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Prohibiting regulatory barriers that interfere with the achievement of jobs- housing balance

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The deepening crisis of escalating housing costs across the United States makes it more important than ever to deter regulatory barriers that prevent housing supply from rising to meet the demand in job-rich communities. Those same barriers also increase environmental degradation by forcing too much new development to sprawl into outlying areas far from where people generally work.

The Economic Fair Housing Act (EFHA) would effectively deter the regulatory barriers to housing opportunity that cause those problems. For example, the EFHA would result in much greater progress toward enough housing in job-rich areas. As the American Planning Association (APA) puts it: “Planners must begin to address jobs-housing balance in their communities.”¹

APA and its chapters should support a regional fair share distribution of housing, in general, and affordable housing, in particular, in proximity to employment centers and moderate- and low-wage jobs. . . . Ideally the jobs available in a community should match the labor force skills, and housing should be available at prices, sizes and locations suited to workers who wish to live in the area.²

Failure to build enough housing to keep up with demand in areas of job growth has been an increasing problem across the United States for decades. Major increases in local land-use restrictions on housing development are the likely cause of housing production lagging increasingly behind job creation in wealthy, urban areas over the last 40 to 50 years.³

¹ APA, *Policy Guide on Housing, Specific Policy Position #2A: Fair Share Distribution of Housing* (2006).

² *Id.* See also, e.g., APA, *Housing Policy Guide*, p. 3 (2019) (“While the goals of the 2006 Housing Policy Guide remain as valid as ever, progress has been mixed over the past 13 years. Many of the same challenges remain and some, particularly housing availability and affordability, have worsened.”)

³ See generally, e.g., Equitable Housing Institute (EHI), *Toward a comprehensive ban on exclusionary housing practices*, pp. 8-9 (2019) (discussing Ganong-Shoag and Hsieh-Moretti studies), posted at: https://www.equitablehousing.org/images/PDFs/PDFs--2018-/EHI-Toward-comprehensive-ban-tech_edits-10-2020.pdf.

Freddie Mac has estimated that housing production nationwide has fallen 3.8 million units behind household formation. According to the policy and research group Up For Growth, which focuses on the housing shortage, that deficit doubled from 2012 to 2019.⁴

A natural result of the long-term lag in housing production is inflation. What seemed decades ago to be basically just an East Coast-West Coast phenomenon of hyperinflation has become a widespread problem in other parts of the United States. “One consequence has been clear during the pandemic: Home prices and rents have soared nationwide, including in places where housing affordability had long been taken for granted.”⁵

“It’s like the cancer was limited to certain parts of our economic body,” said Sam Khater, the chief economist at Freddie Mac. “And now it’s spreading.”⁶

Another natural result of jobs-housing imbalances is transportation and environmental problems. The U.S. Environmental Protection Agency (EPA) points out: “An imbalance in jobs and housing creates longer commute times, more single driver commutes, loss of job opportunities for workers without vehicles, traffic congestion, and poor air quality.”⁷ Resulting transportation costs include those for extra road building, repair and maintenance.⁸

Also, more cars on the roads, for longer times, results in increased consumption of fossil fuels, jobs-housing imbalances lead to increased greenhouse gas emissions.⁹ Those

⁴ Emily Badger and Eve Washington, *The Housing Shortage Isn’t Just a Coastal Crisis Anymore*, NY Times (July 14, 2022), posted at: <https://www.nytimes.com/2022/07/14/upshot/housing-shortage-us.html>. During the 2012-2019 period, supply worsened in 47 states and the District of Columbia, according to an Up For Growth report published in July 2022. *Id.* “Among 310 metropolitan areas nationwide, supply was dwindling or shortages were growing worse in three-quarters of them heading into the pandemic.” *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ U.S. Environmental Protection Agency (EPA), *EnviroAtlas: Fact Sheet*, p. 1 (Nov. 2014), citing Zhou, J., Y. Wang, and L. Schweitzer, *Jobs-housing balance and employer-based travel demand management program returns to scale: Evidence from Los Angeles*, 20 *Transport Policy* 22–35 (2012).

⁸ *See, e.g.*, Texas A&M Transportation Institute, *2019 Urban Mobility Report*, p. 5 (2019).

⁹ *See, e.g.*, UCAR Center for Science Education (UCAR SciEd) (“greenhouse gases . . . have a huge effect on climate. Sometime during this century, the amount of the greenhouse gas carbon dioxide in the atmosphere is expected to double. . . . The quantity of greenhouse gases is increasing as fossil fuels are burned, releasing the gases and other air pollutants into the atmosphere. . . . With more greenhouse gases, heat will stick around, warming the planet.”); posted at <https://scied.ucar.edu/learning-zone/how-climate-works/greenhouse-effect> (accessed March 28, 2023).

