

# THE YALE LAW JOURNAL

PATRICK E. REIDY, C.S.C.

## Churching NIMBYs: Creating Affordable Housing on Church Property

**ABSTRACT.** In recent years, faith communities across the United States have begun to create affordable housing on church property, inspired by sincerely held religious beliefs. Some are building microhomes behind their houses of worship. Others are converting residences once used by religious ministers – from rectories to abbeys to convents – into units for seniors and low-income families. Still others are repurposing their vacant schools, church parking lots, and undeveloped parcels of land for denser multifamily structures, from townhouses to apartment buildings. Within housing-advocacy circles and among faith communities, these continent-wide efforts to create affordable housing on church property have manifested an affirmative declaration: “Yes, In God’s Backyard.”

Legal scholarship and popular media have extensively documented the affordable-housing crisis. In particular, scholars and commentators have underscored the pernicious role of exclusionary zoning in strangling housing production, ultimately sending regional housing prices skyward. When faith communities create affordable housing on church property, much of which is located in residentially zoned areas, they seek something other than fair market value. Some might call it “charity” (*tzedakah*) or “discipleship,” a commitment to “welcome the stranger” or to “love your neighbor as yourself.”

Faith communities seek theologically and morally sound uses for their underutilized property, but often struggle to overcome the regulatory and financial hurdles of adaptive reuse. Local governments can incentivize redevelopment that benefits the wider community, growing their affordable housing supply. But their mutual benefit does not exempt faith communities from challenge when they choose to redevelop church property for affordable housing. Neighbors may seek to thwart faith communities from introducing denser, multifamily residential structures in their backyard, relying on land-use restrictions designed to prohibit less costly forms of housing. When they succeed, these challenges from NIMBY (“Not In My Backyard”) neighbors can limit both housing supply and the free exercise of religion.

This Feature thus proposes a novel response to exclusionary zoning: religious liberty. Where sincerely held religious beliefs inspire faith communities’ efforts to create affordable housing, these communities can assert constitutional and statutory free exercise protections against land-use decisions that obstruct denser, less expensive, multifamily developments on church land. This Feature also explores municipal and state legislative reforms that lower the barrier where faith communities struggle to overcome the regulatory and financial hurdles of adaptive reuse and demonstrates the breadth of potential for affordable housing on church property, drawing



on public sources and a novel data set to map parcels owned by Roman Catholic dioceses in Chicago, Illinois and Oakland, California across municipal zones.

Regardless of how faith communities came to own property within their limits, or why faith communities seek to repurpose property within their limits, most local governments need property within their limits to create affordable housing. And faith communities are willing partners in their endeavor.

**AUTHOR.** Associate Professor of Law, Notre Dame Law School; Faculty Director, Church Properties Initiative, Fitzgerald Institute for Real Estate; Priest of the Congregation of Holy Cross. I received valuable feedback on this project from participants in the Notre Dame Law School Faculty Colloquium and the Fitzgerald Institute for Real Estate Church Properties Conference. I offer my heartfelt thanks to Stephanie Barclay, Sadie Blanchard, Molly Brady, Samuel L. Bray, Christian Burset, G. Marcus Cole, Michael Francus, Nicole Stelle Garnett, Richard W. Garnett, Sherif Girgis, Michael A. Helfand, Bruce Huber, Daniel B. Kelly, James J. Kelly Jr., Meredith Holland Kessler, Maria Maciá, Daniel Markovits, Lloyd Hitoshi Mayer, Stefan McDaniel, John Meiser, Paul B. Miller, Daniel Moore, Jeffrey Pojanowski, Claire Priest, Carol M. Rose, Michael Schierl, David N. Schleicher, Noel W. Sterett, Jay Tidmarsh, Avishalom Tor, and Francisco J. Urbina for their insightful comments and instructive suggestions. My thanks extend to Christopher D’Urso, Natasha Reifenberg, and Jonathan Perez-Reyzin, whose masterful editing and relentless encouragement brought this Feature to life. I remain indebted to Madeline Johnson, our Program Manager for the Church Properties Initiative, who offered joyful and indefatigable assistance in collecting, evaluating, and mapping church property data for this project. For any errors, *mea culpa*.



## FEATURE CONTENTS

INTRODUCTION	1257
I. THE AFFORDABLE HOUSING CRISIS AND HOUSES OF WORSHIP	1264
A. America’s Housing Crisis and Land-Use Regulation	1267
B. Crisis of Houses of Worship	1277
II. AFFORDABLE HOUSING ON CHURCH PROPERTY	1282
A. Yes, In God’s Backyard	1284
B. Development Potential on Church Property	1293
1. Archdiocese of Chicago	1297
2. Diocese of Oakland	1300
C. Reforming Land-Use Regulation Through Legislation	1303
III. RELIGIOUS LIBERTY AND AFFORDABLE HOUSING	1310
A. <i>Mast v. Fillmore County</i>	1315
B. Scrutinizing Exceptions to Zoning	1319
C. Defining the “Religious Exercise” of Faith Communities Creating Affordable Housing on Church Property	1321
D. Discerning the “Substantial Burden” on Faith Communities Creating Affordable Housing on Church Property	1325
CONCLUSION	1332

Is this not the fast that I choose: releasing those bound unjustly, untying the thongs of the yoke; setting free the oppressed, breaking off every yoke? Is it not sharing your bread with the hungry, bringing the afflicted and the homeless into your house; clothing the naked when you see them, and not turning your back on your own flesh? Then your light shall break forth like the dawn . . . .

— Isaiah 58:6-8<sup>1</sup>

## INTRODUCTION

In July 2021, Glencliff United Methodist Church welcomed individuals and families experiencing homelessness into twenty-two microhomes behind its South Nashville sanctuary.<sup>2</sup> In offering a portion of her church’s land for “The Village at Glencliff,” Reverend Ingrid McIntyre hoped to create “a new space . . . for the people she encountered every day trying to survive on Nashville’s streets,” unable to afford the exorbitant price of local housing.<sup>3</sup> The Village aims to nurture a “loving, hospitable, compassionate and rehabilitative community for our friends who are transitioning . . . toward permanent supportive housing.”<sup>4</sup> For members of Glencliff United Methodist Church, efforts to provide transitional housing on church property are part of their Christian discipleship, an uplifting religious mission that reaches beyond the walls of their sanctuary.<sup>5</sup>

This mission reaches outside the sanctuary because communities of faith gather for more than worship. Across the United States, churches like Glencliff serve the spiritual and corporal needs of believers and unbelievers alike, educating the young in schools, feeding the hungry in soup kitchens, welcoming the homeless in shelters, caring for the sick in clinics, and burying the dead in

- 
1. *Isaiah 58:6-8* (New American Bible, Revised Edition).
  2. Jordan Whittington, *Nashville District Welcomes New Community of Tiny Homes for Homeless*, WZTV NASHVILLE (July 19, 2021), <https://fox17.com/news/local/inside-look-nashville-district-opens-new-community-of-tiny-homes-for-homeless-village-at-glencliff-ginny-welsch-district-16-housing-crisis-crime-property> [<https://perma.cc/A3Q9-MY6V>].
  3. *About Us*, VILL. GLENCLIFF, <https://www.villageatglencliff.org/about> [<https://perma.cc/CG74-G7P8>].
  4. *Fact Sheet: Village at Glencliff*, OPEN TABLE NASHVILLE, <http://opentablenashville.org/wp-content/uploads/2017/03/Village-At-Glencliff-Fact-Sheet.pdf> [<https://perma.cc/R2W5-NK6N>].
  5. Holly Meyer, *Nashville Church’s Tiny Home Village Faces Zoning Challenge*, TENNESSEAN (May 17, 2017, 8:00 AM CT), <https://www.tennessean.com/story/news/2017/05/17/nashvilles-churchs-tiny-home-village-faces-zoning-challenge/322126001> [<https://perma.cc/D6J9-SYUN>].

cemeteries.<sup>6</sup> These ministries on church-owned property flow from the same religious belief given ritual expression in worship.<sup>7</sup> Faith communities discern how to use their property based on what their theological and moral convictions require.

In recent years, these convictions have inspired numerous faith communities to create affordable housing on church property. Some, like Glencliff, have built microhomes behind their houses of worship.<sup>8</sup> Others have converted housing once used by religious ministers—from rectories to abbeys to convents—into low-income residences.<sup>9</sup> Still others are repurposing their vacant schools, church parking lots, and undeveloped parcels of land for affordable-housing units, both permanent (e.g., low-income senior housing) and temporary (e.g., emergency shelters).<sup>10</sup> Within housing-advocacy circles and among faith communities, these continent-wide efforts to create affordable housing on church property have manifested an affirmative declaration: “Yes, In God’s Backyard.”<sup>11</sup>

- 
6. This Feature uses the term “church” broadly to refer to those properties where people of any bona fide religion gather for worship. It does not examine the process by which courts define what constitutes a bona fide religion.
  7. In Roman Catholic churches, for example, “ministries” are largely guided by the “Corporal Works of Mercy” (e.g., feeding the hungry, giving drink to the thirsty, sheltering the homeless, visiting the sick, burying the dead) and the “Spiritual Works of Mercy” (e.g., comforting the sorrowful, counseling the doubtful, instructing the ignorant). See *The Corporal Works of Mercy*, U.S. CONF. CATH. BISHOPS, <http://www.usccb.org/beliefs-and-teachings/how-we-teach/new-evangelization/jubilee-of-mercy/the-corporal-works-of-mercy.cfm> [<https://perma.cc/TY2V-WHDK>]; *The Spiritual Works of Mercy*, U.S. CONF. CATH. BISHOPS, <http://www.usccb.org/beliefs-and-teachings/how-we-teach/new-evangelization/jubilee-of-mercy/the-spiritual-works-of-mercy.cfm> [<https://perma.cc/YGW5-6Q73>].
  8. See, e.g., Jennifer Brinker, *Tiny House Resident Finds Security in Her Home, Support from St. Patrick Center*, ST. LOUIS REV. (Apr. 22, 2021), <https://www.archstl.org/tiny-house-resident-finds-security-in-her-home-support-from-st-patrick-center-6416> [<https://perma.cc/8SBJ-74GP>].
  9. See, e.g., *Saint Casimir Parish*, QUO VADIS CATH., <https://www.qvcatholic.com/southbend/southbend> [<https://perma.cc/62FH-62KL>]; *Mercy Housing California Converts OC Nunnery into 50 Affordable Homes*, REAL DEAL (June 14, 2023), <https://therealdeal.com/la/2023/06/14/mercy-housing-california-converts-oc-nunnery-into-50-affordable-homes> [<https://perma.cc/J4M5-J7BL>].
  10. See, e.g., Riley Cooke, *Jordan Court, Affordable Housing Community for Seniors, Opens in North Berkeley*, DAILY CALIFORNIAN (May 9, 2022), <https://www.dailycal.org/2022/05/09/jordan-court-affordable-housing-community-for-seniors-opens-in-north-berkeley> [<https://perma.cc/U9UU-M6SQ>]; *Affordable Housing Begins with a Key*, CATH. CHARITIES USA, <https://www.catholiccharitiesusa.org/affordablehousing> [<https://perma.cc/LQS7-GTCB>].
  11. See, e.g., Clara Pasioka, *‘Yes, In God’s Backyard’: Affordable Housing Proposed on Site of Scarborough Church*, CBC (July 19, 2022), <https://www.cbc.ca/news/canada/toronto/yes-in-gods-backyard-wexford-united-church-1.6524598> [<https://perma.cc/4R2Y-54A2>].

Faith communities can breathe new life into their underutilized property by creating affordable housing. And local governments can grow their affordable housing supply by allowing faith communities such adaptive reuse. But such mutual benefit does not exempt faith communities from challenge when they choose to redevelop their property for affordable housing. Neighbors may seek to thwart faith communities like Glenclyff from introducing denser, multifamily housing in their backyards.<sup>12</sup> When they succeed, these challenges from NIMBY (“Not In My Backyard”) neighbors can altogether limit new housing construction and the free exercise of religion, contributing to America’s affordable-housing crisis.

The affordable-housing crisis has been extensively documented in legal scholarship and popular media. In particular, scholars and commentators have underscored the pernicious role of exclusionary zoning—that is, local land-use controls designed to prohibit the construction of less costly forms of housing—in strangling housing production, ultimately sending regional housing prices skyward.<sup>13</sup> As Professor Robert C. Ellickson argues in his new book, “Low-visibility zoning controls constitute what is likely the most consequential regulatory program in the United States.”<sup>14</sup> Proposals seeking to permit greater residential density, particularly in neighborhoods of existing single-family homes, largely fail at city hall.<sup>15</sup>

While many exclusionary practices, both past and present, have been motivated by racism and classism, local homeowners’ interest in fiscal advantage remains a principal catalyst for exclusion.<sup>16</sup> Exclusionary policies can raise home values. Where schools are funded primarily by local property taxes, “measures that prevent the construction of least-cost housing deter entry by those who would not pay their own way.”<sup>17</sup> When suburbs have “few close counterparts, exclusion can enable homeowners to drive up the value of their houses by

---

12. See, e.g., Adhiti Bandlamudi, *California Churches Want to Build Affordable Housing on Their Land, So Why Is It So Hard?*, KQED (Aug. 18, 2022), <https://www.kqed.org/news/11922784/california-churches-want-to-build-affordable-housing-on-their-land-so-why-is-it-so-hard> [<https://perma.cc/PUS3-P3W7>]; Meyer, *supra* note 5.

13. ROBERT C. ELICKSON, *AMERICA’S FROZEN NEIGHBORHOODS: THE ABUSE OF ZONING* 5-6 (2022) (“Virtually all of the hundreds of legal scholars who have assessed exclusionary zoning practices have condemned them.”); see *infra* Section I.A (discussing this scholarship).

14. *Id.* at 1.

15. *Id.* at 2-3.

16. *Id.* at 10 (“Prospects of gain may tempt a homeowner who is neither a classist nor a racist to support exclusion.”).

17. *Id.* at 10 (citing Bruce W. Hamilton, *Zoning and Property Taxation in a System of Local Governments*, 12 URB. STUD. 205 (1975)).

preventing the construction of competing units.”<sup>18</sup> As zoning issues arise in established neighborhoods, local officials typically defer to residents living closest by, who standardly prefer to maintain the status quo.<sup>19</sup>

Affordable-housing advocates and legal scholars suggest that state legislatures and Congress should correct local zoning abuses. Where local governments zone without concern for effects on regional housing consumers, states can preempt their power to zone, freeing state judiciaries to decide against exclusionary practices. Federal aid for housing vouchers and state agencies established to address local zoning issues can bolster these state-level efforts.<sup>20</sup> But such solutions presume that property owners in residentially zoned areas all think alike, seeking to drive up their properties’ value by preventing new housing construction.

When faith communities create affordable housing on church property, much of which is located in residentially zoned areas, they seek something other than fair market value. Some might call it “charity” (*tzedakah*) or “discipleship,” a commitment to “welcome the stranger,” or to “love your neighbor as yourself.” Certainly, religious institutions have vast and diverse *in rem* portfolios, and – for various economic, sociological, and demographic reasons – many properties owned by them are underutilized.<sup>21</sup> Not every property can be repurposed for every use; indeed, some faith traditions prohibit certain future uses of church property as theologically or morally illicit.<sup>22</sup> But where affordable housing remains an acceptable use, communities of faith should be allowed to repurpose their property.

This Feature thus proposes a novel response to exclusionary zoning: religious liberty. Where sincerely held religious belief inspires faith communities’ efforts to create affordable housing, these communities can assert the free-exercise protections of the First Amendment<sup>23</sup> and the Religious Land Use and

---

18. *Id.*

19. *Id.* at 13.

20. *Id.* at 14.

21. For example, the Roman Catholic Church is “one of the largest, if not the largest, nongovernmental landowners in the world,” with an estimated 177 million acres in property holdings. Timothy Schuler, *Mapping One of the World’s Largest Landowners*, CURBED (Oct. 18, 2017, 8:00 AM EDT), <https://archive.curbed.com/2017/10/18/16483194/catholic-church-gis-good-lands-esri-molly-burhans> [<https://perma.cc/2ZUT-9W6M>]; see also *Making Land Work for Good*, GOODLANDS, <https://good-lands.org> [<https://perma.cc/E4SP-6CR6>] (providing a plan for the Church to use its land for the common good).

22. See Nicole Stelle Garnett & Patrick E. Reidy, C.S.C., *Religious Covenants*, 74 FLA. L. REV. 821, 825 (2022).

23. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”).

Institutionalized Persons Act<sup>24</sup> (RLUIPA) against land-use decisions that obstruct denser, less expensive, multifamily developments on church land.<sup>25</sup>

In particular, RLUIPA's "substantial burden" provision explicitly draws together religious exercise and land use:

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution – (A) is in furtherance of a compelling government interest; and (B) is the least restrictive means of furthering that compelling governmental interest.<sup>26</sup>

Under RLUIPA, "land use regulation" denotes "a zoning or landmarking law . . . that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land . . ."<sup>27</sup> And while courts often construe "religious exercise" relative to church property in line with worship and ritual,<sup>28</sup> RLUIPA offers a capacious definition: "The term

24. 42 U.S.C. §§ 2000cc to 2000cc-5 (2018).

25. This Feature focuses on *federal* constitutional and statutory religious-liberty protections in the land-use context. Faith communities may also assert the free-exercise protections contained in state constitutions, as well as state Religious Freedom Restoration Acts (RFRA). *See, e.g.*, COLO. CONST. art. 2, § 4 ("The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever hereafter be guaranteed . . ."); IND. CONST. art. I, §§ 2-4 ("No law shall, in any case whatever, control the free exercise and enjoyment of religious opinions . . ."); PA. CONST. art. I, § 3 ("All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences . . ."); 775 ILL. COMP. STAT. 35/1-35/99 (2022) (Illinois RFRA); IND. CODE § 34-13-9-9 (2022) (Indiana RFRA).

26. 42 U.S.C. § 2000cc(a)(1) (2018). Following the Supreme Court's decision in *City of Boerne v. Flores*, 508 U.S. 507 (1997), declaring the Religious Freedom Restoration Act (RFRA) unconstitutional as applied to the states, congressional hearings investigating state and local restrictions on religious exercise unearthed statistical and anecdotal evidence revealing widespread discrimination against faith communities in land-use decisions. The Religious Land Use and Institutionalized Persons Act (RLUIPA) applied RFRA's strict-scrutiny protections to land use. *See* Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions*, 28 HARV. J.L. & PUB. POL'Y 501, 510 (2005).

27. 42 U.S.C. § 2000cc-5(5) (2018).

28. *See* Patrick E. Reidy, C.S.C., Note, *Condemning Worship: Religious Liberty Protections and Church Takings*, 130 YALE L.J. 226, 238 (2020) ("[E]ven when courts construe religious liberty protections narrowly, they tend to safeguard 'key religious activities' considered fundamental to religion, 'including the conducting of worship services and other religious ceremonies and



‘religious exercise’ includes *any* exercise of religion, *whether or not* compelled by, or central to, a system of religious belief,” and “[t]he use, building, or conversion of real property for religious exercise *shall be considered to be* religious exercise of the person or entity that uses *or intends to use* the property for that purpose.”<sup>29</sup>

As with many topics exploring the intersection of property law and religion, there is scant legal scholarship about faith communities repurposing their property for housing, and legal scholars have yet to evaluate the practical, theoretical, or doctrinal contours of “Yes, In God’s Backyard.”<sup>30</sup> The literature on religious liberty and church property primarily focuses on litigation involving faith communities seeking to enter residential zones and their efforts to create houses of worship or other ministries within those areas.<sup>31</sup> This Feature aims to bolster the

---

rituals.’ This framework renders courts receptive to arguments defining religious exercise by the spaces and structures in which religious worship, ceremonies, and rituals take place.” (quoting *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 199 (2012) (Alito, J., concurring)).

29. 42 U.S.C. § 2000cc-5(7)(A) to (B) (2018) (emphasis added).
30. Scholarly commentary addressing RLUIPA and religious land use has yet to grapple with the Supreme Court’s recent free-exercise decisions, rendering some of it less instructive. See, e.g., John Infranca, *Institutional Free Exercise and Religious Land Use*, 34 *CARDOZO L. REV.* 1693 (2013); Bram Alden, *Reconsidering RLUIPA: Do Religious Land Use Protections Really Benefit Religious Land Users?*, 57 *UCLA L. REV.* 1779 (2010); Angela C. Carmella, *RLUIPA: Linking Religion, Land Use, Ownership and the Common Good*, 2 *ALB. GOV’T L. REV.* 485 (2009); Shelley Ross Saxer, *Faith in Action: Religious Accessory Uses and Land Use Regulation*, 2008 *UTAH L. REV.* 593 [hereinafter Saxer, *Faith in Action*]; David L. Abney, *Religion and Housing for the Homeless: Using the First Amendment and the Religious Land Use Act to Convert Religious Faith into Safe, Affordable Housing*, 8 *SCHOLAR 1* (2005); Shelley Ross Saxer, *When Religion Becomes a Nuisance: Balancing Land Use and Religious Freedom When Activities of Religious Institutions Bring Outsiders into the Neighborhood*, 84 *KY. L.J.* 507 (1996). One exception is *Canopy Forum*, a digital publication of the Center for the Study of Law and Religion at Emory University, which recently hosted a conference on the topic. See *Religion, Property Law, and the Crisis of Houses of Worship*, *CANOPY F.* (May 3, 2023), <https://canopyforum.org/religion-property-law-the-crisis-of-houses-of-worship> [<https://perma.cc/N6P9-4ACG>]. The Turner Center for Housing Innovation at the University of California, Berkeley has also published an instructive policy brief on the topic. See David Garcia & Eddie Sun, *Mapping the Potential and Identifying the Barriers to Faith-Based Housing Development*, *TURNER CTR. FOR HOUS. INNOVATION* (May 18, 2020), [https://turnercenter.berkeley.edu/wp-content/uploads/2020/08/Mapping\\_the\\_Potential\\_and\\_Identifying\\_the\\_Barriers\\_to\\_Faith-Based\\_Housing\\_Development\\_May\\_2020.pdf](https://turnercenter.berkeley.edu/wp-content/uploads/2020/08/Mapping_the_Potential_and_Identifying_the_Barriers_to_Faith-Based_Housing_Development_May_2020.pdf) [<https://perma.cc/9FY6-NTJC>].
31. See generally Lucien J. Dhooge, *A Case Law Survey of the Impact of RLUIPA on Land Use Regulation*, 102 *MARQ. L. REV.* 985 (2019) (providing an empirical analysis of RLUIPA claims); Rachel Scall, *Bring out Your Dead: An Examination of the Possibilities for Zoning out Cemeteries Under RLUIPA*, 24 *N.Y.U. ENV’T L.J.* 111 (2016) (arguing that municipalities must craft land-use restrictions carefully when zoning cemeteries to avoid RLUIPA’s “substantial burden” provision); Ashira Pelman Ostrow, *Judicial Review of Local Land Use Decisions: Lessons from RLUIPA*, 31 *HARV. J.L. & PUB. POL’Y* 717 (2008) (arguing that RLUIPA is significant because it revives a bifurcated approach to judicial review that can be applied to all land-use decisions).

scholarly conversation, revealing how church property and religious liberty can be powerfully transformative assets where local land-use regimes have limited housing growth and less costly forms of housing. While providing tools for housing advocates to develop new residential options in the face of persistent exclusionary zoning, this Feature offers multiple models for faith communities seeking theologically and morally sound uses for their underutilized property.

Part I explores the phenomenon of exclusionary zoning, surveying scholarly literature that details how local land-use controls have created barriers to less costly forms of housing, strangled housing production nationwide, and driven up regional housing prices. This Part also discusses how faith communities and local governments can mutually benefit from efforts to repurpose and redevelop underutilized church property, given the thousands of houses of worship closing across the country.

Part II introduces the faith-based movement to create affordable housing on church property. After unpacking the theological and practical convictions that inspire faith communities to repurpose their property (“Yes, In God’s Backyard”), this Part demonstrates the breadth of potential for affordable housing on church property, drawing on public sources and a novel data set to map parcels owned by Roman Catholic dioceses in Chicago, Illinois and Oakland, California across municipal zones. Part II then explores municipal and state legislative reforms that lower the barrier where faith communities struggle to overcome regulatory and financial hurdles of adaptive reuse.<sup>32</sup> Such legislation can loosen land-use restrictions that NIMBY neighbors might otherwise use to obstruct denser, less expensive, multifamily residential structures on church land. It can also provide density bonuses and other development incentives for faith communities to create affordable housing on their underutilized property.

Part III defines the constitutional and statutory religious-liberty protections that faith communities could use to challenge exclusionary zoning, examining how the Supreme Court’s religious-liberty precedent should direct judges and local governments when zoning regulations conflict with faith communities’ free exercise of religion. In particular, *Mast v. Fillmore County* – a case almost entirely unexamined in legal scholarship – reveals how strict scrutiny is meant to operate under RLUIPA, when zoning regulations and religious land uses conflict.<sup>33</sup> Part

---

32. See, e.g., Affordable Housing Development on Religious Organization Property, H.B. 1377, 2019 WASH. SESS. LAWS 1074; Seattle, Wash., Ordinance 126384, § 1(B) (2020) [hereinafter Ordinance 126384]; SAN DIEGO, CAL., MUN. CODE art. 1, div. 6, § 141.0602(b)(2) (2023); CAL. GOV’T CODE § 65913.6 (West 2020); PASADENA, CAL., CODE OF ORDINANCES, § 17.50.230 (2022); S.B. 4, 2023–2024 Leg., Reg. Sess. (Cal. 2022).

33. 141 S. Ct. 2430 (2021) (mem.). To date, Professor Josh Blackman has offered the fullest treatment of *Mast* and its potential “post-*Fulton* roadmap for Free Exercise Clause cases.” Josh

III discusses how courts define the “religious exercise” of faith communities creating affordable housing on church property before recommending a test that courts can use to discern whether land-use restrictions impose a “substantial burden” on faith communities.<sup>34</sup> Where sincerely held religious belief inspires their efforts, RLUIPA and the First Amendment should protect faith communities from NIMBY neighbors using land-use restrictions to obstruct denser, multifamily developments on church land.<sup>35</sup> Regardless of how faith communities came to own property within their limits, or why faith communities seek to re-purpose property within their limits, most local governments need property within their limits to create affordable housing. And faith communities are willing partners in their endeavors.

## I. THE AFFORDABLE HOUSING CRISIS AND HOUSES OF WORSHIP

In March 2022, All Souls Episcopal Parish welcomed low-income and formerly homeless seniors into Jordan Court, thirty-four studio apartments beside its North Berkeley, California church.<sup>36</sup> Built on the site of its decrepit parish house and modest church parking lot, Jordan Court also offers community spaces and support services for residents, along with workspace and apartments

---

Blackman, *Justice Gorsuch Sketches the Post-Fulton Roadmap in Amish Septic System GVR*, REASON: VOLOKH CONSPIRACY (July 3, 2021), <https://reason.com/volokh/2021/07/03/justice-gorsuch-sketches-the-post-fulton-roadmap-in-amish-septic-system-gvr> [https://perma.cc/R8U9-XYLZ]. Otherwise, *Mast* has only been mentioned in footnotes. See Joshua L. Johnston, Comment, *A House Built on Sand: The Qualified Immunity Case for Keeping the Smith Doctrine*, 54 ST. MARY'S L.J. 885, 902 n.127 (2023); Bradley J. Lingo & Michael G. Schietzel, *A Second-Class First Amendment Right? Text, Structure, History, and Free Exercise After Fulton*, 57 WAKE FOREST L. REV. 711, 729 n.159 (2022).

34. See *infra* Sections III.C-D.

35. Cf. Christopher Serkin & Nelson Tebbe, *Condemning Religion: RLUIPA and the Politics of Eminent Domain*, 85 NOTRE DAME L. REV. 1, 5, 21 (2009) (arguing that “the strongest story that can be told in support of RLUIPA is that a prophylactic rule is needed because [religious] discrimination is so hard to unearth in the zoning context”).

