

THE STATE VERSUS SINGLE-FAMILY ZONING

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Chair Dolan, Vice Chair Piemonte, 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.

It is a privilege to come before you for the second time this session. Much of my previous testimony on HB 132 applies equally to this bill, which takes a different approach to achieving a similar object: facilitating a modest increase in residential density in places served by water and sewer.¹ Allowing more homes per lot would likewise promote affordability, conserve municipal resources, have less impact on forest and farmland, and promote property rights.

INCREMENTAL PROGRESS

We now have experience with reforms that allow two- to four-unit buildings, and their impact has been incremental. The year after Minneapolis legalized duplexes and triplexes in all zones, just 42 such permits were pulled.² Houston, Texas, has always allowed multifamily housing of any size in almost every location, but in 2018 only 282 units were permitted in duplexes and fourplexes, compared to 5,417 single-family units and 7,538 units in 102 multifamily buildings.³ Of course, if Houston had not allowed large multifamily buildings and small-lot townhouses, it would likely have more small multifamily housing.

The state of Oregon passed legislation quite similar to HB 341 last year, and builders such as Habitat for Humanity are already asking the state to allow “middle housing” lots to be subdivided in a style suitable for townhouses.⁴ They want to make these relatively affordable homes easy to own as well as to rent.⁵

1. Salim Furth, “Four Benefits of Limiting Minimum Lot Sizes” (Testimony before the New Hampshire House Committee on Municipal and County Government, Mercatus Center at George Mason University, Arlington, VA, February 9, 2021).

2. Erin Baldassari, “California Cities Rethink the Single-Family Neighborhood,” KQED, February 16, 2021.

3. “Building Permits Survey,” Census Bureau, accessed February 24, 2021, <https://www.census.gov/construction/bps/>.

4. Oregon law defines “middle housing” as duplexes, triplexes, quadplexes, cottage clusters, and townhouses. Or. Rev. Stat. § 197.758; S.B. 458, 81st Leg. Assemb., 2021 Reg. Sess. (Or. 2021).

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

In California, a series of laws intended to ease the permitting of accessory dwelling units (ADUs), which HB 341 would also do, increased ADU permitting 11-fold from 2016 to 2019. On a population-adjusted basis, California is permitting 37 ADUs per 100,000 residents annually;⁶ Minneapolis is permitting between 20 and 30 units per 100,000 residents annually in duplexes and triplexes; and Houston is permitting about 7 units per 100,000 residents annually in duplexes and fourplexes.⁷

New Hampshire, in 2019, permitted about 350 housing units per 100,000 residents, 5 percent of which were in 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 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 it the right to elect its own governor.⁸ Notwithstanding this tradition, these local powers have never been boundless and have long been contested and restrained.⁹

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.¹⁰ Thus, when state lawmakers deem that there is no compelling reason for a particular restriction—or that its costs outweigh its benefits—it is reasonable to ban such a restriction. In the present case, unless the legislature believes that there is a compelling reason that four households should not reside on a 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 potential schoolchildren out.¹¹ The state legislature can balance those narrow interests 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 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 government when the key levers to achieve some major state goal traditionally 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.¹² Unlike in the case of property rights, the burden of proof ought to

6. "California ADU Growth by City from 2012-2019, Charted," Building an ADU, August 22, 2020, <https://www.buildinganadu.com/adu-blog/california-adu-charts>.

7. Author's calculations. The City of Houston issues building permits in much of unincorporated Harris County, which is home to about 2 million people. Minneapolis permitted between 4 and 12 duplex and triplex units per year prior to its deregulation.

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

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/>; Emily Hamilton, "The Case for Preemption in Land-Use Regulation," Mercatus Center at George Mason University, Arlington, VA, July

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 are obviously overlapping and complementary. In evaluating a restriction on property rights, for instance, the state must consult broad interests and consider its own policy priorities in determining 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.¹³

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,

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

and whether that case is outweighed by

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

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

Thank you for your time. I am happy to answer any questions, either in person or by email.

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, "solving larger problems" is about achieving statewide goals.

13. 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.