

## ZONING REFORM

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APA-NC Legislative Committee - March 2022

This is an article exploring “Zoning Reform” and how state and the federal government are implementing it. The basic premise behind zoning reform is that there is a housing crisis in the United States today, that local zoning and development regulations have significantly contributed to it, and that reform of these regulations is the best way to address the crisis. The article describes recent federal policy related to zoning reform. It also outlines the zoning reform actions several states have taken (including North Carolina) in response to the housing crisis. The last part of the article contemplates the future of zoning reform in North Carolina and the potential role planning professionals can play in the discussion.

### **What is “Zoning Reform”?**

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The concept known as “Zoning Reform” is comprised of two basic ideas: First, that some zoning and local development regulations act, intentionally or unintentionally, to limit the supply of housing generally. That these laws favor single-family detached dwellings at the expense of other residential options; that they interfere with access to housing based on socio-economic factors; and that they increase the costs of housing for all. Second, that changes to the laws governing single-family detached development are necessary to address the housing crisis and its negative societal impacts.

Generally speaking, there are five main concerns or criticisms about local zoning and development regulations, specifically:

- Standards that establish single-family detached dwellings as the sole permitted dwelling type within a specific zoning district or geographic area are inefficient and obstruct housing choice;
- Mandatory minimum lot sizes for residential development are too often unreasonable, suppress efficient residential densities, and raise infrastructure costs;
- Off-street parking standards for residential development often include excessive minimum standards that are environmentally damaging and unnecessarily raise development costs;
- Development application review procedures establish disproportionate barriers to the approval of higher density residential development; and
- Development standards and exactions (like open space dedication) increase the costs of residential construction, and contribute to the inability of many to enter the housing market.

The idea that zoning regulations can have negative outcomes is certainly not a new one. Thinkers and activists from all sides of the political spectrum can point to flaws and less-than-desirable results from development regulations - whether those outcomes are racial segregation, disenfranchisement, environmental damage, or even interference with legitimate investment-backed expectations. What is unique about the current situation is that voices from all sides of the political spectrum (property rights, human rights, environmental rights) are converging or coalescing around the idea that zoning and local development regulations *are* the cause of the housing crisis. It's no secret that developers have long pointed to zoning or development regulations as impediments; but now we are seeing housing and environmental advocates also pointing to zoning and development regulations as impediments to their goals as well.

This convergence of opinion from multiple disparate points of view highlights the need for planners and the planning profession to do its best to understand the zoning reform issue and actively address the negative outcomes from zoning or development regulations. Failure to participate in the discussion and help identify workable solutions may well result in further pre-emption of local land use authority with respect to residential development.

The next section of this article goes into greater detail about federal government initiatives and policies related to zoning reform. The evolution of these initiatives and policies can help to illustrate how views

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from different constituencies have converged on the idea that local government zoning and development regulations are a root cause of the housing problem, whether as seen from a property rights perspective or a human rights perspective.

### Federal Action on Zoning Reform

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Some of the most recent notions of the need for zoning reform can be seen during the Obama Administration in 2015. In 2015 HUD released the “AFFH” (Affirmatively Furthering Fair Housing Rule)<sup>1</sup> as a clarification of the Fair Housing Act. AFFH required that municipalities receiving Federal funds for housing or urban development purposes investigate whether any barriers to fair housing or housing patterns or practices that promote bias towards any protected class under the Fair Housing Act existed in the community, and if so, to then create a plan for correcting or removing these barriers.

Federal perspective on zoning reform took a decidedly different direction in 2019 with the Trump Administration’s Executive Order 13878 – establishment of a White House Council on Eliminating Regulatory Barriers to Affordable Housing. The Council completed its work in January 2021 when HUD released its report: Eliminating Regulatory Barriers to Affordable Housing.<sup>2</sup> As noted in the Executive Summary, the development of the Report is “in response to the high cost of housing in many highly regulated housing markets throughout the United States that share a common concern: a lack of housing supply due to burdensome regulatory regimes,” and that, “A cornerstone of the Trump Administration’s economic policy is the tearing down of overly burdensome and unnecessary government regulations that hinder freedom and opportunity.” The report goes on to explore a variety of actions taken at the state and local levels to “improve their regulatory structures and to remove impediments to greater housing supply.”

