P.2d 439, 441 (Cal. 1950).

<sup>69</sup> *Id.* at 445–46.

<sup>70</sup> *Id.* at 442.

<sup>71</sup> *Id.* at 443.

<sup>72</sup> *Bilbar Const. Co. v. Easttown Bd. of Adjmt.*, 393 Pa. 62, 68–69, 141 A.2d 851, 855 (1958). The majority opinion distinguished in *Appeal of Medinger*, 377 Pa. 217, 104 A.2d 118 (1954), in which the court struck down a municipal requirement banning the construction of homes of less than 1,800 square feet.



a whole, Justice Bell's dissent inaugurated more than a decade of legal victories against large lot zoning by reinvigorated state judiciaries.<sup>73</sup>

The following year, the Virginia Supreme Court dealt a major blow to suburban minimum lot sizes by striking down a two-acre lot size minimum in booming Fairfax County, where the population had grown from 98,000 in 1950 to 201,000 in 1957.<sup>74</sup> Joining Justice Bell's reasoning, the majority stated that the effect of the minimum was to prevent lower-income households from residing in the district and that this exclusionary purpose had no relation to health, safety, or the public welfare.<sup>75</sup> In 1962, the Michigan Supreme Court struck down a half-acre minimum lot size enacted by the growing city of Troy in a far-reaching decision that set limits on the ability of cities to arbitrarily impose limits on present and long-term growth.<sup>76</sup> The half-acre minimum could not be justified by the need to accommodate a septic system because the area in question was served by sanitary sewers. Rather, the city contended that the lot size had been selected to limit total city population to the number of persons able to be served pursuant to its contract with the regional sewer system and that it implicated health concerns.<sup>77</sup> The court rejected the city's rationale, holding that the zoning power could not be used to set a population cap and that citywide sewer capacity is ultimately a political issue, not merely a question of public health.<sup>78</sup> The holding has been imitated by few if any other state courts, but it remains available as an argument that can be employed against municipalities that now, as then, deliberately fail to expand infrastructure for the purpose of manufacturing a public health justification against accommodating additional residents.

Further victories for property owners occurred in Illinois, where the state supreme court in 1963 struck down a 20,000-square-foot lot minimum in Cook County in favor of a builder who planned a subdivision of 10,000-square-foot lots, and in Massachusetts, where the supreme court in the 1964 decision of *Aronson v. Town of Sharon* limited the holding in *Needham* by holding that the Town of Sharon had gone too far in rezoning an area subject to a 40,000-square-foot lot minimum for 100,000 square feet.<sup>79</sup> Without overruling *Needham*, the court held that the rationale for larger lots articulated in that decision would run into diminishing returns as lot sizes continued to increase.<sup>80</sup> The court noted that Sharon's stated purpose in requiring larger lot sizes was a desire to preserve land in its natural state, which the court held was "properly . . . the subject of eminent domain."<sup>81</sup> In so holding, the court *sub silentio* discarded the fairly debatable test that it had identified as the proper standard for review and applied a regulatory takings doctrine in which a desire for generalized and abstract public benefits, such as the supposed recreational amenity of privately owned undeveloped land, should likewise be borne by the public rather than by

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<sup>73</sup> *Vickers v. Twp. Comm. of Gloucester Twp.*, 37 N.J. 232, 181 A.2d 129 (1962), overruled by *S. Burlington Cnty. NAACP v. Mount Laurel Twp.*, 92 N.J. 158, 456 A.2d 390 (1983).

<sup>74</sup> *Board of Supervisors v. Carper*, 200 Va. 653, 655, 107 S.E.2d 390, 392 (1959).

<sup>75</sup> *Id.* at 396.

<sup>76</sup> *Christine Bldg. Co. v. City of Troy*, 367 Mich. 508, 116 N.W.2d 816 (1962).

<sup>77</sup> *Id.* at 512.

<sup>78</sup> *Id.* at 518–19.

<sup>79</sup> *LaSalle Nat. Bank v. Cook County*, 28 Ill.2d 497, 500, 192 N.E.2d 909, 911 (1963); *Aronson v. Town of Sharon*, 346 Mass. 598, 195 N.E.2d 341 (1964).

<sup>80</sup> *Aronson v. Town of Sharon*, 346 Mass. at 604.

<sup>81</sup> *Id.*

individual property owners. Although *Aronson* remains good law, the basis for its holding is open to question in light of subsequent regulatory takings jurisprudence.<sup>82</sup>

In 1965, the Pennsylvania Supreme Court—now presided over by Chief Justice Bell—issued what to date remains a landmark decision in lot size jurisprudence in the *National Land* case.<sup>83</sup> Adopting Justice Bell’s reasoning in his dissent in *Bilbar*, the majority issued a vindication of both individual property rights and the entitlement of the general public to unimpeded housing supply in striking down a four-acre minimum lot size adopted by the very same municipality at issue in *Bilbar*, Easttown Township. Addressing the township’s argument that the minimum was needed to accommodate septic systems because the area lacked sanitary sewers, the court observed that the township had a sanitary code providing health and safety standards for the installation of septic systems, and that the minimum was therefore both superfluous and overly broad.<sup>84</sup> The court also rejected the township’s claim that the minimum was intended to protect rural character, noting that “[i]f the township were developed on the basis of this zoning, however, it could not be seriously contended that the land would retain its rural character—it would simply be dotted with larger homes on larger lots.”<sup>85</sup> The court also rejected general concerns regarding the character of the town, holding that such concerns are matters of private desire rather than public welfare.<sup>86</sup> Lastly, the court cautioned against dire regional consequences were courts to uphold minimums of the sort at issue in *National Land*:

Zoning is a means by which a governmental body can plan for the future—it may not be used as a means to deny the future.... Zoning provisions may not be used...to avoid the increased responsibilities and economic burdens which time and natural growth invariably bring. It is not difficult to envision the tremendous hardship, as well as the chaotic conditions, which would result if all the townships in this area decided to deny to a growing population sites for residential development within the means of at least a significant segment of the people.<sup>87</sup>

The decision in *National Land* was followed by an even bolder decision by the Pennsylvania Supreme Court in 1970’s *Appeal of Kit-Mar Builders*, in which three of the seven justices (with Judge Bell concurring only in the result) held that three- or even two-acre minimum lot sizes were unreasonable “[a]bsent some extraordinary justification.”<sup>88</sup> In doing so, the three justices not only discarded the “fairly debatable” standard employed in prior state court decisions but turned it on its head by placing the burden of proof on the municipality, rather than on the landowner, in cases where minimum lot sizes were two acres or more. Earlier decisions, starting with *Needham*, had arguably erred by applying *Euclid*’s legal standard for a facial challenge to zoning to as-applied challenges to particular ordinances. The authors of the lead opinion in *Appeal of Kit-Mar Builders*, however, established a category of zoning laws for which as-applied challenges would

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<sup>82</sup> Cf. *Collings v. Plan. Bd. of Stow*, 79 Mass. App. Ct. 447, 448, 947 N.E.2d 78, 79 (2011), in which the Appeals Court of Massachusetts cited *Aronson* alongside *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 107 S. Ct. 3141, 97 L.Ed.2d 677 (1987), and *Dolan v. Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L.Ed.2d 304 (1994), in striking down a municipality’s imposition of a transfer of land to the municipality as a condition of subdivision approval.

<sup>83</sup> *Nat’l Land & Inv. Co. v. Kohn*, 419 Pa. 504, 533, 215 A.2d 597, 613 (1965).

<sup>84</sup> *Id.* at 526.

<sup>85</sup> *Id.* at 531.

<sup>86</sup> *Id.* at 530–31.

<sup>87</sup> *Id.* at 528.

<sup>88</sup> *Appeal of Kit-Mar Builders, Inc.*, 439 Pa. 466, 471, 268 A.2d 765, 767 (1970).

be held to an exacting standard in which only the most compelling evidence would suffice to uphold the ordinance in question.

The lead decision, certainly the high-water mark for the cause against excessive minimum lot sizes, was followed by Pennsylvania's commonwealth courts in subsequent years, notwithstanding that the new standard had not commanded the approval of a majority of the Pennsylvania Supreme Court.<sup>89</sup> In 2002, the lead opinion in *Appeal of Kit-Mar Builders* and its lower court progeny were abrogated by the Pennsylvania Supreme Court, which reaffirmed the standard set forth in *National Land* that an ordinance is presumed valid unless it is shown to be unreasonable, arbitrary, or not necessary to a police power purpose.<sup>90</sup>

#### **D. Environmentalism and the Revival of Deference: 1970s–Present**

As the baby boom waned and the rate of American population growth began to slow by the end of the 1960s, an environmental movement that placed an emphasis on the perils of overpopulation, overdevelopment of land, and unceasing urban growth began to make inroads both in the popular imagination and in the American political arena.<sup>91</sup> In the realm of zoning, municipalities latched on to those and other nascent environmental issues as a new means of justifying what the courts of the 1960s had found to be exclusionary and anti-growth land use practices.<sup>92</sup> Due in part to the completion of the interstate highway system, which opened vast new areas to suburbanization, those practices multiplied, diversified, and in some cases became stricter than ever before.<sup>93</sup> Courts that had already struggled with the intricacies of land use regulation were now faced with complex environmental considerations, which they were ill equipped to scrutinize and which were perhaps bound to receive an increased degree of judicial deference.

One of the early signs of resurgent deference came again in Massachusetts, where, in 1975, the appeals court upheld a two-acre minimum lot size in the affluent town of Sherborn<sup>94</sup> under circumstances that, on their face, appeared identical to those in *Aronson v. Town of Sharon*, in which the Massachusetts Supreme Court had, in 1964, struck down a two-acre minimum.

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<sup>89</sup> *Martin v. Millcreek Twp.*, 50 Pa. Cmwlth. 249, 413 A.2d 764 (1980) (10-acre minimum lot size declared unconstitutional); *Mill Valley Assocs. v. Zoning Hearing Bd. of Tredyffrin Twp.*, 126 Pa. Cmwlth. 340, 559 A.2d 985 (1989) (minimum lot size of two and a third acres declared unconstitutional); *Berman v. Bd. of Comm'rs of Twp. of Lower Merion*, 147 Pa. Cmwlth. 405, 608 A.2d 585 (1992) (striking down two-acre minimum in an established neighborhood).

<sup>90</sup> *C & M Developers, Inc. v. Bedminster Twp. Zoning Hearing Bd.*, 820 A.2d 143, 146–47 (2002).

<sup>91</sup> The influential book *The Population Bomb*, by Paul Ehrlich, was published in 1968 and was followed in 1972 by *The Limits to Growth: A Report for the Club of Rome's Project on the Predicament of Mankind*, by Donella H. Meadows et al. See also the succinct discussion of the effect of the environmental movement on land use in ALAN A. ALTSHULER, JOSE A. GÓMEZ-IBÁÑEZ & ARNOLD M. HOWITT, REGULATION FOR REVENUE: THE POLITICAL ECONOMY OF LAND USE EXACTIONS 22–23 (1993) (stating that “[a]s environmental consciousness spread, large numbers of Americans became accustomed to viewing not only large projects but growth itself quite skeptically. . . . For many it seemed only prudent to adopt the working assumption that developers are guilty of environmental recklessness until and unless they can demonstrate otherwise.”).

<sup>92</sup> See, e.g., Brandon M. Ward, *Suburbs Against the Region: Homeowner Environmentalism in 1970s Detroit*, 18 J. PLANNING HISTORY 2 (2018), and Skillern, *supra* note 41, at 4 (noting that “environmental legislation . . . may be an alternative to traditional zoning that achieves basically similar objectives in a less controversial manner”).

