REAL ESTATE RECYCLING: SUPPORTING OFFICE-TO-RESIDENTIAL CONVERSIONS

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Abstract

Following decades of zoning constraints, over-dependence on commercial land uses, and the recent trend toward work-from-home policies, U.S. downtowns are struggling to maintain tax revenues sufficient to keep downtowns vibrant and safe. One potential means of partially addressing these challenges is through greater government support of converting empty office buildings into affordable residential housing. Such office-to-residential conversions can increase affordable housing stock, promote social justice, mitigate climate change, and revitalize city cores. Unfortunately, a variety of structural, legal, and financial constraints presently make these conversion projects unduly difficult and expensive. This Article first highlights how office-to-residential conversions could help mitigate the affordable housing shortages and soaring office vacancy rates affecting U.S. cities. This Article then analyzes the existing regulatory structures surrounding Office Conversion projects and identifies specific legal and policy strategies capable of promoting them across the United States.

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INTRODUCTION

Chicago's once-vibrant and bustling downtown district emerged from the COVID-19 pandemic with a record-high office vacancy rate of 22.4%.[1] By the end of 2023, that rate had increased to an alarming 23.5% and commercial buildings were selling at half their previous sale prices.[2]

1. Helaine Krysik, *Chicago's Ambitious Plan to Convert 5 Million Square Feet of Empty Office Space into Affordable Housing Places a Big Bet on Remote Work*, BUS. INSIDER (June 26, 2023, 9:50 AM), https://www.businessinsider.com/chicago-plans-office-residential-conversion-affordable-housing-2023-6 [https://perma.cc/N27L-3ENS].

2. Shruti Singh, *Chicago Braces for First Post-Pandemic Property Tax Assessment*, BLOOMBERG (Feb. 12, 2024), https://www.bloomberg.com/news/articles/2024-02-12/chicago-braces-for-first-post-pandemic-property-tax-assessment?embedded-checkout=true [https://perma.cc/P7MP-UB5V].

In response to continued drops in property values and corresponding losses in tax revenue, the city government is reconsidering its plans for commercial real estate in the city's downtown core. One proposal attracting national attention is the LaSalle Reimagined Initiative, an adaptive reuse plan that would convert five million square feet of vacant commercial space into 600 mixed-income housing units.[3] If the LaSalle Initiative is successful, three approved conversion projects will begin LaSalle Street corridor's transition from a monoculture of offices to a mixed-use community. The community will offer modern residential neighborhood amenities; a revitalized retail scene; and the community will preserve historic buildings—all while creating 600 affordable housing units in close proximity to low-wage service jobs.[4] The ultimate success or failure of the LaSalle Initiative will likely depend in part on developers' ability to finance the initiative's projects, a daunting obstacle for this unique redevelopment project.

The current challenges facing U.S. downtowns like Chicago are the product of decades of race and class divisions, technological innovations, shifting economic conditions, and a variety of other factors. From eighteenth century shipping ports to twenty-first century coworking floorplans, U.S. downtowns have reflected each generation's vision of the American dream. Although many U.S. downtowns were initially very White-centric, eighteenth and nineteenth century demands for low-wage industrial and service jobs created racially diverse, working-class communities and high-density living conditions in many American downtowns.[5] Twentieth century suburbanization and zoning laws subsequently drained White wealth from many downtowns and invested it in spacious single-family residential zones that indirectly degraded downtown neighborhoods.[6] Despite some public efforts to revitalize downtowns after this exodus, by the late twentieth century relatively inexpensive property values led to a rise in knowledge economy jobs that transformed many American downtowns into bastions of desirable office space.[7]

Today, as twenty-first century technologies and lingering pandemic-era impacts fuel unprecedented work-from-home practices, knowledge

3. Krysik, *supra* note 1.

4. *Id.*

5. *See* David R. Goldfield, *The Stages of American Urbanization*, 5 OAH MAG. HIST. 26, 27–28 (1990).

6. *See* Robert T. Paine Jr., *Homes for the People*, 15 J. SOC. SCI. 104, 116 (1882).

7. *See* U.S. DEP'T OF HOUS. & URB. DEV., DISPLACEMENT OF LOWER-INCOME FAMILIES IN URBAN AREAS REPORT (May 2018), https://www.huduser.gov/portal/sites/default/files/pdf/displacementreport.pdf [https://perma.cc/Q838-2CGR].

economy workers are increasingly abandoning downtown office space.[8] Service industry businesses that once supported downtown professional office activities are exiting, downtown property tax revenues are declining, and city budgets are struggling to cope with these shortfalls.[9] Meanwhile, housing inventories in many cities continue to trail demand, and many middle- and low-income residents are struggling to find affordable places to live.[10]

Facing this glut of office space and shortage of housing, some developers and policymakers are considering office-to-residential conversions (Office Conversions) as one method to address both challenges. Office Conversions could potentially utilize vacant downtown real estate and increase housing supplies while simultaneously advancing social justice and environmental sustainability goals. Unfortunately, many potential Office Conversion projects across the country are encountering seemingly insurmountable political, legal, structural, and financial barriers. Existing policy structures fail to provide adequate incentives for developers to pursue Office Conversion projects that could deliver tremendous benefits to struggling downtown areas. This Article describes the forces that have contributed to the nation's current surplus of office vacancies and dearth of affordable housing, highlights how Office Conversions can help address these problems, and identifies multiple policy strategies capable of facilitating more optimal levels of Office Conversion activity in the United States.

I. BACKGROUND

A. *A History of Downtown Development and the Office Vacancy Crisis*

Office Conversion projects are a potential method to mitigate two growing crises facing American cities: high office vacancy rates and chronic housing shortages. Unfortunately, many existing and proposed policies aimed at supporting Office Conversions fail to account for the unique challenges and attributes of these projects. Among other things, zoning laws in many cities have effectively segregated many residents by race and class for decades, complicating efforts to introduce mixed-use developments and affordable housing to downtown areas. To be

8. *See* Tracy Hadden Loh et al., *Myths About Converting Offices into Housing—and What Can Really Revitalize Downtowns*, BROOKINGS (Apr. 27, 2023), https://www.brookings.edu/articles/myths-about-converting-offices-into-housing-and-what-can-really-revitalize-downtowns/ [https://perma.cc/2M5P-Q778].

9. *See* Taylor McNeil, *Urban Doom Loop: What It Is and How Cities Can Stop It*, TUFTSNOW (Aug. 16, 2023), https://now.tufts.edu/2023/08/16/urban-doom-loop-what-it-and-how-cities-can-stop-it#:~:text=A%20Columbia%20University%20professor%20coined,services%2C%20and%20then%20fewer%20residents [https://perma.cc/LSQ4-JQ6X].

10. *See generally* The Nat'l Low Inc. Hous. Coal., *The Gap: A Shortage of Affordable Homes* (Mar. 2023), https://nlihc.org/gap [https://perma.cc/K8EV-MEMN].

effective, Office Conversion policies will need to overcome the effects of such practices and garner sufficient political and financial support to persuade developers to construct mixed-use communities that produce affordable housing options.

1. Colonialization and Early Urbanization

The challenges facing downtown cores across the United States today are arguably the product of a long history of questionable policies. Injustices in American downtowns are traceable as far back as the seventeenth century, when colonizing Europeans settled into pre-existing Native American villages. To sustain the developing international trade economy operating out of colonial ports, many colonial city dwellers relied on African slave labor to work the fields surrounding city centers. Throughout the eighteenth century, investments in manufacturing, transportation, and business, drew large numbers of rural and foreign settlers into Northeastern port cities.[11] During the Westward Expansion, mostly immigrant labor constructed the transcontinental railroad to link cities across the country and expand the growing industrial economy.[12] As a result, urban populations throughout the United States ballooned such that by 1870, more than 25% of Americans lived in cities.[13]

Unflattering downtown scenes persisted in many U.S. cities throughout much of the early twentieth century. Inflexible streetcar systems and strong economic growth led many growing cities to congregate development around central business districts.[14] Surrounding these commercial centers, high-density residential areas often became separated based on race, ethnicity, and social class. In poorer immigrant neighborhoods, cities developed tenements with unregulated floorplans, very small living spaces, and poor ventilation. These multi-family residential units often subjected entire communities to unsanitary and unsafe living conditions.[15] Many middle- and upper-class urbanites came to associate these tenements with physical disease and spiritual corruption,[16] and some urbanites started to envision revitalized downtowns that were free of these perceived problems.[17]

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11. *See* Goldfield, *supra* note 11, at 27–28.
12. *See id.* at 28.
13. *Id.* at 27.
14. *See* William J. Lloyd, *Understanding Late Nineteenth-Century American Cities*, 71 GEOGRAPHICAL REV. 460, 461 (1981).
15. *See id.* at 465.
16. *See id.*
17. *See* Goldfield, *supra* note 11, at 28.

2. Suburbanization and Single-Family Residential Zoning

The proliferation of high-density residential areas in downtown cores spurred two primary responses in major U.S. cities during the early twentieth century. A progressive public and private urban reform movement during that era sought to bring order to downtowns through health, fire, and police services. These were steps toward greater governmental control in large U.S. cities, which continue to reverberate today.[18] Meanwhile, many Americans in this era embraced a romanticized vision of wholesome suburban life, viewing it as a "safety valve" against crime-ridden and overpopulated city cores.[19] While some early critics decried suburbanization, most seemed to embrace or accept it, turning attention to the challenges of transporting suburbanites to and from downtown workplaces.[20]

A pernicious side effect of land use planning during much of the twentieth century was that, in far too many instances, it directly or indirectly facilitated greater segregation by race, ethnicity, and class. An early example is San Francisco's 1880 Bingham Ordinance, which prohibited people of Chinese descent from living or doing business outside a designated "Chinese" district.[21] When the federal court in the Northern District of California voided the ordinance for intending to "forcibly drive out a whole community . . . without respect to circumstances," San Francisco instead prohibited laundry businesses from operating outside a designated district.[22] Even though most of the city's laundries were owned by people of Chinese descent, and zoning advocates openly admitted to their racially discriminatory intent,[23] the U.S. Supreme Court concluded that "laundry ordinances" did not violate the Equal Protection Clause of the Fourteenth Amendment because the text did not explicitly target a particular racial group.[24] As a result, some other American cities started using similar facially-neutral, but thinly-veiled, segregationist land-use ordinances to segregate commercial areas by ethnicity.

Some cities in the twentieth century also used zoning ordinances to racially segregate residential areas. For instance, Baltimore adopted an ordinance in 1911 that prohibited Black families from living in neighborhoods where more than 50% of the homes were occupied by

18. *See id.*

19. *See* Robert T. Paine Jr., *Homes for the People*, 15 J. SOC. SCI. 104, 116 (1882).

20. *See* Thomas C. Clarke, *Rapid Transit in Cities*, 11 SCRIBNER'S MAG. 566, 758 (1892).

