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## Zoning Barriers to Manufactured Housing

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MANUFACTURED HOUSING IS A MAJOR AFFORDABLE HOUSING RESOURCE FOR MILLIONS OF PEOPLE. Today's models of manufactured housing can resemble traditional housing and must satisfy national construction and safety standards. Despite these similarities and safeguards, zoning barriers are all too common. This article discusses case and statutory law that considers the problem of zoning barriers to manufactured housing. It finds the case law largely hostile and that national and state legislation provide only limited protection. Legislative changes are required.

Part I describes the manufactured housing segment of the housing stock and its characteristics. It finds no basis for zoning barriers in objections that manufactured housing requires different treatment from traditional housing. Part II discusses the federal law that authorizes construction and safety standards for manufactured housing, the national code that contains these standards, and the extent to which the statute preempts local regulation. It does not preempt restrictive local zoning, except possibly when it is applied unequally. Part III discusses case and statutory law that deals with unequal zoning restrictions on manufactured housing; exclusions from residential zones; aesthetic standards; and requirements for approving manufactured housing as a conditional use. Case law is practically unanimous in upholding restrictive zoning and decisions denying the approval of manufactured housing as a conditional use. Statutory protections are available in a number of states, but they are limited and may authorize aesthetic standards without recognizing their potential for exclusion.

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Recommendations for legislative change suggested by this article would open up the zoning system for manufactured housing and restrict its rejection as a conditional use. Part IV recommends revisions in the federal law to require procedural protections in decision making under local ordinances and to preempt zoning barriers to manufactured housing. Part V concludes.

Recent reports show a growing affordable housing crisis.<sup>1</sup> These reports show a growing increase in excessive rental costs and housing prices that make housing unaffordable for a significant number of households in many areas.<sup>2</sup> Low income individuals cannot find housing at prices and rents they can afford. The housing affordability crisis makes favorable zoning treatment of manufactured housing even more critical, as it has significant affordability advantages over site-built traditional housing.

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1. See JOINT CTR. FOR HOUS. STUDIES, *THE STATE OF THE NATION'S HOUSING 2015*, at 10, 28 (2015) (noting that in 2014, home prices hit record highs, that rental markets tightened again, and that rentals increased at double the inflation rate), [http://www.jchs.harvard.edu/research/state\\_nations\\_housing](http://www.jchs.harvard.edu/research/state_nations_housing); see also Chris Herbert, *Addressing the Silent Housing Crisis*, HOUSING PERSPECTIVES (June 19, 2015, 11:57 AM), <http://housingperspectives.blogspot.com/2015/06/addressing-silent-housing-crisis.html?m=1> (discussing other studies finding a crisis in rental housing); JOSH LEOPOLD ET AL., *THE HOUSING AFFORDABILITY GAP FOR EXTREMELY LOW INCOME RENTERS IN 2013*, at 1 (Urban Land Institute, 2015), [http://www.urban.org/research/publication/housing-affordability-gap-extremely-low-income-renters-2013/view/full\\_report](http://www.urban.org/research/publication/housing-affordability-gap-extremely-low-income-renters-2013/view/full_report) (“Nationwide, only 28 adequate and affordable units are available for every 100 renter households with incomes at or below 30 percent of the area median income”).

2. See JOINT CTR. FOR HOUS. STUDIES, *THE STATE OF THE NATION'S HOUSING 2015*, at 10, 28 (2015) (noting that in 2014, home prices hit record highs, that rental markets tightened again, and that rentals increased at double the inflation rate), [http://www.jchs.harvard.edu/research/state\\_nations\\_housing](http://www.jchs.harvard.edu/research/state_nations_housing); see also Chris Herbert, *Addressing the Silent Housing Crisis*, HOUSING PERSPECTIVES (June 19, 2015, 11:57 AM), <http://housingperspectives.blogspot.com/2015/06/addressing-silent-housing-crisis.html?m=1> (discussing other studies finding a crisis in rental housing); JOSH LEOPOLD ET AL., *THE HOUSING AFFORDABILITY GAP FOR EXTREMELY LOW INCOME RENTERS IN 2013*, at 1 (Urban Land Institute, 2015), [http://www.urban.org/research/publication/housing-affordability-gap-extremely-low-income-renters-2013/view/full\\_report](http://www.urban.org/research/publication/housing-affordability-gap-extremely-low-income-renters-2013/view/full_report) (“Nationwide, only 28 adequate and affordable units are available for every 100 renter households with incomes at or below 30 percent of the area median income”); U.S. DEP'T OF HOUS. & URB. DEV., *NATIONAL HOUSING MARKET SUMMARY 5* (Dec., 2015) [hereinafter SUMMARY], [https://www.huduser.gov/portal/sites/default/files/pdf/NationalSummary\\_3q15.pdf](https://www.huduser.gov/portal/sites/default/files/pdf/NationalSummary_3q15.pdf), (graph showing decline in housing affordability index). Consider also a recent study finding, in New York City, that opposition to new development was more common than support. Vicki Been, Josiah Madar & Simon McDonnell, *Urban Land-Use Regulation: Are Homevoters Overtaking the Growth Machine?*, 11 J. LEGAL STUD. 227 (2014).

## I. The Manufactured Housing Segment of the Housing Stock and the Zoning Barrier Problem

There are now 8.6 million manufactured homes<sup>3</sup> in this country,<sup>4</sup> which is about 6.5% of the national housing stock.<sup>5</sup> About half of all manufactured homes are in rural areas, and their percentage of the housing stock varies by region.<sup>6</sup> Southern states have more than the national average.<sup>7</sup> How a manufactured home is built has an important influence on the zoning barriers it attracts. Either it is built as a single, single-wide unit, or double-wide unit, which are two units manufactured in tandem at the factory and attached at the site.<sup>8</sup> Fifty-three percent of homes recently shipped are double-

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3. This type of housing is built as a unit at the factory in compliance with national construction and safety standards, and is transported to the site for installation on a permanent chassis. See 42 U.S.C. § 5402(6) (defining term); WILLIAM APGAR ET AL., AN EXAMINATION OF MANUFACTURED HOUSING AS A COMMUNITY-AND ASSET-BUILDING STRATEGY (2002) [hereinafter EXAMINATION], [http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/w02-11\\_apgar\\_et\\_al.pdf](http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/w02-11_apgar_et_al.pdf). It was formerly known as a mobile home. Statutes sometimes define “mobile home” as “a dwelling unit constructed in a factory before the enactment of the federal standards.” ARK. CODE ANN. § 14-54-1602(3). In 1980, Congress replaced the term “mobile home” with the term “manufactured home” wherever it appeared. Community and Neighborhood Development and Conservation, Pub. L. No. 96-399, § 308, 94 Stat. 1614, 1640-41 (1981). This article uses the term “manufactured housing” or “manufactured home,” except where the term “mobile home” seems appropriate. As compared with manufactured housing, a modular home is a home transportable in one or more sections with some on-site assembly, not constructed on a permanent chassis, and designed to be used as a dwelling on foundations connected to required utilities. See, e.g., ME. REV. STAT. ANN. tit. 30-A, § 4358(A)(2).

4. JOHN FRASER HART ET AL., THE UNKNOWN WORLD OF THE MOBILE HOME (2002) (describing manufactured housing and manufactured housing parks in various parts of the country, with distribution maps for several cities and areas).

5. U.S. BUREAU OF THE CENSUS, AMERICAN HOUSING SURVEY FOR THE UNITED STATES: 2011, at 3-4 (2013), <https://www.census.gov/content/dam/Census/programs-surveys/ahs/data/2011/h150-11.pdf>. Annual deliveries were most recently reported as 70,000 a year. SUMMARY, *supra* note 2, at 9. Shipments peaked in 1998 at about 373,000. EXAMINATION, *supra* note 3, at 3. The housing recession beginning in 2008 had a serious negative impact on the industry. See Patrick Simmons, *Manufactured Homes: A Shrinking Source of Low-Cost Housing*, FANNIE MAE (June 27, 2013), <http://www.fanniemae.com/portal/about-us/media/commentary/062713-simmons.html>.

6. EXAMINATION, *supra* note 3, at 5-6.

7. EXAMINATION, *supra* note 3, at 5-6 (includes extensive literature survey); Richard Genz, *Why Advocates Need to Rethink Manufactured Housing*, 12 HOUSING POL’Y DEBATE 393, 398 (2001) [hereinafter Genz], [http://www.knowledgeplex.org/kp/text\\_document\\_summary/scholarly\\_article/relfiles/hpd\\_1202\\_genz.pdf](http://www.knowledgeplex.org/kp/text_document_summary/scholarly_article/relfiles/hpd_1202_genz.pdf).

8. In 2013, the average size of a single-wide was 1100 square feet, a double-wide, 1720 square feet. *Understanding Today’s Manufactured Housing*, MANUFACTURED HOUSING INSTITUTE, [hereinafter UNDERSTANDING TODAY’S MANUFACTURED HOUSING], [http://www.manufacturedhousing.org/media\\_center/default.asp](http://www.manufacturedhousing.org/media_center/default.asp). The average size of a newly-built traditional home is 2662 square feet. *Cost & Size Comparisons: New Manufactured Homes and New Single Family Site Built Homes*, U.S. Census

wide.<sup>9</sup> There is a significant cost advantage to manufactured homes. When structure, transport, installation, land, and site development costs are included, one study found the total purchase price of a manufactured home might be as much as 75% less than the cost of a traditional home of comparable size and quality.<sup>10</sup>

Zoning barriers persist despite the cost advantage of manufactured housing as a source of affordable housing.<sup>11</sup> One study found that burdensome zoning codes, such as the lack of by-right zoning, architectural design standards, and a lack of buildable land all had a negative effect on sales of manufactured homes.<sup>12</sup> Burdensome architectural design standards had the greatest negative effect.<sup>13</sup> Zoning burdens

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Bureau (2014) [hereinafter *COST & SIZE*], <https://www.census.gov/construction/mh/s/pdf/sitebuiltvsmh.pdf>.

9. *COST & SIZE*, *supra* note 8.

10. Kimberly Vermeer & Josephine Louie, *The Future of Manufactured Housing*, JOINT CENTER FOR HOUSING STUDIES, HARVARD UNIVERSITY (Jan. 1997) [hereinafter *FUTURE OF*], [http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/r97-1\\_vermeer\\_louie\\_futmanhousing.pdf](http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/r97-1_vermeer_louie_futmanhousing.pdf). The report discusses ROBERT JOHNSON & JEFF SCHEUER, MANUFACTURED HOUSING COSTS AND FINANCING, MANUFACTURED HOUSING RESEARCH PROJECT (Univ. of Mich., Rep. Two, 1993), finding a 65% difference.

11. THE PRESIDENT'S COMMISSION ON HOUSING, THE REPORT OF THE PRESIDENT'S COMMISSION ON HOUSING 204 (1982) (noting zoning restrictions and concluding that "[e]xclusionary zoning provisions based on type of manufacture are arbitrary and unrelated to legitimate zoning concerns."); GUOQIANG SHEN & RICHARD A. STEPHENSON, IDENTIFICATION AND MEASUREMENT OF ZONING BARRIERS RELATED TO MANUFACTURED HOUSING: A LOCATION AND ACCESSIBILITY ANALYSIS 4 (1999) (noting manufactured homes are usually placed away from most positive public community facilities, such as hospitals, airports, rescue, recreational, cultural, educational, auto, food, shopping and other business services; their location is also further away from major employment centers and heavy industrial areas, but always close to negative facilities such as landfills and solid waste treatment facilities; percentage of manufactured homes in flood zones is higher); Charles C Geisler & Hisayoshi Mitsuda, *Mobile-Home Growth, Regulation, and Discrimination in Upstate New York*, 52 RURAL SOC. 532 (1987) (noting higher income communities associated with zoning and lack of manufactured housing). Zoning barriers in two states are made acceptable by statutes that authorize local control of zoning and similar land use controls. See FLA. STAT. ANN. § 320.8285(6) (includes zoning, subdivision control, and architectural and aesthetic requirements); NEV. REV. STAT. ANN. § 461.260(3) (similar).

12. CASEY J. DAWKINS ET AL., REGULATORY BARRIERS TO MANUFACTURED HOUSING PLACEMENT IN URBAN COMMUNITIES 37 (2011) [hereinafter *REGULATORY BARRIERS*], [http://www.huduser.gov/portal/Publications/pdf/mfghsg\\_HUD\\_2011.pdf](http://www.huduser.gov/portal/Publications/pdf/mfghsg_HUD_2011.pdf).

13. REGULATORY BARRIERS, *supra* note 12, at 37; see WELFORD SANDERS, MANUFACTURED HOUSING: REGULATION, DESIGN INNOVATIONS, AND DEVELOPMENT OPTIONS, PLANNING ADVISORY SERV. REP. NO. 478 (Am. Planning Ass'n, 1998) [hereinafter *SANDERS*], (noting four-fifths of municipalities allow appearance standards by right in residential districts; they range from density, lot size, lot width, coverage and setback, to perimeter and landscaping requirements); see also Casey J. Dawkins & C. Theodore Koebel, *Overcoming Barriers to Placing Manufactured Housing in Metropolitan Communities*, 76 J. AM. PLAN. ASS'N 73 (2010) (arguing well-designed double-wide manufactured homes, built with conventional siding and roofing materials, are indistinguishable from traditional homes, though at an increased cost); *FUTURE OF*, *supra* note 10.

take several forms, such as a total exclusion, an exclusion from residential zones, and requirements that manufactured housing be limited to manufactured housing parks.<sup>14</sup> A lack of by-right zoning means a manufactured home must seek approval through a conditional use or other procedure, which municipalities can use to keep them out of the community.

Zoning barriers arise because of community and resident concerns about the safety, quality, appearance, occupants,<sup>15</sup> price appreciation<sup>16</sup> of manufactured housing, and the impact these factors are supposed to have on neighboring property values.<sup>17</sup> Courts upholding zoning barriers and the denial of conditional use approval for manufactured homes often quote these objections as the basis for their decisions. Opposition to manufactured housing takes on the typical NIMBY (Not in My Back Yard) syndrome, with neighbors rising in opposition and putting pressure on municipal boards and legislative bodies to deny approval or adopt a restrictive zoning ordinance. Studies show, however, either that there is no basis for these objections, or that they are irrelevant to zoning regulation.

*Safety and Quality.* The safety and construction standards adopted nationally under a federal statute, discussed below,<sup>18</sup> have dramatically improved the quality and safety of manufactured housing. One study found that the structural performance, maintenance, and

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14. See *infra* notes 87-93 and accompanying text.

15. Julia O. Beamish et al., *Not a Trailer Anymore: Perceptions of Manufactured Housing*, 12 HOUS. POL'Y DEBATE 373, 377-78 (2001) [hereinafter Beamish]; REGULATORY BARRIERS, *supra* note 12, at 5.

16. Genz, *supra* note 7, at 407 ("Unfortunately, the perception that depreciation is somehow inherent in manufactured homes is widespread. It is at the root of disinterest about them among development bankers, advocates, planners, and nonprofit developers.").

17. "In jurisdictions where zoning was rated as a significant barrier, the probability of units having been placed was significantly lower than in jurisdictions where zoning was rated as a minor barrier (dropping from 77.5% to 53.9%). In jurisdictions where respondents rated subdivision covenants, architecture design standards, citizen opposition, high land costs, not much land, no new parks approved, and insufficient demand as significant barriers, there were similar statistically significant negative impacts on HUD-Code units being placed." REGULATORY BARRIERS, *supra* note 12, at 21. Burdensome zoning, architectural design standards, and lack of buildable land reduce sales of manufactured housing. Of these factors, burdensome architectural design standards have the largest dampening effect. A more limited 1996 study based on 475 respondents to a survey was more favorable. Almost all communities permitted manufactured housing in residential districts and on individual lots, and permitted them by right. Considerably fewer allowed manufactured housing in the most restrictive residential or in all residential districts. However, only 29 percent of communities had laws that treated traditional and manufactured housing comparably. SANDERS, *supra* note 13.

18. See *infra* notes 42-53 and accompanying text.

repair problems of manufactured housing were similar to traditional housing.<sup>19</sup> The risk of fire is half of that for traditional homes, and national standards have dealt with the wind resistance problem.<sup>20</sup> Neither is there evidence that manufactured housing deteriorates more over time than traditional housing.<sup>21</sup>

*Effect on Neighboring Property Values.* Another objection to manufactured housing is its assumed negative effect on the property values of neighboring property. The effect of land development on property values is a factor zoning statutes authorize zoning ordinances to consider,<sup>22</sup> so the negative impact of manufactured housing, if it existed, could be a reason to support their restriction or rejection. Several studies showed, however, that manufactured housing does not have a negative effect on neighboring property values.<sup>23</sup> A more recent study of five counties in North Carolina criticized the research strategies of earlier studies and used a larger sample and more advanced statistical analysis, but reached similar conclusions.<sup>24</sup> Whether distance close to manufactured homes had a negative effect on the appreciation values of single-family homes produced mixed results. A supplemental hedonic regression analysis showed, however, that structure variables were by far the most important factors that explained property value variations.<sup>25</sup> Distance variables played a minor role.<sup>26</sup> Well-designed

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19. ROBERT JOHNSON, MANUFACTURED HOUSING RESEARCH PROJECT, REPORT 1: MANUFACTURED HOUSING QUALITY (Univ. of Mich., 1993).

20. UNDERSTANDING TODAY'S MANUFACTURED HOUSING, *supra* note 8, at 8-11.

21. Thomas P. Boehm & Alan Schlottmann, *Is Manufactured Owned Housing a Good Alternative for Low-Income Households? Evidence from the American Housing Survey*, 10 *Cityscape: J. Pol'y Dev. & Res.* 159, 163 (2008) [hereinafter Boehm].

22. See U.S. DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT § 3 (1926), <https://www.planning.org/growingsmart/pdf/SZEnablingAct1926.pdf> (zoning to have "a view to conserving the value of buildings"). State zoning statutes are modeled on the Standard Act.

