

PROPERTY RIGHTS, BALANCE, SEGREGATION, AND ZONING

Salim Furth

Senior Research Fellow, Urbanity Project, Mercatus Center at George Mason University

Connecticut General Assembly, Planning and Development Committee

March 15, 2021

Chairs Cassano and McCarthy Vahey, Representative Michel, and members of the committee, thank you for the opportunity to testify on SB 1024. My name is Salim Furth, and I study land use regulation and housing markets as codirector of the Urbanity Project at the Mercatus Center at George Mason University.

As legislatures around the United States take up housing reform proposals, they confront the tradition of zoning falling within the domain of local governments. Few legislators want to preempt local authority without a compelling reason, and many have chosen to defer to local governments.

As a New England native, I am keenly aware that our towns have been vital institutions for centuries.¹ My hometown chose its own leaders and exerted police powers for a century before the revolution gave it the right to elect its governor.² Notwithstanding this tradition, these local powers have never been boundless and have long been contested and restrained.³

THREE ARGUMENTS FOR PREEMPTION

There are, I believe, three types of argument in favor of preempting municipal zoning authority. Various facets of the bill before you are aligned with each of the three arguments.

1. *Property rights.* Municipalities that desire to restrict the normal use and enjoyment of property ought to bear the burden of proof, as they would in the case of any other civil right.⁴ Where state lawmakers believe a restriction is almost never justified, they can reasonably ban such a restriction.

1. This testimony uses language and develops ideas initially published in a similar context; there are similarities and intellectual debts throughout. Salim Furth, "The State versus Single-Family Zoning" (Testimony before the New Hampshire House Committee on Municipal and County Government, Mercatus Center at George Mason University, Arlington, VA, March 8, 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): 369–438.

4. Daniel A. Himebaugh, "Tie Goes to the Landowner: Ambiguous Zoning Ordinances and the Strict Construction Rule," *Urban Lawyer* 43, no. 4 (2011): 1061–83.

In SB 1024, the broad deregulations of parking requirements and accessory dwelling units (ADUs) are clear examples of state preemptions that expand property rights on a wide basis. Unless municipal officials can make a compelling, substantive case that the objectives of these regulations cannot be met without impinging on property rights, the state may remove them from local regulators' toolkits without adversely affecting municipalities.

2. *Balance.* Municipal governments are responsive mainly to their current residents, so zoning can be tilted toward maximizing incumbent property values and keeping potential schoolchildren out. For example, a developer successfully pitched a 202-unit apartment complex by convincing the Town of Trumbull that the complex would house only 16 school-age children.⁵ The state legislature can balance those parochial interests against the interests of people, including school-age children, who are not represented in town decisions.

This argument is implicit in SB 1024 by the requirement that each town create multifamily zones near transit stations or main street corridors. Many Connecticut towns use a paper wall of large-lot zoning to keep out those who were not lucky enough to buy in decades ago or rich enough to buy in now.⁶ Although new multifamily housing is not cheap, it is much more attainable than the prevailing single-family housing stock.

This argument for preemption is narrower in scope and more modest in degree. Residents' concerns and desires are not to be ignored, just balanced. Thus, in SB 1024, towns retain some authority to determine the location of new multifamily zones, and property rights will be expanded for only a small share of landowners.

3. *Solving statewide problems.* States are within their rights to preempt local governments when the key levers to achieve a major state goal traditionally are held at the local level. 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.

Although most recent zoning preemption efforts have been justified primarily on the grounds of expanding economic growth or fighting climate change,⁷ Connecticut activists have made residential racial segregation the central issue.

5. Keila Torres Ocasio, "High-Density Apartment Complex Approved in Trumbull," *CTPost*, July 6, 2017.

6. Robert C. Ellickson, "Zoning and the Cost of Housing: Evidence from Silicon Valley, Greater New Haven, and Greater Austin" (working paper, January 2020).

7. 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' interests in uniform standards even though the soundness of a particular structure is a localized issue. By contrast, the "statewide problems" of the third argument may not be related to town-level concerns.

ZONING AND SEGREGATION

Scholars agree that zoning contributes to segregation,⁸ although the effect is difficult to quantify.⁹ I estimate that zoning one-tenth more of an area's residential land for middle housing adds 1.4 percentage points to the nonwhite population share. The same amount of additional multifamily zoning is associated with 3.1 percentage points more nonwhite residents.¹⁰

My findings are evidence in favor of the broadly held view that lower-cost housing types are more attainable to people with lower incomes and that the correlation between income and race implies that income-based exclusion directly results in residential segregation.

Using zoning preemption to mitigate this kind of segregation is not a case of using the power of government to correct the failures of the market; it is a case of using the power of the market to correct the failures of government.

TECHNICAL ISSUES IN SB 1024

In the following list, I identify areas of ambiguity or items worthy of further consideration.

SECTION 1

Time spent writing definitions is time spent out of court. The following definitions remain ambiguous:

- “As of right” notes that site plan review is an acceptable condition, but this definition makes no mention of building codes, stormwater plans, or similar requirements. Adding language to make clear that requirements of a similar nature to site plan review are acceptable conditions would be helpful.
- “Cottage cluster” is difficult to understand. Perhaps the words “per acre” are misplaced and should be dropped. It appears that the definition is trying to do some legislative work (“at least four”); that work should be moved to the appropriate paragraph.
- In a recent bill in Massachusetts (H. 5250 § 18), a point of ambiguity is whether “multifamily housing” includes “mixed use housing” where zoning requires first-floor commercial space. Adding a definition of “multifamily” that clearly distinguishes that type of housing from mixed-use housing for the purposes of this chapter would be helpful.

