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The Limits of Equity

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ZONING AND LAND USE PLANNING

The Limits of Equity

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Urban planning circles are abuzz with talk of “equity.”¹ For example, the American Planning Association (APA), a national association of urban planners,² claims that it “is working to center equity in all planning processes.”³ The APA has issued a “Planning for Equity” policy guide, which defines equity vaguely as “just and fair inclusion into a society in which all can participate, prosper and reach their full potential.”⁴

Although this language seems a bit vague, other parts of the APA guide are somewhat clearer. For example, the APA writes that “[p]lanning for equity is intended to challenge those planning practices that . . . disproportionately impact and stymie the progress of certain segments of the population more than others.”⁵ The guide adds that the APA seeks social justice by planning “for the needs of the disadvantaged and [promoting] racial and economic integration.”⁶ However, existing zoning policies often are not consistent with these

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¹For example, my Google search for sites referencing both “urban planning” and “equity” revealed over 4.9 million “hits.”

²See About APA, at <https://planning.org/aboutapa/> (describing organization).

³American Planning Association, Our EDI Commitment, at <https://www.planning.org/equity/commitment/>.

⁴American Planning Association, Planning for Equity Policy Guide 3, at https://planning-org-uploaded-media.s3.amazonaws.com/publication/download_pdf/Planning-for-Equity-Policy-Guide-rev.pdf.

⁵Id.

⁶Id. at 4.

objectives; for example, the guide notes that limitations on “multifamily dwellings, affordable homes [and] group homes for people with disabilities . . . continue to perpetuate exclusionary practices.”⁷ Thus, it appears that according to the APA, equitable planning policies are those which favor, or at least do not harm, people who are socially disadvantaged.⁸

The purpose of this article is to show that it is not always obvious which policy choice is the most equitable. To prove the point, I discuss several possible land use-related disputes; as to each issue, both supporters and opponents of almost any possible decision can argue that they are the true defenders of equity.

I. The Polluting Industry

Imagine the following situation: an energy company asks a city for a permit to build a natural gas transmission facility that would create hundreds of jobs within a few blocks of a high-poverty neighborhood. Opponents of the project claim that gas turbines from the project will increase nitrogen oxide and particulate matter pollution, thus increasing the risk of asthma and lung cancer.⁹

At first glance, the “pro-equity” position is opposition to the project: the turbines apparently increase health risks in the nearby neighborhood, without imposing similar risks on more affluent communities. However, it could be argued that the project creates compensating benefits to community

⁷Id. at 3.

⁸Discussion of equity is often focused on race, and parts of the APA policy guide focus on race as well. Id. at 26–27 (addressing shortage of nonwhite urban planners). However, most of the discussion below will focus on the interests of lower-income households generally, for two reasons. First, most policies discussed below are race-neutral on their face. Second, because Blacks and Hispanics tend to be poorer than whites, any policies that negatively affect lower-income Americans will usually have a disproportionately negative effect on those ethnic groups. Cf. Kaiser Family Foundation, Poverty Rate by Race/Ethnicity, at <https://www.kff.org/other/state-indicator/poverty-rate-by-raceethnicity/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D> (Blacks and Hispanics have higher poverty rates than whites). Thus, policies that are inequitable towards lower-income households will often have a similar impact upon Blacks and Hispanics.

⁹This hypothetical is loosely based on the facts of *Friends of Buckingham v. State Air Pollution Control Board*, 947 F.3d 68 (4th Cir. 2020).

residents, by allowing them to live within walking distance of a major local employer. This benefit may be especially useful in large metropolitan areas, where many jobs are located far from lower-income communities, either because they are in gentrified downtowns far from at least some poor areas,¹⁰ or because they are in suburbs that are far from poor urban areas and/or have minimal public transportation.¹¹

How should the city decide whether granting the permit would be inequitable? One factor, of course, is whether the facility's health harms would truly be significant. Other relevant factors might include:

- is it possible to mitigate the pollution caused by the facility?
- is the neighborhood already especially polluted, either because it is an industrial cluster or for some other reason? If this is not the case, one might argue that the neighborhood is merely getting its fair share of industry.¹²
- is it in fact likely that the facility will employ neighborhood residents? For example, are the skills needed for the facility's new employees similar to the skills possessed by neighborhood residents?
- is the neighborhood isolated from other comparable job opportunities? For example, if the proposed facility is in a large city where other industrial jobs would require

