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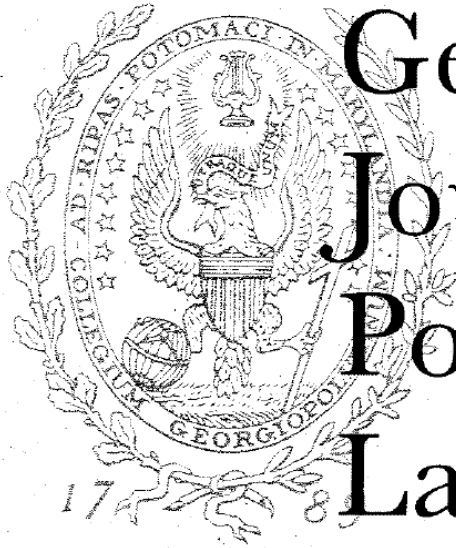
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Rural Housing and Code Enforcement: Navigating Between Values and Housing Types

Ezra Rosser*

INTRODUCTION

The legal literature on building codes and housing focuses almost entirely on urban development, largely ignoring rural housing conditions and development. Discussions of the positives and negatives of building code enforcement, the warranty of habitability, and the nature of housing markets take place but without so much as a side glance at rural experiences and challenges. This Article explores the relationship between rural housing and code enforcement and the effect of building code systems on the types of housing—primary self-help, trailers, homeowner-built, limited contracting, and contractor construction—found in rural areas. By considering different ways that housing “value” can be conceptualized—maximization, fulfilling needs, market, and return on expenses—we can see that, in rural markets, the code’s importance comes from its impact on the mix of housing developed.

Of course, there is no single “rural” type; the impossibility of limiting “rural” to a single, set population or number of business opportunities is reflected in U.S. federal government practice, which “defines ‘rural’ by exclusion—that which is not ‘urban’ is remaindered as ‘rural.’”¹ Rather, building code enforcement for each rural community depends upon its determination of the community-appropriate definition of “value” and the nature of the housing² favored by that

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1. Debra Lyn Bassett, *Ruralism*, 88 IOWA L. REV. 273, 285 (2003). I would like to thank Bobby Dexter for probing me on this point. Each person from a rural community has their own idea of what ‘rural’ communities look like and how they function. “Indeed, virtually all attempts to address rural concerns have observed, correctly, the tremendous variety encompassed within that which is called ‘rural.’” *Id.* at 288-289.

2. Throughout this Article I will be discussing housing or houses, even though at the lower housing quality end the buildings are more akin to shelters, which when viewed by non-occupants might not be considered houses.

rural community. The rural rental market differs significantly from location to location. But, as a general rule, rural rental markets play a lesser role in the welfare of the population in lower-income rural areas than they do in lower-income urban areas.³ In contrast, constructing or purchasing housing are options for the many rural poor who own, or have access to, cheap land but have limited resources for developing it. Therefore, housing code enforcement, or the rejection of enforcement, finds its primary rural importance not in improving the living conditions of tenants but in altering the selective choices of building alternatives available to the rural poor. Moving the legal debate from the urban rental to the rural construction context requires reframing its terms: away from simply benefiting low-income tenants and toward encouraging the greatest value realization of housing dollars by low-income tenants.

If policymakers in poor rural areas are aware of the relationship between spending and value across housing types and how code enforcement or non-enforcement directs spending, they will be better positioned to select the enforcement regime appropriate for their area. The theoretical model developed in this Article can be applied across many rural communities but does not dictate a single building code regime in all areas. Rather, it suggests different conclusions depending on the particular rural community's circumstances. Two case studies—the Navajo Nation and a small Colorado subdivision—illustrate the challenges of rural housing code enforcement and demonstrate how officials could benefit from the model.

I. CODES IN CONTEXT

A. *Urban v. Rural, Quality v. Quantity*

Building codes, seen positively, aim to ensure that houses are free from construction defects or failings which diminish a house's safety, structural soundness, or overall quality. They do so by setting the technical and material requirements for new construction or renovation of housing.⁴ Codes regulate everything from the number of support beams for load-bearing walls or the space between dowels on railings to the maximum variance allowed in the run and rise of steps or the total percentage of house glass allowed on a house's north-facing side.⁵ Code compliance provides direction for construction efforts: at times reflecting the same choices builders would make, at other times requiring builders to select materials or change their building plans to reflect the code's

3. For the rural poor, the rental market does have a significant effect on their welfare. "Renter-occupied households in rural areas are twice as likely to live in substandard housing than their owner counterparts." HOUSING ASSISTANCE COUNCIL, RENTAL HOUSING IN RURAL AMERICA, Apr. 2003, www.ruralhome.org/manager/uploads/RuralRental.pdf.

4. Eric Damian Kelly, *Fair Housing, Good Housing or Expensive Housing? Are Building Codes Part of the Problem or Part of the Solution?*, 29 J. MARSHALL L. REV. 349, 354 (1996).

5. Telephone interview with James Rosser, licensed Arizona contractor (Feb. 28, 2004).

regulations.⁶

Health and safety concerns explain the historical roots of building codes and many (but not all) of the construction requirements contained in them.⁷ “History reflects regulation of construction standards since the time of the Babylonian empire.”⁸ The earliest New World settlements had restrictions on wooden chimneys.⁹ Eric Damian Kelly traces today’s U.S. building codes to two historical periods:

Although building codes have existed for centuries, most of the evolution of the codes has occurred in the last century. Two major periods of expansion of the scope and complexity of the codes included the early part of the century, when reformers in the tenement house movement pushed for basic sanitation in dwellings, and the New Deal era, when the federal government led a major restructuring of the entire U.S. housing system and model codes became a significant factor in regulation.¹⁰

As this account implies, the building code’s historical development was often keyed particularly to urban health and safety concerns.

Health and safety provide the strongest justifications for building code development; however, the balancing of added costs and increased safety can lead to different results depending on whether they are being weighed against each other in an urban or rural context. Consider, for example, code requirements related to fire safety. When housing is tightly packed, a fire that gets out of control in a single unit threatens the safety (and housing investment) of the many households nearby.¹¹ The greater spacing and natural barriers¹² between houses in rural areas demonstrate how the health and safety concerns of rural housing

6. For example, a builder—whether a contractor or a private individual—might choose on his or her own to use triple-wall pipe where a wood stove’s chimney touches the ceiling, as coincidentally is required by the many building codes. However, a builder might not ordinarily choose to place flame-retarding spacers between wall studs every nine feet, but when motivated to comply with the code might do so.

7. See e.g., David Listokin & David B. Hattis, *Building Codes and Housing*, 8.1 CITYSCAPE: J. POL’Y DEV. & RES. 21, 24 (2005).

8. Michael D. Turner, *Paradigms, Pigeonholes, and Precedent: Reflections on Regulatory Control of Residential Construction*, 23 WHITTIER L. REV. 3, 5 (2001).

9. Kelly, *supra* note 4, at 349.

10. *Id.* at 350.

11. See Jeff Govern, *Toward a Theory of Warranties in Sales of New Homes: Housing the Implied Warranty Advocates, Law and Economics Mavens, and Consumer Psychologists Under One Roof*, 1993 WIS. L. REV. 13, 51 (1993) (“States and localities have an interest in insuring that housing meets certain standards, and to this end, most housing is subject to detailed regulation in building codes. For example, localities have an interest in preventing fires that goes well beyond the locality’s interest in a particular house.”).

12. There is an argument that though rural building codes might require looser adherence to fire-based requirements, households might have an offsetting responsibility to landscape their lots in a way that helps prevent fires from spreading. A fire break around houses can both protect the house from lightning-strike fires and from the spread of house fires beyond the immediate area.

can differ from those in urban areas. While in an urban unit it might hypothetically be cost-effective and justified by the possible danger to many households to require expensive fire resistant insulation—"home buyers would tend to underinvest in safety features, thinking only of the potential damage to their own properties, without considering the effect of fire or a collapsing building on surrounding properties"¹³—in a rural one-story structure such expense would not have as great a health and safety justification.¹⁴ Nevertheless, health and safety concerns are the historical and presumptive backdrop for arguments in favor of building codes in both urban and rural areas.

Regulation of housing construction occurs through local authorities (county or city governments) adopting a building code and requiring adherence to that code.¹⁵ Normally this occurs through wholesale incorporation of a model code, though some local authorities will modify or even draft codes to reflect their particular local concerns. The primary building codes in effect across the U.S. are the Uniform Building Code (UBC), the International Building Code (IBC), the National Building Code (NBC), and the Standard Building Code (SBC).¹⁶ Within the same state, different cities do not have to follow the same code; for example, in Arizona, Tucson adopted the IBC 2000, Mesa the UBC 1994, Phoenix the UBC 1997, and Yuma the IBC 2003.¹⁷ Furthermore, the major residential codes are supplemented by related codes, such as electrical or plumbing codes.¹⁸ For the purpose of this Article, all building regulation—model codes, local modifications, and supplemental codes—are collectively considered and termed "building codes."

Building code compliance leads to a degree of construction practice standardization both because of the formal requirement of adhering to code and because the code establishes norms for good techniques and rules-of-thumb. The multiple model codes reflect similar rules, and though they are continually being updated,¹⁹ construction compliance with a particular model code adopted by the local authority helps ensure that even after the local code has changed, the basic

13. Stephen R. Seidel, *Housing Costs and Government Regulations*, 73-74 (1978), reprinted in ROBERT C. ELLICKSON & VICKI L. BEEN, *LAND USE CONTROLS: CASES AND MATERIALS* 520 (2d ed. 2000).

14. For a discussion of the relationship between building codes and acceptable levels of risk, particularly with respect to fires, see Brian J. Meacham, *Understanding Risk*, in *Proceedings of the Australian Building Codes Board Conference: Building Tomorrow's Future—International and National Partners*, Canberra, Austl. (Apr. 9-11, 2001), available at <http://www.arup.com/DOWNLOADBANK/download254.pdf>.

15. Manufactured housing is the exception. Locally-adopted building codes are preempted by HUD regulation, as is discussed *infra*, Section I.D.2.

16. Building codes, as well as local modifications to the model codes, can be purchased from the International Code Council's Store, <http://www.iccsafe.org/> (last visited Feb. 28, 2005).

17. First Source, Reed Construction Data, <http://www.firstsourceonl.com/codes/index.asp> (last visited Feb. 28, 2005).

18. See Listokin & Hattis, *supra* note 7, at 23-24.

19. See International Code Council, Code Development Information, <http://www.iccsafe.org/cs/codes/> (last visited Feb. 28, 2005).

structural elements of the earlier construction will have similar characteristics to new construction. Thus building codes help create a set of standard assumptions, which can help housing purchasers deal with “information overload” which works to limit the ability of those purchasing their housing to understand all aspects of their purchase.²⁰ “According to this argument, as between the builder and the consumer, the builder usually is in the better position to prevent defects and improve housing quality; defects are seen as the builder’s fault.”²¹

The benefits of housing standardization through building code compliance can be overstated, especially for rural areas. In urban areas the burden of defect prevention argument resonates strongly because the structural aspects of housing are often invisible to purchasers—for example, the spacing of studs or the thickness of insulation hidden behind drywall. The danger of hidden defects requires separation between contractor and consumer.²² This split between builder and purchaser is less likely to exist rurally because the consumer is more likely to be building his or her own house, and therefore the agency problems play a less powerful role.²³ Additionally, standardization itself, even in the appropriate market, is not without costs:

Perhaps the most devastating impacts of government regulation, however, happen through stifling innovation. Remarkably, builders in the United States today offer the families of the twenty-first century a product developed and refined in the nineteenth century . . . the best explanation is apparently the limiting factors of building codes, as administered by local governments.²⁴

If innovation does not occur through the work done by architects or developers, however, it might be possible at an individual household level. The motivation and rewards for innovation are particularly strong for lower-income households trying to think through creative, inexpensive solutions to their housing needs. Standardization might benefit the repurchaser who did not participate in the original construction, but the idea of standardization, especially if done because of the lobbying of powerful construction groups, does little for the rural resident primarily concerned with building his or her own home.²⁵

Viewed most favorably, for the individual building his or her own house,

20. Sovern, *supra* note 11, at 27.

21. *Id.* at 48.

22. Housing construction standardization makes the role of building codes somewhat analogous to the role played by the UCC’s implied warranty of fitness for a particular purpose. *See* U.C.C. § 2-315 (1998).

23. This does not mean that agency concerns cannot be significant, nor that some rural areas, particularly better-off areas, will have a frequency of separation between homeowner and contractor that approaches that found in urban areas. As the case studies selected indicate, this Article is more focused on poorer rural areas than on middle-income rural areas.

24. Kelly, *supra* note 4, at 359-60.

25. *See*, Listokin & Hattis, *supra* note 7, at 34 (“To a certain extent, the building code approval process may simply lag behind the leading edge of technology and innovation. Yet, more questionable self-interest influences sometimes play a role, such as plumbers trying to control the market and limit

enforced building codes *require* compliance with a set of health- and safety-based construction requirements. Yet telling individuals they must build their own housing in a certain way for their own health and safety smacks of paternalism, “[a] government’s policy or practice of taking responsibility for the individual affairs of its citizens, esp[ecially] by supplying their needs or regulating their conduct in a heavy-handed manner.”²⁶ Whether mandating a particular construction technique is an example of heavy-handed government regulation or not depends in part on the benefit to the individual of that regulation:

Quality improvements are probably the most justifiable of the regulatory-driven increases in housing costs. . . . These regulations are arguably the most justifiable because the consumer who pays an increased price for the improvements also receives a better product. The public policy argument against these cost increases is that mandating insulation and smoke detectors is somewhat paternalistic.²⁷

Critiques of building code paternalism are analogous to paternalism in critiques of food stamp or housing voucher programs: the less well-off benefit when they are allowed to choose the purchases which most improve their welfare, as opposed to being forced to direct their spending only in the ways approved by the government.²⁸ Government narrowing of the scope of permitted housing expenditure and the type of construction allowed paternalistically asserts that the homeowner has mistaken ideas about his or her own needs.²⁹

Building code enforcement gives the government the power to establish quality standards for those seeking to provide for their own housing; as a consequence, the danger exists that urban or middle-class norms will be imposed upon lower-income rural areas. Debra Lyn Bassett writes, “[l]aws that now govern the rural culture . . . are, in effect, being dictated by an urban majority . . . that is often ignorant of the ways of the people whose lives they are controlling.”³⁰ Many rural areas are not subject to model codes, but those that are will find “standards that far exceed what is required for health and safety.”³¹

competition by intentionally resisting the use of plastic pipe because it was easier and less costly to install, thus reducing plumbers’ charges.”)

26. BLACK’S LAW DICTIONARY 1163 (8th ed. 2004).

27. Kelly, *supra* note 4, at 355.

28. That building code enforcement directs private expenditure, and food stamp or Section 8 housing voucher programs direct spending of publicly provided resources, when compared to a direct open-ended subsidy, does not inherently lessen the paternalism involved in code enforcement.

29. As Duncan Kennedy writes, “where motives are paternalist, the issue is false consciousness.” Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 572 (1982).

30. Bassett, *supra* note 1, at 292.

31. Jane E. Larson, *Informality, Illegality, and Inequality*, 20 YALE L. & POL’Y REV. 137, 171 (2002). See also Kelly, *supra* note 4, at 360. The motivation for code provisions is not necessarily even related to housing quality: “Building codes may contain obsolete provisions or provisions inserted for political

Similarly, Judge Richard A. Posner writes, “[t]hese codes specify minimum standards of housing—although whether in order to ensure a decent minimum level of safety and sanitation or to subsidize the building trades is a matter of debate.”³² Some paternalistic regulation arguably is required even in rural areas if it is true that housing “consumers would rather pay for more immediate creature comfort amenities than for less immediate health securing materials.”³³ Yet, even along health and safety lines, building codes might inappropriately direct housing expenditure along paths which do not truly benefit the lower-income household.

The difference between urban middle-class norms and rural lower-income life situations in housing requirements can perhaps best be explored by looking at a seemingly fundamental housing health need: indoor plumbing. Eric Damian Kelly believes indoor plumbing should be required: “Is the affordable housing problem in this nation so bad that we should allow the construction of new dwelling units without indoor plumbing[?] Of course not.”³⁴ Outhouses are a rural stereotype and an inaccurate stereotype for many areas; yet, rural outhouses do not create the health/disease problems they would in more clustered housing areas. Other water needs can be satisfied by filling jugs or large tanks off-site and bringing them to the house without indoor plumbing. For a family building a house and deciding between spending on indoor plumbing and an extra window or an extra room, the middle-class necessity of running water can conflict with what they know to be their housing needs.³⁵ Middle-class and urban norms of what are “housing needs,” discussed further below, can be found in many building code specifications, adding costs to rural construction without necessarily reflecting rural needs.³⁶

Building code enforcement adds to the cost of housing construction, and concern over added cost animates discussion of the effects of technical construction requirements, housing standardization, and the paternalism of mandating housing quality.³⁷ Indeed, the central debate regarding building code

reasons. In addition, building codes can be enormously complex, far too complex for consumers to grapple with.” Sovern, *supra* note 11, at 52.

32. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 482 (6th ed. 2003).

33. Curtis J. Berger, *Commentary on Redistribution of Income Through Regulation in Housing*, 32 *EMORY L.J.* 733, 744 (1983).

34. Kelly, *supra* note 4, at 361.

35. JANET M. FITCHEN, *POVERTY IN RURAL AMERICA: A CASE STUDY* 88 (1981) (“While better facilities and furnishings are indeed desired . . . they are often assigned a lower priority or repeatedly postponed. The purchase and installation of a flush toilet, for example, may be put off again and again.”). Stephen R. Seidel observes that in general a market distortion exists because building codes “require home buyers to invest present dollars to ensure future soundness.” Seidel, *supra* note 13, at 542. Personal acknowledgment: it is not coincidence that led me to highlight indoor plumbing. I was born into a cabin without indoor plumbing and spent a year of middle school in a different house that also lacked such an amenity.

36. See FITCHEN, *supra* note 35, at 96 (“Middle-class concerns such as the value of the dwelling and its location for enhancement of social status, or for investment potential, are rarely mentioned.”).

37. Listokin & Hattis, *supra* note 7, at 21 (“In theory, the building code could adversely affect housing production and could increase housing costs through both substantive (technical) and administrative impediments. Examples of the former include restrictions of cost-saving materials and technologies and

enforcement is between those who claim that the value of code enforcement exceeds the costs and those who believe that the costs, in terms of reduced ability of individuals to meet their housing needs, make the regulated quality improvement unjustified. Though some academics insist “existing codes do not, as their critics so often claim, appreciably add to housing costs,”³⁸ this position is accurate, if at all, only for what in a rural context are the higher end “sellers already . . . under [a *de facto*] obligation to incur those costs.”³⁹

Requiring homebuilders to follow building codes regulating housing quality and condition raises the cost of housing construction.⁴⁰ The debate between those who believe quality concerns dominate and those who believe the effects of higher cost do not warrant the code requirements is most fleshed out in the warranty-of-habitability literature, not in the writing explicitly focused on new construction.⁴¹

In 1971, Bruce Ackerman began a debate—which still rages today—about the effect of the warranty of habitability on lower-income people.⁴² Reasoning that the warranty could be used as a mechanism to transfer wealth from landlords to tenants by mandatory improvements to the conditions of rental units whose costs could not be passed onto the benefiting tenants, Ackerman tried to defend the warranty of habitability. Neil K. Komesar responded with an attack on the enforcement of housing code violations against landlords, criticizing the idea that the warranty would not impact the supply of rental units and the assumption that wealth transfers from landlords to tenants are inherent social goods.⁴³ In the same issue of the *Yale Law Journal*, Ackerman responded by arguing that uncertainty as to the effect of housing code regulations would not likely affect the future cost considerations of builders.⁴⁴

The basic sides presented in these three articles repeat themselves in the

barriers to mass production; the latter encompasses such barriers as administrative conflicts among different administering parties (for example, building and fire departments) and inadequately trained inspectors.”).