23. See, e.g., THOMAS E. NUTT-POWELL ET AL., RESIDENTIAL PROPERTY VALUE AND MANUFACTURED HOMES (Working Paper 86-1, Joint Ctr. for Hous. Studies of the Mass. Inst. of Tech. and Harvard Univ., 1986) (town without zoning restrictions); RICHARD STEPHENSON & GUOQIANG SHEN, THE IMPACT OF MANUFACTURED HOUSING ON ADJACENT SITE-BUILT RESIDENTIAL PROPERTIES IN NORTH CAROLINA (E. Carolina Univ., n.d.); KATE WARNER & ROBERT JOHNSON, MANUFACTURED HOUSING RESEARCH PROJECT (Univ. of Mich., 1993) (rental manufactured housing communities). *But see* Charles E. Hegji & Linda Mitchell, *The Impact of Manufactured Housing on Adjacent Site-Built Residential Properties in Two Alabama Counties*, 26 *S. Bus. Rev.* 19 (2000). These studies are summarized in MULATU WUBNEH & GUOQIANG SHEN, THE IMPACT OF MANUFACTURED HOUSING ON RESIDENTIAL PROPERTY VALUES: A GIS BASED APPROACH 10-11 (2001), [https://www.lincolninst.edu/pubs/dl/106\\_WP01MW1.pdf](https://www.lincolninst.edu/pubs/dl/106_WP01MW1.pdf).

24. WUBNEH & SHEN, *supra* note 23.

25. *Id.* at 26.

26. *Id.* at 25-30; *see also* John W. Gilderbloom & William P. Friedlander, *How Assessed Values Vary Between Manufactured and Site-Built Houses*, 30 *Hous. & Soc'y*

and well-maintained manufactured housing built to national standards should not have a negative effect on the value of neighboring property.<sup>27</sup>

*Appearance.* Appearance is an important factor in perceptions of manufactured housing. Exterior finish and roof pitch are two exterior features that distinguish manufactured from traditional homes. Manufactured homes are more likely to have a vinyl or steel exterior, and more likely to have a roof pitch less than 4/12 or a flat roof.<sup>28</sup> Single-wide manufactured homes are most likely to be in this category, though design changes can make them attractive.

Recent innovations in the design of manufactured homes have improved appearance and contributed to greater acceptance, though at increased cost. Well-designed double-wide manufactured homes with conventional siding, roofing materials, and acceptable roof pitch are almost indistinguishable from traditional site-built homes of the same price and quality.<sup>29</sup> Two-story homes have been introduced,<sup>30</sup> and other innovative changes, such as innovative chassis and transportation systems and the ability to produce homes with a 12:12 roof pitch that allows blending with existing neighborhoods, substantially improve design.<sup>31</sup> Zoning ordinances can regulate appearance, and state statutes usually authorize the regulation of roof pitch and exterior

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189 (2003), [http://www.housingeducators.org/Journals/H&S\\_Vol\\_30\\_No\\_2\\_How\\_Assessed\\_Values\\_Vary\\_Between\\_Manufactured\\_and\\_Site\\_Built\\_Houses.pdf](http://www.housingeducators.org/Journals/H&S_Vol_30_No_2_How_Assessed_Values_Vary_Between_Manufactured_and_Site_Built_Houses.pdf) (drawing a comparison with double-wide manufactured housing; mixed results on whether presence of manufactured housing can lower overall property values in a neighborhood).

27. See Boehm, *supra* note 21, at 164 (arguing that manufactured, owned housing does not lead to increased instability of neighborhoods); William P. McCarty, *Trailers and Trouble? An Examination of Crime in Mobile Home Communities*, 12 CITYSCAPE 127, 137 (2010), <http://www.huduser.gov/portal/periodicals/cityscape/vol12num2/ch7.pdf> (The presence of crime also affects home values and neighborhood quality, but one study found “no statistically significant difference in the rates of crime between blocks with mobile home communities, blocks adjacent to mobile home communities, and all other residential blocks.”).

28. NAHB RESEARCH CTR., *FACTORY AND SITE-BUILT HOUSING: A COMPARISON FOR THE 21ST CENTURY*, 35-37 (1998) [hereinafter *COMPARISON*], <http://www.huduser.gov/portal/Publications/pdf/factory.pdf>.

29. See *FUTURE OF*, *supra* note 10; see also ROBERT WILDEN, *MANUFACTURED HOUSING AND ITS IMPACT ON SENIORS, PREPARED FOR COMMISSION ON AFFORDABLE HOUSING AND HEALTH FACILITY NEEDS FOR SENIORS IN THE 21ST CENTURY* (2002), [http://govinfo.library.unt.edu/seniorscommission/pages/final\\_report/manufHouse.html](http://govinfo.library.unt.edu/seniorscommission/pages/final_report/manufHouse.html).

30. *UNDERSTANDING TODAY’S MANUFACTURED HOUSING*, *supra* note 8 (“The single most important advancement in the industry over the last seven years has been the development of two-story models.”).

31. *EXAMINATION* *supra* note 3, at 7; see Bradley C. Grogan, *Curb Appeal*, 58 URB. LAND 70, 80 (1999); Joseph E. Link, *Breaking Out of the Box*, 57 URB. LAND 82, 90 (1998).

finish.<sup>32</sup> Changes in design, and the ability to regulate appearance through zoning,<sup>33</sup> mean that appearance need not be a factor in zoning decisions.<sup>34</sup>

*Demographic Characteristics.* Manufactured housing costs less than traditional housing, so residents of manufactured housing have lower incomes than the median average.<sup>35</sup> Residents of manufactured housing also tend to be older or younger than residents of traditional housing<sup>36</sup> and are mostly white,<sup>37</sup> though there has been a rapid growth in minority occupancy in recent years.<sup>38</sup> This data suggests that residents of manufactured housing are a respectable segment of the housing market. If lower income or age is the reason for opposition, it is not legitimate.

Another perception of manufactured housing is that residents damage neighborhood quality because they move more frequently than do residents of traditional housing. One study found this perception is incorrect.<sup>39</sup> Another showed that residents of manufactured housing are

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32. See *infra* note 136 and accompanying text.

33. Appearance standards, of course, will have an exclusionary effect if they can support a denial or refusal to zoning for manufactured housing that does not meet appearance standards.

34. Although it should not affect zoning decisions, another perception of manufactured housing is that it does not appreciate in value as much as traditional housing. The key factor in price appreciation for manufactured housing is whether the land is owned. Boehm, *supra* note 21, at 164 (arguing that in cases in which the land is owned, manufactured owned housing can yield appreciation amounts that are not dissimilar from those of site-built owned housing); EXAMINATION, *supra* note 3, at 7-8 (arguing that land is imperative to value appreciation); KEVIN JEWELL, APPRECIATION IN MANUFACTURED HOUSING: A FRESH LOOK AT THE DEBATE AND THE DATA (Consumers Union, 2002) (finding no statistical difference from site-built homes when land is owned). One survey found that almost all double-wide owners owned their own land, while 73% of single-wide owners owned their own land. Beamish, *supra* note 15, at 381. Another study found that manufactured housing sold for more than its purchase price, but not in excess of the general rate of inflation. KATE WARNER & JEFF SCHEUER, MANUFACTURED HOUSING VALUES (Manufactured Hous. Research Project, Univ. of Mich., Report 3, 1993).

35. Schmitz, *Promoting the Promise Manufactured Homes Provide for Affordable Housing*, 13 J. Affordable Housing & Community Dev. L. 384, 386-87 (2004) [hereinafter Schmitz] (50% below median); Genz, *supra* note 7, at 395 (one-third below national average); see also FUTURE OF, *supra* note 10 (lower income); Robert W. Wilden, *Manufactured Housing And Its Impact on Seniors* COMMISSION ON AFFORDABLE HOUSING AND HEALTH FACILITY NEEDS FOR SENIORS IN THE 21<sup>ST</sup> CENTURY (2002), [http://govinfo.library.unt.edu/seniorscommission/pages/final\\_report/manufHouse.html](http://govinfo.library.unt.edu/seniorscommission/pages/final_report/manufHouse.html). But see EXAMINATION, *supra* note 3, at 9-10 (manufactured housing went up market in 1990s); Beamish, *supra* note 15, at 381 (significant percentage in higher income categories).

36. EXAMINATION, *supra* note 3, at 10.

37. Beamish, *supra* note 15, at 381.

38. Schmitz, *supra* note 35, at 386-87.

39. COMPARISON, *supra* note 28, at 27 ("The 6.6 percent of movers who came from manufactured homes was in line with the proportion of manufactured homes in the



quite similar in maintaining a stable neighborhood as residents of traditional housing.<sup>40</sup> Instability of residence is not a problem. This discussion suggests that objections to manufactured housing that support restrictive zoning are based on older manufactured housing of lower quality or design, and are inaccurate or illegitimate.

## **II. The National Manufactured Housing Construction and Safety Standards Act, and the Preemption of Restrictive Zoning**

The next issue is to examine how the cases and statutes have dealt with zoning barriers. National preemptive legislation is examined first.

### *A. The Statute, its Regulations, and the HUD Policy Statement*

Preemption of state laws and local ordinances that affect manufactured housing can occur under the National Manufactured Home Construction and Safety Standards Act.<sup>41</sup> Congress adopted the Act in 1974, and the Department of Housing and Urban Development (HUD) has adopted Manufactured Housing Construction and Safety Standards (the “HUD Code”), which the Act authorizes.<sup>42</sup> It marked a turning point in state and local treatment of manufactured housing, as it preempts state and local construction and safety codes that are inconsistent with the national code. State statutes that protect manufactured housing may make compliance with the national code a condition of statutory coverage.<sup>43</sup> The HUD Code standards are complete and address all aspects of safety, durability and quality,<sup>44</sup> but they suffer

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overall housing stock;” percentage of movers from rental housing was twice as high as percentage of rental housing in housing stock).

40. Boehm, *supra* note 21, at 195.

41. 42 U.S.C. § 5403(d).

42. 42 C.F.R. § 3280.1(b); *see also* 42 C.F.R. § 3282.51 (procedures for inspections and investigations). For discussion of the statute, the HUD Code, and their implementation see *Implementation of the Manufactured Housing Improvement Act of 2000, Hearing Before the Subcom. on Ins., Hous. and Cmty Opportunity, of the Comm. on Fin. Serv.*, 112th Cong., 2nd Sess. (2012) [hereinafter 2012 Hearing]; *The State of Manufactured Housing, Field Hearing Before the Subcom. on Ins., Hous. and Cmty Opportunity, of the Comm. on Fin. Serv.*, 112th Cong., 1st Sess. (2011); FINAL REPORT OF THE UNITED STATES COMMISSION ON MANUFACTURED HOUSING (1994).

43. *See, e.g.*, CAL. GOV’T CODE § 65852.3(a) (authorizing their installation on lots zoned for conventional single-family residential dwellings).

44. The statute did not apply to installation at first, which was regulated only in some states, and which often was not done properly. Problems were that manufacturers could not oversee the fragmented installment market, and installers did not provide warranties. FUTURE OF, *supra* note 10. Careful installation is necessary in order to prevent structural problems from occurring later. The Manufactured Housing

from lack of regular, timely updating, which prevents the use of new materials and innovations in design and construction.<sup>45</sup>

The preemption provision<sup>46</sup> of the statute provides:

Whenever a Federal manufactured home construction and safety standard established under this chapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any manufactured home covered, any standard regarding construction or safety applicable to the same aspect of performance of such manufactured home which is not identical to the Federal manufactured home construction and safety standard.<sup>47</sup>

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Improvement Act of 2000 required HUD to develop a national model for installation standards, and gave states five years to either adopt them, or develop alternative and more standards. States are also required to adopt a law mandating installer licensing and training and installation inspections. 42 U.S.C. § 5404. HUD adopted installation standards by 2007. 2012 Hearing, *supra* note 42, at 9. For discussion see EXAMINATION, *supra* note 3, at 17. Thirty-three states had adopted their own standards by 2012. 2012 Hearing, *supra* note 42, at 32 (discussing problems with the program). The national standards are at 24 C.F.R. Part 3285. They require an installation certification. 24 C.F.R. Part 3286.

45. “However, it is difficult for HUD to publish timely updates and recommendations from the Manufactured Housing Consensus Committee. This Committee meets and makes recommendations annually.” Email from the Manufactured Hous. Inst., (Dec. 28, 2015 (on file with author). HUD has amended some of the regulations. See 80 Fed. Reg. 77980-01 (2015) (new standards for carbon monoxide detection, stairways, fire safety for attached garages, draftstops and venting systems); 80 Fed. Reg. 76705-01 (2015) (request for proposed changes); 80 Fed. Reg. 53712-01 (2015) (authorizes on-site completion); 78 Fed. Reg. 73966-01 (2013) (incorporating standards of private organizations by reference and amending several standards); 78 Fed. Reg. 45104-01 (2013) (ground anchor installation standards); 78 Fed. Reg. 4060-01 (2013) (roof truss testing procedures). For arguments that the standards are incomplete, inadequate, industry-driven, require comprehensive revision, and do not provide adequate consumer protection, see Statements at 2012 Hearing, *supra* note 42; CONSUMERS UNION, GIVE UP YOUR RIGHT TO SUE? (May 2000) (noting weaknesses of HUD standards and HUD’s failure to comprehensively review these rules); NAHB RESEARCH CENTER, FACTORY AND SITE-BUILT HOUSING: A COMPARISON FOR THE 21ST CENTURY (1998), <http://www.huduser.gov/portal/Publications/pdf/factory.pdf> (states must regulate issues not considered by HUD Code; substantive amendments infrequent); Schmitz, *supra* note 35, at 384, 390 (arguing code particularly deficient with respect to fire and wind safety, energy efficiency, warranty regulation, and chemical usage in production; HUD has catered to industry, weakened standards); Robert W. Wilden, *Manufactured Housing: A Study of Power and Reform in Industrial Regulation*, 6 HOUSING POL’Y DEBATE 523 (1995), <http://content.knowledgeplex.org/kp2/img/cache/kp/2320.pdf> (arguing HUD code out of date, system does not provide consumer protection).

46. “The HUD Code is the only single family residential building code that provides for a rigorous cost impact analysis. In addition, the framework for monitoring and compliance, which also includes quality assurance regulations, results in homes that actually do meet or exceed the building code. This cannot necessarily be said for site-built residential housing, which is subject to a patchwork of state and local regulations that may not be subject to strict enforcement.” Email to the author, *supra* note 45. However, “[o]verall assessments of the quality of the HUD Code relative to other housing codes are difficult to perform because the codes are complex.” FUTURE OF, *supra* note 10.

47. 42 U.S.C. § 5403(d). A 2000 amendment to the statute added the following sentence:

HUD regulations include a preemption section that provides additional interpretation:

No State or locality may establish or enforce any rule or regulation or take any action that stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. The test of whether a State rule or action is valid or must give way is whether the State rule can be enforced or the action taken without impairing the Federal superintendence of the manufactured home industry as established by the Act.<sup>48</sup>

The HUD regulation carries farther than the statute because it applies preemption to “any rule or regulation,” which could include a zoning regulation, while the statute applies only to a “construction or safety standard.” The regulation also adopts an “obstacle” rule that arguably extends the statute.<sup>49</sup>

HUD issued a Statement of Policy in 1997 that extended the statutory preemption provision to zoning.<sup>50</sup> The Statement recognizes there is an equal treatment problem in the application of zoning regulations to manufactured housing. It noted that local governments were placing more restrictions on manufactured homes built to federal standards than they were on manufactured homes that met other standards, such as state or local standards. To prevent this practice, the Statement of Policy provides that “a locality cannot exclude or restrict manufactured homes that meet the Federal standards if the locality accepts manufactured homes meeting other standards.”<sup>51</sup> An example is an

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Federal preemption under this subsection shall be broadly and liberally construed to ensure disparate State or local requirements or standards do not affect the uniformity and comprehensiveness of the standards promulgated under this section nor the Federal superintendence of the manufactured housing industry as established by this chapter.

For discussion of the amendment see *Burton v. City of Alexander*, 2001 WL 527415 at \*8 (M.D. Ala., Mar 20, 2001), *aff'd sub nom.*, *Burton v. City of Alexander*, 277 F.3d 1379 (11th Cir. 2001), concluding it did not change the preemption requirement.

48. 42 C.F.R. § 3282.11(d).

49. *See* *Ga. Manufactured Hous. Ass'n, Inc. v. Spalding Cty.*, 148 F.3d 1304, 1309 n.8 (11th Cir. 1998) (panel not entirely convinced the regulation is valid).

50. U.S. Dep't of Hous. & Urb. Dev., *Manufactured Housing: Statement of Policy 1997-1, State and Local Zoning Determinations Involving HUD-Code*, 62 Fed. Reg. 24337 (1997). A similar statement appears in an Internal Guidance issued by HUD about the same time: “Thus, a locality cannot accept structures meeting the Federal definition of manufactured homes which comply with different standards, such as the local or State Building Code, and exclude or restrict manufactured homes that are aesthetically the same but only meet the Federal standards.” *Manufactured Housing Construction and Safety Standards: Notice of Internal Guidance on Preemption*, 62 Fed. Reg. 3256, 3257 (1997).

51. 62 Fed. Reg. 24337, at 24338; *see* *Duggins v. Town of Walnut Cove*, 306 S.E.2d 186 (N.C. Ct. App. 1983) (different applicable building codes not the only factor differentiating mobile homes from modular homes).

ordinance that allows housing that complies with state and local building codes in residential zones, but does not allow manufactured housing that meets the federal standards in these zones. Courts may not give the Statement of Policy the same judicial deference they give to regulations, however.<sup>52</sup>

### B. *The Cases*

The cases are straightforward in finding preemption<sup>53</sup> of state and local construction and safety standards under the statute.<sup>54</sup> Courts consider zoning to be a local responsibility,<sup>55</sup> however, and the statute does not preempt zoning regulations. Courts have held that exclusions from residence zones,<sup>56</sup> refusals to grant permits for manufactured

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52. *But see* *Burton v. City of Alexander*, 2001 WL 527415 (M.D. Ala., Mar 20, 2001), *aff'd sub nom.*, *Burton v. City of Alexander*, 277 F.3d 1379 (11th Cir. 2001), accepting HUD's interpretation as reasonable.

53. This is a case of applying an explicit federal preemption provision. For discussion of federal preemption doctrine in federal Safety and Construction Act cases see, for example, *Scurlock v. City of Lynn Haven*, 858 F.2d 1521 (11th Cir. 1988); *Texas Manufactured Hous. Ass'n, Inc. v. City of La Porte*, 974 F. Supp. 602, 605 n.6 (S.D. Tex. 1996). *See* 126 A.L.R. Fed 349 (2001).