<sup>93</sup> Fischel, *supra* note 18, at 329–30. Fischel observed that large lot zoning, originally intended as a “holding zone” that would later be subdivided into smaller lots as development pressures intensified, “solidified into a permanent cast that kept the poor and higher-density development away.” The tension between large lot zoning as a temporary planning device intended to manage growth and a permanent institution intended to exclude those of lesser means is reflected in the challenge courts have had distinguishing genuine agricultural zoning—zoning intended to establish a greenbelt subject to enlargement—from zoning designed to permanently constrain population growth by creating an artificial scarcity of land.

<sup>94</sup> According to Census Bureau data, Sherborn, as of 2020, has the fourth-highest median household income of all 300 Massachusetts towns and cities, U.S. Census Bureau, <https://www.census.gov>.

Although the appeals court followed *Aronson* in holding that the “fairly debatable” standard was not applicable to two-acre zoning—which, instead, required some tangible, quantifiable justification—it held that the town’s representation that two acres was needed to accommodate both a well and septic system without the risk of polluting the local water supply was such a justification.<sup>95</sup>

The plaintiff urged the court to consider the exclusionary effect of the town bylaw as a contrary factor, but the court declined to do so, citing Massachusetts’ then-recent anti-snob zoning law, Chapter 40B,<sup>96</sup> as “at least minimiz[ing]” impacts on low- and moderate-income households.<sup>97</sup> In doing so, the court set aside without discussion a wealth of academic literature—relegated to a footnote in the opinion—demonstrating the exclusive effect of typical suburban zoning.<sup>98</sup> That result, in which Chapter 40B was cited by the court to *justify* large lot zoning, was surely not intended by the Massachusetts Legislature, and the court provided no evidence as to whether the law had yet produced any housing at all, much less housing in the town of Sherborn. In 1997, the Massachusetts Supreme Court upheld three-acre zoning on the island of Martha’s Vineyard on the basis of purely environmental and aesthetic concerns.<sup>99</sup>

Elsewhere, the Oregon Court of Appeals in 1976 upheld one-acre “rural” zoning in overturning Clackamas County’s approval of a 110-unit mobile home park without any consideration of the exclusionary effect of the zoning ordinance.<sup>100</sup> In 1984, the Supreme Court of Ohio upheld a five-acre minimum lot size, which had been enacted in 1971 in Rootstown, a town approximately 14 miles east of the city of Akron. The court did so on the basis of environmental concerns, such as protecting the ecological balance, conserving natural resources, and preventing intensive development, but provided no scrutiny of those concerns nor any discussion of exclusionary effects.<sup>101</sup> On the west coast, where the state supreme court had established a standard of obsequious deference in the *Clemons* decision, five-acre zoning was upheld as early as 1967, in part on the grounds that prevention of “urban sprawl” in rural areas was a reasonable and legitimate zoning purpose.<sup>102</sup> In Pennsylvania, as described earlier, the state supreme court in 2002 formally rejected the lead opinion in *Appeal of Kit-Mar Builders* and abrogated decisions that had adopted its reasoning, returning to the standard articulated in *National Land*.<sup>103</sup> And in Illinois, the appellate court in 2003 upheld a denial of a variance to build a home on a lot smaller than the 20,000-square-foot minimum, noting in *obiter dicta* that “[m]inimum lot area and width limitations help to sustain neighboring property values and promote the health and welfare of the public by preventing overcrowding and overuse of public services such as sewer and water.”<sup>104</sup>

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<sup>95</sup> *Wilson v. Town of Sherborn*, 3 Mass. App. Ct. 237, 242, 326 N.E.2d 922, 925 (1975).

<sup>96</sup> MASS. GEN. LAWS Ch. 40B (2023).

<sup>97</sup> *Wilson v. Sherborn*, 3 Mass. App. Ct. at 244.

<sup>98</sup> *Id.*

<sup>99</sup> *Johnson v. Town of Edgartown*, 425 Mass. 117, 124–25, 680 N.E.2d 37, 42 (1997).

<sup>100</sup> *Jackson v. Bd. of Cnty. Comm’rs for Clackamas Cnty.*, 26 Or. App. 265, 267, 552 P.2d 559, 560 (1976). *See also* *Auckland v. Bd. of Cnty. Comm’rs of Multnomah Cnty.*, 21 Or. App. 596, 536 P.2d 444 (1975) (upholding a two-acre minimum lot size).

<sup>101</sup> *Reed v. Rootstown Twp. Bd. of Zoning Appeals*, 9 Ohio St. 3d 54, 9 OBR 260, 458 N.E.2d 840 (1984).

<sup>102</sup> *Morse v. San Luis Obispo Cnty.*, 247 Cal. App. 2d 600, 603, 55 Cal. Rptr. 710, 712 (Ct. App. 1967).

<sup>103</sup> *C & M Developers, Inc. v. Bedminster Twp. Zoning Hearing Bd.*, 820 A.2d 143, 146–47 (2002).

<sup>104</sup> *LaSalle Nat. Bank v. City of Highland Park*, 344 Ill. App. 3d 259, 278, 799 N.E.2d 781, 796 (2003), *as modified on denial of reh’g* (Oct. 31, 2003). The challenge in *LaSalle* was not to the constitutionality of the minimum lot size ordinance but merely to the ordinance as applied to plaintiffs’ particular property. The city did not offer any evidence, so far as the record reveals, to show whether sewer or water capacity was threatened or whether a 20,000-square-foot minimum lot size for a single-family home is substantially related to prevention of overcrowding, a claim that would seem tenuous in the context of the Chicago

Even as environmental concerns were employed to justify exclusive residential zoning in the 1970s and later, that trend was not uniform, with New Jersey courts adopting rigorous scrutiny of exclusionary measures in ways that either directly or incidentally affected municipalities' ability to use large lot zoning as a means of completely excluding lower-cost housing types and preventing population increase.<sup>105</sup> The tension between environmentalism and the need for affordable housing remains present in local debates over development proposals, political debates over zoning reform, and court decisions on zoning and land use matters.

### ***E. Conservationism and the Emergence of Agricultural Zoning***

It did not escape the notice of some courts that, rather than preserving agricultural or natural landscapes, minimum lot sizes in the one- to 10-acre range caused undeveloped land to be consumed at a voracious rate, with prime farmland or pristine forest being subdivided into lots far larger than needed for a single home yet too small for farming purposes.<sup>106</sup> Implicit in such a finding was that the preservation of farmland, wilderness, or other natural resources might be a valid planning or zoning objective. The question was not merely one of conservation or even aesthetics but of efficient urban planning: could towns and cities employ the lot size power to establish an agricultural greenbelt that would assist in the concentration of population into discrete settlements served by urban infrastructure while allowing for compact and contiguous expansion of those urbanized areas?

One of the first American cities to implement this approach was Lexington, Kentucky, where a desire to protect the culturally significant horse farms surrounding the city led to the adoption of an urban service boundary in 1958 beyond which a 40-acre minimum lot size was established.<sup>107</sup> Effectively, Lexington—through the exercise of its zoning powers—had declared that homes could be either urban, on lots that were likely to be small, or rural, on lots that were mandated to be large, but that the home on two or three acres, served by septic and well water, was the enemy of Kentucky's bluegrass landscape. Lexington's plan preceded the modern environmental movement but reflected genuine environmental concerns regarding the conservation of uninterrupted rural landscapes, the liabilities inherent in leapfrog suburban expansion, and the efficiency of urban infrastructure. In time, the planning objective of compact towns surrounded by agricultural land was incorporated into the zoning enabling acts of certain states, such as Vermont and New Jersey, whereas preservation of agriculture was recognized as a zoning goal in others, including Pennsylvania, Virginia, and Iowa.<sup>108</sup>

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metropolitan area, where much smaller lot sizes are common. Only one mile to the east of the plaintiffs' property, the City of Highland Park has permitted the construction of more than 30 units per 20,000 square feet in mid-rise apartment buildings.

<sup>105</sup> Best known among these cases are the Mount Laurel series of cases (*see, e.g., S. Burlington Cnty. NAACP v. Mount Laurel Twp.*, 67 N.J. 151, 336 A.2d 713 (1975)), but *see also* *Berenson v. Town of New Castle*, 67 A.D.2d 506, 516, 415 N.Y.S.2d 669, 675 (1979), for an example from New York.

<sup>106</sup> *See Nat'l Land & Inv. Co. v. Kohn*, 419 Pa. 504, 533, 215 A.2d 597, 613 (1965) ("If the township were developed on the basis of [four-acre] zoning, however, it could not be seriously contended that the land would retain its rural character—it would simply be dotted with larger homes on larger lots"), and *Martin v. Millcreek Twp.*, 50 Pa. Cmwlth. 249, 258, 413 A.2d 764, 768 (1980) (noting that "the one-family minimum area is . . . obviously so much greater than that which is required for any conceivable police power purpose. As the owner's evidence in this case pointed out, to require ten acres for each residence will mean that—given any stated number of homes to be built—much more farmland will be cut up and taken out of production in rural areas such as this district.").

<sup>107</sup> *Ding et al., supra* note 31, at 53–68.

<sup>108</sup> VT. ANN. STAT. § 4302 (local governments should "plan development so as to maintain the historic settlement pattern of compact village and urban centers separated by rural countryside"); PENN. MUNS. PLAN. CODE art. VI, § 604 (local governments should "preserve prime agriculture and farmland considering topography, soil type and classification, and present use"); VA.

In 1974, California’s Fifth District Court of Appeal upheld an 18-acre minimum lot size on the basis that it was a valid means of preserving the agricultural character of a portion of Madera County under a fairly debatable standard with no discussion of exclusionary effects.<sup>109</sup> Even in Pennsylvania, where a heightened standard of review was in force, a trial court in 1985 upheld a 50-acre minimum lot size on the basis that it was a legitimate means of protecting agricultural land pursuant to a 1968 state law.<sup>110</sup> The precise acreage needed to plausibly justify agricultural protection was a matter of contention among the Pennsylvania courts, however, with some finding 10 acres to be insufficient and others finding it adequate.<sup>111</sup> The outcome of particular legal challenges to minimum lot sizes in the vicinity of 10 acres has turned upon the individualized circumstances of the ordinances in question, with the Michigan Court of Appeals striking down a 10-acre lot size minimum in 1995 on the grounds that it seemed to be serving an exclusionary purpose rather than its purported purpose of preserving farmland.<sup>112</sup> In 1995, the New Hampshire Supreme Court upheld a 50-acre minimum lot size in the town of Lyme, which had been adopted in 1989 as a means of protecting and promoting forestry, indicating that a permissible scope of activities for very large lot zoning could extend beyond farming.<sup>113</sup>

The emergence of zoning for agricultural and other nonresidential purposes and its general approval by the courts adds another layer of complexity to the jurisprudence of minimum lot sizes, in which total acreage is only one consideration, and the legislative means will be scrutinized in light of the policy ends.

#### ***F. A Legal Parallel: Minimum Home Size Jurisprudence***

Alongside minimum lot size cases, several state courts have addressed minimum square footage requirements for homes. In these cases, in which an exclusionary motive was perhaps more transparent and intuitive to the judiciary, courts frequently applied a more searching standard than was used in minimum lot size cases to invalidate the ordinances at issue. In the 1951 case of *Hitchman v. Oakland Twp.*, the Michigan Supreme Court struck down an 800-square-foot minimum home size as lacking a basis in health and safety concerns, noting that the township in question had other residential zones that allowed homes of as little as 400 square feet and that federal housing regulations at the time permitted homes as small as 360 square feet.<sup>114</sup> Three years later, in *Appeal of Medinger*, the Pennsylvania Supreme Court confronted a township zoning ordinance that divided the town into various districts requiring home sizes of 1,800 square

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CODE § 15.2-228 (local government should “provide for the preservation of agricultural and forestal lands”); IOWA CODE § 414.3(1) (local governments should “preserve the availability of agricultural land”).