Under the Biden Administration, federal housing policy continued to recognize local zoning and development regulation as an impediment to meeting housing goals, but instead of relying solely on top-down regulatory pre-emption, it looked to provide more resources to states and localities to tackle their own housing and zoning reform issues. While it has now all but stalled, the Administration’s Build Back Better Act<sup>3</sup> included the Unlocking Possibilities Program (Section 40103) which would appropriate funds for grants and programs to support regional and local efforts to develop and evaluate housing policy and plans, improve housing strategies, investigate the streamlining of regulatory requirements and reform of zoning codes to reduce barriers to “housing supply elasticity and affordability,” and provide for technical assistance.

It is important to note that the genesis of the housing programs in the Building Back Better Act was the bipartisan Housing Supply and Affordability Act<sup>4</sup> initiated in early 2021 as a response to a perceived national shortage in housing.

It is interesting to note that through the last three administrations, the issue of housing availability and affordability have all been part of federal policy, albeit for different reasons. While the policy responses of these different administrations took different forms, each identified local zoning and development regulation as a problem area in need of repair in order to address the housing challenges facing the nation.

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<sup>1</sup> <https://www.theregreview.org/2015/07/16/kirschenbaum-housing-segregation/>

<sup>2</sup> <https://www.huduser.gov/portal/portal/sites/default/files/pdf/eliminating-regulatory-barriers-to-affordable-housing.pdf>

<sup>3</sup> <https://www.congress.gov/bill/117th-congress/house-bill/5376>

<sup>4</sup> <https://www.klobuchar.senate.gov/public/index.cfm/2021/3/klobuchar-portman-kaine-introduce-bipartisan-legislation-to-address-nationwide-housing-shortage>.

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### **State Action on Zoning Reform**

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This section identifies actions undertaken by seven different states with respect to zoning reform. Because these are actions taken at the state level, most are legislative in nature. However, many states are also using access to State funding as an incentive for undertaking zoning reform or preparing plans to address housing availability or affordability. In some cases, states are also withholding funding as a penalty for local governments who fail to undertake zoning reforms or adopt required planning documents.

#### Oregon

Oregon has a long history of planning and advocacy for affordable housing. The first piece of legislation relevant to zoning reform is SB1051<sup>5</sup> which was passed by the Oregon Legislature in 2017. The law requires that all cities with populations over 2,500 people revise their zoning regulations to allow for at least one **accessory dwelling unit** to be permitted by right on any lot where a single-family dwelling is located. Except in cases where an accessory dwelling unit is used as a short term rental, the local government regulations may not require owner-occupancy on the site or any additional off-street parking for the accessory dwelling unit. In 2019 the Oregon Legislature passed HB2001,<sup>6</sup> the “Middle Housing” bill (“Middle Housing” includes **duplexes, triplexes, quadplexes, cottage clusters of 4 or more single-family detached dwellings built around a commonly-owned courtyard, and townhouses**). The bill requires that every city of 10,000 people or more allow a duplex dwelling by-right on every lot where a single-family detached dwelling is permitted. The bill also requires cities of 25,000 people or more to permit all forms of “middle housing” in every zoning district where single-family residential dwellings are permitted. Communities may establish “reasonable” siting and design requirements on middle housing forms. Failure to comply with the legislation could result in the responsible state agency adopting and enforcing a model zoning ordinance for those specific housing types within the non-compliant jurisdiction. 2019 also saw the passage of HB2003, which requires all cities over 10,000 people to conduct an analysis of what housing is needed for current and future residents every six to eight years, and the adoption of a **housing production strategy** in order to meet the needs identified in the needs analysis.

