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Preserving Naturally Occurring Affordable Housing

In this Issue:

Preserving Naturally Occurring Affordable Housing

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Most of the United States is now in an affordable housing crisis. While zoning reform to loosen up housing supply is badly needed, it is not enough. Given the slow rate at which the U.S. housing stock grows, we may not be able to narrow the affordability gap without significantly expanding our efforts to preserve the existing stock of relatively affordable housing.

In many communities, smaller, older single-family homes are the largest source of naturally occurring affordable housing (NOAH)—unsubsidized privately owned residences that are affordable to low- or moderate-income households. While it would be nice if these existing older homes would remain at their current levels of affordability without intervention, that often does not happen. Some of them are lost every year due to damage or destruction, and there is not much local government can (or should) do to avoid that. However, others are lost through replacement by newer housing, often at bigger sizes or higher densities.

This issue of *Zoning Practice* addresses how local governments can use zoning to preserve the existing supply of affordable housing. It briefly summarizes housing market conditions that illustrate the importance of NOAH and explains potential precedents for NOAH preservation regulations before presenting a range of potential zoning strategies that communities could use to slow the loss of older, modest homes.

Naturally occurring affordable single-family homes in Denver (Credit: Don Elliott)

Focus on the Big Numbers

The housing affordability crisis is a structural problem of the U.S. economy created in large part because wages are subject to global pressures, while housing construction costs are locally driven. These forces have been unfolding since the 1970s, and there is no reason to believe this basic structural problem will be reversed anytime soon.

More specifically, the availability of outsourcing, automation, part-time staffing, and emerging applications of artificial intelligence all tend to prevent significant wage increases across many parts of our economy, but the inputs for new housing have to be bought or built locally. And the continually rising demand for those inputs keeps housing construction costs high. The key fact is that Americans' earning power continues to rise much more slowly than the costs of land, materials, labor, transportation, and energy necessary to build new rental or for-sale housing units.

While many states and local governments have increased funding for affordable housing, more money alone is unlikely to close the affordability gap. It is also unlikely that public subsidies for rents, purchase prices, or housing construction inputs will be large enough to close the affordability gap. Because increasing wages enough to make housing affordable is largely beyond the control of local governments, housing affordability efforts have tended to focus on increasing housing supply.

As part of that response, many state and local governments are exploring how zoning regulations might be changed to allow more new dwelling units to be built on a given parcel of land and to reduce the amount of open space, parking, or other amenities that also have to be squeezed onto that parcel of land. While these efforts are worthwhile, they are not enough because the nation's housing supply increases slowly.

According to the U.S. census, the total number of housing units in the country increased by 6.7 percent between 2010 and 2020—an annual rate of less than one percent. In 2021 there were about 142 million dwelling units in the U.S., about one million more than one year before. Because even as we build new housing, we lose units to obsolescence, disaster, and replacement. Given the slow rate at which the U.S. housing stock grows, it is not likely that we will be able to build ourselves out of the affordability crisis.

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When tackling a very difficult challenge, it makes sense to look for the biggest levers available to affect the outcome. In this case, the challenge is much bigger than bringing down the price of new housing construction. The more fundamental challenge is to retain a housing stock that is affordable to many more lower and middle income American households. And that housing stock includes both new housing and existing housing. Certainly it makes as much sense to talk about how the 141 million housing units that existed in 2020 could be made more affordable as it does to focus on the one million new units created in 2021. And among those already-existing 141 million, the older and smaller housing stock is among the most affordable.

When these units are lost to accidents or disasters, they are gone. Other NOAH units can become uninhabitable, but could remain habitable if owners were provided with grants or low-interest loans to make needed repairs. Fortunately, many American cities and counties have already been providing those kinds of financial support for decades, often using Community Development Block Grant funds or other federal, state, local, or charitable funds.

