

Micro-Housing in Seattle: A Case for Community Participation in Novel Land Use Decisions

*Patrick Carter**

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INTRODUCTION

Rather than relying solely on the formal interpretations of government regulators invited by the structure of local zoning ordinances, the City of Seattle should adopt a process that invites community-based me-

* J.D. Candidate, Seattle University School of Law, 2016; M.A., Bastyr University, 2009; B.A., Whitman College, 2005. Thank you to all who have inspired, cajoled, assisted, and joined in cahoots with me to complete this project.

diation and problem-solving when a significant shift in housing density is contemplated in a developer's proposal. Greater resident participation in development projects allows the City of Seattle to better support those residents in their reliance interests arising from zoning ordinances while simultaneously furthering the policies that underpin urban zoning. This is especially true when such development projects raise the possibility of substantial impacts on the character of a community or its commons. Moreover, such alternative dispute resolution processes may also help to mitigate potential detriments to the community commons or provide a mechanism for an equitable exchange of capital between developers and residents to offset negative impacts to property values.

This Note specifically examines the development of urban residential property into micro-housing apartment buildings in the City of Seattle, the possible consequences, and a potential community-based solution for disputes regarding such development. Part I introduces the issue using anecdotal and quantitative information, including snapshots of some of the conflicts between urban homeowners and developers and the sometimes questionable application of local zoning ordinances to favor development in the context of micro-housing in Seattle. Included in this discussion is a summary of the "smart growth" principles that supported the development and the countervailing interests of incumbent residents. Part II examines Washington State's Growth Management Act and suggests how it may have impacted the quick acceptance of micro-housing development in Seattle. Part III explores incumbent residents' reliance interests in zoning ordinances for protection against externalities and maintenance of consumer surplus in their homes. Part IV reviews the potential harms suffered by residents adjacent to dramatic residential development and the legal remedies available at law. Finally, I offer a community-based solution to allow for the redress of such harms.

I. THE BACKSTORY

With housing prices soaring in attractive urban neighborhoods and demand for cost-conscious rental options increasing, developers in a variety of jurisdictions have shown interest in micro-housing development. Cities including New York, Boston, San Francisco, and Seattle have either allowed or actively promoted micro-unit housing development within their borders.¹ Supporters champion micro-units as a way of providing affordable housing, reducing sprawling development through urban infill, mitigating the energy usage and environmental impact of larger de-

1. Claire Thompson, *Peace in a Pod: How Tiny Apartments Could Reshape the Big City*, GRIST (Dec. 13, 2012), <http://grist.org/cities/apodment-livin>.

velopments, and allowing seniors to age in place.² City planners, business leaders, and local officials have embraced micro-units as a means through which expensive cities can attract and retain young professionals.³ However, given the burgeoning attempts to permit and encourage these housing types on a larger scale, no comprehensive analyses of their actual effects have been completed.

*A. The Loophole: An Early Path to Micro-Housing
Development in Seattle*

Seattle has seen the most significant development of micro-housing units, and many of those developments have sparked controversy in the city.⁴ As of July 2014, Seattle had permitted over 3,600 micro-housing units, with many residences already occupied and several projects underway in varied stages of development.⁵ Until 2013, shrewd developers exploited what many long-term neighborhood residents described as a “loophole” in city regulations.⁶ Housing in Seattle with nine or more individuals in a unit was traditionally classified as “congregate housing” and was subject to a public review process.⁷ To stay under this number, developers built buildings with “suites” containing eight separately-leased apartments for single individuals; the apartments had a private bathroom and kitchenette but shared one full kitchen.⁸ Because each “suite” was considered one “unit,” developers were able to avoid design and environmental reviews by building seven or fewer “suites” in each building on their property.⁹ In Seattle’s low-rise districts, where many of these buildings have been developed, mandatory review was triggered only if more than eight dwelling units were developed.¹⁰

2. Dominic Holden, *Thinking Small: A Loophole for Really Affordable Housing*, THE STRANGER (June 4, 2009), <https://www.thestranger.com/seattle/thinking-small/Content?oid=1635067>.

3. Thompson, *supra* note 1.

4. See Maria Dolan, *Are Apodments Ruining Seattle Neighborhoods?*, SEATTLE MAG., Nov. 2012, at 106–11, available at <http://www.seattlemag.com/article/are-apodments-ruining-seattle-neighborhoods> (discussing the controversy surrounding developments of Seattle “apodments”).

5. Dominic Holden, *The Fight Against Small Apartments*, THE STRANGER (May 8, 2013), <https://www.thestranger.com/seattle/the-fight-against-small-apartments/Content?oid=16701155>.

6. *Id.*

7. See Holden, *supra* note 2 (discussing code regulations governing congregate housing).

8. Lynn Thompson, *Critics of Micro-Apartments Calling for a Moratorium*, SEATTLE TIMES (Apr. 25, 2013, 6:00 AM), <http://www.seattletimes.com/seattle-news/critics-of-micro-apartments-calling-for-a-moratorium>.