#### California

California, like Oregon, has been grappling with housing availability/affordability challenges for many years. In 2019 California adopted Assembly Bill 68<sup>7</sup> pertaining to accessory dwelling units. AB68 mandates that a decision on an application to establish an **accessory dwelling unit** be made within 60 days of the application filing, and that the decision-making process be administrative in nature. It overrides local covenants prohibiting accessory dwelling units, removes requirements for FAR, and establishes a uniform setback distance of four feet from lot lines for detached accessory dwelling unit structures. No additional parking may be required for the accessory dwelling unit if the lot is located within one mile of a transit stop. Subsequent changes passed after 2019 allow the ADU to be conveyed separately from the principal dwelling. On January 1 of 2022 SB9<sup>8</sup> takes effect in California. The bill over-rides existing density limits in single-family dwelling zoning districts in two important ways: It allows up to **two principal dwellings (plus one accessory dwelling unit for each principal dwelling)** to be built on any one single-family lot. It also allows an existing single family lot to be **further subdivided into two lots** with the ability to accommodate up to four dwelling units as a combination of principal and accessory dwelling units. Only one such subdivision is allowed per existing single-family residential lot. Neither of these two different actions may be subject to a discretionary review or public hearing. There are a variety of standards addressing design, on-site wastewater, and similar issues. The bill does include language to exclude areas that are subject to

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<sup>5</sup> <https://olis.oregonlegislature.gov/liz/2017R1/Downloads/MeasureDocument/SB1051/Enrolled>

<sup>6</sup> <https://www.oregon.gov/lcd/UP/Documents/HB2001OverviewPublic.pdf>

<sup>7</sup> [https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201920200AB68](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB68)

<sup>8</sup> <https://hcd.ca.gov/docs/planning-and-community-development/sb9factsheet.pdf>

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environmental hazards (flood zones or high fire hazard areas) and prime agricultural lands from these additional density allowances.

### Connecticut

In June of 2021 the Connecticut General Assembly passed Public Act 21-29,<sup>9</sup> which included five important features. First, it allows **accessory apartments or accessory dwelling units** on all single-family detached dwelling lots statewide. It **caps minimum parking** mandates for residential uses at one off-street parking space for studio or one-bedroom units and two off-street parking spaces for all other residential units. It eliminates the terms “character”, “overcrowding of land”, and “undue concentration of land” from State law as legal bases for zoning regulations. It requires every municipality to **prepare or amend an affordable housing plan** every five years. Finally, it creates a state-level commission charged with exploring on-site sewage treatment systems, guidelines to comply with affordable housing plans, and model design guidelines for residential buildings and streets.

### Massachusetts

In 2021 the Massachusetts Legislature passed the Housing Choice Initiative.<sup>10</sup> The state seeks to establish 135,000 new housing units by 2025. The bill was part of a series of economic development provisions, and includes three main aspects. The first is the **removal of supermajority voting requirements** (in favor of simple majority requirements) for zoning changes and special use permits associated with the provision of housing. The second is the requirement that each local government within the “Massachusetts Bay Transit Authority (MBTA)” jurisdiction (174 governments, excluding Boston) create **by-right zoning districts** (totaling at least 50 acres) for the establishment of multi-family dwellings at densities of 15 units an acre or higher and with no age restrictions. A greater obligation for providing multifamily housing is placed on jurisdictions with greater levels of public transportation options closer to the metropolitan core city of Boston. The third aspect is that failure of a community to enact the new zoning will result in ineligibility for the community to receive State infrastructure or housing funds. In addition to the requirements for multi-family zoning, this legislation also added standards allowing courts to require a plaintiff who appeals a special permit, variance, or site plan approval related to housing provision to **post a surety or cash bond** of up to \$50,000 to pay costs if the court finds that the harm to the defendant or the public from the delays caused by the appeal outweighs the financial burden to the plaintiff.