36. *Jordan Court: Who Was Ann Jordan, and Why Does She Matter?*, ALL SOULS EPISCOPAL PAR. [hereinafter *Jordan Court*], <https://allsoulsparishorg.dreamhosters.com/about-all-souls/our-buildings/jordan-court> [https://perma.cc/XJ8H-V74Q]; Cooke, *supra* note 10; Supriya Yelimeli, *First North Berkeley Affordable Housing in over 30 Years, Jordan Court, Opens*, BERKELEYSIDE (May 5, 2022, 4:57 PM PT), <https://www.berkeleyside.org/2022/05/05/first-north-berkeley-affordable-housing-in-30-years-jordan-court-opens> [https://perma.cc/A2PE-2P9K]; Jessica Finkel, *Religious Tenets and Low-Income Tenants: Lessons Learned from Jordan Court, an Affordable Housing Development on Land Owned by All Souls Episcopal Parish in Berkeley, California* 13 (Aug. 2022) (Master of City Planning thesis, University of California, Berkeley), [https://turnercenter.berkeley.edu/wp-content/uploads/2022/12/Finkel\\_Final-Capstone-8.29.22.pdf](https://turnercenter.berkeley.edu/wp-content/uploads/2022/12/Finkel_Final-Capstone-8.29.22.pdf) [https://perma.cc/Q4KW-Q6AL].

for parish staff.<sup>37</sup> After deliberating about alternative revenue-generating options for their property, the All Souls Vestry intentionally chose to build affordable housing in collaboration with a local nonprofit, Satellite Affordable Housing Associates (SAHA).<sup>38</sup> Rector Phil Brochard of All Souls recalls that work on Jordan Court began in late 2014, before the housing crisis in Berkeley had reached a “fever pitch.”<sup>39</sup> Rector Brochard explained, “creating affordable housing aligned best with our intention to ‘encounter the Holy through Gospel-inspired service, working side by side with our sisters and brothers in the wider community.’”<sup>40</sup> While All Souls contributed the land and estate gift from longtime parishioner Ann Jordan, SAHA procured most of the project’s funding and shepherded it through the local permitting process.<sup>41</sup> SAHA manages the property and coordinates services for senior residents at Jordan Court,<sup>42</sup> while All Souls continues to own the land.<sup>43</sup>

Berkeley officials rightly celebrate Jordan Court. The thirty-four apartments at All Souls represented North Berkeley’s first affordable-housing development in thirty years.<sup>44</sup> But the neighborhoods around California’s flagship research university continue to strain against housing demand in Alameda County, facing pressures all too familiar in California.<sup>45</sup> And not all of UC Berkeley’s neighbors welcome the creation of new housing in their backyard. Unlike All Souls, Save Berkeley’s Neighborhoods and other NIMBY collectives would leave dilapidated community property undeveloped rather than collaborate to reimagine, redesign, and repurpose that property for desperately needed bedspace. These

---

37. Cooke, *supra* note 10.

38. *Jordan Court*, *supra* note 36.

39. Cooke, *supra* note 10.

40. *Jordan Court*, *supra* note 36 (quoting *The All Souls Vision Statement*, ALL SOULS EPISCOPAL PAR., <https://allsoulsparishorg.dreamhosters.com/about-all-souls/values-vision> [<https://perma.cc/REE3-6R5K>]).

41. *Id.* (noting that Satellite Affordable Housing Associates “procured most of the funding from county, state, and federal sources”); Cooke, *supra* note 10 (highlighting that federal low-income tax credits covered the majority of the project’s \$25.5 million expense).

42. *Jordan Court*, SATELLITE AFFORDABLE HOUS. ASSOCS., <https://www.sahahomes.org/properties/jordan-court> [<https://perma.cc/KM6A-P4PN>].

43. Cooke, *supra* note 10; Finkel, *supra* note 36, at i.

44. Yelimeli, *supra* note 36.

45. See Stephen Menendian, *Deconstructing the ‘Housing Crisis,’ OTHERING & BELONGING INST.* (Nov. 30, 2022), <https://belonging.berkeley.edu/deconstructing-housing-crisis> [<https://perma.cc/LFD6-UR82>]; ELLICKSON, *supra* note 13, at 41–60 (describing the housing crisis in Silicon Valley and Palo Alto); Edward L. Glaeser, *Free to Build: How to Solve America’s Housing Crisis*, CITY J. (Winter 2023), <https://www.city-journal.org/article/free-to-build> [<https://perma.cc/ZEC3-2YC6>] (describing the housing crisis in major metropolitan cities, including Los Angeles).

NIMBY groups have even weaponized environmental-protection laws to combat affordable housing for students, low-income workers, and other neighbors seeking shelter.<sup>46</sup>

The affordable-housing crisis is not unique to California or major metropolitan areas along the coasts. Across the United States, individuals and families, adolescents and seniors, owners and renters, sheltered and homeless members of local communities struggle to leverage their income for adequate housing.<sup>47</sup> The symptoms are epidemic: astronomical home prices, skyrocketing rents, elevated rates of annual appreciation, impulsive opposition to new housing, displacement, and homelessness.<sup>48</sup> This Feature does not presume to evaluate or ease every interrelated dysfunction plaguing U.S. housing markets.<sup>49</sup> Instead, it

- 
46. See Rigel Robinson, *When a Statute Loses Its Way: Fulfilling the Original Intent of the California Environmental Quality Act*, 41 YALE L. & POL'Y REV. 280, 281 (2022); Teresa Watanabe, *Court Ruling Halts UC Berkeley from Building Student Housing at People's Park*, L.A. TIMES (Feb. 25, 2023, 11:44 AM PT), <https://www.latimes.com/california/story/2023-02-24/court-ruling-halts-uc-berkeley-from-building-student-housing-at-peoples-park> [<https://perma.cc/5N79-V8B3>]; M. Nolan Gray, *How Californians Are Weaponizing Environmental Law*, ATLANTIC (Mar. 12, 2021), <https://www.theatlantic.com/ideas/archive/2021/03/signature-environmental-law-hurtshousing/618264> [<https://perma.cc/G5Z9-5L2H>].
47. See *The Gap: A Shortage of Affordable Homes*, NAT'L LOW INCOME HOUS. COAL. 1, 18 (Mar. 2023), [https://nlihc.org/sites/default/files/gap/Gap-Report\\_2023.pdf](https://nlihc.org/sites/default/files/gap/Gap-Report_2023.pdf) [<https://perma.cc/FRP6-BCSB>] ("Extremely low-income renters in the U.S. face a shortage of 7.3 million affordable and available rental homes, resulting in only 33 affordable and available homes for every 100 extremely low-income renter households . . . . Every major metropolitan area in the U.S. has a shortage of affordable and available rental homes for extremely low-income renters."); Yuliya Panfil & Sabiha Zainulbhai, *The First Step to Solving the Housing Crisis Might Be Simpler than You Think*, POLITICO (May 4, 2023, 4:30 AM EDT), <https://www.politico.com/news/magazine/2023/05/04/solving-the-housing-crisis-00095075> [<https://perma.cc/RZB5-XYJQ>] ("In 2022, for the first time in history, median rent nationwide exceeded \$2,000, and nearly half of all renters are 'housing-cost burdened,' meaning they spend more than 30 percent of their income on rent."); Menendian, *supra* note 45.
48. See Menendian, *supra* note 45; Chris Arnold, Robert Benincasa, Jacqueline GaNun & Haidee Chu, *There's a Massive Housing Shortage Across the U.S. Here's How Bad It Is Where You Live*, NAT'L PUB. RADIO (July 14, 2022, 5:00 AM ET), <https://www.npr.org/2022/07/14/1109345201/theres-a-massive-housing-shortage-across-the-u-s-heres-how-bad-it-is-where-you-live> [<https://perma.cc/DQ43-658A>] ("America's fallen 3.8 million homes short of meeting housing needs . . . . And that's both rental housing and ownership." (internal quotation marks omitted) (quoting Mike Kingsella, CEO of Up for Growth, a nonprofit research group)); *The Gap: A Shortage of Affordable Homes*, *supra* note 47, at 4 (noting that the United States has "only 7.0 million affordable rental homes for 11.0 million households" with extremely low incomes and that, "[o]f those 7.0 million rental units, 3.3 million are occupied by higher-income households"); Panfil & Zainulbhai, *supra* note 47.
49. See Menendian, *supra* note 45 (breaking down the "housing crisis" into thirteen distinct problems: (1) lack of housing available to lower-income and low-wealth individuals and families; (2) prohibitively expensive median housing prices; (3) severe rental-housing crisis; (4)

offers church property and religious liberty as powerfully transformative assets where local land-use regimes have limited housing growth and less costly forms of housing. Before unpacking how those assets might be deployed by faith communities, housing advocates, and local governments, this Part underscores the role of local land-use regulation in strangling American housing production.

### A. *America's Housing Crisis and Land-Use Regulation*

Housing affordability reflects the forces of both supply and demand. Like any commodity, the price of housing will tend to decrease when more housing is produced.<sup>50</sup> Of course, the physical costs of construction can fluctuate with access to materials and the limits of supply chains,<sup>51</sup> and certain desirable areas can see their land values rise.<sup>52</sup> But metros like San Francisco, Seattle, New York City, and Washington, D.C., have seen their home prices dramatically exceed building costs. While property in those cities remains expensive, in general, their marginal costs of land have not been substantially higher.<sup>53</sup> Astronomical home prices and skyrocketing rents require another explanation.

Scholars and commentators who write about issues affecting housing and land use broadly agree that excessive land-use regulation in wealthy cities and regions across the United States has created barriers to less costly forms of housing, sending housing prices skyward for all.<sup>54</sup> Facing demand for new housing,

---

housing-production deficit; (5) imbalance between housing and jobs; (6) improper housing fit; (7) sprawl; (8) increased evictions; (9) increased homelessness; (10) gentrification and displacement of working-class communities; (11) worsening racial divide in homeownership rates; (12) exclusionary zoning; and (13) fair-housing concerns).

50. See ELLICKSON, *supra* note 13, at 9; Glaeser, *supra* note 45.
51. See *Supply Chain Issues Continue to Slow Housing*, NAT'L ASSOC. HOME BUILDERS (Feb. 17, 2022), <https://www.nahb.org/blog/2022/02/supply-chain-issues-continue-to-slow-housing> [<https://perma.cc/B7AM-359G>].
52. Edward Glaeser & Joseph Gyourko, *Zoning's Steep Price*, REGUL. 24, 25-26 (Fall 2002).
53. *Id.* at 30; Edward L. Glaeser, Joseph Gyourko & Raven E. Saks, *Why Have Housing Prices Gone Up?*, 95 AM. ECON. REV. 329, 329-30 (2005); Glaeser, *supra* note 45.
54. See, e.g., ELLICKSON, *supra* note 13, at 1; Clara Hendrickson, Mark Muro & William A. Galston, *Countering the Geography of Discontent: Strategies for Left-Behind Places*, BROOKINGS INST. 28 (Nov. 2018), [https://www.brookings.edu/wp-content/uploads/2018/11/2018.11\\_Report\\_Countering-geography-of-discontent\\_Hendrickson-Muro-Galston.pdf](https://www.brookings.edu/wp-content/uploads/2018/11/2018.11_Report_Countering-geography-of-discontent_Hendrickson-Muro-Galston.pdf) [<https://perma.cc/3G8A-6ZBA>]; Glaeser, *supra* note 45; Glaeser, Gyourko & Saks, *supra* note 53, at 329; John Infranca, *Differentiating Exclusionary Tendencies*, 72 FLA. L. REV. 1271, 1273 (2020); David Schleicher, *City Unplanning*, 122 YALE L.J. 1670, 1695-96, 1707 (2013); Richard Florida, *Why America's Richest Cities Keep Getting Richer*, ATLANTIC (Apr. 12, 2017), <https://www.theatlantic.com/business/archive/2017/04/richard-florida-winner-take-all-new-urban-crisis/522630> [<https://perma.cc/KAW2-TML5>]; Matthew Yglesias, *The Real Driver of*

many cities and suburbs “failed to adequately loosen, and in some cases actively tightened,” land-use rules governing building capacity, including zoning regulations on permitted height, density, and use of buildings; minimum lot size and off-street parking requirements; measures to promote historic preservation; and processes for mitigating environmental impact.<sup>55</sup> Other metros with less restrictive land-use regimes experienced significant population growth without comparably high housing prices.<sup>56</sup>

The fundamental problem is “overregulation, not underregulation,” in land use and housing.<sup>57</sup> Since zoning regulations, building requirements, and permitting processes typically allow “only tiny one-off projects, American builders can’t exploit the economies of scale that have made almost every other manufactured good far more affordable.”<sup>58</sup> This has left many housing markets susceptible to extreme price cycles, complete with booms and busts and household financial pain.<sup>59</sup>

Ideally, zoning regulations can increase the collective value of land in cities or neighborhoods by controlling obnoxious land uses.<sup>60</sup> A zoning ordinance

---

*Regional Inequality in America*, VOX (Aug. 18, 2017), <https://www.vox.com/policy-and-politics/2017/8/18/16162234/regional-inequality-cause> [<https://perma.cc/E8AY-N8ZA>]; cf. Christopher Serkin, *A Case for Zoning*, 96 NOTRE DAME L. REV. 749, 770 (2020) (critiquing the “elite consensus” around opposition to many land-use restrictions); Ganesh Sitaraman, Morgan Ricks & Christopher Serkin, *Regulation and the Geography of Inequality*, 70 DUKE L.J. 1763, 1778–79 (2021) (critiquing the “liberalitarian consensus” championing deregulatory policies in land use that “run the risk of exacerbating problems in left-behind places”).

55. See David Schleicher, *Exclusionary Zoning’s Confused Defenders*, 2021 WIS. L. REV. 1315, 1325; Schleicher, *supra* note 54, at 1695–96, 1707, 1726.
56. See Schleicher, *supra* note 55, at 1325 (citing Edward L. Glaeser, Joseph Gyourko & Albert Saiz, *Housing Supply and Housing Bubbles*, 64 J. URB. ECON. 198 (2008)); EDWARD GLAESER, TRIUMPH OF THE CITY: HOW OUR GREATEST INVENTION MAKES US RICHER, SMARTER, GREENER, HEALTHIER, AND HAPPIER 183–93 (2011) (comparing the demand to live in coastal regions and other restrictive metros, where increasing housing prices reflected limits on housing growth, with metros like Houston and Atlanta, where limited housing-price increases reflected permissive home-building regimes).
57. ELLICKSON, *supra* note 13, at 4.
58. See Glaeser, *supra* note 45 (“When a functioning market supplies a good elastically, you don’t get bubbles. Consider an ordinary product: the trash can. These are extremely useful items, of course, but there has never been a trash-can bubble, where the market price of trash cans exploded, say, by 300 percent. The world’s producers can make trash cans almost anywhere and out of almost anything. Elastic supply ensures that prices never get out of whack. When the housing market works correctly, housing becomes just another good that is relatively easy to build, and low construction costs hold prices down. But when housing supply gets restricted, prices inflate and bubbles become far more common.”); Glaeser, Gyourko & Saks, *supra* note 53, at 329–30.
59. See Glaeser, *supra* note 45.
60. ELLICKSON, *supra* note 13, at 5.

divides the territory into mapped districts and varies restrictions—from permitted and prohibited land uses to building location and bulk—based on individually demarcated zones.<sup>61</sup> In addition to zoning, many localities apply complementary tools of land-use control, such as regulations governing historic preservation and land subdivision.<sup>62</sup> Well-crafted regulations can mitigate the threat that new land uses will negatively impact neighboring property in ways that bargaining between neighbors would be unlikely to internalize, allowing local communities to “protect the look and feel of a place.”<sup>63</sup> Thus, people who choose to live in these areas can proactively remove smelly animals and noisy machines.

But horse stables and paper mills differ from multifamily homes and apartment buildings, despite their shared exclusion from most single-family residential zones. Since the 1920s, local governments across the United States have implemented zoning regulations to segregate industrial uses—and most commercial uses—from residential districts.<sup>64</sup> Use segregation has raised the value of houses in many cities, inspiring some residents’ desire to pursue other forms of segregation through zoning based on race and social class.<sup>65</sup> “Racism, most conspicuously against Blacks, unquestionably was once a central motivator

---

61. *Id.* at 4.

62. *Id.* at 4-5 (“By 2020, perhaps fifteen thousand local governments in the United States had adopted zoning ordinances.”); see Serkin, *supra* note 54, at 790-91 (“Although the ostensible purpose of historic preservation is to ensure that important historical resources are preserved for future generations, the use in practice has been to protect the character of certain neighborhoods in order to protect property values and to stimulate investment.”).

63. Serkin, *supra* note 54, at 774 (describing the “aesthetic guidelines for building and development,” coupled with “aggressive historic review,” which have allowed Santa Fe, New Mexico to preserve its distinct “ancient pueblo adobe style”). Economists refer to such impacts that bargaining cannot internalize as “negative externalities.” ELLICKSON, *supra* note 13, at 5.

64. See ADVISORY COMM. ON ZONING, U.S. DEP’T OF COM., A STANDARD STATE ZONING ENABLING ACT: UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING REGULATIONS (1924) (encouraging state governments to authorize their local governments to engage in zoning, following the model act drafted by Secretary of Commerce Herbert Hoover’s advisory committee).

65. See JESSICA TROUNSTINE, SEGREGATION BY DESIGN: LOCAL POLITICS AND INEQUALITY IN AMERICAN CITIES 12 (2018) (“By invoking the power of land use regulation and zoning, city governments promoted the generation of property wealth through segregation and unequal allocation of resources, institutionalizing prevailing race and class hierarchies.”); Allison Shertzer, Tate Twinam & Randall P. Walsh, *Zoning and the Economic Geography of Cities*, 105 J. URB. ECON. 20, 29 (2018) (showing how Chicago’s original zoning ordinance raised the value of urban housing by segregating industrial uses).



of zoning policies,” allowing white homeowners to remove people they deemed undesirable from their neighborhood.<sup>66</sup>

Segregation based on social class arose through exclusionary zoning. Local governments protected neighborhoods of detached, single-family homes through land-use controls designed to prohibit denser, less costly forms of housing from being constructed.<sup>67</sup> By precluding apartments and multifamily homes in certain zones, they reasoned, only households with sufficient financial resources and other “desirable” qualities would join the neighborhood.<sup>68</sup> In its landmark 1926 decision upholding the constitutionality of zoning, *Village of Euclid v. Ambler Realty Co.*, the Supreme Court gave other reasons for excluding apartment buildings from single-family zones, characterizing them as parasitic on single-family neighborhoods:

Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities—until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances, apartment houses, which

---

66. ELLICKSON, *supra* note 13, at 11; *see also id.* (“Today, speakers at zoning hearings are unlikely explicitly to raise issues of race, although this factor may hover unspoken.”). *See generally* RICHARD R.W. BROOKS & CAROL M. ROSE, *SAVING THE NEIGHBORHOOD: RACIALLY RESTRICTIVE COVENANTS, LAW, AND SOCIAL NORMS* (2013) (describing the rise and fall of racially restrictive covenants in America and unpacking why *Shelley v. Kraemer* failed to end their influence).

67. *See* Maureen E. Brady, *Turning Neighbors into Nuisances*, 134 HARV. L. REV. 1609, 1611-14 (2021).

68. *See id.* at 1611-12 (“Inevitably, when residents or representatives of a single-family neighborhood oppose a change in zoning rules, the apartment is invoked as an inherently harmful neighboring use responsible for traffic, decreased school quality, noise, or a parade of other horrors.”); ELLICKSON, *supra* note 13, at 11 (“Parents of public-school children might favor a zoning policy that would boost the fraction of college graduates moving into their neighborhood. They might think, not implausibly, that restricting the development of multifamily housing, for example, would increase the relative capabilities of their children’s classmates.”).

in a different environment would be not only entirely unobjectionable but highly desirable, *come very near to being nuisances*.<sup>69</sup>

Because apartment buildings and denser forms of housing necessarily bring additional people to residential neighborhoods—people whose presence may congest community streets, open spaces, and “free circulation of air”—zoning schemes could circumscribe their location and, in turn, their effects.<sup>70</sup>

Fiscal concerns, combined with fear of these consequences, often motivate exclusionary restrictions on new housing construction and denser forms of housing. Many homeowners consider their house to be their most significant financial asset.<sup>71</sup> Houses are rarely insured against depreciation, and the effects of local decisions involving land use and public education are largely capitalized into property values. So, homeowners tend to favor decisions that enhance the value of their residences.<sup>72</sup> And exclusionary policies can keep property values high, allowing homeowners to ensure access to well-provisioned public services at low tax rates, while precluding from entry those who might benefit from redistribution.<sup>73</sup>

---

69. 272 U.S. 365, 394-95 (1926) (emphasis added). The Court opined that “the development of detached house sections is greatly retarded by the coming of apartment houses,” and that “in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district.” *Id.* at 394.

70. See Brady, *supra* note 67, at 1613 (“Apartments and other uses targeted by early zoning laws were not generally considered legal nuisances, although the lawyers in *Euclid* managed to portray them as close enough. The *Euclid* decision thus scuttled the idea that land use regulation was limited to suppression of legal nuisances, enabling communities through zoning to structure an affirmative concept of the public good. Of course, that public good was often defined by elites hostile to racial minorities, the poor, and even certain women and families, and it carried the widespread economic and social consequences we now know.” (footnotes omitted)); cf. ELLICKSON, *supra* note 13, at 10 (“Exclusionary practices have many catalysts. Among the most defensible are environmental considerations. In some instances, land development can endanger the quality of air, water, and habitat . . . . The net environmental effects of exclusionary zoning, however, commonly tend to be negative. Denser living is more energy-efficient. Large-lot zoning increases automobile dependence and wastes land through sprawl.”).

71. See WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* 1, 4 (2001); ELLICKSON, *supra* note 13, at 135.

72. See FISCHER, *supra* note 71, at 4-18; David Schleicher, *Stuck! The Law and Economics of Residential Stagnation*, 127 *YALE L.J.* 78, 108 (2017) (“Homeowners are more likely to invest in their communities and in their own homes than are fly-by-night renters, it is claimed, contributing to the creation of local amenities.”).

73. See FISCHER, *supra* note 71, at 45-69; Schleicher, *supra* note 55, at 1331; Serkin, *supra* note 54, at 787-88.

Wealthy suburbs continue to use land-use restrictions to maintain abundant per-capita property-tax bases, low property-tax rates, and high-quality local services.<sup>74</sup> Where suburbs have few close counterparts, zoning measures that prevent the construction of competing units can enable homeowners to increase the value of their residence, particularly in regions with job markets driving demand.<sup>75</sup> Where public schools are primarily funded by residential property taxes, zoning schemes that preclude the creation of less costly forms of housing deter entry by households that would not pay their own way.<sup>76</sup> Established residents' dedication to their children's well-being significantly influences decisions restricting housing growth.<sup>77</sup> Otherwise-altruistic homeowners seek to keep denser, more affordable multifamily housing out of their backyard.

Once neighborhoods of detached, single-family houses are established, zoning politics freeze them in place. As Ellickson argues, "In a neighborhood where most land is undeveloped, NIMBY forces are relatively weak. But *straitjacket* perfectly describes the usual upshot of zoning controls in a developed neighborhood of detached houses."<sup>78</sup> Zoning ordinances and building codes rarely bar homeowners from remodeling their detached houses or even demolishing them to build new ones in single-family neighborhoods.<sup>79</sup> But in most developed areas,

- 
74. Schleicher, *supra* note 55, at 1324 (citing ANTHONY DOWNS, *OPENING UP THE SUBURBS: AN URBAN STRATEGY FOR AMERICA* 8 (1973)).
75. See Bruce W. Hamilton, *Zoning and Property Taxation in a System of Local Governments*, 12 URB. STUD. 205, 207-08 (1975); Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 400, 510 (1977) (discussing "homeowner cartels" using control over local zoning restrictions to increase their property value); Schleicher, *supra* note 54, at 1695-96; Glaeser, Gyourko & Saks, *supra* note 53, at 329.
76. See Serkin, *supra* note 54, at 787-88 (describing how suburbs deploy land-use regulations to restrict access to "high-quality local services").
77. ELLICKSON, *supra* note 13, at 11; see also Raj Chetty, Nathaniel Hendren & Lawrence F. Katz, *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, 106 AM. ECON. REV. 855, 899 (2016) (documenting the long-term benefits that accrue to young children who move from high-poverty housing projects to lower-poverty neighborhoods).
78. ELLICKSON, *supra* note 13, at 112; *id.* at 118 ("[S]ingle-family zoning is encased in a political straitjacket once minor interior streets have been laid out within a neighborhood. Prior to the layout of streets, a single-family zone is somewhat easier to override."); see also *id.* at 151 ("The U.S. law of real property traditionally has included doctrines designed to keep land markets dynamic. Among them have been the Rule Against Perpetuities and the Rule Against Restraints on Alienation. The zoning straitjacket goes against this sound legal tradition." (citing BROOKS & ROSE, *supra* note 66, at 73-78)).
79. Of course, historic-preservation laws, community covenants, and environmental-protection laws may limit homeowners in their efforts to remodel or raze and rebuild. See William A. Fischel, *The Rise of the Homevoters: How the Growth Machine Was Subverted by OPEC and Earth Day*, in *EVIDENCE AND INNOVATION IN HOUSING LAW AND POLICY* 13, 28-32 (Lee Anne Fennell & Benjamin J. Keys eds., 2017).

local zoning politics rarely allow landowners to replace a single-family house with a denser residential use (e.g., a duplex, a set of townhouses, or an apartment building).<sup>80</sup> When combined with large minimum lot sizes—which limit the number of separate parcels in an area and thus limit the density of structures and uses—and restrictions on the maximum number of units per lot, municipal zoning schemes can dictate housing’s detached, single-family form.<sup>81</sup>

Since the 1920s, land-use restrictions have been among local governments’ most important powers.<sup>82</sup> In turn, local politics tend to be controlled by homeowners, whose physical proximity to local officials allows them to lobby actively against increased residential density.<sup>83</sup> Wealthy suburbs limit housing construction on behalf of existing homeowners who dominate local politics while disregarding the needs of renters and people beyond the borders of their community.<sup>84</sup>

Furthermore, status-quo bias can foster local efforts to limit residential density. “[N]eighborhood residents and local elected officials plainly choose the existing landscape as their reference point” when evaluating the negative and positive effects of denser residential uses on their community.<sup>85</sup> Downsides of densification might include increased automobile traffic, difficulty finding street

---

80. See Sara C. Bronin, *Zoning by a Thousand Cuts*, 50 PEPP. L. REV. 719, 750, 767 (2023) (finding that “zoning assigns 90.6% of [Connecticut’s] land to as-of-right single-family housing,” largely on parcels with “a minimum lot size requirement of 0.92 acres or more for single-family homes”); Serkin, *supra* note 54, at 752 (suggesting that “affluent neighborhoods regulate out multifamily or more affordable housing options” as a means of “controlling the pace of community change” to “protect the existing character of their neighborhoods”).

81. See Bronin, *supra* note 80, at 730-31.

82. See Schleicher, *supra* note 55, at 1331; Serkin, *supra* note 54, at 749-50, 755-58.

83. See FISCHER, *supra* note 71, at 72-76; ELLICKSON, *supra* note 13, at 147 (“[I]nterest in preserving the existing landscape is more salient to local officials than to either federal or state officials. NIMBYism flourishes at city hall but matters less at a higher level of government. National governments tend best to protect the interests of housing consumers. The federal government has put pressure on localities to accept religious land uses, cell-phone towers, and other uses.”).

84. See David Schleicher, *Constitutional Law for NIMBYS: A Review of “Principles of Home Rule for the 21st Century” by the National League of Cities*, 81 OHIO ST. L.J. 883, 900-01 (2020). But see John Infranca, *The New State Zoning: Land Use Preemption Amid a Housing Crisis*, 60 B.C. L. REV. 823, 879-81 (2019) (discussing restrictions on accessory dwelling units as an area where some existing homeowners may resent local limitations on construction).

85. ELLICKSON, *supra* note 13, at 142-43 (citing Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263 (1979)); cf. Serkin, *supra* note 54, at 771 (“One of the principle uses of zoning today is to create and maintain stable community character . . . . Significant increases in density, or changes in the nature of nearby uses, can implicate that character.”).

parking, shadows cast by bulkier buildings, and noisier surroundings.<sup>86</sup> Upsides could be local and diffuse: incentives to grow the variety and quality of nearby stores and restaurants, feelings of safety from additional pedestrian traffic, broader networking opportunities, and greater specialization in regional employment opportunities.<sup>87</sup> Because of status-quo bias, neighborhood residents tend to give more weight to the prospective costs of densification than to its future benefits. This tendency induces them to support decisions perpetuating existing land uses, which “favors retention of the familiar [and] spurs resistance” to change.<sup>88</sup> A neighborhood’s resistance to new land uses may intensify based on its age and how long its residents have owned their homes.<sup>89</sup>

For more than fifty years, the national costs of local zoning have risen.<sup>90</sup> Professors Edward Glaeser and Joseph Gyourko describe these impediments to housing construction as a “zoning tax” on prospective homeowners.<sup>91</sup> “Before the 1970s, land-use restrictions . . . limited access to certain communities, usually rich suburbs,” but they never “cap[ped] housing construction in entire metropolitan regions. Builders could always construct new housing in downtowns

---

86. See *Vill. Of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394-95 (1926).

87. See David Schleicher, *The City as a Law and Economic Subject*, 2010 U. ILL. L. REV. 1507, 1509-28 (describing “agglomeration economies,” where co-location in dense areas increases market depth for labor and services, as well as opportunities for knowledge spillovers).

88. ELLICKSON, *supra* note 13, at 142-45; see also Serkin, *supra* note 54, at 752 (“Controlling change is at the heart of land use regulation. Zoning sometimes seeks to stimulate new development in new places, but much more often slows or constrains change.”); GLAESER, *supra* note 56, at 262 (describing property owners driven by status-quo bias as “enemies of change”).

89. ELLICKSON, *supra* note 13, at 146; see also Infranca, *supra* note 54, at 1278 (expressing some ambivalence toward privileging “local control over new development in lower income urban neighborhoods” but stressing that any such “preferential treatment . . . should be designed primarily to address concerns about unwanted changes to neighborhood character and the claims of long-term residents to a distinct stake in the neighborhood that merits deference”).