9. *Id.*

10. See CITY OF SEATTLE DEP’T OF CONSTR. & INSPECTIONS, TIP 238, DESIGN REVIEW: GENERAL INFORMATION, APPLICATION INSTRUCTIONS, AND SUBMITTAL REQUIREMENTS 2 (2011), available at <http://www.seattle.gov/DPD/Publications/CAM/cam238.pdf>; CITY OF SEATTLE DEP’T

As such, developers were able to build apartment complexes with, ostensibly, up to fifty-six rentable units without submitting to any of the normal public comment processes or environmental impact reviews that the building of a traditional nine-unit apartment building in that same neighborhood would trigger. At the same time, developers counted the units differently for different purposes: they used each separate sleeping area as a unit when applying for tax exemptions, but combined seven of these spaces together when applying for building permits.¹¹ Though Seattle's Office of Housing announced in March 2013 that it would no longer allow developers to use different unit counts to serve different purposes, many projects were approved before this change and thus were able to take advantage of this previously un contemplated loophole.¹²

B. The Neighbors Complained and Development Increased

As early as 2009, neighbors of these micro-unit development projects lodged complaints with Seattle including: the insufficiency of on-street parking in the area for the increased utilization from dozens of new neighbors, overcrowding of the residential neighborhood, and adverse changes to the neighborhood's character and aesthetics.¹³ Some also stated concerns for micro-housing residents, such as the lack of proper egress from top floors to ensure safety during a fire.¹⁴ Even though some have championed these micro-housing developments as a form of "smart growth," many long-time residents argued that they constituted an "upzon[ing] without any process" and failed a long-term planning goal of adequately spreading increased density citywide.¹⁵ Many neighbors of such projects asked the city to enact a moratorium on micro-housing development until some of their concerns could be better addressed by a modernized building code.¹⁶ Yet, officials at the Seattle Department of Construction and Inspections (SDCI) permitted a significant number of micro-housing developments throughout 2009, and over the next several years SDCI (formerly known as the Department of Planning and Development) created training protocols for its planners to recognize and permit micro-housing under townhouse and congregate hous-

OF CONSTR. & INSPECTIONS, TIP 208, WHEN ENVIRONMENTAL REVIEW IS REQUIRED IN SEATTLE 1 (2012), available at <http://www.seattle.gov/DPD/Publications/CAM/cam208.pdf>.

11. Thompson, *supra* note 8.

12. *Id.*

13. *Id.*

14. *Id.*

15. Dolan, *supra* note 4.

16. *Id.*

ing definitions.¹⁷ Subsequent to this change, there was a rapid increase in congregate projects. Approximately 1,100 units were permitted using the congregate designation, with a number of projects housing well over 100 people;¹⁸ the largest was slated to contain 235 people in individual units.¹⁹

One early development in the Capitol Hill neighborhood, built under the aPodments brand, described its project as “town houses” under the land use code but as a “boarding house” under the building code.²⁰ This sleight-of-hand maneuver allowed the developer to construct the buildings without participating in any design review procedures or providing the type of notice to its neighbors that would otherwise have been required for the construction of a multifamily housing development of its size in that neighborhood.²¹ Many of these apartments were only approximately 150 square feet in size and, like many such micro-housing units, lacked sinks in the bathrooms to avoid being labeled “dwelling units.”²² In addition, tiny in-unit kitchenettes were overlooked by planners at SDCI using an “unwritten interpretation” suggesting that the building code’s “cooking appliance” specification for kitchens required the presence of a full stove in order to qualify as a true “dwelling unit.”²³

C. Residents’ Countervailing Interests

Some community residents argue that such infill projects result in adverse effects on surrounding neighborhoods. These costs may include such negative externalities as increased traffic congestion or lost open space associated with infill.²⁴ Many of these local concerns relate to a fear that an increase in population translates to a greater demand for local services that will be either paid for directly through increased taxes or indirectly by decreased service quality due to overcrowding.²⁵ This concern is most salient for development that occurs at significantly higher densities in neighborhoods that have historically housed only single fam-

17. *Micro-Housing Provokes Big Debate*, SEATTLE NEIGHBORHOOD COAL. (July 1, 2014), <http://seattleneighborhoodcoalition.wordpress.com/micro-housing-provokes-big-debate/>.

18. Sara Solovitch, *Scrunched in Seattle*, POLITICO MAG. (Oct. 14, 2014), <http://www.politico.com/magazine/story/2014/10/seattle-micro-housing-boom-111874>.

19. *Id.*

20. SEATTLE NEIGHBORHOOD COAL., *supra* note 17.

21. *See* Thompson, *supra* note 8.

22. Holden, *supra* note 5.

23. Solovitch, *supra* note 18.

24. Stephen Malpezzi, *Housing Prices, Externalities, and Regulation in U.S. Metropolitan Areas*, 7 J. HOUSING RES., 209, 210–11 (1996).

25. *Id.*

ily homes.²⁶ Moreover, some property buyers associate increased density with inner city blight, poor service quality, and other problems.²⁷ Troubling to incumbent residents, these perceived negative externalities could result in lower housing prices in the area.²⁸

D. Other Cities Moved with Caution

While other municipalities also faced issues with micro-housing since around 2009, many responded in a significantly different way than Seattle. For example, San Francisco crafted responsive legislation to allow 220-square-foot apartments in a 375-unit trial rather than exploiting loopholes in the current code to allow the construction of such projects.²⁹ New York City held a design competition and allowed 250-square-foot apartments as the minimum unit size.³⁰ Rather than allowing for unfettered development of this new housing style, these cities took a more conservative approach to better determine what design requirements should be mandatory for minimum-space dwelling units and engaged in controlled experimentation with this type of apartment building.

