

## LIGHT-TOUCH DENSITY AND NEW HAMPSHIRE'S ROLE IN ZONING

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Chair Turcotte, Vice Chair Pauer, and members of the committee, thank you for inviting me to comment on residential zoning. I study land use regulation and housing markets as codirector of the Urbanity Project at the Mercatus Center at George Mason University. The Mercatus Center is proud to be a financial supporter of the New Hampshire Zoning Atlas, which we hope will be a valuable tool to Granite State towns and citizens.

My testimony this year largely repeats what I said with respect to the same policy last year.<sup>1</sup> Allowing more homes per lot would promote affordability, conserve municipal resources, have less impact on forest and farmland, and promote property rights.

### LIGHT-TOUCH DENSITY

In a 2022 report, my colleague Emily Hamilton and two coauthors make the case for what they call “light touch density,” a strategy of building denser types of housing, including those that HB 44 would legalize in many New Hampshire towns.<sup>2</sup>

They use a case study of towns in Bergen County, New Jersey, to explore the impact of gradual, widespread replacement of single-family homes with duplexes. They find that the borough that was the most permissive toward duplexes, Palisades Park, substantially increased its population each decade, and today has newer homes, higher land values, and lower tax rates. A new-construction home in Palisades Park is cheaper than in neighboring boroughs, and the incomes in Palisades Park are more diverse.<sup>3</sup>

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1. Salim Furth, “Light-Touch Density and the State’s Role in Zoning” (Testimony before the New Hampshire House Committee on Municipal and County Government, Mercatus Center at George Mason University, Arlington, VA, February 7, 2022).

2. Edward Pinto, Tobias Peter, and Emily Hamilton, *Light Touch Density: A Series of Policy Briefs on Zoning, Land Use, and a Solution to Help Alleviate the Nation’s Housing Shortage* (Washington, DC: American Enterprise Institute, 2022).

3. Pinto, Peter, and Hamilton, *Light Touch Density*, 49–59.

## INCREMENTAL PROGRESS

State and local governments now have experience with reforms that allow two- to four-unit buildings, and the impact of those reforms has been incremental. The year after Minneapolis, Minnesota, legalized duplexes and triplexes in all zones, just 42 such permits were pulled.<sup>4</sup> Houston, Texas, has always allowed multifamily housing of any size in almost every location. But, in 2021, it permitted only 255 duplexes, 1 triplex, and 6 fourplexes, compared to 7,146 single-family homes and 7,566 units in 204 multifamily buildings.<sup>5</sup>

The state of Oregon passed legislation quite similar to HB 44 in 2019 and followed up in 2021 to allow lot splits.<sup>6</sup> The latter legislation was sponsored by Habitat for Humanity, which, like other builders, wants to make relatively affordable housing easy to own as well as to rent.<sup>7</sup> Oregon's 2019 is still being implemented, so it is too early for even a preliminary evaluation.

New Hampshire, from 2017 to 2021, permitted about 310 housing units per 100,000 residents per year, 5.5 percent of which were in two- to four-unit buildings. Notably, this puts New Hampshire comfortably ahead of Houston, Minneapolis, and pre-reform Oregon in the permitting of two- to four-unit buildings.

## WHEN TO PREEMPT

The real issue at stake here is not the modest but positive effects this bill is likely to have, but whether New Hampshire ought to decrease the regulatory authority it has granted municipalities. As a New England native, I am keenly aware that its towns have been vital institutions for centuries. My hometown elected its own leaders and exerted police powers for a century before the revolution gave it the right to elect a governor.<sup>8</sup> Notwithstanding this tradition, these local powers have never been boundless and have long been contested and restrained.<sup>9</sup>

There are, I believe, three categories of argument in favor of preempting municipal zoning authority:

1. *Property rights.* Those who propose to limit citizens' right to the normal use and enjoyment of their property ought to face the burden of proof.<sup>10</sup> Thus, when state lawmakers deem that there is no compelling reason for a particular restriction—or that the costs outweigh its benefits—it is reasonable to ban such a restriction. In the present case, unless the legislature believes there is a compelling reason that four households should not reside on a

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4. Erin Baldassari, "California Cities Rethink the Single-Family Neighborhood," KQED, February 16, 2021.

