Zoning as Taxidermy: Neighborhood Conservation Districts and the Regulation of Aesthetics

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Over the last thirty years, municipalities across the country have embraced neighborhood conservation districts, regulations that impose design standards at the neighborhood level. Despite their adoption in thirty-five states, in municipalities from Boise to Cambridge, neighborhood conservation districts have evaded critical analysis by legal scholars. By regulating features such as architectural style, roof angle, and maximum eave overhang, conservation districts purport to protect "neighborhood character" or "cultural stability." Implicit in these regulations is the unsupported assumption that the essential feature of a neighborhood's character is its architectural design at a single point in time. The unfortunate result is zoning as taxidermy, rather than land-use planning that permits places to evolve to meet changing needs and preferences. Conservation districts freeze places in time, exclude would-be residents from desirable neighborhoods, and threaten to increase the cost of housing in those neighborhoods and the cities in which they are located.

Urban culture is defined by dynamism, vitality, and an ability to adapt to and accommodate population and market shifts. Conservation district regulations should be crafted in that same spirit, to preserve cities and suburbs as places amenable to change. They should not only permit *but also* promote *investment and redevelopment, particularly redevelopment of neighborhoods that, because they are close to public amenities, are well suited to dense development. This Article urges state legislators to cabin local authority to enact conservation districts. Revisions to state zoning-enabling legislation can ensure that these regulations (i) are not exclusionary, (ii) are responsive to changing market dynamics and evolving consumer preferences, and (iii) do not artificially inflate housing prices.*

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* Clinical Associate Professor, Yale Law School. I am grateful to Stephen Wizner, Michael Wishnie, Manoj Viswanathan, Jean Koh Peters, Serge Martinez, Annie Lai, Gowri Krishna, Amy Kapczynski, Heather Gerken, Josh Gupta-Kagan, Kate Griffith, James Forman, Bob Ellickson, Fiona Doherty, Deborah Dinner, Michael Diamond, Vicki Been, Ian Ayres, Muneer Ahmad, participants in the Clinical Law Review Workshop at New York University School of Law, and the editors of the *Indiana Law Journal* for their comments and suggestions on earlier drafts. Alexander Taubes provided outstanding research assistance. Any errors are my own.

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INTRODUCTION

Emboldened in recent decades by modern-era case law that permits land-use regulations to be grounded only in aesthetics, local governments have embraced zoning codes that regulate the design of a structure, not simply its use or its size. Originally, zoning ordinances served primarily to segregate uses.[1] In addition, in order to preserve light and air, zoning ordinances have long regulated the bulk of a building by limiting height, establishing setback lines, setting minimum and maximum square footages, and imposing maximum floor-area ratios.[2] Design review ordinances go beyond ordinary use and bulk regulations to consider a building's aesthetics.[3] These ordinances establish design standards and oftentimes entrust an appointed board or commission with the review of the proposed design of a building, including choice of building materials, roof lines, siting and orientation, and scale. For example, a neighborhood conservation district[4] in Phoenix, Arizona, requires all commercial buildings to be built with traditional agrarian materials, such as adobe.[5] Another such district in the Avon Hill neighborhood of Cambridge, Massachusetts, expressly prohibits the use of vinyl siding and requires a local commission to consider the "site layout" of accessory buildings when determining whether to permit

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1. *See, e.g.*, Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); 1 ARDEN H. RATHKOPF, DAREN A. RATHKOPF, SARA C. BRONIN & DWIGHT H. MERRIAM, RATHKOPF'S THE LAW OF ZONING AND PLANNING § 1:5 (4th ed. 2014).

2. 3 RATHKOPF ET AL., *supra* note 1, § 54:2.

3. Throughout this Article, the term "aesthetics" is used just as J. J. Dukeminier used the term in his 1955 article on aesthetic zoning to mean "[o]f or pertaining to the appreciation or criticism of the beautiful" limited to "phenomena evident to sight only, not discernible by the other senses." J. J. Dukeminier, Jr., *Zoning for Aesthetic Objectives: A Reappraisal*, 20 LAW & CONTEMP. PROBS. 218, 218 n.2 (1955).

4. The ordinances described and analyzed in this Article go by many names, including village districts, design overlay districts, neighborhood conservation districts, and neighborhood preservation districts. They all establish design standards based on the context existing in the district on the day of the regulation's adoption and are adopted, implemented, or administered sublocally. *See infra* Part II.A. Given that the shared mission of these various districts is to "conserve" the existing architectural and cultural fabric of already-developed neighborhoods, this Article will use the terms "conservation district" or "neighborhood conservation district."

5. PHX., ARIZ., ZONING ORDINANCE ch. 6, § 649(J)(5) (Supp. 2015) (outlining which building materials should be incorporated into commercial buildings within a Mixed Use Agricultural District).

their construction.[6] A design review ordinance in Noank, Connecticut, requires the local zoning commission to consider "the rhythm of solids to voids in the façade" and the "[r]hythm of spacing of buildings on the street" when determining whether to allow issuance of a building permit.[7] And a district in Dallas requires all new construction to be limited to single-family High Tudors, of the type that were commonly built in that neighborhood in the 1920s.[8] While conservation districts share some characteristics with historic districts, they are distinguishable both procedurally and substantively and merit analysis separate from historic districts.[9]

This Article accomplishes two tasks, both crucial to a critical analysis of neighborhood conservation districts and, more generally, the role of aesthetics in land-use regulations.[10] First, it argues that the increase in the use of aesthetics in zoning regulations is attributable in significant part to an increased consumer preference for housing located in urban residential neighborhoods that are close to downtown districts, jobs, transportation infrastructure, or other immobile amenities, such as waterfronts. Homeowners respond to the perceived threat that increased demand will adversely change their neighborhoods by freezing development patterns, thus limiting supply. As a result, these regulations, like restrictive zoning regulations generally, threaten to increase housing prices, thus contributing to a dearth of housing affordable to middle-income families in urban areas.[11] Second, this Article argues that conservation districts should be understood and treated as a form of exclusionary, overly restrictive zoning of the sort that has been criticized by commentators and land-use scholars.[12] In order to advance housing affordability

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6. Cambridge, Mass., Avon Hill Neighborhood Conservation Dist. Designation Order § V(C)(4)–(5) (Dec. 14, 2009), *available at* http://www2.cambridgema.gov/historic/AHNCD_order.pdf (amended order).

7. GROTON, CONN., ZONING ORDINANCE FOR THE NOANK FIRE DISTRICT § 2.26.3.5, at 11 (2012) (on file with author).

8. Dall., Tex., Ordinance 25,116 (Nov. 12, 2002).

9. *See infra* text accompanying notes 47–59.

10. To date, scholarship on neighborhood conservation districts is quite limited. More than three hundred articles archived on Westlaw discuss business improvement districts, another form of sublocal governance structure, while just twenty-two articles mention neighborhood conservation districts. There are a few noteworthy exceptions, each of which tackles discrete elements of the conservation-district concept and none of which challenges the role played by cultural stability and neighborhood context in land-use regulations. *See* William A. Fischel, *Neighborhood Conservation Districts: The New Belt and Suspenders of Municipal Zoning*, 78 BROOK. L. REV. 339 (2013) (addressing the use of conservation districts to replicate covenants, conditions, and restrictions (CC&Rs) in already-developed neighborhoods); Hannah Wiseman, *Public Communities, Private Rules*, 98 GEO. L.J. 697 (2010) (arguing that while design overlays play an important role in permitting communities to establish community aesthetics, these overlays should be reformulated to permit revision over time and to put new homeowners on notice of existing restrictions); Adam Lovelady, Comment, *Broadened Notions of Historic Preservation and the Role of Neighborhood Conservation Districts*, 40 URB. LAW. 147 (2008) (advocating for neighborhood conservation districts as preservation tools and useful alternatives to historic districts).

11. *See* David Schleicher, *City Unplanning*, 122 YALE L.J. 1670, 1674 n.7 (2013) (collecting sources).

12. *See infra* notes 224, 226 and accompanying text.

and account for the interests of all housing consumers, aesthetic regulations must accommodate changing market dynamics and evolving consumer preferences. In particular, state legislators should require that local aesthetic regulations permit neighborhoods to evolve and change over time in response to shifts in market demand.

Part I of this Article describes the current state of case law and scholarship on the role of aesthetics in land-use regulations, and it highlights the role that cultural stability has played in defining the contours of aesthetic land-use regulations. Part II, based on a review of regulations from various jurisdictions, argues that residential neighborhoods embrace conservation districts in an effort to resist development pressures resulting from the desirability of urban areas and "streetcar suburbs." Part III concludes that requiring aesthetic regulations, like conservation districts, to be grounded in existing context comes at the expense of competing interests, including affordability, community empowerment, and inclusivity. Part IV proposes that conservation districts be reimagined to permit change and dynamism. Rather than seeking to invalidate all aesthetic regulations, this Article argues that state zoning-enabling legislation should prevent the use of aesthetic regulations to advance exclusionary policies.

I. REVISITING THE CASE FOR AESTHETICS: COMMUNITY VALUES AND CONTEXT

Neighbors often desire the ability to dictate the aesthetics of a neighbor's property. Undoubtedly, when a person purchases property, he or she is setting a price based not only on the property in question but also on the state of the surrounding properties and the qualities of the neighborhood. As the aphorism goes, "location, location, location." A home in a well-maintained neighborhood has a very different value when placed in a blighted community. Because "neighborhood" is an element of the purchase price paid by a homebuyer, many homebuyers, once they become homeowners, desire to control certain actions taken by their neighbors with respect to their properties. As a result, a property owner and his or her neighbors may have competing interests in the use of a single parcel of land and, provided that the property owner's intended use does not rise to the level of a nuisance or violate local law, the nature of their interests does not establish a process by which neighbors can have input in land-use decisions.[13] Aesthetic regulations provide a possible public-law mechanism to expand neighbor control of land use.

In the decades following *Village of Euclid v. Ambler Realty Co.*,[14] courts routinely rejected local attempts to impose aesthetic land-use regulations.[15] Treating aesthetics as a purely subjective inquiry incapable of supporting coherent land-use regulations,

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13. These competing interests in property usage and maintenance drive the contemporary use of CC&Rs in residential developments. *See infra* notes 163–70 and accompanying text.

14. 272 U.S. 365, 397 (1926) (holding that zoning is a proper exercise of the police power). Euclidean zoning, so named for Euclid, Ohio, the defendant in that 1926 Supreme Court case, divides a municipality into various sections and designates which uses are permissible in which sections. A simple Euclidean zoning ordinance separates residential, commercial, and industrial uses. *See* ROBERT C. ELLICKSON, VICKI BEEN, RODERICK M. HILLS, JR. & CHRISTOPHER SERKIN, LAND USE CONTROLS: CASES AND MATERIALS 95–100 (4th ed. 2013).

15. Samuel Bufford, *Beyond the Eye of the Beholder: A New Majority of Jurisdictions Authorize Aesthetic Regulation*, 48 UMKC L. REV. 125, 126 (1980).

early twentieth century courts consistently held that aesthetics alone could not serve as a basis for exercise of the police power.[16] Over time, however, particularly in a line of cases addressing regulation of billboards and junkyards,[17] courts couched validation of aesthetic regulations in health, safety, or the general welfare. Courts remained hesitant to hold explicitly that aesthetics *alone* could support the application of land-use regulations as a function of the police power.[18] Instead, courts upheld aesthetic ordinances by finding that they served other valid purposes, such as furthering the "general welfare," increasing property values, or supporting local tourism.[19] But "the asserted linkages between aesthetics and these goals were often dubious, if not transparently fictional."[20]

As early as 1955, some argued that this subterfuge was unnecessary and that courts ought to acknowledge that aesthetics, even standing on its own, was a reasonable and constitutional basis for the exercise of zoning authority.[21] Indeed, through 1980, land-use case law steadily trended toward permitting zoning regulations and other land-use restrictions to be based solely on aesthetics. [22] Since then, the trend has continued, but at a slower pace.[23] The result is that, by one count,

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16. Meg Stevenson, *Aesthetic Regulations: A History*, 35 REAL EST. L.J. 519, 520 (2006).

17. *Id.* at 530–34. This Article saves for another day the question whether the construction of an edifice of aesthetic case law on a foundation of junkyard and billboard cases has created bad policy. Allowing land-use authorities to single out junkyards and billboards is surely distinguishable from allowing the same authorities to limit the number of dormers on a home or to require developers and homeowners to use a gabled rather than a hip roof. In the case of aesthetic regulations, it is possible that *easy* cases have made for bad law.

18. 2 RATHKOPF ET AL., *supra* note 1, § 16:4 (citing cases).

19. *Id.* § 16:2.

20. John J. Costonis, *Law and Aesthetics: A Critique and a Reformulation of the Dilemmas*, 80 MICH. L. REV. 355, 374 (1982); *see also* Dukeminier, *supra* note 3, at 223.

21. Dukeminier, *supra* note 3, at 223. In a footnote, Dukeminier noted that a then-recent U.S. Supreme Court case might provide the guidance and direction necessary for state courts to conclude, finally, that aesthetics is an entirely proper consideration when crafting and enforcing zoning ordinances. *Id.* at 237 n.70. The case to which Dukeminier referred dealt not with zoning but, instead, with eminent domain. In 1954, the U.S. Supreme Court held, in *Berman v. Parker*, that the condemnation of a blighted property was a proper exercise of the police power. In other words, a municipality could take a privately held property simply because that property did not meet aesthetic standards without finding itself in contravention of the Fifth Amendment to the U.S. Constitution. 348 U.S. 26 (1954). As Dukeminier predicted, twenty years later, the Supreme Court, in dicta, found expressly that aesthetics is a proper consideration in zoning. Vill. of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974) ("The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.").

22. Bufford, *supra* note 15, at 127–28; *see also* Georgette C. Poindexter, *Light, Air, or Manhattanization?: Communal Aesthetics in Zoning Central City Real Estate Development*, 78 B.U. L. REV. 445, 483 (1998). One influential scholar, John Costonis, argued that the wholesale shift in judicial thinking on aesthetics was inevitable. "This silliness had to end. Americans wanted and were entitled to aesthetics regulation even if they seemed unable to state and, perhaps, to understand why." JOHN J. COSTONIS, ICONS AND ALIENS: LAW, AESTHETICS, AND ENVIRONMENTAL CHANGE 23 (1989).

23. *See* Kenneth Pearlman, Elizabeth Linville, Andrea Phillips & Erin Prosser, *Beyond*

in approximately thirty-five states, in the District of Columbia, and at the federal level, courts do not question legislative and administrative land-use determinations purportedly grounded in aesthetics,[24] particularly where there is purported to be community support for aesthetic determinations.[25] In five other states, courts have allowed regulations based on aesthetics when aesthetics is but one of multiple bases.[26] These state courts have not, however, opined on whether aesthetics alone is sufficient.[27] In ten states, courts have held that aesthetics alone is insufficient.[28]

Rather than question this trend in land-use law, scholars have sought to validate it. As aesthetic regulations became more commonly accepted over the course of the twentieth century, scholars struggled to identify an underlying principle that would both support and meaningfully limit the use of aesthetics in land-use regulations.[29] In the course of those validation efforts, scholars embraced cultural stability and the preservation of buildings and places that are "icon[s] in the community mind"[30] as accepted bases for the use of aesthetics in land-use regulations.[31] Behind these

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the Eye of the Beholder Once Again: A New Review of Aesthetic Regulation, 38 URB. LAW. 1119, 1120 (2006).

24. *Id.* at 1147–49, 1181.

25. "Modern doctrine . . . requir[es] that regulation reflect a widespread pattern of community preference and not simply the aesthetic tastes of a narrow elite . . . ." 2 RATHKOPF ET AL., *supra* note 1, § 16:7, at 16-31; *see also* United Adver. Corp. v. Borough of Metuchen, 198 A.2d 447, 449 (N.J. 1964) ("We refer not to some sensitive or exquisite preference but to concepts of congruity held so widely that they are inseparable from the enjoyment and hence the value of property."); State *ex rel.* Carter v. Harper, 196 N.W. 451, 455 (Wis. 1923) ("The rights of property should not be sacrificed to the pleasure of an ultra-æsthetic taste. But whether they should be permitted to plague the average or dominant human sensibilities well may be pondered.").

26. *See* Pearlman et al., *supra* note 23, at 1163–67.

27. *See id.*

28. *See id.* at 1167–80.

29. *See* Costonis, *supra* note 20, at 359–60; Dukeminier, *supra* note 3, at 237; Poindexter, *supra* note 22, at 488; Edward H. Ziegler, Jr., *Aesthetics in Ohio Land Use Law: Preserving Beauty in the Parlor and Keeping Pigs in the Barnyard*, 19 AKRON L. REV. 1, 33 (1985).

30. COSTONIS, *supra* note 22, at 84. Costonis defines "icons" as "features invested with values that confirm our sense of order and identity." *Id.* at xv. Conversely, "'aliens' threaten the icons and hence our investment in the icons' values." *Id.* at xv–xvi. Costonis defines "cultural stability" as a resistance to "rapid or fundamental changes" that threaten fundamental institutions including "[f]amily, religion, education, language, and government." Costonis, *supra* note 20, at 418. The environment, playing a "socially integrative and, hence, identity-nurturing role," is another such fundamental institution. *Id.* Hence, for our purposes, policies advancing cultural stability seek to curtail rapid or fundamental changes to the built environment.

31. *See* 2 RATHKOPF ET AL., *supra* note 1, § 16:7 n.9 (citing Costonis for his analysis and finding it consistent with modern case law on aesthetic zoning); Dukeminier, *supra* note 3, at 231 ("Zoning restrictions which implement a policy of neighborhood amenity should be voided, if at all, not because they are for aesthetic objectives but only because the restrictions are unreasonable devices of implementing community policy."); Poindexter, *supra* note 22, at 505–06 (finding that zoning based on aesthetics serves a public good because it encourages community participation). In an article that appeared a few years after *Law and Aesthetics* and a few years before *Icons and Aliens*, Edward H. Ziegler, Jr. made a plea similar to that made by Costonis and Dukeminier. He argued that aesthetics ought to inform land-use and zoning

attempts is an assumption that a person's neighbors have a legitimate interest in "preserving" the neighborhood in the state in which it existed on the day that they purchased their homes.[32] Cultural stability has proved an attractive grounding for aesthetic rulemaking both because it encapsulates the prevailing sentiment that neighborhood homeowners ought to be able to stop time and prevent change and because, proponents argue, it can be defined objectively.[33] Whether a building is visually appealing is a subjective inquiry.[34] Whether a building is consistent with the existing architectural context is a supposedly objective one. As described in Part II, neighborhood conservation districts—by defining acceptable visual features with reference to the existing architectural context—embrace this approach to aesthetics. As a result, they provide a point of departure for considering and evaluating the role of aesthetics and context in land-use regulation.

II. CONSERVATION DISTRICTS: LAND-USE ORDINANCES BASED SOLELY ON AESTHETICS

Neighborhood conservation districts (1) establish design standards based on the context existing in the district on the day of the regulation's adoption and (2) are adopted, implemented, or administered sublocally.[35] They represent a single type of

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regulations only where:

> (1) There is a reasonable basis to believe that those features of the visual environment selected for protection reflect and embody widely shared human meanings and associations that the regulation is intended to preserve; (2) There exist reasonably intelligible standards for regulation derived from those existing features of the visual environment selected for protection; and (3) That the regulation as applied is reasonably related to preventing a "patently offensive" harm to those features of the visual environment selected for protection.

Ziegler, *supra* note 29, at 33. The protection of buildings and landscapes that "reflect and embody widely shared human meanings and associations" and the development of standards based on existing features or context are examples of regulating cultural stability. *See id.*

32. Judges, citing property-value protection as a proper rationale for regulation, also assume that property owners have a right to preservation. *See, e.g.*, Bd. of Supervisors v. Miller, 170 N.W.2d 358, 361 (Iowa 1969) (holding that preservation of a neighborhood is a valid concern for zoning, in part because such preservation can stabilize property values). One observer, discussing neighborhood outrage sparked by a proposed redevelopment project, described this outrage in terms of residents' "psychological ownership" of the neighborhood. Sadia Latifi, *Growth Foments a Fuss in Chapel Hill*, NEWS & OBSERVER (Raleigh, N.C.), August 3, 2008, at 1A (quoting an observer of a battle between a developer and local residents as commenting that the developer may have "underestimated the community's psychological ownership" of the area).

33. *See, e.g.*, Costonis, *supra* note 20, at 437, 440.

34. *See* Poindexter, *supra* note 22, at 486.

35. One of the two defining features is procedural in nature. As Carol Rose has argued, procedure is crucial in designing aesthetic land-use regulations. Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473, 517–18 (1981). As discussed further below, Richard Briffault popularized the use of the term "sublocal structures" to refer to neighborhood-level institutions that "provide for a variety of territorially based differences in taxation, services, or regulation within individual cities." Richard Briffault, *The Rise of Sublocal Structures in Urban Governance*, 82 MINN. L. REV.

aesthetic land-use regulation but an increasingly popular one. One recent survey identified 165 such districts in thirty-five states.[36] In 1983, Cambridge, Massachusetts, was one of the first municipalities to adopt neighborhood conservation districts.[37] Cities as diverse as Nashville,[38] Dallas,[39] Miami,[40] Boise,[41] and Chapel Hill[42] followed, and conservation districts continue to be proposed and adopted today.[43] Despite that fact, to date, neighborhood conservation districts have evaded critical investigation from legal scholars.[44] The existing scholarship and commentary is dominated by historic preservationists advocating for conservation-district

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503, 508 (1997).

36. JESSIE MCCLURG, NEIGHBORHOOD P'SHIPS FOR CMTY. RESEARCH, ALTERNATIVE FORMS OF HISTORIC DESIGNATION: A STUDY OF NEIGHBORHOOD CONSERVATION DISTRICTS IN THE UNITED STATES (2011), *available at* http://www.cura.umn.edu/sites/cura.advantagelabs.com/files/publications/NPCR-1331.pdf.

37. *See* CAMBRIDGE HISTORICAL COMM'N, NEIGHBORHOOD CONSERVATION DISTRICTS IN CAMBRIDGE (2002), *available at* http://www2.cambridgema.gov/Historic/ncd_brochure.pdf.

38. Lovelady, *supra* note 10, at 158–59 ("Then, in 1985, in an effort to protect neighborhoods that did not support full historic zoning, city officials introduced the NCD. Lockeland Springs-East End was the first . . . .").

39. Dall., Tex., Ordinance 19,910 (Mar. 23, 1988) (establishing "Conservation District No. 1," the Kings Highway Conservation District).

40. MIAMI, FLA., MIAMI 21 CODE app. A (2012) (describing neighborhood conservation districts and their regulations).

41. CITY OF BOISE PLANNING & DEV. SERVS., BOISE CITY HISTORIC PRESERVATION PLAN 2010, at 26 (2010), *available at* http://pds.cityofboise.org/media/210354/draft_preservation_plan.pdf ("Conservation Districts are another tool that the City of Boise has implemented to preserve certain neighborhood's characteristics. . . . In 2010, there [were] two adopted conservation districts in the City of Boise.").

42. NORTHSIDE NEIGHBORHOOD CONSERVATION DIST. COMM., DESIGN GUIDELINES 1 (2004), *available at* http://www.townofchapelhill.org/home/showdocument?id=729 ("The Town of Chapel Hill Land Use Management Ordinance adopted by the Town Council on January 27, 2003 includes a provision for creating Neighborhood Conservation Districts."). The Town of Chapel Hill temporarily suspended the creation of new neighborhood conservation districts in 2012. *See* TOWN OF CHAPEL HILL, A RESOLUTION TEMPORARILY SUSPENDING PROCESSING OF PROPOSED NEIGHBORHOOD CONSERVATION DISTRICTS (2012), *available at* http://chapelhillpublic.novusagenda.com/AttachmentViewer.aspx?AttachmentID=9029&ItemID=1687.

43. *See, e.g.*, CITY OF TOPEKA PLANNING DEP'T, NOTICE OF NEIGHBORHOOD INFORMATION MEETING & PUBLIC HEARING 1 (2013), *available at* http://www.topeka.org/pdfs/WestboroNCDNIM.pdf (notifying affected property owners of a proposal to create a neighborhood conservation district); Andreae Downs, *Brookline OK's Tighter Zoning Bylaw, New District Is Applied to Apartment Complex*, BOS. GLOBE, Nov. 20, 2011, at 2 (describing the adoption of the first neighborhood conservation district in Brookline, Massachusetts); Felipe Azenha, *Upper Eastside Neighborhood Conservation District*, MIAMI URBANIST (June 13, 2012), http://www.miamiurbanist.com/upper-eastside-neighborhood-conservation-district/ (giving notice of a meeting to discuss the City of Miami's proposal for a new neighborhood conservation district); Tere O'Connell, *Saving the Good Stuff*, PRESERVATION AUSTIN (April 1, 2013), http://www.preservationaustin.org/blog/saving-the-good-stuff (citing Raleigh's and Dallas's experience with neighborhood conservation districts as possible models for Austin rezoning).