21. *See* Sarah J. Adams-Schoen, *The White Supremacist Structure of American Zoning Law*, 88 BROOK. L. REV. 1225, 1235 (2023).

22. *In re Lee Sing*, 43 F. 359, 359–61 (C.C.N.D. Cal. 1890).

23. Adams-Schoen, *supra* note 21, at 1243.

24. *See* Barbier v. Connolly, 113 U.S. 27, 32 (1884); *see also* Soon Hing v. Crowley, 113 U.S. 703, 711 (1885).

White families.[25] Drawing on the "separate but equal" doctrine arising from *Plessy v. Ferguson*, Baltimore's White segregationists persuaded the U.S. Supreme Court to validate the ordinance on the theory it was sufficiently compatible with "established usages, customs, and traditions of the people . . . and promotion of their comfort . . . ."[26] The Baltimore template and the U.S. Supreme Court's stamp of approval ultimately spurred the rapid adoption of race-motivated zoning codes in nearly every major American city where Black people constituted at least 15% of the population.[27]

In 1917, however, the National Association for the Advancement of Colored People (NAACP) creatively challenged racialized zoning codes by representing a White plaintiff who was prevented from completing the sale of his property to a Black buyer. In *Buchanan v. Warley*, the NAACP successfully convinced the U.S. Supreme Court that Louisville's zoning code unconstitutionally restricted the White plaintiff's right to transfer private property.[28] Although the decision technically prohibited Jim Crow zoning, its narrow focus on protecting property rights failed to dismantle racial segregation and set the stage for another zoning technique that has contributed to continued segregation: single-family-only zoning.[29]

The introduction of single-family zoning in U.S. cities in the 1920s allowed city planners and developers to organize neighborhoods by race and class without violating the Constitution. Using comprehensive coding systems like "R1" and "R2" to denote "single-family" and "multi-family" residential areas, many city governments developed codes that were not facially discriminatory but had the practical effect of maintaining all-White neighborhoods.[30] Many early zoning ordinances also used multi-family zones to provide buffers between industrial zones and other zones.[31] To gain support for exclusionary zoning, some advocates of early zoning proposals even employed race and class tropes that contrasted the "urban jungle" with pastoral tranquility and apartment dwelling with American patriotism.[32]

Facially-neutral, comprehensive city planning also took hold in the central business districts during this early period of zoning, aiming to

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25. Adams-Schoen, *supra* note 21, at 1246.

26. *Id.* at 1248 (quoting Plessy v. Ferguson, 163 U.S. 537, 550 (1896), *overruled by* Brown v. Bd. of Ed., 347 U.S. 483 (1954)).

27. *Id.* at 1249 (citing RICHARD H. SANDER ET AL., MOVING TOWARD INTEGRATION: THE PAST AND FUTURE OF FAIR HOUSING 1–4, 30–31, tbl. 1.1 (2020).

28. 245 U.S. 60, 81–82 (1917).

29. *See* Adams-Schoen, *supra* note 21, at 1254.

30. *See id.* at 1255.

31. *See id.* at 1268–69.

32. *Id.* at 1270.

keep industrial activity separate from retail shopping.[33] Perhaps most famously, New York City's 1916 Zoning Resolution sought to remove garment factories from the Fifth Avenue shopping experience.[34] Responding to local merchants who believed the presence of factory workers was "unaesthetic,"[35] retail companies partnered with realtors, economists and psychologists to gather data on consumer behavior and persuade politicians to develop downtowns into thriving retail centers that were absent immigrant laborers.[36] To avoid Fourteenth Amendment challenges, the city's new Heights of Buildings Commission teamed up with the Fifth Avenue Association to limit building heights and exclude industrial lofts.[37] New York City ultimately established a suburban, single-family residential district, a restricted commercial district, and an unrestricted buffer district with tall apartment buildings and tenements abutting nearby toxic land-uses—a Constitutional template for race and class segregation eventually employed in many other American cities.[38]

3. The Privatization of Downtowns and High-Income In-Migration

As the Standard State Zoning Enabling Act of 1928 led to widespread adoption of zoning in cities throughout the United States,[39] downtown areas continued to evolve. Whereas the Progressive City Beautiful movement had re-imagined downtowns as public centers for sanitized art, parks, and civic engagement, private investors took advantage of newly realized zoning to re-cast urban real estate as a profitable commodity.[40] Through the 1920s and 1930s, this vision spurred mass demolition of "blighted area[s]" and new construction of skyscrapers, department stores, and high-class residential units.[41]

Despite postwar segregation efforts to remove racial minorities and low-income residents from downtown consciousness, the 1960s were a pivotal time for underrepresented groups to demand their recognition through civil right sit-ins, marches, and riots.[42] However, instead of achieving an integrated downtown, many retail shops boarded their windows, the public's confidence in governmental solutions plummeted,

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33. *See* John F. Bauman, *The American Downtown: Sagas of Race, Place, and Space*, 34 J. URB. HIST. 520, 522 (2008).

34. *See* Adams-Schoen, *supra* note 21, at 1260.

35. Bauman, *supra* note 33, at 520.

36. *See id.* at 522.

37. *See* Adams-Schoen, *supra* note 21, at 1261.

38. *See id.*

39. *See id.* at 1272.

40. *See* Bauman, *supra* note 33, at 523 (highlighting Alison Isenberg's view of downtown in the 1920s as not only "urban space . . . but also as a commodity itself, prime urban real estate whose value to be secured must be constantly re-imagined, protected, policed, and re-marketed.").

41. *Id.* at 526.

42. *See id.* at 528.

and suburbanization boomed.[43] Some cities periodically attempted to revive struggling urban centers, primarily through historic preservation and environmental conservation policies.[44] Unfortunately, many cities lacked the public funding necessary for successful revitalization. In response to this dynamic, large private corporations championed their own development proposals. By 2006, private office space accounted for 53% of downtown real estate.[45]

After a century of subtraction within urban cores that gradually replaced residents, craftsmen, museums, theaters, small retailers, and department stores with commercial office complexes, suburbanites in the early twenty-first century started to see commercialized downtowns as an opportunity for low-cost residences, traffic-less transit, and a diverse urban culture. Since that time, growing numbers of high-income residents have clustered in city centers enticed by the combination of shorter work commute times and desirable neighborhood amenities.[46] Bars, gyms, beauty salons, and other service providers have followed and further attracted new residents. Between 1980 and 2017, the population of America's 100 largest cities grew by 55%,[47] and the number of college graduates living in American downtowns rose from 15% to 45%.[48] This in-migration of high-income knowledge workers has increased residential and commercial real estate prices in downtowns and has driven many low-income households and businesses out of downtowns into more affordable areas.[49]

4. Work-from-Home Policies and Rising Office Vacancies

The COVID-19 pandemic dramatically altered the commercial office landscape in America's downtowns. Prior to the pandemic, 85% of Americans worked onsite,[50] but by June 2022, more than 50% of Americans had the option to work remotely.[51] Although work-from-home

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43. *See id.*

44. *See* Stephanie Ryberg-Webster & Kelly L. Kinahan, *Historic Preservation and Urban Revitalization in the Twenty-first Century*, 29(2) J. PLAN. LITERATURE 119, 121 (2014).

45. Emily Badger & Quoctrung Bui, *The Downtown Office District Was Vulnerable. Even Before Covid.*, N.Y. TIMES (July 7, 2021), https://www.nytimes.com/interactive/2021/07/07/upshot/downtown-office-vulnerable-even-before-covid.html [https://perma.cc/77ZW-TYTP].

46. *See* Victor Couture & Jessie Handbury, *Neighborhood Change, Gentrification, and the Urbanization of College Graduates*, 37(2) J. ECON. PERSP. 29, 38 (2023).

47. *Id.* at 31.

48. *Id.* at 29.

49. *See* U.S. DEP'T OF HOUS. AND URB. DEV., *supra* note 7.

50. Gretchen Gavett, *Do We Really Need the Office?,* HARV. BUS. REV. (July 15, 2020), https://hbr.org/2020/07/do-we-really-need-the-office [https://perma.cc/HA4T-69PZ].

51. Jon Gorey, *Office-to-Residential Conversions Are On the Rise—What Does That Mean for Cities?*, LINCOLN INST. LAND POL'Y (May 16, 2023), https://www.lincolninst.edu/publications/articles/2023-05-office-residential-conversions-are-on-the-rise [https://perma.cc/B3TW-K27U].

options had been increasing,[52] pandemic-driven infection concerns rapidly accelerated that trend and downtowns experienced a mass exodus of knowledge workers and supporting service industry workers.[53]

Technological advancements and at-home office spaces emerging just before and during the pandemic made the country's dramatic shift toward at-home work possible. Most notably, between 2000 and 2024, in-home broadband services increased from 1% to 80%.[54] This allowed new technologies such as Zoom to facilitate virtual communication from any location, applications such as Asana to maintain collaboration and track progress on projects, and file-sharing software such as Dropbox to keep work organized and accessible. Embracing these changes, many workers have converted home spaces into comfortable, productive office spaces.[55] Some employers even provided remote workers with compatible equipment such as laptops and ergonomic chairs to aid in this transition.[56]

By the time social distancing requirements relaxed, many American workers had developed a preference for working from home.[57] Despite evidence that some workers felt less connected to co-workers and struggled to balance their work and personal lives, 76% of workers surveyed after the COVID-19 pandemic reported an overall preference for working from home.[58] These worker preferences and advantages such as reduced overhead costs and space needs ultimately spurred many companies to embrace remote work options.[59] Some employers have since expressed concerns that fully remote work arrangements may decrease productivity,[60] and many employers have begun developing

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52. *See* Badger & Bui, *supra* note 45.

53. *See* Gavett, *supra* note 50.

54. *Internet, Broadband Fact Sheet*, PEW RSCH. CTR. (Jan. 31, 2024), https://www.pewresearch.org/internet/fact-sheet/internet-broadband/ [https://perma.cc/97QW-32RH].

55. Many remote workers turned to articles and social media for ideas to remodel, redecorate, and equip their home offices. *See, e.g.*, Kate Jerde, *65 Home Office Ideas that Will Inspire Productivity*, ARCHITECTURAL DIG. (Mar. 16, 2020), https://www.architecturaldigest.com/gallery/home-offices-slideshow [https://perma.cc/6JB6-RDMX].

56. *See* Sonal Khetarpal, *From Laptops to Ergonomic Chairs: Firms Help Employees Set Up Office-Like Workstations at Home*, BUS. TODAY (July 8, 2020), https://www.businesstoday.in/latest/corporate/story/companies-helping-employees-set-up-office-like-workstations-at-home-263517-2020-07-08 [https://perma.cc/Y5EQ-RMX8].

57. *See* Jose Maria Barrero et al., *The Evolution of Work from Home*, 37(4) J. ECON. PERSPS. 1, 3 (2023) (finding workers were favorably surprised by increased productivity).