### Utah

In March of 2019 SB34<sup>11</sup> was signed into law in Utah. The bill connects state transportation funding with local land use planning, and is applied to the 82 cities across the State (in Utah there are legal distinctions that treat cities differently from towns). The bill requires each city in the state to prepare a **moderate income housing plan** and then make annual reports on its implementation. The bill also includes a menu of 20 different State-identified options for cities to consider including in their plan. Some of these options are: rezoning for density to assure production of moderate income housing; participation in a community land conservation trust for low or moderate income housing; encouraging higher density around major transit corridors; preserving existing moderate income housing in place; reducing regulations on accessory dwelling units in residential districts; or allowing higher density housing or moderate income housing by right in mixed-use commercial areas. While preparation of a moderate income housing plan is mandatory, inclusion of items from the menu of options is voluntary. Cities that choose to include three or more of the different options in their plans or implementation efforts are able to avail themselves of **additional**

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<sup>9</sup> <https://cga.ct.gov/2021/act/pa/pdf/2021PA-00029-R00HB-06107-PA.pdf>

<sup>10</sup> <https://www.mass.gov/orgs/housing-choice-initiative>

<sup>11</sup> <https://www.ulct.org/advocacy/senate-bill-34-housing-general-plan-resources>

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**transportation funding than would otherwise be available.** Another bill, HB82<sup>12</sup> became effective in October of 2021 preempts local regulations limiting internal accessory dwelling units (there is an exemption for certain college towns) and adds other standards for regulating the short-term rental of an internal accessory dwelling unit.

### Vermont

In October of 2020 Vermont passed Act Number 179.<sup>13</sup> This was a sweeping set of provisions that **banned minimum lot sizes greater than 5,400 square feet** in locations where public water and sewer service is available. The bill allows duplexes by-right in districts where single-family detached homes are allowed and quadplexes by-right in areas where duplexes are allowed. No local government may prohibit accessory dwelling units in locations where single-family homes are allowed. Vermont also commissioned the preparation of a guidebook for the development of neighborhoods in 2020 that addresses six common topics of reform including dimensional requirements, parking standards, accessory dwelling units, and the development review process.

### Michigan

The Michigan Chapter of APA, along with several other partners, is developing a Zoning Reform Guidebook that is intended to provide regulatory reforms and communication strategies for local government officials to use in overcoming resistance to new more dense housing options. The guidebook is still under development, but is expected to include suggested options and best practices for dimensional modifications, zoning districts (with a wider array of by-right housing options), housing typologies (with differing standards for design), and streamlined processes. The Chapter's plan is to have the guidebook and associated resources completed during 2022.

Examples from these seven states show a variety of different approaches, including mandates for planning for housing needs and production, a blend of withholding funds or offering incentives for additional state funding, procedural changes that remove unpredictability in the provision of housing by limiting discretionary decision-making or adding additional requirements to appeals. A universal trend also appears to be pre-emption of local limitations or prohibitions on accessory dwelling units or other forms of more dense housing in areas that heretofore have been limited to single-family detached development. One aspect of note, however, is the general recognition of the need for design standards or provisions to help ensure compatibility between established single-family detached neighborhoods and the newer more intense forms of residential development that benefit from the pre-emption.

### **North Carolina Action on Zoning Reform**

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Perhaps the most significant piece of legislation put forth by the North Carolina General Assembly to date on the topic of zoning reform is HB 401 (SB349)<sup>14</sup>. This bill was filed on March 24, 2021. The bill sought several changes to Section 160D of the Statutes, several of which were directly related to the concept of zoning reform, others of which were not. For the purposes of this article, only those aspects in the bill pertaining to zoning reform are described here. They include:

- The bill establishes the term "middle housing", which includes duplexes, triplexes, quadplexes, and townhouses.