5. Census Bureau, "Building Permits Survey," accessed February 2, 2022, <https://www.census.gov/construction/bps/>.

6. S.B. 458, 81st Leg., 2021 Reg. Sess. (Or. 2021).

7. Hearing before the H. Comm. on Housing, 81st Leg. Assemb. (Or. 2021) (statement of the Build Small Coalition).

8. Albert K. Teele, *The History of Milton, Mass., 1640 to 1887* (Boston: Press of Rockwell and Churchill, 1887), 221.

9. Joan C. Williams, "The Invention of the Municipal Corporation: A Case Study in Legal Change," *American University Law Review* 34, no. 2 (1985): 369.

10. John Stuart Mill, *The Principles of Political Economy*, vol. 3 of *The Collected Works of John Stuart Mill*, ed. John M. Robson (Toronto: University of Toronto Press, 1977); and F. A. Hayek, *The Constitution of Liberty*, vol. 17 of *The Collected Works of F. A. Hayek*, ed. Ronald Hamowy (Abingdon, UK: Routledge, 2011).

lot where one household can safely and beneficially reside, it ought to limit municipal authority to impose that specific restriction.

2. *Fairness.* Municipal governments are responsive mainly to their current residents, so zoning can be tilted toward maximizing incumbent property values and keeping out families with schoolchildren.<sup>11</sup> The state legislature can balance the narrow interests of current residents against the interests of Granite Staters who live outside the towns in question and do not have representation there. In this case, the state can act on behalf of its citizens' interest in finding an affordable place to live in the community of their choice.
3. *Solving statewide problems.* States are within their rights to preempt local governments when the key levers to achieving some major state goal are held at the local level. For example, recent zoning preemptions have been justified as necessary to address climate change or to increase economic growth.<sup>12</sup> The burden of proof in such cases, unlike for property rights, ought to be on the state to show that preempting a traditional domain of local government is in fact necessary to address a statewide problem.

These categories overlap and complement one another. When evaluating a restriction on property rights, for instance, the state must consult groups with a broad range of interests and consider its own policy priorities to determine whether the reasons given in favor of a specific regulatory tool, such as single-family zoning, are compelling.

There are also strong reasons for the state to leave most decisions with primarily local impact to local governments. I would never want to see a state zoning board, and I do not recommend unfunded mandates.<sup>13</sup>

The debate, however, is not about whether the state should ever restrict local authority—it already does. Using the three arguments for preemption above, the issue is whether, in this particular instance,

1. local regulators can make a compelling case that maintaining single-family zoning is sufficiently important to merit restricting the right of citizens to use and enjoy their private property

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11. William A. Fischel, *The Homevoter Hypothesis* (Cambridge, MA: Harvard University Press, 2009). As it turns out, large-lot and single-family zoning appear to be counterproductive in terms of keeping school taxes low. Ryan M. Gallagher, "Restrictive Zoning's Impact on the Local Education Property Tax Base," *National Tax Journal* 72, no. 1 (2019): 11–44.

12. Michael Andersen, "A Duplex, A Triplex and a Fourplex Can Cut a Block's Carbon Impact 20%," Sightline Institute, June 7, 2019, <https://www.sightline.org/2019/06/07/a-duplex-a-triplex-and-a-fourplex-can-cut-a-blocks-carbon-impact-20/>; and Emily Hamilton, "The Case for Preemption in Land-Use Regulation" (Mercatus Colloquium, Mercatus Center at George Mason University, Arlington, VA, July 20, 2017). I distinguish the latter two reasons by the scale of the issue motivating state action. A preemption justified on the basis of fairness is one where the effects are admittedly in the sphere that the town would normally govern. State-imposed building codes are a good example: they take into account nonresident builders' and buyers' interest in setting uniform standards, even though the structural soundness of a particular building is a local issue. By contrast, solving statewide problems is about addressing problems that are broad by nature.

13. Paul Rogers, "Solar Power Required for All New California Homes Starting Jan. 1," *San Jose Mercury News*, December 15, 2019; and Liam Dillon, "California Tenants Will See Cap on Rent Increases under Bill Sent to Newsom," *Los Angeles Times*, September 11, 2019.

and whether that case is outweighed by

2. other citizens' interest in housing availability or
3. statewide concerns, such as environmental protection, housing affordability, and economic growth.

Thus, the bill before you and others like it present substantive, not procedural, questions. State legislatures should not always preempt nor always defer to local authority. In my view, single-family zoning is ripe for reconsideration.

Thank you for your time. I am happy to answer any questions.