¹⁰ See Luke Juday, *The Changing Shape of America's Metro Areas*, at <https://statchatva.org/changing-shape-of-american-cities/> (in 2015, per capita income in New York's most central neighborhoods was over \$100,000, while per capita income seven miles away was just over \$22,000); Google Maps, maps.google.com (subway ride from East New York, a lower-income area in Brooklyn, to Empire State Building would take roughly an hour); City-data.com, *East New York Neighborhood in Brooklyn, New York (NY), 11207, 11208 detailed profile*, at <https://www.city-data.com/neighborhood/East-New-York-Brooklyn-NY.html> (2019 median income in East New York was just over \$40,000, more than 40 percent below statewide median).

¹¹ *Id.* (for example, a train journey from East New York to suburban Touro Law Center would take roughly two hours).

¹² For example, in *Friends of Buckingham* a state official claimed that the project would not be environmentally harmful because the residents of the affected neighborhood were "already breathing air that is cleaner than the air breathed by 90% of the residents of Virginia." *Friends of Buckingham*, 947 F. 3d at 79.

long commutes from the neighborhood, the facility might be especially beneficial. On the other hand, if there are many other jobs within walking distance, the facility might not be especially helpful for this particular neighborhood.

II. The Not-So-Polluting Business

Suppose that the energy company's request for a permit is denied, and the relevant land is sold to a commercial developer. The developer asks the city to rezone the land in order to permit the construction of restaurants and a hotel.

At first glance, this proposal seems to give residents of the low-income neighborhood the best of both worlds: they have access to employment without the pollution caused by heavy industry. But in 2020, a similar plan in a working-class Brooklyn neighborhood was torpedoed by local politicians because of concerns about gentrification.¹³ Rezoning opponents argued that the proposed new businesses would bring in high-wage employees, and that those employees might want to live in the neighborhood, thus bidding up housing prices enough to displace existing residents.¹⁴

If the rezoning opponents' argument is correct, the only business that would *not* gentrify a working-class neighborhood is one that pays wages as low as those currently earned by existing residents. If a city consistently applied this view, it would seek to exclude any high-wage jobs in working-class neighborhoods; thus, the residents could never better their economic status without long commutes. It is unclear whether this result would be equitable (because it keeps rents down) or inequitable (because it forces the ambitious into longer commutes).

¹³ See Rose Adams, *The Industry City Rezoning is Dead: What's Next for Sunset Park's Waterfront?*, Brooklyn Paper, Sept. 28, 2020, at <https://www.brooklynpaper.com/industry-city-rezoning-waterfront-plans/> (describing collapse of rezoning proposal in Sunset Park, a Brooklyn neighborhood); City-data.com, *Sunset Park Neighborhood in Brooklyn, New York (NY)*, 11215, 11220, 11232 detailed profile at <https://www.city-data.com/neighborhood/Sunset-Park-Brooklyn-NY.html> (Sunset Park median household income is just over \$57,000, about 20 percent below the statewide median).

¹⁴ See Marcela Mitaynes, *No, don't build up Industry City: Development will bring more gentrification and displacement*, New York Daily News, August 10, 2020 at <https://www.nydailynews.com/opinion/ny-oped-dont-build-up-industry-city-20200810-xiv4n2xgvrdt5ekwpcxvcuv5oi-story.html>.

Moreover, even such a rigid prohibition would not prevent demand for housing from increasing. Suppose that a business in a working-class neighborhood creates a thousand new jobs, all of which pay exactly the same as the neighborhood median income. Because labor markets are citywide, these jobs would attract employees who live in other neighborhoods. Because some of these employees might wish to move near the business to shorten their commutes, even this seemingly inoffensive business would raise demand for housing in the neighborhood, and thus create some risk of rising rents. If the only truly equitable policy is the one that reduces demand for housing as much as possible, all jobs should be kept as far away as possible from working-class neighborhoods—obviously an absurd result.

