EQUITABLE HOUSING INSTITUTE

Promoting housing affordability by removing regulatory barriers

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What will the Trump Administration do about regulatory barriers to housing development, affordability, and homeownership?

Although the 2016 Presidential election was based largely on the economy, housing policy was basically absent from the rhetoric. [1] However, President-elect Donald Trump discussed housing policy in a speech before the National Association of Home Builders (NAHB) in August.

"The housing and homebuilding business is the biggest business in the U.S.," he told the NAHB. Trump, whose career has been in real estate—largely as an investor in hotel and multifamily housing development[2]—added: "What's happening with regulations is horrible. You're being driven wild with regulations." [3]

Reducing barriers to mortgage credit

Trump decried the decline in the U.S. homeownership rate, which recently dropped to a 51-year low. "That's the American Dream right there folks," he said. "It's homeownership." He called the decline "a pretty sad thing."

Trump criticized the lack of mortgage credit available to many Americans, and the negative impact of the current regulatory environment on mortgage lending. "It's impossible for people to go get mortgages," Trump said. "Unless you have a lot of money in the bank, you can't borrow. It's impossible with Dodd-Frank. I know people that can't get houses."[4] Thus, Trump suggested that part of his strategy to "Make

[1] Diana Olick, *How housing would fare under Clinton, Trump*, CNBC.com (Nov. 2, 2016).

[2] Olick, (Nov. 2, 2016), *supra*.

[3] Ben Lane, *Donald Trump talks housing (and everything else) in speech to homebuilders*, HousingWire.com (Aug. 11, 2016).

[4] Lane (Aug. 11, 2016), *supra*.

America Great Again" would be to boost the homeownership rate through demand-side policies, such as financial deregulation.[5]

Reducing barriers to housing development and construction

"There's no industry, other than probably the energy industry that is more overregulated than the housing industry," Trump told the NAHB. "Twenty-five percent of costs to build a house are regulations. I think we should get that down to 2%."[6]

The 25 percent figure he cited was based on a May 2016 NAHB report that concluded that "regulations imposed by government at all levels account for 24.3% of the final price of a new single-family home built for sale."[7] Those costs are NAHB's estimates of average fees and other regulatory requirements nationwide on home builders during:

- *land development* (such as the costs of seeking zoning/subdivision approval, of complying with changes in development standards, and of land the developer feels constrained to give away to the local government ("dedicate") for public uses (roads, parks, etc.) in order to facilitate development approval; and
- *construction* (such as permit, hook-up, impact fees, and changes in building and housing codes and standards over the past 10 years).

Trump did not explain how to reduce regulatory costs to 2%, and there are serious obstacles to doing so. For example:

- As Stan Humphries—chief analytics officer and chief economist at Zillow Group (a major, online real estate database company)—puts it, "there [is] some housing regulation that's desirable," such as regulations concerning clean water, energy efficiency and fire prevention;[8] and
- Most regulatory costs of housing development and construction are imposed by state and local governments, which the federal government cannot nullify, generally speaking.

However, we discuss below a way that the federal government could rein in effectively on state and local regulatory barriers to housing development. Removing such barriers is EHI's mission, and EHI is the only national nonprofit organization focused primarily on their removal.

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[5] Kelsey Ramirez, *Trump victory creates great divide among housing experts*, HousingWire.com (Nov. 9, 2016), citing views of Trulia Chief Economist Ralph McLaughlin.

[6] Lane (Aug. 11, 2016), *supra*.

[7] Paul Emrath, Ph.D., *Government Regulation in the Price of a New Home,* p. 1 (NAHB Housing-Economics.com, May 2016).

[8] Aaron Task, *What Donald Trump and Hillary Clinton Don't Get About the Housing Market*, Fortune.com (Nov. 7, 2016).

The "zoning tax"—state and local regulatory barriers to housing development

> State and local regulations are among the principal culprits behind the nation's persistent affordability problems. By *limiting the land available for and density of new development,* as well as imposing *impact fees and subdivision requirements* that raise production costs, state and local governments make it difficult to build affordable housing.[9]

Perhaps the biggest single regulatory culprit is exclusionary zoning, which tends to exclude persons of low or moderate income from the zoned jurisdiction."[10] Examples are regulations requiring unnecessarily large lot sizes, house sizes, and building setbacks; and regulations prohibiting, or placing undue restrictions on, accessory ("in-law") apartments and multifamily housing, including rental apartments and attached condominiums.