58. Kim Parker et al., *Covid-19 Pandemic Continues to Reshape Work in America*, PEW RSCH. CTR. (Feb. 16, 2022), https://www.pewresearch.org/social-trends/2022/02/16/covid-19-pandemic-continues-to-reshape-work-in-america/ [https://perma.cc/7P5F-3F6].

59. *See* Barrero et al., *supra* note 57, at 4.

60. *See* Bryan Robinson, *Remote Work Might Not Be as Productive as Once Thought, New Studies Show*, FORBES (Aug. 12, 2023), https://www.forbes.com/sites/bryanrobinson/2023/08/12/remote-work-might-not-be-as-productive-as-once-thought-new-studies-show/?sh=4aac4d643e7a [https://perma.cc/8QBT-K2W6].

hybrid remote work policies that maintain advantages for the company and employee productivity.[61]

Declining demand for downtown office space has led to dramatic increases in office vacancies in recent years. By early 2023, less than 50% of the available office space in the United States was being used, and many companies were choosing not to renew office leases.[62] As a result, the national office vacancy rate for commercial space reached 17.5% in August 2023,[63] with some cities, like Seattle and San Francisco, experiencing vacancy rates as high as 22%[64] and 27%,[65] respectively. With one-third of existing office leases set to expire by 2026, experts anticipate that these astronomical vacancy rates will only continue to rise.[66]

B. *The Urban Doom Loop and the Affordable Housing Crisis*

The country's troubling rise in downtown office vacancy rates plays a leading role in the phenomena that some call the "urban doom loop."[67] Under this bleak narrative, downtown residents with access to remote work options continue to leave the city and companies continue to vacate commercial office spaces.[68] The vacant spaces and decreased demand cause property values to drop and retail spaces to suffer, leading to crippling losses in tax revenue and pressuring cities to reduce funding for vital services like public health clinics and public transportation systems.[69] Ultimately, this lack of funding for maintaining clean, safe, and vibrant downtowns pushes more remaining residents out of urban

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61. *See* Darja Smite, et al., *Work-From-Home Is Here to Stay: Call for Flexibility in Post-Pandemic Work Policies*, 195 J. SYS. & SOFTWARE 111552 (Jan. 2023); *see also* Hadden Loh et al., *supra* note 8; *see also* Adam McCulloch, *Amazon Joins Google in Demanding More Office Attendance*, PERSON. TODAY (Aug. 11, 2023), https://www.personneltoday.com/hr/amazon-hybrid-work-office-attendance/ [https://perma.cc/3ZFG-X3UE] (Amazon and Meta are requiring employees to work in the office three days per week, and Google is incentivizing in-office work by factoring attendance into performance reviews.).

62. *See* Hadden Loh et al., *supra* note 8.

63. Evelyn Jozsa, *Office Vacancy Rates Continue to Rise Despite Return-to-Office Mandates*, COM. EDGE (Sept. 18, 2023), https://www.commercialedge.com/blog/national-office-report-2023-september/ [https://perma.cc/F8E6-EK78].

64. *See* Hadden Loh et al., *supra* note 8.

65. *Id.*

66. *See* Dror Poleg, *The Next Crisis Will Start with Empty Office Buildings*, THE ATLANTIC (June 7, 2023), https://www.theatlantic.com/ideas/archive/2023/06/commercial-real-estate-crisis-empty-offices/674310/ [https://perma.cc/3Z9M-HNC2].

67. *See* McNeil, *supra* note 9.

68. *Id.*

69. *See* David Zipper, *How to Save America's Public Transit Systems from a Doom Spiral*, VOX (Mar. 27, 2023), https://www.vox.com/future-perfect/23653855/covid-transit-fares-buses-subways-crisis [https://perma.cc/TM4D-KFNR].

centers, and the vicious cycle continues.[70] This nightmare is compounded with an existing housing affordability crisis, as the United States is now facing a shortage of 7.3 million affordable rental homes.[71]

Although the U.S. housing shortage also impacts middle-class residents, it primarily harms low-income renters. As of early 2023, there were only 34 homes for every 100 extremely low-income U.S. renters.[72] This shortage has increased the number of cost-burdened households that are allocating significant proportions of their income to housing. In 2020, 46% of renters spent 30% or more of their income on housing, of that 46%, 23% of renters spent at least 50% of their income on rent.[73] Black, Latino, and Indigenous renters continued to be disproportionately impacted by the housing shortage.[74] Moreover, between 2017 and 2022, homelessness in America increased by 6%,[75] and in 2023 the number of chronically homeless individuals reached a record high of 127,768.[76]

Declining commercial tax revenues and reduced funding for public services in U.S. downtowns are likely to increase the financial burdens on low-wage residents already struggling to afford housing. Because local property taxes fund vital services like public transportation systems, public health departments, and public utilities, declining tax revenues could force many cities to charge more for such services or stop providing them altogether.[77]

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70. *See* McNeil, *supra* note 9 ("[T]he definition of the urban doom loop presumes that as more residents leave the city and less development occurs, the revenue stream—the property tax—diminishes, often rapidly. The doom is the loss of revenue, and the loop is the vicious cycle . . . [that] [n]ew residents—tax payers—resist moving to the city as governmental services are diminished—the public schools aren't sufficiently funded, public playgrounds and open space aren't maintained, and so on—and yet the very revenue needed to make the city attractive again is simply not available.").

71. Nat'l Low Inc. Hous. Coal., *supra* note 10; *see also* Mike Kingsella, Anjali Kolachalam, & Leah MacArthur, *Housing Underproduction in the US*, UP FOR GROWTH (2023), https://upforgrowth.org/apply-the-vision/2023-housing-underproduction/ [https://perma.cc/VS2R-XYWP] (providing an overview of housing underproduction in the United States).

72. Nat'l Low Inc. Hous. Coal, *supra* note 10.

73. Aquiles Suarez, *Federal Incentives Could Help Spur Property Conversions*, NAIOP (2023), https://www.naiop.org/research-and-publications/magazine/2023/Spring-2023/advocacy/federal-incentives-could-help-spur-property-conversions/ [https://perma.cc/8LK2-RY7R].

74. Nat'l Low Inc. Hous. Coal, *supra* note 10 (compared to the 6% of White, non-Hispanic households considered low-income, 19% of Black non-Latino households, 17% of American Indian or Alaska Native households, and 14% of Latino households are considered low-income).

75. National Alliance to End Homelessness, *State of Homelessness: 2023 Edition*, https://endhomelessness.org/homelessness-in-america/homelessness-statistics/state-of-homelessness/#homelessness-in-2022 [https://perma.cc/B83M-XMYY].

76. *Id.*

77. *See generally* Yunji Kim, *Limits of Property Taxes and Charges: City Revenue Structures After the Great Recession*, 55 URB. AFFS. REV. 185 (Jan. 2019).

C. *Potential Benefits of Office Conversions*

In light of America's housing crisis and drastic increases in office vacancies, Office Conversion projects have emerged as one avenue to aid struggling downtown centers. Converting empty office spaces to affordable housing units could help mitigate the array of problems plaguing many U.S. cities while contributing social, economic, and environmental benefits. Understanding the variety of potential positive outcomes is an essential component of crafting holistic and effective conversion policies.[78]

1. Economic and Social Benefits

Office Conversions can provide significant economic and social benefits by diversifying land uses in downtowns and increasing affordable housing options. Many of the benefits of Office Conversions are similar to those typically associated with mixed-use urban development because Office Conversions add multifamily housing to high-density downtowns. Mixed-use developments integrate some combination of retail, office, hotel, recreation, and residential space in one geographic area.[79] Mixed-use urban developments also tend to include pedestrian-friendly infrastructure, "live-work-play" opportunities, and mixed apartment types.[80] Proponents of this type of land use emphasize that these developments can promote a sense of community through increased proximity to amenities and can promote residents' mental and physical health.[81]

Full realization of mixed-use planning requires the addition of sufficient multifamily housing units, including affordable housing options, to draw residents to the variety of land uses. As a result, many mixed-use developments have constructed new housing in ways that have often contributed to gentrification and ultimately made housing in the neighborhood less affordable.[82] By contrast, Office Conversions reuse existing commercial infrastructure to add affordable housing options in ways that can contribute to the ideals of mixed-use planning while

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78. *See* Hadden Loh et al., *supra* note 8 ("[O]ffice-to-residential conversions are a potential remedy in some circumstances . . . [but] public interest in conversion and the potential beneficiaries must be clearly defined in order to justify any public financial support.").

79. *See* Bálint Zoltán TÓTH, *Mixed-Used Developments in Phoenix and Tempe, Arizona: Sustainability Concerns and Current Trends*, 65(2) FOLIA GEOGRAPHICA 53, 55 (2023).

80. *See id.*

81. *See* Todd Litman, *Selling Smart Growth: Communicating the Direct Benefits of More Accessible, Multi-Modal Locations to Households, Businesses and Governments*, VICTORIA TRANSP. POL'Y INST. (Aug. 23, 2023), https://www.vtpi.org/ssg.pdf [https://perma.cc/L8YF-3T4W].

82. *See generally* Markus Moos, Tara Vinadrai, Nick Revington & Michael Seasons, *Planning for Mixed Use: Affordable for Whom?*, 84 J. AM. PLAN. ASS'N 7 (2018).

curbing the impacts of gentrification and economic inequality.[83] In particular, including affordable housing options can make downtown residences more accessible to essential workers and low-wage service workers and can reduce their daily commute times.

By adding affordable housing to urban cores, Office Conversions can also help advance racial justice goals. Black and Hispanic people are overrepresented among low- and moderate-income households.[84] Expanding affordable housing options in affluent downtown neighborhoods can help to counteract past policies that have consolidated wealth and poverty and have restricted access to better schools, health care, and economic opportunities.[85] By making downtowns more affordable and racially inclusive, Office Conversions can help to address the impacts of historically exclusionary zoning policies.

2. Environmental Benefits

Converting downtown office buildings to multi-family housing units can deliver valuable environmental benefits for cities as well. Higher-density residential development reduces suburban sprawl and leaves more natural lands undisturbed. Where development does occur, multi-family buildings can consolidate utility services, creating more energy and water efficient housing options through shared heating and cooling systems and shared infrastructure. Multi-family developments can also improve water quality by generating less stormwater runoff per house.[86] Additionally, high-density residential areas near downtowns can encourage workers to use public transportation for commuting, ultimately reducing automobile use and carbon emissions.

By supplanting new-build housing, Office Conversions can also mitigate some of the environmental harms associated with new construction. As of 2021, the U.S. real estate sector accounted for 30.3%

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83. *See, e.g.*, Lance Freeman, *The Promises and Perils of Racial Equity Planning*, 29(2) ECON. POL'Y REV. 75, 77 (2023) (detailing a 2021 mixed-use redevelopment plan in Brooklyn's Gowanus neighborhood that is advancing racial equity in segregated and gentrifying neighborhoods).