8. Douglas W. Kmiec, “Exclusionary Zoning and Purposeful Racial Segregation in Housing: Two Wrongs Deserving Separate Remedies,” *Urban Lawyer* 18, no. 2 (1986): 393–422; Matthew Resseger, “The Impact of Land Use Regulation on Racial Segregation: Evidence from Massachusetts Zoning Borders” (PhD diss., Harvard University, 2013), https://scholar.harvard.edu/files/resseger/files/resseger_jmp_11_25.pdf; Jonathan Rothwell and Douglas S. Massey, “The Effect of Density Zoning on Racial Segregation in U.S. Urban Areas,” *Urban Affairs Review* 44, no. 6 (2009): 779–806; Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (New York: Liveright, 2017); Allison Shertzer, Tate Twinam, and Randall P. Walsh, “Zoning and Segregation in Urban Economic History,” *Regional Science and Urban Economics* (forthcoming).

9. Formally, segregation is an attribute of an environment—a metro area or state, for instance—not of a particular person or home. Thus, the scale of the phenomenon is much, much greater than the scale of zoning maps, creating a conceptual disconnect.

10. These are cross-sectional estimates. A change in zoning would not necessarily lead to the same-sized effect; it would depend heavily on the contextual value of redevelopment. This work uses proprietary data, and I am not yet free to disclose the metro area in question. It is, however, reasonably comparable to Connecticut in demographics and prices. The impact of zoning on racial composition obviously depends on the share of each race in the total population.

SECTION 4

- Lines 181–93: Even in light of subsection (g), these sections offer at least some possibility that a court could impose soil, water, and hypoxia studies on every building project, which does not seem to be this section’s intent. I recommend language stating that these lines cannot be construed to impose any burden on as-of-right projects beyond what the town requires by ordinance.
- Lines 262–77: The equal treatment of manufactured housing is welcome, because that type of housing and its residents face vicious stereotypes. To place manufactured housing on truly equal footing, however, the bill would need to specify that compliance with the Manufactured Home Construction and Safety Standards (that is, the “HUD Code”) and proper installation are a valid substitute for municipal building code approval.

SECTION 5

This section does the most to broadly and meaningfully expand property rights. This section could be expanded to imitate Los Angeles, California, and treat movable tiny houses as ADUs, which seems to be a workable and fair way to give movable tiny houses the rights and responsibilities of residences without regulating them out of existence.¹¹

- Line 378. The 30 percent size standard is quite restrictive, especially where ADUs are a conservation-minded alternative to destroying and replacing a small house. Small houses on large lots have great detached ADU potential, but a 30 percent standard can make construction impracticable, especially when the standard rules out modular options. A better alternative is to stick to a flat 800- or 1,000-square-foot standard rather than making ADUs feasible only for large homes.
- Line 382. The intent here is probably to allow lot coverage no stricter than if an ADU were not built, but that intent is not conveyed by the text.
- Lines 412–16. I recommend allowing fire sprinkler requirements for detached ADUs that have no fire access by driveway, street, or alley. Somerville, Massachusetts, maintains such a requirement.¹²

SECTION 6

- Line 441. The bill should clarify that the density requirement is net of land dedications (for roads or conservation), not gross. The distinction between net and gross density is important for subdivision developments.
- Line 453. I recommend calculating population from the previous decennial census. Annual municipal population estimates are rather imprecise, and both towns and property owners will benefit from year-to-year consistency in status.
- Line 454. Unlike the previous one, this paragraph does not specify that the lots be “served by water and sewer.” If intended, that must be specified.
- Line 458. “Land” should be “lot area” for consistency with the rest of the subsection and to avoid ambiguity.
- Lines 478–483. This paragraph imposes a regulatory “shot clock” without clear consequences, which means that a builder seeking relief must go to court. However, in Minnesota, North

11. “ADU,” City of Los Angeles, Department of Building and Safety, accessed March 11, 2021, <https://www.ladbs.org/adu>.

12. City of Somerville, *Somerville Zoning Ordinance*, December 16, 2019, 58–60.

Carolina, and Texas, some shot clocks result in an application being “deemed approved.” One state bill I read introduces a shot clock for building permits that results in a 10 percent drop in the building permit fee for each late day. Spelling out the consequences of regulatory inaction will make this paragraph more effective.

- Lines 484–91. These lines leave a lot of room for interpretation and will apply precisely in cases of conflict, which is an invitation for lawsuits. These lines could be clarified to state that if the town ordinance is not amended by a specified date, noncompliant regulations anywhere within one-half mile of transit or one-quarter mile of a main street corridor become void. In towns with no main street corridor, these lines could void any regulation barring any form of middle housing on any residential parcel. The legislature may also wish to add a sewerage restriction to development undertaken under this paragraph. If a town cannot democratically amend its regulations—which is entirely plausible—this single paragraph will become extremely important.

SECTION 9

The prescription of yearly one- or two-hour trainings on specific topics guarantees that training courses will remain painfully shallow. Officials who have completed the survey course ought to have the option of taking deeper, six-hour courses on any of those topics to remain qualified.