However, many other NOAH units are vulnerable to loss through redevelopment. Over the past decades, individuals and custom homebuilders have often purchased older single-family homes simply for the value of their lots and their desirable locations. The NOAH structure is then demolished and replaced with a much larger and more expensive home that is not affordable to existing residents of the

The demolition of an older home in Elmhurst, Illinois, for redevelopment (Credit: clarkmaxwell, Flickr)

neighborhood. In addition to individual home replacement, some larger housing builders have acquired multiple adjacent NOAH properties, demolished those homes, merged the lots, and constructed a larger number of attached townhomes, apartments, or condominiums on the combined properties.

The Expansion/ Affordability Tradeoff

Since building new housing requires the purchase of new construction materials and the hiring of labor and equipment that would not be required if the old dwelling units had been preserved in their current state, the sales prices and rental rates of the resulting housing units are often much higher than those of the existing NOAH units. This is part of the business model; there is money to be made in replacing older, smaller units with newer, larger units, and even more money to be made if one unit can be replaced with more than one unit on the same property.

In order to offset the common loss of affordability when fewer NOAH units are replaced by more newer housing units, some cities and counties require that at least one (or a few) of the resulting new units be deed restricted for occupancy by a lower-income household. Often, but not always, this "inclusionary zoning" strategy forces some level of cross subsidy; the prices of the market rate units often need to be increased to offset the costs of making the income-restricted unit available at below market value.

This type of cross subsidy is often possible only when an existing housing unit is replaced by many more (sometimes 10 or more) units since it is difficult raise the price on only a few new market rate housing units enough to cross subsidize the price of the income-restricted units in any significant way. Where an existing NOAH unit is replaced by only three or four new units, it is often financially unfeasible to require that one of the new units be sold at anything significantly below its market value. The increase in market prices of those three or four unrestricted units that would be necessary to cross subsidize the income-restricted unit is sometimes more than the market will bear. In the worst-case scenario, the builder then decides not to invest, and no housing gets built on that site. While inclusionary zoning strategies often work for larger

The Boardman Neighborhood Historic District in Traverse City, Michigan (Credit: Andrew Jameson, Wikimedia)

projects in very strong real estate markets, they are difficult to apply when only one or a few new units are being created or the market is weak.

The replacement of NOAH units by new units therefore presents local governments with a difficult choice. They can prioritize the expansion of the housing stock with newer but less affordable units, trusting on the "trickle down" effect of increased supply to suppress housing price/rent inflation in the rest of the market. Or they can prioritize maintaining the (often greater) affordability of older NOAH units even though it may suppress the expansion of housing stock. Although most communities appear to (actively or passively) choose the first option, that choice comes at the expense of our communities' poorest residents because the removal of NOAH units often leaves them with few good affordable housing choices.

The key reason why a city or county facing this dilemma might choose to protect existing NOAH is price. While the rental rates and sales prices of existing NOAH units are always subject to the laws of supply and demand (i.e., there is no guarantee that they will remain as affordable in the future as they are today), there are three reasons to believe that preserving the existing housing will reduce those inflationary pressures:

1. Older housing is often less attractive to wealthier households.
2. Smaller housing is generally less attractive to medium or large households.
3. Owners of housing that has not had significant reinvestment do not need to adjust rents upward just to retain their current level of profitability.

A Zoning Strategy

A zoning strategy to protect NOAH could include a new overlay or base zoning district or new restrictions on single-family home demolitions. To understand the viability of a zoning strategy to preserve NOAH, it is useful to compare the policy tradeoffs with those arising from historic preservation controls, restrictions on replacement buildings, and efforts to protect manufactured home communities.

The Historic Preservation Analogy

Although historic preservation controls do not have their roots in traditional zoning, they are often implemented through or in collaboration with zoning controls. In some communities, historic preservation controls are identified as a form of land-use and development regulation, and designated historic districts are listed and mapped as overlay zoning districts. In some communities, the tools used to designate historic districts and to approve context-sensitive improvements or additions to those properties (usually through a "certificate of appropriateness") are integrated into the list of land development procedures alongside zoning and subdivision procedures. Even when they are located in a different chapter of the municipal or county code, historic preservation controls often "quack" like zoning controls in that they limit the types of investment that are permitted on the property.