54. *Mich. Manufactured Hous. Ass'n v. Robinson Twp.*, 73 F. Supp. 2d 823 (W.D. Mich. 1999) (discussing roof and snow load requirements; quoting statute and regulation); *Colo. Manufactured Hous. Ass'n v. Bd. of Cty. Comm'rs of Pueblo*, 946 F. Supp. 1539 (D. Colo. 1996) (discussing statute and regulation); *see also* *Gianakakos v. Commodore Home Sys. Inc.*, 727 N.Y.S.2d 806, 808 (N.Y. App. Div. 2001) (dismissing claim that manufactured housing violated state manufactured housing construction and safety regulations to the extent that federal standards preempted state regulations).

55. *See, e.g.*, *Ga. Manufactured Hous. Ass'n, Inc. v. Spalding Cty.*, 148 F.3d 1304, 1311 (11th Cir. 1998) (noting assumption that historic police powers of the states were not to be superseded by the Safety and Construction Act).

56. *See* *Tex. Manufactured Hous. Ass'n, Inc. v. City of La Porte*, 974 F. Supp. 602 (S.D. Tex. 1996) (exclusion from residential R-1 districts, even if based on erroneous belief that HUD-code homes are not as safe as other types of homes because of the building code to which they are constructed); *King v. City of Bainbridge*, 577 S.E.2d 772 (Ga. 2003) (exclusion from R-2 residential district not preempted); *Miss. Manufactured Hous. Ass'n v. Bd. of Sup'rs of Tate Cty.*, 878 So.2d 180 (Miss. Ct. App. 2004) (exclusion from residential districts except for RM districts of existing manufactured home communities and agricultural districts; nonconforming manufactured housing could be replaced if destroyed); *Bibco Corp. v. City of Sumter*, 504 S.E.2d 112 (S.C. 1998) (exclusion from some, but not all, residential districts; excluded under ordinance not because they failed to comply with state construction or safety standard but because they all were built on permanent chassis and designed to be towed); *see also* *Gackler Land Co. v. Yankee Springs Twp.*, 398 N.W.2d 393 (Mich. 1986) (upholding ordinance with size, dimension and other requirements that excluded single-wide manufactured homes, criticized in *Colo. Manufactured Hous. Ass'n*, 946 F. Supp. at 1551, explaining that ordinance also required compliance with building and fire codes, and *Mich. Manufactured Hous. Ass'n*, 73 F. Supp. 2d at 826, discussing *Colorado Manufactured* case).

housing,<sup>57</sup> restrictions to manufactured housing parks,<sup>58</sup> and appearance codes are not preempted.<sup>59</sup> The courts have also held that ordinances imposing other requirements on manufactured housing are not preempted, such as an age requirement that prohibited the placement of manufactured housing more than 10 years old,<sup>60</sup> and a \$2,000 facilities charge for utility hookups for new electrically heated residential dwellings that did not meet the standards of a public utility district's energy efficiency program. It applied to all housing, not just manufactured housing.<sup>61</sup>

Courts may not use zoning, however, to apply construction and safety requirements that differ from those adopted by HUD. In *Scurlock v. City of Lynn Haven*,<sup>62</sup> an Eleventh Circuit case, the city's zoning ordinance excluded housing that did not meet state and local building code standards, including manufactured housing, from its residential zones. It allowed HUD-approved manufactured housing that did not meet state and local building code standards in a designated mobile home park or an unzoned area of the city. The city did not attempt to explain this difference in treatment.<sup>63</sup> Discussing and quoting the federal regulation, the court held the city could not use

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57. *Burton v. City of Alexander*, 2001 WL 527415 at \*7 (M.D. Ala., Mar 20, 2001) ("Manufactured housing is aberrant housing that is rationally disfavored. A city may exclude such homes altogether, or restrict them to certain designated areas") (citations omitted), *aff'd sub nom.*, *Burton*, 277 F.3d 1379.

58. *City of Brookside Vill. v. Comeau*, 633 S.W.2d 790 (Tex.), *cert. denied*, 459 U.S. 1087 (1982).

59. *Ga. Manufactured Hous. Ass'n, Inc. v. Spalding Cty.*, 148 F.3d 1304, 1311 (11th Cir. 1998) (zoning regulation requiring that manufactured housing be built with 4:12 roof pitch to qualify for placement in most residential districts held not preempted as an aesthetic condition; does not impede HUD standards because does not alter or excuse requirements for HUD certification, but simply imposes an aesthetic condition for placement of manufactured homes in certain localities); *CMH Mfg., Inc. v. Catawba Cty.*, 994 F. Supp. 697, 711 (W.D.N.C. 1998) (county zoning ordinance requiring mobile homes to have exterior siding and roof shingles of type commonly used in standard residential construction not preempted, even though ordinance prohibited use of metal siding and roofing materials permitted under Act; ordinance addressed aesthetic concerns only).

60. *Schanzenbach v. Town of La Barge*, 706 F.3d 1277, 1285 (10th Cir. 2013); *Schanzenbach v. Town of Opal*, 706 F.3d 1269, 1276 (10th Cir. 2013) (ordinance does not supplant any specific standard imposed by the Act or its regulations).

61. *Wash. Manufactured Hous. Ass'n v. Pub. Util. Dist. No. 3 of Mason Cty*, 878 P.2d 1213, 1216-17 (Wash. 1994) (does not mandate compliance with standards higher than the federal standards, but recovers additional costs of providing electricity to all less efficient homes).

62. 858 F.2d at 1525; *cf. Ga. Manufactured Hous. Ass'n, Inc.*, 148 F.3d at 1311 (4:12 roof pitch requirement held not a safety or construction standard preempted by the Act).

63. *See supra* notes 50-51 and accompanying text. This decision is consistent with the policy later adopted in the HUD policy statement.

“land use and planning through the guise of a safety provision in an ordinance” when the safety requirement is preempted by the federal act.<sup>64</sup>

Statutory preemption provided by the National Safety and Construction Act is limited. It preempts state and local building codes, but does not preempt zoning restrictions in most cases. The *Scurlock* case suggests a contrary interpretation in its statement that a city cannot use “land use and planning through the guise of a safety provision in an ordinance.” In that case, however, the ordinance required manufactured housing to comply with state and local building codes if it wanted to locate in a residentially-zoned area, even though it was approved under the HUD Code.

### C. *Reforming the Statute*

Congress should revise the statute to preempt restrictive zoning that applies to manufactured housing certified under the HUD Code. An obvious change is a requirement that preempts zoning regulations that provide unequal treatment for manufactured and traditional housing, such as the exclusion of manufactured, but not traditional, housing from residential zones.<sup>65</sup> Congress should also require procedural protections in decision making under zoning ordinances, and prohibit or restrict substantive zoning regulations that can have an exclusionary effect, such as the exclusion of manufactured housing from residential zones. Part IV of this article discusses these options after it reviews

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64. *Scurlock*, 858 F.2d at 1525. However, the court held that “[u]ndoubtedly [the city] could limit Zone R-AA to conventionally-built residences and exclude mobile homes.” *Id.* (citing cases under state law). Later cases have not applied *Scurlock* to hold zoning exclusions preempted by the statute. *See, e.g., Schanzenbach v. Town of Opal*, 706 F.3d at 1275; *Ga. Manufactured Hous. Ass’n, Inc.*, 148 F.3d at 1309; *CMH Mfg., Inc.*, 994 F. Supp. 697 (W.D.N.C. 1998); *Burton v. City of Alexander*, 2001 WL 527415, at \*7 (M.D. Ala., Mar 20, 2001), *aff’d sub nom.*, *Burton v. City of Alexander*, 277 F.3d 1379 (11th Cir. 2001); *Bibco Corp. v. City of Sumter*, 504 S.E.2d at 116; *see also Westfall v. Vill. of W. Unity*, 1997 WL 43271 (Ohio Ct. App. 1997) (ordinance preempted if only difference between modular homes and manufactured housing was the building standards they met).

One court applied a purpose test to the preemption question. In *Lauderbaugh v. Hopewell Twp.*, 319 F.3d 568 (3d Cir. 2003), the township excluded mobile homes that complied with the HUD code from its R-2 residential zone unless they complied with other building codes. In denying summary judgment for plaintiffs, the court held the question was whether the ordinance “was enacted solely to establish safety and construction standards, or whether there was an underlying purpose to protect aesthetics and property values in certain residential districts.” *Id.* at 578. A purpose test is at odds with federal preemption doctrine, which does not look at motivation. Other courts rejected a purpose test. *See, e.g., Tex. Manufactured Hous. Ass’n, Inc. v. City of La Porte*, 974 F. Supp. 602 (S.D. Tex. 1996).

65. State statutes including an equal treatment requirement can provide a model. They are discussed in Section III.A.2, *infra*.

zoning barriers that prohibit or restrict manufactured housing, and decision procedures that do not provide adequate protection.

### III. Zoning Barriers to Manufactured Housing: State Case and Statutory Law

This section discusses judicial and statutory treatment of selected zoning barriers to manufactured housing.<sup>66</sup> They include the unequal treatment of manufactured housing in zoning regulations, exclusions from residential zones, aesthetic standards, and the requirement that zoning boards must approve manufactured housing as a conditional use.<sup>67</sup>

#### A. Unequal Treatment

##### 1. THE CASE LAW

Unequal treatment lies at the heart of zoning barriers to manufactured housing. Communities, such as cities, counties and townships, apply zoning restrictions to manufactured housing that do not apply to traditional housing. Unequal treatment takes many forms, and any zoning requirement may apply unequally. The courts have largely upheld unequal treatment in a variety of zoning regulations.<sup>68</sup> Zoning is

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66. For discussion of the zoning cases, see Howard J. Barewin, Note, *Rescuing Manufactured Housing From the Perils of Municipal Zoning Laws*, 37 WASH. U. J. URB. & CONTEMP. L. 189 (1990); see also DANIEL R. MANDELKER & MICHAEL ALLAN WOLF, LAND USE LAW §§ 5:19-5:24 (Matthew Bender, 6th ed.).

67. Much of the case law on this and other zoning restrictions that affect manufactured housing is dated. Courts decided many of the cases upholding restrictive zoning before Congress required national construction and safety standards in the mid-1970s. They also predate an important Supreme Court ruling in the mid-1980s that indicates more rigorous equal protection review for laws based on unsupported fears and justifications. The lack of recent cases may also be due to the recession in the manufactured housing industry after the 1990s, or a recognition that courts have settled the major issues in earlier precedent.

68. See *Clark v. Winnebago Cty.*, 817 F.2d 407 (7th Cir. 1987) (refusal to rezone for manufactured housing district); *Ga. Manufactured Hous. Ass'n, Inc.*, 148 F.3d at 1309 (aesthetic regulations); *CMH Mfg., Inc.*, 994 F. Supp. 697 (W.D.N.C. 1998) (aesthetic regulations); *Colo. Manufactured Hous. Ass'n v. City of Salida*, 977 F. Supp. 1080, 1085 (D. Colo. 1997) (excluded from some zones, allowed in others); *Kitchen v. Crawford*, 326 F. Supp. 1255, 1261 (N.D. Ga. 1970) (trailer park denial), *aff'd on basis of district court opinion*, 442 F.2d 1345 (5th Cir. 1971); *McKie v. Cty. of Ventura*, 113 Cal. Rptr. 143, 144 (Cal. App. 1974) (allowed in manufactured housing subdivisions and parks, and as temporary home); *City of Lewiston v. Knieriem*, 685 P.2d 821 (Idaho 1984) (exclusion from farm zone); *Stahla v. Bd. of Zoning Adjustment*, 182 N.W.2d 209 (Neb. 1970) (different treatment from multifamily housing); *Duggins v. Town of Walnut Cove*, 306 S.E.2d 186 (N.C. Ct. App. 1983) (manufactured housing zoned out); *Warren v. Mun. Officers of Gorham*, 431 A.2d 624 (Me. 1981) (town zoning ordinance requiring single-wide homes be located in mobile home parks in areas zoned farm and rural residential); *Town of Pompey v. Parker*, 385 N.Y.S.2d 959, 964 (N.Y. App. Div. 1976), *aff'd*, 377 N.E.2d 741 (N.Y. 1978) (permit system with one-year limits); *Clackamas Cty. v. Aque*, 556 P.2d 1386, 1388

economic regulation and the rational basis standard of judicial review that applies to economic regulations supports these decisions.<sup>69</sup> In applying this judicial review standard, however, the cases make assumptions about manufactured housing that are no longer true. These assumptions often occur in decisions decided before the adoption of the National Construction and Safety Law in 1976 that has led to an improvement in quality, though later cases contain similar assumptions. A 1997 federal district court decision, for example, held that restrictions on manufactured homes are justified by resident perceptions that manufactured homes are incompatible with traditional homes, threaten the tax base, or depreciate the market values of traditional housing.<sup>70</sup> Other courts use similar reasons to justify zoning restrictions on manufactured homes.<sup>71</sup>

These cases make it clear that courts accept zoning barriers to manufactured housing based on the unreasonable fears of property owners

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(Or. Ct. App. 1976) (prohibition of trailer houses); *City of Brookside Vill. v. Comeau*, 633 S.W.2d 790, 795 (Tex.) (restriction to manufactured housing parks), *cert. denied*, 459 U.S. 1087 (1982); *Edelbeck v. Town of Theresa*, 203 N.W.2d 694, 698 (Wis. 1973) (different requirements for mobile homes). Requirements applied equally to traditional and manufactured homes are valid. *See Pauter v. Comstock Charter Twp.*, 415 N.W.2d 232 (Mich. Ct. App. 1987) (zoning ordinance required all dwellings to have core area of living space of at least 20 feet by 20 feet in size); Jay M. Zitter, *Validity of Zoning or Building Restricting Mobile Homes or Trailers to Established Mobile Home of Trailer Parks*, 17 A.L.R.4th 106 (1982). For discussion of total exclusions, size and age restrictions not discussed in this section see *infra* notes 122-124.

69. This standard of judicial review includes a presumption of constitutionality, and means that courts should uphold a regulation if the justification for it is reasonably debatable. These are lenient standards that usually result in a finding of validity. *See Clark*, 817 F.2d at 409 (7th Cir. 1987) (“While some mobile homes may compare favorably with conventional homes, zoning classifications necessarily require that generalizations be made.”); *Brookside Vill.*, 633 S.W.2d at 795 (Tex.) (“While we recognize the substantial improvements made in modern mobile homes, we do not perceive the similarities between mobile homes and conventional housing as sufficient to overcome the presumption of the ordinance’s constitutionality”), *cert. denied*, 459 U.S. 1087 (1982).

70. *Colo. Manufactured Hous. Ass’n*, 977 F. Supp. at 1085 (D. Colo. 1997) (excluded from some zones, allowed in others).

71. *See, e.g., Clark*, 817 F.2d at 409 (7th Cir. 1987) (distinctions between mobile homes and traditional homes exist with respect to design, construction, and general appearance); *Lewiston*, 685 P.2d at 825 (Idaho 1984) (“The indiscriminate placement of mobile homes within a municipality may undermine conservation of property values and stifle the development of a potential residential neighborhood.”); *Duggins*, 306 S.E.2d at 189 (N.C. Ct. App. 1983) (prohibition of manufactured housing is rationally related to the protection of the value of other homes in the area); *Clackamas Cty.*, 556 P.2d at 1388 (Or. Ct. App. 1976) (conventionally constructed homes tend to appreciate in value while mobile homes tend to depreciate in value); *Brookside Vill.*, 633 S.W.2d at 795 (Tex.) (vulnerable to windstorm and fire damage, may lead to transience and detrimentally impact property values), *cert. denied*, 459 U.S. 1087 (1982).



and residents that it is different from traditional housing, and has a negative effect on property ownership and community values.<sup>72</sup> The courts decided many of these cases, however, before the Supreme Court adopted a heightened standard of rational basis judicial review for equal protection cases in *City of Cleburne v. Cleburne Living Center*.<sup>73</sup> The Court faced a zoning problem there similar to that raised by manufactured housing, and rejected fear and illegitimate reasons as a basis for zoning decisions. In *Cleburne*, the city had refused to grant a permit for a group home for the mentally retarded, and the Court held the denial of the permit violated equal protection.<sup>74</sup> The city council had denied the permit, in part, because a majority of property owners had negative attitudes toward group homes.<sup>75</sup> The Court did not agree with this justification. It responded that “[m]ere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like.”<sup>76</sup> The Court concluded, “[t]he short of it is

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72. For a criticism of neighborhood vetoes of new development based on objections to an increase in density see Michael Lewyn, *Against the Neighborhood Veto*, 44 REAL EST. L.J. 82 (2015).

73. 473 U.S. 432 (1985); see Laura C. Bornstein, *Contextualizing Cleburne*, 41 GOLDEN GATE U.L. REV. 91 (2010); DANIEL R. MANDELKER, GROUP HOMES: THE SUPREME COURT REVIVES THE EQUAL PROTECTION CLAUSE IN LAND USE CASES, 1986 INST. ON PLAN. ZONING & EMINENT DOMAIN, CH. 3.

74. The interested reader may wonder at this result, since it seems contrary to the rational basis standard of judicial review usually applied by the Supreme Court. Commentators, however, view *Cleburne* as a departure from the standard norm as it represents a group of cases in which the Court adopted from the rational basis standard of equal protection judicial review “with a bite.” See Gayle Lynn Pettinga, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 780 (1987); Gerald Gunther, *Foreword: In Search of an Evolving Doctrine on a Changing Court: A Model of New Equal Protection*, 86 HARV. L. REV. 1, 18, 19 (1972) (“[T]hese cases found bite in the equal protection clause after explicitly voicing the traditional toothless minimum rationality standard.”). *But see infra* note 80. *Cleburne* refused to require more than rational basis judicial review because it held the disabled were not a suspect class.

75. The Court rejected other reasons the city gave for the permit denial, such as an argument that the denial was at “aimed at avoiding concentration of population and at lessening congestion of the streets,” when similar uses such as apartments and sorority and fraternity houses could locate freely in the area without a permit. *Cleburne*, 473 U.S. at 450.

