

NOTES

An Application of Equality Theories to Commercial-to-Residential Adaptive Reuse Projects

Madison DeLuca*

ABSTRACT

Low-income U.S. renters currently face a severe housing shortage: approximately eight million too few affordable units exist for households earning less than their area’s average median income. At the same time, office buildings have become increasingly underutilized. Thus, adaptive reuse—which focuses on renovating and reusing old buildings for new purposes—can reduce inequality in the United States by turning vacant office space into much-needed affordable housing. This paper posits that if jurisdictions improved adaptive reuse policies by codifying both affordable housing 1) incentives and 2) mandates, those jurisdictions would enjoy more equality, as defined by leading political philosophers. Parts I and II of this paper provide background on affordable housing and adaptive reuse policies. Part III applies Amartya Sen and Martha Nussbaum’s Capabilities Approach to adaptive reuse, identifying adequate shelter as an implicated “capability” to consider in adaptive reuse ordinances. Part IV analyzes whether adaptive reuse advances capabilities at a level consistent with John Rawls’ difference principle; this Part determines that satisfying the difference principle requires governments to include both incentives and mandates for developers to incorporate affordable housing into adaptive reuse projects. Part V outlines additional changes to adaptive reuse ordinances that jurisdictions could implement to better facilitate equality. Part VI concludes.

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* Associate, Hessel, Aluise & O’Leary, P.C.; J.D., Class of 2024, The University of Texas School of Law; B.A., Class of 2017, University of Virginia. Thank you to Professor Oren Bracha for the invaluable feedback provided on this Note—which was originally written for his seminar *Equality*—during the spring 2023 semester. Additionally, this Note would not have been possible without the support of my family and friends; I am grateful for you every day. © 2024, Madison DeLuca.

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PART I. INTRODUCTION: CHANGES TO LOCAL LAWS COULD LIMIT HOUSING INEQUALITY
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How Are Housing Units and Office Buildings Connected?

Low-income renters in the United States currently face a severe housing shortage: approximately eight million too few affordable units exist for households earning less than their area’s average median income.¹ The present deficit continues a years-long trend of dwindling housing supply, pressuring renters as inflation surges, layoffs increase, and rent prices rise across the nation.² Compounding this problem, persistent supply chain issues, high interest rates, and skyrocketing steel, concrete, and labor costs have slowed new construction,³ including new construction of affordable housing,⁴ which is generally understood as housing towards which an occupant pays no more than 30% of their gross income.⁵

At the same time, office buildings have become increasingly underutilized. National office building vacancy rates hit 19.6% at the end of 2023, breaking the previous top vacancy record of 19.3% in 1991.⁶ Commercial vacancies appear

1. NAT’L LOW INCOME HOUS. COAL., THE GAP: A SHORTAGE OF AFFORDABLE HOMES 8 (Matt Clarke ed., 2023).

2. *Id.* at 3.

3. *Federal Funds Effective Rate*, FED. RSRV. ECON. DATA, <https://fred.stlouisfed.org/series/FEDFUNDS> (last visited Sept. 13, 2024) (displaying an effective federal funds rate of 5.33% for August 2024); Jeffrey Steele, *Macroeconomic Trends Stalling Affordable Housing Development*, FORBES (Apr. 21, 2023, 9:00 AM), <https://www.forbes.com/sites/jeffsteele/2023/04/21/macroeconomic-trends-stalling-affordable-housing-development/?sh=337fbcf96f6c>.

4. As outlined in Part II, this paper specifically analyzes affordable housing created by private entities acting in response to inclusionary polices, rather than, for example, affordable housing built by government agencies.

5. *Glossary of Terms to Affordable Housing*, U.S. DEPT. OF HOUS. URB. DEV., <https://archives.hud.gov/local/nv/goodstories/2006-04-06glos.cfm> (last visited Sept. 13, 2024).

6. Thomas Lasalvia, Lu Chen, and Nick Luettker, *Q4 2023 Preliminary Trend Announcement*, MOODY’S ANALYTICS CRE (Jan. 8, 2024), <https://cre.moodyanalytics.com/insights/cre-trends/q4-2023-preliminary-trend-announcement/>.

particularly extreme in major city centers.⁷ For instance, New York City saw a 100% increase in empty office space between the start of the COVID-19 pandemic and late 2022.⁸ In 2022, in Manhattan, where less than 1% of apartments renting below \$1,500 a month sat vacant, the vacancy rate for office buildings hit 20%.⁹ Across the country in San Francisco, nearly 28% of downtown office buildings were vacant in 2022, with this rate projected to remain high through 2026.¹⁰

These vacant buildings are a drag on the nation's cities. Concentrated building abandonment correlates with small business closures, transit budget gaps, and municipal property tax shortfalls.¹¹ Furthermore, cities must generally pay to maintain or demolish abandoned buildings.¹² Philadelphia, for example, spends over \$20 million a year to upkeep approximately 40,000 vacant properties.¹³ Vacant commercial properties in particular can disproportionately burden public safety officials. Although commercial properties make up only 3% of Oklahoma City's vacant property stock, they account for around 40% of police and fire calls.¹⁴ Cities that want to demolish vacant buildings must generally pay \$4,800 to \$7,000 per property to do so.¹⁵

Thus, by appealing to financial and safety concerns to garner municipal political will, advocates could encourage office building "adaptive reuse" projects to mitigate the affordable housing shortage. "Adaptive reuse" means "the renovation and reuse of pre-existing structures . . . for new purposes."¹⁶ More specifically, it

7. Jan Mischke, Ryan Luby, Brian Vickery, Lola Woetzel, Olivia White, Aditya Sangvhi, Jinnie Rhee, Anna Fu, Rob Palter, André Dua, & Sven Smit, *Empty Spaces and Hybrid Places: The Pandemic's Lasting Impact on Real Estate*, MCKINSEY GLOB. INST. (July 13, 2023), <https://www.mckinsey.com/mgi/our-research/empty-spaces-and-hybrid-places#/>.

8. OFF. OF ADAPTIVE REUSE TASK FORCE, N.Y.C. DEP'T OF CITY PLAN., OFFICE ADAPTIVE REUSE STUDY 10 (2023), <https://www.nyc.gov/assets/hpd/downloads/pdfs/services/office-adaptive-reuse-study.pdf>.

9. *Id.* (noting that "[t]he percentage of Manhattan office space available to rent has increased from around 10% pre-pandemic to around 20% in Q3 2022."); N.Y.C. DEP'T OF Hous. PRES. & DEV., 2021 NEW YORK CITY HOUSING AND VACANCY SURVEY SELECTED INITIAL FINDINGS 27 (May 16, 2022), <https://www.nyc.gov/assets/hpd/downloads/pdfs/services/2021-nychvs-selected-initial-findings.pdf> (determining that "[a]mong units with rents of less than \$900, the net rental vacancy rate was 0.86 percent and among those with rents of \$900 to \$1,499 it was 0.93 percent.>").

10. SUJATA SRIVASTAVA, OFFICE-TO-RESIDENTIAL CONVERSION IN SAN FRANCISCO'S CHANGING REAL ESTATE MARKET 3 (Melissa Edeburn & Karen Steen, eds., 2023), https://www.sf.gov/sites/default/files/2023-04/SPUR_Office-to-Residential_Conversion_in_SF.pdf.

11. Tracy Hadden Loh & Joanne Kim, *To Recover From COVID-19, Downtowns Must Adapt*, BROOKINGS (Apr. 15, 2021), <https://www.brookings.edu/research/to-recover-from-covid-19-downtowns-must-adapt/>.