38. Berger, *supra* note 33, at 743 (describing the position of economist Richard F. Muth).

39. Sovern, *supra* note 11, at 52.

40. While building codes raise costs, one recent study highlighted that “[i]n all likelihood, building codes have much less impact on new housing costs compared to other regulations, such as zoning and subdivision requirements. As such, building codes constitute a high, but not the highest, priority for regulatory study.” Listokin & Hattis, *supra* note 7, at 23. But this position implicitly acknowledges that in rural areas that do not have zoning or other limitations on housing construction, building codes would have the largest regulatory impact on housing costs and merit the greatest attention.

41. New construction is governed by building codes; “[o]rdinances that apply retroactively are generally called safety codes, health codes, or housing codes.” ROBERT C. ELLICKSON & VICKI L. BEEN, *LAND USE CONTROLS: CASES AND MATERIALS* 320 (2d ed. 2000).

42. See Bruce Ackerman, *Regulating Slum Housing Markets On Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 *YALE L.J.* 1093 (1971).

43. Neil K. Komesar, *Return to Slumville: A Critique of the Ackerman Analysis of Housing Code Enforcement and the Poor*, 82 *YALE L.J.* 1175 (1973).

44. Bruce Ackerman, *More on Slum Housing and Redistribution Policy: A Reply to Professor Komesar*, 82 *YALE L.J.* 1194, 1203-06 (1973).

subsequent scholarship dealing with the warranty of habitability, usually written entirely from one side or the other.⁴⁵ Presenting only the hard-line version of the right's and left's perspectives arguably presents only straw-man arguments. Hard-line warranty opponents reject even the possibility that Ackerman could be right. Hard-line warranty proponents allow the theoretical possibility of Komesar's position but deny its validity in most real-world markets. Despite the problems with both hard-line arguments, the literature is remarkably polarized. The middle ground in the warranty-of-habitability debate appears only when scholars rest their arguments on very particular market situations or acknowledge the possibility of the other side's points in certain markets.⁴⁶ The warranty-of-habitability debate is a dramatic version of a similar debate regarding the building code's relationship with required housing conditions and the housing supply in new construction; indeed, because the rural environment reflects multiple forms of construction that largely do not exist in urban settings, this antagonism between the housing conditions and housing availability is perhaps even more pronounced in the rural setting.⁴⁷

Building codes "clearly account for a measurable portion of housing cost increases."⁴⁸ Added costs are particularly important in rural areas where housing construction is often done by the homeowner and must be undertaken with limited resources. Jane E. Larson writes:

45. The Ackerman-Komesar debate finds its way into a lengthy list of articles. The following writings capture much, but by no means all, of this ongoing debate: POSNER, *supra* note 32, at 482-85; Charles J. Meyers, *The Covenant of Habitability and the American Law Institute*, 27 STAN. L. REV. 879, 889-97 (1975); Richard S. Markovits, *The Distributive Impact, Allocative Efficiency, and Overall Desirability of Ideal Housing Codes: Some Theoretical Clarifications*, 89 HARV. L. REV. 1815 (1976); Duncan Kennedy, *The Effect of the Warranty of Habitability on Low Income Housing: "Milking" and Class Violence*, 15 FLA. ST. U. L. REV. 485 (1987) (arguing that the warranty can increase the number of units by preventing landlords from rationally under-maintaining units as they would in a downward-spiraling market); Richard Craswell, *Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 43 STAN. L. REV. 361, 380-85 (1991) (analyzing various interpretations of Ackerman's model and arguing that sellers' ability to pass on costs is relevant only from a zero-sum redistributionist view); Robin Powers Kinning, *Selective Housing Code Enforcement and Low-Income Housing Policy: Minneapolis Case Study*, 21 FORDHAM URB. L.J. 159 (1993) (arguing that municipalities can administer selective code enforcement programs under certain market conditions without causing rent increases).

46. The importance of "Existing Conditions in the Market" is highlighted as the final section of a useful advocacy outline on the warranty of habitability contained in Singer's *Property Law* textbook. JOSEPH WILLIAM SINGER, *PROPERTY LAW: RULES, POLICIES AND PRACTICES* 758 (1993).

47. Some building code enforcement does occur in rural areas when electrical or water utility companies in some areas require their employees to inspect and sign off on internal plumbing or wiring as a condition for being hooked up to the regional electrical or water systems. Of course, even in areas where the regional utility company requires this, for those people who live "off the grid," too remote from the systems for a hook-up, this inspection regime is non-existent because it is a market-driven one and not a legislated government system.

48. Kelly, *supra* note 4, at 349. The significance of code-related expenses depends on the size of the house, for "[b]uilders can more easily disguise \$5,000 in new regulatory fees in the price of a 1,500 square-foot home than in the price of an 840 square-foot home." *Id.* at 366.

By requiring high-skill labor, costly materials, and labor-intensive techniques, codes close out self-builders and advance the economic interests of the construction and building materials industries and of labor unions. Thus, the model code process is a confluence of economic interests for whom affordability is not a core policy goal.⁴⁹

Preferences imposed on poor and rich alike through the building code designed for higher-end construction arguably reflect a wealth effect, by which those better off who have certain amenities value them more highly than they would have valued them were they only possessed by others.⁵⁰ An urban policy bias⁵¹ for a certain type of construction, where it shapes the available housing options for lower-income rural communities, can redirect housing spending, and not always positively. “The basic purpose of codes is sound, but their operational effect must also be sound. In many areas, the availability of affordable housing is a much greater problem than issues of safety and sanitation.”⁵² It is fine to set up the debate between enforcement and non-enforcement as it normally is: a dichotomous choice between the poles of conditions or quantity. However, direction is needed as to the thinking required by local governments in order to make such a choice and how values particular to individual rural communities can inform code enforcement policies.

B. *The Relative Stability of Rural Markets*

Before discussing the impact of code enforcement or declared rejection of enforcement on the rural housing market, it is important to describe the rural housing market being considered. This Article is not primarily concerned with rural areas on the edges of major cities which are experiencing rapid increases in property and housing values as they become the new outer edge of expanding cities.⁵³ Nor is this a discussion of rural communities facing rapid decreases in property values resulting from successive crop failures or other unusual economic blows. Rather, the market in this model is a lower-income economy⁵⁴ not subject to large economic shocks. The market’s growth is either negligible or extremely gradual, with both new jobs and job

49. Larson, *supra* note 31, at 171-72 (footnote omitted).

50. JEFFREY L. HARRISON, *LAW AND ECONOMICS IN A NUTSHELL* 37-38 (2000).

51. See Bassett, *supra* note 1, at 276 (asserting society has such a bias).

52. Kelly, *supra* note 4, at 349.

53. Suburban sprawl of either gradual expansion or ‘leap-frog’ development forms—“the haphazard establishment of residential developments in rural areas far from the suburban frontier”—varies across cities; however, the focus in this Article is on rural areas not impacted by either process of sprawl. Patrick J. Skelley, Note, *Defending the Frontier (Again): Rural Communities, Leap-Frog Development, and Reverse Exclusionary Zoning*, 16 VA. ENVTL. L.J. 273, 274 (1997).

54. Debra Lyn Bassett writes, “[O]ne of the most poignant facts about many rural areas is the level of poverty” Bassett, *supra* note 1, at 301. The Economic Research Service of the U.S. Department of Agriculture notes that there is a continuum of increasing poverty as counties become more rural. U.S. Dep’t of Agric., Econ. Research Serv., Briefing Room: Rural Income, Poverty, and Welfare: Rural Poverty, [www.ers.usda.gov/Briefing/IncomePovertyWelfare/rural poverty/](http://www.ers.usda.gov/Briefing/IncomePovertyWelfare/rural%20poverty/) (last visited Apr. 26, 2005).

loss infrequent. As such, the described rural economy is fairly stable—introduction of a new 7-Eleven store to the nearby town is a significant event—both in terms of job growth and the number of economic agents.

Is this market too stylized? Even rural communities can experience shocks to their economies that can dramatically change their situation. When Toyota decides to locate a new plant in Georgetown, Kentucky,⁵⁵ the stable equilibrium of the surrounding communities changes; as the support industries for the plant begin to develop, that change becomes more pronounced. Yet, these shocks are rare and only affect a fortunate few communities; the majority will not experience such dramatic changes. From one perspective, these rural communities are not stable economies: the arrival of a single large employer, such as a major automotive plant, can forever change these communities in ways that a single plant would not in a large city. That is, the critical minimum effort to change the rural economy is less than the effort required to effectuate change in an urban setting. However, such shocks are infrequent in rural settings; given the range of probable shocks or events, rural economies are very stable.⁵⁶

The rural economy's stability is even more pronounced with respect to the rural housing market. Rural housing assets are illiquid, more so than urban housing units because the owners are more directly tied to their specific location.⁵⁷ The occupants of rural housing, if they are farmers, often derive their income from the land the housing is on. Even for non-farmers living in small rural towns, housing is fairly fixed, and short-term tenancies are limited by the fact that these small towns cannot support a commercial rental market except on a very small scale. Land is relatively cheap, yet, for lower-income individuals or families, their land and whatever housing they have managed to purchase or construct on this land is their major asset.

C. Limits on Rural Construction

Rural housing improvements can be divided into five basic categories, distinguishable by both building methods and their relationship to the availability of income for construction of housing:

- primary self-help;
- trailers (double and single-wide);
- homeowner-built;
- limited contracting construction; and

55. See Toyota Georgetown, www.toyotageorgetown.com.

56. *But see* Bassett, *supra* note 1, at 305 (arguing that rural communities normally have only a single major industry or area of economic activity, and therefore they “are more susceptible to boom-and-bust fluctuations, because they lack the buffer that economic diversity provides.”).

57. *Cf.* John Cromartie, *Nonmetro Migration Continues Downward Trend*, RURAL AMERICA, Winter 2002, at 70-71 (discussing declining mobility of nonmetro residents).

- contractor construction.

These housing types are specifically rural because, unlike in the urban environment, contractor construction is at most only a small fraction of the housing improvement going on in low-income rural communities. We can see why this is the case when we consider housing development generally. In any context, if the cost of providing greater quality housing is linear, while the value for the constructed house is convex, contractors will only be able to build where value exceeds cost. *See* Figure 1.

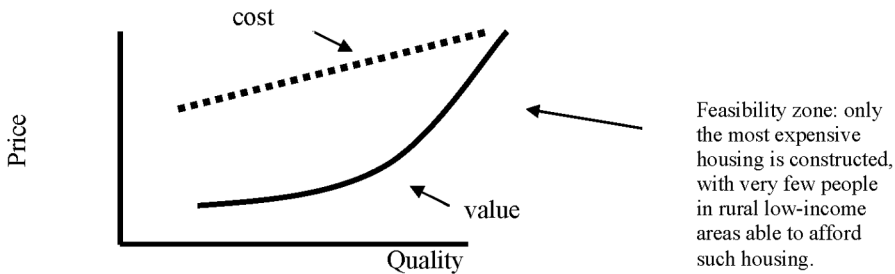


Figure 1. Price v. Quality of Constructed Housing

This narrow feasibility zone does not exist for many rural communities. For contractors, rural construction involves uncertainties and costs not found in urban contexts. In rural areas, the infrequency of contractor-constructed housing, together with complications of rural development, elevates the relative development costs of higher quality homes (this is a description of the construction, not the underlying land costs), relative to those costs in urban areas. The number of people able to afford such housing is very small, separated by a considerable income and wealth gap from the rest of the rural population. Only at a certain scale of construction (number of housing units built annually) would it be worthwhile to expend money for the start-up or fixed costs associated with construction businesses. *See* Figure 2.

Figure 2 suggests that for rural economies without established contractors, the very limited number who can afford contractor-constructed housing could make it such that the fixed costs would trump all other concerns. Given the substantial break in the demand curve caused by the exaggerated rural income gap,⁵⁸

58. Rural communities often do not have manufacturing jobs or other jobs that pay high wages; furthermore, such rural areas “tend to have lower wage scales across all types of employment.” Bassett, *supra* note 1, at 304. Some readers may take issue with the idea of the income gap being “exaggerated” in rural areas as compared to urban areas. Even if people believe that such a gap in rural areas has not been exaggerated, the effect on the contractor industry would not change. That is because the fact that rural areas are less populated leads to the same effect: not enough people with enough money to afford contractor housing, divided (here to the same degree as in urban areas) by a gulf in income from the rest of the rural population. This critique seems misdirected however, for urban areas are likely to contain greater variation in job type and pay structure, providing for more of a continuous demand curve.

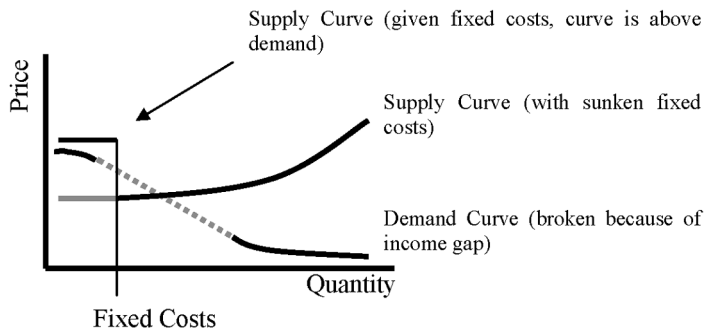


Figure 2. Supply and Demand of Contractor Construction

contractors would not generate sufficient return to justify the fixed start-up costs of such contracting work. What Figure 2 adds to Figure 1 is that, unlike in the urban economy where the existence of contractors can be taken for granted, in rural economies there may not be enough people within the feasibility zone for entrepreneurs to recoup their fixed costs. Therefore the cost curve is above the value curve at all points, even though the cost of added quality remains linear and the value curve convex. See Figure 3.

The consequence is that contractor construction is minimal to non-existent in rural areas. Thus, lower-income members of rural communities do not benefit from trickle-down effects that, according to some conservative commentators, benefit lower-income members of urban communities.

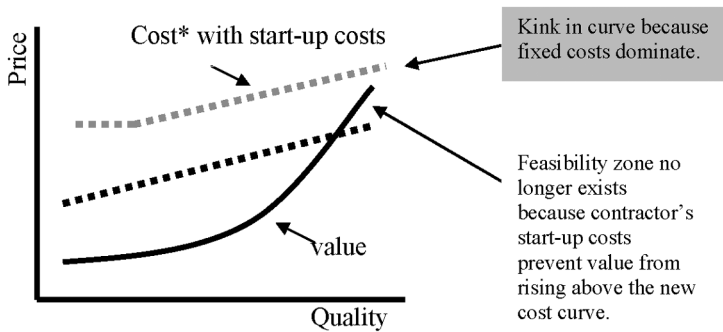


Figure 3. Figure 1 with Fixed Costs taken into account

D. Types of Rural Housing

Lacking the ability to afford contractor housing, and in some areas lacking even the existence of contractors from whom to purchase housing, rural residents often must rely on other housing types when they seek to improve their housing condition. Although in each of the categories there are outliers, the five rural

housing types are, in ascending order of cost: primary self-help, trailers, homeowner-built, limited-contracting construction, and contractor construction.⁵⁹

1. Primary Self-Help

Each of these categories is broad, and primary self-help is no exception, taking in everything from the purchase of a cardboard box for shelter to construction of a permanent structure. At the primary self-help level, construction reflects more a desire to create shelter than to duplicate contractor construction, with the materials being selected and used in a manner not designed to replicate the “American dream” house. Such structures are visibly distinct from more expensive housing in both the materials used and in the frequent lack of “creature comforts” (arguably “needs” such as reliable heating or running water), setting them apart from the housing of the slightly better-off. Except for the most established and better-built structures, primary self-help housing is identifiably the sole option of the poorest members of rural communities.⁶⁰

Of the categories, primary self-help housing is probably most subject to regional differences. In Iowa, primary self-help housing might come in the form of shacks built on land unusable for farming. In Colorado, it might appear as rough-cut logs built into a cabin, or as sheds being converted into housing with add-on covered spaces. On the Navajo Nation, where the per capita income is one-fifth of the national average, it comes in all forms, from the self-cut pole and tin structures to the traditional eight-sided packed mud and wood hogans. Regardless of the location, these structures frequently stand out for their mix of materials: plastic sheets mixed with wood mixed with sheet metal.

The difficulty of capturing the full range of primary self-help housing reflects the very personal as well as somewhat haphazard nature of such housing for people living on extremely low-incomes relative to the rest of the United States. Often built in stages, as money becomes available or as needs arise, with related half-finished projects, this form of housing can seem visually disorganized. Needless to say, such housing makes no effort to meet code. That makes perfect sense: five dollars spent on heavy plastic to keep out rain or the cold likely has a higher value to the occupant than five dollars spent on a floor molding in contractor-constructed houses.

59. The nature of the types differs from rural community to rural community; in one area pull-in trailers might dominate, while in another small modular homes might be more common. However, the essential characteristics of each category are fairly constant.

60. In urban settings, the homeless would form the bottom socio-economic rung; however, in rural areas where homelessness is rare, primary self-help is the bottom rung. Rural land is inexpensive—additionally squatting is possible in some rural areas—allowing all but the most poor to construct some sort of structure or to double up with others.

2. Trailers and Manufactured Housing

The trailer and manufactured housing category includes everything from half-length single-wides to double-wide modulars with add-on decks and front rooms, as well as permanently stationed RVs.⁶¹ Any understanding of homeownership in the United States must include an account of the expanding role of manufactured housing in providing shelter for a growing percentage of households, particularly in rural areas. In nonmetropolitan areas, manufactured housing “has become the fastest growing segment of the housing stock . . . accounting for 38 percent of homes built in the last five years, according to the 2001 American Housing Survey.”⁶² From 1990 to 2000 the number of such rural homes increased by 25%.⁶³ But these numbers only tell part of the story.

Manufactured housing today is dramatically different from earlier, pre-1976, mobile homes that were not subject to the HUD standards for new manufactured homes.⁶⁴ While local regulators continue to “discriminate against mobile homes as compared to conventionally built structures or manufactured buildings,” they do so in spite of the fact that HUD regulation has led to significant quality improvements for manufactured housing.⁶⁵ These quality improvements translate into better insulated, sturdier, more anchored structures with more livable years per unit.

For many, particularly the rural poor, mobile homes are one of the few affordable housing options. “[T]he total development costs of manufactured units are typically 20 to 30 percent lower than those of site-built houses, depending on local costs.”⁶⁶ When Alan Greenspan was asked in a Senate hearing what could be done from an economic perspective “to address the issue of affordable housing,” his response was, “as technology improves, [so does] the ability to significantly increase modular and manufactured housing in one form or another . . . [helping especially those] in the moderate- to lower-income groups.”⁶⁷ He went on to credit the manufactured home industry with being a “significant factor in getting available homes at all [income] levels.”⁶⁸

61. See generally, e.g., Michael Collins, *Rural America's Housing of Choice? Exploring Manufactured Housing's Growth Role*, RURAL VOICES, Summer 2003, at 1, 1-2, available at <http://www.ruralhome.org/manager/uploads/VoicesSummer2003.pdf>; Manufactured Housing Institute, www.manufacturedhousing.org/home.html (last accessed Apr. 25, 2006).

62. Collins, *supra* note 61, at 2.

63. *Id.*

64. Kelly, *supra* note 4, at 354-55. See also Listokin & Hattis, *supra* note 7, at 28-29.

65. Sanford A. Minkoff & Melanie N. Marsh, *Environmental and Land Use Law: State and Federal Preemption in the Mobile Home Arena: What can Local Governments Truly Regulate?*, 77 FLA. B.J. 42, 42 (2003).

66. Collins, *supra* note 61, at 4.

67. *Federal Reserve's Second Monetary Policy Report for 2001: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 107th Cong. 23 (2001) (statement of Alan Greenspan, Chairman, Federal Reserve Board).

68. *Id.*

Yet, the trailer/manufactured housing category being discussed in this exploration of rural housing does not include all manufactured housing products. The high-end variety pre-fabricated housing (massive log cabins, luxury apartments and homes), while available for purchase, are not affordable to most rural households being discussed in this Article.⁶⁹ Therefore, while the category does include split modulars,⁷⁰ a few of which arguably are made of the same structural materials and have equal workmanship as contractor-constructed units, the category generally is made up of trailers of lesser quality.⁷¹ In such housing (including many of the units built after HUD regulation), the doors, whether made of cardboard or of thin metal, tend to be easily broken; the walls are more thinly insulated; the roofs can be so lightly connected to the walls that old tires are needed to weigh them down in the event of a storm.⁷²

Trailers are by their very nature transportable; however, they do differ in the degree to which they are fixed to the ground. Many single-wides have wheels directly fixed to them, hidden only if the owner chooses to stretch metal or wood fencing around the bottom of the trailer. Others are brought to the future homesite on top of flatbeds and fixed to an established foundation. The differences extend to the permanency of the trailer's rooting in the specific home-site, from the foundation to the connection to a developed septic system. Double-wides in some rural areas serve as markers of wealth. Trailer homesites can have both the trailer and self-help housing associated with it through add-ons to the trailer, but the trailer forms the central residence.