<sup>109</sup> *Gisler v. Cnty. of Madera*, 38 Cal. App. 3d 303, 112 Cal. Rptr. 919 (Ct. App. 1974).

<sup>110</sup> *Codorus Twp. v. Rodgers*, 89 Pa. Cmwlth. 79, 84, 492 A.2d 73, 76 (1985).

<sup>111</sup> *Cf. Application of Wetherill*, 45 Pa. Cmwlth. 303, 305, 406 A.2d 827, 828 (1979), and *Martin v. Millcreek Twp.*, 50 Pa. Cmwlth. 249, 258, 413 A.2d 764, 768 (1980) (both striking down 10-acre minimums), with *Henley v. Zoning Hearing Bd. of W. Fallowfield Twp.*, 155 Pa. Cmwlth. 306, 625 A.2d 132 (1993) (upholding a 10-acre minimum on an agricultural basis).

<sup>112</sup> *Scots Ventures, Inc. v. Hayes Twp.*, 212 Mich. App. 530, 534, 537 N.W.2d 610, 612 (1995) (“This case presents a situation in which the township’s interest in preserving ‘farmland’ can be more accurately characterized as an interest in preventing further development of an area that is already used for recreational and residential, rather than agricultural, purposes. The real motivations behind the facade of ‘public health and welfare’ appear to be aesthetics, retention of ‘rural character,’ and a desire to exclude new homeowners from the township.”).

<sup>113</sup> *Caspersen v. Town of Lyme*, 139 N.H. 637, 638, 661 A.2d 759, 761 (1995). *See also Thompson v. Land Conservation and Dev. Comm’n*, 204 P.3d 808 (Or. Ct. App. 2009) (holding that a reduction in minimum lot size from 140 acres to 40 acres, to promote viticulture rather than only wheat farming, had an evidentiary basis and was entitled to deference).

<sup>114</sup> *Hitchman v. Oakland Twp.*, 329 Mich. 331, 337, 45 N.W.2d 306, 309 (1951).

feet, 1,125 square feet, and 1,000 square feet. Holding that a sliding scale of minimums such as those cannot be justified by health or safety considerations, which the court observed are generally uniform in nature, the court struck down the ordinance.<sup>115</sup> The Supreme Court of New Jersey joined that reasoning in 1979, approvingly quoting the trial court’s ridiculing of a health rationale for varying home size minimums and affirming that “[z]oning which excludes low and moderate income families for fiscal purposes has been condemned as contrary to the general welfare.”<sup>116</sup> In 1988, the Connecticut Supreme Court, which had previously been highly deferential to minimum lot sizes, struck down a sliding scale of minimum home sizes in the town of East Hampton, concluding that no evidence indicated any rational relationship between minimum floor area requirements and the legitimate objectives of zoning as set forth in Connecticut’s zoning enabling act.<sup>117</sup>

Given the tendency of municipalities to multiply and vary minima across zones even where no obvious reason for doing so exists, fewer cases are reported that involve challenges to dwelling regulations that impose a uniform minimum dwelling size across all zones. In a 1974 decision, a Pennsylvania trial court distinguished *Medinger* in upholding a township’s requirement that all single-family homes contain at least 1,200 square feet if one story and at least 1,500 square feet if more than one story on the basis that the requirement was uniform and nondiscriminatory.<sup>118</sup> In doing so, the court held without discussion that the scope of inquiry for determining uniformity ended at the borders of the municipality in question and that the existence of lesser floor area minimums in other municipalities—including the municipality at issue in *Medinger*—was not relevant to the legal analysis.<sup>119</sup> The implied conclusion that *Medinger* established a rule against nonuniformity only, rather than a substantive rule regarding minimum dwelling sizes, is open to question given the implications of the reasoning in *Medinger* and the fact that general health and safety standards are established at state, national, and even international levels. In a 1987 decision, the Michigan Court of Appeals upheld a township’s mandate that all homes outside mobile home districts contain a core living area of 20 feet by 20 feet, although the court did not cite *Hitchman*, and the thrust of the challenge was the disparate treatment of site-built homes and mobile homes rather than a direct challenge to the minimum dwelling dimensions.<sup>120</sup> It bears

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<sup>115</sup> *Appeal of Medinger*, 377 Pa. 217, 225 (1954) (noting that “if a 1000-minimum habitable square feet is reasonable and proper for every home in one district and does not adversely affect the health, morals, or safety of the occupants of such a house, 1125 square feet of habitable floor area in a nearby house cannot adversely affect the health, morals, or safety of that home or of that community.”).

<sup>116</sup> *Home Builders League of S. Jersey, Inc. v. Berlin Twp.*, 81 N.J. 127, 143–44, 405 A.2d 381, 390 (1979). (“It is ridiculous to suggest that an 1,100 square foot house may be ‘healthful’ in one part of town and not another.”).

<sup>117</sup> *Builders Serv. Corp. v. Plan. & Zoning Comm’n of Town of E. Hampton*, 208 Conn. 267, 306, 545 A.2d 530, 550 (1988).

<sup>118</sup> *Harborgette Co. v. Zoning Hearing Bd. of Lower Makefield Twp.*, 13 Pa. Cmwlth. 157, 158, 318 A.2d 770, 772 (1974) (stating that in *Medinger* and other cases cited, “the general validity of such [minimum floor area] standards was recognized but de facto exclusionary aspects, or discriminatory and non-uniform requirements varying from one residential district classification to another, rendered invalid the particular restrictions under consideration in these respective cases. No such infirmities may be attributed to [the minimum floor area ordinance] in the instant case.”).

<sup>119</sup> It is a point of irony that, in contexts where other jurisdictions provide instances of *more* restrictive land use regulations, courts have not hesitated to identify and cite to those jurisdictions and their ordinances in weighing the constitutionality of a particular municipality’s ordinance. *See, e.g.*, *Simon v. Needham*, 311 Mass. 560, 564 (1942) (observing that “[i]n the four towns that adjoin Needham the minimum area restrictions for some residential lots have been fixed in one at twenty thousand square feet, in two others at forty thousand square feet, and in the fourth at an acre. Of eight other towns within a short distance from Needham, six have prescribed a minimum area of forty thousand square feet for house lots, and two others have fixed the minimum area as an acre.”).

<sup>120</sup> *Pauter v. Comstock Charter Twp.*, 163 Mich. App. 670, 672, 415 N.W.2d 232, 233 (1987).



mention that those modest dimensions had apparently been adopted as a means of evading a Michigan Supreme Court decision that prohibited outright bans of mobile homes outside areas zoned as mobile home parks rather than as a means of excluding small site-built homes.<sup>121</sup>

The similarities between the substance of minimum home size regulations and minimum lot size regulations suggest a path forward in which courts harmonize the legal analysis they employ in evaluating such minimums. A sliding scale of lot size minimums is precisely what one finds in the zoning codes of most American cities, and in those cases where sewer and water services are available and the municipality avoids the need for on-site wastewater disposal, the same concerns that troubled the courts of Pennsylvania, New Jersey, and Connecticut would seem to be no less applicable. As discussed in the following section, the inconsistencies among minimum lot sizes arguably stand on even shakier ground: if the largest house size minimum in *Medinger* was 1.8 times that of the smallest minimum, allowable lot sizes in urban areas can be found that vary by as much as two, three, four, and even five or more times without any obvious justification.

#### IV. TOWARD A NEW LITIGATION APPROACH TO MINIMUM LOT SIZES

If the course of minimum lot size jurisprudence has not run smoothly, a few general observations can nonetheless be made. The “fairly debatable” test adopted by the courts of the 1940s and 1950s has, in substance if not always in form, been discarded by most courts as a legal standard.<sup>122</sup> Since around 1960, regardless of the outcome of any particular matter in litigation, courts have generally required municipalities to make some tangible, quantifiable demonstration as to how the regulation at issue advances the purposes of the applicable state zoning enabling act.<sup>123</sup> Both environmental protection and exclusionary effects are today routinely considered as factors in evaluating the constitutionality of zoning ordinances, although the degree to which those factors are scrutinized varies from case to case. To a limited extent, courts have begun to assess zoning regulations in terms of uniform health and safety concerns, questioning why minimums should vary where all other factors are held equal. Overall, the jurisprudence in this area has seemed to some observers confoundingly inconsistent in its legal analysis and the scope of remedies the courts are willing to order.<sup>124</sup>

The argument for holding zoning classifications to a stricter, more rigorous, and more evidence-based standard is one that has had the benefit of decades for development and input

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<sup>121</sup> *Gackler Land Co., Inc. v. Yankee Springs Twp.*, 427 Mich. 562, 398 N.W.2d 393 (1986).

<sup>122</sup> The majority in *Euclid* derived the “fairly debatable” language from *Radice v. People of State of New York*, 264 U.S. 292, 44 S. Ct. 325, 68 L. Ed. 690 (1924), a case in which the plaintiff was challenging a New York state statute concerning employment of women in restaurants. The municipal zoning power, by contrast, exists only by sufferance of state law, and accordingly its scope is circumscribed by the purposes articulated in state zoning enabling acts. A more appropriate test, as the *Euclid* majority wrote elsewhere, is to inquire whether a zoning ordinance has a *substantial* relation to the state-promulgated objectives of public health, safety, or general welfare. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 396 (1926). In this context, the question of *whose* welfare is intended to be served is of great importance, and although the Supreme Court did not address this question directly in *Euclid* or *Nectow*, terms used in those decisions include “general welfare” and “general public interest,” the latter of which in *Euclid* is contrasted with the “interest of the municipality.” Implicitly, “general welfare” was of at least a regional consideration, if not statewide or nationwide.

<sup>123</sup> For a review of these changes from an earlier perspective, see Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 837, 839 (1983) (stating that “during the last two decades [1963–1983], judges and legal scholars have shown increasing doubt that local governments make land development decisions fairly and rationally”).

<sup>124</sup> Daniel R. Mandelker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land-Use Law*, 24 URB. LAW. 1, 2 (1992) (noting that “zoning decisions are too often ad hoc, sloppy and self-serving decisions with well-defined adverse consequences without off-setting benefits”).

from many thinkers. As early as 1962, Justice Frederick Wilson Hall of the New Jersey Supreme Court issued a forceful dissent in a case involving the exclusion of mobile homes from a municipality in which he pleaded with the majority to discard an overly permissive version of the “fairly debatable” standard and hold local governments to a higher burden of proof.<sup>125</sup> Writing in 1983, attorney Richard Babcock outlined an ambitious litigation strategy for challenging single-family zoning in which builders, demographers, engineers, planners, environmentalists, and land economists might all be disclosed as witnesses.<sup>126</sup> Twenty years later, the case was made for the invalidation of zoning ordinances that have an exclusionary intent or effect or, with specific respect to minimum lot sizes, require minimums of more than one acre unless the municipality demonstrates the ordinance’s contribution to the public welfare.<sup>127</sup> This test, in other words, would revive the standard set forth by the lead opinion in *Appeal of Kit-Mar Builders*, as discussed earlier, in which the usual burden of proof is reversed when a certain lot size minimum is exceeded.<sup>128</sup>

This article does not propose a new standard for assessing all zoning regulations but instead suggests a tailored approach to the specific issue of residential minimum lot sizes, recognizing that they have a substantial effect on overall urban form and affordability while acknowledging that different minimums, in the context of different settings and different forms of available infrastructure, have been and will continue to be subject to differing evidentiary burdens. As discussed previously, minimum lot size regulation can broadly be grouped into three categories: (1) agricultural lot minimums, which are intended to serve as a greenbelt or urban services boundary without the need for condemnation of development rights, and which are generally 10 acres or more; (2) nonagricultural “large lot” zoning for areas not served by city water or sewer, which generally range from one to 10 acres; and (3) minimum lot sizes for urban areas where water and/or sewer are present, which generally range from 5,000 square feet to one acre, although lower minimums exist in the denser portions of many American cities. These categories form a useful framework for a proposed approach to legal analysis as well.

