

## Housing Reform in the States: A Menu of Options for 2024

*Salim Furth, Emily Hamilton, and Charles Gardner*

August 2023

As state legislatures meet in a year of inflated rents and record home prices, it remains abundantly clear that barriers to housing construction are causing affordability challenges. 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 some accomplishments from the past year:<sup>1</sup>

- State policymakers achieved the “Montana Miracle,” passing a package of bills that remove zoning barriers to apartment construction, legalize duplexes on lots zoned for single-family housing across much of the state, and streamline the housing permitting process.
- With a single bill, Vermont policymakers passed many important housing reforms, including legalizing the subdivision of land to at least five lots per acre, legalizing fourplexes on residential lots in parts of the state with sewer and water infrastructure, limiting local parking requirements, and streamlining approval for some types of projects.
- Learning from policies that have made it feasible to add significant housing supply in other states, legislators in Washington adopted a series of reforms, including rules that make it easier for homeowners to add accessory dwelling units (ADUs).

In this policy brief we offer a menu of housing policy reform options for lawmakers around the country to consider in the upcoming legislative sessions. These reforms largely fit into four categories:

- limit local regulation
- streamline procedures
- improve legal frameworks
- update construction standards

Our first reform recommendation, however, is to establish a housing task force based on Montana's successful model: a body designed to make actionable recommendations in these four categories of reform.

### Option 1: Clear the Path to Reform by Establishing an Effective Housing Task Force

While there is widespread agreement among policymakers that housing is too expensive, ambitious efforts to improve the situation have led to high-profile failures in states where politics have gotten in the way. A housing task force can help identify the right reform package for a particular state and mobilize reform efforts.

In Montana, Governor Gianforte established a task force that identified opportunities for reform tailored to the state's unique challenges and that helped mobilize reform efforts. Specific features of the task force's design and leadership helped it succeed. These included (1) its large membership of 26 people, which included legislators, subject matter experts, and industry participants; (2) its tight deadline for publishing an actionable report; (3) an effective leader who created opportunities for debate and dissent in the report-writing process; and (4) a transparent and open format that created allies in the housing-reform process.<sup>2</sup> Governors and legislators in other states should consider establishing a task force to support their reform efforts.

## **LIMIT LOCAL REGULATION**

Cities and counties receive their regulatory powers from their states. States often direct and limit the exercise of these powers to protect individual rights or to solve statewide problems.<sup>3</sup> The following suggested limitations to local housing regulation would make more housing possible at lower cost.

### Option 2: 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.<sup>4</sup> 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> Policymakers in other states, including Montana, have learned from California's trial-and-error process and passed a single bill that addresses many of the common barriers to ADU construction.<sup>6</sup> 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>7</sup>

### Option 3: Limit Parking Mandates

Developers and homebuilders, rather than city planners, 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>8</sup> Policymakers in other states can follow Connecticut's lead, or they can go further and eliminate parking mandates altogether.

### Option 4: 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>9</sup> State policymakers can put a cap on local minimum lot sizes where sewer and water infrastructure are available.<sup>10</sup> 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 led to the construction of tens of thousands of small-lot single-family houses, opening up new opportunities for homeownership.<sup>11</sup>

### Option 5: Permit Light-Touch Density

The majority of residential land in the US is zoned to exclusively allow detached single-family homes, which are the most expensive type of housing. Policymakers in Oregon, California, Montana, Vermont, and Washington have passed legislation allowing light-touch density—defined as two to four primary units per lot—on most residential lots across their states. The effectiveness of these laws, however, is constrained by local development standards, such as limits on structure size or lot area, which make it too expensive to build anything except single-family houses. Localities such as Palisades Park, New Jersey, that are successfully facilitating light-touch density construction, provide models for the rules that make it feasible to build these units in significant numbers.<sup>12</sup>

### Option 6: Allow Residential Uses in Commercial Zones

States can pass legislation allowing residential uses in any site zoned for commercial uses. The COVID-19 pandemic has accelerated the decline of some forms of retail commerce and may result in long-term office vacancies. Most commercial buildings are poorly suited to residential conversion, but many commercial sites—or their parking lots—can easily be redeveloped. Montana’s law requiring localities to allow multifamily construction in their commercial zones provides one model that other states could follow.

### Option 7: Allow Transit-Oriented Development

Many states subsidize transit systems that have excess capacity because local rules block development dense enough to support the system. 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>13</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>14</sup>

## **STREAMLINE PROCEDURES**

Every builder knows that approval delays can add costs and kill projects. Discretionary review procedures also introduce bias into the approval process and invite corruption. Crafting appropriate reforms to 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. Thus not all the ideas included in this section may be feasible in every state, and they will certainly need to be adapted to fit the existing institutions.