44. *See supra* note 10.

adoption[45] and planners undertaking descriptive accounts of conservation-district ordinances.[46]

Neighborhood conservation districts are not historic districts. The adoption standards for historic districts are higher than those for conservation districts.[47] State enabling legislation limits local historic-district designations to areas that have some historical significance.[48] Sometimes the local or state law requires buildings to be at least fifty or more years old.[49] In addition, the historical integrity of the neighborhood must be intact.[50] If recent development has compromised the historic fabric of the area, the neighborhood may no longer be eligible for local historic-district designation. Conservation districts are not subject to any of these substantive requirements.[51] In fact, because the adoption standards are lower, conservation-district advocates argue that neighborhood conservation districts "can be useful . . . when a neighborhood does not meet the minimum requirements for historic designation."[52] For example, Iowa City designates both historic districts and conservation districts. Conservation districts have "fewer properties that retain a high degree of historic integrity or contribute to a distinct sense of time and place," but these districts "are still considered worthy of protection."[53]

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45. *See, e.g.*, JULIA MILLER, PROTECTING OLDER NEIGHBORHOODS THROUGH CONSERVATION DISTRICT PROGRAMS (2004).

46. *See, e.g.*, MCCLURG, *supra* note 36.

47. *See infra* notes 56–57 and accompanying text.

48. *See, e.g.*, N.C. GEN. STAT. ANN. § 160A-400.3 (West 2000) (defining historic districts, in part, as areas deemed to have special historical, prehistorical, architectural, or cultural significance).

49. Such laws incorporate the definition of "historic" used by the National Park Service's National Register of Historic Places Program. That definition requires a property to be "old enough to be considered historic (generally at least 50 years old)." *National Register of Historic Places Program: Fundamentals*, NAT'L PARK SERVICE, http://www.nps.gov/nr/national_register_fundamentals.htm.

50. *See, e.g.*, N.C. GEN. STAT. ANN. § 160A-400.3 (defining historic districts as having "integrity of design, setting, materials, feeling, and association"). This requirement in state and local laws incorporates National Register of Historic Places criteria evaluating "whether the area retains the spatial organization, physical components, and aspects of design and historic associations that it acquired during its period of significance." CITY OF AUSTIN HISTORIC PRES. OFFICE, CITY OF AUSTIN LOCAL HISTORIC DISTRICT NOMINATION APPLICATION & INSTRUCTIONS 4 (2012), *available at* http://www.austintexas.gov/sites/default/files/files/Planning/Historic_Preservation/lhd_zoning_application.pdf.

51. MILLER, *supra* note 45, at 2 (advocating neighborhood conservation-district adoption where "an area may not be old enough to qualify as historic; the houses in the area, although representative of a particular era of development, may be distinctive but not sufficiently noteworthy to merit full protection; or the area may have been compromised through incompatible development").

52. Lovelady, *supra* note 10, at 154; *see also* WILMINGTON, DEL., CODE OF ORDINANCES § 48-422(d) (2014) ("Neighborhood conservation districts may be designated where traditional city historic district protection is not feasible due to . . . [a] built environment whose resources do not meet the qualification criteria of either the National Register of Historic Places or city historic districts."); MILLER, *supra* note 45, at 1 ("[T]hese neighborhoods tend not to merit designation as a historic district . . . .").

53. IOWA CITY, IOWA, CITY CODE § 14-3B-2(C) (Supp. 2015); *see also* MCCLURG, *supra*

In addition, in some states, the process for adopting a conservation district is less onerous than that required for adopting a historic district. For example, in Connecticut, adoption of a local historic district requires the affirmative vote of two-thirds of the property owners in the proposed district as well as passage of an ordinance by the municipality's legislative body.[54] The process for adopting conservation districts, termed "village districts," requires only that the local zoning commission adopt the district, just as it would adopt any other zoning regulation.[55]

In fact, neighborhood conservation districts are routinely described as *historic districts lite*.[56] They "have less stringent regulatory hurdles and more flexibility in implementation [than do local historic districts], so they can be tailored to the physical, historical, or political needs of particular neighborhoods."[57] Because conservation districts, unlike historic districts, are not preserving well-defined historic architectural characteristics, regulations can be imprecise and ill defined.[58] At the same time, and worse still, conservation districts lack meaningful eligibility standards.[59] They can be used in neighborhoods that do not qualify for

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note 36, at 16 ("After many years of establishing historic districts, cities began to create conservation districts in order to protect the character of neighborhoods that may not have been eligible for historic designation, but that had distinct characteristics worth preserving.").

54. CONN. GEN. STAT. ANN. § 7-147b(i) (West Supp. 2014).

55. CONN. GEN. STAT. ANN. § 8-2j(a) (West Supp. 2014). Most Connecticut municipalities do not require the zoning ordinance to be approved by the local legislature. *See* CONN. GEN. STAT. ANN. § 8-1 (West 2010).

56. *See, e.g.*, LORI SALGANICOFF, PRES. ALLIANCE OF GREATER PHILA., NEIGHBORHOOD CONSERVATION DISTRICTS SURVEY 2 (2003), *available at* http://www.preservationalliance.com /publications/Conservation%20District%20Description.pdf ("Very generally, Conservation District programs can be divided into two categories: 'historic district-lite' and zoning/land use."); Lisa Sorg, *Demolition Derby; Preservation Texas Designates Five SA Neighborhoods as Threatened*, CURRENT (San Antonio, Tex.), March 8, 2006, at 12 ("Once a refuge for downtown denizens fleeing floodwaters, Beacon Hill has been designated a Conservation District . . . (Think of it as Historic District lite)."); O'Connell, *supra* note 43 ("Zoning policies such as Raleigh's historic district 'lite' and Dallas' use of neighborhood stabilization overlays were presented as alternative ways to preserve community character without as many regulations."); Thomas J. Walsh, *Penn Treaty Tower, Navy Yard Updates*, PLANPHILLY (Feb. 19, 2008), http://planphilly.com/articles/2008/02/19/2740 (quoting a city planning official who describes conservation districts as "Historic District Lite"). Local legislatures, zoning commissions, and neighbors also choose to adopt neighborhood conservation districts in lieu of historic districts when they perceive historic-district regulations as onerous. MCCLURG, *supra* note 36, at 7–8 (recounting that residents "grew concerned that local historic designation . . . would essentially bring an end to a long tradition of architectural creativity" and that residents thus considered whether a neighborhood conservation district might better serve their needs); Eric R. Danton, *New Panel To Consider Creating Village District, 7 Members To Include Property Owners in Area Studied*, HARTFORD COURANT, January 3, 2001, at B1 ("[T]he committee recommended against creating [a historic] district because of stringent requirements that home and business owners would have to follow. Instead, committee members suggested studying a village district that would give property owners more latitude in how they use their land and buildings.").

57. Lovelady, *supra* note 10, at 148.

58. *See infra* notes 87–88 and accompanying text.

59. *See* Lovelady, *supra* note 10, at 154–55 ("Some districts amount to a traditional

historic-district status to subject renovations and construction to a design-review process just as stringent as that required in local historic districts. Thus, conservation districts permit residents and regulators to bypass legislative limitations on the use of onerous design criteria in historic districts.

This Part will establish and critique the defining characteristics of neighborhood conservation districts. The first characteristic, a design standard that requires alterations and new construction to be consistent with structures in the vicinity of the proposed development, is a misguided attempt to safeguard cultural stability.[60] The second characteristic, sublocal governance, represents an effort, ultimately unsuccessful, to ensure that the neighborhood conservation regulations reflect a community-based consensus.[61] In addition, this Part will describe how regulators and interest groups use design standards and sublocal governance to resist market forces that might otherwise increase the availability and decrease the cost of housing in desirable neighborhoods.

A. Cultural Stability in Practice: Zoning as Taxidermy[62]

Conservation-district regulations codify aesthetic assessments grounded in a purported desire for stability.[63] For example, Cambridge's design-review process

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[historic district] with rigorous design review and guidelines based on the Secretary of the Interior's Standards for the Treatment of Historic Properties."); *id.* at 157 ("[T]he line between historic and conservation districts is not always easy to draw.").

60. Advocates and regulators make no secret of their intentions in adopting neighborhood conservation districts. They aim to "conserve neighborhoods" through zoning and, in their attempt to do so, they design neighborhood conservation zoning regulations to mirror existing neighborhood land use and architecture. This Part, based on a close reading of a few conservation-district schemes, examines how those regulations work to conserve existing land use and architecture patterns, with the ultimate goal of understanding what the intended and unintended consequences of these regulations might be.

61. These attempts to involve the "community" succeed and fail to varying degrees. Conservation districts vary as to how the "community" is defined. As discussed further below, because some neighborhood conservation districts require a majority or supermajority of *property owners* rather than *residents* to approve a neighborhood conservation district, the "community" that adopts and controls a neighborhood conservation district may not include everyone who lives, works, or spends time in the proposed district. *See infra* Part III.B.

62. This use of the term "taxidermy" is borrowed from Jane Jacobs. *See infra* note 91 and accompanying text.

63. Proponents routinely cite "neighborhood preservation" or "cultural heritage" as their primary motivation for adoption of a neighborhood conservation district. *See, e.g.*, KAN. CITY, MO., ZONING & DEV. CODE § 88-205-03-B (Supp. 2015) ("Neighborhood overlay districts seek to preserve an area's cultural, architectural, and aesthetic ambience."); DALL., TEX., DEV. CODE § 51A-4.505(b) (Supp. 2014) ("[T]he conservation district is established to provide a means of conserving an area's distinctive atmosphere or character by protecting or enhancing its significant architectural or cultural attributes."); SUSAN HANZLIK, CITY OF TOPEKA, KAN., NEIGHBORHOOD CONSERVATION DISTRICTS, *available at* http://www.topeka.org/pdfs/NCDBrochure.pdf ("Helping to preserve your neighborhood's unique character and architectural heritage."); *Community Planning and Design*, SCENIC PITTSBURGH, http://www.scenicpittsburgh.org/community-planning-and-design.html ("Neighborhood conservation districts are an effective way of . . . emphasizing a neighborhood's cultural

requires the neighborhood conservation-district commission to "consider, among other things, the historic and architectural value and significance of the site or structure, the general design, arrangement, texture and material of the features involved, and *the relation of such features to similar features of structures in the surrounding area.*"[64] Existing buildings set the standard for determining whether a proposed development is aesthetically acceptable. [65] This context-based aesthetic review, intended, for example, to "preserve an area's cultural, architectural, and aesthetic ambience,"[66] is consistent with the scholarly call to incorporate aesthetics in land-use regulations so long as those aesthetic considerations are based in cultural preservation.[67]

Each neighborhood conservation district pursues the goal of cultural stability in one of two ways. "Preservation model" conservation districts subject new construction and alterations to a design-review process.[68] "Neighborhood planning model" conservation districts require new construction and alterations to be consistent with precise, detailed regulations that include but are not limited to typical-use and bulk regulations.[69] Both approaches require all new construction, alterations, and additions to be consistent with the existing built environment in the relevant district. [70]

A typical "preservation model" ordinance in Noank, Connecticut, requires that, prior to construction of any structure or exterior renovation, a local commission must determine

> that the overall architectural character of the proposed site and building design is in harmony with the neighborhood in which such activity is

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attributes . . . .").

64. CAMBRIDGE, MASS., CODE OF ORDINANCES § 2.78.220(A) (Supp. 2012) (emphasis added).

65. *Id.* ("In the case of new construction or additions to existing structures a commission shall consider the appropriateness of the size and shape of the structure both in relation to the land area upon which the structure is situated *and to structures in the vicinity* . . . ." (emphasis added)).

66. KAN. CITY, MO., ZONING & DEV. CODE § 88-205-03-B.

67. *See, e.g.*, COSTONIS, *supra* note 22; Costonis, *supra* note 20, at 395–418, 430–32; Rose, *supra* note 35, at 494. In fact, in a brief section of *Icons and Aliens*, Costonis is explicitly supportive of the then-nascent neighborhood conservation movement. COSTONIS, *supra* note 22, at 24–25; *see also* MCCLURG, *supra* note 36, at 15 ("In the category of the classic is lawyer John Costonis' book *Icons and Aliens: Law, Aesthetics and Environmental Change*, which examines the legal basis of aesthetic control, as well as its often subjective nature.").

68. Lovelady, *supra* note 10, at 157.

69. *Id.* at 161–62.

70. MILLER, *supra* note 45, at 8 (quoting a planner in the Dallas, Texas, planning department as saying that Dallas's conservation-district regulations "are meant to be 'tailor-made to the neighborhood and what it collectively wants to conserve'"). The line between the two categories is not fixed, and some districts include elements of both categories: "Over time, the distinctions between preservation and planning-based conservation districts are becoming blurred as communities look for and develop solutions that respond to the specific needs of individual neighborhoods." Rebecca Lubens & Julia Miller, *Protecting Older Neighborhoods Through Conservation District Programs*, 21 PRESERVATION L. REP. 1001, 1011 (2002–03).

> taking place, or accomplishes a transition in character between areas of unlike character; protects property values in the neighborhood, and preserves and enhances the beauty of the community, its historical integrity and architecture.[71]

Design review requires that a property owner consult applicable design guidelines in the process of designing a renovation or new building. The final design, including details regarding materials, roof design, site plans, landscaping plans, and window and door design, is often required to be submitted to a commission for review. Only upon favorable review by the design-review commission is a project eligible for issuance of a building permit. One representative ordinance, in Nashville, charges a local board with determining, among other things, "[t]he appropriateness of the exterior architectural design and features of, and appurtenances related to, any new structure or improvement" and "[t]he appropriateness of exterior alterations and repairs to an existing structure."[72] Even if a proposed structure meets all of the use, setback, height, floor-area ratio, and other requirements of the underlying zoning ordinance, it can be denied a building permit for failure to survive the design-review process.

"Neighborhood planning model" conservation districts do not require design review but, instead, impose detailed design standards based on existing context. In Dallas's M Streets East Conservation District, for example, the minimum front-yard setback for any given block is determined by averaging the setbacks of all the houses on the block on the date on which the district was established.[73] An appendix to the ordinance includes the address of each house in the district and its front yard setback. Based on that background information, it then establishes the setback that is applicable to each block. In the neighboring M Streets Conservation District, neighbors and the city's planning department determined that eight architectural styles (High Tudor, Tudor, Craftsman, Spanish Revival, Minimal Traditional, Neo-Colonial, Ranch, and Contemporary) prevailed in the neighborhood.[74] The M Streets ordinance identifies the architectural style of each and every house in the neighborhood. Much as *Euclid* set out a hierarchy of uses with single-family residences perched at the top and permitted in all zones, the M Streets Conservation District establishes a hierarchy of architectural styles. High Tudors, which sit at the top of the hierarchy, can be demolished "only if the cost of bringing the house into compliance with all applicable building code requirements using materials similar to the original materials is greater than 80 percent of the structure's value . . . ."[75] Any other style may be demolished at the owner's option.[76] Any new construction *must* be in the High Tudor style,[77] typical of houses built in the neighborhood in the 1920s,

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71. GROTON, CONN., ZONING ORDINANCE FOR THE NOANK FIRE DISTRICT § 2.26, at 9 (2012) (on file with author).

72. NASHVILLE AND DAVIDSON COUNTY, TENN., CODE OF ORDINANCES § 17.40.410(C)(1), (3) (Supp. 2014).

73. Dall., Tex., Ordinance 25,474 exhibit A § d(3) (Jan. 13, 2004). The ordinance also contains a list of the average front yard setbacks of buildings on each block. *Id.* exhibit B, app. D.

74. *See* Dall., Tex., Ordinance 25,116 exhibit A (Nov. 12, 2002).

75. *Id.* exhibit A § g.

76. *Id.* exhibit B § 6.

77. *Id.* exhibit A § e(2).

unless the new construction is replacing a demolished Craftsman—in which case the new construction can be in the Craftsman style.[78] Any house may be renovated, but it must be renovated according to its original style or the High Tudor style, per the definitions and guidelines set forth in the ordinance.[79] For example, "Minimal Traditional houses must have a cross-gabled roof with low to moderate roof slope between 30 degrees and 45 degrees, and a single projecting front-facing entryway." Such homes must include a "front porch entry."[80] The ordinance regulates materials, roof design, porch design, and any other characteristics that the city council determined to be essential elements of each style. These very precise standards are all based on the neighborhood study undertaken prior to passage of the ordinance.

The Dallas and Noank ordinances are concerned with consistency—that is, that new development be consistent with the past construction—but they take very different approaches. The Dallas ordinances define consistency in rigorous detail. There is no design-review process by which an administrative body has latitude to determine whether a proposed construction project is consistent with the existing neighborhood fabric. The regulations are, instead, enforced by staff within city hall charged with issuing zoning permits and building permits.

The Noank ordinance also requires consistency, but it does so with significantly less detail. Instead, it simply provides that new construction must be "in harmony with the neighborhood."[81] Whether proposed renovation or construction is harmonious is determined at the discretion of the zoning commission. The zoning commission undertakes a design review in which eleven architectural elements are considered. The proposed construction or renovation must "relate to" the structures within two hundred feet on all eleven elements, which include scale, "[r]hythm of solids to voids in the façade," and "[b]uildings and [s]tructures and [r]elationship of [m]aterials [t]o [b]e [u]sed."[82] The Dallas M Streets ordinance provides detailed requirements as to roof shape, for example: "The roof of new houses must be side-gabled with a roof slope between 45 degrees and 70 degrees. Hipped roofs are not allowed. The maximum overhang for eaves is 18 inches."[83] By contrast, Noank simply provides that the "[r]elationship of roof shapes . . . should be compared to the majority of roofs within two hundred feet of the lot."[84] The regulations are, unlike those in Dallas, vague, perhaps purposefully.[85] The administrative body charged with design review has great latitude to determine whether a proposed construction project is permissible. While the Dallas ordinances are quite granular, the Noank ordinance is perhaps unconstitutionally vague.[86]

In both the planning and preservation models, neighborhood conservation districts, as their name suggests, provide for conservation of a neighborhood's

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78. *Id.* exhibit A § i(1)(A).

79. *Id.* exhibit A § h.

80. *Id.* exhibit A § k(3), (5).

81. GROTON, CONN., ZONING ORDINANCE FOR THE NOANK FIRE DISTRICT § 2.26, at 9 (2012) (on file with author).

82. *Id.* §§ 2.26.3.4, .6, at 10–11.

83. Dall., Tex., Ordinance 25,116 exhibit A § e(5).

84. GROTON, CONN., ZONING ORDINANCE FOR THE NOANK FIRE DISTRICT § 2.26.3.8, at 12.

85. *See infra* notes 274–77 and accompanying text.

86. *See infra* note 275 and accompanying text.

existing architectural and land-use fabric without regard to historical or architectural merit. In some places, as in Noank, the regulations simply provide that design review should be undertaken with conservation as the primary goal.[87] In other places, as in the M Streets neighborhoods, the regulations consist of standards divined from the existing land-use and architectural patterns.[88] In both cases, the result is zoning regulations that do not take into account market dynamics, demand for housing, population growth, or demographic trends.

In an effort to impose an objective standard for aesthetic review, scholars have advocated "cultural stability" as a basis for any aesthetic regulation.[89] Neighborhood conservation districts, in their prioritization of conservation over competing goals, aspire to this approach. Neighborhood conservation districts are not historic districts, motivated by architectural-preservation goals and circumscribed by the strictures in historic-preservation statutes.[90] Nor are neighborhood conservation districts established to further traditional land-use planning goals such as protection of health and general welfare. Instead, their sole goal is to achieve stasis, to preserve the neighborhood as it exists on the day that the regulation is adopted.

The preservation movement has long struggled with the difficulty of attaining through regulation the same urban fabrics that grew organically from the market attributes of bygone eras. Jane Jacobs, the perhaps-unintentional matriarch of historic preservation and neighborhood conservation legislation, predicted the difficulty of preserving or conserving neighborhood fabric; she worried that regulation of urban environments might amount to taxidermy, which "goes too far when the specimens put on display are exhibitions of dead, stuffed cities."[91] Jacobs argued that

> in a closed society, a technologically hampered society, or an arrested society, either hard necessity or tradition and custom can enforce on everyone a disciplined selectivity of purposes and materials, a discipline by consensus on what those materials demand of their organizers, and a disciplined control over the forms thereby created.[92]

Jacobs did not provide examples of "closed," "technologically hampered," or "arrested" societies, but she certainly did not believe that the modern United States or any of its cities qualified.[93] Instead, she believed that "to embody tradition or to

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87. *See supra* notes 71–72 and accompanying text.

88. See *supra* notes 73–80 and accompanying text.

89. *See supra* notes 30–31 and accompanying text.

90. *See supra* text accompanying notes 47–59.

91. JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES 373 (Vintage Books 1992) (1961) ("[T]axidermy can be a useful and decent craft. However, it goes too far when the specimens put on display are exhibitions of dead, stuffed cities. Like all attempts at art which get far away from the truth and which lose respect for what they deal with, this craft of city taxidermy becomes, in the hands of its master practitioners, continually more picky and precious."); *see also* Karrie Jacobs, *Jane Jacobs Revisited*, METROPOLIS (Aug. 2006), http://www.metropolismag.com/August-2006/Jane-Jacobs-Revisited/.

92. JACOBS, *supra* note 91, at 373.

93. *See id.* at 373–74 ("But this [hardened control of architectural materials and forms] is not the case with us. . . . We can't be like that because the limitations on possibilities and the strictures on individuals in such societies extend much beyond the materials and conceptions

express (and freeze) harmonious consensus" is not the "constructive use" to which cities ought to be put.[94] Writing about historic-preservation laws more than thirty years ago and wrestling with this same problem, Carol Rose observed,

> Given the strong influence of urban renewal projects on historic districts, it is no surprise that the districts sometimes share with urban renewal projects an overplanned quality and an imperious suppression of variety that may ruin the liveliness and diversity of an urban neighborhood. Historic district regulation, by narrowing a builder's design choices to a few approved styles, can freeze a community's architectural character to reflect some quasi-mythic time in the past, at the cost of creative contributions by current residents.[95]

Neighborhood conservation regulations exacerbate this problem. While few neighborhoods are eligible for historic-district designation, conservation districts can be implemented almost anywhere.[96] Adoption of neighborhood conservation districts disrupts the process of creative destruction that has long characterized American city building.[97] Too often, policy makers and city residents assume that urban growth must happen outward—that after a neighborhood is developed, it is "built-out" and its density should not change. According to that understanding, new development accommodating population growth and immigration happens only in previously undeveloped areas, successive outer rings surrounding cities. But growing outward onto farmland is just one way in which urban areas accommodate new residents. Redevelopment and infill development have long been important to urban development patterns and have allowed cities and suburbs to accommodate population growth in the very places that are desirable for people to live.[98]

Redeveloping and rebuilding already-developed areas allows homeowners, renters, commercial interests, real-estate developers, and land-use planners to reimagine the highest and best use of land by anticipating future needs. A parcel of

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used in creating works of art from the grist of everyday life. . . . [W]e are too adventurous, inquisitive, egoistic and competitive to be a harmonious society of artists by consensus, and, what is more, we place a high value upon the very traits that prevent us from being so. Nor is this the constructive use we make of cities or the reason we find them valuable: to embody tradition or to express (and freeze) harmonious consensus.").

94. *Id.* at 374. Jacobs cautioned against approaching a city or neighborhood as "a larger architectural problem, capable of being given order by converting it into a disciplined work of art . . . ." *Id.* at 373. Her writings on the subject do not leave much doubt about what she would think of the M Streets East ordinance in Dallas, for example.

95. Rose, *supra* note 35, at 509 (footnote omitted).

96. *See supra* text accompanying notes 51–53.

97. *See generally* MAX PAGE, THE CREATIVE DESTRUCTION OF MANHATTAN, 1900–1940 (1999).