84. *See* Nat'l Low Inc. Hous. Coal, *supra* note 10.

85. *See* Myron Orfield et al., *High Costs and Segregation in Subsidized Housing Policy*, 25 HOUSING POL'Y DEBATE 574, 575 (2015) (Concentrating subsidized housing in poor and segregated neighborhoods "increases the concentration of poverty . . . in [a] region's most racially diverse neighborhoods, and in the attendance areas of predominantly nonwhite schools. In the long run, this hurts the regional economy and exacerbates the racial gaps in income, employment, and student performance . . . .").

86. *See* EPA, *Protecting Water Resources with Higher-Density Development*, https://www.epa.gov/smartgrowth/protecting-water-resources-higher-density-development [https://perma.cc/J6DE-Z9FV].

of all U.S. greenhouse gas emissions.[87] Each year, the new home construction contributes roughly fifty million tons of embodied carbon emissions in the United States[88] and generates around 600 million tons of construction and demolition debris.[89] Forgoing demolition and recycling existing construction stock through Office Conversions can thus do much to help the country meet its emissions targets.[90] By reusing existing building structures, Office Conversions can potentially produce 50% to 75% less carbon emissions than new construction.[91] And Office Conversions contribute significantly less overall lifecycle greenhouse gas emissions than those attributed to office-to-housing demolition-construction projects.[92]

D. *Primary Barriers to Office Conversions*

Although the benefits of conversions are easy to recognize, they face a variety of practical, regulatory, and financial barriers that can make them less attractive to many developers. Recognizing the types of obstacles potential Office Conversion developers may face is essential for crafting policies tailored to effectively promote these projects.

1. Practical Barriers

One challenge to Office Conversions is that the layouts and vacancy status of many office buildings make them relatively ill-suited for conversion projects. For instance, many office buildings with high vacancy rates still have tenants or subtenants whose lease terms will not expire for years, occupying some of the building's space, and ejecting those tenants can be difficult and expensive.[93]

Even when buildings are vacant and unleased, their quality or physical features may present significant challenges for Office Conversion

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87. Arpit Gupta, Candy Martinez & Stijn Van Nieuwerburgh, *Converting Brown Offices to Green Apartments*, NAT'L BUREAU OF ECON. RSCH. (2023), https://www.nber.org/system/files/working_papers/w31530/w31530.pdf [https://perma.cc/Q6WM-YKJ5].

88. Chris Magwood, Tracy Huynh & Victor Olgyay, *The Hidden Climate Impact of Residential Construction*, RMI (2023), https://rmi.org/insight/hidden-climate-impact-of-residential-construction/ [https://perma.cc/3UHR-AYTM].

89. U.S. ENV'T PROT. AGENCY, ADVANCING SUSTAINABLE MATERIALS MANAGEMENT: 2018 FACT SHEET (2020), https://www.epa.gov/sites/default/files/2021-01/documents/2018_ff_fact_sheet_dec_2020_fnl_508.pdf [https://perma.cc/3A4T-DCKJ].

90. *See id.* at 4; *see also* Gorey, *supra* note 51.

91. Magwood, Huynh & Olgyay, *supra* note 88, at 3.

92. *See* D. Stiernon, A. Bolke, A. Stephan, M. Bos & G. Marino, *Office to Housing Conversion: Estimating Life Cycle Environmental and Financial Performance*, 2600 J. PHYSICS: CONF. SERIES 1, 4 (2023) (finding the lifecycle greenhouse gas emissions impact in an Office Conversion project was 60% less impactful than an office demolition-construction scenario).

93. *See Ken McElroy Real Estate Strategies*, *Shadow Vacancy: Hidden Crisis Coming for Office Buildings*, at 05:01 (Nov. 1, 2023) (downloaded using Apple Podcasts).

projects. As of 2023, the office buildings with the highest vacancy rates were older Class B and C buildings.[94] Many of these older buildings have structural attributes that make conversions to residential use relatively difficult. For example, Office Conversions often require internal partition walls to form separate residential units, and adding these walls can decrease access to natural light. Developers may thus have to add a lightwell in the center of the building or find other unique ways to increase natural light in each unit. Old plumbing, electrical, and HVAC systems may also require major modifications to ensure each residential unit has working bathrooms, kitchens, and airflow. Older buildings tend to also be more likely to have asbestos and may require costly mitigation measures. In light of these practical barriers, the most suitable buildings for Office Conversions tend to have been built before 1990 and have narrow floor plates of around 15,000 square feet. Based on these factors, experts estimate that just one in three office buildings have physical features that make them well-suited to be converted to multi-family housing.[95]

2. Regulatory Barriers

Even when a developer finds an unleased vacant office building with physical features that make it suitable for an Office Conversion, local zoning restrictions can obstruct such a project.[96] Single-use zoning restrictions applicable in much of the United States can greatly impede mixed-use, multi-family development.[97] Attempts to secure a change in zoning classification can be an expensive and time-consuming process, and the delays and risks associated with that process are surely unappealing to many developers.[98] And even where no zoning barriers exist, restrictive covenants may pose similar challenges and require

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94. *See Grappling with Office's Future*, J.P. MORGAN (July 11, 2023), https://www.jpmorgan.com/insights/real-estate/real-estate-banking/the-future-of-office-buildings-and-commercial-workspaces [https://perma.cc/C8ME-B7MX].

95. Richard Lawson, *One in Three Office Buildings in Major North American Cities Could Be Ripe for Multifamily Conversion*, COSTAR (May 9, 2023), https://www.costar.com/article/1653762589/one-in-three-office-buildings-in-major-north-american-cities-could-be-ripe-for-multifamily-conversion# [https://perma.cc/CYP7-Y6X3].

96. *See* Emily Badger, *American Cities Have a Conversion Problem, and It's Not Just Offices*, N.Y. TIMES (July 1, 2023), https://www.nytimes.com/2023/07/01/upshot/american-cities-office-conversion.html [https://perma.cc/7FVM-3BF9] (discussing the fact that while New York's zoning code was only 14 pages long in 1916, today the code is nearly 3,500 pages).

97. *See* Badger & Bui, *supra* note 45.

98. *See* Lindsey Postula & Maria Fuentes, *Challenges Abound When Transforming Office to Residential*, DEV. MAG. (2022), https://www.naiop.org/research-and-publications/magazine/2022/winter-2022/development-ownership/challenges-abound-when-transforming-office-to-residential/#:~:text=The%20legal%20hurdles%2C%20financing%20and,frustrate%20a%20planned%20conversion%20project [https://perma.cc/8NNB-VFX7].

negotiations with third parties who may not be supportive of a developer's Office Conversion proposal.[99]

Building codes and federal housing laws can further complicate proposed Office Conversion projects. Many city codes impose light and ventilation requirements for residential buildings that may be difficult to satisfy when the original template is a commercial office building.[100] Office Conversion projects must also comply with federal laws such as the Americans with Disabilities Act, which can add significant additional expenses to any major conversion project.

3. Cost Barriers

The most significant barrier to Office Conversions is the often high monetary cost of completing them. Whereas a typical residential development costs roughly $350 per square foot, a conversion project can cost a developer between $100 and $500 per square foot depending on the building class and renovation needs.[101] Particularly when a building's conversion costs are on the higher end of that range, developers may rightfully doubt whether the finished building would generate sufficient revenue per square foot to justify the project. Securing financing for an Office Conversion can even be extra difficult and expensive because of the unique nature of these projects. The unpredictability of Office Conversion expenses and difficulties persuading lenders to finance such an unusual type of development are often insurmountable despite a project's potential public benefits.

E. *Office Conversion Policymaking and Calls for Improvement*

Given the potential benefits of Office Conversions, there is growing support for policy reforms that could better support and promote these projects. A 2023 U.S. Chamber of Commerce survey found that 50% of real estate experts believed that existing regulations constrained efforts to

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99. *See id.*

100. *See* John Egnatios-Beene, Leslie Byrd, Ross Moskowitz & Raymond Pomeroy, *Legal Considerations, Challenges of Office Conversions to Solve NY's Housing Shortage*, N.Y. L.J. (June 19, 2023), https://www.bloomberglaw.com/document/X8C9S044000000?jcsearch=glm45fdejme#jcite [https://perma.cc/C4PW-DXXT].

101. CBRE, *The Rise and Fall of Office to Multifamily Conversions: A Real Estate Investigation* (Mar. 14, 2023), https://www.cbre.com/insights/viewpoints/the-rise-and-fall-of-office-to-multifamily-conversions-a-real-estate-investigation [https://perma.cc/G3F7-3XFB]; *see also* Miles Haladay, *How to Justify an Additional $25 per sq ft for Office Conversions*, NAIOP.ORG (Apr. 10, 2023), https://blog.naiop.org/2023/04/how-to-justify-an-additional-25-per-sq-ft-for-office-conversions/ [https://perma.cc/KHA2-U4BW] (estimating Office Conversions can be up to 30% cheaper than new buildings but still may not yield justifiable revenues).

transition office space into residential units.[102] Approximately 46% of respondents indicated that zoning and permitting requirements were impacting their ability to convert, with 23% citing zoning and permitting as the most crucial factor.[103] The National Association of Home Builders (NAHB) also recently called upon Congress to enact federal tax incentives to encourage repurposed real estate and to allow for the stacking of such incentives with other tax credits.[104] In fact, a band of real estate trade groups lobbied in 2023 for a 20% tax credit for property conversions with bonus credit for properties in low-income areas.[105]

City, state, and federal policymakers have similarly demonstrated interest in expanding Office Conversion policies. At the local level, many mayors have expressed support for Office Conversions and an interest in loosening regulatory rules and providing tax abatements for them.[106] In New York City, Mayor Eric Adams established a task force to study possible zoning and tax abatements.[107] Denver city officials even created an in-house coordinator position focused on streamlining Office Conversion proposals.[108]

Some state governments have begun encouraging Office Conversions by allocating federal block grants to project developers,[109] providing state tax credits to help offset developer costs, and offering interest-free state loans.[110] At the federal level, the United States Department of Housing and Urban Development (HUD) opened an inquiry in 2023 and

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102. Thaddeus Swanek, *The Future of Office Space May Be Tied Up in Red Tape*, U.S. CHAMBER OF COM. (June 22, 2023), https://www.uschamber.com/economy/regulatory-gridlock-prevents-office-to-residential-infrastructure-development [https://perma.cc/XQ3T-K4T5].

103. *Id.*

104. *Tax Incentives to Convert Commercial Real Estate to Residential Use*, NAT'L ASS'N OF HOME BUILDERS (June 10, 2023), https://www.nahb.org/advocacy/nahb-policies/tax/tax-incentives-to-convert-commercial-real-estate [https://perma.cc/DUB8-5MBV].

