



ARTICLE

The Challenge of Housing Affordability in Oregon: Facts, Tools, and Outcomes

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Introduction

Housing, particularly affordable housing, has been the center of much discussion in the second decade of the 21st century in the United States. This article focuses on that discussion in one American state—Oregon—containing slightly more than one percent of the country’s population, but possessing a land-use planning system that aspires to promote housing affordability, as well as address other social, economic, and political concerns. Indeed, Oregon’s land-use system is nationally known for its centralization and focus on containing sprawl.

Despite its national reputation, much of Oregon is currently in the throes of a housing crisis. Since the end of the Great Recession, the popularity of Oregon—particularly, the Portland and Bend metropolitan areas—as a haven for young, well-educated professionals has surged. With steady population growth fueled by in-migration from other states, the Oregon housing market has struggled to keep up with demand in a way that provides realistic housing opportunities for all income levels. More inner neighborhoods of Portland have been gentrified, with lower-income residents pushed further away from central services and employment opportunities to the edge of the city’s boundary. A steady influx of migrants leaving even higher-priced metropolitan areas, like Los Angeles and San Francisco, for the relative housing “bargain” of Portland and beyond, has contributed to the pressure on housing prices.

Hence, since 2011, the rental vacancy rate in Oregon has hovered between 3.9% and 4.9%, while the national average has gone from 9.5% to 7.1% in the same time period.¹ In 2014, the Bend metropolitan area had a vacancy rate of below 1 percent.² In 2015, the Portland-Vancouver-Hillsboro Metropolitan Statistical Area had either the highest or second-highest annualized rent growth in the country.³ Unsurprisingly, these market con-

1. U.S. Census Bureau, Rental Vacancy Rates by State, Current Population Survey/Housing Vacancy Survey, available at <https://www.census.gov/housing/hvs/data/ann15ind.html> (click on “Table 3. Rental Vacancy Rates by State”).

2. Tyler Leeds, *New Affordable Housing Coming to Bend’s East Side*, BEND BULL., Nov. 16, 2014, <http://www.bendbulletin.com/home/2586098-151/new-affordable-housing-coming-to-bends-east-side>.

3. Marc Straub, *Multifamily Market Analysis*, 10 CTR. FOR REAL ESTATE Q. REP. 54–64 (2016). Straub adds that the overall vacancy rate for rental housing in the Portland-Vancouver-Hillsboro MSA was 2.4% in 2015. *Id.* at 59.

restrictions weigh most heavily on low and moderate income families. While many experts consider housing to be affordable if no more than 30% of income is allocated for that use, a quarter of Oregon renters spent more than 50% of their income on housing costs in 2015.⁴ By 2017, the statewide Fair Market Rent (FMR) for a non-luxury two-bedroom apartment was \$1,028.⁵ At the state minimum wage of \$10.25 per hour, two household workers would have to work at least 77 hours per week to afford that apartment.⁶ To afford a one-bedroom apartment at FMR, two household members earning the state minimum wage would have to work at least 63 hours per week between them.⁷ Due to comparatively lower incomes, many persons of color experience the lack of affordable housing more acutely in Oregon.⁸

This Article assesses the causes of the housing crisis in Oregon and some of the tools that might be used to fix it while situating the Oregon system of housing planning within the national context. Part I details the role that the federal government plays in the housing market, including by sustaining the home-mortgage market, as well as in providing public housing dollars and attempting to prevent some key forms of discrimination. Part I also highlights the limits of the federal government's support for affordable housing and the extent to which these limits made Oregonians vulnerable to an affordability crisis. Part II details Oregon's land-use planning system since the passage of the state's iconic land-use law—still referred to as “Senate

4. Gross Rent as a Percentage of Income in 2015, Oregon (1-Year Estimates), SOCIAL EXPLORER, socialexplorer.com (last visited July 31, 2017).

5. NAT'L LOW INCOME HOUS. COAL. (NLIHC), OUT OF REACH 195 (2017) [hereinafter OUT OF REACH]. NLIHC ranked Oregon eighteenth highest among states in terms of “Housing Wage,” *id.*, or “the estimated full-time hourly wage a household must earn to afford a decent rental . . . while spending no more than 30% of their income on housing costs.” *Id.* at 1.

6. *Id.* It should be noted that as of 2016, Oregon has a tiered minimum wage based on geography in an attempt to better mirror the varied costs of living throughout the state. \$10.25 is the minimum wage for urban counties in the state, except for the Portland Metro area, which has an \$11.25 minimum wage. The minimum wage in non-urban counties is \$10. Oregon.gov, Oregon Minimum Wage Rate Summary, available at <http://www.oregon.gov/boli/WHD/OMW/Pages/Minimum-Wage-Rate-Summary.aspx>.

7. OUT OF REACH, *supra* note 5, at 195. The U.S. Department of Housing and Urban Development determines FMRs on an annual basis; they are intended to reflect the cost of shelter and utilities for middle-of-the-road (typically 40th percentile) apartment. *Id.* at 1.

8. The 2015 median income of African American households in Oregon was 57 percent of that of white, non-Latino households in the state; the median income of Native American and Alaska Native households was 62 percent of that of white, non-Latino households in the state; and the median income of Latino households was 80 percent of that of white, non-Latino households in the state. Per Capita Income (in 2015 Inflation Adjusted Dollars), Oregon, SOCIAL EXPLORER, *supra* note 4.

Bill 100" (SB 100)—in 1973.⁹ SB 100 established a Land Conservation and Development Commission (LCDC) to formulate and implement state policies through statewide planning goals.¹⁰ One of those goals—Goal 10—relates to housing,¹¹ and Part II recounts its content, history, and implementation. Although Goal 10 is unique to Oregon, the state's struggles to ensure the widespread availability of sufficient affordable housing are similar to the challenges faced in other states where zoning is delegated to local governments. Part III describes how housing conditions and challenges have evolved in Oregon since the passage of SB 100. Finally, Part IV explores potential policy and legal tools for addressing Oregon's affordable housing crisis, including some recent high-profile initiatives debated by the state's legislature that are part of the national conversation regarding affordable housing.

I. The Federal Role in Housing

Before the 20th century, the federal government played an instrumental role in securing land for private residences, primarily for citizens of European descent. Federal legislation like the Homestead Act facilitated the population of the West by white families, further aided by the federal government's aggressive—and often rapacious—policies toward the American Indian populations originally occupying the land.¹² With respect to the provision of housing *qua* housing, however, the federal government played almost no substantial role until the 20th century outside of special populations like prisoners, government workers, and military personnel.

By the first half of the 20th century, the American housing landscape was a mishmash of often poorly maintained urban tenements, boarding houses, single-occupancy hotels, self-built housing for laborers on the urban fringe, and rural farmhouses and associated structures.¹³ Until the middle part of the 20th century, most American households were renters.¹⁴ To purchase real property, buyers relied on either inheritances or substantial savings to cover the 50%-plus down payment that banks often required.¹⁵ Most banks required repayment of the balance within six to eight years.¹⁶ Savings and

9. Land Conservation & Development Act, 1973 Or. Laws ch. 80 (codified as amended at OR. REV. STAT. ch. 197 (2017)).

10. OR. REV. STAT. § 197.040 (2017).

11. OR. ADMIN. R. § 660-015-0000(10) (2017), reprinted in the Appendix.

12. JOSEPH WILLIAM SINGER ET AL., PROPERTY LAW: RULES, POLICIES, AND PRACTICES 88, 104–05 (7th ed. 2017).

13. Margaret Garb, *Municipal Housing in America*, in OXFORD RESEARCH ENCYCLOPEDIA: AMERICAN HISTORY (2015), <http://americanhistory.oxfordre.com/view/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e-57>.

14. ALEX F. SCHWARTZ, HOUSING POLICY IN THE UNITED STATES 17 (3d ed. 2014).

15. Garb, *supra* note 13.

16. *Id.*

loan associations, or “thrifts,” often offered more practical financing terms geared toward working-class and immigrant populations.¹⁷

The federal government’s first foray into civilian housing provision was during World War I when Congress created the United States Housing Corporation (USHC) to build worker housing near shipyards and arsenals.¹⁸ In the 1920s, the federal government offered its advice regarding the legal tool of zoning, with the Commerce Department promulgating a model zoning act that would form the basis for many state and local laws.¹⁹ Only after the Great Depression would the federal government begin to play a key role in the financing and provision of housing, as explained below.

A. Housing Finance

1. New Deal to the Bubble

The Depression saw a surge in home loan delinquencies and foreclosures.²⁰ After some modest steps under President Herbert Hoover,²¹ President Franklin D. Roosevelt immediately sought to strengthen the federal role in preventing foreclosures after his landslide 1932 election victory.²² The overwhelmingly Democratic Congress elected on FDR’s coattails quickly established the Home Owners’ Loan Corporation (HOLC) designed to refinance mortgages in default to prevent foreclosure.²³ In 1934, Congress created the Federal Housing Administration (FHA) to in-

17. *Id.*; see also *IT’S A WONDERFUL LIFE* (Liberty Films, Inc. 1946) (Bailey Building & Loan provides loans that allow Italian immigrants to secure housing).

18. 40 Stat. 550, 551 (1918); *id.* at 595; see also Eran Ben-Joseph, *Workers’ Paradise: The Forgotten Communities of World War I*, <http://web.mit.edu/ejb/www/ww1/background.html> (last visited July 19, 2017).

19. U.S. Commerce Dep’t, *A Standard State Zoning Enabling Act, 1926*, available at https://planning-org-uploaded-media.s3.amazonaws.com/legacy_resources/growingsmart/pdf/SZEnablingAct1926.pdf.

20. David C. Wheelock, *The Federal Response to Home Mortgage Distress: Lessons from the Great Depression*, FED. RESERVE BANK ST. LOUIS REV., May/June 2008, at 133, 138–39, <https://files.stlouisfed.org/files/htdocs/publications/review/08/05/Wheelock.pdf>.

21. These included the creation of the Federal Home Loan Bank Board to charter and supervise federal savings and loans institutions as well as the Federal Home Loan Banks to provide liquidity for housing construction. Federal Home Loan Bank Act, Pub. L. No. 72-304, 47 Stat. 725 (1932); Garb, *supra* note 13; DAN IMMERSLUCK, *CREDIT TO THE COMMUNITY* 36 (2004) (stating that Hoover advocated for the Federal Home Loan Bank Act to improve liquidity).

22. Fred M. Wright, Comment, *The Effect of New Deal Real Estate Residential Finance and Foreclosure Policies Made in Response to the Real Estate Conditions of the Great Depression*, 57 ALA. L. REV. 231 (2005).

23. Home Owners’ Loan Act, Pub. L. No. 73-43, ch. 64, § 4; 48 Stat. 128, 129–32 (1933), repealed by Housing Amendments of 1953, Pub. L. 83-94; 67 Stat. 121, 126.

sure qualified mortgages.²⁴ Both institutions played a key role in laying the foundation for the modern mortgage market by introducing new practices like smaller down payments and longer amortization periods.²⁵ These changes had the effect of lowering interest rates and making housing more accessible to the American public.²⁶ The FHA's policies served as a template for the mortgage insurance program the U.S. Department of Veterans Affairs (VA) established after World War II for 16 million returning servicemen.²⁷ The net effect of the FHA's and VA's policies, combined with the pre-existing mortgage interest tax deduction, was to make homeownership much more economically feasible and attractive. The homeownership rate among households jumped from the mid-40%'s in the 1930s to over 60% by the late 1950s.²⁸ Despite their collective success at increasing the national homeownership rate, these agencies engaged in and even helped create discriminatory practices like "redlining" that hurt African Americans, in particular.²⁹

24. National Housing Act of 1934, Pub. L. No. 73-479, 48 Stat. 1246 (1934); see also SCHWARTZ, *supra* note 14, at 72.

25. See KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 196-97* (1985) (crediting HOLC with first introducing amortized mortgages with payments spread out over the life of the loan); *id.* at 204-05 (discussing the FHA's success in making mortgages more attainable).

26. *Id.* at 205 ("Quite simply, it often became cheaper to buy than to rent.").

27. SCHWARTZ, *supra* note 14, at 73.

28. See U.S. Census Bureau, *Historical Home Ownership Rates in the United States*, DQYDJ, https://dqydj.com/wp-content/uploads/2014/11/historical_homeownership_1890_present_USA.png (last visited July 19, 2017).

29. The FHA expressly incorporated segregation into its underwriting standards, encouraging or tolerating the use of racially restrictive covenants and effectively deeming predominantly African American neighborhoods too risky to warrant mortgage insurance. SCHWARTZ, *supra* note 14, at 73; RICHARD ROTHSTEIN, *THE COLOR OF LAW* 83-99 (2017) (detailing FHA support for racial covenants). Similar evidence exists with respect to the VA. See Leonard S. Rubinowitz & Elizabeth Trosman, *Affirmative Action and the American Dream: Implementing Fair Housing Policies in Federal Homeownership Programs*, 74 *Nw. U. L. Rev.* 491, 514 n.88 (1979) (stating that the VA made no attempt to stop lenders whose loans it insured from discriminating by race); U.S. COMMISSION ON CIVIL RIGHTS, *FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT: A REPORT* 177 (1971) (describing VA's failure to prevent discrimination); KEVIN FOX GOTHAM, *RACE, REAL ESTATE, AND UNEVEN DEVELOPMENT: THE KANSAS CITY EXPERIENCE, 1900-2000*, at 66 (2014) (quoting Kansas City-area mortgage bank chairman from 1934 to 1965 for proposition that the VA [and FHA] would not insure housing loans unless there was a racial covenant involved). The evidence regarding HOLC's role in redlining is more ambiguous. Compare ROTHSTEIN, *supra* at 64 (noting that HOLC initiated the practice of coloring a neighborhood red to connote high-risk of foreclosure, and that "[a] neighborhood earned a red color if African Americans lived in it, even if it was a solid middle-class neighborhood of single-family homes"); JACKSON, *supra* note 25, at 197 (suggesting that HOLC "initiated the practice of 'red lining'"), with Amy E. Hillier, *Redlining and the Homeowners' Loan Corporation*,

To purchase FHA-insured mortgages, the New Deal Congress established the Federal National Mortgage Association, or “Fannie Mae,” as a semi-private corporation.³⁰ Congress later established two more institutions to help undergird the secondary mortgage market: the Government National Mortgage Association (Ginnie Mae) in 1968, which acquires and securitizes FHA- and VA-insured mortgages and other mortgages for federally subsidized housing developments, as well as the Federal Home Loan Mortgage Corporation (Freddie Mac) in 1970, which bought up conventional (non-federally insured) home loans from the savings and loans institutions collectively known as “thrifts.”³¹

Over time banks came to replace thrifts as the primary residential mortgage lenders, a change that was accelerated by the collapse of thrifts in the late 1980s due to a combination of high interest rates, questionable deregulation, and some high-profile cases of corruption.³² In 1989, Congress bailed out many thrifts and simultaneously imposed new regulations that further reduced the thrifts’ role in the lending market.³³ This contributed to a precipitous fall in multifamily housing starts from which the industry has never fully recovered.³⁴ In recognition of thrifts’ receding role in lending for home purchases, Congress in 1992 established new oversight of Fannie Mae and Freddie Mac,³⁵ which required HUD to set specific goals for their

29 J. URB. HIST. 394, 397 (2003) (“A variety of evidence suggests that HOLC was not responsible for redlining.”), http://repository.upenn.edu/cgi/viewcontent.cgi?article=1002&context=cplan_papers.

30. SCHWARTZ, *supra* note 14, at 75.

31. *Id.* at 81.

32. *Id.* at 77; The “Keating 5” scandal is one of the best-known examples of corruption in the savings and loans industry. See Ronald M. Levin, *Congressional Ethics and Constituent Advocacy in an Age of Mistrust*, 95 MICH. L. REV. 1, 2–4 (1996). The Garn-St. Germain Depository Institutions Act of 1982, Pub. L. 97–320, H.R. 6267, Oct. 15, 1982, 96 Stat. 1469 (1982) (codified as amended in scattered sections of Title 12 of the U.S. Code), loosened many regulations on savings and loans associations and facilitated the thrift crisis at the end of the decade. See generally KITTY CALAVITA ET AL., *BIG MONEY CRIME: FRAUD & POLITICS IN THE SAVINGS & LOAN CRISIS* (1997). Some economists even attributed the late 2000’s housing bubble burst in part to Garn-St. Germain’s relaxation of down payment requirements for thrifts. Paul Krugman, *Reagan Did It*, N.Y. TIMES, May 31, 2009, <http://www.nytimes.com/2009/06/01/opinion/01krugman.html>.

33. Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183 (codified as amended in scattered sections of 12 U.S.C.); SCHWARTZ, *supra* note 14, at 79 (noting that thrifts held more than 56% of mortgages in 1975 and barely 5% by 2009).

34. Ralph McLaughlin, *Housing Starts Hit 8-Year High in August, But Growth Is Slowing*, TRULIA’S BLOG, Aug. 16, 2016, <https://www.trulia.com/blog/trends/housing-starts-august-16>.

35. Pub. L. No. 102-550, § 1311, 106 Stat. 3944 (1992) (creating the Office of Federal Housing Enterprise Oversight), repealed by Pub. L. No. 110-289, § 1101, 122 Stat. 2661 (2008). See 12 U.S.C. § 4511 note (2012).

lending to low-income and underserved geographic areas.³⁶ Some analysts blame HUD's lending mandates at least in part for the subprime lending crisis that would ensue in the late 2000s, although the degree of culpability is hotly disputed.³⁷

The net result of these post-New Deal federal programs was to make a primary mortgage market eminently possible, and the home-buying dream a reality, for millions of Americans. The home-owning percentage of American households would peak at just above 69% in 2005 before the bursting of the "housing bubble."³⁸ In Oregon, the peak hit 69% in 2004.³⁹

2. The Bubble Burst

A significant increase in subprime lending and mortgage securitization helped inflate housing prices in the mid-2000s.⁴⁰ The bubble was slightly less pronounced, but still noticeable, in Oregon. In the Portland metro area, home prices rose more than 90% between 2000 and 2007.⁴¹ In late 2007, housing prices began declining nationwide in part due to rising delinquencies among subprime borrowers, a dynamic that led to a raft of foreclosures and billion-dollar losses on Wall Street. By 2009, the nation was knee-deep in its worst recession since the Great Depression. Housing

36. Federal Housing Enterprises Financial Safety and Soundness Act of 1992, Pub. L. No. 102-550, 106 Stat. 3941, § 4501(7) (finding that Fannie Mae and Freddie Mac "have an affirmative obligation facilitate the financing of affordable housing for low- and moderate-income families").

37. See Peter J. Wallison, *The True Origins of This Financial Crisis*, AM. SPECTATOR, Feb. 6, 2009 (noting two competing narratives of causes of financial crisis, including one in which HUD regulation of Fannie and Freddie "distort[ed] the housing credit system"); Carol D. Leonnig, *How HUD Mortgage Policy Fed the Crisis*, WASH. POST, June 10, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/06/09/AR2008060902626.html> (noting that HUD's "policy . . . allow[ing] Freddie Mac and Fannie Mae to count billions of dollars they invested in subprime loans as a public good that would foster affordable housing" was a "mistake[] that contributed to an escalation of subprime lending that . . . roil[ed] the U.S. economy"); see also Michael S. Moskowitz, Note and Comment, *Treading Water: Can Municipal Efforts to Condemn Underwater Mortgages Prevail?*, 41 PEPP. L. REV. 633, 636 n.16 (2014) (collecting competing arguments about the causes of the housing crisis of late 2000s).

38. Press Release, U.S. Census Bureau, Quarterly Residential Vacancies & Homeownership, No. CB17-170 (Oct. 31, 2017), <https://www.census.gov/housing/hvs/files/currenthvspress.pdf>.

39. Fed. Reserve Bank of St. Louis, Economic Research, Homeownership Rate for Oregon, <https://fred.stlouisfed.org/series/ORHOWN>.

40. SCHWARTZ, *supra* note 14, at 91.

41. Tom Heinicke, *Bursting Bubbles: Portland's Distressed Housing Market*, Q. URB. DEV. J. 35, 35 (2nd Q. 2009), <https://www.pdx.edu/sites/www.pdx.edu/realstate/files/2Q9-5-Heinicke-Bursting%20Bubbles-wm-4-29-09.pdf>.

prices declined precipitously in Oregon, although less so than in markets like Las Vegas or Miami.⁴² Central Oregon was hit particularly hard by the downturn.⁴³ Foreclosure filings surged in Oregon, which at one point ranked third in the nation in the rate of such filings.⁴⁴

In response to the bursting of the housing bubble, Congress passed housing legislation designed to stabilize Fannie Mae and Freddie Mac, allow for the refinancing of some subprime mortgages, and heighten regulation of the mortgage industry.⁴⁵ In 2010, Congress created the Consumer Finance Protection Bureau (CFPB) and gave it authority to regulate mortgages.⁴⁶ The CFPB has used this power to tighten eligibility standards and reduce subprime, “predatory” lending.⁴⁷ As a result of tighter lending standards and lingering negative effects of the housing bubble’s burst, national homeownership in 2017 now stands just shy of 64%.⁴⁸ Oregon’s homeownership rate as of 2016 was 62.6%.⁴⁹

3. Federal Efforts to Combat Mortgage Discrimination

Sprinkled through the chronology of events presented above were additional federal efforts to bolster equality of access to home mortgage lending. In 1974, Congress enacted the Equal Credit Opportunity Act (ECOA) forbidding discrimination in lending on the basis of sex and marital status,⁵⁰ which was expanded in 1976 to prohibit discrimination on the basis of race, color, religion, national origin, and age.⁵¹ In 1977, Congress passed

42. *Id.* For an excellent narrative of the lending and related practices that led to the Great Recession and their consequences, see *The Big Short* (Paramount Pictures 2015), which is a film adaptation of MICHAEL LEWIS, *THE BIG SHORT: INSIDE THE DOOMSDAY MACHINE* (2010).

43. Richard Read, *After Storybook Boom, Bend Faces a Tougher Chapter*, OREGONIAN, May 16, 2009, http://www.oregonlive.com/business/index.ssf/2009/05/after_storybook_boom_bend_face.html (“Bend . . . soared the highest and crashed the hardest of any community in Oregon.”).

44. Jeff Manning, *Oregon Foreclosure Rate Leaps 20 Percent, Leaving the State No. 3 in the Country*, OREGONIAN, July 3, 2010, http://www.oregonlive.com/business/index.ssf/2010/07/oregon_foreclosure_rate_falls_2.html

45. See Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654 (codified in scattered sections of 12 U.S.C.).

46. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub L. No. 111-203, 124 Stat. 1376 (2010) (CFPB provisions codified at 12 U.S.C. §§ 5491 et seq. (2017)).

47. Joseph J. Reilly & Shara M. Chang, *An Overview of the CFPB’s Ability-to-Repay/Qualified Mortgage Rule*, BANKING & FIN. SERV. POL’Y REP., July 2013, at 1 (describing CFPB’s rules on mortgage lending).

48. U.S. Census Bureau, *supra* note 38.

49. Fed. Reserve Bank of St. Louis, *supra* note 39.

50. Pub. L. No. 93-495, 88 Stat. 1521 (1974) (codified as amended at 15 U.S.C. §§ 1691–1691f (2017)).

51. Pub. L. No. 94-239, 90 Stat. 251 (1976) (codified as amended at 15 U.S.C. §§ 1691–1691f(2017)). ECOA’s enforcement is aided by the Home Mortgage Disclo-

the Community Reinvestment Act (CRA), which incentivizes banks and thrifts to lend money in areas that are underserved by conventional financial institutions.⁵² The CRA was designed to combat redlining and reduce racial inequities in access to conventional, lower-rate mortgages.⁵³ Neither of these laws was a silver bullet, of course, but the CRA has led to increased lending to low-income and minority communities.⁵⁴ Alternatively, some commentators and politicians blamed the CRA, along with HUD's mandates on Fannie Mae and Freddie Mac, for contributing to the housing bubble of the 2000s;⁵⁵ others flatly refute this account.⁵⁶

B. Public Housing and Federal Assistance for Rental Housing

In addition to greasing the wheels of the mortgage market for homebuyers, the federal government has played a significant role in the provision of rental housing. The pillars of federal involvement are financial assistance to public housing; housing choice vouchers (HCV, or Section 8);

sure Act, passed in 1975, Pub. L. No. 94-200, 89 Stat. 1124 (codified as amended at 12 U.S.C. §§ 2801–2811(2017)), which requires certain financial institutions to disclose certain mortgage data to the public. See John L. Ropiequet, *Fair Lending Litigation and the Impact of Wal-Mart Stores, Inc. v. Dukes*, 66 CONSUMER FIN. L. Q. REP. 158, 162 (2012) (“HMDA data and studies of HMDA data form much of the evidentiary basis for ECOA . . . complaints. . .”).

52. Community Reinvestment Act of 1977, Pub. L. No. 95-128, 91 Stat. 1147 (codified at 12 U.S.C. §§ 2901–2908 (2006)). The CRA does not apply to credit unions. Julie Andersen Hill, *When Bank Examiners Get It Wrong: Financial Institution Appeals of Material Supervisory Determinations*, 92 WASH. U. L. REV. 1101, 1110 n.39 (2015) (“Credit unions are not included within the scope of the Community Reinvestment Act”).

53. Nicholas O. Stephanopoulos, *Civil Rights in a Desegregating America*, 83 U. CHI. L. REV. 1329, 1361 (2016) (citing 12 U.S.C. § 2901(a)(1) (2012)).

54. Raymond H. Brescia, *Part of the Disease or Part of the Cure: The Financial Crisis and the Community Reinvestment Act*, 60 S.C. L. REV. 617, 642 (2009); Michael S. Barr, *Credit Where It Counts: The Community Reinvestment Act and Its Critics*, 80 NYU L. REV. 513, 561–80 (2005) (reviewing increased lending in low-income and minority communities under CRA). The evidence regarding ECOA's effect is more equivocal. Compare Gregory E. Elliehausen & Thomas A. Durkin, *Theory and Evidence of the Impact of Equal Credit Opportunity: An Agnostic Review of the Literature* 2 J. FIN. SERV. RES. 89, 109 (1989) (concluding that ECOA likely “has done little to enhance credit opportunities overall,” but that the principle of nondiscrimination is still “profoundly . . . [] important”), with Raphael W. Bostic & Richard W. Martin, *Have Anti-Discrimination Housing Laws Worked? Evidence from Trends in Black Ownership*, 31 J. REAL ESTATE FIN. & ECON. 5, 23–24 (2005) (finding a “positive relationship” between enforcement of civil rights laws, including ECOA, and black homeownership and blacks buying homes in higher-income areas).

55. See Wallison, *supra* note 37 (noting that one narrative of the late-2000s financial crisis blames in part the CRA).

56. Brescia, *supra* note 54, at 643–44 (“Simply put, the CRA . . . did not cause the subprime mortgage crisis. . .”).

project-based rental assistance; and the Low-Income Housing Tax Credit (LIHTC). Oregon relies on each of these tools in various proportions to provide affordable housing to its low-income population.

1. Public Housing

Despite the government's efforts to make home ownership more attainable, in dense urban areas, many residents, particularly of lower income, could not afford to buy single-family homes. Condominiums as a legal form were not yet invented, and cooperatives emerged on a large-scale basis only in the 1930s and primarily in New York City.⁵⁷ Hence, during the Depression the federal government stepped in to make rental housing more available and of higher quality in urban areas and beyond. Initially, the New Deal Public Works Administration (PWA) funded and built affordable housing projects.⁵⁸ In 1937, Congress passed the Wagner-Steagall Housing Act, which provided federal funding for public housing construction but left administration of the program to local officials.⁵⁹ The legislation made local participation optional, thus cementing the local control over land use established by zoning enabling acts that would eventually contribute to the problem of exclusionary zoning.⁶⁰

57. The law underlying condominiums was either nonexistent or in flux until the Uniform Law Commission promulgated the Uniform Condominium Act in the 1970s. See Uniform Law Commission, Legislative Fact Sheet—Condominium Act, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Condominium%20Act> (noting that the Act was promulgated initially in 1977); Julie D. Lawton, *Unraveling the Legal Hybrid of Housing Cooperatives*, 83 UMKC L. REV. 117, 124 (2014) (“Condominium homeownership first arrived in the continental United States in the 1960s when Florida developers sought to capitalize on a Puerto Rican form of homeownership for Florida’s burgeoning retirement population.”) (citation omitted). In large cities like New York, the cooperative provided a more affordable form of unit ownership for lower- and middle-income residents. The first major projects emerged in the 1930s after the New York legislature passed the Limited Dividend Housing Companies Act of 1927. See Nat’l Coop. Law Ctr., *A History of Housing Cooperatives* at 2, <http://nationalcooperativelawcenter.com/national-cooperative-law-center/the-history-of-housing-cooperatives/2/>. In 1942, Congress changed the tax code to allow for the mortgage interest deduction for cooperatives as well, thus putting them on a par with more conventional real estate ownership. *Id.* at 3.

58. Garb, *supra* note 13; Carl Mackley Houses, OPENBUILDINGS.COM, <http://openbuildings.com/buildings/carl-mackley-houses-profile-20900> (last visited July 19, 2017); SCHWARTZ, *supra* note 14, at 163.

59. Pub. L. No. 75-412, 50 Stat. 888 (1937) (codified as amended at 42 U.S.C. §§1437 et seq. (2012)); Garb, *supra* note 13.

60. See A. Mechele Dickerson, *Revitalizing Urban Cities: Linking the Past to the Present*, 46 U. MEMPHIS L. REV. 973, 982–83 (2016) (“[C]ities have used other methods, including exclusionary zoning laws, to keep public housing . . . out of higher-income neighborhoods.”).

Construction of public housing units accelerated with the passage of the Housing Act of 1949,⁶¹ growing from approximately 170,000 in 1949 to over a million by 1980,⁶² peaking at just over 1.4 million in 1990.⁶³ Despite the lingering perception of public housing as tall high-rises, such structures account for only about 30% of the stock nationwide, with other forms including low-rise townhouses and row houses, midrise walk-up apartment buildings, semi-detached houses, and even single-family homes.⁶⁴

Today more than 3,000 local public housing authorities (PHAs) nationwide administer a total of 1.15 million units.⁶⁵ Many are small authorities that operate 100 or fewer units.⁶⁶ Oregon has 22 PHAs, which represent mostly counties (sometimes more than one when smaller counties combine together) and occasionally cities or city-county combinations.⁶⁷ In total, Oregon's PHAs provided 4,871 units as of August 2017.⁶⁸ Hence, Oregon has only about 0.4% of the nation's total public housing units, despite having about 1.25% of the nation's population.⁶⁹

Although public housing serves an undoubtedly crucial need, it has been beset by many problems since its inception, such as the concentration of poverty and deficient design, construction quality, and management of some projects.⁷⁰ Already by the 1960s and 1970s, commentators began portraying public housing as an incubator of poverty, crime, and other social problems rather than as a source of stability or a step up the ladder of opportunity.⁷¹ The Republican takeover of Congress in 1994 gave critics of federal housing programs a prominent role in reshaping those policies, a perch

61. Taft-Ellender-Wagner Housing Act, Pub. L. No. 75-412, 50 Stat. 888 (codified as amended at 42 U.S.C. § 1437-1437f (2017)); see also SCHWARTZ, *supra* note 14, at 164.

62. SCHWARTZ, *supra* note 14, at tbl. 6.1.

63. *Id.*

64. *Id.* at 167.

65. *Id.*; U.S. Dep't of Housing & Urban Development, HUD's Public Housing Program, https://portal.hud.gov/hudportal/HUD?src=/topics/rental_assistance/phprog (last visited July 19, 2017).

66. *Id.*

67. Oregon Housing Authorities, <https://www.orhousingauthorities.org/> (last visited July 19, 2017); Oregon Opportunity Network, Some Basic Information about Housing and Services in Oregon, <https://olis.leg.state.or.us/liz/2013R1/Downloads/CommitteeMeetingDocument/1365> (last visited July 19, 2017).