98. *See, e.g.*, EDWARD GLAESER, TRIUMPH OF THE CITY: HOW OUR GREATEST INVENTION MAKES US RICHER, SMARTER, GREENER, HEALTHIER, AND HAPPIER 223–46 (2011) (discussing the development of Chicago and Atlanta, among other cities); Virginia McConnell & Keith Wiley, *Infill Development: Perspectives and Evidence from Economics and Planning* (Res. for the Future, Discussion Paper No. 10-13, 2010) (describing state and local policies to promote infill development).

land on what would later become Manhattan's Fifth Avenue may have been best used as a portion of a farm in 1800.[99] When it was first developed, Fifth Avenue above Fourteenth Street was a single-family neighborhood.[100] At that time, the best use of a Fifth Avenue parcel may have been as a mansion, a brownstone, or an attached single-family house. By the last decade of the nineteenth century, developers sought to change the Avenue's residential areas to commercial and mixed-use areas.[101] By 1910, half of the fifty-eight brownstones that had been located on Fifth Avenue between Thirty-Fourth and Forty-Second Streets in 1902 had been demolished.[102] The rest were demolished, and replaced with commercial buildings, by 1930.[103] Often, buildings were torn down just a few years after they were originally constructed.[104] Were it not for the constant rebuilding of Manhattan and infill development increasing the density of already-developed neighborhoods, the Upper East Side would not have existed in the state in which it was "preserved" in 1981, when it was designated a landmark. The Upper East Side has existed in a series of wildly differing iterations over the last three centuries. Rebuilding and redeveloping enabled Manhattan to meet evolving needs as New York City grew, architectural styles and technological capabilities evolved, and the needs of homeowners, renters, and commercial interests changed over time. Manhattan provides just one lens through which to view the importance of infill development to neighborhoods that many now consider historic. But the same pattern of development and redevelopment is apparent in urban areas across the country.[105]

Cultural stability does not exist in a vacuum, and it must be considered alongside other competing goals. Even if stability is a relevant consideration in policy making, it cannot be the only consideration. Indeed, changing cultural norms, immigration, population growth, increasing diversity, and other evolving factors will often require society to reconsider whether stability is a worthy policy goal.[106] Neighborhood conservation districts, particularly where they are adopted extensively across a city (as

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99. Fifth Avenue did not exist above Fourteenth Street until the 1850s. PAGE, *supra* note 97, at 26.

100. *Id.* at 28.

101. *Id.* at 24–28.

102. *Id.* at 26.

103. *Id.*

104. *See id.* As historian Max Page carefully details in *The Creative Destruction of Manhattan, 1900–1940*, the breathtaking pace of redevelopment in Manhattan in the early twentieth century was fraught and not without growing pains. Entrenched interests, including the Vanderbilt family, sought (unsuccessfully, in the case of Fifth Avenue) to prevent demolitions and rebuilding in favor of preserving Midtown Manhattan as a neighborhood of single-family homes—both brownstones and freestanding mansions. One wonders what the result might have been had the Vanderbilts had at their disposal the land-use regulatory tools available today.

105. *See* GLAESER, *supra* note 98, at 231–38, 241–44 (describing the development patterns of several American cities).

106. *See generally* 3 RATHKOPF ET AL., *supra* note 1, § 38:27 ("The policy considerations—and, derivatively, the legal principles—governing rezonings can be usefully conceptualized as attempts to reconcile the competing and conflicting goals of promoting, on the one hand, desired stability and, on the other hand, desired flexibility in zoning.").

is the case in Nashville and Cambridge),[107] render local and state governments unable to respond to changing demographics, growing populations, and variable market conditions. This inability to respond to change is an evil inherent in a land-use planning policy that prioritizes conserving neighborhoods in their present state to the exclusion of all other goals, goals that should be considered in the land-use planning process.

B. (Dis)empowering Communities Through Sublocal Governance

Advocates argue that neighborhood conservation districts incorporate community-based decision-making processes.[108] The primary mechanism by which conservation districts incorporate community perspectives is sublocal governance. A neighborhood-level institution is entrusted with one or more of the following: the decision whether to adopt a neighborhood conservation district; the crafting of district regulations; and, less frequently, the administration of the neighborhood conservation district. Voices that may not be heard at the regional or local levels are more likely to be heard at the sublocal level.

Unfortunately, neighborhood conservation districts amplify some voices but exclude others, thus diminishing, if not obliterating, their benefits in increasing participation. In particular, conservation districts often exclude the voices and preferences of renters and those who live outside of the proposed district but who may, nonetheless, be affected by its adoption.[109] In addition, conservation districts always exclude and, in fact, prohibit consideration of the needs of future housing consumers.[110] As a result, any supposed voice-enhancing benefits are undercut.

While zoning is adopted at the municipal level without formal input from each affected neighborhood, zone, or district, neighborhood conservation districts typically require sublocal approval. Neighborhood conservation districts are adopted at the municipal level, but sublocal initiation or approval is a condition precedent to adoption. For example, in Chapel Hill, the process of designating a neighborhood conservation district can be initiated either by the town council[111] or by a

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107. Cambridge, Massachusetts, has four neighborhood conservation districts. *See Historic Districts and Neighborhood Conservation Districts in Cambridge, MA*, CAMBRIDGE HIST. COMMISSION, http://www2.cambridgema.gov/Historic/districts.html. Nashville, Tennessee, has eleven neighborhood conservation districts. *See* MCCLURG, *supra* note 36, at 73.

108. *See* MILLER, *supra* note 45, at 1 ("[N]eighborhood conservation districts offer community-based solutions aimed at protecting an area's distinctive character."); *id.* at 5 ("[H]igh emphasis is placed on neighborhood participation . . . ."); *id.* at 8 ("[M]ost communities require that the process for initiating conservation district status include a significant level of neighborhood involvement."); *id.* at 9 ("A key aspect of neighborhood conservation district programs is mandatory public participation."). The attraction to community-based, neighborhood-level planning is so attractive that even Edward Glaeser, a leading advocate of land-use deregulation, falls into the trap of advocating in favor of some limited sublocal land-use powers. *See* GLAESER, *supra* note 98, at 162.

109. *See infra* Part III.B.1–2.

110. *See infra* Part III.B.3.

111. In at least one instance, the Chapel Hill Planning Board petitioned the town council to consider creating a neighborhood conservation district. *See* Memorandum from W. Calvin Horton, Town Manager, Town of Chapel Hill, to the Mayor and Town Council (May 15, 2006), *available at* http://townhall.townofchapelhill.org/agendas/2006/05/15/1/greenwood_ncd.htm.

neighborhood-level petition.[112] Upon the affirmative vote of either fifty-one percent of the property owners (voting on a single-vote-per-parcel basis) or of the owners of fifty-one percent of the land area within the proposed district, the local government initiates the review process.[113]

Even where the authorizing ordinance does not require that conservation districts be formally approved at the sublocal level, municipalities in practice will require sublocal approval before adopting a design overlay. In Dallas, the ordinance does not require sublocal approval, but the city council will not entertain adoption unless the process is initiated at the sublocal level: "[N]eighborhood-initiated designation is in practice the only politically feasible route."[114] Nashville's local ordinance does not, on its face, require any neighborhood-level input in the adoption of a neighborhood conservation district.[115] As a practical matter, however, often local governments will not consider a neighborhood for designation unless there is sublocal support. In Cambridge, the citywide historical commission "may begin the study of a district, but, in general, neighborhood conservation districts develop out of residents' concern over issues that threaten their neighborhood's character,"[116] and the commission appointed to evaluate designation must include sublocal representation. Connecticut, likewise, does not require sublocal approval in order to adopt a village district, the Connecticut analog to the neighborhood conservation district.[117] As a practical matter, however, such approval is necessary. In one Connecticut town, the planning and zoning commission told village-district advocates that it would not take up a

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112. As of February 2012, Chapel Hill suspended designation of new neighborhood conservation districts. Neighborhoods that had initiated the process prior to that date can proceed. *Neighborhood Conservation District (NCD) Zoning Overlays*, TOWN CHAPEL HILL, http://townofchapelhill.org/town-hall/departments-services/planning-and-sustainability/resources/neighborhood-conservation-district-ncd-zoning-overlays.

113. CHAPEL HILL, N.C., CODE OF ORDINANCES app. A § 3.6.5(c)(1)(A) (Supp. 2014). A bill recently defeated in the General Assembly of North Carolina would have required the unanimous consent of property owners in the proposed district prior to adoption of any regulations "relating to building design elements." H.R. 150, 2013 Gen. Assemb. (N.C. 2013). Senate Bill 139 was substantially similar. *See* S. 139, 2013 Gen. Assemb. (N.C. 2013). Both bills defined "building design elements" as "exterior building color; type or style of exterior cladding material; style or materials of roof structures or porches; exterior nonstructural architectural ornamentation; location or architectural styling of windows and doors, including garage doors; the number and types of rooms; and the interior layout of rooms." *Id.*; *see also infra* note 263.

114. MILLER, *supra* note 45, at 8 (citing conversation with Jim Anderson, a historic preservation planner with the Dallas planning department).

115. *See* NASHVILLE AND DAVIDSON COUNTY, TENN., CODE OF ORDINANCES §§ 17.36.100–.120 (Supp. 2014).

116. CAMBRIDGE HISTORICAL COMM'N, *supra* note 37; *see also* ELIZABETH DURFEE HENGEN & CAROLYN BALDWIN, NEIGHBORHOOD HERITAGE DISTRICTS: A HANDBOOK FOR NEW HAMPSHIRE MUNICIPALITIES 9 (2008), *available at* http://www.nh.gov/nhdhr/documents/neighborr_hert_handbook.pdf ("[E]ven with [the support of city officials], the citizens' group needs to be prepared to take the lead on undertaking a public awareness and education program. The importance of such a campaign is integral to the successful establishment of a neighborhood heritage district ordinance.").

117. *See* CONN. GEN. STAT. ANN. § 8-2j (West Supp. 2014).

proposed design overlay unless the homeowners' association in the affected neighborhood drafted and proposed the ordinance.[118] In another, though not required to do so by the authorizing state statute, the town appointed a committee to consider adoption of a village district and took care to ensure that the nine members included two homeowners and two business owners inside the proposed district.[119]

In addition to requiring sublocal input at the time of adoption, a subset of neighborhood conservation districts incorporate sublocal input in the course of exercising design review. For example, in Cambridge, the board responsible for design review must include three residents, two of whom must be homeowners, and a property owner, who may also be a homeowner.[120] In Nashville, the design-review board is set at the local level, but it must include at least two residents of overlay districts and two people who are either property owners or business owners in an overlay district.[121]

1. Sublocal Governance: Impacts on Efficiency

Sublocal structures allow residents and property owners to establish governance models at the neighborhood level.[122] Proponents of sublocalism argue that these structures allow each consumer of municipal services to choose that combination of service provision and taxation that best meets his or her needs, as originally modeled on the local level by Charles Tiebout.[123] Tiebout theorized that local governments,

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118. Ann DeMatteo, *Hamden PZC Lets Residents Take Lead on Village District*, NEW HAVEN REG., Apr. 18, 2009, at B1.

119. Danton, *supra* note 56. Similarly, the Indianapolis Historic Preservation Commission "requests the residents to get seventy-five percent of the property owners to sign in support of the conservation district; this is not required by the ordinance, but is done in practice." MCCLURG, *supra* note 36, at 45. And in Iowa City, "[i]n order to create a conservation district, residents must get signatures on petitions and letters of support from the neighborhood. This is compiled with information about the neighborhood, the issues that threaten the character of the area, and an argument for designation." *Id.* at 49.

120. CAMBRIDGE, MASS., CODE OF ORDINANCES § 2.78.160(A) (Supp. 2012).

121. The historic zoning commission is responsible for design review in neighborhood conservation districts as well as in historic preservation districts, historic landmark districts, and historic bed-and-breakfast homestay districts. *See* NASHVILLE AND DAVIDSON COUNTY, TENN., CODE OF ORDINANCES §§ 17.36.110, 17.40.400 (Supp. 2014).

122. To date, neighborhood conservation districts have largely escaped the notice of scholars interested in sublocal governance structures. *See supra* note 10. One proponent of sublocal zoning ignores them entirely. *See* Kenneth A. Stahl, *Neighborhood Empowerment and the Future of the City*, 161 U. PA. L. REV. 939 (2013). In a recent symposium, William A. Fischel notes that neighborhood conservation districts are akin to sublocal structures such as BIDs, but he does not consider whether sublocal governance structures facilitate participation, nor does he consider the possible negative implications of allowing sublocal structures to assume elements of zoning authority. Fischel, *supra* note 10, at 350.

123. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956). By no means is this Article intended to contribute to the overreliance on Tiebout to explain local government phenomena. Nor does this Article purposefully avoid addressing more recent economic scholarship that displaces or complicates the Tiebout model. Instead, this Article posits that the extent to which Tiebout's theory pervades thinking about zoning

unlike the federal government, efficiently expend tax dollars on public goods because each "consumer-voter" can move to whichever municipality provides his or her ideal combination of service provision and taxation.[124] While Tiebout himself acknowledged that certain practical realities limit the real world application of his theory,[125] and economists and legal scholars have identified various limitations in his model,[126] that model has nonetheless served as the dominant theoretical baseline for local-government and land-use law scholarship in recent decades.[127]

Tiebout's model assumes that a metropolitan area includes a large number of small municipalities, each with a set revenue and expenditure pattern.[128] Cities, being neither small nor homogenous, complicate application of Tiebout's model.[129] Richard Briffault proposes that, in this context, sublocal structures play a role in increasing Tieboutian efficiency.[130] In a large heterogeneous city, each sublocal area is smaller and more homogeneous than the city as a whole. Sublocal "institutions—which include enterprise zones, tax increment finance districts, special zoning districts, and business improvement districts—provide for a variety of territorially based differences in taxation, services, or regulation within individual cities."[131] As a result, proponents of sublocal institutions argue that these institutions provide the consumer of municipal services an array of choices within a given municipality.[132]

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and land use, not the inherent correctness of that theory, is a possible explanation for the rising popularity of sublocal zoning power and design-review authority.

124. *Id.* at 418; *see also* Richard Briffault, *The Rise of Sublocal Structures in Urban Governance*, 82 MINN. L. REV. 503, 503 (1997) (Tiebout argues that "[t]he multiplicity of local governments in an area means that, as long as each locality is free to adopt its own mix of services, regulations, and taxes, area residents will have a variety of packages of local government actions to choose among in determining where to live.").

125. Tiebout, *supra* note 123, at 418–19 (model assumes that governmental "revenue and expenditure patterns" are fixed, "consumer-voters" are mobile, their movements are not restricted by employment or other factors, there are a large number of diverse communities from which each "consumer-voter" can choose, "consumer-voters" have all necessary knowledge to make an informed choice, and there are no externalities resulting from any one municipality's choices); *see also* Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 415 (1990) ("Tiebout's theory is one of interlocal movement. It does not address the internal operations of urban government, local political institutions or local political activity.").

126. *See, e.g.*, William W. Bratton & Joseph A. McCahery, *The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second-Best World*, 86 GEO. L.J. 201 (1997) (describing theoretical and practical problems with Tiebout's model); David Schleicher, *Local Government's "Law and ___" Problem*, 40 FORDHAM URB. L.J. 1951, 1964 (2013) (decrying the failure of local-government scholars to look beyond the Tiebout model when discussing "the economic study of local government and cities").

127. *See, e.g.*, WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS 39–71 (2001); Stahl, *supra* note 122, at 942 n.4 (noting the influence of Tiebout's theory).

128. Tiebout, *supra* note 123, at 418–19.

129. Briffault, *supra* note 124, at 504–06.

130. *Id.* at 530.

131. *Id.* at 508.

132. *Id.* ("The more recent development of new forms of submunicipal political institutions, however, suggests new possibilities for ameliorating the basic tension between the assumptions of the Tiebout model and the position of big cities in the local government

While Briffault does not consider neighborhood conservation districts, these districts fit neatly into his model. Like business improvement districts, tax-increment financing districts, special zoning districts, and enterprise zones—the institutions described by Briffault—a neighborhood conservation district "tends to treat the sublocal zone or district as a distinctive actor with a formal legal-political identity rather than as an undifferentiated part of the city."[133]

If neighborhood conservation districts work as theorists would hope, informed homebuyers or developers in Nashville, Cambridge, or Dallas can vote with their feet between a neighborhood with a conservation district and one without such a district.[134] And of the neighborhoods with conservation districts, the informed purchaser can choose a district with guidelines that are attractive to her. Fans of Craftsman bungalows can purchase homes in Nashville's Richland-West End Addition,[135] aficionados of "mid to late 19th-century workers' and suburban housing" will be especially attracted to Cambridge's Half Crown-Marsh Neighborhood Conservation District,[136] and the M Streets neighborhood will be particularly desirable to lovers of High Tudors.[137]

2. Sublocal Governance: Impacts on Policy

While many have considered whether sublocal structures produce *efficiency* by facilitating the Tieboutian model within a municipality, whether they better advance citizen preferences is a separate inquiry. Briffault describes the impact that sublocal governance can have on advancing "voice."[138] Proponents of sublocal governance argue that, procedurally, it gives voice to those who might otherwise be silenced in

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system." (footnote omitted)); Stahl, *supra* note 122, at 943 (describing sublocal institutions as "efforts to import into the city the most attractive features of suburban governance by devolving power to the smaller scale of the neighborhood").

133. Briffault, *supra* note 124, at 524.

134. *But see infra* notes 266–68 and accompanying text (regarding the problem of uninformed consumers and the lack of transparency inherent to neighborhood conservation districts).

135. *See* METRO. HISTORIC ZONING COMM'N, METRO. GOV'T OF NASHVILLE & DAVIDSON CNTY., RICHLAND-WEST END ADDITION NEIGHBORHOOD CONSERVATION ZONING 6 (rev. ed. 2012), *available at* http://www.nashville.gov/Portals/0/SiteContent/MHZC/docs/Preservation%20Permits/Maps%20and%20Guidelines/RWE%20Addition%202012_revised.pdf.

136. *See* HALF CROWN-MARSH NEIGHBORHOOD CONSERVATION DIST. CONSOLIDATION STUDY COMM., HALF CROWN-MARSH NEIGHBORHOOD CONSERVATION DISTRICT CONSOLIDATION STUDY 5 (2006), *available at* http://www2.cambridgema.gov/historic/hc_marsh_consol_report.pdf.

137. *See* Dall., Tex., Ordinance 25,116 exhibit A § g (Nov. 12, 2002), *available at* http://dallascityhall.com/departments/sustainabledevelopment/historicpreservation/_layouts/15/WopiFrame.aspx?sourcedoc=/departments/sustainabledevelopment/historicpreservation/DCH%20documents/pdf/MStreet_GreenlandHills.pdf&action=default&DefaultItemOpen=1.

138. Briffault, *supra* note 124, at 505 ("The small size of local units makes it easier for citizens to voice their views to their local government and their fellow local citizens, to respond to each other's concerns, and to deliberate concerning important local public matters. . . . The resulting sense of 'citizen effectiveness' may lead to more participation, which, by reinforcing the sense of effectiveness, can maintain and increase participation." (footnote omitted)).

local, state, or national debates.[139] In advancing voice, sublocal governance might, provided it does not have exclusionary effects, result in substantive benefits.[140] It is possible that sublocal procedures can ensure that neighborhood conservation districts are grounded in community desires and values. The process of creating and interpreting the guidelines can itself result in community members coming together to tell the story of their neighborhood.[141] That storytelling takes regulatory form, and the regulations embody the community building that both impelled and resulted from the adoption of a neighborhood conservation district.[142]

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139. *See, e.g.*, Stephen Breyer, Madison Lecture, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 257–58 (2002) (noting that limitations on federal power serve to facilitate democracy because state and local governments are easier for citizens to hold accountable); Roderick M. Hills, Jr., *Is Federalism Good for Localism? The Localist Case for Federal Regimes*, 21 J.L. & POL. 187, 209 (2005) ("The extraordinary plethora of plebiscitary procedures, neighborhood consent requirements, lay boards and elected bodies that govern local governments under state law . . . indicates a level of public participation at an entirely different level than that provided by federal administrative law."); Matthew J. Parlow, *Civic Republicanism, Public Choice Theory, and Neighborhood Councils: A New Model for Civic Engagement*, 79 U. COLO. L. REV. 137, 145 (2008) ("[L]ocal governments constitute the most viable avenue for engaging the public in the decision- and policy-making processes . . . ."); Lovelady, *supra* note 10, at 175 ("When preservationists desire neighborhood protection but encounter opposition from property rights advocates or residents fearing increased costs, NCDs offer a compromise . . . .").

140. *But see infra* Part III.B.

141. "Procedurally, the very process of community self-definition, including the procedures of modern historic preservation law, brings neighbors together in mutual education and mutual aid, helping to prevent a paralyzing sense of individual powerlessness." Rose, *supra* note 35, at 494. Costonis, on the other hand, ignores process and, instead, places the burden on legislators to determine whether a proposed aesthetic regulation is truly accomplishing a widely supported community interest in cultural stability: "[P]olicy-makers should examine the claimed associational bonds between the resource and the community to determine whether protecting the resource will advance community-wide identity and stability values." Costonis, *supra* note 20, at 434. For Costonis, this examination requires legislators' confirmation that the desire to protect an aesthetic resource must be widely held. As he says, "[i]f the 'objectivity' of aesthetic standards resides in their consistency with patterns of community preference, the inquiry should focus upon the prevalence or absence of these patterns." *Id.* at 435. But Costonis does not propose any check, other than the standard legislative process, to ensure that aesthetic land-use regulations meet the otherwise rigorous standard he establishes. He entrusts legislators and regulators to make a determination that a preference for a proposed aesthetic regulation is widely held in precisely the same way that legislators approach any policy decision, by reviewing "evidence marshalled through hearings, staff studies, and similar sources [to determine whether] the claimed concordance of the initiative with actual or reasonably likely community-wide preferences" can be verified. *Id.* Costonis acknowledges that he requires of aesthetic regulations no more process-related checks and balances than are required of legislative action generally: "The inquiry, in short, should parallel the one regularly conducted by legislators in the zoning and eminent domain fields to determine whether a proposed initiative accords with a 'public' purpose or merely advances the 'private' interest of an individual or a group." *Id.* at 435–36 (footnotes omitted).

142. *See* Rose, *supra* note 35, at 494.

The sanguine theoretical picture painted here is muddied by the fact that sublocal governance generally and neighborhood conservation districts specifically prioritize some community voices over others.[143] Unfortunately, neighborhood conservation districts' voice-enhancing benefits are undone by their exclusionary features. For example, Cambridge's ordinance prioritizes the involvement of property owners, and homeowners in particular, over that of renters in designation of a neighborhood conservation district and in developing the regulations applicable to that district.[144] The designation process in Cambridge, typical of the designation process elsewhere, must include a study of the proposed district, memorialized in a written report.[145] The study and report are conducted by an appointed committee that must include at least one resident of the proposed district and at least one property owner in the proposed district.[146] Once a district is designated, a sublocal commission is responsible for conducting a design review of each proposed construction or renovation project in the district. Property owners receive even more preference here than they do in the designation process. The five members must be (a) three district residents, two of whom must be homeowners; (b) a neighborhood property owner, who may be a homeowner; and (c) a member of the Cambridge Historical Commission.[147] By prioritizing property owners' voices and excluding renters as well as those who live outside of the proposed district, conservation districts undermine the participation benefits that might otherwise result from neighborhood-level decision-making processes. Furthermore, by emphasizing context to the exclusion of other policy goals, conservation districts prohibit consideration of the needs of future housing consumers, again excluding key voices and undermining the community-centered goals espoused by conservation-district advocates.[148]

C. A Tool for Resisting Development Pressures in Desirable Housing Markets

Advancing cultural stability through aesthetics results in land-use regulations that preserve existing architectural context. These regulations prevent property owners from developing buildings that might accommodate evolving preferences, thus disrupting the ability of the market to respond to consumer demand. Existing homeowners exert control over land-use regulations disproportionate to their numbers.[149] And they want their neighborhoods to remain untouched by development. After all, they expressed a preference for the existing neighborhood fabric when they purchased their homes. The neighborhood conservation district provides a regulatory mechanism for homeowners to freeze development patterns and to replicate private-law design-review standards typical in suburban

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143. The inevitable question raised in this section—"Who is the community?"—is discussed in Part III.B, *infra*.

144. *See* CAMBRIDGE, MASS., CODE OF ORDINANCES § 2.78.160 (Supp. 2012).

145. *Id.* § 2.78.180.

146. *Id.*

147. *Id.* § 2.78.160(A). Delegating design-review authority to a sublocal commission raises constitutional questions. These are discussed in greater detail in note 241, *infra*.

148. *See infra* Part III.B.