105. *See* Evan Liddiard, *Adaptive Reuse of Underutilized Commercial Buildings Needs a Federal Tax Incentive*, RISMEDIA (July 24, 2023), https://www.rismedia.com/2023/07/24/adaptive-reuse-underutilized-commercial-buildings-needs-federal-tax-incentive/ [https://perma.cc/7QQ2-YQQN].

106. *See* Carlos Waters, *East Coast Mayors Call for More Office-to-Apartment Conversions*, CNBC.COM (July 15, 2023), https://www.cnbc.com/2023/07/15/east-coast-mayors-call-for-more-office-to-apartment-conversions.html [https://perma.cc/7JUT-DZ6U].

107. *See* Suarez, *supra* note 73.

108. *See* Gorey, *supra* note 51.

109. *See, e.g.*, *Home Investment Partnerships Program*, U.S. DEP'T. OF HOUS. AND URB. DEV., https://www.hud.gov/program_offices/comm_planning/home [https://perma.cc/86EF-LC3E] (last modified Aug. 21, 2024).

110. *See* Alicia Clark et al., *Government Programs Incentivize Office Property Conversions*, BALLARD SPAHR (May 17, 2023), https://www.ballardspahr.com/insights/alerts-and-articles/2023/05/government-programs-incentivize-office-property-conversions [https://perma.cc/KX3H-3Z2P].

announced funding to support research on Office Conversions.[111] The Biden Administration also launched a new Office Conversion initiative that provides funding opportunities for developers and municipalities through HUD PRO Housing, the Inflation Reduction Act, and the Bipartisan Infrastructure Law.[112] The General Services Administration is taking substantial steps to help address the challenges of Office Conversions with developers and municipalities.[113] The U.S. Chamber of Commerce has even joined with the real estate industry in urging Congress to modernize the nation's outdated permitting process.[114] In spite of all of these recent efforts, the pace of Office Conversion activity in the United States remains painfully slow.

II. OVERCOMING OBSTACLES TO OFFICE CONVERSIONS THROUGH A LENS OF EXTERNALITY PRODUCTION

Fortunately, well-tailored policy reforms can accelerate Office Conversion activity in the United States. To be effective, such reforms must confront the various obstacles, regulatory and otherwise, that presently discourage Office Conversions and enhance the profitability of these projects for developers. This Part applies familiar academic frameworks and concepts to analyze the country's current Office Conversion-related policy structures and to identify promising means of strengthening them.

One way of explaining the slow pace of Office Conversions in the United States is to highlight the positive externality problem associated with these projects. Positive externalities occur when an actor is unable to enjoy all the benefits of a particular activity and thus opts to under-engage in it.[115] Office Conversions are subject to positive externality problems because they generate a myriad of economic, social, and environmental benefits, and many of those benefits accrue to parties other than the project developer.[116] Policies that enable developers to internalize more of the broader societal benefits of Office Conversions can do much to drive more optimal levels of Office Conversion activity.[117]

111. *See* The White House, *Biden-Harris Administration Announces Actions to Lower Housing Costs and Boost Supply*, WHITEHOUSE.GOV (July 27, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/07/27/biden-harris-administration-announces-actions-to-lower-housing-costs-and-boost-supply/ [https://perma.cc/K7FC-7A9H].

112. *Id.*

113. *See Home Investment Partnerships Program*, *supra* note 109.

114. Swanek, *supra* note 102.

115. *See* Gideon Parchomovsky & Peter Siegelman, *Cities, Property, and Positive Externalities*, 54 WM. & MARY L. REV. 211, 220 (2012).

116. *See supra* text accompanying notes 79–92.

117. *See* Parchomovsky & Siegelman, *supra* note 115, at 218.

As the British economist Arthur Pigou famously suggested, the most straightforward means of mitigating a positive externality problem is often to subsidize the affected activity.[118] Ariel Porat similarly advocated for a greater policy focus on addressing positive externality problems through subsidies and other positive incentives to promote more optimal levels of the affected activity.[119] Subsidies and related incentives tend to be relatively well-suited for addressing positive externalities, although they can be expensive.[120] Still, together with zoning and tax policy, grants and other subsidies can do much to revitalize city centers and indirectly discourage urban sprawl.[121]

Office Conversions provide substantial benefits because they are more sustainable than new builds and can create affordable housing, revitalize communities, and mitigate the country's office vacancy challenges. However, most of those types of benefits do not directly accrue to for-profit Office Conversion developers.[122] Accordingly, most developers will opt to avoid the additional regulatory uncertainty and challenges associated with Office Conversions in favor of new development projects, causing underinvestment in Office Conversions.[123] Addressing both the additional regulatory obstacles associated with Office Conversions and the inadequate incentive structures surrounding these projects is key to promoting more optimal private investment in these projects.

III. REDUCING THE REGULATORY BARRIERS TO OFFICE CONVERSIONS

One key strategy for driving more optimal levels of Office Conversion activity in the United States is to reform land use laws to be more accommodating of these unique projects.[124] Because Office Conversions have historically been uncommon, government officials understandably did not anticipate these projects when drafting land use laws, and

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118. *See id.* at 221.

119. *See id.* at 231.

120. *See* Brian Galle, *Carrots, Sticks, and Salience*, 67 TAX L. REV. 53, 60 (2013).

121. *See* Parchomovsky & Siegelman, *supra* note 115, at 260.

122. *See* Megan J. Ballard, *Profiting from Poverty: The Competition between For-Profit and Nonprofit Developers for Low-Income Housing Tax Credits*, 55 HASTINGS L.J. 211, 212 (2003).

123. *See* Parchomovsky & Siegelman, *supra* note 115, at 231 (describing Ariel Porat's theory that unsupported positive externalities are underproduced).

124. The degree of state or local involvement in land use reforms depends somewhat on whether a given state applies Dillon's Rule or Home Rule to govern the sharing of land use authority between state and municipal governments. *See The Role of States in Shaping Local Housing Strategies*, LOC. HOUS. SOLS., https://localhousingsolutions.org/plan/the-role-of-states-in-shaping-local-housing-strategies/ [https://perma.cc/LCW9-CLR5]. States that follow Dillon's Rule only allow municipalities to exercise powers granted explicitly by the state, while the Home Rule states allow municipalities to exercise powers that are not restricted explicitly by the state. *See id.*

therefore reforms are needed to better govern them. Among other things, targeted zoning ordinance amendments that provide various exceptions for Office Conversions or that authorize the creation of special zoning districts with separate rules to govern Office Conversions could help to address most of the zoning barriers preventing conversion activity. Government support for the crafting and promulgation of model ordinance provisions for these purposes could significantly aid municipalities in adopting them. Such efforts to minimize zoning barriers are an essential way to reduce the risks and costs involved in developing Office Conversions.

A. *Relaxing Zoning Laws to Accommodate Office Conversions*

Although Office Conversions are not contemplated under most existing zoning laws, it may often be possible for local officials to accommodate these projects through relatively minor zoning ordinance amendments. Zoning reform is an obvious strategy for localities seeking to welcome and encourage Office Conversions after decades of zoning policies that largely precluded them. Indeed, there are growing calls for zoning reforms as a means of helping municipalities address affordable housing shortages, racial inequities, climate change, and other emerging challenges.[125] Advocates of zoning reforms for Office Conversions argue that reforms are likely to be most successful when they reduce limitations and requirements on development.[126] Zoning reforms that embrace exemptions and relaxation of unnecessary standards may be the most straightforward means of enabling more Office Conversions.[127]

Conversion inspired zoning reform has rapidly gained popularity in recent years, with nine states introducing legislation related to conversion zoning changes in 2023.[128] Some cities have already begun relaxing various zoning restrictions and creating new zoning exceptions in efforts to promote Office Conversions and ease the affordable housing crisis. For example, New York City has relaxed certain land use regulations as part

125. *See* Patrick Sisson, *What Is Zoning Reform and Why Do We Need It?*, AM. PLAN. ASS'N (Jan. 18, 2023), https://www.planning.org/planning/2023/winter/what-is-zoning-reform-and-why-do-we-need-it/ [https://perma.cc/9D4Q-Z2VR].

126. *See* Vanessa B. Calder, *Commercial-to-Residential Zoning Reform Gains Steam*, CATO INST. (Nov. 10, 2023), https://www.cato.org/blog/commercial-residential-zoning-reforms-gain-steam-2023 [https://perma.cc/RD35-HNPV].

127. In nations experiencing similar circumstances as the United States, exemptions from change-of-use permitting and other zoning regulations are a popular non-financial component of conversion incentive programs. *See* Gorey, *supra* note 51 (describing the Calgary downtown conversion incentive program).

128. *See* Calder, *supra* note 126.

of a broader scheme to incentivize Office Conversions.[129] Meanwhile, Los Angeles adopted an Adaptive Reuse Ordinance that allows conversion of older buildings without having to satisfy certain requirements such as the addition of additional parking.[130] This ordinance has already been credited with supporting the conversion of 12,000 housing units in that city.[131] Helping other cities to replicate or expand upon these early examples of Office Conversion-related zoning reforms could do much to break down existing zoning barriers to these projects.

B. *Forming Special Zoning Districts to Support Office Conversions*

Another potential means of supporting greater Office Conversion activity within a city's downtown core is through the formation of a special zoning district tailored to that purpose. Special zoning districts allow local governments to adjust their zoning policies to specific uses within delineated territories.[132] While standard zoning laws can create undue challenges for certain types of development, special zoning districts can enable municipalities to impose an alternative set of zoning restrictions to support that type of development in targeted geographic areas.[133] In particular, overlay zones are often used to promote mixed-use and affordable housing initiatives and could be useful in supporting Office Conversions.[134] Overlay zones allow regulations to be tailored towards a particular initiative within the district.[135] Incentive zoning is another potentially effective tool for supporting Office Conversion activity because it makes special tax abatement or other incentives available for certain types of development within prescribed geographic areas.[136]

To date, the most successful local Office Conversion policies have utilized special zoning districts to allow Office Conversions to simultaneously bypass regulatory hurdles and receive subsidies. Most notably, the Special Lower Manhattan District in New York and the La Salle Reimagined Initiative in Chicago are both using flexible zoning

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129. *See* Anna Rahmanan, *Behind Mayor Eric Adams' Decision to Turn Empty NYC Offices Into New Apartments*, TIMEOUT (Jan. 10, 2023), https://www.timeout.com/newyork/news/behind-mayor-eric-adams-decision-to-turn-empty-nyc-offices-into-new-apartments-011023 [https://perma.cc/4TH6-REBC] (describing results of a report that suggests zoning reform as a solution to the housing and office vacancy crisis).

130. *See* Calder, *supra* note 126.

131. *See id.*

132. *See* RESTATEMENT (FOURTH) OF PROP. § 34.5 (AM. L. INST., September 2017 Draft).

133. *See id.*

134. *See* Dorothy Ariail, *Property Topics and Concepts: Flexible Zoning Techniques*, AM. PLAN. ASS'N (2008), https://www.planning.org/divisions/planningandlaw/propertytopics.htm [https://perma.cc/Z9PU-JW6Z].