The payoff to all this research, however, can be immense. In some cases, state-level procedural reforms have had a significant effect on housing market outcomes without raising controversy.<sup>15</sup>

### Option 8: Require “Specific and Objective” Approval Criteria

On paper, the typical American zoning ordinance states that uses are allowed “by right,” “with conditions,” or by “special permit” in each zone. Conditions and special permits are often subject to discretionary votes (by a council or board) or discretionary decisions (by administrative staff) with little advance guidance as to what will be approved. This discretionary system of approvals is susceptible to corruption.<sup>16</sup>

To reduce opportunities for self-dealing, states can require that development approvals be linked to published criteria. If these criteria are met, approval must be granted. In 2023, Rhode Island passed several laws that require “specific and objective” criteria for a variety of permits.<sup>17</sup> Washington and Montana each passed a similar restriction on the enforcement of design review, which can be especially vague and open to abuse.<sup>18</sup> Legislators in other states should identify confusing or discretionary land use processes and craft bills requiring predictability and clarity.

#### Option 9: Allow Third-Party Reviews of Building Plans

Developers submit a variety of development documents in their applications for building permits, subdivision permits, and similar permits. Backlogs or understaffing at city permitting departments can result in long delays. Many cities allow developers, at their own expense, to hire third-party reviewers—private companies or other cities—to ease the city’s workload.

Third-party reviewers are subject to auditing and licensing requirements. Some cities do not allow third-party review, however, which contributes to slower permitting processes. Texas and New Jersey enacted laws in 2023 to ensure that builders facing slow review times have eventual recourse to third-party reviewers.<sup>19</sup> Other states may wish to go further and allow third-party review as a matter of course.

#### Option 10: Waive Some Environmental Reviews

A perverse result of rules intended to protect the environment is that they can encourage sprawl by delaying infill development. In Minneapolis, for example, anti-growth groups have sued on environmental grounds to delay the city’s zoning deregulation, forcing the city to undertake a costly study and leaving private-sector plans in limbo.<sup>20</sup> In California, bills including S.B. 10 and S.B. 35 have narrowed the scope of the powerful California Environmental Quality Act with respect to nonsprawl housing development.<sup>21</sup> Montana law exempts subdivisions served by municipal water and sewer from its environmental assessment requirement.<sup>22</sup> Other states can adapt this approach to their own situations, putting clear limits on the application of environmental statutes.

#### Option 11: 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: the neighborhood associations that complain loudest receive the largest benefits. Critics say the process amounts to “zoning for sale.”<sup>23</sup> States can instead require that local CBA programs be systematic, setting a fixed, predictable schedule of exactions that developers must pay. The city can then consult with neighborhood residents to decide how to spend the money. The city of New

Rochelle, New York, introduced this approach, along with other innovations, to spark a downtown reinvestment surge that has funded tremendous city benefits.<sup>24</sup>

## **IMPROVE LEGAL FRAMEWORKS**

Local zoning rests on state policymakers having delegated their authority to regulate land use. State policymakers therefore have a responsibility to develop a land use framework that provides protections for the right to build housing and considers the importance of housing construction and housing affordability for state residents' well-being.

### **Option 12: Create a Housing or Land Use Appeals Board**

Challenging an adverse decision by a municipal land use commission is often a costly, time-consuming, and uncertain foray into civil litigation. Recognizing that time is of the essence in housing development and that a delay can have the same effect as a denial, states such as New Hampshire and Connecticut have designated special courts or dockets to hear land use matters on an expedited basis.<sup>25</sup> State-level courts of special jurisdiction or other bodies, such as housing or land use appeals boards, can assist in reducing unnecessary delay while offering an informed review of local land use decisions that state courts with heavy caseloads and little expertise in local zoning matters are often unable to provide.

### **Option 13: Block Zoning That Illegalizes Existing Conditions**

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>26</sup> Zoning that doesn't reflect reality can make it infeasible to redevelop vacant sites and replace decayed buildings. To address this problem, states can invalidate restrictions on siting, use, parking, or bulk on blocks where at least one quarter of buildings do not comply.

