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Home Sweet Home? The Efficacy of Rental Restrictions to Promote Neighborhood Stability

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HOME SWEET HOME? THE EFFICACY OF RENTAL RESTRICTIONS TO PROMOTE NEIGHBORHOOD STABILITY

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I. INTRODUCTION

Homeownership is an enduring and fundamental American tradition. Its economic and social benefits are well examined and have received renewed attention in recent articles and books.[1] Homeownership is encouraged by favorable tax laws,[2] protected by homestead and property laws,[3] and vigorously defended against eminent domain attempts.[4] This symposium critically examines the continuing primacy of homeownership—including the corollary effects on wealth creation—in light of the recent general economic downturn and the resulting impact on the housing sector. The economic and housing crises have forced commentators and policymakers to reexamine the connection between traditional conceptions of homeownership and economic stability, particularly for low-income residents.[5] This article questions the

1. *See, e.g.*, D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255, 259, 276–77 (2006) (examining the underlying bases for legal protections accorded houses); Lee Anne Fennell, *Homeownership 2.0*, 102 NW. U. L. REV. 1047, 1054 (2008) ("Households desire homeownership for many reasons: it delivers a stable stream of housing consumption, a large degree of personal control over the residence, access to superior housing stock and public services, important tax advantages, and unparalleled social and status benefits."); Tim Iglesias, *Our Pluralist Housing Ethics and the Struggle for Affordability*, 42 WAKE FOREST L. REV. 511, 518–19 (2007) (identifying "five housing" ethics that have influenced housing policy); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959 (1982) (citing a house as an example of property closely connected with personhood); Stephanie M. Stern, *Residential Protectionism and the Legal Mythology of Home*, 107 MICH. L. REV. 1093, 1095–1098, 1110 (2009) (challenging the "psychological primacy" of the home and consequent home protection legislation); Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277, 326–329 (1998) (describing "[America's] Romance of the Single-Family House"). *See generally* WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES (2001) (describing homeowners' incentives and desires to affect local amenities); LEE ANNE FENNELL, THE UNBOUNDED HOME: PROPERTY VALUES BEYOND PROPERTY LINES (2009) (describing the value links between individual home purchasers and the communities they live in).

2. Federal tax law permits homeowners to deduct mortgage interest payments and property taxes. I.R.C. § 163(h) (2006); § 164(a).

3. State homestead laws protect some or all of the equity in a debtor's home from the reach of creditors. *See, e.g.*, TEX. PROP. CODE ANN. §§ 41.001–41.024 (2000 & Supp. 2008) (protecting all of a debtor's equity). In some states, married couples can elect to hold their home as tenants by the entirety, which shields the home from many creditor claims of one spouse. *See* John V. Orth, *Tenancy by the Entirety: The Strange Career of the Common-Law Marital Estate*, 1997 BYU L. REV. 35, 46 (1997).

4. In Kelo v. City of New London, 545 U.S. 469, 483–84 (2005), the U.S. Supreme Court validated economic development as a sufficient public use under the Fifth Amendment to justify an eminent domain action. Many states enacted legislation making eminent domain against homes harder to accomplish. *See, e.g.*, CAL. CONST. art. I, § 19(b) (severely limiting eminent domain actions against owner-occupied residences).

5. *See, e.g.*, A. Mechele Dickerson, *The Myth of Home Ownership and Why Home Ownership Is Not Always a Good Thing*, 84 IND. L.J. 189, 213–20, 232–37 (2009) (evaluating

traditional conception of homeownership by exploring how local governments, in an effort to promote regulatory land use goals, frequently place limitations on the power of homeowners to freely alienate property. This article further explores whether these locally imposed restrictions on alienation would be effective policy tools if employed to combat residential real estate speculation. A potential anti-speculation ordinance would not allow investor purchasers to rent their homes for a prescribed period. To the extent residential real estate speculation harms local communities, would such an ordinance increase the economic stability of neighborhoods?

I focus on rental restrictions on homeowners for two primary reasons. First, the right to freely alienate "ownership" of property is one of the conventional hallmarks of property.[6] Given the importance of alienability in legal conceptions of homeownership, there are a surprising number and variety of restrictions on the alienability of homes across communities nationwide.[7] This assortment of existing rental restrictions suggests they are effective at promoting home ownership directly, as well as the values associated with home ownership and owner occupancy. Second, reactions to the housing crisis and its effect on borrowers and communities have largely focused on the activities of lenders, individual borrowers, and state and national regulators.[8]

home ownership policies that created the mortgage crisis and proposing reforms); Rachel D. Godsil & David V. Simunovich, *Protecting Status: The Mortgage Crisis, Eminent Domain, and the Ethic of Homeownership*, 77 FORDHAM L. REV. 949, 995–97 (2008) (examining the effects of the economic crisis on conceptions of homeownership and rationales for government protection of homeowners).

6. I have written elsewhere about whether anti-speculation restrictions would be impermissible restraints on alienation under the common law. *See* Ngai Pindell, *Fear and Loathing: Combating Speculation in Local Communities*, 39 U. MICH. J.L. REFORM 543, 576–77 (2006) (noting the Restatement (Third) of Property focuses on reasonableness). Although the issue was sometimes discussed in dicta, none of the rental restriction examples in this article were struck down because they were impermissible restraints on alienation. *See, e.g.*, Anderson v. Provo City Corp, 108 P.3d 701, 709–10 (Utah 2005).

7. *See* discussion *infra* Part II.A–H. This article does not include a discussion of restrictions contained in condominium community bylaws. Owner occupancy restrictions in condominiums are more commonplace. *See, e.g.*, Apple Valley Gardens Ass'n, Inc. v. MacHutta, 763 N.W.2d 126, 130 (Wis. 2009) (upholding amendment to condominium bylaws requiring owner occupancy of units); Jordan I. Shifrin, *No-Leasing Restrictions on Condominium Owners: The Legal Landscape*, 94 ILL. B.J. 80, 80 (2006) ("Condominium associations in large numbers are adopting provisions that eliminate rental units and forbid absentee ownership.").

8. *See, e.g.*, A. Mechele Dickerson, *Over-Indebtedness, the Subprime Mortgage Crisis, and the Effect on U.S. Cities*, 36 FORDHAM URB. L.J. 395, 395–410 (2009) (discussing rising consumer debt levels); Christopher L. Peterson, *Preemption, Agency Cost Theory, and Predatory Lending by Banking Agents: Are Federal Regulators Biting Off More Than They Can Chew?*, 56 AM. U. L. REV. 515 (2006) (discussing tension between federal and state regulation of predatory lending); Arthur E. Wilmarth, Jr., *The Dark Side of Universal Banking: Financial Conglomerates and the Origins of the Subprime Financial Crisis*, 41 CONN. L. REV. 963 (2009) (discussing the

The dialogue has not included what local communities, including governments, could do to prevent or mitigate such a crisis.[9]

Rental restrictions are an existing local land use tool that could be reconceived to address real estate speculation problems exposed by the housing crisis. Residential real estate speculation, combined with other economic trends and lending practices, poses a possible threat to the economic stability of residential communities. Speculative purchases have exacerbated the wild inflation of housing prices over the last decade, making many communities unattainable for low-income families.[10] When the real estate bubble burst, individual borrowers, communities, cities, and renters were hurt.

In an earlier article, I explored whether a mandatory holding period would be useful as an anti-speculative policy.[11] In this article, I examine the number and breadth of rental restrictions nationwide, the efficacy of rental restrictions generally, and their potential role in creating an effective anti-speculation policy. I argue that rental restrictions on speculative purchases could reduce speculation by eliminating the opportunity for investors to purchase a property, lease it for one to two years to a short-term renter, and then resell the property at a higher price. In other words, short-term renters could not subsidize the investor's purchase.

These restrictions, however, create three primary challenges. First, it is necessary to identify the type of rental—long or short-term—in order to distinguish between a speculator and a long-term investor. Second, purchases should be viewed in the context of a speculation-fueled rising market, rather than in the aftermath of a collapsed market. This article assumes that

role of large lenders); PEW CTR. ON THE STATES & PEW HEALTH AND HUMAN SERVICES PROGRAM, THE PEW CHARITABLE TRUSTS, DEFAULTING ON THE DREAM: STATES RESPOND TO AMERICA'S FORECLOSURE CRISIS (2008), http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Subprime_mortgages/defaulting_on_the_dream.pdf (collecting state policies addressing the impacts of foreclosure).

9. There has been some scholarship on cities' efforts against predatory lending. *See generally* Kathleen C. Engel, *Do Cities Have Standing? Redressing the Externalities of Predatory Lending*, 38 CONN. L. REV. 355 (2006) (analyzing whether cities have standing to bring suit for damages caused by predatory lenders); Ngai Pindell, *The Fair Housing Act at Forty: Predatory Lending and the City as Plaintiff*, 18 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 169 (2009) (exploring opportunities for a broader range of FHA suits with the city as plaintiff); John P. Relman, *Foreclosures, Integration, and the Future of the Fair Housing Act*, 41 IND. L. REV. 629 (2008) (further discussing the city as a plaintiff in predatory lending suits).

10. Pindell, *supra* note 6, at 543–45 (discussing rising prices in Las Vegas fueled by speculation on residential housing).

11. *Id.* at 546–47. *Cf.* George Lefcoe, *How "Spec" Condo and Tract Home Buyers Helped Sink Our Housing and Finance Markets: Should the Alienability of Their Interests Be Restrained By Law?*, 36 J. ON LEGISLATION (2009) (focusing on the deceptive acts of spec buyers in violation of state and federal laws and cautioning against restraining spec buyers by limiting the alienation of houses).

speculator purchasers harmed the rising housing market of a few years ago and therefore the market would have been better if the speculators would have been excluded. In the aftermath of a collapsed market, a different evaluation of purchasers is required. Third, the focus of the examination must be on the negative effects of speculation, rather than on arguments about the perceived negative impacts of renters themselves on communities. Local governments would craft rental restrictions to limit *speculators*, and not to limit the number of *renters* in the community.

To illustrate these challenges, Part II examines a variety of rental restrictions throughout the country. Part III then attempts to respond to these challenges within the context of real estate speculation. My goal is not necessarily to convince policy makers and courts that the scope of rental restrictions should be expanded to include curbs on speculative purchases. Political and economic objections to such an expansion would be strong. Given this symposium's exploration of the connection between homeownership and economic stability, it is instead appropriate to challenge the assumption that traditional homeownership includes, without question, the right to alienate property in a way that may be detrimental to the larger community. By deconstructing this "alienation norm," I hope to identify regulatory spaces to enable local governments to better regulate housing to protect communities from the harms of market crashes while preserving the community-building and wealth-building characteristics of home ownership.

In this article, I attempt to strike the proper balance of legal protections concerning homeownership. Do we over protect traditional conceptions of homeownership at the expense of other important values?[12] If the answer is yes, then do limitations on owners' alienation rights achieve worthwhile goals? Or are we perhaps offering owners too little in terms of ownership options? Owners may need more flexibility in the compromise between shelter and commodity, or between on-site and off-site risk factors.[13] These questions of "too much" or "too little" suggest that the issues of rental restrictions and limits on speculation are ones that jurisdictions will soon be compelled to reconsider.

This article also focuses on rental restrictions in an attempt to deconstruct a monolithic version of homeownership in which the home is a domain free from

12. One examination argues that psychological, sociological, and demographic data does not support the breadth of legal protections for homes. Stern, *supra* note 1, at 1110–11, 1120. Similarly, other property protections, such as homestead exemptions and rent control, may under-protect creditors or other members of the community. Barros, *supra* note 1, at 284–290.

13. Fennell, *supra* note 1, at 1048 ("Current legal arrangements make homeowners high-stakes gamblers.").

outside interference and regulation,[14] and a commodity that should be protected to maximize its economic value. Rental restrictions—limitations on a classic, fundamental right of alienation for homeowners—are frequently used to achieve a number of policy goals. The question, then, is whether anti-speculation should be one of these goals.

II. VARIETIES OF RENTAL RESTRICTIONS

Rental restrictions can be organized by both the entity that imposes the regulation, and by the characterization of the regulation. The following chart and the remainder of this section begin with a regime with minimal or no restrictions on the rental of single-family housing, and end with a regime of heavy restrictions on rentals in a community burdened by restrictive covenants. In each of these regimes, regulating actors attempt to balance the demands of individual property owners with concerns about community character.[15] A common failing of arguments supporting community character, however, is that they often cast renters as undesirable community members—a view this article does not endorse.[16] Negative impacts on a community commonly

14. In examining takings law through three models of property, Joseph Singer includes several historical annotations to the phrase "A man's house is his castle" including a 1644 attribution to Sir Edward Coke and a 1768 attribution to William Blackstone. *See generally* Joseph Singer, *The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations*, 30 HARV. ENVTL. L. REV. 309 (2006) (examining three models of property to flesh out the takings doctrine).