12. ALAN MALLACH, LAYING THE GROUNDWORK FOR CHANGE: DEMOLITION, URBAN STRATEGY, AND POLICY REFORM 12 (Sept. 2012), <https://www.brookings.edu/wp-content/uploads/2016/06/24-land-use-demolition-mallach.pdf>.

13. Hadden Loh & Kim, *supra* note 11.

14. *Vacant and Abandoned Properties: Turning Liabilities Into Assets*, HUDUSER (2014), <https://www.huduser.gov/portal/periodicals/em/winter14/highlight1.html>.

15. *Id.*

16. *Adaptive reuse*, MERRIAM-WEBSTER (last visited March 3, 2024), <https://www.merriam-webster.com/dictionary/adaptive%20reuse>.

can refer to “the repurposing of a building for a new, more valuable use *while preserving as much of the existing structure as possible*.”¹⁷ Adaptive reuse generally occurs when an old building, such as a warehouse or hotel, is renovated for a new use, such as residential living, that is different from its originally intended purpose.¹⁸ Adaptive reuse projects usually satisfy the following criteria: “(1) existence of a structure to be reused, (2) functional and/or economic obsolescence of the existing building, (3) change of use, and (4) economic viability of the new project.”¹⁹

While an adaptive reuse project can turn a building into almost any type of space, including a hotel, school, or research lab, this paper focuses on adaptive reuse projects that create rental housing.²⁰ A “primary application” of adaptive reuse is converting commercial properties to residential ones, and in the wake of the COVID-19 pandemic, many jurisdictions have considered policies to reallocate commercial square footage to residential use because of the rise in remote work.²¹ Remote work, which was already becoming increasingly popular pre-pandemic, boomed in 2020.²² In many areas, companies with offices in low-quality and aging buildings are transitioning to more telework-centered operations, rendering those buildings obsolete.²³ The rise of remote work has potentially significant benefits for housing: for example, if Los Angeles converted only 10% of its current office space into housing, the city would gain an estimated 8,000 to 16,000 units.²⁴ The number of units converted from office space could quickly outpace those provided via the federal government’s foremost affordable housing construction program, the Low-Income Housing Tax Credit Program, which placed 1,216 units in service in Los Angeles in 2021.²⁵

Some jurisdictions have specifically adopted “adaptive reuse ordinances,” which encourage building conversions by outlining regulatory exemptions for

17. JASON M. WARD & DANIEL SCHWAM, CAN ADAPTIVE REUSE OF COMMERCIAL REAL ESTATE ADDRESS THE HOUSING CRISIS IN LOS ANGELES? 1 (2022), https://www.rand.org/pubs/research_reports/RR1333-1.html (emphasis added).

18. Matthew A. Young, *Adapting to Adaptive Reuse: Comments and concerns about the Impacts of a Growing Phenomenon*, 18 S. CAL. INTERDISC. L.J. 703, 703-05 (2009).

19. DAVID GARCIA & ELLIOT KWAN, ADAPTIVE REUSE CHALLENGES AND OPPORTUNITIES IN CALIFORNIA 3 (2021), <https://turnercenter.berkeley.edu/wp-content/uploads/2021/11/Adaptive-Reuse-November-2021.pdf>.

20. See OFF. OF ADAPTIVE REUSE TASK FORCE, *supra* note 8, at 18.

21. See WARD & SCHWAM, *supra* note 17.

22. See Hadden Loh & Kim, *supra* note 11.

23. See, *id.*; SRIVASTAVA, *supra* note 10, at 1.

24. GARCIA & KWAN, *supra* note 19, at 2.

25. LIHTC Database Access, U.S. DEP’T HOUS. URB. DEV., [https://lihtc.huduser.gov/\(Select “California” within “Select a Single State to Select Cities or Counties within the State” dropdown menu; then select “Los Angeles” within “City or Cities” dropdown menu; then select “2021” under “Placed-in-Service Years” dropdown menu; then select “New Construction” within “Construction Type” subfield; then click “Retrieve Project Data” button\); OFF. POL’Y DEV. RSCH, *Low-Income Housing Tax Credit \(LIHTC\)*, U.S. DEP’T HOUS. URB. DEV., <https://www.huduser.gov/portal/datasets/lihtc.html>, \(last visited Mar. 18, 2024\).](https://lihtc.huduser.gov/(Select%20California))

them.²⁶ Areas where commercial buildings sit are often not zoned for residential purposes, requiring special permits, waivers, or variances to change their use.²⁷ Obtaining such exemptions sometimes requires property owners to overcome temporal and financial challenges in order to prove hardship in court.²⁸ However, adaptive reuse ordinances proactively provide regulatory exemptions, allowing developers to sidestep protocols that might otherwise kill a project.

Specifically, cities including Los Angeles and Phoenix have put adaptive reuse ordinances in place, and other city governments have considered implementing similar policies.²⁹ Los Angeles' ordinance has been especially successful, creating around 12,000 new residential units in the first two decades of its existence.³⁰ Even though most areas in the U.S. lack adaptive reuse ordinances, meaning adaptive reuse projects generally face steep regulatory hurdles, total U.S. conversions to apartments from other property types rose 25% in the two years after the start of the COVID-19 pandemic.³¹ New apartment volume rose only 10% during the same period.³² Conversions can, and do, create housing.

Why Is An Equality Analysis Relevant to Adaptive Reuse Policy?

This paper evaluates adaptive reuse outcomes in the U.S. against political theorists' concepts of equality. Equality is a key aim of modern U.S. housing policy, as ameliorating racial inequality in housing played a central role in the civil rights movement of the 1960s.³³ The Fair Housing Act (FHA), a cornerstone piece of federal housing legislation, categorically prohibits unequal treatment on the basis of race, color, national origin, religion, sex, familial status, or disability in the sale or rental of housing.³⁴ Urban planning scholars have noted how the FHA put the problem of "white flight" to the suburbs "at the forefront of the civil rights movement, with National Association for the Advancement of Colored People (NAACP) Director Roy Wilkins framing suburbia as the next civil rights battleground."³⁵

26. Tatiana Walk-Morris, *How Adaptive Reuse Can Help Solve the Housing Crisis*, PLANNING MAGAZINE (May 1, 2021), <https://www.planning.org/planning/2021/spring/how-adaptive-reuse-can-help-solve-the-housing-crisis/>; Janet Nguyen, *Converting Office Space to Apartment Buildings is Hard. States Like California are Trying to Change That.*, MARKETPLACE (Mar. 13, 2023), <https://www.marketplace.org/2023/03/13/converting-office-space-to-apartment-buildings-is-hard-states-like-california-are-trying-to-change-that/>.

27. Walk-Morris, *supra* note 26.

28. *Id.*

29. *Id.*

30. WARD & SCHWAM, *supra* note 17, at 5.

31. Andreea Neculae, *Record Office-to-Apartment Conversions Registered as Adaptive Reuse Apartments Go Up 25% from Pre-Pandemic Numbers*, RENTCAFE (Dec. 20, 2022), <https://www.rentcafe.com/blog/rental-market/market-snapshots/adaptive-reuse-apartments-2022/>.

32. *Id.*

33. Andrew H. Whittemore, *Exclusionary Zoning*, 87 J. AM. PLAN. ASS'N 167, 167 (2021).

34. Fair Housing Act, 42 U.S.C. § 3604(a).

35. Whittemore, *supra* note 33, at 172 (citing Paul Davidoff & Mary E. Brooks, *Zoning Out the Poor*, in SUBURBIA: THE AMERICAN DREAM AND DILEMMA 135, 135-66 (Phillip C. Dolce ed., 1976)).

