MERCATUS SPECIAL STUDY

CONSIDERATIONS FOR STATE "FAIR SHARE" HOUSING FRAMEWORKS

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Abstract

State "fair-share" housing frameworks aim to address regional housing shortages by mandating that local governments adopt state-approved plans for housing growth. This study explores the design and efficacy of these frameworks, highlighting key issues such as target-setting, plan evaluation, and accounting for market dynamics. It critiques current practices that presuppose municipal planners will identify the best sites for development and assume the needs of lower-income households can only be met with new deed-restricted housing units. Recommendations include setting achievable targets, evaluating plans for expected yield in new units, employing a simple builder's remedy for noncompliance, and sanctioning local governments for poor performance. While fair-share frameworks hold the potential to mitigate housing shortages, they have historically placed too much emphasis on planning and not enough on performance.

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Groping for a solution to unaffordable housing costs, a number of states have passed or are considering fair-share laws. These laws require local governments to periodically adopt a state-approved plan to accommodate what the state determines to be regionally needed housing.[1] This paper explains the main components of fair-share laws, highlights some important issues for state policymakers who are considering whether to adopt one, and offers recommendations.

I shall not try to answer the question of whether a state writing on a clean slate should prioritize the adoption of a fair-share law—as opposed to, say, a mandatory upzoning of sites near transit, a cap on minimum lot sizes, or an accessory dwelling unit law. Rather, my recommendations assume that state policymakers have decided, for political or other reasons, that they favor the fair-share concept but are unsure of how to design a fair-share law that works.

I will start by reviewing the ways in which states have set housing targets for local governments. Then I'll take up the question of how states evaluate the sufficiency of local housing plans. A target is meaningless if the municipality's plan to achieve it amounts to makework or subterfuge. Next, I will look at how states that set distinct targets for "affordable housing" assess progress toward such targets. To date, states have ignored the indirect effect of new market-rate housing on the availability and affordability of older, relatively inexpensive

1. At least three states—California, Oregon, and New Jersey—periodically assign housing targets to local governments and require each local government to adopt a state-approved plan for meeting the target (Cal. Gov't Code §§ 65580 et seq; Or. Rev. St. §§ 184.451–184.455; Assemb. Bill 4 (New Jersey, 2024)). Washington and Florida also require local governments to adopt a state-approved general plan that accommodates forecasted population growth, but these states do not assign numerical housing targets to local governments (Wash. Rev. Code ch. 36.70A; Fla. St. §§ 163.3177, 163.3184). Several other states—including Massachusetts, Connecticut, Rhode Island, and Illinois—stipulate that at least 10 percent of all housing units in each local jurisdiction should consist of deed-restricted affordable housing, but these states do not set targets for housing-stock growth (Mass. Gen. Law ch. 40B; Conn. Gen. Stat. § 8-30(g); R.I. Stat. tit. 45, ch. 53; Ill. Stat. ch. 310, § 67). In these states, a locality could, in principle, achieve the 10 percent target by imposing deed restrictions on 10 percent of extant dwelling units without any growth in its housing stock.

market-rate units—the kind of housing that the vast majority of lower-income households depend on. Finally, I'll address remedies. Fair-share housing laws typically feature a "builder's remedy" that allows developers of certain types of projects to bypass local land use restrictions in cities without a compliant plan. I suggest that states authorize a simple, low-cost builder's remedy that would apply not only in jurisdictions that lack a state-approved plan but also in cities that have proven to be exceptionally poor performers.

1. Setting Targets

The first order of business for lawmakers considering a fair-share law is to set the targets, i.e., the outcomes that local governments' housing plans are supposed to achieve. There are two kinds of housing targets in use today. California, Oregon, and New Jersey set a target for *housing-stock growth*, which they derive from forecasts of household growth supplemented with ad hoc fudge factors.[2] The ad hoc factors are supposed to be indicia of unmet "present need," e.g., low vacancy rates, limited new construction, high rates of cost-burdened households, overcrowding, homelessness, or the presence of "deficient" units occupied by low-income households.[3]

Forecasted household growth is a poor standard of housing need because household growth is endogenous to land-use regulation.[4] Places with high prices and severely restrictive regulations have low rates of household growth, but that just shows that their growth controls *successfully block development*, not that they have low need. By providing for ad hoc adjustments, states tacitly acknowledge this point. The adjustments can be very big or very small, depending on the priorities of state administrators.[5]

The other kind of housing target, adopted in Massachusetts, Rhode Island, Connecticut, and Illinois, specifies the *minimum proportion* (typically 10 percent) of the housing stock in a jurisdiction that should be deed-restricted affordable housing.[6] This approach is even worse than basing targets on projected

2. See Cal. Gov't Code § 65584.01; Or. Rev. St. §§ 184.451–184.455; NJ ST § 52:27D–304.3.
3. See Department of Administrative Services Office of Economic Analysis, *Oregon Housing Needs Analysis: Draft Methodology Oregon* (September 2024) and Christopher S. Elmendorf et al., "Making It Work: Legal Foundations for Administrative Reform of California's Housing Framework," *Ecology Law Quarterly* 47, no. 4 (2020): 1001–04.
4. Christopher S. Elmendorf, "Beyond the Double Veto: Housing Plans as Preemptive Intergovernmental Compacts," *Hastings Law Journal* 71 (2019): 79–150.
5. Christopher S. Elmendorf et al., *Regional Housing Need in California: The San Francisco Bay Area* (UCLA Lewis Center for Regional Policy Studies, July 2020).
6. Elmendorf, "Beyond the Double Veto."

household growth, as it incentivizes cities to restrict the development of market-rate housing. A town with 1,000 houses, 100 of which are affordable, satisfies the 10-percent-of-all-housing-should-be-affordable norm. But if a developer proposes to build 100 new market-rate homes in the town, approving the project would put the town in the penalty box ($100 / 1100 \cong 0.09$), even though building the homes would be good for regional housing affordability.

