

## THE LOGIC OF PREEMPTION IN CONNECTICUT

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Chair Cassano, Chair McCarthy Vahey, and members of the joint 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 uses market-oriented ideas grounded in academic research to address public policy problems at all levels of government.

It is a privilege to come before you again as you consider expanding transit-oriented development.<sup>1</sup> Increasing density around transit stations would promote affordability, conserve municipal resources, have less impact on forest and farmland, and restore property rights. Bipartisan legislation in Massachusetts has set a regional precedent for pushing towns to allow landowners near transit stations to use their land to its fullest potential, in ways that will build on the strengths of traditional New England towns. I have attached a recent op-ed on the likely effects of the Massachusetts law, which are broadly applicable to the legislation before you.

### WHEN TO PREEMPT

The real issue at stake with HB 5429 is not the positive effects this bill is likely to have, but whether the state ought to decrease the regulatory authority it has granted municipalities. As a New England native, I am keenly aware that New England towns have been vital institutions for centuries. My hometown elected its own leaders and exerted police powers for a century before the revolution gave residents the right to elect their governor.<sup>2</sup> Notwithstanding this tradition, these local powers have never been boundless and have long been contested and restrained.<sup>3</sup>

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1. Much of my testimony repeats testimony given last year. Salim Furth, "Property Rights, Balance, Segregation, and Zoning" (Testimony before the Connecticut Joint Committee on Planning and Development, Mercatus Center at George Mason University, Arlington, VA, March 15, 2021).

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

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

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>4</sup> Thus, when state lawmakers deem that there is no compelling reason for a particular restriction—or that the restriction's costs outweigh its benefits—it is reasonable to ban such a restriction. In the present case, unless the legislature believes that the costs of restrictions on moderate-density residential development within walking distance of transit stations exceed the manifest benefits of such development, it should preempt such bans.
2. *Fairness.* Municipal governments are responsive mainly to their current residents, so zoning can be tilted toward maximizing incumbent property values and keeping families with schoolchildren out.<sup>5</sup> The state legislature can balance those narrow interests against the interests of Nutmeggers who live outside the towns in question and do not have representation there. In this case, the state can act on behalf of 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 achieve 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>6</sup> Unlike in the case of property rights, the burden of proof 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 in determining whether the reasons given in favor of a specific regulatory tool—such as low-density 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>7</sup>

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

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4. 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), F. A. Hayek, *The Constitution of Liberty*, vol. xvii of *The Collected Works of F. A. Hayek*, ed. Ronald Hamowy (Abingdon, UK: Routledge, 2011).

5. Salim Furth, "The Two-Board Knot," *American Affairs* 1, no. 4 (2017); William A. Fischel, *The Homevoter Hypothesis: How Home Values Influence Local Government Taxation, School Finance, and Land-Use Policies* (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.

6. 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/>; Emily Hamilton, "The Case for Preemption in Land-Use Regulation," 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 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.

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

1. local regulators can make a compelling case that maintaining low-density zoning near transit is sufficiently beneficial to merit restricting the right to use and enjoy private property

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 local authority, nor should they always defer. In my view, the benefits of walkable, moderately dense housing around transit stations far exceed the costs, and the majority of Connecticut residents' towns will find that such growth makes their towns better places to live in.

#### **ATTACHMENT**

Salim Furth, "New Mass. Zoning Law Offers a Better Kind of Growth," *Banker & Tradesman*, January 2, 2022.

# BANKER & TRADESMAN

SHOES ON SIDEWALKS

## New Mass. Zoning Law Offers a Better Kind of Growth

Builders, Developers Must Help Make Sure Law Succeeds

By Salim Furth | Special to Banker & Tradesman | Jan 2, 2022

The Baker administration's implementation of Massachusetts' new zoning law, Section 3A, has the potential to reshape and restore town centers throughout Greater Boston and bring rental prices down to a more affordable level. The Department of Housing and Community Development floated [draft guidance](#) in December that promises to have a bigger – and better – impact on the Greater Boston housing market than any previous effort, including the contentious 1969 Affordable Housing Law, known as “40B.” As a uniquely New England approach, it can strengthen the local civic life for which our towns have historically been known.

