

**Regulatory Implementation:
Examining Barriers from Regulatory Processes**

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Executive Summary

This contribution addresses the effects of regulatory processes on the availability and affordability of housing for regulations governing such things as building safety, the environment, and land use. Consideration of regulatory processes draws attention to two types of effects that occur during the implementation of regulations. One involves delays in construction and the rehabilitation of housing related to red tape. A second is the effects of the added burdens of regulatory implementation in discouraging housing development or rehabilitation in the first place. The magnitude of each of these is hard to establish since the existing research fails to adequately distinguish between the effects of the regulations and the effects of the way with which they are administered.

Sources of Regulatory Process Barriers

Several sources of regulatory process barriers are considered:

- *Regulatory approvals.* These consist of delays associated with permit processes and approvals that arise from cumbersome decisionmaking processes and duplication of regulations. The delays associated with these processes are central concerns of the development community.
- *Regulatory enforcement strategies and practices.* These consist of overly rigid practices that foster an unsupportive regulatory environment for the development and rehabilitation of housing. These considerations also add delays in construction and discourage development.
- *Patchwork of administrative arrangements.* This results from the duplication of administrative structures and gaps in regulatory decision processes. This patchwork frustrates regulatory implementation and adds to the complexity of regulation.

Overcoming Regulatory Process Barriers

Understanding how to lessen these barriers is one foundation for development of policies for advancing affordable housing. Although few prescriptions emerge from the housing literature about these topics, regulatory scholars who have studied reforms of regulatory practices provide useful insights. Several key directions are reviewed with attention to their implications for affordable housing, including:

- *Regulatory and administrative process simplification.* This consists of steps to reduce duplication and regulatory delays.
- *Conflict reduction and consensus building approaches.* These are aimed at achieving greater agreement about affordable housing goals.
- *Smart enforcement practices.* These are aimed at reducing deterrents to development by fostering a more supportive regulatory environment.

- *Facilitative reviews and inspection processes.* These actions are aimed at speeding up housing approvals and construction while also maintaining standards for housing quality.

Policy Challenges

Bringing these changes about presents several policy challenges. A key challenge for federal policymakers stems from the fact that the implementation of the relevant regulatory programs falls largely within the province of state and local governments. As a consequence, the federal influence in addressing many of the regulatory process barriers and bringing about reforms is indirect. A second challenge concerns the balance between achieving regulatory objectives for land use, environmental protection, and other non-housing related goals, and achieving affordable housing goals. The lack of a consensus about affordable housing goals, particularly at local levels of government, seems at present to tilt this balance toward the former categories of objectives. A final set of policy challenges stems from the constraints on regulatory reform at local levels of government. Although local practices are not immutable, it is important to recognize that the practices have developed over time in response to specific demands and needs that provide powerful drags on achievement of local regulatory reforms.

Research Gaps and Directions

Many advances have been made in recent years in understanding the concerns of developers and others about regulatory barriers, about the ways that choices by regulatory agencies and field personnel affect potential development, and about the procedural roadblocks and decision considerations. Nonetheless, the existing research findings are highly proscribed in several respects. They are based on a limited number of studies, almost entirely related to the regulation of building safety, which do not provide a strong base for drawing generalizations about housing impacts. Most of the studies only examine residential development and do not address multi-family housing or housing rehabilitation. None of the studies directly address the affordability or price of housing. And, none of the studies directly address the potential impact of procedural barriers in discouraging housing development or rehabilitation in the first place. Given these limitations, a number of gaps in understanding of regulatory barriers and of steps to eliminate them can be identified. Three avenues for future research are considered:

- *Improved understanding of regulatory process barriers.* This entails analysis of the true costs of the barriers for the availability and affordability of housing, looking beyond building regulation as a regulatory arena for study, and paying attention to lesser studied aspects of regulatory processes—citizen opposition and fragmented regulatory structures.
- *Improved understanding of solutions to regulatory process barriers.* This entails consideration of administrative process simplification, the implications of the use of third parties in regulatory practices, the use of procedural reforms in regulatory decisionmaking and goal setting, and ways to carry out flexible regulatory approaches.
- *The implications of broader regulatory reforms.* This entails consideration of the implications of performance-based regulation and voluntary codes for regulatory implementation.

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Introduction

This workshop draws attention to the ways that the pursuit of regulatory goals concerning such subjects as the safety of buildings, environmental protection, historic preservation, and land use affect the availability and affordability of housing. This is not a new topic, as it has been addressed over the past 35 years by several national commissions concerned with affordable housing (e.g., Advisory Commission on Intergovernmental Relations (1966); National Commission on Urban Problems (1968); Advisory Commission on Regulatory Barriers to Affordable Housing (1991); Millennial Housing Commission (2002)). Despite the consistency of the findings of these reports, the ways that different regulations act as barriers to various aspects of housing are not well understood.

The barriers to affordable housing posed by regulatory processes are lesser-studied aspects of these concerns. Consideration of regulatory processes draws attention to two aspects of barriers that are posed during the implementation of regulations. One includes delays in construction and the rehabilitation of housing related to cumbersome decisionmaking processes. Delays add to the costs of construction and, in turn, affect the affordability of housing. A second aspect is the effect of the added burdens of regulatory implementation in discouraging housing development or rehabilitation in the first place. This lessens the availability of housing in those locations that developers avoid, and can lessen the overall supply of housing rather than shifting it to other locations.

This contribution reviews different types of regulatory process barriers, advice concerning how to lessen these barriers, the policy challenges that bringing about these changes presents, and research needs related to regulatory process barriers. The degree to which various sources of regulatory barriers affect the availability and cost of housing is largely unknown. Many of these aspects have not been studied and the studies that exist rarely separate the effects of the substance of regulations from their implementation. Although few prescriptions emerge from the housing literature about reducing regulatory process barriers, this review addresses the relevance of insights provided by regulatory scholars who have studied reforms of regulatory practices more generally. Identification of necessary research to advance policy and other actions aimed at alleviating regulatory process barriers sets the foundation for considering future research.

Considering Regulatory Process Barriers

A variety of regulations potentially impinge upon different facets of the availability and affordability of housing (for an overview, see Schill (2002)). Land use and zoning provisions affect the location, density, and type of housing that is allowed. Environmental and other impact assessment requirements further affect the location and type of development that is allowed. Building safety regulations, along with disability provisions, energy codes, historic preservation requirements, asbestos and lead paint abatement provisions, health and safety provisions, and housing codes, govern various aspects of new construction and rehabilitation of buildings. A

variety of procedural requirements affect who has a voice in determining how and when structures are built or rehabilitated.

In considering the barriers that implementation of these regulations pose for affordable housing, it is useful to review what the development community views as the key barriers. That understanding provides a basis for more systematic review of the relevant regulatory process barriers. No matter the type of regulation being considered, the role of regulatory approvals, hearings, enforcement, and administrative structures need to be considered.

Concerns of the Development Community

The concerns of the development community and housing advocates have been well represented in the reports of the various national commissions considering barriers to affordable housing. These reports highlight frustration over delays and disruptions that limit the availability of affordable housing. It is important to underscore the fact that few of these studies separate the effects of regulatory provisions from the way with which they are administered. As a consequence, it is difficult to draw conclusions about the magnitude of the barriers posed by regulatory processes.