The FHA is enforced by the U.S. Department of Housing and Urban Development (HUD), the nation's federal housing agency.³⁶ Today, HUD includes a specific division, the Office of Fair Housing and Equal Opportunity, tasked with carrying out the Department's commitment to fair and equal housing.³⁷ Unfortunately, race still plays a dispositive role in housing: for instance, home appraisal values of essentially-identical properties are highly correlated with the home seller's race.³⁸ Because significant inequality still exists in housing, and because the U.S. executive and legislative branches have structured modern housing policy with an eye towards remedying inequality, it is appropriate to analyze the effect of targeted adaptive reuse policies on equality in housing.³⁹

On a more conceptual plane, subjecting adaptive reuse policy to an equality analysis is appropriate because housing is a particularly equality-sensitive good.⁴⁰ At its core, advocating for equality means advocating for the concept that no one life is more important than another and thus society has a basic duty to take care of each person.⁴¹ Adequate shelter, unlike more gratuitous goods like luxury clothing or discretionary travel, is something that all people need⁴² but not everyone has.⁴³ And the reality that adequate shelter is necessary but not universally available is deeply incongruous with the idea that each person's life holds equal value. Therefore, this paper will analyze whether adaptive reuse policies advance the axiom that all lives are equally valuable and should be treated as such by society; the outcome of this analysis will inform the extent to which jurisdictions should enact policies supporting adaptive reuse.

At first glance, adaptive reuse appears to honor the idea that all lives are equally valuable, as it opens up opportunities for developers to create housing where none previously existed.⁴⁴ The reality of commercial square footage sitting empty while renters fight for scarce units certainly illustrates that cities

36. Fair Housing Act, 42 U.S.C. § 3608(a).

37. 76 Fed. Reg. 73984 (Nov. 29, 2011).

38. See Debra Kamin, *Widespread Racial Bias Found in Home Appraisals*, N.Y. TIMES (Nov. 2, 2022), <https://www.nytimes.com/2022/11/02/realestate/racial-bias-home-appraisals.html>.

39. Even critics who would disagree with the contention that equality is a central value of U.S. housing policy would likely concede that it is one of multiple aims. Ronald Dworkin explains this phenomenon by noting that “even those who do not think that equality is the whole story in political morality usually concede that it is part of the story, so that it is at least a point in favor of some political arrangement.” RONALD DWORKIN, *SOVEREIGN VIRTUE* 13 (Harvard Univ. Press 2002).

40. See generally DANYELLE SOLOMON, CONNOR MAXWELL, & ABRIL CASTRO, *SYSTEMIC INEQUALITY: DISPLACEMENT, EXCLUSION, AND SEGREGATION* (2019) <https://www.americanprogress.org/wp-content/uploads/sites/2/2019/08/StructuralRacismHousing.pdf> (illustrating how housing inequality closely tracks racial and economic inequality).

41. DWORKIN, *supra* note 39, at 1.

42. See G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) (reflecting the international community's consensus that everyone has a right to adequate housing).

43. See Brian Glassman, *Nearly 327,000 in U.S. Lived in Emergency and Transitional Shelters*, U.S. CENSUS BUREAU (Feb. 27, 2024), <https://www.census.gov/library/stories/2024/02/living-in-shelters.html>.

44. WARD & SCHWAM, *supra* note 17, at 5.

have not distributed building materials and space in an equal fashion.⁴⁵ However, it does not necessarily follow that a more equal world would result if adaptive reuse ordinances were adopted and strengthened. For example, while adaptive reuse projects can create much-needed housing units, it is not always clear that those units can or will be affordable.⁴⁶ Thus, whether adaptive reuse contributes to or detracts from equality requires analysis.

This paper tackles that analysis. Part II provides background on adaptive reuse policies. Part III applies Amartya Sen and Martha Nussbaum's Capabilities Approach to adaptive reuse, identifying adequate shelter as a core capability. Part IV analyzes whether adaptive reuse advances this capability at a level consistent with John Rawls' difference principle; it determines that satisfying the difference principle requires governments to include both incentives *and* mandates for developers to incorporate affordable housing into adaptive reuse projects that they choose to pursue. Part V outlines additional changes to adaptive reuse ordinances that jurisdictions could implement to better facilitate equality. Part VI concludes.

PART II: BACKGROUND ON ADAPTIVE REUSE ORDINANCES AND OTHER ADAPTIVE REUSE POLICIES

Under adaptive reuse ordinances, adaptive reuse projects are often subject to expedited approval processes and distinct city codes.⁴⁷ Adaptive reuse ordinances typically modify the zoning and building codes that apply to adaptive reuse projects, subjecting them to different requirements than new construction projects.⁴⁸ For example, such ordinances can allow floor areas to exceed the limits imposed by a local zoning code; this allows projects to proceed without developers obtaining variances.⁴⁹ Adaptive reuse ordinances also often provide expedited approval processes or give priority to conversion projects.⁵⁰ Ordinances frequently apply only to designated areas within a jurisdiction and sometimes include incentives for the specific types of development, such as affordable housing, that is valued in the area.⁵¹

Even in a jurisdiction with a lenient zoning code, the lack of an adaptive reuse ordinance likely inhibits conversions. San Francisco's downtown area allows residential development "by right" (essentially, without needing case-by-case municipal approval), but planning and building codes still make office-building-to-residential

45. *See id.* at 1.

46. OFF. OF ADAPTIVE REUSE TASK FORCE, *supra* note 8, at 24.

47. *See* Walk-Morris, *supra* note 26.

48. Vanessa Brown Calder, *Commercial-to-Residential Zoning Reform Gains Steam*, CATO AT LIBERTY (Nov. 10, 2023), <https://www.cato.org/blog/commercial-residential-zoning-reforms-gain-steam-2023>.

49. PRES. GREEN LAB, NAT'L TR. FOR HISTORIC PRES., *UNTAPPED POTENTIAL: STRATEGIES FOR REVITALIZATION AND REUSE* 27 (2017), <https://ohp.parks.ca.gov/pages/1054/files/Untapped%20Potential%20Green%20Lab%20ULI.pdf>.

50. *Id.* at 43.

51. *Id.* at 27; *see* OFF. OF ADAPTIVE REUSE TASK FORCE, *supra* note 8, at 12.

conversions infeasible.⁵² For instance, open space and bedroom count requirements frequently clash with the unit layouts that architects can fashion in office building conversion processes.⁵³ To bypass such requirements, developers must undertake difficult, years-long exemption processes.⁵⁴ In California, where some jurisdictions have adaptive reuse ordinances and some do not, the “prevalence of conversions appears to be greater in areas where such conversions are explicitly allowed under local zoning codes.”⁵⁵

Notably, Los Angeles’ adaptive reuse ordinance is considered a housing-creation gold standard.⁵⁶ It was passed in 1999 and expanded in 2003 to “foster the redevelopment of buildings that were too costly and time-consuming to redevelop under existing law.”⁵⁷ The ordinance provides expedited approval processes and distinct zoning and code requirements for conversions.⁵⁸ It especially focuses on allowing projects that meet key specifications to move forward as a matter of right, eliminating discretionary approval stages.⁵⁹ Critically, it also exempts conversions from the requirement to provide any net new parking.⁶⁰ This relaxed parking requirement has facilitated projects in dense areas that lack the physical space to add parking spots.⁶¹ Alternatively, developers can take advantage of the ordinance’s lenient parking requirement by converting extra parking spaces into residential square footage, increasing the number of units their projects create.⁶² Overall, Los Angeles’ ordinance has reduced the average permitting timeline for a conversion project from 30 months to six months and contributed to the revitalization of the City’s now-vibrant downtown, with a “rush of people moving back” to a neighborhood that was previously deserted after business hours.⁶³

