

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

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As state legislatures reconvene under the shadow of a lingering pandemic, it remains abundantly clear that housing supply is insufficient to meet demand. Although some of the supply issues, such as lumber prices, are beyond states' reach, 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.

In recent years, the highest-profile housing legislation has largely fallen into three categories:

- Legislation that removes barriers to the creation of accessory dwelling units (ADUs), such as California's AB 68 (2019–2020)<sup>1</sup>
- Legislation that allows duplexes, townhouses, or fourplexes in most residential zones previously reserved for detached houses, such as Nebraska's LB 794 (2020)<sup>2</sup>
- Legislation that allows small areas of dense development around transit stations, such as Massachusetts's H.5250 (2019–2020)<sup>3</sup>

These policies have much to recommend them and have been widely written about. However, Nebraska's LB 794 failed to pass,<sup>4</sup> as did similar bills or provisions in at least seven other states.<sup>5</sup> In states where the housing crunch is less acute, lawmakers have preferred narrower or indirect solutions.<sup>6</sup>

This policy brief offers a menu of other housing policy reforms that lawmakers around the country can consider in the upcoming legislative sessions. They fit into four categories:

- Direct limits on local regulation
- Procedural reforms
- Adjustments to zoning authority
- Fairness in construction standards

## **DIRECT LIMITS ON LOCAL REGULATION**

Cities and counties receive their regulatory powers from their states. States often direct and limit the exercise of those powers. The following suggested limitations, like the three categories of reform mentioned in the introduction, would tend to make new housing construction simpler, more widespread, and more affordable.

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

States can pass legislation allowing residential uses in any site zoned or used for commerce, with exceptions for physically unsafe locations. 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. States can adapt this policy by limiting its scope so that it covers, for instance, only vacant commercial sites or sites with connections to side streets.

### Option B: Create Floating “Starter Home” Zones

Recently, new homes have become skewed to the high end of the market.<sup>7</sup> States could allow *floating zones*—i.e., zones that a developer can claim in any residential district—to build moderate-sized homes on small lots. To protect municipal finances, such zones would require developers to fund any new utilities, streets, or school capacity. Adding too many strings, however, would make this solution unworkable, as was the case with Massachusetts’s Starter Home Zoning District program.<sup>8</sup> This approach could be combined with the previous idea to create a floating residential zone that can be claimed in commercial-zoned areas, as the Town of Brookhaven, New York, has done.<sup>9</sup>

### Option C: Preempt Nonconforming Zones

In older areas of many cities, zoning does not conform to the built environment, making it difficult to redevelop vacant sites. States can preempt any restrictions on siting, use, or bulk that do not conform to the existing conditions on at least four-fifths of a street block.

#### Option D: Cap Parking Minimums

Unnecessary parking spaces cost money, worsen stormwater runoff, and prevent adaptive reuse. In 2021, Connecticut’s legislature limited parking minimums to one or two spaces per apartment, depending on apartment size.<sup>10</sup> States could also eliminate parking requirements for adaptive reuse of buildings at least five years old or for areas served by state-subsidized transit.

### PROCEDURAL REFORMS

Every builder knows that approval delays can add costs and kill projects. Discretionary review procedures can improve outcomes, but they also introduce bias and potential corruption. Bringing reform 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.

The payoff to all that research is that, unlike zoning preemptions, procedural reforms can have a significant effect on housing market outcomes without raising controversy. The following ideas would not apply in every state and would need to be adapted to fit the existing institutions.

#### Option E: Eliminate Some Environmental Reviews for Infill

A perverse result of rules intended to protect the environment is that they can encourage sprawl by delaying infill development.<sup>11</sup> Several recent California bills, including SB 10,<sup>12</sup> have narrowed the scope of the powerful California Environmental Quality Act with respect to nonsprawl projects.