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<sup>12</sup> <https://le.utah.gov/~2021/bills/hbillint/HB0082.pdf>

<sup>13</sup> <https://legislature.vermont.gov/Documents/2020/Docs/ACTS/ACT179/ACT179%20As%20Enacted.pdf>

<sup>14</sup> <https://www.ncleg.gov/BillLookUp/2021/HB401>

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- The bill requires local governments to allow each kind of middle housing in areas zoned residential, including areas zoned solely for single-family [detached] dwellings, provided that such residential areas are served by water or sewer.
- The bill seeks to amend the State Building Code to include definitions and requirements for triplex and quadplex units.
- The bill requires local governments to permit at least one accessory dwelling unit on each lot containing a single-family dwelling. The bill forbids local governments from requiring owner occupancy, minimum parking requirements for accessory dwelling units, the use of conditional zoning as a process to establish an accessory dwelling unit on land where a single-family dwelling is permitted, separate setbacks for accessory dwelling units, or prohibition of the sharing of utilities with the principal structure.
- The bill prohibits downzoning of land with access to public water or sewer except when the local government can demonstrate that such a change supports public health, safety, or welfare.
- The bill prohibits downzoning of land in order to evade voluntary consent of landowners as part of a conditional rezoning application.
- The bill prohibits local governments from enacting rules that only allow the establishment of a particular use type through conditional zoning.
- The bill prohibits local governments from establishing thresholds of total square footage or density that may only be exceeded via a conditional rezoning application.

Despite having a companion bill in the Senate, neither version of this bill made the May 13, 2021, crossover deadline. This means the bill cannot advance as is. However, there are a variety of exceptions to the crossover rules, and the text of HB401/SB349 could be slotted into a different bill that did make the crossover deadline. It is interesting to note that much of the wording of HB401 follows the wording and structure of the SB1051 and HB2001 bills from Oregon (with a wide variety of additional provisions relating to the use of conditional zoning). Also interesting is that the legislation lacks any sort of mandate for planning to address housing availability and does nothing to address legitimate concerns about siting or compatibility of new higher density dwelling forms.

Another bill of note is HB232.<sup>15</sup> This bill is entitled “LRC Study – Affordable Housing.” This bill passed the House on May 12 and thus made the crossover deadline. It directs the Legislative Research Commission to study the availability of affordable housing in the State. This includes the availability of affordable housing, available grants and funding for affordable housing, best practices from other states in increasing the availability of affordable housing, and examining any costs associated with government rules, regulations, and ordinances. The bill directs the LRC to make its report (and any associated proposed legislation) to the General Assembly upon the convening of the 2022 short session.

House Bill 684<sup>16</sup> “LRC Study Development Exactions” also passed the House on May 6 and also made crossover. The preamble to the bill cites National Association of Home Builder figures that development regulations imposed by governments account for 24.3% of the final price of a new single-family home. It also includes the statement that “increased regulatory costs disqualify thousands of our State’s citizens from qualifying for a mortgage and thereby depriving these citizens of the many benefits of home ownership.” This bill directs the Legislative Research Commission to study numerous aspects, including:

- If exactions imposed by local governments (like road construction or park dedication) are legislatively authorized;

<sup>15</sup> <https://www.ncleg.gov/BillLookUp/2021/HB232>

<sup>16</sup> <https://www.ncleg.gov/BillLookUp/2021/HB684>

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- If administrative fees for development review should be paid by taxes;
- If statewide enabling legislation allowing exactions should be modified or eliminated to reduce development costs;
- If local acts allowing impact fees should be repealed;
- If plan and review timelines are reasonable;
- The extent to which costs of litigation impact the cost of affordable housing; and
- The extent to which all aspects identified for further study in the bill impact the ability of citizens to participate in homeownership.

The bill directs the LRC to make its report (and any associated proposed legislation) to the General Assembly upon the convening of the 2022 short session.