76. *Id.* at 448. In a non-land use case, Chief Justice Rehnquist commented that this passage from *Cleburne* “simply states the unremarkable and widely acknowledged tenet of this Court’s equal protection jurisprudence that state action subject to rational-basis scrutiny does not violate the Fourteenth Amendment when it ‘rationally furthers the purpose identified by the State.’” *Bd. of Tr’s. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 367 (2001).

that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded.”<sup>77</sup>

Although *Cleburne* considered a permit denial for a group home for the disabled, its reasoning applies to the unequal treatment of manufactured housing in zoning ordinances. As in *Cleburne*, courts often uphold zoning barriers to manufactured housing for reasons based on fear and irrational prejudice.<sup>78</sup> Courts should follow *Cleburne* and reject unequal zoning barriers when fear and prejudice are the only reasons for their adoption.<sup>79</sup>

Some cases have held unequal zoning restrictions on manufactured housing invalid.<sup>80</sup> The leading case is *Robinson Township v. Knoll*,<sup>81</sup> which held invalid an ordinance restricting manufactured housing to manufactured housing parks. The court rejected the assumption that manufactured housing is different from traditional housing “with respect to criteria cognizable under the police power,”<sup>82</sup> and found no inherent characteristics that justified its restriction. There was no reason to presume that a manufactured home would fail to live up to a community’s aesthetic standards, which can be imposed. Concerns based on health and safety were illusory, as they can be dealt with in a reasonable code. There should be no concern that the use of manufactured housing is transient. “The disparate treatment of mobile homes seems to be based on attitudes which once had but no longer have a basis in fact.”<sup>83</sup> Nor was there a reasonable basis for distinguishing manufacturing from modular housing, which the township al-

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77. *Cleburne*, 473 U.S. at 450.

78. See, e.g., *City of Raleigh v. Morand*, 100 S.E.2d 870 (N.C. 1972); *Town of Stonewood v. Bell*, 270 S.E.2d 787 (W. Va. 1980); *Cty. of Durham v. Addison*, 136 S.E.2d 600 (N.C. 1964).

79. See *Pleasant Valley Home Const., Ltd. v. Van Wagner*, 363 N.E.2d 1376, 1377 (N.Y. 1977) (reversing denial of mobile home complex because of community pressure directed against allowing any additional mobile home development in the area zoned for mobile homes).

80. See, e.g., *Bourgeois v. Par. of St. Tammany*, 628 F. Supp. 159 (E.D. La. 1986) (exclusion of manufactured but not modular homes from residential zones not justified because of failure to regulate aesthetics; distinction based on characteristics of manufactured homes at time of delivery, not as they exist on the land); *Yurczyk v. Yellowstone Cty.*, 83 P.3d 266 (Mont. 2004) (modular home; ordinance requiring on-site construction held invalid; home would not affect property values in rural setting spread out into large residential acreages).

81. 302 N.W.2d 146 (Mich. 1981). The court did not identify the case as an equal protection case, but it clearly raised unequal treatment issues.

82. *Id.* at 150-151.

83. *Id.* at 153.

lowed.<sup>84</sup> Other courts invalidating discriminatory zoning ordinances found no difference between manufactured and traditional housing, and held that manufactured housing did not have negative aesthetic effects.<sup>85</sup>

## 2. STATUTORY EQUAL TREATMENT REQUIREMENTS

A number of state statutes require the equal treatment of manufactured housing in zoning ordinances.<sup>86</sup> The statutes differ substantially,<sup>87</sup> but the equal treatment requirement applies to how a zoning ordinance is written, as well as to how it is applied.<sup>88</sup> The Nebraska statute is the

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84. However, the court concluded that “[t]his is not to say that a municipality must permit all mobile homes, regardless of size, appearance, quality of manufacture or manner of installation on the site, to be placed wherever site-built single family homes have been built or are permitted to be built.” *Id.* at 154. This concession would appear to allow unequal treatment.

85. *See* *Town of Chesterfield v. Brooks*, 489 A.2d 600 (N.H. 1985) (invalidating ordinance requiring manufactured housing to locate on unpaved roads at least 500 feet back from paved road; held discriminatory regulation regardless of size or appearance; nexus between charm and paved road not logical; manufactured housing often compares very favorably to site built housing; expense of compliance is an undue burden); *Geiger v. Zoning Hearing Bd. of N. Whitehall Twp.*, 507 A.2d 361 (Pa. 1986) (allowed only as special exception; modular homes permitted; only difference between manufactured and traditional housing is that manufactured housing is built in one complete section and transported; court refused to presume that style or design of manufactured home detracts from the aesthetic characteristics of a community); *see also* *Janas v. Town Bd. & Zoning Bd. of Appeals, Fleming*, 51 A.D.2d 473 (N.Y. App. Div. 1976) (may not limit mobile homes to relatives no more distant than first cousins or employees of owners of property).

86. How statutory equal treatment requirements relate to the constitutional equal protection clause remains a puzzle. *See* Samuel R. Bagenstos, *Disparate Impact and the Role of Classification and Motivation in Equal Protection Law after Inclusive Communities*, 101 CORNELL L. REV. \_\_\_\_ (forthcoming; discussing Title VIII of the federal Fair Housing Act).

87. A similar provision in the federal Religious Land Use and Institutionalized Persons Act (RLUIPA) that requires the “equal treatment” of religious land uses, has received conflicting interpretations in the courts of appeal. Courts must compare a “comparator” use with the religious use to decide if there is unequal treatment, but courts disagree on how unequal treatment is determined. *See* *Chabad Lubavitch of Litchfield Cty., Inc. v. Litchfield Historic Dist. Comm’n*, 768 F.3d 183 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 1853 (2015); *see also* Ryan M. Lore, *When Religion and Land Use Regulations Collide: Interpreting the Application of RLUIPA’s Equal Treatment Provisions*, 64 U.C. DAVIS L. REV. 1339 (2013). RLUIPA imposes a number of limitations on zoning treatment of religious land uses.

88. Refusals to rezone are a special case, because courts review them under a deferential judicial review standard when they are a legislative decision, which is usually the case. *See, e.g.,* *City of Lowell v. M & N Mobile Home Park, Inc.*, 916 S.W.2d 95 (Ark. 1996) (refusal to rezone upheld); *Stoddard v. Town of Marilla*, 400 N.Y.S.2d 637 (N.Y. App. Div. 1977) (same), *aff’d as modified*, 387 N.E.2d 621 (N.Y. 1979). However, refusals to rezone can be challenged under an equal treatment provision if they discriminate against the manufactured dwelling. *Cf. Czech v. City of Blaine*, 253 N.W.2d 272 (Minn. 1977) (refusal to rezone an unconstitutional taking). A “class of one” claim is also possible under the equal protection clause of the federal constitution. *Vill. of Willowbrook v. Olech*, 528 U.S. 562 (2000); *see also* William D.

simplest: “The city council may not require additional standards unless such standards are uniformly applied to all single-family dwellings in the zoning district.”<sup>89</sup> A similar group of statutes requires “equal” or “uniform” treatment, or enacts a requirement in comparable language, such as treatment on the “same conditions.”<sup>90</sup> A few statutes prohibit

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Araiza, *Flunking the Class-of-One Failing Equal Protection*, 55 WM. & MARY L. REV. 435 (2013) (rejecting subjective motivation for class-of-one and requiring heightened pleading establishing the existence of a person in a similar situation).

89. NEB. REV. STAT. § 14-402(2)(b).

90. See ARK. CODE ANN. § 14-54-1604(c) (“Municipalities shall not impose regulations or conditions on manufactured homes that are inconsistent with the regulations or conditions imposed on other single-family dwellings permitted in the same residential district or zone.”); CAL. GOV’T CODE § 65852.3(a) (“Except with respect to architectural requirements, [cities] shall only subject the manufactured home and the lot on which it is placed to the same development standards to which a conventional single-family residential dwelling on the same lot would be subject, including, but not limited to, building setback standards, side and rear yard requirements, standards for enclosures, access, and vehicle parking, aesthetic requirements, and minimum square footage requirements.”); CONN. GEN. STAT. ANN. § 8-2 (“Such regulations shall not impose conditions and requirements on manufactured homes [over 22 feet and built under federal standards] which are substantially different from conditions and requirements imposed on single-family dwellings and lots containing single-family dwellings. . . . [or] which are substantially different from conditions and requirements imposed on multifamily dwellings, lots containing multifamily dwellings, cluster developments or planned unit developments.”); FLA. STAT. § 553.38 (“Such local requirements and rules which may be enacted by local authorities must be reasonable and uniformly applied and enforced without any distinction as to whether a building is a conventionally constructed or manufactured building.”); IDAHO CODE § 67-6509A(4)(f) (“[A] city or county may subject a manufactured home and the lot upon which it is sited to any development standard, architectural requirement and minimum size requirements to which a conventional single-family residential dwelling on the same lot would be subjected.”); IOWA CODE § 335.30 (“[A] zoning ordinance or regulation shall require that a manufactured home be located and installed according to the same standards, including but not limited to, a permanent foundation system, set-back, and minimum square footage which would apply to a site-built, single family dwelling on the same lot . . . .”); ME. REV. STAT. ANN. tit. 30-A, § 4358(2) (“Municipalities shall permit manufactured housing to be placed or erected on individual house lots in a number of locations on undeveloped lots where single-family dwellings are allowed, subject to the same requirements as single-family dwellings . . . .”); N.J. REV. STAT. § 40:55D-104 (“A municipal agency shall not exclude or restrict, through its development regulations, the use, location, placement, or joining of sections of manufactured homes [not less than 22 feet wide, are on owned land and on permanent foundations] unless those regulations shall be equally applicable to all buildings and structures of similar use.”); OR. REV. STAT. ANN. § 197.307(8)(g) (“[A] city or county may subject a manufactured home and the lot upon which it is sited to any development standard, architectural requirement and minimum size requirement to which a conventional single-family residential dwelling on the same lot would be subject.”); VT. STAT. ANN. tit. 24, § 4412(B) (“[N]o bylaw shall have the effect of excluding mobile homes, modular housing, or prefabricated housing from the municipality, except upon the same terms and conditions as conventional housing is excluded.”); VA. CODE ANN. § 15.2-2290(A) (manufactured housing on permanent foundations in agricultural districts “shall be permitted, subject to development standards that are equivalent to those applicable to site-built single family dwellings within the same or equivalent zoning district.”);

any land use regulation directed specifically at manufactured housing.<sup>91</sup> All of these statutes should invalidate zoning ordinances that treat manufactured housing unequally from traditional housing.

An initial question is to decide on what level a locality must apply an equal treatment requirement. If courts applied the statute to specific zoning categories, such as zoning for residential districts, a zoning regulation would be invalid unless it applied equally to manufactured and traditional housing. Zoning could not exclude manufactured housing in residential zones if it allowed traditional housing in residential zones.

Another alternative is to apply the equal treatment requirement at the community level. In the example just given, there would be no statutory violation if a community excluded manufactured housing from some residential zones if the ordinance allowed it in other residential zones. This interpretation would permit zoning barriers to manufactured housing, because a community could adopt zoning restrictions that substantially limit where it could locate, even it was allowed in some zoning districts. How much manufactured housing a community would have to allow to correct an exclusion from some residential zones is not clear.

The courts have not applied equal treatment requirements at the community level. One example is decisions invalidating ordinances that restricted manufactured housing to manufactured housing parks.<sup>92</sup> Other cases applied statutory equal treatment requirements,

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Wash. Rev. Code Ann. § 36.01.225(1) (“Homes built to [federal] standards . . . must be regulated for the purposes of siting in the same manner as site built homes, factory built homes, or homes built to any other state construction or local design standard.”).

91. See IOWA CODE §§ 335.30, 414.28 (“A city shall not adopt or enforce zoning regulations or other ordinances which disallow the plans and specifications of a proposed residential structure solely because the proposed structure is a manufactured home.”); *Id.* § 414.28(A) (“A city shall not adopt or enforce zoning or subdivision regulations or other ordinances which disallow or make infeasible the plans and specifications of land-leased communities because the housing within the land-leased community will be manufactured housing.”); MICH. COMP. LAWS ANN. § 125.2307(6) (“A local government ordinance shall not contain roof configuration standards or special use zoning requirements that apply only to, or excludes, mobile homes.”); MINN. STAT. § 394.25 (“No provision may prohibit manufactured homes built in conformance with [the manufactured housing building code] that comply with all other zoning ordinances promulgated pursuant to this section.”).

92. See, e.g., *Bahl v. City of Asbury*, 656 N.W.2d 336 (Iowa 2002) (restriction to manufactured housing parks held invalid relying on historical context of statute, which is extensively described; statute provided city shall not enforce regulations “which disallow or make infeasible the plans and specifications of land-leased communities because the housing within the land-leased community will be manufactured housing”); *In re Lunde*, 688 A.2d 1312 (Vt. 1997) (restriction to manufactured housing parks held invalid; court relied on plain meaning of statute and legislative history; statute

or statutes prohibiting regulations directed specifically at manufactured housing, to invalidate restrictions that applied only to such housing, such as residential zone exclusions and dimensional requirements.<sup>93</sup>

### B. *Exclusion from Residential Zones*

Zoning ordinances that exclude individual single-family manufactured homes from residential zones are a common example of unequal treatment.<sup>94</sup> Typically, the zoning ordinance does not totally exclude manufactured housing from all residential zones but excludes it from some residential zones while allowing it in others or in nonresidential zones.<sup>95</sup> The exclusion usually applies to the lowest density residential zone.<sup>96</sup> Even a partial exclusion from residential zones limits the area for manufactured housing in a community and can be quite restrictive if it covers a substantial area.<sup>97</sup> Exclusions from residential zones limit

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prohibited exclusion “from the municipality, except upon the same terms and conditions as conventional housing is excluded”). The Iowa court relied on the *Lunde* case. *See also* ME. REV. STAT. ANN. tit. 30-A, § 4358(2)(B) (“Providing one or more zones or locations where mobile home parks or mobile home subdivisions or developments are allowed does not constitute compliance with this section.”).

93. *See, e.g.,* *Paladac v. City of Rockland*, 558 A.2d 372 (Me. 1989) (manufactured housing “subject to the same requirements as single-family dwellings”; must be located at least 300 feet from dwelling that exceeds 1 1/2 stories in height; risk that erection of house over that height would prevent such housing on site where owner intended to build one); *Bell River Assoc.’s v. China Charter Twp.*, 565 N.W.2d 695 (Mich. Ct. App. 1997) (ordinance may not contain special use requirements that apply only to manufactured housing; “minimum site size of twenty acres; direct access to paved public road with planned right of way of not less than 120 feet; site cannot abut any suburban residential district”); *Marion Cty. v. Dep’t of Cmty. Affairs*, 817 So. 2d 1062 (Fla. Dist. Ct. App. 2002) (requirements must be “uniformly applied”; exclusion from residential R-1 zones in subdivisions; aesthetic problems can be handled by regulations).

94. Tiny houses are another type of mobile housing that can be used for permanent living. These are small dwelling units that may have only 400 square feet, and are manufactured as recreational vehicles towed on wheels. They may not meet HUD Code standards. Modification of residential zoning may be necessary to allow tiny houses as permanently occupied housing. *See* Donald L. Elliott & Peter Sullivan, *Tiny Houses, and the Not-So-Tiny Questions They Raise*, *Zoning Practice*, AM. PLAN. ASS’N (Nov. 2015). A foundation and connection to utilities is usually required.

95. Communities may also prohibit single-family manufactured homes in residential zones by restricting them to manufactured housing parks. *See supra* note 69 and accompanying text.

96. Land in lower density residential districts may be too expensive for manufactured housing because more land is required for each home, so that the exclusion will have an exclusionary effect. However, there may or may not be an additional cost factor depending on the condition of the local housing market. Communities often adopt large lot zoning in suburban areas that may exclude manufactured housing if it raises land costs excessively. For discussion see *Johnson v. Town of Edgartown*, 680 N.E.2d 37 (Mass. 1997).

97. Manufactured housing is not the only unwanted land use that communities exclude from residential areas. Other examples are: group homes, Daniel R. Mandelker, *Housing Quotas for People with Disabilities: Legislating Exclusion*, 43 *URB. LAW.* 915

opportunities to place manufactured housing on single lots, either in new residential subdivisions<sup>98</sup> or on isolated lots in residential areas, such as infill areas.<sup>99</sup> There is no justification for this exclusion, except possibly for aesthetic reasons when manufactured housing does not resemble traditional housing. Aesthetic regulations can handle this problem.<sup>100</sup>

#### 1. THE CASES

The cases uphold exclusions from residential zones against equal protection and substantive due process objections when the zoning ordinance allows manufactured housing in other zones. In some cases, the ordinance excluded manufactured housing from the lowest density residential zones but allowed it in other residential zones, in commercial and industrial zones, or in agricultural areas. In other cases, the ordinance excluded manufactured housing from all residential zones but allowed it in other zones or in a special manufactured housing zone.<sup>101</sup> The community may not actually designate a manufactured

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(2011), nontraditional families, *Belle Terre v. Boraas*, 416 U.S. 1 (1974), and religious uses, *State v. Cameron*, 445 A.2d 75, 80 (N.J. Super. Ct. Law Div. 1982) (collecting cases on traffic problems associated with churches), *rev'd on other grounds*, 498 A.2d 1217 (N.J. 1985). Federal legislation protects group homes and religious uses, though most states still uphold the exclusion of nontraditional families. Tim Iglesias, *Defining 'Family' for Zoning: Contemporary Policy Challenges, Legal Limits and Options*, ZONING & PLAN. L. REP. (May 2014).

98. See REGULATORY BARRIERS, *supra* note 12 (noting the need for regulations allowing the creation of special HUD-Code subdivisions).