#### Option F: Curtail Filibuster by Study

The best study of contemporary land use process, *Neighborhood Defenders*, by Katherine Einstein, David Glick, and Maxwell Palmer, points out that well-heeled neighbors can require a builder to pay—and wait—for one traffic (or stormwater or soil) study after another. The threat of repeated studies can induce builders to make concessions, which usually involve shrinking the project and raising the prices. The authors suggest that local planning boards should define in advance which areas are subject to potential study and disallow dilatory or repetitive study demands.<sup>13</sup>

#### Option G: Introduce the Baker Majority

Governments ought to begin with the presumption of liberty and restrict liberty only when they have a compelling reason. Massachusetts Governor Charlie Baker brought this principle to zoning. Previous law required a two-thirds majority for any zoning change. Owing to Massachusetts H.5250, however, certain deregulatory actions are now subject to approval by a bare majority.

States, which set voting rules for land use decisions, can require a narrower majority for actions that loosen or remove restrictions than for those that tighten or introduce restrictions.

#### Option H: Allow Neighbors to Waive Setbacks

Zoning reasonably places buffers, or “setbacks,” around the edges of property to protect neighbors. States can allow abutters to waive those protections in covenants or contracts, either for compensation or mutual benefit. Under current law, abutters’ rights are murky; a Maryland court case that might have helped clarify the status quo was instead decided on narrower grounds.<sup>14</sup>

### **ADJUSTMENTS TO ZONING AUTHORITY**

Municipal zoning relies on authority granted by the state to achieve specific, enumerated goals. Without changing any specific zoning designation, states can move local zoning regimes onto foundations that reflect a respect for property rights, environmental conservation, and individual dignity regardless of class and race, values that did not characterize the central planners who popularized zoning in the 1920s.

#### Option I: Rewrite the Zoning-Enabling Language

On its own, updating zoning-enabling statutes to reflect current priorities and values accomplishes little. But as part of a comprehensive reform effort, as in Connecticut,<sup>15</sup> doing so can frame and unite efforts, showing that the state takes its role in zoning seriously.

#### Option J: Adopt the Property Ownership Fairness Act

Arizona’s 2006 law requires municipalities to compensate landowners if a new 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>16</sup> The act places citizens and cities on more equal footing before the law, without changing any existing regulation.

#### Option K: Narrow and Strengthen City Planning

Most states require cities to maintain updated comprehensive plans in order to engage in zoning. But in most states, those plans are powerless documents and are often little more than expensive brainstorming exercises. States can instead allow municipalities to plan for all, some, or none of their land, as they see fit. If, however, a city publishes a plan with a land use element, the plan ought to have the force of law, trumping zoning where the two are contradictory, for a decade.

## **FAIRNESS IN 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. State legislatures can ensure that smaller, simpler homes are legal throughout the state.

### **Option L: Give Equal Treatment to Factory-Built Housing**

A concerted effort to discredit factory-built housing succeeded in stigmatizing and sidelining it in the 1970s.<sup>17</sup> As a result, home buyers have missed out on cost-saving innovations. A few states already guarantee that houses are subject to equal standards regardless of building methods in every residential zone.<sup>18</sup> Others can follow and specify that aesthetic or procedural requirements that effectively ban factory-built housing are also disallowed.

### **Option M: 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 historic districts,<sup>19</sup> which can continue to require period aesthetics in a few locations.

### **Option N: Eliminate Minimum Home Sizes**

Cities should not require developers to build large homes or apartments. North Carolina pre-empted minimum-home-size restrictions in 2019.<sup>20</sup>

## **CONCLUSION**

As the economy continues to recover and reconfigure itself to meet new needs and evolving preferences, state legislatures can ensure that their states' 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 approach their own situations while averting abuses of regulatory power.

## ABOUT THE AUTHOR

Salim Furth is a senior research fellow and director of the Urbanity project at the Mercatus Center at George Mason University. His research focuses on housing production and land use regulation and has been published in *Critical Housing Analysis* and the *IZA Journal of Labor Policy*. 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. Furth's writing has appeared in *National Affairs*, *American Affairs*, *The City*, *Public Discourse*, and numerous newspapers. He previously worked at the Heritage Foundation, at Amherst College, and as a contractor to HUD. He earned his PhD in economics from the University of Rochester.