Phoenix has also been a leader in adaptive reuse, perhaps because of the high vacancy rates that have swept the state of Arizona.⁶⁴ The city’s adaptive reuse

52. SRIVASTAVA, *supra* note 10.

53. *Id.*

54. *Id.*

55. ISSI ROMEM, DAVID GARCIA, AND IDA JOHNSON, STRIP MALLS TO HOMES: AN ANALYSIS OF COMMERCIAL TO RESIDENTIAL CONVERSIONS IN CALIFORNIA 19 (2021), <https://ternercenter.berkeley.edu/wp-content/uploads/2021/11/Commercial-Zoning-Quantitative-November-2021.pdf>.

56. Alex Summers, *Adaptive Reuse: The US Cities Leading the Way in Alternative Building Use*, CITYMONITOR (July 20, 2023), <https://www.citymonitor.ai/analysis/adaptive-reuse-alternative-building-use/?cf-view>.

57. WARD & SCHWAM, *supra* note 17, at 5.

58. Jeremy Rosenberg, *How Downtown L.A. Became a Place to Live (without Parking)*, KCET (Apr. 2, 2012), <https://www.kcet.org/history-society/how-downtown-l-a-became-a-place-to-live-without-parking>.

59. WARD & SCHWAM, *supra* note 17, at 16.

60. Rosenberg, *supra* note 58; GARCIA & KWAN, *supra* note 19, at 6.

61. GARCIA & KWAN, *supra* note 19, at 6.

62. *Id.*

63. WARD & SCHWAM, *supra* note 17, at 5; Andrea Lo, *How Downtown Los Angeles Made a Stunning Comeback*, CNN (Feb. 16, 2017), <https://www.cnn.com/2017/02/15/architecture/downtown-la-revival/index.html>.

64. See *Vacant and Abandoned Properties: Turning Liabilities Into Assets*, HUDUSER (2014), <https://www.huduser.gov/portal/periodicals/em/winter14/highlight1.html>.

ordinance streamlines permitting and offers fee reductions for adaptive reuse projects.⁶⁵ Phoenix especially highlights the development assistance component of its adaptive reuse program, through which it provides technical assistance with the land development and permitting processes.⁶⁶

Moreover, adaptive reuse ordinances can contain inclusionary affordable housing provisions. This is because the majority of the affordable housing created in the U.S. today is produced by private developers.⁶⁷ Building an affordable unit generally costs as much as building a market-rate unit, so without government intervention, it is rarely financially feasible.⁶⁸ Affordable units are difficult to develop because they amass lower profits, since residents' rents are typically capped based on income rather than subject to market forces.⁶⁹ Moreover, low rental income figures make it harder for developers to secure loans to construct affordable housing in the first place, as lenders will generally only provide loans if they receive proof that, once a development gets up and running, rent revenue will produce sufficient funds to cover principal and interest payments.⁷⁰

At a high level, jurisdictions often create affordable rental housing by adopting mandates, incentives, or both.⁷¹ Jurisdictions regularly mandate that developers include a percentage of affordable housing in any new residential development.⁷² Under this model, developers must choose projects that allow them to absorb affordable units' rent deficits.⁷³ Another key route to affordable housing creation is through incentive programs.⁷⁴ In incentive programs, developers that commit to building affordable housing or including affordable housing in otherwise market-rate developments receive tax breaks, higher density allowances, or other benefits designed to offset the financial loss of the affordable units.⁷⁵

Some jurisdictions' adaptive reuse efforts explicitly include affordable housing creation. For instance, Washington, D.C. maintains a program offering tax abatements to commercial property owners who convert at least a portion of their

65. PRES. GREEN LAB, *supra* note 49, at 17.

66. *Id.* at 19; *What is Adaptive Reuse?*, CITY OF PHOENIX, <https://www.phoenix.gov/pdd/services/permitservices/arp>.

67. LANCE FREEMAN & YINING LEI, AN OVERVIEW OF AFFORDABLE HOUSING IN THE UNITED STATES 2 (2023), https://pennur.upenn.edu/uploads/media/An_Overview_of_Affordable_Housing_in_the_United_States_Updated.pdf (“The overwhelming majority of affordable [housing] . . . is produced by the private sector.”).

68. *The Cost of Affordable Housing: Does it Pencil Out?*, THE URB. INST., <https://apps.urban.org/features/cost-of-affordable-housing/>.

69. *Id.*

70. *Id.*

71. *Voluntary Programs*, INCLUSIONARYHOUSING.ORG, <https://inclusionaryhousing.org/designing-a-policy/program-structure/voluntary-programs/>.

72. *Density Bonuses*, LOC. HOUS. SOLUTIONS (May 7, 2021), [https://localhousingsolutions.org/housing-policy-library/density-bonuses/\(demonstrating how communities can require that, for example, at least 10% of the new units in every housing development remain affordable to very low-income households, as defined by the federal government, for at least 30 years\)](https://localhousingsolutions.org/housing-policy-library/density-bonuses/(demonstrating%20how%20communities%20can%20require%20that%20for%20example%20at%20least%2010%20of%20the%20new%20units%20in%20every%20housing%20development%20remain%20affordable%20to%20very%20low-income%20households%20as%20defined%20by%20the%20federal%20government%20for%20at%20least%2030%20years).).

73. INCLUSIONARYHOUSING.ORG, *supra* note 71.

74. *Id.*

75. *Id.*

downtown property into residential housing.⁷⁶ To receive the tax abatement, at least 15% of housing units produced by a conversion must be affordable.⁷⁷ Similarly, Pittsburgh has solicited proposals to turn “fallow and underutilized office space” into affordable housing.⁷⁸

Adaptive reuse policies can also arise at the state level. California recently passed the Middle Class Housing Act, which aims to create new housing for low- and middle-income residents by streamlining housing project approvals in underutilized commercial zones.⁷⁹ However, it does not contain affordable housing incentives or mandates.⁸⁰ Rather, it assumes that adaptive reuse will naturally create housing appropriate for low- and middle-income families.⁸¹ In this way, the Act is vulnerable to the most direct critiques of adaptive reuse: adaptive reuse policies do not sufficiently address affordable housing in a world where market forces fail to meet affordable housing needs.⁸²

Critics of adaptive reuse also argue that it is nonresponsive to rural and suburban areas. For example, in California, although commercial land is more plentiful further from central business districts, commercial-to-residential conversions often occur closer to the center of major metro regions.⁸³ Similarly, adaptive reuse is less helpful in weak housing markets, where supply greatly exceeds demand, and in areas with decreasing populations.⁸⁴ While rural and suburban housing needs are an important part of the housing crisis puzzle, this paper devotes attention to urban areas, to which adaptive reuse ordinances generally pertain.⁸⁵

76. Daniel Miktus & James T. Clark, *Washington, D.C. to Provide Tax Abatements for Conversions to Residential Properties*, AKERMAN (Feb. 15, 2023), <https://www.akerman.com/en/perspectives/washington-dc-to-provide-tax-abatements-for-conversions-to-residential-properties.html>.