The city could try to prevent displacement by conditioning the rezoning on anti-gentrification safeguards. For example, city law could provide that in order to get the rezonings necessary to locate in a working-class neighborhood, an employer must promise to prevent displacement by subsidizing lower-income housing in the neighborhood. But if no such restrictions exist in suburbs, that employer will find it more profitable to move its business to the suburbs (or to a more affluent city neighborhood not subject to the policy). Unless capital is extremely immobile, the city's restrictions will reduce the number of jobs in working-class urban neighborhoods—hardly an equitable result.¹⁵

III. More Housing

Suppose that after the developer's request for a rezoning is denied, he instead asks the city to rezone the land to allow a large apartment building. As noted above, the APA writes that restrictions on multifamily housing are exclusionary,¹⁶ presumably because apartments take up less land per housing unit than large houses and thus might be less expensive

¹⁵The broader policy problem, of course, is: how can a city attract new jobs without causing housing costs to soar as a result? As I have written elsewhere, the best answer is to eliminate zoning that limits new housing, thus slowing or preventing increased housing costs. See Michael Lewyn, *Make New York Affordable Again*, 33 *Mun. L.* 22 (2019), at <https://archive.nysba.org/WorkArea/DownloadAsset.aspx?id=85182>.

¹⁶See American Planning Association, *Planning for Equity Policy Guide 4*, at https://planning-org-uploaded-media.s3.amazonaws.com/publication/download_pdf/Planning-for-Equity-Policy-Guide-rev.pdf.

to build.¹⁷ Thus, it might seem that upzoning land (that is, altering zoning to allow more apartments or other housing units than is currently allowed on the land)¹⁸ is a “pro-equity” policy. Moreover, if enough new apartments are built citywide, rents might go down, which certainly is good for lower-income households.

But the objections to new housing are sometimes phrased in pro-equity, anti-gentrification language. Because of rising land and construction costs, new housing is more expensive to build than older housing.¹⁹ It logically follows that the newest market-rate housing will be more expensive than older housing, and thus will often be too expensive for some of a neighborhood’s current residents.²⁰ This reality in turn leads to claims that the construction of new market-rate

¹⁷Cf. Nolan Gray, *Density is How the Working Poor Outbid the Rich for Urban Land*, Market Urbanism, Feb. 5, 2018, at <https://marketurbanism.com/2018/02/05/density-working-poor-outbid-rich-urban-land/> (explaining in more detail why apartments less expensive per housing unit than houses).

¹⁸See Diana Budds, *Will upzoning neighborhoods make housing more affordable?*, Curbed, Jan. 30, 2020, at <https://archive.curbed.com/2020/1/30/21115351/upzoning-definition-affordable-housing-gentrification> (explaining concept).

¹⁹Cf. Marcy Nicholson et. al., *Building a Home in the U.S. Has Never Been More Expensive*, Bloomberg, June 3, 2021, at <https://www.bloomberg.com/graphics/2021-us-housing-construction-costs/> (describing problem). It could be argued that an equitable solution would be to allow new housing, but only in already-gentrified areas. But even affluent areas usually have some lower-income residents, so the same anti-gentrification arguments that can be made in poor areas could be made in rich ones as well. For example, my Manhattan zip code (10019) has a median household income of over \$100,000, but also includes over 3000 households who earn less than \$20,000 per year. See City-data.com, *10019 Zip Code (New York, NY) Detailed Housing Profile*, at <https://www.city-data.com/zips/10019.html>.

²⁰For example, I just visited streeteasy.com to look at new housing in midtown Manhattan (where I live). Out of forty one-bedroom apartments for rent in new multifamily buildings, only eleven (27 percent) had an effective rent of less than \$4000. By contrast, about 82 percent (772 of 937) of not-so-new Midtown one-bedroom apartments rented for under \$4000, and about half rented for under \$3000.

housing is inequitable, because the high-cost housing will attract higher-income people who will bid up housing costs.²¹

But if new housing increased housing costs, the cities with the most new housing would have the highest housing costs, and the cities with the most restrictive zoning would be dirt-cheap. In fact, this is not the case. Although not all slow-growth cities are expensive, the cities with the highest rents tend to have low levels of housing growth.²² Moreover, some academic research suggests that even in low-income areas, new housing reduces rents. For example, one recent study examined 253 buildings built between 2014 and 2016²³ in low-income neighborhoods in eleven cities, and found that new construction reduced nearby rents by 5 to 7 percent, compared to buildings slightly further away from the new building.²⁴