90. See Schleicher, *supra* note 55, at 1326-27 (“Economists . . . estimated the effect of reducing excessively restrictive zoning rules on both output and welfare, net of externalities and congestion, using a variety of empirical methods and assumptions. The estimates they developed beggar the mind, ranging from around 2% of GDP (enormous!) to 36% of GDP (hard to comprehend!).” (citing Bryan Caplan, *Hsieh-Moretti on Housing Regulation: A Gracious Admission of Error*, ECONLIB (Apr. 5, 2021), <https://www.econlib.org/a-correction-on-housing-regulation> [<https://perma.cc/B2SX-8PH8>]); Devin Buntten, *Is the Rent Too High? Aggregate Implications of Local Land-Use Regulation* 1 (Fed. Rsrv. Bd., Fin. & Econ. Discussion Series Working Paper No. 2017-064, 2017), <https://www.federalreserve.gov/econres/feds/files/2017064pap.pdf> [<https://perma.cc/DEH8-7H3X>])).

91. Glaeser & Gyourko, *supra* note 52, at 26-29; see also Edward L. Glaeser, Joseph Gyourko & Raven Saks, *Why Is Manhattan So Expensive? Regulation and the Rise in Housing Prices*, 48 J.L. & ECON. 331, 359 tbl.4 (2005) (listing the calculated zoning tax for various metropolitan areas).

or on the urban fringe.”<sup>92</sup> This freedom to build was greatly limited in the 1970s and 1980s when land-use regulation became “much, much stricter.”<sup>93</sup> During those decades, “coastal metropolitan regions like San Francisco, New York, and Boston restricted construction in cities, suburbs, and exurbs. Because these popular regions restricted new housing, demand for living space outpaced supply, housing prices soared, but population growth did not.”<sup>94</sup>

In recent years, criticism of excessive land-use regulation has been amplified, particularly among academics, commentators, and advocates who engage with housing issues.<sup>95</sup> That criticism accompanies “an academic consensus that easing land use regulations to increase the housing supply can help lower housing prices.”<sup>96</sup>

To be sure, the extent of that easing and its pace remain debated. While “many early justifications of zoning describe a regulatory system that essentially no longer exists,” Professor Christopher Serkin argues that zoning’s density limits and use restrictions “continue to serve important functions that go beyond [zoning’s] conventional justification of controlling externalities by separating incompatible uses.”<sup>97</sup> For Serkin, land-use restrictions should not entitle in-place property owners to “lock in the status quo” through naked exclusion, but rather should (and do) allow property owners to regulate “the pace and costs of community change . . . by maintaining community character, enhancing property values, and allocating the costs of development between insiders and outsiders.”<sup>98</sup> Professor John Infranca underscores this point, making a case for “local

---

92. Schleicher, *supra* note 72, at 114 (citing William A. Fischel, *The Evolution of Homeownership*, 77 U. CHI. L. REV. 1503, 1515-16 (2010)).

93. *Id.*; see also Schleicher, *supra* note 84, at 900-01 (noting the shift in the 1970s and 1980s that restricted new housing construction).

94. Schleicher, *supra* note 72, at 114-15 (citing Fischel, *supra* note 92, at 1515-16); see also Glaeser, *supra* note 45 (detailing the later expansion of these construction restrictions and soaring prices to metropolitan housing markets across the country).

95. See Serkin, *supra* note 54, at 751; Christopher Serkin, *Divergence in Land Use Regulations and Property Rights*, 92 S. CAL. L. REV. 1055, 1059-60 (2019); Ilya Somin, *The Emerging Cross-Ideological Consensus on Zoning*, WASH. POST: VOLOKH CONSPIRACY (Dec. 5, 2015, 4:59 PM EST), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/12/05/the-emerging-cross-ideological-consensus-on-zoning/> [<https://perma.cc/76TD-TGBQ>].

96. Infranca, *supra* note 54, at 1271; see also Schleicher, *supra* note 55, at 1328 (“Today, land use restrictions enacted by local governments lead to higher housing prices across whole regions.”); Serkin, *supra* note 54, at 751 (“A consensus is . . . building, at least among academics and elite activists, that zoning is a problem to be overcome.”).

97. Serkin, *supra* note 54, at 752 (noting that zoning “seems increasingly anachronistic” as “municipalities’ use of zoning has evolved significantly from its origins in the 1920s when it was focused on keeping industry and intensive land uses out of residential neighborhoods”).

98. *Id.* at 752-53.

control over new development in lower income urban neighborhoods” based on factors that include “the historical treatment of these communities” through redlining and other forms of racism, “the more fragile personhood interests at stake,” and “the principle of subsidiarity.”<sup>99</sup>

In wealthy cities, zoning deregulation still may not lead to new housing construction. “It can be more expensive to build in urban areas regardless of the zoning rules,” Professor Richard C. Schragger argues, “in large part because of higher land values, but also because greenfield development [involving projects on previously undeveloped land] is often easier.”<sup>100</sup> As a result, builders of moderate-income housing “do not generally attempt to build housing in high-demand cities anyway.”<sup>101</sup> However, efforts to preempt local zoning restrictions through state law would primarily affect suburban housing, where single-family uses predominate. “That’s where the people, the land value, and the most severe zoning restrictions generally are,” Professor David Schleicher notes, and while demand to live in cities has increased since the 1990s, and property prices in some cities increased dramatically, the overwhelming majority of Americans continue to live in suburbs.<sup>102</sup>

Excessive land-use regulation across broad swathes of urban and suburban America prevents housing developers from responding to consumer preferences about where and how to live. The exclusionary effects of land-use and density restrictions have created barriers to less costly forms of housing, sending housing prices skyward and precluding many poor and middle-class people from moving to areas where higher incomes are available.<sup>103</sup> Denser residential land

---

99. Infranca, *supra* note 54, at 1278; *see also id.* at 1275-76 (“Critics of zoning reform contend that allowing new development—particularly market-rate development—will only exacerbate housing costs, gentrification, and displacement in lower income urban communities. To the extent that opposition to new development is rooted in skepticism over the relationship between restrictive zoning, housing supply, and affordability, the available evidence and basic economics suggest this opposition is misplaced.” (citations omitted)). *But see* Lee Anne Fennell, *Residents Against Housing: A Response to Professor Infranca’s ‘Differentiating Exclusionary Tendencies’*, 72 FLA. L. REV. F. 171, 173 (2023) (“[There is] empirical shakiness at the heart of opposition [to new housing development] in lower-income communities . . . as many of the qualitative changes that incumbents oppose may not be substantially caused by (and indeed, should be mitigated by) the addition of new housing.” (emphasis omitted)).

100. Richard C. Schragger, *The Perils of Land Use Deregulation*, 170 U. PA. L. REV. 125, 166 (2021).

101. *Id.* at 166.

102. Schleicher, *supra* note 55, at 1359-60 (“When one favors land use localism, the main beneficiaries are owners of housing in rich suburban towns.”).

103. *See* ELLICKSON, *supra* note 13, at 114 (“Moreover, the straitjacket misallocates the national labor force, prompting household to migrate from overregulated regions, such as California and New England, to less regulated regions.”); Schleicher, *supra* note 73, at 114-17 (“Housing costs eat up a larger percentage of a poor person’s paycheck than that of a wealthy person.

uses, which might alleviate the affordable housing crisis, are overwhelmingly frozen out.<sup>104</sup>

### B. *Crisis of Houses of Worship*

Across the United States, another real estate crisis continues to intensify: houses of worship are closing. Not just hundreds, but *tens of thousands*, across faith traditions and denominations, in central cities and suburban neighborhoods, on side streets and Main Streets, from coast to coast.<sup>105</sup> Where houses of worship have yet to close, many faith communities struggle to afford their upkeep and use or find the community's religious needs unmet by antiquated facilities. Vacant and dilapidated houses of worship, along with other underutilized church properties, present unique challenges and opportunities for communities long accustomed to their spiritual, communal, and physical presence.

Why are so many houses of worship closing? While the experience and discernment of each faith community are unique, we can observe a few general trends.<sup>106</sup> First, organized religious membership continues to diminish in the United States. Less than half of all Americans belong to a church, synagogue, mosque, or temple, and over twenty-one percent of Americans do not identify with any religion.<sup>107</sup> Accordingly, financial contributions to religious institutions have shrunk.<sup>108</sup> Second, despite general exemptions from property taxes, houses of worship have become costlier to maintain due to the increasing costs of

---

Thus, even in a city that can provide marginally higher wages, low-income persons simply may not be able to afford the cost of living in rich, land-use-restricted areas.”); Glaeser, *supra* note 45; Schleicher, *supra* note 87, at 1527-28.

104. See ELLICKSON, *supra* note 13, at 13, 146-48; Schleicher, *supra* note 84, at 900-02; Menendian, *supra* note 45; Glaeser, *supra* note 45; Panfil & Zainulbhai, *supra* note 47; *The Gap: A Shortage of Affordable Homes*, *supra* note 47.

105. See Rick Reinhard, *For Whom the Church Bell Tolls: Congregations, Of Course, but Municipalities Too*, CANOPY F. (May 5, 2023), <https://canopyforum.org/2023/05/05/for-whom-the-church-bell-tolls-congregations-of-course-but-municipalities-too> [https://perma.cc/8XR6-DUTB].

106. See Rick Reinhard, *Churches Are Closing. It's a Challenge for Local Governments.*, GOVERNING (Apr. 13, 2021), <https://www.governing.com/community/churches-are-closing-its-a-challenge-for-local-governments.html> [https://perma.cc/4Y2V-MULW].

107. Jeffrey M. Jones, *U.S. Church Membership Falls Below Majority for First Time*, GALLUP (Mar. 29, 2021), <https://news.gallup.com/poll/341963/church-membership-falls-below-majority-first-time.aspx> [https://perma.cc/2GMB-5KP3] (noting that religious membership in America had remained near 70% throughout the twentieth century).

108. See Reinhard, *supra* note 106; Mike Ferguson, *Do We Need Our Church Property to Be Faithful?*, PRESBYTERIAN MISSION (Dec. 15, 2021), <https://www.presbyterianmission.org/story/do-we-need-our-church-property-to-be-faithful> [https://perma.cc/VB9F-88L8].



utilities, insurance, and capital repairs.<sup>109</sup> When combined with shrinking collections from diminishing congregations, many faith communities cannot afford to keep their religious property.<sup>110</sup> Third, advances in mobility and connectivity throughout the past century have lessened the need for every town, village, and urban neighborhood to have its own house of worship for every faith community and denomination.<sup>111</sup> Mergers and closures often go hand in hand, primarily where houses of worship are densely situated in urban settings.<sup>112</sup> Finally, the COVID-19 pandemic forced most faith communities to gather online for worship and religious education.<sup>113</sup> Many of their members have not returned in person since gathering restrictions have been lifted.<sup>114</sup>

Declining membership and diminishing resources burden faith communities, particularly when their real estate “becomes too big and too expensive” to maintain.<sup>115</sup> But local governments cannot absolve themselves from sharing

- 
109. See Reinhard, *supra* note 106; see also Ferguson, *supra* note 108 (“Congregations trying to sell their building or buildings are sometimes hampered by years of delayed maintenance of their property . . . ‘Delayed maintenance’ is the delicate term, [Rev. Dr. Eileen Lindner] said. ‘The indelicate term is, “Their buildings are a wreck and they have eroded the salability of their property.’”).
110. See Reinhard, *supra* note 106; Ferguson, *supra* note 108.
111. See Reinhard, *supra* note 106; Rick Reinhard, *Seeing the Glass as Half Full: Exploring the Reuse Opportunity for Houses of Worship on Main Street*, MAIN ST. AM. (May 3, 2022) [hereinafter Reinhard, *Glass as Half Full*], <https://www.mainstreet.org/blogs/national-main-street-center/2022/05/03/seeing-the-glass-as-half-full-exploring-the-reuse> [https://perma.cc/BzGM-FVUW] (“Imagine the impact of these projected closures on Rome, Georgia (population 36,000), which has 15 churches in its six-by-four-block Main Street area or Orange, New Jersey (population 31,000), which has 16.”).
112. For example, the Roman Catholic community in New Haven, Connecticut, began a process in December 2021 whereby ten local churches were amalgamated into one parish under shared pastoral leadership. See Leonard P. Blair, Archbishop of Hartford, *Decree Concerning the Extinctive Union of Parishes of New Haven, Connecticut*, NEW HAVEN CATH. (June 7, 2023), [https://www.newhavencatholic.org/uploads/9/0/0/6/90060259/decreee\\_-\\_new\\_haven\\_merger\\_-\\_newly\\_merged\\_blessed\\_michael\\_mcgivney\\_parity\\_-\\_final\\_\\_1\\_.pdf](https://www.newhavencatholic.org/uploads/9/0/0/6/90060259/decreee_-_new_haven_merger_-_newly_merged_blessed_michael_mcgivney_parity_-_final__1_.pdf) [https://perma.cc/S8PV-Y2R6]; Address from Most Reverend Leonard P. Blair, Archbishop of Hartford, NEW HAVEN CATH., <https://www.newhavencatholic.org/address-from-archbishop-blair.html> [https://perma.cc/TAC7-QUVW].
113. See Reinhard, *supra* note 106; Ferguson, *supra* note 108.
114. See Ferguson, *supra* note 108 (“In addition, because up to one-third of American workers are now performing all or most of their work duties at home, many are now choosing to live in the suburbs or in rural areas – which alters the composition of communities and, in turn, affects church participation and membership.”).
115. Scott Neuman, *The Faithful See Both Crisis and Opportunity as Churches Close Across the Country*, NAT’L PUB. RADIO (May 17, 2023), <https://www.npr.org/2023/05/17/1175452002/church-closings-religious-affiliation> [https://perma.cc/XE7H-TJTS]; see Reinhard, *supra* note 106 (“Many churches have found themselves spending half or more of their operating budgets on real estate and owning assets that are 80 or 90 percent composed of illiquid real estate.”).

their burden. Empty houses of worship and underutilized church properties present unique challenges that cities and neighborhoods cannot ignore. To be sure, in “hot real-estate markets” like San Francisco and New York City, “developers swoop in to acquire vacant houses of worship, turning them into luxury condos, brew pubs, and mixed-use developments.”<sup>116</sup> Currently, “billions of dollars’ worth of now-tax-exempt property may be redeveloped and returned to the tax rolls.”<sup>117</sup> But in “cold real-estate markets, such as smaller cities and even larger cities in the American heartland, empty houses of worship are liable to sit vacant for years if not decades, a blight on the community, often at critical locations.”<sup>118</sup> Either way, the scale is immense: between 2020 and 2025, the National Council of Churches estimates that as many as 100,000 houses of worship will have closed.<sup>119</sup>

Local governments face additional challenges when houses of worship close. Most problematically, they lose the innumerable services that faith communities host—mainly on the communities’ property—for neighborhoods and cities: from soup kitchens to clothing closets, health clinics to daycare centers, vocational training to self-help groups.<sup>120</sup> These services “often greatly outweigh the size and scope of an actual congregation.”<sup>121</sup> In fact, many houses of worship have an “economic halo effect” on their local communities, whereby “an average urban congregation creates over \$140,000 per year in value through the contribution of volunteer time; space at below market rates; and cash and in-kind donations to community-serving programs.”<sup>122</sup> Faith communities make provision

116. Reinhard, *supra* note 105.

117. Reinhard, *supra* note 106.

118. *Id.* (“Ottumwa [in Iowa], with a stable population of 25,000, has experienced eight house-of-worship closings over the past few years. The community is struggling to adaptively reuse five, leaving three empty. Three more churches remain open but have small, aging congregations . . .”).

119. Ferguson, *supra* note 108.

120. See *supra* notes 6–7 and accompanying text; Reinhard, *supra* note 105.

121. Reinhard, *supra* note 105; see *The Economic Halo Effect of Historic Sacred Places*, PARTNERS FOR SACRED PLACES 5 (Nov. 2016), <https://sacredplaces.org/uploads/files/16879092466251061-economic-halo-effect-of-historic-sacred-places.pdf> [<https://perma.cc/6WP6-T95G>] (“87% of the beneficiaries of the community programs and events housed in sacred places are not members of the religious congregation.”).

122. *Economic Halo Effect*, PARTNERS FOR SACRED PLACES, <https://sacredplaces.org/info/publications/halo-studies> [<https://perma.cc/A55T-2EHU>]. Partners for Sacred Places, a nonprofit focused on preserving historic houses of worship, and the University of Pennsylvania’s School of Social Policy and Practice also found that “the average urban historic sacred place generates over \$1.7 million in economic impact annually,” employs, “on average, 5 full-time and 6 part-time staff,” and attracts “780 visits each week with only 11% of visits for worship.” *Id.* (emphasis omitted).

for their neighborhoods and cities where the market fails to provide, operating within an economy of charity and free offering that may not be replicated in their absence.

Faith communities may desire to retain their houses of worship for spiritual, moral, or emotional reasons, even when their buildings have fallen into disrepair. For living members, their house of worship remains the place where sacred moments of initiation, healing, union, and passing mark their lives, hearts, and stories. Many “want to hang on to their buildings until the bitter end, allowing the properties to deteriorate around them.”<sup>123</sup> Memory and solemnity keep some faith communities from letting go, precluding local governments from addressing concerns with blighted structures on parcels that faith communities could beneficially repurpose.<sup>124</sup>

Even when faith communities are willing to lease or sell, they cannot repurpose every property for every use. Architecturally, many houses of worship (with their cavernous, lofted sanctuaries) are difficult to repurpose, and an adjacent cemetery can further complicate redevelopment.<sup>125</sup> Theologically, some faith traditions prohibit certain future uses of church property as morally illicit.<sup>126</sup> Even when not required theologically, faith communities may feel bound to protect themselves from association or complicity with activities that contradict their spiritual and moral commitments.<sup>127</sup> Where faith communities impose covenant restrictions on property they choose to sell, they limit possibilities for adaptive reuse that local governments may seek to promote.

Finally, “outdated municipal zoning, building-code, and property-tax regulations often discourage for-profit and not-for-profit developers from proposing alternate uses” for church property – including proposals that local governments

---

123. Reinhard, *supra* note 105 (“As a result, unlike a usual place of business, congregations seem motivated less by logic and more by nostalgia.”).

124. *See id.*; Ferguson, *supra* note 108.

125. Reinhard, *Glass as Half Full*, *supra* note 111.

126. *See* Garnett & Reidy, C.S.C., *supra* note 22, at 822-29. “The Code of Canon Law permits Roman Catholic churches ‘no longer . . . used for divine worship’ to be repurposed or sold for ‘profane [secular] but not sordid use.’” *Id.* at 825 n.19 (quoting 1983 CODE c.1222, § 2).

127. *See id.* at 822-29. For example, the Roman Catholic Archdiocese of Chicago imposed a restrictive covenant on its surface parking lot outside Holy Name Cathedral, which developers purchased for \$110 million to construct luxury residential towers. The developers in Chicago agreed that the cathedral’s former parking lot would not be used for

abortion, in vitro fertilization, surrogacy, euthanasia, assisted suicide, embryonic and fetal stem cell research, Satanism, atheism, palm reading, astrology, or any kind of restaurant, bar or club that encourages or requires personnel to be shirtless or to wear provocative clothing . . . (e.g., so-called hot pants, shorts not covering the entire buttocks, tight fitting or otherwise revealing tank tops or halter tops).

*Id.* at 823-24 (internal quotation marks omitted).

would support.<sup>128</sup> Although many houses of worship exist as prior nonconforming uses in their respective communities, zoning schemes are frequently interpreted to preclude their conversion for alternative uses (e.g., only single-family residential rather than multifamily residential, commercial, or mixed use).<sup>129</sup> Where historic-preservation restrictions and environmental-impact requirements may not prohibit faith communities from repurposing and redeveloping their property, such regulations often delay their efforts significantly.<sup>130</sup> Additional permits, impact statements, and design submissions all take time and cost money. For many faith communities, land-use regulations make alternative uses for church property financially untenable.<sup>131</sup>

The crisis of houses of worship reveals how faith communities and local governments can mutually benefit from efforts to repurpose and redevelop underutilized church property. Where faith communities seek theologically and morally sound uses for their underutilized property but struggle to overcome the regulatory and financial hurdles of adaptive reuse, local governments can incentivize redevelopment that benefits the wider community. In particular, local governments can grow their affordable-housing supply by helping faith communities redevelop their underutilized church property for affordable housing.<sup>132</sup>

- 
128. Reinhard, *supra* note 105; see Reinhard, *Glass as Half Full*, *supra* note 111 (“Land use and building codes regulating parking, utilities, sewer, stormwater, fire safety, signage, accessibility, curb cuts, and the like, can make even a well-zoned [church] property nearly impossible to reuse or redevelop.”).
129. See *Churches and Nonconforming Use*, BUSHORE CHURCH REAL ESTATE, <https://bushore-inc.com/churches-and-nonconforming-use> [<https://perma.cc/A8UC-EWGY>]. Prior nonconforming uses are any uses of property that were allowed under the zoning regulations at the time they were developed, but that do not conform with current zoning laws. As a result, most local governments choose to exempt nonconforming uses from certain zoning regulations. See *id.* Churches were often built without the need for special exceptions or conditional-use permits, since at the time, they were permitted by zoning rights, or zoning laws had not yet been adopted. See *id.*
130. See, e.g., Finkel, *supra* note 36, at 59 (discussing the “threat of lawsuits from neighbors under outdated environmental protection laws” and its “chilling effect on [faith-based organization]-led housing development”); Ginny Myrick & Kate Moorehead Carroll, *Religion, Property Law, and the Crisis of Houses of Worship*, CANOPY F. (May 10, 2023), <https://canopyforum.org/2023/05/10/religion-property-law-and-the-crisis-of-houses-of-worship> [<https://perma.cc/V35T-TV93>] (describing “impediments to success” in redeveloping historic churches).
131. See, e.g., Natalie Bicknell Argerious, *Seattle Black Faith Leaders Urge Mayor Durkan Not to Sign Amended Density Bonus Bill*, URBANIST (July 12, 2021), <https://www.theurbanist.org/2021/07/12/seattle-black-faith-leaders-and-supporters-urge-mayor-durkan-not-to-sign-amended-density-bonus-bill> [<https://perma.cc/T8GE-MJFA>].
132. This Feature explores numerous municipal and state incentives for faith communities to create affordable housing on their underutilized property, including density bonuses and grants to fund predevelopment work. See *infra* Section II.C.

## II. AFFORDABLE HOUSING ON CHURCH PROPERTY

In Orange, California, the Sisters of St. Joseph are converting their historic Motherhouse into multifamily apartments for low-income seniors.<sup>133</sup> Built in 1960, the three-story convent once housed sixty consecrated religious women who prayed together, shared meals, and rested between shifts at St. Joseph Hospital.<sup>134</sup> The renovated structure, Villa St. Joseph, will remain alongside the Sisters' hospital and include fifty apartments—eighteen reserved for formerly homeless residents—along with a community room, office space for care providers, and shared laundry facilities.<sup>135</sup> For the Sisters, efforts to create affordable housing flow from their religious mission to “work together with people living in the neighborhoods they serve to help improve the well-being of the local community,” always striving “to be mindful of the diverse and unmet needs of the dear neighbor.”<sup>136</sup> After an extensive community-outreach process, the Sisters decided that the best use for their former convent would be high-quality affordable housing for seniors, ultimately partnering with Mercy Housing California to develop and manage Villa St. Joseph.<sup>137</sup> In the words of their religious superior, Sister Mary Beth Ingham: “As Sisters of St. Joseph have done since our earliest days, we continue to extend our mission of unity, hospitality, and welcome as we open our hearts to create a home for those in need . . . and may all who dwell with us be abundantly blessed.”<sup>138</sup>

Villa St. Joseph is a coveted real estate property in Orange County. Less than fifteen minutes from Disneyland and accessible to countless educational,

---

133. *Sisters of St. Joseph of Orange, Mercy Housing California Celebrate the Start of Construction of a New Senior Affordable Community, Villa St. Joseph*, MERCY HOUS. (Dec. 19, 2022), <https://www.merchyhousing.org/2022/12/sisters-of-st-joseph-of-orange-mercy-housing-california-celebrate-the-start-of-construction-of-a-new-senior-affordable-community-villa-st-joseph> [https://perma.cc/L7NW-4VZD].

134. *Id.*; *100 Years in Orange*, SISTERS ST. JOSEPH ORANGE, <https://www.csjorange.org/100-years-in-orange> [https://perma.cc/9XQ6-TUSC].

135. *Mercy Housing California Converts OC Nunnery into 50 Affordable Homes*, REAL DEAL (June 16, 2023, 1:45 PM), <https://therealdeal.com/la/2023/06/14/mercy-housing-california-converts-oc-nunnery-into-50-affordable-homes> [https://perma.cc/J4M5-J7BL].

136. *Our Mission*, SISTERS ST. JOSEPH ORANGE, <https://www.csjorange.org/our-mission> [https://perma.cc/2ZUQ-2K9T].

137. See *Sisters of St. Joseph*, *supra* note 133. Mercy Housing California will also provide formerly homeless residents with services, including “case management, mental health services, crisis intervention, therapeutic groups, substance abuse services,” and external referrals. *Id.* Funding providers included the City of Orange, Orange County, the California Department of Housing and Community Development, the California Housing Finance Agency, Umpqua Bank, and Enterprise Communities. *Id.*

138. *Id.* (invoking the patronage of St. Joseph, “himself a builder”).

medical, and commercial institutions, the property would have sold for millions of dollars, whether the old convent was redeveloped or torn down.<sup>139</sup> Instead, the Sisters of St. Joseph saw an opportunity to fulfill their religious mission, serving “the diverse and unmet needs of the dear neighbor” by converting their historic Motherhouse into affordable housing. In the process, they contributed to alleviating California’s housing crisis, adding another convent to the growing list of residential church properties that have been transformed into apartments for teachers, seniors, low-income workers, and neighbors seeking shelter.<sup>140</sup>

The Sisters of St. Joseph do not sequester their religious exercise in Sacred Heart Chapel.<sup>141</sup> Like countless faith communities across the United States, the Sisters’ sincerely held religious belief inspires their ministry on church property, where they offer food and shelter, education and health care, charity and solidarity to believers and unbelievers alike.<sup>142</sup> Faith communities like the Sisters discern how to use their property based on what their theological and moral convictions require.

In recent years, those convictions have inspired numerous faith communities to redevelop and repurpose their underutilized property for affordable housing.<sup>143</sup> Their efforts have echoed across the continent, with housing advocates

139. See *Villa St. Joseph*, SISTERS ST. JOSEPH ORANGE, <https://www.csjorange.org/villastjoseph> [<https://perma.cc/X4PN-PCEH>].

140. See, e.g., Len Ramirez, *Church in San Jose Converts Old Convent to Affordable Teacher Housing*, CBS NEWS BAY AREA (Aug. 31, 2022, 7:10 PM), <https://www.cbsnews.com/sanfrancisco/news/san-jose-old-convent-affordable-teacher-housing-st-john-vianney-catholic-church> [<https://perma.cc/A3B3-MLQK>] (“The nuns aren’t here anymore, but the parish wanted to make sure that the building still housed people willing to serve others.”); Loan-Anh Pham, *San Jose Church Tackles Teacher Housing*, SAN JOSE SPOTLIGHT (Sept. 1, 2022), <https://sanjosespotlight.com/san-jose-church-tackles-teacher-housing> [<https://perma.cc/5DE7-3NGP>] (“Silicon Valley’s high cost of living has contributed to a teacher shortage, leaving educators unable to buy or even rent in the area’s housing market.”); *Apartments*, ST. MARTIN TOURS CATH. CHURCH, <http://www.stmartinsdc.org/apartments.html> [<https://perma.cc/L7GA-SCAM>] (“This project is grounded in our firm belief that people of all income levels, races and cultural backgrounds deserve safe and affordable housing.”); *Saint Casimir Parish*, *supra* note 9.

141. See *Sacred Heart Chapel*, SISTERS ST. JOSEPH ORANGE, <https://www.csjorange.org/mas-sinsacredheartchapel> [<https://perma.cc/Q3H2-P9Y4>].

142. See *supra* note 7.

143. See Finkel, *supra* note 36, at 3 (“The [Yes In God’s Backyard] movement is part of a longer historical arc of [development led by faith-based organizations (FBOs)], but it differs markedly from earlier iterations. Most notably, whereas in previous decades FBOs were more focused on *acquiring* land and property for housing, the current generation is looking to *repurpose* land and buildings they already own.”).

and faith leaders together proclaiming, “Yes, In God’s Backyard.”<sup>144</sup> This Part explores the practical, theoretical, and legal contours of faith-based efforts to create affordable housing on church property. First, it surveys how faith communities have repurposed their property and how their land can be leased or donated to render housing projects affordable. Second, it demonstrates the breadth of potential for affordable housing on church property, drawing on public sources and a novel data set to map parcels owned by Roman Catholic dioceses in Chicago, Illinois, and Oakland, California, across municipal zones. Finally, it explores municipal and state legislation that encourages the development of affordable housing on church property through density bonuses, parking-minimum waivers, and other limits on local land-use regulation. Where faith communities can redevelop their underutilized church property for affordable housing and local governments can grow the affordable-housing supply within their municipal limits, everyone wins.

