

Fair Occupancy Restrictions Can Expand Housing Opportunities in New Hampshire

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Chairman Alexander, Vice Chairman Cole, and members of the House Housing Committee, thank you for allowing me to offer informational testimony relating to House Bill 457, titled “Relative to zoning restrictions on dwelling units,” which would prohibit local discrimination against unrelated persons seeking to share housing. 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.

People share homes with others unrelated to them for numerous reasons, including financial constraints, lack of other housing options such as small apartments, the absence of any nearby family, or simply the growing personal preference for shared living arrangements.¹ 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.² When municipalities outlaw these living arrangements, they interfere with basic individual liberties and contribute to housing shortages by forcing people to rent or purchase more space than they prefer.

Whatever the reason a person may have for choosing a particular living situation, it is difficult to see the legitimate interest a municipality could have in deeming certain arrangements permissible and others illegal on the basis of familial relationship. The fundamental right to establish a household of one’s choosing and to associate freely with others would be eroded if certain types of cohabitation were outlawed and the state were allowed to intrude into the private affairs of individuals who only wish to live undisturbed within their own homes.³ Growing doubt as to the validity of laws restricting certain

¹ 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,” *The New York Times*, November 2, 2022.

² See Paul Briand, “Home Prices in New Hampshire Set Another New Record; Old Concerns Remain,” *NH Business Review*, June 14, 2023; and Brooklee Han, “New Hampshire’s Hot Housing Market Has the State in Crisis Mode,” *Housingwire*, December 19, 2024.

³ 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

types of cohabitation has spurred recent legislative and judicial action. Last year, Colorado enacted a bill to prohibit local governments from discriminating against nonfamilial households.⁴ Additionally, in Kansas a company promoting shared living arrangements filed a lawsuit against discriminatory occupancy limits.⁵

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.⁶ Households of related persons are not subject to these restrictions and are governed instead by the building codes that the state legislature adopts.⁷ In recent years, the role of restrictive zoning ordinances—those exceeding health and safety standards—in contributing to housing shortages has been increasingly recognized.⁸

One other problem here is that New Hampshire’s legislature has never granted localities the zoning power to regulate occupancy at all, much less to affirmatively discriminate against unrelated persons. The zoning enabling act the state passed in 1924 granted cities and towns limited powers to regulate certain elements of land use. It did not mention dwelling occupancy among those powers and certainly did not authorize prejudice against shared living arrangements.⁹ The legal situation remains the same today.¹⁰ House Bill 457 simply makes explicit the limitations of zoning power that were already implicit in the enabling statute, clarifying its scope and emphasizing that the state does not countenance a reading of the statute that allows zoning to be used for the unequal treatment of similarly sized households. Moreover, the bill would not forbid localities from regulating occupancy through zoning but instead provides that a zoning regulation on occupancy is permissible so long as it allows at least two occupants per bedroom.

Even within explicitly enumerated zoning powers, local ordinances must advance concerns rooted in health, safety, or the general welfare. When local authority is used in a manner that contravenes those objectives, a state has the authority, and perhaps even the obligation, to intervene on behalf of its residents. In the case of occupancy restrictions based upon familial ties, state reforms such as those contemplated in House Bill 457 have the potential to safeguard individual freedoms and increase housing opportunity for New Hampshire residents at a time when affordable options are scarce.

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).

⁴ Colorado House Bill 24-1007 (2024). The bill, signed into law by Colorado’s governor on April 15, 2024, provides that “a local government shall not limit the number of people who may live together in a single dwelling based on familial relationship.”

⁵ *Homeroom, Inc. et al. v. City of Shawnee, Kansas*, Case No. 2:23-cv-02209-HLT-GEB (D. Kan.). The case is currently on appeal to the United States Court of Appeals for the Tenth Circuit.

⁶ See Durham Zoning Ordinance, Article XII, Sec. 175-56(A) and (B).

⁷ 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.

⁸ 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, March 2019).

⁹ Laws 1925, c. 92.

¹⁰ See N.H. Rev. Stat. § 674:16(I)(a-d), which allows regulation of “[t]he density of population in the municipality” through zoning but does not address dwelling unit occupancy or discriminating among household types.