149. *See infra* note 159 and accompanying text.

subdivisions.[150] Imposing private-law design-review standards would require all of the property owners to submit to a restrictive covenant that would require their unanimous consent. Some property owners may flat-out reject yielding control of the use of their land. Others will, quite reasonably, require compensation before they do so. Regulatory aesthetic review, on the other hand, requires neither unanimity nor compensation. In addition, it permits homeowners to resist market forces toward higher-density uses, whether those uses are multifamily rentals or large single-family homes.[151]

Neighborhood conservation districts have been used almost exclusively in residential areas.[152] As a result, conservation districts impact housing markets and, therefore, housing prices. That simple fact should worry those who believe that housing affordability is an appropriate goal for land-use policy. In some cases, the applicable local ordinance limits the adoption of neighborhood conservation districts to residential areas.[153] In other cases, commercial and office districts are eligible for designation, but no such designations have been made. If concern for historic preservation motivated adoption of neighborhood conservation districts, one would expect to see conservation districts in both residential and nonresidential areas.[154] Factors other than the desire to protect historic communities cause neighborhood conservation districts to be limited, largely, to residential areas. These same factors have led policymakers and scholars to defer to homeowners in the course of crafting land-use regulations.

First, there is a stronger compulsion to preserve residential neighborhoods, the places where people live. Our legal system recognizes and supports an attachment to owner-occupied homes that often exceeds their pure economic value.[155] Zoning, tax, and other laws treat owner-occupied homes favorably because they are bound up with the personhood of the owner-occupant.[156] Owner-occupied homes are "markers

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150. *See infra* notes 162–64 and accompanying text.

151. *See infra* notes 181–82 and accompanying text.

152. MILLER, *supra* note 45, at 1.

153. *See, e.g.*, BOISE, IDAHO, BOISE MUNICIPAL CODE § 11-05-02(1)(A) (permitting adoption in nonresidential neighborhoods but stating that "[a] conservation overlay district is usually applied to residential neighborhoods"); CHAPEL HILL, N.C., CODE OF ORDINANCES app. A § 3.6.5 (Supp. 2014).

154. *Cf.* Rose, *supra* note 35, at 504–06 (noting that a major impetus for the establishment of historic districts was to encourage business investment in particular areas and to protect the tourism industry).

155. *See* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 996–1002 (1982) (discussing homes and cars as paradigmatic examples of "personhood property" that are given greater protections than other forms of property).

156. "[I]n our social context a house that is owned by someone who resides there is generally understood to be toward the personal end of the continuum. There is both a positive sense that people are bound up with their homes and a normative sense that this is not fetishistic." *Id.* at 987 (footnote omitted). But neighborhood conservation districts cannot be analyzed solely as a form of protection of personhood property. Certainly, conservation districts arise out of a desire to protect some people's personhood property (i.e., owning a home in a neighborhood with certain defined characteristics). They accomplish that goal, however, by limiting others' personhood property (i.e., owning a home that can be demolished, renovated, and altered as one likes). This tension can be seen in design-review meetings, in which regulators consider relevant whether a property belongs to an owner-occupant or a

of a homeowner's identity."[157] Even properties that appear to be interchangeable, like the mass-produced Cape Cods of Levittown, New York, are, over time, individualized to meet the particular needs and desires of their occupants "to the point where [decades after Levittown was first developed] the interiors and exteriors did not even resemble each other."[158] By contrast, most commercial property is owned for the purpose of collecting rents. The initial design and any renovations are intended to maximize profitability and cash flows. The typical commercial-property owner should be indifferent as between owning his or her property and receiving, in its stead, an amount equal to the present value of the net cash flows the owner expects to receive from the property. As a result, the emotional response to architectural changes and development pressures in commercial districts, where property is fungible, is less potent, and commercial districts are less likely to be targeted by voters and lawmakers for conservation.

Second, homeowners exert influence disproportionate to their numbers in local land-use policy making.[159] Homeowners' outsized interest in local land-use policy motivates them to advocate and achieve policy goals that may be unavailable to others, such as commercial property owners or those who enjoy shopping in business districts.[160] Even where homeowners are a minority of the voting populace, their significant financial self-interest motivates them to assemble outsized political power.[161] As a result, they are in a strong position to advocate for any land-use tool that they believe will protect and enhance the value of their property. Private-law design-review processes are one such tool. These private agreements, imposed through restrictive covenants, are typical in subdivisions governed by homeowners' associations, which "have rapidly proliferated in recent decades."[162] These

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nonresident landlord. *Cf.* Robert C. Ellickson, *Three Systems of Land-Use Control*, 13 HARV. J.L. & PUB. POL'Y 67, 72 (1990) ("[Z]oning officials tend to be insensitive to the interests of nonresidents, such as housing consumers and owners of undeveloped land . . . .").

157. Brian J. Miller, *Competing Visions of the American Single-Family Home: Defining McMansions in the* New York Times *and* Dallas Morning News, *2000–2009*, 38 J. URB. HIST. 1094, 1096 (2012).

158. *Id.* (citing JOHN ARCHER, ARCHITECTURE AND SUBURBIA: FROM ENGLISH VILLA TO AMERICAN DREAM HOUSE, 1690–2000 (2005); BARBARA M. KELLY, EXPANDING THE AMERICAN DREAM: BUILDING AND REBUILDING LEVITTOWN (1993)).

159. FISCHEL, *supra* note 127, at 80–81. According to Fischel's analysis, homeowners are heavily invested in the value of their homes. For most homeowners, their home is their largest asset, by far, and their wealth is not diversified. The typical homeowner simply cannot afford to risk the value of his or her home. As a result, homeowners are unlikely to favor new development that they perceive as a threat to their property values or that is likely to increase the cost of public-services provision, thereby increasing local property taxes. *Id.* at 4. Whether rental housing has these deleterious effects is not a question Fischel tackles, nor is it one that I attempt to answer here. Two things are clear: homeowners perceive that rental housing has negative impacts, and they act on that perception.

160. *See id.*

161. *See* Vicki Been, Josiah Madar & Simon McDonnell, *Urban Land-Use Regulation: Are Homevoters Overtaking the Growth Machine?*, 11 J. EMPIRICAL LEGAL STUD. 227 (2014).

162. Lee Anne Fennell, *Contracting Communities*, 2004 U. ILL. L. REV. 829, 829; *see also* Gerald Korngold, *The Emergence of Private Land Use Controls in Large-Scale Subdivisions: The Companion Story to* Village of Euclid v. Ambler Realty Co., 51 CASE W. RES. L. REV. 617,

developments impose on all property owners and residents a "community-wide set of conditions, covenants, and restrictions (CC&Rs) control[ling] each homeowner's use of her own property, the use and maintenance of common property and amenities, and other details of community life and governance."[163] CC&Rs are more expansive, more detailed, and more onerous than traditional-use and bulk-zoning regulations. They control "not only types of land uses but also matters of aesthetics" including "the color of the house paint, the placement of trees and shrubbery, the size and location of fences, the construction of decks and other housing extensions, the parking of automobiles in streets and driveways, and the use and placement of television antennas, among others."[164]

Neighborhood conservation districts are public-law forms of CC&Rs, historically private-law tools. Local legislators considering whether to adopt neighborhood conservation districts have expressly acknowledged that these districts are a public regulatory attempt to recreate CC&Rs.[165] As one local legislator described the issue in email correspondence preceding a vote on the Belmont-Hillsboro district in Nashville,

> Although I think the potential effect that the [conservation district] overlay can achieve can be beneficial, I do think they still turn a city neighborhood into a virtual 'subdivision,' something I can understand some people not wanting to have imposed on them. Many people do not live in subdivisions because they do not want restrictive covenants, something that overlays do.[166]

Because it affects consumers' expectations, the explosion of housing units located in private developments encumbered by CC&Rs affects the greater housing market, not just housing located in private developments. Even in neighborhoods not encumbered by restrictive covenants, homeowners expect to have the authority to control the appearance of their neighborhood based on the fact that such control has become commonplace in the market.[167] The homeowner who purchased a High Tudor home in the M Streets neighborhood in Dallas in the 1920s may never have

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619 (2001) (citing statistics that 2.58% of housing units were located in homeowners' association developments in 1975, a percentage that increased to 14.67% in 1998).

163. Fennell, *supra* note 162, at 830.

164. Robert H. Nelson, *Privatizing the Neighborhood: A Proposal To Replace Zoning with Private Collective Property Rights to Existing Neighborhoods*, 7 GEO. MASON L. REV. 827, 831 (1999).

165. *See, e.g.*, Johnston v. Metro. Gov't of Nashville & Davidson Cnty., 320 S.W.3d 299, 304 (Tenn. Ct. App. 2009); *see also infra* note 171.

166. *Johnston*, 320 S.W.3d at 304 (citing council members' e-mail correspondence in advance of designation of the Belmont-Hillsboro neighborhood conservation district in Nashville).

167. Homeowners who have the desire to control their neighbors' behavior and land-use choices have a strong financial incentive to do so. "Studies consistently demonstrate that just about any change in the character of one's neighborhood can have a quantifiable impact—either positive or negative—on local property values." Stahl, *supra* note 122, at 948.

expected to be able to control the design of his neighbor's house. The owner of that same High Tudor home in the year 2015 will have different expectations.[168]

Indeed, more than one legal scholar has advocated adopting a regulatory mechanism that will allow homeowners who live in older neighborhoods to provide services and to control their neighbors' use of property in a way that is more typical of CC&R-encumbered suburban subdivisions.[169] Imposing CC&Rs on a mature neighborhood, where properties have already been developed and ownership has been conveyed to multiple individual homeowners, would require each individual property owner to consent to these new encumbrances on title. CC&Rs might result in a net benefit to the neighborhood. But each individual homeowner will have different preferences. A homeowner who does not value the predominant architectural style or who would prefer, for example, not to be required to remove an inoperable automobile from her front yard, will refuse to impose CC&Rs on her property. Alternatively, quite sensibly, she will require compensation for relinquishing rights to control her property. In such cases, the majority of neighbors can bypass the unanimity requirement and the demand for compensation from otherwise unwilling neighbors by proposing that their locality (or sublocality) adopt land-use regulations that mimic CC&Rs.[170] The proliferation of neighborhood conservation districts in older communities is a response to the proliferation of CC&Rs in newly developed communities.[171]

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168. The notion that the desire to control one's neighbor's architectural and aesthetic choices is a modern one is not uncontested. One neighbor testified before the Noank Zoning Commission, which was acting in its capacity as a sublocal design-review board,

> I would propose that you only have to look as far as New England literature of the 18th and 19th Century, starting with the *Scarlet Letter*, which everybody read in tenth grade, to understand that though they were not written laws, there were certainly social strictures, there were social behaviors—this is the land of shunning and social regulation on what people would build, what people would wear.

Application of Thomas and Elizabeth Halsey for a Certificate of Design Appropriateness To Construct a New Single Family Dwelling at 28 Potter Court, at 30 (Noank Fire Dist. Zoning Comm'n July 17, 2012). Perhaps the desire is not a modern invention, but the use of regulations and public law to effectuate that desire certainly is.

169. *See, e.g.*, ROBERT H. NELSON, PRIVATE NEIGHBORHOODS AND THE TRANSFORMATION OF LOCAL GOVERNMENT 4 (2005); Robert C. Ellickson, *New Institutions for Old Neighborhoods*, 48 DUKE L.J. 75 (1998); Fischel, *supra* note 10; Stahl, *supra* note 122, at 949–50 (arguing in favor of sublocal zoning regulations); Wiseman, *supra* note 10, at 702 ("Several scholars have accordingly suggested that public communities should be able to form their own private homeowners' associations and covenants."). The sources cited by Wiseman generally advocate for creation of sublocal institutions that provide services, however, rather than regulate land use.

170. *See* Fischel, *supra* note 10, at 342–49; Wiseman *supra* note 10, at 732.

171. *See, e.g.*, *Johnston*, 320 S.W.3d at 304; TOWN OF CHAPEL HILL, NORTH CAROLINA, FREQUENTLY ASKED QUESTIONS ABOUT NEIGHBORHOOD CONSERVATION DISTRICTS, *available at* http://www.townofchapelhill.org/home/showdocument?id=755 (comparing neighborhood conservation districts to restrictive covenants); Rob Warren, *Urbana City Council Discusses Tax Rate, Neighborhood Plan*, DAILY ILLINI (Oct. 24, 2006, 12:00 AM), http://www.dailyillini.com/news/article_a2680e69-4314-5579-8287-0bdd6423d9ed.html (quoting city council member decrying similarity between proposed conservation district plan and "the restrictive covenant of sub-divisions").

That newer residential neighborhoods are already encumbered by homeowners' association rules requiring design review may explain why neighborhood conservation districts are typically found in older residential neighborhoods.[172] There is, perhaps, another reason why this particular regulatory tool has gained a foothold in urban areas and streetcar suburbs, relatively dense residential communities developed beginning in the late nineteenth century around public transportation infrastructure.[173] Older neighborhoods face growing development pressures as they become increasingly desirable to families and empty nesters seeking walkable neighborhoods proximate to downtown commercial districts, public transit, and—in some towns—colleges and universities.[174]

The United States is now experiencing a shift in market demand for housing.[175] After decades of "white flight" and decreasing population in center cities, middle-class people and families are returning to urban neighborhoods.[176] Automobile usage, measured in number of cars owned per capita and vehicle miles traveled per capita, is in decline as people choose to live closer to their jobs or close to transit.[177] Pedestrian-friendly neighborhoods are in vogue, with brokers touting a

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172. Even homeowners in subdivisions encumbered by restrictive covenants may seek to adopt neighborhood conservation districts if they are dissatisfied with the protections offered by the restrictive covenants. For example, restrictive covenants must be enforced privately, in litigation initiated by neighbors or homeowners' associations. Neighborhood conservation districts are instead enforced by a local government, even where administration may be sublocal. *See infra* note 238 and accompanying text. As neighborhood conservation districts continue to proliferate, it is likely that they will become more common in newer suburban subdivisions that are also encumbered by restrictive covenants. This phenomenon will echo the evolution of zoning at the beginning of the last century. Fischel points out that early twentieth century suburbs utilized both early zoning ordinances and restrictive covenants to prioritize the development of owner-occupied single-family homes. William A. Fischel, *An Economic History of Zoning and a Cure for Its Exclusionary Effects*, 41 URB. STUD. 317, 325 (2004) ("[T]here is evidence that covenants and zoning developed side-by-side. . . . Even where they are comprehensive, covenants may not convey enough control over development to satisfy its residents.").

173. *See* DOLORES HAYDEN, BUILDING SUBURBIA: GREEN FIELDS AND URBAN GROWTH, 1820–2000, at 71–96 (2003); KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 20–44 (1985).

174. *See* Eric Jaffe, *The Suburbs are Dead, Long Live the Suburbs*, ATLANTIC CITYLAB (Aug. 27, 2013), http://www.theatlanticcities.com/housing/2013/08/suburbs-are-dead-long-live-suburbs/6680/. Jed Kolko, chief economist at Trulia, a real-estate website, recently observed that price gains on the website in 2013 were stronger in urban neighborhoods. Jed Kolko, *Home Prices Rising Faster in Cities Than in the Suburbs—Most of All in Gayborhoods*, TRULIA TRENDS (June 25, 2013), http://trends.truliablog.com/2013/06/home-prices-rising-faster-in-cities/.

175. ELLICKSON ET AL., *supra* note 14, at 4 ("[H]ouseholds are locating in larger cities at an increasing rate . . . although the majority of the population in urbanized areas lives in the suburbs, in recent decades, the central city has seen small relative gains.").

176. *Id.*

177. *See, e.g.*, Emily Badger, *America's Driving Less, and This Evidence Suggests It's Not About the Economy*, ATLANTIC CITYLAB (Aug. 29, 2013), http://www.theatlanticcities.com/commute/2013/08/americas-driving-less-and-evidence-suggests-it-cant-be-just-about-economy/6706/ (citing U.S. PUB. INTEREST RESEARCH GRP., MOVING OFF THE ROAD: A STATE-BY-STATE

home's "walk score" alongside granite countertops, en suite baths, and the local school district's test scores in real-estate listings.[178] The development pressures building in urban residential neighborhoods and old streetcar suburbs manifest in two ways. First, developers seek to build rental apartments, marketed to young professionals and college students, in neighborhoods that previously were dominated by single-family residences.[179] Second, individuals and families want larger homes with the amenities that are typical in contemporary suburban subdivisions, in walkable places, close to downtown districts and transit. In order to procure that combination of amenities, homeowners and developers purchase lots with smaller homes, typical of the times in which they were constructed, and either alter the existing houses or replace them with larger structures.[180]

Conflict arises when existing homeowners, fearing change, resist new development. Advocates of neighborhood conservation districts suffer from a Goldilocks syndrome. Rental units are too small, resulting in too many units per acre. McMansions[181] are too big, resulting in too much built square footage per acre. The existing single-family homes are just right. The result is that existing homeowners embrace land-use regulations that are derived from the existing architectural context. Resisting development pressures is evident in various materials advocating the adoption of neighborhood conservation districts.[182] For example, a commission established by Cambridge to evaluate a new neighborhood conservation district celebrates the role the design overlay played to disrupt development and

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ANALYSIS OF THE NATIONAL DECLINE IN DRIVING (2013), *available at* http://www.uspirg.org/sites/pirg/files/reports/Moving_Off_the_Road_USPIRG.pdf); Emily Badger, *Yet More Evidence of Peak Car*, ATLANTIC CITYLAB (July 23, 2013), http://www.theatlanticcities.com/commute/2013/07/yet-more-evidence-peak-car/6299/ (citing MICHAEL SIVAK, UNIV. OF MICH. TRANSP. RESEARCH INST., HAS MOTORIZATION IN THE U.S. PEAKED? PART 2: USE OF LIGHT-DUTY VEHICLES (2013), *available at* http://deepblue.lib.umich.edu/bitstream/handle/2027.42/98982/102950.pdf).

178. *See, e.g.*, LOUISE KEELY, BART VAN ARK, GAD LEVANON & JEREMY BURBANK, DEMAND INST., THE SHIFTING NATURE OF U.S. HOUSING DEMAND 25–26 (2012), *available at* http://www.demandinstitute.org/sites/default/files/blog-uploads/tdihousingdemand.pdf ("[A] trend toward accessible locations, reflecting householders' preference for living in areas where they can walk to local stores and other amenities, makes certain urban areas more attractive than the suburbs and rural areas.").

179. *See, e.g.*, Jenny Surane, *Chapel Hill Works To Increase Affordable Rental Housing*, DAILY TAR HEEL (Aug. 26, 2013, 6:31 PM), http://www.dailytarheel.com/article/2013/08/affordable-rental-0827 (quoting local housing advocate who argued that "the problem with the availability in affordable rental housing for Chapel Hill's workforce began when students moved into low-income neighborhoods throughout the town and rented homes originally slated as single-family units").

180. *See* Adrian Scott Fine & Jim Lindberg, *Taming the Teardown Trend*, F. NEWS (Nat'l Trust for Historic Pres., Wash., D.C.), July–Aug. 2002, *available at* http://www.preservationnation.org/information-center/sustainable-communities/creating/teardowns/teardowns_executive_summary.pdf.

181. For a discussion of McMansions, see *infra* notes 202–11 and accompanying text.

182. *See, e.g.*, MILLER, *supra* note 45, at 2 ("[N]eighborhood conservation districts provide a means to protect character-defining streetscapes in older areas threatened by new development . . . .").

redevelopment attempts in a nearby neighborhood: "In 1984, [the Half Crown area] *was secured against further development* when the City Council designated it as the Half Crown Neighborhood Conservation District."[183] A study considering adoption of a neighborhood conservation district in a small town in the heart of North Carolina's growing Research Triangle is explicit in its fear of development pressures: "[I]t is evident that the Town of Hillsborough will have to take action to *prevent neighborhoods from being overrun by developers*, ensuring that development projects are within the scale or nature of the existing homes."[184] A memorandum from Chapel Hill Town Manager Cal Horton, responding to a neighborhood petition to adopt a conservation district, stated, "It is reasonable to believe that the physical and social fabric of the Greenwood [neighborhood] is being affected by infill development pressures, [and] *the character of the neighborhood could be eroded by subdivision and new development* which is unsympathetic to the existing neighborhood in form, massing and scale."[185] In Raleigh, North Carolina, a single-family neighborhood zoned for high-density residential development adopted a conservation district to prevent developers from constructing the sort of high-density residential development permitted by the zoning ordinance.[186]

Existing residents have long feared the development of rental housing.[187] The bias against rental housing is evident in the rhetoric of neighborhood conservation-district

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183. HALF CROWN-MARSH NEIGHBORHOOD CONSERVATION DIST. CONSOLIDATION STUDY COMM., *supra* note 136, at 12 (emphasis added).

184. Hilary Schoendorf, A Closer Look at Neighborhood Conservation Districts: West Hillsborough Neighborhood, NC 7 (Apr. 13, 2007) (unpublished Master's paper) (emphasis added), *available at* https://cdr.lib.unc.edu/record;jsessionid=0142327F050AE462337D6E782236784C?id=uuid%3A5032e816-4bbb-445c-a3d0-4c6bd81eb14f.

185. Rob Shapard, *Greenwood Residents Fight Splitting of Lots*, HERALD-SUN (Durham, N.C.), Apr. 15, 2005, at 1 (alterations in original) (emphasis added), *available at* 2005 WLNR 6815119.

186. Lovelady, *supra* note 10, at 166–67; *see also* Elizabeth Sappenfield, *Dealing With Development Pressure: Preservation Strategies for Desirable Neighborhoods*, PRESERVATION N.C. (2008), http://web.archive.org/web/20090618142746/http://www.presnc.org/Features/Dealing-with-Development-Pressure ("Recently the City of Raleigh Planning Department conducted a survey of the best management practices for protecting neighborhood character and concluded that rezoning, neighborhood conservation districts, and local historic districts are at the top of the list.").

187. Conventional zoning's distaste for apartment buildings dates back to the first zoning ordinances adopted in the United States. Despite the fact that restrictions on apartment buildings were not at issue in the Supreme Court's seminal zoning case, the Court nevertheless seized the opportunity to denounce the development of apartment buildings in single-family residential neighborhoods and, in an oft-cited diatribe against dense housing, the Court worried that allowing even a single apartment building could act as a "parasite" and do irreversible damage to a previously bucolic suburban setting. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 394–95 (1926). In fact, Fischel argues that "[t]he attraction of city-wide zoning was the security it gave to early 20th-century home-builders and home-owners [that] [o]nce zoning was adopted, they were no longer completely uncertain whether the nearby tract of undeveloped land or land ripe for redevelopment would be put for some use that was incompatible with their own." Fischel, *supra* note 172, at 318. While Fischel recognizes the role that apartment buildings and rental housing played in the ubiquitous adoption of zoning codes in municipalities across the country, he does not question the underlying assumption

advocates. Newspaper accounts and public-hearing testimony provide plentiful examples of conservation-district advocates expressing concern that single-family lots will be subdivided into two or more lots,[188] single-family homes will be turned into multifamily dwellings,[189] and existing homes will be razed and replaced with high-density development.[190] As one proponent of neighborhood conservation districts in Cambridge, Maryland, wrote in his local newspaper, "The residents in the [neighborhood conservation] district have worked very hard over the past 20 years to promote single family home ownership. This encourages property owners to live in and improve their properties. To allow apartment conversions would be a big step backward for the [neighborhood conservation] district."[191] Homeowners fear that renters will not invest in the neighborhood as homeowners would. One Chapel Hill advocate told a local newspaper, "It's important to take that distinction [between a short-term student renter and a long-term neighborhood resident] into account when looking at the issue. . . . My interest is in listening to the people who've invested in the community for decades."[192] Oftentimes, apartment-style condominiums are as troubling to existing homeowners as rental housing is.[193] Homeowners are concerned that apartment dwellers will not invest in their neighborhoods[194] and that the density of new housing threatens the "feel" of a neighborhood.[195] One neighborhood in

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that single-family houses and apartment buildings are "incompatible." *Id.*

188. *See, e.g.*, Matt Dees, *Resident's Plans Divide Historic Neighborhood*, NEWS & OBSERVER (Raleigh, N.C.), Apr. 19, 2005, at B1 ("The proposed rezoning would prevent the type of 'minor subdivision' for which [one local developer] has applied."); Joe Schwartz, *Freeze in Chapel Hill Halts Development*, INDEP. WEEKLY (Durham, N.C.), June 22, 2011, at 5, *available at* 2011 WLNR 13073237; Shapard, *supra* note 185 ("Greenwood residents started organizing [in support of a conservation district] in earnest this year in reaction to a building company's plans to tear down a home at 907 Greenwood Road and divide the lot into two for new homes.").

189. *See, e.g.*, Eric Damian Kelly, Neighborhood Integrity and Rental Housing, College Station Texas: Consultant's Synthesis of Issues from Meetings 2 (Feb. 4, 2008) (unpublished manuscript), *available at* http://www.cstx.gov/Modules/ShowDocument.aspx?documentid=3963 ("Most who spoke appeared to accept the concepts of neighborhood petitions and some degree of neighborhood self-determination, policies that underlie the City's new Neighborhood Conservation District; many seemed to believe that the Neighborhood Conservation process could be expanded to include limitations on future rental housing.").