Federal commissions created by both Democratic and Republican Presidents, and by the U.S. Congress, have found that exclusionary zoning adds a steep price to housing and is a major barrier to production of housing affordable to low- and moderate-income Americans.[11] Exclusionary zoning contributes substantially to housing insecurity among those people, as well as poverty, homelessness, instability in housing markets, and suburban sprawl (including unnecessary road building and air pollution in the rural countryside, longer commutes, and increased traffic congestion).

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[9] Joint Ctr. for Housing Studies, Harvard Univ., *State of the Nation's Housing 2007*, p. 28 (emphasis added), *available at* http://www.jchs.harvard.edu/publications/markets/son2007/index.htm.

[10] *See, e.g., Suffolk Housing Services v. Town of Brookhaven*, 397 N.Y.S.2d 302, 306 (Sup. Ct. 1977) (citing 2 ANDERSON, AMERICAN LAW OF ZONING § 8.02 (2d ed.)), *aff'd as modified*, 405 N.Y.S.2d 302 (App. Div. 1978).

[11] *E.g.*, William A. Fischel, *Does the American Way of Zoning Cause the Suburbs of Metropolitan Areas to Be Too Spread Out?* 151, in ALAN ALTSHULER, *ET AL.*, GOVERNANCE AND OPPORTUNITY IN METROPOLITAN AMERICA (National Academies Press, 1999). Those commissions include:

- National Commission on Urban Problems ("Douglas Commission") (1969), appointed by President Lyndon Johnson (Democrat);
- Advisory Commission on Regulatory Barriers to Affordable Housing (1991), appointed by President George H. W. Bush (Republican);
- Millennial Housing Commission (2002), appointed by the U. S. Congress.

The Obama Administration joined the consensus. Its White House Housing Development Toolkit focuses on the devastating problems caused by regulatory barriers and ways to remove them. For more, click on EHI's summary: 2016 WHITE HOUSE TOOLKIT. The full White House document is posted at: https://www.whitehouse.gov/sites/whitehouse.gov/files/images/Housing_Development_Toolkit%20f.2.pdf.

The NAHB report states that *on average, nationwide*, raw land accounts for 10.6% of the final price of a new single-family home built for sale; that regulations imposed by government at all levels account for 24.3% of that price; and that construction ("structure") costs account for 56% of that price.[12] In some major American metropolitan areas, however, land and regulatory costs account for a much higher percentage of the total price of a basic, single-family home for sale.

For example, a recent study by the McKinsey Global Institute of housing affordability challenges around the world found that land costs accounted for 78 percent of total housing unit costs in San Francisco, and 49 percent in New York City. [13] Those were the highest land costs of any major metropolitan areas in the world, as a share of total housing costs.

Eminent housing economists have found that regulation—especially restrictive zoning regarding the types and amounts of housing in urban areas—drives high land costs, and other non-structure costs, in those areas. [14] The overall burden of regulatory restrictions has been termed the "zoning tax."[15] For example, one rigorous study found that:

- Up to 1970, structure cost appears to have represented almost all of the cost of housing, even in the most expensive metropolitan areas.
- Between 1970 and 2000, the average purchase price nationwide for a basic, single-family house rose 72%, while construction costs actually fell 3%.
- In 15 of the 26 major metropolitan markets examined, regulation accounted for over 90% of the housing price in excess of construction costs, by the late 1990's.[16]

Although the disconnect between structure costs and housing prices due to the "zoning tax" first appeared in major markets on the East and West Coasts, that phenomenon has

[12] Appendix to Paul Emrath, Ph.D., *Government Regulation in the Price of a New Home,* p. 1 (NAHB Housing-Economics.com, May 2016).

[13] McKinsey Global Institute, *A blueprint for addressing the global affordable housing challenge* ("McKinsey Blueprint"), p. 49, Exhibit 16 (October 2014).

[14] *E.g.,* Edward L. Glaeser, *et al., The Impact of Building Restrictions on Housing Affordability,* Economic Policy Review, Federal Reserve Bank of New York, June 2003, at 28, 31 and Table 4; posted at http://www.newyorkfed.org/research/epr/03v09n2/0306glae.pdf.