The most common approach to identifying these concerns is to conduct surveys of either firms or regulators asking about their impressions of regulatory impediments. For example, the National Association of Home Builders (NAHB) found in a 1998 survey of association members that 10 percent of the cost of building a typical new home is attributable to unnecessary regulation, regulatory delays, and fees (U.S. House of Representatives, Committee on Small Business (2000: 42)). In more refined research based on profiles of development costs for new residential subdivisions in New Jersey, Luger and Temkin (2000: 140-141) estimate that the “direct cost of excessive regulation” imposed by delays added expenses for construction and impact fees, and financing costs average \$10,000 to \$20,000 per new housing unit (in 2000 dollars).

A variety of surveys of different constituencies within the housing and development industry evidence concerns about regulatory burdens.¹ Nearly three decades ago, Charles Field and Steven Rivkin (1975) published a book, *The Building Code Burden*, which provided an indictment of building codes as impediments to innovation in housing and construction. Sixty-nine percent of the respondents to their survey of home manufacturers cited building codes as one of the top three problems limiting innovation in construction practices—the highest percentage of any item (Field and Rivkin (1975: 74)). In order to assess trends for different concerns over time, Eran Ben-Joseph (2003) replicated key elements of a survey undertaken in 1976 by Stephen Seidel (1978). In both 1976 and 2002, nearly three-fourths of the development community respondents cited “government-imposed regulations” as one of the three most significant housing problems.

Delays in Permitting and Construction. Delays in permitting and construction are clearly noteworthy concerns. Developers of subdivisions who participated in Ben-Joseph’s study (2003) report waiting 17 months for relevant permits, on average. One-fifth of the respondents report waiting more than two years. In a study of motivations for building-code compliance by homebuilders in western Washington, May (2004) found that a primary motivation for

compliance, cited by 76 percent of the respondents, is avoidance of delays in construction. Luger and Temkin (2000) provide insights about the sources of delay for residential development in their surveys of regulators in New Jersey and North Carolina.ⁱⁱ “Organized citizen opposition” to subdivisions was cited by the greatest percentages of respondents, respectively followed by contractor or development error, inadequate staffing, and unspecified sources of delay in negotiations (2000: 57). In response to other questioning, from one-third to over one-half of the respondents cited complexity in regulations or regulatory processes as a major factor in delays in regulatory approvals (2000: 61).

Inconsistencies in Regulatory Requirements and Inspections. Inconsistencies in regulatory requirements and in what inspectors require among jurisdictions constitute another set of noteworthy concerns. More than three-quarters of the residential homebuilders surveyed by May (2004) cited this as a constraint on code compliance. “Unnecessary delays” and the impacts of “local administrative discretion” each were cited as the most burdensome aspect of regulation by approximately one-quarter of the respondents in both the 1976 and 2002 studies summarized by Ben-Joseph (2003: 7). These are all different ways of communicating concerns about lack of coordination and inconsistencies in interpretation of rules.

Citizen Opposition to Affordable Housing Development. The ability of groups to use regulatory processes to frustrate housing goals was highlighted by the Advisory Commission on Regulatory Barriers to Affordable Housing as reflected in the title of their report, “Not in My Back Yard,” Removing Barriers to Affordable Housing (1991). That commission cited the NIMBY (not-in-my-backyard) atmosphere in which groups that are opposed to affordable housing have been able to slow or block the expansion of such housing.

Among recent studies, only the Luger and Temkin research (2000) specifically asked about citizen opposition. Over one-half of New Jersey regulators and more than one-third of North Carolina regulators cited this as a reason for delays in subdivision applications. Interestingly, only nine percent of the residential developers Luger and Temkin surveyed in New Jersey cited “organized citizen opposition” as a reason for delay, with another 15 percent citing “individual/isolated opposition” as a consideration (2000: 57).

Barriers Posed by Regulatory Approval Processes

Those seeking to develop new housing or rehabilitate existing housing undergo a regulatory gauntlet that entails obtaining necessary approvals, including:

- A series of pre-approval meetings to discuss the outlines of the proposed development, the process to be followed for approval, and preliminary negotiations over the development itself.
- Submission of application materials that detail plans, alternatives, and adherence to the variety of relevant regulations concerning land use and location of the property; environmental considerations and remediation of potential harms; adherence to local codes concerning visual appearance, utilities, and roads; adherence to building regulations; and, in the case of housing rehabilitation, consideration of potential environmental considerations, such as asbestos removal.

- A variety of special studies to support the application materials that may include separate environmental reviews, engineering assessments, traffic studies, and other technical back up.
- Community or other hearings by approval boards to register concerns about the proposed development.
- Approval decisions that contain conditions placed on the development that must be met prior to receiving necessary permits or other approvals; these may be appealed to hearing examiners or other quasi-judicial bodies.

This is clearly a stylized depiction of the long gauntlet of regulatory approvals prior to initiation of major housing developments or rehabilitation projects. Further complicating the situation is the fact that there rarely is a single approval process. Instead, developers must deal with multiple agencies and approval processes that relate to separate regulations governing land use, building safety, environmental considerations, and other regulations.

In most instances, decisionmaking for approvals is highly prescribed by relevant regulations with respect to the participation of different groups, locus of decisionmaking, and appeal procedures. This typically entails discretion granted to regulatory agencies to make decisions that are subject to administrative law review (e.g., by a hearing examiner), appeal to political authorities for variances (e.g., a city council), and options for legal contestation (e.g., through civil courts). In some settings, separate appeals committees with quasi-judicial authority have been established to handle such things as growth management disputes (e.g., Washington State Growth Management Hearings Boards) and implementation of requirements for affordable housing set asides (e.g., Massachusetts Housing Appeals Committee).

The delays associated with these processes are central concerns of the development community. However, other than the research noted above documenting delays, there is limited understanding of the effects of different aspects of approval processes and duplication. The findings about these delays are largely anecdotal. For example, in commenting about the high costs of new housing construction in New York City, Salama, Schill, and Stark write: “Because the Buildings Department is the single most important agency in the development process, its management and operations need to be as efficient as possible. In fact, the New York City permitting process is not—the process is arcane, cumbersome, confusing, complicated and paper-intensive” (1999: 108).

The extent to which groups are able to use the regulatory process to avert new housing is especially difficult to gauge. Examples of instances for which groups that did not want multi-family housing in their neighborhoods were able to use public hearings concerning environmental, zoning, or other regulatory aspects to provide roadblocks to the planned developments are not hard to find (see Euchner and Frieze 2003; Field 1997). However, without specific knowledge of the circumstances of the actual situations, it is difficult to evaluate whether these are fundamental problems in regulatory administration or particular instances of outright opposition.

Barriers Posed by Regulatory Practices

Enforcement practices concern how regulatory agencies go about their business with respect to how vigilant they are in enforcing regulations, their approach to enforcement, and what inspectors do in the field. Although the regulatory literature is still somewhat unsettled about distinctions in regulatory strategies and philosophies, a broad distinction can be made between those approaches that are strict, “by-the-book” and those that are more facilitative, “business-friendly” (see Kagan 1994, May and Burby 1998). The former entails strict enforcement and formal processes, while the latter entails cooperative enforcement and facilitative practices. The term “business friendly” could suggest a variety of things including a strong, pro-development stance on the part of elected officials and regulatory agencies. However, the term is used here to characterize a regulatory agency approach that entails a supportive regulatory regime that helps developers negotiate the regulatory gauntlet. The issue of regulatory enforcement approaches crosscuts different types of regulations.

Figure 1, based on data employed in the analyses reported in May and Burby (1998) and Burby et al. (2000), shows the variation among cities and counties across the United States in enforcement philosophies and strategies for building regulation. Each data point shows how the regulatory practices of a given jurisdiction score with respect to systematic and facilitative practices. The categories of agency enforcement strategies reflect the degree of emphasis that each jurisdiction places on systematic and facilitative practices. Jurisdictions with scores on the upper left of the figure are considered as having a more “business friendly” approach, while those in the lower right of the figure are considered as having a more “by the book” approach.