190. *See, e.g.*, Mark Schultz & Meiling Arounnarath, *Glen Lennox Wants Meeting*, CHAPEL HILL NEWS (Raleigh, N.C.), June 11, 2008, at A1 ("Previous requests for NCDs have sought protections against long-term trends—duplexes, teardowns, tree clearing . . . .").

191. Ron Berman, *Reaction to Cambridge's Comprehensive Rezoning Proposal*, BANNER (Cambridge, Md.), Aug. 7, 2013, at 5, *available at* 2013 WLNR 19481399.

192. Katelyn Ferral, *Rules Target Student Rentals—Coalition Wants To Limit Temporary Residents in Pine Knolls, Northside*, CHAPEL HILL NEWS (Raleigh, N.C.), Nov. 9, 2011, at 1A.

193. *See, e.g.*, MILLER, *supra* note 45, at 2, 12 (discussing Annapolis conservation district intended to prevent construction of waterfront condominiums); Joe Schwartz, *A Delicate Balance*, INDEP. WEEKLY (Durham, N.C.), June 16, 2010, at 16, *available at* 2010 WLNR 13214345.

194. *See, e.g.*, Schwartz, *supra* note 188.

195. *See* Schwartz, *supra* note 193 ("We're not fighting the students [who make up the majority of renters], what we're fighting for is preservation of our neighborhood. . . . We're trying to keep that feel, and [tightening conservation-district regulations] is the only way we

Minneapolis considered adoption of neighborhood conservation regulations when "land occupied by older workers' homes was recently rezoned to allow multi-story, mixed-use residential buildings, potentially threatening these smaller dwellings."[196]

McMansions are a newer form of a supposed nuisance.[197] When property theorists analyze the impact that a person's use of land has on his or her neighbors, they typically consider nuisances and noxious uses that impose identifiable economic externalities.[198] Manufacturing facilities that emit pollutants and attract heavy trucks, office complexes that cause rush-hour traffic jams, and even apartment buildings that unleash the horrors described in detail by Justice Sutherland in *Euclid* are common examples.[199] The assumption that rental buildings, whether duplexes or high-rises, compromise the quality of life in single-family neighborhoods is not new. It has persisted for at least a century.[200] In fact, Fischel traces the history of zoning in the United States and concludes that local

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know how."); *see also* Latifi, *supra* note 32 (quoting an observer of a battle between a developer and local residents as commenting that the developer may have "underestimated the community's psychological ownership" of an area).

196. MCCLURG, *supra* note 36, at 33.

197. The term McMansion typically refers to homes that are large by historic standards and are located on suburban-sized lots, a half-acre or more, far from center cities. In the context of neighborhood conservation districts, however, the term McMansion takes on a slightly different meaning. Neighborhood conservation districts are not designed to address homogenous subdivisions consisting of large homes on suburban lots, a phenomenon commonly known as sprawl. Instead, they are designed to address teardowns and "mansionization."

"[M]ansionization is formally defined as 'replacing (or constructing additions to) smaller dwellings within established neighborhoods with significantly larger homes,' and is synonymous with residential infill development." INSTITUTE FOR REGIONAL EXCELLENCE, METRO. WASH. COUNCIL OF GOV'TS, WHAT TO DO ABOUT . . . MANSIONIZATION . . . ENCOURAGE, PROHIBIT OR SIMPLY MANAGE? COMMUNITY IMPACTS & POLICY ALTERNATIVES 2 (2006), *quoted in* Paul J. Weinberg, *Mansionization and Its Ordinances: How's That Working Out for You?*, ZONING & PLAN. L. REP., Feb. 2013, at 1, 2. Infill development is new construction that typically increases density or changes existing land-use patterns after an area is initially developed. Conservation districts provide a mechanism for residents to stymie their neighbors' efforts to maximize the square footage of existing homes. While regulations resisting mansionization are new, complaints about mansionization are not. Henry James, for example, famously decried the demolition of his childhood home just north of Washington Square to make way for "marble mansions and baroque ornamentation." PAGE, *supra* note 97, at 41.

198. *See* Gideon Parchomovsky & Peter Siegelman, *Cities, Property, and Positive Externalities*, 54 WM. & MARY L. REV. 211, 222–23 (2012) (summarizing major contributions to the development of property-law theory on negative externalities, illustrated by all of the described theorists through examples of individual property owners polluting the natural environment).

199. *See supra* note 187 and accompanying text.

200. *See supra* note 187 and accompanying text. In recent years, that assumption has faced serious scrutiny by planners, particularly those who ascribe to the New Urbanism. The original Awahnee Principles that are the foundation of the New Urbanist movement provide that "[a] community should contain *a diversity of housing types* to enable citizens from a wide range of economic levels and age groups to live within its boundaries." LOCAL GOV'T COMM'N, THE AHWAHNEE PRINCIPLES FOR RESOURCE-EFFICIENT COMMUNITIES 2 (1991) (emphasis added).

zoning has always been motivated by the desire to protect the value of single-family homes in residential areas.[201]

The pejorative term "McMansion" first appeared in common usage in the 1980s[202] but its use "was limited prior to 2000."[203] The harms allegedly imposed by McMansions are myriad. They include increased housing prices,[204] suburban sprawl,[205] and—of particular note here—aesthetic affronts.[206] Where a McMansion replaces an older, smaller home, preservationists and neighbors take particular umbrage because the new structure undermines expectations of nearby homeowners. As early as 1999, one observer noted that "battles [against the construction of McMansions] are ongoing across the country as stock market money pours into trophy homes."[207] The proliferation of neighborhood conservation districts in the 1990s and the first few years of the twenty-first century coincided with rising concerns in commentary and academia regarding McMansions.

As with rental housing, the evidence that conservation-district advocates are motivated by distaste for McMansions is plentiful. In the case of McMansions, advocates decry additions "that are not in harmony with the surrounding area"[208] and the razing of existing single-family homes to make way for larger homes. In Wellesley, Massachusetts, advocates argued for adoption of a neighborhood conservation ordinance by citing recent "out-of-scale" development.[209] In Edina, Minnesota, the

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201. Fischel, *supra* note 172.

202. Nate Berg, *The Wildly Variable Definition of 'McMansion,'* ATLANTIC CITYLAB (Apr. 20, 2012), http://www.theatlanticcities.com/housing/2012/04/does-word-mcmansion-actually-mean-anything/1813/.

203. Miller, *supra* note 157, at 1095. Miller identifies four common definitions for the term McMansion: "a large home, a home that is large compared to others, a home lacking architecturally or in its design, and a symbol for other concepts such as sprawl and excessive consumption." *Id.* at 1099.

204. Catherine Durkin, Comment, *The Exclusionary Effect of "Mansionization": Area Variances Undermine Efforts To Achieve Housing Affordability*, 55 CATH. U. L. REV. 439, 439–41 (2006). While the resistance to McMansions might suggest that conservation districts are not motivated by desires to preserve property values, the rhetoric is not quite so clear. Some advocates of conservation districts argue, for example, that McMansions *decrease* the value of existing homes by reducing that value to "lot value." These advocates argue that prohibiting McMansions will, as a result, preserve or increase home values. *See, e.g.*, *Frequently Asked Questions*, BELMONT ADDITION CONSERVATION DISTRICT, http://belmontconservation.com/ordinance-and-forms/frequently-asked-questions/.

205. Tamara Mullen, Comment, *The McMansion: Architecture's Role in Facilitating Urban Sprawl and Farmland Loss*, 12 DRAKE J. AGRIC. L. 255, 257–59 (2007).

206. LEIGH GALLAGHER, THE END OF THE SUBURBS: WHERE THE AMERICAN DREAM IS MOVING 69 (2013) (quoting the *Oxford English Dictionary*'s definition of McMansion, "a large modern house that is considered ostentatious and lacking in architectural integrity").

207. Dwight H. Merriam, *The 1999 ZiPLeRs: The Fifth Annual* Zoning and Planning Law Report *Land Use Decision Awards*, ZONING & PLAN. L. REP., Feb. 2000, at 9, 15 (noting a homeowners' association's attempt to block construction of a "15,000 square-foot cottage").

208. Daniel Goldberg, *Coker Hills District Wins OK—The Neighborhood Conservation Rules Will Take Affect Jan. 1*, HERALD-SUN (Durham, N.C.), Oct. 9, 2007, at 1 ("Supporters [of adopting a conservation district] have said that the new rules will guard against people subdividing larger lots and constructing additions that are not in harmony with the surrounding area.").

209. Lisa Keen, *Voters Approve Districts To Help Limit McMansions*, BOS. GLOBE, May

Edina Massing Task Force recommended neighborhood conservation districts to combat "massing," a synonym for "mansionization."[210] In San Antonio, residents considered adoption of a neighborhood conservation district to address the possibility that "[s]ome guy decides to build a two-story brick McMansion with a silly two-story arched entry right next to the two-car garage" in "a neighborhood of low-slung, wooden bungalows with shady wrap-around porches and detached garages."[211]

The desire to prevent mansionization and exclude rental housing is not just evident in advocacy materials. It also manifests in conservation-district regulations. Guidelines applicable to the Hillsboro-West End district in Nashville require new buildings to be "compatible, by not contrasting greatly, with those of surrounding historic buildings" with respect to height, scale, materials, texture, details, material color, and roof shape.[212] Notably, new construction must be compatible with "historic buildings," not with other new buildings, without regard to whether new construction or historic buildings are prevalent on a given block or in a given neighborhood. In addition, the regulations permit demolition only where a building "has irretrievably lost its architectural and historical integrity," the building does not contribute to the local character, or the inability to demolish a building "will result in an economic hardship on the applicant."[213] In the case of rental housing, while some districts take care to ensure that design guidelines themselves do not impact use, others expressly limit any increase in the amount of rental housing. For example, in Nashville's conservation districts, property owners cannot build accessory units on single-family lots unless they record a restrictive covenant that requires the homeowner to live in either the original single-family home or the accessory unit.[214] For all eternity, the property owner cannot simultaneously rent out both the original home and the accessory unit; only one of the two units can be rented to another party. In Chapel Hill, neighborhood conservation-district regulations limit bedroom-to-bathroom ratios on the assumption that developers of rental housing and their tenants will want more bathrooms per bedroom than owner-occupants would normally require. In addition, two Chapel Hill neighborhood conservation districts prohibit homes occupied by unrelated persons from having more than two bedrooms.[215] Those same conservation districts ban the construction of new duplexes, though, in 2011, town planners "acknowledged creating the [conservation] district had failed to stop student-rental

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6, 2007, at 3, *available at* 2007 WLNR 8775763.

210. Adam Johnson, *Minnetonka Could Become First MN City To Implement So-Called "McMansion Policy,"* FIN. & COM. (Minneapolis, Minn.), Aug. 29, 2006, *available at* 2006 WLNR 27176787.

211. Mike Greenberg, *Design Rules Could Match Neighborhood*, SAN ANTONIO EXPRESS-NEWS, Nov. 24, 2000, at 01B, *available at* 2000 WLNR 9685253.

212. METRO. HISTORIC ZONING COMM'N, METRO. GOV'T OF NASHVILLE & DAVIDSON CNTY., HILLSBORO-WEST END NEIGHBORHOOD CONSERVATION ZONING 13–14 (rev. ed. 2012), *available at* http://www.nashville.gov/Portals/0/SiteContent/MHZC/docs/Preservation%20Permits/Maps%20and%20Guidelines/HWE2012.pdf.

213. *Id.* at 21.

214. *See* NASHVILLE & DAVIDSON CNTY., TENN., CODE OF ORDINANCES § 17.16.030(F)(10) (Supp. 2014).

215. Ray Gronberg, *Bill Targets Neighborhood-Protection Zones*, HERALD-SUN (Durham, N.C.), Mar. 17, 2013, at A1, *available at* 2013 WLNR 6629454; Schwartz, *supra* note 188.

conversions."[216] Whether a unit is occupied by its owner or is rented is not typically in the province of zoning regulations, because it does not impact the use of the land. But much of the rhetoric supporting conservation districts involves encouraging home ownership, without regard to design or land use.[217]

Conservation-district regulations allow homeowners to resist market forces towards higher density uses, whether those uses are multifamily rentals or large, single-family homes. As a result, they artificially depress supply—a regulatory impact that merits serious critical analysis, an analysis undertaken in Parts III and IV of this Article.

III. THE PROBLEM WITH AESTHETICS: HAZARDS OF SUBLOCAL CONTEXTUAL REGULATIONS

As described in Part II of this Article, the recent proliferation of conservation districts is a response by homeowners to development pressures. Current residents seek to freeze or depress housing supply, thus excluding potential future residents. Advocates argue that neighborhood conservation districts advance cultural stability and that requiring aesthetic regulations to be grounded in context creates an objective standard by which to measure aesthetics. In fact, as this Part argues, grounding aesthetic regulations in existing architectural context exacerbates, rather than mitigates, certain exclusionary and inefficient impacts.[218] Addressing those negative impacts—decreased affordability, increased exclusivity, and information asymmetries—should inform any future legislative and regulatory land-use action that incorporates aesthetics.

A. The Affordability Conundrum

The evolution of land uses, which—as described in Part II—occurred so visibly in New York City,[219] takes place in cities and suburbs everywhere. Cities are in a moment of transition, in which older residential neighborhoods are increasingly

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216. Ferral, *supra* note 192.

217. *See* Fischel, *supra* note 172, at 332.

218. Asking whether neighborhood conservation districts are efficient is really asking two different questions. First, do these districts effectively and without unnecessarily wasting resources meet their own stated goal—to protect and conserve existing neighborhoods? Conservation districts vary in this regard, and it is difficult to generalize across districts. Chapel Hill's first neighborhood conservation district, for the Northside neighborhood, was adopted in February 2004. *See* CHAPEL HILL TOWN COUNCIL, NORTHSIDE NEIGHBORHOOD CONSERVATION DISTRICT PLAN (2004), *available at* http://www.townofchapelhill.org/home/showdocument?id=12179. Six years later, however, the local planning board and neighborhood residents presented a petition to the city council protesting that the conservation district was ineffective at stemming development pressures in the neighborhood. TOWN OF CHAPEL HILL, NORTHSIDE AND PINE KNOLLS COMMUNITY PLAN 7 (2012), *available at* http://www.townofchapelhill.org/home/showdocument?id=11921.

Second, do these districts result in or exacerbate inefficiencies in the housing market? Given conservation districts' shared characteristics, as described in Part II, *supra*, it is possible to draw some conclusions about this second question.

219. *See supra* notes 99–105 and accompanying text.

desirable.[220] The supply of old, walkable neighborhoods close to fixed amenities is necessarily constrained. As a result, as urban residential neighborhoods become more desirable, they also become more expensive.

Many advocates of conservation districts argue that designation of a conservation district preserves affordability.[221] They argue that designation prevents new homeowners from tearing down smaller existing structures and replacing them with larger, presumably more expensive, structures.[222] And they argue that because designation prevents properties from being used for denser purposes, it preserves affordability.[223] As the argument goes, a one-half acre lot with a single-family house would be more valuable if it were redeveloped as a larger single-family house or if it were redeveloped to accommodate additional units. A regulatory cap on the size of the house or the number of units will prevent a property's value from escalating to reflect the denser potential use.

But there is more to the affordability story. The attempt to preserve affordability by restricting denser uses ignores the impact that artificial restrictions on supply will have on price.[224] If demand for urban-neighborhood housing is increasing and there is a limited supply of land that is proximate to central business districts and transit, coupled with regulatory constraints on the ability to develop and redevelop that land, prices will increase. Under those circumstances, a decrease in affordability is inevitable.[225] Neighborhood conservation districts suggest an intralocal version of a national problem, a spatial mismatch between housing demand and supply. Scholars and popular commentators have bemoaned the effect that restrictive land-use

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220. *See supra* notes 175–80 and accompanying text.

221. *See, e.g.*, CHAPEL HILL, N.C., CODE OF ORDINANCES app. A § 3.6.5 (including the promotion and retention of affordable housing as one purpose for the creation of neighborhood conservation districts), *reprinted in Sample Conservation District Ordinance Provisions*, 21 PRESERVATION L. REP. 1059, 1078 (2002–03); SAN ANTONIO, TEX., UNIFIED DEVELOPMENT CODE § 35-335 (Supp. 2014) (including promotion and retention of affordable housing as a goal of neighborhood conservation districts); *see also infra* note 232.

222. *See* Malachi Reid Peacock, Neighborhood Conservation Districts and Their Relevance to Historic Preservation in the 21st Century 12 (2009) (unpublished Master's thesis), *available at* https://getd.libs.uga.edu/pdfs/peacock_malachi_r_200908_mhp.pdf ("Affordable housing and property values are protected by neighborhood conservation districts because teardowns-to-McMansions are not permitted to gentrify neighborhoods and negatively influence the property values of existing residents.").

223. *Cf.* Schoendorf, *supra* note 184, at 57 ("Without any protective mechanism in place, West Hillsborough may fall victim to large out of scale development . . . . [L]ow-income or fixed-income residents will be priced out, and the neighborhood will start to gentrify . . . . Consequently, Hillsborough's supply of affordable housing will be reduced.").

224. *See* Edward L. Glaeser & Joseph Gyourko, *The Impact of Building Restrictions on Housing Affordability*, FED. RES. BANK N.Y. ECON. POL. REV., June 2003, at 21 ("[H]ousing is expensive because of artificial limits on construction created by the regulation of new housing."); *see also* MATTHEW YGLESIAS, THE RENT IS TOO DAMN HIGH (2012).

225. As discussed in note 257, *infra*, preservation of property values is an oft-cited rationale for aesthetic land-use regulations. Given the impact that aesthetic regulations have on restricting supply, aesthetic land-use regulations preserve property values in part simply because they artificially restrict supply, thus inflating prices—not, as advocates often argue, because the regulations themselves add value.

regulations have on housing costs in high-demand regions of the country.[226] The perverse effect is that migration now flows to low-housing-cost, low-wage areas of the country.[227] This Article suggests, however, even within those low-housing-cost, low-wage regions, restrictive land-use regulations prevent supply from meeting demand in the most desirable locations.

In short, the places where neighborhood conservation districts are common are the same places where increasing the density of housing stock is an appropriate measure to meet housing demand in a sustainable manner. Freezing these neighborhoods in time will not put an end to demand for housing. It will simply force would-be residents to live elsewhere,[228] perhaps somewhere further from public transit and from employment opportunities, thus increasing commuting times along with the well-documented environmental impacts of sprawl.[229] This dislocation of housing demand has significant deleterious effects on the economy.[230] Those forced to live far from transit and job opportunities suffer financial consequences and decreased economic opportunity.[231]

In the absence of empirical research specifically demonstrating that conservation districts contribute to the lack of affordable housing in urban and suburban areas,

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226. *See, e.g.*, Edward L. Glaeser, Joseph Gyourko, & Raven E. Saks, *Why Have Housing Prices Gone Up?* (Nat'l Bureau of Econ. Research, Working Paper No. 11129, 2005); Matthew Yglesias, *Housing Affordability Is Blue America's Greatest Failing*, VOX (Dec. 15, 2014, 10:45 A.M.), http://www.vox.com/2014/8/28/6063679/the-biggest-thing-the-blue-states-are-screwing-up; *see also* John Mangin, *The New Exclusionary Zoning*, 25 STAN. L. & POL'Y REV. 91, 93 n.10 (2014) (collecting sources).

227. Mangin, *supra* note 226, at 93.

228. GLAESER, *supra* note 98, at 147 ("Indeed, opposing new building is the surest way to make a popular area unaffordable.").

229. *See generally* Samuel Brody, *The Characteristics, Causes, and Consequences of Sprawling Development Patterns in the United States*, 4 NATURE EDUC. KNOWLEDGE, no. 5, 2013, at 2, *available at* http://www.nature.com/scitable/knowledge/library/the-characteristics-causes-and-consequences-of-sprawling-103014747 ("[N]egative impacts include, among others, air pollution resulting from automobile dependency, water pollution caused in part by increases in impervious surfaces, the loss or disruption of environmentally sensitive areas . . . reductions in open space, increased flood risks, and overall reductions in quality of life.").

230. These effects occur on both the micro- and macroeconomic levels. *See* Schleicher, *supra* note 11, at 1692–93 (collecting sources).

231. *See, e.g.*, Paul Krugman, Op-Ed, *Stranded by Sprawl*, N.Y. TIMES, July 29, 2013, at A17 ("[D]isadvantaged workers often find themselves stranded; there may be jobs available somewhere, but they literally can't get there." (citing RAJ CHETTY, NATHANIEL HENDREN, PATRICK KLEIN & EMMANUEL SAEZ, THE EQUALITY OF OPPORTUNITY PROJECT (2013), *available at* http://obs.rc.fas.harvard.edu/chetty/website/IGE/Executive%20Summary.pdf)). The use of design regulations to exclusionary effect is not limited to the housing sphere. Beavercreek, Ohio, a suburb of Dayton, applied design criteria to refuse to install bus stops necessary to the introduction of regional bus service, which would allow Dayton residents access to a hospital, large shopping center, and employment in Beavercreek. Ultimately, advocates succeeded in forcing Beavercreek to accept bus service only by invoking Title VI of the Federal Civil Rights Act. *See* Anita Hairston, Transportation Equity: A Civil Rights Issue, Remarks for the Leadership Conference Education Fund (July 1, 2014), *transcript available at* http://equitycaucus.org/sites/default/files/Transript%20for%20TEC%20Jul%201%202014%20Webinar_1.pdf.

some might argue that it is premature to endeavor to solve this problem. But advocates of conservation districts routinely argue that these districts increase property values.[232] And, arguing by analogy, research demonstrates the impact of historic designation on housing prices.[233] Increasing property values for current residents necessarily increases housing prices, thus decreasing affordability for renters and for future residents. Certainly the impact of conservation-district adoption on housing prices is an area ripe for empirical analysis. But even in the absence of such empirical analysis, planners, policymakers, and residents should worry about housing-affordability issues.

Meeting demand for housing in cities and older suburbs and doing so in a way that is affordable will require those locations to evolve and adapt to accommodate different kinds of housing stock that respond to the desires of demographic populations that once spent decades depopulating urban centers. Neighborhood conservation districts commonly face strong development pressures. It should be no surprise that developers are attracted to these neighborhoods, which are close to universities, downtown areas, and other job centers. In addition, because these are older neighborhoods close to downtown urban areas, they are walkable and well served—relative to the broader regions in which they are located—by public transit.

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232. Advocates often argue that adoption of a neighborhood conservation district will increase property values. *See, e.g.*, Sappenfield, *supra* note 186 ("[I]t makes sense to protect your neighborhood character and, by doing so, protect your own property value."); Michael Benhaim, *Conservation District Not Right for Settlement Neighborhood*, WICKED LOCAL (Nov. 10, 2012, 10:14 A.M.), http://www.wickedlocal.com/brookline/news/x481717181/Column-Conservation-district-not-right-for-Settlement-neighborhood?zc_p=1 ("I have heard claims that this NCD will increase our property value, but have not seen any type of study or actual evidence of that."); *Frequently Asked Questions*, KESSLER NEIGHBORS UNITED, http://kesslerpark.org/about/conservationdistrict/cdfaq/ ("We believe that becoming a conservation district can protect and possibly increase property values."); Laura Ward, *The Lower Jefferson Conservation District*, UNIV. MO., http://web.missouri.edu/~wardla/lowerjeffersonconservationdistrict.html (last revised Aug. 9, 2009) ("A neighborhood conservation district helps a neighborhood . . . stabilize and improve property values . . . ."). The inherent contradiction apparent in much of conservation district advocacy—that conservation districts will simultaneously increase property values and increase affordability—is discussed in Part IV.A.3, *infra*.

233. *See, e.g.*, N.Y.C. INDEP. BUDGET OFFICE, THE IMPACT OF HISTORIC DISTRICTS ON RESIDENTIAL PROPERTY VALUES 8 (2003), *available at* http://www.ibo.nyc.ny.us/iboreports/HistoricDistricts03.pdf ("IBO found clear evidence that after controlling for property and neighborhood characteristics, market values of properties in historic districts were higher than those outside historic districts for every year in our study."); Robin M. Leichenko, N. Edward Coulson & David Listokin, *Historic Preservation and Residential Property Values: An Analysis of Texas Cities*, 38 URB. STUD. 1973, 1973 (2001) ("Results suggest that, in most cases, historic designation is associated with higher property values."); Dan S. Rickman, *Neighborhood Historic Preservation Status and Housing Values in Oklahoma County, Oklahoma*, 39 J. REGIONAL ANALYSIS & POL'Y 99, 99 (2009), *available at* http://ageconsearch.umn.edu/bitstream/132429/2/09-2-1.pdf ("Neighborhood historic designation is found to be associated with significant relative appreciation of housing values in most districts."); M. Keivan Deravi, Property Value Appreciation for Historic Districts in Alabama 1–7 (July 31, 2002) (unpublished report submitted to the Alabama Historical Commission summarizing literature assessing the impact of historical districts on property values).