### **A. Deference for Agricultural Zoning**

Agricultural zoning, perceived as having arisen from conservationist and growth management motives rather than exclusionary ones, has in most cases been upheld as having a purpose substantially related to legitimate zoning objectives.<sup>129</sup> In light of Supreme Court regulatory takings jurisprudence, in which a major diminution in value is permissible provided some viable economic use remains, agricultural zoning is one of a limited number of planning tools that American cities and counties have at their disposal to protect prime farmland and steer development to areas where the infrastructure for higher-density housing exists.<sup>130</sup> Following the holding in *Scots Ventures, Inc. v. Hayes Twp.* discussed previously, a court might conceivably

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<sup>125</sup> *Vickers v. Twp. Comm. of Gloucester Twp.*, 37 N.J. 232, 181 A.2d 129 (1962), *overruled by* *S. Burlington Cnty. NAACP v. Mount Laurel Twp.*, 92 N.J. 158, 456 A.2d 390 (1983). Justice Hall would later author the well-known decision in *S. Burlington Cnty. NAACP v. Mount Laurel Twp.*, 67 N.J. 151, 192, 336 A.2d 713, 734 (1975).

<sup>126</sup> Richard Babcock, *The Egregious Invalidity of the Exclusive Single-Family Zone*, 35 LAND USE L. & ZONING DIGEST 4 (1983).

<sup>127</sup> Jeffrey M. Lehmann, *Reversing Judicial Deference Toward Exclusionary Zoning: A Suggested Approach*, 12 J. OF AFFORDABLE HOUS. & COMM. DEV. L., no. 2, at 229, 229–30.

<sup>128</sup> *See Appeal of Kit-Mar Builders, Inc.*, 439 Pa. 466, 471, 268 A.2d 765, 767 (1970). The court in that case shifted the burden of proof for lot sizes in excess of two acres, rather than one acre.

<sup>129</sup> *See Codorus Twp. v. Rodgers*, 89 Pa. Cmwlth. 79, 84, 492 A.2d 73, 76 (1985).

<sup>130</sup> *See Penn Central Trans. Co. v. New York City*, 438 U.S. 104 (1978).

strike down such a minimum for a particular parcel if it could be shown to have no relationship to the preservation of agriculture or to other activity requiring substantial acreage or where zoning for higher-density residential development elsewhere is absent. In addition, zoning that requires agricultural use or agricultural income where agriculture is not economically viable would potentially be vulnerable to a regulatory takings challenge. A legal challenge brought against agricultural zoning would likely be intensely fact dependent; for that reason, this article will not address the subject in any further detail.

### ***B. Greater Scrutiny for Large Lot Zoning***

The vast majority of both the literature and the jurisprudence concerning minimum lot sizes has dealt with minimums of an acre or more in undeveloped suburban or exurban areas not served by sanitary sewers or city water.<sup>131</sup> That those areas have been the primary focus of attention, particularly in the mid-20th century, should be unsurprising given the rapidity and intensity of suburban growth and the disinvestment in urban areas during that period. The court decisions, as surveyed previously, have varied greatly in their reasoning and their outcomes, across time and between states. Justifications for large lot minimums also have evolved over time, with the fiscal considerations initially advanced by municipalities, having been disfavored by the courts, yielding to environmental concerns over the area necessary for private wells and on-site wastewater disposal. The acceptance of environmental justifications by most courts, in turn, has had the perverse outcome of dissuading municipalities from extending sewer services to outlying areas to avoid jeopardizing the evidentiary basis for large lot minimums.<sup>132</sup>

Attempts to establish bright line analytical rules regarding the permissibility of large lot sizes in the absence of sanitary sewers have been generally unsuccessful. The courts of Pennsylvania, the state in which the judiciary has pushed back more than any other against minimum lot sizes, experimented with a two-acre cutoff for reversing the burden of proof on municipalities<sup>133</sup> but ultimately abandoned it.<sup>134</sup> Although attempts at setting clear boundary lines have the obvious benefit of establishing predictability and usable guidance for municipalities and property owners, in practice, the science of on-site wastewater disposal is inherently complex, multifactorial, and not susceptible to any but the broadest general presumptions. For example, North Carolina's health code requires a separation of at least 100 feet between septic system and private well and 10 feet between septic system and the property line, which mathematically would suggest the

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<sup>131</sup> Of the cases surveyed in this article, only one (the *Clemons* case from 1950, 36 Cal. 2d 95, 222 P.2d 439) involved a challenge to a lot minimum of less than a half-acre, and most involved minimums of an acre or more. The extant scholarship is almost exclusively directed toward large lot sizes in non-urban areas.

<sup>132</sup> For an example, see the town of Burlington, Connecticut, which in its sewerage regulations noted, "The Connecticut Department of Environmental Protection . . . declared sewer avoidance to be a desirable policy in rural communities where sewers do not exist and are not planned. It further recognized that sewer avoidance is a useful and, indeed, necessary tool to control and plan development consistent with historical or planned development patterns in many municipalities." In other words, the refusal to construct a wastewater treatment facility and to instead rely on discharge of effluent directly into the soil through individual septic leach fields is deemed a means of limiting the intensity of development and limiting the capacity of the land to sustain denser development rather than a public health measure. See BURLINGTON WATER POLLUTION CONTROL AUTH., REGULS. FOR EXTENSION, EVALUATION AND USE OF MUN. SANITARY SEWERAGE SYS. IN THE TOWN OF BURLINGTON (Jan. 24, 1995), <https://www.burlingtonct.us/water-pollution-control-authority/files/water-pollution-control-authority-regulations>.

<sup>133</sup> *Appeal of Kit-Mar Builders*, 439 Pa. at 471 (holding that minimum lot sizes of more than 2 acres are presumptively invalid "[a]bsent some extraordinary justification").

<sup>134</sup> *C & M Developers, Inc. v. Bedminster Twp. Zoning Hearing Bd.*, 820 A.2d 143, 146–47 (2002).

potential for house lots of significantly less than one acre.<sup>135</sup> In practice, however, those basic minimums are subject to modification by a dizzying array of additional factors, from soil quality and water absorption rates, which affect the area needed for leaching fields, to proximity to wetlands, watercourses, and other protected areas from which even greater setbacks may be required.<sup>136</sup> In Connecticut, although the minimum distance between septic systems and private wells is only 75 feet, systems must also be set back at least 25 feet from the property line, and separate regulations for wells require a 50-foot setback from property lines.<sup>137</sup> Areas in which septic systems can be constructed are subject to the exclusion of steep slopes, wetlands, and other common terrain types, which can greatly reduce available building sites and cause difficulty in meeting minimum setbacks even when lot sizes are large.<sup>138</sup>

For all those reasons, courts are understandably hesitant to second-guess lot sizes in excess of one, two, or even three acres. Moreover, whether, in all cases, minimum lot sizes established by municipalities are necessarily larger than needed to meet the requirements of state health codes is not clear, and variances or code exemptions may allow for development of otherwise substandard lots.<sup>139</sup> Courts faced with those complexities may find that, even if questionable in some respects, minimum lot sizes in the one- to three-acre range are substantially related to public health objectives and need not be narrowly tailored to meet those objectives. A minimum acreage may also provide the benefits of predictability and consistency to property owners, who may otherwise need the assistance of a professional surveyor and civil engineer to ascertain whether a particular parcel can satisfy various state statutes and local ordinances governing residential site planning.

How then is the court system to play a role in restraining large lots not served by sewers? If judges are reluctant to adopt a certain acreage as a point at which the burden shifts to the municipality to justify its ordinance, they may be more willing to ask why a home that complies with all applicable health and safety codes for construction and wastewater disposal can nonetheless be prohibited by a municipality on the basis of a lot minimum of arbitrary size. According to that approach, which was embraced in Pennsylvania's *National Land* decision, a litigant would ask the court to accept that a plan for home construction that meets all public health requirements should be given a presumption of validity.<sup>140</sup> A municipality denying such an application would have the burden of presenting a countervailing rationale that is founded on genuine, nonspeculative health and safety concerns sufficient to outweigh the initial presumption. Whether that burden is an "extraordinary" one, as articulated in Pennsylvania's *Appeal of Kit-Mar*

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<sup>135</sup> 15A N.C. ADMIN. CODE 18A.1900 (2006).

<sup>136</sup> *Id.*

<sup>137</sup> CONN. DEP'T OF PUB. HEALTH, CONN. PUB. HEALTH CODE: ON-SITE SEWAGE DISPOSAL REGULATIONS AND TECHNICAL STANDARDS FOR SUBSURFACE SEWAGE DISPOSAL SYSTEMS (Jan. 2018), [https://www.tahd.org/uploads/1/2/5/9/12591539/technical\\_standards\\_2018.pdf](https://www.tahd.org/uploads/1/2/5/9/12591539/technical_standards_2018.pdf).

<sup>138</sup> CONN. PUB. HEALTH CODE § 19-13-B103d (1982).

<sup>139</sup> See 15A N.C. ADMIN. CODE 18A.1950(b) (2006) (providing for distances of as small as 50 feet between septic systems and private wells in cases where 100 feet is not feasible because of space constraints).

<sup>140</sup> *Nat'l Land & Inv. Co. v. Kohn*, 419 Pa. 504, 531 (1965). In *National Land*, the court found that the existence of a sanitary code undermined the position of the defendant town that a four-acre minimum lot size was needed to accommodate on-site wastewater disposal: "We can not help but note also that the Second Class Township Code provides for establishing sanitary regulations which can be enforced by a 'sanitary board' regardless of the zoning for the area. The Code also provides for the installation and maintenance of sewer systems but the township has made no plans in this regard. In addition, under the township subdivision regulations, the zoning officer may require lots larger than the minimum permitted by the zoning ordinance if the result of percolation tests upon the land show that a larger land area is needed for proper drainage and disposal of sewage. These legislatively sanctioned methods for dealing with the sewage problem compel the conclusion that a four acre minimum is neither a necessary nor a reasonable method by which Easttown can protect itself from the menace of pollution."

*Builders* decision, or simply one in which the preponderance of the evidence controls, it would provide a means of holding municipalities to account without asking courts to opine on matters outside their expertise.<sup>141</sup>

The basis for formally discarding a “fairly debatable” or rational basis test, in turn, is the substance of the state zoning enabling acts, without which municipalities lack the power to enact zoning and by which that same zoning power is circumscribed. The original Standard State Zoning Enabling Act (SSZEA), published by the United States Department of Commerce in 1926, defined that power broadly in terms of health—deliberately omitting use of the term *public health* lest courts inquire about the benefits to public health of yard size mandates—while defining the public welfare to be served as that of the “community,” a term that the otherwise meticulous drafters of the Act left undefined.<sup>142</sup> In spite of those careful definitions, when the United States Supreme Court decided the case of *Nectow v. Cambridge* in 1928, it held that the proper test was whether the application of a particular zoning requirement “bear[s] a substantial relation to the *public health*, safety, morals, or general welfare.”<sup>143</sup> In accordance with *Nectow*, at least 16 states have specifically incorporated a “public” health rationale into their zoning enabling acts.<sup>144</sup> In addition, several states have now added affirmative obligations to use zoning for inclusive, rather than exclusionary, purposes.<sup>145</sup> Concerns about exclusion, unaddressed by the drafters of the SSZEA, have expanded as the adverse effects of exclusionary zoning have made themselves more and more apparent and as scholars, courts, and state governments became solicitous of the rights and welfare of those intentionally excluded.<sup>146</sup> To the extent that courts have left undetermined the question of whether the “public welfare” to be served is that of the particular locality or of a wider area,<sup>147</sup> certain states have clarified that the zoning powers are to be exercised in the interest

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<sup>141</sup> See *Appeal of Kit-Mar Builders, Inc.*, 439 Pa. 466, 471, 268 A.2d 765, 767 (1970).