### **Option 14: 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>27</sup> The act places citizens and cities on a more equal footing before the law without changing any existing regulation. The law has encouraged local policymakers in Arizona to decide against adopting new land use restrictions, such as restrictive historic districts, that could lead to widespread reductions in property values.<sup>28</sup>

### Option 15: Reform Zoning Enabling Acts

Zoning enabling acts, the state statutes that delegate the power to regulate land use to localities, are a powerful tool for defining the scope and limits of that power. Today, the majority of state enabling laws contain century-old language that is no longer relevant to today's concerns and that provides courts with little guidance when they must assess municipal ordinances.<sup>29</sup> Revisions that can help steer zoning in a new direction include the removal of antiquated and ambiguous references to overcrowding and congestion, the promotion of housing supply, and the clarification that zoning laws are to be judged on their contribution to the welfare of all state residents rather than the welfare of the residents of a particular community. States such as Connecticut, Pennsylvania, and Nevada have pioneered enabling act reforms; matching their accomplishments can serve as a starting point for other states' reform efforts.<sup>30</sup>

## **UPDATE 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 16: Allow HUD Code Manufactured Housing

A concerted effort to discredit factory-built housing succeeded in stigmatizing and sidelining it in the 1970s.<sup>31</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. Making manufactured housing feasible for use on all residential lots will often require preempting local requirements for custom design, which make manufactured housing infeasible.<sup>32</sup>

### Option 17: 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>33</sup> which can continue to require period aesthetics.

## Option 18: Allow Skinny Apartment Buildings

The International Building Code used across much of the US requires that multifamily buildings with more than 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 units in such buildings are usually small, since each unit has windows only on one side.<sup>34</sup>

Like several European and Asian countries, New York City and Seattle have building codes that permit multifamily buildings up to six stories tall with a single staircase if they have other fire safety features, including sprinklers and materials with slow burn times.<sup>35</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 US 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 address unique local challenges while averting abuses of regulatory power.

## ABOUT THE AUTHORS

Emily Hamilton is a research fellow at the Mercatus Center at George Mason University. Her research focuses on urban economics and land use policy. Hamilton has testified before several state legislatures as well as the US House of Representatives. Hamilton serves on the Advisory Boards of Up for Growth and *Cityscape*, a journal published by the Department of Housing and Urban Development.

Salim Furth is a senior research fellow and Director of the Urbanity project at the Mercatus Center at George Mason University. He has testified before several state legislatures as well as the US Senate and House of Representatives. He frequently advises local government officials on zoning reform and housing affordability.

Charles Gardner is a research fellow at the Mercatus Center whose research focuses on planning law and housing affordability. During a career as an attorney devoted primarily to the practice of civil litigation, he nurtured an interest in cities and urban planning which he developed into an area of expertise through his work at the Old Urbanist blog and his involvement in state and local policy and planning. In particular, Charlie works on zoning and land use issues as a local elected

official and as an active participant in state policymaking, where he serves on the Connecticut Advisory Committee to the U.S. Commission on Civil Rights (USCCR) and on the Commission on Connecticut’s Development and Future (CCDF).

## NOTES

1. Eli Kahn and Salim Furth, “Breaking Ground: An Examination of Effective State Housing Reforms in 2023” (Mercatus Policy Brief, Mercatus Center at George Mason University, Arlington, VA, August 2023).
2. Emily Hamilton, “Four Elements of a Successful Housing Task Force: Lessons from the Montana Miracle” (Mercatus Policy Brief, Mercatus Center at George Mason University, Arlington, VA, August 2023).
3. 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).
4. Emily Hamilton and Abigail Houseal, “A Taxonomy of State Accessory Dwelling Unit Laws” (Mercatus Policy Brief, Mercatus Center at George Mason University, Arlington, VA, March 2023).
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” (American Enterprise Institute, Washington, DC, January 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. S.B. 528, 68th Leg., Reg. Sess. (Mont. 2023).
7. “ADU Model State Act and Local Ordinance,” AARP, last modified January 2021, <https://www.aarp.org/livable-communities/housing/info-2021/adu-model-state-act-and-local-ordinance.html>.
8. 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; “Desegregate Connecticut, Parking,” Desegregate Connecticut, accessed September 2, 2021, <https://www.desegregatect.org/parking>.
9. 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).
10. Charles Gardner, “Urban Minimum Lot Sizes: Their Background, Effects, and Avenues to Reform” (Mercatus Policy Brief, Mercatus Center at George Mason University, Arlington, VA, August 2023).
11. Emily Hamilton, “Learning from Houston’s Townhouse Reform” (Mercatus Policy Brief, Mercatus Center at George Mason University, Arlington, VA, April 2023).
12. Emily Hamilton, “To Fix Its Housing Crisis, California Must Unleash the Duplex,” Bloomberg, March 1, 2022.
13. 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).
14. Emily Hamilton, “How a Tysons Task Force Built a Road Map for Redevelopment,” *Greater Greater Washington*, November 3, 2020.
15. 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 S.B. 827 (2018) and S.B. 50 (2019), but—with much less fanfare—they have passed several bills reforming the state’s opaque Regional Housing Needs Assessment, which is starting to facilitate deregulation across the state. Because procedural rules do not immediately impact anyone’s zoning, they are often less controversial than zoning preemption. See Ben Luckens, “Annexation and the ETJ,” in *A Guide to Urban Planning in Texas Communities* (American Planning Association, Texas Chapter, 2013); Christina Sandefur and Timothy Sandefur, *The Property Ownership Fairness Act: Protecting*