E. The Role of “Smart Growth”

“Smart growth” advocates have applauded Seattle’s quick acceptance of small-footprint living arrangements such as micro-housing.³¹ These advocates seek to change current patterns of low-density dispersed development.³² They stress the need for planned growth that concentrates development in and near current communities because such projects take advantage of existing infrastructure and increase investment in current neighborhoods.³³ Smart growth advocates also emphasize that planned growth reduces the conversion of open space areas with public benefits, decreases traffic volumes, and prevents other such external costs associ-

26. Anthony Flint, *The Density Dilemma: Appeal and Obstacles for Compact and Transit-Oriented Development* (Lincoln Inst. of Land Policy Working Paper, 2005), available at https://drcog.org/documents/Density_dilemma.pdf.

27. *Id.*

28. *Id.*

29. Nathan Hurst, *Take That, Tokyo! San Francisco Approves 220-Square-Foot ‘Micro-Apartments,’* WIRED (Nov. 20, 2012, 5:45 PM), <http://www.wired.com/2012/11/san-francisco-micro-apartments/all/>.

30. Lidija Grozdanic, *Bloomberg Announces Winner of the adAPT NYC Competition to Develop Micro-Unit Dwellings*, INHABITAT (Jan. 31, 2013), <http://inhabitat.com/nyc/bloomberg-announces-winners-of-the-adapt-nyc-competition-to-develop-micro-unit-dwellings/>.

31. Dolan, *supra* note 4.

32. See Anthony Downs, *What Does Smart Growth Really Mean?*, 67 PLANNING 20, 20–25 (2001).

33. See Anthony Downs, *Smart Growth: Why We Discuss It More Than We Do It*, 71 J. AM. PLAN. ASS’N 367, 367–78 (2005).

ated with sprawl.³⁴ The smart growth philosophy holds that low-density subdivisions scattered at the exurban fringe exacerbate traffic congestion because of longer commutes and increase land consumption due to more people living on large individual lots in previously undeveloped areas.³⁵ The argument is that only better-planned, higher-density developments located in and around existing communities can effectively address these problems.³⁶ Many of these perceived benefits, like decreased congestion and air pollution, are regional in impact.³⁷

The City of Seattle has also been spurred on in its development considerations by Washington State's Growth Management Act, which looks to increase urban infill as a protective measure against sprawling development and the diminishment of farm and conservation lands.

II. WASHINGTON'S GROWTH MANAGEMENT ACT

From a statutory perspective, the Growth Management Act (GMA) controls much of the land use regulation in Washington State.³⁸ The GMA "requires state and local governments to manage Washington's growth by identifying and protecting critical areas and natural resource lands, designating urban growth areas, preparing comprehensive plans and implementing them through capital investments and development regulations."³⁹ The GMA provides thirteen goals to guide cities and counties in this course of action, which include the consideration of transportation, housing, economic development, natural resource industries, property rights, and the environment.⁴⁰

While the GMA establishes state goals, sets deadlines for compliance, and offers direction for municipalities to prepare comprehensive plans and regulations, it relies primarily on local control instead of any sort of centralized planning at the state level.⁴¹ Within the framework provided by the mandates of the GMA, local governments have many

34. Robert W. Burchell, David Listokin & Catherine C. Galley, *Smart Growth: More Than a Ghost of Urban Policy Past, Less Than a Bold New Horizon*, 11 HOUSING POL'Y DEBATE 821, 829 (2000).

35. See Mary H. Cooper, *Can Managed Growth Reduce Sprawl?*, 14 CONG. Q. RESEARCHER 469 (2004).

36. *Id.*

37. *Id.*

38. WASH. REV. CODE ch. 36.70A (1990). The GMA has been recognized as "one of the most comprehensive and modern planning statutes in the country" by the American Planning Association. AM. PLANNING ASS'N, PLANNING FOR SMART GROWTH: 2002 STATE OF THE STATES 130 (2002).

39. *Growth Management Laws and Rules*, WASH. STATE DEP'T OF COMMERCE, <http://www.commerce.wa.gov/Services/localgovernment/GrowthManagement/Pages/LawsRules.aspx> (last visited Mar. 5, 2016).

40. WASH. REV. CODE § 36.70A.020 (2002).

41. *Growth Management Laws*, *supra* note 39.

choices regarding the specific content of comprehensive plans and implementing development regulations. The Washington State Department of Community, Trade and Economic Development (CTED) does not have the authority to certify, approve, or reject plans. The only significant check on the land use regulations of local municipalities comes by way of the Growth Management Hearings Board, which hears and determines allegations that a government agency has not complied with the GMA.⁴²

The State of Washington originally wrote its GMA in 1990 with the goal of allowing communities to participate in the land use planning process and tailor the process to their unique needs.⁴³ In practice, however, the planning process has continued to be top-down.⁴⁴ Rural communities with declining populations have tended to adopt the same growth management strategies as cities, such as Seattle, that are experiencing rapid growth.⁴⁵ Moreover, “[r]esidents also have complained that the [local growth management] boards largely have ignored some of the GMA’s goals, such as recognizing the need to support ‘natural resource industries’ like farming,” while favoring environmental concerns.⁴⁶ As such, even though the GMA was originally intended to help facilitate community participation in land use decisions, it has ostensibly created a policy (and potentially bureaucratic) hurdle for neighbors of proposed urban infill projects, such as micro-housing development.⁴⁷

While the GMA has exerted pressure on the green-lighting of micro-housing development by Seattle regulators, better local zoning practices could have pushed back against the top-down mandates to better mitigate conflicts between incumbent residents and developers at the municipal and neighborhood levels.