States that set regional targets for housing growth differ in how they allocate the target among localities in a region. California delegates the allocation decision to so-called "councils of governments," which are akin to a United Nations of metro-area local governments.[7] New Jersey and Oregon use formulas set by state law.[8]

In 2023, Governor Hochul proposed a simpler, more transparent approach for New York. Cities in the high-demand, high-price New York City metro area would be expected to grow their housing stock by an average of 1 percent annually; for cities upstate, the target was one-third as large. Her plan met with fierce resistance from Long Island suburbs and was not enacted.[9] A similar proposal is now pending in Virginia.[10]

Recommendation: There is no one right formula for setting housing targets, but if state lawmakers want their fair-share programs to increase the supply of housing in high-demand, supply-constrained markets, they need to arrive at a formula that doesn't merely perpetuate shortages (like the household-growth standard) or encourage jurisdictions to curtail market-rate production (like the 10-percent-of-all-housing-should-be-deed-restricted standard). The delicate task is to arrive at a formula that yields targets that represent a substantial increase in production over the status quo but that are not politically infeasible. The failure of Hochul's proposal in New York suggests that there needs to be play in the joints to accommodate politically powerful NIMBY (not in my backyard) jurisdictions—whether through flexible criteria and procedures for intraregional allocation of regional targets or through an explicit mechanism for trading housing allocations among the local governments in a region. Also, while Hochul's announced target of 1 percent annualized growth for the New York City metro

7. Cal. Gov't Code § 65584.01.
8. NJ ST § 52:27D–304.3; Oregon Department of Administrative Services, Oregon Housing Needs Analysis: Draft Methodology, September 2024.
9. Ben Max, "Hochul to Abandon Required Construction Mandates in Ambitious Housing Plan," *City & State NY*, November 29, 2023.
10. James A. Bacon, "Vanvalkenburg Tackles Affordable Housing," *Bacon's Rebellion* (blog), January 7, 2025.

region seems to be quite reasonable (high-demand, low-cost regions in the South and West have grown much faster),[11] the fact that it was set by Hochul herself rather than derived from a putatively technocratic process may have made it *feel* more arbitrary than the California and Oregon approach of forecasting household growth and topping it off with ad hoc adjustments for "present need."

Perhaps the best approach would be for states to base targets on a committee of economists' rough judgment of economic feasibility. The feasibility determination could be grounded on rates of housing-stock growth achieved by fast-growing metros elsewhere in the nation,[12] or estimates of the number of units that would have been built in the absence of local land-use restrictions,[13] or estimates of the number of units that would be feasible to build today in the absence of local land-use restrictions, given prices and construction costs.[14]

2. Evaluating Plans: Expected Yield vs. Ad Hoc Sums of Nominal Capacity

Once a state has set targets, it needs a method for evaluating the sufficiency of local governments' plans. One approach currently in use simply aggregates the nominal zoned capacity of every parcel in the jurisdiction that meets certain ad hoc criteria for being a good candidate for development. Further ad hoc adjustments may be applied if site characteristics or land-use codes make it infeasible to build a project that maxes out a site's nominally allowed density. The city's plan is then scored as legally adequate if the adjusted nominal zoned capacity across all sites that pass the good-candidate screen equals or exceeds the jurisdiction's housing target. This has been the standard approach in California. There, each city chooses its own screening criteria and ad hoc adjustments to generate a housing-plan "inventory" of sites and an estimate of the sites' aggregate capacity

11. Edward Glaeser and Joseph Gyourko, "The Economic Implications of Housing Supply," *Journal of Economic Perspectives* 32, no. 1 (2018): 3–30.
12. California uses a "comparable regions" approach for cost-burden and overcrowding adjustments to baseline regional housing targets (Gov't Code § 65584.01(b)). At first glance, this looks similar to basing housing-growth targets on what has been achieved elsewhere, but in reality it is very different. The California cost-burden and overcrowding adjustments adjustment are ad hoc, rather than designed to identify a feasible rate of housing growth as revealed by *top* performers. Also, the criteria for "comparable regions" aren't spelled out by statute, which resulted in some regions identifying "comparators" based on indicia of low growth and high demand. Elmendorf et al., *Regional Housing Need in California,* 7–10.
13. For a county-level estimate of this counterfactual, see Kevin Corinth and Hugo Dante, "The Understated 'Housing Shortage' in the United States" (IZA Institute of Labor Economics, July 2022).
14. Christopher S. Elmendorf et al., "State Administrative Review of Local Constraints on Housing Development: Improving the California Model," *Arizona Law Review* 63 (April 2, 2021): 609–77.

for new housing during the planning period.[15] The state housing department then reviews, and approves or rejects, the municipal plans.

The tacit assumption of this approach is that city planners can and will determine ex ante precisely which sites will be developed during the planning period.[16] This assumption is risible. A study of San Francisco Bay Area jurisdictions found that the typical housing-plan site had about a 1-in-10 chance of getting developed during the planning period.[17] Local officials who disfavor growth have acknowledged that they assigned their city's housing target to sites they knew would be tough to develop.[18] Given that the underlying (and correct) premise of the fair-share laws is that local officials don't have sufficient political incentives to approve new housing, it shouldn't surprise anyone that local officials have used their fair-share planning discretion to thwart the state's objectives.