<sup>142</sup> U.S. Department of Commerce, Advisory Committee on Zoning, *A Standard State Zoning Enabling Act* (1926 rev. ed.).

<sup>143</sup> *Nectow v. City of Cambridge*, 277 U.S. 183, 187 (1928) (emphasis added).

<sup>144</sup> VT. ANN. STAT. § 4302 (2023); R.I. GEN. LAWS § 45-24-30; N.Y. GEN. CITY LAW § 20, 24–25 (2023); N.J. STAT. § 40:55D-2; PENN. MUN. PLAN. CODE art. VI, § 604; OHIO REV. CODE § 713.07 (2023); Mich. Zoning Enabling Act § 125.3203 (2006); ILL. COMP. STAT. 5 § 11-13-1 (2023); MINN. STAT. § 462.357(1) (2023); KAN. STAT. ANN. § 100.201(2) (2023); TENN. ANN. CODE §§ 13-7-103 & 13-7-201 (2023); N.C. GEN. STAT. § 160D-701 (2023); S.C. CODE OF LAWS § 6-29-710 (2023); FLA. STAT. § 163.3161(4) (2023); MONT. ANN. CODE § 76-2-304 (2023); ARIZ. REV. STAT. § 11-811(A) (2023).

<sup>145</sup> See VT. ANN. STAT. § 4302 (2023); MASS. GEN. LAWS ch. 40A (2023); R.I. GEN. LAWS § 45-24-30 (2023); CONN. GEN. STAT. § 8-2 (2023); N.Y. GEN. CITY LAW § 20, 24–25 (2023); N.J. STAT. § 40:55D-2 (2023); PENN. MUN. PLAN. CODE art. VI, § 604 ; VA. CODE § 15.2-2283 (2023); IDAHO STAT. § 67-6502 (2023); S.C. CODE ANN. § 6-29-710 (2023); FLA. STAT. § 163.3161(4) (2023); NEV. REV. STAT. § 278.250.2 (2023). Notwithstanding these statutes, only two states, Nevada and Florida, have a requirement in their zoning enabling acts to ensure an adequate supply of housing (although other states, such as California, have elsewhere adopted housing targets), and only one state, Idaho, mentions property rights in its zoning enabling act.

<sup>146</sup> See U.S. Department of Commerce, Advisory Committee on Zoning, *A Standard State Zoning Enabling Act*, *supra* note 141. The SSZEA contains no mention of housing supply, nor does it address the potential for exclusionary practices. Those omissions are unlikely to be the result of oversight, as one of the principal authors of the SSZEA, Edward Murray Bassett, advocated the creation of restrictive residential districts as a means of subsidizing the lifestyle preferences of affluent city residents and shielding them from being outcompeted for their land by those of lesser means by way of apartment buildings. Edward Murray Bassett, *ZONING*, 323 (1922 rev. ed.) (writing that New York City’s lowest-density residential districts were not practical for multifamily dwellings due to lot coverage restrictions and were “preventing well-to-do citizens from leaving the city to settle . . . in outlying villages because they offer an opportunity for villa homes protected against all injurious buildings for an unlimited time. In them people can have the advantages of open surroundings and still be near their businesses, all city conveniences, and have the benefit of low car-fares.”).

<sup>147</sup> For what remains one of the clearest judicial statements on this question, see *S. Burlington Cnty. NAACP v. Mount Laurel Twp.*, 67 N.J. 151, 177, 336 A.2d 713, 726 (1975) (“The warning implicates the matter of whose general welfare must be served or not violated in the field of land use regulation. Frequently the decisions in this state, including those just cited, have spoken only in terms of the interest of the enacting municipality, so that it has been thought, at least in some quarters, that such was the

of the state as a whole or of the general public.<sup>148</sup> Finally, two states have identified prevention of “sprawl” as a zoning objective, which, although not defined, is implicitly directed at low-density, large lot development.<sup>149</sup>

In sum, by appealing to a principle of scientific and public health uniformity, by citing to the standard established in the *National Land* decision, by emphasizing the objectives of the applicable state zoning enabling act, and by marshaling the available economic evidence regarding the adverse effects of exclusionary zoning, a litigant will have a fighting chance to persuade a state court to invalidate specific instances of large-lot zoning.

### **C. Strong Skepticism for Urban Minimum Lot Sizes**

Although the literature on minimum lot sizes has focused heavily on large lots in suburban areas, the point of greatest legal vulnerability for this regulatory mechanism is in denser urban areas where sewer and water services already exist. Legal challenges in this context have been uncommon as well, with only the *Clemons* case discussed previously addressing subdivision in a developed urban setting.<sup>150</sup> Given the current state of the case law, the presence of city water and sewer connections is important for countering the primary public health and environmental concerns that have dissuaded courts from scrutinizing minimum lot sizes in areas where no such services exist. Deprived of that rationale, municipalities must rely on other bases to sustain urban minimum lot sizes, which may be related only tangentially to genuine public health or safety, such as speculative concerns about the ease of emergency vehicle access or generalized worries about stormwater runoff.<sup>151</sup>

As discussed in section II, cities began adopting minimum lot sizes in urban neighborhoods as early as the 1920s, with larger minimums arriving in the late 1940s and 1950s. Although mandates varied from city to city, a minimum of about 5,000 square feet for the densest single-family zone was common—and in many American cities, persists to this day, reflecting a typical urban lot of 50 feet street frontage by 100 feet in depth.<sup>152</sup> Also common are residential zoning

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only welfare requiring consideration. It is, of course, true that many cases have dealt only with regulations having little, if any, outside impact where the local decision is ordinarily entitled to prevail. However, it is fundamental and not to be forgotten that the zoning power is a police power of the state and the local authority is acting only as a delegate of that power and is restricted in the same manner as is the state. So, when regulation does have a substantial external impact, the welfare of the state’s citizens beyond the borders of the particular municipality cannot be disregarded and must be recognized and served.”).

<sup>148</sup> See, e.g., IDAHO STAT. § 67-6502 (2023) (“The purpose of this act shall be to promote the health, safety and general welfare of the people of the state of Idaho”); TENN. ANN. CODE § 13-7-103 (2023) (“Such regulations shall be designed and enacted for the purpose of promoting the health, safety, morals, convenience, order, prosperity and welfare of the present and future inhabitants of the state and of its counties”); N.J. STAT. § 40:55D-2 (2023) (intent of act to “ensure that the development of individual municipalities does not conflict with the development and general welfare of neighboring municipalities, the county and the State as a whole”); CONN. GEN. STAT. § 8-2 (zoning regulations shall “consider the impact of permitted land uses on contiguous municipalities and on the planning region”).

<sup>149</sup> N.J. STAT. § 40:55D-2 (2023) and ME. REV. STAT. § 4312 (2023).

<sup>150</sup> *Clemons v. City of Los Angeles*, 36 Cal. 2d 95, 222 P.2d 439 (1950).

<sup>151</sup> For examples of opposition on these and other grounds, see, e.g., Jared Weber, *A Developer Who Wants to Put Affordable Housing in New Canaan May See His Third Project Denied*, STAMFORD ADVOCATE, March 1, 2023, <https://www.stamfordadvocate.com/news/article/new-canaan-developer-s-affordable-housing-17812808.php> (last visited Aug. 14, 2023) (noting repeated objections raised over fire safety, vehicular and pedestrian safety, stormwater management, and protection of adjacent and nearby properties in the context of multifamily housing proposed for construction in an area served by sanitary sewers and city water).

<sup>152</sup> See, e.g., Austin, Texas, with a minimum lot size of 5,750 square feet; Los Angeles, California, with a minimum lot size of 5,000 square feet; Detroit, Michigan, with a minimum lot size of 5,000 square feet; and Knoxville, Tennessee, with a minimum lot size of 5,000 square feet. See AUSTIN LAND DEV. CODE § 25-2-492 (2023); Los Angeles Dep’t of City Plan., *Generalized*

classifications, which are deployed on a zoning map simply to match existing lot sizes. Notwithstanding those mandates, a single home, even one that is detached, requires far less than 5,000 square feet of land.<sup>153</sup> Millions of homes on lots smaller than 5,000 square feet, many predating the arrival of zoning ordinances, exist today in cities across the United States without posing any apparent danger to health, safety, and the public welfare and range from waterfront mansions to the most humble dwellings.<sup>154</sup> If such dangers are present, one might ask, why have they not made themselves apparent during the century or more in which they have existed and served as places of residence to countless Americans and their families?

When the city of Houston amended its land use ordinances in 1998 to allow lots as small as 1,400 square feet in place of the former minimum of 5,000 square feet, not only did no apparent harm befall the public welfare but instead the city witnessed a construction boom that has had the salutary effect of mitigating housing cost growth and multiplying home ownership opportunities for Houston residents.<sup>155</sup> In an urban area, where land values are high, the ability to subdivide land into very small parcels is critical in controlling the cost of detached homes, and the exclusionary effect of minimum lot sizes is magnified, leading to an intensified economic segregation in which lower-income residents are consigned to multifamily zones or areas far outside primary employment centers.<sup>156</sup>

The experiences of cities that have legalized a greater number of units per structure without permitting small lot subdivision further illustrates the practical advantages of Houston's approach toward zoning reform. In Minneapolis, for example, which in 2019 legalized up to three units per structure in formerly single-family zones but that did not adopt minimum lot size reform, only 104 duplex or triplex units were built the first two years following the reform.<sup>157</sup> In Houston, by contrast, more than 1,000 small-lot homes (homes on lots between 1,400 and 5,000 square feet) were built in the first year after the 1998 reform, which applied only to a limited area of the city.<sup>158</sup> By 2016, more than 25,000 small-lot homes had been constructed in Texas' Harris County.<sup>159</sup>

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*Summary of Zoning Regulations* (2020), [https://planning.lacity.org/odocument/eacdb225-a16b-4ce6-bc94-c915408c2b04/Zoning\\_Code\\_Summary.pdf](https://planning.lacity.org/odocument/eacdb225-a16b-4ce6-bc94-c915408c2b04/Zoning_Code_Summary.pdf) (last accessed Aug. 14, 2023); DETROIT CODE OF ORDINANCES § 50-13-2 et seq. (2023); KNOXVILLE CODE OF ORDINANCES app. B, § 4.3 (2023).

<sup>153</sup> In 2022, the median new detached single-family home in the United States contained approximately 2,270 square feet of living space, which, if accommodated on two stories, would occupy only 45 percent of a 2,500-square-foot lot (U.S. Census Bureau, *New Privately Owned Housing Units Started in the United States by Purpose and Design*, [https://www.census.gov/construction/nrc/pdf/quarterly\\_starts\\_completions.pdf](https://www.census.gov/construction/nrc/pdf/quarterly_starts_completions.pdf) (last visited Aug. 14, 2023)).

<sup>154</sup> A Zillow search conducted in May 2023 revealed 202 detached homes for sale in the City of Los Angeles on lots of between 1,000 and 4,000 square feet, with asking prices ranging as high as \$9.8 million for a 3,850-square-foot waterfront home on 2,500 square feet and as low as \$325,000 for a 630-square-foot home on 1,500 square feet of land. According to 2020 Census Bureau data, 8.8 million "attached 1-family" homes are in the United States, most of which are townhouses on parcels of land smaller than 5,000 square feet. Texas' Harris County alone has approximately 128,000 fee simple homes on lots less than 5,000 square feet, and Texas' Dallas County has an additional 30,000, according to tax data from the Harris and Dallas Central Appraisal Districts. See U.S. Census Bureau, <https://www.census.gov>; Harris Central Appraisal District, *Public Data*, <https://hcad.org/hcad-online-services/pdata/> (last visited Aug. 14, 2023); and Dallas Central Appraisal District, *Data Products*, <https://www.dallascad.org/DataProducts.aspx> (last visited Aug. 14, 2023).