#### A. *Yes, In God’s Backyard*

When faith communities create affordable housing on church property, real estate decisions are guided less by market value and more by religious value — a commitment to “welcome the stranger,” to “love your neighbor as yourself.”<sup>145</sup>

---

144. See Johnny Khamis, *Yes In God’s Backyard*, SAN JOSE SPOTLIGHT (Aug. 17, 2021), <https://sanjosepotlight.com/khamis-yes-in-gods-backyard> [https://perma.cc/F2QU-AJ6A]; Julia Oller, *Will California Churches Build Affordable Housing ‘In God’s Backyard’?*, SOJOURNERS (July 7, 2022), <https://sojo.net/articles/will-california-churches-build-affordable-housing-god-s-backyard> [https://perma.cc/6JHX-XTRX]; Pasioka, *supra* note 11.

145. See, e.g., Brooke Wirschafter, *Why My Synagogue Is Building a 55-Unit Housing Development for the Homeless*, JEWISH TELEGRAPHIC AGENCY (Mar. 24, 2022, 4:57 PM), <https://www.jta.org/2022/03/24/ideas/why-my-synagogue-is-building-a-55-unit-housing-development-for-the-homeless> [https://perma.cc/CV4W-TSCJ] (“Our [Jewish] tradition calls on us to love the stranger, and over and over to remember that we were strangers in the Land of Egypt. We can think of no more important way to do that than to welcome those who have been cast out as ‘strangers’ into homes of their own alongside our new communal home.”); Alejandra Molina, *‘Yes In God’s Backyard’: Churches Use Land for Affordable Housing*, EPISCOPAL NEWS SERV. (Nov. 15, 2019), <https://www.episcopalnewsservice.org/2019/11/15/yes-in-gods-backyard-churches-use-land-for-affordable-housing> [https://perma.cc/ZFH5-UYFM] (“Jesus very clearly tells us to keep our eyes open to those who are in need . . .” (quoting Jonathan Doolittle, pastor at Clairemont Lutheran Church)); see also Off. of Domestic Soc. Dev., *Affordable Housing and the National Housing Trust Fund (NHTF)*, U.S. CONF. CATH. BISHOPS (Feb. 2011), <https://www.usccb.org/issues-and-action/human-life-and-dignity/housing-homelessness/upload/affordable-housing-and-NHTF-2011-FINAL.pdf> [https://perma.cc/34HV-VWRF] (describing the U.S. Conference of Catholic Bishops’ support for “a national housing policy that includes the preservation and production of quality housing for low-income families, the elderly and other vulnerable people, as well as the participation and partnership of residents, nonprofit community groups, and churches to build and preserve affordable housing”).

For Jewish and Christian faith communities alike, the Prophet Isaiah offers divine instruction:

Is this not, rather, the fast that I choose: releasing those bound unjustly, untying the thongs of the yoke; setting free the oppressed, breaking off every yoke? Is it not sharing your bread with the hungry, *bringing the afflicted and the homeless into your house*; clothing the naked when you see them, and not turning your back on your own flesh? Then your light shall break forth like the dawn . . . .<sup>146</sup>

Christians also look to Matthew’s gospel account of the “Last Judgment,” where Jesus warns his disciples against neglecting to care for people who suffer hunger, thirst, homelessness, nakedness, illness, or imprisonment: “Amen, I say to you, what you did not do for one of these least ones, *you did not do for me.*”<sup>147</sup> These scriptural mandates inspire practical responses to worldly reality—religious exercise reaching outside the sanctuary.

Sincerely held religious beliefs inspire faith communities to create affordable housing on their underutilized church property. But the property itself often dictates what form such housing will take. While parcels and structures are unique, their predevelopment position tends to reflect one of three former uses by faith communities.

First, faith communities repurpose unused church residences as affordable housing. Housing once used by religious ministers—from rectories to abbeys to convents—can be converted into apartments and multifamily homes.<sup>148</sup> The Sisters of St. Joseph transformed their historic Motherhouse, where sixty consecrated religious women once lived, into fifty apartments for low-income seniors.<sup>149</sup> The University of Notre Dame’s Alliance for Catholic Education collaborates with local dioceses to house hundreds of early-career educators in empty rectories and convents across the country.<sup>150</sup> Through *Quo Vadis*, graduate students can limit their debt and create community, by living together in unoccupied rectories near their university.<sup>151</sup> From Portland to Pleasantville,

146. *Isaiah* 58:6–8 (New American Bible Revised Edition) (emphasis added).

147. *Matthew* 25:31–46 (New American Bible Revised Edition) (emphasis added) (“Then he will say to those [who neglected the poor], ‘Depart from me, you accursed, into the eternal fire prepared for the devil and his angels.’”).

148. See *supra* notes 9, 133–140 and accompanying text.

149. See *supra* notes 133–140 and accompanying text.

150. See Madeline Johnson, *Superintendents Explore Teacher Housing Strategies*, FITZGERALD INST. FOR REAL EST. (June 12, 2023), <https://realestate.nd.edu/news-events/news/catholic-school-superintendents-explore-teacher-housing-strategies> [https://perma.cc/DL2E-QAKZ].

151. See *Saint Casimir Parish*, *supra* note 9.



Spokane to Manhattan, Baltimore to Buffalo, unused church residences are finding new life as affordable housing where local real estate forces many households to spend a disproportionate percentage of their income on rent and utilities, leaving them cost-burdened.<sup>152</sup>

Second, faith communities renovate underutilized church structures as affordable housing. Schools and parish halls, long bereft of students and congregants, can also be converted into apartments and multifamily housing.<sup>153</sup> Transfiguration School in Detroit, Michigan, now contains nineteen apartments for “residents with extremely low incomes of 0% to 50% AMI [area median income] . . . and no resident will pay more than 30% of their income in rent, plus utilities.”<sup>154</sup> St. John Kanty School in Buffalo, New York, was remodeled with thirty-seven apartments, including twelve set aside for survivors of domestic violence.<sup>155</sup> St. Mary Star of the Sea School in New London, Connecticut, includes

---

152. Seán Devlin, *Affordable Housing Lottery Opens for 63 Units at Former Convent in Bushwick Starting at \$519*, BROWNSTONER (Jan. 4, 2017), <https://www.brownstoner.com/real-estate-market/affordable-housing-brooklyn-1875-broadway> [<https://perma.cc/Z8PJ-Q7LA>]; *Convent Living Offers Affordable Housing Option in NYC*, CBS NEWS N.Y. (May 23, 2014), <https://www.cbsnews.com/newyork/news/seen-at-11-convent-living-offers-affordable-housing-option-in-nyc> [<https://perma.cc/WJ2F-8GPK>]; Phil Hirschhorn, *Portland Convent Being Turned into Affordable Housing*, WMTW (July 11, 2019), <https://www.wmtw.com/article/portland-convent-being-turned-into-affordable-housing/28370304> [<https://perma.cc/G6N6-J222>]; Mike Desmond, *Former Sacred Heart Property to Be Converted into Affordable Housing with \$14.5 Million Project*, WBFO (Sept. 24, 2021), <https://www.wbfo.org/local/2021-09-24/former-sacred-heart-property-to-be-converted-into-affordable-housing-with-14-5-million-project> [<https://perma.cc/8GBC-DME3>]; *Converting Surplus Church Property into Affordable Housing*, CATH. CHARITIES USA, <https://www.catholiccharitiesusa.org/wp-content/uploads/2020/08/CCUSA-Surplus-Church-Property-into-Affordable-Housing-Guide.pdf> [<https://perma.cc/KJ64-5VCE>]. Cost burdens are a direct result of low wages and housing-supply shortages. Households are “cost-burdened” when they spend more than 30% of their income on rent and utilities and “severely cost-burdened” when they spend more than 50% of their income on these expenses. See *The Gap: A Shortage of Affordable Homes*, *supra* note 47, at 10.

153. See *supra* notes 10, 36-44 and accompanying text.

154. See *Mayor Duggan Helps Open Former Transfiguration School After \$7.2 Million Conversion to Affordable Housing*, CITY DETROIT (Jan. 24, 2022), <https://detroitmi.gov/news/mayor-duggan-helps-open-former-transfiguration-school-after-72-million-conversion-affordable-housing> [<https://perma.cc/EUY5-BPPT>] (“The Transfiguration School served the community for nearly a century, and now, as affordable housing, it will continue that mission in a new way. This project shows the potential for reusing our historic assets in a way that leads to a better, stronger and more equitable Detroit.”).

155. See Jonathan D. Epstein, *Former St. John Kanty Church School Building to Become Affordable Apartments*, BUFFALO NEWS (Jan. 15, 2021), [https://buffalonews.com/news/local/former-st-john-kanty-church-school-building-to-become-affordable-apartments/article\\_b68cocbe-569a-11eb-b9bo-2baa8do34cbd.html](https://buffalonews.com/news/local/former-st-john-kanty-church-school-building-to-become-affordable-apartments/article_b68cocbe-569a-11eb-b9bo-2baa8do34cbd.html) [<https://perma.cc/3LN7-BLSA>].

support services for mental health and wellbeing, vocational training, and job skills, along with twenty studio and one-bedroom apartments.<sup>156</sup>

Third, faith communities develop affordable housing on vacant parcels of land. Many faith communities own land near their house of worship that remains undeveloped. Others own antiquated structures that they raze for new development. Expansive parking lots, which were created to meet local parking minimums for church attendance, present countless opportunities to develop useful housing structures on unused asphalt.<sup>157</sup> Glenclyff's tiny-home village was built on grassy acreage behind its Nashville sanctuary.<sup>158</sup> Jordan Court was constructed on All Souls' church parking lot and decrepit parish hall in Berkeley.<sup>159</sup> Tiny houses for low-income households are popping up on land owned by faith communities across the country: in California, First Presbyterian Church of Hayward, Meridian Baptist Church, Asbury United Methodist Church, Crosswinds Church, and Grace Presbyterian Church; in North Carolina, Episcopal Church of the Advocate; in Minnesota, Church of the Nazarene; in Missouri, Saints Theresa and Bridget Parish; in Washington, First Christian Church of

---

156. See Greg Smith, *St. Mary School to Be Transformed into Affordable Housing*, DAY (June 4, 2019), <https://www.theday.com/local-news/20190604/st-mary-school-to-be-transformed-into-affordable-housing> [https://perma.cc/PB49-XLEQ] (“The Connection, a statewide human services and community development agency, secured a 99-year-lease for the property from the church.”); Jeannette Penniman, *Saint Mary Place: How We Converted a Historic School into Affordable Housing*, PATRIQUIN ARCHITECTS (Aug. 18, 2021), <https://www.patriquinarchitects.com/saint-mary-place-how-we-converted-a-historic-school-into-affordable-housing> [https://perma.cc/DM73-SHPV].

157. See Edward Erfurt, *Where Do I Park My Pew?*, STRONG TOWNS (June 30, 2023), <https://www.strongtowns.org/journal/2023/6/30/where-do-i-park-my-pew> [https://perma.cc/VFD8-5CHV] (describing parking regulations based on church seating); Edward Erfurt, *Parking Is More Than a Number*, STRONG TOWNS (Oct. 28, 2022), <https://www.strongtowns.org/journal/2022/10/28/parking-is-more-than-a-number> [https://perma.cc/9CFN-EDRK] (“These requirements for parking spaces are based on peak demand [for example, Sunday Mass], intended to accommodate every visitor arriving at the location, all at the same time, each in their own car, and with the expectation that everyone will have a dedicated parking stall.”).

158. See *supra* notes 2-5 and accompanying text.

159. See *supra* notes 36-44 and accompanying text.

Tacoma.<sup>160</sup> Apartment complexes on vacant lots are even more numerous,<sup>161</sup> from St. Paul's Commons in Walnut Creek, California,<sup>162</sup> to Cathedral Arts Apartments in Detroit, Michigan,<sup>163</sup> to IKAR synagogue's housing development in Los Angeles, California.<sup>164</sup>

Regardless of their property's former use, most faith communities partner with another organization, typically an independent secular developer or a faith-based, nonprofit community-development corporation (CDC), to create affordable housing.<sup>165</sup> CDCs bring expertise in real estate that faith communities often

- 
160. This list is far from exhaustive. See Brinker, *supra* note 8; Jyoti Mann, *Churches Are Building Tiny Homes Across the US to Help House the Homeless*, BUS. INSIDER (Apr. 8, 2023), <https://www.businessinsider.com/churches-build-tiny-homes-to-help-ease-the-homeless-crisis-2022-6> [<https://perma.cc/7CHT-23E9>]; Marisa Kendall, *Bay Area Churches Build Tiny Homes for Their Homeless Neighbors*, SILICONVALLEY.COM (June 15, 2022, 6:10 AM), <https://www.siliconvalley.com/2022/06/15/bay-area-churches-build-tiny-homes-for-their-homeless-neighbors> [<https://perma.cc/5XK6-EU6L>]; *Tiny Home Living*, GOODNESS VILL., <https://gvlivemore.org/tinyhomeliving> [<https://perma.cc/QD6M-GTW2>].
161. See, e.g., Khamis, *supra* note 144 (“In San Jose, the Cathedral of Faith has been in talks with the city . . . for more than a year in hopes of building 200 units to house low-income residents on their unused land.”); Molina, *supra* note 145 (“Clairemont Lutheran Church plans to jump-start its housing efforts next year, hoping to put between 16 and 21 apartments on its parking lot.”); Bandlamudi, *supra* note 12 (“The Blessings of Faith church, located a few blocks away from downtown Hayward, wants to build a 42-unit complex for seniors with low incomes in a small parking lot behind the church.”); Tiffany Huertas, *New City Program to Help Churches, Nonprofits Seeking to Develop Affordable Housing*, KSAT (Dec. 4, 2019, 10:02 PM), <https://www.ksat.com/news/local/2019/12/05/new-city-program-to-help-churches-nonprofits-seeking-to-develop-affordable-housing> [<https://perma.cc/YY73-RY3R>] (describing potential for “an acre of land . . . with a two-, three-story unit” at West End Baptist Church in San Antonio).
162. See Molina, *supra* note 145 (describing a plan for forty-five affordable apartments and physical space for a nonprofit “to serve people who are homeless”).
163. See Michael Stechschulte, *Construction Begins on New Cathedral Arts Apartments; Actor Wahlberg Sends Congrats*, DETROIT CATH. (June 8, 2023), <https://www.detroitcatholic.com/news/construction-begins-on-new-cathedral-arts-apartments-actor-wahlberg-sends-congrats> [<https://perma.cc/ZG3M-69LL>] (quoting Mayor Michael Duggan: “The archdiocese is the trustee of a lot of valuable land, and what you have done here is what we would have prayed for – that you’re taking very valuable land and creating 53 affordable units to help rebuild this neighborhood and rebuild the Woodward corridor.”); *Mayor Duggan Joins Archdiocese, MHT Housing to Celebrate New Affordable Housing Property near North End*, CITY DETROIT (June 8, 2023), <https://detroitmi.gov/news/mayor-duggan-joins-archdiocese-mht-housing-celebrate-new-affordable-housing-property-near-north-end> [<https://perma.cc/9BJ7-9YHE>].
164. See Wirtschafter, *supra* note 145 (describing a project for fifty-five units of “permanent supportive housing” on the synagogue’s land).
165. See Catherine Fisher, *Faith Based Affordable Housing Development and Religious Land: Examining Successful Practices*, CANOPY F. (May 17, 2023),

lack (for example, “how to talk to an architect, how to understand financing, how to find the right lawyer”).<sup>166</sup> Many faith communities that form development partnerships maintain ownership of their property, offering a long-term ground lease ranging from fifty to ninety-nine years.<sup>167</sup> But some congregations sell or donate their property to nonprofit housing developers and often add deed restrictions that limit new housing to low-income households.<sup>168</sup> Funding overwhelmingly comes from federal low-income housing tax credits, housing grants from municipal and state governments, and bank loans. Private benefaction, congregational donations, private foundation grants, and owner financing by faith communities also contribute to making each development affordable.<sup>169</sup>

To be clear, most faith communities lack the financial resources to self-fund affordable housing projects on their property. Housing projects serving low-income populations (i.e., affordable for households earning up to 80% of AMI)

---

<https://canopyforum.org/2023/05/17/faith-based-affordable-housing-development-and-religious-land-examining-successful-practices> [<https://perma.cc/6G58-W2AM>]; Reinhard, *supra* note 105.

166. *Putting Faith in a Local—and Ingenious—Solution for Affordable Housing*, LOC. INITIATIVES SUPPORT CORP. (Feb. 19, 2020), <https://www.lisc.org/our-stories/story/putting-faith-local-ingenious-solution-affordable-housing> [<https://perma.cc/G7NK-S4EE>] (describing the New York Land Opportunity Program that “helps property-owning churches . . . develop the expertise and partnerships they need to build affordable housing on their underutilized land”); see Patrick Sisson, *Churches Divine a New Role: Housing Development*, CURBED (Feb. 4, 2020, 8:00 AM EST), <https://archive.curbed.com/2020/2/4/21117310/church-real-estate-san-antonio-homeless-affordable-housing> [<https://perma.cc/2E2P-7MQ2>] (describing San Antonio’s “Mission-Oriented Development Pilot,” a municipal partnership to provide faith communities “willing to use their land with assistance, in the form of guidance from city agencies that handle permitting, help applying for tax credits, and connections with developers”).
167. See Finkel, *supra* note 36, at 6 (“Given its value as an asset, FBOs are often wary of entering into contracts or debt relationships that might jeopardize their ownership and control of their land, which can be unacceptably risky for congregants and boards charged with safeguarding the intergenerational legacies of their institutions. As a result, FBOs sometimes prefer to ground lease their land.”); Garcia & Sun, *supra* note 30, at 9; Smith, *supra* note 156; Fisher, *supra* note 165.
168. See Fisher, *supra* note 165. *But see* Garnett & Reidy, C.S.C., *supra* note 22, at 822-24 (describing the \$110 million sale of a Chicago cathedral parking lot for development as luxury residential towers).
169. See Fisher, *supra* note 165 (surveying affordable-housing projects created by faith communities on their property: “81% of congregation representatives checked funding from low-income tax credits, 80% city and state grants, 54.8% bank loans, 48.4% private foundation grants, 45.2% private donations and 42% reported congregation donations”); see also *Mayor Duggan Joins Archdiocese*, *supra* note 163 (“The [Cathedral Arts Apartments] development’s affordability was made possible through funding secured through the Michigan State Housing Development Authority, including Low-Income Housing Tax Credits and Housing Trust Funds; 16 Project-Based Vouchers from the Detroit Housing Commission; and a portion of owner financing provided by the Archdiocese of Detroit and MHT.”).

require significant funding to cover their development costs.<sup>170</sup> Funding largely comes through debt and equity, as well as public and nonprofit subsidy.<sup>171</sup> While private benefaction and congregational contributions may offset some modest portion of those development costs, what faith communities principally contribute to housing development is their *land* through lease, sale, or donation. They begin with the property entitlement and share their valuable property interest with housing projects that might not otherwise afford the land needed for development.<sup>172</sup>

The complexity of securing low-income housing tax credits, state and municipal grants, bank loans, and bond purchases often necessitates partnering with more sophisticated housing developers.<sup>173</sup> But faith communities need only rely on government and nonprofit funding where they dedicate their property to truly low-income housing. Nehemiah Initiative Seattle—a faith-based community-development organization that seeks to combat Black urban displacement, in part, by creating affordable housing on Black church-owned property—describes how lower affordability requirements can render housing developments financially untenable for most faith communities, absent public and nonprofit subsidy:

Our experience and analysis shows that at 80% AMI, a typical church with 5,000 square feet of extra land could build an 18-unit family housing project which would cover its costs and earn about a 4.2% per year yield before interest. The same project targeting 60% AMI would yield

---

170. These development costs include: (1) *land acquisition*, through purchase or ground lease; (2) *soft costs* involved in permitting and zoning, as well as fees for consultants, architects, engineers, and lawyers; (3) *hard costs* involved in constructing the building, from materials to contractors' fees; and (4) *financing* through equity and debt, accounting for interest rates on construction loans and return to outside investors. See Daniel Moore, President & CEO, Rockefeller Grp., Lecture at the Fitzgerald Institute for Real Estate: How Can Real Estate Development Be a Force for Good? (Sept. 16, 2022) (on file with Notre Dame Law School). Within the realm of private real estate development, developers' anticipated *profits* from their projects would also factor into development costs for those projects. *Id.*

171. See *supra* notes 167–169.

172. Cf. Schragger, *supra* note 100, at 165–66 (noting that building projects are often more expensive in urban areas “in large part because of higher land values,” and that builders of moderate-income housing “do not generally attempt to build housing in high-demand cities” as a result).

173. See Garcia & Sun, *supra* note 30, at 9 (“While LIHTC is a critical source of funding for new construction (and indeed, funds the majority of subsidized housing in the United States), affordable housing funded through the LIHTC program tends to be in medium- to large-sized developments (e.g., 50 units) in order to be competitive for state funding programs and benefit from economies of scale. However, not all institutions are comfortable with developing larger developments, and may instead prefer smaller-scale buildings (e.g., 10 to 20 units).”).

only 2.9%. That seems small, until you realize that the churches without massive endowments will need to borrow money at current interest rates around 3.75% per year. The 80% AMI project works – the 60% AMI project goes bankrupt.<sup>174</sup>

Where faith communities provide affordable housing above eighty percent of AMI, project financing solely through bank loans, bond purchases, and congregational contributions becomes much more realistic.<sup>175</sup> Ground-lease payments can offset the costs of debt financing.<sup>176</sup>

Ground leases can also bend the cost curve of real estate development, incentivizing private developers to collaborate with faith communities on affordable-housing projects. Under a ground-lease structure, faith communities retain ownership of their land, while developers make lease payments to use that land and own any improvements (i.e., buildings) they create. Since no fee-simple title transfer is involved – and thus, no lump-sum purchase price for that title – the ground lease lowers up-front development costs significantly. Ground-lease payments are added to the building’s operating costs, distributed over the lease term. When ground leases last ninety-nine years, faith communities can service debts associated with housing development and generate income to provide for their ministries.<sup>177</sup> St. Austin Catholic Parish and School in Austin, Texas, offers an instructive example.

St. Austin’s sits on a two-acre parcel adjacent to the University of Texas at Austin.<sup>178</sup> Despite its vibrant parish ministry and strong school enrollment, St.

174. Natalie Bicknell Argerious, *Seattle Black Faith Leaders Urge Mayor Durkan Not to Sign Amended Density Bonus Bill*, URBANIST (July 12, 2021), <https://www.theurbanist.org/2021/07/12/seattle-black-faith-leaders-and-supporters-urge-mayor-durkan-not-to-sign-amended-density-bonus-bill> [<https://perma.cc/SHE8-5RYS>]; see *What We Do*, NEHEMIAH INITIATIVE SEATTLE, <https://www.nehemiahinitiativeseattle.org/about> [<https://perma.cc/VA3M-Z895>].

175. See Argerious, *supra* note 174; Moore, *supra* note 170. Residential real estate projects targeting households that earn 80% to 120% of AMI address an increasingly unmet need for “workforce” housing throughout the United States, particularly in wealthy metros. These rent-burdened households, roughly 2 million in number (6.5 million people), earn too much income to qualify for subsidized housing, but not enough income for “Class A” residential developments. See Moore, *supra* note 170.

176. See Moore, *supra* note 170.

177. I remain indebted to Daniel J. Moore for these insights about ground-lease structures and church property. Mr. Moore is President and CEO of Rockefeller Group and serves as an invaluable member of our Advisory Board for the Fitzgerald Institute for Real Estate at the University of Notre Dame. See *id.*

178. See Church Properties Initiative, *St. Austin Catholic Parish and School: Land Monetization and School Construction Case Study Austin, Texas*, FITZGERALD INST. FOR REAL EST. 6 (Summer 2022), <https://drive.google.com/file/d/iRozhe-YByikXWY4BSwtLKx4Pn7unayxB> [<https://perma.cc/G8AR-ENWC>].

Austin's concrete facilities—constructed during the 1950s and 1960s—had begun to deteriorate, and the cost of maintenance outstripped the cost of new construction over the long term.<sup>179</sup> The parish community defined its need for 100,000 square feet of ministry space beyond its house of worship for parish life, neighborhood outreach, and its school.<sup>180</sup> Due to explosive growth in high-rise development for student housing around the university, St. Austin's excess land was attractive to developers.<sup>181</sup> So, the parish monetized it, leasing one acre of its campus on a 99-year ground lease for the construction of a \$100 million, twenty-nine-story, 423-unit student-housing and parking structure, with 200 beds (out of 991 total) dedicated to affordable housing.<sup>182</sup> Coupling revenues from the ground lease with bank loans and bond purchases, St. Austin's could build a \$44 million, five-story building on its campus, which would house the school and parish ministries, along with a gym and rectory located on lower levels of the residential tower.<sup>183</sup> The project was a win-win for St. Austin's and its university neighbors.<sup>184</sup> The parish replaced its aging, ill-adapted facilities with a state-of-the-art campus, inviting growth in school enrollment and enhanced ministry to the local community. Hundreds of university students will be able to live across the street from their campus, including 200 students needing affordable housing. St. Austin's faith community has secured a revenue stream (in the form of ground-lease payments) to support its ministries for the next century.<sup>185</sup>

Like St. Austin's, faith communities across the country contribute church property to housing development. When they lease or donate their property, faith communities can bend the cost curve of housing projects, rendering them more affordable. Because they *begin* with the property entitlement, faith communities can freely share that entitlement with housing projects that the price of

---

179. *Id.* at 10 (“Engaged in a \$5 million capital campaign to fund building renovations in early 2016, the community of St. Austin parish began to question the long-term sustainability of conducting periodic capital campaigns to fund maintenance projects for aging buildings that may actually need to be replaced.”).

180. *Id.*

181. *Id.* (“St. Austin was able to monetize its property in the way it did because market demand in its location warranted a large, expensive, new development.”).

182. *Id.* (“St. Austin selected student housing developer EdR (soon after acquired by Greystar) as its partner in August 2018. EdR's proposal for housing that would target first-generation college students appealed to the parish's mission to support inclusion and ease housing pressures in a hot market.”).

183. *Id.* (“The debt package consists of \$30 million of senior, tax-exempt bank debt to be repaid entirely by the ground lease payments and \$9 million of junior, taxable bonds to be paid by the parish capital campaign and other existing parish income.”).

184. *Id.* (“The St. Austin Catholic Parish and School project is a paradigm for other stewards of church land seeking to transform real estate liabilities into assets serving their mission.”).

185. *Id.*

land might otherwise foreclose. To be sure, many of these faith communities could realize significant profits by relinquishing ownership or allowing market-rate development on their property, especially in high-demand cities.<sup>186</sup> Their decision to forgo such profits testifies to their sincerely held religious belief – the demands of conscience responding to worldly reality.

### B. Development Potential on Church Property

Municipal and state governments benefit from faith communities creating affordable housing on church property in no small part because church property is *everywhere*. Areas in the United States with any significant population almost always have some kind of faith community or house of worship, even if local religious affiliation has diminished.<sup>187</sup> Many of these church properties are located in residential zones, some as prior nonconforming uses, others as of right.<sup>188</sup> Their potential for housing development is vast.

In May 2020, the Turner Center for Housing Innovation at UC Berkeley demonstrated just how vast. The Turner Center’s policy brief, *Mapping the Potential and Identifying the Barriers to Faith-Based Housing Development*, revealed that “approximately 38,800 acres of land – roughly the size of the city of Stockton – are used for religious purposes and potentially developable” as low-cost housing in California alone.<sup>189</sup> The study included any land parcel larger than 10,000 square feet (roughly 0.23 acres) that was zoned for religious purposes, based on the assumption that parcels smaller than 10,000 square feet “are too small to be suitable for new housing, particularly housing financed through the

186. See, e.g., Garnett & Reidy, C.S.C., *supra* note 22, at 822-23 (describing the sale of surface parking lots owned by the First Church of Christ, Scientist in Boston and the Roman Catholic Archdiocese of Chicago for \$21.9 million and \$110 million, respectively).

187. See Matthew Speiser, *The U.S. Cities with the Most Religious Venues Per Capita Aren’t Quite What You’d Expect*, BUS. INSIDER (June 3, 2015, 5:15 PM EDT), <https://www.businessinsider.com/cities-with-most-churches-2015-6> [https://perma.cc/7HEY-NG9Q]; Reinhard, *supra* note 106.

188. For example, the Chicago Zoning Ordinance permits houses of worship (“Religious Assembly”), convents, monasteries, schools, and cemeteries “by-right” in every residential zone. CHI., ILL., MUN. CODE § 17-2-0100 (defining residential districts); *id.* § 17-2-0200 (defining land uses allowed in residential districts); see also *id.* § 17-15-0100 (“In older cities, such as Chicago, many buildings and uses that were established in compliance with all regulations in effect at the time of their establishment [e.g., most Roman Catholic churches, schools, rectories, and convents in the Archdiocese of Chicago] have been made nonconforming by zoning map changes (rezonings) or amendments to the Zoning Ordinance text.”).