15. Rent control provisions limiting the amount of rent a landlord can charge a tenant may also affect rental decisions. The use of rent control to preserve affordable housing is examined in Peter Salsich, *State and Local Regulation Promoting Affordable Housing*, *in* THE LEGAL GUIDE TO AFFORDABLE HOUSING DEVELOPMENT 73, 110–12 (Tim Iglesias & Rochelle E. Lento eds., 2005). The propriety of rent control legislation is examined in Richard A. Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 BROOK. L. REV. 741 (1988) (arguing that rent control statutes are unconstitutional) and in several responses. *See, e.g.*, W. Dennis Keating, *Commentary on "Rent Control and the Theory of Efficient Regulation,"* 54 BROOK. L. REV. 1223 (1989) (arguing that rent control is a legal exercise of the police power). While these provisions can therefore have a significant impact on a homeowner, this Article instead focuses on limitations that limit the ability of a homeowner to rent in the first instance, at any price.

16. *See, e.g.*, Repair Master, Inc. v. Borough of Paulsboro, 799 A.2d 599, 601 (N.J. Super. Ct. App. Div. 2002) ("This excessive presence of rental tenure throughout the municipality has adversely impacted the socio-economic fabric of the community in a variety of areas, including the housing market, the commercial real estate market, the municipal tax base, demand for police services, incidence of code enforcement violations, and increased presence of children-at-risk throughout the local school system."); Coll. Area Renters & Landlord Ass'n v. City of San Diego, 50 Cal. Rptr. 2d 515, 516, 520 (Cal. Ct. App. 1996) (Most of the problem houses are tenant occupied and the problems include "parking; regular gathering place for many friends; number of people over age of 18 exceed number of bedrooms available; and lack of proper maintenance detracts from appearance of the neighborhood. Associated reported problems included noise, litter, property damage and traffic congestion.").

ascribed to renters—overcrowding, short-term horizons, increased traffic, limited care of property—can also be attributed to many owners. As a consequence, distinctions (made by cities and communities) between renter activity and owner activity appear arbitrary, exclusionary, and often mean spirited.

1. Actor: none	*Minimal or no regulation* minimal or no regulation of rental requirements
2. Actor: local government	*Procedural rental requirements* homeowner must comply with local safety regulations in order obtain permit to rent housing
3. Actor: local government	*Land use approvals* homeowner may not rent accessory unit or obtain special land use approval without owner occupancy
4. Actor: local government	*Short-term vacation rentals* homeowner may not engage in short term or vacation rentals at all, or they are regulated
5. Actor: local government	*Substantive rental requirements* homeowner may not rent unless get permit
6. Actors: local government and residents	*Neighborhood self-determination* homeowners may not rent at all or without permit
7. Actors: local government and developer	*Development agreement restrictions* homeowner may not rent at all within certain time period
8. Actor: developer	*Private covenants* homeowner may not rent at all in common interest community

A. Minimal or No Regulation

This type of regime includes single-family housing that requires no special governmental approval to rent. This does not mean, however, that rental

decisions are free from all governmental or private oversight. For example, many zoning ordinances contain a definition of "family" that governs the applicable residential zoning district.[17] This definition may ostensibly regulate how many people can occupy a house in order to preserve residential neighborhood values,[18] but the zoning definition will likely face increased judicial scrutiny if it impinges on Fair Housing protections,[19] or the living arrangements of a "non-traditional" family.[20] Furthermore, a regulation that distinguishes between owner-occupied and rented housing in restricting the allowable number of residents will likely be similarly scrutinized.[21]

Private restrictive covenants may also burden individual houses.[22] These covenants often impose maintenance and other obligations that either the tenant or the owner may actually perform, although responsibility for their performance ultimately lies with the owner. For example, a covenant might require that the exterior of the house be maintained, landscaping be kept neatly trimmed, and outdoor sign displays be limited.[23] In short, communities within this default category are not free from property regulation generally. Instead, they are only free from property regulations focused on rental housing.

17. *See, e.g.*, GAINESVILLE, FL., CODE OF ORDINANCES §§ 30-23, 30-51 (1990), *available at* http://www.municode.com/resources/gateway.asp?pid=10819&sid=9. For a comprehensive examination of family definitions in residential zoning districts, see Adam Lubow, *"…Not Related by Blood, Marriage, of Adoption": A History of the Definition of "Family" in Zoning Law*, 16 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 144 (2007).

18. In Vill. of Belle Terre v. Boraas, 416 U.S. 1, 9–10 (1974), the Supreme Court upheld a zoning ordinance designed to limit the numbers of college students in a residential neighborhood. The Court approved the zoning practice of preserving "[a] quiet place where yards are wide, people few, and motor vehicles restricted" as "legitimate guidelines in a land-use project addressed to family needs." *Id.* at 9

19. *See* City of Edmonds v. Oxford House, 514 U.S. 725, 735 (1995) (holding that maximum occupancy restrictions based on housing size are permissible, but that the city's proffered maximum occupancy restriction was really a family composition rule and could be challenged under the Fair Housing Act).

20. In Moore v. City of E. Cleveland, 431 U.S. 494, 499 (1977), the Supreme Court struck down a zoning ordinance that would prevent many extended families from living in the same house. The court noted that "[t]he tradition of uncles and aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable [to the nuclear family] and equally deserving of constitutional protection." *Id.* at 504.

21. *See* Coll. Area Renters & Landlord Ass'n v. City of San Diego, 50 Cal. Rptr. 2d 515, 516, 520 (Cal. Ct. App. 1996) (invalidating an ordinance that limited the number of adult occupants in a rented home).

22. For a discussion of substantive restrictions imposed by covenants, see *infra* Part II.H.

23. *See, e.g.*, Paula A. Franzese, *Privatization and Its Discontents: Common Interest Communities and the Rise of Government for "the Nice"*, 37 URB. L. 335, 335–37 (2005) (noting the popularity of common interest communities and their frequent reliance on restrictive covenants).

B. Procedural Rental Requirements

Jurisdictions in this category are often desirable vacation destinations or located near a college or university. In response to the disproportionately large number of renters in these areas, long-term residents often demand more accountability from landlords who lease property to tourists or university students,[24] and these jurisdictions often face political and social pressure to address rental housing issues more aggressively.

In response to this pressure, jurisdictions with procedural rental requirements impose some obligations on landlords, including requirements that the landlord register with the city, obtain certification of building code compliance, and provide tenants with a copy of state and local leasing laws.[25] Registration requirements on landlords are often accompanied by substantive obligations to respond promptly to problems with the rental house along with penalties for failing to do so.[26]

Generally, jurisdictions in this category impose leasing requirements on individual landlords to mitigate the perceived adverse effects of a high concentration of renters. It is possible, however, that a jurisdiction could deny approvals of rental licenses altogether pursuant to a broad leasing moratorium.[27] But generally, communities employ procedural rental requirements to ensure that landlords maintain their rental properties and that renters are well-behaved. Landlords face restrictions on the operation of their rental, but not on the decision to rent itself.

24. *See, e.g.*, Jack S. Frierson, Note, *How are Local Governments Responding to Student Rental Problems in University Towns in the United States, Canada, and England?*, 33 GA. J. INT'L & COMP. L. 499, 515–18 (2005) (discussing Gainesville, Florida Definition of Family Ordinance and its Landlord Permit Ordinance).

25. *See* Palmieri v. Town of Babylon, No. 01CV1399(SJ), 2006 WL 1155162 at *1 (E.D.N.Y. Jan. 6, 2006), *aff'd*, 277 Fed. App'x. 72 (2d Cir. 2008) (upholding a city Rental Permit Law "requir[ing] that an owner seeking to obtain a rental permit apply in writing to the Town's Building Inspector and provide certification that the subject Property complies 'with all the provisions of the Code of the Town of Babylon, the laws and sanitary and housing regulations of the County of Suffolk and the Laws of the State of New York.'"); MIAMI GARDENS, FL., ORDINANCE 2005-14-5-52 (2005) (obligating landlord to provide tenant with state and city landlord tenant laws and obtain a certificate of occupancy based on compliance with local building code regulations).

26. GAINESVILLE, FL., CODE OF ORDINANCES § 14.5-2(e) (2003), *available at* http://www.municode.com/resources/gateway.asp?pid=10819&sid=9 (providing a point system for landlord violations of city provisions).

27. *See* Repair Master, Inc. v. Borough of Paulsboro, 799 A.2d 599, 608 (N.J. Super. Ct. App. Div. 2002) (finding that a borough did not have the authority to impose a leasing moratorium).

C. Land Use Approvals

Cities may condition land use activity on owner occupancy in two types of scenarios. The first occurs when cities require owner occupancy of all or part of a house in order to rent an accessory apartment.[28] The second occurs when cities require owner occupancy of a house as a condition of a special land use approval, such as approval of a variance, conditional use permit, or special exception.[29] Each of these scenarios face potential judicial scrutiny because they challenge the land use maxim that zoning provisions must regulate the *use* of property rather than the *user* of property.[30] If the owner occupancy requirement restricts a large number of houses and is substantially related to a valid land use policy, the restriction may be upheld. On the other hand, those restrictions that impact a single residence are especially vulnerable to challenges.

Typically, when a city conditions the rental of a house on owner-occupancy, a homeowner will live in the primary residence and rent a guest house or garage.[31] It is also possible, but less likely, that the owner will occupy the guest house or smaller residence, and rent the main house. States vary in their responses to challenges to these restrictions. New York and Utah have upheld owner occupancy restrictions, while North Carolina has ruled against them.

In *Kasper v. Brookhaven*, New York homeowners who wished to rent an accessory apartment were required to occupy the primary home themselves.[32] The purpose of the ordinance was

28. See discussion *infra* this section.

29. See discussion *infra* this section.

30. *Compare* Ewing v. City of Carmel-By-The-Sea, 286 Cal. Rptr. 382, 393 (Cal. Ct. App. 1992) ("In general, zoning ordinances are much less suspect when they focus on the use than when they command inquiry into who are the users. The Ordinance here does just that. It prohibits the transient commercial use of residential property for remuneration in the R-1 District—regardless of who the parties are.") *and* Coll. Area Renters & Landlord Ass'n v. City of San Diego, 50 Cal. Rptr. 2d 515, 521 (Cal. Ct. App. 1996) (striking an ordinance that limited the number of adult occupants in rental housing but not in owner occupied housing. "In general, zoning ordinances are much less suspect when they focus on the use than when they command inquiry into who are the users." (quoting City of Santa Barbara v. Adamson, 610 P.2d 436, 441–42 (Cal. 1980)), *with* Gangemi v. Zoning Board of Appeals of Town of Fairfield, 763 A.2d 1011, 1022 (Conn. 2001) (Sullivan, J., dissenting) (dissent arguing that the general trend in many jurisdictions has leaned away from a strict adherence to the use/user distinction).

31. Affordable housing pressures also lead jurisdictions to pass accessory housing ordinances. *See, e.g.*, Paul J. Weinberg & Nola McGuire, *"Granny Flats" and Second Unit Housing: Who Speaks for the Neighborhood?*, 23 ZONING & PLAN. L. REP. 25 (2000) (discussing California affordable housing legislation permitting accessory housing in local communities).

32. Kasper v. Town of Brookhaven, 535 N.Y.S.2d 621 (N.Y. App. Div. 1988). *See also* Sounhein v. City of San Dimas, 55 Cal. Rptr.2d 290 (Cal. Ct. App. 1996) (upholding an owner occupancy condition on the approval of an accessory apartment).

> [T]o provide the opportunity and encouragement for the development of small rental housing units designed, in particular, to meet the special housing needs of single persons and couples of low and moderate income, both young and old, and of relatives of families presently living in the Town of Brookhaven. Furthermore, it is the purpose and intent of this local law to allow the more efficient use of the town's existing stock of dwellings to provide economic support of present resident families of limited income and to protect and preserve property values.[33]

The *Kasper* court minimized the distinction between regulating the use and user by noting that zoning regulations often—and permissibly—regulate both. For example, a retirement community district could be created to enable nonprofits to accommodate the needs of the elderly. This type of district necessarily focuses on the user—the elderly—rather than the use of the property.[34] The *Kasper* court concluded that the Town of Brookhaven "has appropriately considered, *inter alia*, the economic plight of occupying homeowners and the obvious benefits which will accrue to the community as a whole in enacting the accessory-apartments law."[35]

In *Anderson v Provo City Corp*, the Utah Supreme Court upheld a city ordinance permitting only owner-occupiers to rent accessory apartments in a neighborhood near Brigham Young University.[36] The Provo City Planning Commission staff recommended approval of the ordinance and noted that residents felt "'that the[ir] stability is disintegrating one home at a time from what was once a predominantly affordable family owner occupied neighborhood.' The proposed amendment was thus intended to 'prohibit outside investors from targeting these neighborhoods[,] buying up homes and essentially creating duplexes that do not contribute to overall stability of the neighborhood."[37] The Provo ordinance exempted owners from the owner occupancy requirement in two instances—medical reasons and defined leaves of absences. The ordinance did not apply if "[t]he owner is placed in a hospital, nursing home, assisted living facility or other similar facility,"[38] or if an "owner has a bona fide, temporary absence of three (3) years or less for [certain] activities."[39]

In both *Kasper* and *Anderson*, local conditions, such as the opportunity to earn extra income through renting, or balancing the long-term and short-term

33. *Kasper*, 535 N.Y.S.2d at 622.