## NOTES

1. Assemb. B. 68, Gen. Assemb., Reg. Sess. (Cal. 2019). For further details on ADU policy, see 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).
2. Emily Hamilton and Salim Furth, "Allowing Missing Middle Development Would Contribute to Housing Affordability in Nebraska" (Testimony before the Nebraska Legislature, Urban Affairs Committee, Mercatus Center at George Mason University, Arlington, VA, February 4, 2020).
3. Salim Furth, "Massachusetts Omnibus Law Will Result in Widespread Rezoning," *The Bridge*, January 15, 2021.
4. Emily Hamilton, "Nebraska Housing Reform Bill Fails to Go Far Enough," *The Bridge*, March 20, 2020.
5. Oregon succeeded in passing a bill allowing duplexes and fourplexes in 2019, and California's duplex bill awaits the governor's signature. The states with failed bills include Connecticut, Maryland, Minnesota, Montana, New Hampshire, North Carolina, and Virginia. "Housing Choices (House Bill 2001)," Oregon Department of Land Conservation and Development, accessed September 2, 2021, <https://www.oregon.gov/lcd/UP/Pages/Housing-Choices.aspx>; Alexei Koseff, "Bills to Increase Housing Density in California Head to Newsom," *San Francisco Chronicle*, August 30, 2021.
6. Salim Furth, "Hopeful News on Housing," *City Journal*, January 3, 2020.
7. Salim Furth, Emily Hamilton, and Kelcie McKinley, "North Carolina's Housing Deficit," *The Bridge*, April 20, 2021.
8. An important distinction between the Massachusetts law and the idea proposed here is that Massachusetts's program is optional for municipalities and does not preempt local zoning. Scott Van Voorhis, "Baker's Starter House Effort a Bust," *Commonwealth Magazine*, December 3, 2020.
9. The Town of Brookhaven's innovation may fail because its floating zone is highly prescriptive. Anthony S. Guardino, "Brookhaven Adopts Innovative Zoning Regulations to Foster Redevelopment of Vacant and Underutilized Commercial Properties," *Long Island Land Use and Zoning*, March 1, 2021.
10. "Desegregate Connecticut, Parking," Desegregate Connecticut, accessed September 2, 2021, <https://www.desegregatect.org/parking>.
11. Bernard J. Friedan, *The Environmental Protection Hustle* (Cambridge, MA: MIT Press, 1979).
12. Senator 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>.
13. Katherine Levine Einstein, David Glick, and Maxwell Palmer, *Neighborhood Defenders: Participatory Politics and America's Housing Crisis* (Cambridge, UK: Cambridge University Press, 2020), 164–65.
14. Dan Mountain Wind Force LLC v. Allegany County Board of Zoning Appeals, 236 Md. App. 483 (Md. Ct. Spec. App., 2018).

15. “Desegregate Connecticut, Character,” Desegregate Connecticut, accessed September 2, 2021, <https://www.desegregatect.org/character>.
16. Christina Sandefur and Timothy Sandefur, *The Property Ownership Fairness Act: Protecting Private Property Rights* (Phoenix, AZ: Goldwater Institute, 2016).
17. James A. Schmitz Jr., “Solving the Housing Crisis Will Require Fighting Monopolies in Construction” (Federal Reserve Bank of Minneapolis Working Paper No. 773, Federal Reserve Bank of Minneapolis, Minneapolis, MN, December 11, 2020).
18. Daniel Mandelker lists Idaho, Oregon, and Tennessee as states that already require equal treatment in all zones. A much longer list of states have similar-sounding policies that allow municipalities to limit manufactured housing to specific zones: Arkansas, California, Connecticut, Florida, Iowa, Maine, Michigan, Minnesota, Nebraska, New Jersey, Oregon, Vermont, Virginia, and Washington. Daniel R. Mandelker, “Zoning Barriers to Manufactured Housing,” *Urban Lawyer* 48, no. 2 (2016): 251–53, 256.
19. S.B. 170, 92nd Gen. Assemb., Reg. Sess (Ark. 2019); H.B. 2439, 86th Leg., Reg. Sess. (Tex. 2019).
20. H.B. 675, Gen Assemb., Reg. Sess. (N.C. 2019).