Nevertheless, the popularity of restrictive zoning in expensive cities suggests that the anti-housing argument is not without political support. Renters in high-cost cities are

²¹ See, e.g., Abigail Savitch-Lew, *East Harlem Rezoning Hearing: Residents Beg Brewer To Vote No*, at <http://citylimits.org/2017/07/14/east-harlem-rezoning-hearing-residents-beg-brewer-to-vote-no/> (neighborhood activists oppose upzoning because of fears of gentrification); Brian J. Asquith et al., *Supply Shock Versus Demand Shock: The Local Effects of New Housing in Low-Income Areas 4*, at https://research.upjohn.org/cgi/viewcontent.cgi?article=1334&context=up_workingpapers ("Approving new housing in low-income areas is often contentious because of worries that new buildings will accelerate rent increases and gentrification"). But see Lewyn, *Does the Threat of Gentrification Justify Restrictive Zoning?*, 46 Real Est. L.J. 447 (2017) (criticizing argument).

²² Id. at 455-56.

²³ See Asquith et al. *supra* note 21, at 7. See also Kate Pennington, *Does Building New Housing Cause Displacement? The Supply and Demand Effects of Construction in San Francisco 1* (finding similar results in study limited to San Francisco), at <https://www.dropbox.com/s/oplls6utgf7z6ih/Pennington JMP.pdf?dl=0>.

²⁴ See Asquith et al. *supra* note 21, at 2. I note, however, that there may be one small grain of truth in the anti-upzoning argument: where one small area is singled out for upzoning while nearby areas are subjected to more restrictive regulations, the upzoned area might get the worst of both worlds: rents rise because demand rises for the upzoned blocks, but the increased demand is not offset by new supply because of the regulations in the restrictive areas. See Lewyn, *supra* note 21, at 460-61. (suggesting that this might explain growth of rents in upzoned New York neighborhoods).

generally less likely to support new housing than residents of low-cost cities: one study shows that renters in the most expensive quintile of cities (that is, those with average rent over \$2247)²⁵ were less likely to support market-rate housing within 1/8 mile of their homes than similar buildings 2 miles away.²⁶ By contrast, in the least expensive cities, renters were actually more likely to support nearby housing than faraway housing.²⁷

IV. Allow More Housing, But . . .

Our hypothetical city might choose to allow new housing, but only with safeguards in order to prevent displacement of lower-income renters. Portland, Oregon, for example, has an “inclusionary zoning” policy, which requires that all apartment buildings with over twenty units devote some units to low- and moderate-income housing.²⁸ In most Portland neighborhoods, a developer can comply with the policy by making 15 percent of units affordable to persons earning 80 percent of city median income, or by making 8 percent of new units affordable to persons earning 60 percent of median income.²⁹ At first glance, this seems like a highly equitable

²⁵See Michael Hankinson, When Do Renters Behave Like Homeowners?, High Rent, Price Anxiety, and NIMBYism 14, at https://www.jchs.harvard.edu/sites/default/files/harvard_jchs_hankinson_2017_renters_behave_like_homeowners_0.pdf (working paper for Joint Center for Housing Studies of Harvard University).

²⁶Id. at 13 (noting that among renters, there is a “12 percent decrease in support” for buildings 1/8 mile away, compared to buildings 2 miles away).

²⁷Id. at 14.

²⁸See Portland.gov, Inclusionary Housing, at <https://www.portland.gov/phb/inclusionary-housing> (describing policy in detail); infra notes 29, 30 (using term “inclusionary zoning”).

²⁹Id. (adding that slightly different policies apply to the Central City and Gateway Plan neighborhoods). In addition, the developer may choose to build low-rent housing on another site, or pay a fee in lieu of compliance. Id. The city defines affordability through charts listing appropriate rents for persons of various incomes. For example, under city policy a one-bedroom apartment is affordable to persons earning 80 percent of median income if the rent is under \$1382 per month, and affordable to persons earning 60 percent of median income if the rent is under \$1036 per month. See City of Portland, Inclusionary Housing 1, July 2020, at <https://www.portland.gov/sites/default/files/2020-07/phbihinfosheet-7-1-2020.pdf>.

policy: developers get to build new housing, and lower-income renters get to share in the bounty.