68. Email from Laure Rawson of Portland HUD, Aug. 7, 2017 (on file with author).

69. These calculations include Puerto Rico and use 2016 U.S. Census estimates.

70. SCHWARTZ, *supra* note 14, at 167-76.

71. The televised implosion of the notorious Pruitt-Igoe housing complex in St. Louis in 1973 galvanized the simmering criticisms of public housing. See Joseph Heathcott, *Planning Note: Pruitt-Igoe and the Critique of Public Housing*, 78 J. AM. PLANNING ASS'N 450, 450 (2012) (noting that "accounts of high-rise public housing" from the 1960s and 1970s blamed "inept management, weak design, poor construction, or ungovernable tenants" for public housing's failures); see also ROTHSTEIN, *supra* note 29, at 37 (explaining that the gradual exclusion of middle-income fam-

used to shift resources from expanding public housing toward merely preserving and redeveloping the existing stock.⁷² Congressional antipathy toward public housing culminated in the Faircloth Amendment of 1998, which effectively quashed the production of new public housing.⁷³

Given Congress's continued hostility to appropriating additional funding to renovate existing public housing, which is estimated to need \$26 billion in capital repairs, HUD in 2012 sought and obtained congressional authorization for PHAs to convert some of their properties to Section 8 project-based contracts, which are discussed below; this conversion program is called "RAD" (Rental Assistance Demonstration).⁷⁴ Home Forward—formerly known as the Housing Authority of Portland and the largest PHA in Oregon—has used RAD to convert several properties, containing hundreds of units, from public housing to project-based funding.⁷⁵ Moreover, since 1999, Home Forward has operated as part of HUD's pilot "moving to work" program, which allows the agency additional flexibility in allocating housing funds.⁷⁶

2. Tenant-based Vouchers—"Section 8"

Apart from public housing, the federal government funds the Housing Choice Voucher (HCV) program, frequently referred to as "Section 8," which allows low-income, elderly, and disabled families to live in private housing paid for in part by a voucher administered by the local PHA.⁷⁷ In total, HCV assists 2.2 million households and provides 41,568 units in Oregon.⁷⁸ Oregon thus accounts for nearly 2% of the nation's HCV inven-

ilies from public housing deprived the program of a critical constituency to advocate for its funding).

72. SCHWARTZ, *supra* note 14, at 164.

73. Pub. L. No. 105-276, 112 Stat. 2461, § 519 (1998) (codified at 42 U.S.C. § 1437g (g)3(A) (2017)) ("Limitation on New Construction"). The Amendment only prohibited HUD funding for additional units, thus forcing PHAs to make up difference.

74. ECONOMETRICA, INC., INTERIM REPORT: EVALUATION OF HUD'S RENTAL ASSISTANCE DEMONSTRATION, U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT xiv (2016), https://portal.hud.gov/hudportal/documents/huddoc?id=RAD_InterimRpt_Final.pdf.

75. Home Forward, Fiscal Year 2017 Budget at 22, <http://www.hapdx.org/sites/default/files/Home%20Forward%20FY%202017%20Budget%20-%20Final.pdf>.

76. Home Forward, Moving to Work, <http://www.homeforward.org/homeforward/moving-to-work> (last visited Dec. 4, 2017). For more on the Moving to Work program, see HUD.gov, Moving to Work (MTW) FAQ, https://www.hud.gov/program_offices/public_indian_housing/programs/ph/mtw/faq#4 (last visited Dec. 4, 2017).

77. HUD.gov, Housing Choice Vouchers Fact Sheet, https://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/hcv/about/fact_sheet (last visited Dec. 4, 2017).

78. Center on Budget and Policy Priorities (CBPP), Policy Basics: The Housing Choice Voucher Program, <http://www.cbpp.org/research/housing/policy->

tory. Oregon is thus disproportionately weighted toward HCV and away from public housing.

HCV and other voucher programs give voucher holders more choice regarding where to live, although this choice can be highly constrained by rental prices, the availability of eligible properties, and housing discrimination, including discrimination against the use of HCVs where legal, as it was in Oregon until 2014.⁷⁹ Before 2014, it was commonplace for Oregon landlords to discriminate blatantly against Section 8 recipients, especially in their advertisements.⁸⁰ While such discrimination is now illegal in Oregon, the effectiveness of the prohibition remains in question. Moreover, rising post-Recession rents in Portland and beyond made it more difficult for Section 8 recipients to use their vouchers to afford market rents.⁸¹ In 2016, in response to skyrocketing rents, Home Forward drastically increased the amount its Section 8 recipients can spend on rent, invoking an authority known as “exception rents.”⁸²

Despite its shortcomings, compared to public housing, a much smaller percentage of HCV users live in economically distressed neighborhoods.⁸³ HCV has been less effective, however, in combating residential racial segregation.⁸⁴ Another advantage of vouchers as compared to public housing is that they are generally less expensive per unit.⁸⁵ On the other hand, in ad-

basics-the-housing-choice-voucher-program?fa=view&id=279 (updated May 3, 2017); Rawson email, *supra* note 68.

79. SCHWARTZ, *supra* note 14, at 260. For a complete list of those states and localities that protect source of income from discrimination in housing, see Poverty & Race Research Action Council, *Expanding Choice: Practical Strategies for Building a Successful Housing Mobility Program* at 1–2, <http://www.prrac.org/pdf/AppendixB.pdf> (Aug. 2017) (listing twelve states and numerous cities/counties in other states with such protections). In the vast majority of jurisdictions outside of Oregon, however, discrimination against HCV recipients remains legal.

80. Brad Schmidt, *Portland's Section 8 Clients Are Shifted East of 82nd Avenue: Locked Out, Part 2*, OREGONIAN, June 2, 2012, http://www.oregonlive.com/portland/index.ssf/2012/06/portlands_section_8_clients_ar.html.

81. Sara Roth, *No Place to Call Home*, KGW.com, <http://www.kgw.com/news/investigations/no-place-to-call-home-/153386> (last visited Dec. 4, 2017).

82. Sara Roth, *For Portland Section 8 Tenants, New Limits Mean More Can Find Homes*, KGW.com, Mar. 19, 2016 <http://www.kgw.com/news/local/for-portland-section-8-tenants-new-limits-mean-more-can-find-homes/85830432>; The guidelines for determining exception rents are detailed in 24 C.F.R. § 982.503 (2017).

83. SCHWARTZ, *supra* note 14, at 260.

84. *Id.*; cf. John Eligon & Robert Gebeloff, *Affluent and Black, and Still Trapped by Segregation*, N.Y. TIMES, Aug. 20, 2016, <https://www.nytimes.com/2016/08/21/us/milwaukee-segregation-wealthy-black-families.html> (observing that even wealthier blacks sometimes prefer to live in lower-income, majority black areas despite the option of living in higher-income, whiter neighborhoods).

85. SCHWARTZ, *supra* note 14, at 260.

dition to being of limited use in tight housing markets, vouchers are also not as useful for residents with special needs like large families, elderly, and disabled.⁸⁶ Finally, just as Congress has underfunded public housing, the vast majority of PHAs have long voucher waitlists that are often closed to new applicants. Home Forward, for instance, last opened its wait list in September 2016, and only for five days; prior to that its wait list had been closed since 2012.⁸⁷ Hence, as the Oregon housing market has heated up, money for the HCV program has not increased sufficiently.

3. Project-Based Vouchers and Rental Assistance

In addition to tenant-based vouchers, the HCV program also includes “project-based” vouchers (PBV), which are vouchers attached to a specific unit whose owner contracts with the local PHA to rent to low-income families.⁸⁸ As of 2016, the PBV component of HCV served 140,000 households, constituting less than 7% of HCV recipients.⁸⁹ In Oregon there are approximately 2,500 PBV units, with Home Forward accounting for 2,100 of these.⁹⁰ Hence, in Oregon, PBV accounts for about 6% of the HCV housing stock.

Outside of the HCV system, the federal government also funds “project-based rental assistance” (PBRA), which assists 1.2 million households or 2 million persons.⁹¹ Unlike PBV, HUD directly administers PBRA rather than local PHAs.⁹² A majority of PBRA beneficiaries are elderly or disabled.⁹³ PBRAs are subject to 20-year terms and many such projects’ terms have expired or are expiring soon.⁹⁴ In Oregon, there are 9,708 PBRA housing units as of December 2017.⁹⁵ Public housing, HCV, and PBRA constitute about

86. *Id.*

87. Affordable Housing Online, Home Forward, <https://affordablehousingonline.com/housing-authority/Oregon/Home-Forward/OR002> (last visited Dec. 4, 2017).

88. CBPP, *supra* note 78.

89. Brent D. Mast & David Hardiman, *Policy Briefs: Project-Based Vouchers*, 19 CITY-SCAPE 301, 302 (2017), available at <https://www.huduser.gov/portal/periodicals/cityscape/vol19num2/ch21.pdf>.

90. Email from Laure Rawson of Portland HUD, Dec. 15, 2017 (on file with author)

91. U.S. HUD, Office of Multifamily & Public and Indian Housing, Rental Assistance Demonstration at 2 (Feb. 27, 2015, corrected Apr. 20, 2015), available at https://www.hud.gov/sites/documents/RAD_PBVBPBRA_COMPAREGUIDE.PDF; <https://www.cbpp.org/research/housing/policy-basics-section-8-project-based-rental-assistance>.

92. *Id.* at 3.

93. NLIHC, *Advocates’ Guide, Project-Based Rental Assistance*, <http://nlihc.org/sites/default/files/2014AG-139.pdf> (last visited Dec. 4, 2017).

94. U.S. HUD, *supra* note 91, at 2, 4.

95. Email from Patrick J. Shea, Portland HUD Office (Dec. 7, 2017) (on file with author).

90% of the total households receiving federal rental assistance, with other, more specialized programs making up the remaining 10%.⁹⁶

Through all of these rental assistance programs, the federal government makes rental housing more affordable for approximately 10 million people or 5 million households nationally.⁹⁷ While this might seem like a large number, it is barely more than 3% of the nation's population, about 4% of all households, and about 11% of renter households.⁹⁸ By way of comparison, in 2015 approximately 32 million American households claimed the mortgage interest tax deduction.⁹⁹ Moreover, the mortgage interest tax deduction directly costs the federal treasury more than \$70 billion annually,¹⁰⁰ whereas the total outlay for public housing and rental assistance was approximately \$45 billion in 2014.¹⁰¹

Focusing on Oregon, there are approximately 56,000 public housing, HCV, and PBRA units in the state, out of a total of about 1.7 million hous-

96. CBPP, Policy Basics: Federal Rental Assistance (updated Nov. 15, 2017), <https://www.cbpp.org/research/housing/policy-basics-federal-rental-assistance>.

97. *Id.* (noting that 10 million receive assistance); NLIHC, *supra* note 78 (noting that 4.8 million households receive assistance).

98. These numbers are based on U.S. Census estimates (population of 323,127,513 as of 2016 and households of 116,926,305 as of 2011–15), U.S. Census Bureau, QuickFacts, <https://www.census.gov/quickfacts/fact/table/US/PST045216> (last visited Dec. 4, 2017); for renter households, see Nat'l Multifamily Hous. Council, Quick Facts: Resident Demographics, <http://www.nmhc.org/Content.aspx?id=4708> (last visited Dec. 4, 2017) (relying on 2016 Census American Community Survey data, updated as of Sept. 2017, for a total of 118,860,065).

99. Tax Policy Ctr., Statistics, Mortgage Interest Tax Deduction by State and AGI, Nov. 20, 2017, <http://www.taxpolicycenter.org/statistics/mortgage-interest-deduction-state-and-agi> (showing that 32,261,720 claimed the deduction in 2015); Anthony Randazzo & Dean Stansel, *Mortgage Interest Deduction Saves Middle Class Taxpayers All of \$51/Month*, FORBES, Dec. 18, 2013, <https://www.forbes.com/sites/realspin/2013/12/18/mortgage-interest-deduction-saves-middle-class-taxpayers-all-of-51month/#10bdd9f0105c> (quoting 34 million).

100. Will Fischer & Chye-Ching Huang, *Mortgage Interest Deduction Is Ripe for Reform*, CBPP, <http://www.cbpp.org/research/mortgage-interest-deduction-is-ripe-for-reform> (revised June 25, 2013) (noting that mortgage interest tax deduction costs "at least \$70 billion a year"). At the time of this Article's editing, Congress passed a bill, which President Trump signed on December 22, 2017, that reduces the amount of debt eligible for the mortgage interest tax deduction from \$1 million to \$750,000. H.R. 1, 115th Cong. (2017), § 11043. This change will undoubtedly reduce to some extent the total "cost" of the mortgage interest tax deduction.

101. Cong. Budget Office, Federal Housing Assistance for Low-Income Households, at 2 (Sept. 2015), <https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/50782-lowincomehousing-onecolumn.pdf> (noting that in 2014 the federal government spent \$18 billion on HCV, \$12 billion on PBRA, \$7 billion on public housing, and about \$8 billion "for other housing programs"). This figure does not include LIHTC, discussed in Section I.B.4, *infra*, which was estimated to cost \$7 billion in 2014. *Id.*

ing units.¹⁰² Thus, it can be inferred that about 3% of Oregon households receive some direct federal rental assistance. By contrast, over half a million, or about 27%, of all Oregon households claimed the mortgage interest tax deduction in 2015.¹⁰³ Per household affected, the mortgage interest tax deduction—approximately \$2,000—costs less than public housing and vouchers—approximately \$9,400. But critics note that many households receiving the deduction are high income.¹⁰⁴

4. Low-Income Housing Tax Credit

The final significant way in which the federal government subsidizes affordable rental housing is through the low-income housing tax credit (LIHTC), a creation of the 1986 Tax Reform Act.¹⁰⁵ The LIHTC allows investors in qualified rental properties to reduce their federal income taxes for ten years by somewhere between 4% and 9%.¹⁰⁶ When initially created, the program required participants to guarantee 15 years of affordability; in 1990, that threshold was increased to 30 years.¹⁰⁷ The federal government allocates credits to state agencies that administer the program in turn and may require even higher compliance periods, which in Oregon is now 60 years.¹⁰⁸ The Oregon Housing and Community Services division (OHCS) administers the state's LIHTC program. In 2016, Oregon was allocated \$9.4 million in LIHTC credits.¹⁰⁹ OHCS is responsible for issuing an annual Qualified Allocation Plan (QAP) for how its share of federal LIHTC dollars will be distributed.¹¹⁰

102. For total housing units, see U.S. Census Bureau, Quick Facts: Oregon, <https://www.census.gov/quickfacts/OR> (last visited Dec. 4, 2017) (estimate of housing units as of July 2016).

103. See Tax Policy Ctr., Statistics, *supra* note 99.

104. See Fischer & Huang, *supra* note 100 (noting that, based on 2012 data, 77% of the benefits of the mortgage interest tax deduction went to households with an income greater than \$100,000, and 35% went to households with incomes about \$200,000); see also HENRY J. AARON, SHELTERS AND SUBSIDIES: WHO BENEFITS FROM FEDERAL HOUSING POLICIES? 53–60 (1972). Fischer and Huang also note that close to half of homeowners with mortgages, mostly those with lower or middle incomes, receive no benefit from the mortgage interest tax deduction. Fischer & Huang, *supra* note 100.

105. Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085, § 252 (codified at 26 U.S.C. § 42 (2017) (low-income housing tax credit)).

106. SCHWARTZ, *supra* note 14, at 137.

107. *Id.*; Oregon Hous. & Cmty. Servs., LIHTC 2016 Qualified Allocation Plan, Mar. 29, 2016, at 10, <http://www.oregon.gov/ohcs/HD/HRS/LIHTC/2016-QAP-Final.pdf> [hereinafter, "2016 Oregon QAP"].

108. Brandon M. Weiss, *Residual Value Capture in Subsidized Housing*, 10 HARV. L. & POL'Y REV. 521, 534 (2016).

109. Novogradac & Co., LLP, Affordable Hous. Res. Ctr., 2016 Federal LIHTC Information by State, <https://www.novoco.com/resource-centers/affordable-housing-tax-credits/application-allocation/2016-federal-lihtc-information-state> (last visited Dec. 4, 2017).

110. See, e.g., 2016 Oregon QAP, *supra* note 107.

Since its inception, LIHTC has assisted in the development of more than 2.6 million housing units.¹¹¹ Only 31-years old, the program helps fund twice as many units as public housing, which was established in the 1930s.¹¹² In Oregon, LIHTC has funded the construction of about 650 projects, or almost 35,000 low-income housing units, from 1987 through 2015.¹¹³ Initial projects were subject only to a 15-year compliance period, so many might have been taken out of the program since their construction.¹¹⁴

Just as with public housing, local communities ultimately control the placement of LIHTC projects through their zoning authority; as a result, such projects are “disproportionately built in majority nonwhite communities,” thus “helping to maintain entrenched racial divides” in housing.¹¹⁵ Further, notable instances of fraud in the program’s administration in South Florida have led journalists to question whether the program is adequately supervised.¹¹⁶ This cause for concern is buttressed by data indicating a decline in the number of LIHTC units built nationwide even as the total cost of the tax credit to the federal treasury has increased.¹¹⁷ Moreover,

111. Weiss, *supra* note 108, at 525.

112. *Id.* Of course, Congress kneecapped public housing in 1998 with the Faircloth Amendment. See *supra* note 73.