Protecting those characteristics by limiting supply of a product in high demand diminishes, rather than promotes, affordability.[234]

B. The First-Equity Problem: Who Is the Community?

Sublocal governance structures prioritize the voice of those who live within or, in those cases where sublocal voice is limited to property owners, own property within the demarcated boundaries of the district. Other interests are diminished. As a result, any effects or impacts felt by renters, future housing consumers, and those who reside outside of the proposed district are ignored or discounted in the decision-making process.

1. Excluding Nonresidents

Sublocal administration allows those whose property values will be affected by the design guidelines to determine how vigilantly to apply them. At least one proponent of sublocal land-use control, building off of Fischel's work, argues that those most affected by their neighbors' land-use decisions will most efficiently exercise the power to control land use and, therefore, that zoning authority is properly exercised at the sublocal level, particularly in large cities.[235] Another purported benefit of sublocal administration is that a sublocal commission endowed with the authority to enforce a zoning ordinance can choose to enforce some measures vigorously while softening the impact of design guidelines considered harsh or costly.[236] When second-party enforcement takes place, it is nuanced in a way that is

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234. The lack of affordable housing in urban and suburban areas and the negative impacts resulting from that lack of housing are well-documented. *See, e.g.*, Gabriella Chiarenza, Fed. Reserve Bank of S.F., *Challenges for Affordable Housing in a New Era of Scarcity*, COMMUNITY INVESTMENTS, Spring 2013, at 3, 3–4 (collecting statistics demonstrating the current lack of affordable housing and projections of increased demand pressure in the future); Lance Freeman, *America's Affordable Housing Crisis: A Contract Unfulfilled*, 92 AM. J. PUB. HEALTH 709, 709 (2002) ("[I]n many expensive urban centers even used housing is beyond the means of many low-income households.").

235. Stahl, *supra* note 122, at 948–50 (advocating sublocal zoning but ignoring the history of neighborhood conservation districts); *see also* Stephen R. Miller, *Legal Neighborhoods*, 37 HARV. ENVTL. L. REV. 105, 149–52 (2013) (describing favorably rezoning processes that incorporate neighborhood-level input but omitting from discussion any reference to neighborhood conservation districts).

236. Tad Heuer, in an article on a historic district in New Haven, Connecticut, describes "second-party enforcement, defined for these purposes as the enforcement of communal standards by other members of the community, relying on the community's own internal social norms rather than on external 'third-party' enforcement by official governmental entities." Tad Heuer, *Living History: How Homeowners in a New Local Historic District Negotiate Their Legal Obligations*, 116 YALE L.J. 768, 802 (2007). "First-party enforcement" is self-enforcement, where property owners simply obey the strictures of the historic-district regulations. With respect to second-party enforcement, Heuer found that "all violations [are] not deemed to be equal." *Id.* at 803. In the words of one property owner, "I like the idea of the historic district a lot, but I do think that they need to be a bit more flexible on things like windows, particularly for some of the elderly on fixed incomes. Oil is becoming so expensive, and people really need to be able to save money on their fuel costs, and making sure you have

not necessarily consistent with the strictures of design-review requirements.[237] Extrapolating this research to the neighborhood conservation-district realm, one would expect both negative and positive effects. Sublocal administration might result in more nuanced decision making that incorporates neighborhood-level understandings of the cost of compliance and individual homeowners' relevant circumstances.[238] In addition, however, it might result in unpredictable decision making that incorporates neighborhood politics and relationships.

Advocates of sublocal control ignore spillover effects that impact areas outside of the relevant sublocality. Where there are spillover effects or externalities affecting areas outside of the district, sublocal designation and administration excludes a subset of affected persons from the decision-making process. Tiebout's model of efficient provision of local services assumes that there are no externalities imposed by local decisions.[239] This assumption, as Tiebout himself acknowledged, is just that—an assumption—and will prove incorrect under most real-world circumstances.[240] The decision to adopt a neighborhood conservation district will have impacts on other parts of a municipality. Following adoption of a neighborhood conservation district intended to resist development pressures, other nearby

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insulated windows is a big part of that." *Id.* at 804.

237. *Id.*; *cf.* Heather K. Gerken, *The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 28–33, 47 (2010) (arguing that substate and sublocal institutions can serve as vehicles for minority rule and promote democratic values by initiating dialogue with other institutions).

238. Alternatively, a neighborhood may choose to adopt a neighborhood conservation district because it prefers public-local—rather than private-sublocal—administration of design guidelines. In Coker Hills, a neighborhood in Chapel Hill, the local homeowners' association successfully advocated for adoption of a neighborhood conservation district to replicate the association's own design guidelines, embodied in a restrictive covenant. *See* TOWN OF CHAPEL HILL, COMPARISON OF NEIGHBORHOOD COVENANT RESTRICTIONS AND CURRENT ZONING REGULATIONS (2006). The homeowners' association had tired of the time, expense, and neighborhood discord borne of privately enforcing the restrictive covenant. The neighborhood conservation district provided a mechanism for imposing that cost and bad will on the municipality. Conservation-district advocates told the town council that they "merely want the covenant to be reflected in town law. This would shift enforcement responsibility to the town from the neighborhood association, whose only recourse is to sue an offending property owner." Matt Dees, *Zoning Rancor Saddens Council*, NEWS & OBSERVER (Raleigh, N.C.), May 16, 2006, at B1. Houston, Texas, will enforce violations of restrictive covenants. This use of public resources and authority to enforce private property interests and contracts replicates a kind of zoning authority despite the oft-cited claim that there is no zoning in Houston. Teddy M. Kapur, *Land Use Regulation in Houston Contradicts the City's Free Market Reputation*, 34 ENVTL. L. REP. 10045, 10050 (2004). It is far from clear why a municipality would willingly take on an assignment of responsibility to incur costs and bad will to enforce private contracts. This fact suggests that there is a vocal-minority, silent-majority problem here.

239. Because the model assumes that there are no externalities, the sorts of regional problems that would be best addressed at the national, state, or regional level are unaccounted for in the basic Tiebout model. Tiebout, *supra* note 123, at 419; *see also* Bratton & McCahery, *supra* note 126, at 231 ("The Tiebout model unrealistically assumes the absence of externalities.").

240. Tiebout, *supra* note 123, at 423.

neighborhoods may feel those pressures more strongly. If a developer can no longer build duplexes in North Neighborhood, he or she may seek out development opportunities in South Neighborhood. Briffault recognizes this issue and argues that it can be addressed so long as sublocal institutions "lack true autonomy" and cannot act without local approvals.[241]

Typically, sublocal approval is necessary but not sufficient for adoption of a neighborhood conservation district. In most municipalities, neighborhood conservation districts require a sublocal referendum, petition, or other expression of sublocal support but then are formally adopted at the local level.[242] The two-step approval mechanism requires the consent of both the local government, whether it acts through a town council or a planning commission, and a majority or supermajority of property owners or residents in the affected district.

If adoption of a neighborhood conservation district will impose negative externalities on other neighborhoods, the requirement that the locality also approve the district can limit those externalities. If a neighborhood conservation district takes on a problem that is better served at the local level, the local government can refuse to adopt or revise the terms of the neighborhood conservation district. The residents of South Neighborhood have no voice in the North Neighborhood referendum, but they can exercise their political voice against approval of the district at the local level.

The local government represents all of the residents in the municipality, not just the property owners in the proposed district. It must respond to a much broader array of interests than may be present in the limited area that makes up the proposed neighborhood conservation district. It also has the ability to set priorities, plan for accomplishment of those priorities, and fund its activities on a local, rather than sublocal, scale. Where a locality includes numerous neighborhoods with varying income levels, preferences, and infrastructure needs, citywide planning can result in a more efficient result. In a different context, Vicki Been has noted that "[a] jurisdiction-wide approach to the local government's needs is likely to be more comprehensive, better planned, and better integrated with the local government's other initiatives."[243]

As a result, the requirement that local adoption follow sublocal approval could, in theory, protect against the hazards that may be otherwise associated with sublocal governance. In practice, however, a review of neighborhood conservation districts

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241. Briffault, *supra* note 124, at 528.

242. This bifurcation of the adoption process may be in response to case law that suggests that pure assignment of zoning authority to a sublocal district would be an unconstitutional delegation of legislative authority. Washington *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928); Thomas Cusack Co. v. City of Chicago, 242 U.S. 526 (1917); Eubank v. City of Richmond, 226 U.S. 137 (1912); *see also* Stahl, *supra* note 122, at 957–62 (discussing the cases); Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145, 164–77 (1977–78) (reconciling the cases). The bifurcated process is also consistent with Briffault's description of sublocal institutions' operations. *See generally* Briffault, *supra* note 124.

243. Vicki Been, *Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exactions Theme?*, 77 U. CHI. L. REV. 5, 26 (2010) (comparing neighborhood-level planning to local planning in the context of neighborhood-level negotiation of community-benefits agreements).

nationwide has not revealed any instances of local denial following sublocal approval.[244] Because conservation-district regulations are perceived as burdens only on local property owners and because local property owners are often heavily invested in their neighborhood's character, local governments defer to the sublocal choice whether to adopt a neighborhood conservation district. In addition, advocates of neighborhood conservation districts are, as others have argued with respect to homeowners generally, a deeply vested interest group for whom political mobilization is facilitated by their geographic proximity to one another.[245] The residents outside the neighborhood conservation district who may suffer negative externalities are dispersed and more difficult to mobilize. They may not be aware of the negative impact that the district will have on them until after the district is adopted and those impacts are felt. As a result, the local check on sublocal governance is insufficient to protect those living outside of the district from the negative externalities resulting from creation of the neighborhood conservation district.

2. Excluding Renters

In addition to excluding nonresidents, conservation-district governance often also excludes renters.[246] In these districts, only property owners vote in the referenda necessary to adopt a neighborhood conservation district.[247] And only property owners are guaranteed seats on design-review boards.[248]

While developers might represent the interests of renters, sublocal governance, in effect, diminishes their voice. In large cities, the voice of each individual citizen is muted by the difficulties of deliberation and decision making by a large number of parties, spread out over a large area. When governance occurs at the county or state level or, in the case of large municipalities, at the local level, moneyed interests—including real-estate developers—play an outsized role. They are able to gather information, develop a coherent policy position, nurture relationships with decision

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244. *See, e.g.*, HENGEN & BALDWIN, *supra* note 116.

245. *See, e.g.*, Schleicher, *supra* note 11, at 1731.

246. While renters may not be represented during the sublocal approval process, they will be represented when citywide approval is considered. If, in practice, the local government simply defers to the sublocal decision to adopt a conservation district, then either (1) there is no local interest that is negatively affected by adoption of the district or (2) the local adoption process fails to account for negative impacts on the local community. The latter explanation is consistent with the homevoter hypothesis and newspaper accounts of conservation-district adoption. In addition, notably, where design-review commission members must be property owners—even if renters participate in the decision to adopt a conservation district—renters will be excluded from administration of that district.

247. *See, e.g.*, CHAPEL HILL, N.C., CODE OF ORDINANCES app. A § 3.6.5(c)(2)(A) (Supp. 2014) (empowering owners representing fifty-one percent of the land area within a district, or fifty-one percent of property owners, to initiate the process for a neighborhood conservation district by referenda).

248. *See, e.g.*, CAMBRIDGE, MASS., CODE OF ORDINANCES § 2.78.160(A) (Supp. 2012) (guaranteeing seats on neighborhood conservation district commissions to at least two homeowners and limiting representation of those who do not live within the district). The Cambridge ordinance also prioritizes homeowners over other property owners, such as landlords or owners of commercial properties.

makers, and exercise influence that exceeds their vote count in a direct democracy. This is borne out in the literature on the influence exerted by real-estate developers at different levels of government: "Because of their larger size, which makes it more difficult for voters to know candidates' positions, county governments were more often responsive to developer interests and thus were regarded as excessively permissive by owners of homes in existing neighbourhoods."[249] In contrast, "[t]he small size of local units makes it easier for citizens to voice their views to their local government and their fellow local citizens, to respond to each other's concerns, and to deliberate concerning important local public matters."[250] As a result, sublocal adoption and administration of neighborhood conservation districts, particularly in areas dominated by homeowners, amplifies homeowner voice relative to developers.

In limiting participation to property owners, neighborhood conservation districts are similar to another sublocal institution, the business improvement district.[251] Business improvement districts, commonly known as BIDs, limit participation to property owners because they impose costs on property owners, assessments that are used to provide public goods and services—everything from street cleaning to marketing and advertising a downtown commercial district. "Because BIDs are financed by taxes on property or businesses within the districts, most state laws condition the formation of a district on some proof that the property or business owners endorse the supplemental taxation."[252] While, as their name suggests, BIDs are commonly found in commercial districts, one influential scholar has advocated the adoption of an analogous institution, the Block Improvement District (BLID), in residential neighborhoods.[253] Arguing that small, block-level institutions will provide a rich opportunity for homeowners to engage in self-governance and to express their preferences for public goods, Robert Ellickson argues that BLIDs could replicate in urban neighborhoods the residential community associations that are common in suburban subdivisions.[254] His framework for BLIDs requires that governance be limited to property owners because the value of sublocal public goods is capitalized into the price of their homes.[255] Ellickson argues that because property owners incur the costs of providing public goods and also benefit from the increase in their property values resulting from those public goods, they are in the best position to make decisions regarding public goods.[256] Conservation districts, unlike BIDs or BLIDs, are regulatory structures, not taxing districts that burden only

249. Fischel, *supra* note 172, at 326.

250. Briffault, *supra* note 124, at 505.

251. *See id.* at 519–20.

252. *Id.* at 519.

253. Ellickson, *supra* note 169, at 77.

254. *Id.* at 81–82.

255. *Id.* at 92–93.

256. To the extent that costs are passed on to tenants in the form of increased rents, tenants may, in effect, incur these costs. They will not see a benefit in the form of enhanced property values. Whether any one tenant enjoys any benefits will depend on the nature of the service provided (does the tenant appreciate the increased service provision?) and his or her ability to relocate if he or she does not value the increased service provision in an amount equal to or greater than the increase in rent, thus allowing a renter who does value the increased service provision to occupy the unit.

property owners. Nevertheless, some conservation districts have imported BID rules that limit voting rights to property owners.[257]

Limiting "the community" to property owners in the proposed district comports with a property-value preservation approach to land-use planning.[258] But it is not consistent with the goal of advancing community-based decision making. Community preservation is not a value or interest unique to property owners. If hyperlocal voting on neighborhood conservation districts excludes renters, these referenda inefficiently gauge local support for these restrictions—and the utility to be gained or lost from their adoption—by omitting a group directly and indirectly affected by the decision to adopt aesthetic regulations.[259] And if aesthetic land-use regulations will increase rents by raising the cost of property maintenance or by raising property values, renters will have another reason to voice their opinion on adoption of neighborhood conservation districts. Then, even if the sole rationale for aesthetic land-use regulations is property-value preservation, it is inequitable and inefficient[260] to ignore the preferences of the renter population when deciding whether to adopt such regulations.

3. Excluding Future Housing Consumers

Always omitted from the concept of "the community" in these discussions are those who would like to live in a neighborhood but who do not yet live there, or "future housing consumers."[261] Zoning decisions—indeed, most policy making—often excludes the voices of future interests from consideration. But neighborhood conservation districts go a step further. By prioritizing consistency over all other policy goals, conservation districts not only exclude the voices of future housing consumers, they absolutely prohibit consideration of what future housing consumers' preferences might be.

Choices made today will affect development patterns and inform infrastructure investments that are not easily undone. Land-use planning requires investing in

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257. *See infra* Part IV.B.1.

258. That deploying land-use powers to increase property values, rather than to decrease rents, is a proper use of the police powers is widely accepted, though debatable. It is also a topic beyond the scope of this Article.

259. *See infra* Part IV.B.1.

260. The inefficiency results from a regulatory environment that prioritizes ever-escalating prices rather than providing an array of price points that represents the preferences of the full range of potential buyers. Because the supply of land is constrained and because housing, as a result of zoning and building codes, is a highly regulated market, there are many fewer entry-level units than there are potential entry-level buyers and renters.

261. Dallas restricts conservation districts to neighborhoods that are "stable." According to the Dallas code, "STABLE means that the area is expected to remain substantially the same over the next 20 years with continued maintenance of the property. While some changes in structures, land uses, and densities may occur, all such changes are expected to be compatible with surrounding development." DALL., TEX., CITY CODE § 51A-4.505(a)(8) (Supp. 2014). In this way, Dallas attempts to accommodate future housing consumers by limiting conservation districts to neighborhoods that are not experiencing significant change. The development pressures that provoke neighborhood activists to adopt conservation districts, however, suggest that the term "stable" is applied liberally.

long-term decisions. If an environmentally sensitive wetland is filled and then developed—whatever the impacts of that development may be in future years—it is nearly impossible to undo the land-use permissions that allowed that development to occur in the first instance. Similarly, if an area proximate to a transit station is developed with single-family homes on large lots, despite the fact that more people will have better access to transit if the area around the station is densely developed, infill development is difficult. Land-purchase coordination problems, limitations on existing infrastructure, and residents' settled expectations complicate efforts to densify an existing developed neighborhood. Land-use planning decisions are most efficient if they consider future needs. In the case of neighborhood conservation districts, the relevant future needs are the desires of those who would live in an area but do not yet live there, either because the current housing stock does not accommodate them or because they do not yet exist.

Future housing consumers are not easily identified. They do not vote in sublocal referenda, though, in the case of would-be residents, they may vote in local or statewide elections. A childless couple living in a downtown apartment may not be aware of their own interests (five years down the road) in affordable home-ownership opportunities in a residential neighborhood close to downtown. Future empty nesters may not be cognizant of their interest in the development of smaller homes in dense, walkable neighborhoods close to the suburban neighborhood where they raised their children. At the time a neighborhood conservation district is adopted, there are many who may be affected by the adoption of the district but who are unaware of the impact that that decision has on them.

Despite these impediments, divining future housing consumers' preferences is not impossible. Planners are trained to consider and incorporate estimates of future demand in crafting land-use regulations.[262] The needs of future housing consumers are expressed in the form of market demand, and real-estate developers act based on their perception of market demand. The developer, motivated by potential profits, may, in effect, give voice to would-be residents barred from the neighborhood by exclusionary zoning policies. If the developer, because he or she does not already own property in the neighborhood or is a minority stakeholder, is excluded from the decision whether to adopt a conservation district, the voices of future housing consumers are excluded. While developers may be excluded from sublocal decision making, they are not excluded from local- and state-level decision making,[263] though

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262. Typical required courses in graduate urban-planning programs include economic analysis and dynamic modeling.

263. Developers, acting in their own financial interest, can counteract sublocal land-use planning efforts by advocating for state and local restrictions on the exercise of sublocal authority. A hazard of overreaching aesthetic regulations is that those with an economic interest in unfettered development will react to the overreach by advocating for repeal of those aesthetic regulations and, perhaps, repeal of similar land-use regulations that are not overreaching. During the 2013 legislative session, North Carolina state legislators introduced two bills that would have invalidated the neighborhood conservation districts established in Chapel Hill and elsewhere in North Carolina. H.R. 150, 2013 Gen. Assemb. (N.C. 2013); S. 139, 2013 Gen. Assemb. (N.C. 2013). Both bills would have required one hundred percent of affected property owners to consent to the regulation of "building design elements" in one- and two-family homes unless the affected structures or lots were located in local historic districts.

their political clout, particularly at the local level, may be outmuscled by that of homeowners.[264]

C. The Second-Equity Problem: Buyers Beware

Neighborhood conservation districts and related forms of design review restrictions pose consumer-protection problems. Hannah Wiseman notes that design overlay communities, which include neighborhood conservation districts,

> offer none of the three notice protections—whether those protections are real or merely theoretical—associated with private communities. There is no formal recording requirement for the rules contained within the overlay zone. Nor must the seller provide formal disclosure of the rules to the buyer at or before closing. Even those who actively attempt to learn of community rules before purchasing a home in overlay communities will have trouble identifying them. A quick visit to the city code will not reveal the neighborhood-specific zoning overlay absent vigilant research.[265]

As a result, a homebuyer's decision to purchase in a particular neighborhood may be uninformed, and her valuation of her new asset may not account for the restricted ability to use that asset. In his survey of homeowners in a design-review burdened local historic district[266] in New Haven, Tad Heuer found that about one-half of homeowners who had purchased their homes after the historic district was adopted did not know that their property was located in a local historic district.[267] Hannah Wiseman proposes that "incoming residents . . . should be formally alerted to the

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The bills defined "building design elements" broadly to include "exterior building color; type of style of exterior cladding material; style or materials or roof structures or porches; exterior nonstructural architectural ornamentation; location or architectural styling of windows and doors, including garage doors; the number and types of rooms; and the interior layout of rooms." N.C. H.R. 150 § 1; N.C. S. 139 § 1. The North Carolina Home Builders Association, an affiliate of the National Association of Home Builders, lobbied legislators to support the bill. Though ultimately unsuccessful, the bill garnered bipartisan support. On March 20, 2013, the bill passed overwhelmingly in the house of representatives, but it later died in the senate. *See House Bill 150 (= S139)*, N.C. GEN. ASSEMBLY, http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2013&BillID=H150 (showing last action on bill as rereferral to committee). Chapel Hill Mayor Mark Kleinschmidt remarked to a Durham newspaper that the issue did not break down on party lines but, instead, on geographic lines. Gronberg, *supra* note 215. Urban legislators rallied around neighborhood conservation districts, while suburban and rural legislators voted for their demise, supporting the claim made above that neighborhood conservation districts are creatures of cities and older suburbs—areas developed prior to the proliferation of deed-restricted subdivisions and homeowners' associations. *See id.*

264. *See* Been et al., *supra* note 161.

265. Wiseman, *supra* note 10, at 749 (footnote omitted).

266. For discussion of the differences between historic districts and conservation districts, see *supra* text accompanying notes 47–59.

267. Heuer, *supra* note 236, at 790.

existence of overlay rules in closing paperwork" in order to address this information failure.[268]

A mandate that closing paperwork disclose overlay requirements addresses the information failure in theory but may not have any real impact on a homeowner's actual knowledge. In part due to consumer-protection legislation in the home-finance arena, at residential real-estate closings homebuyers are inundated with information and disclosures, mostly relating to financing[269] and, where applicable, to common-interest ownership communities.[270] Homebuyers routinely sign and initial reams of documents without much understanding of what information is contained in those documents. It is unlikely that a homeowner will take much notice of yet another written disclosure at the closing table. In addition, closing may simply be too late. At that time, the homebuyer has incurred attorney's fees, loan-application fees, and appraisal fees and, moreover, is contractually obligated to purchase the property. In order to be effective, the disclosure must come earlier in the process, at the time the homebuyer is deciding whether to make an offer on a property. Ideally, the information would be disclosed in the real-estate listing itself.[271] Requiring sellers to disclose conservation district restrictions will also force homeowners to internalize the costs associated with the restricted ability to subdivide, expand, or renovate property even if the current homeowners do not desire to make those changes to their homes.

Even where a homeowner is aware that design controls exist, he or she may not understand what is permitted by those design controls. First, he or she simply may underestimate the extent of local control. Homebuyers in conservation districts are susceptible to the same problem of incomplete information. CC&Rs are often more restrictive than homebuyers had anticipated: "[O]nce residents have joined an association, they are often surprised at the extent of collective control."[272] In addition to being more restrictive than many homeowners might reasonably expect, design-review regulations are often vague. They affect the use and value of property but are not precise in how they limit changes and additions. Often, they list considerations and factors without providing guidance as to how those factors will be applied. For example, the guidelines applicable to the Mid Cambridge Neighborhood Conservation Districts are not guidelines at all but, instead, simply a list of questions to be asked of applicants.[273] The questions include, "What are the

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268. Wiseman, *supra* note 10, at 760.

269. The Real Estate Settlement Procedures Act imposes various disclosure requirements in connection with residential home mortgages. 12 U.S.C. §§ 2601–2617 (2012).

270. Connecticut's Common Interest Ownership Act imposes disclosure requirements in connection with the sale of residential condominium and cooperative units. *See, e.g.*, CONN. GEN. STAT. ANN. §§ 47-262 to -281 (West 2009 & Supp. 2014).