See also, e.g., U.S. Energy Information Administration, *Greenhouse gases and the climate* (“In 2020, fossil fuels were the source of about 79% of U.S. primary energy consumption, 94% of total U.S. carbon dioxide emissions, and 80% of total U.S. greenhouse gas emissions resulting from human activity.”); posted at: <https://www.eia.gov/energyexplained/energy-and-the-environment/greenhouse-gases-and-the-climate.php> (accessed March 28, 2023).

emissions have been linked to climate change, to loss, degradation, and fragmentation of animal and plant habitat, and to degradation and loss of water resources.¹⁰

Of course, minimizing regulatory barriers to housing opportunity is not the only key to solving housing-related inflation, transportation and environmental problems. And major improvements in jobs-housing ratios will take a long time. However, prohibiting those regulatory barriers is among the crucial conditions of the overall solution.

30-minute commuting goal to and from “major workplaces”

The general target standard for jobs-housing balance has been defined as one suitable housing unit for every 1.5 jobs in a community.¹¹ The term “suitable housing unit” goes beyond merely the number of housing units. “Ideally, the jobs available in a community should match the labor force skills, and housing should be available at prices, sizes, and locations suited to workers who wish to live in the area.”¹²

The goal proposed by the EFHA—jobs-housing balance within 30 minutes of the major workplaces in a community, during peak commuting hours—has been used by numerous planning groups, such as the Maricopa County, Arizona, Association of Governments;¹³ The Housing Partnership (King County, Washington);¹⁴ and the Southern California Association of Governments (SCAG).¹⁵ Similarly compact commuting areas have been termed appropriate for achieving jobs-housing balance in an APA report.¹⁶

¹⁰ See, e.g., EPA, *Our Built and Natural Environments*, pp. 34-70 (2013).

¹¹ APA Advisory Service Report No. 516, *Jobs-Housing Balance* (“APA Report 516”), p. 4 (2003). Academic studies reviewed in the report found that acceptable ranges of jobs-housing ratios were between 1.3:1 to 1.7:1, depending on factors such as the number of workers per household in the community. See *id.*

¹² APA Report 516, p. 4.

¹³ Maricopa Assoc. of Governments, *Commute Shed Analytics* (rev. April 4, 2022) (analyzing area from which a worker can normally commute in 30 minutes or less to various locations within Maricopa County (which includes Phoenix)).

¹⁴ An important theme of that group’s 2005 report on Seattle-area housing issues “is the focus on subregions, or commute-sheds. These rough geographic designations are built around employment centers and encompass an area that can offer commutes of under a half hour to most of the major employment sites in the subregion.” Housing Partnership, *Jobs and Housing: Can’t Have One Without the Other*, Seattle, December 2005, p. 1. (That report was funded partly by the Washington [State] Association of Realtors.)

¹⁵ APA Report 516, pp. 16-17 (discussing research by SCAG planners that found “little public support for commuting more than 30 minutes. Consequently, SCAG used an average commute speed in the region of about 28 mph to calculate that commute-sheds have radii of about 14 miles around employment centers.”)

¹⁶ Among the examples given in that APA report are:

- Coburg, Oregon—“a small, rural *community* approximately seven miles north of Eugene”—had a “*mismatch of jobs and residences*” in 1998 and lacked sufficient affordable housing for its workforce, even though there were numerous, predominantly residential towns in the same county (Lane), within about a 30-minute commute. (APA Report 516, p. 6 (emphasis added)). Coburg had 1,704 jobs and 388 housing units in 1998; its jobs-to-housing units ratio was therefore 4.39 to 1. Almost all the workers in Coburg’s industrial and highway commercial areas lived outside the Coburg area. *Id.*
- Suburban “edge cities” bring together “a mix of activities at a scale somewhere between central cities and low-density suburbs.” They are major employment hubs and entertainment nodes and

“Major workplace” is defined by the EFHA as “any of the five largest places of employment in a jurisdiction, as well as any other places of employment there to which 50 or more workers commute.” (EFHA, section (a)(5))¹⁷ There is support for the “50 or more workers” definition of a “major workplace” in employment statistics.

For example, in 2018—a relatively normal recent year, economically—about 94.4% of business establishments in the United States had fewer than 50 employees.¹⁸ However, the 5.6% of workplaces that had 50 or more employees accounted for about 60% of the nation’s employees.¹⁹

Some major international organizations also differentiate between business establishments that have at least 50 workers and those with fewer workers. The Organization for Economic Cooperation and Development (OECD) classifies a business establishment with between 50 and 249 “people employed” as a “medium-sized enterprise.”²⁰ So does the European Union (EU), which uses the term “persons employed.”²¹ Like the EFHA’s definition of a “major workplace,” the EU’s definition of a business establishment is not based merely on the number of common-law employees who work there.²²

“are also supposed to be self-contained, allowing people to live, work, and consume in the same place” APA Report 516, p. 7 (emphasis added).