3. Homeowner-Built (Secondary Self-Help)

In secondary self-help housing, the structure is in most respects intended to replicate contractor construction, although done through the homeowner's own sweat equity. The homeowner-built home requires a great deal of effort on the part of the homeowner, as well as access to capital greater than is the case with primarily level self-help housing. The level of sophistication in the construction and plans does depend in part on the knowledge the homeowner comes with or has access to through friends.

Homeowner-built homes are constructed in as rapid a manner as the owners can manage, either continuously or, as is often done, in several summers with completion of the shell in the first summer and internal elements in following

69. See, e.g., Country Log Cabins, <http://www.countrylogcabins.com>; Michelle Kaufman Designs, Glide House, <http://www.mkd-arc.com/whatwedo/glidehouse/index.cfm>.

70. See, e.g., Chelsea Modular Homes, <http://www.chelseamodular.com/index.htm> (last accessed Apr. 26, 2006).

71. This assertion that the quality is not the same goes against the assertions of the pre-fabricated housing industry and even some scholars who highlight the change in quality following HUD regulation of such housing. See, e.g., Manufactured Housing Institute, *supra* note 60.

72. See, e.g., *Dream Home . . . or Nightmare? Manufactured Housing Has Come a Long Way. But It's Still Buyer Beware in the Market for Mobile Homes*, CONSUMER REP., Feb. 1998, at 307.

seasons. Of course, homeowner construction on finishing projects can stretch out into many years, well after the home is habitable. The range of homeowner-built homes can include fancy homes whose quality the owner felt could not be duplicated by work done by a contractor. However, in rural areas, homeowner-built homes are more frequently constructed as a way of leveraging personal effort in order to lower the cost of owning a home. The building materials surpass those of trailers and the planning far exceeds that of primary self-help housing. Building codes might be consulted, but they do not necessarily dictate the manner of construction or the house plans.

4. Limited-Contracting Construction

Some homeowners cannot do all the work themselves; consequently, they supplement their efforts by hiring short-term labor or specialists. This limited-contracting construction relies on contractors providing assistance at key moments, such as to raise the roof, to install the electrical or plumbing systems, to lay the foundation, or simply on a time basis, such as hiring professional help for ten-day terms of service. The price of such construction usually, but not necessarily (if the professionals, for example, inform the homeowner that a certain material is better or reduces the waste of lumber), is above that of purely homeowner-built housing. The professionals might bring with them a certain level of adherence to building codes, but the home likely does not meet code standards throughout because professional construction work is only a small fraction of the total work.

5. Contractor Construction

Despite the rarity of contractor construction noted in the description of the rural market, some of the better-off members of low-income rural communities do choose to purchase contractor-built homes. Such homes, especially with land costs included, are less expensive than identical houses built closer to major urban areas. That said, such homes are more expensive relative to the other types of rural housing. This is so both because of additional labor costs and because contractors generally at least attempt to follow building codes, creating two categories of additional cost: (1) where codes reflect value to the homeowner, and (2) where the code raises costs while not adding to the value of the constructed home.

As these five categories make clear, rural housing is not defined by the contractor model construction that dominates the urban environment and scholarly debates on housing development.⁷³

73. In a few rural markets there might be a sixth category of commercial rental development, but it is not a typical part of the rural housing mix.

II. MODELING HOUSING VALUE AND CODE ENFORCEMENT IN RURAL AREAS

A. *Thinking about “Value”*

In order to analyze the effect of code enforcement or deliberate non-enforcement on low-income rural communities, we need an understanding of the “value” of dollars spent on housing—that is, the return on spending in terms of improved housing conditions. Describing as amorphous an idea as “value” is difficult not only because any definition can be contested but also because the nature of value necessarily alters according to income; the incremental increase in value attached to the 100,001st dollar of income is different from the incremental increase in value resulting from the 40,001st dollar. By looking at several different ways value can be assessed, the importance of the definition of “value” to selecting the appropriate building code for each rural area becomes clear.

Law and economics literature normally assumes a single definition of “value.” The field’s primary text, Posner’s *Economic Analysis of Law*, links together “efficiency or value maximization” as descriptions of the same thing.⁷⁴ *The New Palgrave Dictionary of Economics and the Law* is no exception. The “Value Maximization” entry begins by acknowledging that the “basic problem with the idea of value maximization is to specify what ‘value’ means in an unambiguous way.”⁷⁵ Despite noting the unclear “ethical basis” for using total wealth maximization as the metrics by which to consider “value,”⁷⁶ the entry—by developing only the neoclassical version of “value”—fails to explore the many different ways “value” can be considered. For while “[e]conomists normally take efficiency (often called Pareto optimality) as the basic criterion for economic performance,”⁷⁷ policy decisions related to building code enforcement implicate more than a singular idea of value. Arthur Allen Leff, for example, highlights Posner’s claim that “[v]alue too is defined by willingness to pay,” and goes on to explain: “In such a system whatever is, is. If you do not ‘buy’ something, you are *unwilling* to do so. There is no place for the word or concept ‘unable.’”⁷⁸

Louis Kaplow and Steven Shavell, however, describe the need to diverge from typical law and economics analysis where, for example, distribution concerns are more central:

74. POSNER, *supra* note 32, at 15.

75. John Roberts, *Value Maximization*, in 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 655, 655 (Peter Newman ed., Stockton Press 1998).

76. *Id.*

77. *Id.*

78. Arthur Alan Leff, *Economic Analysis of Law: Some Realism about Nominalism*, 60 VA. L. REV. 451 (1974), *reprinted in* FOUNDATIONS OF THE ECONOMIC APPROACH TO LAW 353, 362 (Avery Wiener Katz ed., 1998).

It therefore appears that there are sound reasons for much normative economic analysis of law not to take explicit account of the distribution of income. As we have stressed, these reasons derive from judgments about the best ways to organize analysis and to accomplish distributive objectives, not from a belief that distributive concerns lack normative importance. If these reasons are inapplicable in a particular setting, a proper welfare economic analysis will take distributional concerns into account.⁷⁹

Therefore, though standard law and economics asserts that “distribution of money among individuals does not matter for determining value,”⁸⁰ distribution does matter for rural housing “value.”

The *market value* concept is one of the most intuitive. In housing, increases in the price to which a willing buyer and a willing seller will agree may exceed increases in dollars spent. This definition of value will clearly favor certain types of construction, but it too will react, within each housing type and across types, to changes in code enforcement.

Another idea of value, one less considered, is that every dollar spent should be measured against the best possible use of that same dollar in terms of improving housing conditions for the person spending the money. I will call this idea the *maximization* concept. A fundamental assumption of economics is that the purchaser has perfect information, an assumption that would make every dollar spent, by definition, maximal.⁸¹ However, lived experience and the positions of many economists demonstrate the fallibility of such an assumption. Except in the rare case in which a perfect decision is made, each dollar will be spent sub-optimally. This is especially the case as a general matter and can be used as a way of thinking about how choice of building or purchase method relates to the best use of funds available to provide for housing. Within each housing type, optimality will change as more or less money is spent on that type of construction; optimality will also differ across types. Furthermore, the degree of sub-optimality—in other words, the distance from 100% perfect use of funds across types and as more or less is spent on each type—will respond to the legal framework’s position on code enforcement.

A third notion of value might best be described as the *fulfilling needs* concept. Value would be judged according to the dollars spent on housing against the degree to which the dollar spent goes towards satisfying basic human needs.⁸² A

79. Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 995 (2001).

80. Roberts, *supra* note 75, at 656.

81. Posner deals with this assumption of the rational choice model and the related critique, which he labels a “superficial objection,” in much the same way that this Article constructs the assumptions regarding housing type: by stating that what matters is “explaining and predicting tendencies and aggregates rather than the behavior of each individual person.” POSNER, *supra* note 32, at 18. However, the critical point for the purpose of this Article, is that here, even in the aggregate, dollars will not be spent fully rationally.

82. See, e.g., STANLEY BOBER, *ALTERNATIVE PRINCIPLES OF ECONOMICS* 88 (2000).

strict notion of human needs would make the graph with needs on the vertical and spending on the horizontal a sharply falling curve, hitting zero on the needs idea of value quickly and staying there permanently as more money is spent on housing.⁸³ Yet, by loosening the notion of need and divorcing value from a numerical scale, the fulfilling needs concept can also be used to understand the code enforcement debate.

Perhaps the most intuitive idea of value is related to the concept of *what you get for what you pay*, or for short, the *return* concept. The return concept amounts to the idea that some spending gives you more than what you pay for and some spending does not. While finding an academic description of this idea of value is challenging, the intuitive nature of the return concept might most accurately capture what ordinary consumers think of as “value.”

The final two categories of value—*intrinsic social value* and *extrinsic social value*—describe the value to the surrounding community of each dollar spent by the individual constructing or purchasing housing.⁸⁴ The value categories discussed above consider the value to the individual, without regard to the effect of the expenditure choices upon neighbors. Yet almost every seemingly individual decision—and housing is no different—creates or diminishes value for the community. Economists normally describe this in terms of positive or negative *externalities*,⁸⁵ yet the impetus for and form of many building codes can be traced to the desire to provide value to the community by directing the form private housing spending takes. Because they relate to value of a sort that goes beyond individual choices about housing type, they will not be discussed further but should be kept in mind.

Intrinsic social value describes the health and safety benefits or costs to neighbors and the relevant community of a dollar spent on housing by the individual member of that community. This value concept is the community version of the individual “fulfilling needs” value concept. For example, to the degree to which housing purchases help prevent an individual house fire from spreading to neighboring houses, the purchase is creating intrinsic social value. This category includes all value related to actual health and safety, but does not include merely perceived health and safety values, nor does it include subjective—even if universally shared—benefits.

83. This can be contrasted with the maximization concept because even after all needs are satisfied, spending can still improve housing conditions.

84. I am using this pair of terms to mean something distinct from their use in behavioral psychology. See, e.g., John F. Stolte, *The Value of Socially Extrinsic vs. Intrinsic Outcomes: An Exploration of Americans for 1974 to 1994*, SOCIAL BEHAVIOR AND PERSONALITY (2000), available at http://www.findarticles.com/p/articles/mi_qa3852/is_200001/ai_n890146 (defining socially extrinsic value as value that can be easily detached from the other people and socially intrinsic value as inseparable from the people (e.g., family members or friends) who are its source). In economics, motivations described as intrinsic and extrinsic also refer to noncalculative, “for its own sake” motivations and external reward or punishment motivations, respectively. See, e.g., AVNER BEN-NER & LOUIS PUTTERMAN, EDS., ECONOMICS, VALUES, AND ORGANIZATION 441 (2000).

85. See, e.g., STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 77 (2004).

Community costs and benefits beyond health and safety benefits, such as curb appeal or neighborhood effects on land and housing resale value, are covered by the *extrinsic social value* category. Dollars spent by individuals on their housing do not necessarily affect community members directly, though they can. To illustrate: if an individual chooses to pay an extra dollar for light white instead of crisp white mini-blinds, it is hard to argue that there is any effect on the extrinsic social value. On the other hand, the choice to spend money to repaint a picket fence when the paint fades, or to wait until paint starts chipping off, has extrinsic social value implications. Furthermore, extrinsic social value lies behind “Not-In-My-Backyard” (NIMBY), resentment about the family whose junked cars are in their yard and collective utility from living in an area of beautiful houses (but not any resulting health and safety concerns or benefits).

Though I will discuss each of the first three concepts of value in the context of code enforcement decisions, as an initial matter it is important to note that within each type of housing, the value will change depending on whether the spending is at the front or back end of spending on that type. A simple example is the difference between the purchase of a \$20 piece of metal to rest against a tree to serve as shelter from rain by someone who has nothing else and the purchase by another primary self-help homeowner of a mat to clean off dirt outside their house for \$20. Individual examples are misleading, however, because policymakers ought to be concerned with aggregate differences in value and not with the individual judgments of value. In the aggregate, the relationship between spending and value across types should influence policymakers when they contemplate changes in code enforcement because the relationship will respond to such changes.

B. Code Enforcement: Values and Trade-Offs

In rural contexts, the traditional urban focus on the rental market’s warranty of habitability gives way to the importance of construction types as outlined in Section II.D *supra*. Because urban housing is almost entirely contractor-constructed, the code impact on housing *type* is minimal. For rural communities, the choice between building code enforcement and non-enforcement is a choice between housing quality and number of houses built, played out in terms of the type of housing developed. But the warranty of habitability literature provides a good window upon trade-offs between conditions and increased housing production that are equally acute in the rural context.⁸⁶

86. The costs and benefits of hard-line building condition rules versus the costs and benefits of a more libertarian approach are found in other areas of housing literature. However, the warranty literature continues to be a good way of exploring these issues, for in other contexts the basic contours of the warranty debate are replicated. *See, e.g.,* Turner, *supra* note 8, at 66-67 (“The academic debate over establishment and enforcement of residential building standards can be generally categorized in two camps. One favors objectivity through definitive mandates and systematic enforcement, a more rigid

Judge Skelly Wright brought the warranty of habitability to the urban rental market with the *Javins* decision,⁸⁷ which supported code enforcement through tenant policing (as affirmative claims or as a defense to eviction). In contrast, in rural settings whatever code enforcement does take place typically occurs in building inspections *during construction*. Michael Turner—writing in part about “the nature of residential construction requirements, and the impact of such controls on housing in an area [of California] facing demands for both greater capacity and high quality”⁸⁸—highlights the limitations of building inspection-based enforcement:

As with any law enforcement agency, building departments operate to fulfill their role as best they can under the reality of limited budgets, inadequate staffing, and influence exercised by powerful economic interests. They do not benefit from the development of real property; those they attempt to monitor and regulate do. Nevertheless, and although it may constitute an unhappy cold-shower wake-up call, the present system intended to achieve compliance with minimum building code requirements has not and does not function adequately to achieve its stated purpose.⁸⁹

There is reason to suspect that the “limited resources and capacities of the building departments which administer the codes” are only going to be more marked in rural areas with less of a tax base and not going through the changes described by Turner.⁹⁰ The division between stated purpose and actual function is partly the difference between formal law and actual practice (police rarely pull someone over for going only four miles per hour above the speed limit). Thus, “the inspection process is typically viewed by inspectors and by homebuilders as a form of shared problem solving,” rather than strict enforcement of set norms.⁹¹

There is the possibility that enforcement will be in the form of owner suits

system emphasizing use of the force of law for deterrence in obtaining regulatory objectives. The other favors subjectivity through policies of co-production and facilitation, a paradigm of relaxed central control where local agencies determine and enforce regulatory objectives with participation by the regulated.”).

87. In explaining the *Javins* decision, Wright would later write, “I offer no apology for not following more closely the legal precedents which had cooperated in creating the conditions that I found unjust.” Letter from Skelley Wright, Circuit Justice, D.C. Cir., to Edward J. Rabin, Professor, Sch. of Law, Univ. of Cal. (Oct. 14, 1982), in Edward J. Rabin, *The Revolution of Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 519, 549 (1984); see also WERNER Z. HIRSCH, *LAW AND ECONOMICS: AN INTRODUCTORY ANALYSIS* 65 (2d ed., Academic Press, Inc. 1988).

88. Turner, *supra* note 8, at 4.

89. *Id.* at 91-92.

90. John A. Gardiner & Theodore R. Lyman, *Decisions for Sale: Corruption and Reform in Land-Use and Building Regulation*, 20-22 (1978), reprinted in ROBERT C. ELLICKSON & VICKI L. BEEN, *LAND USE CONTROLS: CASES AND MATERIALS* 528 (2d ed., Aspen Publishers 2000).

91. Peter J. May, *Compliance Motivations: Affirmative and Negative Bases*, 38 LAW & SOC’Y REV. 41, 63 (2004).

against contractors or architects.⁹² However, given the minimal role of contractor housing, discussed in Part I.C., *supra*, in rural areas where households likely participate directly in meeting their housing needs, such enforcement will play a minor role. Turner concludes that “[p]revention and abatement should be the focus” of code enforcement;⁹³ however, his policy advice depends upon a particular development pattern. In Turner’s Article, “for all practical purposes the ‘owners’ making the decisions of the level of ‘reliability and risk’ are not the inhabitants of the structures, but are instead large corporate enterprises in a mature consolidated industry.”⁹⁴ However, in most rural areas, a large corporate housing industry does not exist. Therefore, while Turner’s analysis helps make code enforcement understandable, his conclusion favoring strict initial code enforcement and prevention does not carry over to the rural housing types and construction practices.

That rural code enforcement differs from that found in Boston or Chicago, that building codes are not currently fully enforced in many rural areas, does not mean that code enforcement has no rural construction impact, however.⁹⁵ Many community members are aware of their existence, and building codes, even when not enforced, influence choice of housing type or the value within the type for a given amount of housing spending. Inspections, while not able to enforce complete code adherence, presumably can deter flagrant code violations.⁹⁶ Furthermore, for those with the wherewithal who wish “not to tarnish their reputation[s],”⁹⁷ the fear of looking bad before the inspectors (even if there is no regulatory penalty) can provide motivation to follow as closely as possible the building code. The expectation that more frequent inspections should lead to increased compliance can be true even when inspections are not coupled with penalties for non-compliance. A “shared commitment” to the values underlying the regulation can foster affirmative motivations for compliance,⁹⁸ especially when the inspections help convey the reasons behind the regulations and simplify

92. Turner, *supra* note 8, at 12.

93. *Id.* at 88.

94. *Id.* at 55.

95. Regulations, even if we choose not to comply with them precisely, can direct our actions (if the speed limit is 55 miles per hour, one might go 59 miles per hour; if it is 65 miles per hour, that same person might go 69 miles per hour):

Regulations are legal means of specifying actions that are required to protect public welfare. Compliance with regulations is far from automatic for a variety of reasons . . . regulatees may not know about regulatory requirements, may not agree with them, may not be capable of complying with them, may find it too costly to comply, or simply may not care. The challenge for regulatory authorities is to craft regulatory approaches that address these obstacles.

May, *supra* note 91, at 43.

May’s “expectation,” supported by common sense, “is that more frequent inspections, more thorough inspections, and more frequent sanctions contribute to stronger negative motivations.” *Id.* at 45.

96. *Id.* at 63.

97. *Id.* at 48.

98. *Id.* at 42.

for individuals the steps needed for compliance.⁹⁹

The split between regulation and enforcement creates uncertainty that can influence construction choices as well. Duncan Kennedy writes, “We can distinguish between regimes on paper and regimes as enforced or not enforced on the ground. *A regime as enforced has effects on the market.* These effects may be intended or unintended, and they may be desired or undesired.”¹⁰⁰ However, what is missing from Kennedy’s analysis is the recognition that even regimes which are not enforced can have effects on a market. For the poorest person whose only option is rudimentary primary self-help, such uncertainty plays almost no role because such a person has no other option. However, imagine a person who has the choice between spending a relatively high amount on primary self-help construction and a low-end trailer. Such a person (or the person debating between homeowner-built and contractor-built) might opt for the trailer (or the contractor-built house) simply because of his or her uncertainty regarding the code.

But motivation to comply, whether positive or negative, cannot ensure compliance when individuals are not able to act upon their motivations because they lack resources.¹⁰¹ With only the wealthiest rural community members able fully to comply, even with full motivation, rural individuals will fail to comply; therefore, motivation might influence choices but it cannot direct all housing decisions. The central question is whether policymakers should take into account the lived experience of the rural poor in a pragmatic way when considering building codes. If building codes truly do reflect a minimum set of standards that all people need, than permitting deviation legally could lead to societal acceptance of the poor living below these minimum standards. As Jane E. Larson describes what is at stake: “Perhaps the tolerance of exploitation and inequality intrinsic to informality presents the more grave problem for legal scholars. Do regularization policies, premised on legitimating informal housing, give the law’s imprimatur to that inequality?”