However, it is not clear whether these “affordable” units would always be profitable for a developer to build. If not, the developer would have lower profits than would otherwise be the case. Since developers can always invest their capital in commercial real estate, the stock market, or in cities without inclusionary zoning requirements, a policy that reduces developers’ profits in a city might reduce the supply of new housing in that city. In turn, a smaller housing supply means higher rents for everyone—hardly an equitable result.

It could be argued that development is so profitable that developers will build apartments even if they are required to set aside lower-income units. However, this has not been the case in Portland. Since the inclusionary zoning policy was enacted in 2017, the number of new multifamily housing permits for buildings covered by the city’s policy decreased by 74 percent, from 5767 in 2017 to 4431 in 2019 to 1491 in 2020.³⁰ It could be argued that adverse market conditions caused this decrease—but if this was the case, the number of permits for apartments with sixteen to twenty units (which are not subject to the city’s policy) would also have decreased. Instead, the number of permits for buildings in this category actually *increased* between 2016 and 2020.³¹ Moreover, if adverse market conditions caused Portland’s collapse in building permits, the number of permits would have decreased statewide and regionwide. In fact, the number of multifamily building permits throughout Oregon did decrease between 2016 and 2020—but only by about 13 percent (from 7763 to 6715).³² Similarly, the number of multifamily housing units permitted in the entire Portland metropolitan

³⁰ See Joe Cortright, *Inclusionary Zoning: Portland’s Wile E. Coyote Moment Has Arrived*, City Observatory, March 9, 2021, at <https://cityobservatory.org/inclusionary-zoning-portlands-wile-e-coyote-moment-has-arrived/>.

³¹ *Id.*

³² See United States Census Bureau, *Building Permits Survey, Permits by State*, at <https://www.census.gov/construction/bps/statemonthly.html>. I note that these figures are not strictly comparable to those cited above, because they include all structures with five or more units. *Id.*

area (including parts of the state of Washington) decreased by only about 20 percent, from 7098 in 2016 to 5681 in 2020.³³

It might be the case that a more moderate version of inclusionary zoning might avoid these negative consequences.³⁴ For example, some cities limit inclusionary zoning to developers who are requesting a zoning variance, or allow developers who comply with inclusionary zoning to build more housing units than would otherwise be allowed.³⁵ But if inclusionary zoning only applies to a fraction of new housing supply, it might produce even fewer lower-income units than a broader, more coercive policy such as Portland's.

Another inclusionary zoning trade-off involves the level of affordability that a city requires. Imagine, for example, three possible versions of inclusionary zoning:

- Version One: Portland's policy, which focuses on making new housing units available to persons earning 60 to 80 percent of median income.³⁶ This policy might make some units available to lower-middle-class tenants, but would still freeze out the truly poor, and thus might not be the most equitable policy.
- Version Two: 15 percent of units must be affordable to persons earning 10 percent of median income. This policy would be most beneficial to the truly needy, and thus might be more equitable than Version One. But because this policy would require developers to subsidize poorer tenants by charging lower rents, it would reduce developer profits to a much greater extent than the Version One, which in turn would discourage developers

³³ See United States Census Bureau, Building Permits Survey, Permits by Metropolitan Area, at <https://www.census.gov/construction/bps/msaannual.html>. Like the survey referenced at *supra* note 32, this survey also references all permits for housing with over five units.

³⁴ Cf. Kriti Ramakrishnan et. al., Inclusionary Zoning: What Does the Research Tell Us about the Effectiveness of Local Action?, at https://www.urban.org/sites/default/files/publication/99647/inclusionary_zoning_what_does_the_research_tell_us_about_the_effectiveness_of_local_action_2.pdf (generally, research on effectiveness of inclusionary zoning is mixed).

³⁵ Id. at 2; see also Stephanie Reyes and Ruoniu Wang, Inclusionary Zoning: Secrets to Success, Shelterforce, March 10, 2021, at <https://shelterforce.org/2021/03/10/inclusionary-housing-secrets-to-success/> (citing examples).