III. ZONING

In the most ideal sense, zoning provides a deliberative process through which residents of a municipality can express their preferences

42. The board’s administrative rules of practice and procedure can be found in the Washington Administrative Code. *See* WASH. ADMIN. CODE tit. 242-03 (2011).

43. *See* WASH. REV. CODE § 36.70A.010 (1990) (“It is in the public interest that citizens, communities, local governments, and the private sector cooperate and coordinate with one another in comprehensive land use planning.”); *id.* § 36.70A.020(11) (expressing an intention to “[e]ncourage the involvement of citizens in the planning process”).

44. Hannah Jacobs, Note, *Searching for Balance in the Aftermath of the 2006 Takings Initiatives*, 116 YALE L.J. 1518, 1559 (2007).

45. *Id.*

46. *Id.*

47. *See* MIKE PODOWSKI & GEOFFREY WENTLANDT, SEATTLE DEP’T OF PLANNING & DEV., MICRO-HOUSING UNITS AND CONGREGATE RESIDENCES (2014), available at http://www.seattle.gov/dpd/cs/groups/pan/@pan/documents/web_informational/s048065.pdf.

about the growth and character of their community.⁴⁸ The prevalence of zoning laws suggests that residents may have both financial and nonfinancial interests in the planning and coordination of their communities.⁴⁹ Zoning regulations can be seen to preserve “collective values” and to protect “a neighborhood from encroachments by land uses inconsistent with its character.”⁵⁰ Courts have also given credence to the view of land use planning as a deliberative tool to preserve the overall character of a neighborhood.⁵¹ For example, courts have upheld procedural measures that give all community members “a voice in decisions that will affect the future development of their own community”⁵² as well as government actions that “preserve the . . . nature of a community and . . . maintain its aesthetic and functional characteristics through zoning requirements.”⁵³

In Washington State, municipal zoning powers trace their origin to the state constitution. Under the police power provisions of the Washington State Constitution, “[a]ny county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws.”⁵⁴ Yet, Washington courts have generally followed “Dillon’s Rule” limiting the authority of municipal corporations to that granted by the legislature: “[A] municipal corporation’s powers are limited to those conferred in express terms or those necessarily implied. If there is any doubt about a claimed grant of power it must be denied. The test for necessary or implied municipal powers is legal necessity rather than practical necessity.”⁵⁵

While preserving the nature of a community is an important practical interest, municipal zoning laws are carefully drafted to meet the “legal necessity” standard of Dillon’s Rule. At the same time, judicial scrutiny over zoning ordinances is guided by another crucial variable: the interests of the incumbent landowner.

48. See, e.g., Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 837, 890–91 (1983); Eric H. Steele, *Participation and Rules—The Functions of Zoning*, 11 AM. B. FOUND. RES. J. 709, 713 (1986).

49. See, e.g., Bradley C. Karkkainen, *Zoning: A Reply to the Critics*, 10 J. LAND USE & ENVTL. L. 45, 46 & n.6 (1994) (discussing the universality of zoning laws).

50. *Id.* at 68 (emphasis omitted).

51. See, e.g., *Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 340–41 (2002) (discussing the importance of “protecting the decisional process” for a regional plan and finding that a rule penalizing long deliberations would “disadvantage those landowners and interest groups who are not as organized or familiar with the planning process”).

52. *James v. Valtierra*, 402 U.S. 137, 143 (1971).

53. *Sylvia Dev. Corp. v. Calvert Cnty.*, 48 F.3d 810, 821 n.3 (4th Cir. 1995).

54. WASH. CONST. art. XI, § 11.

55. *Chem. Bank v. Wash. Pub. Power Supply Sys.*, 666 P.2d 329, 339 (1983) (internal citations omitted); see also Hugh Spitzer, “Home Rule” vs. “Dillon’s Rule” for Washington Cities, 38 SEATTLE U. L. REV. 809, 813–16 (2015).

A. Zoning and the Interests of the Incumbent Landowner

The enforcement of local zoning ordinances is an essential ingredient in securing community members' reliance interests in their homes. Residents of all income groups become attached not only to their personal home or living space but also to the traits of their surrounding neighborhood.⁵⁶ Whether homeowners or renters, residents "selfishly" care about things such as the appearance of their street or the neighborhood park where their children play throughout the summer.⁵⁷ Public zoning proceedings allow residents to express their desires for the preservation of the characteristics that they most strongly value and to develop a degree of consensus around core community issues.⁵⁸ Preventive land use regulation is important in determining the compatibility of land uses within a neighborhood—a significant component of community character. At the parcel-by-parcel level, studies have found zoning laws to be positively correlated with property values because they prevent the diminution in value from mixed and incompatible land uses.⁵⁹

In fact, communal attitudes toward zoning expectations have even begun to impact judicial review of zoning ordinances. American courts have historically given significant weight to the interests of individual property owners in their determinations regarding land use.⁶⁰ More recently, though, concern for the general community welfare has begun taking precedence, thus favoring most exclusionary zoning measures.⁶¹ Communities have been granted a degree of freedom to enact policies in accordance with community welfare goals even in many cases where such policies infringe upon a specific individual's property rights.⁶² Courts have also begun to shift their jurisprudence to reflect a belief that municipal regulatory power emanates from its role as an agent for local

56. See Margaret Jane Radin, *Residential Rent Control*, 15 PHIL. & PUB. AFF. 350, 362 (1986) (discussing residents' interest in remaining in an "established" home).