Perhaps the best way to approach this question is to consider the debate between Larson and Richard Delgado on housing standards in the *colonias* of unincorporated parts of rural Texas.¹⁰² Though the *colonias* literature constructs the question in large part as a racial one, at the risk of committing “the sin of

99. *Id.* at 46-47. May suggests that increased facilitation during inspections fosters greater cooperation and positive motivation, while formalists can create an antagonistic atmosphere and undermine confidence in the system.

100. Duncan Kennedy, *Legal Economics of U.S. Low Income Housing Markets in Light of “Informality” Analysis*, 4 J.L. Soc’y 71, 77 (2002) (emphasis added).

101. While they are “not central” to May’s research, he acknowledges that “[p]erhaps the most basic set of considerations influencing compliance motivations are the factors that enhance or detract from the ability of regulatees to comply.” May, *supra* note 91, at 48.

102. Larson, *supra* note 31; Richard Delgado, *Rodrigo’s Twelfth Chronicle: The Problem of the Shanty*, 85 GEO. L.J. 667 (1997).

treating the poor in lump fashion,”¹⁰³ I believe that many of the concerns about pragmatism’s relation to legitimacy are present in many lower-income rural communities.

Larson describes the *colonia* building standards in language that highlights the lack of code enforcement:

Homes in these subdivisions are a collection of concrete-block bungalows, trailers, shacks, and an occasional conventional frame house. Construction usually is substandard, violating even the minimum habitability standards imposed elsewhere by building and housing codes. Decrepit trailers, shacks made of wood slats, tin, or cardboard nailed onto scavenged pallets, and condemned homes moved from the city are common sights.¹⁰⁴

Larson describes this lack of code enforcement as “a regulatory vacuum” free from meaningful building controls.¹⁰⁵ “This lack of regulation has been both the virtue and the vice of *colonia* housing,” according to Larson; “average housing conditions fall below minimum standards of human habitability that apply in other communities, endangering the health and safety of both *colonia* residents and those of the surrounding communities.”¹⁰⁶ But, Larson also observes, “the bottom rung of the housing ladder in the El Paso area has been low enough to make home ownership affordable to even the poorest families, an unusual opportunity in the U.S. housing market.”¹⁰⁷

Delgado’s riposte takes the form of a fictional dialogue:

“More than that,” Rodrigo responded. “Mild remedies like Larson’s make matters worse. They virtually invite the rest of us to conclude that the dirt, poverty, hunger, and despair in the *colonias* are normal and ordinary. There are no *colonias* in Beverly Hills, no open sewers in Marin County. We make sure that land-use and health regulations are strictly enforced. We wouldn’t consider arguments like Larson’s about the price of regulation or the trade-off between cost and code enforcement in those fancy communities.”

“So in the end it comes back to who lives there—to race,” I said. “That’s your gap, Rodrigo, right?”

“Precisely. And norm theory predicts that liberals like Larson will reach for halfway measures in such a situation.”

“Perhaps with the consideration that society will stand for nothing more,” Giannina suggested.

“Yet it supplies a powerful argument against doing anything that reinforces

103. Delgado, *supra* note 102, at 685.

104. Jane E. Larson, *Free Markets Deep in the Heart of Texas*, 84 GEO. L.J. 179, 191 (1995). The housing types Larson identifies parallel the types identified in this Article, with a slightly greater emphasis on primary self-help construction.

105. *Id.* at 185.

106. *Id.*

107. *Id.*

someone's wretchedness, and our general sense that they deserve nothing better," Rodrigo added.

"Which Larson's fatalistic approach does," I seconded. "It symbolically tells the rest of the world, including Texas legislators, that the *colonistas* are second-class citizens who ought to be satisfied with a little electrical wiring and a running tap or two per block. Even though one's intentions are entirely laudable, as Larson's clearly are, this approach deepens the dilemma of those whom one is trying to help."¹⁰⁸

The debate between Larson and Delgado could be framed as one regarding whether those working on behalf of the poor should be pragmatic or dogmatic when it comes to a human right to decent housing.¹⁰⁹ A large number of treaties and UN conventions contain provisions reflecting international consensus that there is a human right to adequate housing.¹¹⁰ Yet, as a United Nations Development Programme Report states, "[t]hrough widely recognized throughout international human rights law, few universal rights are enjoyed less universally than housing rights."¹¹¹ Indeed, "the United States is one of the key opponents to the promotion and protection of the right to adequate housing at the international and regional levels."¹¹² While the U.S. government does have a stated goal of

108. Delgado, *supra* note 102, at 674-75. Though clearly differing in their approaches, both Larson and Delgado seek improved conditions for the *colonias* residents. Delgado, through his fictional Rodrigo, advocates the government assuming its "proper role" in "redressing historical wrongs" and private individuals devoting "themselves to a program of outright resistance" to the causes of poor conditions in the *colonias*. *Id.* at 682-83. Larson argues: "A domestic program for regulating housing quality and development built around the progressive realization of standards would better balance the regulatory burden on diverse populations, the public interest in adequate housing, and an aspirational commitment to elevating living standards in pursuit of social equality." Larson, *supra* note 31, at 180.

109. Delgado's Rodrigo argues against lowering standards by stating:

Here—Larson says there is a—here it is—'direct tradeoff between higher standards and affordability for lower-income households.' I'm sure she didn't intend this, but her theory is explicitly predicated on a legal acceptance of otherness, difference, and perhaps inferiority. She justifies this pragmatically, but can it ever be justified as a matter of social principle?

Delgado, *supra* note 102, at 688.

110. This human right to housing, together with the assumption, which Delgado seems to accept throughout his article, that building standards reflect the minimum quality level that must exist for housing to be considered adequate, is implicitly central to the fictional Giannina's perspective. She suggests that there can be "[n]o tradeoffs or exceptions [and implicitly no lessening of building code standards], in other words . . . of the kind Larson is willing to tolerate as a matter of pragmatic realism." *Id.* at 680.

For a list of the international treaties and conventions related to housing rights, see Scott Leckie, UNDP Human Development Report 2000: Housing Rights, Annex 1, Nov. 20, 1999, *available at* http://hdr.undp.org/docs/publications/background_papers/leckie.pdf; *see also* the People's Movement for Human Rights Education section on Housing, *available at* <http://www.pdhre.org/rights/housing.html> (last visited Apr. 30, 2005). Discussion of the human right to housing and its relation to U.S. policy is contained in Janet Ellen Stearns, *Symposium: Voluntary Bonds: The Impact of Habitat II on U.S. Housing Policy*, 16 ST. LOUIS U. PUB. L. REV. 419 (1997).

111. UNDP Human Development Report 2000: Housing Rights, *supra* note 110, at 2.

112. Centre on Housing Rights and Evictions: National Jurisprudence, <http://www.cohre.org/iframe.htm> (last visited Apr. 30, 2005).

providing “a decent home” to every American family,¹¹³ the “housing shortage facing the country today is nearly as severe as the one” that led the initial stated push half a century ago to provide a decent home to all families.¹¹⁴ Given that, according to the Millennial Housing Commission, almost twenty-eight million U.S. households have housing affordability problems,¹¹⁵ Rodrigo’s shift from a pragmatic to social principle-based argument makes sense.

The problem with Rodrigo’s argument¹¹⁶ is that it proves too much. Advocating policies which bring *colonias* up to general standards rather than adjusting those standards to reflect the true conditions would work *if* there were a true commitment (demonstrated through action) by Americans to ensure adequate housing for all families. However, in the words of a *colonias* resident interviewed by Larson, “You cannot impose housing quality standards on people without giving them the resources to meet them.”¹¹⁷ To insist upon a high moral principle to the exclusion of all intermediate policies—for example, to urge partial welfare payments be halted because they do not amount to adoption of John Rawls’ “maximin” rule¹¹⁸—would prohibit most government policies on the grounds of social principle. Though rural construction concerns do not perfectly parallel those raised in Larson and Delgado’s articles, as in the *colonias* context, those concerned with improving the lives of the poor need to remain aware of how the affected communities experience high-minded requirements (such as the health and safety standards contained in building codes).

If society will not provide adequate, affordable housing for all Americans,¹¹⁹ for housing code policymakers the basic options are to enforce, to elect not to enforce (which is, more or less, the current system), or to guarantee that the code will not be enforced.¹²⁰ Changes to the present system could be graduated by

113. See, e.g., Dan Nnamdi Mbulu, *Affordable Housing: How Effective Are Existing Federal Laws in Addressing the Housing Needs of Lower Income Families?*, 8 AM. U.J. GENDER SOC. POL’Y & L. 387, 390-92 (2000) (citing Pub. L. No. 81-171, 63 Stat. 413 (codified at 42 U.S.C. § 1425(b) (1940) (repealed 1990) and 42 U.S.C. § 12701 (1990)).

114. Editorial, *Facing Up to the Housing Crisis*, N.Y. TIMES, July 5, 2002, at A18.

115. BIPARTISAN MILLENNIAL HOUSING COMM’N, 107TH CONG., MEETING OUR NATION’S HOUSING CHALLENGES (2002).

116. At least implicitly, Rodrigo’s argument is also partly Delgado’s.

117. Larson, *supra* note 31, at 175 (quoting Interview with David Arizmendi, Proyecto Azteca, in San Juan, Tex. (Aug. 4, 2000)).

118. In his influential work, Rawls argues that, if hidden behind a “veil of ignorance” about one’s eventual position in society, one would choose in advance a high minimum standard of treatment for all. See generally JOHN RAWLS, A THEORY OF JUSTICE (1971).

119. Accepting that Americans are not yet going to decide to adequately house all families does not mean accepting that decent housing is not a worthy goal to pursue. In my view, the owners of inadequate housing are not the ones shamed by such housing; those with ample means who observe and do nothing are the ones truly shamed, to the degree they believe in a human right to decent housing.

120. Cass R. Sunstein and Edna Ullmann-Margalit undertake an insightful analysis of all the possible decisions, labeled second-order decisions, regarding “the appropriate strategy for reducing the problems associated with making a first-order decision.” Cass R. Sunstein & Edna Ullmann-Margalit, *Second Order Decisions*, in BEHAVIORAL LAW AND ECONOMICS 187, 187-208 (Cass R. Sunstein ed., 2000). This Article will focus on the first strategy, Rules, identified in Sunstein and Ullmann-Margalit’s article,

degree or timing or a combination. Partial changes would dampen the impact of any selection by the policymakers, but any change would likely have an effect on individual housing decisions.¹²¹ That said, the value of housing types relative to money spent would still change in response to graduated code enforcement policy changes, though to a lesser degree than if the change were more absolute. Absolute enforcement or non-enforcement will be the starting assumption in the following discussion.¹²²

C. Modeling the Effects of Code Status and Code Changes

1. Assumptions

In order to explore the relationship between building codes and the types of construction, it is important to first make certain assumptions explicit:

1. Housing types do not overlap:¹²³ the relationship between housing types is continuous. Progressing along a housing value curve, the housing types change based on divisible periods along the same curve.
2. Financial ordering: the relationship between housing types is financially linear such that as funding for housing changes, the housing types correspond with a predictable progression of types.
3. Fixed progression of housing types: the types of housing come in the financial order: primary self-help → trailers → homeowner-built → limited-contracting construction → contractor construction.
4. General trends matter, outliers do not in considering housing types.
5. Building codes add both expense and quality to construction.
6. “Value” and Housing Funding can be plotted in non-numerically defined space so that the relationship can be expressed even if the horizontal and vertical scale needs to shift to fit each rural market.

though the other strategies—Presumptions, Standards, Routines, Small Steps, Picking, Delegation, and Heuristics—doubtlessly influence the first’s implementation and any graduated set of rules. *Id.* at 188-90.

121. As Richard Posner writes, “The concept of man as a rational maximizer of his self-interest implies that people respond to incentives—that if a person’s surroundings change in such a way that he could increase his satisfactions by altering his behavior, [such as the development of definitive building code enforcement decisions, for example,] he will do so.” POSNER, *supra* note 32, at 4.

122. Richard Delgado’s fictional Rodrigo criticizes just such a dichotomous understanding of enforcement or non-enforcement in the *colonias* context that “sees only two options: regulation . . . or no—or very little—regulation.” Delgado, *supra* note 102, at 672.

123. Of course, this is not really true, but a reasonable simplification for modeling purposes. They do overlap for some people, and where they do people must make choices. For some who fall squarely into one of the types, the choice is never even evident; for others, the choice between, say, a trailer and a time-consuming but better-quality homeowner-built house can be a real struggle, and one that will respond to code enforcement decisions as well.

The most important assumption is not included on the above list because it is three things at once: assumption, limitation and conclusion. The assumption is that the value curves actually reflect reality; the limitation is that no empirical study has yet been done to determine the true shape of the curve.¹²⁴ The conclusion is that the shape of the actual curves matters little relative to the generalization that the primary impact of rural code enforcement is not through the rental warranty of habitability (though that can matter) but through the effect of code enforcement on building methods and consequent value of housing expenditures.

2. Value Curves Generally

The value curves take as a given the present situation of low code enforcement with awareness of possible enforcement and resulting uncertainty on the part of low-income rural residents. The curves that follow are approximations (not empirically-tested but intuitive and experience-based) for each concept of “value” given the current legal framework. Arrows indicate the direction in which I predict the curves would change if a policy of code enforcement or genuine non-enforcement were instituted by the local authorities.

a. Market concept of value

A change to code enforcement would likely only affect the more expensive types of housing construction. Primary self-help structures by their nature are not worth all that much, except to the owner, from the moment the materials are purchased. Like automobiles, trailers suffer an immediate off-the-lot loss of value and, despite the manufactured housing industry’s efforts, normally depreciate over time. The type of housing which might gain the most from code enforcement is the limited contracting construction type because homeowners would more fully recognize their limitations and would contract out parts of construction as a way of insuring against code violations. If the policy decision came out against code enforcement, the reverse would be true in that homeowner-built would gain relatively—both from additional would-be trailer purchasers who now would feel comfortable doing construction and from homeowners no longer feeling compelled to hire contractors.

b. Maximization concept of value

As a concept, maximization or optimality of dollars spent is fairly straightforward, yet thinking about it graphically shows how the concept is dependent upon

124. Rather, the “evidence” is a mix of starting assumptions related to each housing type and the corrections of a professional carpenter.

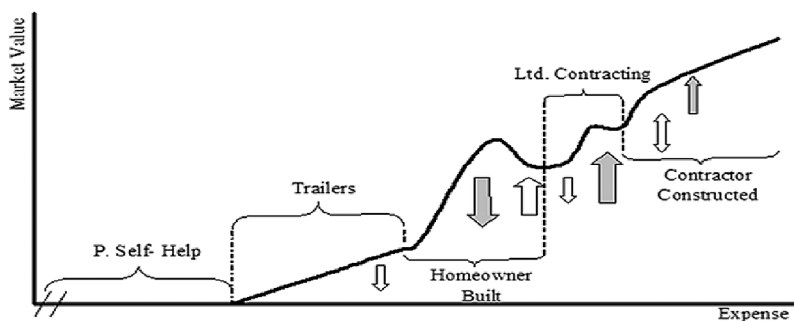


Figure 4A. Market Value of Housing Types by Expense

the category of housing to which money is being directed. The graph reflects percentages of the total optimal use of the dollar spent, given the desired housing level and resources available to spend on housing. Optimality is not being measured against other, non-housing uses of the financial resources, since if one accepts the basic notion of a competitive market, the use of the resources on housing is by definition optimal relative to any other good not purchased. Absolutely optimal purchases do not exist both because no one purchase is entirely perfect, and, more important as a general matter, the nature of each type limits the purchaser's ability to make the optimal decision. The optimality is a measurement which asks how well each dollar's value is being maximized, given the choice to spend on housing.

When the expense is very low—when, say, the individual is building a rudimentary self-help shelter—the optimality will be high. However, the loss in optimality is severe until a slight gain with the transition to trailers, and a much larger one with the homeowner-built type of housing. All the housing types except contractor construction experience a decline caused by the general limits on that housing type that explain the transition into the next type as financial resources increase. Frankly, it is unclear what to do with the end of the contractor construction portion of the curve; either each additional dollar approaches 100% optimality or it approaches 0% optimality. Approaching 100% makes the most sense because as a well-off individual demonstrates a willingness to incur enormous housing expenses, the contractor type housing becomes increasingly the best use of each dollar for such an individual.

Code enforcement—both strict adherence or complete rejection—would change the maximization value for each type of housing, as shown below. Length of arrows help show relative strength of changes. (The large arrow in the primary self-help type of housing reflects the fact that strict code enforcement could wipe out this type of housing, as is largely the case in urban environments. However, the housing type might also involve people whose poverty forces them to ignore code enforcement in order to have shelter of any sort.)

Grey arrows indicate the likely change given code enforcement; white arrows

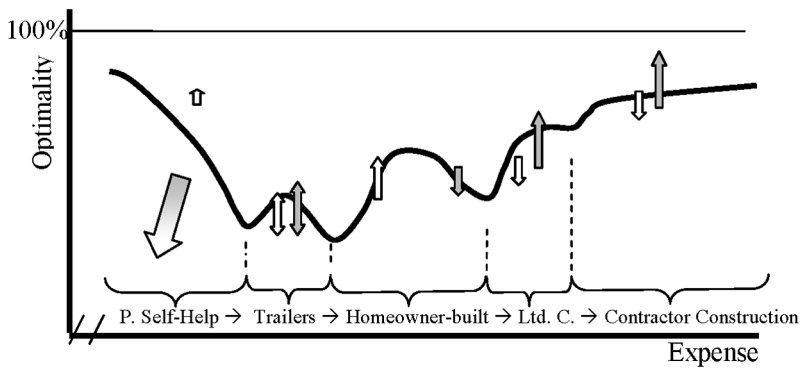


Figure 4B. Maximum Value of Housing Types by Expense

indicate the same given code rejection and associated eradication of uncertainty; and multi-directional arrows indicate uncertainty as to effect.

c. Fulfillment of needs concept of value

When fulfillment of need is the guiding concept of value, the chilling effect that code enforcement could have is even more pronounced than it is in the self-help type of housing when maximization is the value concept. *See* Figure 4c. One quick critique of the diagram of this value is that “need” is defined too narrowly. After all, according to Komesarian critics of the warranty of habitability, urban “need” is being defined by code enforcement. These critics would, rhetorically, claim that even electrical socket covers have been defined as “needs,” and therefore, the concept of need must be broadened. This is a fair criticism, but one which privileges urban ideas of need and does not demonstrate an understanding of the nature of rural poverty.

This concept of value rises slightly whenever buildings are likely to be materially more resistant to the weather or more structurally sound.

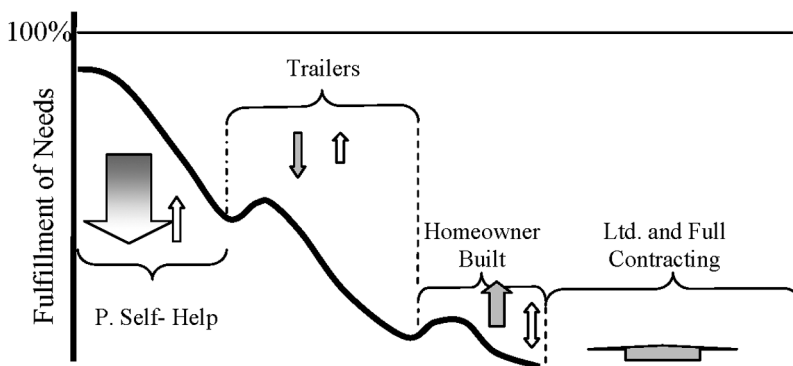


Figure 4c. Fulfillment of Needs Value of Housing Types by Expense

d. Return concept of value

This conception of value rejects both the fulfilling need concept's privileging of the lower expense types of housing and the market value concept's exaggeration of the value of the upper expense types of housing. *See* Figure 4D. Phrased one way, it means that one should get what one pays for—that is, there is the expectation that, if one pays \$1 for an item, that item should be worth approximately \$1, regardless of where in the rural income distribution one falls. The forty-five degree guideline suggests the ideal that all expenses should roughly be equivalent in terms of return on those expenses. The distance above or below that angle reflects the general notion that spending on some types of housing is more valuable than spending on other types of housing; yet, ultimately the housing types aim for the same basic good.