[15] *See, e.g.,* Edward Glaeser and Joseph Gyourko, *Zoning's Steep Price*, Regulation 24, 26 (Fall 2002).

[16] Edward L. Glaeser, *et al., Why have housing prices gone up?* NBER Working Paper 11,129 (2005), at 2, 4-5, and Table 1. Another important study found that structure costs accounted for an average of less than 40% of the total price of a home in the pricey Boston, Massachusetts area, from 1980 to 2004. Edward L. Glaeser and Bryce A. Ward, *The causes and consequences of land use regulation: Evidence from Greater Boston*, 65 Journal of Urban Economics, pp. 265–278 (2009).

spread to many interior markets.[17] Minimizing the non-construction costs of housing in American metros means removing undue zoning restrictions on housing supply.

Interstate effects of state and local regulatory barriers

According to a highly influential, recent study, regulatory restrictions on housing growth have interfered increasingly with American economic growth, at least since 1980. By raising the cost of housing dramatically in many of the nation's most productive metropolitan areas, those restrictions have prevented many Americans moving from poorer states to wealthier states for better jobs and pay, and higher productivity.[18] Numerous other recent economic findings support the results of that study. For more, click on EHI's report: INTERSTATE EFFECTS OF RBHAs (2014).

What can the federal government do about state and local regulatory barriers to housing development?

Federal statutes, executive and judicial actions have helped limit certain state and local regulatory barriers to housing development at times.[19] However, federal actions

[17] By the year 2000, Denver and Ann Arbor had prices in excess of construction cost by over 200% and 150%, respectively. Numerous other major, interior markets had excessive regulatory costs, too, including Albuquerque, Austin-San Marcos (Texas), Atlanta, Charlotte, Nashville, Phoenix, Raleigh, and Salt Lake City. *Why have housing prices gone up?, supra,* Figure 2.

[18] Peter Ganong and Daniel Shoag, *Why Has Regional Income Convergence in the U.S. Declined?* (Jan. 2015), posted at: http://scholar.harvard.edu/files/shoag/files/why_has_regional_income_convergence_in_the_us_declined_01.pdf .

[19] Among the latest, potentially helpful federal actions regarding those barriers are: (1) a recent U.S. Supreme Court decision prohibiting them where they have a "disparate impact" on members of minority groups; and (2) a new Fair Housing rule issued by the U.S. Department of Housing and Urban Development (HUD), affecting state and local applicants for federal housing grants.

The Supreme Court decision, issued last year, held that such barriers, and other exclusionary housing practices, generally violate the federal Fair Housing Act (42 U.S.C. § 3601 *et seq*.), where they have a disproportionate effect on minority groups members, compared to the general population,. *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project (ICP)*, 135 S. Ct. 2507 (June 25, 2015). Housing practices that have a justifiable purpose and properly limited scope are excepted. *Id.* The FHA does not protect non-members of the specified minority groups, however.

HUD's new rule calls for a deeper inquiry by that agency into a state's or locality's discriminatory, exclusionary, and other impediments to fair housing, when that entity applies for a federal housing grant. HUD, *Affirmatively Furthering Fair Housing (AFFH): Final Rule*, 80 Fed. Reg. 42,272, 42,352 (July 16, 2015). HUD has no authority to prohibit such barriers directly, however.

certainly have not gotten those barriers under control. The barriers have been increasing over time. What else can the federal government do to get them under control?

The well-documented, interstate effects of those barriers provide the basis for a new and more effective federal remedy. Congress can prohibit state and local regulations that have harmful economic effects in other states, under the Commerce Clause of the U.S. Constitution.[20] Congress also can prohibit state and local regulations that effectively prevent Americans from moving from one state to another in search of better economic opportunities.[21]

So, the federal government could enact a statute that prohibits exclusionary zoning, and other unjustified regulatory barriers to housing development, by government at any level, to the extent that those barriers affect interstate commerce. In fact, Congress *already* has prohibited exclusionary land use regulations by state and local governments that affect interstate commerce, where they substantially and unnecessarily burden religious exercise. *Religious Land Use and Institutionalized Persons Act of 2000* ("RLUIPA"), 42 U.S.C. §§ 2000cc(1)(a).

The federal government can and should use its Commerce Clause power to combat exclusionary state and local land use regulations that adversely affect interstate commerce.