The adoption of local historic preservation designation programs reflects a local government policy choice to prioritize the preservation of key examples of local history over the economic value of allowing market driven reinvestment of those properties for their "highest and best use" or otherwise. They only allow investments to preserve the historic assets or to expand or rebuild them in ways that do not compromise their historic value to the community, even though replacement of those landmarks with newer or larger structures might produce more housing units or better commercial or civic spaces that have a much longer useful life and might well generate higher property taxes. While designation and protection of historic buildings and neighborhoods clearly creates significant economic value (e.g., through increased tourism), the value of historic preservation controls is often defended based on shared community pride independent of their net financial gain or loss to the community.

One unintended but foreseeable outcome of imposing historic preservation controls is that the properties involved may deteriorate over time. More specifically, if owners are prohibited from reinvesting in their properties as they wish, or replacing them with the buildings they wish, there is always a risk that they will stop investing in regular maintenance or needed replacements of building systems as they age or fail. While some communities impose a duty on the property owner not to engage in "demolition by neglect," this is difficult to enforce. Absent a property owner application to alter the property or its use, it is difficult to force a passive owner to spend money on the property unless and until it creates a nuisance or a threat to public health and safety. And while many communities offer grants and low-interest loans to encourage historically contextual reinvestment, there is nothing to prevent a property owner from ignoring those offers. In a worst-case scenario, some property owners do engage in "demolition by neglect" in the hope that once the property has deteriorated significantly the local government will decide that its remaining historic value is limited and will permit demolition or a more significant redevelopment or replacement of the building.

Although historic designation and project approval decisions can be contentious, few question that it is a valid local policy choice to protect these historic assets and limit opportunities for market-driven investments, in spite of the foregone values and opportunities resulting from those limits. That is true even though the opportunity costs of historic preservation controls (i.e., the narrower range of investment and redevelopment options available to them) and sometimes the economic costs fall predominantly on owners of designated properties, while the benefits of local designation often flow to the entire community.

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If it is valid to limit the market-driven investment or building replacement options available to property owners because of the recognized historic value of their properties to the community as a whole, perhaps that is true of the preservation of NOAH as well. Both cases involve a policy choice to limit the ability of property owners to maximize the value of their property, or to pursue their intended use of the property, in order to achieve a

Typical residences in Scarsdale, New York (Credit: Alex Potemkin, Getty)

desired community value. In one case, it is the sometimes hard-to-measure subjective value of retaining historic structures and neighborhoods in the community. In the other, it is the preservation of housing affordable to households who would not be able to rent or buy even the few income-restricted housing units that might be included in the redevelopment project. In both cases, that choice involves a risk that the property will deteriorate over time if property owners are not able to pursue their desired redevelopment or replacement.

The Replacement Building Restrictions Analogy

A second analogy comes from those communities that have placed standards or requirements for approval of an acceptable replacement building as part of a demolition approval process. While many of these requirements have been attempts to limit the size and scale of new development in order to preserve unique or uniform development character rather than affordability, their approval shows that elected officials are often willing to compromise property owner desires to increase property values for the sake of achieving another community goal. Scarsdale, New York, for example, has adopted a sliding scale of maximum floor area ratios (FARs) for single- and two-family homes based on the size of the lot on which the house is located (§310-100 et seq.). Austin, Texas, adopted a similar limit on redevelopment intensity for several types of low-density residential uses (plus clubs and lodges and daycare services) that generally include an overall development at 2,300 square feet of gross floor area (§25-2-F). In 2021, Colorado's capital city adopted a Bungalow Conservation Overlay District limiting residential home heights to match existing (mostly) single-story homes in significant parts of northwest Denver (§9.4.3.11).