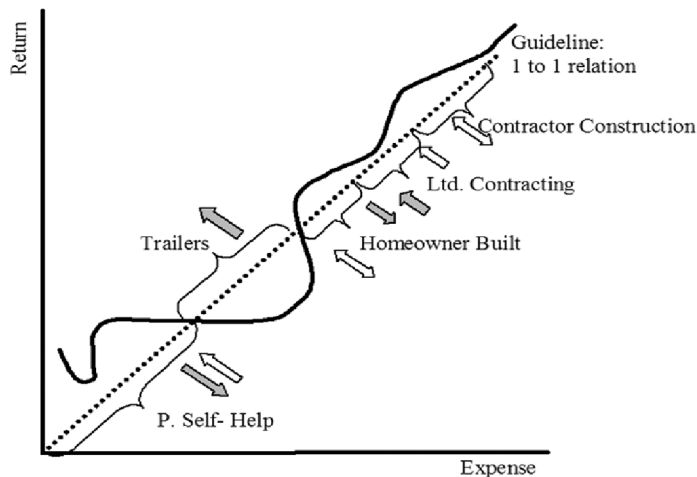


Figure 4D. “Get what you pay for” or Return Value of Housing Types by Expense

The relationship between the return concept and code enforcement is perhaps the most complex of the three ideas of value discussed here because the curve's response depends on one's idea of the code. If the code is a set of regulations that in fact do reflect the best possible materials, construction, and way of doing things, then the code might function as a normalizing mechanism, pushing each type of housing towards the guideline. From this perspective, trailers would be forced to improve their quality and their return on spending,¹²⁵ homeowner-built

125. The lack of return on trailers can be seen in the fact that “mobile homes, unlike conventional housing, depreciate rather than appreciate.” Bailey H. Kuklin, *Housing and Technology: The Mobile Home Experience*, 44 TENN. L. REV. 765, 822 (1997).

or contractor construction might initially raise quality at the low-expense end but would also not improve much beyond code. On the other hand, if code enforcement is a mechanism of bureaucratic control over individual decisions—a stance that perhaps makes more sense in the rural than the urban context, as discussed *supra*—then code enforcement would push the curve left, lowering return.

Undoubtedly it can be both, simultaneously affecting some individuals within each category of housing in a negative way and others in a positive way. When a culvert is required where not needed and when the owners already have an alternative driveway cut, such enforcement lowers return. However, when code enforcement ensures proper connections from a propane tank to a propane fueled refrigerator, code enforcement probably serves its purpose, even where the propane tank owner might object. Below is a prediction of the response a return-based value curve might have to code enforcement.

D. Summary

This modeling of rural housing policy is intended to caution against facile application of urban housing debates to the challenges of low-income rural housing. The academic debate concerning the warranty of habitability's effect on the development of housing in urban environments relies heavily upon the particular status of the market at any particular moment in order to argue for or against code enforcement. In a gentrifying market, the warranty can slow down the conversion of a neighborhood to an upper-class enclave. In a downward-spiraling market, code enforcement can prevent landlords from milking tenants. However, in both cases, there is always at least one degree of separation between the person affected by the code enforcement and the market which might or might not react. In rural communities, code enforcement, while not as firmly rooted in the legal system, has a more direct impact on housing construction or purchase precisely because the group most affected are those people creating their own or purchasing their own housing.¹²⁶ Rural areas have types of housing not found, and often not allowed, in urban areas. These types of housing exist in part only through the non-enforcement of building codes. The challenge for academics coming from the warranty of habitability literature is to step outside of their established mental framework and attempt to enter the mind and wallets of rural community members as they navigate their finances and the range of housing types available to them. The point is not that the exact relationship between the types of housing is precisely as I have modeled it, nor that the Ackerman-

126. The possibility of the warranty having the “negative effect of producing a shrinkage of substandard housing,” is felt not as something that will happen to other people but something felt even when the local government has not yet enforced the code. Shelby D. Green, *The Public Housing Tenancy: Variations on the Common Law that Give Security of Tenure and Control*, 43 *CATH. U.L. REV.* 681, 711 (1994).

Komesar debate will never play an important role for the rural poor. Rather, what matters is the recognition that code enforcement decisions will affect the nature of each type of housing, the prevalence of each type, and the relationship each type has with the other types. Code enforcement alters the choices individual rural community members face, especially at the edges of each type of housing, and the aggregate effects of these choices may be dramatic for the community as a whole.

In the rural context, then, policymakers need to select what value they would like to support and then make decisions about code enforcement based on the relationship between enforcement and the concept of value they favor. No single solution or value is appropriate for every rural community, for though many areas share the similar trait of having stagnant to very gentle economic and housing growth, their starting points are very different. For example, I have different personal beliefs about each of the rural areas I have lived: I believe the fulfilling needs concept to be most appropriate for the Navajo Nation, the return concept seems right for Iowa, and the market value approach for parts of rural Colorado. Let us turn now to two case studies to see the dialogue that occurs between housing types in different code enforcement contexts.

III. NAVAJO NATION CASE STUDY

A. *An Introduction to Tribal Housing*

The grossly inadequate supply of reservation housing and the consequent emphasis on construction—usually federally funded—of new housing units necessarily informs consideration of building codes on reservations. Many tribes do not have codified, legally enforceable building codes.¹²⁷ But, through informal usage, codes do influence reservation development.¹²⁸ Understanding the role and place of reservation building code enforcement requires an introductory outline of the housing situation confronting Native Americans.¹²⁹

Every tribe is unique and the condition and quantity of housing differs both

127. Cf., e.g., Pamela G. Dempsey, *Navajo Nation Begins Undergoing Necessary Home Improvement: Sub-Standard NHA Houses Receiving Needed Repairs*, THE INDEPENDENT (Gallup, N.M.), January 21, 2005.

128. See *id.*

129. Terms and labels can be highly controversial, and I am hopeful that readers will understand that every term is meant to be largely descriptive. “Tribal lands” are predominantly made up of reservation trust land, but can include land near or within reservations even though held in fee simple. “Reservation” refers to tribal trust land and will be used throughout this Article even though in relation to individual tribes my preference is to acknowledge the sovereign nature of the tribes and their land. Therefore, as an example, I prefer to refer to the Navajo Indian Reservation as the Navajo Nation. I use the term “Native,” to refer to the Native peoples generally, despite the fact that doing so unduly diminishes the distinct nature of different tribes. I use “non-Native” not as a pejorative but as a descriptive label. I use “Navajo” because it is more familiar to many people, though if I were on the Navajo Nation I often would use “Diné.”

between tribes and geographically across the United States. The media's considerable focus on the resources and wealth generated by Native casinos, particularly Foxwoods and the Mohegan Sun, can cause a distorted view of the lived experience of most Natives.¹³⁰ Despite the romantic portrayal of Natives that has dominated non-Native popular culture at least since Kevin Costner played with "Two-Socks,"¹³¹ Natives as a group live in circumstances that, along many lines of measurement, are much worse than those found off-reservation.

It is estimated that over 32% of homes in tribal areas are overcrowded and have serious physical deficiencies, compared with a national average of 4.9%.¹³² Furthermore, 11.7% of households in tribal areas lack complete plumbing.¹³³ Unsurprisingly, considering the housing statistics, rural Natives, including all Navajos, have a poverty rate of 26%, more than two and one-half times the comparable rural white rate and higher than any other racial/ethnic group in the U.S.¹³⁴ "Native Americans living on reservations suffer severe housing distress. Even middle- and upper-income Indians on reservations are confronted by inadequate housing."¹³⁵ As Chester Carl, the Chairman of the National American Indian Housing Council (NAIHC) and the CEO of the Navajo Housing Authority stated, "Who could not be touched by the plight of Native Americans forced to live under such conditions[?]"¹³⁶

Meeting the Native population's housing needs is a considerable challenge that could become even more difficult. Natives make up only 0.9% of the total population.¹³⁷ Yet, during the 1990s Native populations grew at 16.0% compared to a national average of 9.7% over the same time frame.¹³⁸ Not all Natives live on tribal lands, but for those who do, the housing situation is often an individual, as well as communal concern. "NAIHC estimates that there is an immediate need

130. The executive editor of Indian County Today, Tim Johnson, was quoted by the *New York Times* as saying, "Indians have gone from the stereotypical impoverished noble savage to the stereotypical Mr. Money Bags . . . It's amazing how quickly we've been universally branded." James Ulmer, *Indians Investing, but Carefully, in Hollywood*, N.Y. TIMES, Apr. 25, 2005, at C7.

131. The importance of Costner comes across in the following joke: "Anglos have BC and AD to measure time. Native people have the five BC's: Before Columbus Before Custer Before Commodity Before Casinos Before Costner!!" Douglas Spotted Eagle, http://www.spottedeagle.com/jokes_page.htm (last visited Sept. 29, 2005).

132. See NAT'L AM. INDIAN HOUSING COUNCIL, TOO FEW ROOMS: RESIDENTIAL CROWDING IN NATIVE AMERICAN COMMUNITIES AND ALASKA NATIVE VILLAGES 3 (2001), <http://naihc.net/naihc/files/cclibraryfiles/filename/0000000051/too%20few%20rooms%20publication.pdf>.

133. Tribal Court Clearinghouse, <http://tribal-institute.org/lists/housing.htm> (last visited Nov. 20, 2005).

134. *Id.*

135. David Listokin, et al., *Case Study: Navajo Partnership for Housing*, in MAKING NEW MORTGAGE MARKETS: CASE STUDIES OF INSTITUTIONS, HOME BUYERS AND COMMUNITIES, FANNIE MAE FOUNDATION RESEARCH REPORT 363-400 (2000), at 364.

136. Chester Carl, Remarks at NAIHC/CIHD News Conference *reprinted in* NATIVE AMERICAN HOUSING NEWS (Nat'l Am. Indian Housing Council, Wash., D.C.), Apr. 2001, at 3.

137. Press Release, U.S. Census Bureau, American Indian Heritage Month: November 1-30 (Oct. 21, 1999), <http://www.census.gov/Press-Release/www/1999/cb99ff14.html>.

138. *Id.*

for 200,000 housing units in Indian Country.”¹³⁹ A large number of these units, if they are to be built at all, have to be built by tribal governments.

Representative of the situation on many reservations, housing constructed on the Navajo Nation today is largely funded through federal grants channeled through the tribe.¹⁴⁰ Many Navajos do live in non-federally funded housing, in trailer homes or traditional Navajo hogans; however, construction as it is thought of in the Anglo world is almost entirely federally-funded. New homes are being built under the auspices of many government programs, ranging from Veterans Affairs (VA) housing to new construction built under the total replacement provisions of the Bureau of Indian Affairs’ (BIA) Home Improvement Program. However, the single largest program and agency responsible for housing is the Navajo Housing Authority (NHA), which is the Tribally Designated Housing Entity (TDHE) for the Navajo Nation. Each tribe has the power to select its TDHE, which performs a role similar to an off-reservation regional or city-based housing authority. Owing to the severe shortage of reservation housing and the federal government’s trust responsibilities concerning tribes, TDHEs receive funding that enables new construction of units as well as renovation of existing projects.¹⁴¹

The Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA)¹⁴² attempts to “remedy the acute housing problems that Native Americans face by severing them from non-Indian urban housing programs and recognizing that tribes are sovereign Nations with separate and unique needs.”¹⁴³ Doug Dewalt, the executive director of the Sokaogon Chippewa Indian Housing

139. *Conventional Mortgage Loans to Native Americans Rise 59%*, NATIVE AM. HOUSING NEWS (Nat’l Am. Indian Housing Council, Wash., D.C.), Oct. 2000, at 1.

140. *Cf., e.g., Pamela G. Dempsey, Indian Housing Funds May Go to War Effort*, THE INDEPENDENT (Gallup, N.M.), June 8, 2005.

141. U.S. governmental responsibility towards tribes is beyond the scope of this Article. Briefly, this responsibility is for many tribes contained in individual treaties made with the U.S. government and for all tribes is codified in the Snyder Act of 1921, 25 U.S.C. § 13, 42. The construction of new additional units in tribal housing does distinguish TDHEs from off-reservation housing authorities, which, due to budget cuts, must content themselves with renovation or renewal projects that lead to a decrease, rather than an increase, in total number of units. In part this is a reflection of the policy changes based upon the findings of many studies showing “it is more expensive to house people using production subsidies than demand subsidies.” Jill Khadduri, Kimberly Burnett & David Rodda, Abt Associates, *Targeting Housing Production Subsidies: Literature Review*, 48 (Dec. 2003) (prepared for U.S. Dep’t of Housing and Urban Dev., Off. of Pol’y Dev. and Res.), available at http://www.novoco.com/Research_Center/TargetingLitReview.pdf.

142. The Native American Housing Assistance and Self-Determination Act of 1996, Pub. L. 104-330, reorganized the system of federal housing assistance to Native Americans by replacing several separate programs of assistance with a single block grant program. In addition to simplifying the process of providing housing assistance, the purpose of NAHASDA was to provide federal assistance for Indian tribes in a manner that recognizes the right of Indian self-determination and tribal self-governance. Tribal Law and Policy Institute, Tribal Legal Code Project: Tribal Housing Code (1999), http://tribal-institute.org/codes/part_three.htm (last visited Feb. 11, 2006).

143. George H. Cortelyou, Note, *An Attempted Revolution in Native American Housing: The Native American Housing and Self-Determination Act*, 25 SETON HALL LEGIS. J. 429 (2001).

Authority and a member of the Negotiated Rulemaking Committee which developed NAHASDA, described the program's central element as: "Self-determination! Essentially, Indian tribes will control the housing efforts on their own reservations The tribally designated housing entity selected by each tribe can tailor the block grant received from HUD to meet the tribe's own needs."¹⁴⁴ As the mechanism through which almost all housing is being built on reservations, NAHASDA and the resultant relationship between TDHEs, such as NHA, and the Office of Native American Programs of the Department of Housing and Urban Development (ONAP) play a critical role in housing development.¹⁴⁵

For Navajos, NAHASDA and the Navajo Housing Authority provide the best hope of creating a better housing situation. Fortunately, as NHA's director states, "we know NAHASDA works; it's tripled the amount of affordable housing on Native and Tribal lands since its inception in 1996."¹⁴⁶ The Navajo Nation in particular has benefited from the NAHASDA program. As Doug Dewalt acknowledged when interviewed about NAHASDA's creation, "the Southwest region, where the Navajo historically have been located, had been on the short end of receiving funds to satisfy housing needs, so we chose to increase the amount of money that region will receive."¹⁴⁷

It is not coincidental that the Navajo Nation gained relative to other tribes through NAHASDA, for NHA's head, Chester Carl, was instrumental in drafting it and he is considered to be one of the foremost experts on both NAHASDA and Native housing generally.¹⁴⁸ The Navajo tribal council made an attempt to regain some control from NHA and from Chester Carl by forming the Navajo Nation Strategic Housing Task Group.¹⁴⁹ However, the Task Group "didn't go anywhere [and the Navajo Nation] President then gave [the] directive to consolidate all

144. Thomas Moore, *Implementing NAHASDA: How the Rule was Written*, CMTY. DIVIDEND (Fed. Reserve Bank of Minneapolis, Minn.), Spring 1998. Thomas Moore is a Community Affairs management analyst for the Federal Reserve Bank of Minneapolis.

145. The relationship between TDHEs and ONAP under NAHASDA is important because it forms the basis for review of TDHE activity done through federal funding. However, the relationship could change if NAHASDA is changed. Chester Carl advocated one idea for major change at the Eighth Annual Homeownership Conference. Carl began his remarks by saying that NAHASDA represented a step forward but was not the ultimate step in a government-to-government relationship. He proposed that the eventual goal should be funding without guidelines, strings, or oversight from the United States. Chester Carl, Chairman, Native American Indian Housing Council, Remarks at the Eighth Annual Homeownership Conference, National American Indian Housing Council (July 2001) (notes on file with author were destroyed in Hurricane Katrina).

146. Carl, *supra* note 136, at 3.

147. Moore, *supra* note 144, at 18.

148. CEO Chester Carl's role is explained in *Navajo Housing Program Flourishes under Carl: Program and Housing Director are Both Innovative*, NATIVE AM. HOUSING NEWS (Wash., D.C.), Sept. 2000, at 3. See also, e.g., *Largest Development in Indian Country Breaks Ground*, NATIVE AM. HOUSING NEWS (Wash., D.C.), Nov. 2001, at 1.

149. Interview with Elrena Mitchell, Housing Specialist, Navajo Nation Strategic Housing Task Group, in St. Paul, Minn. (July 11, 2001) (notes on file with author).

housing activities to the housing authority, so all would be special programs under NHA.”¹⁵⁰ Thus, the end result of the Navajo tribal council’s exploration of housing was an acknowledgement and strengthening of Chester Carl’s leadership by granting NHA almost sole responsibility for housing development on the Navajo Nation.

B. Formal Building Codes

Though most tribes have not formally adopted a building code, they often use off-reservation building codes informally as a construction reference and guide. According to Chester Carl, the Navajo Nation “in practice has adopted the Universal Building Code.”¹⁵¹ Most tribes, relative to the Navajo Nation, are smaller (the Navajo Nation controls the most land of any tribe) and have less codified law.¹⁵² For example, “California tribal systems of tribal codes and ordinances are not as complete” as Navajo systems, according to California Indian Legal Services Staff Attorney Jennifer Kim.¹⁵³ In fact, the only tribe that has passed a formal building code is the Grand Traverse Band, though many do make use of building codes.¹⁵⁴

In 1996, ONAP published a model comprehensive “Tribal Housing Code” under the title, “Our Home: Providing the Legal Infrastructure Necessary for Private Financing.”¹⁵⁵ ONAP did so after recognizing that most tribes had not formally adopted any sort of housing or building code.¹⁵⁶ Such a title does convey ONAP’s position on whether tribes need to and should codify codes, but also is in keeping with the sentiments of many Native housing activists and professionals. The Tribal Law and Policy Institute, a Native-owned and -operated non-profit, published a revised Tribal Code in 1999 to take into account the

150. Telephone Interview with Chester Carl, CEO, Navajo Housing Authority, and, Chairman, National American Indian Housing Council (May 14, 2002).

151. *Id.* The Universal Building Code (UBC) is used by many state and local non-Native governments as their building code.

152. I will return to this at the end of the Article, but I write “codified law” because the discussion of building codes on reservations must be grounded in an understanding that “law” can exist in many forms and tribes offer forms of law not found off-reservation.

153. Telephone Interview with Jennifer Kim, Staff Attorney, California Indian Legal Services (May 2, 2002).

154. Many tribes have passed very limited housing codes designed for the use of the TDHE in relation with their residents, but such housing codes are concerned merely with the TDHE/resident’s landlord/tenant relationship. The Band’s building code is identified as a ‘Best Practice’ but from talking to officials at the ONAP headquarters office in Denver, CO, I have been unable to identify a single other existing building code. *See* Tribal Law and Policy Institute, *supra* note 142, at 16. Indeed, though “many tribes began enacting housing code provisions during the mid-1990s in order to comply with the provisions of the Section 184 Indian Housing Loan Guarantee Program[, m]ost of these codes . . . were designed primarily to meet the specific needs of the Section 184 Program rather than to address more comprehensive tribal housing issues.” *Id.* at 2.

155. Tribal Law and Policy Institute, *supra* note 142, at 1.

156. *Id.*

self-determination effect NAHASDA has upon reservation housing.¹⁵⁷ The Institute identifies the establishment of “laws and procedures which are necessary in order to obtain governmental funding for tribal housing programs or loan guarantees for private or tribal housing construction, purchase, or renovation,” as one of the purposes behind their development of a model code for tribes.¹⁵⁸

For those who believe that establishing a code is required or is an improvement upon the current absence of a formalized code, ONAP’s model code is a step in the right direction. But, for many tribes, actual tribal governmental action towards a code remains an elusive goal. A Navajo building code currently “is going through the planning progress.”¹⁵⁹ Thus, even for the Navajo tribe, which arguably has the most knowledgeable and powerful Native housing expert as the head of its housing authority, formal adoption of a building code remains an idea, not a reality.

