

Opportunities for Innovation in State Regulation of Local Land Use Controls

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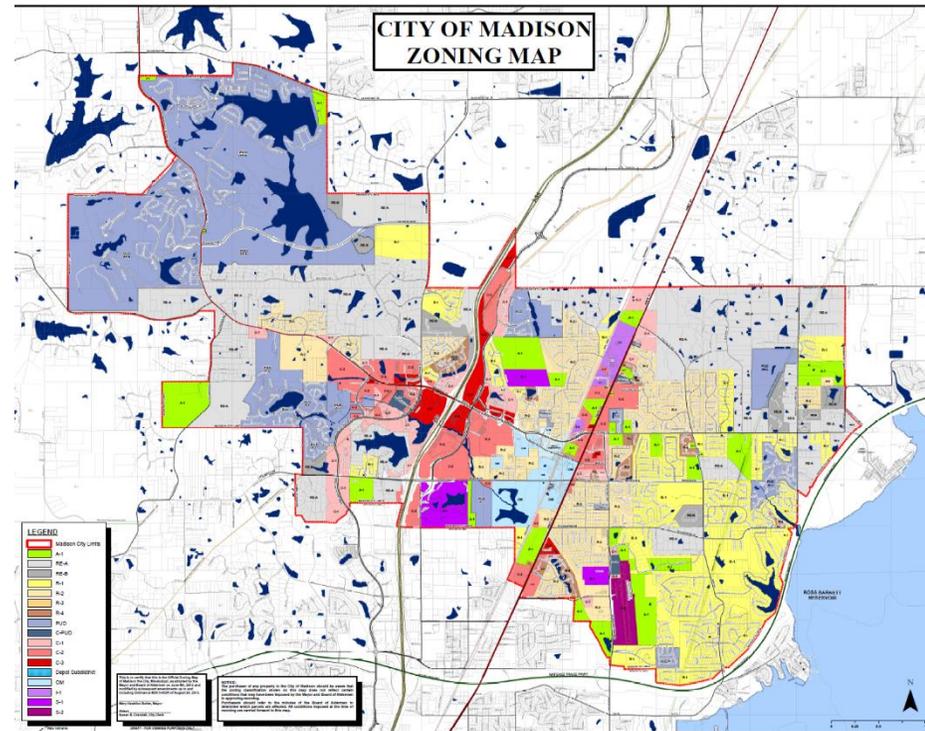
Zoning and Residential Exclusion: Early History

Restrictive zoning and land use controls have played a major role in shaping and reinforcing residential racial and socioeconomic segregation since their advent in the early twentieth century.

- 1910: Baltimore adopts explicit racial zoning ordinance to maintain residential racial segregation.
- 1916: New York City adopts the nation's first citywide zoning ordinance.
- 1917: The U.S. Supreme Court strikes down an explicit racial zoning ordinance in Louisville, Kentucky.
- 1922: The U.S. Department of Commerce, under the leadership of then-Secretary Herbert Hoover, publishes the Standard State Zoning Enabling Act. Many states rush to adopt legislation based on the model.
- 1926: The Supreme Court upholds a municipal zoning ordinance in a challenge under the Due Process Clause, holding that zoning is a valid exercise of the police power unless it fails a permissive rational basis test.

Once the legal basis for municipal zoning was clearly established, its use rapidly proliferated, particularly in suburban areas.