113. These data were obtained and sorted from HUD’s online LIHTC database. See <https://lihtc.huduser.gov/>; see also Oregon Sec’y of State Audit Report, OHCS: Critical Improvements Needed to Help Ensure Preservation of Affordable Housing for Low-Income Oregonians, at 7 (Dec. 2016), <http://sos.oregon.gov/audits/Documents/2016-31.pdf> (“In Oregon, 38,783 rental units were created or preserved” by LIHTC from its inception through 2014).

114. Hous. Dev. Ctr. & Year 15 Work Group, Risk Assessment and Strategy Recommendations to Preserve Oregon’s Low Income Housing Tax Credit Projects Reaching Year 15 from 2006–2011, at 5 (May 1, 2006), https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=7&ved=0ahUKEwivs5e5wOLXAhUeHGMKHYKaCB0QFghIMAY&url=http%3A%2F%2Fwww.housingdevelopmentcenter.org%2F_literature_110416%2FHDC%2527s_LIHTC_Year_15_Final_Report&usg=AOvVaw1wdn2NmbSVtKAbR5JZHBC.

115. John Eligon et al., *Program to Spur Low-Income Housing Is Keeping Cities Segregated*, N.Y. TIMES, July 2, 2017, <https://www.nytimes.com/2017/07/02/us/federal-housing-assistance-urban-racial-divides.html>. Indeed, allegations of segregation in LIHTC project siting were front-and-center in a recent, high-profile Supreme Court case in which the Court held that the federal Fair Housing Act permitted disparate-impact claims against the state agency responsible for administering LIHTC. *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project*, 135 S. Ct. 2507 (2015). This case is discussed further below; see *infra* note 139 and accompanying text.

116. Laura Sullivan, *Affordable Housing Program Costs More, Shelters Fewer*, NPR.org, May 9, 2017, <http://www.npr.org/2017/05/09/527046451/affordable-housing-program-costs-more-shelters-less>; but see NPR and PBS *Frontline Misrepresent the LIHTC*, Novogradac & Co. Affordable Hous. Res. Ctr., <https://www.novoco.com/notes-from-novogradac/npr-and-pbs-frontline-misrepresent-lihtc>.

117. Sullivan, *supra* note 116 (observing decline from 70,220 LIHTC housing units in 1997 to 58,735 in 2014).

the changes to the tax code passed by Congress in late 2017 will likely reduce significantly the production of affordable housing under LIHTC.¹¹⁸

C. Federal Efforts to Combat Housing Discrimination

Discrimination in the sale and rental of housing was rampant until at least the mid-twentieth century. Although Congress passed the Civil Rights Act of 1866 in the wake of the Civil War to ensure that “all citizens . . . have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property,”¹¹⁹ the judiciary interpreted this injunction as applying to state action only, thus neutering the law’s practical effect on rampant private discrimination.¹²⁰ The first stirrings of antidiscrimination enforcement with respect to real property at the federal level came from the federal judiciary interpreting the Fourteenth Amendment. In the 1917 case of *Buchanan v. Warley*, the U.S. Supreme Court invalidated a Louisville ordinance that forbade blacks from living on majority-white blocks and vice versa.¹²¹ With racial zoning illegal, white, Christian homeowners of northern European extraction increased their reliance on privately enforced restrictive covenants to perpetuate residential discrimination against blacks, Asians, Jews, and others.¹²² In 1948, however, in the landmark case of *Shelley v. Kraemer*, the U.S. Supreme Court held that the enforcement of restrictive covenants by state courts violated the Equal Protection Clause.¹²³

Private use of covenants and other forms of housing discrimination persisted after *Shelley* although some local and state jurisdictions passed laws limiting discrimination in housing on the basis of race, religion, and national origin.¹²⁴ The Oregon legislature passed a fair housing law in 1957 that pro-

118. See Michael Novogradac, *Final Tax Reform Bill Would Reduce Affordable Rental Housing Production by Nearly 235,000 Homes*, NOVOCO.COM (Dec. 19, 2017, 12:00 AM), <https://www.novoco.com/notes-from-novogradac/final-tax-reform-bill-would-reduce-affordable-rental-housing-production-nearly-235000-homes>.

119. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended in scattered sections of 42 U.S.C.).

120. Civil Rights Cases, 109 U.S. 3 (1883).

121. 245 U.S. 60 (1917). Racial zoning schemes became quite popular in the South and “border states” in the 1910s after Baltimore was the first to enact such a regime. ROTHSTEIN, *supra* note 29, at 44–45.

122. ANTERO PIETILA, NOT IN MY NEIGHBORHOOD 48–49 (2010) (describing the use of covenants to exclude blacks, Jews, Asians, Irish, and others); GOTHAM, *supra* note 29, at 38–39 (describing the rise of racial and other restrictive covenants in the second decade of the twentieth century as the “primary mechanism used by the emerging real estate industry to create and maintain racially segregated neighborhoods”).

123. *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948).

124. Paul Diller, *The City and the Private Right of Action*, 64 STAN. L. REV. 1109, 1146 & n.170 (2012) (citing early municipal civil rights ordinances). The California legislature, for instance, passed the Rumford Fair Housing Act in 1963, prohibiting discrimination in the rental and sale of housing of more than four units on the basis

hibited discrimination in publicly subsidized housing; two years later the law was extended to prohibit discrimination by any person who, “as a business enterprise,” sells, leases or rents real property.¹²⁵ At the federal level, the push for a fair housing law was perhaps the toughest challenge of the 1960s civil rights movement, culminating in the passage of the Federal Fair Housing Act (FFHA) only after Martin Luther King, Jr.’s assassination in 1968.¹²⁶

The FFHA prohibited discrimination in the sale, rental, or advertising of real property on the basis of race, color, religion, or national origin,¹²⁷ with exceptions such as the “Mrs. Murphy” exclusion for live-in landlords or landladies leasing out four or fewer units.¹²⁸ In 1974, Congress added sex to the list of protected classes under the FFHA.¹²⁹ In 1988, Congress strengthened enforcement of the FFHA through the Fair Housing Amendments Act (FHAA).¹³⁰ The FHAA also expanded the coverage of the FFHA to include familial status and disabled individuals.¹³¹

of race. 1963 Cal. Stat. ch. 185 (codified at CAL. HEALTH & SAFETY CODE §§ 35700 et seq. (1964)). California voters overturned the Rumford Act by initiative in 1964, but the Supreme Court invalidated that reversal as a violation of the Fourteenth Amendment in *Reitman v. Mulkey*, 387 U.S. 369 (1964).

125. Joseph B. Robison, *Housing—The Northern Civil Rights Frontier*, 13 CASE W. RES. L. REV. 101, 112–14 (1962) (discussing the 1957 and 1959 Oregon fair housing laws).

126. Pub. L. 90–284, 82 Stat. 81 (codified at 42 U.S.C. § 3601 et seq. (2017)); Nikole Hannah-Jones, *Living Apart: How the Government Betrayed a Landmark Civil Rights Law*, PROPUBLICA, June 25, 2015, <https://www.propublica.org/article/living-apart-how-the-government-betrayed-a-landmark-civil-rights-law> (discussing the FFHA’s passage in 1968).

127. Pub. L. No. 90-284, § 804 (codified as amended at 42 U.S.C. § 3604(a)).

128. Pub. L. No. 90-284, § 803 (codified as amended at 42 U.S.C. § 3603(b)(2) (2017) (live-in landlord with four or fewer units)). The Act also excepts “the sale or rental of [a] single-family house shall . . . if such house is sold or rented (A) without the use in any manner of the sales or rental facilities or the sales or rental services of any real estate broker, agent, or salesman, or of such facilities or services of any person in the business of selling or renting dwellings, or of any employee or agent of any such broker, agent, salesman, or person and (B) without the publication, posting or mailing, after notice, of any advertisement or written notice in violation of section 3604(c) of this title.” *Id.* § 3603(b)(1).

129. Pub. L. No 93-383, Title VIII, § 808(b)(1), Aug. 22, 1974, 88 Stat. 729 (adding sex as a protected class) (codified as amended at 42 U.S.C. § 804(a)).

130. Pub. L. No. 100-430, 102 Stat. 1619, 1625, § 8 (“Enforcement Changes”); ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW & LITIGATION § 4:5 (West 2017) (explaining how the 1988 FHAA strengthened the FFHA’s three primary enforcement mechanisms); *id.* § 23:1 (discussing enforcement in more detail); *see also* Hannah-Jones, *supra* note 126 (explaining how compromises in passing the 1968 law included weak enforcement mechanisms).

131. Pub. L. No. 100-430, 102 Stat. at 1622, §6(b) (adding disability and familial status as protected classes) (codified at 42 U.S.C. § 3604 (2017)).

HUD has historically enforced the FFHA nationwide although it may delegate enforcement authority to state agencies that enforce “substantially equivalent” fair housing laws. From 2008 to 2016, HUD delegated enforcement to Oregon’s Bureau of Labor and Industries (BOLI), certifying it as enforcing “substantially equivalent” state fair housing laws.¹³² At BOLI’s request in 2015, the Oregon legislature granted BOLI discretion in how it responds to FFHA complaints, a move that HUD deemed to make Oregon law no longer “substantially equivalent” to federal enforcement procedure.¹³³ Hence, in 2016, HUD ended BOLI’s enforcement contract.¹³⁴ As a result, HUD employees supervised by the Seattle regional office now investigate discrimination complaints under the FFHA in Oregon.¹³⁵

Since its inception, the FFHA has included language that requires “[a]ll executive departments and agencies . . . [to] administer their programs relating to housing and urban development . . . in a manner affirmatively to further the purposes of this subchapter.”¹³⁶ Grant programs administered by HUD, consistent with this requirement and other federal laws, require that participants certify, as a condition of receiving federal funds, that they will affirmatively further fair housing (AFFH).¹³⁷ In 2015, the Obama administration sought to breathe new life into the AFFH requirement by promulgating a rule that requires recipient jurisdictions to engage in a more robust assessment of fair housing issues in their communities than required under prior regulations.¹³⁸ A Supreme Court decision issued shortly before the rule’s issuance bolstered its legal standing by holding that the FFHA can be read to prohibit policies that have a disparate impact, not

132. Notice, 74 Fed. Reg. 37237 (July 28, 2009) (requesting public comment on Oregon’s interim certification to enforce federal fair housing laws as of 2008).

133. 2015 Or. Laws ch. 609 (SB 380) (codified at OR. REV. STAT. § 659A.845 (2015) (changing commissioner “shall” prepare formal charges to “may” after finding of substantial evidence and failure to conciliate); see also Multifamily NW, 2016 Legislative Update (noting that it is “unclear how HUD will react” to the 2015 legislative changes giving “prosecutorial discretion” to BOLI).

134. See Clackamas Cnty., 2017–2021 Assessment of Fair Housing Report, at 6 (Oct. 14, 2016), http://www.clackamas.us/communitydevelopment/documents/2017-2021_plan.pdf [hereinafter, “Clackamas AFH”].

135. See Multifamily NW, *supra* note 133; BOLI Brief: Technical Fixes to Maintain HUD Substantial Equivalency Status (SB 58 & SB 59), <http://library.state.or.us/repository/2009/200905151103515/index.pdf> (last visited Dec. 5, 2017) (noting that if BOLI cannot enforce federal fair housing law, HUD’s office in Seattle will investigate claims, resulting in longer waiting times and reduced accessibility for the complainants and respondents).

136. 42 U.S.C. § 3608(d).

137. GPO at 42274, citing statutes.

138. See 80 Fed. Reg. 42272 (July 16, 2015) (amending 24 C.F.R. parts 5, 91, 92 et seq.), <https://www.gpo.gov/fdsys/pkg/FR-2015-07-16/pdf/2015-17032.pdf> (explaining and promulgating new AFFH rule).

just a discriminatory intent.¹³⁹ In Oregon, Clackamas County was the first to complete its assessment of fair housing (AFH) under the new AFFH rule in 2016.¹⁴⁰ In January 2018, the Trump administration announced a delay in the AFFH rule's implementation, allowing those jurisdictions next in line until October 2020 or later to complete their required AFHs.¹⁴¹

In sum, the federal government's attempts at direct production of housing were short-lived. Instead, it settled on providing the financial means (e.g., grants, loans, rental supplements, and tax credits) for private, local public, and nonprofit sectors to produce rental housing for households of modest means. However, the amount of resources for low-income subsidized housing provided by the federal government has never been sufficient to meet the need. Historically, the federal government's commitment to civil rights in housing has wavered over time, typically varying with the administration in power and the national mood. These conditions present a challenging environment for state and local governments to provide adequately for the housing needs of their residents. For Oregon, in particular, housing has become *more* unaffordable as federal funding has continued to prove insufficient to meeting the nation's low-income housing needs.

II. Housing in Oregon: Planning and Land Use Regulation

Oregon's modern land use system was created in the 1970s and 1980s. At that time, faced with the federal government's failure to provide sufficient housing funds, states pondered how to address the housing needs of low-income residents. These residents often pay a disproportionate amount of their income on housing costs, live in substandard conditions, or survive without housing at all. A state must decide whether to leave housing to the "market" (distorted as it may be by real estate and zoning practices), incentivize affordable housing only, or take up the gap between what the market will provide and what is needed. At least since the 1920s, land use and zoning, matters critical to housing production, had been pri-

139. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project*, 135 S. Ct. 2507 (2015); *see also* 80 Fed. Reg. at 42283 (citing *Inclusive Cmty. Project* as among the justifications for the new AFFH rule in response to comments on proposed rule).

140. Clackamas AFH, *supra* note 134. The timing of Clackamas County's AFH report was due to its timeline for completing a "Consolidated Plan" every five years. *See* Letter from Richard Swift, Director, Clackamas Cnty., Health, Hous., & Human Servs., to Bd. of County Comm'rs, at 4 (Sept. 15, 2016), <http://www.clackamas.us/bcc/documents/businesspackets/bcc20160915.pdf> (noting that the county would be among the first twenty-two jurisdictions in the nation to submit an AFH under the new AFFH rule).

141. *Affirmatively Furthering Fair Housing: Extension of Deadline for Submission of Assessment of Fair Housing for Consolidated Plan Participants*, 83 Fed. Reg. 683 (Jan. 5, 2018).

marily a local matter, including in Oregon.¹⁴² As they reconsidered the state's land-use policies in the 1970s and early 1980s, Oregon's policy-makers examined whether zoning could be a tool to both create conditions in which affordable housing can be created when subsidies are available and to nudge the private market to produce housing for households of modest means as well as the more lucrative upper end of the market.

This Part tells the story of how Oregon addressed these challenges through SB 100 in 1973 and beyond. Oregon's land use system now contains unique housing requirements and expectations for state, regional, and local governments, and private parties. Unlike the practice in most states, which continue to delegate land use regulatory powers to local governments with few or no requirements,¹⁴³ SB 100 established a long-standing system of state policy obligations to further multiple objectives.

Space does not allow a full presentation of the Oregon planning system here.¹⁴⁴ Suffice it to say that in 1973 Oregon established the Land Conservation and Development Commission (LCDC), staffed by the Department of Land Conservation and Development (DLCD),¹⁴⁵ to perform several functions:

- (1) The adoption and revision of state land use policies ("Goals") that are binding on regional and local (city and county) governments, which must incorporate those policies into their plans, and which in turn govern all non-federal public and private land use activities.¹⁴⁶ This function also includes the adoption of binding administrative rules that detail goal requirements.¹⁴⁷
- (2) The review of regional and local plans and regulations to assure those goals have been incorporated into those binding plans¹⁴⁸ and a continuing review of amendments to those plans and regula-

142. Although Oregon did not use the Standard Zoning Enabling Act (1926) as a model for its zoning enabling legislation, it did follow the pattern of complete delegation of land use regulatory power to local government that characterizes that model act. See Edward J. Sullivan, *The Quiet Revolution Goes West: The Oregon Planning Program 1961–2011*, 45 JOHN MARSHALL L. REV. 357, 360–61 (2012) [hereinafter, "*Quiet Revolution*"].

143. The Standard State Zoning Enabling Act, for example, was the template for enabling legislation for most of the states and was broadly predicated on advancing the public health, safety, morals, and general welfare. See *id.* at 361; see also *supra* note 19 and accompanying text.

144. For a more complete description of the Oregon land use system, see Sullivan, *Quiet Revolution*, *supra* note 142.

145. OR. REV. STAT. § 197.030–.045. Statutes relating to the Department of Land Conservation and Development are found at *id.* § 197.075–.095.

146. *Id.* § 197.225–.250.

147. *Id.* § 197.175 and .250.