- “Developments of regional impact” (DRI’s) (Atlanta, Georgia, region)—applicants for developments of more than 400,000 gross square feet of space have been required to study the project’s impact in relationship to development in its “Area of Influence” (AOI), or an area extending *six road miles from the development in all directions*. APA Report 516, p. 29 (emphasis added). Those requirements were applied within the 13-county nonattainment area (for air pollution) of Atlanta by the Georgia Regional Transportation Authority, in 2002. *Id.*

Compact commuting areas such as those have been called by different names—communities, commutesheds, and subregions. *See, e.g.,* APA Report 516, pp. 4, 6 (“community”); Maricopa Assoc. of Governments, *supra* n. 13 (“commute-shed”); Housing Partnership, *supra* n. 14, at 1 (“subregion”).

¹⁷ The EFHA also makes clear that the opportunity for suitable housing “as close as feasible, consistent with sound planning, to where a person protected by this section” works or has certain other contacts with the jurisdiction, applies to the rest of the jurisdiction as well. (EFHA, sec.(c))

¹⁸ U.S. Census Bureau, 2018 County Business Patterns, *Share of Number of All Employer Establishments and Employment by Establishment Employment Size: 2018* (“2018 Census Bureau Chart”), posted at: <https://www.census.gov/library/stories/2021/01/what-is-a-small-business.html#:~:text=It%20defines%20small%20business%20by,of%20%2416.5%20million%20or%20less.>

¹⁹ *Id.*

²⁰ <https://data.oecd.org/entrepreneur/enterprises-by-business-size.htm> (accessed Feb. 28, 2023). The OECD is a forum in which governments of 38 nations with market-based economies, from North and South America to Europe and Asia-Pacific, collaborate to develop policy standards to promote economic growth. *See, e.g.,* <https://www.oecd.org/about/members-and-partners/> (accessed Feb. 28, 2023).

²¹ Eurostat, *Glossary: Enterprise size*, posted at https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Glossary:Enterprise_size (accessed Feb. 21, 2023). Eurostat is the official statistical office of the European Union (EU). Eurostat, *About us—who we are*, posted at: [https://ec.europa.eu/eurostat/en/web/main/about-us/who-we-are.](https://ec.europa.eu/eurostat/en/web/main/about-us/who-we-are)

²² The EU definition includes “the total number of persons who work in the observation unit (inclusive of working proprietors, partners working regularly in the unit and unpaid family workers), as well as persons

By contrast, the U.S. Small Business Administration (SBA) classifies some businesses by their number of “employees.”²³ However, that category is based on the overall employment in their “firm” nationwide, and it is limited to actual “employees” as defined at common law. It does not include other agents of the firm, such as independent contractors.²⁴ So, SBA classifications do not focus on separate establishments within a larger business organization, or on the total number of people who commute to such an establishment in the course of their work.

Getting local governments to drop regulatory barriers to the production and preservation of their fair share of the region’s and subregions’ housing needs is one of the essential ingredients to having adequate amounts and types of housing produced in the right places. The EFHA would prohibit those regulatory barriers comprehensively, for the first time. Such a statute also is one of the keys to reducing housing-related environmental and transportation problems.

who work outside the unit who belong to it and are paid by it (e.g., sales representatives, delivery personnel, repair and maintenance teams).” Eurostat, *Glossary: Enterprise size*, *supra* n. 21.

We have found no specific definition of the term “people employed” in the OECD statistics. However, those statistics track the number of separate business establishments and the “number of persons engaged” in employment at each establishment. *See* OECD, *Structural and Demographic Business Statistics 2006*, p. 10 (<https://doi.org/10.1787/sdbs-2006-en-fr>) (accessed Feb. 28, 2023).

²³ *See, e.g.*, U.S. Small Business Administration (SBA), *Table of size standards* (Dec. 19, 2022) (“A size standard, which is usually stated in number of employees or average annual receipts, represents the largest size that a business (including its subsidiaries and affiliates) may be to remain classified as a small business for SBA and federal contracting programs. The definition of “small” varies by industry.”), posted at: <https://www.sba.gov/document/support-table-size-standards>.

²⁴ *See, e.g.*, 13 C.F.R. Part 121 (SBA “Small Business Size Regulations”). *See, e.g., id.*, § 121.106(a) (“In determining a concern’s number of employees, SBA counts all individuals employed on a full-time, part-time, or other basis. This includes employees obtained from a temporary employee agency, professional employee organization or leasing concern. SBA will consider the totality of the circumstances, including criteria used by the IRS for Federal income tax purposes, in determining whether individuals are employees of a concern. Volunteers (i.e., individuals who receive no compensation, including no in-kind compensation, for work performed) are not considered employees.”)

The IRS uses a common-law test of who is an “employee”: anyone who performs services for someone else is an employee if that other person (or firm) can control what will be done and how it will be done. What matters is the right to control the details of how the services are performed. Otherwise, the person performing the services is considered an independent contractor. *See, e.g.*, IRS Publ. 1779 (Rev. June 2022).