99. For a case study of infill manufactured housing in Oakland, California, see generally *id.* at 43-70.

100. See *infra* Section III. C., discussing aesthetic regulations for manufactured housing.

101. See *Grant v. Seminole Cty.*, 817 F.2d 731, 736 (11th Cir. 1987) (exclusion from R-1a but not other residential zones); *Colo. Manufactured Hous. Ass'n v. Bd. of Cty. Comm'rs of Pueblo*, 946 F. Supp. 1539, 1554 (D. Colo. 1996) (excluded from some but not all residential zones); *Sweitzer v. O'Fallon*, 481 N.E.2d 729, 731 (Ill. App. Ct. 1985) (partial exclusion from SR-1 and SR-2 zones, allowed in mobile home zones and subdivisions); *Conner v. Danville*, 314 N.E.2d 206, 391 (Ill. App. Ct. 1974) (excluded from R-1, allowed in trailer zone); *Mack T. Anderson Ins. Agency v. Belgrade*, 803 P.2d 648, 652 (Mont. 1990) (excluded from R-4 but allowed in other residential zones); *Martz v. Butte-Silver Bow Gov't*, 641 P.2d 426, 427 (Mont. 1982) (allowed in R-4 and R-4S zones where vacant land amounted, respectively, to .9% and 4.2% of total area zoned); *Miss. Manufactured Hous. Ass'n v. Bd of Sup'rs of Tate Cty.*, 878 So. 2d 180, 183 (Miss. Ct. App. 2004) (restricted from all residential zones not specified for manufactured housing, in county's agricultural areas, no per se prohibition in residential areas); *Bd. of Trustees Malone v. Zoning Bd. of Appeals*, 562 N.Y.S.2d 973, 975 (N.Y. Sup. Ct. 1990) (allowed in planned unit development district, none zoned); *Gravatt v. Latrobe*, 404 A.2d 729, 729-30 (Pa. Commw. Ct. 1979) (excluded from certain zones, allowed in others); *Fayette Cty. v. Holman*, 315 A.2d 335 (Pa. Commw. Ct. 1973) (exclusion from R-1 zone; record evidence of unfavorable aesthetic impact and adverse effect on property values); *Dugdins v. Walnut Cove*, 306 S.E.2d 186, 189 (N.C. Ct. App. 1983) (allowed in certain

housing zone, however. These are cases of unequal treatment, because the ordinance targeted only manufactured housing for the zoning exclusion.<sup>102</sup> Some courts relied on the adequacy of areas available for manufactured housing as a reason for upholding a residential zoning exclusion,<sup>103</sup> a rough fair share housing rule. No recent cases were found that held partial residential zoning exclusions invalid.<sup>104</sup>

The reasons the courts give for upholding residential zoning exclusions limited to manufactured housing are the same as the discredited reasons they give in other unequal treatment cases. Examples are the need to guard against increased crime,<sup>105</sup> or that manufactured housing tends “to stunt growth potential of the land and have an adverse effect upon the development potential of a neighborhood.”<sup>106</sup> In some cases the justifications were bizarre, such as the probability of increased clutter, storage sheds, and other temporary shelters because manufactured housing has minimum storage capacity.<sup>107</sup>

## 2. STATUTORY PROTECTION

Residential zoning exclusions need statutory correction. Some states have statutes that require zoning ordinances to allow manufactured housing in all residential zones without restriction.<sup>108</sup> Other statutes

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districts zoned R-6 MH but prohibited in more restrictive residential R-20 zones); *Bibco Corp. v. Sumter*, 504 S.E.2d 112, 117 (S.C. 1998) (limited to General Residential zones); *Scranton v. Willoughby*, 412 S.E.2d 424, 425 (S.C. 1991) (excluded from all zones except manufactured housing zone); *Duckworth v. Bonney Lake*, 586 P.2d 860, 864 (Wash. 1978) (prohibited in R-S single family zone, adequate area in duplex and trailer zones).

102. The courts have also upheld exclusions from agricultural districts when manufactured housing is allowed elsewhere. *Bd. of Cty. Comm'rs v. Mountain Air Ranch*, 192 Colo. 364, 369 (Colo. 1977); *City of Lewiston v. Knieriem*, 685 P.2d 821, 824-25 (Idaho 1984); *Stevens v. Smolka*, 202 N.Y.S.2d 783, 785 (N.Y. Sup. Ct. 1960).

103. *See Mack T. Anderson Ins. Agency*, 803 P.2d at 651 (Mont. 1990); *Duckworth*, 586 P.2d at 867 (Wash. 1978) (prohibited in R-S single family zone, adequate area in duplex and trailer zones); *see also Martz*, 641 P.2d at 427-28 (Mont. 1982) (allowed in R-4 and R-4S zones where vacant land amounts, respectively, to .9% and 4.2% of total area zoned).

104. *But see Anstine v. Zoning Bd. of Adjustment*, 190 A.2d 712, 716-17 (Pa. 1963) (exclusion from R-Residential District except in permitted trailer camp; no evidence of unfavorable aesthetic impact, and evidence that home will enhance value of surrounding property).

105. *Bibco Corp.*, 504 S.E.2d at 116-17 (S.C. 1998).

106. *Duckworth*, 586 P.2d at 867 (Wash. 1978); *see also supra* note 69 and accompanying text.

107. *See supra* note 69 and accompanying text.

108. IDAHO CODE § 67-6509A(1) (all land zoned for residential uses except for historic districts); OR. REV. STAT. § 197.314 (within urban growth boundaries, “all land zoned for single-family residential uses to allow for siting of manufactured homes,” in addition to “designated manufactured dwelling subdivisions”); TENN. CODE ANN. § 13-24-201 (no power to exclude placement of residential dwelling on land



place some restrictions on the type of manufactured housing allowed in residential zones, such as a requirement that they be HUD-certified,<sup>109</sup> or allow placement in only a limited number of zones without indicating which residential zones the community should select.<sup>110</sup> The second type of statute gives a community the discretion to decide how many residential zones should allow manufactured housing, and where they should be located, which may allow partial exclusion. The statutes have received limited judicial attention.<sup>111</sup>

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designated for residential use solely because partially or completely constructed in a manufacturing facility); *see also* VT. STAT. ANN. tit. 24, § 4302(c)(11)(c) (“Sites for . . . manufactured housing should be readily available in locations similar to those generally used for single-family conventional dwellings.”); VA. CODE ANN. § 15.2-2290(a) (allowed in agricultural districts subject to standards that apply to traditional single family dwellings).

109. *See* CAL. GOV'T CODE § 65852.3(a) (HUD-certified homes on a foundation “on lots zoned for conventional single-family residential dwellings”); IND. CODE § 36-7-4-1106(c)(d) (manufactured homes “that exceed twenty-three (23) feet in width and nine hundred fifty (950) square feet of occupied space as permanent residences on any lot on which any other type of dwelling unit may be placed”); N.M. STAT. ANN. § 3-21A-3 (homes built under HUD or uniform building code, “shall [not] exclude multi-section manufactured homes from a specific-use district in which [traditional], single-family housing is allowed or place more severe restrictions upon [such] than are placed upon single-family, [traditional] housing within that specific-use district”); TEX. OCC. CODE ANN. § 1201.008 (HUD code dwelling in areas deemed appropriate).

110. *See* ARK. CODE ANN. § 14-54-1604(a)(1) (“Municipalities that have zoning ordinances shall allow the placement of manufactured homes on individually owned lots in at least one (1) or more residential districts or zones within the municipality.”); ME. REV. STAT. ANN. tit. 30-A, § 4358(2) (“shall permit manufactured housing to be placed or erected on individual house lots in a number of locations on undeveloped lots where single-family dwellings are allowed, subject to the same requirements as single-family dwellings;” “Providing one or more zones or locations where mobile home parks or mobile home subdivisions or developments are allowed does not constitute compliance” with this requirement); N.H. REV. STAT. ANN. § 674:32(I) (“shall allow, in its sole discretion, manufactured housing to be located on individual lots in most, but not necessarily all, land areas in districts zoned to permit residential uses within the municipality”); N.C. GEN. STAT. ANN. § 160A-383.1(e) (according to comprehensive plan and based on local housing needs, designate manufactured home overlay district within a residential district as a defined with additional requirements or standards); TEX. OCC. CODE ANN. § 1201.008 (HUD code dwelling “in any area determined appropriate by the municipality, including a subdivision, planned unit development, [or] single lot”). *But see* ARK. CODE ANN. § 14-54-1605 (“Municipalities may prohibit the placement of mobile homes in all residential districts or zones . . .”).

111. *See* *Town of Plaistow v. Nadeau*, 493 A.2d 1158, 1162 (N.H. 1985) (allowing manufactured housing on individually owned lots in residential areas complied with statute); *Town of Chesterfield v. Brooks*, 489 A.2d 600, 602 (N.H. 1985) (ordinance allowing manufactured housing in one of two residential zones complied with statute, but ordinance violated equal protection); *Plainfield v. Sanville*, 485 A.2d 1052, 1056 (N.H. 1984) (ordinance restricting number of mobile home parks and number of spaces within parks violated statute). For the current citation to the New Hampshire statute, *see supra* note 110.

### 3. RECOMMENDATIONS FOR STATUTORY CHANGE

Statutes that allow manufactured housing to locate in residential zones provide helpful but usually limited protection. The preferred model is a statute that allows manufactured homes in all residential zones. Only a few states have this requirement, and others are not likely to follow.<sup>112</sup> Some limitations are acceptable. Requiring compliance with the HUD Code for manufactured housing is reasonable, for example. An equal treatment requirement should provide that manufactured housing is subject only to the same requirements in residential zones that apply to traditional housing.

Zoning ordinances should not be able to select which residential zones will have manufactured housing. An ordinance, under some of these statutes, can select geographically limited residential zones,<sup>113</sup> or residential zones that are difficult to develop or unattractive, or can unreasonably limit the residential zones in which it allows manufactured housing. Statutes can remedy this problem by treating manufactured housing as an affordable housing resource.<sup>114</sup> One option is statutory authority that allows the designation of defined residential zones based on local housing needs, where manufactured housing is allowed as a matter of right.<sup>115</sup> Whether statutes should require zoning ordinances to designate a minimum amount of area

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112. American Planning Association policy states that “Manufactured homes should be allowed as a type of housing accommodated in residential zoning districts at the permitted density for the district. Issues of design and compatibility arising from manufactured housing zoning parity should be addressed for all forms of housing and should be addressed through generally accepted standards of planning practice.” Am. Planning Ass’n, *Policy Guide on Factory Built Housing, Policy Position 3d*, AMERICAN PLANNING ASSOCIATION (2001), <https://www.planning.org/policy/guides/adopted/factoryhousing.htm>.

113. *See Northfield Dev. Co. v. City of Burlington*, 523 S.E.2d 743, 749, *aff’d in part, review dismissed in part*, 535 S.E.2d 32 (N.C. 2000) (city approved only two of twenty overlay districts for manufactured homes; statute preventing exclusion not violated, substantial presence of manufactured housing not required); *see* Am. Planning Ass’n *supra* note 112.

114. *See, e.g.*, OR. REV. STAT. ANN. § 197.303(1)(d) (“needed housing” within urban growth boundaries includes “[m]anufactured homes on individual lots planned and zoned for single-family residential use that are in addition to lots within designated manufactured dwelling subdivisions”). Manufactured housing should also be a resource under the Affirmatively Favoring Fair Housing rule adopted by the Department of Housing and Urban Development that requires local strategies to improve fair housing opportunities. *See* 80 Fed. Reg. 42272 (2015).

115. N.C. GEN. STAT. § 160A-383.1(e) (defined overlay district in residential area based on local housing needs); *see also* N.J. STAT. ANN. § 40:55D-105 (“When reviewing and approving development regulations pertaining to residential development, a municipal agency is to be encouraged to review those regulations to determine whether or not mobile home parks are a practicable means of providing affordable housing in the municipality.”).

for these zones or require a minimum quota for manufactured housing, should also be considered.<sup>116</sup>

A state can also include manufactured housing as an affordable housing resource in programs that require communities to provide affordable housing.<sup>117</sup> One option is the housing elements that about half the states require in comprehensive plans.<sup>118</sup> The California statute is an example and enacts a detailed housing element program.<sup>119</sup> The key requirements are the assessment of housing needs, and the establishment of quantified goals by regional councils and the state housing and community development agency. Local governments must make sites available, with appropriate zoning, development standards and services and facilities, to accommodate a city or county's regional housing need at each income level that cannot be accommodated in an inventory the statute requires.<sup>120</sup>

Statutes should also prohibit other zoning restrictions on manufactured housing, such exclusions from an entire community;<sup>121</sup>

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116. Massachusetts has a ten percent quota in its statute that authorizes appeals from local decisions that reject or restrict affordable housing. MASS. GEN. LAWS ch. 40B, § 20 (definition of “[c]onsistent with local needs”); see *Zoning Bd. of Appeals of Canton v. Hous. Appeals Comm.*, 923 N.E.2d 114 (Mass. App. Ct. 2010) (not binding if regional housing needs not fully met). For discussion of these laws see *infra* notes 180-183.

117. Another option is to require each local government to accept its fair share of manufactured housing. New Jersey is the best example of a state that has tried this approach for all types of affordable housing, but its experience with this program is problematic. For a discussion of struggles the state agency charged with developing the fair share formula has had, see *In re Adoption of N.J.A.C. 5:94 & 5:95* by N.J. Council On Affordable Hous., 914 A.2d 348 (N.J. Super. Ct. App. Div. 2007) (invalidating regulations); see also John M. Payne, *The Paradox of Progress: Three Decades of the Mount Laurel Doctrine*, 5 J. PLAN. HIST. 126 (2006). See generally Thomas Silverstein, *State Land Use Regulation in the Era of Affirmatively Furthering Fair Housing*, 24 J. Affordable Housing & Community Dev. L. 305 (2015).

118. See, e.g., CONN. GEN. STAT. § 8-23; FLA. STAT. § 163.3177(6); N.Y. TOWN LAW § 272-a(3)(h); R.I. GEN. LAWS § 45-22.2-6(6); VT. STAT. ANN. tit. 24, § 4302(C)(11); see also AMERICAN PLANNING ASSOCIATION, GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE, 7-277 to -81, and Table 7-5 (Stuart Meck, ed., 2002). For a discussion of the effect of housing elements on comprehensive planning, see Daniel R. Mandelker, *The Affordable Housing Element in Comprehensive Plans*, 30 B.C. ENVTL. AFF. L. REV. 555 (2003).

119. CAL. GOV'T CODE §§ 65580-65589.8.

120. *Id.*, § 65583(c)(1). Private litigation enforces the statute. The courts often apply the usual presumptions of validity and deference to find that the housing element “substantially complies” with the statute. See *Hernandez v. City of Encinitas*, 33 Cal. Rptr. 2d 875 (Cal. Ct. App. 1994). For discussion see Baer, *California's Fair-Share Housing: 1967-2004: The Planning Approach*, 7 J. Plan. Hist. 48 (2008); S. MECK, R. RETZLAFF & J. SCHWAB, REGIONAL APPROACHES TO AFFORDABLE HOUSING, AMERICAN PLANNING ASSOCIATION, PLANNING ADVISORY SERV. REP. NO. 513/514, at 42-67 (Am. Plan. Ass'n, 2003).

121. Some courts upheld total exclusions of manufactured housing, relying on the usual reasons for discriminatory treatment. See *Barre Mobile Home Park v. Town of*

requirements for the minimum size of a manufactured home,<sup>122</sup> which are exclusionary; or a prohibition on manufactured homes over a certain age.<sup>123</sup> A critical question is whether, and to what extent, aesthetic

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Petersham, 592 F. Supp. 633 (D. Mass. 1984) *aff'd*, 767 F.2d 904 (1st Cir. 1985); *Koston v. Town of Newburgh*, 256 N.Y.S.2d 837 (N.Y. Sup. Ct. 1965); *Duggins v. Town of Walnut Cove*, 306 S.E.2d 186 (N.C. Ct. App. 1983). Other courts invalidated total exclusions. *See High Meadows Park, Inc. v. City of Aurora*, 250 N.E.2d 517 (Ill. App. Ct. 1969) (special use not provided); *Tocco v. Atlas Twp.*, 222 N.W.2d 264 (Mich. Ct. App. 1974); *Southern Burlington City N.A.A.C.P. v. Mount Laurel Twp.*, 67 N.J. 151, 336 A.2d 713 (N.J. 1975), *appeal dismissed & cert. denied*, 423 U.S. 808 (1975); *Town of Conover v. Jolly*, 177 S.E.2d 879 (N.C. 1970) (lack of statutory authority); *Davis v. McPherson*, 132 N.E.2d 626 (Ohio Ct. App. 1955); *Borough of Malvern v. Jackson*, 529 A.2d 96 (Pa. Commw. Ct. 1987). Several statutes prohibit the total exclusion of manufactured housing through zoning and development regulations. ARK. CODE ANN. § 14-54-1604(c) (may not prohibit); CAL. GOV'T CODE § 65852.3(a) (may not preclude from being installed as permanent residence); COLO. REV. STAT. § 30-28-115(3)(b)(I) (may not exclude manufactured homes that meet or exceed county building code standards); MICH. COMP. LAWS. § 125.2307(3) (shall not prohibit); MINN. STAT. § 394.25(3) (same); MISS. CODE ANN. § 17-1-39(2) (same, if located in some part of city or county); NEB. REV. STAT. § 14-402(2)(a) (may not prohibit if meet code standards); N.H. REV. STAT. ANN. § 674:32(I) (shall afford reasonable opportunities for siting and shall not exclude); N.C. GEN. STAT. § 160A-383.1(c) (effect of excluding); VA. CODE ANN. § 15.2-2290(B) (same). *But see* TEX. OCC. CODE ANN. § 1201.008 (may prohibit).