What Exclusionary Zoning Looks Like: City of Madison, Mississippi



Brandon Township, Michigan

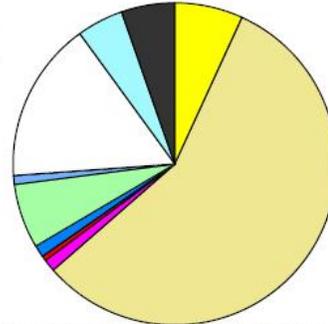


Township of Brandon 2015 Land Use Statistics

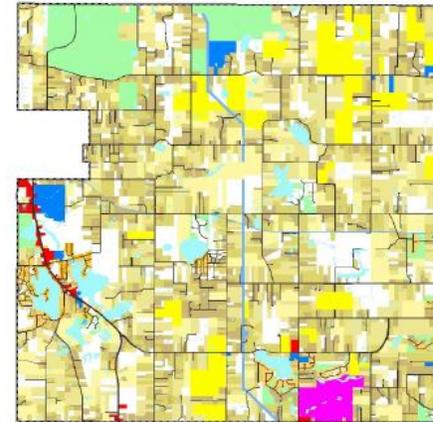
Land Use	Area (ac.)	Area (%)	Parcels	Parcels (%)
Agricultural	1,528.0	6.8%	51	0.9%
Single Family Residential	12,701.8	56.7%	4,263	77.6%
Multiple Family				
Mobile Home Park	271.9	1.2%	4	0.1%
Commercial/Office	111.3	0.5%	63	1.1%
Industrial	1.8	0.0%	1	0.0%
Public/Institutional	269.0	1.2%	24	0.4%
Recreation/Conservation	1,451.0	6.5%	206	3.7%
Transp./Utility/Comm.	198.1	0.9%	12	0.2%
Extractive				
Vacant	3,016.0	18.2%	870	15.8%
Water	1,042.2	4.7%		
Railroad Right-of-Way				
Road Right-of-Way	1,195.4	5.3%		
Total	22,388.5	100.0%	5,494	100.0%

Single Family By Lot Size	Area (ac.)	Area (%)	Parcels	Parcels (%)
10 acres or greater	2,415.3	19.0%	145	3.4%
5 to 9.9 acres	3,238.5	25.5%	425	10.0%
2.5 to 4.9 acres	3,501.3	28.0%	1,000	23.0%
1 to 2.4 acres	2,952.4	23.2%	1,449	34.0%
14,000 to 43,550 sq. ft.	429.3	3.4%	735	17.2%
8,000 to 13,999 sq. ft.	84.9	0.7%	359	8.4%
Less than 8,000 sq. ft.	20.2	0.2%	144	3.4%
More than one unit per parcel				
Single Family Sub-total	12,701.8	100.0%	4,263	100.0%

- Land Use by Area**
- Agricultural
 - Single Family Residential
 - Multiple Family
 - Mobile Home Park
 - Commercial/Office
 - Industrial
 - Public/Institutional
 - Recreation/Conservation
 - Transp./Utility/Comm.
 - Extractive
 - Vacant
 - Water
 - Railroad Right-of-Way
 - Road Right-of-Way