34. *Id*. at 626–27 (citing the example of Maldini v. Ambro, 330 N.E.2d 403 (N.Y. 1975)).

35. *Kasper*, 535 N.Y.S.2d at 627.

36. Anderson v. Provo City Corp., 108 P.3d 701 (Utah 2005).

37. *Id*. at 704.

38. *Id*. at 705.

39. *Id*. Presumably, the three year or less absence would permit individuals to leave for a service mission under the Church of Jesus Christ of Latter-day Saints. *Id.* at 709. Utah has a significant Mormon religious community.

shelter needs of a college town, were found to support the use of rental restrictions. In both instances, non owner-occupier landlords were included in the prohibition because these landlords did not have the requisite long-term economic and social ties to the surrounding community. However, the exceptions in the Provo ordinance suggest that potentially over-inclusive or politically sensitive rental restrictions can be fine tuned to the needs of a particular community.

North Carolina took a different approach in *City of Wilmington v. Hill*,[40] when the Court of Appeals found unconstitutional a local ordinance that required owner occupancy of the primary residence as a condition of renting a garage apartment.[41] Because garage apartments were allowable uses within the particular zoning district, the court reasoned that the local ordinance impermissibly regulated the *user* of the apartment rather than the structure's *use* as an apartment.[42] The ruling in this case was in accord with the general principle in North Carolina that it is "beyond the power of the municipality to regulate the manner of ownership of the legal estate."[43]

In support of its ruling, the *City of Wilmington* court cited a decision of the New Jersey Superior Court affirming the similarities between rental and owner-occupied housing:[44]

> Defendants do not even suggest, nor do we believe they properly could, that owner-occupation of a dwelling is a different use of the property in a zoning sense from tenant-occupation, the actual occupancy of the residence in either case being by a single family . . . As indicated, we do not regard a mere change from tenant occupancy to owner occupancy as an extension or alteration of the previous non-conforming use of the dwellings.[45]

This approach exemplifies the reluctance of some courts to uphold zoning distinctions between renters and homeowner occupiers. It reflects the view that similarly situated people—in this case families in a single family district—should be treated equally. The challenge for an anti-speculation rental restriction, then, is to deflect perceptions that it would impermissibly distinguish between renters and owner-occupiers. A starting point for such a rental restriction would be to focus on its anti-speculator purpose rather than perceived, anti-renter effects.

40. 657 S.E.2d 670 (N.C. Ct. App. 2008).

41. *Id*. at 673 (concluding that if the owner wanted to rent the house, the owner would have to live in the garage apartment).

42. *Id*. at 672.

43. Graham Court Assoc. v. Town Council of Chapel Hill, 281 S.E.2d 418, 422–23 (N.C. Ct. App. 1981).

44. Beers v. Bd. of Adjust. of Twp. of Wayne, 183 A.2d 130 (N.J. Super. Ct. App. Div. 1962).

45. *Id.* at 136.

Cities can also require owner occupancy of the house as a condition of a special land use approval. *Gangemi v. Zoning Bd. Of Appeals of Town of Fairfield*[46] offers an illustration. In *Gangemi*, owners of a residential beach property obtained a variance from setback requirements that allowed them to enlarge their house and convert the house from summer to year-round use; the grant of the variance was subject to a condition that the property would not be used for rental purposes.[47]

Invalidating the owner occupancy restriction, the court noted the substantial economic impact faced by property owners who could not rent their home. "Owners of a single-family residence can do one of three economically productive things . . . : (1) live in it; (2) rent it; or (3) sell it . . . . Stripping the plaintiffs of essentially one-third of their bundle of economically productive rights constituting ownership is a very significant restriction on their right of ownership."[48] It would cause "gross[]" unfairness to the owners stemming from the significantly reduced resale value of their home compared to the values of nearby homes unencumbered by a similar rental restriction.[49]

The court in *Gangemi* objected to the patent unfairness of singling out one house among many similarly situated houses by imposing an owner occupancy restriction. Such a restriction places a financial and practical burden on an isolated homeowner that is not shared with similar homeowners in the community. The court recognized the significance of this disparate treatment and cited an example where a different rule might be appropriate:

> It may be that where such a condition is imposed by virtue of a statute or regulation that is of district-wide application and is tailored to a specific land use policy . . . such a condition might be valid. Where, however, as in the present case, the no rental condition is not district-wide and therefore presumably applies only to the property at issue, thereby affording the other property owners in the beach district a distinct market advantage, and there is no other regulation even approaching is scope or purpose, the continued maintenance of the no rental condition serves no valid purpose, and violates

46. 763 A.2d 1011 (Conn. 2001).

47. *Id.* The property owners did not object to this condition until ten years after the variance was granted. Despite their failure to object to the original condition, the court allowed the property owners to proceed with their challenge in light of the importance of the public policy issue at hand. *Id.* at 1015. However, not every court is so forgiving of a property owner's failure to make a timely objection. In Kulak v. Zoning Hearing Bd. of Bristol Twp., 563 A.2d 978 (Pa. Comm. Ct. 1989), the court did not allow a subsequent owner to contest an owner occupancy restriction imposed without challenge by a previous owner even though the reviewing court disagreed with the validity of the owner occupancy provision.

48. *Gangemi*, 763 A.2d at 1015–16.

49. *Id*. at 1016.

> the strong and deeply rooted public policy in favor of the free and unrestricted alienability of property.[50]

D. Short-term Vacation Rentals

Communities that are also tourist destinations often face a high demand for short-term vacation rentals. In these communities, landlords typically rent single-family homes for a short period of time, such as one or two weeks, rather than for six months or a year. These short-term rentals can cause considerable friction in single-family residential neighborhoods. Long-term residents—both renters and owner-occupiers—complain of the increased traffic, noise, and sporadic upkeep associated with short-term rentals. In response, some communities have banned short-term rentals through privately-enforced restrictive covenants.[51] Other communities have sought to limit short-term rentals through municipal action.[52]

Sedona, Arizona, a picturesque town north of Phoenix, is an example of such a community. Sedona has long had a short-term rental ordinance (defined as a rental for less than 30 days) on its books, but the ordinance was seldomly enforced. Buoyed by increased advertising on the internet, short-term rentals in the area grew rapidly and led the city council to revisit the ordinance in 2008. The council voted to keep the ordinance, add penalties against advertisers of these rentals, and raise the penalty for noncompliance from $250 to $2500.[53] In support of its decision, the council noted Sedona's "small-town character, scenic beauty and natural resources" and concluded that an ordinance prohibiting short-term rentals was necessary "to safeguard the peace, safety and general welfare of the residents of Sedona . . . by eliminating noise, vandalism, overcrowding, neighborhood uncertainty, high occupant turnover, diminution of neighborhood character, and other secondary effects [of short-term rentals]."[54]

Short-term rental restrictions like Sedona's typically aim to protect the aesthetic tranquility and quality of life of neighborhoods. The impact of these restrictions on homeowners who wish to rent, however, can be quite significant. In many cases, the regulations affect the second homes of owners in vacation areas who may wish to rent the properties when they are not using

50. *Id.* at 1018. The *Gangemi* Court cited Ewing v. City of Carmel-By-The-Sea, 286 Cal. Rptr. 382 (Cal. Ct. App. 1991) as an example of a district wide application. In *Ewing*, the Court upheld a community wide ban on short term rentals.

51. *See, e.g.*, Mission Shores Ass'n v. Pheil, 83 Cal. Rptr. 3d 108, 113 (Cal. Ct. App. 2008) (finding a prohibition on short term rentals in CC & Rs reasonable and discussing its commonality in common interest communities).

52. *See, e.g.*, SAN BUENAVENTURA, CAL., ORDINANCE CODE § 6.455 (2009) (requiring an application, surety bond, and a nuisance response plan).

53. SEDONA, ARIZ., ORDINANCE §§ 8-4-1–8-4-6 (2008).

54. § 8-4-2.

them. While these short-term restrictions may not appear severe at first glance, the lost rental income can be significant, and the usefulness of the house as a primary dwelling is often limited due to the owner's other homes.

Jurisdictions that enact short-term rental restrictions through their zoning powers can face significant hurdles. While courts may be sympathetic to the problems that neighbors and municipalities face with short-term rentals, they are often troubled by these atypical expressions of zoning power or the effect of restrictions on individual property owners. As one New Jersey court explained, "[z]oning laws are designed to control types of uses in particular zones and are not ordinarily concerned with periods of occupancy or the property interest of the occupants."[55]

Courts often deem the effects of short-term rental bans on the rights of private property ownership too extreme and over-inclusive. For example, a long-time resident who wants to travel abroad for a summer cannot make a limited rental of her home; a long-time owner who uses the home as a summer residence cannot rent the home for other portions of the year; and an executor of an estate cannot make a short-term rental of the deceased's home while settling the estate.[56] In striking down these zoning regulations, courts have encouraged municipalities to use other measures—such as definitions of family or increased enforcement of nuisance codes—to mitigate the impact of potentially disruptive, short-term renters on a community.

When courts do uphold short-term rental bans, they typically emphasize the connection between the zoning provision and the city's comprehensive planning goals, the other uses the property owner could make of the property, and the rational relationship between the ban and the goal of residential stability.[57] In *Ewing v. City of Carmel-by-the-Sea*, the court compared the threat posed by short-term rentals to the residential character of the community with the goal of zoning ordinance banning short term rentals.[58] Rather than focus on the empirical dispute about whether short-term renters adversely impacted communities more than homeowners or long-term tenants, the court instead concluded that short-term tenants do not engage in community-strengthening activities.[59] Therefore, a rational relationship existed between the ban and the goal of protecting residential character.

Thus, short-term rental ordinances appear to succeed or fail depending on how a court balances the extent of the property interest impaired with the goal

55. United Prop. Owners Ass'n of Belmar v. Borough of Belmar, 447 A.2d 933, 936 (N.J. 1982) (striking down a zoning regulation prohibiting the temporary or seasonal rental of residential property in most residential districts).

56. *Id.* at 936–37.

57. *See, e.g.*, Ewing v. City of Carmel-By-The-Sea, 286 Cal.Rptr. 382 (Cal. Ct. App. 1991)

58. *Id.* at 385.

59. *Id.* at 388.

of the government regulation. In finding for the government, a court may characterize the ordinance as a relatively minor intrusion on alienation rights; the goal of such an ordinance—protecting residential neighborhood values—is long-held and particularly vulnerable in tourist communities where hotels and similar establishments traditionally engage in short-term rentals. In finding for the homeowner, the court may view the ordinance as one that has a disparate impact on an individual member of the community, far-reaching economic consequences for the property, or an unintended over-inclusive effect.

E. Substantive Rental Requirements

St. Bernard Parish is a municipality southeast of New Orleans that is in the process of rebuilding after being severely damaged during hurricane Katrina in 2005. The population of the Parish was 66,000 before the flood; in 2009 that number stood at just over 33,000.[60] In 2006, the Parish Council enacted an ordinance to regulate single-family rental housing, with the goal of "encourage[ing] single family residence owners to return, rebuild, and resume living in the parish and to reoccupy their homes . . . to maintain the integrity and stability of established neighborhoods . . ." and "to foster and encourage a community and family atmosphere in the neighborhoods of St. Bernard Parish." (Ordinance 12–06.)[61] Under the terms of the ordinance, "No person or entity shall rent, or lease, directly or indirectly, any single-family residence located in an R-1 zone, without first obtaining a Permissive Use Permit from the St. Bernard Parish Council."[62]

In St. Bernard Parish, the restriction on alienation was enacted in the wake of a tremendous natural disaster. While the cause of the destruction and subsequent construction of new homes in the parish is exceptional, the phenomenon of a community undergoing population growth and, consequently, construction of a large number of new homes, is much more commonplace.

The St. Bernard ordinance requires landlords to obtain a permit from the city planning department before renting a property. In contrast to the permits or code requirements noted in the procedural rental requirements category,[63] these permit requirements contain many more substantive elements and focus

60. U.S. Census Bureau, St. Bernard Parish QuickFacts (2009), http://quickfacts.census.gov/qfd/states/22/22087.html (last visited Feb. 6, 2010).

61. Baker v. St. Bernard Parish Council, No. 08-1303, 2008 WL 4681373, at *1 (E.D. La. Oct. 21, 2008).

62. *Id.* at *2. Although the Parish Council ultimately determines whether a permit will be granted, an individual must first submit an application (along with a $250 filing fee) to the planning department who reviews the application and submits a recommendation to the Parish Council. *Id.*

63. *See supra* Part II.B.

on the larger community, as well as the physical condition of the particular home for rent. The approval process includes an analysis of the following criteria:

> 1. The history of any properties within a one thousand (1,000) foot radius being used as rental properties.
>
> 2. The volume of rental properties shall not exceed 2 R1 Permissive Use Permit rental properties within five hundred (500) linear frontage feet of contiguous R1 dwellings.
>
> 3. The availability of R1 homes used as rental properties within the boundaries of St. Bernard Parish at the time of the request.
>
> 4. The level of compliance exhibited by the property owner in maintaining other rental properties within St. Bernard Parish.[64]

The text of the St. Bernard ordinance does not address speculation, but it does mention the "integrity and stability of established neighborhoods" and its hope that residents will "return, rebuild, and resume living" in the parish.[65] While these express substantive requirements could encourage the exclusion of politically and economically vulnerable communities,[66] they could also have the effect of excluding speculators and similar purchasers with short-term outlooks, an outcome the Parish seems to be promoting.