189. Garcia & Sun, *supra* note 30, at 2, 4-5. Real estate data was drawn from “the administrative data of county assessors’ offices,” which “maintain records of properties that are used exclusively or primarily for worship,” since such properties are exempted from paying property taxes. *Id.* at 3.



Low-Income Housing Tax Credit (LIHTC) program, which necessitates larger-sized projects” to receive public funding.<sup>190</sup> According to the Turner Center, San Diego and Los Angeles counties together contain about 20% of California’s total church property, with over 9,000 acres of potentially developable land and more than 4,000 potentially developable parcels (i.e., at least 10,000 square feet).<sup>191</sup> By comparison, Alameda and Sacramento counties together contain just over 3,000 developable acres and more than 1,500 developable parcels; San Francisco County’s ninety-eight developable acres, though small and densely developed, contain 162 parcels on which affordable housing could be built.<sup>192</sup> Relative to zoning restrictions, the Turner Center found that “a significant share of religious land is located on parcels that are exclusively zoned for single-family development.”<sup>193</sup> In San Diego, Sacramento, and Oakland, more than half of all potentially developable religious land is zoned for single-family uses.<sup>194</sup> Multifamily housing structures are likewise disallowed on nearly a quarter of developable religious land in San Francisco and more than one-third of such land in Los Angeles.<sup>195</sup>

This Section builds upon the methodology of the Turner Center’s *Faith-Based Housing Development* study, mapping potentially developable religious land owned by Roman Catholic dioceses in Chicago, Illinois, and Oakland, California. It draws on publicly available real estate data for the Archdiocese of Chicago and real estate data reported by the Diocese of Oakland – which is held by the Church Properties Initiative (CPI) within the Fitzgerald Institute for Real Estate at the University of Notre Dame – to determine how much Roman Catholic church property could be repurposed as affordable housing.<sup>196</sup> While CPI has studied the real estate holdings of other dioceses and faith communities, none have reported data that would allow nearly as comprehensive an evaluation of

---

190. *Id.* at 3 (“Other development scenarios not captured by our analysis include the redevelopment of existing religious structures into housing units [(e.g., convents, rectories, or schools)], or the demolition and replacement of existing religious structures on smaller lots with new residential buildings.”).

191. *Id.* at 4-5 (“Los Angeles County’s median parcel size is .63 acres, compared to 1.26 acres in San Diego County. This signals that there are different development opportunities in each place.”).

192. *Id.* (noting median parcel sizes of 0.73 acres for Alameda, 1.65 acres for Sacramento, and 0.41 acres for San Francisco counties).

193. *Id.* at 8.

194. *Id.* (noting the percentage of potentially developable religious acreage in areas zoned single family (R1), including San Diego (50.6%), Sacramento (66.1%), and Oakland (50.6%)).

195. *Id.* (including percentages for San Francisco (21.6%) and Los Angeles (42.2%)).

196. I serve as Faculty Director for the Church Properties Initiative. I remain indebted to our Program Manager, Madeline Johnson, for her indefatigable assistance in collecting, evaluating, and mapping the church-property data we received from the Diocese of Oakland and publicly sourced for the Archdiocese of Chicago.

affordable-housing potential in a significant housing market as we find in Chicago and the East Bay. By studying the Archdiocese of Chicago and the Diocese of Oakland, we also discover instructive points of comparison and contrast with respect to church property and affordable-housing development. The amount of church property, and its location relative to zoning restrictions, reveals the expansive potential for affordable-housing development in comparable areas.

Reported or publicly available diocesan real estate data in Chicago, Oakland, and Berkeley allows for the following estimates: (1) total church land acreage; (2) church land acreage that remains unbuilt, including parking lots and open space; and (3) individual sites with more than one acre of unbuilt, open space.<sup>197</sup> In the case of Oakland and Berkeley, reported data additionally permits the calculation of (4) interior square footage of residential church buildings, including rectories and convents; and (5) interior square footage of nonresidential church buildings, including schools and parish halls. In the case of Chicago, total built footprint is provided as a proxy for interior building square footage. Church land acreage (total and unbuilt) is further demarcated based on zoning schemes that either (6) require single-family uses or (7) permit multifamily housing structures.<sup>198</sup>

The following three massing model images depict infill housing development at varying levels of density to give readers a sense of scale.<sup>199</sup> Each model

---

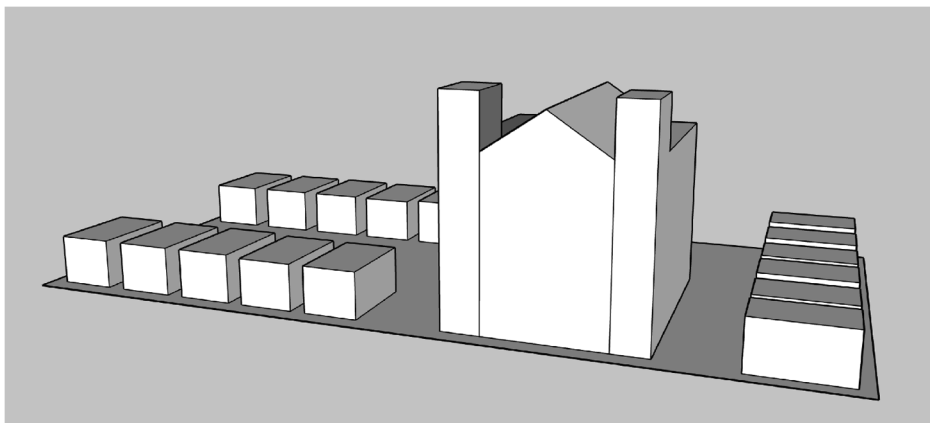
197. *Total church land acreage* was estimated from the geometric area of parcel polygons in R. *Unbuilt church land acreage* was estimated in R by subtracting the geometric area of building footprints, sourced from Microsoft Maps' US Building Footprints dataset (<https://github.com/microsoft/USBuildingFootprints> [<https://perma.cc/L6KR-9L8B>]), from the geometric area of parcel polygons. The sum of the area of these building footprints makes up the *total built footprint* reported for Chicago. *Church building square footage* in Oakland and Berkeley was calculated based on real estate data reported by the Diocese of Oakland. In this reported data, "residential" church buildings include properties listed as rectories, convents, dwellings, houses, residences, or dormitories.

198. Chicago zoning was calculated with residential zoning data from the City of Chicago's ArcGIS REST Services Directory and was checked against zoning descriptions compiled by 2nd City Zoning. See *ArcGIS REST Services Directory*, CITY CHI., <http://gisapps.cityofchicago.org/arcgis/rest/services/ExternalApps/Zoning/MapServer/1> [<https://perma.cc/XGW2-GVLH>]; *Chicago Zoning Map*, 2ND CITY ZONING, <https://secondcityzoning.org> [<https://perma.cc/2V4C-RVNF>] (citing City of Chicago public zoning data). Oakland zoning was calculated with residential zoning data collected by the Othering & Belonging Institute at UC Berkeley. See *San Francisco Bay Area Residential Zoning Data*, OTHERING & BELONGING INST., <https://github.com/OtheringBelonging/BayAreaZoning> [<https://perma.cc/9CNB-65KD>].

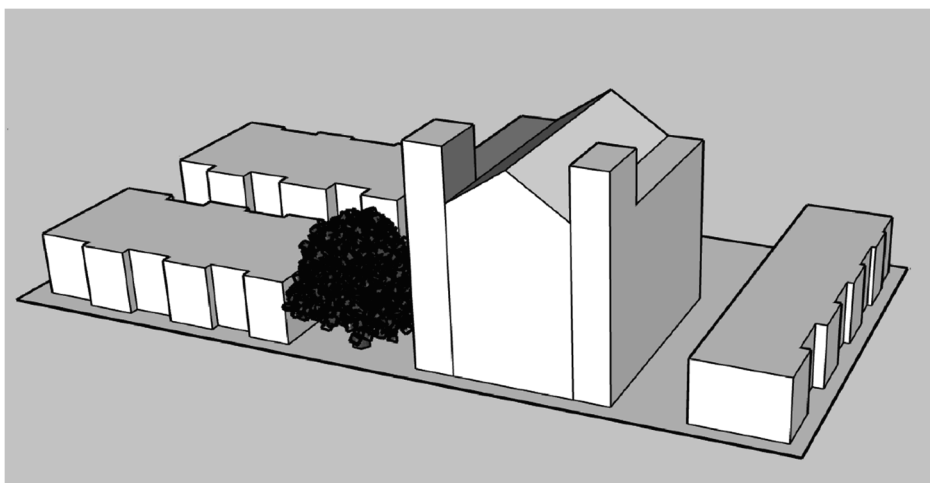
199. "Massing models" are simplified representations of buildings meant to indicate the approximate area or bulk of those buildings without conveying specific details about their material, façade, or design. "Infill development" involves new buildings introduced within an already-developed area (i.e., inserted among existing buildings). Infill increases the density of an

is situated on a three-acre site anchored by a house of worship with a 17,000-square-foot footprint. The depictions illustrate a theoretical site's approximate physical capacity at three plausible (though arbitrary) density levels, but do not reflect the particulars of an existing zoning scheme on housing development.

**FIGURE 1. DUPLEX (MM1): A LOW-DENSITY DEVELOPMENT COULD INCORPORATE 32 DUPLEX UNITS, EACH 2,475 SQUARE FEET IN AREA**



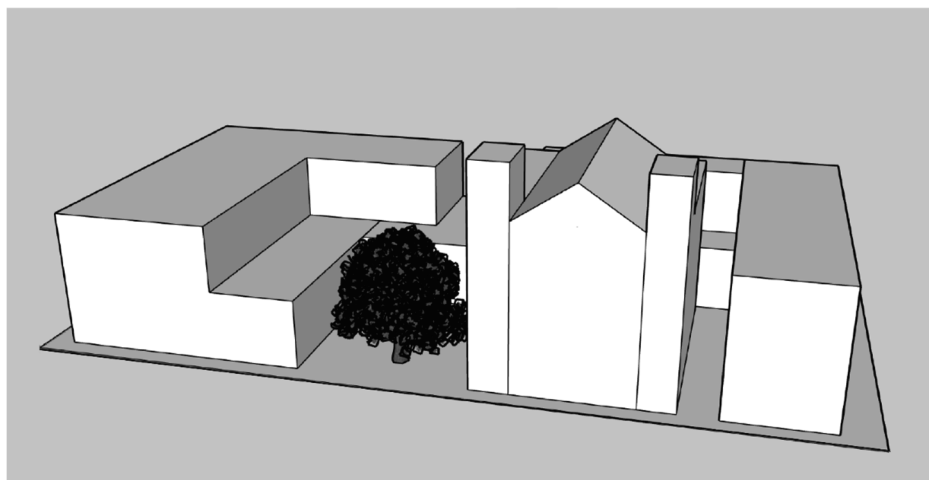
**FIGURE 2. WALK-UPS (MM2): A MEDIUM-DENSITY DEVELOPMENT COULD INCORPORATE 128 WALK-UP APARTMENTS, EACH 1,350 SQUARE FEET IN AREA**



---

existing neighborhood or region, rather than expanding its outer boundaries through development.

**FIGURE 3. MULTIFAMILY (MM3): A HIGH-DENSITY DEVELOPMENT COULD INCORPORATE OVER 300 APARTMENT UNITS RANGING FROM 500 TO 1,275 SQUARE FEET IN AREA**



1. *Archdiocese of Chicago*

The Roman Catholic Archdiocese of Chicago owns a staggering amount of property in the City of Chicago. Across Cook County and Lake County, diocesan property holdings total over 5,500 acres. Eight hundred and eighty-three acres of diocesan property are located within the City of Chicago.<sup>200</sup> A significant share of that acreage (74% or 657 acres) is located on parcels exclusively zoned for single-family development. Multifamily housing structures are only allowed on a fifth of diocesan land inside city limits (20% or 181 acres). Most church land owned by the Archdiocese remains unbuilt (81% or 717 acres) and is covered with parking lots and open space rather than buildings. That unbuilt acreage is overwhelmingly zoned for single-family uses (77% or 555 acres) rather than multifamily structures (18% or 128 acres). In Chicago, 102 individual diocesan sites have at least one acre of unbuilt, open space that could be developed as affordable housing.

The Archdiocese of Chicago also owns a significant number of buildings within the City of Chicago. This fact is unsurprising, given the history of

---

<sup>200</sup>. The City of Chicago is located within Cook County, though its expansive metro area also includes Lake County. Both Cook County and Lake County are served by the Archdiocese of Chicago. Estimating from county records for tax years 2021 (Lake) and 2023 (Cook)—and excluding land held for cemeteries—the Archdiocese owned 1,555 acres of built and unbuilt property in Lake County and 3,954 acres in Cook County, including 883 acres in the City of Chicago. See *supra* note 197.

neighborhood parishes — many built with rectories, schools, and convents for religious educators — throughout the city.<sup>201</sup> A significant portion of the Archdiocese's seven-million-square-foot building footprint consists of such residential diocesan church buildings, many of which can be converted into affordable housing. Many of the nonresidential diocesan church buildings that make up the balance of the built footprint may be similarly conducive to housing (e.g., neighborhood parish elementary schools).

**TABLE 1. ARCHDIOCESE OF CHICAGO—CITY OF CHICAGO**

Total church land acreage	883 acres
Zoned single-family	74% (657 acres)
Zoning permits multifamily	20% (181 acres)
Unbuilt acreage	717 acres
Zoned single-family	77% (555 acres)
Zoning permits multifamily	18% (128 acres)
<i>Built footprint</i>	7,334,232 ft <sup>2</sup>
<i>Sites with ≥ 1 acre of unbuilt, open space</i>	102 sites

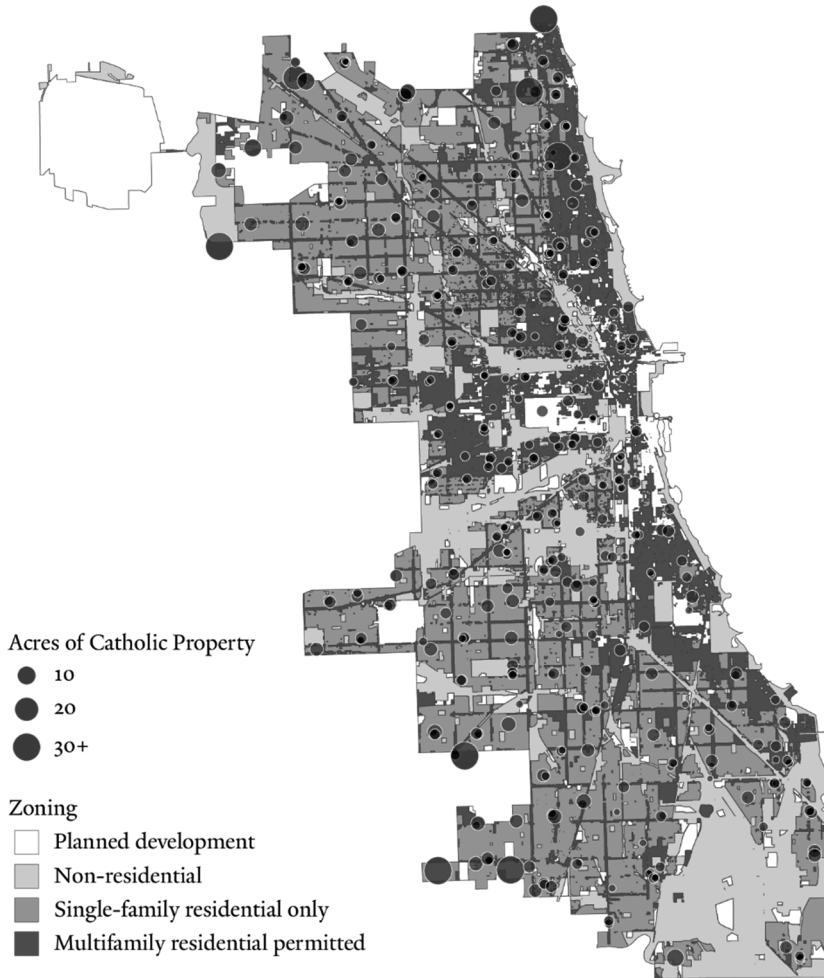
*Built footprint* is defined as the two-dimensional land area occupied by buildings. Given the presence of additional interior square footage in multi-story buildings, this figure (7,334,232 square feet) should be taken as a conservative minimum estimate of total usable building square footage. When mapped, parcels are depicted according to their size in acres. To facilitate viewing, contiguous parcels were grouped and their aggregate area depicted with a single dot at the geographic center of the grouped site. Four hundred and twenty-nine such sites are depicted, with areas ranging from a minimum of 0.001 acres to a maximum of 244.6 acres. The average site area is 2.64 acres.

Our CPI map also depicts Chicago zoning districts aggregated by the level of housing permitted in each district. The map was derived from the Chicago Data Portal and relies on the following zoning-district classifications: nonresidential; single-family residential only; and multifamily residential permitted

201. See generally JOHN T. MCGREEVY, *PARISH BOUNDARIES: THE CATHOLIC ENCOUNTER WITH RACE IN THE TWENTIETH-CENTURY URBAN NORTH* (1996) (describing the history of Roman Catholic parishes in Chicago and other major U.S. cities as well as examining encounters between Euro-American Catholics and African Americans in these metropolitan areas).

(with “multifamily” defined as housing of two or more units).<sup>202</sup> Areas zoned as planned developments (12.6% of total zoned area) were excluded from classification due to the large number (1,227) and individuated nature of these districts.

**FIGURE 4. CPI MAP OF CHICAGO ZONING DISTRICTS**



202. The zoning map was downloaded from the Chicago Data Portal. *Boundaries – Zoning Districts (Current)*, CHI. DATA PORTAL, <https://data.cityofchicago.org/Community-Economic-Development/Boundaries-Zoning-Districts-current-/7cve-jgbb> [https://perma.cc/4XUA-8Y7P]. Zoning-district classifications (e.g., “single-family residential only” or “multifamily residential permitted”) follow the zoning-district summaries of 2nd City Zoning. *Zoning Districts, 2ND CITY ZONING*, <https://secondcityzoning.org/zones> [https://perma.cc/EM2L-KED8].

Density defines the Archdiocese of Chicago, which owns a staggering amount of built and unbuilt property throughout the Windy City. The potential for housing is tremendous, especially near Chicago's urban center, where church properties are zoned to permit multifamily structures. Where single-family or low-density zoning regulations require exceptions for denser affordable-housing developments on church property, pursuing rezonings or variances from these requirements can increase costs, delay construction, and garner opposition from neighbors, some of whom may sue to block new housing in their backyard.<sup>203</sup>

## 2. Diocese of Oakland

The Roman Catholic Diocese of Oakland owns significantly less property than its confrere in Chicago, though its land holdings are still considerable. Across Alameda County and Contra Costa County, diocesan property holdings total nearly 775 acres. Ninety-three acres of diocesan property are located within the city limits of Oakland and Berkeley.<sup>204</sup> A limited share of that acreage (29% or 27 acres) is located on parcels that are exclusively zoned for single-family development. Multifamily housing structures are allowed on more than two-thirds of diocesan land inside the East Bay cities (69% or 64 acres). Most church land owned by the Diocese remains unbuilt (74% or 69 acres) and is covered with parking lots and open space rather than buildings. But unlike Chicago, that unbuilt acreage is largely zoned to allow for multifamily structures (66% or 46 acres), rather than exclusively single-family uses (31% or 21 acres). In Oakland and Berkeley, 17 individual diocesan sites have at least one acre of unbuilt, open space that could be developed as affordable housing.

The Diocese of Oakland also continues to own a number of buildings in Oakland and Berkeley. Residential diocesan church buildings, much of which can be converted into affordable housing, contain more than 200,000 square feet of interior space.<sup>205</sup> Nonresidential diocesan church buildings, some of which may be conducive to housing (e.g., neighborhood parish elementary schools), contain over 1.3 million square feet of interior space.<sup>206</sup>

---

203. See Garcia & Sun, *supra* note 30, at 7-8.

204. See *supra* note 197.

205. More precisely, the buildings contain 208,739 square feet of interior space, which represents 13% of the total square footage in church buildings owned by the Diocese. See *supra* note 197.

206. The buildings contain 1,392,673 square feet of interior space, which represents 87% of the total square footage in church buildings owned by the Diocese. See *id.*

**TABLE 2. DIOCESE OF OAKLAND—CITIES OF OAKLAND AND BERKELEY**

Total church land acreage	93 acres
Zoned single-family	29% (27 acres)
Zoning permits multifamily	69% (64 acres)
Unbuilt acreage	69 acres
Zoned single-family	31% (21 acres)
Zoning permits multifamily	66% (46 acres)
<i>Total building square footage</i>	<i>1,601,412 ft<sup>2</sup></i>
<i>Existing residential building square footage</i>	<i>208,739 ft<sup>2</sup></i>
<i>Sites with <math>\geq 1</math> acre of unbuilt, open space</i>	<i>17 sites</i>

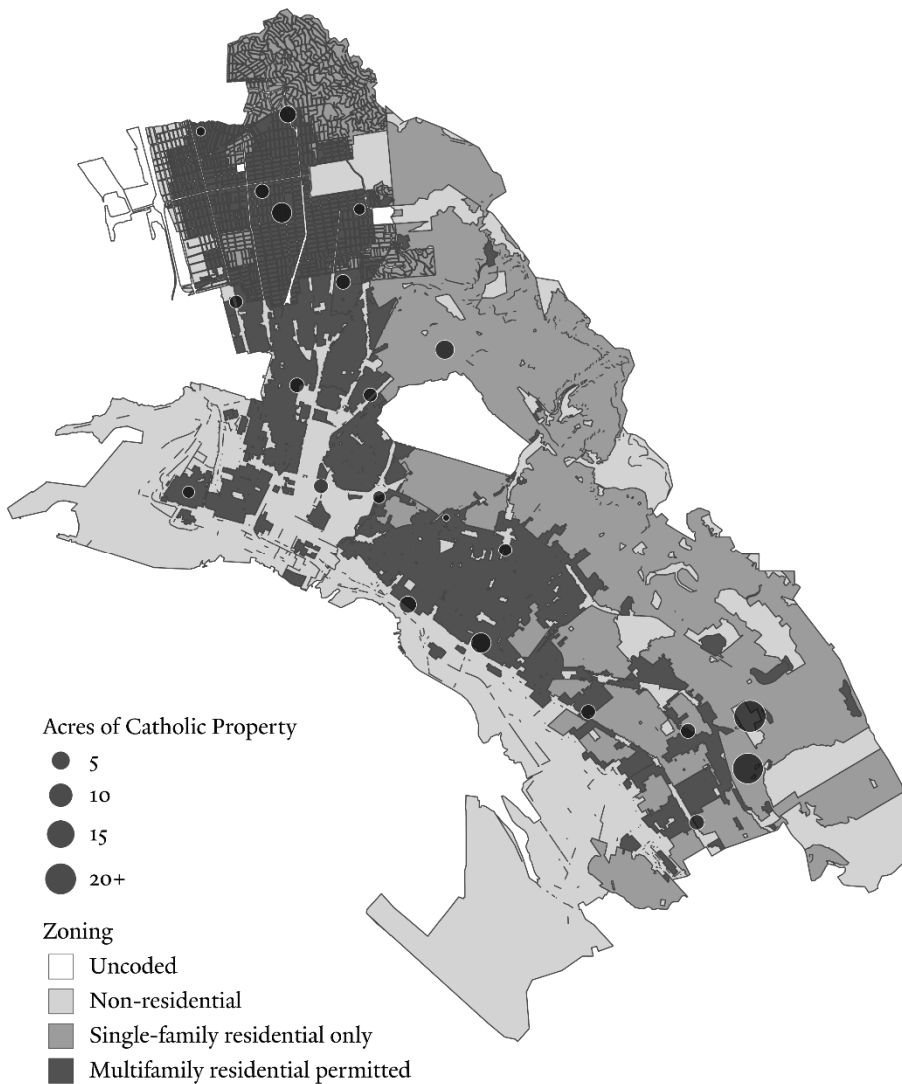
Real estate owned by the Diocese of Oakland within the Cities of Oakland and Berkeley was reported to CPI as diocesan, parish, school, or other church-owned property. When mapped, parcels are depicted according to their size in acres. The area of reported parcels was aggregated to the level of entity (i.e., as belonging to a certain parish, school, etc.), such that the total area of all parcels belonging to a particular entity is depicted with a single dot at the geographic center of the aggregated parcels. Twenty-two real estate entities are depicted, with areas ranging from a minimum of 0.5 acres to a maximum of 20.4 acres. The median entity area is 2.51 acres.

Our CPI map also depicts Oakland and Berkeley zoning districts aggregated by the level of housing permitted in each district. Districts marked as “Uncoded” are unclassified in datasets published by UC Berkeley’s Othering & Belonging Institute.<sup>207</sup>

---

207. The map uses zoning maps and classifications produced by UC Berkeley’s Othering & Belonging Institute and made available via the Institute’s Bay Area Zoning GitHub repository. *San Francisco Bay Area Residential Zoning Data*, *supra* note 198.



**FIGURE 5. CPI MAP OF OAKLAND AND BERKELEY ZONING DISTRICTS**

By comparison to Chicago, the Diocese of Oakland owns considerably less property in the East Bay, built or unbuilt, and that property is much more dispersed. But unlike Chicago, more than two-thirds of diocesan property is located on parcels zoned to permit multifamily uses. If those parcels allow adequate building density, zoning exceptions for affordable-housing projects (i.e., rezonings or variances) would not be required.<sup>208</sup>

208. See Garcia & Sun, *supra* note 30, at 7-8.

Diocesan real estate statistics tell compelling stories about possibilities for developing affordable housing on church property in Chicago, Oakland, and Berkeley. Of course, one story remains obscured by these statistics: many of these church properties are still being used for sacred worship, religious education, and pastoral ministry. Despite the nationwide crisis of houses of worship, numerous Roman Catholic faith communities continue to gather throughout Chicago, Oakland, and Berkeley. Yet affordable housing could be created on much of their property, just the same. Many houses of worship sit on parcels that include substantial amounts of unbuilt, minimally developed land, especially church parking lots. That property alone could be leveraged to build countless apartments, townhouses, and multifamily homes. And certain structures on church property can be repurposed or demolished without denigrating the continued liturgical and ministerial practices of most faith communities that occur elsewhere on their property.<sup>209</sup> The free exercise of religion and affordable housing can faithfully coincide.

### C. *Reforming Land-Use Regulation Through Legislation*

Local and state governments have begun to recognize how partnering with faith communities can transform underutilized church property into desperately needed affordable housing. Where faith communities struggle to overcome the regulatory and financial hurdles of adaptive reuse, legislative reforms can lower their barrier to entry. Municipal ordinances and state statutes can relax local land-use restrictions used by NIMBY neighbors to thwart denser, multifamily residential structures on church land. Such legislation can also provide development incentives – including density bonuses and grants to fund predevelopment work – for faith communities to create affordable housing on their underutilized property.