148. *Id.* § 197.251 to .265.

tions, either on a periodic basis¹⁴⁹ or as individual amendments are adopted locally, again to assure goal compliance.¹⁵⁰

- (3) The power to enforce, thereby requiring local governments to adopt and apply plans and to undertake actions to carry out the goals.¹⁵¹

In addition to these policy-making and administrative bodies, Oregon also provides for a unique system of review of most land use decisions through the Oregon Land Use Board of Appeals (LUBA), which has jurisdiction to review almost all regional and local land use decisions and some decisions by state agencies.¹⁵²

A. Goal 10: Housing

Housing is one of nineteen statewide planning goals and is set out in the appendix.¹⁵³ The goal was adopted in 1974 as one of the original statewide planning goals and has been amended over time. However, the history of Goal 10 is more nuanced. SB 100 required that LCDC adopt statewide planning goals by the end of 1974.¹⁵⁴ By December 1974, three drafts of those goals were proposed.¹⁵⁵ None of those drafts contained a housing goal until about six weeks before the deadline when Betty Niven, the Chair of the State Housing Council,¹⁵⁶ proposed a separate housing goal.¹⁵⁷

To ensure that fulfilling the other goals of the statewide land use plan will not unreasonably impact the supply of modestly priced housing.¹⁵⁸

149. *Id.* § 197.628 to .646.

150. *Id.* § 197.610 to .625.

151. *Id.* § 197.319 to .335.

152. *Id.* § 197.805 to .845. See Edward J. Sullivan, *Reviewing the Reviewer: The Impact of the Land Use Board of Appeals on the Oregon Land Use Program, 1979–99*, 36 WIL-
LAMETTE L. J. 441 (2000).

153. OR. ADMIN. R. § 660-0015-0000(10) (2017).

154. Sec. 33, Ch. 80, Or. Laws 1973.

155. LCDC Goal Adoption Files (1974) (on file with authors).

156. The Oregon Housing Council was created in 1971 to provide a conduit for federal housing funds, primarily from the federal Department of Housing and Urban Development (HUD). The role of the Council and Division in general, and Niven in particular, is found in an unpublished paper by two academics from Portland State University, Andrée Tremoulet & Sy Adler, *Unlikely Alliance: How Oregon Addressed Exclusionary Zoning in the 1970s* (2010) (on file with authors).

157. Betty Niven, Chair, Oregon State Housing Council, Memorandum to Land Conservation and Development Commission, dated November 26, 1974, entitled “Proposal for a statewide planning goal as an element in the statewide land use goals and guidelines” (on file with authors). The Oregon State Homebuilders Association also advocated for a separate housing goal at that hearing. See testimony of Fred VanNatta, Executive Director, Oregon State Homebuilders Association.

158. *Id.* The language was not completely accurate, as there was no “statewide land use plan” envisioned by SB 100. Eventually, environmental organizations and others agreed on the need for a housing goal. Tremoulet and Adler note:

Niven advanced the idea that housing should have an equal status among the goals and that “modestly priced housing” should be a state policy objective. While Niven succeeded in convincing LCDC to adopt a statewide housing goal, it was the language and approach of another key stakeholder, the Oregon State Homebuilder’s Association, which provided the foundation of the goal’s approach and standards.

B. The Early Days of the Oregon Housing-Land Use Relationship

While LCDC adopted a Goal that specified that buildable lands would be inventoried and plans would “encourage” needed housing at price ranges and rent levels and include flexibility of housing location, type and density,¹⁵⁹ the Commission failed to elaborate on its expectations regarding the details of type and density, given the political sensitivities of that elaboration at the local level.¹⁶⁰ Instead, LCDC initially left that discretion up to local governments; most of its efforts were aimed at providing suggestions and housing toolkits to assist local governments in meeting their housing responsibilities.¹⁶¹

One of the key aspects of the early history of the Oregon land use planning program is the creation of an alliance among environmental activists, conventional and manufactured homebuilders, realtors, planners, and affordable housing advocates. They supported policies to facilitate residential development inside urban growth boundaries as necessary complements to regulations to preserve farm and forest lands outside them. 1000 Friends of Oregon, the land use watchdog group that emerged from the mix of environmental organizations, especially OEC, OSPIRG and NEDC in 1975, played a leadership role in establishing the alliance. 1000 Friends attorneys began meeting with building industry and related groups as well as local government planners in 1976 to highlight the ways in which LCDC’s Goal 10 could and should be used to expand the supply of affordable housing by transcending the limits set by exclusionary zoning practices.

Tremoulet & Adler, *supra* note 156, at 10.

159. Statewide Planning Goal 10, OR. ADMIN. R. § 660-0150-0000(10) (2017). This approach was, and is, unique among American states. By requiring all cities to “encourage” all housing types in its plans and land use regulations, Oregon effectively prohibited exclusionary zoning—for example, no city could designate all residential uses to be single family homes on large lots, a practice of local governments in many other states. Later legislation, rules, and court decisions gave greater specificity to the obligation, but requiring all communities to provide housing for all income levels was embedded in Goal 10 from the beginning.

160. Tremoulet & Adler, *supra* note 156, at 9–10. These authors cite the concerns of housing advocates to local opposition to state-imposed housing obligations.

161. An example of this approach was a document entitled *Housing Planning in Oregon* (1979) by Richard L. Ragatz Associates, Inc., funded jointly by LCDC and the State Housing Council. While helpful to local governments in a technical sense, *Housing Planning in Oregon* failed to move the housing needle much locally

An early key housing issue under the SB 100 regime concerned local regulations of manufactured, or “mobile” homes.¹⁶² In 1977, a Clackamas County prohibition on “trailer homes” was interpreted to include mobile homes.¹⁶³ The Oregon Court of Appeals reversed that interpretation, finding it unsupported.¹⁶⁴ However, the Oregon Supreme Court, by a vote of four to three, upheld the county’s interpretation.¹⁶⁵ The decision caused 1000 Friends of Oregon, a land use advocacy organization, to suggest that unreasonable exclusion of manufactured housing could violate Goal 10.¹⁶⁶ Representatives of the manufactured housing industry redoubled their efforts to assure that its housing product would be treated equally with conventional housing.¹⁶⁷ The discussions with DLCD staff had previously met with some success when the Commission approved a “policy paper” on housing in August 1978 stating:

Where a need has been shown for a particular type of housing, it should be permitted outright in some zones, although it may be a conditional use in other zones. Care should be taken to remove vague approval standards from zoning ordinances.¹⁶⁸

so that it seemed will, rather than knowledge, was the problem. While there was no overtly racial bias present in the land use regulations of most Oregon communities, the typical approach for suburban areas was to have larger lot sizes that had the net effect of exclusion. See discussion on the evolution of the “St. Helens policy,” *infra* note 168.

162. Tremoulet & Adler, *supra* note 156, at 1.

163. Clackamas County Zoning Ordinance § 3.2. For the interpretation that deemed a mobile home to be a prohibited “trailer house,” see *Clackamas County v. Dunham*, 579 P.2d 223, 224–25 (Or. 1978).

164. *Clackamas Cnty. v. Dunham*, 567 P.2d 605 (Or. Ct. App. 1977).

165. *Dunham*, 579 P.2d at 223. In that same year, the Oregon Supreme Court also upheld the denial of a conditional use permit for a manufactured home in *Anderson v. Peden*, 587 P.2d 59 (Or. 1978).

166. Tremoulet & Adler, *supra* note 156, at 12.

167. Industry representatives met with the DLCD Director and had earlier caused legislation to be introduced to remove some of the local land use limitations and prohibitions affecting manufactured housing. Tremoulet & Adler, *supra* note 156, at 11–12.

168. *Id.* at 13. The authors also note a relatively obscure case before LCDC where this policy was applied, *Seaman v. City of Durham*, 1 LCDC 283, 289–90 (1978), which provided precedent for future LCDC actions. *Seaman* directly influenced the “fair share” and “least cost housing” principles that became the foundation of Oregon Housing Planning Law and found their way as well into the *Mt. Laurel* line of cases in New Jersey. Carl Abbott, Deborah A. Howe & Sy Adler, PLANING THE OREGON WAY: A TWENTY-YEAR EVALUATION 102–04 (1994) at 102–04. However, even before these policies were formalized in administrative rules, LCDC had a consistent body of precedent from the cases and plan acknowledgment proceedings that came before it as to regional fair share obligations, clear and objective standards for permitting and upzoning, and adequate inventories of buildable lands. 1000 Friends of Oregon v. City of Lake Oswego, 2 LCDC 138, 145–46 (1981).

However, LCDC had previously failed to adopt formally more detailed policies to carry out Goal 10. The legislature then passed legislation in 1981 that established specific housing obligations.¹⁶⁹ Among other things, the legislation provided that:

1. Implementation and enforcement of comprehensive plans is deemed to be a matter of statewide concern;¹⁷⁰
2. The key terms “buildable lands” and “needed housing” were defined by statute;¹⁷¹ and

A further version of this precedent was adopted by LCDC and called the “St. Helens Policy,” as it originated in an acknowledgment of the City of St. Helens, Oregon. As set forth below, that document stated policy that would ultimately become part of Oregon’s “needed housing” legislation:

Where a need has been shown for housing within an urban growth boundary at particular price ranges and rent levels, housing types determined to meet that need shall be permitted in a zone or zones with sufficient buildable lands to satisfy that need. This policy shall not be construed as an infringement on a community’s prerogative to 1) set approval standards under which a particular housing type is permitted outright, 2) impose special conditions upon approval of a specific development proposal, or 3) establish approval procedures. However, approval standards, special conditions, and the procedures applicable to both 1) must be clear and objective and, 2) must not have the effect, either of themselves or cumulatively, of discouraging, such as through unreasonable cost or delay, the needed housing type.

Files of Land Conservation and Development Commission re: Statewide Planning Goal 10, Part V, References, #1, St. Helens Policy.

169. Ch. 884, Or. Laws, 1981. See *Rogue Valley Ass’n of Realtors v. City of Ashland*, 35 LUBA 139 (1998), *aff’d*, 970 P.2d 685 (Or. Ct. App. 1999), *review denied* 987 P.2d 514 (Or. 1999).

170. OR. REV. STAT. § 197.013. The purpose of this statute was to avoid “home rule” type arguments on the part of local governments. Beginning in 1980, the legislature had already begun to regulate the use of moratoria to limit residential or other construction (see *id.* § 197.505 to .540), so that preemption had already been asserted in the housing context.

171. *Id.* OR. REV. STAT. § 197.295(1) defined “buildable lands” as those lands in urban and urbanizable areas “that are suitable, available and necessary for residential uses,” including both vacant lands and developed land “likely to be redeveloped.” The starting point of housing obligations was a “buildable lands inventory” of those lands that could be built upon to be used as a basis for planning and zoning sufficient land to meet housing obligations under the goal and state legislation. Determining buildable lands is the first step in the housing process. OR. ADMIN. R. § 660-008-0010. For local governments in the Metro region, there is a specific calculus for determining buildable lands. See OR. ADMIN. R. § 660-007-0045.

On the other hand, with some exemptions for smaller jurisdictions, “needed housing” included those housing types determined to meet the need shown for housing within an urban growth boundary at particular price ranges and rent lev-

3. Specific obligations on local government, including:
 - a. Planning and zoning sufficient lands to fulfill demonstrated housing needs;¹⁷²
 - b. Using clear and objective standards during the permit process for needed housing;¹⁷³ and
 - c. Utilizing uniform statewide placement standards for manufactured homes located outside manufactured home parks.¹⁷⁴

In 1983, the legislature continued to promote the inclusion of less costly housing types by outlawing city and county charter restrictions that prohibited attached, multifamily, and manufactured homes, as well as government-assisted housing.¹⁷⁵ In addition, the legislature declared that certain mobile home or manufactured dwelling parks¹⁷⁶ and farmworker housing¹⁷⁷ were also “needed housing.” These obligations have now been reflected in the current version of Goal 10 and in the housing administrative rules adopted by LCDC to implement that goal.

C. Housing Administrative Rules

Oregon courts have consistently ruled that state agencies may not adopt binding policy in any other way but the adoption of administrative

els, and generally included single and multiple family, government assisted, manufactured, and farmworker housing.

172. OR. REV. STAT. § 197.307(3) provides:

When a need has been shown for housing within an urban growth boundary at particular price ranges and rent levels, needed housing shall be permitted in one or more zoning districts or in zones described by some comprehensive plans as overlay zones with sufficient buildable land to satisfy that need.

173. *Id.* § 197.307(4) to (7). With some exceptions, clear and objective standards must be an applicant’s option, although local governments may also offer a “discretionary track,” perhaps with additional density.

174. OR. REV. STAT. § 197.307(8). These standards include placement, minimum area, siding, and carports.

175. Following a successful state action to invalidate a charter requirement that restricted multifamily housing in Forest Grove in *State v. City of Forest Grove*, 9 Or LUBA 92 (1983), the legislature in that same year enacted the present OR. REV. STAT. § 197.312(1), prohibiting this and similar local charter provisions. The legislature also added government-assisted housing to the list of needed housing. *See id.* § 197.303(1)(b) and 197.307(2).

176. *Id.* § 197.303(1)(c). The legislature has defined “manufactured dwelling park,” “manufactured dwelling,” and “mobile home park” in *id.* § 197.295(2), (4), and (5), respectively, to avoid ambiguity. The “needed housing” status requires that these uses comply with *id.* § 197.475 to .490. *Id.*

177. *Id.* § 197.303(1)(e). OR. REV. STAT. § 197.307(1) terms the provision of farmworkers housing to be a matter of statewide concern and sets limits on local regulation of such housing.

rules.¹⁷⁸ To assure that the needed housing legislation and Goal 10 would be implemented, LCDC adopted two sets of administrative rules that would have the force and effect of law to supersede the informal rules embodied in policy papers that had not formally been adopted by rule.

One set of rules was adopted in 1982 concerning overall interpretations of Goal 10.¹⁷⁹ To assure that the housing needs of the citizens of the state were met, comprehensive plans for urban areas were required to allocate lands within urban growth boundaries (UGBs) for demonstrated housing needs by type and density range.¹⁸⁰ Once sufficient lands were justified and designated in local comprehensive plans, rezoning those lands to the maximum ultimate residential densities must generally be undertaken.¹⁸¹

178. *Burke v. Children's Servs. Div.*, 607 P.2d 141, 149 (Or. 1980) (holding that Division program may be terminated "only by proper promulgation of a rule to that effect").

179. OR. ADMIN. R. § 660-008-0000(1) states the purpose of these rules:

The purpose of this division is to ensure opportunity for the provision of adequate numbers of needed housing units, the efficient use of buildable land within urban growth boundaries, and to provide greater certainty in the development process so as to reduce housing costs. This division is intended to provide standards for compliance with Goal 10 "Housing" and to implement ORS 197.303 through 197.307.

Id.

180. OR. ADMIN. R. § 660-008-0010 provides:

The mix and density of needed housing is determined in the housing needs projection. Sufficient buildable land shall be designated on the comprehensive plan map to satisfy housing needs by type and density range as determined in the housing needs projection. The local buildable lands inventory must document the amount of buildable land in each residential plan designation.

In turn, buildable lands that could be candidates for residential designation were described more in terms of what was excluded, i.e., land constrained by physical hazards or significant building constraints, or subject to protection under other goals.

The obligations were made complete by OR. ADMIN. R. § 660-008-0020(1) which requires:

Plan designations that allow or require residential uses shall be assigned to all buildable land.

... The plan designations assigned to buildable land shall be specific so as to accommodate the varying housing types and densities identified in the local housing needs projection.

For more on UGBs in Oregon's land-use system, see *infra* notes 200-03 and accompanying text.

181. *Id.* OR. REV. STAT. § 660-008-0025 provides that the rezoning obligation may be deferred, but only if the plan contains a justification for the rezoning process and policies that explain how this process will be used to provide for needed housing and allows for rezoning under "clear and objective conditions." Thus, deferral

In any event, there is a level of certainty that housing obligations will be met.¹⁸²

Another set of administrative rules, originally adopted in 1981,¹⁸³ applied only to the Portland region and is commonly known as the Metropolitan Housing Rule. These rules applied more specific housing requirements to that region and dealt with conflicts with the more general rules.¹⁸⁴ These rules require specific clear and objective approval standards and procedures for development of residential lands¹⁸⁵ and contain a specific calculus to determine “buildable lands” on a regional basis.¹⁸⁶ In addition, local governments within the Portland region were required to consider use of manufactured homes as part of their housing mix;¹⁸⁷ to meet a specific requirement on a city-by-city basis for increased density depending on the city’s population and distance from the center of the region,¹⁸⁸ and to achieve a general density mix so that half of new residential construction is multifamily or single-family attached.¹⁸⁹ The Metropolitan Housing Rule also provides for regional coordination of these obligations by the regional government, Metro.¹⁹⁰

D. Lethe and Phobos

Goal 10, its implementing administrative rules, and Oregon’s needed housing legislation combine to provide significant potential for ascertain-

of a rezoning that requires a major public works facility may be deferred, but the ultimate obligation remains.