F. Neighborhood Self-determination

The city of East Lansing, Michigan allows communities to petition the city council to establish rental restrictions through a residential rental restriction overlay district.[67] The ordinance enables residents "to preserve the attractiveness, desirability, and privacy of residential neighborhoods by precluding all or certain types of rental properties and thereby preclude the deleterious effects rental properties can have on a neighborhood with regard to property deterioration, increased density, congestion, noise and traffic levels and reduction of property values."[68] A community must obtain the signatures

64. *Id.*

65. *Id.* at *1.

66. The ordinances in St. Bernard Parish have been challenged by a fair housing agency. Press Release, Greater New Orleans Fair Housing Action Center, Fair Housing Center Files Suit Against St. Bernard Parish (Oct. 3, 2006), http://gnofairhousing.org/10-03-06-StBernardsuit.htm (last visited Oct. 20, 2009). St. Bernard Parish officials have also objected to the construction of multifamily rental apartments in the community. *See* Campbell Robertson, *A Battle Over Low-Income Housing Reveals Post-Hurricane Tensions*, N.Y. TIMES, Oct. 4, 2009, at A16.

67. EAST LANSING, MICH., CODE OF ORDINANCES §§ 50–772–776 (2003).

68. § 50-773. The ordinance also contains these additional objectives: (1) To protect the privacy of residents and to minimize noise, congestion, and nuisance impacts by regulating the types of rental properties (2) To maintain an attractive community appearance and to provide a

of two-thirds of the property owners in the community to qualify for the overlay district.[69] Communities can prohibit new rentals altogether, or restrict rental licenses to owner-occupiers who wish to allow a renter to share the house. According to the city's website, thirteen neighborhoods have obtained overlay district designations restricting rentals in this way.[70]

A benefit of this type of regulation is the ability of neighborhoods to determine for themselves whether they will enact restrictions. Community members are able to participate meaningfully in decisions at the neighborhood level, and local officials can mediate disagreements among contentious neighbors or use their discretionary power to deny or modify some requests.

It is interesting to consider the types of neighborhoods that would take advantage of an overlay opportunity. The obvious candidates are relatively affluent neighborhoods with residents who want to maintain a high quality of life. An overlay ordinance could also be useful, however, to less affluent neighborhoods that are vulnerable to changes in stability and quality of life. Consider, for example, a neighborhood of long-time homeowners in a declining urban area. Residents in this neighborhood may fear displacement by gentrification, or instead, may fear the gradual encroachment of poorer residents and poorly maintained houses from nearby communities. A zoning overlay district preventing rentals, and thereby discouraging speculation and absentee owners, might be desirable for this type of neighborhood as well.[71]

G. Development Agreement Restrictions

This type of restriction begins to transition from a public regulation enforceable by governmental actors to a private agreement enforceable by private actors. For example, a local government and a developer may agree to limit rentals in a new planned community of single-family homes. A development agreement—a contract between the two parties—would reflect the restriction.[72] Unlike a public ordinance enforceable by the city, a

desirable living environment for residents by preserving the owner occupied character of the neighborhood (3) To prevent excessive traffic and parking problems in the neighborhoods. *Id.*

69. § 50-775 (1)(c).

70. *See* City of East Lansing, Rental Restriction Overlays Passed by City Council, http://www.cityofeastlansing.com/Home/Departments/CodeEnforcement/RentalHousingInformation/ResidentialRentalRestrictionOverlayDistrict/ (last visited October 20, 2009).

71. Robert Nelson argues that established neighborhoods could benefit from the restrictive covenant communities and private neighborhood associations that frequently appear in new communities and proposes a statutory scheme to create this possibility. *See* ROBERT H. NELSON, PRIVATE NEIGHBORHOODS AND THE TRANSFORMATION OF LOCAL GOVERNMENT 265–270 (2005).

72. *See generally* DAVID L. CALLIES ET AL., BARGAINING FOR DEVELOPMENT: A HANDBOOK ON DEVELOPMENT AGREEMENTS, ANNEXATION AGREEMENTS, LAND DEVELOPMENT CONDITIONS, VESTED RIGHTS, AND THE PROVISION OF PUBLIC FACILITIES 91–

development agreement imposing a rental restriction is typically enforceable by the developer.

Development agreements can be useful land use planning tools that govern virtually all aspects of a new community—from providing alternatives to rigid, prevailing zoning standards, to outlining the financial and in-kind contributions a developer agrees to make to the community in exchange for land use approvals by the local government. As a result of these trade-offs, development agreements provide benefits to both local governments and developers. Local governments can extract more financial and in-kind contributions from developers than they would in a standard land use approval process.[73] Developers, in turn, can design a community without conforming to standardized requirements ill-suited to a planned community. Moreover, future residents of these communities benefit because negotiation often results in more thoughtful inclusion and placement of amenities than does the application of a rigid standardized zoning and development code.[74]

One example of this kind of requirement is the development agreement provision in a yet-to-be developed housing community in North Las Vegas, Nevada. At the time the city council adopted the requirement, North Las Vegas was experiencing unprecedented population growth and the city council sought to manage the effects of this growth on neighborhoods and residents. The applicable provision states:

> (f) Leasing Restriction. The Developer agrees, and shall require of all Builders, to include in all contracts for the sale of Dwelling Units other than Custom, Semi-Custom, Executive and Upgrade, a section prohibiting the leasing of the Dwelling Unit for twenty-four (24) months. Developer shall submit the proposed language to the City Manager for review and approval which shall be considered approved if the City Manager does not respond with

115 (2003); Judith Welch Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals*, 65 N.C. L. REV. 957 (1987).

73. Exactions law limits the ability of the government to demand broad concessions from landowners as a condition of a particular land use approval to those that are reasonably connected and proportional to the anticipated adverse public effects of a proposed development. Nollan v. California Coastal Comm'n, 483 U.S. 825, 836–37 (1987); Dolan v. City of Tigard, 512 U.S. 374, 390–91 (1994).

74. A challenge for future residents of the community as well as existing residents of surrounding communities is achieving meaningful participation in the development agreement process. *See* Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions, Installment One*, 24 STAN. ENVTL. L.J. 3 (2005); Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions, Installment Two*, 24 STAN. ENVTL. L.J. 269 (2005); Ngai Pindell, *Developing Las Vegas: Creating Inclusionary Affordable Housing Requirements in Development Agreements*, 42 WAKE FOREST L. REV. 419 (2007).

> thirty (30) days. The language shall include an assignment by the seller of the seller's right to enforce the prohibition after closing.[75]

In comparison to other cities in the Las Vegas valley, North Las Vegas has historically housed an unequal proportion of apartment houses and single-family homes. As the Las Vegas valley boomed in the late 1990s and early 2000s, surrounding areas like the City of Henderson and the City of Las Vegas grew more affluent by adding relatively high-end, master-planned communities. North Las Vegas wanted to share in that growth, as well as limit the harms that speculators and absentee owners brought to new communities.

Recently, North Las Vegas, like other cities in Nevada and across the nation, has been ravaged by unprecedented numbers of home foreclosures and a corresponding plummet in housing prices. The city would likely be pleased if any purchaser—speculator or not—purchased housing in the area. It remains to be seen whether North Las Vegas will keep the rental restrictions in place once the community is built.

H. Private Covenants

Algy and Edna McGlothin owned a home in a subdivision burdened by private covenants.[76] One of the covenants required that an owner or immediate family member reside in the home and prohibited homeowners from renting their houses to tenants.[77] The McGlothins lived together in the home until Mrs. McGlothin fell and broke her hip in 1998, after which she moved into a nursing home. Five months later, Mr. McGlothin also moved to the nursing home. Mr. McGlothin died in the summer of 1999, and their daughter began leasing the home to others to help defray the costs of Mrs. McGlothin's nursing home care.[78]

The conflict was simple: when the McGlothins leased their home, the homeowners association sued to enforce the covenant.[79] The McGlothins did not violate the covenants because they believed in the free alienation of

75. Development Agreement,The City of North Las Vegas-November 2005 Land Investors, L.L.C./DRHI, Inc., May 3, 2006, at 16 (emphasis added).

76. Villas West II of Willowridge Homeowners Ass'n, Inc. v. McGlothin, 885 N.E.2d 1274, 1277 (Ind. 2008). *See also* discussion of minimal requirements, *supra* Part II.A.

77. *Villas West II*, 885 N.E. 2d at 1277. The covenant read: "Lease of Dwelling by Owner. For the purpose of maintaining the congenial and residential character of Villas West II and for the protection of the Owners with regard to financially responsible residents, lease of a Dwelling by an Owner, [sic] shall not be allowed. Each Dwelling shall be occupied by an Owner and their immediate family." *Id.* Some of these same restrictions exist in condominium units, especially those providing affordable housing. *See* City of Oceanside v. McKenna, 264 Cal. Rptr. 275 (Cal. Ct. App. 1989) (upholding reasonableness of owner occupancy and no rental provision in a condominium).

78. *Villas West II*, 885 N.E.2d at 1277–78.

79. *Id*. at 1278.

property or because they were rebelling against overly restrictive covenants. Instead, their story reflected the ordinary, and often adverse, twists and turns of families everywhere. The McGlothins objection to the no-rental provision arose from a simple need for income. They needed the rental income the house produced to make their lives work.[80]

The court found the no-rental covenant enforceable, noting the frequency and utility of covenant provisions across the country.[81] The McGlothin's story illustrates the danger of rental restrictions imposed by restrictive covenants: they have the potential to increase economic instability for lower-income families, depriving them of rental income from their homes when a sale of the home is impracticable or impossible. The McGlothin's were not able to use their property to generate income for medical expenses. The overinclusiveness of this type of rental provision lies in its permanency and lack of provision for exceptions. If a municipality adopted this type of restriction, however, it could be limited to a fixed period of time, like two or three years, thus reducing its potential for overinclusivity.

III. EVALUATION AND CRITIQUE

Part II of this article described examples of rental restrictions used by communities across the country. What those restrictions have in common is the struggle to strike a balance between individual property ownership and community concerns. Ideally, rental limitations enhance the interests of both the community and the individual. These restrictions help stabilize communities threatened by short-term disruptive activities that could otherwise lead to long-term destabilization, and individual property owners often derive personal and economic value from the imposition of restrictions in their communities. The rental restrictions described in Part II are often used for purposes that bear some similarity to the goals of anti-speculation legislation. What do these examples suggest, then, for using rental restrictions to combat speculation?

The first two categories of restrictions—minimal restrictions and procedural requirements—generally reflect the normal slate of local land use regulations on home ownership. At the edges, jurisdictions may escalate these garden-variety restrictions so they have a substantive effect,[82] but this escalation appears to be the exception rather than the rule. At their normal level of enforcement, these types of minimal restrictions could be used to monitor speculative activity in a neighborhood, but they would not likely alter any speculative behavior because they can be easily satisfied.

80. *Id.*

81. *Id.* at 1278–79.

82. *See* discussion of *Repair Master, Inc. v. Borough*, *supra* note 16, and Part II.B.

The land use approval examples illustrate local governments' concern about the effects of owner-occupied and rental housing on community character, but the scope of these regulations is often narrow and typically applies to individual homeowners. Those provisions that do apply to entire communities, such as accessory use ordinances, reflect the conflict between regulating the use versus the user of property. As shown by the variety of approaches, this conflict remains unresolved. The lesson for an anti-speculation measure is that a broadly applied ordinance will be more likely to withstand judicial scrutiny than a measure that applies to an individual homeowner.

Short-term and substantive rental requirements raise issues similar to those that would be raised by speculation ordinances. Jurisdictions in both categories distinguish between owner-occupied and rental housing, and prohibit rental housing using brightline or substantive rules, often with over-inclusive consequences. Because of this potentially harsh result, a system that includes local government discretion to allow rentals may fare better than one without such exceptions. The St. Bernard Parish ordinance, outlined in Part III.E, survived a facial challenge largely because of this type of local discretion.