³⁶ See *supra* note 29 and accompanying text.

from building new housing to a much greater extent than Version One. As a result, Version Two seems more likely to raise rents for everyone not living in the “inclusionary” apartments.

- Version Three: 5 percent of units must be affordable to persons earning 10 percent of median income. This policy would benefit the poorest renters (unlike Version One) and would reduce developer profits (and thus housing supply) less than Version Two. But it would require fewer affordable apartments than Version Two, and thus benefit fewer poor people.

In sum, all three policies promote equity in some ways but fail in others. Version One promotes equity by maximizing the number of affordable housing units, but does not make those units affordable to extremely low-income households. Version Two promotes equity by making more units affordable to extremely-low income households, but at a possibly heavy cost to regional housing supply. Version Three is less costly than Version Two, but creates fewer affordable units.

V. Public Housing and Homeless Shelters

Suppose that, because of anti-gentrification arguments, the developer discussed above simply gives up on private construction, and sells its land to the city for a song. The city then proposes to build a homeless shelter on the land, reasoning that equity demands that the poorest of the poor should have the first claim on public resources.

But such housing is likely to meet equity-related objections. If the shelter is in a poor area, its residents might argue that their neighborhood is already packed with poverty, and that the neighborhood needs additional support from the city rather than an additional influx of the destitute.³⁷ This is especially true if, as is sometimes the

³⁷ See, e.g., Reid Singer, No One Wants A Homeless Shelter Next Door, Bklynr, Oct. 3, 2013, at <https://www.bklynr.com/no-one-wants-a-homeless-shelter-next-door/> (when homeless shelter proposed in Brooklyn’s lower-class East New York neighborhood, some residents argued that the area already has fifteen homeless shelters, as well as facing “high rates of violent crime, slow emergency response times, and strained public utilities, all of which are exacerbated by the presence of homeless shelters.”).

case, homeless shelters are already concentrated in lower-income neighborhoods.³⁸

Thus, the more equitable course of action might be to place homeless shelters and public housing in less distressed areas—for example, in the city's most prosperous neighborhoods. But even here, residents of these neighborhoods could make an equity-related argument. They might point out that they could easily afford to relocate to an affluent suburb which has no homeless shelters.³⁹ And if these affluent urbanites did relocate to suburbia, they would reduce the city's tax base, thus causing the city to have higher taxes and worse services than its suburbs. And because most central cities already have a disproportionate share of regional poverty,⁴⁰ any policies that weakened urban tax bases would disproportionately harm the poor—which means that they would be, in short, inequitable.

VI. Conclusion

"Equity" is certainly an appealing slogan. But a wide variety of land use policies could plausibly be justified as equitable (or fought as inequitable). Thus, it is often unclear which policy is the most equitable.

³⁸Id.

³⁹For example, the west side of midtown Manhattan alone has at least nine homeless shelters. See Community Board 4, Homeless Services, at <https://www1.nyc.gov/html/manch4/html/local/homeless.shtml>; Census Reporter, NYC-Manhattan Community District 4 & 5- Chelsea, Clinton & Midtown Business District PUMA, NY at <https://censusreporter.org/profile/s/79500US3603807-nyc-manhattan-community-district-4-5-chelsea-clinton-midtown-business-district-puma-ny/> (describing geography and socioeconomic nature of area). By contrast, affluent suburbs such as Greenwich, Connecticut and Scarsdale, New York appear to have none. See ShelterListings.org at www.shelterlistings.org.

⁴⁰See Larry Eichel & Octavia Howell, *City v. Suburbs: How the Geography of Poverty in Philadelphia Compares With 18 Other Metropolitan Regions*, at <https://www.pewtrusts.org/en/research-and-analysis/articles/2017/11/15/city-vs-suburbs-how-the-geography-of-poverty-in-philadelphia-compares> (in every region examined, poor disproportionately lived in cities; for example, in Philadelphia core city had 26 percent of region's population and 51 percent of its poor); Joe Cortright, *Reality check: poverty rates are much lower in suburbs*, City Observatory, July 12, 2017, at <https://cityobservatory.org/reality-check-poverty-rates-are-much-lower-in-suburbs/> (among neighborhoods with poverty rate of 40 percent or higher, majority were in densest third of metropolitan neighborhoods).