The strong presumption by critics of regulatory excesses is that by-the-book enforcement is a hindrance, while business-friendly enforcement helps foster greater opportunities for affordable housing. The by-the-book approach is presumed to present unnecessary delays that drive up the cost of housing and, in the extreme, provide a business climate that deters development (see, in particular, Downs 1991, Field and Rivkin 1975). The business-friendly approach, as the label suggests, is expected to facilitate development and rehabilitation by easing the restrictions of the more intrusive and burdensome by-the-book approach.

Also relevant is the role of inspectors’ enforcement styles. The enforcement style that is adopted serves a “signaling effect” that communicates the reality of the regulatory philosophy of a given jurisdiction or regulatory authority. A tough enforcement style, marked by higher formalism and less facilitation in regulatory interactions, may signal a by-the-book approach that is off-putting to developers. A flexible enforcement style may signal a more business friendly regulatory climate and encourage development. As such, these expectations about enforcement styles parallel those noted above for enforcement philosophies and strategies.

A final consideration for regulatory practices is the role of corruption in building regulation. It is especially difficult to determine the extent of corruption, but the subject has been a long-standing concern among developers and regulatory officials. Thirteen percent of the building officials who responded to a national survey undertaken by May and Burby (1998) volunteered that their jurisdiction had experience with corruption in building regulatory practices within the prior 10 years. Bryan Jones (1985) found that past experiences with corruption in building functions in

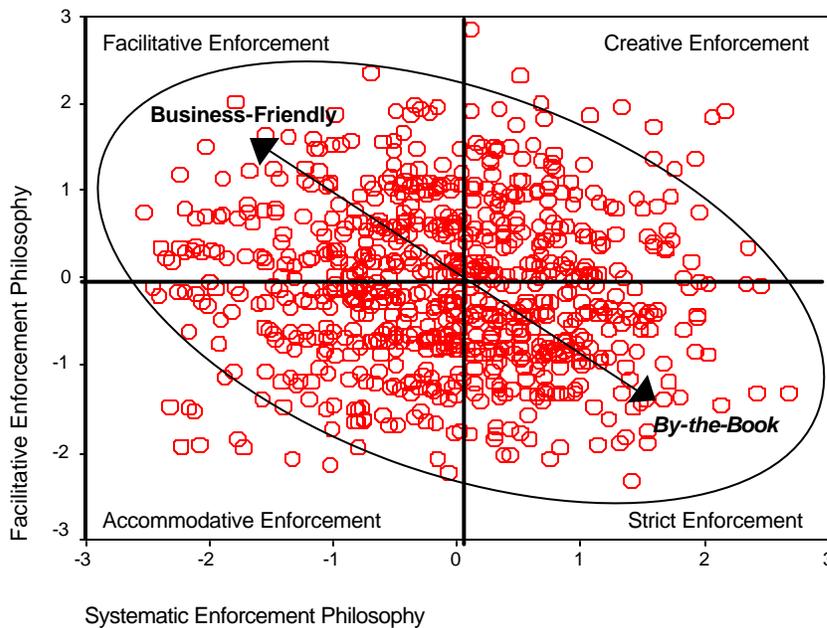


Figure 1. Building-Code Agency Enforcement Philosophies and Strategies

Note: Each circle represents the philosophy and strategy employed by a local building-code enforcement agency, based on a national sample of city and county agencies. The scales show relative differences in approach. The oval and end-points of the arrow show degrees of the extent to which both philosophies and strategies are either business-friendly” or ”by-the-book.” (Source: Author, adapted from May and Burby (1998) and Burby et al. (2000))

Chicago were important aspects of the tightening up of managerial processes, leading to greater formalism and delays in the process. Salama, Schill, and Stark (1999: 141-143) identify several types of corruption—bid rigging, bribes to union officials and municipal employees, and disruptions by labor coalitions—that they conclude add to the cost of new construction in New York City.

Barriers Posed by Fragmented Administrative Structures

Regulations tend to get layered upon one another over time in response to particular demands or crises, according to what Bardach and Kagan (1982) label a “regulatory ratchet.” New organizations are often created as new regulations are added or new provisions developed. The end result can be a patchwork of different agencies administering in a haphazard manner a variety of different regulations. This is a source of complaints concerning regulatory inconsistencies and duplication.

Because different levels of government administer various regulations, some overlap in regulatory functions is inevitable. Thus, for example, permits associated with development in areas with wetlands may require review by the U.S. Army Corps of Engineers, along with parallel reviews by the U.S. Environmental Protection Agency (EPA), as well as corresponding

state and local agencies. Duplication within a given level of government reflects assignment of regulatory functions to different agencies at that level. Vertical and horizontal fragmentation of functions is commonly cited as inherent aspects of American governance. These clearly add to the complexity of regulation.

There are numerous anecdotes that illustrate how the effects of duplication of administrative structures and gaps in regulatory decision processes frustrate regulatory implementation. For example, Euchner and Frieze highlight the impacts of regulatory fragmentation as barriers to housing in the greater Boston area:

The lack of integration [of regulations] at the state level [then] can lead to confusion among local enforcement authorities such as building inspectors, fire chiefs, and boards of health and increase the number of appeals boards in front of which a builder has to appear. The process is especially complex (and confusing) in the case of environmental and handicap access regulations.

Public officials also regularly defer to “community process” when controversial projects are proposed. Many cities and towns specifically require that projects undergo community scrutiny, even when the projects fit into the existing look and feel of the neighborhood. Community process can be especially problematic in small communities with volunteer governance structures like town meeting and little professional staff in town hall. (2003: 7)

Potential duplication of regulations and inconsistencies among regulatory authorities specifically address administrative structures. A well-developed tenant of the implementation literature is that decision structures that entail multiple decision points—across levels of government, among agencies at the same level of government, or both—frustrate effective implementation (Pressman and Wildavsky 1972). These, at a minimum, introduce delays as decisions are made and remade. More often, this introduces multiple opportunities for vetoes of policy decisions or implementation actions.

Toward Solutions: Evaluating the Evidence

Understanding how to lessen the preceding barriers is the foundation for development of policies for advancing affordable housing. Although few prescriptions emerge from the housing literature about these topics, regulatory scholars who have studied reforms of regulatory practices provide key insights (in particular, see May 2002; Sparrow 2000). Several key directions are reviewed in what follows with attention to relevant research findings and their implications for affordable housing.

Regulatory and Administrative Process Simplification

In recent years, a number of states and localities have launched efforts to streamline regulatory functions as part of efforts to enhance business climates and economic development opportunities. In keeping with these reforms, there has been much interest at local levels in streamlining permit processes and code enforcement. Twenty-four percent of the local code administrators who responded to a 1998 HUD-sponsored survey of rehabilitation enforcement practices reported that they had initiated efforts to streamline enforcement (Housing Research and Development Building Research Council 1998: 44). These efforts include use of electronic

permitting, delegation of enforcement to third parties, and administrative reorganizations to combine regulatory functions.