<sup>155</sup> See Emily Hamilton, *Learning from Houston's Townhouse Reforms*, MERCATUS CTR., GEO. MASON UNIV. (April 11, 2023), <https://www.mercatus.org/research/policy-briefs/learning-houstons-townhouse-reforms>.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> Gray & Millsap, *supra* note 46.

<sup>159</sup> *Id.*



Whereas Minneapolis' limitation on the size of structures may have hindered the effectiveness of the city's reform efforts,<sup>160</sup> Houston furnishes an example for comparison because before 1998, no municipal regulation prohibited the construction of more than one unit in a single structure. Houston developers, had they desired, faced no obstacle to constructing three-family homes on 5,000-square-foot lots rather than three single-family homes on 1,400-square-foot lots, which, before the 1998 reforms, required special planning permission.<sup>161</sup> Developer preference, however, has been for the latter option, which may reflect a wider pool of potential buyers for noninvestment properties, a buyer preference for fee simple ownership, or other factors relating to developer or buyer financing.<sup>162</sup> Whatever the underlying reasons, the small-lot home has a demonstrated track record of generating housing abundance in the American housing market of the late 20th and early 21st centuries in a manner that small multifamily homes (often characterized as "missing middle" housing) do not.<sup>163</sup>

### *1. The Arbitrariness of Urban Lot Minimums: A Comparative Approach*

From a legal perspective, zoning in areas with urban services has features that would appear to be no less arbitrary than the minimum home size requirements that several state courts have struck down.<sup>164</sup> How so? As an example, why should a minimum in one zone be set at 10,000 square feet and in another at 5,000 square feet, as in the Kansas City zoning and development code, where city services and infrastructure are equivalent?<sup>165</sup> Des Moines, Iowa, which adopted a citywide form-based code in 2019, has at least 10 residential districts (characterized as "neighborhood" districts) with minimum lot sizes of 4,800 square feet, 6,000 square feet, 6,750 square feet, 7,200 square feet, 7,500 square feet, 8,000 square feet, 8,400 square feet, 9,000 square feet, 9,600 square feet, and 10,000 square feet.<sup>166</sup> Downtown residential zones, where setbacks are allowed to be small or nonexistent and where impervious coverage is permitted to be as high as 90 percent, have no minimum lot sizes despite allowable residential densities far greater than in the neighborhood zones.<sup>167</sup>

If a zoning enabling act authorizes a city to establish minimum lot sizes for public health and safety purposes, does it authorize cities to create a sliding scale of lot sizes in this manner where public health factors are otherwise equal? As another example at a smaller scale, the portion of the zoning map for New Canaan, Connecticut, served by city sewer and water<sup>168</sup> has four different

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<sup>160</sup> Hamilton, *supra* note 155.

<sup>161</sup> Gray & Millsap, *supra* note 46.

<sup>162</sup> Hamilton, *supra* note 155.

<sup>163</sup> See DANIEL PAROLEK, MISSING MIDDLE HOUSING: THINKING BIG AND BUILDING SMALL TO RESPOND TO TODAY'S HOUSING CRISIS (2020). *Missing middle housing* is defined as "house-scale buildings with multiple units in walkable neighborhoods," which excludes detached single-family homes without reference to the size of the lot on which they sit.

<sup>164</sup> See *Appeal of Medinger*, 377 Pa. 217, 225, 104 A.2d 118, 122 (1954); *Home Builders League of S. Jersey, Inc. v. Berlin Twp.*, 81 N.J. 127, 143–44, 405 A.2d 381, 390 (1979); *Builders Serv. Corp. v. Plan. & Zoning Comm'n of Town of E. Hampton*, 208 Conn. 267, 306, 545 A.2d 530, 550 (1988).

<sup>165</sup> Varying minima for single-family homes are nearly universal in American zoning codes, but Kansas City has no fewer than eight different minimum lot sizes, including 80,000 square feet, 10,000 square feet, 7,500 square feet, 6,000 square feet, 5,000 square feet, 4,000 square feet, 3,000 square feet, and 2,500 square feet. KAN. CITY ZONING AND DEV. CODE, § 88-110-06 (2023).

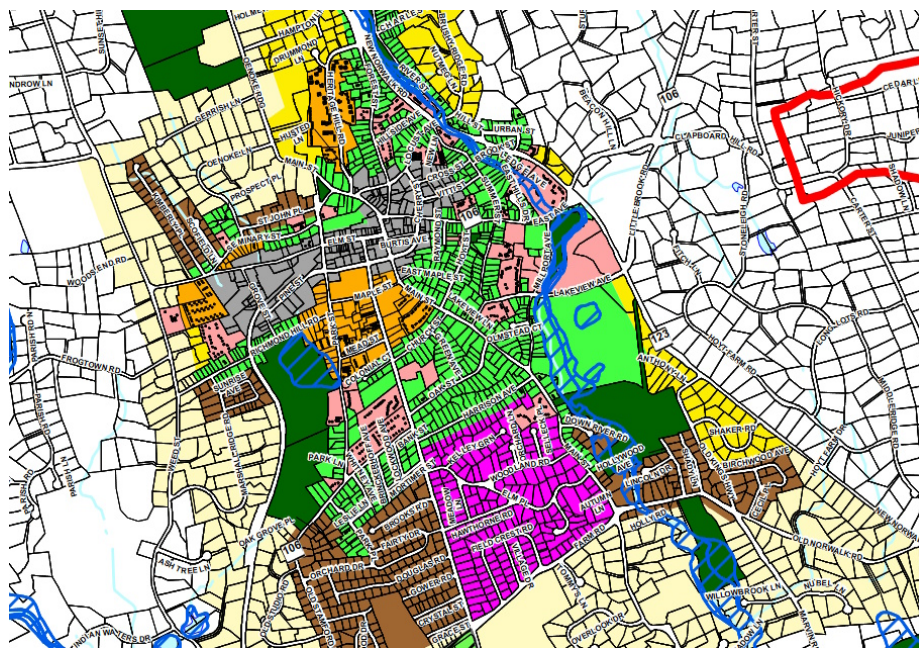
<sup>166</sup> See CITY OF DES MOINES CODE OF ORDINANCES, §§ 135-2-13 through 135-2-16 (2023), [https://library.municode.com/ia/des\\_moines/codes/code\\_of\\_ordinances?nodeId=MUCO\\_CH135PLDEOR](https://library.municode.com/ia/des_moines/codes/code_of_ordinances?nodeId=MUCO_CH135PLDEOR).

<sup>167</sup> *Id.* at §§ 135-2-3 through 135-2-5.

<sup>168</sup> See Conn. Dep't of Energy & Env't Prot., *Connected Sewer Service Areas*, <https://ct-deep-gis-open-data-website-ctdeep.hub.arcgis.com/datasets/connected-sewer-service-areas/explore> (last visited Aug. 14, 2023). A small number of lots zoned for one acre also appear to be served by sewers.

single-family residential zoning categories, which are applied in seemingly hodge-podge fashion. Each of the categories contains a different lot size minimum: 7,500 square feet, 10,000 square feet, 14,520 square feet, and 21,780 square feet.<sup>169</sup> Closer scrutiny of the zoning map (figure 2) reveals that these zones have been applied in a manner which insures that areas which happen to have larger pre-existing lots than their surroundings are subject to larger lot minimums than surrounding areas, which prevents the lots in those areas from being lawfully subdivided. One zone, requiring at least 14,520 square feet per lot, exists in only one neighborhood. This custom-tailored zoning resembles a private covenant in which deed restrictions are intended to serve the interests of a small group of homeowners rather than the interests of the public at large, and where the terms of those covenants should be expected to vary depending on the preferences of the owners. The delegated zoning power, as most courts have come to acknowledge, requires zoning ordinances to further the general welfare, not solely the interest of the municipality and certainly not the interests of a single neighborhood—or even a single street—which has available to it recourse through voluntary covenants should it wish to coordinate on land use matters.<sup>170</sup>

**FIGURE 2.** Zoning map for the town of New Canaan, Connecticut



Note: White represents two-acre zoning; pale yellow, one-acre zoning; dark yellow, 21,780-square-foot zoning; purple, 14,520-square-foot zoning; brown, 10,000-square-foot zoning; and light green, 7,500-square-foot zoning. Of these, all but the one-acre and two-acre zones fall within the town's water and sewer district.<sup>171</sup>

<sup>169</sup> NEW CANAAN ZONING REGULATIONS § 3.5 (2023), <https://www.newcanaan.info/Departments/Land%20Use/Zoning%20Regulations.pdf> (last visited Aug. 14, 2023). The regulations also contain an “apartment” zone and a “multi-family” zone, which are not included in the list of residential zones. Interestingly, although the “apartment” zone requires 7,500 square feet of land for a single-family home, it requires only 200 square feet of land per apartment, thereby allowing multifamily dwellings to be built more than 37 times more densely than single-family homes within the same zone.

<sup>170</sup> For a thorough exposition of these options, see BERNARD SIEGAN, *LAND USE WITHOUT ZONING* (1972).

<sup>171</sup> See *Zoning Map: New Canaan, CT* (2005), [https://portal.ct.gov/-/media/CSC/1\\_Dockets-medialibrary/Docket\\_401/Application/ZoningMappdf.pdf](https://portal.ct.gov/-/media/CSC/1_Dockets-medialibrary/Docket_401/Application/ZoningMappdf.pdf) (last visited Aug. 14, 2023) and *supra* note 168.

In addition to the questionable adherence to the goal of advancing the general public interest, a parallel could be drawn here to the uniformity principle articulated in the minimum home size cases. As David Becker succinctly noted, “[s]urely the police power goes no further than to authorize a single minimum standard.”<sup>172</sup> If the late Judge Mary Ellen Talbott found it “ridiculous to suggest that an 1,100 square foot house may be ‘healthful’ in one part of town and not another,”<sup>173</sup> is it any less ridiculous that a house require 21,780 square feet in one part of town and 7,500 square feet in another when both zones are served by the same sewer and water system, the same street network, and the same fire apparatus?<sup>174</sup> What of the varying minimums in Kansas City, Des Moines, or any of many hundreds or thousands of municipalities in the United States? As of the date of this writing, such a challenge to urban lot minimums does not seem to have been attempted in any American jurisdiction, but the argument is there to be made.<sup>175</sup> Where courts have distinguished minimum home size ordinances from minimum lot size ordinances, such as in the *Bilbar* case discussed in section II.C, the minimum lot size regulation in question was not in an area with city sewer and water, and the same court subsequently changed its standard of review to invalidate large lot minimums in the *National Land* case.<sup>176</sup>

Another means of challenging urban lot size minimums is to identify arbitrary disparities among building types that seem to have no identifiable foundation in health or safety concerns. For an example that is not uncommon, the city of Knoxville, Tennessee, requires 5,000 square feet of land and at least 50 feet of street frontage for a single-family detached home in most residential zones, but single-family attached homes require as little as 2,000 square feet and 20 feet of street frontage.<sup>177</sup> The only other distinction between the two regulatory categories is that the former, being detached, are subject to a cumulative 15-foot side setback, whereas the attached

<sup>172</sup> Becker, *supra* note 24, at 293.

<sup>173</sup> *Home Builders League of S. Jersey, Inc. v. Berlin Twp.*, 157 N.J. Super. 586, 601, 385 A.2d 295, 302 (Law. Div. 1978), *aff’d*, 81 N.J. 127, 405 A.2d 381 (1979) (“One purpose of zoning which is recognized in the new act, N.J.S.A. 40:55D-2, is the encouragement of municipal action to promote the public health. Plaintiffs have shown that no interest of public health is advanced through the use of nonoccupancy-based minimum standards. An obvious flaw in any argument in favor of the health rationale is the fact that different standards exist for different parts of each town. It is ridiculous to suggest that an 1,100 square foot house may be ‘healthful’ in one part of town and not another.”).