77. *Id.*

78. Mae Anderson, Ashraf Khalil, and Michael Casey, *Cities Reviving Downtowns by Converting Offices to Housing*, AP NEWS (Apr. 24, 2023), <https://apnews.com/article/cities-downtowns-vacant-offices-affordable-housing-pandemic-cc2cd895fd0f186229f69b74a133eddb>.

79. *California to Build More Housing, Faster*, OFF. OF GOVERNOR GAVIN NEWSOM (Sep. 28, 2022), <https://www.gov.ca.gov/2022/09/28/california-to-build-more-housing-faster/>; Jamie Gold, *California Passes Adaptive Reuse Legislation To Address Housing Crisis*, FORBES (Sep. 30, 2022), <https://www.forbes.com/sites/jamiegold/2022/09/30/california-passes-adaptive-reuse-legislation-to-address-housing-crisis/?sh=394aec084648>.

80. CAL. GOV'T CODE § 65852.24 (West 2023).

81. *Id.*

82. Walk-Morris, *supra* note 26; Ashfaq Khan, Christian Weller, and Lily Roberts, *The Rental Housing Crisis Is a Supply Problem That Needs Supply Solutions*, CTR. FOR AM. PROGRESS (Aug. 22, 2022), <https://www.americanprogress.org/article/the-rental-housing-crisis-is-a-supply-problem-that-needs-supply-solutions/#:~:text=Market%20forces%20alone%20will%20be,both%20rental%20housing%20and%20homeownership>.

83. ROMEM ET AL., *supra* note 55, at 11.

84. HUDUSER, *supra* note 64.

85. See OFF. OF ADAPTIVE REUSE TASK FORCE, *supra* note 8, at 12; PRES. GREEN LAB, *supra* note 49.

PART III: ADAPTIVE REUSE AND THE CAPABILITIES APPROACH

To analyze whether adaptive reuse supports equality, it is natural to first look to the Capabilities Approach, advanced by political theorists Amartya Sen and Martha Nussbaum.⁸⁶ The Capabilities Approach provides a compelling answer to *what* a society should try to equalize, whether it is happiness, income, goods, access to affordable housing, or something else.⁸⁷ Nussbaum defines capabilities as “the answers to the question, ‘What is this person able to do and to be?’”⁸⁸ She also describes capabilities as “the freedoms or opportunities created by a combination of personal abilities and the political, social, and economic environment.”⁸⁹ Ultimately, the Capabilities Approach focuses on protecting those freedoms that are important enough that their removal would be an affront to human dignity.⁹⁰ Nussbaum declares that these freedoms, which any “decent” society must secure for its citizens, include life; bodily health; bodily integrity; senses, imagination, and thought; emotions; practical reason; affiliation; other species (i.e. the ability to live with “concern for and in relation to” plants and animals); play; and control over one’s environment.⁹¹

In analyzing a practice like adaptive reuse, the Capabilities Approach is proper because it measures a particular aspect of well-being, avoiding the perils of theories that simply prioritize society obtaining the largest amount of well-being generally. The Capabilities Approach recognizes that core elements of quality of life are both multiple and distinct; according to Nussbaum they “cannot be reduced to a single metric without distortion.”⁹² The Capabilities Approach thus facilitates analysis of how well a practice advances the precise capability of access to affordable housing, rather than requiring extrapolation to a more general concept like utility (essentially, a calculable feeling of happiness).⁹³ Furthermore, the Capabilities Approach focuses on the individual, rather than the amorphous societal aggregate that theories like utilitarianism favor.⁹⁴ Focusing on the individual avoids endorsing a situation where many people fare poorly and a few are massively well-off, which could conceivably maximize aggregate societal utility without creating a desirable or equal system. Such equality is important under the Capabilities Approach, which operates in the shadow of Dworkin’s idea, introduced in Part I, that society has a basic duty to take care of all people because everyone is equally valuable.⁹⁵ The Capabilities Approach strives towards

86. MARTHA NUSSBAUM, *CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH* 17 (2011).

87. *Id.* at 20.

88. *Id.*

89. *Id.*

90. *Id.* at 27.

91. *Id.* at 33-34.

92. *Id.* at 18.

93. *Id.* at 17-18 (explaining the basic differences between the Capabilities Approach and utilitarianism); Matthew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 YALE L. J. 165, 191 (1999) (defining utility).

94. NUSSBAUM, *supra* note 86, at 35.

95. *Id.* at 31; DWORKIN, *supra* note 39, at 1.

equality by recognizing that if people are considered on an individual basis, “the claims of all citizens are equal” because each person is “worthy of equal respect and regard.”⁹⁶

The Capabilities Approach also accounts for individual choices, as it focuses on providing opportunities for people to exercise if they so choose.⁹⁷ However, the Capabilities Approach does not confine its reach to equality of opportunity. Prioritizing equality of opportunity could lead to a society where outcomes for individuals are poor, but there is no identifiable equality issue because such outcomes were achieved through a fair process. Instead, the Capabilities Approach focuses on whether people realize specific, substantive life improvements under a given policy.⁹⁸

Though policymakers and philosophers disagree on what exactly should be scrutinized under the Capabilities Approach, access to affordable housing seems to bear the hallmarks of a key capability.⁹⁹ Scholars consider access to shelter a basic capability, and Nussbaum includes “adequate shelter” high on her list of ten central capabilities, under the heading of “Bodily Health.”¹⁰⁰ Though the word “adequacy” connotes ideas of housing quality, the definition also involves availability. If quality shelter is unavailable to a household because they cannot afford to rent it, it certainly is not “adequate” for them. In this way, the capability of adequate shelter encompasses housing that is affordable enough for households to access.

Because the Capabilities Approach seeks to address entrenched social injustice and inequality, it ascribes an “urgent” task to governments and policymakers to improve quality of life, as defined by people’s capabilities, for everyone.¹⁰¹ While current housing policies may be procedurally equal, they do not reflect the Capabilities Approach.¹⁰² Even if policymakers could show that current housing policies treat all renters and housing development projects equally, the current housing crisis illustrates that such policies fail to secure appropriate access to affordable housing and thus do not hold up under the Capabilities Approach.¹⁰³

However, to achieve meaningful equality in affordable housing, the appropriate benchmark for capabilities in the adaptive reuse context should be set even higher than what the Capabilities Approach requires. Nussbaum argues that in

96. NUSSBAUM, *supra* note 86, at 31.

97. *Id.* at 18.

98. *Id.* at 24.

99. Robert R. M. Verchick, *Disaster Justice: The Geography of Human Capability*, 23 DUKE ENVTL. L. & POL’Y F. 23, 57 (2012).

100. Radhika Balakrishnan et al., *Financial Regulation, Capabilities and Human Rights in the U.S. Financial Crisis: The Case of Housing*, 12 J. HUM. DEV. & CAPABILITIES 154, 159 (2011); NUSSBAUM, *supra* note 86, at 33.