57. *Id.*

58. Ariel Graff, Comment, *Calibrating the Balance of Free Exercise, Religious Establishment, and Land Use Regulation: Is RLUIPA an Unconstitutional Response to an Overstated Problem?*, 53 UCLA L. REV. 485, 519 (2005) (arguing that developing a comprehensive zoning plan "forces residents to mediate between conflicting values and arrive at a consensus that accurately captures local sentiments").

59. See, e.g., Stephen Malpezzi et al., *New Place-to-Place Housing Price Indexes for U.S. Metropolitan Areas, and Their Determinants*, 26 REAL EST. ECON. 235, 263 (1998) (finding that regulations drove up "quality adjusted" rents and housing prices).

60. See Paul E. King, *Exclusionary Zoning and Open Housing: A Brief Judicial History*, 68 GEOGRAPHICAL REV. 459, 460 (1978).

61. JONATHAN LEVINE, ZONED OUT: REGULATION, MARKETS, AND CHOICES IN TRANSPORTATION AND METROPOLITAN LAND-USE 97 (2005).

62. *Id.*

residents and families rather than for the government.⁶³ Many of these rulings have focused on the rights and interests of residents in suburban areas where homeowners tend to comprise a significant component of the local power base.⁶⁴

Despite favorable court rulings for suburban residents, developers in more urban environments tend to exert disproportionate influence in the land use process because their interests are highly concentrated, eliminating the organizational problems that face neighbors who might oppose development.⁶⁵ As such, urban residents' reliance upon zoning protections may be positively correlated with local community members' ability to more regularly and more actively participate in neighborhood land use determinations.

B. Protection Against Externalities

Zoning advocates have historically suggested that zoning is necessary to protect or enhance property values,⁶⁶ particularly the values of residential properties.⁶⁷ In this way, zoning serves principally to protect property owners from the negative externalities of new developments. Without zoning, residential property owners would face plummeting property values if a development with significant negative externalities—a tannery or a metal grinding shop, for example—moved in next door. Moreover, the mere prospect that such a development could move in would tend to depress the value of residential property. The solution that zoning provides is to divide the municipality into zones so that industries are sited near other industries, commercial enterprises near other commercial enterprises, and residential properties with other residential properties.

In a more salient example, Keith Wiley conducted a study in 2009 examining the change in property values near residential infill sites in Montgomery County, Maryland.⁶⁸ Wiley's results across the various models identified a consistent, negative price effect associated with the infill.⁶⁹ The study found that, in general, the property values of lower-

63. ROY LUBOVE, *THE URBAN COMMUNITY: HOUSING AND PLANNING IN THE PROGRESSIVE ERA* 95–98 (1967) (arguing for enactment of zoning ordinance principally as a means to protect existing property values).

64. See David A. Dana, *Land Use Regulation in an Age of Heightened Scrutiny*, 75 N.C. L. REV. 1243, 1272–73 (1997).

65. Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENT. 279, 289 (1992).

66. LUBOVE, *supra* note 63.

67. RICHARD F. BABCOCK, *THE ZONING GAME* 115 (1966).

68. See KEITH WILEY, *AN EXPLORATION OF THE IMPACT OF INFILL ON NEIGHBORHOOD PROPERTY VALUES* (2009).

69. *Id.* at 23.

income areas tend to benefit whereas higher income areas had property values decline as a result of infill.⁷⁰ Also, larger projects generated greater negative effects than smaller projects.⁷¹

Some zoning advocates have suggested the prevention of “fiscal freeloading” as another benefit of zoning.⁷² According to this view, some new developments place a greater burden on public services than they contribute in new taxes.⁷³ Zoning is a means by which such developments can be screened out in favor of developments that pay their fair share.⁷⁴ Typically, it is lower-income, multifamily rental housing developments that are thought not to “pay their own way.”⁷⁵ High-density, lower-cost developments often increase the demand for public services by the sheer increase in numbers of new residents they bring to the community.⁷⁶

C. Consumer Surplus

Zoning provides additional benefits beyond simply protecting individual property owners against the effects of “spillovers” or negative externalities that adversely affect the market values of their property.⁷⁷ It also protects a homeowner’s consumer surplus in a home and in the surrounding neighborhood—value that lies above the market value of that home. Zoning in urban neighborhoods is not merely a system for protecting the market values of individual properties, but rather it is a device to protect neighborhood residents’ interests in their entirety, including consumer surplus in their homes, as well as their interests in the neighborhood commons.⁷⁸

Neighborhoods are not just made up of individual parcels, but include collective resources comprising a neighborhood commons,⁷⁹ and the property rights of an urban neighborhood dweller typically consist

70. *Id.* at 48.

71. *Id.*

72. See, e.g., Bruce W. Hamilton, *Zoning and Property Taxation in a System of Local Governments*, 12 URB. STUD. 205, 206–07 (1975) (arguing that, in a metro area with a large number of competing municipal jurisdictions, the use of zoning as a neutral fiscal device can make residential property taxes function as an efficient price for public services).

73. *Id.* at 206.