The Manufactured Home Community Analogy

Some communities have gone beyond limiting the redevelopment potential of historic areas to make it more difficult to realize the redevelopment value of a key supply of relatively affordable housing: the manufactured housing community. According to ***Fortune***, as of 2020, 22 million Americans resided in manufactured homes. Many of those live in manufactured home communities, where they rent individual home sites on land that they do not own. Some sources identify manufactured homes as the largest source of unsubsidized very affordable housing in the country. Because many manufactured homes begin to settle after they are installed on a site and cannot be feasibly moved to another location, these residents are particularly vulnerable to dislocation if the owner of the land decides to redevelop the park for a more profitable use. In fact, when manufactured home communities are redeveloped for other purposes, many manufactured home-owners—particularly those with the oldest and potentially most affordable housing—simply abandon their homes for lack of a viable alternative location or inability to afford the costs of moving the home.

Because of these unique vulnerabilities—and because it would be very difficult to create new, equally affordable housing to replace the lost manufactured homes without deep public subsidies—several states have passed laws increasing tenant protections for manufactured home park residents. In addition, many cities and counties have enacted zoning changes making it more difficult to redevelop manufactured home communities without the specific approval of the governing body, which is sometimes conditioned on the owner offering some form of compensation or relocation assistance to the current residents of the park. In essence, these local governments are treating manufactured home communities as an important source of NOAH (e.g., see the *PAS Memo* "**Preserving Manufactured Home Communities**").

As with historic preservation controls, creating barriers to redevelopment of manufactured home communities may come at the expense of increasing the housing supply, since the redevelopment could create many more multifamily units than the current number of homes on the property. In addition, as with historic preservation districts, zoning protections for manufactured homes are sometimes adopted over the opposition of the property owners through a controversial process, and they run similar risks that an unhappy property owner will respond by slowing or ending routine needed investments in the property. As a result, a number of states have adopted laws requiring that owners of manufactured home communities make those investments necessary to preserve at least the habitability, if not the current quality, of their parks.

Remember, however, that zoning has been limiting property owners' investment options for as long as zoning has existed. In fact, that is a primary reason why zoning exists; it is very effective at preventing individually preferred forms of property use and development that elected officials believe would harm the community as a whole. The use of zoning to limit redevelopment options is nothing new. What is new is a discussion about whether the preservation of existing NOAH dwellings is important enough to justify this particular use of the tool.

The Holiday Hills manufactured home community in Federal Heights, Colorado (Don Elliott)

A NOAH Preservation District

APA's **[Equity in Zoning Policy Guide](#)** calls on planners and local officials to "consider establishing specialized overlay zones to help protect residential areas that are affordable to low- and moderate-income households, but are not protected from speculative development pressures by an local, state, or federal program" (Zoning District Policy 4). How might this work in practice? And who would it affect?

Whether as a base or overlay zoning district, rules to prevent the demolition or limit the expansion of NOAH dwellings could also be made contingent on the relative income of the neighborhoods where they are applied.

How It Would Work

A NOAH preservation zoning district might include, for example, a provision limiting the physical expansion of an existing single-family home structure to no more than 10 or 20 percent of the gross floor area during each five-year period (and perhaps impose a maximum home size). Or it could include a limit on the dollar value of building permits issued for a structure to 10 or 20 percent of the assessed fair market value of the property during each five-year period. Or it might prohibit the expansion of any one-story structure into a two-story structure (a "pop-top") or more intense forms of housing. It could also prohibit consolidations of smaller residential lots into fewer, larger lots.

Local officials could apply a NOAH preservation district as an overlay to an existing base zoning district or as a new base district. While many historic preservation districts are codified as overlay districts (or treated as de facto overlay districts), many manufactured home community protection laws are embedded in base zoning districts.

Whether as a base or overlay zoning district, rules to prevent the demolition or limit the expansion of NOAH dwellings could also be made contingent on the relative income of the neighborhoods where they are applied. For example, the criteria for approval of either type of NOAH preservation district by the governing body could include a provision that the area where they will apply have average household incomes no greater than 80 percent of the HUD-published area median income (AMI) for the community as a whole. Or the criteria could require that average assessed values of single-household detached structures in the proposed zoning district not exceed 80 percent of average assessed value of single-household detached structures in the city or county as a whole. Such criteria would allow much of the current market activity to replace and expand the housing supply to continue as it does now, but would remove some of the speculative value that allows those actions to harm residents with the fewest affordable housing choices.