<sup>174</sup> The town zoning code explains that “[t]he differentiation among the residential districts is intended to provide for variety in the size and density of residential neighborhoods and a diversity of housing opportunities after consideration of soil types, terrain and infrastructure capacity.” NEW CANAAN ZONING REGULATIONS § 3.1 (2023), <https://www.newcanaan.info/Departments/Land%20Use/Zoning%20Regulations.pdf> (last visited Aug. 14, 2023). In Connecticut, the argument that a range of mandated minimums for housing is reasonably related to the goal of variety was decisively rejected in *Builders Serv. Corp. v. Plan. & Zoning Comm’n of Town of E. Hampton*, 208 Conn. 267, 298 (1988), a case concerning varying home size minimums. The same reasoning could be applied to setback regulations also. Even if it were conceded that municipalities possess the authority to establish front, side, and rear setbacks, do they possess the authority to vary these setbacks arbitrarily among zones? As setbacks implicate takings arguments as well, this article does not explore them in any further detail, but it suffices to say that the uniformity principle has applications beyond the context of minimum lot sizes.

<sup>175</sup> For an analogous case, see *Weiss v. City of Stamford*, 1993 WL 88380 (Conn. Super. Ct. March 22, 1993), *aff’d*, 33 Conn. App. 936, 636 A.2d 883 (1994). The plaintiff argued that the City of Stamford’s zoning code contained dual density requirements within the same zone (lots of less than 20,000 square feet could be built to 21 units per acre, whereas those at or greater than 20,000 square feet could be built to 29 units per acre), which violated the uniformity requirements of the Stamford city charter and Connecticut’s zoning enabling act. The court decided in favor of the city without addressing the plaintiff’s uniformity argument, deferring to a city analysis that explained only *why* the dual density requirements existed. The question, however, was not whether a rational basis existed for the two density maximums but whether they could lawfully exist within the same zone.

<sup>176</sup> Compare the outcomes in *Appeal of Medinger*, 377 Pa. 217, 104 A.2d 118 (1954), with *Bilbar Const. Co. v. Easttown Bd. of Adjmt.*, 393 Pa. 62, 141 A.2d 851 (1958), and *Nat’l Land & Inv. Co. v. Kohn*, 419 Pa. 504, 215 A.2d 597 (1965).

<sup>177</sup> Knoxville Code of Ordinances § 4.3, Table 4-1 (2023).

homes, being separated by party walls, are not.<sup>178</sup> The reasoning behind those varying minima, which effectively provide density bonuses to attached homes, is not obvious and is not articulated in the zoning ordinance.

If an attached home sits on a parcel of land measuring 20 feet by 100 feet, accommodating a 15-foot cumulative side setback would require a lot of only 3,500 square feet (35 feet by 100 feet).<sup>179</sup> If a detached home on a lot of 3,500 square feet could therefore comply with all setback requirements and the implied minimum of 20 feet for the width of a structure, on what grounds does the zoning ordinance forbid it? It cannot be on the basis of greater density—even if density were assumed to be valid grounds—because the detached home would be significantly less dense in units per acre than the attached home. A litigant faced with the denial of an application for a subdivision could challenge the municipality to show how the 5,000-square-foot minimum bears a substantial relation to the public health, safety, or general welfare in light of the zoning ordinance as a whole. Acknowledging, for the purposes of this narrow argument, the Supreme Court precedent that reasonable height and setback requirements are generally constitutional and do not ordinarily amount to a taking,<sup>180</sup> a litigant may further argue that any detached home<sup>181</sup> with city sewer and water access that complies with the applicable setback requirements should be presumptively deemed valid notwithstanding noncompliance with other dimensional requirements. The burden would then shift to the municipality to advance a countervailing justification for the regulation. In addition, a litigant could argue that any home that complies with the applicable building codes should be given a presumption of validity.<sup>182</sup>

A court could also take into account the exclusionary effects of urban lot size minimums in its deliberations, but a uniformity rationale allows the judiciary the option of avoiding the perhaps politically sensitive conclusion that an aspect of an ordinance is solely or primarily driven by exclusionary motives. By reducing minimum lot sizes to a matter of mathematics, the arbitrary nature of those minimums is laid bare, and their lack of substantial relation to public health, safety, or welfare is made plain. Courts willing to entertain exclusionary intent or effect, as many have been, can deploy that reasoning to further support a holding based on arbitrariness and lack of rational basis.

What arguments might be anticipated in opposition? The contention that different lot sizes in different areas provide a menu of choices to buyers was rejected by the Connecticut Supreme Court in the context of home size minimums.<sup>183</sup> Personal preference for lot size, like personal

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<sup>178</sup> *Id.*

<sup>179</sup> That is, adding 7.5 feet to each side of the 20 foot x 100 foot lot required that an attached dwelling comply with side setback requirements.

<sup>180</sup> *Welch v. Swasey*, 214 U. S. 91 (1909).

<sup>181</sup> Arguably, this reasoning could apply to any detached structure regardless of the number of dwelling units it contains, but such an argument is beyond the scope of this article. For further information, *see, e.g.*, Babcock, *supra* note 126, and Becker, *supra* note 24, at 293 (arguing that “[a]s long as multi-family dwellings are sanctioned at some location within the community, it would seem that their segregation from single family residences must be primarily for purposes other than health and safety unless it is assumed that people who reside in multi-family dwellings lead a life which is substandard as to health and safety”).

<sup>182</sup> Knoxville, Tennessee, for example, has adopted the 2018 International Residential Code (IRC) for single-family homes, two-family homes, and townhouses up to three stories. The code does not require setbacks for those housing types but rather prescribes the fire standards to which exterior walls must adhere, up to and including homes with no setback at all (two-family homes and townhouses). City of Knoxville, *Current Construction Codes*, [https://www.knoxvilletn.gov/government/city\\_departments\\_offices/plans\\_review\\_inspections/current\\_construction\\_codes](https://www.knoxvilletn.gov/government/city_departments_offices/plans_review_inspections/current_construction_codes) (last visited Aug. 14, 2023).

<sup>183</sup> In that case, a witness for the municipality “asserted that the ‘only justification’ for the 1300 square foot minimum ‘would be to allow for a range of housing choice . . . [w]ithin the entire town.’ Forcing home buyers in one part of town to have bigger and

preference for any other attribute of one's home or land, is a matter of private concern rather than public interest and, in any event, would be frustrated by minimum lot requirements that forbid the option of lots smaller than a certain size. The preservation of neighborhood character similarly seems to be an objective that serves private, rather than public, interests and that has fallen out of favor with state courts and in certain zoning enabling acts.<sup>184</sup> Connecticut's zoning enabling act, for instance, explicitly forbids the use of undefined "character" as a basis for denying a land use application.<sup>185</sup> What of traffic concerns? Often raised as a basis for opposing denser development of any kind, increased traffic as the sole factor has been rejected by some courts as a pretextual basis for denying proposed housing.<sup>186</sup> Moreover, those concerns would be even less viable in the context of single-family detached homes resulting from lot splits compared with denser multifamily development or nonresidential uses, such as retail. Concerns regarding stormwater runoff, increase in impervious cover, impact on wetlands and watersheds, and other similar issues would no doubt be emphasized by defenders of existing zoning,<sup>187</sup> but those issues pertain to infrastructure and design, which, like standards for on-site wastewater disposal, can be reduced to objective, quantitative standards. Courts should by now be expected to be skeptical of the tendency of localities to magnify or rely on solvable environmental issues as a justification for exclusion and de facto population caps.<sup>188</sup>

Even if some of those concerns are found to have merit, they face the further hurdle of demonstrating why they should justify different minimum lot sizes *within the same similarly situated area*. The author emphasizes again that any challenge to minimum lot sizes contemplated by this article would not seek to invalidate the authority of localities to establish lot size minimums as a general matter. As discussed in section III.A, agricultural zoning serves important conservationist and planning purposes for many municipalities and has routinely been acknowledged both by state legislatures and by the courts as serving a valid public interest and

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more costly houses does not provide a choice of housing but rather prevents home buyers from exercising a choice as to the most appropriate housing for their individual means and needs." Builders Serv. Corp. v. Plan. & Zoning Comm'n of Town of E. Hampton, 208 Conn. 267, 298 (1988).

<sup>184</sup> See section II. After the 1950s, courts upholding minimum lot sizes typically cited environmental justifications, which could be plausibly linked to public health concerns, rather than the desires of town residents to create or reinforce a particular economic or aesthetic character. Compare *Senior v. New Canaan*, 146 Conn. 531, 535, 153 A.2d 415, 417–18 (1959), with *Wilson v. Town of Sherborn*, 3 Mass. App. Ct. 237, 242, 326 N.E.2d 922, 925 (1975). See also CONN. GEN. STAT. § 8-2(d)(10): "Zoning regulations adopted pursuant to subsection (a) of this section shall not . . . be applied to deny any land use application, including for any site plan approval, special permit, special exception or other zoning approval, on the basis of . . . a district's character, unless such character is expressly articulated in such regulations by clear and explicit physical standards for site work and structures."

<sup>185</sup> CONN. GEN. STAT. § 8-2(d)(10).

<sup>186</sup> See, e.g., *Appeal of O'Hara*, 389 Pa. 35, 54, 131 A.2d 587, 596 (1957) (stating that "[i]t is not *any* anticipated increase in traffic which will justify the refusal of a 'special exception' in a zoning case. The anticipated increase in traffic must be of such character that it bears a *substantial* relation to the health and safety of the community. A provision of the effect of such an increase in traffic must indicate that not only is there a likelihood but a high degree of probability that it will affect the safety and health of the community, and such provision must be based on evidence sufficient for the purpose.").

<sup>187</sup> For a detailed account from a practitioner as to how localities attempt to block or delay sewer extensions to stop multifamily housing, see Timothy S. Hollister, *Sewer Laws and Wars: The Limits of Government Use of Sewers to Control Development*, Shipman & Goodwin LLP (Oct. 26, 2018), <https://www.shipmangoodwin.com/a/web/dWvHY2kvhuUu4V8NBwMN1A/Xbww5/Sewer%20Wars.pdf>.

<sup>188</sup> As Bernard Siegan assessed the situation from a front-row seat in 1972's *Land Use Without Zoning*, "[i]t is difficult to remove the pretext from the real in [anti-development arguments based upon water, sewer, roads, and schools] but even assuming that the municipalities' stated reasons were in fact true . . . state courts had a simple reply: a municipality cannot generally use zoning as an excuse to avoid added community cost. Otherwise it would curtail normal and natural growth. New communities would be able to force other and older developed communities to bear an undue portion of the burdens of life." Siegan, *supra* note 170, at 214.

representing a valid exercise of zoning power. Public health standards and the spatial demands of on-site wastewater disposal will set defensible lower limits in other contexts, at least in the absence of technological developments that abate or avoid the discharge of effluent into the soil.<sup>189</sup> The question is not whether localities have the power to establish lot size requirements but the manner in which those powers are employed. Although this inquiry is fact intensive, it is precisely the sort of which American courts since the *Nectow* decision have had a warrant to scrutinize and police. This question has greater urgency and relevance in the context of a housing crisis, as of 2023, in which American housing costs have reached record levels<sup>190</sup> and zoning restrictions pose an impediment to increasing needed supply.<sup>191</sup>

## 2. Using Existing Conditions to Illustrate Lack of Regulatory Coherence

A litigant might take the approach of the plaintiff in the *Clemons* case, discussed previously, and apply to subdivide two or more freestanding homes already located on the same parcel.<sup>192</sup> One potential application of that approach might be in the context of a detached accessory dwelling unit (ADU), such as those that exist pursuant to statute and as a matter of historical legacy in cities and towns across the United States.<sup>193</sup> ADU statutes typically allow the construction of a second home on a lot without allowing subdivision of the lot, although dividing ownership through the creation of a common-interest community, such as a condominium, may be possible depending on state law.<sup>194</sup> Recapitulating the legal challenge in *Clemons*, a litigant might reasonably ask what public interest is served or which public health and safety rationale is protected by allowing a home to be rented but not sold. The reasons enumerated by the *Clemons* court, which employed a disdainful and patronizing attitude toward low-income persons to justify depriving them of home ownership opportunities, should be rejected as improper, unbefitting of an impartial judiciary, and insufficient to meet the proper standard to which individual zoning regulations must be held.