In another paper, my coauthors and I argue that housing plans should be evaluated for their expected yield during the planning period, not the aggregate nominal or adjusted capacity of putatively "good" sites.[19] The expected-yield approach sums up the housing potential of all parcels in a jurisdiction, but it discounts each parcel's nominal capacity by a rough estimate of its probability of development during the planning period. A housing plan is legally adequate if the sum across all parcels of **(probability of development) multiplied by (expected net gain in units conditional on development)** equals or exceeds the city's housing target.

The first term, probability of development, can be estimated in various ways. A very simple proxy—which also creates good incentives for cities to approve housing—is the rate at which parcels in the city's previous housing plan were developed during the previous planning period. A more sophisticated approach is to generate pro-forma–based estimates of hypothetical projects' net present value (NPV), and then to fit a link function to historical permitting data and obtain estimates of the probability of development over a given period of

15. Christopher S. Elmendorf et al., "Making It Work: Legal Foundations for Administrative Reform of California's Housing Framework," *Ecology Law Quarterly* 47, no. 4 (2020): 973–1060.
16. New Jersey's fair-share law makes a similar assumption. It locks the zoning rules that apply to designated fair-share sites for the duration of the planning period, while providing that the city or other "interested party" may petition for a site substitution or change in site's zoning if the site hasn't received a "preliminary site-plan approval" by the midpoint of the 10-year planning period. N.J. Stat. § 52:27D-313(c).
17. Sidharth Kapur et al., *What Gets Built on Sites That Cities 'Make Available' for Housing?* (UCLA Lewis Center for Regional Policy Studies, August 2021).
18. Liam Dillon, "California Lawmakers Have Tried for 50 Years to Fix the State's Housing Crisis. Here's Why They've Failed," *Los Angeles Times*, June 29, 2017.
19. Elmendorf et al., "Making It Work."

time (the planning period) of a site with a given potential-project NPV.[20] The second term in the formula, expected net gain in units conditional on development, can be calculated based on nominal or realistic zoned density, as under the traditional approach.

Given that even high-quality sites have a probability of development much closer to zero than one,[21] adjusting for sites' probability of development is much more realistic than the traditional assumption that housing-plan sites *will* be developed during the planning period.

San Francisco's housing plan for the current planning period uses the expected-yield approach and shows considerable promise.[22] Meanwhile, the City of Los Angeles provides an instructive case study of how fair-share planning goes off the rails when cities instead "prove" the sufficiency of their plans using ad hoc site-screening criteria and no plausible adjustment for sites' probability of development during the planning period.

To fully appreciate what happened in Los Angeles requires a little history. In 2019, the Southern California Association of Governments (SCAG) proposed that the region needed 430,000 new homes over the next eight-year planning period, roughly the same as the region's target for the previous period.[23] The state disagreed. Applying new statutory criteria that were meant to generate larger targets, the state's housing department *tripled* the region's target to more than 1.3 million new homes.[24] The City of Los Angeles's share of the revised regional target came to more than 486,000 units. Hitting this number would require roughly doubling the number of housing units the city had been entitling annually.[25] Major policy reforms seemed to be in the offing.

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20. Issi Romem and Samantha Wilkinson, *Creating a Stronger Housing Element: The Example of Los Angeles* (Terner Center for Housing Innovation, August 3, 2021).
21. Kapur et al., *What Gets Built* and Romem and Wilkinson, *Creating a Stronger Housing Element*.
22. San Francisco's plan commits the city to adopting a rezoning that increases expected housing yield by at least 36,282 units; the rezoning plan "shall reasonably account for sites' likelihood of development during the planning period using an analytical model and shall not add government constraints that reduce project financial feasibility as determined by an analysis prior to the rezoning enactment" (San Francisco Planning Department 2023, Action 7.1.1).
23. Liam Dillon, "Coastal Cities Give in to Growth. Southern California Favors Less Housing in Inland Empire," *Los Angeles Times*, November 8, 2019.
24. Dillon, "Coastal Cities Give in to Growth."
25. From 2015 to 2020, the city entitled 211,475 units, or about 35,000 per year, Los Angeles City Planning, *Housing Progress Reports*, last accessed January 15, 2025, https://planning.lacity.gov/resources/housing-reports. The city's eight-year housing target is equivalent to 60,797 units/year. Not all entitled units will be built, so to achieve a 60K/year production target, the city probably has to aim for a substantially higher entitlement rate.

In developing its housing plan, the City of Los Angeles started out on the right track. It worked with the Terner Center at UC Berkeley to estimate the expected yield of potentially developable sites under the regulatory status quo. Combining pro-forma–based estimates of the returns from various project typologies with historical data on sites' conversions to new uses, the Terner team concluded that the typical parcel in the city had only about a 0.01 probability of redevelopment over a five-year period and that even the very best sites (99th percentile) had a five-year probability of development of less than 0.10.[26] Under the regulatory status quo, vacant and underutilized sites were expected to yield only about 43,000 new dwellings over the planning period, far short of the city's 486,000-unit target.[27] Los Angeles then credited itself with another 125,000 units from already-proposed projects, plus 41,000 projected ADUs and roughly 20,000 units from a pending rezoning and disposition of public lands.[28] That still left the city with a deficit of more than 250,000 units relative to its target.

To make up for the deficit, the city identified various sites that could be rezoned and redeveloped at higher densities. Then came the wrong turn. Instead of modeling the sites' probability of development under the proposed rezoning and counting them for their expected yield, the city reverted to ad hoc calculations. It baldly asserted that each site would accommodate a number of units equal to 80 percent of the site's post-rezoning maximum density, plus a further downward or upward adjustment based on certain "suitability adjustment factors."[29] Sites with a "historic cultural monument" received a downward adjustment of 50 percent; those with a maximum-units-to-existing-units ratio of less than 4:1 received a downward adjustment of 35 percent; those with rent-stabilized units were downwardly adjusted by 10 percent; and those located in a "high opportunity area" received an upward adjustment of 20 percent. The city's choice of these factors and the size of the adjustments were entirely ad hoc. For all I know, the factors and percentages may have been reverse engineered to validate a rezoning plan that city planners favored on other grounds.