122. *See, e.g., Gackler Land Co. v. Yankee Springs Twp.*, 398 N.W.2d 393 (Mich. 1986) (held valid); *Osetek v. Barone*, 304 N.Y.S.2d 350 (N.Y. Sup. Ct. 1968); *Corning v. Town of Ontario*, 121 N.Y.S.2d 288 (N.Y. Sup. Ct. 1953); *Currituck County v. Willey*, 266 S.E.2d 52 (N.C. Ct. App. 1980). *But see Builders Service Corp. v. Town of East Hampton*, 545 A.2d 530 (Conn. 1988) (1,300-square-foot non-occupancy based minimum for single-family housing not rationally related to any legitimate zoning purpose). Several statutes authorize minimum size regulations. CAL. GOV'T CODE § 65852.3(a) (minimum square footage); COLO. REV. STAT. § 30-28-115(3)(a)(I)(B) (24x36 feet); IDAHO CODE § 67-6509A(4)(a) (1000 square feet); IND. CODE § 36-7-4-1106(b)(4) (minimum square footage); IOWA CODE § 414.28 (same); KY. REV. STAT. ANN. § 100.348(2)(d)(4) (900 square feet); MONT. CODE ANN. §§ 76-2-202, 76-2-302 (1,000 square feet); NEB. REV. STAT. § 14-402(2)(a)(i) (900 square feet); N.M. STAT. ANN. § 3-21A-2 (864 square feet); N.C. GEN. STAT. ANN. § 160A-383.1(d) (dimensional criteria); OR. REV. STAT. § 197.307(8)(a) (1000 square feet); WASH. REV. CODE § 35.63.160(1)(A) (12x36 feet). A leading case presumptively invalidating minimum house size requirements is *Home Builders League of S. Jersey, Inc. v. Berlin Twp.*, 405 A.2d 381 (N.J. 1979) (municipality has burden to show valid basis; ordinance invalid). *See also Builders Serv. Corp. v. Planning & Zoning Comm'n E. Hampton*, 545 A.2d 530 (Conn. 1988) (1300 square foot minimum held invalid). Earlier cases were mixed. *See Randy R. Koenders, Validity and Construction of Zoning Laws Setting Minimum Requirements for Floorspace or Cubic Footage Inside Residence*, 87 A.L.R.4th 294 (1991).

123. *See, e.g., Herrington v. Town of Mexico*, 398 N.Y.S.2d 818 (Sup. Ct. 1977) (prohibiting mobile homes except for original owner units manufactured less than one year prior to proposed date of placement; held invalid). Held authorized and not a taking, *Forest Glade Mgmt. v. City of Hot Springs*, 2008 WL 4876230 (Ark. Ct. App. Nov. 12, 2008). A few statutes authorize age requirements. CAL. GOV'T CODE § 65852.3(a) (discretionary preclusion "if more than [ten] years have elapsed between date of manufacture" and date of installation permit application); KY. REV. STAT. § 100.348(2)(d) (manufactured on or after July 15, 2002). Statutes may prohibit

standards should apply to manufactured housing. The next section considers this question.

### C. *Aesthetic Standards*

Manufactured housing raises aesthetic issues.<sup>124</sup> Aesthetic problems arise most frequently with single-wide manufactured housing, which can be flat-roofed, have vinyl or metal siding, and be rectangular in shape, though architectural changes such as porches can modify its appearance. Double-wide manufactured housing can be indistinguishable from traditional housing. Two types of ordinances deal with aesthetic issues.<sup>125</sup> One type, called a “look-alike” ordinance, requires new housing to look like existing housing in the neighborhood.<sup>126</sup> This type of ordinance enacts a design standard that requires compatibility with adjacent housing, and can be used to exclude manufactured housing. The problem is compatibility with nearby traditional housing, which usually does not have steel or vinyl exteriors or other features found on manufactured housing, such as flat roofs. This requirement guarantees incompatibility if manufactured housing tries to locate in a traditional housing neighborhood. A second type of ordinance is a design review ordinance that contains design standards that apply to all residential housing. They include design criteria<sup>127</sup> for architectural features, such as roofs and facades.<sup>128</sup> They would not necessarily exclude manufactured housing, but vague standards can allow exclu-

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age requirements. See FLA. STAT. ANN. § 320.8285 (6); ME. REV. STAT. ANN. tit. 30-A, § 4358(2)(D).

124. The requirement in the HUD Code, that manufactured housing be “built on a permanent chassis,” limits aesthetic treatment and increases costs. 42 U.S.C. § 5402(6) (definition of Manufactured Home); 24 C.F.R. § 3280.2 (same).

125. For discussion see LANE KENDIG, TOO BIG, BORING OR UGLY, AMERICAN PLANNING ASS’N, PLANNING ADVISORY SERV. REP. NO. 528 (2004). For discussion of free speech objections to aesthetic regulation see Kevin G. Gill, Note, *Freedom of Speech and the Language of Architecture*, 30 HASTINGS CONST. L.Q. 395 (2003); see also *Novi v. City of Pacifica*, 215 Cal. Rptr. 439 (Cal. Ct. App. 1985) (city rejected permit under ordinance requiring variety in design; free speech principles did not require objective criteria).

126. The converse of the “look-alike” ordinance is the “not-look-alike” or “dissimilarity” ordinance, which is intended to achieve variety. Because manufactured housing may look different from traditional housing, it may not be prohibited under this type of aesthetic ordinance.

127. These standards will have to be specific enough to avoid constitutional vagueness objections, and to prevent their application to exclude manufactured housing. See *infra* notes 187-188 and accompanying text.

128. Paola, Kansas, for example, uses the following anti-monotony measures: floor plan, orientation, roof lines, materials, architectural features, and color. PAOLA, KAN., LAND DEVELOPMENT ORDINANCE § 15.310, <http://www.cityofpaola.com/DocumentCenter/Home/View/144>.

sion.<sup>129</sup> Both ordinances require the appointment of a board, usually called an Architectural Review Board, to rule on proposals for new residential housing through administrative procedures. The boards often have qualified architects as members.

Both types of ordinances require courts to accept aesthetics as an acceptable basis for zoning regulation, but the regulation of aesthetics in zoning ordinances, though once disputed, is now settled. Aesthetics can be the only justification advanced to support a zoning regulation in almost half the states. The remaining states accept the use of aesthetics along with other factors.<sup>130</sup> In a few early cases, the courts upheld aesthetic “look alike” requirements for residential dwellings intended to achieve compatibility with adjacent traditional housing.<sup>131</sup>

Aesthetic standards for manufactured housing, rather than containing look-alike requirements or design criteria, identify housing features that must meet specified design requirements. Roof pitch and exterior treatment requirements are most common. They require a specified vertical height for each specified linear front footage of the dwelling, and specify the use of traditional exterior materials, such as wood, to prevent the use of vinyl or metal. These are highly specific regulations intended to deal with two of the common objections to manufactured housing.

These standards, such as an exterior treatment standard, are not justifiable aesthetically. There is no aesthetic reason, for example, why manufactured housing should have stone rather than steel exteriors. Communities would have difficulty adopting these standards for all residential housing, which equal treatment statutes require. A community might want to prohibit vinyl and metal everywhere, but flat roofs are a contemporary design that can be compatible with traditional

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129. For discussion of the vagueness problem, see DANIEL R. MANDELKER, *DESIGNING PLANNED COMMUNITIES* CH. 5 (2010), <http://landuselaw.wustl.edu/BookDPC/Designing%20Planned%20Communities.pdf>.

130. Kenneth Pearlman et al., *Beyond the Eye of the Beholder Once Again: A New Review of Aesthetic Regulation*, 38 *URB. LAW.* 1119 (2006). An important dictum endorsing aesthetic regulation in *Berman v. Parker*, 348 U.S. 26, 102-03 (1954) has had an important influence on the state decisions.

131. *State ex rel. Stoyanoff v. Berkeley*, 458 S.W.2d 305 (Mo. 1970); *Reid v. Architectural Bd. of Review of Cleveland Heights*, 192 N.E.2d 74 (Ohio Ct. App. 1963); *State ex rel. Saveland Park Holding Corp. v. Wieland*, 69 N.W.2d 217 (Wis. 1955); *see also Breneric Assoc.'s. v. City of Del Mar*, 81 Cal. Rptr. 2d 324 (Cal. Ct. App. 1998) (upholding denial of permit for addition to residence because inconsistent with existing structure and surrounding neighborhood). Ordinances may also require residential dwellings to be dissimilar rather than similar. *See Vill. of Hudson v. Albrecht, Inc.*, 458 N.E.2d 852 (Ohio 1984) (upholding ordinance that contained both similarity and dissimilarity requirements, as well as general design review standards).

housing.<sup>132</sup> The problem is whether aesthetic differences justify the exclusion of an affordable housing resource that is badly needed by lower-income families, or the higher costs that aesthetic regulation brings.

### 1. CASE LAW

Case law on aesthetic standards for manufactured housing is limited. Two cases upheld aesthetic standards as applied only to manufactured housing, dismissing unequal treatment objections. *Georgia Manufactured Housing Association, Inc. v. Spalding County*<sup>133</sup> held that a 4:12 roof pitch requirement that applied only to manufactured housing did not violate substantive due process or equal protection. It advanced the goal of “aesthetic compatibility” by requiring manufactured housing to conform to the standard characteristics of traditional housing. This holding assumes that traditional housing is the preferred aesthetic model, and that manufactured housing must conform. A federal district court upheld an ordinance that required exterior siding and roof shingles of a type commonly used in standard residential construction.<sup>134</sup> The court accepted the usual reasons for targeting manufactured housing, such as that maintenance of property values is an acceptable purpose. It also held that the ordinance attempted to improve the appearance of manufactured housing without reducing its availability or diversity, a questionable conclusion.

### 2. STATUTORY REGULATION

A substantial number of statutes authorize a variety of aesthetic standards for manufactured housing. Roof pitch and exterior siding are usually required.<sup>135</sup> Statutes in a few states authorize aesthetic standards only if

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132. See *Hankins v. Borough of Rockleigh*, 150 A.2d 63 (N.J. Super. Ct. App. Div. 1959) (invalidating ordinance prohibiting flat roofs as applied in area where flat-roofed dwellings already existed).

133. 148 F.3d 1304 (11th Cir. 1998); see also *Miss. Manufactured Hous. Ass'n v. Bd. of Sup'rs*, 878 So. 2d 180, 192 (Miss. Ct. App. 2004) (upholding requirement that manufactured housing must have greater roof pitch than barns in agricultural areas).

134. *CMH Mfg., Inc. v. Catawba Cty.*, 994 F. Supp. 697 (W.D.N.C. 1998) (holding no substantive due process or equal protection violation).

135. See, e.g., CAL. GOV'T CODE § 65852.3(a) (roof overhang; roofing material, and siding material not exceeding those required of traditional single-family dwellings); COLO. REV. STAT. § 30-28-115(3)(a)(I)(D) (brick, wood, or cosmetically equivalent exterior siding and a pitched roof); FLA. STAT. ANN. § 320.8285(6) (roofing and siding materials); IDAHO CODE § 67-6509A(4) (pitched roof no greater than 3:12; exterior siding and roofing in color, material and appearance similar to exterior siding and roofing material commonly used on residential dwellings in the community or comparable to predominant materials used on surrounding dwellings); IND. CODE § 36-7-4-1106(b) (roofing and siding standards); IOWA CODE §§ 414.28, 335.30 (visual compatibility of permanent foundation system with surrounding residential structures); KY. REV. STAT. ANN. § 100.348(3) (compatibility standards relating to architectural features with

they apply to traditional as well as manufactured housing, an equal treatment requirement.<sup>136</sup> Roof pitch requirements are detailed, and exterior siding must use materials found on surrounding dwellings. Local governments may adopt aesthetic standards when the statute authorizes them, but will have to look to implied statutory powers when explicit statutory authority is lacking, which is typical.<sup>137</sup> Statutory authority, of course, does not guarantee judicial acceptance, though acceptance is probable in most states.<sup>138</sup> Two statutes prohibit aesthetic standards.<sup>139</sup>

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significant impact on overall assessed value of the structure, including roof pitch and type and quality of exterior finishing materials); KY. REV. STAT. ANN. § 100.348(2)(a) (“compatibility standards” means standards to protect and preserve monetary value of real property); ME. REV. STAT. ANN. tit. 30-A, § 4358(2)(A) (pitched shingled roof, permanent foundation, and exterior siding residential in appearance); ME. REV. STAT. ANN. tit. 30-A, § 4358(1)(E) (pitched shingled roof means roof means roof with 2:12 pitch and covered with asphalt or fiberglass composition shingles or other materials, but not metal); MICH. COMP. LAWS ANN. § 125.2307(6) (“ensure that mobile homes compare aesthetically to traditional housing located or allowed in the same residential zone”); MISS. CODE ANN. § 17-1-39(2) (“reasonable appearance and dimensional criteria”); MONT. CODE ANN. §§ 76-2-202(4), 76-2-302(4) (“pitched roof and siding and roofing materials that are customarily, as defined by local regulations, used on traditional homes”); NEB. REV. STAT. § 14-402(2)(a) (minimum 2.5/12 roof pitch; exterior material color, material, and scale comparable with residential traditional, single-family construction; nonreflective roof material which is or simulates asphalt or wood shingles, tile, or rock); NEV. REV. STAT. ANN. § 461.260(3) (reserved to local jurisdictions); N.C. GEN. STAT. ANN. § 160A-383.1(d) (“appearance and dimensional criteria”); OR. REV. STAT. § 197.314(6) (parks under three acres; pitched roofs up to 3:12; exterior siding and roofing in color, material and appearance similar to exterior siding and roofing material commonly used on residential dwellings or comparable to predominant materials used on surrounding dwellings); WASH. REV. CODE § 35.63.160(1) (composition of wood shake or shingle, coated metal, or similar roof of nominal 3:12 pitch; “exterior siding similar in appearance to siding materials commonly used on conventional site-built uniform building code single-family residences”).

136. CAL. GOV'T CODE § 65852.3(a) (roofing material, and siding material not exceeding those required of traditional single-family dwellings); CAL. GOV'T CODE § 65852.5 (size requirements for a roof overhang, and size up to 16 inches if no size requirement); FLA. STAT. ANN. § 320.8285(6) (“must be reasonable, uniformly applied, and enforced without distinctions as to whether such housing is manufactured, located in a mobile home park or a mobile home subdivision, or built in a conventional manner”); WASH. REV. CODE ANN. § 36.01.225(1)(c) (“all local design standards applicable to all other homes within the neighborhood in which the manufactured home is to be located”).

137. *See, e.g., State ex rel. Stoyanoff v. Berkeley*, 458 S.W.2d 305 (Mo. 1970) (authority for “look-alike” design requirement implied from zoning statute).

138. Aesthetic regulations must be reasonable as applied. *Campbell v. Monroe County*, 426 So. 2d 1158, 1161 (Fla. Dist. Ct. App. 1983) (holding an ordinance requiring masonry construction for all housing in a residential zone could not be enforced against manufactured housing with stucco construction, when the county's building official admitted at trial there was no difference between manufactured housing built with stucco construction, and traditional housing built with masonry construction. The ordinance violated a statute providing that aesthetic requirements “must be reasonable and uniformly applied and enforced without any distinction as to whether such building is a conventionally constructed or manufactured building.”)

139. *See, e.g., Iowa Code* §§ 414.28 (shall not adopt design standards if housing complies with federal standards); MICH. COMP. LAWS § 125.2307(6) (“ordinance



### 3. RECOMMENDATIONS FOR STATUTORY REFORM

Statutory reform is needed to protect manufactured housing as an affordable housing resource from the exclusionary use of aesthetic standards. All states should adopt equal treatment requirements that prevent the adoption of aesthetic standards that apply only to manufactured housing.<sup>140</sup> They will prevent cases like *Spalding County*, which upheld unequal aesthetic regulation. If a community wants to have aesthetic standards or design review for manufactured housing, it should apply these requirements to all housing. They can include look-alike requirements and design standards to the extent that local law supports them.

Aesthetic standards can still present opportunities for exclusion, even if equal treatment requirements apply. Statutes can authorize zoning options that remedy this problem. One option, discussed earlier, is overlay residential zones that allow manufactured housing as a matter of right, and where compliance with design standards is not required.<sup>141</sup> The community can select areas where manufactured housing with flat roofs, or steel or vinyl siding, is compatible with existing traditional housing, or where incompatibility is excusable.<sup>142</sup>

#### D. *Approval as a Conditional Use*

The Standard Zoning Enabling Act authorized a board, typically a board of adjustment, to grant special exceptions, also called a conditional use, from the zoning ordinance.<sup>143</sup> States based their zoning statutes on the Standard Act, and all contain this authority. If manufactured housing is to be made available as an affordable housing resource, however, conditional use approval should not be required. Manufactured housing is single-family housing. Nothing about it justifies its designation as a conditional use in residential zones. Separate regulation can handle aesthetic issues.

Zoning ordinances often designate manufactured housing as a conditional use in single-family zones, however, so this section considers this requirement. The accepted understanding is that conditional uses are

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shall not contain roof configuration standards or special use zoning requirements that apply only to, or excludes, mobile homes”).

140. See, e.g., *Wright County v. Kennedy*, 415 N.W.2d 728, 731 (Minn. Ct. App. 1987) (minimum width and roof pitch requirements).

141. See Am. Planning Ass'n, *supra* note 112 and accompanying text.

142. For a case study of infill manufactured housing in Oakland, California, that includes single-wide housing see REGULATORY BARRIERS, *supra* note 12, at 43-70.

143. U.S. DEP'T OF COMMERCE, *supra* note 22. This article uses the term “conditional use.”

potentially allowable in a zoning district, but that their possible negative adverse effects require review to decide whether they are compatible in the district in which they plan to locate.<sup>144</sup> A day care center in a residential zone is an example. The zoning ordinance must provide the standards under which the zoning board reviews conditional uses; these are not contained in the zoning statute. This option allows local governments to decide on what standards it should adopt.

State courts can reverse conditional use denials when they occur. Their inclusion as a conditional use is a signal they are presumptively acceptable,<sup>145</sup> and that zoning boards should approve them if they meet the standards contained in the ordinance. A zoning board must approve a conditional use if ordinance standards are specific, such as structural standards, and the applicant complies with these standards. Approval is not mandatory if standards give the zoning board a broad amount of discretion, such as a standard that a proposed use must be compatible with adjacent property.<sup>146</sup> Broad discretionary standards also protect conditional use decisions from judicial attack under the due process clause of the federal constitution.<sup>147</sup>

A restraint here is that standards contained in an ordinance for approval must meet constitutional delegation of power requirements. An

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144. See *Cty. Council of Prince George's Cty. v. Zimmer Dev. Co.*, 120 A.3d 677, 691 n. 17 (Md. 2015) ("zoning device that provides a middle ground between permitted and prohibited uses"); *People's Counsel for Balt. Cty. v. Loyola Coll. in Maryland*, 956 A.2d 166, 197 (Md. 2008) ("[T]he local legislature puts on its 'Sorting Hat' and separates permitted uses, special exceptions, and all other uses").