Electronic Permitting and “One-Stop” Permits. These efforts are aimed at reducing duplication of approvals and cumbersome decision processes. The National Alliance for Building Regulatory Reform in the Digital Age cites the work of nearly two dozen counties and states that have adopted technology for integrating one or more aspects of permits, inspection, enforcement, licensing, and plan review using a mix of proprietary and commercially available technology.ⁱⁱⁱ The benefits of these and other changes have not been systematically analyzed, but the anecdotal evidence provided by the Alliance shows substantial improvements, including:

- Streamlining of regulatory functions by the City of Los Angeles that resulted in reductions in waiting times by a factor of nearly 10 for processing of permits, plan checking, and inspection scheduling.
- Use of integrated permit forms and processes among jurisdictions in the three-county Portland, Oregon, area, resulting in a substantial reduction of delays and confusion caused by the prior fragmentation of services.
- Use of on-line processing of permits and inspection requests by Fairfax County, Virginia, which achieved \$1.5 million in operational savings for these regulatory functions in 2001 and reduced permit processing times on average from over four hours to under one hour (National Conference of States on Building Codes and Standards (2003)).

A National Institute of Building Sciences report on electronic permitting cites over 100 jurisdictions as “known leaders” in electronic permitting (National Institute of Building Sciences (2002)). Recent scholarship in public administration provides a broader discussion of both promise and pitfalls of E- governmental reforms (see Ho (2002); Moon (2002)). The examples here show how technology can be used to both streamline regulatory processes and overcome the barriers of fragmented regulatory authorities without necessitating major re-organization of those functions. These examples clearly have the potential for reducing regulatory delays. But, how these changes affect the regulatory environment remains to be examined.

Enforcement Delegation and Third-Party Certification. Additional steps to reduce delays in construction consist of delegating approvals and enforcement to third parties that are granted authority to certify compliance with regulations. This speeds up regulatory processes by expanding the leveraging of resources available to regulatory agencies. For example, engineers hired by cities to conduct inspections of engineered structures or to conduct “peer review” of development applications compensate for limits in agency staff. Use of third parties, in principle, can be expanded to the use of private certifiers to review plans, conduct inspections, and perform audits of regulatory compliance. Some smaller jurisdictions in the United States currently do this by contracting out for these services. One example of the use of third-parties is the authorization for “self-certification” in New York City of building applications and plans, final surveys, and other considerations for certain classes of buildings by registered architects and professional engineers (Salama, Schill, and Stark (1999: 111-112)).

The experience with energy conservation and radon reduction in the United States provides instructive examples of the use of third-party certification of regulatory compliance. In both

cases, private certifiers play important roles in evaluating problems, certifying compliance, or both. The more problematic part of a system of third-party certification is monitoring the quality of third-party actions. This entails some form of external monitoring by regulators, self-policing by industry groups, or use of liability or financial mechanisms to police the quality of third-party actions. An example of substantial shortfalls in third-party certification was the “leaky building” crisis in New Zealand where some 20,000 homes and hundreds of apartment buildings developed structural failures from water infusion. As discussed by May (2003), a key source of problems with the crisis was giving poorly trained consultants authority as building certifiers to sign off on adherence to code provisions.

This experience provides a good understanding of the issues involved with greater reliance on third parties for providing regulatory approvals. The benefits of such delegation for reducing delays in regulatory approvals and for production of affordable housing more generally have not been systematically addressed.

Administrative Reorganization. The goal of administrative reorganization is to reduce duplication of regulatory programs and organizations. This presumably has the benefit of reducing delays associated with the need to deal with multiple agencies. The relevant organizational issue is the degree to which regulatory functions are integrated versus separated. Administrative integration can be brought about in different ways. The most obvious is to have regulatory functions performed by the same agency. This has been typically accomplished by combining planning and permit functions at local levels of government so that planning approval, permit issuance, and inspections are administered by the same organization.

A second approach is to coordinate functions across different agencies. Advances in E-government make it possible to have a virtual integration of regulatory functions without necessitating administrative reorganization. Coordination can be facilitated with the appointment of a central administrator with responsibility for overseeing the integration of regulatory functions. Examples are the appointment of “permit Czars” in some cities charged with cutting through bottlenecks in regulatory processes. These Czars serve functions that the implementation literature refers to as a “fixer” for implementation problems.

Like other aspects of regulatory simplification, the implications for housing of administrative simplification at local levels of government have not been systematically studied. The broader literature on implementation suggests that administrative simplification or coordination is necessary for reducing delays, but these in themselves are not sufficient for guaranteeing that delays or other problems will be eliminated. In particular, re-arranging the organizational boxes does not necessarily reduce turf considerations and other bureaucratic hurdles. A transformation of organizational cultures and routines is necessary to overcome these constraints.

Conflict Reduction and Consensus Building. The barriers presented by opposition to affordable housing are more difficult to address. At issue is the way with which the voices of different participants enter into regulatory decisions. As noted by Burby, citizen involvement in planning, and by extension development and housing decisions, “tends to be dominated by an ‘iron triangle’ composed of local business and development interests, local elected and appointed government officials, and neighborhood groups” (2003: 38). How interactions among these

groups are structured can profoundly affect both the timeframe for and character of planning and other regulatory decisions.

In recent years there have been extensive discussions of different forms of stakeholder involvement in the planning literature and the literature on environmental decisionmaking (for overviews, see Beierle (2000), Beierle and Konisky (2000), Burby (2003)). Given the diversity of approaches, there is not a simple taxonomy of different forms of stakeholder involvement. Relevant processes include such things as different types of advisory committees, facilitated forums, systematic canvassing of groups, and structured deliberation. Participation that reflects a diverse set of stakeholders is helpful for anticipating and raising issues that might not otherwise be identified. However, more voices are not necessarily conducive to rapid decisionmaking. The end result may be a better policy, but the process may be frustrating and drawn out. The consensus of the evolving literature on stakeholder involvement is that a shared commitment to broad stakeholder involvement *and* to joint resolution of disputes is more important for effective outcomes than are the specifics of the mechanisms for involvement.

Conflict-resolution and other negotiation processes have been employed to lessen the delays and undesirable outcomes that follow from contentious decision processes. Charles Field (1997) of the NAHB argues that joint problem solving that makes use of mediation and “principled negotiation” can be helpful in overcoming impasses created by groups that oppose affordable housing developments. Field illustrates successful use of these processes in securing agreements about affordable housing in Hartford, Connecticut. Although there is an extensive literature addressing negotiated decisionmaking and stakeholder involvement (see Beierle and Cayford (2001) for a review), very little of it specifically addresses negotiating conflicts over affordable housing.

Smart Enforcement: Regulatory Approaches Matter

One of the main changes in thinking about regulation in recent years is a shift in perspective from thinking about ways to strengthen enforcement to addressing ways to improve compliance. The terminology for this shift includes “smart enforcement” (Sparrow (2000: 181-193)), “responsive regulation” (Ayres and Braithwaite (1992)), and “business-friendly enforcement” (Burby et al. (2000)). While the specific actions differ among these approaches, the basic point is one of altering the regulatory approach to reduce particularistic, by-the-book approvals and enforcement, and to rely more on facilitative actions in regulatory approvals and enforcement. Most of the literature about these topics is concerned with the effect of regulatory approaches on *regulatory compliance*.^{iv} The research reviewed here about enforcement strategies provides evidence that changes in regulatory practices can enhance housing availability. This is a more positive set of findings than simply bemoaning the barriers associated with regulatory implementation.

Research about the effects of building regulation on central city development provides important insights for affordable housing. Burby et al. (2000) consider the effects of regulatory approaches upon economic development in central cities. In considering the ability of central cities to capture development relative to that of surrounding suburbs, the authors get at the issue of the extent to which regulatory practices deter development in the first place. Table 1 summarizes the

findings for the effects of different regulatory approaches on single-family, detached residential construction.^v The calculations of change in construction activity shown in Table 1 are based on multivariate findings by Burby et al. (2000) that control for differences among central cities in demand for housing, development opportunities, development costs, indicators of the quality of life (i.e., crime, poverty, and schools), and metropolitan-area characteristics.