135. *See id.*

136. *See id.*

techniques to promote Office Conversions.[137] Both approaches are the result of significant city planning and the coordination of relaxed regulations, financial incentives, and adjacent policy schemes such as historic preservation laws.[138] Policies that utilize special zoning districts go further than authorizing individualized exceptions to existing zoning restrictions and better support the joint use of other government tools, including tax policy and subsidy programs, to promote Office Conversions within specific neighborhoods.

C. *Funding Model Ordinance Drafting for Office Conversion-Oriented Zoning Reforms*

Creating model ordinance provisions could be a valuable means of aiding cities interested in better supporting Office Conversion activity within their jurisdictions. Designing and drafting new land use ordinances can be costly and administratively difficult. Although the zoning ordinance amendment process is relatively straightforward under zoning laws based on the widely-used Standard State Zoning Enabling Act, processing zoning law amendments has proven to be an arduous undertaking in many cities.[139] Model ordinances can partially mitigate these challenges by sparing resource-constrained municipalities from having to invest time and funds to craft novel ordinance provisions from scratch.[140] Model ordinances can be adopted without change or used as a useful starting template for drafting locally-tailored land use laws.[141]

Policy makers have used model ordinances in a variety of instances in which ill-fitting existing land use laws were obstructing desired outcomes. For instance, model ordinances have assisted with the local regulation of backyard chickens in urban areas,[142] zoning matters related

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137. *See* NYC Zoning Resolution Article IX, Chapter 1, 91–100; *see also Invitation for Proposals, Chicago Department of Planning and Development & Chicago Department of Housing, LaSalle Street Reimagined @ The Intersection of History, Innovation, and Equity, 22–27*, CHICAGO.GOV (Sept. 26, 2022), https://www.chicago.gov/content/dam/city/depts/dcd/rfps/LaSalle_Street_IFP.pdf [https://perma.cc/NV62-XCJB].

138. *See* NYC Zoning Resolution Article IX, *supra* note 137.

139. *See Amending the Zoning Ordinance*, AM. PLAN. ASS'N (Oct. 1958), https://www.planning.org/pas/reports/report115.htm [https://perma.cc/BV2B-VJ9C].

140. *See Model Municipal Ordinances*, SABIN CTR. FOR CLIMATE CHANGE L., https://climate.law.columbia.edu/content/model-municipal-ordinances#:~:text=The%20model%20ordinance%20regulates%20new,a%20specific%20green%20building%20standard [https://perma.cc/EF6P-A47Y].

141. *See, e.g.*, Jaime Bouvier, *Illegal Fowl: A Survey of Municipal Laws Relating to Backyard Poultry and a Model Ordinance for Regulating City Chickens*, 42 ENV'T L. REP. 10888, 10920 (2012).

142. *See id.*

to wind energy development,[143] and various affordable housing policy objectives.[144]

Model ordinances tend to be drafted by research groups that specialize in the relevant policy area or by superior governments. For example, the Sabin Center for Climate Change Law at Columbia Law School has drafted model ordinances to help localities support renewable energy development and green building.[145] A county in New York created a model ordinance for municipalities within the county to promote fair and affordable housing in building codes and land use laws.[146] The U.S. Department of Energy has even prepared model ordinances to help communities better protect critical habitat areas in certain types of energy development.[147]

Because model ordinances are generally not marketable to others for compensation and thus have minimal commercial value, their creation often requires some type of government support. Model ordinances are public goods—goods that are nonrival in consumption such that one city's use of them generally does not preclude or adversely impact any other city's use of them.[148] Basic microeconomic theory teaches that public goods tend to be underproduced absent government intervention because others are able to free-ride and use such goods without cost once another actor creates them.[149] Government-funded grants can help to mitigate these challenges by compensating an entity that invests time and resources to generate a useful new model ordinance. The federal government is already using grants through HUD's Pathways to Removing Obstacles to Housing program to help promote Office Conversions by funding research for a guide on the economic viability of these projects.[150] The Economic Development Administration is also administering a grant program aimed at supporting efficient land use and density between commercial and residential areas, and Office Conversion-related policy-design research may fit within that

143. *See* James McElfish & Sara Gersen, *Local Standards for Wind Power Siting: A Look at Model Ordinances*, 41 ENV'T L. REP. ELR NEWS & ANALYSIS 10825, 10828 (Sept. 2011).

144. *See, e.g.*, *Model Ordinance Provisions*, WESTCHESTER COUNTY, https://homes.westchestergov.com/resources/affordable-housing-ordinances/model-ordinance [https://perma.cc/HY79-6XNC].

145. *See Model Municipal Ordinances*, *supra* note 140.

146. *See Model Ordinance Provisions*, *supra* note 144 .

147. *See* Alison Moss & Beverlee Silva, *Regulation of the Wetlands in Western Washington Under the Growth Management Act*, 16 SEATTLE U. L. REV. 1059, 1062 (1993).

148. *See* Ned Snow, *Moral Bars to Intellectual Property: Theory & Apologetics*, 28 UCLA ENT. L. REV. 75, 80 (2021) (discussing intellectual creations as a public good).

149. *See id.*

150. *See Biden-Harris Administration Announces Actions to Lower Housing Costs and Boost Supply*, *supra* note 111.

program.[151] However, more direct and targeted federal grant support could accelerate efforts to create Office Conversion-focused model ordinances.

IV. Supplementing Office Conversion Financing

Even if zoning reforms were to make Office Conversion projects more feasible under local zoning laws, many developers would likely still avoid these projects because of persistent externality problems that make them less profitable than alternative development projects. Absent government-instituted incentives to do otherwise, developers who do pursue Office Conversions are also more likely to use them to add high-cost luxury residential units to downtown cores than to add affordable housing. Although a few existing government programs help developers internalize some of the broader social benefits of Office Conversions, those programs are presently insufficient to drive significant levels of Office Conversion activity in the United States. Reforms that provide additional subsidies for Office Conversions could help to better address this lingering cost barrier to Office Conversion projects.

A. *Using Government Subsidies and Supports to Overcome Financial Barriers*

Governments have long sought to use various subsidies to address positive externality problems despite often drawing undeserved criticism for that approach.[152] Ronald Coase famously argued for "careful consideration of all of the benefits and costs of the available policy options" in the course of policymaking.[153] In the context of positive externalities, this requires efforts to calibrate subsidies to accurately reflect the broad societal benefits of the targeted activity.[154] To the extent that Office Conversions generate public benefits such as environmental conservation, economic growth, and more affordable housing, compensating developers for those benefits can help drive more optimal levels of Office Conversion development.

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151. *See id.*

152. *See, e.g.*, Martin Austermuhle, *Bowser Offers Bigger Tax Breaks For Office-To-Housing Conversions in Downtown, But Critics Question Value*, DCIST (Apr. 5, 2023, 10:42 AM), https://dcist.com/story/23/04/05/dc-bowser-budget-downtown-tax-breaks [https://perma.cc/Q76M-JU2T].

153. Steven G. Medema, *Through a Glass Darkly or Just Wearing Dark Glasses? Posin, Coase, and the Coase Theorem*, 62 TENN. L. REV. 1041, 1056 (1994).

154. Even 'successful' programs like the Lower Manhattan Conversion Program have to be cost justified because these programs can be incredibly expensive. *See* SEAN CAMPION, CITIZENS BUDGET COMM'N, THE POTENTIAL FOR OFFICE-TO-RESIDENTIAL CONVERSIONS 11 (2022) (discussing the $1.7 billion 2023 tax expenditure of the program and officials' statements about cost efficiency).

Expanded government financial support for Office Conversions can take a variety of forms, from loan guarantee programs to block grants to property tax abatements or income tax credits. All such programs help developers to internalize more of the public benefits of Office Conversions and thereby promote greater private investment in Office Conversion activity. Simplifying and consolidating the processes for developers to apply and qualify for such government support could further increase the positive impact of such programs.

B. *Government Subsidies and Supports Available for Office Conversions*

As highlighted above, financial assistance and incentive programs are increasingly available to support Office Conversions.[155] As federal efforts to support Office Conversions multiply, existing opportunities from various agencies and departments have been linked to their potential Office Conversion uses.[156] A handful of state and local governments across the country are also introducing tax abatement programs, grant programs, loan guarantees, and tax credit programs to encourage Office Conversions.[157] For example, New York City has a property tax abatement program and additional tax incentives to supplement special zoning districts, Chicago sponsors tax-increment financing, Washington D.C. has introduced property tax abatements, California has allocated funds to use in a two-year incentivization program, Wisconsin offers interest-free loans, and Missouri uses the existing historic tax credit to incentivize conversions.[158]

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155. *See infra* Section I.E; *see also* The White House, *Commercial to Residential Conversions: A Guidebook to Available Federal Resources* Version 1, at 9 (Oct. 2023), https://www.whitehouse.gov/wp-content/uploads/2023/10/Commercial-to-Residential-Conversions-Guidebook.pdf [https://perma.cc/G9QM-AN6M] (providing information about over 20 federal agencies that can be used to support conversions).

156. *See, e.g.*, Keith Phillis & Michael Raposa, *Converting Office Space to Housing? There Are Incentives for That*, JDSUPRA (Dec. 20, 2023) at 1–2, https://www.jdsupra.com/legalnews/converting-office-space-to-housing-6441464/#_ftn4 [https://perma.cc/R258-G3GU] (describing the Department of Transportation's Railroad Rehabilitation & Improvement Financing and the Transportation Infrastructure Finance and Innovation Act programs as well as the Community Block Development Grant program).

157. Some relevant programs incorporate these incentives with zoning reform initiatives, like the 1994 Lower Manhattan Revitalization Plan, which utilized tax incentives, zoning reform, and relaxed regulations to incentivize Office Conversions and revitalize the area. Even as programs phase out, the structure and initiatives continue, with Manhattan seeing the Commercial Revitalization Program continuing energy, property, and commercial tax breaks to those leasing in lower Manhattan in 2023. *See* CAMPION, *supra* note 154, at 9.

158. *See* Lew Sichelman, *Getting Congress to Back Office Conversions*, MULTI-HOUSING NEWS (Aug. 23, 2023) at 2, https://www.multihousingnews.com/getting-congress-to-back-office-conversions/ [https://perma.cc/9ZN8-YS77].

Of the various programs that governments use to incentivize developers, loan guarantees are particularly well suited to assuage the financial barriers to Office Conversions. Existing federal programs such as HUD's Section 108 Loan Guarantee Program are easily applied to Office Conversion projects.[159] However, some loan guarantee programs require that developers apply for and fail to secure private financing before applying for loan guarantees.[160] More direct loan guarantee programs could reduce lenders' risks in financing Office Conversions, thereby making financing for these projects more accessible and less expensive.