The (near) pointlessness of a fair-share planning framework that judges plans' sufficiency in such an ad hoc manner was driven home by a subsequent UCLA Lewis Center analysis of site capacity in Los Angeles.[30] Applying ad hoc

26. Romem and Wilkinson, *Creating a Stronger Housing Element*.
27. Los Angeles City Planning, *2021–2029 Housing Element* (2021): chap. 4, 151.
28. Los Angeles City Planning, *2021–2029 Housing Element* (2021): chap. 4, 151.
29. Los Angeles City Planning, *2021–2029 Housing Element* (2021): chap. 4, table 4.18.
30. Aaron Barrall and Shane Phillips, *CHIPing In: Evaluating the Effects of LA's Citywide Housing Incentive Program on Neighborhood Development Potential* (UCLA Lewis Center for Regional Policy Studies, November 2024).

screening and adjustment factors similar to those the city had used to score its plan for remedying the putative 250,000-unit shortfall of capacity, the UCLA report concluded that under existing zoning, Los Angeles already has capacity for about 1.33 million net new housing units, or about three times the city's assigned target and nearly equal to the 1.34-million-unit target for the entire Southern California region. Had Los Angeles planners used the Lewis Center's analysis in the city's original, state-approved housing plan, they would have concluded the city had a million units of surplus capacity rather than a 250,000-unit deficit—and thus no need to do any upzoning at all. This, despite the California legislature's finding of an extreme housing shortage,[31] despite the legislature's repeated efforts to increase housing targets and check municipalities' efforts to evade them,[32] despite the state housing department's tripling of the LA region's housing target, and despite numerous academic studies finding that California's expensive cities and suburbs are some of the most supply-constrained places in the nation.[33]

How could it be that Los Angeles has a massive housing shortage but also unused zoned capacity for more than 1.33 million new homes on sites that are plausible candidates for development? The simple answer is that there are zillions of local rules and regulations that constrain development, in addition to density limits. Planning scholars Paavo Monkkonen and Michael Manville call it the "regulatory hydra."[34] The heads of the hydra are impact fees, inclusionary-housing mandates, environmental-study requirements, aesthetic standards, discretionary neighborhood reviews, limits on redevelopment of rent-controlled or tenant-occupied properties, local building code amendments, historic preservation ordinances, and more. The list goes on and on.

Every time the state chops off a local hydra's head, the local government, if it doesn't want development, tries to grow a new one. This dynamic all but dooms the fair-share approach unless local plans are evaluated using the expected yield approach, with estimates of sites' probability of development that have some footing in the local government's actual track record of approving housing. In a

31. Cal. Gov't Code 65589.5(a).
32. Elmendorf et al., "Making It Work."
33. Glaeser and Gyourko, "The Economic Implications;" Joe Gyourko and Jacob Krimmel, "The Impact of Local Residential Land Use Restrictions on Land Values Across and Within Single-Family Housing Markets," *Journal of Urban Economics* 126 (November 2021): 103374; and Joseph Gyourko, Jonathan S. Hartley, and Jacob Krimmel, "The Local Residential Land Use Regulatory Environment Across US Housing Markets: Evidence from a New Wharton Index," *Journal of Urban Economics* 124 (2021): 103337.
34. Paavo Monkkonen and Michael Manville, "Planning Knowledge and the Regulatory Hydra," *Journal of the American Planning Association* 86, no. 2 (2020): 268–69.

city like Los Angeles with a gruesome regulatory hydra, good sites' probability of development will be very low, and so to achieve a reasonable housing target, the city must either upzone on an absolutely massive scale or else slay the monster.

To be clear, one should not expect actual housing production under a housing plan that's been evaluated for expected yield to equal the expected yield. Housing production is cyclical and sensitive to interest rates, especially in less-constrained markets.[35] In planning periods that coincide with economic booms, actual production should exceed a plan's expected yield under normal conditions, whereas in planning periods that coincide with a recession or an interest-rate spike, actual production will typically fall short. That's fine. The point of the expected-yield approach is not to hit the bullseye every time, just to hit it on average. And even if the expected-yield estimates aren't quite right on average, they at least put pressure on cities to acknowledge and wrestle with the various ways in which local rules, regulations, and existing uses together constrain development.

Recommendation: States should score cities' housing plans for their expected yield of new units during the planning period under normal economic conditions. A plan should be deemed legally sufficient if its expected yield equals or exceeds the city's housing target. The underlying model of sites' development probability need not be sophisticated, but at a minimum it should account for the rate at which sites have been developed in the city in the past.

3. Affordability Categories and Market Dynamics

All fair-share frameworks aim to increase the amount of affordable housing. By "affordable housing," states typically mean "deed-restricted housing," whose price or rent is regulated for households earning a designated fraction of the area's median income (e.g., 50 percent or 80 percent). In California and Oregon, production targets are set at various levels of affordability, corresponding to the forecasted regional distribution of income.[36] This lends an "air of unreality" to the frameworks, however, as it generally implies that 40 percent or more of all of the new housing should be deed-restricted affordable housing—which would require massive public subsidies that the state legislature won't provide.[37] Local governments then complain, legitimately, that it is fiscally impossible for them to meet their affordable housing targets.

35. Edward Glaeser and Joseph Gyourko, "The Economic Implications."
36. Cal. Gov't Code § 65584; Or. St. § 184.453(4).
37. Elmendorf et al., "Making It Work," 984.