There could be exceptions granted for accidental damage or destruction, or to bring the building into compliance with building, fire, safety, or accessibility codes. Perhaps there could be an exception if any investments above the 10 or 20 percent limits was required to create a new dwelling unit that is affordable at very low levels of AMI. That would allow investments by community land trusts or affordable housing nonprofits or the construction of an income-restricted accessory dwelling unit. Any combination of these tools would allow a property owner to make periodic investments while discouraging the real estate market from targeting the area in ways that would lead to the destruction of the NOAH units. More specifically, it would reduce the market's tendency to value NOAH properties for their lot value and location for a much bigger house or multifamily dwelling by restricting the size of the potential replacement structure. This is similar to the impact of a historic district designation, which forces the market to revalue historic properties for their potential reuse value, and not for the structures that might be built on the site if the historic structure did not need to be preserved.

A pop-top bungalow in Chicago (Credit: Chicago Bungalow Association)

Who Would be Affected, and How

Any evaluation of the merits of a NOAH preservation district needs to consider who lives in each potential overlay or base-district area. We begin with the very reasonable assumption that each resident in the area lives there for a reason; either they like it there or they have limited choices to live elsewhere.

Property renters who want to stay in the neighborhood and like it the way it is might support a NOAH zone because of its potential to reduce future rent increases and the likelihood of lease terminations if the property is redeveloped. Property owners who live in the neighborhood and like it the way it is—as well as land trusts and others who acquired their property specifically to preserve affordability—might likewise support a NOAH preservation zone, either because they have no plans to move or because they did not buy the property for either revenue stream or potential value appreciation. However, owners who would like to see their property become more valuable in hopes of selling it for a high price—which could include both long-time neighborhood residents and more recent buyers who purchased based on its speculative value as a redevelopment site—would almost certainly oppose designation as a NOAH zone because it could substantially reduce the opportunities to increase the revenue stream or the resale value of the property.

This last group could, of course, be very large. The ability to redevelop one's property for another use or building permitted by the current zoning is a deeply ingrained expectation among many property owners. In many communities, the ability to try to increase that redevelopment value by requesting a rezoning to allow a bigger building or a different use is almost as deeply ingrained. Just as many local governments are very reluctant to designate a historic district unless a substantial majority of the property owners in the area support the designation, many cities and counties would be reluctant to remove the speculative value of redeveloping NOAH properties for bigger houses or more dwelling units in the face of substantial property owner opposition. Nevertheless, the potential political difficulties of designation over opposition should not cloud the fact that such designations have occurred in the past (see the landmark ***Penn Central Transp. Co. v. New York City,*** 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978)) and could just as well occur to protect NOAH units. This is particularly true as the need to preserve some of our most affordable housing becomes clearer and if alternative ways to create equally affordable housing become even more difficult or expensive.

One likely objection is that, for this last group, the adoption of a NOAH preservation zone is an illegal regulatory taking without compensation because it interferes with "reasonable investment-backed expectations" (sometimes abbreviated as RIBE). However, RIBE jurisprudence generally holds that mere purchase of a property in the expectation that it can be put to a different use is not enough to require compensation; the owner must have affirmatively invested in the property (beyond mere purchase) to begin the hoped-for repurposing or redevelopment of the property. Some courts go further and require that the investment must have been made with the knowledge or tacit or express approval of the local government before an illegal regulatory taking will be found.

This may be difficult for a NOAH property owner to demonstrate, since few property owners who anticipate one day demolishing the smaller, more affordable home to make way for either a large single home or a multifamily development will have made significant investments in improvements to the very house they hope to remove. Where investments beyond purchase have been made, it is likely those were made in hopes of obtaining higher rents from the existing property (rather than being made in anticipation of the redevelopment), and the adoption of a NOAH zone will not prevent those higher rents from being achieved.