Density bonuses allow faith communities to build more housing on less land. In December 2022, Lutheran Church of the Good Shepherd broke ground on an eighty-six-unit apartment building for low-income workers and formerly

---

<sup>209</sup>. To be sure, some faith communities may require their entire property to remain exclusively dedicated to particular uses (e.g., sacred worship). But many faith communities would be open to repurposing sections of their property, especially unbuilt parcels, and unused structures. The Sisters of St. Joseph in Orange and All Souls Episcopal Parish in Berkeley offer helpful examples. The Sisters of St. Joseph transformed their historic Motherhouse into low-income apartments without inhibiting their consecrated religious life and ministry. *See supra* notes 133-144 and accompanying text. All Souls built Jordan Court on the site of its church parking lot and decrepit parish hall without impeding sacred worship and pastoral ministry in its church. *See supra* notes 36-46 and accompanying text.

homeless neighbors behind its church in Seattle's Central District.<sup>210</sup> Built on the site of Seattle's first tiny-house village – which the faith community created on its land in 2015, together with the Low Income Housing Institute (LIHI) – Good Shepherd Housing is the first development to take advantage of state legislation allowing density bonuses for affordable housing on church-owned properties.<sup>211</sup> The faith community at Good Shepherd intentionally chose to lease their land “long-term to LIHI to create permanently affordable housing for vulnerable people who are unhoused or cost burdened,” rather than sell to commercial developers.<sup>212</sup> Pastor Nate Whittaker and his flock now pray that their efforts, and Divine Providence, will “continue to bring this city and, specifically, the central district together to fight the effects of gentrification, especially the skyrocketing costs of living that bring about such homelessness.”<sup>213</sup>

Good Shepherd and LIHI can offer eighty-six apartments where fourteen tiny houses once stood because Seattle allowed them to build *upward* and *outward* on church property.<sup>214</sup> In 2019, the State of Washington signed Substitute House Bill 1377 into law, granting “an increased density bonus consistent with local needs for any affordable housing development of any single-family or multifamily residence located on real property owned or controlled by a religious organization.”<sup>215</sup> To qualify for the bonus, all housing created on the site must remain

- 
210. See *Community Outreach*, LUTHERAN CHURCH GOOD SHEPHERD, <https://www.goodshepherdlutheranseattle.com/about> [<https://perma.cc/X4AV-33FT>]; *Construction Begins on LIHI Good Shepherd*, WALSH CONSTR. CO. (Feb. 13, 2023), <https://www.walshconstruction.com/2023/02/construction-begins-on-lihi-good-shepherd> [<https://perma.cc/TK26-7YQF>]; *LIHI & Lutheran Church of the Good Shepherd Break Ground on 86-Unit Affordable Housing Project*, SEATTLE MEDIUM (Dec. 7, 2022), <https://seattlemedium.com/lihi-lutheran-church-of-the-good-shepherd-break-ground-on-86-unit-affordable-housing-project> [<https://perma.cc/JA44-V7NF>]. The apartment complex may ultimately include ninety-two units. See *Good Shepherd Housing*, RUNBERG ARCHITECTURE GRP., <https://runberg.com/work/good-shepherd-housing> [<https://perma.cc/9P5C-WRDE>].
211. See *LIHI & Lutheran Church*, *supra* note 210; *Construction Begins*, *supra* note 210; *About LIHI*, LOW INCOME HOUS. INST., <https://www.lihihousing.org/about> [<https://perma.cc/W2HZ-QVM2>].
212. *LIHI & Lutheran Church*, *supra* note 210 (reporting a quote that “other churches have sold their land to for-profit developers instead”).
213. *Id.* (quoting Pastor Whittaker’s groundbreaking invocation).
214. See Becca Savransky, *Tiny House Village Must Find New Location After Four Years*, SEATTLE POST-INTELLIGENCER (Jan. 21, 2020, 2:32 PM), <https://www.seattlepi.com/seattlenews/article/Tiny-house-village-must-find-new-location-after-14990441.php> [<https://perma.cc/9SUB-7KPJ>] (noting that Good Shepherd “is committed to serving people experiencing homelessness, with long-term plans to redevelop the property to include multi-story low-income housing units”); Argerious, *supra* note 174.
215. Affordable Housing Development on Religious Organization Property, ch. 218, § 1(1), 2019 Wash. Sess. Laws 1074.

affordable to households earning up to eighty percent of AMI for at least fifty years.<sup>216</sup> Seattle's local ordinance deepened the affordability requirement to sixty percent of AMI for rental units, clarifying that eligible property "must be owned or controlled by a religious organization at the date of the permit application" to qualify housing structures for additional height and floor area.<sup>217</sup> For Good Shepherd and LIHI, that meant building seven stories, instead of two or three, more than doubling the number of apartments that their Central District housing complex could offer.<sup>218</sup>

Municipal and state legislation allows faith communities in Seattle to create affordable housing on church property without invoking their religious beliefs.<sup>219</sup> Housing proposals that meet ownership and affordability requirements qualify for an increased density bonus, regardless of motivation or sincerity.<sup>220</sup> Put another way: whether faith communities are motivated by sincerely held religious belief<sup>221</sup> or some other value,<sup>222</sup> to receive the density bonus, they need only demonstrate that (1) they own the property upon which housing will be

216. See *id.* § 1(1)(b) ("The affordable housing development is part of a lease or other binding obligation that requires the development to be used exclusively for affordable housing purposes for at least fifty years, even if the religious organization no longer owns the property . . ."); *id.* § 1(6)(a)-(b).

217. Seattle, Wash., Ordinance 126384 § 1(B) (2021) (defining ownership by religious organization); *id.* § 1(C) (maintaining 80% area median income for "ownership units"); *id.* §§ 6-9 (defining additional height limits and floor area ratios based on zone and building type); see *Affordable Housing on Religious Organization Property*, CITY SEATTLE, <https://www.seattle.gov/opcd/ongoing-initiatives/affordable-housing-on-religious-organization-property> [<https://perma.cc/9MD2-S4GR>]. Many Black church leaders have been critical of Seattle's lower affordability requirement, which they argue renders housing developments untenable on their property. See Argerious, *supra* note 174.

218. In fact, Good Shepherd and the Low Income Housing Institute needed to petition for their land to be rezoned pursuant to SHB 1377 since Seattle's ordinance had not yet been approved. See Argerious, *supra* note 174.

219. See Ordinance 126384; 2019 Wash. Sess. Laws 1074.

220. Cf. *Project Benefits*, CITY SEATTLE, <https://www.seattle.gov/opcd/ongoing-initiatives/affordable-housing-on-religious-organization-property#whatwhy> [<https://perma.cc/W2EN-B34U>] ("Many faith organizations have advocated for City policies that support affordable housing development on their property as a strategy to address displacement, strengthen community ties, and maintain community ownership in their neighborhood.")

221. For example, faith communities may believe that Jesus teaches "whatever you did for one of these least brothers of mine, you did for me," and creating affordable housing as an act of charity for love of neighbor. See *Matthew 25:40* (New American Bible Revised Edition).

222. For example, faith communities may strive to "address historic and ongoing inequities in housing access by supporting community-driven and community-owned development." See *Project Benefits*, *supra* note 220.

constructed and (2) every unit of housing constructed will remain affordable for any household making less than 80% of AMI for at least fifty years.<sup>223</sup>

Religious beliefs may not matter to most local governments. Regardless of *how* faith communities came to own property within their limits, or *why* faith communities seek to repurpose property within their limits, most local governments *need* property within their limits to create affordable housing. And many faith communities are willing partners in their endeavor. Local governments can grow their affordable-housing supply and faith communities can redevelop their underutilized church property for affordable housing. Everyone wins.

Seattle recognized this reality in prefacing its ordinance, underscoring three facts that resonate with this Feature's structure and argument. First, "Seattle's faith institutions have a long history of supporting and creating affordable housing for low-income families and individuals, with the help of the City's housing levy and other public funds."<sup>224</sup> Second, "religious organizations own property in multifamily, mixed-use, and single-family zones throughout Seattle, including many underdeveloped sites that could be feasible for affordable housing . . ."<sup>225</sup> Finally, "while religious organizations may be motivated, as a matter of mission, to redevelop their land into affordable housing, their property may not be ideal for residential development under existing regulations if, among other reasons, it lacks sufficient development capacity for a financially feasible multifamily project."<sup>226</sup> Many faith communities want to create affordable housing. They own property that could be used for affordable housing. But existing land-use regulations often make the development of affordable housing on their property untenable. This is why Washington passed a statute, and Seattle passed an ordinance: to change the regulations.<sup>227</sup>

The Evergreen State is not alone in reforming land-use regulations to support affordable housing on church property. Inspired by the "Yes In God's Backyard" movement, San Diego revised its municipal land-development code in 2019 to reduce or eliminate parking requirements for many houses of worship.<sup>228</sup>

---

223. See Ordinance 126384 § 1(B)-(C), §§ 6-9. SHB 1377 requires that an affordable-housing development "not discriminate against any person who qualifies as a member of a low-income household based on race, creed, color, national origin, sex, veteran or military status, sexual orientation, or mental or physical disability; or otherwise act in violation of the [Fair Housing Act]." § 2(c), 2019 Wash. Sess. Laws 1074.

224. Ordinance 126384 pmbl.

225. *Id.*

226. *Id.*

227. See *id.*; § 1, 2019 Wash. Sess. Laws 1074.

228. See *City Council Unanimously Adopts Mayor's YIGBY Housing Reforms*, CITY SAN DIEGO (Dec. 17, 2019), <https://www.sandiego.gov/planning/programs/housing/newsrelease191217>

Faith communities could replace expanses of their parking lots – which remain largely unused between Sunday and Saturday – for residential development.<sup>229</sup> In 2020, the State of California followed San Diego’s lead, passing Assembly Bill 1851 to reduce or eliminate parking requirements for “religious institution affiliated housing development project[s].”<sup>230</sup> Pasadena has since amended its zoning code to allow “affordable-housing units” on parcels “owned and operated by a religious assembly . . . for a minimum of five years prior to the application date for a proposed affording housing project.”<sup>231</sup> Eligible sites in the City of Roses include “[p]arcels developed with an existing religious facility use on-site” or located “in commercial or [multifamily residential] zones that are adjacent to or contiguous with a parcel developed with an existing religious facility use,” and the “maximum residential density is 36 dwelling units per acre.”<sup>232</sup> In 2023, the California State Senate passed legislation aimed at reducing barriers that nonprofit religious and educational institutions face when planning affordable, multifamily housing projects on their properties.<sup>233</sup> Senate Bill 4 “would supersede

---

[<https://perma.cc/E3WF-XWD6>]; Andrew Bowen, *San Diego Proposes Easing Church Parking Rules in Favor of Housing*, KPBS (Oct. 30, 2019, 11:45 AM PDT), <https://www.kpbs.org/news/politics/2019/10/30/san-diego-church-parking-affordable-housing-yigby> [<https://perma.cc/3NTT-Y6C9>] (“City code currently requires houses of worship to maintain a certain number of parking spaces based on either pew space or square feet of assembly space.”); *see also* *About YIGBY, YES IN GOD’S BACK YARD*, <https://yigby.org/about-yigby> [<https://perma.cc/T4GD-PY3J>] (describing the nonprofit’s beginnings in San Diego).

229. SAN DIEGO, CAL., MUN. CODE § 141.0602(a)(2) (2020) (“The reduction in parking allowed shall be limited to the footprint of the residential *structure* and any required landscape or open space for the residential *development*.”); *see also supra* note 157 and accompanying text (discussing parking regulations).
230. CAL. GOV’T CODE § 65913.6 (2023) (“Notwithstanding any other law or ordinance, a local agency shall not require the replacement of religious-use parking spaces that a developer of a religious institution affiliated housing development project proposes to eliminate . . . as part of that housing development project . . .”).
231. PASADENA, CAL., MUN. CODE § 17.50.230(F) (2022); ‘*Yes In God’s Backyard*’: *Pasadena Ok’s Affordable Housing on Religious Institutions’ Land*, PASADENA STAR-NEWS (Sept. 24, 2022, 5:00 AM), <https://www.pasadenastarnews.com/2022/09/24/yes-in-gods-backyard-pasadena-oks-to-affordable-housing-on-religious-institutions-land> [<https://perma.cc/8VL7-ZY63>] (“Under the state’s affordable housing goals, the city has been asked to plan for more than 9,400 new units from 2021 to 2029 – 600% more units than the previous eight-year cycle.”).
232. PASADENA, CAL., MUN. CODE § 17.50.230(F)(1) (2022) (defining “religious facility” as “a nonprofit organization that has owned and operated all parcels proposed for development for a minimum of five years”).
233. S.B. 4, 2023-2024 Leg., Reg. Sess. (Cal. 2022) (defining “religious institution” to mean “an institution owned, controlled, and operated and maintained by a bona fide church, religious denomination, or religious organization composed of multidominational members of the same well-recognized religion, lawfully operating as a nonprofit religious corporation”);

local zoning rules that either prohibit or discourage this development and would bar opponents of the housing projects from using the environmental review law to slow down construction through litigation.”<sup>234</sup>

State preemption of local rules can help to mitigate the negative effects of exclusionary land-use regulations.<sup>235</sup> But not every community can provide equally for its most vulnerable neighbors. People who suffer from chronic homelessness or struggle with extremely low income often require more than shelter on church land, including support services for mental health and wellbeing, vocational training, and job skills.<sup>236</sup> Where faith communities and nonprofit organizations do not offer this aid, vulnerable residents will look to local governments, which may lack the resources or infrastructure to provide such assistance.<sup>237</sup> The League of Minnesota Cities voiced this concern in response to state legislation that will “authorize religious institutions to site ‘micro-unit dwellings’ on religious property for the purpose of housing chronically homeless persons [and] extremely low-income individuals.”<sup>238</sup> Preempting local

---

Hannah Wiley, *California Churches, Nonprofit Colleges Could Build Homes on Their Land with Proposed Law*, L.A. TIMES (Dec. 6, 2022, 6:36 PM PT), <https://www.latimes.com/california/story/2022-12-06/california-churches-nonprofit-colleges-could-build-homes-on-their-land-with-new-bill> [<https://perma.cc/DCS5-MNP7>] (“[SB 4] would apply only to projects that guarantee 100% affordability, meaning they are largely preserved for low-income households. Building organizations would need to commit to that affordability requirement for 55 years in rental units and 45 years for owner-occupied units.”).

234. Wiley, *supra* note 233; see Christian Britschgi, *California Bill Would Exempt Church-Sponsored Housing Projects from Hellish Zoning Laws*, REASON (Dec. 7, 2022, 1:20 PM), <https://reason.com/2022/12/07/california-bill-would-exempt-church-sponsored-housing-projects-from-hellish-zoning-laws> [<https://perma.cc/6FT9-VZWS>] (“NIMBY . . . neighbors wouldn’t be able to stop them by filing endless environmental lawsuits.”); see also *supra* note 46 and accompanying text (discussing CEQA and student housing at UC Berkeley).
235. See ELLICKSON, *supra* note 13, at 14 (suggesting that local zoning abuses—characterized by hyperlocal NIMBY politics—should be corrected by state legislatures and Congress).
236. See *supra* note 156 and accompanying text (describing support services provided to low-income residents of Saint Mary’s Place, formerly St. Mary Star of the Sea School, in New London, Connecticut).
237. But see Fisher, *supra* note 165 (“97% [of congregation-sponsored affordable-housing projects] reported planning two or more on site social support services for residents.”); Molly Bolan, *Governments Have Faith that Church Property Can Help Solve the Housing Crisis*, ROUTE FIFTY (Aug. 15, 2023), <https://www.route-fifty.com/management/2023/08/governments-have-faith-church-property-can-help-solve-housing-crisis/389442> [<https://perma.cc/ZD7D-Q2BW>].
238. *House and Senate Labor Committees Include Sacred Settlement Micro Units Language in Labor Omnibus Policy Bills*, LEAGUE MINN. CITIES (Apr. 3, 2023), <https://www.lmc.org/news-publications/news/all/sacred-settlement-micro-units> [<https://perma.cc/8KFP-6UQG>]; see Steve Abrams, *One Possible Solution to the Homeless Crisis? Communities of Tiny Homes on Holy Ground*, MINN. HOUSE REPS. (Mar. 21, 2023, 5:20 PM), <https://www.house.mn.gov/ses-siondaily/Story/17839> [<https://perma.cc/W5JA-EJQN>]; Bolan, *supra* note 237.

regulations, the Minnesota law requires municipalities to allow tiny-house developments, “regardless of the size of the community and the resources available” to support its poorest residents.<sup>239</sup> In turn, faith communities must allow vulnerable residents to access showers and kitchens in their church, synagogue, temple, or school and must submit plans for each tiny-house development (e.g., how sewage from individual units will be disposed of) to municipal authorities.<sup>240</sup> However, the Minnesota statute does not oblige local governments in the “Land of 10,000 Lakes” to provide funding for affordable-housing projects on church property. In fact, no state statutes (to date) create such an unfunded mandate for municipalities. But, in some states, local governments have begun to invest in projects designed to create affordable housing on church property. In Atlanta, Georgia and San Antonio, Texas, city officials have instituted technical-assistance programs designed to help faith communities plan for housing developments on their property.<sup>241</sup> The Faith-Based Development Initiative (Atlanta) and Mission Oriented Development Initiative (San Antonio) also provide grants to fund predevelopment work, which is “often a major obstacle to getting a project under way.”<sup>242</sup> In Montgomery County, Maryland, the Religious Land Use Working Group assists faith communities in repurposing and redeveloping their real estate, helping them navigate county land-use regulations.<sup>243</sup> In Detroit,

---

239. See Bolan, *supra* note 237 (quoting an official from the League of Minnesota Cities as claiming, “If a religious institution meets the requirements in [the] statute, they can do it. . . . There’s nothing that a city can do to say, ‘Hey, we’re not really prepared to support this novel use in our city, we have a very small police force, small EMS, etc.’”).

240. See *id.* The League of Minnesota Cities voiced practical concerns about this arrangement: “[I]n a state where winter temperatures can drop to well below zero, it’s a system that can be dangerous for residents.” *Id.*

241. See *Faith-Based Development Initiative*, CITY ATLANTA, <https://www.atlantaga.gov/government/departments/city-planning/housing/faith-based-development-initiative> [<https://perma.cc/7L7G-W79H>] (connecting faith communities with (1) “1 to 1 peer mentoring and coaching via a network of local organizations that have successfully completed a development project,” (2) “subject matter experts and other professionals that can support [the] development process,” and (3) “pre-development capital and training opportunities” in Atlanta); *Mission Oriented Development*, CITY SAN ANTONIO, <https://www.sanantonio.gov/NHSD/Coordinated-Housing/Development> [<https://perma.cc/2QHC-7YMZ>] (committing to “work with mission oriented groups with available land and an interest in providing affordable housing” and allocating “\$300,000 to provide technical assistance and navigate our partners through the development process”).

242. See Reinhard, *supra* note 105.

243. See *Religious Land Use Working Group*, INTERFAITH ADVISORY BD. MONTGOMERY CNTY., <http://montgomerycountyinterfaithmd.org/wp-content/uploads/2014/08/RLUWG-Mission-and-Goals-.pdf> [<https://perma.cc/55BR-8GHD>] (decreeing that its goal is “[t]o educate Montgomery County faith communities about the laws, codes, and regulations affecting land use in Montgomery County, so that faith communities may better understand and more effectively negotiate them”).



Michigan, project-based vouchers from the Detroit Housing Commission helped fund the construction of fifty-three deeply affordable units on valuable land owned by the Cathedral of the Most Blessed Sacrament.<sup>244</sup>

To be sure, many private nonprofit organizations also invest in helping faith communities create affordable housing on their property.<sup>245</sup> But where local governments dedicate human and financial capital, they gain more than access to valuable land. Seeds sown in municipal efforts to grow housing access, when combined with underutilized church land and willing faith-community partners, can return thirty, sixty, and a hundredfold.<sup>246</sup> Local and state legislation can loosen land-use restrictions that NIMBY neighbors might use to obstruct denser, multifamily housing in their community. Absent such legislation, faith communities facing exclusionary zoning may need to rely on constitutional and statutory religious-liberty protections to create affordable housing on church property.

### III. RELIGIOUS LIBERTY AND AFFORDABLE HOUSING

NIMBY resistance to affordable housing on church property is nothing new. But disputes over land-use restrictions have only recently been framed in terms of religion. In 1970, the Roman Catholic Clerics of Saint Viator (the Viatorians) decided to devote a vacant portion of their substantial campus in Arlington Heights, Illinois, for low- and moderate-income housing.<sup>247</sup> Since the “most

---

244. See Stechschulte, *supra* note 163.

245. See, e.g., *Faith-Based Development*, ENTER. CMTY. PARTNERS, <https://www.enterprisecommunity.org/impact-areas/preservation-and-production/faith-based-development> [<https://perma.cc/89UY-9ULF>] (“Our Faith-Based Development Initiative (FBDI) provides houses of worship the knowledge and tools to develop underutilized land into affordable homes and community facilities.”); *Our Vision: Transform*, UNITED CHURCH CHRIST, <https://cblfund.org> [<https://perma.cc/9PNL-VGH4>] (“We assist new and renewing congregations of the United Church of Christ—and other Christian denominations in the United States—with programs and services that help a congregation plan, raise, finance, and build projects, including property and social enterprises, that advance the mission of the church.”); *Our Mission*, BRICKS & MORTALS, <https://www.bricksandmortals.org/about/mission> [<https://perma.cc/499N-CHBD>] (“Bricks and Mortals is a grassroots membership organization comprised of individuals and organizations from faith-based institutions and the development sector that provides resources, connections and trainings in order to empower congregations in NYC to maximize and monetize their real property to support mission, benefit the community and continue their good work.”).

246. Cf. *Mark* 4:8 (New American Bible, Revised Edition) (“And some seed fell on rich soil and produced fruit. It came up and grew and yielded thirty, sixty, and a hundredfold.”).

247. See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 255 (1977). The Viatorians are a Roman Catholic religious order of priests and brothers. Their eighty-acre campus

expeditious way to build such housing was to work through a nonprofit developer experienced in the use of federal housing subsidies,” the Viatorians entered into a ninety-nine-year lease and sale agreement with Chicago’s Metropolitan Housing Development Corporation (MHDC), “contingent upon MHDC’s securing zoning clearances from the Village and [Section] 236 housing assistance from the Federal Government.”<sup>248</sup> MHDC engaged an architect to develop plans for the housing development, to be known as “Lincoln Green,” which would include twenty two-story buildings, totaling 190 units, while leaving much of the Viatorians’ fifteen-acre site “open,” with landscaping to “screen” single-family homes abutting the property.<sup>249</sup> MHDC also petitioned the Village Plan Commission for rezoning, from single family (R-3) to multifamily (R-5).<sup>250</sup> After considering the proposal at three public meetings, which “drew large crowds” from the surrounding community, the Plan Commission recommended denying the request: “While the need for low and moderate income housing may exist in Arlington Heights or its environs, [we] would be derelict in recommending it at the proposed location.”<sup>251</sup> Accordingly, the Village Board of Trustees declined to rezone the Viatorian property, prompting MHDC to sue.<sup>252</sup>

Of course, students of constitutional law learn that MHDC sued Arlington Heights for racial discrimination, in violation of the Equal Protection Clause of the Fourteenth Amendment and the Fair Housing Act.<sup>253</sup> In its landmark decision, *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, the

“just east of the center of Arlington Heights” includes “the Viatorian high school, and . . . the Order’s three-story novitiate building, which houses dormitories and a Montessori school.”  
*See id.*

248. *Id.* at 255-56. “The agreement established a bargain price of \$300,000, low enough to comply with federal limitations governing land-acquisition costs for [Section] 236 housing.” *Id.*
249. *Id.* at 256-57 (noting that 100 units would have a “single bedroom, thought likely to attract elderly citizens,” while the remainder would have “two, three, or four bedrooms”).
250. *Id.* at 255, 257 (noting that all land surrounding the Viatorian property had been zoned single-family since 1959, “when the Village first adopted a zoning ordinance”). The Viatorians’ novitiate building was considered a “pre-existing non-conforming use” on property zoned for detached, single-family residences. *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 373 F. Supp. 208, 211 (N.D. Ill. 1974), *rev’d*, 517 F.2d 409 (7th Cir. 1975), *rev’d*, 429 U.S. 252 (1977).
251. *Arlington Heights*, 429 U.S. at 257-58.
252. *Id.* at 258.
253. *See Arlington Heights*, 373 F. Supp. at 209 (describing original complaint); *Arlington Heights*, 429 U.S. at 258-61, 271. Because the Seventh Circuit “had not decided the statutory question,” the Supreme Court remanded *Arlington Heights* for further consideration of the Metropolitan Housing Development Corporation’s (MHDC) claims under the Fair Housing Act. *See Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1287 (7th Cir. 1977) (holding that Village had a statutory obligation under Fair Housing Act to refrain from zoning policies that effectively foreclosed construction of low- and moderate-income housing within its municipal boundaries).

Supreme Court held that “racially discriminatory intent or purpose” must be proven to show that land-use decisions violate the Equal Protection Clause.<sup>254</sup> Local-government action will not be held unconstitutional “solely because it results in a racially disproportionate impact.”<sup>255</sup> In *Arlington Heights*, MHDC “failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village’s decision” not to rezone the Viatorian property for low- and moderate-income housing, even though the “impact of the Village’s decision does arguably bear more heavily on racial minorities.”<sup>256</sup> Since Arlington Heights first adopted a zoning map, the Viatorian site and its surroundings had been zoned for single-family homes, and “the Village is undeniably committed to single-family homes as its dominant residential use.”<sup>257</sup> The Court found “no reason to doubt that there has been reliance by some neighboring property owners on the maintenance of single-family zoning in the vicinity,” yet the Village had applied its policy “too consistently . . . to infer discriminatory purpose from its application” to property leased by the Viatorian faith community for affordable housing.<sup>258</sup>

What if the Viatorians, rather than MHDC, had sued Arlington Heights and framed their land-use challenge in terms of religious liberty? By all accounts, their decision to devote nearly 20% of their property to create affordable housing in Arlington Heights was motivated by sincerely held religious beliefs. Since 1831, the Clerics of Saint Viator have accompanied communities throughout the world, “proclaiming the Gospel as educators and ministering to a variety of needs,” including housing for young people, poor and working-class families, immigrants, and asylum seekers.<sup>259</sup> Viator House of Hospitality—opened in 2017, less than five miles from the Viatorian campus in Arlington Heights—offers young residents “an environment of care and compassion and hope,”

---

254. *Arlington Heights*, 429 U.S. at 265.

255. *Id.* at 264–65 (citing *Washington v. Davis*, 426 U.S. 229 (1976)).

256. *Id.* at 269–70 (“The impact of the Village’s decision does arguably bear more heavily on racial minorities. Minorities constitute 18% of the Chicago area population, and 40% of the income groups said to be eligible for Lincoln Green. But there is little about the sequence of events leading up to the decision that would spark suspicion.”).

257. *Id.* at 269.

258. *Id.* at 270 (“The statements by the Plan Commission and Village Board members, as reflected in the official minutes, focused almost exclusively on the zoning aspects of the MHDC petition, and the zoning factors on which they relied are not novel criteria in the Village’s rezoning decisions.”).

259. See *The Clerics of St. Viator*, SAINT VIATOR HIGH SCH., <https://www.saintviator.com/faith/clerics-of-st-viator> [<https://perma.cc/HHK6-3KY8>]; Michelle Martin, *Homes Offer Safety for Young Asylum Seekers*, CHI. CATH. (Feb. 7, 2018), <https://www.chicagocatholic.com/chicagoland/-/article/2018/02/07/homes-offer-safety-for-young-asylum-seekers> [<https://perma.cc/5TJ4-PSFU>].

something they may never have experienced or enjoyed.<sup>260</sup> Religious belief inspires the Viatorians to proclaim Good News to “those whom they serve, and work to raise up communities” where all people can “see their basic human dignity and the value they have in the world.”<sup>261</sup>

On church property, religious exercise and affordable housing may not merely coincide, but mutually oblige. Insofar as sincerely held religious belief inspires faith communities to create affordable housing on their underutilized property, *religious liberty* may protect them from local authorities – and NIMBY neighbors – who seek to obstruct apartments, tiny houses, and denser multifamily developments on church land. Faith communities can assert constitutional and statutory free-exercise protections against zoning regulations that might prevent them from repurposing and redeveloping their property.<sup>262</sup> In particular, RLUIPA’s “substantial burden” provision explicitly draws together religious exercise and land use.<sup>263</sup>

This Feature is not the first to argue that “[t]he First Amendment and [RLUIPA] provide powerful tools for protecting the rights of religious institutions to supply housing for the homeless as a part of the exercise of their religious beliefs.”<sup>264</sup> But prior scholarship has focused on caselaw about religious-liberty protections for faith-based homeless shelters and other forms of temporary housing; its assessment can only answer so many questions about permanent housing on church property.<sup>265</sup> And courts applying RLUIPA have inconsistently limited which religious land uses count as “religious exercise” for purposes of

260. Martin, *supra* note 259.

261. *Who We Are*, VIATORIANS, <https://www.viatorians.com/who-we-are> [<https://perma.cc/L4T9-FEBZ>]; Martin, *supra* note 259 (quoting Viatorian Father Corey Brost, Co-director of Viator House of Hospitality).

262. See U.S. CONST. amend. I; 42 U.S.C. §§ 2000cc to 2000cc-5 (2018). This Feature focuses on federal religious-liberty protections in the land-use context. In future research, I plan to explore state religious-liberty protections. See *supra* note 25 (highlighting state laws).

263. 42 U.S.C. § 2000cc(a)(1) (2018).

264. See Abney, *supra* note 30, at 15.

265. The assertion that “the majority of courts have been sympathetic toward the Religious Land Use [and Institutionalized Persons] Act in cases involving temporary shelter and other forms of housing for the homeless” is almost certainly correct. Abney, *supra* note 30, at 13; see, e.g., *Fifth Ave. Presbyterian Church v. City of New York*, 293 F.3d 570 (2d Cir. 2002); *Stuart Circle Par. v. Bd. of Zoning Appeals*, 946 F. Supp. 1225 (E.D. Va. 1996); *Henley v. City of Youngstown Bd. of Zoning Appeals*, 735 N.E.2d 433 (Ohio 2000); *Capital City Rescue Mission v. City of Albany Bd. of Zoning Appeals*, 652 N.Y.S.2d 388 (App. Div. 1997); *Solid Rock Ministries Int’l v. Monroe Bd. of Zoning Appeals*, 740 N.E.2d 320 (Ohio Ct. App. 2000); *St. John’s Evangelical Lutheran Church v. City of Hoboken*, 479 A.2d 935 (N.J. Super. Ct. Law Div. 1983). But see *First Assembly of God of Naples v. Collier Cnty.*, 20 F.3d 419 (11th Cir. 1994) (holding that a county zoning ordinance did not violate a faith community’s free exercise of religion, despite requiring the closure of a homeless shelter on church property).

determining substantial burden, suggesting that scholarly guidance may prove beneficial.<sup>266</sup> To be sure, scholarly concerns that RLUIPA would “expand the class of protected religious uses to all auxiliary uses,”<sup>267</sup> safeguarding “day care centers, playgrounds, baseball or softball fields, homeless shelters, administrative buildings, cemeteries, and coffee houses,”<sup>268</sup> have not been realized.<sup>269</sup> But how courts should evaluate “religious exercise” that might otherwise be considered “secular” or “commercial,” such as faith communities constructing an apartment building or townhouses rather than a synagogue or a sanctuary, remains an open question.

