

Colorado Can Improve Housing Affordability by Requiring a Health and Safety Basis for Occupancy Limits

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Colorado Senate Local Government and Housing Committee
House Bill 24-1007, The HOME (Harmonizing Occupancy Measures Equitably) Act

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Chair Exum, Vice Chair Gonzales, and members of the Senate Local Government and Housing Committee, thank you for allowing me to offer informational testimony relating to House Bill 24-1007, titled “The HOME (Harmonizing Occupancy Measures Equitably) Act.” I am Charles Gardner, a research fellow at the Mercatus Center at George Mason University. I study housing policy and affordability across the country. In this testimony I argue that reforms to occupancy limits such as those proposed in House Bill 24-1007 can not only protect an individual’s freedom to establish a household and associate freely with others but also increase affordable housing opportunities for Colorado residents.

Ever since zoning received the sanction of the nation’s highest court almost a century ago, many municipalities across the United States used the zoning power to exclude nonfamilial households from residential zones. A popular means of doing this is by restricting occupancy of housing units to persons related by blood or marriage.¹ This practice, challenged as unconstitutional infringement on personal rights, was upheld by the Supreme Court in a notorious 1974 case.² Emboldened by this decision, municipalities have used occupancy ordinances to outlaw a group of adult friends seeking to share a large home in Connecticut and roommates with co-living arrangements in Kansas.³ The latter of these 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 sharing a home.⁴

State and lower federal courts and legislatures have also been active in resisting exclusionary local practices on housing occupancy. Federal and state courts in Ohio have recently held that occupancy

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

² See *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

³ Stephen Dunn, “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>.

⁴ *Homeroom, Inc. et al. v. City of Shawnee, Kansas*, Case No. 2:23-cv-02209-HLT-GEB (D. Kan.).

limits violated state constitutional provisions nearly identical to those of Colorado.⁵ In the federal case, *Yoder v. City of Bowling Green*, the United States District Court for the Northern District of Ohio invalidated a local ordinance prohibiting more than two unrelated persons from residing together, stating,

[T]he limit is arbitrary, unduly oppressive, fails to substantially advance the avowed government interests of reducing population density or targeting specific issues with college-aged inhabitants, and treats similarly-situated homeowners and tenants differently without any justifiable basis. (*Yoder v. City of Bowling Green*, Case No. 3:17 CV 2321, 2019 WL 415254, N.D. Ohio 2019)

In the state case, decided in January 2024, an Ohio state court followed *Yoder* in striking down the application of a locality’s occupancy ordinance. Acknowledging that the municipality in question may have had legitimate concerns underlying the occupancy limit, the court observed that these could be dealt with directly rather than by interfering with individuals’ choices of living arrangement:

In the instant case, if the City of Kent is concerned with noise, property maintenance, parking or traffic problems, or similar issues, it can deal with those issues separately. . . . [T]his Court finds the restriction of the occupancy of dwellings for unrelated parties to be unconstitutional. (*Havel v. Board of Zoning Appeals, City of Kent*, Case No. 2023 CV 0188, Court of Common Pleas, Portage County, Ohio [Pittman, J., Jan. 30, 2024])

If the Ohio decisions are any indication, the legal climate may be growing more hostile toward occupancy limits. Meanwhile, other states such as New Hampshire have introduced their own bills to prohibit local governments from discriminating against unrelated households.⁶

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.⁷ These concerns are particularly pressing at a time when Colorado 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.⁸

⁵ Compare Colo. Const. Art. II, Section 3 (“All persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; of acquiring, possessing and protecting property; and of seeking and obtaining their safety and happiness”) with Ohio Const., Art. I, Section I, Inalienable Rights (“All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety”).

⁶ New Hampshire House Bill 1281 (2023). The relevant portion of the bill provides that local governments shall not enforce “any code, ordinance, by-law, or regulation related to the occupancy of residential rental property that restricts the number of occupants to less than 2 occupants per bedroom based upon the existence of unrelated or non-familial relationships between the occupants of such rental property.”

⁷ 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.

⁸ See Aldo Svaldi, “Colorado Has the Four Most Expensive Housing Markets in US Not on a Coast,” *The Denver Post*, October 17, 2023; Sara B. Hansen, “Limited Supply Keeps Colorado’s Housing Market Off Balance,” *The Denver Post*,

Whatever the reason for a person's preference for a particular living situation, it is difficult to see a municipality's legitimate interest in deeming certain arrangements permissible and others 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.⁹

It should be emphasized that occupancy limits based upon the relationship between members of a household are typically found in zoning regulations, not in health and safety regulations. For instance, the zoning code of the town of Broomfield, Colorado, prohibits more than two unrelated adults from sharing a dwelling unit.¹⁰ Households of related persons are not subject to numerical limitation and are governed instead by the health and safety codes that the locality adopts.¹¹ 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.¹² House Bill 24-1007 addresses this distinction between exclusionary motives and legitimate concerns about overcrowding by forbidding discrimination based on familial relationships while allowing municipalities to retain occupancy limits based on demonstrated health and safety standards.¹³

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 its citizens. In the case of occupancy restrictions based upon familial ties, state reforms such as those contemplated in House Bill 24-1007 have the potential not only to safeguard individual freedoms, but to increase housing opportunity for Colorado residents at a time when affordable options are scarce.

March 17, 2023; Kelsey Vlamis, "A Colorado Ski Town Can't Fill a Job with a \$167,000 Salary Because Potential Candidates Can't Afford to Live There," *Business Insider*, March 4, 2024.

⁹ 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).

¹⁰ See Broomfield Municipal Code, Title 17 (Zoning), Chapter 4 (Definitions), Section 130.

¹¹ See Broomfield Municipal Code, Title 15 (Buildings and Construction), Chapter 8 (Uniform Housing Code). Subject to certain amendments, Broomfield has adopted the 1997 Uniform Housing Code, which contains square footage requirements for bedrooms based upon occupancy by "persons," regardless of whether the persons in question are related by blood or marriage.

¹² 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).

¹³ House Bill 24-1007, Section 1, Paragraph 5.