74. See Michelle J. White, *Fiscal Zoning in Fragmented Metro Areas*, in FISCAL ZONING AND LAND USE CONTROLS 31–33 (Edwin S. Mills & Wallace E. Oates eds., 1975).

75. See Michael H. Schill, *Deconcentrating the Inner City Poor*, 67 CHI.-KENT L. REV. 795, 812–14 (1991).

76. *Id.* at 814.

77. ROBERT H. NELSON, ZONING AND PROPERTY RIGHTS: AN ANALYSIS OF THE AMERICAN SYSTEM OF LAND USE REGULATION 7–10 (1977).

78. *Id.* at 10.

79. See Ralph Townsend & James A. Wilson, *An Economic View of the Tragedy of the Commons*, in THE QUESTION OF THE COMMONS 311 (Bonnie J. McCay & James M. Acheson eds., 1987).

both in specified rights in an individual dwelling and inchoate rights in a neighborhood commons. This commons consists of open access, communally owned property, such as streets, sidewalks, parks, playgrounds, and libraries.⁸⁰ It also includes restricted access, communally owned property, such as public schools, public recreational facilities, and public transportation facilities.⁸¹ It further includes privately-owned “quasi-commons” to which the public is generally granted access, but with privately imposed restrictions as to use, cost, and duration; examples include restaurants, nightspots, theaters, groceries, and retail establishments.⁸² Finally, the neighborhood commons includes other intangible qualities, such as neighborhood ambiance, aesthetics, the physical environment, and relative degrees of anonymity or neighborliness.⁸³ These features together make up the “character” of a neighborhood. They are what give the neighborhood its distinctive flavor. An owner or renter of residential property in an urban neighborhood buys not only a particular parcel of real estate, but also a share in the neighborhood commons. Typically, differences in the neighborhood commons may be as crucial to a decision to purchase as differences in individual parcels.⁸⁴

For many people, a high level of consumer surplus may attach to particular features of a neighborhood commons. These values are highly subjective and may not be widely shared by people who have never lived in the neighborhood. Thus, they may add little or nothing to the market value of the property. Moreover, these resources are largely nonfungible and therefore irreplaceable. In addition to protecting the market value of their home and their consumer surplus in that particular piece of real estate, residents will naturally want to protect those collective resources of their neighborhood that they care about most, whether they are reflected in the market value of their property or are part of their consumer surplus.⁸⁵ These values can be almost priceless, especially for long-term neighborhood residents. Like one’s home, one’s neighborhood may be centrally bound up in one’s definition of self and the sense of his or her place in the world.

80. *Id.* at 312.

81. *Id.*

82. *Id.* at 313.

83. *Id.*

84. See Mingche M. Li & H. James Brown, *Micro-Neighborhood Externalities and Hedonic Housing Prices*, 56 *LAND ECON.* 125, 126 (1980) (arguing that neighborhood “amenities” are significant factors in market value of residential real estate).

85. Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 *YALE L.J.* 385, 416 (1977).

IV. HARMS AND REMEDIES

Some property owners and residents in Seattle, such as neighbors of the aPodments development in Capitol Hill mentioned earlier, have alleged damages to the neighborhood commons resulting from a significant increase in local housing density and the lack of any planned remedial efforts to enhance local resources, such as enhancing parking and transportation facilities. While new residents may not realize the reduction in available resources, long-time residents will likely feel the hit as will the commons.

Whereas it may seem, at first glance, that the significant capital and profits generated from micro-housing developments are garnered only because of the particularly high price-per-square-foot rates charged in their leases,⁸⁶ the consumer surplus present in the character of the neighborhood and the community resources arguably allows for those high rental rates to be marketable. Such consumer surplus likely played a large role in the siting of these high-density developments, and such apartment complexes, on average, represent a significantly greater impact to the commons than adjacent single family homes tend to have. Because the community commons has more significant utilization, the per-person (or per-property) related consumer-surplus value is diminished.⁸⁷ While all of the residents in the neighborhood pay for the privileges of the local consumer surplus, the only benefactors in this recent scenario have been the developers and landlords of such apartment complexes.⁸⁸ Though profit is an important element of incentivizing innovation and development, profit at the expense of others in such a way is not an equitable or sustainable solution.

A. Limitations of Remedies at Law

By the time a building has been developed, or even by the earlier date of the construction permit issuance, it is too late for neighboring landowners to seek any remedy for such a reduction in their property values. Property owners who face loss of value in their property due to rezoning or neighbors' conduct that falls below the nuisance threshold have few remedies available at law.⁸⁹ Due to the regulatory apparatus of

86. See Susan Kelleher, *Seattle's Micro-Housing Boom Offers an Affordable Alternative*, SEATTLE TIMES (Mar. 7, 2015, 4:04 PM), <http://www.seattletimes.com/pacific-nw-magazine/seattles-micro-housing-boom-offers-an-affordable-alternative/> (stating price per square foot as high as fifty dollars per month exist in some Seattle micro-housing units).

87. See Li & Brown, *supra* note 84.

88. Often, the same individual or partnership both builds and manages micro-housing units in Seattle. See, e.g., Holden, *supra* note 5.

89. A nuisance is anything that is "injurious to health or indecent or offensive to the senses, or an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoy-

Seattle building permitting, which allowed many nonconforming structures under the color of law, landowners' claims of nuisance would fail the "under the express authority of a statute" element, as all of the building projects received a stamp of regulatory approval before any construction commenced.