Table 1. Effects of Enforcement Choices on Success of Central Cities in Capturing Single-Family Residential Construction, 1985-1995

| <u>Enforcement choices</u> | <u>Percentage change in construction activity</u> | |
|--|---|-----------------------|
| | <u>Number of units</u> | <u>Value of units</u> |
| Enforcement philosophy ^a | | |
| More business friendly | 9.1 | 8.8 |
| Enforcement strategy ^b | | |
| Strict | base case | base case |
| Creative | -1.7 | -.7 |
| Facilitative | 7.3 | 8.1 |
| Accommodative | 9.0 | 8.7 |
| Enforcement level of effort ^c | | |
| Stronger | .3 | 1.8 |

Source: Burby et al. (2000), Table 4, pg. 153.

Notes:

^a Cell entries show the effects of changes of moving from the highest quartile to the lowest quartile of all cities for the systematic enforcement philosophy.

^b Cell entries show the effects of changes associated with each strategy relative to the base case of a strict enforcement strategy.

^c Cell entries show the effects of changes of moving from the lowest quartile to the highest quartile of all cities for enforcement effort.

The findings are noteworthy in that they directly address the impacts of agency-level regulatory practices on housing. The conclusions from this research are particularly germane and, thus, warrant quoting:

Adopting business-friendly approaches will not reverse the movement of industrial, office, and retail businesses from central cities to the suburbs. But these approaches can help cities attract more single-family detached housing (and the population that comes with it) and spur more commercial rehabilitation projects. The percentage gains in construction activity that can be achieved are not large—about 5 to 10 percent. Because home building and commercial rehabilitation account for about 70 percent of construction activities in metropolitan areas, however, the absolute amounts of additional construction activity central cities can capture is large enough to merit attention (Burby et al. (2000: 154-155)).

Although these findings are supportive of arguments made by those advocating regulatory practices that are less rigid and more business-friendly as ways of advancing affordable housing, the failure to find an effect on multi-family housing is an important limitation that needs further exploration.

Current research by Burby and Salvesen for the Fannie Mae Foundation addressing the impacts of New Jersey's rehabilitation code suggests that rehabilitation can be spurred by "smart codes" and flexible enforcement.^{vi} Smart code provisions, which were first implemented in 1998 through the New Jersey rehabilitation sub-code, clarified rehabilitation requirements and reduced some previous requirements for projects to fully meet the code requirements for new construction. These changes also signaled a desire for local governments to adopt a more facilitative approach to regulating the rehabilitation of buildings. Although this research has yet to be published, the findings to date show that New Jersey's efforts resulted in a greater number of rehabilitation projects than under the prior regime and than the rehabilitation activity of control cities from neighboring states without the smart code provisions. However, there was no discernable difference in the total value of rehabilitation projects for either set of comparisons. These findings suggest that developers of smaller projects were likely to have been deterred from undertaking rehabilitation by more stringent regulations and by regulatory practices that created uncertainty about the standards to be applied to rehabilitation projects.

Facilitative Review and Inspection: Regulatory Practices Count

Housing and rehabilitation specialists express concerns over inconsistencies in the interpretation of rules for which regulatory inspectors are often viewed as sources of what is perceived as picky and inconsistent enforcement of rules. These considerations draw attention to the role of what happens in the field in affecting the ability of housing developers to comply with regulations and in enhancing cooperation between the developers and regulatory inspectors. The available research provides evidence that inspectors' enforcement styles do have appreciable effects on compliance, understanding of rules by regulated entities, and cooperation between inspectors and regulated entities.

Burby, May, and Paterson (1998) find that use of a facilitative enforcement approach enhances commitment of residential and nonresidential contractors to comply with building codes. May and Wood (2003) provide a more nuanced set of findings from their study of residential contractors in western Washington. The authors found facilitative enforcement styles are helpful in fostering a better understanding of rules for less knowledgeable contractors, but that advice can be undermined by inconsistencies across inspectors or over time. These findings evidence a downside to the use of "responsive regulation," calling for flexible enforcement and toughness only when flexibility fails. In particular, May and Wood write: "To the extent that such flexibility fosters inconsistent signals by inspectors across time or across settings, it undermines regulatees' understanding of rules and the development of shared expectations concerning compliance" (2003: 135).

Policy Challenges

Bringing about these changes presents several challenges for federal, state, and local policymakers. Three broad challenges are considered here:

- Indirect federal influence
- Balance of regulatory objectives
- Constraints in bringing about change

Indirect Federal Influence

A key challenge for federal policymakers stems from the fact that the implementation of the relevant regulatory programs falls largely within the province of state and local governments. As a consequence, the federal influence in addressing many of the regulatory process barriers and bringing about reforms is indirect. This situation is the classic dilemma of shared governance in the American system. On the one hand, federal housing officials desire to promote expansion of affordable housing; on the other hand, these efforts rest on the actions of state and local officials who do not necessarily assign a high priority to these housing goals. This dilemma explains why the recommendations of the various commissions on affordable housing have not had more impact in reducing regulatory process barriers.

There are several broad avenues of influence for affecting change in regulatory processes at state and local levels of government. One avenue that is an important part of this workshop is federal sponsorship of research that identifies the sources of regulatory barriers and means for addressing them. A second avenue is sharing information and examples of best practices among relevant state and local associations in order to help diffuse these practices. Examples include the efforts of the U.S. Department of Housing and Urban Development (HUD) to document barriers to affordable housing (e.g., Listokin and Listokin (2001)) and by the National Institute of Building Standards to promote adoption of E-permit processes (National Institute of Building Standards (2002)). A third avenue is sponsorship of demonstration programs at local levels of government that serve as exemplars of regulatory reforms.

Balance of Regulatory Objectives

A second challenge concerns the balance between achieving regulatory objectives for land use, environmental protection, and other non-housing related goals with achievement of affordable housing goals. The lack of a consensus about affordable housing goals, particularly at local levels of government, seems at present to tilt this balance toward the former categories of objectives. Charles Field has argued that there is a breakdown in the national consensus over the goals of affordable housing. He writes: "Today, proponents of affordable housing must negotiate with diverse and sometimes hostile parties to secure project approvals. Discussions are frequently adversarial, and stalemate is often the result" (1997: 801).

Just as some community groups and local elected officials are reluctant to restrict land use for environmental protection (see Burby and May (1998)), some are reluctant to endorse and carry out affordable housing programs. Simply put, the problem in many communities is that there is

not a meaningful political constituency for affordable housing. Instead, there is a stronger coalition arguing against it that operates often under the guise of pursuing other, more important goals. As a consequence, local officials either need to be cajoled into creating programs by state mandates or court orders (as in Massachusetts and New Jersey) or constituencies need to be fostered. Mandates are often ineffective because they are circumvented with token compliance. Fostering constituencies is difficult. But, as discussed by Burby (2003), participation in planning processes is one mechanism for building constituencies around community goals. When done well, participation in planning processes can be a vehicle for planners raising issues and for citizens and community groups to express their concerns.

Constraints in Bringing About Change

A final set of policy challenges stems from the constraints on regulatory reform at local levels of government. Although local practices are not immutable, it is important to recognize that the practices have developed over time in response to specific demands and needs that provide powerful drags on achievement of local regulatory reforms. In general, regulatory practices are shaped by broader objectives of local governments (e.g., whether to promote development or to limit it) and the internal workings of regulatory bureaucracies that operate out of the glare of visible political debates. Studies of the adoption and enforcement of building codes at the state level (May (1997)) and at local levels (Burby and May (1999); May and Birkland (1994); May and Feeley (2000)) reinforce the importance of political considerations, economic realities, and problem context in affecting regulatory choices.