C. Informal Use of Building Codes

Building codes do play a role on reservations, despite not being formally adopted by tribal governments. Federally-funded programs loosely require code compliance and the reservation construction industry often sees building codes simply as a matter of professional norms. Tribes, “even if they don’t have a fully codified array of tribal policies, . . . will have policies” that define appropriate construction practice.¹⁶⁰ As a consequence, there is no contradiction between the policy of the NHA to use the Uniform Building Code and the statement by former NHA architect James Dennis that “there is no formal adopted rule that we are mandated to comply with, nor is there a formal inspection process.”¹⁶¹ Absence of formal adoption or even code-based inspection does not preclude practical use of, and borrowing from, code standards.

1. Federal Funding Requirements and Inspections

Federal funding for tribal construction is associated with flexible standards requiring general, but not strict, code compliance.¹⁶² Housing grants require that tribes comply, at a minimum, with Section 8 standards in their construction projects; tribes are expected to adopt the Uniform Building Code “or adopt [their] own equivalent code.”¹⁶³ The fact that NHA is considered a model TDHE,

157. *Id.*

158. *Id.* at 8-9.

159. Telephone Interview with Chester Carl, *supra* note 150.

160. Telephone Interview with Jennifer Kim, *supra* note 153.

161. Telephone Interview with James Dennis, Architect, Navajo Housing Authority (May 2, 2002).

162. Telephone Interview with John Fernandes, Lead Grants Evaluation Specialist, Southwest Regional Office of Native American Programs (May 2, 2002).

163. Telephone Interview with Wayne Johnson, Grants Evaluation Specialist, Office of Native American Programs (May 1, 2002).

though the tribe has not formally adopted a code, suggests that compliance is judged according to the practice of the TDHE and not on formal tribal code adoption. Tribes are required to submit Annual Performance Reviews (APR) to ONAP and must specify the number of inspections performed and what percentage of total units the figure represents, but as a practical matter ONAP does not judge the TDHE for the nature or presence of a code to focus the inspections.¹⁶⁴ While most tribes do certify on their APR that they have a code, certification does not require legal formalization of the policy by the tribe.¹⁶⁵ Rather, informal tribal use of building codes practically satisfies the requirements imposed by ONAP oversight.

The Indian Self-Determination and Education Assistance Act of 1975 provides a minimum standard for federally-funded construction done on reservations that conforms with ONAP's level of oversight:

The contractor shall include in the proposal of the contractor the standards under which the tribal organization will operate the contracted program, service, function, or activity, including in the area of construction, provisions regarding the use of licensed and qualified architects, applicable health and safety standards, adherence to applicable Federal, State, local, or tribal building codes and engineering standards. The standards referred to in the preceding sentence shall ensure structural integrity, accountability of funds, adequate competition for subcontracting under tribal or other applicable law, the commencement, performance, and completion of the contract, adherence to project plans and specifications (including any applicable Federal construction guidelines and manuals), the use of proper materials and workmanship, necessary inspection and testing, and changes, modifications, stop work, and termination of the work when warranted.¹⁶⁶

The BIA's Home Improvement Program conducts inspections at every stage of construction and continues these inspections after completion of a project to ensure quality workmanship, resulting in a mere 1% of tenants requesting an inspection in the first year after unit completion, but such inspection levels are not typical of the inspection level on the Navajo Nation or on other reservations.¹⁶⁷

NAHASDA grants ONAP the right to on-site evaluation of the quality of work performed in order to review compliance with performance measures.¹⁶⁸ Inspectors are not currently employed by ONAP and while grants evaluation

164. Though in the APR the TDHE is to describe its policies, several ONAP officials confirmed that the APR review does not include a review of the nature of the code, focusing instead on the inspections performed. Telephone interviews with Ralph Mecham, John Fernandes, and Peter Petronich, ONAP (May 12, 2002).

165. Telephone Interview with Gerry Murphy, Grants Evaluation Specialist, Office of Native American Programs (May 13, 2002).

166. Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450f (2)(E) (2000).

167. Telephone Interview with Vern Charleston, Director, Navajo Housing Services (Apr. 30, 2002).

168. 24 C.F.R. § 1000.526 (2005).

specialists visiting reservations can include visits to a few houses, they are generalists and “don’t have the expertise” necessary to do a quality inspection for compliance.¹⁶⁹ Architects can choose not to sign off on NHA projects where they overly deviated from plans, but the few random inspections that take place are done by “management types” from NHA or those who might be labeled “half inspectors.”¹⁷⁰ The imperfect nature of the current inspection system is highlighted by Chester Carl, who believes that the “inspector should be from the local government” and not the housing provider being inspected.¹⁷¹ The practice of the Confederated Tribes of Grand Ronde arguably provides an example of a workable inspection regime: by “contracting out with a local [off-reservation] county inspector who would do a non-binding review” and sign off to unit safety but was not concerned with compliance with inapplicable codes, the tribe ensured the housing units met federal minimum standards while enabling the construction to differ from off-reservation housing standards.¹⁷²

2. Professional Norms

Building code standards, despite codes not being formally adopted, are also informally adopted on reservations through professional usage even in the absence of regulatory mandates. “What rules [in housing construction] is good practice,”¹⁷³ and the codes found off-reservation are considered reference points for good construction practice by many. The founder and owner of one of the three largest gas companies on the Navajo Nation inspects home heating systems in accordance with federal norms because, in the absence of local and state regulation, “we follow the federal regulations.”¹⁷⁴ Service workers for the Navajo Nation’s utility provider, NTUA, also conduct minimal inspections prior to providing housing units with utilities; however, such workers themselves are often nervous about what will happen when the switch is turned on for the units.¹⁷⁵ The codes are not necessarily referred to directly when performing professional duties or services but underlie the project standards and planning.

D. Judging Uncodified, Informal Code Use

Should tribes be adopting building codes? Understanding the forms of housing construction that occur on reservations is a necessary first step for answering this

169. Telephone Interview with Gerry Murphy, *supra* note 165.

170. Telephone Interview with James Dennis, *supra* note 161.

171. Telephone Interview with Chester Carl, *supra* note 150.

172. See Telephone Interview with David Harjo, Director of Native American Programs, Rural Community Assistance Corporation (May 8, 2002).

173. Telephone Interview with James Dennis, *supra* note 161.

174. Telephone Interview with Royal Churchill, Owner/Operator, Chief Propane (May 10, 2002).

175. Conversation with Sidney B. Dietz II, Board Vice Chairperson, Navajo Tribal Utility Authority in Berkeley, Cal. (Mar. 30, 2005).

question. It is impossible to describe all reservation housing forms given the sheer number of different tribes, but often reservation housing generally falls into one of four categories: federally-funded housing, privately-financed Anglo style construction, mobile homes, and traditional dwellings. The focus to this point on federally-funded housing when discussing building codes is not coincidental, for the other three forms of housing do not lend themselves to a discussion of building codes for three reasons: (1) privately-financed construction of off-reservation style housing is infrequent on many reservations, (2) mobile-home construction is done off-reservation so tribal building codes have less significance, and (3) traditional style homes usually are quite distinct from off-reservation housing, such that they do not meet even minimal codes based on Anglo construction characteristics. Each point will be discussed in turn.

For many Natives who live on reservations, it is difficult to construct their own privately-financed Anglo style homes. A U.S. Treasury Department study concluded that “65% [of Natives] find conventional mortgage financing ‘difficult’ or ‘impossible’ to obtain,” even when they have qualifying incomes.¹⁷⁶ “By law, such lands cannot be encumbered or foreclosed on unless authorized by a tribal government. Because acceptable collateral is fundamental to the mortgage process, historically the inability to collateralize tribal land has defeated home lending to Indians.”¹⁷⁷ That then-Navajo Nation President Kelsey Begaye and staff from New Mexico Representative Jeff Bingaman’s (D-NM) office attended the purchase of a house because it was, in the words of the title of a *Native American Housing News* article, the “First Conventional Loan Closed on Navajo Trust Land,” illustrates the difficulty of building private housing on reservations.¹⁷⁸ Predatory lending also limits financing: 68% of NAIHC members reported being victims of such abuse.¹⁷⁹ “Mortgage rates as high as 24%—or about 3 times the national average rate—are being charged homebuyers with steady incomes.”¹⁸⁰ Even honest lenders are often reluctant to lend for projects

176. Press Release, Nat’l Am. Indian Housing Council, Native American Lending Study, Lauded by NAIHC (Jan. 15, 2002), <http://naihc.net/NAIHC/files/CCPAGECONTENT/DOCFILENAME/0000000918/lendingstudy.01.15.02.doc>; see, e.g., *Study Highlights Finance Barriers to Native American Homeownership*, NATIVE AM. HOUSING NEWS (Wash., D.C.), Feb./Mar. 2002, at 7; *Legal Symposium Panel Presents Options for Mortgage Financing*, NATIVE AM. HOUSING NEWS (Wash., D.C.), Jan. 2002, at 4.

177. Listokin et al., *supra* note 135, at 368.

178. *First Conventional Loan Closed on Navajo Trust Land*, NATIVE AM. HOUSING NEWS (Wash., D.C.), Sept. 2000, at 3. The novelty is also true for other tribes. See *First Privately Financed Home Loan Closed on Pojoaque Pueblo Land*, NATIVE AM. HOUSING NEWS (Wash., D.C.), Sept. 2001, at 2.

179. Jane DeMarines, *Survey Shows Predatory Lending Prevalent in Indian Country*, NATIVE AM. HOUSING NEWS (Wash., D.C.), Sept. 2001, at 3.

180. *Predatory Lending: Stealing Dreams. Tribal Members Lose Homes to Abusive Lenders*, NATIVE AM. HOUSING NEWS (Wash., D.C.), Sept. 2000, at 1; see, e.g., *Treasury Department Eyes Uniform Standards to Stem Predatory Lending Practices*, NATIVE AM. HOUSING NEWS (Wash., D.C.), Jan. 2002, at 5; *NAIHC Chairman Testifies on Predatory Lending*, NATIVE AM. HOUSING NEWS (Wash., D.C.), Oct. 2000, at 1; Jane DeMarines, *Two Largest Lenders in Indian Country [two Citigroup affiliates,] Reportedly Use Predatory Practices*, NATIVE AM. HOUSING NEWS (Wash., D.C.), Apr. 2002, at 1.

on reservations.¹⁸¹ Finally, on the Navajo Nation, and on other reservations as well, obtaining the approval needed to secure a home site lease on land held in trust from both the tribal government and from the BIA can be a very time-consuming process, requiring “considerable effort in acquiring approval,” because of the unique status of tribal trust land and excess bureaucracy.¹⁸² The combination of these factors, at least on the Navajo Nation, leads to little private, Anglo-style construction occurring outside of “minor additions” and “handyman projects.”¹⁸³

Partly in reaction to these challenges of privately-financed construction, “[m]obile-homes are often the second most popular form of housing in Indian Country.”¹⁸⁴ Consequently, “Navajo homeowners often occupy very basic mobile homes that they find less than adequate. They cite creaky, unstable floor panels and thin walls, which provide poor insulation and wind resistance, among other problems.”¹⁸⁵ Even wealthier reservation residents frequently live in mobile-homes, with ownership of a double-wide a sign of prosperity.¹⁸⁶ However, the prefabricated nature of such units, whether single or double-wide, limits the direct applicability of a building code discussion, though not the ultimate effect building code enforcement decisions would have upon the type of housing selected by residents.

Traditional tribal construction generally does not accord with model codes created for off-reservation construction. The traditional Navajo home is an eight-sided log and mud structure called a “hogan.”¹⁸⁷ Navajos “get the lumber from the mountain,” and, according to a traditional Navajo Nation man and tribal council member, it then “takes only a couple of days” to build the hogan.¹⁸⁸ Federal funding can be used for construction that incorporates traditional elements or ideas; for example, the Lakota non-profit Earthen Cob Homes for

181. Thomas Moore & Margaret Tyndall, *HUD 184 Loan Program Helps Native Americans Achieve Homeownership*, CMTY. DIVIDEND (Fed. Reserve Bank of Minn., Minn., MN), Spring 1998 (“the factors that have inhibited mortgage lending on Indian reservations . . . [include] lenders [who] are often unfamiliar with tribal court procedures and unclear as to procedures to be used in cases of default or foreclosure. On some reservations, tribes have not developed the legal infrastructure necessary to handle mortgage loans. . . . To address these concerns, HUD devised its 184 mortgage loan program to finance the purchase, construction or rehabilitation of one- to four-family homes.”). See, e.g., *Section 184 Loans to Allow Low-Interest Refinancing*, NATIVE AM. HOUSING NEWS (Wash., D.C.), Jan. 2002, at 5.

182. Listokin et al., *supra* note 135, at 369.; see U.S. GEN. ACCT. OFF., NATIVE AMERICAN HOUSING: HOMEOWNERSHIP OPPORTUNITIES ON TRUST LANDS ARE LIMITED, GAO/RCED-98-49 (1998), available at <http://www.gao.gov/archive/1998/rc98049.pdf> (for an overview of the complications related to trust land and a discussion of the effect of bureaucratic backlogs).

183. Telephone Interview with Chester Carl, *supra* note 150.

184. Tribal Housing Code, *supra* note 142, at 5.

185. Listokin et al., *supra* note 135, at 366.

186. In Kayenta, AZ, on the Navajo Nation, the owner of three highly successful Burger Kings lives in a large double-wide on a hill overlooking the township.

187. See generally SCOTT THYBONY, *THE HOGAN: THE TRADITIONAL NAVAJO HOME* (1998).

188. Telephone Interview with JC Begay, Navajo Nation Council Representative, Red Valley/Cove District, Ariz. (May 13, 2002) (notes on file with author).

Ongoing Environmental Sustainability has built durable clay and straw homes, discovering in the process that “reverting back to the ancestral methods of building homes has proven to be substantially efficient.”¹⁸⁹ Such experiments do suggest that traditional styles of construction might fit within altered off-reservation building codes, provided that they could be modified for such a fit.

E. Navajo Nation Lessons

The multiple housing forms present on reservations suggest that tribal codes, if adopted, need somehow to allow for both federally-funded and traditional construction. As the model Tribal Building Code highlights, tribal “obligations” include “respecting unique historic housing and building practices of the communities.”¹⁹⁰ There are two basic methods of respecting such traditional style construction: (1) “exempting structures being built using historic designs and methods from some or all code requirement,”¹⁹¹ or (2) having an alternative method defined in the code.¹⁹² The first method could be done formally or informally—the exemption could be explicit or it could be simply an exemption in practice for traditional housing. Defining traditional structures within a building code would represent a greater recognition of the culture and wisdom contained in some elements of traditional housing.¹⁹³

Arguably, building codes help bring project financing from off-reservation private parties to tribes. However, the current system of informal usage, despite minimal oversight, seems to be working and satisfies the federal requirements. Those concerned with affordable housing development should consider whether the Navajo Housing Authority could permit construction largely separated from regulation. Many housing and economics specialists suggest that regulation prevents the construction of housing by making such construction more expensive; limiting regulation could lead to greater Native housing construction. Affirmatively moving away from building code regulation may make sense

189. Shahinaz Ayoub, *A Traditional Solution to Indian Country's Housing Shortage*, NATIVE AM. HOUSING NEWS (Wash., D.C.), Feb./Mar. 2002, at 5. The Minneapolis Federal Reserve Bank writes, “[c]urrent straw bale construction technology provides quality housing that is not only safe from the big, bad wolf, but also affordable and energy-efficient. . . . [S]traw bale construction can provide attractive and affordable homes that use energy-efficient design and construction techniques, meet building code standards, fit into historic neighborhoods, encourage home ownership by low- and single-income families, and can be financed through conventional means.” Straw bale construction has been used successfully in two affordable housing projects, one in Missoula, Montana, and the other in Minneapolis, Minnesota. Nicole Bennett & Stephanie Omersa, *Straw Bale Construction Provides Affordable, Efficient Housing*, CMTY. DIVIDEND (Fed. Reserve Bank of Minn., Minn., MN), Fall 1998.

190. Tribal Law and Policy Institute, Tribal Legal Code Project: Tribal Building Codes (1999), http://tribal-institute.org/codes/part_six.htm.

191. *Id.*

192. Telephone Interview with Vern Charleston, *supra* note 167.

193. For example, hogans have eight sides because that enables the use of a single length of wood carried from the mountains on each of its sides, which greatly improves structural strength in the absence of nails.

because of the specific nature of the rural housing needs in the Navajo Nation. With self-help and trailer-built housing types the predominant forms of non-federally-funded housing, an enforced building code arguably would not be appropriate under whatever understanding of “value” is accepted as correct for the reservation. For individuals with severe financial limitations, active code enforcement might force excessive doubling-/tripling-up in the few code-compliant structures, even where all parties would be better off living in primary self-help structures.

Individuals of very limited means, armed with the knowledge and skills needed to create traditional forms of housing, are arguably better suited than politicians to determine whether code compliance *maximizes* dollar value at the low end of the financial spectrum. Similarly, in deciding to live in a separate self-help structure, individuals are more capable of *fulfilling their needs* than they would be by following building codes created for a culture with a different set of norms and possessing a greater ability to pay. Essentially the same reasons can be cited when considering the *return* measure of value, yet the fulfilling needs method makes the most sense in light of exaggerated reservation poverty even when compared with other depressed areas. The non-alienability of tribal land makes the *market* measure of value inappropriate. However, even by that measure of value, the funneling of very limited capital into houses, which as a consequence of the enforcement would be even more severely overcrowded, is likely to have a negligible positive effect not equaling the damage caused by the overuse of the housing.

The consideration of building code enforcement on Native reservations is a unique case study, but one consistent with my model of building codes in rural areas. Building codes are primarily important with regard to their effect on decisions regarding initial construction type. The possibility of traditional style housing, and the minimal role of non-reservation “standard” construction outside of the federally-funded, complicates the rural construction analysis. On the one hand, this split offers a convenient way of creating a dual system of enforcement (for federally-funded construction) and non-enforcement (for traditional structures). Nevertheless, the ultimate goal for tribal policymakers remains to get the most value out of both private and public funds put towards reservation housing, and, as such, a deliberate policy of non-enforcement would most benefit many reservations. The isolation that is part of life on reservations only dramatizes the basic, unique aspects of rural housing’s relationship with building codes that are found in other parts of the country.

IV. RURAL COLORADO SUBDIVISION CASE STUDY

Badger Creek Ranch (hereinafter Badger Creek), a small, three square mile,¹⁹⁴

194. Badger Creek Ranch has a total of 1938 acres, and there are 640 acres per square mile.

rural subdivision in the Colorado Rockies, offers another interesting case study through which rural building codes can be considered. Badger Creek is only a small fraction of a percent the size of the Navajo Nation, and it has some shared values and concerns with Navajo Nation and some distinct. Whereas the Navajo case study presents one sort of building code analysis, by closely examining Badger Creek we can work through housing construction practice on a more “micro” level, through the experiences of individual homeowners and builders. By looking at these practices at the subdivision level as well as by taking into account the most appropriate value system for these lots, we can begin to understand how to ensure that building codes reflect even micro-level concerns.

A. *The Subdivision*

Badger Creek is a residential, primarily recreational, subdivision located a thirty minute drive from the nearest electric line and forty-five minutes from the nearest small town.¹⁹⁵ In the middle of a rough triangle of three towns and without agricultural potential, Badger Creek, until recently, was permanent home to only a pair of semi-retired couples and a part-time minister. Those working in the neighboring towns did not, and still largely do not, find the forty-five minute commute over dirt roads to be worthwhile, leaving the vast majority of Badger Creek’s 286 lots in the hands of part-time vacationers or absentee landholders. Reflecting the opportunities and limits of the surrounding communities, Badger Creek’s development is defined by its particular rural influences and institutions.

In the last five years, the number of Badger Creek permanent residents has gone from four to nine households, with new residents primarily working in Buena Vista. Buena Vista is a quaint town with a population of just over two

195. For purposes of this Article, parcel information from the Park County Assessor’s Office has been combined with information obtained through personal observation, trips to Badger Creek, and interviews with lot owners and those active in the regional real estate market. The resulting database forms the basis for the substantive descriptions of Badger Creek, with the exception of those specifically identified as coming from a different source.