- 
266. See, e.g., *Roman Cath. Bishop of Springfield v. City of Springfield*, 724 F.3d 78, 93 (1st Cir. 2013) (noting that “deconsecration” of church property constituted “religious exercise” (citing *Roman Catholic Bishop of Springfield v. City of Springfield*, 760 F.Supp.2d 172, 186 (D. Mass. 2011))); *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 348 (2d Cir. 2007) (holding that the renovation and expansion of a religious school was “religious exercise” since “every classroom being constructed will be used at some time for religious education”); *Living Water Church of God v. Charter Twp. of Meridian*, 258 F. App’x 729, 739 (6th Cir. 2007) (holding that the development of church property for a religious school and daycare ministry was “religious exercise,” though denial of a special-use permit was not a “substantial burden”); *Greater Bible Way Temple of Jackson v. City of Jackson*, 733 N.W.2d 734, 746 (2007) (holding that a faith community failed to show that an apartment complex on church property constituted “an exercise of religion”); *St. John’s United Church of Christ v. City of Chicago*, 502 F.3d 616, 632 (7th Cir. 2007) (allowing condemnation and relocation of church cemetery to proceed since “there is nothing inherently religious about cemeteries or graves”); *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 659–60 (10th Cir. 2006) (holding that a religious daycare center proposed for church property was not “religious exercise”); *N. Pac. Union Conf. Ass’n of Seventh Day Adventists v. Clark Cnty.*, 74 P.3d 140, 144 (Wash. 2003) (holding that a church office building intended primarily for administrative use was not “religious exercise”); see also Saxer, *Faith in Action*, *supra* note 30, at 621 (“There does not appear to be a consistent approach in state and federal courts of determining whether an accessory use [i.e., a secondary activity that is necessary and convenient to the principal use of the property, such as a church’s parking lot or daycare center] should be protected under RLUIPA along with the permitted use to which it is attached.”).
267. Sara C. Galvan, *Beyond Worship: The Religious Land Use and Institutionalized Persons Act of 2000 and Religious Institutions’ Auxiliary Uses*, 24 YALE L. & POL’Y REV. 207, 220 (2006) (“The law has done so both by offering a broader, statutory definition of ‘religious exercise’ and by failing to exclude tangential auxiliary uses from receiving its protections.”).
268. Diane K. Hook, *The Religious Land Use and Institutionalized Persons Act of 2000: Congress’ New Twist on “Speak Softly and Carry a Big Stick,”* 34 URB. LAW. 829, 853 (2002) (citing pre-RLUIPA caselaw that involved such “accessory uses”).
269. Dhooge, *supra* note 31, at 1043 (“Religious organizations remain largely subject to local regulations and are not free to act with impunity.”); Saxer, *Faith in Action*, *supra* note 30, at 619–21.

The Supreme Court has yet to write precedentially on RLUIPA's land-use provisions.<sup>270</sup> But since 2020, its religious-liberty decisions have been instructive.<sup>271</sup> In particular, *Mast v. Fillmore County*—a case that until now has gone almost entirely unexamined in legal scholarship—reveals how strict scrutiny is meant to operate under RLUIPA when zoning regulations and religious land uses come into conflict.<sup>272</sup> Justice Gorsuch's seven-page concurrence in *Mast* sketches how *Fulton v. City of Philadelphia* governs judicial review of RLUIPA claims in addition to claims brought under the First Amendment.<sup>273</sup>

#### A. *Mast v. Fillmore County*

*Mast* concerned wastewater regulations in Fillmore County, Minnesota, that infringed upon an Amish community's longstanding religious practice.<sup>274</sup> Like other Amish communities in the United States, but among the most traditional, "[t]he Swartzentruber Amish are religiously committed to living separately from the modern world. . . . They grow their own food, tend their farms using pre-industrial equipment, and make their own clothes . . . lead[ing] lives of faith and self-reliance that have 'not altered in fundamentals for centuries.'"<sup>275</sup> In 2013, Fillmore County adopted an ordinance requiring modern septic systems for gray water (i.e., nonsewage household wastewater from washing, bathing, cooking, and/or cleaning) disposal in homes.<sup>276</sup> For generations, the Swartzentruber Amish have hand-carried and disposed of gray water through soil, as "thousands of campers, hunters, fishermen, and owners and renters of rustic cabins" are

---

270. The Supreme Court upheld the constitutionality of RLUIPA in *Cutter v. Wilkinson*, 544 U.S. 709 (2005), which concerned accommodations for religious prisoners under the statute. The Court has since decided two other cases involving the "institutionalized persons" provisions of RLUIPA: *Holt v. Hobbs*, 574 U.S. 352 (2015), and *Ramirez v. Collier*, 595 U.S. 411 (2022).

271. See, e.g., *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020); *Dunn v. Smith*, 141 S. Ct. 725 (2021); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021); *Ramirez*, 595 U.S. 411.

272. *Mast v. Fillmore Cnty.*, 141 S. Ct. 2430 (2021) (mem.); see *supra* note 33.

273. See *Mast*, 141 S. Ct. at 2432 (Gorsuch, J., concurring) (citing *Fulton*, 141 S. Ct. at 1881); Blackman, *supra* note 33.

274. See *Mast*, 141 S. Ct. at 2430 (Gorsuch, J., concurring); *Mast v. Cnty. of Fillmore*, No. A19-1375, 2020 WL 3042114, at \*2-5 (Minn. Ct. App. June 8, 2020), *vacated*, 141 S. Ct. 2430 (2021).

275. *Mast*, 141 S. Ct. at 2430 (Gorsuch, J., concurring) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 216-17 (1972)).

276. See *id.* at 2431; MINN. STAT. § 115.55(2)(a) (2020); MINN. R. 7080.1050-7080.2540 (2019); *Fillmore Cnty. Sub-Surface Sewage Treatment System Ordinance* §§ 501-02 (Dec. 3, 2013).

permitted to do in Minnesota.<sup>277</sup> When they asked for an exemption from the septic-system rule – offering to create mulch-basin water-recycling systems on their property, which are used in twenty states and accord with the Amish faith tradition – Fillmore County filed administrative enforcement actions against them, mandating that they install modern septic systems under pain of criminal penalties and civil fines.<sup>278</sup>

Those Swartzentruber Amish families sued Fillmore County in state court, alleging that the septic-system rule violated their freedom of conscience under the Minnesota Constitution and RLUIPA.<sup>279</sup> The County filed a counterclaim seeking an order “displacing the Amish from their homes, removing all their possessions, and declaring their homes uninhabitable” if they failed to install modern septic systems within six months.<sup>280</sup> While the state trial court agreed with the Amish that the ordinance substantially burdened their sincerely held religious belief, it sided with the County in concluding that “septic systems – not mulch basins – are the least-restrictive means of meeting the government’s compelling interest of protecting public health and the environment.”<sup>281</sup> The Minnesota Court of Appeals affirmed and the Minnesota Supreme Court denied review.<sup>282</sup> But when the Swartzentruber Amish petitioned for certiorari, the U.S. Supreme Court granted their petition, vacated the Minnesota judgment, and remanded “for further consideration in light of *Fulton v. Philadelphia*.”<sup>283</sup> The Court had held in *Fulton* that Philadelphia’s refusal to contract with Catholic Social Services (CSS) for the provision of foster-care services, unless CSS agreed to certify same-sex couples as foster parents, violated the Free Exercise Clause of the First Amendment.<sup>284</sup>

---

277. *Mast*, 141 S. Ct. at 2432 (Gorsuch, J., concurring); see Petition for Writ of Certiorari at 17, *Mast*, 141 S. Ct. 2430 (No. 20-7028). In Minnesota, people who “hand-carry” their gray water are allowed to discharge it directly into the ground. See MINN. R. 7080.1500 § 2.

278. See Petition for Writ of Certiorari, *supra* note 277, at 20-27; *Mast*, 141 S. Ct. at 2431 (Gorsuch, J., concurring) (“Responding to this development, the Swartzentruber Amish submitted a letter explaining that their religion forbids the use of such technology and ‘asking in the name of our Lord to be exempt’ from the new rule.” (quoting Appendix to Brief in Opposition for Respondent Minnesota Pollution Control Agency at 79, *Mast*, 141 S. Ct. 2430 (No. 20-7028))).

279. See *Mast*, 2020 WL 3042114, at \*2. Southern Minnesota Regional Legal Services represented the Amish families.

280. *Mast*, 141 S. Ct. at 2431 (Gorsuch, J., concurring).

281. *Mast*, 2020 WL 3042114, at \*2.

282. *Mast*, 141 S. Ct. at 2431-32 (Gorsuch, J., concurring).

283. *Id.* at 2430 (remanding to the Court of Appeals of Minnesota).

284. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021).

The Justices heard no argument in *Mast*, nor did they issue an opinion deciding the Amish case on the merits. But an instructive concurrence from Justice Gorsuch underscored how “lower courts and administrative authorities” can avoid “misapprehend[ing] RLUIPA’s demands” in cases where land-use regulations and religious exercise conflict.<sup>285</sup> Under *Fulton*, those strict-scrutiny “demands” apply to claims brought under both the Free Exercise Clause and RLUIPA. Justice Gorsuch’s reasoning tracks arguments made by Yale Law School’s Free Exercise Clinic on behalf of the Jewish Coalition for Religious Liberty and the National Committee for Amish Religious Freedom – the only amicus brief filed on behalf of the Amish petitioners (and the only amicus brief filed in the case).<sup>286</sup>

Under RLUIPA, the government bears the burden of proving that its land-use regulations serve a compelling governmental interest and are narrowly tailored.<sup>287</sup> This “strict scrutiny” analysis must be “precise.”<sup>288</sup> Courts cannot simply “rely on ‘broadly formulated [governmental] interests,’” but “must ‘scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants.’”<sup>289</sup> Accordingly, Justice Gorsuch writes, “[T]he question in this case ‘is not whether the [County] has a compelling interest in enforcing its [septic-system requirement] *generally*, but whether it has such an interest in denying an exception’ from that requirement to the Swartzentruber Amish *specifically*.”<sup>290</sup> In their analysis, courts err by “failing to give due weight to exemptions other groups enjoy” – including Minnesota campers, hunters, fisherman, and rustic-cabin owners who “hand-carry” and dispose of their “gray water” through

285. *Mast*, 141 S. Ct. at 2430, 2432 (Gorsuch, J., concurring). Justice Alito added a two-sentence concurrence. See *id.* at 2430 (Alito, J., concurring) (“The lower court plainly misinterpreted and misapplied the Religious Land Use and Institutionalized Persons Act.”).

286. See Brief of Amici Curiae Jewish Coalition for Religious Liberty and National Committee for Amish Religious Freedom in Support of Petitioners, *Mast*, 141 S. Ct. 2430 (No. 20-7028). During my third year of law school, I helped lead the clinical student group who prepared this amicus brief (in collaboration with Sidley Austin). See *SCOTUS Sides with the Amish in Case Supported by Free Exercise Clinic*, YALE L. SCH. (July 12, 2021), <https://law.yale.edu/yls-today/news/scotus-sides-amish-case-supported-free-exercise-clinic> [<https://perma.cc/Z8V8-FZ5N>].

287. 42 U.S.C. § 2000cc(a)(1) (2018).

288. *Fulton*, 141 S. Ct. at 1881.

289. *Id.* (quoting *Gonzales v. O Centro Espirita Beneficente União do Vegetal*, 546 U.S. 418, 431 (2006)).

290. *Mast*, 141 S. Ct. at 2432 (Gorsuch, J., concurring) (quoting *Fulton*, 141 S. Ct. at 1881 (alterations in original)); see also *Holt v. Hobbs*, 574 U.S. 352, 362–63 (2015) (“RLUIPA, like RFRA, ‘contemplates a “more focused” inquiry’ and ‘requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law “to the person” – the particular claimant whose sincere exercise of religion is being substantially burdened.’” (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726 (2014))).



soil.<sup>291</sup> Religious-liberty precedents spanning three decades underscore this point:

Under strict scrutiny doctrine, the County must offer a compelling explanation why the same flexibility extended to others cannot be extended to the Amish. As *Fulton* put it, the government must offer a “compelling reason why it has a particular interest in denying an exception to [a religious claimant] while making [exceptions] available to others.” Or as this Court has said elsewhere [in *Church of Lukumi Babalu Aye*], it is “established in our strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited.”<sup>292</sup>

Courts should weigh exemptions enjoyed by other groups as well as “rules in other jurisdictions” that, by comparison, might reveal less restrictive means of achieving the government’s interest.<sup>293</sup> If twenty states allow for gray-water disposal “using mulch basins of the sort the Amish have offered to employ,” Fillmore County “bore the burden of presenting a ‘compelling reason why’ it cannot offer the Amish this same alternative.”<sup>294</sup> And “strict scrutiny demands more than supposition” by government: “The County must prove with evidence that its rules are narrowly tailored to advance a compelling state interest with respect to the specific persons it seeks to regulate. Here, that means proving that mulch basins will not work on these particular farms with these particular claimants.”<sup>295</sup> If “the government can achieve its interests in a manner that does not burden religion, it must do so.”<sup>296</sup>

291. *Mast*, 141 S. Ct. at 2432 (Gorsuch, J., concurring) (citing MINN. R. 7080.1500 § 2).

292. *Id.* at 2432-33 (internal citations omitted) (first quoting *Fulton*, 141 S. Ct. at 1882; and then quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 547 (1993)). Justice Gorsuch also cites *Holt* and *O Centro Espirita* for this point. *Id.* at 2433; see *Holt*, 574 U.S. at 367 (“[T]he Department has not adequately demonstrated why its grooming policy is substantially underinclusive.”); *O Centro Espirita*, 546 U.S. at 436 (“The Government’s argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I’ll have to make one for everybody, so no exceptions.”).

293. *Mast*, 141 S. Ct. at 2433 (Gorsuch, J., concurring).

294. *Id.* (quoting *Fulton*, 141 S. Ct. at 1882). In response to Fillmore County’s claim that the “record contains no evidence of a single, properly working mulch basin system in Minnesota,” Justice Gorsuch clarified, “It is the government’s burden to show this alternative won’t work; not the Amish’s to show it will.” *Id.*

295. *Id.*

296. *Fulton*, 141 S. Ct. at 1881. Justice Gorsuch also cited *Tandon v. Newsom* on this point: “The State cannot ‘assume the worst when people go to worship but assume the best when people go to work.’” 141 S. Ct. 1294, 1297 (2021) (per curiam) (quoting *Roberts v. Neace*, 958 F.3d 409, 414 (6th Cir. 2020) (per curiam)).

### B. *Scrutinizing Exceptions to Zoning*

Of course, concurring opinions do not bind courts. But in *Mast*, Justice Gorsuch revealed how the Supreme Court’s religious-liberty precedent should direct judges and local governments when zoning regulations conflict with faith communities’ free exercise of religion. For faith communities seeking to create affordable housing on their underutilized property, the First Amendment and RLUIPA may offer protection from local authorities and NIMBY neighbors who seek to obstruct apartments, tiny houses, and dense multifamily developments on church land.<sup>297</sup>

Zoning involves an apparatus of individualized assessments and exceptions to otherwise “neutral and generally applicable” ordinances: *variances* and *special exceptions* (also called *conditional uses*).<sup>298</sup> Every variance and conditional-use permit constitutes an exception, involving an individualized assessment of property.<sup>299</sup> Where single-family or low-density zoning regulations require exceptions for denser affordable-housing developments, pursuing variances from these requirements, conditional-use permitting, or rezoning of property can increase costs, delay construction, and garner opposition from neighbors—all of which can discourage developers from proposing such different residential uses.<sup>300</sup> Historically, NIMBY neighbors used these regulations to prevent faith communities from repurposing and redeveloping their property.

<sup>297</sup>. Cf. *supra* note 35.

<sup>298</sup>. The Standard State Zoning Enabling Act of 1924 (SZEA) provided for a “board of adjustment” to fine-tune its local zoning law through three types of administrative actions: (1) hearing appeals from the decisions of building inspectors’ interpretation of the ordinance’s terms; (2) deciding whether to grant “special exceptions to the terms of the ordinance” where the ordinance provided for particular land uses; and (3) authorizing “upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.” ADVISORY COMM. ON ZONING, *supra* note 64, at 10. The SZEA laid the foundation for boards of adjustment across the country—which most modern zoning ordinances denote as “boards of zoning appeals”—with little variation among states in the governmental structures used to process zoning changes. See *supra* note 64 and accompanying text; see also *Fulton*, 141 S. Ct. at 1876 (citing *Emp. Div. v. Smith*, 494 U.S. 872, 878-82 (1990)) (discussing “neutral and generally applicable” laws).

<sup>299</sup>. See *Int’l Church of Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1066 (9th Cir. 2011) (citing *Guru Nanak Sikh Soc’y of Yuba City v. Cnty. of Sutter*, 456 F.3d 978, 985-86 (9th Cir. 2006)) (“[W]hile the zoning scheme itself may be facially neutral and generally applicable, the individualized assessment that the City made to determine that the Church’s rezoning and [conditional-use permit] request should be denied is not.”).

<sup>300</sup>. See *Garcia & Sun*, *supra* note 30, at 7-8; *Robinson*, *supra* note 46, at 281; *Reinhard*, *supra* note 105.

Variations, conditional-use permits, and rezonings matter for faith communities and church property, especially after *Fulton*. Whenever local governments allow for variances or conditional uses within their zoning and building ordinances – and all of them do<sup>301</sup> – they create “a formal mechanism for granting exceptions” to their policy.<sup>302</sup> This “system of exceptions” renders the policy “not generally applicable, regardless whether any exceptions have been given, because it ‘invite[s]’ the government to decide which reasons for not complying with the policy are worthy of solicitude.”<sup>303</sup> Where a local government allows exceptions to its land-use regulation for secular reasons, but not for religious reasons, it violates the First Amendment and RLUIPA.<sup>304</sup>

Under RLUIPA, the government must offer a “compelling reason why it has a particular interest in denying an exception to [a religious claimant] while making them available to others.”<sup>305</sup> RLUIPA does not allow courts to treat a local government’s general interest in regulating density – or sanitation, stormwater, signage, utilities, fire safety, accessibility, or parking – as “compelling” without evaluating how the particular rule affects the particular faith community and its particular property.<sup>306</sup> The “asserted harm of granting specific exemptions to particular religious claimants” must be scrutinized in every case.<sup>307</sup>

For most local governments, this level of scrutiny will prove fatal in fact. Zoning boards and city councils will be hard-pressed to “prove with evidence” that their rules precluding denser residential uses (e.g., apartment buildings, townhouses, duplexes) are narrowly tailored to advance a compelling governmental interest with respect to the specific faith community whose church

301. See, e.g., IND. CODE § 36-7-4-918.4 (2023); ST. JOSEPH CNTY., IND., CNTY. CODE ch. 154, § 154.295 (2005) (defining county variance procedures for property encompassing the University of Notre Dame); see also *supra* note 298 (describing where the Standard State Zoning Enabling Act of 1924 authorized variances and special exceptions).

302. *Fulton*, 141 S. Ct. at 1879.

303. *Id.* at 1879 (quoting *Smith*, 494 U.S. at 884); *id.* at 1882 (“The creation of a system of exceptions under the contract undermines the City’s contention that its non-discrimination policies can brook no departures.” (citing *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546-47 (1993))).

304. See *id.* at 1881-82; *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020); *Holt v. Hobbs*, 574 U.S. 352, 367 (2015); *Gonzales v. O Centro Espirita Beneficente União do Vegetal*, 546 U.S. 418, 436 (2006); *Lukumi*, 508 U.S. at 547.

305. *Fulton*, 141 S. Ct. at 1882; see *Lukumi*, 508 U.S. at 547 (“[A] law cannot be regarded as protecting an interest ‘of the highest order’ . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.” (quoting *Fla. Star v. B.J.F.*, 491 U.S. 524, 541-42 (1989) (Scalia, J., concurring in part and concurring in the judgment))).

306. See *Fulton*, 141 S. Ct. at 1881; *Lukumi*, 508 U.S. at 547; Reinhard, *supra* note 106.

307. *Fulton*, 141 S. Ct. at 1881 (quoting *O Centro Espirita*, 546 U.S. at 431).

property they seek to regulate.<sup>308</sup> Part of their challenge will be justifying the municipal interest in large minimum lot sizes, or detached single-family houses, or vast tracts of undeveloped private land.<sup>309</sup> Not every state court would consider such localized interests “compelling,” particularly given their exclusionary effects on regional housing markets.<sup>310</sup> But even if courts found those interests compelling based on their local effects (e.g., enhanced home values, decreased traffic, defined neighborhood aesthetic and character, environmental protection, historic preservation),<sup>311</sup> to satisfy strict scrutiny, zoning boards and city councils will also need to demonstrate how denying *this* exception to *this* faith community for *this* church property is the *only* way to further its interest.<sup>312</sup> Given the innumerable variances, permitted conditional uses, and property rezonings across municipal zones and regional housing markets that qualify buildings for greater density or higher occupancy or entirely new uses, it seems improbable that local governments will be able to carry RLUIPA’s heavy burden.

C. *Defining the “Religious Exercise” of Faith Communities Creating Affordable Housing on Church Property*

Admittedly, courts have yet to apply *Fulton* in disputes involving affordable housing on church property. Litigation over religious liberty and church property still largely concerns faith communities seeking to enter residential zones and their efforts to create houses of worship or other ministries within those areas.<sup>313</sup> But those cases provide little guidance for how courts should

---

308. See *Mast v. Fillmore Cnty.*, 141 S. Ct. 2430, 2433 (2021) (mem.) (Gorsuch, J., concurring); see also ELLICKSON, *supra* note 13, at 114 (“[L]ocal zoning politics [in most urban areas] almost never allows a landowner to replace a house with a denser residential use, such as a duplex, set of townhouses, or apartment building.”).

309. Cf. ELLICKSON, *supra* note 13, at 12 (measuring “exclusionary zoning” by metrics that include the incidence of a city’s large-lot zoning, whether a locality permits development of single-family houses on small lots, and how suburbs zone twenty- and forty-acre tracts of undeveloped private land).

310. This is also why affordable-housing advocates and legal scholars, including Professor Ellickson, suggest that local zoning abuses—characterized by hyperlocal NIMBY politics—should be corrected by state legislatures and Congress. See, e.g., *id.* at 14.

311. See *supra* notes 70–77 and accompanying text; cf. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394–95 (elaborating the Supreme Court’s interest in “the residential character of the neighborhood”).

312. See 42 U.S.C. § 2000cc(a)(1) (2018); *Fulton*, 141 S. Ct. at 1881 (“[S]o long as the government can achieve its interests in a manner that does not burden religion, it must do so.”).

313. See, e.g., *Canaan Christian Church v. Montgomery Cnty.*, 29 F.4th 182, 199 (4th Cir. 2022), *cert. denied sub nom. Burtonville Assocs. v. Montgomery Cnty.*, 143 S. Ct. 566 (2023) (denying

distinguish *religious* exercise from activity that may be considered *secular*, even *commercial*—faith communities constructing townhouses, rather than temples. In 2007, the Supreme Court of Michigan distinguished such uses of property, affirming the denial of a faith community’s request to rezone its property from single-family to multifamily residential for an apartment complex:

Generally, the building of an apartment complex would be considered a commercial exercise, not a religious exercise. The fact that the apartment complex would be owned by a religious institution does not transform the building of an apartment complex into a “religious exercise,” unless the term is to be deprived of all practical meaning. Something does not become a “religious exercise” just because it is performed by a religious institution.<sup>314</sup>

To be sure, the faith community in *Greater Bible Way Temple of Jackson v. City of Jackson* provided minimal evidence that its proposed apartment complex constituted an exercise of sincerely held religious belief.<sup>315</sup> But religious sincerity is

---

a faith community’s claim that requests to extend water and sewer service to the site of a proposed church were reviewed under a discretionary system that could have accorded them an exception: “Rather, the decision was based on the [neighborhood plan], which expressly prohibited the extension of sewer service to the Property ‘for any use’ without exception. Consequently, *Fulton* is inapplicable.” (citation omitted)); *Redeemed Christian Church of God (Victory Temple) Bowie v. Prince George’s Cnty.*, 17 F.4th 497, 512 (4th Cir. 2021) (holding that a county’s denial of a faith community’s application to amend the water and sewer plan for the site of a proposed church violated the “substantial burden” provision of RLUIPA: “Put succinctly, the County never sought to show at trial that it considered alternatives—such as roadway improvements or additional road signs—before denying the Application.”); *Chabad of Prospect, Inc. v. Louisville Metro Bd. of Zoning Adjustment*, 623 F. Supp. 3d 791, 801 (W.D. Ky. 2022) (holding that a faith community seeking to open a synagogue in a residential zone failed to allege either a “substantial burden” or an “equal terms” violation under RLUIPA).

314. *Greater Bible Way Temple of Jackson v. City of Jackson*, 733 N.W.2d 734, 746 (Mich. 2007). The state trial court ruled that “RLUIPA did apply because the city’s zoning decision constituted an ‘individualized assessment,’ and the refusal to rezone plaintiff’s property imposed a ‘substantial burden’ on the exercise of religion.” *Id.* at 738. It also ruled that the city “failed to demonstrate” a “compelling interest for its refusal to rezone.” *Id.* The Michigan Court of Appeals affirmed the trial court “in all respects.” *Id.*; see *Greater Bible Way Temple of Jackson v. City of Jackson*, 708 N.W.2d 756 (Mich. Ct. App. 2005).

315. See *Greater Bible Way Temple*, 733 N.W.2d at 746 (noting “the only evidence that plaintiff has presented . . . is an affidavit signed by the bishop of the Greater Bible Way Temple” stating that his community “wishes to further the teachings of Jesus Christ by providing housing and living assistance to the citizens of Jackson”). In finding that “plaintiff has not shown that the building of the apartment complex constitutes an exercise in religion,” the court also highlighted that “there is no evidence that the proposed complex would either be limited to housing elderly and disabled persons or be designed to accommodate [them] to any particular extent.” *Id.* at 746 & n.17.

a delicate judicial inquiry.<sup>316</sup> And in the context of affordable housing, zoning regulations do not necessarily “infringe upon or restrict . . . a religious practice without a secular meaning.”<sup>317</sup> Secular analogues to religious practices, on property unaffiliated with religion—from elementary education to foster care, summer camp to shelter—implicitly challenge the claim that a particular faith community’s property should be treated differently than the property of its nonreligious neighbors.<sup>318</sup> Thus, adaptive reuse of church property for seemingly secular purposes can render its owner’s religious exercise difficult to discern.<sup>319</sup>

And yet, RLUIPA defines “the term ‘religious exercise’ to include *any* exercise of religion, *whether or not* compelled by, or central to, a system of religious

- 
316. The Supreme Court has long recognized that courts are ill-positioned to evaluate the beliefs and practices of faith communities, particularly those of minority religious traditions in the United States. *See, e.g.,* *Holt v. Hobbs*, 574 U.S. 352, 361-62 (2015) (dismissing the District Court’s misguided evaluation of a Muslim prisoner’s sincere religious exercise under RLUIPA’s “substantial burden” analysis); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 185-88 (2012) (summarizing cases that underscore the Court’s avoidance of “quintessentially religious controversies whose resolution the First Amendment commits exclusively to [church authorities]”); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (“[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.” (quoting *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 714 (1981))); *Emp. Div. v. Smith*, 494 U.S. 872, 886-87 (1990) (“It is no more appropriate for judges to determine the ‘centrality’ of religious beliefs before applying a ‘compelling interest’ test in the free exercise field, than it would be for them to determine the ‘importance’ of ideas before applying the ‘compelling interest’ test in the free speech field.”); *Thomas*, 450 U.S. at 714 (“The determination of what is a ‘religious’ belief or practice . . . is not to turn upon a judicial perception of the particular belief or practice in question.”); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (“[A] determination of what is a ‘religious’ belief or practice entitled to constitutional protection may present a most delicate question.”).
317. *See* *St. John’s United Church of Christ v. City of Chicago*, 502 F.3d 616, 632 (7th Cir. 2007) (quoting *Lukumi*, 508 U.S. at 533). *St. John’s* concerned the City of Chicago’s condemnation and relocation of St. Johannes Cemetery for runway expansion at O’Hare International Airport. *Id.* at 623, 632. The Seventh Circuit ruled against *St. John’s* in holding that its burial ground need not be protected from condemnation on the basis of religious liberty, asserting that “there is nothing inherently religious about cemeteries or graves.” *Id.* at 632.
318. *See* Reidy, C.S.C., *supra* note 28, at 263. Religious practices often serve as templates for their “secular analogues.” *See, e.g.,* *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1874 (2021) (describing how Roman Catholic associations, orphanages, and foster homes have “served the needy children of Philadelphia for over two centuries”).
319. *See* Church Props. Initiative, *Adaptive Reuse & Densification*, FITZGERALD INST. REAL EST., <https://churchproperties.nd.edu/research/focus-areas/adaptive-reuse-and-densification> [<https://perma.cc/5TYV-GJWL>] (“If the transition of working factories to luxury apartments raises difficult economic and social questions, the transformation of historic places of worship, community, and service into recreational spaces, private residences, or businesses raises even more.”).

belief.”<sup>320</sup> The plain meaning of RLUIPA’s statutory text contemplates broad coverage for religious land uses: “The use, building, or conversion of real property for the purpose of religious exercise *shall be considered to be* religious exercise of the person or entity that uses or *intends to use* the property for that purpose.”<sup>321</sup> Adaptive reuse of church property need not involve ritual worship to constitute “religious exercise” under RLUIPA. The “use, building, or conversion” of church property need only be “for the purpose of religious exercise” to meet RLUIPA’s statutory definition. If faith communities create affordable housing on church property as an exercise of sincerely held religious belief, that “religious exercise” is protected.<sup>322</sup>

The apparent breadth of RLUIPA’s statutory scope with respect to “religious exercise” has led certain courts to seek limiting principles in its legislative history. In particular, they highlight how Senators Orrin Hatch and Edward Kennedy distinguished “religious exercise” from nonreligious “activities or facilities” when first introducing the bill that would become RLUIPA:

[N]ot every activity carried out by a religious entity or individual constitutes “religious exercise.” In many cases, real property is used by religious institutions for purposes that are comparable to those carried out by other institutions. While recognizing that these activities or facilities may be owned, sponsored or operated by a religious institution, or may permit a religious institution to obtain additional funds to further its religious activities, this alone does not automatically bring these activities or facilities within the bill’s definition or [sic] “religious exercise.” For example, a burden on a commercial building, which is connected to religious exercise primarily by the fact that the proceeds from the building’s operation would be used to support religious exercise, is not a substantial burden on “religious exercise.”<sup>323</sup>

Under this analysis, faith communities that merely own, sponsor, or operate “activities or facilities,” apart from their religious practice, may not “automatically” receive protection under RLUIPA. According to Senators Hatch and

---

320. 42 U.S.C. § 2000cc-5(7)(A) (2018) (emphasis added).

