

## Housing Reform in the States: A Menu of Options for 2023

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As state legislatures meet in a year of inflated rents and record home prices, it remains abundantly clear that housing supply is insufficient to meet demand. Although some of the supply issues, such as lumber prices, are beyond states' reach, states play a vital role in setting the rules and incentives that influence whether localities decide to permit new housing construction. Overly restrictive local zoning is the fundamental cause of America's housing shortage, and states can place limits on local zoning as well as reform the processes that make land use regulation a source of frustration for so many local officials and citizens.

Legislatures across the nation have begun to rein in local regulatory power with bipartisan bills aimed at loosening zoning. Here are a few examples:

- Inspired by Habitat for Humanity, the Oregon legislature passed SB 458 (2021) with just six nay votes. The law allows most homeowners to split their lots into two or four smaller house lots to enable starter home construction.<sup>1</sup>
- The Utah legislature passed HB 82 (2021) to remove barriers to the construction of accessory dwelling units (ADUs).<sup>2</sup>
- Going further than Utah, the Connecticut legislature passed HB 6107 (2021), legalizing ADUs as well as capping parking mandates and eliminating arbitrary home size minimums.<sup>3</sup>

In this policy brief we offer a menu of housing policy reforms for lawmakers around the country to consider in the upcoming legislative sessions. They fit into five categories:

- Direct limits on local regulation, such as those laws discussed in the earlier examples
- Streamlining procedures

- Fiscal innovations
- Narrowing the scope of zoning authority
- Updating construction standards

## **DIRECT LIMITS ON LOCAL REGULATION**

Regulatory powers are given to cities and counties by their states. States often direct and limit the exercise of those powers to protect individual rights or solve statewide problems.<sup>4</sup> The following suggested limitations would make more housing possible at lower cost.

### Option 1: Permit Accessory Dwelling Units

Several states have passed laws permitting homeowners to build ADUs, which can take the form of backyard cottages, basement apartments, or garage conversions. In California, the push to allow ADUs statewide began in 1982, but it took a recent series of laws eliminating remaining barriers to their construction, such as excessive fees, owner-occupancy requirements, and parking minimums, to really open up the market.<sup>5</sup> Other states can learn from California's trial-and-error process and pass a single bill that addresses many of the common barriers to ADU construction. AARP has published an excellent model ADU law as part of its effort to promote communities that are convenient for people of every age.<sup>6</sup>

### Option 2: Limit Parking Mandates

Rather than city planners, developers and homebuilders are in the best position to know how much parking should be provided at each site. In 2021, Connecticut's legislature limited parking minimums to one or two spaces per apartment, depending on apartment size.<sup>7</sup> Policymakers in other states can follow Connecticut's lead or go further and eliminate parking mandates altogether.

### Option 3: Cap Minimum-Lot-Size Requirements

Minimum-lot-size requirements are one of the key regulations that prevent entry-level housing construction because they require each new house to sit on a large piece of land.<sup>8</sup> State policymakers can put a cap on local minimum lot sizes where sewer and water infrastructure are available. Houston's successful minimum-lot-size reform provides one potential model. Since 1999, Houston has allowed house lots as small as 1,400 square feet, which has opened up homeownership opportunities and funded improvements in older neighborhoods.<sup>9</sup>

#### Option 4: Permit Light-Touch Density

The majority of residential land in the United States is zoned to allow exclusively detached single-family homes, which are the most expensive type of housing. Policymakers in Oregon, California, and Maine have passed legislation allowing light-touch density<sup>10</sup>—in these cases two to four units per lot—on most residential lots across their states. The effectiveness of these laws, however, is limited by local development standards, such as limits on structure size or lot area, which make it too expensive to build anything except a single-family house. Localities such as Palisades Park, New Jersey, that are successfully facilitating light-touch density construction provide models for the rules that make it feasible.<sup>11</sup>

#### Option 5: Allow Transit-Oriented Development

Many states subsidize transit systems, which have excess capacity because local rules block development dense enough to support those systems. Legislatures can allow appropriately dense multifamily development in areas served by state-subsidized transit. Bills introduced in California provide one model for state-led reform to permit transit-oriented development.<sup>12</sup> Many localities also provide proven models of zoning for transit-oriented development, including the Tysons area of Fairfax County, Virginia. In Tysons, transit-oriented planning has led to the construction of tens of thousands of new apartments and condos on land that was formerly limited to offices, big box stores, and car dealerships.<sup>13</sup>

### **STREAMLINING PROCEDURES**

Every builder knows that approval delays can add costs and kill projects. Discretionary review procedures also introduce bias and invite corruption. Reforming procedural rules requires detailed conversations with city employees, builders, developers, and lawyers who know the formal and informal rules that determine how building is done in each state.