Moreover, the only context within nuisance jurisprudence in which courts have recognized diminution of value claims is hazardous waste contamination.⁹⁰ Claims for diminution generally require a plaintiff to show actual physical contamination—though some courts have found mere stigma to be sufficient.⁹¹ Furthermore, claims are restricted when contamination falls below regulatory levels, further demonstrating courts' accommodation to a potential tortfeasor's reliance upon published regulations. At their core, claims of diminution are ones of perception: the attraction of the plaintiff and market to the land. The plaintiff, the market, and the finder of fact must see the property as damaged in some way and undesirable for such claims to be brought and have any chance of success. This is a less likely occurrence in a rising real estate market. The market desperate for real estate is less likely to care about hypothetical stigma, and a jury, likely to include many who have been priced out of the windfall in real estate, may feel more jealous than sympathetic towards a plaintiff claiming decreased appreciation.

For the case at hand, no traditional common law remedies will provide relief to landowners who believe that their property values have been diminished by neighboring structures that negatively impact the character of their neighborhood. There generally is no physical contamination in the landowner's property from the construction of a higher-density housing facility on an adjacent property. As such, under the current diminution of value jurisprudence, incumbent landowners are precluded from recovering any market value decrease in their property due to nearby micro-housing development.

ment of the life and property." WASH. REV. CODE § 7.48.010 (2015). To prove a private cause of action of nuisance, a plaintiff must show interference that has "injuriously affected" his use and enjoyment of his property. *Id.* § 7.48.020. The causal conduct must be culpable and must not have been done "under the express authority of a statute." *Id.* § 7.48.160; *see, e.g.*, *Kitsap Cnty. v. Kitsap Rifle & Revolver Club*, 337 P.3d 328 (Wash. Ct. App. 2014), *review denied*, 352 P.3d 187 (Wash. 2015).

90. *See, e.g.*, *Berger v. Smith*, 95 S.E. 1098 (N.C. 1912) (rejecting plaintiff's claim that if his neighbor built a saw mill, it would cause injury to his property and depreciate its value). The court held that injunctive relief was inappropriate as there was only speculative proof of any possible injury. *Id.* at 1101. The court noted that if plaintiff's conjectures were realized, he had a legal remedy. *Id.*

91. While some jurisdictions and occasional outlier trial courts allow owners of uncontaminated property to recover for the perceived "stigma" of being near contamination, they are the exception.

B. Looking Toward a Plan for the Future

While restrictive guidelines on rental unit number reporting and recent city ordinances defining minimum standards for micro-housing developments are now in effect,⁹² given Seattle's initial endorsement of underregulated micro-housing permitting in the late 2000s, the dilemma of dealing with yet-uncontemplated, novel development trends should be an ongoing concern for any current Seattle resident or homeowner. Because residents generally cannot avail themselves to a remedy after the construction of buildings that have slipped through zoning loopholes, and there is a general preclusion of ex post facto legislation which would change the statutory authority for such projects after they are underway, the only potential solution under the current Washington regulations would be to intervene in the permitting and preconstruction process—before substantial reliance interests are created by high-density housing developers.

Currently, the only regularly utilized methodology for higher scrutiny review of building permit and land use applications in Seattle involves the public comment process and the potential for further environmental assessments.⁹³ Early developers of micro-housing apartments evaded this process by exploiting loopholes in the local building code, claiming justification for their action due to the prohibitively high cost thresholds of engaging in community comment periods and developing more comprehensive environmental impact plans.⁹⁴

One author has suggested a community board solution, borrowed from New York City's model, to serve as a liaison between the public and the planning and zoning boards to better avoid land use disputes that emerge in the context of potential negative community impacts.⁹⁵ The groups would be similar to New York City's community boards, which provide an official body through which residents can propose zoning changes and can respond to others' proposals.⁹⁶ Unlike New York City's community boards, however, the input groups would be required to conduct public hearings for each proposed land use permitting that could

92. Daniel Beekman, *Seattle City Council Approves Restrictions on Micro-Apartments*, SEATTLE TIMES (Oct. 7, 2014, 11:07 PM), <http://www.seattletimes.com/seattle-news/seattle-city-council-approves-restrictions-on-micro-apartments/>.

93. Seattle Dep't of Constr. & Inspections, *Comment on a Project*, SEATTLE.GOV, <http://www.seattle.gov/dpd/permits/commentonaproject/> (last visited Mar. 5, 2016).

94. Holden, *supra* note 5. Some unhappy neighbors of properties that changed from single family homes to complexes housing upwards of fifty to sixty additional people in separate dwellings have claimed that they have experienced an injustice due to the lack of notice or ability to participate in decisions that have had a significant impact on the character of their neighborhoods. *Id.*

95. Juliana Maantay, *Zoning Law, Health, and Environmental Justice: What's the Connection?*, 30 J.L. MED. & ETHICS 572, 583 (2002).

96. *Id.*

substantially affect property or living conditions within the neighborhood.⁹⁷ While this proposal gains positive benefits of ensuring community participation in land use decisions, it does so at the cost of requiring potentially unnecessary and costly public hearings every time a development with potential community effects is proposed.

C. A Third Option

A more efficient solution, which could better approximate both residents' and developers' needs, would be to utilize nonjudicial community dispute resolution procedures during the building permitting process.