Section 3A would incentivize 175 Greater Boston cities and towns to zone for multifamily housing near transit stations or, in the absence of transit, other appropriate locations. To qualify for grants, towns must allow 15 homes per acre, giving builders flexibility to provide low- or moderate-density housing. A town could qualify, for example, by allowing six-unit buildings on one-third-acre lots. Each town has a specific zoning target based on its size and level of transit service; existing multifamily zones can count toward the target.

As drafted, the Baker administration's implementation guidelines would make Section 3A a national model of state housing legislation. The rules preserve local governance: Towns retain the authority to design and map new qualifying zones and can opt out entirely at the cost of eligibility for state capital grants. Unlike some state interventions, Section 3A is not freighted down with “value capture” provisions which perversely require builders, who are providing much-needed housing, to also fund rent subsidies and other benefits which, if enacted, ought to be every taxpayer's responsibility.

Unlike California, which relies on uncertain, politicized lawsuits to enforce its “fair share” housing law, Section 3A is self-enforcing: If a town opts out of allowing housing growth, the state opts out of funding infrastructure expansions in that town. It makes sense. After all, if a town is not growing, it has less need of new infrastructure. Towns that quickly cooperate may face some growing pains, but they will also be first in line for MassWorks and Local Capital Projects funding to ease the transition.

### **How to Help Ensure Success**

Having released the draft guidelines, the Baker administration is seeking public comments on Section 3A through March 31.

Workers and businesspeople in the Massachusetts real estate industry should engage vocally in this public discussion. They stand to benefit from a new approach to homebuilding that emphasizes simple approval processes, opportunities across many communities the creation of housing that will allow tradespeople to buy homes in the towns where they work.

The first step is to [submit a comment](#) on the draft guidelines, encouraging DHCD to continue the existing, ambitious approach and identifying any ambiguities in the guidelines. Second, those who work closely with town governments can help explain what Section 3A means for them. If they rezoned, what types of homes would make sense? What prices would new housing fetch?

Demystifying the process can help town officials who have the unenviable task of proposing significant zoning changes to town meeting members.

Finally, people committed to making Section 3A work should step up and participate in public meetings and the public discussion of zoning in their own towns. Local government relies on citizens bringing expertise and advocacy from their day jobs. Developers, tradespeople and others can inform their town’s feedback to DHCD and subsequently work with neighbors to ensure that their town’s rezoning is well-designed to strengthen the community as well as meet DHCD’s guidelines.

### **Rejuvenation for Town Centers**

Section 3A can be consequential, maybe even transformational. But what kind of state will it leave Massachusetts? Although change is always uncertain, I think that it can be implemented in ways that help restore town centers to their role as cores of community life.

Strict zoning governing post-World War II suburbanization often deflected growth away from the town greens that had been community hubs for generations. Instead of intensifying town life, suburbanization drew businesses out to highways and new residents into subdivisions and self-contained apartment complexes. Town centers sometimes thrived, but often became quaint and irrelevant.

Many Massachusetts communities have become hostile to growth of any kind. No New Englander drives through the contemporary suburbs of Atlanta or Phoenix and wishes for more endless, undifferentiated suburbia. Yet those cities offer attainable home prices and true housing choice, which Greater Boston does not. Can towns expand opportunity without losing their identities?

Section 3A offers a new, old-fashioned way. Qualifying towns will zone land for at least 750 homes, typically in a town center location alongside a commuter rail station. But towns can allow other uses, such as starter homes on small lots and ground-floor retail, giving the new districts flexibility to meet a variety of needs.

In the region's longstanding suburban areas, rezoning will strengthen older village centers. Rather than putting cars onto highways, as most postwar growth has done, town-center growth can put shoes onto sidewalks, reinvigorating local businesses. Farther from Boston, in towns where most land is still forested or farmed, Section 3A will channel growth toward the traditional New England approach, showing that Massachusetts can offer homes to more families without losing its identity.

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