The payoff to all that research is that some state-level procedural reforms have had a significant effect on housing market outcomes without raising controversy.<sup>14</sup> The following ideas might not apply in every state and would need to be adapted to fit the existing institutions.

#### Option 6: Reform Protest Petitions

In 20 states, a small group of neighbors can use an obscure state law, the protest petition, to block rezonings. As practiced, protest petitions are unrepresentative and impinge on property rights. North Carolina, Wisconsin, and Massachusetts have recently repealed or sharply reformed their protest petition statutes.<sup>15</sup> Other states can repeal protest petition statutes or reform them to be more representative and to better protect property rights.

### Option 7: Allow Neighbors to Waive Setbacks

Zoning often requires buffers, or “setbacks,” around the edges of property to cushion immediate neighbors from new buildings. States can allow abutters to waive that buffer in covenants or contracts, either for compensation or mutual benefit. This replaces a bureaucratic approach with one that empowers people. In Houston, these waivers are called “maintenance agreements” and allow builders to provide attached or detached homes as the market dictates. Setback waivers can also facilitate ADUs and additions.

## FISCAL INNOVATIONS

When housing development places an unreasonable burden on any party—the builder, the municipality, or the eventual resident—construction slows or stops. If a city or neighborhood association has a financial incentive to prevent development, it will find creative ways to do so. Sustainable pro-housing policy requires rationalizing financial flows so that new housing usually pays its own way.

Fiscal norms are state specific. In this section we offer three innovations that may help address imbalanced fiscal norms. However, they are not necessarily applicable in every context.

### Option 8: Make Community Benefit Agreements Fair and Predictable

Many cities require developers to sign community benefit agreements (CBAs) to fund, for example, park improvements or local nonprofits. But most CBA programs are unnecessarily adversarial and unfair: neighborhood associations that complain loudest receive the largest benefits; critics say the process amounts to “zoning for sale.”<sup>16</sup> States can instead require that local CBA programs be systematic, setting a fixed, predictable dollar value that developers must pay. Neighbors can then help determine how the money is spent. New Rochelle, New York, introduced this approach, along with other innovations, to spark a downtown reinvestment surge that has funded tremendous city benefits.<sup>17</sup>

### Option 9: Allow Ohio-Style Tax Abatements for Residential Reinvestment

Many cities suffer more from decay and disinvestment than from high prices.<sup>18</sup> Rather than subsidizing individual projects, which raises taxes on other investments and invites corruption, cities can offer tax abatements for any residential reinvestment within given parameters. Ohio has long enabled its cities to do so,<sup>19</sup> and the city of Akron has become an outspoken exemplar, using the program to level the playing field between the city and its suburbs.<sup>20</sup> This program, however, would be a poor fit in high-demand cities.

#### Option 10: End “Inclusionary Zoning”

“Inclusionary zoning” is a requirement that new buildings offer some apartments for rent at subsidized rates. However, some research indicates that inclusionary zoning increases average rent, the opposite of its objective.<sup>21</sup> In some states, local policymakers are explicitly allowed to enact inclusionary zoning, whereas in others it is unclear whether localities have this authority. State policymakers can follow the lead of Tennessee, which explicitly prevents localities from adopting inclusionary zoning requirements.<sup>22</sup> State and local policymakers should address poverty directly rather than handing off the responsibility to developers.

### **NARROWING THE SCOPE OF ZONING AUTHORITY**

Municipal zoning relies on authority granted by the state to achieve specific, enumerated goals. Without changing any specific zoning designation, states can move local zoning regimes onto foundations that reflect a respect for property rights, environmental conservation, and individual dignity regardless of class and race, values that did not characterize the central planners who popularized zoning in the 1920s.

#### Option 11: Adopt the Property Ownership Fairness Act

In 2006, Arizona voters passed a ballot initiative that requires municipalities to compensate landowners if a new land use restriction lowers their property’s value. Restrictions that preserve public health and safety are exempt, as are preexisting restrictions. Landowners are responsible for demonstrating any decrease in property value.<sup>23</sup> The act places citizens and cities on more equal footing before the law, without changing any existing regulation. The law has led to local policymakers in Arizona deciding against adopting new land use restrictions, such as restrictive historic districts, that could lead to widespread reductions in property values.<sup>24</sup>

#### Option 12: Block Zoning That Makes Existing Conditions Illegal

In older areas of many cities, zoning has become so restrictive that most existing buildings are non-compliant. Before a 2019 rezoning, Somerville, Massachusetts, noted that (at most) 22 buildings in the entire city complied with its zoning code.<sup>25</sup> Zoning that doesn’t reflect reality can make it infeasible to redevelop vacant sites and replace decayed buildings. To address this, states can invalidate restrictions on siting, use, parking, or bulk on blocks where at least one-quarter of buildings do not comply.