Chapter 7.75 of the Revised Code of Washington authorizes cities and counties to create dispute resolution centers.⁹⁸ Several jurisdictions have established centers to resolve conflicts, including nuisance problems.⁹⁹ While the majority of cases involve public nuisance issues such as noise, animal complaints, and property maintenance concerns, there is nothing that prohibits such boards from mediating other neighbor conflicts as well.

In order to significantly change the housing density of a piece of property, the City should require developers to provide public notice of their land use and development intentions within a reasonable timeframe before the anticipated commencement of construction. Within this timeframe, community members could have the option to schedule a meeting with the developer at a dispute resolution center. These community dispute resolution centers could be utilized to clarify any plans and calm any concerns of neighbors to better ensure a harmonious coexistence going forward. Moreover, if projects represented a significant change to the character of the local community, with a related net decrease in adjacent property values, incumbent homeowners and developers could negotiate a fee to remediate this harm and proceed with con-

97. *Id.*

98. WASH. REV. CODE ch. 7.75 (2014).

99. For example, Bellevue's Neighborhood Mediation Program began as a pilot project in the code compliance division as an alternative to traditional enforcement of neighborhood issues. *Neighborhood Conflict*, CITY OF BELLEVUE, http://www.ci.bellevue.wa.us/neighborhood_conflict.htm (last visited Apr. 5, 2016). The program is designed to enable citizens to resolve neighborhood problems, at the earliest possible stage, without government intervention. *Id.* Mercer Island Neighborhood Mediation is a program administered by the Office of the City Attorney to help Mercer Island residents resolve disputes quickly, cooperatively, and cost-efficiently. See MUN. RESEARCH & SERVS. CTR. OF WASH., NUISANCE REGULATION FOR WASHINGTON CITIES AND COUNTIES 13 (2000), available at <http://mrsc.org/getmedia/F487787A-3C3F-4D48-8E9A-3DD8C3BFB6C2/nuisance.aspx>. Clark County Community Mediation Services handles negotiable disputes arising between neighbors throughout the county. *Community Mediation Services*, CLARK CNTY., <http://www.mediationclarkcounty.org/> (last visited Apr. 5, 2016).

struction, much as a party might buy an injunction from another to continue in some conduct considered to be a nuisance.

Further, community and developer conversations could also lead to alternative solutions to better ensure maintenance of the character of the community and mitigate any harms to the local commons, which might come at a lesser aggregate cost if both interests are in agreement as to its solution. If no mutually beneficial agreement can be reached between the parties, the potential for a public comment and review cycle would emerge. Officials at the SDCI could then determine whether or not such review was necessary after hearing the concerns of both parties and conducting their own closer analysis of the proposed construction.

This system would create incentives for both incumbent homeowners and developers to participate in good faith. For those projects that straddle the line between the letter of the zoning ordinance and improper land use, developers would have the incentive to invest up to the amount of the expense of a protracted public review (and possibly environmental review) of their project directly into the surrounding community either by paying individual landowners a fee to offset the diminution of their property values, or investing in the community to directly respond to harms to the commons, such as by providing more parking spaces or paying into a community trust account to fund future needs. Incumbent homeowners would be incentivized to participate by the possibility of recapturing property value that would potentially be lost, if a developer was forced to participate in a costly review but was still permitted to build essentially the same type of property as was first intended.

Instead, rather than automatically requiring developers to participate in costly mandatory review processes, as has been advocated by some parties resisting the micro-housing trend,¹⁰⁰ the above proposed solution aims to result in a more efficient mitigation to the property value harms that increased density in residential neighborhoods might bring. The central tenet of this solution is not that novel development projects such as micro-housing construction are bad or that they should be dissuaded from development. Rather, the primary problem with this recent trend in Seattle land development has been the value-grabbing behavior of the developers of such projects. It is this value-grabbing that the solution attempts to solve.

100. Many of the parties resisting micro-housing development in Seattle have been local land use and neighborhood activists such as the Capitol Hill neighborhood's Dennis Saxman and Chris Leman, who have opposed regulations that do not require mandatory review of micro-housing development proposals. See Justin Carder, *Seattle's New Regulations Leave Space for Densest Microhousing to Continue in Capitol Hill's Core*, CAPITOL HILL SEATTLE BLOG (Sept. 16, 2014, 6:33 AM), <http://www.capitolhillseattle.com/2014/09/seattles-new-regulations-leave-space-for-densest-microhousing-to-continue-in-capitol-hills-core/>.

Through the sort of cooperation incentivized by alternative dispute resolution in this context, it is likely that sustainable profits can still be maintained. At the same time, the consumer surplus of the neighborhood character and commons may be sustained through developer concessions such as the provision of parking, aesthetic design agreements, or at minimum providing some level of economic relief for those whose property values have been decreased by adjacent high-density development.

CONCLUSION

While the above proposed solution would likely not endear itself to either side of the land development debate, it will provide a comfortable middle ground for both parties to avoid or mitigate the direct harms of significant density shifts in established urban residential neighborhoods. The general tenets of zoning as well as the Washington statutes and regulations that control how municipalities regulate their own development point to community participation as an essential ingredient to the successful facilitation of economic efficiencies and the building of shared value. Rather than continue to try to regulate from a top-down approach, the City of Seattle should thoroughly consider the interests of both sides of the debate on urban housing density increases. In so doing, Seattle could explore the possibility of better solutions emerging from the community and neighborhood level, with involved community participation as the GMA imagines, through a solution such as community dispute resolution.