The implications of these studies are that bringing about reform in regulatory practices is not a simple undertaking. Legal considerations constrain efforts to increase flexibility and discretion in regulatory approaches and practices. Local officials open themselves to litigation if administrative procedures are short-cut or actions are inconsistent. Perhaps the largest constraint is the inertia of bureaucracy that provides powerful forces that resist change. Studies of housing code enforcement undertaken by Ross (1995) and of field practices in building regulation by May and Wood (2003) and by Wood (2003) highlight the important role that inspectors' values and attitudes play in determining what regulations look like in practice. Changing these values and attitudes to reflect more business-friendly and flexible regulatory approaches is likely to be difficult.

Gaps and Research Needs

The indirect influence of federal actions over regulatory processes at state and local levels of government draws attention to the important federal role in sponsoring research about regulatory process barriers and ways to overcome them. The preceding discussion evidences a much better understanding today than a decade ago about aspects of regulatory barriers to housing. Advances have been made in understanding the concerns of developers and others about regulatory barriers, about the ways that choices by regulatory agencies and field personnel affect potential development, and about the procedural roadblocks and decision considerations. Nonetheless, there are a number of gaps in understanding of the problem and of steps to address it. The gaps and the related research needs that are suggested here are summarized in Table 2.

Improved Understanding of Regulatory Process Barriers

Several weaknesses are evident in the research that has been undertaken concerning regulatory process barriers. One is the heavy reliance on what developers report as their concerns, which inevitably will be shaped by general impressions of regulations and, thus, subject to bias. A second limitation is the imprecision of estimates of the costs associated with regulatory burdens. Estimates of those costs often lump together costs associated with administrative burdens and costs of legitimate regulatory hurdles, making it difficult to assess the impacts of regulatory inefficiencies. A third limitation is the inability to generalize from these findings to broader, national impacts on housing supply and affordability.

These broad criticisms lead to consideration of three avenues for research that will lead to improved understanding of regulatory process barriers.

Understanding the True Costs of Regulatory Process Barriers to the Availability and Affordability of Housing. The existing research provides an understanding of the sources of the administrative barriers and the types of costs that are imposed. In particular, Lugar and Temkin (2000) provide estimates of the costs associated with delays, impact fees, and other regulatory provisions from their data about the costs of developing residential subdivisions in New Jersey. But, these are limited data that do not address costs on a nationwide basis or account for costs imposed on different types of housing. While many developers complain about the administrative burdens and the costs they impose, it is unclear how much of the “housing affordability gap” can be explained by regulatory process barriers. Understanding this will help put into perspective the degree to which policy should focus on these barriers versus other aspects of regulatory impacts on housing.

The limited research on these topics consists mainly of case studies of the experience in selected jurisdictions with particular types of housing. The advantage of this approach is that it allows for collection of detailed information about different sources of regulatory burdens. The disadvantage is that it provides little basis for generalizing across housing types or jurisdictions to provide a broader understanding of the national situation. Development of this understanding requires more systematic data collection for a sample of local jurisdictions and development types across the country. A carefully constructed study involving a national sample of jurisdictions and housing types could provide a good understanding of the nationwide variation in local regulatory processes and their effects on housing.

Understanding the Effects of Regulatory Practices for Regulatory Areas other than Regulation of Building Safety. Much of the understanding of the implications of different regulatory processes is based on studies of regulation of building safety. This focus is appropriate since new housing production and rehabilitation of existing housing must comply with relevant building regulations. Yet, as discussed by May and Wood (2003), building regulation differs in two important ways from other regulations. Inspection is certain (and frequent) for building regulation, whereas it is infrequent and sometimes non-existent for most regulatory functions. Second, building inspection is aimed at identifying and rectifying problems, whereas for most regulatory settings, inspection is primarily aimed at preventing harms.

Table 2. Gaps and Research Needs

| Issue | Research Gap | What Addressing This Provides |
|--|--|--|
| <i>A. Understanding of regulatory process barriers.</i> | | |
| Cost of regulatory process barriers to housing goals. | Understanding of the true costs of regulatory process barriers as distinguished from other sources. | Basis for evaluating relevance of addressing regulatory process barriers versus other barriers. |
| Implications of regulatory processes for regulations other than regulation of building safety. | Better understanding of implications of regulatory processes relating to environmental, land use, and other regulations. | Broader understanding of regulatory process issues and their implications. |
| Attention to lesser studied aspects of regulatory processes: citizen opposition and fragmented structures. | Better understanding of sources of regulatory process barriers. | Ways of reducing these barriers. |
| <i>B. Understanding of solutions to regulatory process barriers.</i> | | |
| Administrative e-government reforms and other mechanisms for process simplification. | Understanding of the implications of these reforms for other aspects of regulatory processes than efficiency alone. | Better understanding of how to design effective administrative process reforms. |
| Third-party involvement in regulatory administration. | Understanding of the potential and limits to third-party certification and other forms of involvement. | Potential leveraging of regulatory resources and reduced delays in administrative processing of permits and other reviews. |
| Procedural reforms in regulatory decisionmaking and goal setting. | Better understanding of role of mediation and negotiation along with public participation in shaping consensus for affordable housing goals. | Ways of addressing opposition to housing developments and forging consensus about housing goals. |
| Flexible regulatory approaches. | Better understanding of what these entail and how to implement them. | Ways of reducing enforcement burdens. |
| <i>C. Consideration of implications of broader regulatory reforms.</i> | | |
| Performance-based regulation. | Implications for regulatory processes and practices as they affect housing-related goals. | Greater flexibility and potentially reduced costs of compliance. |
| “Voluntary” regulation. | Implications for regulatory practice and housing-related goals. | Less direct governmental regulation. |

Research concerning regulatory processes for environmental, land use, and other non-building related regulations is necessary to tell whether the lessons from existing studies of building regulation also apply to other regulatory areas. This might consist of a set of analytic studies that compare the differences in regulatory approval and enforcement processes for selected jurisdictions for different types of regulations with particular attention to duplication of regulatory processes. This research would provide a broader understanding of the influence of regulatory processes for affordable housing. It also could provide a basis for commenting about the potential for reducing overlap in regulatory processes.

Attention to Lesser-Studied Aspects of Regulatory Processes. The research concerning regulatory processes tends to focus on enforcement aspects of building regulation. Lesser attention has been paid to citizen opposition and its effects, and to the implications of fragmented regulatory structures. Each of these is a somewhat separable topic for research. But, as noted above, it is useful to put them in context with respect to their contribution to the overall barriers posed by regulatory processes.

The understanding of the impact of citizen (and other group) opposition to affordable housing developments is long on anecdotes and thin in providing insights about the nature of the opposition and its implications. A better understanding of the reasons for opposition is essential for responding to it. Also important is an understanding of the way that regulatory procedures foster what regulatory scholar Robert Kagan (1991, 2001) has labeled as “adversarial legalism” in providing veto points for affordable housing. This type of research is perhaps best conducted as in-depth case studies of citizen opposition to affordable housing with selection of cases to provide illustrations of different types and degrees of opposition.

The role of fragmented regulatory structures in contributing to frustration and delays is not hard to understand. But, such broad observations provide little understanding of the sources of fragmentation and the constraints in overcoming it. How much of the fragmentation is driven by legal considerations related to procedural considerations specified in regulations beyond the control of local governments? Are some functions better left separate in order to avoid abuse or increase accountability? This type of research is perhaps best conducted as case studies of organizational arrangements in different jurisdictions with attention to the basis for the organizational structures and their implications for regulatory delays.