#### Option 13: Protect “Build to Rent”

The single-family rental sector in the United States has grown rapidly since 2010, with a new corporate presence in a market traditionally dominated by small-scale landlords.<sup>26</sup> Most of the

new rentals arise from purchases of existing homes, but a minority are in build-to-rent subdivisions. Beginning in Georgia, a number of counties have limited or banned such subdivisions.<sup>27</sup> However, doing so is counterproductive because it increases competition for existing homes. It may also be beyond the scope of local zoning authority. States can remove this new regulatory temptation by clarifying that their zoning-enabling statutes do not confer authority to regulate ownership patterns.

## **UPDATING CONSTRUCTION STANDARDS**

Where the developer's work ends, the builder's begins. In states where land is inexpensive, construction costs are the key determinant of new home prices. Policymakers should review and update their building codes to ensure that cost-effective types of housing remain an option across their states.

### **Option 14: Allow HUD Code Manufactured Housing without Redundant Local Inspections**

A concerted effort to discredit factory-built housing succeeded in stigmatizing and sidelining it in the 1970s.<sup>28</sup> As a result, home buyers have missed out on cost-saving innovations. "HUD code" manufactured homes are those inspected and certified by the US Department of Housing and Urban Development. However, many zoning codes allow such homes only in mobile home parks, or not at all. States can require that HUD code homes be allowed on any residential lot that allows a single-family home without being subject to additional construction standards or redundant inspections.

### **Option 15: Eliminate Aesthetic Mandates and Materials Bans**

Neither zoning authority nor building code enforcement should extend to home aesthetics. Materials bans should be justified only by unique climate or health and safety conditions. States can follow the lead of Arkansas and Texas and eliminate aesthetic requirements, except in existing historic districts,<sup>29</sup> which can continue to require period aesthetics.

### **Option 16: Allow Skinny Apartment Buildings**

The International Building Code, which is used across much of the United States, requires that multifamily buildings over three stories include two staircases that are accessible from each unit. This requirement leads to multifamily buildings that generally have long corridors with units on each side, known as double-loaded corridors. Double-loaded corridor buildings cannot be built on small sites, and the requirements lead developers to build small units because each unit only has windows on one side.<sup>30</sup> Like several European and Asian countries, New York City and Seat-

tle’s building codes permit multifamily buildings up to six stories with a single staircase if they have other fire safety features including sprinklers and materials with slow burn times.<sup>31</sup> This has opened up opportunities for lower-cost multifamily construction and units large enough to accommodate families. States can either revise statewide building codes to permit single-stair buildings or allow cities to permit them in local building codes.

## CONCLUSION

As the economy responds to a rapidly changing world, state legislatures can ensure that their housing markets are a source of economic strength and opportunity. Limiting the scope of local zoning authority preserves local leadership in land use planning and allows cities to creatively approach their own situations while averting abuses of regulatory power.

## ABOUT THE AUTHORS

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## NOTES

1. S.B. 458, 81st Leg. Assembly, Reg. Sess. (Ore. 2021).
2. H.B. 82, 64th Leg., Gen. Sess. (Utah 2021).
3. H.B. 6107, Gen. Assemb. of 2021, Jan. Sess. (Conn. 2021).
4. Salim Furth, “The Logic of Preemption in Connecticut” (Testimony before the Connecticut Joint Committee on Planning and Development, Mercatus Center at George Mason University, Arlington, VA, March 14, 2022).
5. 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), 37; Salim Furth and Jess Remington, “Ordinances at Work: Seven Communities That Welcome Accessory Dwelling Units” (Mercatus Policy Brief, Mercatus Center at George Mason University, Arlington, VA, April 2021).