Because property tax abatements reduce a major periodic cost of property ownership during and after conversion they can also help to encourage more Office Conversion activity. Some of the fastest growing cities are utilizing property tax abatements to encourage affordable housing, allowing developers to avoid paying property taxes in part or in full for five to fifteen years.[161] The most elaborate such programs orient property tax abatements towards specific initiatives, with many currently incentivizing affordable housing.[162] Some have suggested that property tax abatements are the best means to incentivize meritorious land uses because they end up generating net financial benefits for municipalities in the long run, unlike other programs that trade risk or monetary loss for public benefits.[163] The tax abatement programs in Philadelphia, Kansas City, and Dallas have been particularly successful in facilitating Office Conversions, furnishing excellent examples for other municipalities to consider.[164]

Federal tax credits could also promote more Office Conversions by enabling developers to internalize more of the broader public benefits of these projects. Various agencies administer federal tax credit programs, such as the Department of Energy's efficiency initiatives.[165] Although

159. *See Office to Residential Conversions*, EVIDENCE MATTERS: HUD.GOV (Fall 2023), https://www.huduser.gov/portal/periodicals/em/fall-23/highlight1.html [https://perma.cc/UTT8-R3XD].

160. See 4C Real Estate Financing § 4.08 (2024).42 U.S.C. § 5308 (2024).

161. *See* Robbie Sequeira, *Desperate for Affordable Housing, Some Cities Sweeten Tax Breaks for Developers*, STATELINE (Feb. 6, 2024), https://stateline.org/2024/02/06/desperate-for-affordable-housing-some-cities-sweeten-tax-breaks-for-developers/ [https://perma.cc/G6FY-KY CK].

162. *See, e.g.*, Thomas D. Bridenbaugh & Fabian D. Walters Jr., *District of Columbia Lays Groundwork for Office to Residential Building Conversions Through Tax Abatement Program*, PARKERPOE (Feb. 22, 2024), https://www.parkerpoe.com/news/2024/02/district-of-columbia-lays-groundwork-for-office-to [https://perma.cc/YUK9-LKX5].

163. *See Office to Residential Conversions*, *supra* note 159.

164. *See id.*

165. *See* Kristin Niver et al., *'Supercharging' Office to Housing Conversions: New Federal Resources Available to Speed Conversion of Downtown Buildings*, THOMPSON COBURN LLP

few such credits may currently apply to Office Conversions, if Congress were to authorize a new tax credit program specifically aimed at promoting Office Conversions, such a program could substantially drive increased private investment in these projects.

Some cities and state governments also offer special tax credits of various kinds that might apply to some aspects of Office Conversions, but more such support at these government levels could greatly accelerate Office Conversion activity as well. Chicago's aggressive high-vacancy initiative, which provides tax credits to developers who repurpose high-vacancy buildings in downtown Chicago, exemplifies the potential for this type of local tax credit program.[166] The types of local tax credit programs that could best address the positive externality problems that otherwise hinder Office Conversion activity are those that would specifically reward affordable housing and environmentally sustainable projects. Building strategically upon the federal Low-Income Housing Tax Credit and Historic Preservation and Rehabilitation Tax Credit could do much to help increase the profitability of Office Conversions that add affordable housing units or embrace sustainability building practices.[167]

C. *Better Educating Developers About Government Programs and Support*

One other potential strategy for accelerating Office Conversion activity in cities across the United States would be to help developers better navigate the often-complex array of government programs that can potentially support these projects. Different multiple government programs may be available to subsidize or provide financing assistance for Office Conversions,[168] and many of these programs are not specifically marketed to or designed for Office Conversion developers.[169]

(Jan. 8, 2024), https://www.thompsoncoburn.com/insights/publications/item/2024-01-08/supercharging-office-to-housing-conversions-new-federal-resources-available-to-speed-conversion-of-downtown-buildings [https://perma.cc/7S3K-9B6M] (listing various resources available for Office Conversions, including the new energy efficient home and clean energy investment tax credits).

166. *See* Suarez, *supra* note 73.

167. *See infra* text accompanying notes 168–69.

168. For example, the LaSalle Street Reimagined initiative in downtown Chicago plans to repurpose vacant commercial space on LaSalle Street into 600 mixed-income housing units by utilizing both the Low-Income Housing Tax Credit and historic tax credits, among other grants and funds. *See* Krysik, *supra* note 1; *see also* Emma Waters, *Converting Vacant Offices to Housing: Challenges and Opportunities*, BIPARTISAN POL'Y CTR. (July 31, 2023), https://bipartisanpolicy.org/explainer/vacant-offices-housing-conversion/ [https://perma.cc/LC7X-NVHE].

169. Specifically, Historic Preservation and Rehabilitation Tax Credits are frequently used for Office Conversions, in part due to similar incentives of reusing existing buildings and in part

Initiatives that make developers more aware of the programs that may apply to their potential project could help to overcome these complexities and encourage more developers to try Office Conversions. An interagency working group recently released a new guide of federal policies applicable to Office Conversions aimed at helping developers who are interested in pursuing these projects.[170] Ideally, state governments and municipalities could supplement this new guide with clear descriptions of their Office Conversion-related programs to aid developers in accessing and utilizing those programs. Governments at all levels have made notable progress in recent years in introducing policies to support Office Conversions. Adding to these policies as outlined above and clearly communicating them to developers will help ensure that this progress continues and results in many more Office Conversions in cities across the country.

CONCLUSION

Office Conversions are a potentially valuable means of curbing office vacancy rates and mitigating affordable housing shortages in U.S. cities. By adding housing units near public services and private businesses, Office Conversions can generate substantial social, economic, and ecological benefits. Unfortunately, existing regulatory and market structures are largely failing to incentivize developers to undertake Office Conversion projects. Fortunately, legal and policy reforms are available that could reduce existing barriers to Office Conversions and bring more of these projects and their numerous benefits to downtown areas across the country.

Targeted zoning ordinance and building code reforms are among the most promising means of reducing barriers to Office Conversions. Among other things, municipalities could tailor such reforms to allow Office Conversions in commercial zoning districts and to exempt qualifying Office Conversion projects from various zoning rules such as minimum parking space requirements. Because many cities have limited resources available for crafting new ordinance amendments aimed at facilitating Office Conversions, state or federal grant support for the development of model ordinance amendments and accompanying guides

due to the ability to combine various tax incentives for one project. *See* Stephanie Ryberg-Webster & Kelly L. Kinahan, *Historic Preservation and Urban Revitalization in the Twenty-first Century*, 29 J. PLAN. LITERATURE 119–39 (2013), https://doi-org.ezproxy1.lib.asu.edu/10.1177/08854 12213510524 [https://perma.cc/L7LW-FNTK].

170. *See* The White House, *Commercial-to-Residential Conversion: Addressing Office Vacancies*, THE WHITE HOUSE.GOV (Oct. 27, 2023), https://www.whitehouse.gov/cea/written-materials/2023/10/27/commercial-to-residential-conversion-addressing-office-vacancies/ [https://perma.cc/92K4-CMZE]; *see also Commercial to Residential Conversions: A Guidebook to Available Federal Resources* Version 1, *supra* note 155.

could benefit many cities and accelerate the adoption of such amendment provisions.

More generous tax credits and other programs that enable Office Conversion developers to internalize more of the public benefits of these projects could also help to promote more optimal levels of Office Conversion activity. Some existing federal tax programs could apply to Office Conversions and the federal government has generated a guide to aid developers in navigating these programs, but additional subsidies will likely be needed to bring significantly more of these projects and their numerous economic, social, and environmental benefits to cities across the country. States and local governments could also do more to support Office Conversions by introducing or expanding their property tax abatement programs and other supports to make these projects more financially viable.

With appropriate reforms in place, Office Conversions could play a valuable role in helping to combat the nation's glut of downtown office vacancies and shortage of affordable urban housing. Such reforms could unleash a new age of real estate recycling that supports more vibrant, inclusive, and sustainable urban environments across the United States.

THE FLORIDA DIGITAL BILL OF RIGHTS: PROVIDING EXPANDED CONSUMER PROTECTION IN THE DIGITAL WORLD

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Abstract

The Florida Digital Bill of Rights comprises a statutory framework designed to regulate the use and collection of Florida consumers' personal data in the digital world. This Article breaks down the components of the new statute and explores its preliminary successes and shortcomings, particularly from an enforcement perspective.

INTRODUCTION

Effective July 1, 2024, Chapter 501 of the Florida Statutes features a brand-new statutory component that establishes consumer protections in data privacy and security—an area that has heretofore seen very little of it. The Florida Digital Bill of Rights, beginning at Florida Statute section 501.701, establishes extensive policies and procedures regulating the collection and use of consumers' personal data. While the new statute boasts laudable strengths, like establishing extensive consumer rights, the degree to which these rights will be protected and enforced is significantly undercut by the lack of a private cause of action and the narrow scope and applicability of the new law.

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I. CONSUMER RIGHTS

One of the most commendable aspects of the Florida Digital Bill of Rights is the comprehensive consumer rights that it established for Florida residents. Consumers are granted broad power and control over the collection and use of their personal data. "Personal data" is broadly defined as any information, with the exception of deidentified data or publicly available information, which is "linked or reasonably linkable to an identified or identifiable individual."[1]

A consumer is entitled to obtain confirmation as to whether a controller is processing the consumer's personal data and to access the personal data.[2] Many current data privacy concerns stem from the fact that consumers have no idea who has their personal data, what specific personal data they have, and how to go about determining this information in the first place. Not only does the new statute affirmatively grant consumers the right to access the personal data that controllers have on them, it also establishes a streamlined procedure for consumers to request that access and to exercise the other consumer rights established by the statute.[3] Specifically, consumers may submit a request to a controller specifying the consumer right(s) that the consumer wishes to exercise.[4] The controller is required to establish two or more "secure, reliable, and clearly and conspicuously accessible" methods of enabling consumers to submit a request to exercise their consumer rights.[5] In developing these methods, the controller must take into account (a) the ways in which consumers normally interact with the controller, (b) the necessity for secure and reliable communications of the requests, and (c) the ability of the controller to authenticate the identity of the consumer making the request.[6] Upon receipt, the controller must respond to the consumer request "without undue delay" and in no event later than forty-five days after receipt, though this time period may be extended by fifteen days if reasonably necessary and if specific procedures are followed.[7] The controller is also obligated to establish a process for a consumer to appeal the controller's refusal to take action on a request.[8] Not much statutory guidance is provided as to the appellate process and the obvious drawback is that the appeal, like the initial consumer request, is reviewed by the controller. Theoretically, the exact same department or representative of the controller who reviewed the consumer request may

1. FLA. STAT. § 501.702(19) (2024).
2. *Id.* § 501.705(2)(a).
3. *Id.* § 501.705(1)–(2).
4. *Id.*
5. *Id.* § 501.709(1).
6. *Id.*
7. FLA. STAT. § 501.706(2) (2024).
8. *Id.* § 501.707(1).

also be reviewing the appeal so it is unlikely that a different outcome would be reached, especially where no specific guidance is provided as to how the review of the consumer request is any different substantively from the review of the appeal. Controllers who are on the receiving end of consumer requests that are "manifestly unfounded, excessive, or repetitive" are given the option of either (1) denying the request outright or (2) charging the consumer a reasonable fee to cover the administrative costs of complying with the request.[9]

Reminiscent of the rights established under the federal Fair Credit Reporting Act, the Florida Digital Bill of Rights also creates a consumer right "[t]o correct inaccuracies in the consumer's personal data, taking into account the nature of the personal data and the purposes of the processing of the consumer's personal data."[10] Notably, the statute anticipates the possibility that a controller may implement a self-service mechanism of allowing a consumer to correct certain personal data and permits a controller to deny a consumer request and require the consumer to correct his or her own personal data through this mechanism.[11] Depending how the self-service mechanism is structured and monitored, it may strike a reasonable balance between consumers' interests in correcting their personal data and controllers' interests in achieving these ends without undue burden. Given the broad definition of "personal data," that disputes may arise as to whether a consumer's personal data is, in fact, inaccurate and who the final arbiter of that inquiry is or should be—for example, with respect to personal data that the consumer claims is defamatory.