Property appraisal data is used because it provides the richest source for the Badger Creek lots. Market transactions help inform property appraisal, but use of sales data alone would limit the data only to those parcels which have been recently exchanged. “An appraisal is an estimate of value based upon historical data, as of a specific date.” *Appraisal Methods: How Does the Assessor Appraise My Property?*, Park County Assessor’s Office, www.parkco.org/appraisalmethods.asp (last visited Sept. 9, 2005). Trained assessors look at “what people are buying and selling to understand market activity,” analyzing these sales “to determine common and typical trends within the local real estate market.” *Id.* There are clear limitations to assessment data, most notably that actual sales value can differ dramatically from assessment value (a lot assessed at \$10,000 might sell for \$20,000). Assessments are used and taken for the purpose of determining property taxes; thus the assessment categories are appropriate for some parcels and less related to value for other parcels. The largest limitation of assessment data for Badger Creek lots is that assessments done in Park County are based upon more than simply the Badger Creek subdivision, as explained by Park County Appraiser Technician Jana Chalmers: “We do a mass appraisal, we do a whole economic area and put it together, we do not base it on the nearby three or four properties.” Telephone Interview with Jana Chalmers, Appraiser Technician for Park County Assessor’s Office (Apr. 8, 2005).

thousand,¹⁹⁶ and its charm and ideal location along the banks of the Arkansas River draw summer tourists who come primarily for whitewater rafting through Brown's Canyon and hiking in the nearby Collegiate Peaks. Buena Vista and its "suburb" Johnson Village are also home to one grocery store, eight motels/hotels, a medium security prison, and an outstanding bakery. The regional prison is a major employer with 375 employees.¹⁹⁷

To the south, Salida, population 5,500,¹⁹⁸ forms the second corner of the triangle of small towns around Badger Creek. Salida also lies along the Arkansas River, but, being further from Denver and downstream of Brown's Canyon, does not have as strong a rafting industry. Yet, tourism does play an important role in Salida, bringing customers to a few art and hiking stores. Salida also has a Walmart, a sometimes-open, sometimes-closed Sears, and several fast food restaurants. Salida's biggest draw for those in Badger Creek is probably its two-screen movie theater; however, the narrow, winding dirt road to Salida is not regularly plowed during the winter and not as well maintained as the road to Buena Vista, making it more dangerous and a longer (one hour) drive, limiting the importance of the Salida to Badger Creek lot owners.

An hour to the northeast sits Hartsel, population approximately 150.¹⁹⁹ The town's only businesses are a gas station, a trading post, a seedy bar, and, since 2003, a six foot by twelve foot used bookstore. Hartsel's most unusual item is its hot springs' pool; nevertheless, for most people traveling through or even working in that part of Colorado, Hartsel is at most a pit stop. (Hinting at this obscurity, a locally produced t-shirt shows an outhouse next to the words "University of Hartsel.") This rural community as well as its slightly larger neighbor, Fairplay, thirty minutes to the north, formed the inspiration for the hit comedy show "South Park."

Roughly the size of Rhode Island, Park County largely consists of arid semi-grasslands. Fairplay, whose annual highlight is the World Championship Pack-Burro Race,²⁰⁰ is the county seat. Badger Creek lies on the southern edge of Park County. The easternmost lots, numbers 1-14, blend into Park County's dominant grassland landscape, whose only prominent, and only treed, point is Black Mountain. Taxes on Badger Creek lots are paid to Park County and in return Park County is responsible for plowing the roads in the subdivision and the

196. Census 2000, Colorado data set, http://factfinder.census.gov/servlet/GCTTable?_bm=y&-geo_id=04000US08&-box_head_nbr=GCT-PH1&-ds_name=DEC_2000_SF1_U&-format=ST-7 (last visited Apr. 30, 2005).

197. Tracy Harmon, *Buena Vista Battles DOC over Houses, Sewer Bill*, PUEBLO CHIEFTAIN, Mar. 20, 2005, available at <http://www.chieftain.com/metro/1111304681/3>.

198. Census 2000, *supra* note 196.

199. Hartsel is not a separate Census 2000 city, and there is a great range in the published figures for Hartsel's population. My 150 estimate is based on an internet search using Google, www.google.com, and site visits to Hartsel.

200. The race occurs in late July and is a twenty-nine mile run with a pack mule. See World Championship Pack-Burro Race, <http://www.2camels.com/festival44.php3> (last visited Apr. 22, 2005).

road to Hartsel (the road to Buena Vista crosses into Chaffee County five miles from the edge of the subdivision). Being within Park County means Badger Creek is subject to Park County land use regulations.

B. Park County Land Use Regulations

Building use and development in Park County, which includes Badger Creek, is governed by Park County's Land Use Regulations ("LURs").²⁰¹ Underlying the regulations are five goals: (1) implementation of the county's Strategic Master Plan; (2) compliance with Colorado law; (3) protection of quality of life; (4) preservation of orderly development of the County; and (5) preservation of property values.²⁰² Notably, the definition of "quality of life" is quite broad, listing "public health, safety, welfare, comfort, convenience, prosperity of the residents and the cultural environment."²⁰³ The definition for the goal of "preservation of property values" begins by citing preservation and promotion of the values of property and protection of the county's tax base, then concludes by identifying "respect" for citizens' property rights as within the purposes of the county's land use regulations.²⁰⁴ While the subject matter of individual regulations varies from the particular (such as what is meant by "bison")²⁰⁵ to the general (for example, the requirements for subdivision development),²⁰⁶ the county's goals are evident when the LURs are viewed in their entirety. The LURs manage the challenge of simultaneously managing development and building quality while acknowledging the potentially contradictory goal of value-based limits on enforcement in favor of a county choice for additional freedom.

Most construction in Park County must adhere to the Uniform Building Code. The LURs proscribe both unlawful construction and unlawful use of buildings.²⁰⁷ Underlying the LURs and the limits on construction and use are protectionist values according to the first section of the definition section: "these Land Use Regulations shall be regarded as minimum requirements for the protection of public health, safety, and welfare."²⁰⁸ The LURs begin with the assertion that all construction, reconstruction, remodeling, and improvements require compliance with the LURs.²⁰⁹ Consequently, "[i]t is unlawful to erect a structure without first obtaining the required County permits. The Building Department administers

201. Park County, Colo., Land Use Regulations § 1-103(A)(2004), *available at* www.parkco.us [hereinafter PCLURs]. The website also posts administrative decisions and land use meeting minutes.

202. *Id.* § 1-102.

203. *Id.* § 1-102(C).

204. *Id.* § 1-102(E).

205. *Id.* § 4-200.

206. *Id.* § 6.

207. PCLURs § 2-100(C)-(D).

208. *Id.* § 4-100(A).

209. *Id.* § 2-100(A).

permits according to the Uniform Building Code.”²¹⁰ Limited farming,²¹¹ agricultural,²¹² and minor finish related construction projects²¹³ are exempt from the requirement to obtain a building permit, as are small storage sheds of less than 120 square feet²¹⁴ and skid mounted buildings of less than 201 square feet.²¹⁵ However, it is worth repeating that the exemptions only apply where both the type of building and the use of that building fit within the exception to the general rule that all construction requires a building permit and consequent adherence to the Uniform Building Code (“UBC”). Thus, a permit is not required for small “one-story detached accessory buildings used as a tool and storage shed [*sic*], playhouses, and similar uses,”²¹⁶ but if such a building were used as a residence it would fit within the county’s required permit scheme.²¹⁷

Park County LURs provide strict civil and criminal sanctions for failure to follow the LURs, while simultaneously acknowledging that a degree of LURs non-compliance is allowed:

Enforcement Philosophy. The County recognizes free will, personal responsibility and the rights of individuals to be accountable for their own actions, and that generally; people do not want to be overly protected from themselves. In contemplating the enforcement of these Land Use Regulations, it is the intent of the County to balance protecting the health, safety, welfare, comfort, convenience, and prosperity of the public versus protecting the public from over zealous enforcement and keeping the County out of personal, private disputes. The County is not concerned with minor, trivial matters. Prior to initiating any criminal or civil court enforcement proceeding, the Board of County Commissioners must authorize such action by motion or resolution with a specific finding that the violation is substantial and not de minimis.²¹⁸

The laissez-faire, almost libertarian, description of the enforcement philosophy sits uncomfortably next to the next two paragraphs of Park County’s LURs that detail the criminal and civil penalties for regulatory violations. Violation of the LURs is a criminal misdemeanor punishable by a maximum \$100 fine, imprisonment of up to ten days, or both.²¹⁹ Additionally, violators can have civil penalties between \$250 and \$500 awarded against them, with up to \$50 imposed

210. *Id.* § 2-100(B).

211. *Id.* § 2-100(B)(1).

212. *Id.* § 2-100(B)(2) (exempted only where this agricultural use is within an agricultural zone).

213. PCLURs § 2-100(B)(5) (“Fences not over six (6) feet.”); *id.* § 2-100(B)(8) (retaining walls under 4 feet tall); *id.* § 2-100(B)(9) (on ground water tanks); *id.* § 2-100(B)(10) (projects near to ground level decks or platforms); *id.* § 2-100(B)(11) (“Painting, papering, and similar finish work.”); *id.* § 2-100(B)(13) (small window awnings); PCLURs § 2-100(B)(14) (prefabricated swimming pools).

214. *Id.* § 2-100(B)(4).

215. *Id.* § 2-100(B)(3).

216. *Id.* § 2-100(B)(4).

217. *See id.* § 2-100(B) (residential buildings are not exempt for the building permit requirements).

218. *Id.* § 2-200(A).

219. PCLURs § 2-200(B).

for each day unlawful activity continues.²²⁰ It is through continued violations that penalties compound, for each day that a person “fails to fully conform with the requirements of these Land Use Regulations shall constitute a separate offense and violation.”²²¹ The county’s goals of preventing “over zealous enforcement” are protected through the requirement that use of criminal or civil penalties is only allowed where the violation was “(1) substantial and (2) willful, wanton, extreme or habitual.”²²² Yet, for violations meeting both (1) and (2), both civil and criminal penalties can be pursued by the county against the violator.²²³ Finally, the LURs provide for a number of lesser penalties— withholding of construction or building permits,²²⁴ revoking of earlier granted permits,²²⁵ assessing the violator with County costs associated with violation enforcement,²²⁶ issuing cease-and-desist or stop-work orders,²²⁷ or withholding of occupancy certificates²²⁸—more in line with an ongoing effort by the regulators to urge, rather than to strictly penalize after the fact, land owner compliance with Park County’s regulations.

1. Limited Legal Right to Not Follow LURs

The sale, split, or division of rural land into two or more lots is subject to Park County LURs, even land divisions within unincorporated areas.²²⁹ An exception exists for a division of land “which creates Lots each of which comprises thirty-five (35) or more acres of land.”²³⁰ Such large lot subdivisions do not have to obtain county subdivision approval; however, “exemption from County subdivision approval is not an exemption from County regulation of the property’s use and County construction and building requirements.”²³¹

Grandfathering of certain subdivision requirements and land use options can similarly limit the applicability of the LURs. However, while Park County does contain separate rules permitting some “nonconforming uses,” such grandfathered uses are not allowed a blanket exemption: “A nonconforming use or activity, which was legal prior to enactment of current Land Use Regulations, shall be grandfathered. However, the grandfather provision shall not apply to any substantial change in the grandfathered use or activity.”²³² Grandfathering is a

220. *Id.* § 2-200(C).

221. *Id.* § 2-100(I).

222. *Id.* §§ 2-200(B) (criminal penalties), 2-200(C) (same language for civil penalties).

223. *Id.* § 2-200(D).

224. *Id.* § 2-200(E)(1).

225. PCLURs § 2-200(E)(3).

226. *Id.* § 2-200(E)(6).

227. *Id.* § 2-200(E)(5).

228. *Id.* § 2-200(E)(2).

229. *Id.* § 6-100(A). *See also id.* § 4-200 (defining “Division”).

230. PCLURs § 6-101(A). *See also id.* § 2-100(H)(3)(a).

231. *Id.* § 6-101(A)(1).

232. *Id.* § 9-101(C).

regulatory standard practice; thus, a development approved and progressing under the pre-2004 LURs would be protected from imposition of 2004 LURs that conflicted with the earlier requirements.

Grandfathering can allow land uses and divisions not presently permitted within Park County. When the original approved use occurred prior to Park County's initial regulation of unincorporated areas and subdivisions, grandfathering permits ownership interests of sorts no longer permitted. Significantly, developers seeking to subdivide land must file three plans that all detail the subdivision applicant's ability to "deliver water, sewer, and electric services to and throughout the property."²³³ However, subdivisions dating prior to Park County's first LURs are not subject to the same utility planning requirements. "Prior to such adoption of regulations, divisions of property by deed were likely or arguably legally permitted without County approval."²³⁴

The thirty-five acre requirement for subdivision approval exemption, together with the grandfathering of older subdivisions, partially directs land purchases and consequent development. While the motto "location, location, location" holds in Park County as it does for all involved in real estate, the level of utilities associated with lots also affects cost per acre within the County. Since land subdivision under the LURs involves added costs (provision for utilities in particular, but also required paperwork and fees for approval of the plans²³⁵), all other things being equal the price per acre should be lower for land exempt from county approval. It is not the approval itself—indeed, approval costs should have little effect on resale price because such costs were already in place when the land was first purchased²³⁶—but the attendant utilities that raise land costs. The cost per acre of large, thirty-five-plus-acre lots is low; however, because of the number of total acres, the total cost for such an exempt lot can be beyond the ability of poorer Park County residents. Thus, for those with a limited budget, grandfathered subdivisions lacking utilities can offer such individuals the possibility of land ownership foreclosed by the prices for newer subdivision lots.

2. Practical Right Not to Follow LURs

Park County building code enforcement is the responsibility of the Park County Building Department, and, in extreme cases, the Park County Prosecutor's Office. In a guide made available to those considering construction, the building department slightly exaggerates its role by claiming: "A building permit

233. *Id.* § 6-405(B)(13)(c) (from final plan); *see also id.* § 6-404(B)(10)(c) (from preliminary plan); PCLURs § 6-403(B)(9)(e) (proposal summary calling for a detailing "[a]nticipated providers of utilities (water, sewer, gas, electric, telephone)").

234. *Id.* § 4-200 n. 1.

235. The minimum cost for subdivision plan review is \$1550.00 + \$7.00 per lot. PCLURs Fee Schedule.

236. This assumes that the developer did succeed in passing along these costs to the buyer.

is required to erect, construct, enlarge, alter, repair, move, improve, remove, convert, or demolish any building or structure in Park County.”²³⁷ Yet, Park County is not exaggerating with regard to its considerable level of involvement in all stages of construction.

The first step in legally constructing a structure or residence is to submit plans to the building department for review for compliance with County regulations and the building code.²³⁸ This submission includes not only the construction drawings; it also includes evidence of septic system compliance, a copy of the driveway cut permit from the Environmental Health Department, statements of responsibility, and diagrams of the proposed structure’s location, as well as permit fees and fire protection fees.²³⁹ The construction drawing portion of the submission includes foundation, floor, floor framing, roof framing, wall section, and elevation plans.²⁴⁰ Once the plans are approved, construction can begin but the project must be continually “inspected at various stages of construction.”²⁴¹ These eleven inspections are, in chronological order: footing, interior structural pads, foundation wall, below slab plumbing, deck footing, damp proofing, sheathing, midroof, frame (only following rough plumbing and rough electrical inspections by plumbing and electrical inspectors), drywall, and final inspections.²⁴² Only after successful completion of these steps does the building department issue a certificate of occupancy.²⁴³

The formal process established by Park County can only be properly understood when it is set alongside the informal norms of the building department. Doc McKay, the person in charge of the building department and the inspection regime, says the building department is “not the building police.”²⁴⁴ Doc McKay does acknowledge that sometimes the inspection process can get homeowners constructing their own housing “a little rankled” because the inspectors are treating them like contractors rather than owners doing their own home; nevertheless, the goal is always to “make sure owners get their money’s worth for what they are building.”²⁴⁵ This goal is evident in the inspection information given homeowners: the county provides home owners a list of what

237. *Park County Building Permit Guide* (Park County Building Department), 2005 (on file with the author and available from the Park County Building Department at 1246 County Road 16, Fairplay, CO 80440).

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Park County Building Permit Guide*, *supra* note 229.

244. Telephone Interview with Doc McKay, Park County Building Department Supervisor (Apr. 8, 2005).

245. *Id.*

inspectors look for and what they often find missing when doing inspections.²⁴⁶ Yet, while Doc McKay believes that the “UBC is the appropriate code for” Park County and is the “minimal code” that “reflects what works,” under his direction the building department does not pursue every case of non-compliance.²⁴⁷ When the department does encounter illegal construction (that taking place outside of the building department’s oversight yet of a type requiring oversight), Doc McKay states, “we actually don’t tend to do anything, unless someone formally complains.”²⁴⁸ The building department’s work in the inspection process is summarized by Doc McKay: “We are a pretty friendly bunch to deal with. We are not a policing organization. We are here to help ensure safe buildings get built.”²⁴⁹

C. Badger Creek Ranch

Totaling almost exactly three square miles, Badger Creek lots vary from tree covered hills to barren stretches of land.²⁵⁰ The original developers of Badger Creek as a subdivision chose to divide the land into parcels according to the lay of the land and the natural divisions of the land.²⁵¹ This accords with the Park County guidelines, which state that “[I]mitations and opportunities presented by the topography of the site” should be taken into account in determining lot design.²⁵² Much of the difference in land values per acre and in construction found on different lots can be explained by differences in the land characteristics of the areas of Badger Creek. The Park County assessment categories provide a window on just a few of the significant lot differences: possible housing sites, tree

246. *Park County Inspection Information* (Park County Building Department), 2005 (on file with the author and available from the Park County Building Department at 1246 County Road 16, Fairplay, CO 80440).

247. Telephone interview with Doc McKay, *supra* note 236.

248. *Id.*

249. *Id.*

250. A brief methodological aside on the number of the lots and the composition of the lot based data being used is required before tackling the details of lot comparisons. As initially developed, Badger Creek had 287 lots; however, due to the annexing of a lot to a neighboring subdivision, Badger Creek now has 286 lots (The owner of lot 257 also owned a lot in the subdivision, Forest Park, to the North of Badger Creek, and officially merged lot 257 with other property, making Badger Creek lot 257 become Forest Park lot 16. Telephone interview with Park County Assessor’s Office (Nov. 20, 2005)). However, the lot count and data is complicated by individuals or families owning multiple lots. The assessor’s office and the work in this Article reflects the perspective of those owning the lots. If they have consolidated their original lots—a choice requiring the filing of a simple document and not requiring the payment of any associated fee, PCLURs §§ 6-900-6-906—the decision is respected by both the assessor’s office and the work in this Article that relies upon the assessment data. Where they have not consolidated, even where the lots are next to each other, those lots are considered separate lots. Therefore, taking into account lot consolidation, this analysis will consider Badger Creek through 264 distinct lot units.

251. Telephone interview with Kenneth H. Barber, partner in the group that subdivided Badger Creek Ranch (Feb. 1, 2005).

252. PCLURs § 7-201(A)(5).

cover, quality of the view, solar exposure, and whether there is water on or through the property. Land values and, significantly, construction practices correspond to each of these categories.

The most important consideration for both the original developers and for most purchasers is the amount of tree coverage of individual lots. The barren Northeastern lots tend to be larger than the tree-covered lots: the developers seemed to have desired to create lots with similar equivalent values, doing so by increasing the total acreage of land with less desired characteristics. In Figure 5, the first graph relates land value per acre to lots, with the earlier lots being barren lots, hence less valuable per acre. In the second graph relating lots to total land value, not land value per acre, the developers' attempts to correct the skewed value of lots by increasing the size of barren lots is shown:

When trying to sell land, people are looking for "trees"; according to Sherri Pearson, a local realtor, "trees come even before the view."²⁵³ Tree coverage impacts more than simply land pricing; it also correlates to trends in housing construction. Therefore, while amount of coverage seems removed from a building code discussion, it is worth exploring.

Lots with average or heavy tree cover are twice as likely to have a building constructed on them than lots with minimal or no tree coverage.²⁵⁴ If degree of tree coverage had no correlation with the probability of construction, the percent of units compared to total number of each lot type would be 29.5% across all lots.²⁵⁵ Multiplying the overall development percentage by the number of lots of each type generates an expected number of buildings according to each type.²⁵⁶ Yet actual development is only 70% of expected on non-treed lots and 67% of expected on minimally treed lots; yet, it reaches 136% of expected on average covered lots and 188% of expected on heavily covered lots.