6. AARP, *Accessory Dwelling Units: Model State Act and Local Ordinance*, 2021.
7. Emily Hamilton and Sloane Argyle, “Case Studies on Smart Zoning Reforms, Part Four: Removing Parking Requirements in Buffalo, New York,” *The Bridge*, February 22, 2022; “Parking,” Desegregate Connecticut, accessed September 2, 2021, <https://www.desegregatect.org/parking>.
8. M. Nolan Gray and Salim Furth, “Do Minimum-Lot-Size Regulations Limit Housing Supply in Texas?” (Mercatus Research, Mercatus Center at George Mason University, Arlington, VA, May 2019); Paul Boudreaux, “Lotting Large: The Phenomenon of Minimum Lot Size Laws,” *Maine Law Review* 37, no. 1 (2016): 1–43.
9. When lots are redeveloped to take advantage of the smaller lot size, the developer is responsible for either providing sidewalks or funding sidewalks in underserved parts of the city. See Emily Hamilton and Sloane Argyle, “Case Studies on Smart Zoning Reforms, Part One: Houston, Texas,” *The Bridge*, February 9, 2022.
10. Edward Pinto, Tobias Peter, and Emily Hamilton define “light touch density” as “housing including detached single-family houses with accessory dwelling units (ADUs), small-lot single-family houses, attached single-family houses, and duplexes, triplexes, and fourplexes.” Pinto, Peter, and Hamilton, *Light Touch Density*, 3.
11. Emily Hamilton, “To Fix Its Housing Crisis, California Must Unleash the Duplex,” *Bloomberg*, March 1, 2022.
12. Salim Furth and Emily Hamilton, “California Can Improve Housing and Transit by Preempting Local Ordinances” (Mercatus Policy Brief, Mercatus Center at George Mason University, Arlington, VA, January 2020).
13. Emily Hamilton, “How a Tysons Task Force Built a Road Map for Redevelopment,” *Greater Greater Washington*, November 3, 2020.
14. For example, Texas amended its annexation procedures in 1999 and again in 2018, which significantly weakened cities’ power to extend zoning. Arizona’s 2006 Property Ownership Fairness Act has made it harder for cities to tighten existing rules. California legislators have stopped short of passing the most ambitious rezoning bills, such as SB 827 (2018) and SB 50 (2019), but—with much less fanfare—passed several bills reforming the state’s opaque Regional Housing Needs Assessment, which will result in greater deregulation in future years. Because procedural rules do not immediately affect anyone’s zoning, they are less controversial. See Ben Luckens, “Annexation and the ETJ,” in *A Guide to Urban Planning in Texas Communities* (Dallas, TX: American Planning Association Texas Chapter, 2013), 159; Christina Sandefur and Timothy Sandefur, *The Property Ownership Fairness Act* (Phoenix, AZ: Goldwater Institute, 2016); Christopher S. Elmendorf, Nicholas J. Marantz, and Paavo Monkkonen, *A Review of California’s Process for Determining, and Accommodating, Regional Housing Needs* (Los Angeles: UCLA Lewis Center for Regional Policy Studies, 2022).
15. Salim Furth and Kelcie McKinley, “Rezoning Protest Petitions Are Ripe for Reform” (Mercatus Policy Brief, Mercatus Center at George Mason University, Arlington, VA, January 2022).
16. Vicki Been, “Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exactions Theme?,” *University of Chicago Law Review* 77, no. 1 (2010): 31.
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18. Alan Mallach, *The Divided City: Poverty and Prosperity in Urban America* (Washington, DC: Island Press, 2018).
19. Daphne Kenyon et al., “The Effects of Property Tax Abatements on School District Property Tax Bases and Rates,” *Economic Development Quarterly* 34, no. 3 (2020): 227–41.
20. Abbey Marshall, “Is Akron’s Tax Abatement Program Working? Here’s Who Is Using It and Why,” *Devil Strip*, August 27, 2020.
21. Emily Hamilton, “Inclusionary Zoning and Housing Market Outcomes,” *Cityscape* 23, no. 1 (2021): 161–94.
22. S.B. 363, 110th Gen. Assemb., Reg. Sess. (Tenn. 2018).
23. Sandefur and Sandefur, *The Property Ownership Fairness Act*.



24. Braden Boucek, Emily Hamilton, and Kimberly Hermann, *Legislative Exits from the Land Use Labyrinth* (Washington, DC: Federalist Society, 2021).
25. Daniel Hertz, "The Illegal City of Somerville," *City Commentary*, June 15, 2016.
26. Deirdre Pfeiffer, Alex Schafran, and Jake Wegmann, "Vulnerability and Opportunity: Making Sense of the Rise in Single-Family Rentals in US Neighbourhoods," *Housing Studies* 36, no. 7 (2021): 1026–46.
27. Salim Furth, "Build-to-Rent Housing Bans: A Case of Zoning Overreach" (Mercatus Policy Brief, Mercatus Center at George Mason University, Arlington, VA, August 2022).
28. James A. Schmitz Jr., "Solving the Housing Crisis Will Require Fighting Monopolies in Construction" (Federal Reserve Bank of Minneapolis Working Paper No. 773, Federal Reserve Bank of Minneapolis, Minneapolis, MN, December 11, 2020).
29. S.B. 170, 92nd Gen. Assemb., Reg. Sess. (Ark. 2019); H.B. 2439, 86th Leg., Reg. Sess. (Tex. 2019).
30. Michael Eliason, "The Case for More Single Stair Buildings in the US," *Treehugger*, August 10, 2021.
31. Conrad Speckert, "Jurisdictions: The Second Egress: Building a Code Change," accessed July 18, 2022, <https://secondegess.ca/Jurisdictions>.