145. See *Archdiocese of Portland v. Cty. of Wash.*, 458 P.2d 682, 686 (Or. 1969) (holding that "[T]he ordinance itself reveals the legislative plan forecasting the likelihood that certain specified uses will be needed to maximize the use of land in the zone for residential purposes. The Board's discretion is thus narrowed to those cases in which an application falls within one of the specified uses. The fact that these permissible uses are pre-defined and have the legislative endorsement of the governing body of the county as a tentative part of the comprehensive plan for the area limits the possibility that the Board's action in granting a permit will be inimical to the interests of the community."); see also *People's Council*, 965 A.2d at 197 ("The special exception is a valid zoning mechanism that delegates to an administrative board a limited authority to allow enumerated uses which the legislature has determined to be permissible absent any fact or circumstance negating the presumption.").

146. *Crooked Creek Conservation & Gun Club, Inc. v. Hamilton Cty. N. Bd. of Zoning Appeals*, 677 N.E.2d 544 (Ind. Ct. App. 1997) contains a good explanation of these principles.

147. See Daniel R. Mandelker, *Entitlement to Substantive Due Process: Old Versus New Property in Land Use Regulation*, 3 WASH. U.J.L. & POL'Y 61 (2000). Judicial attacks could claim a substantive due process violation if a denial did not have legitimate justifications. However, the entitlement rule means an applicant for a conditional use or other permit must have a right to receive the permit as the basis for judicial attack. There is no right to a conditional use if the ordinance contains broad discretionary standards under which the zoning board has discretion to approve or disapprove the conditional use.

ordinance is unconstitutional if it does not provide standards.<sup>148</sup> Judicial acceptance of “general welfare” standards is mixed. Courts overwhelmingly accept standards authorizing the board to reject conditional uses that will have negative external effects. A standard that the proposed use must be compatible with the surrounding area, or that it will not affect the value of surrounding properties is typical.<sup>149</sup> Courts have held some standards unacceptable, such as a standard that a proposed conditional use is a “public necessity.”<sup>150</sup>

Procedures under which zoning boards consider conditional uses are elementary in most states. The Standard Zoning Act required limited procedures, and only a few states require adjudicatory procedures that include notice and a hearing, the right to cross-examination and a requirement for findings of fact.<sup>151</sup> The American Planning Association’s proposed model land use legislation includes disciplined adjudicatory procedures for administrative reviews, like administrative reviews for conditional uses, which include these requirements.<sup>152</sup>

#### 1. CASE LAW

Approval as a conditional use is a common requirement for manufactured housing. Discretionary standards applied in undisciplined proceedings allow boards of adjustment to deny conditional use approval as a strategy for keeping manufactured housing out of the community. For example, in *Anderson v. Peden*,<sup>153</sup> the court upheld a conditional use denial in a single-family and agricultural zone. It rejected the

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148. *Summerell v. Phillips*, 282 So. 2d 450, 453 (La. 1973) (manufactured housing park); *Lakewood Estates, Inc. v. Deerfield Twp. Zoning Bd. of Appeals*, 194 N.W.2d 511, 512 (Mich. Ct. App. 1971) (trailer-coach park); or if the standards are inadequate, *Town of Windham v. LaPointe*, 308 A.2d 286 (Me. 1973) (same), or overbroad, *Chandler v. Town of Pittsfield*, 496 A.2d 1058 (Me. 1985) (maintenance of safe and healthful conditions, prevention and control of water pollution, control of building sites, protection of wildlife habitat and conservation of shore cover, without directing weight or effect to be accorded to various factors).

149. For discussion see Daniel R. Mandelker, *Delegation of Power and Function in Zoning Administration*, 1963 WASH. U.L.Q. 60, 67, 95 (1963). See, e.g., *Janas v. Town Bd. & Zoning Bd. of Appeals, Fleming*, 382 N.Y.S.2d 394, 397 (N.Y. App. Div. 1976) (addressing injurious to the neighborhood standard).

150. See, e.g., *Pioneer Trust & Sav. Bank v. McHenry County*, 241 N.E.2d 454, 81-82 (Ill. 1968) (mobile home park and sales agency; deprivation of private property).

151. See *Creten v. Bd. of Cty. Comm’rs*, 466 P.2d 263 (Kan. 1970) (holding that findings of fact are not required for conditional use decisions).

152. AMERICAN PLANNING ASSOCIATION, *GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE*, 10-17 to -52 (Stuart Meck, ed., 2002). For a discussion of the model legislation proposal and the procedures available in the Standard Zoning Act see Daniel R. Mandelker, *Model Legislation for Land Use Decisions*, 35 URB. LAW. 635 (2003).

153. 587 P.2d 59 (Or. 1978) (en banc). The dissenting opinion argued it would be difficult to convince some people that manufactured housing would “conserve and

applicant's argument that he was entitled to a conditional use as a matter of right if he met the standards contained in the ordinance. The court held "the ordinance contemplated the exercise of some range of discretion in allowing or denying conditional uses."<sup>154</sup> The statement of purpose in the ordinance authorized two of these discretionary standards.<sup>155</sup> One was whether the proposed use would "conserve and stabilize the value of adjacent property."<sup>156</sup> The other was whether it would be "an encouragement of the most appropriate use of land,"<sup>157</sup> which the court held was not an unconstitutional delegation of power.<sup>158</sup> The county could consider compatibility of appearance with surrounding structures as one element bearing in "appropriate use" without adopting this element in a prior rulemaking.<sup>159</sup>

This case is a typical judicial response to conditional use denials of manufactured housing.<sup>160</sup> Courts upheld conditional use denials for

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stabilize the value of adjacent property." Therefore, this criterion amounted to a prohibition of manufactured housing. *Id.* at 71.

154. *Id.* at 63. A city council may have even reserved broader powers to review conditional uses on policy grounds without adopting standards for the exercise of its discretion. *Liska N.Y., Inc. v. City Council of New York*, 19 N.Y.S.3d 461, 462 (N.Y. App. Div. 2015).

155. *Anderson*, 587 P.2d at 63. See also *Rolling Pines Ltd. P'ship v. City of Little Rock*, 40 S.W.3d 828 (Ark. Ct. App. 2001), for another generous interpretation of a conditional use provision to allow rejection of a conditional use for manufactured housing. *Contra Keiger v. Winston-Salem Bd. of Adjustment*, 178 S.E.2d 616 (N.C. 1971) (may not rely on purpose and intent clause of ordinance to deny conditional use).

156. *Anderson*, 587 P.2d at 63.

157. The court held this standard was "self-evident to the point of redundancy." *Id.* at 65.

158. See accord in manufactured housing cases, *Rolling Pines Ltd. P'ship*, 40 S.W.3d (Ark. Ct. App. 2001) (following *Anderson* and approving compatibility standard); *Hansen v. Ponticello*, 325 N.Y.S.2d 795, 797 (N.Y. App. Div. 1971) ("areas of the Town where conventional housing is already congregated and expanding") (denial of multi-family housing in residential district; standard required that conditional use "will not adversely affect the value of adjacent properties").

159. The court rejected an argument that the denial was "triggered primarily by the opposition of neighboring landowners" as not supported by the record. *Anderson*, 587 P.2d at 67-69.

160. For cases upholding conditional use denials for manufactured housing parks see *Pruitt v. Meeks*, 177 S.E.2d 41 (Ga. 1970) (need not shown, no provision for sewerage, commercial use included but not allowed, schools could not adjust, inconsistent with surrounding area, interfere with proper planning); see also *Johnson Cty. Plan Comm'n v. Fayette Bldg. Corp.*, 297 N.E.2d 899 (Ind. Ct. App. 1973) (flooding); *Jensen's, Inc. v. City of Dover*, 547 A.2d 277 (N.H. 1988) (traffic safety); *Borger v. Tomwamensing Twp. Zoning Bd. of Adjustment*, 395 A.2d 658 (Pa. Commw. Ct. 1978) (competent evidence on noise level, fire hazard, effect on neighboring property values, unacceptable highway congestion, effect on local police and fire services, sewage pollution, and would substantially alter the character of the surrounding area); *Byrum v. Bd. of Sup'rs of Orange Cty.*, 225 S.E.2d 369 (Va. 1976) (sufficient guidelines to exercise discretion to deny use); *Creten v. Bd. of County Comm'rs of Wyandotte Cty.*,

manufactured homes in several other cases, and relied on the same reasons the courts relied on when upholding an exclusion of manufactured housing from residential zones, such as a claim that the manufactured home would decrease property values.<sup>161</sup> In some cases, the court upheld the denial because the manufactured home was not “compatible” with the “character of the existing neighborhood.”<sup>162</sup> This approval standard prevents the approval of any manufactured home as a conditional use because incompatibility is inevitable if the court accepts the usual myths about manufactured housing. If one manufactured home is incompatible, then all manufactured homes are incompatible.<sup>163</sup>

Recall the Supreme Court case of *Cleburne v. Cleburne Living Center*,<sup>164</sup> discussed earlier, where the Supreme Court struck down a city’s refusal to grant a permit to a group home for the mentally retarded in a residential zone as a denial of equal protection.<sup>165</sup> The ordinance required a permit for group homes, but not for apartment houses,

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466 P.2d 263 (Kan. 1970) (special permit, adverse adjacent conditions and overwhelming protest). In most of these cases, the court upheld the denial based on substantial proof of adverse impacts.

161. *Rolling Pines Ltd. P’ship*, 40 S.W.3d at 834 (Ark. Ct. App. 2001) (five manufactured homes in subdivision of 26 site-built homes; “[P]lacement of manufactured homes was not compatible with the character of the existing neighborhood, which is one that is well-established and consists of modest, well-kept homes where all but one are brick-and-frame structures.”); see *Bd. of Cty. Comm’rs for Cecil Cty. v. Holbrook*, 550 A.2d 664, 669 (Md. 1988) (single-wide trailer in agricultural zone; “Board justifiably assumed that the conspicuous presence of a mobile home will lower adjacent property value.”); see also *Hansen*, 325 N.Y.S.2d (N.Y. App. Div. 1971) (denial in developing area of town); *Shaw v. Burleigh County*, 286 N.W.2d 792, 799 (N.D. 1979) (denial of second two-year temporary extension in residential district: board could have reasonable determined that extension would be detrimental to use or development of adjacent properties, and decrease the value of surrounding properties).

162. See cases cited *supra* note 160.

163. See *Gorham v. Town of Cape Elizabeth*, 625 A.2d 898, 904 (Me. 1993). The court upheld the denial of a conditional use for a multi-family housing in a residential area. The dissenting opinion commented, “the Board’s adoption of the theory that multi-family units devalue surrounding property effectively precludes approval of any plan proposing a multi-family unit, clearly contravening the legislative intent.” *Id.* at 904.

164. 473 U.S. 432 (1985); see *supra* notes 73-78 and accompanying text; see also DANIEL R. MANDELKER, *GROUP HOMES: THE SUPREME COURT REVIVES THE EQUAL PROTECTION CLAUSE IN LAND USE CASES, IN 1986 PROCEEDINGS OF THE INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN CH. 3* (1986).

165. The interested reader may wonder at this result, since it seems contrary to the rational basis standard of judicial review usually applied by the Supreme Court. Commentators, however, have viewed *Cleburne* as a departure from the standard norm, as it represents a group of cases in which the Court adopted a standard of equal protection “with bite.” See Gayle Lynn Pettinga, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 780 (1987); Gerald Gunther, *Foreword: In Search of an Evolving Doctrine on a Changing Court: A Model of New Equal Protection*, 86 HARV. L. REV. 1, 18, 19 (1972) (“(T)hese cases found bite in the equal

multiple dwellings, boarding and lodging houses and other uses similar to a group home. The Court held that negative attitudes, unsubstantiated by proper zoning factors, could not be the basis of treating group homes for the mentally retarded differently from similar dwellings that did not require a permit.<sup>166</sup> Though *Cleburne* applied to the denial of a permit for a group home, it clearly requires courts to reject denials of conditional uses for manufactured housing when they are based on negative attitudes and unsubstantiated zoning factors.

Courts struck down ordinances requiring neighbor consent for a permit for a manufactured housing permit but not for a permit for other dwellings,<sup>167</sup> and upheld the approval of a conditional use for a manufactured dwelling,<sup>168</sup> but the cases reversing conditional use denials have been about manufactured home parks.<sup>169</sup> These cases are a

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protection clause after explicitly voicing the traditional toothless minimum rationality standard.”). *But see supra* note 80.

166. *Cleburne*, 473 U.S. at 448.

167. *Janas v. Town Bd. & Zoning Bd. of Appeals, Fleming*, 382 N.Y.S.2d 394 (N.Y. App. Div. 1976) (void under due process); *Bashant v. Walter*, 355 N.Y.S.2d 39 (N.Y. Sup. Ct. 1974) (unlawful delegation of legislative or governmental authority to individuals); *Williams v. Whitten*, 451 S.W.2d 535 (Tex. App. 1970) (invalid delegation to adjoining landowners).

168. *Perez v. Garden Isle Cmty. Ass’n*, 882 So. 2d 217 (Miss. 2004) (no showing that criteria in ordinance not met; court relied on limited scope of judicial review); *see also In re McGlynn*, 974 A.2d 525 (Pa. Commw. Ct. 2009) (upholding approval of manufactured home park); *Gravin v. Zoning Bd. of Review of N. Kingstown*, 221 A.2d 109 (R.I. 1966) (same). *But see Leibring v. Planning Bd. of Newfane*, 34 N.Y.S.2d 236 (N.Y. App. Div. 1988) (reasons for approval conclusory).

169. *See Zoning Bd. of Adjustment of New Castle v. Dragon Run Terrace, Inc.*, 222 A.2d 315, 318 (Del. 1966) (rejection based in part on possibilities, such as possibility of pollution, and claims that the park would be detrimental to the non-urban development in the general area, be detrimental to the tax base and lower property values in the area); *Scherrer v. Bd. of Cty. Comm’rs of Wyandotte Cty.*, 441 P.2d 901 (Kan. 1968) (best usage for mobile home park); *Mulias v. City of Trenton*, 188 N.W.2d 37 (Mich. Ct. App. 1971) (service, planning and revenue reasons arbitrary); *Holasek v. Vill. of Medina*, 226 N.W.2d 900, 903 (Minn. 1975) (compliance with detailed ordinance requirements, and “absence of any record of the facts or legally sufficient reasons for both denials”); *Pleasant Valley Home Const., Ltd. v. Van Wagner*, 363 N.E.2d 1376 (N.Y. 1977) (community pressure directed against allowing any additional mobile home development in the area zoned for mobile homes); *Baxter v. Gillispie*, 303 N.Y.S.2d 290, 296 (N.Y. Sup. Ct. 1969) (conversion of garage to trailer park; “naked claim that the use will have a tendency to depreciate adjacent lands is insufficient to deny a special permit”; denial may not be “speculative, sentimental, personal, vague or merely an excuse to prohibit the use requested”); *Walworth Leasing Corp. v. Sterni*, 316 N.Y.S.2d 851 (N.Y. Sup. Ct. 1970) (rejecting traffic congestion and sociological effects); *In re Ellis*, 178 S.E.2d 77 (N.C. 1970) (all requirements of ordinance met; no suggestion of special hazard); *Clark v. City of Asheboro*, 524 S.E.2d 46 (N.C. Ct. App. 1999) (all conditions of ordinance met; fears of eyesore, crime and traffic not enough; no negative effect on adjacent property); *In re Application for Conditional Use Approval of Saunders*, 636 A.2d 1308 (Pa. Commw. Ct. 1994) (sewer and sewer requirements met; no showing that use would cause adverse impact not normally generated by the type of proposed use); *E. Manchester Twp.*

striking contrast to cases where courts upheld the denial of a conditional use for individual manufactured homes. They refused to accept fears that neighbors have about manufactured homes, did not accept objections based on the effect the manufactured home park would have on neighboring property values, and did not accept concerns about crime, traffic congestion, or sociological effects, among others. They also stressed the importance of the legislative designation of manufactured homes as a conditional use, put the burden of proof on objectors, and rejected speculative, personal, and vague objections. It is possible that courts treat manufactured home parks more favorably than individual manufactured homes because a park is a self-contained project that can avoid effects on neighboring property through setbacks and buffering perimeter treatments, but the cases do not make this distinction.

## 2. STATUTORY REGULATION

A few statutes deal with conditional use requirements for manufactured homes. Some are equal treatment statutes. California prohibits local governments from subjecting manufactured homes approved under the HUD Code to “any administrative permit, planning, or development process or requirement” that is different from what “would be imposed on a conventional single-family residential dwelling on the same lot.”<sup>170</sup> New Hampshire prohibits special exceptions or special permits for manufactured housing unless they are required “for single family housing located on individual lots or in subdivisions.”<sup>171</sup>

Other statutes deal with the availability of a conditional use. A Montana statute enacts a rebuttable presumption, in a permit proceeding to place manufactured housing in a residential zone, “that placement of a manufactured home will not adversely affect property values

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Zoning Hearing Bd. v. Dallmeyer, 609 A.2d 604 (Pa. Commw. Ct. 1992) (expansion; water requirements met; burden to show detrimental effect on health, safety and welfare not met); Appeal of Estate of Achey, 484 A.2d 874 (Pa. Commw. 1984), *aff'd sub nom. In re Estate of Achey*, 501 A.2d 249 (Pa. 1985) (proof of decrease in surrounding property values not enough); Zajac v. Zoning Hearing Bd. of Mifflin Twp., 398 A.2d 244 (Pa. Commw. Ct. 1979) (density concerns based on fears; claim that homes will be occupied by families of child-bearing age based on stereotyping; concerns about access to public roads, off-street parking and interior circulation not proved); Utility Constructors, Inc. v. Zoning Hearing Bd. of Sadsbury Twp., 28 Pa. D. & C.3d 132 (Pa. Com. Pl. 1982) (rejecting site planning objections and noncompliance with comprehensive plan), *aff'd on basis of lower court opinion*, 471 A.2d 944 (Pa. Commw. Ct. 1984).