321. *Id.* § 2000cc-5(7)(B) (emphasis added).

322. *Id.* § 2000cc-5(7)(A)-(B).

323. *Westchester Day Sch. v. Vill. of Mamaroneck*, 386 F.3d 183, 190 n.4 (2d Cir. 2004) (quoting 146 CONG. REC. S7776 (daily ed. July 27, 2000) (joint statement of Sens. Hatch & Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000)); *see also* Cal.-Nev. Ann. Conf. of the Methodist Church v. City of San Francisco, 74 F. Supp. 3d 1144, 1154-55 (N.D. Cal. 2014) (quoting the joint statement); *Scot. Rite Cathedral Ass’n of L.A. v. City of Los Angeles*, 156 Cal. App. 4th 108, 119 (Ct. App. 2007) (same).

Kennedy, the property must be used for something more than making money, even if that money “would be used to support religious exercise” elsewhere.<sup>324</sup>

Floor statements by bill sponsors are certainly not enacted statutory text. But RLUIPA’s failure to qualify “religious exercise” beyond its broad definition need not disqualify the senators’ “Joint Statement” from offering prudential guidance for courts discerning if, and how, zoning regulations impermissibly burden faith communities seeking to create affordable housing on church property.<sup>325</sup> Even when relying on such guidance, however, judges attempting to distinguish between religious practices and their secular analogues risk playing theologian, deciding for themselves what is meaningful or true in religious matters affecting land use.<sup>326</sup>

*D. Discerning the “Substantial Burden” on Faith Communities Creating Affordable Housing on Church Property*

Rather than wrestle with defining “religious exercise” more narrowly than RLUIPA requires, courts should instead focus on *what constitutes a substantial burden* on faith communities repurposing their property for affordable housing. A proper substantial-burden test can effectively limit claims for heightened scrutiny under the First Amendment and RLUIPA by comparing the religious impacts of legal burdens on land-use decisions. Such a test will leave courts to determine (ultimately) whether a burden is substantial, but without requiring or permitting judges, in the course of answering that question, to rely on any religious beliefs other than those held by the claimants.<sup>327</sup>

This proposed substantial-burden test for religion is built on an “adequate alternatives” principle, the same principle that courts have developed to sift serious from incidental burdens on numerous constitutional liberties.<sup>328</sup> Professor Sheriff Girgis states the test as such:

---

324. See 146 CONG. REC. S7776 (2000).

325. See *id.*

326. See *supra* notes 316-319 and accompanying text. At least three Justices echoed this concern in *Fulton*. See *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1883 (Barrett, J., joined by Breyer & Kavanaugh, JJ., concurring).

327. See Sheriff Girgis, *Defining “Substantial Burdens” on Religion and Other Liberties*, 108 VA. L. REV. 1759, 1780, 1800-04 (2022) (“[T]he *Fulton* Court jumped over, rather than clarifying, the questions facing courts in identifying substantial burdens for themselves, without deciding religious questions.”).

328. *Id.* at 1792-93, 1815 (“Courts have long borrowed from the doctrine of one liberty to develop doctrines for another.”). Professor Girgis defines the “adequate alternatives” principle for



State action that prevents, prohibits, or raises the cost of religious exercise imposes a ‘substantial burden’ unless it leaves you another way that you could realize your religion to *about the same degree* as you could by the now-burdened means of exercise, and at *not much greater cost* than you could by that means.<sup>329</sup>

Alternative options might “flunk” the test if they are “not as good from your religion’s perspective,” or if they prove “significantly costlier in material terms.”<sup>330</sup> Since the frustration of mere religious preference may not be, by itself, a significant material cost, the “religious significance” part of the proposed test asks instead whether the alternatives are as good in religious terms—whether “you had a religious reason to do *X* rather than *any alternative left open by the law*.”<sup>331</sup> If any options left open by a law are as religiously valuable as those foreclosed by the law—based on the claimants’ views about relative religious value—the law does not impose a substantial burden on religious exercise.<sup>332</sup> To trigger heightened scrutiny, the conduct impeded by the law must be religiously non-fungible with options left open (that is, religiously significant).<sup>333</sup>

---

many constitutional liberties—including free speech, guns, abortion (*pre-Dobbs*), and travel—in this way:

A (non-targeted) law that prevents, prohibits, or raises the cost of exercising your civil liberty imposes a “substantial” or “undue” burden (triggering heightened scrutiny) if the law leaves you no adequate alternatives. And to be adequate, an alternative means of exercising the liberty must let you pursue *the interest served by* that liberty (i) to about the same degree, and (ii) at not much greater cost, than you could have through the options the law has closed off.

*Id.* at 1792; *see id.* at 1782-88 (tracing the principle for other civil liberties). This is different than the “least restrictive alternative” (or “least restrictive means”) test that courts sometimes invoke at stage two of their civil-liberties analysis. *Id.* at 1784 & n.139 (“Under the adequate alternatives principle, the question is whether the claimant has other forms of conduct by which to pursue her interests—whereas the “least restrictive means” test asks if the government has other policies by which to pursue its interests.”).

329. *Id.* at 1795 (“Another way to put this, roughly, is that substantial burdens increase the cost to you of living your faith to about the same degree as you could before.”).

330. *Id.* at 1795, 1810.

331. *Id.* at 1797, 1810.

332. *Id.* at 1800-01.

333. *Id.* at 1797-98 (“If the only alternative left open by a law—or the only equally affordable one—involves violating a religious duty, that alternative is *by definition* religiously inferior.”). To be sure, courts should not ask whether a religious practice is “central” to a claimant’s faith (the “centrality” test), which the Supreme Court and scholars have together rejected. *See Emp. Div. v. Smith*, 494 U.S. 872, 887 (1990) (“Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.” (citing *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450

Courts would define the essential legal question of what “substantial” means by elaborating these two criteria: religious significance and material cost. While the religious-significance criterion turns on a claimant’s creed (and not judicial theologizing), courts can apply the material-cost criterion without consulting the claimant’s views at all.<sup>334</sup> And enforcing the religious-significance criterion sets real limits on claimants. It requires claimants to make more than a conclusory assertion – to “show that the challenged decision poses a substantial and realistic threat to their religious exercise” – while weeding out cases that involve mere religious motivation.<sup>335</sup> Where a law leaves religiously adequate alternatives, claimants may still prefer what the law precludes for *nonreligious* reasons and so decide to challenge the law.<sup>336</sup> In such cases, the religious-significance criterion prevents “believers from exploiting religious liberty . . . to get an exemption for their mere wants when others cannot.”<sup>337</sup>

What might constitute a substantial burden on faith communities seeking to repurpose and redevelop their property for affordable housing? The law will typically be a municipal-zoning ordinance with rules governing density and use. While many houses of worship and residential church buildings exist as prior nonconforming uses in their respective neighborhoods, the parcels on which they sit are often zoned to preclude denser residential uses (such as apartment buildings, townhouses, and duplexes).<sup>338</sup> When faith communities repurpose those buildings, the properties lose their prior nonconforming exemption from enacted zoning regulations. Without a variance or rezoning, church property must comply with established density limits and use restrictions, which may require detached single-family houses or large minimum lot sizes, to the exclusion of most affordable housing.<sup>339</sup>

---

U.S. 707, 716 (1981); *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 450 (1969); *Jones v. Wolf*, 443 U.S. 595, 602-06 (1979); *United States v. Ballard*, 322 U.S. 78 (1944)); *Girgis*, *supra* note 327, at 1801-02. But if, by a claimant’s own account of her faith, a particular religious practice is “fungible” with options left open by the law, courts can (and must) credit that account in determining whether her religious exercise is substantially burdened. *See id.* at 1798, 1800-02.

334. *See Girgis*, *supra* note 327, at 1803.

335. *Id.* (quoting *Lyng v. Nw. Indian Cemetery Ass’n*, 485 U.S. 439, 475 (1988) (Brennan, J., dissenting)).

336. *Id.* at 1804 (“You might be speeding to church not because your faith required you to leave the house late, but because you preferred to hit the snooze button, or watch a few more minutes of ‘Meet the Press.’”).

337. *Id.*

338. *See supra* note 188 and accompanying text.

339. *Cf. ELLICKSON*, *supra* note 13, at 12 (measuring “exclusionary zoning” by metrics that include the incidence of cities’ large-lot zoning and whether development of single-family houses on small lots is permitted).

Some faith communities will request a variance from their board of zoning appeals; others will petition their planning commission for rezoning.<sup>340</sup> Either way, faith communities must first receive permission from local officials to create denser, multifamily residential structures (unless the zoning scheme allows for multifamily use and adequate building density) on their property. If they receive permission in the form of a variance or rezoning, faith communities can proceed with their redevelopment plans.<sup>341</sup> They need not invoke religious liberty to create affordable housing.

But what if their request for a variance or their petition for rezoning is denied?<sup>342</sup> The faith community may then decide to invoke RLUIPA or the First Amendment against local officials, claiming the denial constitutes a substantial burden on their religious exercise. To make their case under the proposed substantial-burden test, the faith community would need to show (1) how the zoning decision prevents, prohibits, or raises the cost of their religious exercise; (2) without leaving them another way to realize their religion; (3) to about the same degree as they could by redeveloping their property for affordable housing; and (4) at not much greater cost than they could by that means.<sup>343</sup> Consider the *Arlington Heights* counterfactual as a test case: suppose the Viatorians had sued Arlington Heights, rather than MHDC, and framed their land-use challenge in terms of religious liberty.<sup>344</sup>

*First*, for the Viatorians: *what is the religious significance* of creating affordable housing on the Arlington Heights campus? The Viatorians may believe themselves morally obligated to provide quality housing for low-income families, the elderly, and other vulnerable people within their community.<sup>345</sup> Following the

---

340. Of course, faith communities could also seek a conditional-use permit if their local zoning ordinance permitted denser, multifamily residential structures as a special exception. However, I have yet to find such an exception within ordinances governing municipal density and use restrictions.

341. The same holds true for building permits, which municipalities require for new residential structures, as well as additions, accessory buildings, and renovations to existing structures. See, e.g., *Building Permits*, S. BEND, IND. (Nov. 28, 2023), <https://southbendin.gov/department/community-investment/building/building-permits> [<https://perma.cc/5AS7-LQA7>].

342. Cf. ELLICKSON, *supra* note 13, at 114 (“In most urban areas . . . local zoning politics almost never allows a landowner to replace a house with a denser residential use, such as a duplex, set of townhouses, or apartment building.”).

343. See *supra* notes 327–333 and accompanying text.

344. See *supra* text accompanying notes 247–261.

345. See Off. of Domestic Soc. Dev., *supra* note 145 (citing the U.S. Catholic bishops’ statement, *The Right to a Decent Home*).

scriptural commands of Isaiah 58 and Matthew 25,<sup>346</sup> they may decide to create affordable housing as part of their “corporal works of mercy,” an integral part of their Christian discipleship.<sup>347</sup> The founding charism of their Roman Catholic religious order, the Clerics of St. Viator, may compel them to provide housing on their unused property, as they seek to “raise up communities” where all people can “see their basic human dignity and the value they have in the world.”<sup>348</sup> Alternatively, the Viatorians may seek to create housing as a morally licit means of generating income for their other ministries, including Saint Viator High School and Viator House of Hospitality.<sup>349</sup> Unused acreage on their Arlington Heights campus could provide an additional source of revenue in the form of rental payments; housing for teachers and other lay ministers could offset salary expenses.

*Second*, for Arlington Heights officials: *what are potential alternatives* for the Viatorians to creating affordable housing on their campus? The Village “apartment policy” allows for “R-5 zoning primarily to serve as a buffer between single-family development and land uses thought incompatible, such as commercial or manufacturing districts.”<sup>350</sup> If the Viatorians desire to create affordable housing as an exercise of their religion, and such housing requires denser, multifamily residential structures not permitted in “R-3” (the single-family zone that governs all land surrounding their campus), then the Viatorians could seek parcels zoned “R-5” elsewhere in the Village.<sup>351</sup> Alternatively, the Viatorians could restructure their arrangement with MHDC to create single-family homes on small lots, instead of two-story buildings with multiple units.<sup>352</sup>

*Third*, for the Viatorians, *which alternatives left open by the zoning ordinance would be as religiously valuable* as creating affordable housing on their campus? If the Viatorians seek to create housing as a morally licit means of generating revenue for their other ministries, either alternative (building single-family homes on their campus or denser, multifamily structures on another off-campus site) may prove just as religiously valuable. For housing teachers and other lay

346. *Isaiah* 58:6-7 (New American Bible, Revised Edition) (“Is this not, rather, the fast that I choose . . . sharing your bread with the hungry, bringing the afflicted and the homeless into your house . . . ?”); *Matthew* 25:45 (New American Bible, Revised Edition) (“Amen, I say to you, what you did not do for one of these least ones, you did not do for me.” (internal quotations omitted)).

347. *The Corporal Works of Mercy*, *supra* note 7.

348. See Martin, *supra* note 259.

349. Cf. Garnett & Reidy, C.S.C., *supra* note 22, at 824-25 (noting that some faith traditions prohibit certain future uses of church property as theologically or morally illicit).

350. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 492 U.S. 252, 258 (1977).

351. *Id.* at 255-57.

352. *Id.*

ministers, the Viatorians would likely consider both options religiously “fungible” with their original plan, since either option would offset salary expenses.<sup>353</sup> The question of religious fungibility may prove more complicated if the Viatorians consider affordable housing an integral part of their corporal works of mercy or compelled by their religious order’s founding charism. Their religious convictions may only require the Viatorians to provide quality housing for low-income families, the elderly, and other vulnerable neighbors *somewhere* in Arlington Heights – doing their part to help remedy the municipal and regional need for such housing. In that case, the housing’s location would be religiously fungible. But presence often matters for works of mercy. Following scriptural injunctions to *welcome* the stranger and to bring the homeless *into your house*, the Viatorians may believe themselves morally obligated to create housing *on their property*, where they live in Arlington Heights.<sup>354</sup> Given such convictions, off-campus housing sites would not be religiously adequate alternatives. Requiring the Viatorians to create affordable housing off campus would thus impose a substantial burden on their religious exercise.

*Fourth*, for Arlington Heights officials, the Viatorians, and, ultimately, the court reviewing their zoning dispute: *what material costs would the religiously adequate alternatives impose* on the Viatorians, should they choose to pursue them? Broadly conceived, the Viatorians’ two religiously adequate alternatives involve building either a) single-family homes on their campus or b) denser, multifamily structures on another off-campus site. Here, money becomes an issue. If the Viatorians are limited to single-family homes on their fifteen-acre parcel, rather than two-story multifamily buildings, their total number of housing units decreases by at least one-third, and likely more.<sup>355</sup> Depending on their financing arrangement with MHDC, that decrease in units may render the project prohibitively expensive, precluding the Viatorians from moving forward with its on-

---

353. See Girgis, *supra* note 327, at 1798. Of course, the Viatorians might find religious significance in teachers and lay ministers living on the same campus where they serve. In that case, off-campus housing would not be religiously “fungible” with on-campus housing, even if both alternatives allowed the Viatorians to offset salary expenses and dedicate those additional revenues to their other ministries.

354. See *Matthew* 25:31-46 (New American Bible, Revised Edition) (emphasis added); *Isaiah* 58:7 (New American Bible, Revised Edition) (emphasis added).

355. Presuming the Village’s “R-3” residential zone required minimum lot sizes of 5,000 square feet, the Viatorians would only be able to site 130 houses (at most) on their fifteen-acre parcel. Their original plan called for 190 units in twenty two-story buildings. *Arlington Heights*, 492 U.S. at 256-57. In fact, the Village’s “R-3” residential zone likely required a larger minimum lot size. See ARLINGTON HEIGHTS MUN. CODE § 28-5.1-3.2 (2022) (establishing the minimum lot size for “R-3” single-family residential zones at 8,750 square feet).

campus development.<sup>356</sup> And off-campus development would invariably be more expensive, since the Viatorians would need to *buy land* in Arlington Heights. Higher land values in urban areas make building projects more expensive, which is why developers do not generally attempt to build affordable housing in high-demand cities.<sup>357</sup> Faith communities can bend the cost curve of those housing projects by leasing or donating their property. But they have to *begin* with the property entitlement and then share their valuable property interest with housing projects that might not otherwise be able to afford land for development.<sup>358</sup> Requiring the Viatorians to acquire additional property in Arlington Heights for affordable housing would almost certainly impose a substantial burden on their religious exercise.<sup>359</sup>

\* \* \*

Not every land-use restriction constitutes a substantial burden on faith communities seeking to create affordable housing on church property. Where zoning rules precluding denser residential uses allow for religiously adequate alternatives, and where those alternatives do not impose significant material costs on faith communities, courts are unlikely to subject them to heightened scrutiny.<sup>360</sup> And even when courts do find that exclusionary zoning schemes impose a substantial burden on faith communities' religious exercise, local governments may be able to prove that their land-use restrictions are narrowly tailored to advance a compelling government interest with respect to the specific faith community whose church property they seek to regulate. Zoning boards and city councils would likely need to demonstrate with evidence that *no properties have been granted exceptions* from local rules governing density and use.<sup>361</sup> Where they have granted variances, permitted conditional uses, and rezoned properties within their limits – qualifying buildings for greater density, higher occupancy, or entirely new uses – local governments seem unlikely to satisfy strict scrutiny.

---

356. See *supra* notes 165-176 and accompanying text. Of course, if their financial arrangement with MHDC allowed for that decrease in units without rendering the project prohibitively expensive, the burden on their religious exercise might no longer be substantial.

357. See Schragger, *supra* note 100, at 165-66.

358. See *supra* notes 172-177 and accompanying text.

359. Of course, it is possible that the Viatorians may receive a charitable donation of fifteen acres in Arlington Heights, perhaps from sympathetic alumni of Saint Viator High School. In that scenario, where the costs of land acquisition are null, the burden on their religious exercise may no longer be substantial.

360. See Girgis, *supra* note 327, at 1795.

361. See 42 U.S.C. § 2000cc(a)(1) (2018); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1881 (2021) (“[S]o long as the government can achieve its interests in a manner that does not burden religion, it must do so.”).

Across the country, faith communities are repurposing and redeveloping their property for affordable housing. Where sincerely held religious belief inspires their efforts, RLUIPA and the First Amendment should protect faith communities from NIMBY neighbors using land-use restrictions to obstruct denser, multifamily developments on church land.

## CONCLUSION

Most Americans support loosening land-use restrictions to allow for affordable housing on church property.<sup>362</sup> And faith communities throughout the United States are contributing their property to housing development. Where they lease or donate their property, faith communities can bend the cost curve of housing projects, rendering them more affordable. Since they begin with the property entitlement, faith communities can freely choose to share that entitlement with housing projects that might otherwise be foreclosed by the price of land. But many forgo significant profits by choosing not to sell, or allow market-rate development on, their property.

High-end developers will pay impressive sums for desirable church real estate. In May 2019, the Archdiocese of Chicago sold its surface parking lot outside of Holy Name Cathedral to JDL Development, a Chicago-based real estate developer, for an astronomical \$110 million.<sup>363</sup> In addition to street-level retail space, JDL's project includes two skyline-altering luxury residential towers that overlook the church.<sup>364</sup> The First Church of Christ, Scientist sold its modest

---

362. Alex Horowitz & Tushar Kansal, *Survey Finds Large Majorities Favor Policies to Enable More Housing*, PEW CHARITABLE TRS. (Nov. 30, 2023), <https://www.pewtrusts.org/en/research-and-analysis/articles/2023/11/30/survey-finds-large-majorities-favor-policies-to-enable-more-housing> [https://perma.cc/6VL4-B65V] (finding that 81% of Americans want to “ease rules for the construction of dorms or affordable housing on land owned by nonprofits such as colleges or churches”).

363. See Garnett & Reidy, C.S.C., *supra* note 22, at 822; Jay Koziarz, *Work on 78-Story Skyscraper Across from Holy Name Cathedral Begins*, CURBED CHI. (Mar. 21, 2019), <https://chicago.curbed.com/2019/3/21/18275779/construction-holy-name-skyscraper-one-chicago-square> [https://perma.cc/R8RK-TYK2]; Ryan Ori, *Luxury Towers Planned After Holy Name Cathedral Parking Lot Sold for \$115 Million*, CHI. TRIB. (Apr. 5, 2017), <https://www.chicagotribune.com/business/ct-holy-name-parking-lot-development-ryan-ori-0406-biz-20170405-story.html> [https://perma.cc/ABG2-ZFS3]; Robert Herguth, *Much of \$100 Million from Sale of Holy Name Lot to Go to Church Sex-Abuse Debts*, CHI. SUN-TIMES (Feb. 8, 2019), <https://chicago.suntimes.com/2019/2/8/18317337/much-of-100-million-from-sale-of-holy-name-lot-to-go-to-church-sex-abuse-debts> [https://perma.cc/K8Z5-BFBW].

364. See Garnett & Reidy, C.S.C., *supra* note 22, at 822; Koziarz, *supra* note 363; Dennis Rodkin, *Here's the First Look Inside Those High-End Condos Going up Across from Holy Name*, CRAIN'S CHI. BUS. (Nov. 6, 2019), <https://www.chicagobusiness.com/residential-real-estate/heres->

surface parking lot behind Christian Science Plaza less than five years earlier.<sup>365</sup> Another Chicago-based developer, Pritzker Realty Group, paid \$21.9 million for title to the Boston property, replacing asphalt spaces with lavish apartments in its landmark tower.<sup>366</sup>

Downtown parking lots may not inspire the religious imagination. But open pavement, and the soaring property values that surround it, can invite real estate developers to dream.<sup>367</sup> One Chicago and 30 Dalton—built upon parking lots that once served Holy Name Cathedral and Christian Science Plaza, respectively—command lucrative per-unit price tags.<sup>368</sup> JDL and Pritzker paid handsomely for their potential. Both faith communities profited.

Many faith communities need the income that partnerships with real estate developers can provide.<sup>369</sup> Burdened by declining membership, diminishing resources, and real assets that become “too big and too expensive” to maintain, faith communities often make the painful decision to cash out, selling or leasing their valuable property for market-rate development.<sup>370</sup> In urban areas, the windfall can be immense. The seven largest Black churches in Seattle own seven

---

first-look-inside-those-high-end-condos-going-across-holy-name [https://perma.cc/DKH5-QS2N].

365. See Garnett & Reidy, C.S.C., *supra* note 22, at 822-23; Eric Convey, *Christian Science Parcel Sells for \$22M, with Some Serious Strings Attached*, BOS. BUS. J. (Oct. 22, 2014), [https://www.bizjournals.com/boston/real\\_estate/2014/10/christian-science-parcel-sells-with-strings.html](https://www.bizjournals.com/boston/real_estate/2014/10/christian-science-parcel-sells-with-strings.html) [https://perma.cc/8CD6-27T7].

366. See Convey, *supra* note 365; Garnett & Reidy, C.S.C., *supra* note 22, at 823; *Christian Science Center Complex: Boston Landmarks Commission Study Report*, BOS. LANDMARKS COMM’N 2-3 (2011), [http://plaza.christianscience.com/wp-content/uploads/2016/05/christian-science-center-complex-study-report-as-amended\\_tcm3-17697.pdf](http://plaza.christianscience.com/wp-content/uploads/2016/05/christian-science-center-complex-study-report-as-amended_tcm3-17697.pdf) [https://perma.cc/82LH-CQ4R]; *Floor Plans*, 30 DALTON, <https://www.30dalton.com/floor-plans> [https://perma.cc/CG32-2N8X].

367. See Tom Acitelli, *Parking Lots, Once Asphalt Wasteland, Become Golden Opportunities*, N.Y. TIMES (Dec. 3, 2019), <https://www.nytimes.com/2019/12/03/business/parking-lot-death-redevelopment.html> [https://perma.cc/52WM-HW52].

368. Monthly rent for some units in 30 Dalton will likely exceed \$10,000. See *Floor Plans*, *supra* note 366. For-sale residences in One Chicago stretch from \$1.75 to \$28 million. Jay Koziarz, *A Closer Look at the High-Tech Condos Headed to River North’s One Chicago Development*, CURBED CHI. (Dec. 11, 2019), <https://chicago.curbed.com/2019/12/11/21005192/onechicago-development-condos-renderings-construction> [https://perma.cc/FK7Q-GLU4].

369. See Jon Banister, *As More Churches Approach Fiscal ‘Breaking Point,’ Housing Projects Are Providing a Lifeline*, BISNOW (Mar. 4, 2021), <https://www.bisnow.com/washington-dc/news/multifamily/developers-partnering-with-churches-to-build-housing-on-excess-land-107983> [https://perma.cc/2XRA-GLAU] (“As land becomes scarce in cities that are looking to build more housing, religious institutions are increasingly partnering with developers to build on their large pieces of valuable urban property, unlocking a long-term source of income for churches that are struggling financially.”).

370. See *supra* notes 106-115 and accompanying text.



acres of property with a total appraised value of more than \$65 million.<sup>371</sup> But even in colder real estate markets—where a church parcel may sell for tens of thousands, rather than tens of millions—faith communities may find it hard not to sell.<sup>372</sup>

Faith communities that instead choose to create affordable housing on church property seek something other than market value for their real estate. What many call “charity” (*tzedakah*) or “discipleship” inspires them to forego material profits in pursuing spiritual profit.<sup>373</sup> Their adaptive reuse of church property itself becomes a witness to faith communities’ theological and moral convictions, particularly where zoning schemes would otherwise exclude denser, less expensive forms of housing. Religious sincerity becomes almost empirical—the gap between real estate sales prices in North Berkeley and Jordan Court. All Souls Episcopal Parish may never have received \$21.9 million (30 Dalton), let alone \$110 million (One Chicago), for its parish house and church parking lot. But it would have made money, just the same.<sup>374</sup>

Foregone profits on church property testify to sincerely held religious belief, the demands of conscience responding to worldly reality. Regardless of how faith communities came to own property within their limits, or why faith communities seek to repurpose property within their limits, most local governments need property within their limits to create affordable housing. And faith communities are willing partners in that endeavor. Local governments and courts can interrogate their religious sincerity. But they need only ask what faith communities sacrifice, and see what faith communities build, to shelter their neighbors.

---

371. See Argerious, *supra* note 131; see also Donald King, *The Central District Has Lost over a Dozen of Its Black Churches. The Rest May Still Be Saved*, CROSSCUT (Dec. 9, 2019), <https://crosscut.com/2019/12/central-district-has-lost-over-dozen-its-black-churches-rest-may-still-be-saved> [<https://perma.cc/NW86-2D8J>] (“Many [Black churches in Seattle] succumb to the pressure to sell without considering the options to stay and leverage their underdeveloped property. These churches are property rich and cash poor.”).

372. Savings realized from costly utilities, insurance, and capital repairs on church property may justify a lower sales price—so long as the deal gets done. See Reinhard, *supra* note 106; Ferguson, *supra* note 108.

373. See *supra* notes 145-147 and accompanying text.

374. Residential properties less than 25% the size of All Souls’ parish house and parking lot (13,900 square feet) sell for well over \$1.5 million in Berkeley. See, e.g., *Berkeley CA Real Estate & Homes for Sale*, ZILLOW, <https://www.zillow.com/berkeley-ca> [<https://perma.cc/7E2N-7VQC>].