Additional consumer rights established by the statute include (1) the right to delete any or all personal data provided by or obtained about the consumer; (2) the right to obtain a copy of the consumer's personal data in a portable and, to the extent technically feasible, readily usable format if the data is available in a digital format; and (3) perhaps most notably, the right to opt out.[12] Consumers have the right to opt out of several activities, including (a) the processing of personal data for purposes of targeted advertising, the sale of personal data, or profiling in furtherance of a decision that produces a legal or similarly significant effect concerning a consumer; (b) the collection of sensitive data, including precise geolocation data, or the processing of sensitive data; and (c) the collection of personal data collected through the operation of a voice recognition or facial recognition feature.[13] "Sensitive data" is a subset of personal data that includes personal data revealing an individual's racial

9. *Id.* § 501.706(5).
10. *Id.* § 501.705(2)(b).
11. *Id.* § 501.706(3).
12. *Id.* § 501.705(2)(c)–(e).
13. FLA. STAT. § 501.705(2)(e)–(g) (2024).

or ethnic origin, religious beliefs, mental or physical health diagnosis, sexual orientation, or citizenship or immigration status; genetic or biometric data processed for the purpose of uniquely identifying an individual; personal data collected from a known child; or precise geolocation data.[14] Though many mobile applications, websites, and digital platforms have started featuring an opt-out option, the scope and nature of the opt-out will now be subject to the foregoing requirements.

While not expressly categorized as a "consumer right," the new statute also imposes a number of duties with respect to privacy notices that create an implied consumer right to receive a full, fair, and current disclosure of a controller's data privacy practices.[15] A controller is required to furnish consumers with a "reasonably accessible and clear" privacy notice that is updated at least annually and that includes various disclosures, including what personal data is collected, what personal data is shared with third parties, for what purpose(s) the personal data is collected, and how consumers can exercise the consumer rights referenced above.[16] If a controller sells any of the consumer's sensitive data, biometric data, or personal data,[17] a clear, conspicuous, and specific notice of the same must be provided.[18]

II. Applicability

After seeing the expansive consumer rights established by the statute, consumers and practitioners alike may be surprised to discover the exceedingly narrow and limited applicability of the statute—that is, *whose* conduct the statute actually regulates. The definition of a "controller" is a key component of this statute as there are multiple conditions that must be met for an entity to qualify as a controller.

The first condition is that a qualifying controller must be a sole proprietorship, partnership, limited liability company, corporation, association, or legal entity—or any entity that controls or is controlled by a controller.[19] Individuals are excluded from the definition of a "controller." If an entity satisfies the first condition, it must then determine whether it meets the next set of lengthy criteria. Specifically, the second condition is that the entity must meet *all* of the following criteria: (1) is organized or operated for the profit or financial benefit of its shareholders or owners; (2) conducts business in this state; (3) collects personal data about consumers, or is the entity on behalf of which such information is collected; (4) determines the purposes and means of

14. *Id.* § 501.702(31).
15. *See id.* § 501.711.
16. *Id.* § 501.711(1).
17. Only personal data sold for targeted advertising is implicated. *Id.* § 501.711(4).
18. *Id.* § 501.711(2)–(4).
19. *Id.* § 501.702(9)(a)–(b).

processing personal data about consumers alone or jointly with others; and (5) makes in excess of $1 billion in global gross annual revenues.[20] If the entity meets all of the foregoing requirements, then it must determine whether it satisfies the last and final condition. The third condition is that the entity must either (a) "derive[] 50 percent or more of its global gross annual revenues from the sale of advertisements online, including providing targeted advertising or the sale of ads online," *or* (b) "operate[] a consumer smart speaker and voice command component service with an integrated virtual assistant connected to a cloud computing service that uses hands-free verbal activation," *or* (c) "operate[] an app store or a digital distribution platform that offers at least 250,000 different software applications for consumers to download and install."[21]

Few entities will satisfy all of these conditions and qualify as a "controller" for purposes of the statute. The protection afforded by the Florida Digital Bill of Rights, therefore, can be quite limited given the handful of data controllers it will actually apply to and regulate. Were this a data breach notification statute, then perhaps limiting the qualifying controllers to those with significant global gross annual revenues would be a fair and reasonable restriction. But the rights and duties established by the statute should ideally apply across the board, regardless of controllers' annual revenues, because the consumer rights that are created are no less important or less fundamental when applied to a small start-up as compared to a national conglomerate. The right to access, correct, and delete one's personal data—and to be given a full and fair disclosure of a controller's privacy notice—is an unalienable right in a digital economy like the present one that is enabling controllers to financially profit off the personal data of its users. There is no doubt that the fundamental significance of these rights is what led to its compelling name—the Florida Digital *Bill of Rights*. While the statute currently maintains a narrow scope and applicability, practitioners would be well-served in treating the law's requirements as aspirational goals that all clients, regardless of their annual revenue, should strive to comport with. In time, the scope of the statute will likely be significantly broadened to align with consumers' reasonable expectations of privacy in the digital economy.

III. ENFORCEMENT

A huge drawback of the Florida Digital Bill of Rights is that it does not create a private cause of action and vests the Department of Legal

20. *Id.* § 501.702(9)(a)(1)–(5).
21. *Id.* § 501.702(9)(a)(6).

Affairs with sole enforcement authority.[22] The statute even goes so far as to state that, "liability for a tort, contract claim, or consumer protection claim unrelated to an action brought under this section does not arise solely from the failure of a person to comply with this part."[23] Although section 501.72 expressly establishes that "[a] violation of this part is an unfair and deceptive trade practice actionable under part II of this chapter", i.e., actionable under the Florida Deceptive and Unfair Trade Practices Act, consumers are essentially left without legal recourse and are wholly dependent on the Department of Legal Affairs for protection of their newly established rights and enforcement of the new statute.[24] The efficacy of the statute in policing and deterring violative conduct may, therefore, be weakened given the lack of a private cause of action.

IV. CONSENT AND LACK THEREOF

Consent is not necessarily the focal point of the statute, but a medley of statutory provisions and definitions draw significant attention to what does, and does not, amount to legally sufficient consent.

Substantial emphasis is placed on the requirement that the statutory disclosures be clear and accessible. The controller's methods of enabling consumers to submit a request to exercise their consumer rights must be "secure, reliable, and clearly and conspicuously accessible".[25] The privacy notice furnished by the controller must be "reasonably accessible and clear".[26] The process by which a controller sells or processes personal data for targeted advertising, and the manner in which a consumer may opt out of that process, must be "clearly and conspicuously disclose[d]".[27] An "up-to-date, plain language description of the main parameters that are individually or collectively the most significant in determining ranking" in search engines must be made available to consumers in an easily accessible location.[28] Notably, any measures taken to compromise the integrity of a consumer's consent are strongly spurned and prohibited. For example, a controller may offer financial incentives, including payments to consumers as compensation, for the processing of personal data "if the consumer gives the controller prior consent that clearly describes the material terms of the financial incentive program and provided that such incentive practices are not unjust, unreasonable, coercive, or usurious in nature."[29] The use of dark patterns in obtaining

22. *Id.* § 501.72(1), (8).
23. FLA. STAT. § 501.72(7) (2024).
24. *Id.* § 501.72(1).
25. *Id.* § 501.709(1).
26. *Id.* § 501.711(1).
27. *Id.* § 501.711(4).
28. *Id.* § 501.71(4).
29. FLA. STAT. § 501.71(2)(c) (2024).

consent voids the consent altogether.[30] "Dark patterns" are statutorily defined as "user interface[s] designed or manipulated with the effect of substantially subverting or impairing user autonomy, decision-making, or choice."[31] Given the Federal Trade Commission's documented rise in the use of "dark patterns" online,[32] the fact that the Florida Digital Bill of Rights declares that legally sufficient consent cannot be obtained through the use of dark patterns creates a promising foundation for the future of consumer protections. The new statute also prohibits the waiver or limitation of the consumer rights established in sections 501.705, 501.706, and 501.707 through a contract or agreement, and declares the same to be void, unenforceable, and contrary to public policy.[33]

The statute defines "consent" as "a clear affirmative act signifying a consumer's freely given, specific, informed, and unambiguous agreement to process personal data relating to the consumer."[34] Consent may be given through a written statement or an "unambiguous affirmative act," but it cannot be given or inferred from a consumer "[h]overing over, muting, pausing, or closing a given piece of content."[35] Consent is also insufficient if it is part of a consumer's acceptance of general or broad terms of use or a similar document which contains descriptions of personal data processing along with other unrelated information.[36] As evidenced by the foregoing restrictions, the standard of legally sufficient consent for purposes of the Florida Digital Bill of Rights is a high one.

CONCLUSION

Adding a new consumer protection statute in the area of data privacy and security to Chapter 501 of the Florida statutory framework was a huge leap forward for the Florida Legislature. Various provisions of the statute—such as the exclusion of dark patterns from consent and the allowance for a self-serving mechanism of correcting consumer's personal data—show promise that the Florida Digital Bill of Rights will successfully keep up with technological developments in the digital world. Although the law's currently limited applicability and lack of a private cause of action suggest that there may be challenges in enforcing and protecting consumers' newly created digital rights, these are

30. *Id.* § 501.702(7)(c).

31. *Id.* § 501.702(11).

32. *Bringing Dark Patterns to Light*, FED. TRADE COMM'N (Sept. 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P214800%20Dark%20Patterns%20Report%209.14.2022%20-%20FINAL.pdf [https://perma.cc/QNN5-QVW2].

33. FLA. STAT. § 501.708 (2024).

34. *Id.* § 501.702(7).

35. *Id.*

36. *Id.* § 501.702(7)(a).

shortcomings that may—and hopefully will—be remedied in years to come.