170. CAL. GOV'T CODE § 65852.4. Architectural requirements are excepted.

171. N.H. REV. STAT. ANN. § 674:32(I).

of conventional housing.”<sup>172</sup> This statute prevents the denial of a permit based on neighbor opposition unless there is proof of facts to overcome the statutory presumption. Minnesota provides that a manufactured home park is a conditional use in a two-family zoning district.<sup>173</sup> These statutes are helpful, but the authority to designate manufactured housing as a conditional use demands comprehensive statutory reform.<sup>174</sup>

### 3. RECOMMENDATIONS FOR STATUTORY CHANGE

Statutes should not allow zoning ordinances to designate manufactured housing as a conditional use in single-family residential zones.<sup>175</sup> Nothing about manufactured homes distinguishes it from traditional single-family housing except possibly its appearance in some models, which zoning can handle through aesthetic standards. If statutes allow zoning ordinances to designate manufactured housing as a conditional use, they should revise how this authority is used. An initial problem is that manufactured housing is usually only one of many uses designated as a conditional use in the zoning ordinance, and the conditional use function needs reform for all conditional uses.

An equal treatment requirement is essential. Review standards in the zoning ordinance should apply equally to all conditional uses.<sup>176</sup> Equality of treatment will go a long way to prevent discrimination against manufactured housing through the denial of conditional use approvals. A more specific application of this requirement would prohibit the denial of a conditional use for manufactured housing in any zone in which multifamily residential uses are allowed.<sup>177</sup>

Statutes should also require ordinances to contain definite and specific standards for all conditional uses, which some states require.

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172. MONT. CODE ANN. §§ 76-2-202(2), 76-2-302(3).

173. MINN. STAT. § 394.25(3b).

174. The New Hampshire Supreme Court has held that requiring a special exception for manufactured housing does not violate statutory anti-exclusion provisions. *Mudge v. Precinct of Haverhill Corner*, 587 A.2d 603, 606 (N.H. 1991) (expansion of mobile home park); see N.H. REV. STAT. ANN. § 674:32.

175. Courts divide on whether the federal Fair Housing Act invalidates a conditional use requirement for group homes for the disabled because of the burdens it places on a disadvantaged class. Compare *United States v. Vill. of Palatine*, 37 F.3d 1230, 1234 (7th Cir. 1994) (holding it doesn't; “public input is an important aspect of [all] decision making”), with *Arc of New Jersey, Inc. v. New Jersey*, 950 F. Supp. 637, 646 (D.N.J. 1996) (holding a statute requiring conditional use permit for group homes with more than six persons was invalid). This argument is not likely to succeed as applied to manufactured housing.

176. For discussion of statutory equal treatment requirements see *supra* notes 87-94 and accompanying text.

177. See OR. REV. STAT. § 197.670(1)(b).



Idaho requires “clear and objective” standards and procedures that “shall not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay.”<sup>178</sup> Unfortunately, even this statutory requirement may allow vague standards, such as a requirement that a conditional use must be desirable to the public convenience and welfare and not detrimental to the value of surrounding property.<sup>179</sup>

Free speech law provides better direction. Cases reviewing standards for the approval of signs as conditional uses, whose messages the free speech clause protects, disapprove similar standards.<sup>180</sup> They require the sign ordinance to detail factors the board must consider when it includes more general standards, such as a compatibility or general welfare standard.<sup>181</sup> Statutes should adopt a similar requirement for conditional

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178. IDAHO CODE § 67-650 9A(5); *see also* OR. REV. STAT. ANN. § 197.307(4) (“[C]lear and objective standards, conditions and procedures regulating the development of needed housing on buildable land [which] may not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay.”); *Id.*, § 227.173(2) (“[S]tandards must be clear and objective on the face of the ordinance.”); *Id.*, § 215.416(8)(a) (counties).

179. *Lee v. City of Portland*, 646 P.2d 662, 665 (Or. Ct. App. 1982) (approving under Oregon’s “clear and objective” standards law a requirement that “the use at the particular location is desirable to the public convenience and welfare and not detrimental or injurious to the public health, peace or safety, or to the character and value of the surrounding properties,” and upholding approval of fire station as conditional use); *see Jacob Green, When Conditions Go Bad: An Examination of the Problems Inherent in the Conditional Use Permitting System*, 2014 B.Y.U. L. Rev. 1185 (2014).

180. *Desert Outdoor Advertising v. City of Moreno Valley*, 103 F.3d 814, 821 (9th Cir. 1996); *see accord Outdoor Sys. v. City of Merriam*, 67 F. Supp. 2d 1258, 1262 (D. Kan. 1999) (requirement that “all signs shall conform, generally, to the aesthetics of the immediate area in which they are placed”); *Macdonald Advertising Co. v. City of Pontiac*, 916 F. Supp. 644, 649 (E.D. Mich. 1995) (billboard, standards applied to all special exceptions: that the proposed development will not unreasonably injure the surrounding neighborhood or adversely affect the development of the surrounding neighborhood, and that any proposed building shall not be out of harmony with the predominant type of building in the particular district by reason of its size, character, location, or intended use); *City of Indio v. Arroyo*, 191 Cal. Rptr. 565, 567 (Cal. Ct. App. 1983) (sign’s relationship to overall appearance of subject property as well as surrounding community; compatible design, simplicity and sign effectiveness). *But see Wag More Dogs, LLC v. Cozart*, 680 F.3d 359, 373 (4th Cir. 2012) (upholding similar standards). *See generally* DANIEL R. MANDELKER, *FREE SPEECH LAW FOR ON PREMISE SIGNS* §2:8(3) (2012), <http://landuselaw.wustl.edu/BookFSL/MandelkerFreeSpeechLawforonPremiseSignsAug92012.pdf>.

181. *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064 (9th Cir. 2006). The sign permit standards required signs to be “compatible with other nearby signs, other elements of street and site furniture and with adjacent structures.” The ordinance provided a “limited and objective set of criteria” for the compatibility determination, stating that “[c]ompatibility shall be determined by the relationships of the elements of form, proportion, scale, color, materials, surface treatment, overall sign size and the size and style of lettering.” A requirement that reasons must be stated for decisions, a fourteen-day processing period, and the availability of an appeal to the city council helped support the validity of the ordinance.

use requirements in zoning ordinances. It is difficult to imagine, however, what special problems individual manufactured homes present in residential zones, since they would have to meet density and lot development standards. Aesthetics can be a contentious issue. A separate design review board with the required expertise is best qualified to handle aesthetic regulation, rather than the typically lay board of zoning appeals that considers conditional uses. If the zoning board considers aesthetic requirements as part of the conditional use review process, however, the zoning ordinance should detail the factors the board should take into account when making the aesthetic decision, as suggested earlier.<sup>182</sup>

The following statutory reforms will also make the conditional use procedure more receptive to manufactured housing:

*Conditions.* Zoning boards may impose conditions on their approval of a conditional use.<sup>183</sup> Conditional use approvals usually include conditions, which must relate to the physical characteristics of the use.<sup>184</sup> Statutes should go further, and require boards to consider and give acceptable reasons for rejecting conditions that would allow approval of a conditional use. A similar requirement is standard procedure under regulations for the National Environmental Policy Act. They authorize federal agencies to make a finding of no significant environmental impact if the agency adequately mitigates any environmental impacts of a proposed action or project that are significant.<sup>185</sup> This requirement, as applied to the review of conditional uses, would encourage zoning boards to adopt mitigating conditions that can avoid the rejection of a manufactured housing.

*Burden of proof and procedures.* A zoning ordinance must contain clear and objective standards for the review of conditional uses, so courts should find that applicants for conditional uses meet their burden of proof when they show compliance with these standards and are entitled to approval. The burden of proof should then shift to objectors, who would then have the burden to show that the applicant has not met the standards contained in the ordinance.<sup>186</sup> Statutes should reinforce this requirement by mandating disciplined adjudicatory procedures for

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182. See PAOLA, *supra* note 128, at 15-2.

183. U.S. DEP'T OF COMMERCE, *supra* note 22 at § 7; see sources cited *supra* note 23.

184. See, e.g., *Titman v. Zoning Hearing Bd. of Allentown*, 408 A.2d 166, 166-67 (Pa. Commw. Ct. 1979) (senior citizen housing; parking area).

185. DANIEL R. MANDELKER ET AL., NEPA LAW AND LITIGATION § 8:57 (2d ed. 2015).

186. See, e.g., *E. Manchester Twp. Zoning Hearing Bd. v. Dallmeyer*, 609 A.2d 604, 610 (Pa. Commw. Ct. 1992), holding that the burden of proof then shifts to objectors to show that the conditional use has "a generally detrimental effect on public health, safety and welfare or will conflict with the expressions of general policy

the consideration of conditional uses. They should include adequate notice that states the basis for a quasi-judicial hearing, from which the zoning board must produce findings of fact and conclusions of law.<sup>187</sup> As noted earlier, the American Planning Association's proposed model land use legislation includes disciplined adjudicatory procedures for administrative decisions, like decisions on conditional uses.<sup>188</sup>

*Housing Appeals Laws.* These statutory protections will help prevent arbitrary decision making in the consideration of conditional uses for manufactured housing. States should also consider, for manufactured and other affordable housing, a version of the housing appeals laws that some states have adopted. These laws allow an appeal to a court or state board that can override local government decisions, such as decisions on conditional uses, which reject or restrict affordable housing.<sup>189</sup> They shift the burden of proof to local government, which must justify its rejection or a conditional approval that makes the project economically infeasible. Under the Connecticut statute, for example, the decision must be "necessary to protect substantial public interests in health, safety or other matters which the

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contained in the ordinance." General welfare and similar standards are not allowable under the proposals made here.

187. See, e.g., OR. REV. STAT. ANN. § 227.173(3) ("Approval or denial of a permit application shall be based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, states the facts relied upon in rendering the decision and explains the justification for the decision based on the criteria, standards and facts set forth."). The statute should also require zoning boards to make a completeness determination on an application for a conditional use in a reasonable time, and should also require zoning boards to make their decision in a reasonable time. The APA model law includes these requirements. See AMERICAN PLANNING ASSOCIATION *infra* note 188.

188. AMERICAN PLANNING ASSOCIATION, GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE, 10-52 (Stuart Meck, ed., 2002).

189. For discussion see *id.* at 4-152; see also CONN. GEN. STAT. ANN. § 8-30g(f); MASS. GEN. LAWS ch. 40B §§ 20-23; R.I. GEN. LAWS §§ 45-53-1 to 45-53-8. Studies of the Massachusetts law found it has a positive effect on making affordable housing available. Sharon Perlman Krefetz, *The Impact and Evolution of the Massachusetts Comprehensive Permit and Zoning Appeals Act: Thirty Years of Experience with a State Legislative Effort to Overcome Exclusionary Zoning*, 22 W. NEW ENG. L. REV. 381, 384 (2001); see also Spencer M. Cowan, *Anti-Snob Land Use Laws, Suburban Exclusion, and Housing Opportunity*, 28 J. URB. AFF. 295, 305 (2006) (evaluating all three laws and finding they resulted in the creation of significantly more affordable housing in exclusionary communities). As applied to manufactured housing, the law should have a cutoff point so that it applies only to housing that does not exceed a price level considered affordable by families at a specified income level, such as eighty percent below the median income for the area.

commission<sup>190</sup> may legally consider,” public interests must clearly outweigh the need for affordable housing, and the commission must show that “public interests cannot be protected by reasonable changes to the affordable housing development.”<sup>191</sup> Speculative concerns are not enough.<sup>192</sup> An appeal should be available in cases in which a local government refuses to approve a conditional use for manufactured housing, or approves it with conditions.

#### IV. Additional Changes in the Preemption Section in the Federal Law

This article earlier proposed a change in the preemption section of the National Manufactured Home Construction and Safety Standards Act that would preempt any zoning that requires unequal treatment of manufactured housing.<sup>193</sup> Preemption should go further and prohibit or restrict other zoning restrictions that affect manufactured housing, such as exclusions from residential zones. The difficulty is deciding how much discretion local governments should have, and defining the scope and character of the federal interest.<sup>194</sup>

A statutory model for this kind of federal intervention is the Telecommunications Act of 1996, which limits local zoning of cellular towers and other personal wireless facilities to prevent arbitrary restrictions and decision making.<sup>195</sup> The statute does not authorize the

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190. “Commission” means a zoning commission, planning commission, planning and zoning commission, zoning board of appeals or municipal agency exercising zoning or planning authority. CONN. GEN. STAT. ANN. § 8-30g(a)(4).

191. *Id.* § 8-30g(g). The commission must be able to support these justifications in addition to proof, for example, that a denial is justified under a conditional use provision in a zoning ordinance.

192. *Avalon Bay Cmty., Inc. v. Plan. & Zoning Comm’n*, 930 A.2d 793, 851 (Conn. App. Ct. 2007) (inadequate gaps in traffic to allow drivers to exit from proposed development safely, inadequate recreational space, and safety concerns associated with bus stop not accepted). The remedial powers of the court are broad. *See West Hartford Interfaith Coal., Inc. v. Town Council of W. Hartford*, 636 A.2d 1342 (Conn. 1994) (trial court can order requested zone change and approve special development district designation).

193. *See supra* note 65 and accompanying text.

194. For discussion of these issues see Ashira Pelman Ostrow, *Process Preemption in Federal Siting Regimes*, 48 HARV. J. ON LEGIS. 289 (2011). Professor Ostrow examines a number of federal statutes that limit land use regulation.

195. 47 U.S.C.A. § 332(c)(7). For discussion of the statute see BRIAN W. BLAESSER & ALAN C. WEINSTEIN, *FEDERAL LAND USE LAW & LITIGATION* §§ 10.5-10.14 (2015 EDITION). Professor Ostrow believes this Act is a good example of federal intervention to control local land use regulation. *See Ostrow, supra* note 194. The Religious Land Use Law and Institutionalized Persons Act is another federal statute that places limits on local zoning, in this case on religious uses. *See Douglas Laycock & Luke W. Goodrich, RLUIPA: Necessary, Modest, and Under-Enforced*, 39 FORDHAM URB. L.J. 1021

federal agency, the Federal Communications Commission, to adopt zoning regulations for these facilities. Instead, it authorizes a cause of action to challenge local restrictions and decisions in court.<sup>196</sup> Congress adopted it to control land use restrictions on wireless facilities.

The Act contains restrictions on decision making procedures and substantive requirements. Governments must act on applications for wireless facilities in a reasonable time, and make denials in writing in a written record supported by substantial evidence.<sup>197</sup> The Act also contains standards and limitations that restrict substantive requirements. Local regulations may not “[p]rohibit or have the effect of prohibiting the provision of personal wireless services,”<sup>198</sup> and may not “[u]nreasonably discriminate among providers of functionally equivalent services.”<sup>199</sup>

Manufactured housing, which requires certification for quality under federal legislation, certainly demands as much federal statutory protection as wireless facilities. Congress should amend the preemption section to require decision making procedures at least equivalent to those required for wireless facilities. It should also add a requirement for clear and objective standards, and the additional procedural protections recommended by the APA model law.<sup>200</sup> A requirement for transparent and timely decisions under clearly stated standards should help prevent the use of zoning barriers for exclusion.

Congress can also adopt substantive prohibitions on zoning for manufactured housing similar to those contained in the Telecommunications Act.<sup>201</sup> The preemption provision should prohibit zoning

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(2012); Alan C. Weinstein, *The Effect of RLUIPA's Land Use Provisions on Local Governments*, 39 *FORDHAM URB. L.J.* 1221 (2012).

196. 47 U.S.C.A. § 332(c)(7)(B)(v).

197. *Id.* § 332(c)(7)(B)(ii) & (iii).

198. *Id.* § 332(c)(7)(B)(i)(II).

199. *Id.* § 332(c)(7)(B)(i)(I). The Act also does not allow government to “[a]ddress potential effects of nonionizing electromagnetic radiation.” *Id.* § 332(c)(7)(B)(iv).

200. See *supra* notes 186-188 and accompanying text.

201. The Act's limitations on substantive requirements have produced conflicting court decisions, partly because of complexities in the provision of wireless services. Manufactured housing does not present these problems. For discussion of the court decisions and problems in regulating wireless services see Benjamin L. Meersman, Note, *You Can't Hear Me Now: The Ambiguous Language of the Telecommunications Act of 1996's Tower Siting Provision*, 39 *J. CORP. L.* 437 (2014); Lucas R. White, *Untangling the Circuit Splits Regarding Cell Tower Siting Policy and 47 U.S.C. § 332(C)(7): When Is a Denial of One Effectively a Prohibition on All?*, 70 *WASH. & LEE L. REV.* 1981 (2013); Alexander W. Judd, *What Was Once Old Is New Again: Recent Developments in Judicial Review of Land Use Regulation of Cellular Telecommunications Facilities*, 46 *URB. LAW.* 865 (2014); Gordon Williams Jr., et al, *Municipal Regulation of Telecommunications: The Telecommunications Act of 1996 and the Facets of the Paradigm*, 28 *URB. LAW.* 745 (1996); James A. Kushner, *City Life in the Age of High Technology*,

barriers to manufactured housing such as exclusions from residential zones<sup>202</sup> or an entire community; requirements for the minimum size of a manufactured home; and a prohibition on manufactured homes over a certain age.<sup>203</sup> The equal treatment requirement in the preemption section will prohibit discriminatory zoning and refusals to rezone. A cause of action should be available to enforce these and the procedural requirements.

## V. Conclusion

Zoning treatment of manufactured housing is a national tragedy. Even if annual shipments continue only at the present rate of about 70,000 a year, 700,000 manufactured homes will ship in the next ten years. They face insurmountable zoning barriers in many states. These barriers, such as the unequal treatment of manufactured housing, exclusions from residential zones, the exclusionary use of aesthetic standards, and the denial of conditional use approval, are not justified. Arguments that the negative impacts of manufactured housing justify discriminatory zoning treatment are no longer true, or are illegitimate. Manufactured housing requires the same treatment that zoning ordinances give to traditional housing.

Case law generally supports these barriers, and state legislation that sometimes provides remedial protection is limited geographically and in scope. It requires revision to provide adequate protection against discriminatory local zoning. The Manufactured Housing National Safety and Construction Act authorizes a national code that has improved quality. The preemption preempts state and local building codes, but does not preempt restrictive zoning. Change is needed so that the statute preempts restrictive zoning regulation. Zoning acceptance of manufactured housing, a major affordable housing resource, requires reform.

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37 URB. LAW. 893 (2005); John Gibbons, *The Telecommunications Act of 1996 and its Impact on Municipal Regulation*, 28 URB. LAW. 737 (1996); see also Blaesser & Weinstein, *supra* note 195, §§ 10.7, 10.8.

202. See *supra* notes 95-124 and accompanying text.

203. See *supra* notes 121-123 and accompanying text.