The remaining types of rental restrictions each have a significant private enforcement component that seems to mitigate their legal vulnerability. In the self-determination category, neighborhood residents can request that the local government impose rental restrictions. Although the local government enforces violations, the fundamentals of this system are similar to a community burdened by mutually restrictive covenants where owners are able to opt in to a more regulated ownership structure. Private covenants still trigger an exclusionary zoning analysis, but the rental restriction itself is viewed as a common feature of restrictive covenant communities, rather than an exceptional limitation on an owner's right of alienation. Finally, restrictions in development agreements allow local governments to impose public values through private enforcement, thereby avoiding the legal challenges faced by jurisdictions under other schemes.[83] Any of these three types of rental restrictions could accommodate an anti-speculation focus if the affected

83. New and growing communities, like North Las Vegas, Nevada, offer a chance to explore property relationships that would pose more difficult political and economic challenges in established neighborhoods. This same possibility may exist in a city like New Orleans that has been ravaged by natural disaster. *See generally* John A. Lovett, *Property and Radically Changed Circumstances*, 74 TENN. L. REV. 463 (2007) (exploring how Hurricane Katrina altered how lawmakers and theorists view property); Joseph William Singer, *After the Flood: Equality & Humanity in Property Regimes*, 52 LOY. L. REV. 243 (2006) (exploring the nature of poverty and property in the context of Post-Hurricane Katrina New Orleans).

community wished. Each also involves a private element that could mitigate political opposition to anti-speculation measures.

The examples in Part III provide a baseline for evaluating an anti-speculation ordinance restricting rentals. The following analysis explores the policy and legal challenges an anti-speculation ordinance restricting rentals might face.

A. Competing Visions of Housing—Deconstructing Homeownership

Because the first hurdle for any anti-speculation ordinance is likely to be a challenge to prevailing conceptions of property and home ownership, it is useful to deconstruct those conceptions before thinking about the propriety of "limitations." While the investment model of homeownership has enjoyed prominence over the last decade of housing price inflation and deflation, anti-speculation ordinances embody a view of homeownership as the expression of many components—and the embodiment of many ideals—and that each of these deserves legal protection.

In addition to its investment value, housing also provides other subjective benefits, like its facilitation of family life and identity, its necessity as shelter, and its role in preserving social order.[84] Private property, and by extension the family home, can be seen as a source of freedom and liberty from government coercion.[85] The home reflects ideals of privacy,[86] security,[87] identity,[88] as well as an escape from crowded cities.[89] While speculation therefore reflects a view

84. Iglesias, *supra* note 1, at 511.

85. *See generally, e.g.*, MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1962); Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964) (For a recent evaluation of the debate, see D. Benjamin Barros, *Property and Freedom*, 4 N.Y.U. J. LAW & LIBERTY 36 (2009)) (evaluating the institutional relationship between property and freedom).

86. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003) (declaring a Texas law criminalizing same sex intercourse unconstitutional. The Court stated that "[t]he laws involved . . . here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home." *Id.* at 567.

87. Barros, *supra* note 1, at 260–269 (discussing security against other individuals and security against government intrusion).

88. *See, e.g.*, Radin, *supra* note 1, at 959 (citing a house as an example of property closely connected with personhood).

89. *See, e.g.*, Belle Terre v. Boraas, 416 U.S. 1, 9 (1974) (upholding a "traditional family" single family zoning designation and extolling the values of suburban life). The Court declared that "[a] quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. . . . The [scope of the] police power . . . 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." *Id.*

of housing as a market asset to be managed for maximum economic gain, it is also important to remember these subjective values.[90]

In addition to investment value and other subjective values of property, homeownership also provides use value. Unlike the exchange value of property, which focuses on property as an investment and assumes that consumers manage their investment in rational, profit maximizing ways, use value refers generally to those features of property that are not captured solely by maximizing economic gain. For example, home ownership signals to the rest of society the maturation, adulthood, and stability of homeowners.[91] Homeowners can transform the interior and exterior spaces of a property to suit their lifestyles.[92] Homeownership provides access to social goods like schools and parks, and creates and reinforces social ties among neighbors.[93] The mortgage excesses of the last decade illustrate the pitfalls of an overemphasis on the exchange values of property, and a corresponding underemphasis on homeownership's other, more subjective, benefits.

Decisionmakers should care about disentangling exchange and use values. In a recent article, Eduardo Penalver offers three reasons why theorists should be cautious about using an investment or exchange-value-maximization as the overarching model: (1) if there are other values that motivate homeowners besides maximizing exchange value, a theory that relies solely on exchange value will not accurately reflect or predict homeowners decisions; (2) even when the exchange value model seems to accurately predict an action, the model may not accurately capture the motive for the action; and (3) the prevailing conversation about exchange maximization causes homeowner-actors to believe that this is what is expected of them and then act to fulfill those expectations.[94]

While the investment model has enjoyed prominence over the last decade of housing price inflation and deflation, rental restrictions reflect the existence of and support for other values. Although rental restrictions can promote the investment model by maximizing property values, they also create long-term relationships in communities and can promote healthy, stable living environments. Furthermore, rental restrictions imposed by local governments

90. *See, e.g.*, Eduardo Penalver, *Land Virtues*, 94 CORNELL L. REV. 821, 834 (2009); Christopher Serkin, *Big Differences for Small Governments: Local Governments and the Takings Clause*, 81 N.Y.U. L. REV. 1624, 1656 (2006) (describing homeowners' subjective and market values of their homes).

91. Penalver, *supra* note 90, at 835.

92. *Id.* at 836–37.

93. *Id.* at 838.

94. *Id.* at 840–41.

are one component of larger scheme of land use regulation; rather than operating independently, these values often coexist.[95]

B. Speculation and the Efficacy of Municipal Responses

Would an anti-speculation ordinance advance important housing values? To answer this question, it is first necessary to describe the harm that residential real estate speculation causes local governments and communities, and then address the policy and practical challenges to local government intervention.

1. The Effects of Speculation

Residential real estate speculators have been blamed for much of the creation and destruction of the housing bubble across the country.[96] The primary allegation is that speculative purchasers increase prices rapidly and artificially; that is, price increases are not due to any improvement in the quality of the housing stock, community amenities, or local jobs, but to the perceived demand created by speculative purchases.[97] Anti-speculation measures, such as rental restrictions, would ideally create more stable

95. Iglesias, *supra* note 1, at 516–17. Iglesias argues that "(1) there are five distinct, decipherable, and stable housing ethics deeply embedded in American housing policy and law that influence current housing law and policy through an ongoing social dialogue; (2) the five housing ethics can combine with each other, and they may also conflict and function as reciprocal constraints on each other; and (3) while there is a potential for temporary or limited hegemony in certain contexts, coexistence and pluralism among the housing ethics is the norm and is likely to persist." *Id.*

96. *See* Ruth Simon & Michael Corkery, *Speculators May Have Accelerated Housing Downturn*, WALL ST. J., Feb. 6, 2008, at B8 (reporting high numbers of "hidden speculators" and corresponding claims of occupancy fraud); Jeff German et al., *Speculators Bear Brunt of Foreclosures*, LAS VEGAS SUN, Sep. 23, 2007 (describing effect of speculation on Las Vegas housing market); Patty Shillington, *Adjustable Mortgages Out of Favor*, MIAMI HERALD, May 31, 2009 (noting that adjustable rate mortgages were popular among speculators).

97. The economist Robert Shiller called the speculative bubble a "social contagion" in which everyone believed prices would continue to go up. ROBERT J. SHILLER, THE SUBPRIME SOLUTION: HOW TODAY'S GLOBAL FINANCIAL CRISIS HAPPENED, AND WHAT TO DO ABOUT IT 44–45 (2008). *See also* R. Lisle Baker & Stephen O. Andersen, *Taxing Speculative Land Gains: The Vermont Experience*, 22 URB. L. ANN. 3, 9 (1981):

> Proponents of government intervention to control land speculation . . . argue that speculators artificially increase land prices in different (and sometimes inconsistent) ways: (1) by withholding some land from resale, awaiting even higher prices; (2) by bidding up the prices of land they do not yet own; or (3) by short-term holding of other land, fostering an accelerating turnover of properties that amplifies the cost-push inflation of significant land transfer expenses. Arguably, these price increases cause higher tax assessments for land-owners reluctant to sell.

Id.

communities by limiting turnover and preventing community decline from free-falling home prices caused by the "bursting" of the speculative bubble.[98]

Speculation on housing differs from speculation on raw land or other property assets. This article defines speculation broadly as purchasing an asset primarily—if not solely—for its resale value rather than for its immediate use.[99] While speculation on vacant land may actually increase efficiencies by regulating the pace of development, speculation on existing housing units does not achieve the same goals.[100] Because the units have already been built, the speculator who purchases these units is merely incentivizing a builder to build more units that may not be occupied.

The collapse of the housing market has harmed individual homeowners and communities in many ways. In the exuberance of the last decade, lenders and borrowers regularly overreached.[101] Lenders extended credit at higher and higher prices to borrowers who would not be able to pay when interest rates and terms reset. Both borrowers and lenders assumed that as home values continued to rise, borrowers could refinance at lower rates and maintain payments, at least temporarily, on high-cost mortgages. When home values fell, and the broader economic crisis reduced or eliminated the income of many borrowers, homeowners found themselves upside down in their homes and unable to service existing loans.[102] This problem intensified when the interest rates and terms on variable rate loans reset after three or five years. Unable to afford existing loan payments, refinance, or sell their homes for an amount

98. The housing crisis does offer an opportunity to increase the stock of affordable housing. In some cities, housing advocates acquire foreclosed houses, make repairs, and resell them to owner occupiers. Speculators are not allowed to purchase the homes. *See* Marcelle S. Fischler, *Affordable Homes, via Foreclosure*, N. Y. TIMES, May 3, 2009, at RE7 (describing the work of the federally financed Neighborhood Stabilization Program).

99. Vermont imposes a tax on speculative land purchases. A study of the program defined speculation similarly. "The Vermont land gains tax . . . deter[s] landowners from transferring (by sale or other exchange) land held for a short period of time, where the principal economic return realized comes from increased value rather than rental or other income." Baker & Andersen, *supra* note 97, at 7.

100. *See* NELSON, *supra* note 71, at 294 (noting the benefit of speculation on vacant land). Cyber-squatting presents an example of speculation that the law currently disfavors. *See* Daphna Lewinsohn-Zamir, *More is Not Always Better Than Less: An Exploration in Property Law*, 92 MINN. L. REV. 634, 694 (2008) (comparing the relative lack of laws prohibiting land speculation to more laws regulating the speculative purchases of domain names in cyberspace).

101. *See generally* Ellen Harnick, *The Crisis in Housing and Housing Finance: What Caused it? What Didn't? What's Next?*, 31 W. NEW ENG. L. REV. 625, 625 (2009) ("The problem is not simply that people borrowed more than they could repay, but that loans were structured in a way that was inherently unstable.").

102. *See id*. at 628–31 (2009) (describing use of risky loan products).

sufficient to pay off the mortgage, these borrowers have been forced to walk away from homes, or face short sales, or foreclosures.[103]

The effect of the housing market crash on individuals is not limited to the borrower's economic situation. Borrowers who have been foreclosed on often suffer from stress, depression, and feelings of failure,[104] and their children can experience significant educational and social disruption.[105] Surrounding homeowners can also suffer. Owners of houses facing foreclosure often neglect the maintenance of landscaping and housing exteriors. Foreclosed houses can remain vacant for months or even years, falling into disrepair and becoming susceptible to vandalism or other property crimes. Finally, bank-owned foreclosed homes resell at a deflated price, lowering the property values of surrounding homes.[106]

Apart from the impact on individual homeowners and neighborhoods, cities also suffer in a rapidly declining housing market.[107] Cities face falling property tax revenue,[108] as well as increased administrative costs.[109] To respond to the increased crime rates surrounding vacant properties, cities must increase monitoring of vacant and foreclosed housing, as well as police and fire protection.[110]

Finally, renters of foreclosed housing can be displaced, typically with limited legal protections and little notice.[111] With limited exceptions, a renter's

103. A borrower must ask herself "[s]hould I stay in the home I love, or stick it to the bank?" Brian Eckhouse, *Whether to Walk Away: Housing's Moral Minefield*, LAS VEGAS SUN, Mar. 22, 2009, at M1 (describing decision matrix when a borrower owes more on a mortgage than the house is worth).

104. Lauren E. Willis, *Will the Mortgage Market Correct? How Households and Communities Would Fare If Risk Were Priced Well*, 41 CONN. L. REV. 1177, 1188–91 (2009).

105. *Id.* at 1191–92.

106. *See* Engel, *supra* note 9, at 355–60.

107. Some cities blame predatory lending for exacerbating the housing crisis and have sued lenders directly. *See* Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255, 1260 (2002) (defining predatory lending as practices ranging from severely harmful payment structures to fraud). For more on city suits against lenders, see Pindell, *supra* note 6, at 170, 176–77.

108. *See, e.g.*, Dan Immergluck & Geoff Smith, *The External Costs of Foreclosure: The Impact of Single-family Mortgage Foreclosures on Property Values*, 17 HOUSING POL'Y DEBATE 57, 58 (2006) (noting an average property value decline of $159,000 per foreclosure in Chicago).

109. *See, e.g.*, William C. Apgar et al., *The Municipal Cost of Foreclosures: A Case Study* 1–2 (Homeownership Preservation Fund, Research Paper No. 2005-1), *available at* http://neighborworks.issuelab.org/research (estimating that each foreclosure in Chicago could increase municipal costs by $34,000).