101. NUSSBAUM, *supra* note 86, at 19.

102. See Kamin, *supra* note 38.

103. See NAT’L LOW INCOME HOUS. COAL., *supra* note 1, at 8 (outlining that approximately eight million too few affordable units exist for households earning less than their area’s average median income).

order for a society to truthfully say that it respects human dignity and eliminates social injustice, each of its citizens must be raised above a threshold level of each capability, such that they have a sufficient amount rather than an equal amount.¹⁰⁴ According to Nussbaum, determining what amount of each capability is sufficient is a “matter for each nation”; she notes that, in theory, those who write a nation’s constitution will set these levels, but in practice, this task usually falls to courts and legislatures.¹⁰⁵ Nussbaum believes that sufficiency levels can differ based on each nation’s history and tradition, further suggesting they might even vary based on each nation’s economic resources.¹⁰⁶ Regardless of how sufficiency thresholds are set, though, “those who need more help to get above” the threshold level of a capability warrant more assistance than those without such a need.¹⁰⁷

But at least in the housing context, a stricter equality inquiry than “sufficiency” is necessary. First, the “sufficiency” analysis makes no determination about how to handle inequalities above the minimum capability threshold. Once everyone has achieved a baseline level of housing, the “sufficiency” inquiry appears neutral about how society should allocate the rest of its resources. Ostensibly this means the rest of society’s homes could inure to its wealthiest person without dilemma under the “sufficiency” analysis. Nussbaum herself specifically notes that having “decent, ample housing may be enough: it is not clear that human dignity requires that everyone have exactly the same kind of housing.”¹⁰⁸ But more importantly, a key weakness with the “sufficiency” analysis is the problem of resource limits. Society, and particularly, government—which Nussbaum charges with special responsibility for achieving capabilities improvements—has limited resources.¹⁰⁹ If the level of resources in a society is low, that can mean that the sufficiency bar is necessarily set low, rendering the capability and sufficiency analyses essentially meaningless.

Instead, because of resource limits, the Rawlsian “difference principle”—the idea that a society should embrace only inequalities that raise the level of its worst-off citizens—should be imported into the equality framework when applying the Capabilities Approach to housing issues.¹¹⁰ Rawlsian analysis begins by bracketing key, fundamental liberties, such as freedom to participate in the political process and freedom from physical abuse, which governments can never distribute unequally.¹¹¹ Additionally, the analysis requires that offices of power in

104. NUSSBAUM, *supra* note 86, at 24, 31-32.

105. *Id.* at 41-42.

106. *Id.*

107. *Id.* at 24.

108. *Id.* at 41.

109. *Id.* at 19.

110. JOHN RAWLS, A THEORY OF JUSTICE: REVISED EDITION 65 (Harv. Univ. Press, Belknap Press 1999).

111. *Id.* at 53 (“The basic liberties are given by a list [which includes] political liberty (the right to vote and to hold public office) and freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of the person, which includes freedom from psychological oppression and physical

society be equally open to all people.¹¹² Then, according to the difference principle, other things in society that people desire, such as access to affordable housing, should be distributed equally unless a different distribution benefits the least advantaged people in society.¹¹³ Ultimately, under the difference principle, governments should only institute housing policies that change the status quo by benefiting individuals with the least access to housing.¹¹⁴ For example, only accepting applications for affordable housing units from housing-insecure people is a policy that creates inequality in access to affordable housing, but would be required by Rawlsian analysis because it benefits those with the least access to housing.

Within the context of housing, many areas of the U.S. naturally experience a key resource ceiling: there is limited land for housing.¹¹⁵ In urban areas, there is often minimal available land in close proximity to the majority of the area's jobs.¹¹⁶ Rawlsian analysis better comports with this reality and prevents theorists from effectively nullifying the housing equality analysis by determining that an acceptable level of resource provision is near zero.¹¹⁷ Because adaptive reuse policies are one potential part of the solution to the affordable housing shortage, it is appropriate to measure them against the difference principle. Ultimately, jurisdictions should strive for their adaptive reuse policies either to facilitate equal access to affordable housing or only create inequalities in access to affordable housing that benefit the most disadvantaged of their citizens.

PART IV: HOW ADAPTIVE REUSE STANDS UP UNDER A RAWLSIAN ANALYSIS OF CAPABILITIES

A combined Rawlsian and Capabilities Analysis of adaptive reuse's impact on access to affordable housing reveals that adaptive reuse schemes must include both affordable housing incentives *and* mandates to measurably increase societal equality.

Adaptive reuse ordinances necessarily introduce inequalities, as they provide certain valuable exemptions, and even specific city resources, only to developers that take on commercial-to-residential conversions.¹¹⁸ But, in compliance with the difference principle, these ordinances appear to benefit the least advantaged

assault and dismemberment (integrity of the person); the right to hold personal property and freedom from arbitrary arrest and seizure.”).

112. *Id.*

113. *Id.* at 65.

114. *Id.*

115. Konrad Putzier, *The U.S. is Running Short of Land for Housing*, WALL ST. J. (Sept. 25, 2022 1:10 PM ET), <https://www.wsj.com/articles/the-u-s-is-running-short-of-land-for-housing-11664125841>.

116. See Stephen Menendian, *Deconstructing the ‘Housing Crisis’*, THE OTHER & BELONGING INST. AT U.C. BERKELEY (Nov. 30, 2022), <https://belonging.berkeley.edu/deconstructing-housing-crisis>.

117. See, e.g., Mark S. Stein, *Nussbaum: A Utilitarian Critique*, 50 B.C. L. REV. 489, 503 (2009) (critiquing Nussbaum by arguing that if “there is going to be the same threshold for everyone (a position to which Nussbaum is committed), it would have to be set at a ridiculously low level.”).

118. See, e.g., PRES. GREEN LAB, *supra* note 49, at 15, 17; CITY OF PHOENIX, *supra* note 66.

by facilitating low-cost housing creation.¹¹⁹ Generally, if a private developer can produce a unit at a lower cost, it can more easily get the loans necessary to create that unit in the first place.¹²⁰ Additionally, the cheaper a unit is to build (or convert), the higher the likelihood that a developer can charge a below-market rent to recoup the expenses incurred by its creation.¹²¹ If adaptive reuse ordinances could lower development costs, such ordinances could make affordable housing a safer and more attractive bet for developers.¹²²

Specifically, projects developed under adaptive reuse ordinances appear more feasible because permitting and code exemptions accelerate projects, making them cheaper.¹²³ While experts note that minimal high-quality, empirical evidence exists on the cost differences between adaptive reuse and traditional new construction, the limited research available suggests that adaptive reuse is a cost-effective approach to development.¹²⁴ Some sources estimate that adaptive reuse projects are a quarter less expensive than market-rate projects.¹²⁵ Furthermore, the types of properties converted in adaptive reuse projects suggest that adaptive reuse ordinances lower development costs. Adaptive reuse projects leverage existing buildings, meaning developers may not have to shoulder labor and supply costs for tasks like laying foundations and constructing walls. Conversion allows a developer to save on some of a building's costliest elements, like parking lots, elevators, stairs, and structural components.¹²⁶ Repurposing a building can also "help bypass neighborhood opposition that otherwise may mount against a new construction project of similar scale," which can result in costly delays for developers.¹²⁷ Neighborhood opposition for adaptive reuse projects is less likely because such projects often do not change the appearance or character of a neighborhood, making them more palatable.¹²⁸ Finally, existing buildings may also be old enough to allow developers to obtain historic preservation tax credits for further cost-savings.¹²⁹

119. See RAWLS, *supra* note 110, at 65.

120. See *The Cost of Affordable Housing: Does it Pencil Out?*, *supra* note 68.

121. See *id.*

122. See *id.* (highlighting government intervention as a solution to financial feasibility problems in affordable housing development).