The stakes—freeing a major sector of the American economy from overregulation by government at all levels

As mentioned, President-Elect Trump calls the housing and homebuilding sector the biggest business in the United States. The housing sector's collapse in 2007-09 drove the Great Recession, and that sector has been quite slow to recover.

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[20] The Commerce Clause: "Congress shall have power [to] regulate commerce . . . among the several States." (Art. I, § 8). Commerce "among the several States" means "commerce which concerns more states than one." *See, e.g., Gibbons v. Ogden,* 22 U.S. 1, 194 (1824) (per Marshall, C.J.).

[21] The "freedom to travel throughout the United States has long been recognized as a basic right under the Constitution." *Shapiro v. Thompson,* 394 U.S. 618, 631 (1969) (quoting *United States v. Guest*, 383 U.S. 745, 757-758 (1966)). That individual right has been applied to an "indigent who desires to migrate, resettle, find a new job, and start a new life." *Shapiro,* 394 U.S. at 629.

Also, a regulation that in effect imposes a penalty on the exercise of the right to travel violates the Equal Protection Clause of the Fourteenth Amendment "unless shown to be necessary to promote a compelling governmental interest," *See Saenz v. Roe*, 526 U.S. 489, 499 (1999), quoting *Shapiro,* 394 U.S. at 634.

For example, fixed residential development slipped from 6.1% of the nation's Gross Domestic Product (GDP) in 2006 to 2.2% in 2011.[22] (That sector includes construction of new single-family and multifamily structures, residential remodeling, production of manufactured homes, and associated brokers' fees.) The fixed residential development sector had climbed back to only 3.4% of GDP by 2015.[23]

Consumer spending on housing services suffers when residential investment declines. That sector of the economy contributes to GDP several times the amount that fixed residential development does—in the form of rent and utilities paid by renters, owners' imputed rents and utility payments, and other housing services.[24]

Employment in the construction industry also has been quite slow to recover from the 2007-09 recession. Construction employment fell from more than 7.6 million workers in January 2006 to 5.4 million in January of 2011 (a 40% drop). Construction employment improved to only 6.6 million jobs five years later. [25]

Removing regulatory barriers to housing development would stimulate home building and new jobs tremendously, in the biggest sector of the American economy. Also, as the Administration causes jobs to return to the United States, there will be added need for new housing.

Conclusions

Accelerating the American economy and job growth is high on the Trump Administration's agenda, along with regulatory relief. The President-Elect has identified housing and homebuilding as the biggest sector of the economy and one of the most overregulated sectors. He specifically has criticized excessive regulatory costs on housing development—including those that are due to state and local regulations.

Perhaps the biggest, single regulatory cost factor is exclusionary zoning, which adds a steep, indirect price to housing and creates major barriers to production of housing affordable to ordinary Americans. Recent studies show that exclusionary zoning and

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[22] https://www.thebalance.com/components-of-gdp-explanation-formula-and-chart-3306015 (accessed Nov. 17, 2016). Fixed residential investment includes construction of new single-family and multifamily structures, residential remodeling, production of manufactured homes, and associated brokers' fees. NAHB, *Housing's Contribution to Gross Domestic Product (GDP)*, posted at: https://www.nahb.org/en/research/housing-economics/housings-economic-impact/housings-contribution-to-gross-domestic-product-gdp.aspx.

[23] NAHB Table, *supra.* From 1980 to 2006, fixed residential development generally contributed between 4.5% and 6% of the nation's GDP. NAHB, *Housing's Contribution to GDP*, *supra.*

[24] NAHB, *Housing's Contribution to GDP, supra*.

[25] U.S. Bureau of Labor Statistics, *Employees, Construction, 2006-2016 (seasonally adjusted)*, posted at: http://data.bls.gov/timeseries/CES2000000001?data_tool=XGtable.

other unnecessary regulatory restrictions on housing growth have interfered seriously, and increasingly, with American economic growth since at least 1980.

Because of those adverse effects on interstate commerce, the federal government could prohibit unjustified state and local regulatory restrictions on housing growth, under the Commerce Clause of the U.S. Constitution. We urge the Trump Administration to use its full authority to combat the interstate effects of overly restrictive zoning, as well as other state and local regulatory barriers to housing development, affordability, and homeownership.