110. Relman, *supra* note 9, at 633–34.

111. Vicki Been & Allegra Glashausser, *Tenants: Innocent Victims of the Nation's Foreclosure Crisis*, 2 ALB. GOV'T L. REV. 1, 2–4, 6–7 (2009) (examining effect of foreclosure on renters and renter legal protections).

interest in a foreclosed property is subordinate to a prior, valid mortgage.[112] Moreover, renters often do not learn of a foreclosure until a bank representative knocks at the door or a "for sale" sign appears in the front yard.[113] The renter may be current on her lease obligation, but the landlord has not used her rent to pay the mortgage and has defaulted. This scenario has encouraged the federal government and some local governments to respond with protective tenant legislation,[114] but the efficacy of these legislative efforts will need to be evaluated over the coming years.

The significant impact that residential real estate speculation has on homeowners, cities, and renters creates a clear incentive for local governments to address speculation. The next section examines whether they should.

2. The Wisdom of Municipal Rental Restrictions on Homeowners

Are local governments effective regulators of residential real estate speculation? An alternative to local government regulation is to create federal legislation to respond to lending and borrowing practices that create speculation. Local governments can face resistance when they attempt to regulate issues that are perceived to be more national in scope.[115] Another approach could be to let the private borrowing and lending market sort itself out, either through changes to the purchasing attitudes of borrowers in response to a national recession, or through changes to the lending industry in response to market lessons and incentives; both of these changes perhaps supplemented by national or state regulation. Relying on behavior reforms to solve the problem is troubling, however, on both demand and supply sides. Individual borrowers will continue to engage in risky behavior by failing to account for the existence of a foreclosure risk, or by minimizing the foreclosure risk they do perceive.[116] From a lending perspective, the system

112. *Id.* at 10–12.

113. *See, e.g.*, Jeff Pope, *Impeding Foreclosures Leave Renters in Limbo*, LAS VEGAS SUN, Aug. 28, 2008 (reporting that renters often have no knowledge of an impending foreclosure).

114. *See, e.g.*, Protecting Tenants at Foreclosure Act, Pub. L. No. 111-22, § 702 (2009) (providing a 90-day notice requirement and some tenure protections for renters).

115. *See, e.g.*, Karla Mari McKanders, *Welcome to Hazleton! "Illegal" Immigrants Beware: Local Immigration Ordinances and What the Federal Government Must Do About It*, 39 LOY. U. CHI. L.J. 1, 26 (2007) ("[T]he plenary powers doctrine should be applied to broadly preclude municipal [immigration] regulation."). *But see* Rick Su, *A Localist Reading of Local Immigration Regulations*, 86 N.C. L. REV. 1619 (2008) (noting that local immigration debates reflect elements of traditional conversations about the structure and organization of local communities). Predatory lending is another area of local intervention and resistance. *See, e.g.*, American Financial Services Ass'n v. City of Oakland, 104 P.3d 813 (Cal. 2005) (holding that California state law preempts the city of Oakland's regulations on predatory lending).

116. *See* Willis, *supra* note 104, at 1231–53.

> In sum, it is unlikely that the mortgage market will self-correct to an equilibrium state in which homeowners will consistently avoid buying overly-risky loans, renters will avoid

may be too large and complicated to effectively change, encompassing a vast array of financial bodies[117] and instruments, insurance products, leveraging schemes, regulatory agencies, and information systems with sometimes diverging incentives. Individual lenders may not be properly incentivized to curb speculative purchases and banking incentives are likely to encourage speculation.

In response to these diverse challenges to the regulation of speculation, local governments could have performed an important preventative function in the last several years. Instead of reacting to the effects of the housing crisis, cities could have regulated the rental market and stabilized neighborhoods *before* the speculative bubble and subsequent crash. While this sort of intervention might have been considered wise had it been implemented before the crash, ideas about investor purchasers in the housing market changed when the market declined.[118] Investor purchasers are now welcomed for injecting *any* capital into the beleaguered market, and for providing rental homes for those homeowners whose homes have been foreclosed.[119]

As the market continues to weaken, investor purchases are approaching levels seen during the housing boom. As one commentator noted, "Real estate got just about everyone into trouble in Phoenix, and the thinking seems to be that real estate is going to get everyone out."[120] Moreover, the general economic recession accompanying the housing crash has increased the demand for rental housing by individuals who have lost jobs or housing, and investor purchasers are able to fill this void. The current economic climate and the state of the housing market do not immediately suggest that limiting the availability of rental housing would be a popular decision.

In addition to the public reaction to anti-speculation efforts, there are difficult policy questions to consider. For example, a rental restriction could create selection effects: some potential homebuyers might choose not to buy because they would not later be able to rent those homes to others. In a

> housing units that are security for overly-risky mortgages, and neighborhoods will benefit from all the residential mortgage transactions that take place along their streets.

Id. at 1184.

117. "Seventeen large universal banks accounted for more that half of the $1.1 trillion of losses reported by the world's banks and insurance companies. . . . In view of the huge losses suffered by these institutions, and the extraordinary governmental assistance they received, they are clearly the epicenter of the global financial crisis." Wilmarth, *supra* note 8, at 968.

118. *See* Lefcoe, *supra* note 11, at 15–16 (noting the usefulness of investor purchases in the current market).

119. *See, e.g.*, David Streitfeld, *Amid Rubble of Housing Bust, One City Begins a New Frenzy*, N.Y. TIMES, May 24, 2009 at A1 ("Absentee buyers, who can be either investors or individuals purchasing a vacation property, bought nearly 4 of every 10 homes sold in the Phoenix metropolitan area in April [2009].").

120. *Id.*

perfectly tailored, anti-speculation and anti-rental provision, the class of people deterred from purchasing a home would only include would-be speculators. In the actual implementation of such a provision, however, a larger class might be captured and harmed. A related concern involves efficiency: policy makers must evaluate the cost associated with the loss of two sets of buyers in these "lost" transactions—the would-be first-order buyers (speculators) and the second-order, end-user buyers (purchasers from speculators)—as well as the loss of rental opportunities during the holding period.[121]

Finally, policy makers should evaluate the potential gains of anti-speculation regulation. While there has been extensive discussion about the frequency and potential harms associated with speculative real estate purchases over the last decade,[122] it is not clear that eliminating speculation would have prevented housing price increases. There are some examples of communities attempting to make this correlation in real estate transactions, though none with conclusive results. For example, Vermont has imposed a land gains tax on land speculation.[123] Established in 1973, the land gains tax imposes a substantial tax on capital gain from "short-term, high-profit sales of Vermont land."[124] A 1981 study found that the tax deterred some speculative purchases, but the study was unable to draw any conclusions about the effect of the tax on land prices.[125]

Perhaps rental restrictions on homeownership are a clumsy and over-inclusive attempt to disaggregate shelter values. A better approach might focus on expanding individual ownership choices, instead of increasing community mandates. Existing approaches that attempt to separate homeownership from investment risk include equity insurance programs, collectivized equity housing, shared appreciation and shared equity models,

121. Lee Anne Fennell, *Adjusting Alienability*, 122 HARV. L. REV. 1403, 1440–42 (2009). Fennell brought welcome attention to an area of property law that has received relatively less analysis. Navigating the choices and outcomes between an injunction or damages, described famously as property rules and liability rules in a highly influential article, Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972), has dominated the academic literature on property. Much less attention has been paid to the inalienability alternatives described in the same article.

122. *See, e.g.*, Virginia Heffernan, *For Armchair Flippers, Speculation as Spectator Sport*, N.Y. TIMES, Aug. 4, 2005, at F1; J.M. Kalil, *California Investor Calls Valley Market an "Interesting Ride,"* LAS VEGAS REV. J., Aug. 2, 2004, at 8A (discussing an investor's experience in the Las Vegas Valley housing market).

123. VT. STAT. ANN. tit. 32, § 10001 (1973).

124. Baker & Andersen, *supra* note 97, at 4.

125. *Id.* at 50. Notably, Vermont also employs a comprehensive, statewide land use planning scheme, suggesting that anti-speculation measures can be effective components of thoughtful land use strategies rather than isolated expressions of land use policy. VT. STAT. ANN. tit, 10 §§ 6001–6101 (1973).

and home equity hedges.[126] Professor Fennell builds on these existing approaches to suggest a market-oriented strategy—a "homeownership 2.0"—to decouple the shelter and investment strands of homeownership and offer components of each strand for sale in a sophisticated market.[127] Under this approach, the effect of speculators on a community (and consequently on a particular house) would be considered an "offsite risk" that individual property owners may want to contract out of.[128]

Identifying speculators and crafting a proportionate and accurate response pose difficult challenges. Because the effects of speculation hit hardest at the individual and neighborhood level, local governments become the likely first responders to these harms, but they should not be the only entities to address speculation. The market needs to realign lending incentives and rules, and federal and state authorities must monitor lending practices and increase regulation when necessary. Local governments have a long history addressing the economic and social issues that affect neighborhood character, however, and should play a significant role in applying this experience to residential real estate speculation, a developing threat to the economic stability of families and communities.

C. Protecting Community Character or Exclusion?

Municipalities have a long history of using land use policies to shape the character of communities. This history suggests that rental restrictions may have the effect or intent of excluding the most economically vulnerable residents from neighborhoods, perhaps in violation of Fair Housing laws and related protections.[129] Rental restrictions raise legitimate concerns about the exclusion of renters as a class, and the exclusion of residents who are politically and economically vulnerable. The challenge for municipalities is in promoting rentals as a housing choice, while still maintaining restrictions on those rentals. To accomplish this, however, it is first necessary to dispel the idea that homeowners are *per se* more valuable to a community than renters. Next, it is important to ensure there are adequate opportunities for rental housing in communities. Finally, municipalities must closely police rental regulations for exclusionary effects prohibited by state law or by the Fair Housing Act.

Municipalities can best address these concerns by adopting housing policies promoting longer-term occupancy by both renters and owners, and by ensuring an adequate supply of affordable rental housing—both short and long-term—in the community. Instead of a policy aimed at renters as a class,

126. Fennell, *supra* note 1, at 1064–69.

127. *Id.* at 1054–63.

128. *Id*. at 1049.

129. *See* discussion *infra* Part III.C.3.

rental restrictions on homeowners should be carefully crafted to prevent speculators from using short-term renters to subsidize their house purchases.

1. Long Term Community Stakeholders

The importance of the *duration* of occupancy in a community—rather than the *form* (rental or homeownership) of the occupancy—was emphasized in a recent examination of laws encouraging and protecting homeownership:

> Tenure plays a critical role with long-term renters increasing social capital at levels only slightly lower than homeowners. Stable neighborhoods with higher proportions of long-term residents, both owners and renters, have increased local participation, greater reciprocated exchange of favors, more linkages between children and adults in the community, increased home values, and higher levels of neighborhood sociability.[130]

Similarly, some commentators suggest that studies favoring homeownership or criticizing rentals are overstated and that homeownership has received the benefit of favorable laws and policies since the colonial era.[131]

Many communities enact rental restrictions out of fear that short-term renters will adversely affect property values, or that renters will not maintain their houses as well as homeowners. These communities may fear that owners with a short-term outlook may rent property without maintaining it, instead trying to extract as much income as possible,[132] while renters with a similarly short-term outlook may engage in socially undesirable behavior. While renters in general have little incentive to maintain the exterior of a house, short-term renters are even less motivated to care for the house or contribute to neighborhood character. Restrictions on short-term vacation rentals also reflect a fear of large gatherings, with the attendant disruptive effects of noise and traffic on the surrounding community.[133]

130. Stern, *supra* note 1, at 1125–26.

131. Donald A. Krueckeberg, *The Grapes of Rent: A History of Renting in a Country of Owners*, 10 HOUS. POL'Y DEBATE 9, 11 (1999). Similarly, the value of homeownership in raising levels of community social capital is questionable. *See* Stern, *supra* note 1, at 1122–24.

132. Duncan Kennedy, *The Effect of the Warranty of Habitability on Low Income Housing: "Milking" and Class Violence*, 15 FLA. ST. U. L. REV. 485, 489–90 (1987).

133. *See supra* Part II.D. Communities enacting these rental restrictions might point to studies showing that Section 8 subsidized housing can have a detrimental effect on neighborhood housing values. George C. Galster et al., *The Impact of Neighbors Who Use Section 8 Certificates on Property Values*, 10 HOUS. POL'Y DEBATE 879 (1999). These studies, however, do not capture the effects of nonsubsidized rental housing. Or, municipalities might point to the beneficial price effects and social effects of homeownership in a community. *See, e.g.*, Chengri Deng & Gerrit-Jan Knaap, *Property Values in Inner-City Neighborhoods: The Effects of Homeownership, Housing Investment, and Economic Development*, 13 HOUS. POL'Y DEBATE 701 (2002) (studying neighborhood property values in Cleveland); Eduardo M. Peñalver, *Property as Entrance*, 91 VA. L. REV. 1889, 1948–50 (2005) (discussing the increased rates of mobility of renters and the connection of homeowners to the communities they live in).