182. *Id.*

183. *Id.* § 660, Div. 007. As with the more general housing rules, there were amendments in 1987, 1990, 1999, and 2012, but these too were not significant policy changes, but rather language clarification and reflection of statutory changes.

184. OR. ADMIN. R. § 660-008-0000(2) provides:

OAR chapter 660, division 7, Metropolitan Housing, is intended to complement and be consistent with OAR chapter 660, division 8 and Statewide Planning Goal 10 Housing (OAR 660-015-0000(10)). Should differences in interpretation between division 8 and division 7 arise, the provisions of division 7 shall prevail for cities and counties within the Metro urban growth boundary.

185. OR. ADMIN. R. §§ 660-008-0015(1) and (2) provide detail the application of clear and objective standards at the local level.

186. *Id.* § 660-007-0045.

187. *Id.* § 660-007-0033. However, additional statutes and rules require more than “consideration” of this housing type.

188. *Id.* § 660-007-0035. Commonly known as the “6-8-10 rule,” the rule generally requires a residential density of six units per net buildable acre in outer residential areas, eight units in the next ring closest to the city center, and ten units in the core area.

189. *Id.* § 660-007-0030. The rules provide for alternatives to achieve the same ends in OR. ADMIN. R. § 660-007-0037.

190. *Id.* § 660-007-0050.

ing and meeting housing needs for homeowners and renters. The actual experience, however, has been more complicated. There has been significant litigation regarding the failure of local governments to apply clear and objective standards and procedures to needed housing.¹⁹¹ Another significant decision required a city to explain how it met its housing needs when it approved a large tract of residential land for a hospital.¹⁹² Still another found a city ordinance requiring landlord payments to manufactured home park homeowners in the event of park closure to be consistent with state housing policies.¹⁹³ On the other hand, there have been disappointments for affordable housing advocates. In the Portland region, a local government undertaking a significant reduction in density was allowed to have that loss effectively deferred to a time when the regional urban growth boundary was to be re-examined.¹⁹⁴ Other cases have turned on the scope of statutory obligations and the sequence of the needed housing process, rather than issues of principle.¹⁹⁵

While Oregon has done a decent job of prohibiting classical exclusionary zoning through its use of Goal 10,¹⁹⁶ its administrative rules, and the needed housing statutes,¹⁹⁷ those prohibitions do not affirmatively provide housing. Indeed, regulations by themselves do little to place additional housing on the ground.¹⁹⁸ The laws are there to require local governments to plan and zone sufficient lands for sufficient numbers of affordable homes and provide the metrics for evaluating the sufficiency of their efforts. Why have these laws

191. Regarding the use of discretionary standards and interpretations that had the effect, intended or otherwise, of keeping people out, *see, e.g.*, *Rogue Valley Ass'n of Realtors v. City of Ashland*, 970 P.2d 685 (Or. Ct. App.), *review denied* 328 Or. 594 (1999) (ambiguous standards); *Parkview Terrace Dev. LLC v. City of Grants Pass*, 70 Or. LUBA 37 (2014) (code interpretations); *Homebuilders Ass'n of Lane Cnty. v. City of Eugene*, 41 Or. LUBA 370 (2002) (ambiguous standards); *Multi/Tech Eng'g Servs. v. Josephine Cnty.*, 37 Or. LUBA 314 (1999) (manufactured housing park application); *Creswell Court, LLC v. City of Creswell*, 35 Or. LUBA 234 (1998) (manufactured housing park standards).

192. *Jaqua v. City of Springfield*, 91 P.3d 817 (Or. Ct. App. 2004).

193. *Thunderbird Mobile Club LLC v. City of Wilsonville*, 228 P.3d 650 (Or. Ct. App. 2010).

194. *Hous. Land Advocates v. City of Happy Valley*, LUBA No. 2016-031/105 (Mar. 24, 2017).

195. *1000 Friends v. LCDC (City of McMinnville)*, 259 P.3d 1021 (Or. Ct. App. 2011); *GMK Developments LLC v. City of Madras*, 199 P.3d 882 (Or. Ct. App. 2008); *1000 Friends v. City of Dundee*, 124 P.3d 1249 (Or. Ct. App. 2005).

196. *See supra* note 168 (discussing the "St. Helens policy").

197. *See* discussion of the 1981 needed housing legislation at notes 168, 171, 175–77, and 180 and accompanying text, *supra*.

198. Some do, however. In 2016, the Oregon Legislature authorized (in limited circumstances, however) the use of "inclusionary zoning," i.e., the set aside of a certain number of housing units to be used for low or moderate-income housing. Ch. 59, Or. Laws, 2016.

not led to the production of enough housing affordable to households with low and moderate incomes? The Greek words *lethe* (forgetfulness) and *phobos* (fear) help describe the situation. There is forgetfulness of—or just willful ignorance toward—the situations in which lower-income people find themselves involved, the housing obligations we have imposed on ourselves including associated costs, and the need to meet these obligations in our own neighborhoods. There is the fear of change, of people different than ourselves, and of losing what we cherish in our surroundings. These fears make many residents resistant to change and unwilling to support public officials who seek to follow the law and their obligations.¹⁹⁹

As a final matter, it must be noted that one of the reasons frequently asserted for higher housing costs in Oregon—and the Portland metropolitan area in particular—is the UGBs established by SB 100's land-use system.²⁰⁰ There is a voluminous economic and planning literature on this subject, and it is beyond the confines of this article, and its authors' expertise, to engage

199. While LCDC has the power to direct local governments to meet the goals under OR. REV. STAT. §§ 197.319 to .335, it is often politically inconvenient for it to do so. Such enforcement may cause the loss of support for the state's land use program from urban constituencies since remedies for noncompliance include state takeover of local programs and loss of state-shared revenues. *See also* Brad Schmidt, *Low-Cost Housing Shut Out Amid Riches of Lake Oswego and West Linn: Locked Out, Part 3*, OREGONIAN, June 5, 2012, http://www.oregonlive.com/portland/index.ssf/2012/06/amid_abundance_of_lake_oswego.html (noting that the Portland area's regional government in charge of land-use planning, Metro, "could have flexed some muscle" in its allocation of millions in transportation funds to force wealthy suburbs to plan for more affordable housing, but failed to do so). Goal 14 requires urban areas to have a long-term land supply for urban expansion that is regularly reviewed, so that in a periodic review of the sufficiency of available housing lands, the perennial question for growing areas is whether to grow "up," by increasing density or "out," by expanding the UGB. For the Portland Metropolitan Region, Oregon law requires such reviews at least every six years. *See* OR. REV. STAT. §§ 197.298 and .299 (2015).

200. The notion of an urban growth boundary (UGB) is a product of LCDC's Goal 14, Urbanization. *See* OR. ADMIN. R. § 660-015-0000(14). Goal 14 provides that UGBs "shall be established and maintained by cities, counties, and regional governments to provide land for urban development needs and to identify and separate urban and urbanizable land from rural land." *Id.* The UGB must include all lands needed or projected to be needed for urban uses (including housing that meets the requirements of Goal 10) over a twenty-year period. All cities must adopt UGBs, but in the Portland region, the elected regional government, "Metro," establishes the UGB. *Id.* For discussions of the dynamics and effectiveness of the Urbanization Goal, *see* Edward J. Sullivan, *Urbanization in Oregon: Goal 14 and the Urban Growth Boundary*, 47 URB. L. 165 (2015) (general description of the use of UGBs in Oregon), and Edward J. Sullivan, *Urban Growth Management in Portland, Oregon*, 93 OR. L. REV. 455 (2014) (focused discussion of UGB use in the Portland region).

with this literature in depth.²⁰¹ Nonetheless, it is worth noting that while the evidence shows that UGBs raise *land* prices within the boundary, the evidence does not clearly show that UGBs raise *housing* prices therein if zoning permits sufficiently high degrees of density.²⁰² Alternatively, even in metropolitan areas with no UGBs, housing prices may become extremely unaffordable due to zoning limits on density.²⁰³ This is because forces of agglomeration still drive employment and amenities to urban centers, and the transportation costs of reaching jobs and amenities there are significant. Hence, if the zoning codes within Oregon's UGBs are permitting sufficiently dense housing, then the UGBs themselves should not be driving up housing costs. This dynamic reinforces the essential need for higher levels of residential density under the SB 100 system, particular when UGBs are not expanding.

III. The Evolution of Housing Conditions in Oregon Since 1974

The development and adoption of Goal 10 in late 1974 was in part a response to the housing conditions and challenges that existed at that time. But times change, and so has Oregon's housing environment. This section examines three dimensions of the economic and social milieu of the mid-

201. For research on the UGB's effect in Portland and Oregon, see, e.g., Daniel P. Bigelow & Andrew J. Plantinga, *Town Mouse and Country Mouse: Effects of Urban Growth Controls on Equilibrium Sorting and Land Prices*, 65 REGIONAL SCI. & URB. ECON. 104 (2017) (finding that UGBs in the Willamette Valley increase housing prices *outside* of UGBs but offer other benefits such as the preservation of open space); Myung-Jin Jun, *The Effects of Portland's Urban Growth Boundary on Housing Prices*, 72 J. AM. PLANNING ASS'N 239 (2006) (finding no increase in housing prices for residences within the UGB and citing other research on Portland). For research on UGB's effects elsewhere, see, e.g., Shishir Mathir, *Impact of Urban Growth Boundary on Housing and Land Prices: Evidence from King County, Washington*, 29 HOUS. STUDIES 128 (2014) (concluding that when UGBs are implemented in conjunction with planning processes, they do not necessarily increase housing prices); Seong-Hoon Cho et al., *Urban Growth Boundary and Housing Prices: The Case of Knox County, Tennessee*, 38 REV. REGIONAL STUDIES 29 (2008) (finding that after the imposition of a UGB, home prices within it are higher than those without, everything being equal).

202. E.g., Mathir, *supra* note 201.

203. See Edward L. Glaeser et al., *Why Have Housing Prices Gone Up?* 20 (Nat'l Bureau for Econ. Res., Working Paper 11129, Feb. 2005), <http://www.nber.org/papers/w11129.pdf> (concluding that "new construction has plummeted and housing prices have soared" in places like the San Francisco, New York City, and Los Angeles metropolitan areas); John Mangin, *The New Exclusionary Zoning*, 25 STAN. L. & POL'Y REV. 91, 92 (2014) (noting that "the anti-development orientation of certain cities is turning them into preserves for the wealthy"); see also Jesse Simpson et al., *Gentrification as Urban Strategy: Evaluating Inequity & Portland's Urban Growth Boundary* at 5 (Apr. 2016), <https://ds.lclark.edu/jessesimpson/wp-content/uploads/sites/97/2016/04/GentrificationUGB-2.pdf> (noting that between 1980 and 2000, "housing prices in Portland did not rise as fast as in several metropolitan areas (San Francisco, Los Angeles, and Denver)" without a UGB).

1970s in Oregon and the Western Region and considers how they changed over time and the implications for Goal 10. The dimensions include Oregon's population, its expectations and preferences for housing, and the share of income used to pay for it. Where appropriate, Oregon data are compared to their national counterparts.

A. Population Dynamics

In the four decades between 1975 and 2015, Oregon experienced population growth, increasing racial and ethnic diversity, and shrinking household size. These factors play a role in the quantity and types of housing Oregon communities require to meet the needs of current and future households.

Oregon's annual population growth has steadily outpaced the nation's since 1950,²⁰⁴ despite the efforts of those, like Tom McCall, governor from 1967 to 1975, to urge those from out of state to visit but not stay.²⁰⁵ In the seven decades since 1950, Oregon's population increased by 2.5 times, while the nation's population slightly more than doubled.²⁰⁶ Oregon's population count on April 1, 2010, was 3,831,074, and the state is expected to reach 4.3 million by 2020.²⁰⁷ Measured differently, Oregon's rank of population by state increased from 32 (of 48) in 1950 to 27 (of 50) in 2010.²⁰⁸ During this time period, the state's population became significantly more urban than rural.²⁰⁹

A major component of population growth in Oregon has been net migration to the state during periods of economic expansion. During the 1980s, an economic recession combined with restrictions on timber harvests led to a period of net out-migration, particularly from rural areas of the state. In the next decade, however, net migration accounted for nearly three-fourths of the population change, but declined to 51% during the recession of the 2000s. According to the Oregon Office of Economic Analysis, migration is expected to account for more than two-thirds

204. Office of Economic Analysis (OEA), State of Oregon, Dep't of Admin. Servs., Oregon's Demographic Trends at 3 (Dec. 2012), http://www.oregon.gov/das/OEA/Documents/OR_pop_trend2012.pdf.

205. See BRENT WALTH, FIRE AT EDEN'S GATE 5 (1995) (discussing McCall's famous quip).

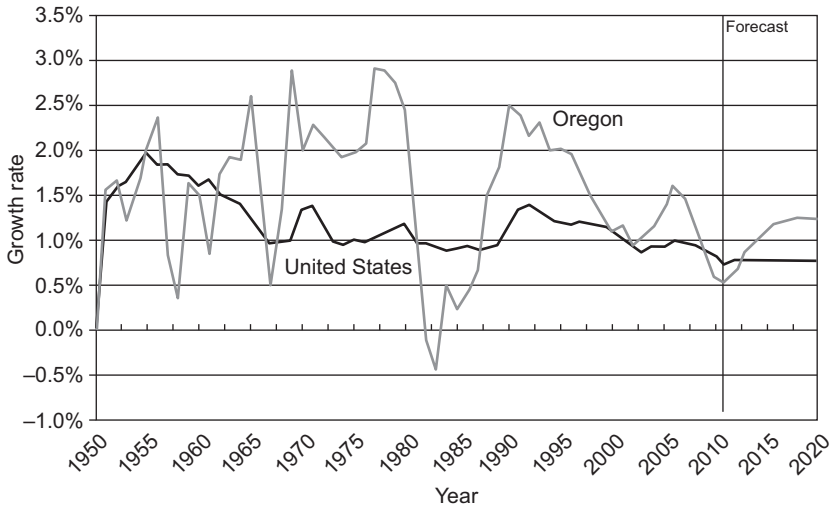
206. OEA, *supra* note 204, at 1-2.

207. *Id.* at 1. Indeed, as of 2017, the state's population is estimated to be 4.14 million. See Portland State University, Population Estimates and Reports (click on "Download Excel file" under "Preliminary Population Estimates, July 1, 2017"), <https://www.pdx.edu/prc/population-reports-estimates>.

208. These numbers are based on historical U.S. Census data.

209. See Portland State University, Population Research Center, Regions: Urban and Rural Population, <http://roadto4million.research.pdx.edu/roadto4million/urban-and-rural-population/urban-and-rural-population> (last visited Dec. 6, 2017) (showing that in 1950 Oregon's rural population exceeded its urban population, but by 2010 the urban population was more than four times the rural population).

Figure 1
U.S. and Oregon Population Growth Rates, 1950–2020



Source: *Oregon’s Demographic Trends*. State of Oregon Office of Economic Analysis, 2012, p. 2. Based on US Census data.

of the state’s population growth from 2010 to 2020.²¹⁰ Figure 2 depicts the role of net migration as a component of Oregon’s population growth.

Net migration has been a robust contributor to recent population growth in the Portland metro region in particular. From 1980 through the present, Portland has been a key destination for young, college-educated adults, ranking consistently among the top eight cities for this component of population change.²¹¹ Presumably, not all these young people have come to Portland to “retire.”²¹² Indeed, this influx into the state’s largest metropolitan region has set the stage for rising incomes and rising housing prices, as well as gentrification and displacement of existing lower income residents.