The correlation between tree coverage and construction indicates that construction is not being undertaken purely to provide shelter. Given the unique characteristics of each lot and the number of ways in which lots are differentiated along lines other than tree coverage, causation cannot be shown. However, while non-treed land in Badger Creek is cheaper and is more likely to have an easily prepared building site, those constructing housing are much more likely to do so on treed land. This suggests that a motivation for shelter is being coupled with a desire for a nice overall setting, and that Badger Creek residents constructing housing are in a position to provide themselves with a level of construction above the bare minimum.

253. Telephone interview with Sherri Pearson, Broker/Owner for the Valley Broker Real Estate Company (Apr. 4, 2005).

254. Development as a percentage of average or heavily treed lots is 41.4%, whereas it is only 20.3% of minimal or non-treed lots.

255. A total of seventy-eight of the 264 lots have construction on them according to the assessment data.

256. The expected numbers are: twenty-four on barren lots, twenty on minimally covered lots, thirty-two on average cover lots, and three on heavily covered lots (numbers rounded).

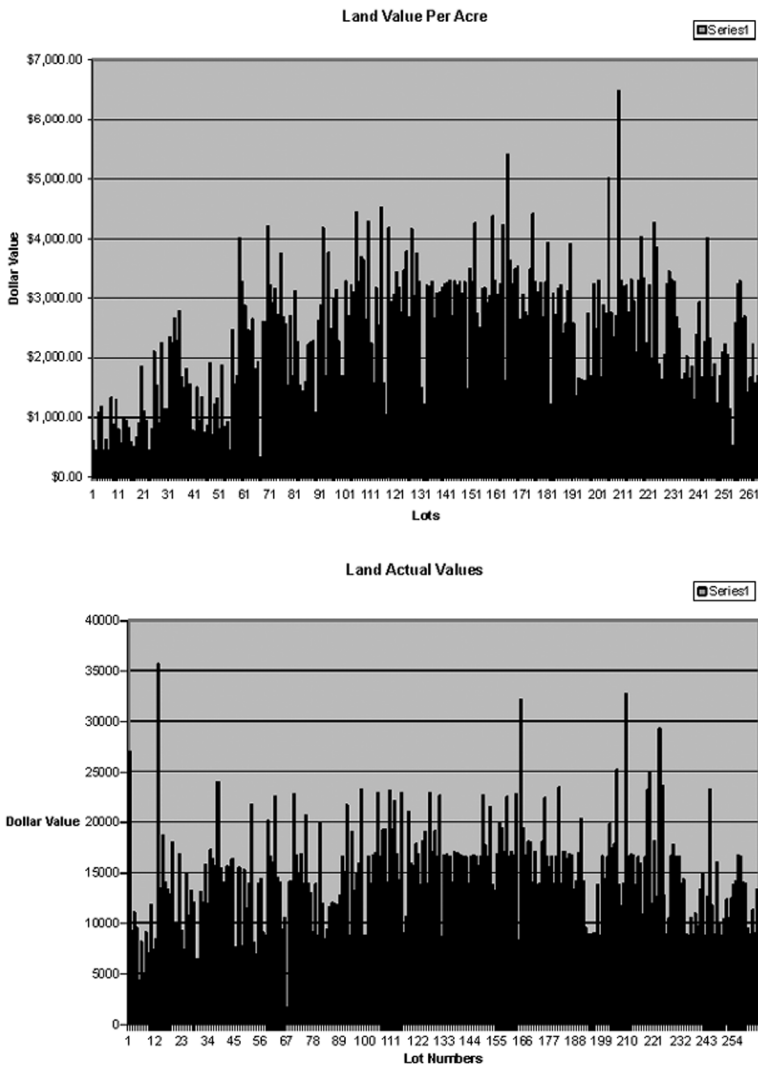


Figure 5.

Since Badger Creek was made into a rural subdivision, development has been sporadic, and the type of lot owner has varied. Badger Creek was one of the last Colorado subdivisions created with lots of under thirty-five acres apiece and without associated utilities. With the introduction of Park County’s first set of LURs in 1974,²⁵⁷ the law was changed so that all land divisions with lots under

257. The turnover date at which subdivisions are said to be subject to Park County oversight of property division is January 1, 1975, not when Land Use Regulations were originally adopted in 1974: “Because the County cannot conclusively determine the exact date of adoption in 1974 of the first subdivision regulations, the Board of County Commissioners by these Land Use Regulations establishes

35 acres had to have planning for subdivision utilities. Developers initially paid for the utilities, but then passed the costs along to purchasers. Thus, it remains true today, as it was true in 1971 with the original lot filing with Park County, that Badger Creek lots have a relatively low cost per acre. Those who purchase Badger Creek lots are choosing to forego the convenience of utility-provided electricity, for ideological (the allure of living “off-the-grid”) or financial (the lower cost of the land) reasons.

Badger Creek land value reflects its location and distance from urban amenities. The average land value per acre is \$2,439; however, the value per acre range varies considerably: from a low of \$319 to a high of \$6,480 per acre. Lot size varies from 5.00 to 44.48 acres; however, most lots fall within the six to ten acre range. In general, given a “five acre lot with no trees,” Sherri Pearson, the real estate agent with an in-depth knowledge of Badger Creek, said, “it is good if you can get fifteen thousand, the one with the trees you will get at least twenty-one thousand dollars.”²⁵⁸ In contrast, in Ranch of the Rockies, a similar subdivision in Park County that offers electricity, purchasers pay \$23,000 to \$35,000 for half size lots, of *two and a half* acres.²⁵⁹

Like all other rural areas, Badger Creek’s uniqueness explains in part the nature of its development and types of families in the subdivision. Realtor Sherri Pearson has tried to make living off the grid a “plus” rather than a negative.²⁶⁰ Given the beautiful setting, the challenges of Badger Creek living, and the timing of the land’s subdivision, many Badger Creek residents “still carry torches from the last big social movements to hit the Rockies—one of the most entertaining, if least celebrated, displays of American wildlands fever of the past seventy-five years, the back-to-nature movement.”²⁶¹ Thus, Badger Creek includes many old or former (not necessarily the same thing) hippies who purchased land when it first became available.²⁶² However, in the last decade just as many families who fit a yuppie stereotype have bought land and built structures in Badger Creek.²⁶³ Stereotypes provide some hint about whether someone will follow the building code,²⁶⁴ but ultimately very little insight into what to expect from a particular resident when a neighbor decides to put up a decrepit shack on his or her lot, a point alluded to by Gary Ferguson in his study of the Rocky Mountains: “Ironically, even many of those who came to mountain towns during the

a policy that divisions of property by deed dated prior to January 1, 1975 are recognized as lawful divisions of property.” PCLURs § 4-200 n.1.

258. Telephone interview with Sherri Pearson, *supra* note 253.

259. *Id.*

260. *Id.*

261. GARY FERGUSON, *THE GREAT DIVIDE: THE ROCKY MOUNTAINS IN THE AMERICAN MIND* 228, 250 (2004).

262. For example, lot 43 fits this category (in the interest of full disclosure, this lot belongs to the author’s parents).

263. For example, lot 222 fits this category.

264. For example, “Young people experimenting with back-to-nature lifestyles are notorious for building without notifying the local government.” Seidel, *supra*, note 13, at 545.

back-to-the-land movement, going on to eventually prosper themselves, these days show little tolerance for newcomers who look different, who are clearly outside the status quo.²⁶⁵

The number of owners of Badger Creek lots makes it a challenge to label a single set of characteristics that fit the status quo, or the type of construction that is the norm. Though the number of households for which Badger Creek is the primary, year-long, residence is increasing (from five to fifteen in the past five years), it remains for many a vacation community, which explains in part the prevalence of recreational trailers or campers. There are 224 distinct households that own Badger Creek Land.²⁶⁶ Looking at Badger Creek as it was originally divided by the developers—in other words, viewing lots individually and not paired through lot consolidation—179 households own a single lot and 45 own two or more lots. Of the multiple lot owners, three have four lots, nine have three lots, and 33 have two lots. Significantly, the type of construction found in Badger Creek reflects an array of styles, costs, and permanency. Log cabins²⁶⁷ coexist with kit homes,²⁶⁸ trailers,²⁶⁹ modulares,²⁷⁰ shacks or sheds,²⁷¹ A-frames,²⁷² recreational campers/trailers,²⁷³ and even homes similar to standard suburban constructions.²⁷⁴ Conflicts between neighbors regarding an individual household's decisions about its type of housing and construction techniques are rare, for as the list of different types demonstrates, many possibilities as far as cost and type are considered “acceptable” or within Badger Creek's social norms.²⁷⁵

D. Consequences of Non-Compliance

Badger Creek owners who construct a log cabin or even a shack can count on Park County's policy of not concerning itself with “minor, trivial matters” related

265. FERGUSON, *supra* note 261, at 250.

266. There is also a single lot, lot 185, owned by Park County.

267. For example, lots 38, 43, 69, 72, 91, 96, 101, 109, 116, 124, 129, 132, 138, 141, 171, 206, 240, 243, and 269.

268. For example, lots 154, 159, 180, 235, and 238.

269. For example, lots 15, 37, 39, 65, 74, 128, 201, 234, 276, and 280.

270. For example, lots 8, 73, 168, 262, and 277.

271. For example, lots 3, 162, 175, 193, 223, 239, 250, 251, 254, and 271.

272. For example, lot 78.

273. For example, lots 14, 16, 26, 31, 62, 66, 76, 81, 92, 93, 102, 119, 131, 133, 136, 150, 151, 172, 192, 194, 210, 215, 216, 217, 227, 232, 259, and 281.

274. For example, lots 36, 104, 106, 125, 134, 135, 140, 160, 181, 183, 184, 185, 198, 200, 231, and 247. The lists of lots, by type, in this footnote and the preceding ones are meant to be representative and not definitive. The breakdown is based upon photographs taken from the road and as such is not an in-depth examination of each of the structures. Moreover, while it is easy to tell the difference between a camper and a modular, many structures lie in between types or might be classified in at least two categories.

275. Norms are part of the rules of a society, similar to formal laws. Douglass C. North, *The New Institutional Economics and Third World Development*, in *THE NEW INSTITUTIONAL ECONOMICS AND THIRD WORLD DEVELOPMENT* 18, 23 (John Harriss et al. eds., 1995).

to land use or building code regulation non-compliance.²⁷⁶ Thus, one lot owner can speak with pride of his “plywood condominium,” despite the fact the owner did not follow Park County’s permit procedures and the construction proceeded sporadically according to the owner’s access to money. Similarly, other owners can live in two story sheds, build their own decks, or expand their houses without fear of Park County kicking them out of their houses or even directly imposing sanctions.²⁷⁷ Indeed, the worst that will happen to *most* people who do not follow Park County regulations is that they will find that “they have not created an asset,” which is an entirely personal cost.²⁷⁸ The exception is when “someone formally complains” about the construction project or land use traits of a neighbor,²⁷⁹ in that case, enforcement is arguably geared towards protecting the entitlements of neighbors to have the subdivision maintain a certain quality²⁸⁰ and not to guarantee a certain minimum safety standard. Despite the norm of generally allowing each landowner to do his or her own thing, the actions and construction plans of the owner of Lot 15 generated rounds of complaints from the neighbors and a response from the Park County authorities.

On July 14, 2004, Timothy Ricard was charged with “unlawful use of residential property” for using his property “as a salvage yard, vehicle storage yard, recycling center and/or a junk yard.”²⁸¹ Ricard had filled large areas of his lot with junked cars, industrial trash, and many piles of tires.²⁸² One long-term Badger Creek lot owner, when asked if she had any complaints about a neighbor, explained:

The only thing I would complain about if I was to complain about something would be that fellow over there with the tire piles. If he had done what he had planned [built a tire based earthen structure] it would be different. When you collect tires and let them sit, they become an eyesore.²⁸³

The charges against Ricard came after the Badger Creek Ranch Property Owners Association (BCRPOA) helped Park County understand how Ricard was using his property and how the other owners felt they were affected by the condition of

276. PCLURs § 2-200(A).

277. Telephone interview with Doc McKay, *supra* note 244. As a Buena Vista real estate agent states, “[there are] plenty of people who still feel that if you buy your forty you can put on it whatever you want.” Telephone Interview with Mal Sillars, Agent, Summit Realty, in Buena Vista, CO (Nov. 15, 2004).

278. Telephone interview with Doc McKay, *supra* note 244.

279. *Id.*

280. An entitlement is a “legitimate claim a person has . . . that direct[s] governments to pursue [rights held by the person].” HIRSCH, *supra* note 87, at 11.

281. Bess McNamara, *County Files Charges Against Ricard*, FAIRPLAY FLUME, July 23, 2004.

282. As Janet M. Fitchen writes, “front-yard auto junkyards are offensive to passers-by and contribute to the public’s stereotype of the rural poor. The visual offensiveness of the cars is interpreted . . . as a sign of the moral offensiveness of their owners.” FITCHEN, *supra* note 35, at 100.

283. Telephone Interview with Sarah Huhn (name changed to protect lot owner’s privacy) (Apr. 11, 2005).

Lot 15.²⁸⁴ After the judge read the charges against Ricard, he responded: “It’s my property. It’s my belongings.”²⁸⁵ It should be noted that both Ricard’s response and the depth of feelings held by Ricard’s neighbors are influenced by “the tendency for parties to arrive at judgments that reflect a self-serving bias—to conflate what is fair with what benefits oneself.”²⁸⁶ Yet, on September 1, 2004, in return for the promise that the charges would ultimately be dropped if he cleared up his lot within six months, Ricard agreed with Park County Attorney Stephen Groome to plead guilty to all charges.²⁸⁷

Park County’s efforts to deal with Timothy Ricard’s choices and the resulting externalities²⁸⁸ illustrate the challenges of trying to enforce building and land use codes while also respecting “free will, personal responsibility and the rights of individuals to be accountable for their own actions.”²⁸⁹ This challenge is reflected in the protracted dealings between Ricard, the County, and the BCRPOA. The expanding piles of tires on Lot 15 were the primary focus of a July 2001 letter from the BCRPOA to the Park Commissioners. The July 2001 letter noted:

These piles of tires . . . obviously are a major ‘eye sore’ in the area, thus affecting the property values for the entire Badger Creek Ranch area [T]heir placement in an area adjacent to the surface water along Badger Creek is a major health hazard [The BCRPOA] also believes that the nature of the piles of tires is a major fire hazard.²⁹⁰

In August 2001, the BCRPOA reiterated to the Commissioners the BCRPOA’s belief that Lot 15’s “apparent violations constitute a real public health hazard, an environmental hazard, risk to children in the residential area, a public nuisance, and a threat to property values for the entire area.”²⁹¹ The letter continued by asserting that Ricard’s “continuation of bringing in used tires and dumping them

284. Telephone interview with Doc McKay, *supra* note 244.

285. McNamara, *supra* note 281.

286. Linda Babcock and George Loewenstein, *Explaining Bargaining Impasse: The Role of Self-serving Biases*, in *BEHAVIORAL LAW AND ECONOMICS* 355, 355 (Cass R. Sunstein ed., 2000). Distorted perception occurs when parties “see things in the light most favorable to them; while people care about fairness, their assessments of fairness are distorted by their own self-interest. This is a form of bounded rationality—specifically, a judgment error; people’s perceptions are distorted by self-serving bias.” Christine Jolls, Cass R. Sunstein & Richard H. Thaler, *A Behavioral Approach to Law and Economics*, in *BEHAVIORAL LAW AND ECONOMICS* 13, 29 (Cass R. Sunstein ed., 2000).

287. Lora Abcarian, *Ricard, County Reach Agreement*, *FAIRPLAY FLUME*, Sept. 24, 2004.

288. An externality is an action which “influences, or may influence with a probability, the well-being of another person, in comparison with some standard of reference.” STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW* 77 (2004).

289. PCLURs § 2-200(A).

290. Letter from the Badger Creek Property Owner’s Association to Park County Commissioners (July 9, 2001) (on file with the author).

291. Letter from the Badger Creek Property Owner’s Association to Park County Commissioners (August 25, 2001) (on file with the author).

on the lot is simply a matter of financial reward for him.”²⁹²

Enforcement of Park County regulations—in this case, the building permit requirement that construction of the earthen home occur in a timely manner and the land use requirement that residential lots be used for residential purposes—is an ongoing effort by County officials. Ricard was taken to court after Park County discovered that seizing the property would not solve the problem because the County could not afford the clean-up: projected costs were \$150,000,²⁹³ while the annual code enforcement budget for all of Park County was less than \$30,000.²⁹⁴ The general belief, as stated by a former president of the BCRPOA, is that though the County has some “definite limitations . . . they do what they can.”²⁹⁵ Yet, despite the condition of Lot 15 being the “worst” Park County Building Supervisor Doc McKay has ever seen, tire and rubbish piles still litter the lot in violation of County regulations four years after the BCRPOA brought Ricard to the attention of Park County.²⁹⁶ Rural enforcement, as shown in interactions between Badger Creek owners and Park County, requires much less than full compliance with land use regulations and building codes. Still, many Badger Creek owners, even those whose land value arguably is diminished by construction projects such as Ricard’s, believe that “we have got all the enforcement we need *up there*.”²⁹⁷

E. Badger Creek Lessons

If Badger Creek is subjected to a new type of code enforcement, care must be taken to ensure that the transition will not harm the less well-off residents who are making the toughest decisions regarding their housing. One possible way of doing this would be to impose “liability instead of prescribing methods of construction,” which was the case under Roman Civil Law and became part of the Napoleonic Code.²⁹⁸ While “Anglo-American governments have generally relied on public regulations that prohibit the erection of buildings that do not

292. *Id.* The “financial reward” for bringing in tires is produced by gas stations and tire vendors paying individuals per tire they haul away. This arraignment benefits the gas station and vendors, who first acquired such a used tire when selling someone a new tire, because they can pay the individual less than they would have to pay a tire recycling center.

293. McNamara, *supra* note 281.

294. KATHY BOYCE, PARK COUNTY, COLO., FINAL ADOPTED BUDGET FOR THE YEAR 2005 36 (2004), available at <http://www.parkco.us/Documents/2004%20Budget/2005%20Budget.pdf> (on file with the author).

295. Telephone Interview with Art Woodward, former President, Badger Creek Ranch Property Owners Association (Apr. 11, 2005).

296. The degree to which Ricard has cleaned up his lot is subject to dispute. Building Supervisor Doc McKay, who is also Ricard’s probation officer, believes 65% of the conditions leading to the charges against Ricard have been cleaned up. Telephone interview with Doc McKay, *supra* note 244. However, photographs of the lot still reveal an impressive collection of tires, junked cars, and structures out of compliance with the building code. Photographs of Lot 15 (on file with the author).

297. Telephone Interview with Sarah Huhn, *supra* note 283.

298. Seidel, *supra*, note 13, at 527.

utilize prescribed materials and techniques,” regulations based on liability arguably fit Badger Creek better than traditional technique-based approaches.²⁹⁹ Liability would allow lot owners greater flexibility in defining their own needs, and, with some supplemental training for inspectors, would do so without sacrificing safety.

Badger Creek is a subdivision in transition, and the suggested switch to a liability code is based on the choice of the model’s best value system for the subdivision. While the distance from jobs and lack of utilities once meant that Badger Creek would be attractive to occasional vacationers and a few hearty families, its lots increasingly are becoming the province of better-off families. From the reactions evident in the efforts to enforce shared standards on Lot 15, the great majority of Badger Creek residents are concerned with both their own housing and that of other community members. As such, while the *fulfilling needs* concept might have been most appropriate when Badger Creek Ranch was founded, the *maximization* value concept best fits the present Badger Creek and should guide future code enforcement decisions.

CONCLUSION

This Article presents a new way of thinking about the values underlying code enforcement decisions in rural areas and attempts to develop a model that will expand the tools available for considering building codes while being concrete enough to provide practical guidance. Policymakers in rural areas—whether for areas as large and distinct as the Navajo Nation or small and particular as Badger Creek—have before them the task of ensuring that their choices reflect the values important to their areas. By considering these values and not simply mimicking the processes developed in urban contexts, rural building code enforcement can reflect an awareness of the ways in which code enforcement directs choices regarding rural housing types.

299. *Id.*