Taken as a group these bills indicate a desire by the General Assembly to explore issues related to zoning reform. What is less clear is whether or not these proposals are aimed at the provision of affordable housing in its own right or as a means of reducing development costs for all residential uses across the board (of which affordable housing could also benefit). It also appears that continued pre-emption of local development rules and local acts are also under continued consideration as part of the State's zoning reform efforts. These issues, when considered in light of the convergence of opinion about the functionality of current zoning and development regulations from all sides of the political spectrum, should give planners pause, and point squarely to the need for the planning profession to make a greater contribution to the discussions underway about zoning reform across the State.

### **Planners and the Future of Zoning Reform**

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The majority of this article has focused on zoning and the calls to reform zoning and local development regulations as a means of addressing the housing crisis. However, the notion that zoning, in and of itself, as the sole cause of the housing crisis would be short-sighted and fails to take the range of economic and demographic factors into account. For example, the anticipated continued rapid population growth and demand for housing in North Carolina (at least in and around urban areas). We are seeing increased lifespans among baby-boomers and more persons seeking to "age in place" in their homes (further constraining housing supply). There is a major societal change underway with respect to working from home and the increased demand for larger homes (albeit in potentially remote locations). We are likely to see continued supply chain and labor shortages that will affect prices. After years of federal economic stimulus and low interest rates we are now seeing significant amounts of investment in single-family housing by Wall Street and foreign capital (thus outbidding first-time homebuyers for new homes). We can expect rising interest rates and inflation to further erode consumer's buying power making it even more difficult to afford a home. We could also see rising costs for insurance and increase construction costs as more resilient building techniques are proposed to address changing weather patterns.

Planners who are involved with development application review are quick to point out that it is not just zoning regulations that can be an impediment to housing availability or affordability. There are several other regulations involved, including Building and Fire Code requirements, flood damage prevention, water/sewer rate schedules and policies, and road construction standards (pavement layers, ROW width, fire truck turnaround, etc.). Interestingly, most of these standards are mandated by the state or federal governments but implemented by local jurisdictions. These are important standards required for the protection of the public's health and safety, but can often be "lumped in" with zoning and other local development regulations as impediments to housing provision.

The American Planning Association's Policy and Advocacy staff has been watching the zoning reform debate unfold at the federal and state levels, and cautions planners to avoid the tendency to dismiss calls for

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zoning reform as an effort to change zoning by persons who do not fully understand all that is involved. Or to view it as an effort to undermine local development regulations that is motivated by profit. While there may be a grain of truth to the argument that if people understood all the non-negotiable aspects and complexities of the development review process they would soften their calls for reform, we are reminded that this argument will do little to advance the cause of planners in the zoning reform debate. A likely response from zoning reform proponents is that regulations are regulations, regardless of where they come from, and that the goals of these regulations are given more credence by local governments than the need to provide adequate and affordable housing. The simple fact is that zoning rules are complex, they are not well understood by the public, and thus are an easy target for criticism.

In North Carolina, perhaps the largest concern is not whether zoning and local development regulations are to blame for the housing crisis. Nor is the largest issue the degree to which the public or law makers understand the issues at play. The largest concern is that there is a convergence of opinion that zoning and local development regulations are to blame and that the likely response from the General Assembly will be to further pre-empt local governments' abilities to control their own growth and development patterns. Pre-emption alone is a very blunt tool. It treats all areas the same, inhibits the ability of communities to differentiate themselves from one another, and can run counter to well-founded and properly formulated public will. We have some evidence from other states that pre-emption can be a part of the solution to the housing crisis, but is not the only answer. Effective solutions to the housing crisis need to include studies that explore the scope of the problem, plans for government intervention in the supply of housing, funding for local governments who do not have the resources to tackle these problems on their own, a deeper understanding of state and federal rules affecting the cost of housing, and finally, the ability of local governments to apply their creativity to issues of compatibility and environmental protection as part of providing more housing. Pre-emption of zoning or local development regulation alone will not solve the problem.

If planners in North Carolina fail to get involved and become a more present part of the discussion, pre-emption alone is a real possibility. The Legislative Committee urges all North Carolina planners to start talking about zoning reform and working with all involved to find a workable solution to the housing challenges facing our State.