No state's fair-share framework addresses the economic reality that most of the housing occupied by lower-income households in any regional market is not deed-restricted affordable housing but rather older market-rate units in less desirable areas. Whether such older market-rate units remain accessible to lower-income households depends on the supply of new market-rate housing in more desirable areas. Within regions, and to some extent, across regions, housing submarkets are linked by "chains of moves." That is, when a household moves into a new, fancy market-rate unit in a desirable area, that household typically vacates a somewhat less fancy "used" unit in a somewhat less desirable area. The next occupant of that unit frees up another unit elsewhere, and so forth.[38] Thus, an exogenous increase in the supply of new market-rate housing lowers rents across all market segments.[39] Conversely, a lack of new market-rate housing in high-demand areas causes "upward filtering" of existing units in relatively affordable neighborhoods, also known as gentrification.[40]

To improve the welfare of lower-income households generally—not just the lucky winners of housing lotteries for subsidized, deed-restricted units—a fair-share housing framework must increase the supply of market-rate housing. This will benefit tenants and new homebuyers across the board. And, by driving down the rents of relatively affordable market-rate housing, it will allow the fixed sums of money that Congress appropriates for affordable-housing vouchers to cover many more of the eligible lower-income households.[41]

Recommendation: States that assign separate targets for "affordable" and "market-rate" housing should give local governments partial credit toward their affordable-housing targets if they exceed their market-rate targets. The size of the credit can be tied to empirical evidence of the rate at which relatively affordable units are freed up regionally through chains-of-moves induced by new market-rate production. This would reduce the political pressure on cities to adopt so-called "inclusionary zoning" requirements (which drive up the cost of

38. Bratu, Oskari Harjunen, and Tuukka Saarimaa, "JUE Insight: City-Wide Effects of New Housing Supply: Evidence from Moving Chains," *Journal of Urban Economics* 133 (January 2023): 103528 and Evan Mast, "The Effect of New Market-Rate Housing Construction on the Low-Income Housing Market," *Journal of Urban Economics* 133 (January 2021).
39. Andreas Mense, "The Impact of New Housing Supply on the Distribution of Rents" (Conference Paper, Vereins für Socialpolitik 2020: Gender Economics, ZBW—Leibniz Information Centre for Economics, 2020).
40. Liyi Liu, Doug McManus, and Elias Yannopoulos, "Geographic and Temporal Variation in Housing Filtering Rates," *Regional Science and Urban Economics* 93 (March 2022): 103758.
41. Kevin Corinth and Amelia Irvine, "The Effect of Relaxing Local Housing Market Regulations on Federal Rental Assistance Programs," *Journal of Urban Economics* 136 (July 2023): 103572.

building), since a city could fulfill its affordable-housing obligations by permitting a surfeit of market-rate housing. It would also become harder for housing opponents to argue that their city was approving "too much luxury housing" at the expense of affordable housing, since state law would officially recognize that the former actually contributes to regional affordability.

4. The Builder's Remedy: Nuclear Option or Default Upzoning?

Most fair-share laws reinforce the planning requirement with a "builder's remedy," which allows developers to build affordable housing projects in derogation of local zoning if the city lacks a state-approved housing plan.[42] States have also conditioned cities' eligibility for certain streams of grant funding on the adoption of a compliant housing plan.

The traditional builder's remedy is a nuclear option: It blows up local zoning while leaving a state agency or state court to decide on a project-by-project basis whether the public interest in affordable housing outweighs whatever ostensible problems a builder's remedy project might cause locally, such as overburdened infrastructure.[43]

If one thinks the main purpose of the builder's remedy is to scare cities into adopting a state-approved plan, the nuclear option has a pretty obvious logic. However, a nuclear builder's remedy may generate intense political pressure for approval of mediocre housing plans, precisely because the remedy is so extreme.[44]

Instead of simply blowing up zoning, a state could specify an alternative, more generous zoning code that would kick in by default when cities are out of compliance with the fair-share law. In 2024, California took a step in this direction. The legislature established density limits on builder's remedy projects and

42. Builder's remedies have been codified in New Jersey, Illinois, Massachusetts, Rhode Island, California, and Oregon. See Elmendorf, "Beyond the Double Veto," 97–99. The California builder's remedy was substantially revised in 2024 by Assembly Bill 1893. The Oregon builder's remedy is still being developed administratively; it will take the form of a default zoning code that may be imposed if a city fails to make adequate progress toward housing targets relative to peer jurisdictions (Or. Rev. Stat. §§ 197A.100–197A.130; Draft Or. Admin. R. 660-008-0335(d) (proposed Sept. 26, 2024, https://www.oregon.gov/lcd/LAR/Documents/660-008_NoticeFilingTrackedChanges.pdf)).

43. Elmendorf, "Beyond the Double Veto," 97.

44. Note, however, that Blanco and Sportiche, in a study of Massachusetts, find no evidence that exposure to large builder's remedy projects causes nearby homeowners to become more politically active. Hector Blanco and Noémie Sportiche, "Local Effects of Bypassing Zoning Regulation," SSRN Scholarly Paper, July 26, 2024, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4906689.

clear criteria for determining which local zoning and development standards may be applied to these projects.[45] Going one step further, Oregon may soon require "application of model [state] ordinances and procedures . . . to all residential development" in certain cities that are out of compliance with the state's fair-share law.[46]

An important advantage of this "default state zoning code" remedy is predictability for the developer. It makes clear what is buildable when a jurisdiction is in the penalty box. And if the state wants to apply a little more pressure, it can always make the default code more accommodating of large projects or supplement it with financial incentives for the adoption of a compliant fair-share plan.