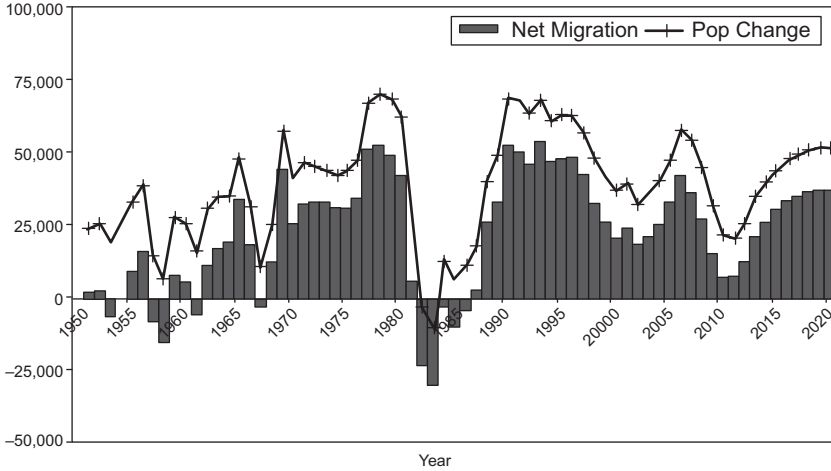
In-migration has been accompanied by growth in racial and economic diversity. As Figure 3 below shows, Oregon’s growth in the share of population who identified as being any race other than white closely paralleled that of the U.S. from 1970 through 2015. While both the nation and the state became more diverse over those four and a half decades,

210. OEA, *supra* note 204, at 5.

211. Jason R. Jurjevich et al., *Destination Portland: Post-Great Recession Migration Trends in the Rose City Region*, PDX Scholar Publications, Reports, and Presentations 39, at 3–4 (2017), http://pdxscholar.library.pdx.edu/cgi/viewcontent.cgi?article=1039&context=prc_pub.

212. PORTLANDIA episode 1 (2011).

Figure 2
Annual Population Change and Net Migration, 1950–2020



Source: Oregon’s Demographic Trends. State of Oregon Office of Economic Analysis, 2012, p. 5. Based on US Census data.

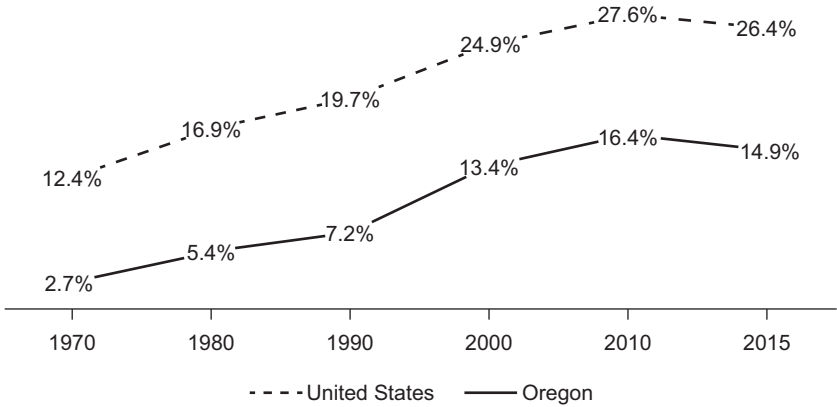
Oregon went from very little racial diversity to more than five times its 1970 share of people of color by 2015. Currently, Oregon’s second largest racial group after white is two or more races (4.1%), followed by Asian (4.0%). In contrast, the nation’s second largest racial group is African American or Black (12.6%), followed by Asian (5.1%).

Oregon and the United States have also experienced a growth in the Latino population. As Figure 4 below shows, the share of Oregon’s population who identified as being Latino or Hispanic increased more than sevenfold from 1970 to 2015. By 2015, one in eight Oregonians identified as Latino. Children and young adults with larger-than-average family sizes form a large share of the Latino population in Oregon.²¹³ Thus, Latinos have contributed to population growth not only through migration but also through a relatively higher birthrate. Planning for adequate housing (particularly rental housing) for this young and growing population of larger families is one of the factors that should be considered by Oregon’s jurisdictions. Moreover, given its demographic profile in Oregon, the Latino population is particularly susceptible to familial status discrimination, on top of any ethnic discrimination in housing it may experience.

Despite the growth in Oregon’s Latino population, the state’s average household size has decreased over the last 40 years. As Figure 5 shows,

213. OEA, *supra* note 204, at 7.

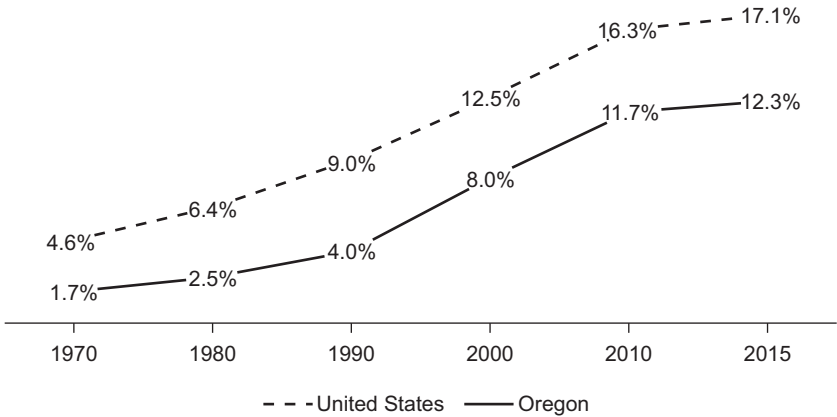
Figure 3
Share of Population That Identifies with a Race Other Than White, 1970–2015



Source: US Census Bureau, Census 1970–2010 and ACS 5-year Survey 2011–15.

the average size of a household in Oregon went from 2.94 persons in 1970

Figure 4
Share of Population that Identifies as Latino or Hispanic, 1970–2015



Source: US Census Bureau, Census 1970–2010 and ACS 5-year Survey 2011–15.

to 2.47 persons in 2010,²¹⁴ a decrease of 16%. Oregon's shrinking household size mirrored that of the nation. Smaller average household size suggests a need for smaller housing units. Not surprisingly, the share of households with children under 18 years of age in Oregon decreased as well, from 37.8% in 1980 to 29.4% in 2015.²¹⁵

In summary, since 1970 Oregon's population has changed in ways that have implications for housing. The population has doubled and grown more diverse, and average household size has shrunk. To accommodate these changes, the kinds of housing that was built in the last four decades should have included options such as the following:

- Smaller houses for smaller households
- Flexible living arrangements for multigenerational households
- Larger rental units for young families
- Live-work spaces to capture the entrepreneurial talents of immigrants and long-term residents
- In places where economic displacement is an issue, opportunities for long-term residents to remain in their communities.

But, as the next section explains, those needs were largely unmet by the kinds of new housing that was built in Oregon since the 1970s.

B. Housing Changes

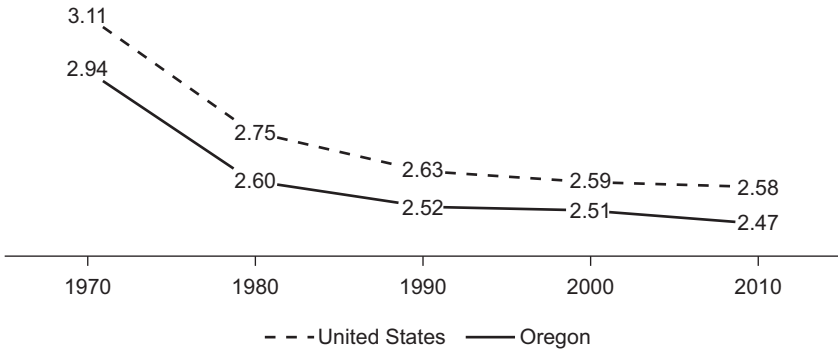
As in the rest of America, Oregonians' tastes and expectations in housing changed substantially over the past four decades. In general, the trend has been toward the construction of larger single-family detached homes with features intended to provide higher levels of comfort and privacy. These features likely contribute increases in the cost of new housing built for sale. This section analyzes changes in housing built between 1975 and 2015, using data for the West as a proxy for Oregon-specific data, because historical information about Oregon is not consistently available for the period studied.²¹⁶

214. Average Household Size, 1970-2010, Oregon, SOCIAL EXPLORER, *supra* note 4.

215. Family Type by Presence and Age of Own Children Under 18, 1970-2010, Oregon, SOCIAL EXPLORER, *supra* note 4.

216. The West Region of the U.S. Census Bureau consists of the Pacific Division (Washington, Oregon, California, Hawaii, and Alaska) and the Mountain Division (Arizona, Colorado, Idaho, New Mexico, Montana, Utah, Nevada, and Wyoming). U.S. Census Bureau, Census Regions and Divisions of the United States, https://www2.census.gov/geo/pdfs/maps-data/maps/reference/us_regdiv.pdf (last visited Dec. 6, 2017). Indeed, the lack of Oregon-specific housing data has been a source of frustration to the Oregon Home Builders Association and others for years. See email from Jon Chandler, CEO, Oregon Home Builders Ass'n, Dec. 11, 2017 (on file with authors) (noting that there is no central repository of housing data in Oregon, including the number of building permits issued, and that

Figure 5
Average Household Size, 1970–2010



Source: Social Explorer Tables (SE), Census 1970–2010, U.S. Census Bureau; Social Explorer.

In the West, the median size of a new single-family home built for sale in 1975 was 1,490 square feet. By 2015, the median size of a new single-family home was more than one and a half times as large, at 2,446 square feet. The figure below shows a trend towards larger homes over the 40-year period.

Evidence also suggests that new single-family homes tended to incorporate more costly features over time. For example, the share of new homes built with air conditioning in the West rose from 30% in 1975 to 79% in 2015.²¹⁷ Similarly, the share of new houses with two and a half bathrooms or more nearly quadrupled, growing from 20% in 1975 to 78% in 2015.²¹⁸ Increasing the number of bathrooms drives up the cost of constructing a new home, because bathrooms are typically the second most costly room to build per square foot, after a kitchen.

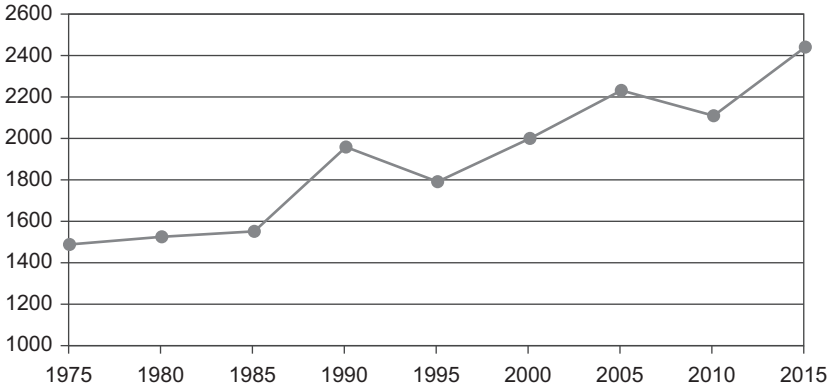
Oregon’s single-family homes have become more spacious and more luxurious since the adoption of Goal 10, despite shrinking household sizes. Regardless of what local jurisdictions planned for, this outcome draws into question whether the full range of housing types that met the needs of existing and future residents were being constructed. It appears that the homebuilding industry focused production on the market at the

Portland State University maintained some of this data until the 1990s but that program was defunded).

217. U.S. Census Bureau, Characteristics of New Housing, Characteristics of New Single-Family Houses Completed, <https://www.census.gov/construction/chars/completed.html> (click on “Air-Conditioning” data) (last visited Dec. 6, 2017).

218. *Id.* (click on “Bathrooms” data).

Figure 6
Median Square Feet of New Single-Family Houses Built for Sale, West Region



Source: US Census Bureau, 2016 Characteristics of New Housing.

more spacious and luxurious end of the spectrum, and that planning efforts at the state and local level did not change that tendency sufficiently.

C. Housing Affordability

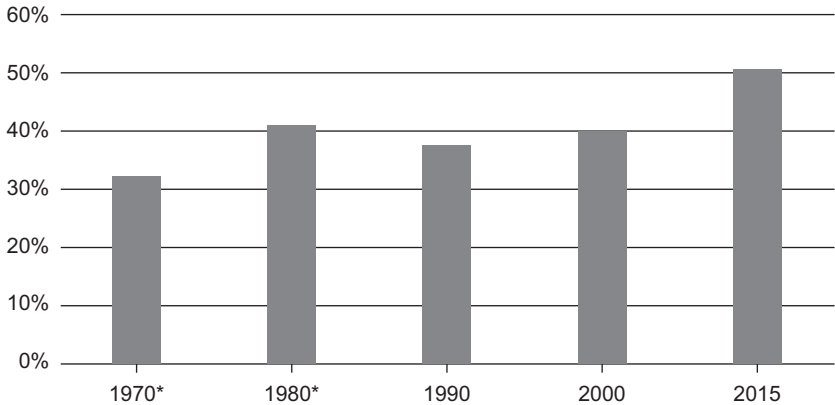
Goal 10 also requires that jurisdictions adopt plans that “encourage the availability of adequate numbers of needed housing units at price ranges and rent levels which are commensurate with the financial capabilities of Oregon households” as Goal 10 provides.²¹⁹ Thus, changes in housing affordability are an important measure of the success of Goal 10. This section examines the affordability of rental and owner-occupied housing in Oregon from 1970 to the present.

A rule of thumb is that renters are considered housing cost-burdened if they spend 30% or more of their gross monthly income for housing costs. In actuality, households with extremely low incomes cannot afford to spend even 30% of their income on housing costs because if they did, they would not have enough income remaining for other essentials like food and clothing. Nevertheless, because it is a commonly accepted standard, Figure 7 depicts the growing share of Oregon renters who were housing cost-burdened from 1970 through 2015. In 1970, approximately 32% of renters were housing cost-burdened; by 2015, slightly more than half were.

From 2000 to 2015, the share of Oregon renting households considered to be severely housing cost-burdened because they spent 50% or more of

219. See Appendix.

Figure 7
Share of Oregon Renters Paying 30% or More of Income for Housing Costs



Source: Social Explorer Tables (SE), Census 1970–2000 & 2011–15 ACS Five-Year Data, U.S. Census Bureau; Social Explorer.

*Percentages shown for 1970 and 1980 are estimates due to the way data were aggregated by the source.

their income on housing costs rose from one in five to more than one in four. Similar data on severe housing cost burden were not available for earlier decades.

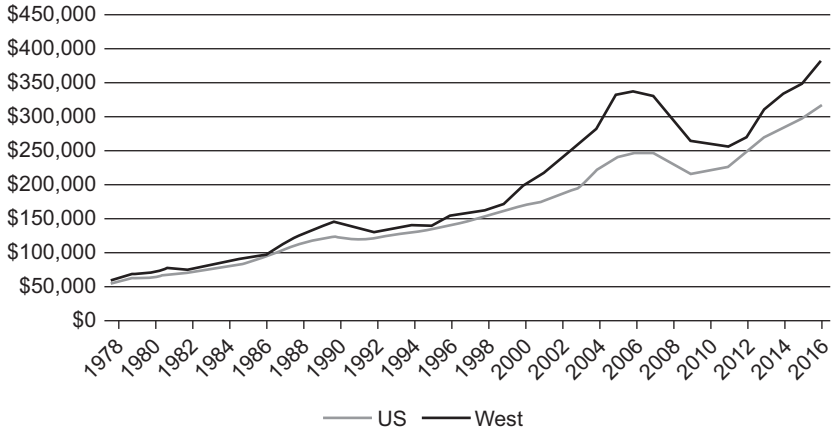
Not surprisingly, the cost of owning a home rose as well. In 1970, the average value of an owner-occupied home was 1.6 times the average family income in Oregon.²²⁰ In 2015, the median value of an owner-occupied home was 2.9 times the average family income in Oregon.²²¹ Figure 8 shows that the median sales price for a new home in the West Region was both higher than that of the United States and more volatile over time.

Thus, it appears that, on average, both rental and owner-occupied housing became significantly less affordable since the adoption of Goal 10. The harshest impact of the lack of affordability fell on those who could afford it least, including households with extremely low incomes, communities of color, older adults on fixed incomes, and people with disabilities who face limited accessible housing options.

220. Median House Value for All Owner-Occupied Units, Oregon, 1970, SOCIAL EXPLORER, *supra* note 4; Median Household Income, Oregon 1970, SOCIAL EXPLORER, *supra* note 4.

221. Median House Value for All Owner-Occupied Units, Oregon, 2015 (5-Year Estimates), SOCIAL EXPLORER, *supra* note 4; Median Household Income, Oregon, 2015 (5-Year Estimates), SOCIAL EXPLORER, *supra* note 4.

Figure 8
Median Sales Price of New Homes Sold



Source: US Census Bureau, Characteristics of New Single-Family Houses Sold. Prices are not inflation-adjusted.