General Demolition Restrictions

Alternatively, the community could decide not to create a NOAH preservation overlay or base zone district and instead modify the terms on which it grants demolition permits for residential homes. Instead of applying in a defined area (in which case a base or overlay zoning district would be more appropriate), those restrictions could apply based either on the value of the homes as compared to citywide averages, or could be based on the size of the home proposed for demolition or some other factor serving as a proxy for its likely affordability.

Again, an analogy to historic preservation controls may be helpful. While some communities prohibit the demolition of designated contributing historic structures altogether, others allow demolition provided that the applicant first submit a redevelopment plan ensuring that a replacement structure will be constructed and that its design will reinforce the intended historic character of the neighborhood. A city or county wanting to limit the removal of NOAH could similarly require that the applicant demonstrate that the resulting structure(s) will not only be "affordable," but will be "as affordable" (i.e., affordable to households at the same percentage of AMI) as the housing it replaces. That would allow community land trusts and other affordable housing groups, or developers constructing projects with low-income housing tax credits, to replace existing NOAH units with more units at the existing levels of affordability.

As with all governmental interventions into the housing market, any zoning tool used to preserve the size (and hopefully the greater affordability) of currently existing NOAH structures has some potentially undesirable consequences.

Conclusions

As with all governmental interventions into the housing market, any zoning tool used to preserve the size (and hopefully the greater affordability) of currently existing NOAH structures has some potentially undesirable consequences. As noted above, the most obvious downside is that if investment is held below those levels desired by the private market, the housing will continue to age and the quality of the housing may well deteriorate, perhaps significantly. This will also affect the sustainability and resilience of housing in the neighborhood, since many older homes are less energy efficient, less well insulated, less fire resistant, or contain harmful products like asbestos or lead-based paint, when compared to newer housing.

In addition, the housing in a NOAH protected neighborhood may remain small relative to newer housing elsewhere in the community, or compared to the replacement housing that would otherwise have been built in the neighborhood, which may make it less usable by larger low-income families. This could result in the neighborhood being disproportionately occupied by smaller older or younger households, while doing little to promote housing affordability for larger or multigenerational families with potentially even greater affordable housing needs.

Finally, protecting the existing NOAH stock may result in a greater concentration of poverty than would otherwise occur, although that is by no means given. In the worst case, moderate- or higher-income households may avoid buying in the area due to limits on their ability to expand the homes and increase their values correspondingly. Or existing moderate- or higher-income households may move out for the same reasons, leading to lower overall incomes in the area. On the other hand, middle-income households that are unable to afford housing elsewhere in the community may still find the housing stock and limited appreciation opportunities an acceptable investment opportunity for a starter home. And property owners unable to increase revenues by expanding or replacing the home may instead invest in upgrading the appliances, design, finishes, and HVAC equipment in order to make the housing more attractive to wealthier buyers and tenants. If housing prices in other neighborhoods continue to increase, middle-income households may even make up a larger share of the neighborhood than they did before. Limits on household demolition, expansion, or investment are not a guarantee against gentrification.

Despite these drawbacks, however, some cities and counties may find the use of zoning tools to preserve existing NOAH dwelling units to be a viable policy choice for one important reason: It may be impossible to provide the deep subsidies to create an equal number of equally affordable housing units to replace the current NOAH stock. As noted earlier, new construction almost always requires higher sales prices and rental rates to offset construction costs, and only deep subsidies can make those units affordable at low levels of AMI. And deep subsidies are always in short supply. When faced with the impossibility of housing current NOAH residents, or those in similar circumstances, in subsidized new housing, and with the slow pace at which market rate new housing will loosen the real estate market enough to maintain current levels of affordability, cities and counties may decide that using zoning to preserve the existing NOAH housing stock is the “least bad” option for keeping housing available to their most housing-challenged residents.

Of course, there are other options theoretically available to those who want to protect our poorest households—like imposing rent control or requiring substantial relocation payments and support to those who are relocated by redevelopment. Both are valuable strategies, but they rely on actions beyond traditional zoning controls and are not considered here.

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