Recommendation: The workhorse remedy for noncompliance with a fair-share housing law should be a simple builder's remedy. Local governments that don't want to incur the administrative or political costs of adopting a housing plan should be allowed to opt into the builder's remedy without further sanction. The builder's remedy should have the following features:

1. *Low-cost building.* The builder's remedy should enable the production of housing at a low cost, as the cost of building ultimately determines housing prices if production can be scaled.[47] To this end, builder's remedy projects should be subject to low impact fees, low inclusionary requirements, and predictable permitting. This could be achieved by promulgating a default builder's remedy code that prescribes zoning, fees, and affordability requirements (if any) for these projects. Alternatively, a state could constrain local fees and inclusionary mandates by making them waivable if a reasonable person could conclude, from the evidence in the record, that they would render a project economically infeasible. The California builder's remedy will use the waiver approach starting in January 2025.[48]
2. *Clarity about compliance status.* As a corollary to "low-cost building," states should make it easy for developers and cities alike to figure out

45. Assembly Bill 1893 (amending Cal. Gov't Code § 65589.5(d) & (f)).
46. Draft Or. Admin. Reg. 660-008-0335(4)(d) (Sept. 27, 2024).
47. Glaeser and Gyourko, "The Economic Implications."
48. Specifically, AB 1893 (2024) requires cities to waive local inclusionary requirements in excess of a=the state baseline if a reasonable person could conclude that the local requirement renders the proposed project infeasible.

whether a city is subject to the builder's remedy.[49] Lack of clarity about projects' eligibility for the builder's remedy was a problem in California for many years. The builder's remedy was triggered by a city's failure to adopt a "substantially compliant" plan, and the law of "substantial compliance" was murky.[50] Moreover, it wasn't clear whether a developer who submitted their project application while a city was out of compliance obtained vested rights or if the city could deny the project if it subsequently achieved compliance.[51] In 2024, the legislature fixed these problems. The California builder's remedy is now triggered by the state housing department's administrative determination of noncompliance and remains in effect until the department approves a revised plan or a court reverses the department's decision.[52] Developers obtain vested rights if they file a simple preliminary application while the city is subject to the builder's remedy.[53]

3. *Checks on local permitting shenanigans.* Many local governments have resisted approving builder's remedy projects.[54] To combat local evasion, states should either authorize a state agency to review and approve the projects or provide a cause of action backed by attorney's fees and fines if a city unlawfully denies a builder's remedy project or delays it gratuitously. California's Housing Accountability Act is a good example of the latter approach.[55] Amendments adopted in 2023 and 2024 create remedies for unwarranted delay.[56] A new clean-energy law in Massachusetts exemplifies the former approach of backstopping local permitting with state-agency review (albeit for energy, not housing).[57]

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49. If it's uncertain whether a project is eligible for the builder's remedy, investors in the project will demand a higher expected return, which increases the developer's cost of capital and therefore the cost of building.
50. Christopher S. Elmendorf, *A Primer on California's 'Builder's Remedy' for Housing-Element Noncompliance*, (UCLA Lewis Center for Regional Policy Studies, April 2022).
51. Elmendorf, *A Primer on California's 'Builder's Remedy'*.
52. A.B. 1886, 2024 Cal. Stats. Ch. 267; Cal. Gov't Code §§ 65585.03, 65589.55.
53. A.B. 1893, 2024 Cal. Stats. Ch. 268; Cal. Gov't Code §§ 65589.5(d)(6), (f)(6), (h)(5) & (o).
54. Kate Talerico, "Builder's Remedy Was Supposed to 'Manhattanize' the Bay Area. So Where Are All the Houses?," *SiliconValley.Com*, April 19, 2024.
55. Cal. Gov't Code § 65589.5.
56. AB 1633, 2023 Cal. Stats. Ch. 768; AB 1893, 2024 Cal. Stats. Ch. 268.
57. S.B. 2967 (Mass. 2024); Ma. St. ch 164 § 69U(a) (authorizing state board to issue a comprehensive permit for a "small clean energy and distribution" project—a type of project which is normally subject to local permitting—"[u]pon request by an applicant and upon a showing of good cause").

The trickiest question about the design of a builder's remedy is deciding how the remedy should apply in single-family-home neighborhoods. Fair-housing considerations and the pervasiveness of single-family-only zoning suggest that the remedy should apply in these neighborhoods. But the development of tall apartment buildings in affluent, single-family-home neighborhoods could unleash a political backlash.[58] A reasonable compromise might be to allow "missing middle" housing (such as townhomes and two-to-eight unit buildings) but not large apartment buildings in single-family neighborhoods pursuant to the builder's remedy.[59]

5. Remedies for Bad Plans, Bad Outcomes, or Both?

A recurring question about state fair-share frameworks is whether local governments should face consequences (such as a builder's remedy) only for failing to enact a state-approved housing plan or also for failing to meet housing targets.

Traditionally, state legislatures said that the adoption of an approved plan is enough.[60] Recent reforms in three states put more emphasis on performance. Since 2019, California has required local governments that are not on track to hit their targets to review certain housing projects ministerially, that is, without applying discretionary standards.[61] Oregon's new housing-needs framework authorizes a state agency to conduct mid-cycle audits and demand corrective-action plans from local governments whose performance is below the median of

58. David Broockman, Christopher S. Elmendorf, and Joshua Kalla, "The Symbolic Politics of Housing," under review, 2024, https://doi.org/10.31219/osf.io/surv9; Martin Vinæs Larsen and Niels Nyholt, "Understanding Opposition to Apartment Buildings," *Journal of Political Institutions and Political Economy* 5, no. 1 (2024): 29–46; William Marble and Clayton Nall, "Where Self-Interest Trumps Ideology: Liberal Homeowners and Local Opposition to Housing Development," *The Journal of Politics* 83, no. 4 (October 2021): 1747–63; Stephanie Ternullo, "The Politics of Concentrated Advantage," SSRN Scholarly Paper, March 20, 2024, https://ssrn.com/abstract=4766660; and Elaenor West and Marko Garlick, "Upzoning New Zealand," *Works in Progress* 13 (November 15, 2023).