271. There is some precedent for this requirement. For example, in Connecticut, whether a residential property is located in a village or historic district must be disclosed in the residential-condition report, a document that must, by statute, be provided by the seller to the buyer before the buyer executes either a contract to purchase or a lease with an option to purchase. CONN. GEN. STAT. ANN. § 20-327b(d)(1)(C) (West Supp. 2014).

272. NELSON, *supra* note 169, at 4.

273. Memorandum from the Mid Cambridge Neighborhood Conservation Dist. Comm'n to Applicants to the Mid Cambridge Neighborhood Conservation Dist. Comm'n (Feb. 2, 1988), *available at* http://www2.cambridgema.gov/historic/MCNCD_guidelines.pdf.

architectural features of the buildings in the neighborhood? What are the architectural features of the proposed development (including materials, design, and setting)?" The implication is that the architectural features should be consistent with those in the neighborhood, but by what measure? Should they be identical, or is it sufficient for the new construction to incorporate some architectural elements while disregarding others? Are there certain architectural elements that are necessary, while others are optional?

Even where guidelines purport to do more than simply list factors, the so-called regulations are imprecise. Inherently vague terms abound in neighborhood conservation-district regulations. These include words such as "considered," "compatible," "minimized," and "encouraged."[274] The vagueness of these regulations, even if it does not rise to the level of a due process violation,[275] is a

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274. *See, e.g.*, NAPA, CAL., MUNICIPAL CODE § 15.52.050(D) (Supp. 2015) ("No certificate of appropriateness shall be issued unless the following findings are made: . . . The project shall be *compatible* with those neighborhood characteristics that result from common ways of building." (emphasis added)); CAMBRIDGE, MASS., CODE OF ORDINANCES § 2.78.220(A) (Supp. 2012) ("In passing upon matters before it, the Historical Commission or neighborhood conservation district commission shall *consider*, among other things, the historic and architectural value and significance of the site or structure, the general design, arrangement, texture and material of the features involved, and the relation of such features to similar features of structures in the surrounding area. In the case of new construction or additions to existing structures a commission shall *consider* the appropriateness of the size and shape of the structure both in relation to the land area upon which the structure is situated and to structures in the vicinity, and a Commission may in appropriate cases impose dimensional and setback requirements in addition to those required by applicable provision of the zoning ordinance." (emphases added)); CHAPEL HILL, N.C., CODE OF ORDINANCES § 3.6.5 (Supp. 2014) ("The purposes of a neighborhood conservation district in older town residential neighborhoods or commercial districts are as follows: . . . To *encourage* and strengthen civic pride; and [t]o *encourage* the harmonious, orderly and efficient growth and redevelopment of the Town." (emphases added)); Cambridge, Mass., Avon Hill Neighborhood Conservation Dist. Designation Order § V(C)(1) (Dec. 14, 2009), *available at* http://www2.cambridgema.gov /historic/AHNCD_order.pdf (amended order) ("Impacts on significant landscape features and mature plantings should be minimized.").

275. Others have considered the question of whether design guidelines violate the Fifth Amendment because they are overly vague. Most courts to consider the question have concluded that design guidelines are *not* unconstitutionally vague. *Compare* Morristown Rd. Assocs. v. Mayor of the Borough of Bernardsville, 394 A.2d 157, 163 (N.J. Super. Ct. 1978) (holding design-review standards unconstitutionally vague), *and* Anderson v. City of Issaquah, 851 P.2d 744, 752 (Wash. Ct. App. 1993) (striking down a municipality's design requirements as unconstitutionally vague), *with* Novi v. City of Pacifica, 215 Cal. Rptr. 439, 441 (Ct. App. 1985) ("California courts permit vague standards because they are sensitive to the need of government in large urban areas to delegate broad discretionary power to administrative bodies . . . ." (internal quotation marks omitted)), State *ex rel.* Stoyanoff v. Berkeley, 458 S.W.2d 305, 312 (Mo. 1970), Nadelson v. Twp. of Millburn, 688 A.2d 672, 677–78 (N.J. Super. Ct. 1996) (upholding design-review standards within a historic district), A-S-P Assocs. v. City of Raleigh, 258 S.E.2d 444, 452 (N.C. 1979), Vill. of Hudson v. Albrecht, Inc., 458 N.E.2d 852, 857 (Ohio 1984), Pinecrest Homeowners Ass'n v. Glen A. Cloninger & Assocs., 87 P.3d 1176, 1183 (Wash. 2004) (en banc) (distinguishing *Anderson v. City of Issaquah* while upholding design-review standards), *and* State *ex rel.* Saveland Park

burden on homeowners and developers and results in information asymmetries in the housing market.[276] As a pair of homeowners stated at a public hearing during which they sought approvals to enlarge a home they had recently purchased in one of Nashville's neighborhood conservation districts, "I think we [bought the house] without fully understanding what 'historical' meant."[277] The pair is a young couple expecting a child. They had purchased this home with the expectation that they would be able to renovate it to meet their desires and needs for their family. Whatever the merits of their proposed architectural design might be, it is clear that their expectations were undermined by the neighborhood conservation-district guidelines. If so, they may have overpaid for their house and for associated costs, such as legal fees and architectural-design fees. The result, attributable to a lack of information, is an inefficient market for housing, where homes restricted by aesthetic controls may be overvalued, while those that are unrestricted may be undervalued. Again, the result is a decrease in housing affordability, this time arising from inefficiencies and transaction costs imposed by vague regulations in the housing market.

The vagueness inherent in conservation-district guidelines is evidence of two key problems for policymakers and scholars. First, the proverbial truth that beauty is in the eye of the beholder makes aesthetic rulemaking difficult. It is nearly impossible to regulate aesthetics with the degree of certainty that informed property buyers, good public policy, and properly functioning markets require. Second, the degree of vagueness misleads voters. If these guidelines were truly honest, they would look more like the M Streets East guidelines in Dallas.[278] The desire to avoid codifying the level of detail in the M Streets East guidelines is an indication that many are uncomfortable with purely aesthetic regulations. Codifying that level of detail would crystallize the degree to which these guidelines inhibit individual choice. That level of crystallization might give rise to greater skepticism among homebuyers and voters and a greater degree of scrutiny from courts. By leaving things vague, design-review boards and city-planning staff reserve for themselves the discretion to restrict truly aesthetic choices while maintaining the appearance that they will exercise their discretion only to further goals that are not aesthetic or that coexist with aesthetic goals.

IV. PRESERVING CHANGE: CHALLENGING THE COMMUNITY-STABILITY MODEL

This Article does not attempt to dethrone aesthetics as a proper consideration in exercising the police power. Even the most basic Euclidean ordinance serves aesthetic objectives. It is an impossible task to disaggregate aesthetic regulations from those that serve other legitimate police-power purposes. Instead, the more effective approach is to permit aesthetic regulations while limiting the adverse effects of those regulations. In the case of conservation districts, state legislators can cabin

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Holding Corp. v. Wieland, 69 N.W.2d 217, 224 (Wis. 1955).

276. *See* Nicole Stelle Garnett, *Redeeming Transect Zoning?*, 78 BROOK. L. REV. 571, 584 (2013) (giving examples of aesthetic, form-based codes that may be constitutional yet may present practical difficulties for property owners).

277. MetroGovNashville, *06/19/13 Historic Zoning Commission Meeting*, YOUTUBE (June 20, 2013), https://www.youtube.com/watch?v=6cPR_HAatU0 (testimony at 00:31:41).

278. *See supra* note 73 and accompanying text.

those negative impacts by, first, requiring regulations to anticipate change and, second, embracing inclusivity when adopting and drafting regulations.

This Part proposes two major shifts in thinking about neighborhood conservation and cultural stability. First, lawmakers, regulators, and scholars should dissociate aesthetics from consistency. In particular, state zoning-enabling legislation should acknowledge the role that change plays in neighborhood culture by requiring aesthetic regulations to anticipate and accommodate housing demand, changing markets, and demographics. In this way, state enabling legislation can force residents and planners to imagine and develop land-use regulations that conserve cherished neighborhood features while also allowing for the possibility of more dense development in appropriate locations. For too long, neighborhood activists have assumed that increased density will tear apart neighborhood fabrics; they have thus refused to innovate regulations that preserve neighborhood fabric while also accommodating increased density. Imposing state-level limitations on local adoption of conservation districts will force that innovation to take place.

Second, state zoning-enabling legislation should require that those affected by spillovers are included in both the decision to adopt conservation-district regulations and the process of drafting those regulations. In essence, state zoning-enabling legislation should disrupt the inertia resulting from homevoter[279] control of local land-use regulation. State and local lawmakers, planners, and courts all have roles to play in requiring that conservation districts are dynamic and inclusive. But just as externalities resulting from state-level lawmaking are properly addressed at the federal level, in the case of conservation districts, spillovers and exclusionary effects are properly addressed at the state level. State governments have an incentive to curtail restrictive land-use policies that raise housing prices, because a lack of affordable housing stymies economic development. Employers seek to locate where their employees will enjoy a low cost of living.[280] States, then, have an incentive to prevent local land-use policies from raising housing prices.

In most of the states discussed in this Article, there is no express state legislation authorizing localities to designate and regulate conservation districts. Instead, the authority to adopt conservation-district regulations derives from a locality's home-rule powers or from state statutes that authorize local zoning or historic preservation more generally.[281] State lawmakers should cabin conservation districts

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279. *See supra* note 127 and accompanying text.

280. KEITH WARDRIP, LAURA WILLIAMS & SUZANNE HAGUE, CTR. FOR HOUS. POLICY, THE ROLE OF AFFORDABLE HOUSING IN CREATING JOBS AND STIMULATING LOCAL ECONOMIC DEVELOPMENT 10–13 (2011), *available at* http://www.nhc.org/media/files/Housing-and-Economic-Development-Report-2011.pdf (summarizing surveys showing that the availability and cost of housing are important considerations for employers deciding where to locate their businesses).

281. Of the states featured in this Article (California, Connecticut, Iowa, Massachusetts, Minnesota, North Carolina, Tennessee, and Texas), only Connecticut has a state authorizing statute that expressly authorizes adoption of conservation districts. CONN. GEN. STAT. ANN. § 8-2j (West Supp. 2014) (permitting zoning commissions to establish "village districts," another name for neighborhood conservation districts). In the remainder of the states, municipalities derive the power to enact conservation districts from historic districting statutes, the general grant of zoning authority, or home-rule status. *See, e.g.*, Bell v. City of

by adopting state-level authorizing legislation that limits local discretion to impose de facto development moratoria using conservation districts. Revisions to state-level authorizing statutes should require conservation-district adoption processes to be inclusive and to limit spillover effects. Regulations should be required by state legislation to accommodate changing market dynamics, consumer preferences, and understandings of sustainability.

A. Require Planning for Change

State authorizing statutes should require that aesthetic and contextual regulations anticipate change, specifically the task of meeting demand for housing within the district.[282] Addressing different forms of restrictions on development, others have posited procedural fixes intended to facilitate better land-use policy.[283] In the case of neighborhood conservation districts, substantive fixes, imposed by state governments in their zoning-enabling statutes, may be a more direct approach to cabin the negative impacts on affordability, inclusivity, and information asymmetries.

1. Accommodate Future Demand

As discussed earlier, conservation districts are often adopted in response to increased demand for housing.[284] Developers and future housing consumers find these neighborhoods desirable in some measure for their existing neighborhood fabric but, more importantly, because these districts are close to important amenities and resources—the waterfront, a downtown commercial center, a college campus, or transportation infrastructure.[285] If it is not primarily neighborhood fabric that attracts new residents, developers and new residents do not have an interest in design regulations. They suffer the negative effects of those regulations, but they do not see any benefit from imposition of the regulations. In other words, there is no reciprocity of advantage. Because the benefits of the regulatory imposition accrue to some, but not to all, the regulations should be narrow so as to limit their cost to those who do

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Waco, 835 S.W.2d 211, 214 (Tex. App. 1992) (upholding a neighborhood conservation district as a valid exercise of the city's police powers authorized by state law); Brief of Defendant-Appellee at 10, Patmore v. Town of Chapel Hill, 757 S.E.2d 302 (N.C. Ct. App. 2014) (No. 13-1049), 2013 WL 6516982 (defending parking regulations in neighborhood conservation districts as authorized under the general grant of zoning authority to North Carolina municipalities).

282. While this Article's primary audience is state legislators, courts as well as local and sublocal actors may have roles to play as well. On the local and sublocal levels, as design-review regulations are being crafted for a particular district, planners and lawmakers must work to ensure that the regulations, in addition to meeting the strictures of authorizing statutes, anticipate change and the possibility of growth. Courts, of course, will play a role in ensuring that local governments comply with authorizing statutes and ordinances at the state and local levels.

283. *See, e.g.*, Roderick M. Hills, Jr. & David N. Schleicher, *Balancing the "Zoning Budget,"* 62 CASE W. RES. L. REV. 81, 112–18 (2011); Schleicher, *supra* note 11, at 1720–21.

284. *See supra* notes 172–217 and accompanying text.

285. *See supra* notes 228–34 and accompanying text.

not benefit from the regulations. Accordingly, the purpose of design-review regulations should not be to halt development. If regulations are intended to impose a de facto development moratorium, the impact of those regulations will be to inflate housing prices within the district and to push development to areas that are less desirable. In housing markets, desirability is a function of location—proximity to employment centers, transportation infrastructure, and other amenities.[286] In this way, the most desirable locations are often the most sustainable because residents of these areas do not have to commute long distances by car on a daily basis. Regulations that force development into less *desirable* locations have the unintended consequence of forcing development into less *sustainable* locations.

Over the last thirty years, residents and planners crafting conservation-district regulations have undertaken to regulate land development so that neighborhoods do not change. In an attempt to preserve neighborhood character, they ignore both the inevitability of change and the positive role that change plays in creating neighborhood character. Instead, planners and residents should regulate land development so that, as change happens, the fabric of the neighborhood is not undone. State statutes should require conservation districts to identify areas that are appropriate for redevelopment, growth, and densification. Instead of being drafted to impose de facto development moratoria, design-review and conservation-district regulations should be crafted to accommodate densification while preserving neighborhood character.[287] In order to further their stated purpose of conserving neighborhood character, district regulations should describe how redevelopment projects can maximize consistency with existing character. Duplexes and triplexes can be required to be constructed to look like single-family homes. Row houses built with no front setback may be more appropriate than garden apartments set back twenty feet from the street, or vice versa. Areas close to commercial strips may be more appropriate for dense development than are blocks dominated by single-family homes. These are land-use choices appropriately made with public input. But they should be made in a way that does not prevent new development, thereby inflating housing prices and preventing future housing consumers from having the opportunity to reside in the neighborhood.

One criticism of this argument is that it applies not just to conservation districts but to zoning generally. All zoning should derive from a planning process that anticipates and accommodates future demand in desirable locations. In fact, "about half of the states compel their localities to prepare a comprehensive plan"[288] and "California and about a dozen other states require 'consistency' between a municipality's land use

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286. *See, e.g.*, SOFIA BECKER, SCOTT BERNSTEIN & LINDA YOUNG, CTR. FOR NEIGHBORHOOD TECH., THE NEW REAL ESTATE MANTRA: LOCATION NEAR PUBLIC TRANSPORTATION (2013) *available at* http://www.apta.com/resources/statistics/Documents/NewRealEstateMantra.pdf.

287. Boise, Idaho, provides one example of a conservation-district ordinance that anticipates redevelopment. The ordinance states, in relevant part, that one purpose of the Near North End Conservation District shall be to "[a]llow for adaptive reuse of existing structures for multiple-family residential and office uses." BOISE, IDAHO, CITY CODE § 11-05-02(3)(A)(4) (Supp. 2013).

288. ELLICKSON ET AL., *supra* note 14, at 74 (noting, however, that the state statutes are not easy to classify).

decisions and its comprehensive plan."[289] In addition, a handful of states have half-heartedly adopted New Jersey's *Mount Laurel* doctrine, which requires each municipality in the state to accommodate the development of affordable housing.[290] Nevertheless, communities across the country continue to engage in restrictive zoning, refusing to meet regional demand for housing and using land-use planning to exclude a range of housing types, particularly affordable rental units. In addition, these communities use planning to codify and freeze existing development patterns rather than to accommodate redevelopment. Oftentimes, communities shroud exclusionary land-use practices in purported desires to avoid overloading local infrastructure,[291] to preserve property values,[292] or to prevent traffic congestion.[293]

Conservation-district advocates make no such efforts to pretend that they are seeking to advance legitimate planning goals. The refusal to consider change is embedded in the regulations. It is codified in the applicable ordinances. In the case of conservation districts, identifying and cataloging the current architectural fabric passes for planning. Codification and embalmment of existing land-use patterns passes for planning. The planning process simply does not take into account the possibility of change over time. That other land-use regulations, in practice, are characterized by this same failure to consider change does not detract from this problem and proposed solution in the realm of conservation districts. Indeed, conservation districts are perhaps an extreme example of common problems in land-use regulation—planning processes that ignore future housing consumers, zoning decisions that are made outside of a comprehensive planning process, and regulations intended to exclude renters and future housing consumers. These local and sublocal failures can be addressed by state legislatures in authorizing statutes.

2. Prohibit Regulation of Irrelevant Building Features

In addition, authorizing statutes should prohibit conservation districts from regulating (1) building features that are not visible from public rights-of-way and (2)

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289. *Id.* at 69.

290. S. Burlington Cnty. NAACP v. Twp. of Mount Laurel, 336 A.2d 713, 728 (N.J. 1975) ("[B]roadly speaking, the presumptive obligation arises for each such municipality affirmatively to plan and provide, by its land use regulations, the reasonable opportunity for an appropriate variety and choice of housing . . . ."); *see also* CONN. GEN. STAT. ANN. § 8-30g (West Supp. 2014) (describing the state's affordable housing appeals procedure); MASS. ANN. LAWS ch. 40B, § 21 (LexisNexis 2006) (same). *But see* Brian R. Lerman, *Mandatory Inclusionary Zoning—The Answer to the Affordable Housing Problem*, 33 B.C. ENVTL. AFF. L. REV. 383, 402 (2006) ("The number of affordable units created by 40B—in a process that penalizes municipalities for lacking affordable developments—has been rather small.").

291. *See, e.g.*, Builders Serv. Corp. v. Planning & Zoning Comm'n, 545 A.2d 530, 533 n.5 (Conn. 1988) ("Zoning regulations may be made with reasonable consideration for the protection of historic factors and shall be made with reasonable consideration for the protection of existing and potential public surface and ground drinking water supplies.").

292. *See* Bd. of Supervisors v. Miller, 170 N.W.2d 358, 361 (Iowa 1969) (holding that stabilization of property values is a legitimate concern of zoning).

293. *See* First Hartford Realty Corp. v. Plan & Zoning Comm'n, 338 A.2d 490, 496 (Conn. 1973) ("One of the proper purposes of zoning . . . is to 'lessen congestion in the streets.'").

tenure.[294] These features are not relevant to neighborhood character and are not susceptible to regulation through aesthetic land-use regulation.

First, conservation districts should not be used to regulate building features unrelated to exterior design. The policy rationale underlying conservation districts is the preservation of a neighborhood aesthetic, which is a function of the appearance of public spaces and those portions of private buildings that are visible from public rights-of-way. Some design-review ordinances recognize this fact and restrict their reach to those elements of a building that are visible to the public.[295] Others, however, overreach. As described above, cities like Chapel Hill and Nashville have used conservation districts to regulate the number of bathrooms permitted per bedroom.[296] The number of bathrooms in a house is an interior feature unrelated to the public appearance of a building. And there are surely more efficient, more direct approaches to encouraging home ownership than to regulate bedroom-to-bathroom ratios or to prohibit parking in front yards. Similarly, the number of units in a building does not affect the exterior appearance of a building and should not be the subject of design restrictions.

Second, conservation districts should not be used to regulate tenure.[297] Policymakers have long cited encouraging home ownership as an important policy goal. But recently, in the wake of an economic crisis in which residential housing markets played an important role, economists and others have argued that home ownership is not an unqualified good.[298] Often, conservation districts are motivated by the desire to limit the conversion of owner-occupied homes to rental properties, but the regulations do not expressly regulate tenure. Tenure is sometimes restricted by private law in private covenants, deed restrictions, and common-interest ownership situations but is not typically governed by public regulations. In a few instances, however, conservation districts expressly regulate tenure.[299] These tenure requirements are not related to design. Whether a home is occupied by its owner or a renter has no impact on a neighborhood's aesthetic. Where renters cause secondary impacts, such as loud parties held by college-student renters in Chapel Hill, those secondary impacts—not tenure itself—should be regulated and controlled.

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294. *See supra* notes 214–17 and accompanying text.

295. *See, e.g.*, DALL., TEX., CITY CODE § 51A-4.501(e)(4), .505(c)(2) (Supp. 2014); Cambridge, Mass., Avon Hill Neighborhood Conservation Dist. Designation Order (Dec. 14, 2009), *available at* http://www2.cambridgema.gov/historic/AHNCD_order.pdf (amended order).

296. *See, e.g.*, CHAPEL HILL TOWN COUNCIL, NORTHSIDE NEIGHBORHOOD CONSERVATION DISTRICT PLAN 3 (2004), *available at* http://www.townofchapelhill.org/home/showdocument?id=12179 (regulating bedroom-to-bathroom ratios); *see also supra* note 215 and accompanying text.

297. Tenure, in this context, refers to whether property is owned or rented. *See, e.g.*, Megan Glasheen & Casius Pealer, *Continuing the Conversation with Policy Makers: A Review of the Brookings Institution Report on HOPE VI*, 15 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 104, 105 (2005).

298. *E.g.*, Robert J. Shiller, *Owning a Home Isn't Always a Virtue*, N.Y. TIMES, July 14, 2013, at BU6; Richard Florida, *The Link Between High Levels of Homeownership and Unemployment*, ATLANTIC CITYLAB (May 9, 2013), http://www.theatlanticcities.com/jobs-and-economy/2013/05/link-betweeen-high-levels-homeownership-and-unemployment/5520/.

299. *See supra* notes 214–16 and accompanying text.

3. Correct Information Deficiencies

Advocacy materials and press reports evidence conflicting accounts of the impact of conservation districts on affordability. On the one hand, residents are told that conservation districts will raise their property values.[300] On the other, they are told that conservation districts will preserve neighborhood affordability.[301] Both claims cannot be true. State authorizing statutes should be crafted to maximize the information available to local legislators and residents considering whether to adopt a conservation district and what the district regulations should limit.

First, state and local statutes that authorize conservation districts should require that aesthetic regulations be revisited periodically. Authorizing statutes should require that where a sublocal or local referendum is required to adopt a conservation district, the regulations will be in effect for a designated period of time, not to exceed five years, and a new referendum will be required in order to keep the regulations in place.[302] Where no referendum is required, authorizing statutes should require that the applicable regulatory or legislative body reconsider each conservation district at least once every five years and that, in connection with such reconsideration, the body convene two or more public hearings noticed citywide.

A sunset provision will force aesthetic regulations to be responsive to changing markets and changing public desires. If consumer preferences change over time, a sunset provision will give voters the opportunity to account for those changing preferences in a new referendum on the matter. With changing market conditions, voter preferences will shift. As gas prices increase, voters may be willing to live in smaller units in locations that are closer to employment so that they can avoid driving great distances. As a neighborhood becomes more desirable and more costly, property owners will have a financial interest in ensuring that they can construct an in-law unit that will yield rental income. If a city's schools improve and demand for housing increases among families, residents may wish to ease restrictions that limit expansion of existing homes.

Sunset provisions will also provide residents an opportunity to have input on the administration of design guidelines. In the initial adoption process, voters typically approve guidelines that are quite vague. Like the Noank regulations described above,[303] conservation-district guidelines are usually broad and subject to interpretation.[304] The degree to which regulations impede development depends on the way in which the local commission or municipal staff administers the regulation. After a conservation district has been in place for five years, local residents will be able to take into account the way in which the regulations have been administered. Perhaps the regulations have been administered rigidly, hindering renovations and redevelopment projects that voters did not originally anticipate would be restricted.

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300. *See supra* note 232 and accompanying text.

301. *See supra* notes 221–22 and accompanying text.

302. *Cf.* Melissa J. Mitchell, Comment, *Cleaning Out the Closet: Using Sunset Provisions To Clean Up Cluttered Criminal Codes*, 54 EMORY L.J. 1671, 1679 (2005) (arguing for the importance of regular re-examination of criminal codes).

303. *See supra* Part II.A.

304. *See supra* notes 274–76 and accompanying text.

If so, the sunset provision will permit voters to reconsider whether the conservation district is meeting their expectations.