123. Steele, *supra* note 3; Ian Volner, *How Adaptive Reuse Can Help Solve the Affordability Crisis*, DWELL (Aug. 25, 2022), <https://www.dwell.com/article/how-adaptive-reuse-can-help-solve-the-affordability-crisis-joe-bone-lbba23a84ca8-cda354bd-c06edf59>; GARCIA & KWAN, *supra* note 19, at 5, 8; see also Renee Ing, *Adaptive Reuse Of Empty Buildings Could Create Affordable Housing*, HONOLULU CIV. BEAT (Dec. 16, 2022), <https://www.civilbeat.org/2022/12/adaptive-reuse-of-empty-buildings-could-create-affordable-housing/>.

124. WARD & SCHWAM, *supra* note 17, at 9.

125. Ing, *supra* note 123.

126. Payton Chung, *Not Every Obsolete Office Building is Cut Out to Become Apartments*, GREATER GREATER WASH. (Nov. 20, 2017), <https://ggwash.org/view/65628/not-every-obsolete-office-building-is-cut-out-to-become-apartments>.

127. GARCIA & KWAN, *supra* note 19, at 6.

128. *Id.*

129. WARD & SCHWAM, *supra* note 17, at 7.

Nevertheless, some scholars contest the idea that the typical adaptive reuse project is more financially lucrative than new construction.¹³⁰ The uniqueness of each building conversion introduces significant risk into adaptive reuse projects, which can threaten their financial feasibility and thus, their capacity to create affordable housing.¹³¹ And the more logistically difficult a building is to convert, the more expensive the project is.¹³² For example, large office buildings with wide, open floor-plan layouts present particular challenges to developers trying to fashion individual units that feature enough windows to provide appropriate natural light.¹³³ Additionally, conversions of older buildings, which are more likely to contain asbestos or lead paint, can necessitate unforeseen environmental remediation efforts.¹³⁴ Developers have noted that for buildings requiring particularly costly remediation, even obtaining the building for free may not provide enough cost-savings for a conversion to occur.¹³⁵ Finally, converting a building from office to residential use can require alterations that decrease the amount of its usable square footage, since interior cubicle spaces do not have access to, for example, appropriate plumbing systems for individual units.¹³⁶ Decreased square footage is particularly detrimental in high-demand areas like downtown Washington, D.C., where offices can rent for more than double apartments per square foot.¹³⁷

However, the fact that scholars contest adaptive reuse's *average* cost-savings does not take away from adaptive reuse ordinances' ability to impact affordable housing access in a way that is either equal for all or more beneficial for the least advantaged. Even though adaptive reuse may not always save costs, many projects could still have significant cost-savings for developers if appropriately incentivized. More jurisdictions could deliver equality if they instituted high-quality, opt-in adaptive reuse ordinances, putting the onus on developers to identify whether to pursue conversions under their applicable ordinance.

It is important to note that one regularly mentioned idea to increase adaptive reuse does directly threaten equality and jurisdictions should avoid it. Analysts have suggested that cities should waive otherwise-existing affordable housing

130. GARCIA & KWAN, *supra* note 19, at 2.

131. *Id.* at 4–5, 17.

132. *Id.* at 3–4.

133. Janet Nguyen, *Converting Office Space to Apartment Buildings is Hard. States like California are Trying to Change That.*, MARKETPLACE (Mar. 13, 2023), <https://www.marketplace.org/2023/03/13/converting-office-space-to-apartment-buildings-is-hard-states-like-california-are-trying-to-change-that/> (“[N]ewer office buildings can be harder to convert compared to older ones because they have very large floors with a lot of space that doesn’t have access to natural light, and may not even have windows that are operable.”).

134. GARCIA & KWAN, *supra* note 19, at 4.

135. *See* Anderson, Khalil, & Casey, *supra* note 78.

136. OFF. OF ADAPTIVE REUSE TASK FORCE, *supra* note 8, at 23; *see* Nguyen, *supra* note 133 (“If you buy a hotel and convert it to studio apartments, that’s pretty easy, because every room already has plumbing. But when you buy a commercial building, your plumbing is in the middle of the building,” said [nonprofit developer Linda Mandolini].”).

137. *See* Chung, *supra* note 126.

requirements for adaptive reuse projects, arguing that because buildings may have already paid into their local coffer via impact fees,¹³⁸ jurisdictions should decrease or eliminate affordability requirements.¹³⁹ For example, San Francisco's current inclusionary housing policy requires that 21.5% of new units rent at rates affordable to lower-income families.¹⁴⁰ A study evaluating adaptive reuse as a solution to the city's workforce housing and economic diversity issues concluded that "a significant reduction in the inclusionary requirement would be necessary to make office-to-residential conversions more viable."¹⁴¹

While reducing the inclusionary requirement might indeed make conversions more viable, incentivizing adaptive reuse without requiring conformity to the affordable housing requirements that are imposed on other developments cuts against the difference principle. Thus, jurisdictions seeking to advance equality under a Capability Approach and Rawlsian analysis should avoid reducing inclusionary requirements. If a jurisdiction provides financial incentives for residential adaptive reuse but waives its otherwise-existing affordable housing requirements, it introduces an inequality that does not benefit the most disadvantaged people's access to affordable housing. Instead, it essentially subsidizes developers who, via adaptive reuse, create market-rate housing.

However, though affordable housing mandates are necessary, they are not sufficient. A study released by a New York City working group identified affordable housing mandates in market-rate adaptive reuse projects as unworkable.¹⁴² The group noted that absent a government incentive, requiring projects to set aside "a meaningful number" of affordable housing units would "make most mixed-income conversions financially infeasible."¹⁴³ Similarly, during the process of updating its adaptive reuse ordinance, the Los Angeles City Planning department commissioned an economic feasibility study which determined that "imposing an inclusionary affordability requirement would render most adaptive reuse conversions to residential uses economically infeasible."¹⁴⁴ To impose mandates without incentives might mean that developers do not endeavor adaptive reuse projects at all.

Following its findings, Los Angeles, in lieu of imposing affordable housing mandates, enhanced the development incentives in the proposed ordinance update "to better encourage the voluntary provision of affordable units within adaptive reuse projects."¹⁴⁵ But even Los Angeles' gold standard adaptive reuse ordinance

138. See *Impact Fees*, CITY OF BURLINGTON, <https://www.burlingtonvt.gov/728/Impact-Fees> (Impact fees are fees "charged against new development to help offset the costs of new infrastructure required by [a city's] growth.").

139. See SRIVASTAVA, *supra* note 10, at 6.

140. *Id.* at 4.

141. *Id.*

142. OFF. OF ADAPTIVE REUSE TASK FORCE, *supra* note 8, at 24.

143. *Id.*

144. L.A. CITY PLAN., CITYWIDE ADAPTIVE REUSE ORDINANCE 1-2 (2024), https://planning.lacity.gov/odocument/55760ec6-e4c1-4add-9927-cd348fe51ed2/FD_Fact_Sheet_-_2024_Adaptive_Reuse_Ordinance_2024-0214.pdf.

145. *Id.* at 2.

currently does not create as much housing as it could, let alone as much affordable housing as the city needs.¹⁴⁶ In 2022, a study estimated that if all underutilized commercial real estate in Los Angeles County was repurposed as housing, it would constitute approximately 9 to 14% of the total housing the county must produce over the next eight years.¹⁴⁷ If commercial conversions follow trends between 2014 and 2019, the Los Angeles region will gain just 4% of the homes it needs to create to meet California-mandated housing targets.¹⁴⁸ And some of the most optimistic projections of how much housing adaptive reuse will create involve the assumption of significant financial or regulatory incentives.¹⁴⁹ Los Angeles serves as a case study indicating that a jurisdiction providing affordable housing incentives alone for adaptive reuse projects does not satisfy the Rawlsian difference principle.