59. The current California compromise allows densities of 45 dwelling units (du) per acre in urban areas and 30 du/acre in suburban areas, plus another 35 du/acre near transit and in high-opportunity neighborhoods. Additional bonuses are available through the state's density bonus law if the project includes below-market-rate units. See Assembly Bill 1893 (2024); Cal Gov't Code § 65589.5(h)(11)(C).

60. Elmendorf, "Beyond the Double Veto."

61. Cal. Gov't Code § 65913.4. Unfortunately, to qualify for ministerial review, a project must meet "everything bagel" labor and affordability standards Christopher S. Elmendorf and Clayton Nall, "Plain-Bagel Streamlining? Notes from the California Housing Wars," *Case Western Law Review*, forthcoming, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4811580 and Ezra Klein, "The Economic Mistake the Left Is Finally Confronting," *The New York Times*, September 19, 2021.

their peer jurisdictions.[62] New Jersey addresses failures of performance by topping off a municipality's housing target for the current planning period with the unmet share of its target from the previous planning period (although the total target is statutorily capped).[63]

Cities often assert that performance-based standards are unfair because housing production is determined not only by local regulations but also by housing demand, the value of existing uses, the distribution of parcel sizes, and landscape features like wetlands, slopes, parks, and protected species. Yet a purely plan-based standard of compliance invites cities to game the system by submitting plans that sound the right notes but in fact are designed to fail. Disregarding outcomes is particularly risky insofar as cities have leeway about how to score their plans, e.g., whether and how to model sites' probability of development, or what site-screening criteria to use. Recall the above example of Los Angeles.

Performance-based standards of compliance can account for factors beyond a city's control, albeit imperfectly and at the price of making the performance standard more complicated. Here are three examples:

- As Oregon is demonstrating, cities can be ranked relative to peer jurisdictions of similar size, with similar economies and housing stocks.[64] As peers, such jurisdictions are likely to experience shocks to demand and construction costs at the same time. Because the peers are similar to one another in such respects and because the performance standard is relative, not absolute, Oregon's outcome standard substantially mitigates concerns about cities being "punished" for factors beyond their control.
- In "State Administrative Review of Local Constraints on Housing Development: Improving the California Model,"[65] my coauthors and I propose that states rank cities by production normalized by the number of "Locally

62. Oregon Department of Land Conservation and Development, "Draft Oregon Administrative Rules Chapter 660, Division 008, version 3.0," updated September 27, 2024, https://www.oregon.gov/lcd/Housing/Documents/20240930_Division%208%20Rules%20Draft%203.0.pdf.
63. N.J. Stat. § 52:27D-304(f)(2) (setting cap of 1000 low-income units or 20 percent of the municipality's housing stock at the start of the planning period, whichever is lower). Note that the New Jersey law targets exclusionary suburbs, exempting larger cities entirely.
64. Oregon will rank cities by their performance relative to peer jurisdictions that are similar along several dimensions, including current population size; share of households with incomes greater than $150,000; share of housing used as second and vacation homes; share of housing that is single unit detached; share of housing that is owner-occupied; population growth from 2011 to 2022; and annualized housing-growth target as a percentage of the city's current housing stock, Oregon Department of Administrative Services, *Oregon Housing Needs Analysis: Draft Methodology*, September 2024.
65. Christopher S. Elmendorf et al., "State Administrative Review of Local Constraints on Housing Development: Improving the California Model," *Arizona Law Review* 63 (2021): 609–77.

Unconstrained Feasible Units" (LUFU) in each city. The LUFU is the number of units that would be economically feasible to build, at current prices, given parcel characteristics and existing uses, in the absence of locally enacted regulations limiting development. It can be estimated using pro forma models and tax assessor records. This approach resembles Oregon's, in that the performance standard is relative. Shocks that diminish housing production in all cities, such as interest rate hikes or new tariffs on imported lumber, won't trigger sanctions for poor performance. But unlike Oregon's approach, our proposal does not define peer groups using factors that are likely to be highly correlated with NIMBYism (e.g., homeowner share, second-home share, and income). It adjusts only for cites' housing-growth potential.

- Several recent economics papers estimate the price elasticity of housing supply at the census-tract level, conditioning on tract-level features such as slopes, wetlands, housing density, and the share of undeveloped land.[66] A state that wants to reward cities for liberalizing housing supply without holding them responsible for factors beyond their control could evaluate cities based on tract-level supply elasticities, relative to similar tracts elsewhere in the country. So long as the tract-level estimates reasonably adjust for supply-affecting features that cities can't control (e.g., slopes, wetland, and existing housing stock), or the tracts are benchmarked against comparators with similar features, this performance standard also answers the "punishing cities for things beyond their control" critique.

Performance standards for below-market-rate housing production are trickier to design because hitting an affordable-housing target will typically require substantial subsidies, and cities differ in their resources for subsidizing housing. California has finessed this problem by limiting the stringency of the remedy for failures of performance, even as the state's affordable-housing targets remain unrealistically high. California cities that miss their targets must review certain projects ministerially, but they don't have to change their zoning or reduce development fees. Oregon's solution is to rate jurisdictions relative to their peers rather than relative to their assigned target, which is reasonable insofar as peer

66. Nathaniel Baum-Snow and Lu Han, "The Microgeography of Housing Supply," *Journal of Political Economy* 132, no. 6 (June 2024): 1897–946; Salim Furth, "Housing Supply in the 2010s" (Mercatus Working Paper, Mercatus Center at George Mason University, February 14, 2019); and Alexander Hempel, "Tightening the Belt: The Impact of Greenbelts on Housing Affordability" (University of Toronto Working Paper, October 25, 2024).

jurisdictions have roughly similar resources for subsidizing housing or applying for grants.