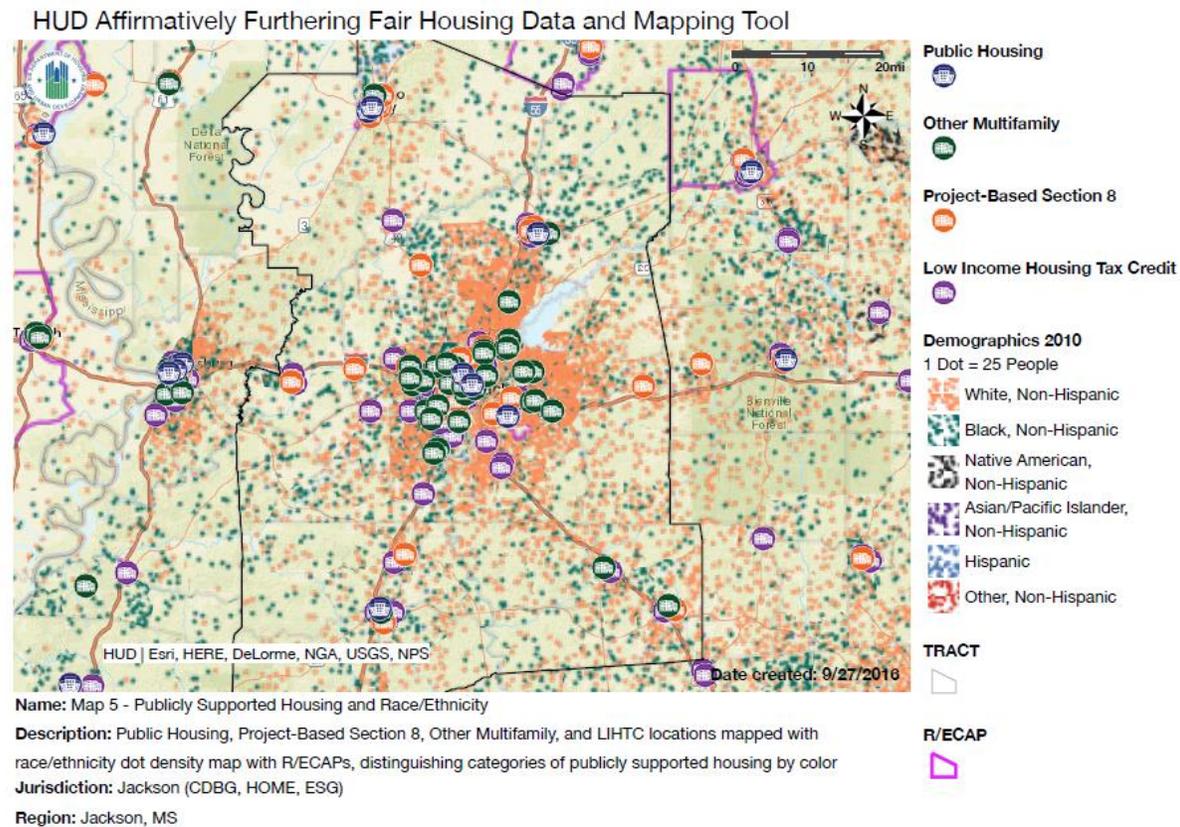


For more information, maps, or questions about this data, please contact the Oakland County One Stop Shop at (248) 659-0720.



This Oakland County land use data has been compiled from recorded deeds, plats, tax maps, surveys, assessing records, and other public records. Users should consult the information sources mentioned above when questions arise.

Exclusionary Zoning and Location of Affordable Housing



Why Does State Law Matter?

Contrary to what most people assume, all zoning authority originates in state governments.

- As a matter of federal law, all zoning authority is state authority.
- If municipalities possess zoning authority, it is because they are creations of states and states chose to delegate that authority to them.
- If all exercise of local zoning authority is delegated by states, states can change *how* or *if* that authority is delegated in order to advance policy goals. As a matter of state law, this may require constitutional amendments in some states though, in most states, this can be accomplished legislatively.
- Unlike municipalities, even the states that are the most hostile to fair housing are HUD grantees and have a duty to affirmatively further fair housing, including through regulation and oversight of their municipalities' exercise of delegated zoning authority.

Current State Interventions in Local Land Use

Most states intervene in local zoning and land use control in some manner. They just do so in ways that are utterly ineffective and sometimes in ways that impede the development of affordable housing in high opportunity areas:

- Comprehensive plans and plan consistency requirements
- State environmental quality laws

A small number of states, however, have gone further, sometimes in response to litigation and with varying levels of success and following different models, and limit the scope of local zoning authority in ways that are specifically intended to promote the development and equitable distribution of affordable housing:

- New Jersey
- Massachusetts, Connecticut, Rhode Island, Illinois
- California, Minnesota

Core Features of Effective State Law Interventions

The Enforcement Lever:

- The builder's remedy is the most common enforcement lever for state law interventions in local land use.
- A builder's remedy allows a developer to sue or bring an administrative action to override a local government's denial of zoning approval if the development includes a set-aside of affordable units.
- Under some regimes, private parties, including community-based organizations and low-income individuals, can bring suit to compel compliance with the relevant obligation.
- In California, one available remedy in such suits is particularly powerful in communities that want growth but do not want affordable housing: an injunction freezing all development until the municipality complies with the housing element requirement.

Core Features of Effective State Law Interventions

The Obligation:

- There are two general types of obligations that are enforced through the enforcement levers outlined on the previous slide. They sometimes appear in hybrid form.
- Planning obligations require municipalities to develop plans that are designed to allow for the development of a community's share of regional housing need at various income levels.
- Threshold requirements exempt municipalities from the threat of builder's remedy actions if more than a certain percentage of a community's housing stock is comprised of affordable housing.
- Some states either require a plan or hold out the completion of a valid plan as a bail-out system to exempt municipalities that fail to meet threshold requirements from potential builder's remedy suits.