Thus, harnessing adaptive reuse ordinances to create the access to affordable housing prescribed by a Rawlsian analysis should include not only menus of incentives for developers to create affordable housing, but also government mandates that such housing be included in adaptive reuse projects. An adaptive reuse ordinance with both incentives and mandates would prevent affordable housing from getting sidelined during exciting, new, adaptive reuse projects, while making it financially feasible for developers to produce units. It does not matter whether these incentives and mandates are specifically included in an adaptive reuse ordinance, or present in a city's code applied to both adaptive reuse and non-adaptive-reuse projects; either option will fulfill the difference principle. From a financial perspective, the development sector at-large will likely choose to leave commercial buildings empty rather than to convert them into housing that must include affordable units, unless including affordable units is both subsidized *and* mandated.¹⁵⁰ Although providing city resources to developers for commercial-to-residential conversions (including those that create affordable units) is an inequality, because it ultimately benefits the least well-housed people in society, it is an inequality we should encourage.

PART V: PROPOSED CHANGES TO ADAPTIVE REUSE ORDINANCES TO BETTER FACILITATE EQUALITY

As demonstrated above, adaptive reuse ordinances that include explicit affordable housing requirements and incentives facilitate equality. However, they

146. See Ing, *supra* note 123; WARD & SCHWAM, *supra* note 17, at 9.

147. WARD & SCHWAM, *supra* note 17, at 1-2.

148. ROMEM ET AL., *supra* note 55, at 3, 17.

149. WARD & SCHWAM, *supra* note 17, at 9.

150. See Elsie Peng and Vinay Viswanathan, *The Price is Still Too High for Office-to-Multifamily Conversion*, GOLDMAN SACHS ECON. RSCH. (Feb. 26, 2024), <https://www.gspublishing.com/content/research/en/reports/2024/02/26/b455f8f4-3b5d-4d85-8230-858fe2630cb9.html> (“For the top 5 metropolitan areas that are most affected by remote work . . . office acquisition prices would [likely] need to fall almost 50% for conversion to be financially feasible. This suggests that most of these offices will likely remain underutilized in the near term.”).

could facilitate *more* equality. A common sentiment in areas with a significant adaptive reuse presence is that current policies are outdated and ripe for improvement; rethinking these policies would provide opportunities to encode more affordable housing protections within them.¹⁵¹

Proposals increasing affordable housing incentives and requirements have already been made in Los Angeles and New York City. In 2020, Los Angeles City Councilmember Paul Koretz called for the city to update its adaptive reuse ordinance to encompass more buildings in Los Angeles.¹⁵² Critically, the proposal stated that any new housing created from the ordinance must be deed-restricted for rent or purchase by households with an annual income of no more than \$92,750.¹⁵³ Additionally, in 2023, New York City officials announced a plan to bring housing, including rent-restricted units, to their city primarily by rezoning commercial areas into ones allowing residential use.¹⁵⁴ The New York City Department of Planning has also called for a tax incentive to support the conversion of more office buildings to affordable housing.¹⁵⁵ As discussed in Part IV, the most important feature of an adaptive reuse ordinance's ability to facilitate access to affordable housing is whether it mandates and incentivizes affordable housing creation. However, adaptive reuse ordinances should also take cues from the strongest adaptive reuse policies around the country to better facilitate projects.

First, adaptive reuse ordinances should provide as much by-right project approval as possible.¹⁵⁶ For example, a jurisdiction can simply base the ordinance's applicability on a building's age, rather than subjecting each building to a discretionary review process.¹⁵⁷ Second, adaptive reuse ordinances should provide substantial code exemptions. For example, ordinances can remove minimum and average unit size requirements, exempt basement and roof area expansions from maximum floor area limits, and waive parking minimums.¹⁵⁸ By-right approvals and robust code exemptions expedite the development process and make adaptive reuse projects more attractive to developers.¹⁵⁹

Finally, adaptive reuse ordinances can improve by including clear guidance.¹⁶⁰ For example, in Los Angeles, there are multiple alternative building codes that non-new-construction projects can take advantage of, and discretionary decisions

151. See WARD & SCHWAM, *supra* note 17, at 17; OFF. OF ADAPTIVE REUSE TASK FORCE, *supra* note 9, at 4.

152. Steven Sharp, *L.A. City Councilmember Proposes Expansion of Adaptive Reuse Ordinance*, URBANIZE (Dec. 17, 2020), <https://la.urbanize.city/post/la-city-councilmember-proposes-expansion-adaptive-reuse-ordinance>.

153. *Id.*

154. Anderson et al., *supra* note 78.

155. OFF. OF ADAPTIVE REUSE TASK FORCE, *supra* note 8, at 4.

156. See WARD & SCHWAM, *supra* note 17, at 16–7.

157. *Id.*

158. OFF. OF ADAPTIVE REUSE TASK FORCE, *supra* note 8, at 27–9; WARD & SCHWAM, *supra* note 17, at 17.

159. See WARD & SCHWAM, *supra* note 17, at 5.

160. *Id.* at 17.

by city officials often determine which of these many applicable codes governs a given adaptive reuse project, creating regulatory uncertainty.¹⁶¹ Adaptive reuse ordinances should specify clear alternative building code requirements and establish, at the time of a project's approval, which code will apply to each project.¹⁶² Clear guidance will increase developer confidence and interest in adaptive reuse projects.

To better achieve equality, states should also support more adaptive reuse projects by revising state-level regulations to support local adaptive reuse ordinances.¹⁶³ Some states have already tackled this. For example, California has enacted legislation making it easier to redevelop shopping centers, office buildings and parking lots into housing.¹⁶⁴ The legislation frees up land, requires municipal governments to approve conversions as long as projects meet a set of key criteria, and simplifies the permitting and entitlement process.¹⁶⁵ The approval process is especially preferential towards 100% affordable projects, and also provides special exemptions for projects that designate at least 15% of units for low-income people and sit along a business transit corridor.¹⁶⁶ Furthermore, a bill was introduced in California to make it quicker and easier to convert office buildings, specifically, into housing.¹⁶⁷ The legislation includes a provision disallowing local officials from blocking a project if it designates at least 10% of units as affordable and does not exceed height and density limits.¹⁶⁸

PART VI: CONCLUSION

Jurisdictions have a variety of tools to improve adaptive reuse policies' impact on access to affordable housing, foremost among them the imposition of both affordable housing incentives and mandates. By imposing affordable housing incentives and mandates within or alongside adaptive reuse ordinances, cities could take advantage of the ripe opportunity to transform underutilized commercial space into desperately needed affordable housing. Packaging these policies together would advance the capability of access to affordable housing in a way that holds up under a Rawlsian equality analysis, as it would create only inequalities that benefit the least well-housed people in society.

Though commercial buildings currently sit empty as residents leave their neighborhoods in search of more affordable rent, this problem does not have to continue. And under a combined Capabilities Approach and difference principle analysis, it shouldn't.

161. *Id.* at 8.

162. *Id.* at 17–18.

163. GARCIA & KWAN, *supra* note 19, at 7.

164. Ethan Varian, *Gov. Gavin Newsom Signs Bills Allowing New Housing on Commercial Property*, MERCURY NEWS (Sept. 29, 2022 4:31 AM), <https://www.mercurynews.com/2022/09/28/gov-gavin-newsom-signs-bills-allowing-new-housing-on-commercial-property/>.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*