Recommendations: Because states have limited ability to predict the performance of local housing plans, and because local governments in NIMBY jurisdictions would have a political incentive to design their plans to fail if there were no sanctions for bad performance, fair-share laws should include remedies for bad performance. For example, the builder's remedy could be automatically triggered at the midpoint of the planning period for jurisdictions that are in the bottom tercile of performers. If cities are rated against peers, the criteria for defining peer groups should focus on demand and potential supply (e.g., LUFU), rather than factors that mainly correlate with political opposition to housing.

States considering sanctions for bad outcomes should also invest in better data about housing production. The US Census conducts an annual survey of building permits, but these data are far from ideal as a measure of outcomes. First, property owners who have no immediate plan to build may acquire building permits as a way of increasing the redevelopment-option value of their property;[67] the incentive to lock in option value in this way is likely to be higher in more tightly regulated markets. The building permit survey also excludes permits for accessory dwelling units inside existing structures,[68] an important source of supply in some markets.

6. Summary and Conclusion

Despite being founded on economically dubious projections of need and heroic assumptions about state agencies' capacity to supervise local housing plans, fair-share frameworks do have certain attractive features. They create agenda-setting events, moments when local governments must overcome their status-quo bias and decide how they will accommodate new housing.[69] In California, these events have become focal points for YIMBY (yes in my backyard) organizing.[70]

67. Gustavo Cortes and Cameron LaPoint, "Housing Is the Financial Cycle: Evidence from 100 Years of Local Building Permits," SSRN Scholarly Paper, June 05, 2024, https://ssrn.com/abstract=4855353.
68. US Department of Commerce US Census Bureau, "US Census Form C-404 (11-1-2021)," last accessed January 10, 2025, https://www.census.gov/construction/bps/pdf/c404_sample_11012021.pdf.
69. Christopher S. Elmendorf et al., "'I Would, If Only I Could': How California Cities Can Use State Law to Overcome Neighborhood Resistance to New Housing," *Willamette Law Review* 57 (2020): 221–52.
70. *The Campaign for Fair Housing Elements*, YIMBY Law, https://www.yimbylaw.org/he-landing.

The frameworks also allow local governments to make and bind themselves to a citywide decision about accommodating new housing. Such citywide decisions are less susceptible to NIMBY influence than project-by-project permitting fights.[71] Finally, the frameworks honor the tradition of local control over development, while recognizing that local control must be exercised in a manner that accounts for regional and statewide interests. This has clear normative appeal. No state legislators will stand up and say, "I'm on Team Unfairness. The communities I represent shouldn't have to do their fair share."

But whether fair-share laws make real headway on the problems they purport to solve is less clear. There is evidence that tracts of land near the state border in Connecticut, which has a fair-share mandate, yield more housing than similar tracts across the line in New York, which does not.[72] Similarly, places in New Jersey, which has a fair-share law, near the New York border yield more housing than similar places across the New York line.[73] However, New Jersey tracts near the Pennsylvania border do not produce more housing than similar tracts across the Pennsylvania line, and Pennsylvania lacks a fair-share law.[74]

Whether or not the benefits of the fair-share laws have exceeded their costs historically, there is clearly room for improvement. Happily, some significant improvements are underway. As we have seen, Oregon is developing innovative, outcome-based performance standards, and California has made its builder's remedy more predictable.

To increase the odds of success, this special study has offered several recommendations. The goal is to reorient the planning processes so that outcomes take center stage. Housing targets should be based on rough judgments of economic feasibility, not projected household growth or a norm for the "right" share of deed-restricted units. Official determinations of the sufficiency of a city's fair-share plan should be based on the plan's expected yield during the planning period, not the sum of the nominal or putatively "realistic" capacity of sites that meet ad hoc criteria for being candidates for development. Cities that fail to adopt a compliant plan should be subjected to a simple, low-cost builder's remedy in the nature of a default zoning code. And cities that prove to be very poor performers relative to their housing potential or peer jurisdictions should also

71. Elmendorf et al., "'I Would, If Only I Could'" and Roderick M. Hills and David N. Schleicher, "Balancing the Zoning Budget," *Case Western Reserve Law Review* 62 (2011): 81–113.
72. Nicholas J. Marantz and Harya S. Dillon, "Do State Affordable Housing Appeals Systems Backfire? A Natural Experiment," *Housing Policy Debate* 28, no. 2 (2018): 267–84.
73. Nicholas J. Marantz and Huixin Zheng, "Exclusionary Zoning and the Limits of Judicial Impact," *Journal of Planning Education and Research* 42, no. 3 (2022): 280–93.
74. Marantz and Zheng, "Exclusionary Zoning."

face the builder's remedy. In states that create separate targets for market-rate and low-income housing production, cities should receive partial credit toward their low-income targets for exceeding their market-rate target in recognition of the chains-of-moves that connect different segments of the market.

If there is one overarching recommendation, it is to build state capacity for economic analysis of housing markets. States that develop this capacity are likely to do a much better job setting housing targets, gauging the expected yield of local housing plans, and developing metrics of municipal performance that adjust for market conditions and site characteristics that cities can't control. A state that currently lacks in-house economic expertise should probably build it out before enacting a fair-share law. Otherwise, the state risks adopting fair-share requirements that inadvertently encourage bad local policies, such as unfunded inclusionary-zoning mandates or limits on market-rate production meant to keep the below-market share of new construction "high." Planning paperwork should not be pushed unless the pushing does some good.

About the Author

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