Improved Understanding of Solutions to Regulatory Process Barriers

Further research concerning several avenues for overcoming regulatory process barriers are fruitful to consider for further research. Four are considered here.

Understanding of Administrative Process Simplification. There is a paucity of research that addresses regulatory processes and decisionmaking as these relate to barriers to affordable housing. The anecdotal evidence about streamlining of regulatory processes suggests that substantial reductions in administrative delays can be achieved through use of E-government reforms. However, that evidence is highly selective and focuses entirely on efficiency considerations. Little is known about how such reforms affect regulatory outcomes, the level of understanding by regulated entities of what is expected of them, and the overall satisfaction with

regulatory processes. Studies of developers who have participated in selected jurisdictions' E-government reforms in permit applications and processes are necessary to gain this understanding. These are best conducted as surveys of participants perhaps undertaken in conjunction with sponsorship by one or more local governments of an evaluation of their E-permit reforms.

To date, the emphasis of E-regulatory reforms has been on coordinating regulatory paper flows. Although these constitute major advances in processing of regulatory applications, other advances can and should be explored. In particular, the use of electronic collaboration for pre-development permit discussions and joint decisions among regulatory authorities have potential for reducing the barriers imposed by multi-agency, serial decisionmaking. These might best be undertaken as small pilot studies or demonstrations in cooperation with jurisdictions that are interested in such regulatory advances.

Implications of the Use of Third Parties in Regulatory Practices. One response to limitations of staff resources for carrying out review of plans and inspection has been to rely on third parties for these functions. The selected experiences reviewed above provide some understanding of the issues involved when placing greater reliance on third parties for regulatory approvals. However, the benefits of such delegation for reducing delays in regulatory approvals and for production of affordable housing more generally have not been systematically addressed. The involvement of third parties raises issues concerning certification of the third parties, accountability for their actions, and legal liability for jurisdictions that rely on third parties.

Research concerning the legal implications—regarding assignment of responsibility and liability—of use of third parties is especially important to undertake. Much can be learned from the selected experiences in the use of professional engineers and registered architects for certifying plan conformance and adherence to various regulatory provisions. A broader understanding of the role of third parties from the literature on energy conservation, radon reduction, and other fields may be useful in drawing policy lessons.

Understanding of Procedural Reforms in Regulatory Decisionmaking and Goal Setting. Perhaps the least understood aspect of regulatory administration is how to effectively use mediation, negotiation, and other problem-resolution techniques for reducing conflicts over affordable housing projects. While there is extensive literature addressing environmental dispute resolution, there is a paucity of research that addresses the implications of these approaches for housing disputes. The housing-related literature on these topics is long on advocating the use of the techniques and short in evaluating their implications—especially as they relate to addressing disputes involving tradeoffs between non-housing and housing-related regulatory objectives. Case studies of circumstances where dispute resolution has been employed for mediating tradeoffs among regulatory goals could provide insights about the strengths and limitations of dispute resolution mechanisms.

A more basic set of issues is the degree of community and local elected officials' support for affordable and other housing goals in the first place. Such support is no doubt variable depending on economic conditions, housing markets, desires to facilitate development, and the extent of environmental and other concerns within a community. Nonetheless, establishing housing goals

is an important aspect of land use and community planning. As discussed by Burby (2003), the role of participation mechanisms in establishing those plans is important to consider (also see Beirle (1998)). Research on the role of planning processes and other mechanisms for establishing housing-related goals is important to undertake for gaining an understanding of how to build consensus around housing issues. This type of research is usually undertaken by considering planning processes and resultant plans across communities that have made efforts to address affordable housing.

Flexible Regulatory Approaches and How to Carry Them Out. One of the key research findings noted above is that of Burby and his colleagues (2000) in showing that business-friendly and flexible regulatory approaches have positive payoffs with respect to encouraging development of housing in central cities. Indeed, the notion of flexible regulatory approaches is not new. Roger Ahlbrandt (1976) cited the virtues of flexible code enforcement for neighborhood preservation over 25 years ago. More recently, regulatory scholars such as Ayres and Braithwaite (1992) and Sparrow (2000) have endorsed variants of flexible approaches that involve situational monitoring of compliance, results-oriented enforcement of code requirements, and the use of sanctions only when required. Yet, what really constitutes a flexible approach and how to bring it about are not well understood.

Advances in thinking about this approach require a better understanding of how the choices that are entailed with respect to different tools of enforcement (e.g., use of sanctions and incentives and provision of information), priorities for enforcement (e.g., who is targeted and what is inspected), and the degree of effort involved in carrying out enforcement (e.g., the allocation and leveraging of enforcement resources) add to or detract from a business-friendly regulatory climate. Yet, how to bring about this climate entails more than simply specifying what choices enhance that approach. As discussed by Sparrow (2000), fundamental changes in the culture of regulatory agencies are required. And, as noted above, legal constraints relating to administrative due process considerations and equitable treatment of regulated entities may constitute barriers.

Research is required that considers the value and feasibility of flexible approaches from the perspective of regulatory officials, as well as the perceptions of this approach from the perspective of developers. Regulated entities “value clarity in expectations, consistency in procedures, and the benefit of the doubt when deficiencies are found. But, inspectors must be able to strike a proper balance to encourage cooperation without allowing them to be manipulated into ignoring substantial violations” (May and Wood (2003: 135)). This type of research is best conducted with surveys within selected jurisdictions of developers and regulatory officials. The challenge is to be able to convey what a flexible approach really means so that respondents can express their views about it. One strategy might be to find jurisdictions that have recently introduced changes in regulatory approaches to examine the views about the changes. A second strategy would be to develop vignettes about different approaches that can be incorporated into survey research.

Gaps Related to Evolving Regulatory Reforms

Any discussion of regulatory barriers is framed with respect to the regulations and administrative processes that are in place at the time. In thinking about regulatory process barriers, it also is

important to consider the implications of evolving regulatory reforms that will likely shape future regulatory implementation. Two potentially relevant sets of reforms are discussed here.

Implications of Performance-Based Regulation and Regulatory Regimes^{vii}. Performance-based regulation embodies the notion that regulations should be based on achievement of specified results rather than on adherence to particular technologies or prescribed means. This approach has been widely accepted as a basis for improving social and environmental regulations and has been central to reforms of the regulation of building safety in the United States, as well as a number of other countries. Until the past decade, the regulation of building safety has developed throughout the world as one of the more rule-bound and prescriptive aspects of protective regulation. Employing a prescriptive approach, the typical building code provision addresses requirements for a component (i.e., wall, partition, and floor) in specifying required practice (i.e., nailing pattern and bolting or bracing), materials, or both. Since the initial model building code in the United States was promulgated in 1927 (the Uniform Building Code (UBC)), revisions and additions have resulted in hundreds of provisions that, as of the 1997 version of the UBC, comprised nearly a thousand pages.

Recognizing the deficiencies of the prescriptive approach and the increasing complexities of code provisions, a trickle of efforts that began in the 1970s and gathered momentum in a variety of forums since then has led to a rethinking of the philosophy of building and fire codes. Two separate sets of developments are relevant in the United States. One was an effort undertaken by a consortium of the three national code-writing entities, creating a new entity called the International Code Council, to develop a performance-based building code. The result is a performance-based code published in December 2001 as the ICC Performance Codes for Buildings and Facilities (International Code Council, Inc. (2001)). A second effort in the United States is a competing model code that has been promulgated by the National Fire Protection Association (2002) as the NFPA 5000, Building Construction and Safety Code. Both the ICC and the NFPA performance-based code provisions are presently formulated as alternatives to existing prescriptive code provisions, which like all model codes in the United States must be adopted by states and/or localities before they come into effect. The basic approach of the performance-based codes is similar in specifying broad goals for building and fire safety, functional requirements that relate to specific aspects of the building (e.g., structural stability, fire safety, and hazardous materials), performance requirements (standards) that specify minimum requirements, designation of means for verifying building performance, and, in some instances, examples or guidelines for “acceptable solutions.”