- Private Property Rights* (Phoenix: 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,” UCLA Lewis Center for Regional Policy Studies, January 4, 2022.
16. Emily Jacobson, “The Dysfunctional Metropolis: Reforming Los Angeles’s Land Use Planning and Entitlement,” California YIMBY Education Fund, 2023, <https://cayimby.org/research/la-the-dysfunctional-metropolis/>; US Department of Justice, “Developers, Contractors and Seven City Employees among 15 Charged in Federal Bribery Probe of City Building Permits,” news release, May 22, 2008, [https://www.justice.gov/archive/usao/iln/chicago/2008/pr0522\\_01.pdf](https://www.justice.gov/archive/usao/iln/chicago/2008/pr0522_01.pdf).
  17. Salim Furth, “Rhode Island’s Process Package,” *Market Urbanism*, June 26, 2023.
  18. H.B. 1293, 68th Leg., Reg. Sess. (Wash. 2023); S.B. 407, 68th Leg., Reg. Sess. (Mont. 2023).
  19. H.B. 14, 88th Leg., Reg. Sess. (Tex. 2023); A. 573, 220th Leg., Sess. 2022–2023 (N.J. 2022).
  20. Susan Du, “Minneapolis Commissions Environmental Review in Final Stretch of 2040 Plan Lawsuit,” *Star Tribune*, May 15, 2023.
  21. Scott Wiener, “Senate Bill 10—Local Control for Increased Housing Density,” n.d., <https://cayimby.org/wp-content/uploads/2021/04/SB-10-Fact-Sheet-2.18.21.pdf>; “SB 423—Extend SB 35,” California YIMBY, accessed July 18, 2023, <https://cayimby.org/sb-423/>.
  22. This expedited subdivision approval process was recently expanded in H.B. 211. H.B. 211, 68th Leg., Reg. Sess. (Mont. 2023).
  23. 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.
  24. Salim Furth and Philip Wharton, *Case Study: New Rochelle, Zoning & Permitting Innovations Unlock Opportunity* (Las Vegas: Better Cities Project, June 2021).
  25. See New Hampshire Revised Statutes § 679:1 (providing for a Housing Appeals Board); Connecticut General Statutes, C.126a § 8-30g (providing for affordable housing land use appeals to be heard when practicable by a small number of trial judges with special expertise). Connecticut today has a designated “land use docket” for zoning litigation.
  26. Daniel Hertz, “The Illegal City of Somerville,” *City Commentary*, June 15, 2016.
  27. Sandefur and Sandefur, *Property Ownership Fairness Act*.
  28. Braden Boucek, Emily Hamilton, and Kimberly Hermann, “Legislative Exits from the Land Use Labyrinth,” Regulatory Transparency Project of the Federalist Society, May 3, 2021.
  29. The Standard State Zoning Enabling Act, first issued in 1922, proposed language reflecting antiquated concerns about the dangers of urbanization and population density. This language remains in the enabling acts of at least 27 states.
  30. Connecticut General Statutes, C.124 § 8-2; Pennsylvania Municipalities Planning Code, Article VI § 604; Nevada Revised Statutes § 278.250.2.
  31. James A. Schmitz Jr., “Solving the Housing Crisis Will Require Fighting Monopolies in Construction” (Working Paper No. 773, Federal Reserve Bank of Minneapolis, December 11, 2020).
  32. For a model showing how to make it feasible to provide manufactured housing on all residential lots and in manufactured housing parks, see Daniel R. Mandelker, “Getting Zoning for Manufactured Housing Right” (Working Paper WP23DM1, Lincoln Institute of Land Policy, February 2023).
  33. S.B. 170, 92nd Gen. Assemb., Reg. Sess. (Ark. 2019); H.B. 2439, 86th Leg., Reg. Sess. (Tex. 2019).
  34. Michael Eliason, “Unlocking Livable, Resilient, Decarbonized Housing with Point Access Blocks” (report prepared by Larch Labs for the City of Vancouver, December 28, 2021).
  35. Conrad Speckert, “Jurisdictions—the Second Egress: Building a Code Change,” accessed July 18, 2022, <https://secondegress.ca/Jurisdictions>.