Ideally, purchasers will self select, choosing communities with a package of amenities that are valuable to the particular consumer.[134] Alienation restrictions therefore become a sorting mechanism, distinguishing between those consumers who desire a long-term relationship with a community from those who have a shorter time horizon. This focus on long-term occupancy suggests that communities using rental restrictions to limit speculation need to determine beforehand which purchasers intend to hold properties for the long term, and which are shorter-term speculators, a significant regulatory challenge.

Moreover, the *McGlothin* case suggests that some purchasers will not be able to internalize their preferences for long-term owner occupancy.[135] In other words, unforeseen events can arise that may cause owners to shift preferences. It is unclear whether the McGlothins knew of the owner occupancy requirement when they purchased their unit, or only learned about it later. It is clear, however, that once their circumstances changed, they did not want to be held to that preference.[136] Cities and communities need to be aware of these individualized limitations to a potential regulatory scheme and craft rental restrictions accordingly.

2. Supply of Affordable Housing

Rental restrictions can also reduce the overall supply of rental housing, which disproportionately affects lower income residents who cannot afford a home. This type of rental housing reduction could negatively impact the existing shortage of affordable housing in communities nationwide. It is be important, then, that a community employing rental restrictions in parts of the community maintain an adequate supply of affordable rental housing elsewhere in the community.[137]

A municipality may find it too difficult to demonstrate, practically or politically, that it is successfully maintaining an adequate supply of affordable

134. A similar point may be made about information asymmetries. Fennell notes that restrictions on alienation may help to overcome information asymmetries by allowing potential purchasers to self-select based on their preferences rather than relying on some form of governmental agency to select purchasers based on the agency's assessment of their suitability. Fennell, *supra* note 121, at 1453–55. Here, individual purchasers can decide whether they will be long term or short-term members of the community based on their desire to purchase a house burdened by rental restrictions.

135. Villas West II of Willowridge Homeowners Ass'n v. McGlothin, 885 N.E.2d 1274, 1284 (Ind. 2008).

136. *Id.* at 1277–78.

137. Many state statutes require local governments to include a Housing Element within their master planning process. What must be included in the Housing Element varies from state to state, but California requires that local jurisdictions assess their affordable housing needs and form specific strategies to address these needs. CAL. GOV'T CODE § 65583 (West Supp. 2009).

housing while employing rental restrictions. Municipalities might hope that rental restrictions on homeowners in some communities would check speculation and curb inflated housing prices, thereby preserving affordable housing generally. Cities might also assume that restrictions on rentals in some communities would not preclude an adequate supply of rentals in other communities. The danger, however, is that rental restrictions would have a minimal impact on speculation or escalating housing prices, while affordable housing remained scarce generally. This could create a "race to the bottom," with each community adopting renter exclusion policies out of fear that it could become the dumping ground for all of the region's renters.[138]

While an anti-speculation ordinance should have a goal of preserving affordable housing by preventing rampant price inflation, the ordinance might unintentionally make housing less affordable. This result seems less likely if local governments used rental restrictions as one component of an integrated regulatory scheme. A local government could thus limit speculation and promote affordable housing through other land use policies.

3. Illegal Exclusion

Municipalities have historically employed exclusionary housing policies, and deserve the skepticism surrounding policies limiting some tenure types in favor of others. One commentator described these impermissible, exclusionary zoning policies as ones that "keep[] out lower-income households in three main ways: (1) by raising the cost of housing generally, (2) by restricting supply of low-income housing types and mandating minimum land and housing purchases, and (3) by zoning out families with school-aged children."[139]

Regulating land use through comprehensive zoning regimes has historically been associated with exclusion. The Supreme Court first upheld

138. In a race to the bottom, actors engage in increasing retaliatory behavior trying to seek advantage from each other and preventing disadvantage. This term is used in a variety of legal and policy contexts, and it is frequently used to describe the competition among states for corporations and the states' corresponding adjustment of their corporate regulations. *See, e.g.*, Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588 (2003) (arguing that the federal government influences the conventional race to the bottom story).

139. Henry Span, *How the Courts Should Fight Exclusionary Zoning*, 32 SETON HALL L. REV. 1, 9 (2001). Another challenge of rental restrictions is that they may foster communities of like-interested homeowners which may negatively impact political participation and debate. In other words, housing policies that focus on owner occupied homes elevate the importance homeownership itself—to the detriment of other forms of housing tenure. "[W]ith greater homogeneity one can expect political debate to be more narrowly economistic, focused only on the fiscal aspects of taxation and government action and their effect on the value of one's perhaps primary investment, one's home. If one's interests and values are similar, then there is not much to debate. Politics becomes 'the administration of things' rather than the government of people." *Id.* at 17–18.

comprehensive zoning largely out of fear of the effects of apartments on the economic and social values of single-family home communities.[140] Local communities have long attempted to exclude some residents for racial and economic reasons.[141] State and federal actors have responded by enacting planning and zoning laws to deter local communities from excluding vulnerable populations,[142] and by enacting fair housing enforcement measures that police impermissible discriminatory conduct.[143]

McGlothin provides a useful illustration of exclusionary arguments. The *McGlothin* rental restrictions were evaluated under the Fair Housing Act (FHA), and the case ultimately turned on how the court balanced the perceived problem of renters in the community with the solution offered by the no-rental provisions. On appeal, the court adopted a burden shifting approach to analyzing the restrictions under the FHA:

> [A] plaintiff must establish a prima facie case by demonstrating that a policy or practice actually or predictably has a significantly adverse or disproportionate impact on a protected class. To rebut this showing, the defendant must demonstrate that its policy or practice has a manifest relationship to a legitimate, nondiscriminatory interest. The plaintiff may then overcome the defendant's showing by demonstrating that a less discriminatory alternative would serve the defendant's legitimate interest equally well.[144]

140. Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 394 (1926) (noting the pernicious effect of apartment houses on communities of detached houses: "With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district.").

141. A good description of exclusionary zoning practices and legal remedies can be found in JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW 214–51 (2007). *See also* CHARLES M. HAAR, SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES (1996) (focusing on suburban racial and economic integration in New Jersey).

142. *See, e.g.*, Peter H. Schuck, *Judging remedies: Judicial Approaches to Housing Segregation*, 37 HARV. C.R.-C.L. L. REV. 289, 309–19 (2002) (discussing New Jersey's Mount Laurel litigation and regulatory structure); Ngai Pindell, *Planning for Housing Requirements, in* THE LEGAL GUIDE TO AFFORDABLE HOUSING DEVELOPMENT 3, 5–19, 31–38 (Tim Iglesias & Rochelle E. Lento eds., 2005) (discussing affordable housing state planning requirements in California, New Jersey, Florida and Minnesota and federal housing planning requirements).

143. *See, e.g.*, The Fair Housing Act, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601–3619 (2006). *See generally* ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION (2009).

144. Villas West II of Willowsridge Homeowners Ass'n v. McGlothin, 885 N.E.2d 1274, 1283 (Ind. 2008). The court could have adopted a balancing test in which a disparate impact claim succeeds under the FHA when the defendant's actions produce a discriminatory effect and, balancing four factors, relief under disparate impact is appropriate.

The court's burden shifting analysis bears some structural similarity to the analyses in other owner-occupancy cases outside of the FHA.[145] The plaintiff, McGlothin, claimed that the no-rental provision had a disparate impact on African Americans because a greater proportion of African Americans rent homes than do whites.[146] The burden then shifted to the Homeowners Association to offer a legitimate, nondiscriminatory reason for the no-rental provision: the provision excluded renters from the community because renters do not maintain their homes as well as owners.[147] The burden then shifted back to McGlothin to show that the reason was pretext, which she did by citing a number of covenant provisions focusing on the extensive maintenance obligations of unit owners, which the owners were responsible for if the renter did not perform them.[148] McGlothin argued that the Association's claims of renter misconduct or inaction "lack[ed] a factual basis, and [were] mere subterfuge, rendering [the no-rental provision] unnecessary and useless."[149]

The ordinance survived McGlothin's FHA challenge because the Homeowners Association was able to articulate a purpose of the no rental restrictions that was not equally served by other covenant provisions: the other maintenance provisions were "not equally effective means of maintaining property values."[150] Maintaining a property goes beyond mere repair and general maintenance, and extends to updates and improvements. The McGlothin's covenants, therefore, did not oblige owners to improve or update the house, only to maintain it. Unlike renters, owner-occupiers "have an incentive to improve and update because they can both enjoy the improvements and reap the fruits of their labor upon selling the home."[151]

In contrast, the St. Bernard Parish ordinance is likely to have a harder time surviving FHA analysis because the Parish had a history of racial segregation

> The four factors are (1) the strength of the plaintiff's showing of discriminatory effect; (2) evidence of discriminatory intent, though not enough to satisfy the constitutional standard of Washington v. Davis; (3) the defendant's interest in the challenged conduct; and (4) whether the plaintiff seeks affirmative relief or merely to restrain the defendant from interfering with individual property owners who wish to provide housing.

Id. at 1281 (citing Metro. Housing Dep't Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977)).

145. *See supra* examples in Part II.

146. *Villas West II*, 885 N.E.2d at 1283.

147. *Id.* at 1283–84.

148. "These covenants require homeowners to, among other things, maintain windows, door hardware, patios, and appliances; water lawns and shrubs; keep the exterior free of trash, certain signs, certain communication devises, and certain vehicles; and 'promptly perform all maintenance and repair . . . which if neglected, might adversely affect any other Dwelling, Common Area or the value of the Property." *Id.* at 1284.

149. *Id.*

150. *Id.*

151. *Villas West II*, 885 N.E.2d at 1284

before Hurricane Katrina, tainting the post-hurricane rental ordinance. In 2000, the Parish was 88.3% white, 7.6% African-American, and 5.09% Hispanic.[152] Moreover, "[w]hites own[ed] virtually all owner-occupied housing in St. Bernard Parish—93% of all owner-occupied units in the Parish. African Americans, in contrast, own[ed] only 4.5% of owner-occupied units."[153] Adding to this disparity, the need for rental housing in the community is proportionately more acute for minorities than for non-minorities: 21% of white residents lived in rental housing in 2000 compared to 31% of African Americans.[154] The hurricane only intensified the rental needs of African Americans, as almost all of the rental units in the Parish were damaged by the hurricane.[155]

In communities with a history of racial discrimination or disparity, the exclusionary zoning implications of a no-rental restriction would be difficult for an anti-speculation ordinance to overcome. The racial history of the community matters, as does the extent of efforts by the jurisdiction to document the magnitude and effect of speculative purchases in the community.

D. Violations of Constitutional, Statutory, or Common Law Provisions

In addition to the policy concerns outlined above, rental restrictions on homeowners are susceptible to a variety of legal challenges including takings, due process, and the authority of the jurisdiction to pass such a measure.[156]

152. Amended Complaint for Injunctive Relief, Declaratory Judgment, and Remedial Relief at 4, Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Parish, No. 2:06-CV-07185 (E.D. La. Nov. 2, 2006).

153. *Id.*

154. *Id.* at 4–5.

155. *Id.* at 5 (stating that 97% of the Parish's rental units were damaged). "An estimated 272,000 of those displaced by Hurricane Katrina in Orleans Parish were African-American, accounting for 73% of the population in the Parish affected by the hurricane." *Id.* at 5.

156. Some homeowners may argue that an ordinance is unconstitutionally vague. The St. Bernard Parish court upheld the ordinance stating that the permit requirements did not give unfettered discretion to the Parish Council to deny a rental permit, and applicants had a reasonable opportunity to ascertain what is required of them during the permit process. Baker v. St. Bernard Parish Council, No. 08-1303, 2008 WL 4681373, at *10 (E.D. La. Oct. 21, 2008).

An ordinance may face a claim that it violates the dormant Commerce Clause by discriminating against out-of-state investors. This principle explores whether a law adversely and impermissibly affects interstate commerce. *Id.* at *11. The court cited a two-step analysis for dormant Commerce Clause violations. Step one is to determine:

> whether the challenged statute regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect. . . . If the law affirmatively discriminates against out-of-state interests, it is subject to stricter scrutiny and will be upheld only if it is necessary to achieve a legitimate local purpose that cannot be adequately served by reasonable non-discriminatory alternatives. *Id*. at *12.

This section will briefly explore the contours of these arguments and probable municipal responses.

1. Takings

Homeowners could argue that a rental restriction takes their property without compensation. This claim could take one of two forms:[157] a claim that the regulation deprives a property owner of all of the property's economic value,[158] or a claim that the regulation goes "too far" under the circumstances.[159] Before reaching a full-fledged takings analysis, however, a federal court must first decide if the claim is ripe for adjudication.[160] To be ripe, the applicable government entity must have reached a final decision on an application involving the property and the applicant must have exhausted state compensation procedures, unless these procedures are unavailable or inadequate.[161] A ripeness review prevents federal courts from becoming a sort of super-zoning board in cases where state procedures are available to address the conflicts.