Proponents of performance-based codes argue that the codes will foster greater flexibility and innovation in reaching regulatory objectives. Simplification of code provisions also is an evident goal as evidenced by the fact that the ICC performance code is one-fifth the length of the corresponding UBC. Interest in the performance-based approach on the part of the building industry has been driven by desires for increased flexibility and by the potential for reductions in compliance costs and time involved for complying with regulatory provisions. Proponents argue that these savings are especially evident when using performance-based codes in the rehabilitation of existing buildings.

Given that the performance-based codes have only recently been adopted, their effects on the administrative aspects of building regulation have not been systematically studied. It is clear that the provisions put more responsibility on the development community (and their consultants) to demonstrate that a given building design complies with expected performance standards. The roles of plan checkers and inspectors change from assessing compliance with specific, prescriptive provisions to certifying that overall compliance with expected performance has been adequately demonstrated. This necessitates greater administrative capacity on the part of regulatory agencies and more expertise on the part of plan checkers and inspectors.

The shift to performance-based regulations is not limited to building regulation as it has been employed for regulations concerning environmental harms, food safety, health and safety, nuclear power plant safety, and transportation safety among other regulatory arenas. The main issue for production of housing is how shifts from largely prescriptive-based regulations to performance-based regulations affect the types of barriers discussed here. One research approach is to consider the lessons from the use of performance-based regulation to date. One such set of lessons is provided by May (2003) in describing the “leaky building crisis” that emerged in New Zealand after a performance-based building code was introduced. That experience does not serve as an indictment of performance-based regulation; however, it does serve as a reminder of the need to consider the implications for regulatory implementation of performance-based approaches.

Implications of Voluntary Regulation. Another set of regulatory reforms of potential relevance to housing considerations is increased use of various forms of “voluntary” regulation either as additions to or substitutes for traditional forms of regulation. Under the voluntary approach, government calls attention to a potential harm and facilitates voluntary actions by relevant firms or industry associations to address the potential harms. There are several variants of voluntary approaches. One variant, discussed by Potoski and Prakash (2002), consists of encouraging industry associations to develop “voluntary codes” for which adherence by industry members will provide market and public relations benefits. Coglianesi and Lazar (2003) discuss the use of “environmental management systems” as part of voluntary codes with which firms make use of management systems for identifying and addressing problems with adherence to environmental regulations. A prime example of this is adoption by firms of the environmental management processes specified under the international voluntary standard, ISO 14001. The presumption is that firms that adopt these systems will have better compliance, and even go beyond compliance, with environmental regulations.

The potential for the use of industry-based voluntary codes within housing-related regulatory programs has yet to be explored. As with the study of performance-based regulation, it would be useful to consider the lessons for housing from experiences with voluntary codes in other arenas and settings. Perhaps the most directly relevant issue for housing production is the ways in which participation in environmental voluntary codes by large housing manufacturers ease compliance burdens imposed by environmental regulations. This type of research can be undertaken by identifying developers and housing manufacturers that have participated in voluntary codes and studying how such participation has affected the timing of regulatory approvals and other regulatory barriers.

Conclusions

This contribution addresses the effects of regulatory processes for housing for regulations concerning such things as building safety, the environment, and land use. Consideration of regulatory processes draws attention to two aspects of the implementation of regulations. One is delays in construction and the rehabilitation of housing related to cumbersome decisionmaking processes. A second is the effects of the added burdens of regulatory implementation in discouraging housing development or rehabilitation in the first place. The magnitude of each of these is hard to establish since the existing research fails to distinguish the effects of the provisions of regulations from the effects of the way with which they are administered.

Many advances have been made in recent years in understanding the concerns of developers and others about regulatory barriers, about the ways that choices by regulatory agencies and field personnel affect potential development, and about the procedural roadblocks and decision considerations. Nonetheless, the existing research findings are highly proscribed in several respects. They are based on a limited number of studies, almost entirely related to the regulation of building safety, which do not provide a strong base for drawing generalizations about housing impacts. Most of the studies only examine residential development and do not address multi-family housing or housing rehabilitation. None of the studies directly addresses the affordability or price of housing. And, none of the studies directly address the potential impact of procedural barriers in discouraging housing development or rehabilitation in the first place.

Given these limitations, a number of gaps in understanding of regulatory barriers and steps to eliminate them can be identified. Three avenues for research have been discussed here. One is the development of an improved understanding of regulatory process barriers in analyzing the true costs of the barriers for the availability and affordability of housing, in looking beyond building regulation as a regulatory arena for study, and in paying attention to lesser studied aspects of regulatory processes—citizen opposition and fragmented regulatory structures. Second is the development of an improved understanding of solutions to regulatory process barriers in considering more fully administrative process simplification, the implications of the use of third parties in regulatory practices, the use of procedural reforms in regulatory decisionmaking and goal setting, and how to carry out flexible regulatory approaches. A third avenue is consideration of the implications of broader regulatory reforms relating to performance-based regulation and voluntary codes for housing-related goals and the types of regulatory barriers considered here.

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Endnotes

ⁱ As noted by Ben-Joseph (2003), surveys of homebuilders undertaken by NAHB in the 1960s did not show government regulations as noteworthy obstacles to the housing industry. This suggests that the perceptions of regulatory burdens accompany the growth of social regulation in the United States that took place in the 1970s.

ⁱⁱ Luger and Temkin (2000) also surveyed developers in New Jersey. The focus of their research was the impact of zoning and subdivision regulations, environmental regulations, and impact fees on housing costs. The impact of building codes was not included in their study.

ⁱⁱⁱ The Alliance is a public-private partnership among 42 organizations that has an objective of "streamlining the building regulatory process through the use of information technology to enable the nation to build 'faster, better, safer, and at less cost'." Alliance members include the National Governors Association, U.S. Conference of Mayors, National Association of Counties, National Association of State Chief Information Officers, National Institute of Standards and Technology, American Institute of Architects, Building Owners and Managers Association International, National Association of Homebuilders, and National Institute of Building Sciences. The National Conference of States on Building Codes and Standards serves as the secretariat for the Alliance.

^{iv} A second closely related focus of the regulatory implementation literature is explaining variation in the motivations of regulated entities to comply with regulations. This literature addresses the ways that regulatory practices facilitate or impede the willingness and ability of regulated entities to comply with regulatory provisions (see, for example, Winter and May (2001); May (2003)).

^v These effects were studied for 155 central cities across the United States. Success in attracting real estate construction was measured with respect to the number and value of building units in the central city relative to the surrounding metropolitan area. The research failed to find detectable effects of different regulatory practices on central-city development of multi-family housing or upon development of industrial, office, or retail/warehouse buildings. The effects on rehabilitation of commercial office buildings paralleled those for single-family detached residences.

^{vi} The research results reported in this paragraph are findings reported in personal communication with the authors on 20 January 2004. The research results are for residential rehabilitation.

^{vii} This discussion of performance-based regulation draws from May (2003). It is interesting to note that HUD was one of the early proponents of performance-based codes as explored in the late 1960s under an innovative housing demonstration program, "Operation Breakthrough."