Until 2016, Oregon jurisdictions were prohibited from limiting the cost of housing, whether through rent control or mandatory inclusionary zoning.²²² The principal tools that they had at their disposal were land use and zoning controls, including ensuring that there was a sufficient quantity of multifamily-zoned land and for smaller homes on smaller lots. Communities could also offer financial and other incentives, but, as of 1990, a voter-approved amendment to the Oregon Constitution called Measure 5 limited real estate property tax increases and constrained the budgets of cities and counties. Nevertheless, planners, housing providers, and advocates continued to look for solutions. It is to those ideas that this article now turns.

IV. Conclusion: The Search for Solutions

Goal 10 poses two interrelated planning challenges for local comprehensive plans and implementing codes: to provide for housing of a variety of types, densities, and locations, and to provide for housing that Oregon households can afford. Within the last decade, urban planners have redoubled their efforts to increase the variety of housing types in Oregon communities. Nationally, there has been a movement to reclaim and sti-

222. While rent control remains prohibited by state law, see OR. REV. STAT. § 91.225 (2017), the ban on inclusionary zoning at the local level was relaxed in 2016. See *supra* note 198.

mulate the production of “missing middle” housing—housing somewhere between traditional single-family detached suburban homes and large apartment complexes—that used to be built in American cities before the rise of middle-class suburbs after World War II. These include housing types such as duplexes, triplexes, four-plexes, multiplexes, bungalow courts, courtyard apartments, townhouses, and live/work housing.²²³ As cities such as Bend and Portland have updated their comprehensive plans and codes, they have incorporated some of these options into the mix, although not to the extent necessary to make a significant dent in the housing affordability problem.²²⁴

Because Oregon jurisdictions have a history of zoning a large share of their residential land for single-family housing, there is an urgency to increase the housing options permitted outright in single-family zones. The challenge is to do this while preserving the character of the built environment in established neighborhoods, thus reducing community resistance. In 2016, three departments of the state government collaborated to develop a guide for local jurisdictions on incorporating cottage clusters, in-

223. Daniel Parolek, *Missing Middle: Responding to the Demand for Walkable Urban Living*, <http://missingmiddlehousing.com/dev/wp-content/uploads/2015/04/Missing-Middle-Housing-Responding-to-the-Demand-for-Walkable-Urban-Living-by-Daniel-Parolek.pdf> (last visited Dec. 6, 2017). Nevertheless, those proposals for change have not been without controversy. A Portland neighborhood group has filed objections with LCDC over the City of Portland’s “Missing Middle” efforts based on, among other things, on lack of adequate citizen involvement. *Residents Challenge Missing-Middle Plan*, PORTLAND TRIB., May 25, 2017, <http://portlandtribune.com/pt/9-news/360341-239823-residents-challenge-missing-middle-plan>.

224. There is still a long way to go. As a prominent Oregon housing advocate stated recently:

Fully 90% of Portland’s residential land supply TODAY is zoned for SF [single-family], detached homes. A large percentage of Bend’s housing stock is in CC&Rs with restrictive covenants disallowing smaller lots, ADUs, etc. . . . Almost 2/3 of Medford’s residential zoning [are] SF detached. . . . In Grants Pass in 2016, zero MF [multifamily] units and only a few duplexes were built. Yet 2/3 of Oregon households (and of Portland’s and of the US) consist of 1–2 persons. We have a long-term structural mis-match between zoning and housing needs. It did not happen overnight—it has been with us since the 1950s. But population growth and falling incomes relative to housing costs have exacerbated this. We have a lot of catch-up to do. Portland’s Residential Infill Project—a fairly modest attempt to get more missing middle housing built—is not yet adopted (more than a year overdue) amidst some intense opposition, mostly from wealthier neighborhoods. Several Eugene neighborhoods are pushing hard against ADUs, missing middle housing, etc. There are many more such examples. There is a strong NIMBY element in many Oregon cities.

Personal communication of Mary Kyle McCurdy, Policy Director, 1000 Friends of Oregon, Dec. 23, 2017 (on file with authors).

ternal division of larger homes, corner duplexes, and accessory dwelling units into single-family neighborhoods.²²⁵

In the Portland region and elsewhere in the state, there has been a strong interest in accessory dwelling units (ADUs), whether mobile or set in place.²²⁶ Since 2010, the City of Portland has waived permit fees for ADUs, helping to spur a dramatic increase in their production.²²⁷ Multnomah County, which includes most of Portland and some other jurisdictions, has embarked on an innovative project to incentivize property owners to add ADUs to house homeless people.²²⁸ Clackamas County, adjacent to Multnomah and the third most populous in the state with more than 400,000 people, has recently embarked on an effort to amend its zoning code to allow for transitional shelters for homeless people on land currently zoned industrial.²²⁹ The 2017 Oregon legislature, responding to the state's housing challenges, approved Senate Bill 1051, which requires that, as of July 2018, cities with populations of at least 2,500 and counties with a population of at least 15,000 allow at least one ADU for every lot that allows a detached single-family dwelling.²³⁰ The law also shortens the timeline for approval for certain affordable, multifamily developments, and expands the "needed housing" definition to more clearly include affordable housing.²³¹ These and similar measures represent efforts to increase the variety and types of housing units available in Oregon communities. However, it is unclear whether these efforts will result in the production of housing that is also lower-cost upon completion.

One of the principal ways that a community's inventory of lower-cost housing grows is through a process known as filtering. Filtering is the gradual decrease in the relative cost of housing as it ages.²³² Older hous-

225. Eli Spevak & Madeline Kovacs, *Character-Compatible, Space-Efficient Housing Options for Single-Dwelling Neighborhoods* (May 2016), <http://www.oregon.gov/LCD/TGM/Pages/SpaceEfficientHousing.aspx>.

226. For more on the challenges and opportunities presented by ADUs, see generally John Infranca, *Housing Changing Households*, 25 STAN. L. & POL'Y REV. 53 (2014).

227. AccessoryDwellings.org, *City of Portland ADU Permit Trends*, <https://accessorydwellings.org/2014/03/12/city-of-portland-adu-permit-trends/> (last visited Dec. 6, 2017).

228. *Everything There Is to Know About the A Place For You Granny Flats Project*, MULTNOMAH COUNTY (Mar. 28, 2017), <https://multco.us/multnomah-county/news/everything-there-know-now-about-place-you-granny-flats-project>.

229. Tim Heider, *Clackamas County Planning Commission to Discuss Proposed Regulation Allowing Transitional Shelters at May 22 Work Session*, OREGONLIVE.COM: MY OREGON CITY (May 17, 2017), http://blog.oregonlive.com/my-oregon-city/2017/05/clackamas_county_planning_comm.html.

230. 2017 Or. Laws ch. 745 (SB 1051), § 6 (amending OR. REV. STAT. § 197.312).

231. *Id.* §§ 1, 4 (with the latter amending the definition of "needed housing" in OR. REV. STAT. § 197.303).

232. Sarah L. Mawhorter & Dowell Meyers, *Filtering*, in THE ENCYCLOPEDIA OF HOUSING 225-27 (Andrew T. Carswell ed., 2d ed. 2012).

ing is sometimes “revitalized” through a major influx of capital to make it more appealing to contemporary households by incorporating modern features while maintaining its historic character. However, some units, typically those with fewer historic features or initially built as less expensive housing, may continue to be maintained and repaired for habitability, but not be fully renovated and upgraded. This housing stock might become more affordable over time relative to newer units being built. When this happens, these units are said to have filtered.²³³ Owner-occupied housing typically takes longer to filter than rental housing.²³⁴ The market-driven process of filtering alone does not create a sufficient supply of housing affordable to Oregon households with low incomes.

Besides filtering, other methods of increasing a community’s low-cost housing supply when the private market is not producing it on its own are through the development of rent- or price-controlled subsidized units and through inclusionary zoning. Since the removal of the statewide preemption on inclusionary zoning by the Oregon legislature in 2016, the only jurisdiction to adopt it (as of early 2018) was the City of Portland. Portland engaged in months of study and careful calibration of requirements and incentives to decrease the risk to the cost of housing overall by discouraging new development or by driving up the price of the market rate units. As of February 2017, new developments applying for permits with 20 or more units in Portland were required to set aside 20% of the units for households earning at or below 80% of median, which in 2016 was \$58,650 for a family of four.²³⁵ As of September 2017, the City of Portland had approved its first three developments under the new ordinance, resulting in 23 new units affordable to households earning 60% to 80% of area median income in projects totaling 170 units in three highly sought-after neighborhoods.²³⁶ The Oregon legislature has also authorized cities to impose an “excise tax” on new construction for promotion of affordable housing.²³⁷ It is too soon to evaluate the effectiveness of either the Oregon inclu-

233. *Id.*

234. *Id.*

235. Elliot Njus, *Portland City Council Unanimously Approves Inclusionary Zoning Program*, OREGONIAN/OREGONLIVE, Dec. 21, 2016 (updated Oct. 3, 2017), http://www.oregonlive.com/front-porch/index.ssf/2016/12/portland_city_council_unanimou.html.

236. Rachel Monahan, *City Council Approves First Tax Breaks Under Portland’s Inclusionary Housing Policy*, WILLAMETTE WEEK, Sept. 28, 2017, <http://www.wweek.com/news/city/2017/09/28/city-council-approves-first-tax-breaks-under-portlands-inclusionary-housing-policy/>. As a practical matter, the legislation was drafted to limit the breaching of the rule against the use of inclusionary zoning beyond Portland.

237. Inclusionary zoning and the excise tax is authorized by ch. 59, Or. Laws 2016 (enrolled SB 1533) and were described as follows:

sionary zoning mechanism or the excise tax at this point, except to note that both are more likely to be used in the Portland region.

Advocates continue to identify and lobby for new state sources of funding for subsidized housing. In 2009, the Oregon State Legislature created a new revenue stream for affordable housing based on document recording fees. However, a major obstacle to maximizing the use of state and federal resources remains the cost to produce subsidized housing. In addition to the usual development costs, developers building subsidized housing incur additional costs related to cobbling together multiple layers of subsidy and meeting the procurement, design, reporting, and other requirements of multiple funders.²³⁸

In the most recent long session of the state legislature, from January to July 2017, various efforts to promote and preserve affordable housing—rent control, prohibition of no-cause evictions, preempting the use of historic districts as an exclusionary tool, and limiting the mortgage interest deduction—all failed to become law despite one-party (Democratic) control of the legislature and governor's office. The legislature, however, did pass legislation to promote preservation of affordable housing by providing opportunity to purchase and right of first refusal (in certain cases) when publicly supported affordable housing is at risk of flipping to market rate.²³⁹ Thus, housing affordability remains a major challenge for the state. As recently as 2016, OHCS determined that there was a statewide shortage of at least 100,000 units affordable to households with incomes at or below 30% of median.²⁴⁰ This problem is not unique to Oregon. However, as long as the economy is robust and Oregon continues to attract well-educated

This bill authorizes city and county use of inclusionary zoning to require that up to 20% of units in multifamily housing developments of at least 20 units be sold or rented at affordable rates, if the jurisdiction also offers developers certain incentives. The bill also requires a city or county that implements inclusionary zoning to provide the options for developers to pay an in-lieu fee. The bill also lifts the general preemption on city and county authority to impose new local construction excise taxes (which had previously been scheduled to sunset in 2018), subject to certain requirements to use the revenue for housing programs and incentives. . . .

Oregon Department of Land Conservation and Development, Final Report on 2016 Land Use Legislation (Apr. 18, 2016).

238. MEYER MEMORIAL TRUST, *THE COST OF AFFORDABLE HOUSING DEVELOPMENT IN OREGON 16–22* (2015), https://mmt.org/sites/default/files/inline-files/Cost-Efficiencies10_1_15.pdf.

239. 2017 Or. Laws. ch. 608 (HB 2002) (codified in scattered subsections of OR. REV. STAT. § 456).

240. Ore. Hous. & Cmty. Servs., *Oregon Housing Plan: Needs Analysis and Market Study 35* (Nov. 2016 draft) (on file with authors).

workers and households with wealth, it is likely that having a sufficient supply of affordable housing will remain an elusive goal.

As this article is written in the fall of 2017, it appears unlikely that large amounts of new federal funds will be directed towards housing.²⁴¹ Nor does it appear that new initiatives in civil rights enforcement will be undertaken—indeed, current funding is likely to be reduced.²⁴² Moreover, while public agencies may affect the housing market, those agencies generally do not build housing, especially not in their regulatory capacities. For the present and the foreseeable future, it will be the private sector that invests, funds, and builds that housing. Oregon law has dealt with some aspects of the problem by providing tools that prevent many *de jure* instruments associated with exclusionary zoning. For instance, state law discourages large lot sizes, vague and discretionary local zoning criteria, and unfair local zoning procedures. On the flip side, state law promotes pro-affordability practices through the use of housing metrics and the review of local land use regulations and actions for conformity with state housing policy. But these efforts, while they create the circumstances under which housing, including affordable housing, has planning support, do not guarantee any housing will be built. However, binding review of local housing obligations is altogether tepid and often depends on objections raised by housing advocates, if done at all, and enforcement through litigation is virtually nonexistent. Moreover, although the state provides some direct financial support for affordable housing, the amount is far less than necessary; indeed, for the recent biennium of 2017–19, the legislature increased state funding to the state’s main housing agency, OHCS, but this increase was offset somewhat by reductions in other funds to the agency.²⁴³ And while Oregon may be better than most, or even the best, at creating those conditions, that is not an especially high bar.

241. President Trump proposed to reduce HUD’s budget by \$6.2 billion, or 13.2%. Kelsey Ramírez, *Here’s What Trump’s Proposed Budget Means for Housing*, HOUSINGWIRE, May 23, 2017, <https://www.housingwire.com/articles/40192-heres-what-trumps-proposed-budget-means-for-housing>.

242. On June 16, 2017, the United States Commission on Civil Rights (USCCR) expressed concern regarding President Trump’s proposed cuts to HUD and other programs. See Press Release, USCCR, *The USCCR Expresses Concern Regarding Federal Civil Rights Enforcement Efficacy and Priorities* (June 16, 2017), <http://www.usccr.gov/press/2017/06-16-Efficacy-of-Federal-Civil-Rights-Enforcement.pdf> (noting that the proposed cuts to HUD and other programs “would deal devastating blows to the Department’s work to reduce segregation and promote fair housing”).

243. See Oregon Hous. & Cmty. Serv., *2017–19 Legislatively Adopted Budget*, at 130, <http://www.oregon.gov/ohcs/pdfs/budget/2017-2019-Legislatively-Adopted-Budget.pdf>.

The future is likely to look a lot like the present in Oregon housing policy—a mixture of requirements and incentives to encourage the private sector to build housing. Thus, the binding plan and zoning designations, the prohibition on vague standards, the requirements for a regional approach towards housing obligations, the favorable treatment of most housing decisions on review, combined with use of urban renewal and housing authority measures, public agency bonding powers, coordinated infrastructure, and political pressure allow Oregon the room to experiment and innovate. While that might not be the silver bullet that housing advocates desire, it may be all that is possible at the moment.

Appendix: Oregon Statewide Planning Goal 10, Housing

As revised over the years, the Oregon housing goal now provides:

To provide for the housing needs of citizens of the state.

Buildable lands for residential use shall be inventoried and plans shall encourage the availability of adequate numbers of needed housing units at price ranges and rent levels which are commensurate with the financial capabilities of Oregon households and allow for flexibility of housing location, type and density.

Buildable Lands—refers to lands in urban and urbanizable areas that are suitable, available and necessary for residential use.

Government-Assisted Housing—means housing that is financed in whole or part by either a federal or state housing agency or a local housing authority as defined in ORS 456.005 to 456.720, or housing that is occupied by a tenant or tenants who benefit from rent supplements or housing vouchers provided by either a federal or state housing agency or a local housing authority.

Household—refers to one or more persons occupying a single housing unit.

Manufactured Homes—means structures with a Department of Housing and Urban Development (HUD) label certifying that the structure is constructed in accordance with the National Manufactured Housing Construction and Safety Standards Act of 1974 (42 USC 5401 et seq.), as amended on August 22, 1981.

Needed Housing Units—means housing types determined to meet the need shown for housing within an urban growth boundary at particular price ranges and rent levels. On and after the beginning of the first periodic review of a local government's acknowledged comprehensive plan, "needed housing units" also includes government-assisted housing. For cities having populations larger than 2,500 people and counties having populations larger than 15,000 people, "needed housing units" also includes (but is not limited to) attached and detached single-family housing, multiple-family housing, and manufactured homes, whether occupied by owners or renters.