In *St. Bernard Parish Council*, the court determined the case was not ripe for adjudication.[162] The homeowners argued that the Parish had delayed the processing of their rental applications to such a degree that either the delay itself was a taking, or that the delay prevented the plaintiffs from seeking state administrative remedies.[163] The court rightly noted that even if the permit processing delay was long, it fell well short of the extraordinary delay necessary to invoke a takings remedy.[164] In *Tahoe*, for example, the Supreme Court did not find a taking had occurred, despite the fact that property owners

In St. Bernard Parish, the court determined that the plaintiffs did not offer enough evidence to demonstrate that the Parish Council impermissibly favored local landowners or disfavored absentee, out-of-state investors. *Id.* at *11.

157. Homeowners might claim that the rental restrictions are an impermissible governmental condition on development in excess of the particular development's impact on the local community. If rental restrictions are made as part of a generally applicable ordinance or through a development agreement, the restrictions should not run afoul of exactions prohibitions limiting what the government can require for a particular land use approval. *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987); Dolan v. City of Tigard, 512 U.S. 374 (1994).

158. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992).

159. Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186 (1985).

160. *Id.* at 186–87.

161. *Id.* at 186.

162. Baker v. St. Bernard Parish Council, No. 08-1303, 2008 WL 4681373, at *7 (E.D. La. Oct. 21, 2008).

163. *Id.* at *6–7.

164. *Id.* at *7.

suffered a nearly three-year development moratorium.[165] Moreover, a delay in application processing did not excuse the plaintiff's failure to pursue state administrative and judicial remedies first.[166]

Assuming a case is ripe for adjudication, homeowners still face an uphill battle proving a takings claim. A homeowner will have a difficult time arguing that a rental restriction made a property worthless. Even with a rental restriction, one can imagine some value as an owner-occupied unit; several courts have considered and rejected takings claims based on rental restrictions by finding that other, significant economic uses remain.[167]

Under a balancing test, as illustrated by *Penn Central*, a court will examine the economic impact of the regulation, the character of the government activity, and the reasonable investment-backed expectations of the owner.[168] The economic impact of the regulation may vary depending on market conditions, but there will always be some significant value in a sale to a new owner. To the extent that a court characterizes the ordinances as unusual, rather than as ordinary land use regulations, the ordinances may receive increased scrutiny under a challenge to the character of the government activity. Finally, an evaluation of the investment-backed expectations of the owner may depend on how broadly the ordinance is applied. If the ordinance is applied to purchasers—speculators and others—who have already bought homes, then the ordinance would likely have a severe impact on the owners' investment-backed expectations. The impact on these expectations would be reduced, however, if the ordinance were applied more narrowly to new purchasers. In short, while some of the prongs of a takings analysis could apply to a rental restriction ordinance, it is unlikely that a takings claim would ultimately prevail.

2. Due Process

Rental restrictions should not face procedural due process claims, as long as they were part of generally applicable legislative acts or quasi-legislative decisions. The St. Bernard Parish ordinance, for example, "was a legislative decision of broad applicability by an elected City Council, and hence no procedural due process rights attach[ed]."[169]

165. Tahoe-Sierra Pres. v. Tahoe Regulatory Planning, 535 U.S. 302, 312, 341–42 (2002) (finding no taking as a result of a 32-month moratorium on development around Lake Tahoe).

166. Baker v. St. Bernard Parish Council, No. 08-1303, 2008 WL 4681373, at *6–7 (E.D. La. Oct. 21, 2008).

167. *See* Ewing v. City of Carmel-By-The-Sea, 286 Cal. Rptr. 382, 389 (Cal. Ct. App. 1992); Palmieri v. Town of Babylon, No. 01CV1399(SJ), 2006 WL 1155162 at *9 (E.D.N.Y. Jan. 6, 2006), *aff'd*, 277 Fed. App'x. 72 (2d Cir. 2008).

168. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

169. *Baker*, 2008 WL 4681373 at *8.

Substantive due process challenges to generally applicable zoning regulations—questioning whether an ordinance is arbitrary, unreasonable, or capricious—are generally subject to a rational basis review.[170] Again, in *St. Bernard Parish*, plaintiffs argued that the ordinance had no legitimate public purpose and was unduly oppressive.[171] The court noted that homeowners would have a difficult time demonstrating that any ordinance has no rational basis, and found that the Parish's stated purpose for the Ordinance—stabilizing the housing market and encouraging the return of single-family home owners—was rational and permissible.[172]

Not only were the goals of the St. Bernard Parish ordinance permissible, but the means to achieve those goals were also permissible. "The law does not permit this Court to review whether the Ordinance will in fact stabilize the rental market in St. Bernard Parish, or to question whether defendant's legislation and the means it employs is the best way to achieve this goal, or even whether St. Bernard Parish could achieve its goal in a less restrictive manner."[173] In short, jurisdictions should meet substantive due process challenges if the jurisdiction can produce some findings connecting the regulated activity—in this case residential speculation—to community harm.

3. Authority

Municipalities may also face challenges from homeowners who argue that the municipality lacks the legal authority to implement a rental restriction. Generally, municipalities possess only the authority and powers the state government grants them.[174] This grant of power may be relatively large and general as in a home rule jurisdiction,[175] or it may be more narrowly construed as in Dillon's Rule states. In Dillon's Rule states, municipalities may exercise

170. *See, e.g.*, State v. Germane, 971 A.2d 555, 584 (R.I. 2009) (applying substantive due process to the Sexual Offender Registration and Community Notification Act); Harbit v. City of Charleston, 675 S.E.2d 776, 782 (S.C. Ct. App. 2009) (applying a "reasonable relationship" test to a denial of a rezoning application). Some jurisdictions might impose a higher standard of review such as requiring a "real and substantial" relationship between the purpose of the ordinance and the exercise of police power. *See, e.g.*, Hanna v. City of Chicago, 771 N.E.2d 13, 22 (Ill. App. Ct. 2002) (outlining a six factor test).

171. *Baker*, 2008 WL 4681373 at *9 ("The 'unduly oppressive' nature of the ordinance includes the process and criteria for obtaining a Permit, the disclosures required for obtaining a permit, the $250 application fee, and potential penalties for violating the Ordinance.").

172. *Id.*

173. *Id.* at *10.

174. Local governments have only the legal authority granted to them by the state and have no inherent legal powers. *See* Richard Briffault, *Our Localism: Part I – The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 7–8 (1990).

175. *See* GERALD E. FRUG & DAVID J. BARRON, CITY BOUND: HOW STATES STIFLE URBAN INNOVATION 60–74 (2008). *See generally* David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2257 (2003) (discussing the concept of home rule and its effect on suburban sprawl).

only those powers expressly granted by the state, powers implied from express grants, or powers necessarily incidental to express grants.[176]

While home rule jurisdictions generally have more expansive powers, it is simplistic to assume that those jurisdictions will necessarily possess—or express—more autonomy than Dillon's Rule jurisdictions. Much depends on the risk tolerance of local politicians to enact legislation that pushes the boundaries of local authority, the willingness of the state legislature to closely police (or not) local initiatives, and the reviewing court's interpretation of those initiatives as within prescribed bounds or as outside of conventional practice.[177] Under this analysis, a rental restriction could be viewed in one of two ways. It could be an application of a local jurisdiction's long-recognized power to regulate land uses under its zoning authority, or protect public health and safety under its police power. Or the restriction could be seen as exceeding traditional zoning practices and outside of a jurisdiction's grant of authority from the state legislature.

The conflict between these two views of rental restrictions is well illustrated in a New Jersey case, *Repair Master, Inc. v. Borough of Paulsboro*.[178] The city of Paulsboro felt it had too much renter-occupied housing and too few owner-occupied units. The city commissioned a study, which confirmed this imbalance and concluded the "excessive presence of rental tenure throughout the municipality has adversely impacted the socio-economic fabric of the community . . . , including the housing market, the commercial real estate market, the municipal tax base, demand for police services, incidence of code enforcement violations, and increased presence of children-at-risk throughout the local school system."[179] As a result of these findings, the city passed a moratorium on the issuance of rental licenses for single-family and non-owner-occupied duplex units.[180]

The appellate court's view of the ordinance was mixed. The court seemed genuinely sympathetic to and supportive of the city's homeownership goals. For several years, the city had worked with federal, state, local, private, and faith-based initiatives to increase homeownership, including efforts to rehabilitate vacant and abandoned housing.[181] The court was not overly concerned that the city was applying exclusionary policies and "[did] not doubt the Borough's alleged laudable motives to revitalize its owner-occupied

176. Briffault, *supra* note 174, at 8.

177. *See* DAVID BARRON ET AL., DISPELLING THE MYTH OF HOME RULE: LOCAL POWER IN GREATER BOSTON 9–12 (2004) (exploring the legal and practical limitations on local power among home rule cities).

178. 799 A.2d 599 (N.J. Super. Ct. App. Div. 2002).

179. *Id.* at 601.

180. *Id.* at 600.

181. *Id.* at 601.

housing stock."[182] In other words, the court did not believe the city was trying to exclude lower income residents in favor of higher income residents.

While the appellate court's view was mixed, the lower court objected to the commissioned study's generalized conclusions about the socio-economic impact of rental properties. The city's moratorium impacted all single-family rentals and "[i]t is a stretch of logic to make the conclusion that a particular rental property would contribute to social problems which the municipality is attempting to address."[183] In other words, not every renter presents socio-economic problems, and not every child of those renters presents special educational problems.[184]

The characterization of the rental restriction in *Repair Master* was significant to the court's holding. Local land use goals are necessarily broad, and to the extent a jurisdiction can rationally connect the regulatory method to the broad goal, the regulation will likely be upheld. A rental restriction becomes vulnerable, however, if it is too blunt and powerful to address local social problems that other local regulations, such as nuisance and code enforcement measures, could also address.[185] The court in *Repair Master* ultimately found that the city lacked the authority "to ban a class of housing occupants or deny an owner a substantial attribute of ownership and possession of real estate."[186] While the court did discuss implied authority,[187] the court ultimately supported its conclusion by citing a series of cases in which cities unsuccessfully attempted to regulate perceived anti-social conduct through zoning codes. The court saw the proper function of zoning as regulating the physical use of property, and not addressing perceived anti-social conduct.

Of course, the regulation of physical use is often intended to impact social and economic relationships within the community. What the *Repair Master* court seemed particularly concerned with was the problem of over-inclusion; the regulation included too many innocent people within its prohibitions. If the city was concerned about the impact of disruptive people on quiet neighborhoods, an appropriate response would be to monitor the behavior of

182. *Id.*

183. *Repair Master*, 799 A.2d at 603.

184. *Id.*

185. *See id.* at 606–07.

186. *Id.* at 606.

187. The city listed twenty-one examples of regulatory activities cities had engaged in that were upheld as valid exercises of implied authority. *Id.* at 604–06. New Jersey cities had no express authority to require owners of large multiple dwellings to provide armed security guards, regulate automobile sales lots, or regulate hours of business operation for example. But New Jersey courts had upheld these and other activities, finding that cities had implied authority. Not finding authority for the rental moratorium, the court that the list was "impressive but not persuasive in the Borough's favor." *Id.* at 606.

those individuals, and not to prevent a group of unrelated people from living together.[188]

A speculation ordinance that similarly swept too broadly could be addressed by an enforcement scheme allowing homeowners to rent in certain, prescribed circumstances. For example, the *McGlothin* outcome suggests that an exception should be made if an owner occupant dies and the surviving occupant, or an executor of the estate, wants to rent the home.[189] The *Anderson* ordinance contained an exception for medical reasons or defined leaves of absence.[190] An enforcement scheme with these types of exceptions mitigates some of the impact on individual homeowners, which would result from a complete moratorium, and would be more likely to survive a challenge.

IV. CONCLUSION

Alienation restrictions on homeowners appear in a surprising number of contexts—they are not isolated, extreme occurrences. These restrictions could be a potentially useful complement to a comprehensive regulatory approach, but they are not without risks. More work needs to be done to examine how effective local governments could be in identifying, monitoring, and enforcing speculative activity.

Local governments, however, are unlikely to implement rent restrictions to the extent suggested in this article. While local governments are sometimes entrepreneurial in their pursuit of authority to act,[191] other factors make local governments more risk averse. For example, local governments have limited resources to contribute to a diverse number of projects, local constituents can be risk averse, and the political consequences of decisions that turn out poorly can be significant.[192] Whether local governments actually implement anti-speculation measures in general, or implement rental restrictions in particular, to achieve anti-speculation goals, it is useful to consider limitations on homeownership generally. The investment ideal of conventional homeownership has remained unquestioned for too long. Moreover, recent economic events demonstrate that more flexibility in ownership models and regulatory regimes is necessary to preserve the economic stability of individuals and communities. Local governments—close to their constituents and adaptable to change—may be the appropriate sites for new regulatory approaches.

188. *See Repair Master*, 799 A.2d at 606–07; For a discussion of short term rental bans, see *supra* Part II.D.

189. *See supra* Part II.H.

190. Anderson v. Provo City Corp., 108 P.3d 701, 705 (Utah 2005).

191. FRUG & BARRON, *supra* note 175, at 195–96, 232.

192. Serkin, *supra* note 90, at 1666–67.