Where renters are included in conservation-district referenda, a sunset provision will provide them crucial information regarding impacts on housing affordability. If rents increase over the course of the initial term of the conservation district, that fact may inform renters' votes at the time that the district is considered for renewal. Similarly, if local, in addition to sublocal, approval is required, a sunset provision will provide "future housing consumers"[305] with critical information that they may not have had at the time of initial adoption of a conservation district. After a conservation district has been in place for a period of time, voters may know whether the conservation district resulted in higher housing prices in the district and in areas surrounding the district. At the time of initial adoption, voters and legislators defer to the residents of a conservation district in deciding whether such a district is appropriate.[306] If, however, after a district has been adopted, it becomes clear that the adoption of the district is impacting housing prices or development patterns outside of the district, voters and legislators at the local level will be more willing to defy sublocal preferences and reject the continuation of a conservation district.

Some observers have expressed concern that sunset provisions create opportunities for rent seeking, particularly by legislators who can delay or prevent renewal of a provision scheduled to sunset.[307] In the case where a referendum determines whether a conservation district is renewed, the rent-seeking opportunities are diminished. Individual residents, unlike elected legislators, are unlikely to seek campaign contributions or other quid-pro-quo consideration in exchange for their votes. In addition, the possibility of rent seeking may be a risk worth taking in light of the potentially massive inefficiencies resulting from perpetual imposition of static land-use regulations on an otherwise dynamic housing market.

One might worry that sunset provisions create transaction costs that, in turn, create the risk of inefficient results.[308] A tax provision, for example, may be sound fiscal policy. Scheduled to sunset, however, that tax provision is not extended because the transaction costs associated with passage of new legislation are too high. The result is a suboptimal change in law that could have been avoided had the tax provision been passed in the first instance without a sunset clause. This argument assumes, however, that the expired provision was sound policy. If, instead, the original tax provision was, or became over time, unsound, the sunset provision has effectively limited the harm done by that provision. Of course, mere uncertainty can result in inefficiencies. But those inefficiencies, when they take the form of information costs,

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305. *See supra* note 261 and accompanying text.

306. *See supra* Part II.B.

307. *E.g.*, Manoj Viswanathan, *Sunset Provisions in the Tax Code: A Critical Evaluation and Prescriptions for the Future*, 82 N.Y.U. L. REV. 656 (2007).

308. Transaction costs can easily be minimized by automating certain aspects of the renewal process. For example, typically before a referendum is held, proponents must collect signatures demonstrating that some percentage of eligible voters support the referendum. That requirement need not be met for renewal of conservation districts. Instead, the municipality could automatically initiate a referendum on renewal of the conservation district one year before the conservation district would otherwise expire.

are not waste. The initial presunset period provides information about the impact of the legislation that will inform the decision whether to renew the legislation.

Authorizing statutes can also address the information asymmetries by requiring city planning departments to issue impact statements prior to adoption of a conservation district. This approach would require the city planning department to conduct an analysis of the likely impacts of district designation. Authorizing statutes should require that impact statements address (1) housing prices and potential effects on affordability; (2) estimated future demand for housing in the proposed district, the locality, and the region; and (3) potential costs imposed on property owners to comply with district regulations. Each impact statement should be released in advance of one or more legislative or administrative public hearings. In addition, each statement should be disseminated widely—at a minimum, to anyone eligible to vote on the conservation-district referendum.

If the district regulations are drafted to accommodate all of the demand for housing within the district, then there should be no impacts felt outside of the district. If the district regulations, on the other hand, restrict supply below what might otherwise have been built to meet demand, the impacts of that restriction on the local housing economy should be estimated. Acknowledging these potential impacts will cause policymakers and planners to draft or redraft the district regulations to minimize negative impacts on housing affordability.

4. Distinguish Between Conservation Districts and Local Historic Districts

Authorizing statutes should distinguish between historic districts and conservation districts.[309] Conservation districts should not simply be *historic districts lite*[310] but, instead, should be clearly distinguishable from historic districts. Local historic districts mummify neighborhoods. Any demolition, construction, exterior renovation, or exterior decoration is subject to review by a local historic-district commission. The commission is charged with ensuring that any alterations comport with well-defined architectural standards.[311] The externalities resulting from mummification, however, are limited, provided the number of historic districts is low. And, while there is no cap on the number of local historic districts, that number is effectively limited because both the substantive and the procedural bars for adopting historic districts are high.

In contrast, conservation districts require fewer procedural hurdles and need not meet the same substantive requirements that apply to historic districts.[312] Not every

309. For discussion of the differences between historic districts and conservation districts, see *supra* text accompanying notes 45–57.

310. *See supra* note 56 and accompanying text.

311. Local historic-district ordinances, rules, and practices often require renovation and construction to comport with the Secretary of the Interior's Standards for the Treatment of Historic Properties. *Compare* 36 C.F.R. § 68.3 (2014) (federal standards), *with* MICH. COMP. LAWS ANN. § 399.201–.215 (West 2010), R.I. GEN. LAWS § 45-24.1-1 to -10 (2009), *and* SAVANNAH, GA. ZONING ORDINANCES § 8-3030 (2015). *See also Local Preservation: Local Historic District Zoning*, R.I. HIST. PRESERVATION & HERITAGE COMMISSION, http://www.preservation.ri.gov/local/local_zoning.php.

312. *E.g.*, Kevin E. McCarthy, *Village Districts Vs. Historic Districts*, CONN. OFF. LEGIS.

urban neighborhood is eligible for historic-district status. On the other hand, typically, there are no eligibility standards for conservation-district designation. And adoption is not subject to the same strictures as is adoption of historic districts. As a result, it is much easier for a locality to adopt a conservation district than it is to adopt a historic district.[313] The ease of adoption increases the potential number of conservation districts.[314] The more districts designated, the greater the negative spillover effects imposed on the residents of the city in which the conservation districts are located.

In those cases in which there is reciprocity of advantage, historic districts are appropriate, and regulations can be more stringent.[315] Areas heavily dependent on tourism, such as the French Quarter in New Orleans or downtown Charleston, South Carolina, were among the first areas to adopt historic districts.[316] In such areas, the historic quality of the architecture fuels the dominant industry. As a result, each property owner benefits from the assurance that every property in the district will maintain its historic character. Owners of hotels, restaurants, and entertainment venues benefit because they are frequented by visitors who are drawn to the area due to its historic architecture. Other businesses benefit because they service tourism organizations and provide other goods and services to those organizations' employees and to tourists. And property owners benefit because the demand for space to construct hotels, restaurants, and entertainment venues drives up property values.[317] If the district is narrowly defined to include a limited geographic area, impacts on housing demand and affordability in the larger region can be muted. Historic districts may invite the same questions raised by neighborhood conservation districts, but where there is a strong reciprocity of advantage and the geographic area of the district is limited, the benefits outweigh the costs.

RES. (Dec. 22, 2003), http://www.cga.ct.gov/2003/rpt/2003-R-0921.htm ("A municipality can establish a [neighborhood conservation district] by amending its zoning regulations. . . . Establishment of a local historic district requires the passage of an ordinance following a study of the proposed district and the vote of property owners in the affected area in which at least two-thirds vote in favor of creating the district.").

313. Lovelady, *supra* note 10, at 175 ("Conservation districts are tailored to reach more neighborhoods" than are historic districts.). By "tailored," Lovelady, of course, means quite the opposite. Because these ordinances are not tailored, they are available for use in almost all neighborhoods.

314. Consider Nashville, which has six local historic districts and seventeen neighborhood conservation districts. *See MHZC District Boundaries and Design Guidelines*, METRO GOV'T NASHVILLE & DAVIDSON COUNTY, TENN., http://www.nashville.gov/Historical-Commission/Services/Preservation-Permits/Districts-and-Design-Guidelines.aspx.

315. Thomas Merrill proposes applicable criteria where direct voting by property owners is appropriate. Some of those criteria support my conclusion that property-owner voting is inappropriate in the context of neighborhood conservation districts (i.e., such districts differ from historic districts in relevant ways). *See* Thomas W. Merrill, *Direct Voting by Property Owners*, 77 U. CHI. L. REV. 275, 275 (2010).

316. Rose, *supra* note 35, at 505.

317. This is not to say that everyone benefits from designation of a historic district. Renters who prefer low rents to preserving architectural history are disadvantaged, as are property owners who value the ability to renovate a building more than they value an increase in property values due to historic-district designation.

Most conservation districts are not defined by a strong tourism industry. In fact, as described above, typically, these districts are rather ordinary residential neighborhoods. The imposition of restrictive design regulations does not result in reciprocal advantages enjoyed by all property owners, much less by all residents and business owners. Instead, conservation-district regulations, even when adopted by a supermajority of property owners, impose restrictions on a substantial minority of property owners. And advocates of affordability should worry that where conservation districts are not limited to a few, discrete areas, selected for their historic integrity or tourism value, the impacts on citywide affordability will be exponentially higher. As a result, conservation districts should be much less restrictive, and interpreted much more narrowly, than are historic districts or other regulations that are properly characterized as resulting in reciprocal advantages for all property owners, if not residents.

While it might be appropriate to allow local governments to freeze a limited number of historic districts in time, the same is not true for conservation districts. Accordingly, it is critical that state statutes draw meaningful distinctions between these two classifications so that conservation districts cannot be used as Trojan horses, introducing strict historic district–type design-review processes to neighborhoods that would not otherwise meet the requirements for historic-district designation.

B. Internalize Spillover Effects

In order to mitigate negative spillover effects outside of a conservation district, designation processes should be inclusive and should include nonresidents and renters. Inclusivity will permit some of the out-of-district impacts to be internalized into the conservation-district adoption process. State legislation is the appropriate vehicle for limiting the spillover effects associated with local and sublocal land-use decisions.[318] These recommendations are procedural in nature and prioritize inclusivity. Admittedly, the outsized power of homeowners and neighborhood-level interests suggests that procedural fixes will be insufficient to meaningfully limit conservation districts. Even where renters and local governments are included in conservation-district adoption and implementation, homeowners are likely to exert disproportionate power and to continue to depress housing supply. As a result, these procedural recommendations are important, but they are secondary to the substantive fixes described in Part IV.A.

1. Include Renters in Referenda

Where standard practice or authorizing statutes require a referendum or petition in order to designate a conservation district, the referendum or petition is intended both to confirm community support for preservation of the "icon"[319] and also to solicit neighborhood-wide consent to imposition of increased restrictions on use of

318. *See, e.g.*, 1 RATHKOPF ET AL., *supra* note 1, § 1:9 ("State courts generally have ruled that the authority to enact zoning ordinances, the matters which may be regulated thereunder, and the manner in which they may be enacted or amended, must be specifically delegated to local governments for them to exercise the power to zone.").

319. *See supra* note 30 and accompanying text.

private property. Because the referendum is playing this dual role, it should not be limited to property owners. All residents, not just property owners, have interests in or against community stability and the values purportedly advanced by aesthetic regulations. And renters have their own interest in preserving and furthering housing affordability, an interest not shared by property owners and, therefore, wholly excluded from referenda that are limited to property owners.

Where renters are excluded from a sublocal or local referendum required for adoption of a conservation district, the relevant local or state law should be revised to remove the property ownership requirement for voters. In a case study examining a failed attempt to adopt a historic district by referendum in a neighborhood in New Haven, Connecticut, Thomas W. Merrill argues in favor of direct voting by property owners.[320] Merrill favors limiting land-use referenda to property owners because they "have a powerful incentive to inform themselves about any issue that will affect local property values, either positively or negatively."[321] But limiting the franchise to property owners introduces an element of bias into the voting scheme. The vote is limited to those with an interest in property-value maximization and entirely excludes any voter who might instead prefer housing affordability. Both are legitimate policy goals. Neither should be eliminated from consideration before the votes have been cast. Limiting the franchise to property owners effectively eliminates from consideration the goal of making housing more affordable. So long as the vote is limited to property owners, that bias cannot be exorcised from the referendum, and the referendum itself is skewed in favor of a result that will increase housing prices, a result contrary to the interest of the full one-third of the nation's population that rents.[322]

In the BID or BLID context, where taxes are based on property ownership and on the value of the property owned, the utility enjoyed by renters' use of public services is captured in the form of increased rents. As the argument goes, better provision of public services by the BID or BLID will result in higher rents, which will in turn result in higher property values, driving property owners' votes. But even if one believes that owner-only voting is appropriate in taxing districts, in the regulatory context, there is no reason to create two classes of citizens by limiting voting in this way. In Ellickson's BLID model, the utility gained by a renter from a well-maintained park or efficiently plowed streets is not considered in the decision whether to provide those services.[323] Similarly, where renters are excluded from a

320. Merrill, *supra* note 315.

321. *Id.* at 294. Merrill acknowledges that property ownership is a weak tool for assuring that voters are well informed. *Id.* ("Some residents who are not property owners, such as long-term tenants, may also be well informed about developments that affect the quality of neighborhood life . . . .").

322. *See id.* at 284 n.31 (noting the work of scholars who argue that limits on housing construction have caused increases in housing prices).

323. Ellickson, *supra* note 169, at 94–95. Where property values are driven by potential rents, the renters' preferences impact local property value and, therefore, may affect the homeowners' decisions regarding public-service provision. The psychic value of home ownership and the various tax benefits available to homeowners cause many homes in owner occupant–dominated neighborhoods to exceed the value that one would expect based on the present value of a rental income stream. A sales comparison will result in a higher property valuation than would an income-capitalization approach. As a result, in many neighborhoods

neighborhood conservation-district referendum, the decision-making process ignores their desires. The simple fact that they do not own property does not mean that they have no legitimate perspective on whether to preserve a culturally or historically significant area. If renters are excluded from a sublocal referendum, the vote may undercount, or overcount, desire for cultural stability. In addition, renters may have other preferences that will be affected by the adoption of a neighborhood conservation district. For example, if the imposition of design criteria will increase the cost of property upkeep by, for instance, prohibiting vinyl windows, and will thereby increase rents, renters will have a preference that is not capitalized into home values and that remains unrepresented in the neighborhood conservation-district referendum.

Ellickson describes those who would challenge voting based on property ownership as hyperegalitarians, and he argues that their fears for the wellbeing of renters are unfounded.[324] He argues that tenants have low costs of exit and, therefore, the risk that they will suffer expropriation when excluded from the democratic process is low.[325] If they do not like the referendum results, they can simply leave.[326] But housing markets are notoriously imperfect. The primary market input—land—is strictly limited, and housing markets are heavily regulated by zoning codes that discourage the provision of rental housing and tax codes that prefer owner-occupied housing. Rarely are supply and demand in equilibrium, though scarcity of land and regulations might impose a status quo (based on fixed supply) that results in ever-increasing rents. A tenant may be unable to locate another housing option that meets his or her needs. And even for renters, exit can be expensive. Leaving one neighborhood for another may require other major life changes, such as changing school districts or, where a tenant is leaving a neighborhood close to his or her employment or one well-served by public transportation, incurring significant additional transportation costs. Even the simple cost of moving furniture and household items is substantial.

Notably, while Ellickson is not concerned with excluding renters' voices in BLIDs—entities primarily concerned with service provision—he acknowledges that were a BLID to take on regulatory authority, its formation should be approved by a majority of both owners and residents.[327] Land-use regulations are markedly different from the sorts of services Ellickson proposes that BLIDs should provide.[328] A renter typically does not control how his or her landlord chooses to procure services. A renter is indifferent as to whether a landlord shovels the snow off of the sidewalk herself, hires a contractor to shovel the snow, or, with other local property owners, negotiates a preferred rate for a contractor to shovel the snow from all of the sidewalks on the block. In the case of land-use regulations, however, a renter may be more impacted than his landlord by regulations that permit a neighbor to construct a 4500 square-foot house on a 2000 square-foot lot. If the new house blocks a pleasant

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dominated by single-family homes, renters' preferences, even if they increase the rent that can be charged to tenants, may not be reflected in home values.

324. *Id.*

325. *Id.*

326. *Id.* at 94.

327. *Id.* at 99.

328. *See id.* at 77.

view or decreases natural light into the renter's home, it affects the renter's daily existence. It may not affect the landlord at all.[329]

As Ellickson describes it, "American law rightly is more tolerant of grass-roots deregulation than of grass-roots regulation."[330] This analysis militates against adopting neighborhood conservation districts solely based on the input of property owners. Renters, like property owners, are affected by the decision to adopt neighborhood conservation districts. If neighborhood conservation districts are efforts to ensure cultural stability, renters may be as invested in cultural stability as property owners are. Interest in stability is more likely to be a function of the length of one's tenure in the neighborhood than whether that tenure is as a renter or a homeowner. In fact, because renters have less control over the places where they live than owner-occupants do, renters may have an enhanced interest in a regulatory scheme that preserves their neighborhoods. To omit them from the decision to adopt a neighborhood conservation district ignores the utility that they may gain from the adoption, or not, of design-review guidelines. It also ignores and omits from any public policy discussion those ends that are valued by renters but detrimental to property owners, such as affordable rents.

2. Require Local Approval

In order to capture spillover effects and to include at least some future housing consumers, authorizing legislation should require that each conservation district be approved at both the sublocal and local levels. Underlying conservation-district legislation is an assumption that the impact on conservation-district designations is felt only by residents of the district. But these neighborhoods do not exist in a vacuum. They are part of larger municipalities and regions. The local housing market is certainly larger than a single conservation district. If imposition of a conservation district constrains supply of housing in that district, the attendant impacts on price are felt not just in the conservation district but also in the larger region.

In recognition of the impact that conservation-district designation has on the larger housing market, approval of a conservation district should rest not just on the district's property owners but also on the residents of the municipality in which the proposed district is located.[331] In localities where a sublocal referendum is required, the referendum should be administered citywide. In order for the district to be approved, the referendum must be passed by a majority, or supermajority if so required by the authorizing ordinance, of voters citywide and in the proposed district. In localities where a referendum is not required but the local planning agency designates conservation districts, administrators typically require evidence of sublocal support in the form of petitions, nonbinding referenda, or testimony

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329. The value of living next to a small house that does not block air and light may be capitalized into the rental value. It may be outweighed by the value to the landlord of having the ability to construct a larger house, like that on the neighboring lot, and collect a higher rent for the additional square footage.

330. Ellickson, *supra* note 169, at 99.

331. Where the relevant housing market is larger than the municipality, state legislators may wish to take a broader approach and require approval of a regional governance structure (such as a county or even the state itself) or of neighboring municipalities.

received at public hearings.[332] In these cases, soliciting input from those who do not reside in the proposed district will be more difficult. Nevertheless, where those who do not reside in the district testify at public hearings, write letters, and otherwise participate in the public process to express a viewpoint on whether a conservation district should be adopted, these viewpoints should be considered just as valid as those held by property owners in the conservation district.

It is appropriate to require local authorization of each individual conservation district in addition to a local enabling ordinance permitting adoption of conservation districts generally. The fact that the local legislative body adopted the authorizing ordinance making conservation-district designation possible is not sufficient protection of the interests of those who live outside of the proposed district. First, when adopting authorizing legislation, legislators and voters may not have complete information on what proposed conservation-district regulations will look like. They may wish to authorize conservation districts generally but not to authorize particular types of regulations. It may simply be impractical to identify and prohibit every type of objectionable regulation in the authorizing legislation. Second, local government may choose to permit adoption of conservation districts but balk at adoption of a city's fifteenth conservation district.

Requiring local approval is necessary to cabin spillover effects, but as discussed in Part III, it is not sufficient.[333] For that reason, it is crucial that conservation districts be required to meet the substantive requirements described in Part IV.A so that spillover effects are addressed in the substance of conservation-district regulations and not only in the procedures required to adopt those regulations.

3. Impose Minimum Voter Turn-Out Requirements

Conservation districts present a vocal minority / silent majority problem. This problem is not unique to conservation districts and affects policy making in all realms.[334] In the context of conservation districts, however, the problem is acute.

First, in the sublocal context, a small absolute number of voters can constitute a simple majority. In practice, these neighborhoods can be quite small. Nashville's South Music Row neighborhood conservation district consists of just seventy properties.[335] Because neighborhood conservation districts require new construction to be "contextual," the smaller the district, the more limiting the regulations will be. There is a stark difference between a requirement that a home's design be architecturally consistent with five thousand nearby homes and a requirement that

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332. *See supra* Part II.B.

333. *See supra* Part III.B.1.

334. *See* Kevin R. Johnson, Los Olvidados*: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement*, 1993 B.Y.U. L. REV. 1139, 1160 (discussing silent-majority problem in the context of immigration enforcement but acknowledging that the vocal minority / silent majority problem "might be characteristic of a number of subject areas where strong (often referred to pejoratively as 'special') interest groups might prevail over a majority").

335. *South Music Row*, METRO GOV'T NASHVILLE & DAVIDSON COUNTY, TENN., http://www.nashville.gov/Historical-Commission/Services/Preservation-Permits/Districts-and-Design-Guidelines/South-Music-Row.aspx.

the context be defined by the five closest homes.[336] In addition, the small size of a neighborhood conservation district might result in a few property owners being greatly affected by the district designation.[337] In the Glen Lennox neighborhood of Chapel Hill, the movement to adopt the conservation district was spurred by a single property owner's desire to raze a fifty-year-old, low-density, one-story apartment complex close to two major highways. The developer sought to replace the existing complex with a shopping center, movie theater, hotel, parking structure, and almost one thousand housing units.[338] Neighbors, objecting to the scale of the proposed changes, rallied to adopt a neighborhood conservation district, thus granting themselves a greater degree of control over the redevelopment project. In 2011, Brookline, Massachusetts, adopted its first neighborhood conservation district under very similar circumstances. Troubled by a single property owner's plan to redevelop a postwar, low-rise, multifamily housing complex, neighbors voted to adopt a conservation district by a ten-to-one ratio.[339]

A land-use regulation that affects the ability to use one's home can have deleterious effects on quality of life. Because the vocal minority / silent majority problem is so acute, the process of adopting conservation districts should be structured to maximize the likelihood that the referendum will accurately represent community sentiment. To avoid the possibility that a vocal minority will prevail over the desires of a silent majority, minimum voter turn-out requirements should be imposed. These requirements are not intended to do away with conservation districts altogether and can be set with reference to actual voter turnout in local elections in the relevant municipality. But a conservation district should not be adopted based on a voter turnout significantly less than that experienced in regular municipal elections.

Despite a culture that otherwise espouses free-market ideology and the importance of free expression, the outsized role played by risk-averse homeowners in the land-use arena and their desire to control perceived risks to their property values has given us aesthetic context-based regulation in a majority of states. But the conservation-district process is flawed. Planners, legislators, and courts should subject it to heightened scrutiny. First, it overemphasizes the voice of existing homeowners, to the exclusion of renters, nonresidents, and future housing consumers. And because the impacted communities are, almost by definition,

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336. That the context might be dictated by five nearby homes is not an extreme example. The Noank ordinance discussed in Part II.A, *supra*, requires, for example, that context be defined by the homes within two hundred feet of the proposed structure.

337. *E.g.*, *Glen Lennox Area Neighborhood Conservation District Development (CD-8)—Background and Process*, TOWN CHAPEL HILL, http://www.townofchapelhill.org/town-hall/departments-services/planning-and-sustainability/resources/neighborhood-conservation-district-ncd-zoning-overlays/glen-lennox-ncd-background ("The Committee continued meeting from September of 2011 to March of 2012 to develop NCD zoning overlay regulations, design guidelines, and Guiding Principles for the Glen Lennox apartment and commercial property which are referred to as CD-8C.").

338. Mark Schultz, *Plan 'Done Hastily,' Developer Says*, NEWS & OBSERVER (Raleigh, N.C.), June 26, 2008, at B1; Schultz & Arounnarath, *supra* note 190.

339. *See, e.g.*, Downs, *supra* note 43 ("Community activist William Pu said that in designating Hancock Village as a conservation district . . . [the town] was acting 'to preserve the public good from the actions of a single entity.'").

desirable, conservation districts—by restricting density and, therefore, the total number of housing units—cut off the supply of a valuable good and artificially inflate the price of housing located near fixed amenities, such as downtown business districts and transportation nodes. Land-use policy is characterized by decades of exclusionary motivations and impacts. Local governments should not empower sublocal groups to perpetuate these policies through conservation districts.

A generation ago, a scholarly consensus emerged to explain the movement of courts toward accepting aesthetics as a basis for exercise of the police power. This consensus relied on context, or cultural stability, as a legitimate rationale for aesthetic regulation. But cultural *stability* is no more a legitimate or widely held value than is cultural *change*. And while a powerful voting bloc might prefer to establish a conservation district, often voices that prefer change to stability are excluded from that decision. Because of evolving market dynamics and demographics, change is inevitable in the land-use arena, and desirable neighborhoods should not be frozen in time and walled off from would-be residents in the name of "conservation."