

## LIFTING ONEROUS OCCUPANCY REQUIREMENTS CAN HELP UNLOCK HOUSING AFFORDABILITY

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New Hampshire House Municipal and County Government Committee  
House Bill 1281, Relative to zoning restrictions on residential rental property

January 24, 2024

Chairman Turcotte, Chairman Pauer, and members of the House Municipal and County Government Committee, thank you for allowing me to offer informational testimony relating to House Bill 1281, titled “Relative to zoning restrictions on residential rental property.” I am Charles Gardner, a research fellow at the Mercatus Center at George Mason University. I study housing policy and affordability across the country and how reforms like those proposed in this bill have affected housing market outcomes.

Ever since zoning received the sanction of the nation’s highest court almost a century ago, certain municipalities across the United States have attempted to use the zoning power to exclude nonfamilial households from residential zones by restricting occupancy to persons related by blood or marriage.<sup>1</sup> Upheld by the Supreme Court in a notorious 1974 case that has been called into question by subsequent legal developments, these restrictions have in recent years been used to exclude a group of adult friends seeking to share a large home in Connecticut, and roommates with co-living arrangements in Kansas.<sup>2</sup> The latter of these two examples is now the subject of a federal lawsuit challenging the constitutionality of limiting occupancy on the sole basis of marital or genetic ties between those living in a home.<sup>3</sup> Meanwhile, other states such as Colorado have introduced their own bills to prohibit local governments from discriminating against nonfamilial households.<sup>4</sup>

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<sup>1</sup> See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

<sup>2</sup> See *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); “8 Adults, 3 Children, 1 House—and a Big Zoning Dispute in Hartford,” *Hartford Courant*, November 20, 2014; and Roxie Hammell, “Shawnee Residents Petition City Council to Reconsider Co-living Restrictions,” *NPR*, May 10, 2022, <https://www.kcur.org/housing-development-section/2022-05-10/shawnee-co-living-ban-roommates-council-petition>.

<sup>3</sup> *Homeroom, Inc. et al. v. City of Shawnee, Kansas*, Case No. 2:23-cv-02209-HLT-GEB (D. Kan.).

<sup>4</sup> Colorado House Bill 24-1007 (2023). The relevant portion of the bill provides that “a local government shall not limit the number of people who may live together in a single dwelling, regardless of familial relationship, except for regulations tied to a minimum required square footage per person that are necessary to regulate health, safety, and welfare.”

The reasons people may have for sharing a home with others unrelated to them are numerous, including financial constraints, lack of suitable housing options such as small apartments, the absence of any nearby family, or simply the growing personal preference for shared living arrangements.<sup>5</sup> These concerns are particularly pressing at a time when New Hampshire housing costs are at or near record highs, leaving many state residents struggling to find a home—or even just a bedroom—they can reasonably afford.<sup>6</sup>

Whatever the reason a person may have for a particular living situation, it is difficult to see the legitimate interest a municipality has in deeming certain of these arrangements to be permissible and others to be illegal. The fundamental right to establish a household of one's choosing and to associate freely with others would mean little if cohabitation among members of the household were outlawed and the state were allowed to intrude into the private affairs of persons desiring only to live undisturbed within their own homes.<sup>7</sup>

It should be emphasized that occupancy limits based upon the relationship between members of a household are typically found in zoning regulations, not in life safety regulations. For instance, the zoning code of the town of Durham, New Hampshire, prohibits more than three unrelated persons from sharing a dwelling unit and subjects them to special floor area requirements.<sup>8</sup> Households of related persons are not subject to these restrictions, and are governed instead by the building codes that the state legislature adopts.<sup>9</sup> The role of restrictive zoning ordinances that go beyond health and safety standards in contributing to a shortage of housing has been increasingly recognized in recent years.<sup>10</sup>

In general, local government authority to regulate housing density, including housing occupancy, is based upon the state-granted power to protect health, safety, and general welfare. When local authority is used in a manner that contravenes those objectives, a state has the authority to intervene on behalf of all citizens of the state. In the case of occupancy restrictions based upon familial ties, state reforms such as those contemplated in House Bill 1281 have the potential not only to safeguard individual freedoms, but to increase housing opportunity for New Hampshire residents at a time when affordable options are scarce.

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<sup>5</sup> See Alexander Fabino, "Inside Communal Living: Shared Living Spaces Explode in Popularity," *Newsweek*, November 14, 2023; and C. J. Hughes, "As Housing Costs Soar, Co-living Makes a Comeback," *New York Times*, November 2, 2022.

<sup>6</sup> See Paul Briand, "Home Prices in New Hampshire Set Another New Record; Old Concerns Remain," *NH Business Review*, June 14, 2023; and Gene Martin, "Housing Crisis Is Harming New Hampshire's Economy and Its Communities," *New Hampshire Bulletin*, September 25, 2023.

<sup>7</sup> See *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (Stevens, J., concurring, stating that "a community has other legitimate concerns in zoning an area for single-family use, including prevention of overcrowding in residences and prevention of traffic congestion. A community which attacks these problems by restricting the composition of a household is using a means not reasonably related to the ends it seeks to achieve."). For further reading on the familial and household rights implicated by occupancy limits based on relatedness, see Kate Redburn, "Zoned Out: How Zoning Law Undermines Family Law's Functional Turn," *Yale Law Journal* 128, no. 8 (June 2019); and John G. Sprankling, "The Constitutional Right to 'Establish a Home,'" *George Washington Law Review* 90, no. 3 (2021).

<sup>8</sup> See Durham Zoning Ordinance, Article XII, Sec. 175-56(A) and (B).

<sup>9</sup> See New Hampshire House Bill 1681 (2022). Municipalities may, however, impose requirements stricter than those contained in state-adopted codes. See N.H. Rev. Stat. § 155-A:2.

<sup>10</sup> See Kevin Erdmann, Salim Furth, and Emily Hamilton, "The Link Between Local Zoning Policy and Housing Affordability in America's Cities" (Mercatus Policy Brief, Mercatus Center at George Mason University, Arlington, VA, March 2019).