In California, such an argument might also require the court to reexamine its decisions upholding prohibitions on converting rental apartment buildings to condominium ownership and

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<sup>189</sup> As of 2023, alternatives to the traditional in-ground leach field method—in which untreated waste liquids are directed through a network of subsurface perforated pipes through which they percolate into the soil—have been developed and marketed for sale. These methods have the potential to reduce dramatically the area needed to accommodate wastewater treatment by avoiding the need for leach fields. For an example, see WaterPlantir, <https://waterplantir.com/> (last visited Aug. 14, 2023).

<sup>190</sup> Lance Lambert, Housing Market Affordability Is Worse Now than at the Height of the Housing Bubble in 2006, *Fortune*, Aug. 22, 2023, <https://fortune.com/2023/08/22/housing-market-affordability-is-worse-now-than-during-the-housing-bubble-homes-prices/>.

<sup>191</sup> See, e.g., Edward L. Glaeser & Joseph Gyourko, *The Impact of Zoning on Housing Affordability* (National Bureau of Economic Research, NBER Working Paper No. 8835, March 2002).

<sup>192</sup> *Clemons v. City of Los Angeles*, 222 P.2d 439, 441 (Cal. 1950).

<sup>193</sup> New or strengthened ADU ordinances have been adopted by numerous states in recent years, including California, Connecticut, Montana, and others. See Emily Hamilton & Abigail Houseal, *A Taxonomy of State Accessory Dwelling Unit Laws*, MERCATUS CTR., GEO. MASON UNIV. (March 30, 2023), <https://www.mercatus.org/research/policy-briefs/state-accessory-dwelling-unit-laws>; and Catie Gould, *Montana's Big Bipartisan Housing Deal*, SIGHTLINE INST., May 9, 2023, <https://www.sightline.org/2023/05/09/montanas-big-bipartisan-housing-deal/>.

<sup>194</sup> See the discussion of ADU ordinances *supra* note 193. The definitional essence of an ADU is found in the term itself: the dwelling unit is “accessory” to another dwelling unit, which in almost all cases means that both units are on one lot and are owned by the same person or entity. It also frequently means that the ADU has a maximum square footage that is smaller than the maximum for the primary dwelling to emphasize that one of the dwellings is subsidiary to the primary dwelling. Neither of those considerations genuinely pertains to health or safety issues, which are not concerned with the type of housing tenure or the size of a home without respect to its occupancy.

to establish a more general principle that no valid justification exists under the zoning power for regulating housing tenure in a manner that would prohibit conversions.<sup>195</sup> Those principles would apply with the same force to other jurisdictions that limit conversion to condominium ownership, although the complexities of state condominium law and their interaction with the municipal zoning power are beyond the scope of this article.

#### **D. The Potential for Statutory Changes**

The primary avenue for legislative reform to municipal zoning laws has, in recent years, been through direct preemption of local ordinances, such as the laws that have been proposed or adopted in states ranging from Florida, Montana, Rhode Island, Texas, Vermont, and Washington.<sup>196</sup> Scholars have likewise emphasized the effectiveness of state legislation in corralling local zoning powers.<sup>197</sup> Pursuant to the bills that have been proposed or passed, municipalities are typically barred from excluding certain building typologies, such as small multifamily housing or ADUs, or from requiring certain minimums, such as those for parking spaces or lot size.<sup>198</sup> Other legislation has been more ambitious, seeking to require counties and municipalities to revise their zoning ordinances to accommodate certain quantities of housing through zoning changes adopted by those local governments. A third means of reform, adopted in certain states and under certain circumstances, is for states to directly provide a heightened standard of review for zoning ordinances, including those ordinances governing minimum lot sizes.<sup>199</sup>

Examples of those reforms can be found in Connecticut, where, for purposes of the state affordable housing statute, proposed developments that comply with certain income-restriction criteria are presumed to be approved and can only be denied if (1) necessary to protect substantial public interests in health, safety, or certain other matters; (2) such public interests clearly outweigh the need for affordable housing; and (3) such public interests cannot be protected by reasonable changes to the affordable housing development.<sup>200</sup> Similarly, California's so-called builder's remedy requires approval of residential projects in cities and counties that are out of compliance with state targets for housing capacity unless the locality can demonstrate that (1) the project would have a specific adverse impact on public health and safety and (2) no way exists to mitigate or avoid the impact without making the development unaffordable.<sup>201</sup> The impact that

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<sup>195</sup> *Griffin Dev. Co. v. City of Oxnard*, 39 Cal. 3d 256, 259, 703 P.2d 339, 339 (1985), *but see* *Sequoia Park Assocs. v. Cnty. of Sonoma*, 176 Cal. App. 4th 1270, 1300, 98 Cal. Rptr. 3d 669, 692 (2009) (upholding state preemption of a county ordinance regarding conversion of a mobile home park to resident ownership).

<sup>196</sup> Eli Kahn & Salim Furth, *Breaking Ground: An Examination of Effective State Housing Reforms in 2023*, MERCATUS CTR., GEO. MASON UNIV. (Aug. 1, 2023), <https://www.mercatus.org/research/policy-briefs/breaking-ground-examination-effective-state-housing-reforms-2023>.

<sup>197</sup> For two thorough and scholarly discussions regarding the history, basis, and benefits of state reforms to zoning and land use in the United States, *see* Anika Singh Lemar, *The Role of States in Liberalizing Land Use Regulations*, 97 N.C. L. REV. 293 (2019), and John J. Infranca, *The New State Zoning, Land Use Preemption Amid a Housing Crisis*, 60 BOSTON COLL. L. REV. 823 (2019).

<sup>198</sup> *Id.* As an example, Montana's reforms allow duplexes in all areas where single-family homes are permitted in cities with more than 5,000 inhabitants, and Washington's reforms legalize ADUs and forbid local regulations making them impractical to construct.

<sup>199</sup> This approach was perhaps first suggested by attorney Richard Babcock. *See* Babcock, *supra* note 1, at 159–66. *See also* Bernard Siegan, *supra* note 170, at 174–75.

<sup>200</sup> CONN. GEN. STAT. § 8-30g (2023).

<sup>201</sup> CAL. GOV. CODE § 65589.5 (2023).



serves as the basis for the denial must be founded on objective, written public health or safety standards in place when the application was deemed complete.

Mirroring the litigation approach outlined previously, statutory changes that narrow the scope of authority of local zoning commissions with reference to concrete health and safety standards could, in effect, override local minimum lot sizes that are beyond what those standards would require. For example, a state statute might provide that a proposed development that complies with all state building and sanitary codes must be issued a permit, with provisions allowing applications to petition the courts for a writ of mandamus in the event an application is wrongfully denied. Such an approach has been adopted in Connecticut in response to the state supreme court decision discussed previously,<sup>202</sup> in which the state zoning enabling act has been amended to prohibit zoning regulations from “[e]stablish[ing] for any dwelling unit a minimum floor area that is greater than the minimum floor area set forth in the applicable building, housing or other code.”<sup>203</sup> Connecticut, like certain other states, also contains a uniformity requirement mandating that all zoning regulations be uniform for each zoning district but which nonetheless allows regulations in one district to vary from those in another district.<sup>204</sup> The provision, which pays lip service to the idea of uniform legal standards of the sort that characterize health and safety regulations, has only encouraged a proliferation in the number of zoning districts over time because each minor adjustment within a zone can only be lawfully accommodated through the creation of another zone. A coherent uniformity provision might require cities to establish a uniform lot size within areas served by sewer and water, establish a uniform density (measured by units per acre) within those areas, or otherwise require the imposition of uniform standards for massing, setbacks, or other building and site planning regulations.

For minimum lot sizes, a preemption provision might bar municipalities from requiring a quantity of land greater than the minimum needed to satisfy the provisions of the applicable health or sanitary code or, for urban areas, prohibit requiring frontages beyond a certain length, setbacks of a certain depth, or lot sizes larger than necessary to accommodate the minimum frontage and setbacks. Although that approach carries the risk of politicizing state codes, their uniformity and basis in professional expertise to some extent shields them from shifting political winds.

## V. CONCLUSION

In a country where most homes are single-family and detached<sup>205</sup> and where minimum lot sizes are ubiquitous, allowing property owners to subdivide their land to accommodate additional detached homes is a critically important means of increasing the housing supply and promoting the option of fee simple home ownership for American households. The success of accessory

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<sup>202</sup> *Builders Serv. Corp. v. Plan. & Zoning Comm’n of Town of E. Hampton*, 208 Conn. 267, 298 (1988).

<sup>203</sup> CONN. GEN. STAT. § 8-2(d)(7) (2023).

<sup>204</sup> CONN. GEN. STAT. § 8-2(a)(2) (2023) (“Such zoning commission may divide the municipality into districts of such number, shape and area as may be best suited to carry out the purposes of this chapter; and, within such districts, it may regulate the erection, construction, reconstruction, alteration or use of buildings or structures and the use of land. All zoning regulations shall be uniform for each class or kind of buildings, structures or use of land throughout each district, but the regulations in one district may differ from those in another district.”).

<sup>205</sup> According to the 2021 American Community Survey 1-year estimates, 62.9 percent of all occupied American housing units are single-family detached, and as many as 5.2 percent are freestanding mobile homes. Accordingly, 69.3 percent of Americans live in freestanding homes, whether site built, manufactured, or mobile. Another 6.4 percent live in attached single-family housing. Only 25.5 percent of occupied housing units are apartments, although some of them may be held in ownership or through condominiums, cooperatives, or other forms of common interest community. U.S. Census Bureau, *American Community Survey Data*, <https://www.census.gov/programs-surveys/acs/data.html> (last visited Aug. 14, 2023).

dwelling units in California and of minimum lot size reform in Houston shows the potential for such changes to result in major increases in housing production that restrain cost increases while allowing better utilization of existing infrastructure. Legal challenges to those minimums, particularly in the case of urban lots where city sewer and water are already available, remain an underexplored option of effecting change despite decades' worth of litigation that has primarily involved large lot minimums on the urban fringe. As the author of this article has argued, urban minimum lot regulations contain logical inconsistencies of dubious defensibility that cities will be hard pressed to explain in terms of health, safety, or the public welfare and that are therefore vulnerable to judicial action in the same manner that arbitrary home size minimums have often been. A legal revolution of the sort that would overthrow *Euclid* and its progeny is simply not a necessary prerequisite to challenges of this sort. The history of minimum lot size litigation, although widely varying in its outcomes, shows that most courts have discarded in substance (if not always in form) the excessively deferential test employed by the courts of the 1940s and 1950s and are no longer willing to afford local zoning commissions the same degree of lawmaking latitude that they would afford a state legislature.

Reinforcing this trend are amendments to state zoning enabling acts made in recent years that have narrowed the scope of local authority to enact zoning ordinances. Alongside state legislative efforts to directly preempt local minimum lot sizes, efforts such as these to enshrine a higher standard of judicial review or to further limit the zoning power to matters of public health, safety, and the general welfare of all citizens can further assist in constraining zoning practices where a purpose other than exclusion or income sorting is difficult to discern. With the need for new housing of reasonable cost as pressing as it has ever been, however, courtroom challenges remain an essential element of unshackling the American housing market from the arbitrary constraints with which localities have fettered it.