Fair Share v. Threshold

The primary reason to favor a fair share approach rather than a threshold approach is that, whereas having 10% of housing units be affordable at 80% of AMI is a relatively typical threshold, far more than 10% of households need affordable housing and many need housing that is affordable at income levels far below 80% of AMI.

The primary reason to favor a threshold approach is that the process of determining an individual jurisdiction's fair share is often extremely complicated and contentious. A threshold is much easier to administer.

The development of housing that is affordable for very low-income and extremely low-income households is critical from a fair housing perspective because the correlation between race, ethnicity, and socioeconomic status is much more pronounced below 50% of AMI than it is between 50% and 80% of AMI.

Process Flow for Reforms

Massachusetts:

- If more than 10% of units within a municipality are affordable at 80% of AMI or below, the municipality is shielded from the builder's remedy.
- If a municipality has a Housing Production Plan that the Department of Housing and Community Development certifies, the municipality is effectively shielded from the builder's remedy.
- If neither of the above apply, a developer can appeal the denial of a comprehensive permit application to an administrative agency if the proposed development includes a set-aside of affordable units.

California:

- Municipalities are required to have a General Plan, which has a Housing Element.
- The Housing Element must plan, including through the zoning of appropriate sites, for the production of housing sufficient to meet the municipality's share of regional housing need at different income levels.
- If a municipality does not have a valid housing element, the municipality is vulnerable to litigation from both developers seeking a builder's remedy or community groups seeking other injunctive relief.

Process Flow for Reforms

New Jersey:

- At a high level, the process is similar to California, but the administrative agency charged with determining municipalities' affordable housing obligations and reviewing their plans has fallen into deliberate dysfunction, causing the courts to reclaim the process.
- For a period of time, the success of the New Jersey model was undermined by the existence of Regional Contribution Agreements (RCAs), which allowed wealthy municipalities to pay poor municipalities to take on their affordable housing obligations. RCAs were banned in 2008.

Guiding Questions for Advocates:

- Are planning and, by extension, site selection primary goals or secondary goals?
- Is judicial enforcement or administrative enforcement? Which costs more? Which is more efficient?
- Is getting some affordable multi-family housing built no matter what the priority or is reaching 30% and 50% of AMI essential?
- Can developers be trusted with the task of enforcement?

State Land Use Law and Gentrification

Can state land use law reforms be leveraged to prevent the displacement of low income people of color from gentrifying neighborhoods? Do reforms risk the unintended consequence of accelerating displacement?

- Reducing suburban exclusion and undersupply eases (to a degree) gentrification pressures.
- If a core city has very little affordable housing and is undergoing gentrification, problems could arise, but those would be resolved by a focus on neighborhood level conditions in the planning process.
- Unlikelihood of application of builder's remedy even in affluent cities because of greater existing affordable housing supply.
- Other reforms may be more useful, e.g., enabling inclusionary zoning and streamlining environmental review for developments with significant affordable components.

Pivoting Towards Fair Housing

Moving beyond high level policy design questions, there are a few concrete ways in which these types of state land use reforms can further fair housing:

- The affirmative marketing of affordable units, whether in developments built pursuant to a builder's remedy or in developments that count toward threshold requirements or planning goals, should be mandatory.
- Source of income discrimination should be prohibited in affordable units and in market rate units that benefitted from the builder's remedy or from an inclusionary ordinance adopted in order to comply with a planning mandate.
- Residency preferences, including live/work preferences, should be presumptively prohibited. In a threshold state, there should be no need for an exception to permit preferences for anti-displacement purposes. In a planning mandate state, a very narrow exception may be appropriate where granting that exception would foster stable integration.
- Planning obligations must require that municipalities identify suitable sites for affordable housing development in a process that allows for robust community participation. A development that appears to promote integration in light of census tract demographics may not do so in practice if it is cut off from the broader neighborhood by train tracks or other buffers.
- Coverage of discriminatory municipalities even if no other basis for coverage.

Contact Information

If you have any questions or comments or are interested learning more about the work of the Lawyers' Committee's Fair Housing & Community Development Project, please do not hesitate to contact me at:

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