

# Zoning Bulletin

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## Proceedings/Jurisdiction—State court finds challenge to constitutionality of zoning ordinance is time barred under state law

Property owner then brings same challenge to federal court

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### Contributors

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Corey E. Burnham-Howard

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Citation: *May v. Morgan County Georgia, 2017 WL 6521296 (11th Cir. 2017)*

*The Eleventh Circuit has jurisdiction over Alabama, Florida, and Georgia.*

ELEVENTH CIRCUIT (GEORGIA) (12/21/17)—This case addressed the issue of whether the constitutionality of a zoning ordinance that is challenged in state court can later be challenged in federal court.

**The Background/Facts:** Christine May (“May”) purchased lakefront property in Morgan County, Georgia (the “County”) on which she constructed a vacation home. In order to allay the cost of construction, May planned to (and did) use the home for short-term vacation rentals. At the time, the County’s zoning ordinance only allowed uses that were listed as “permitted” or “conditional.” Short-term rental of single family dwellings (such as May’s) were not listed as “permitted” or “conditional.”

In 2010, the County adopted Regulation 15.35. That regulation explicitly banned rentals of single family dwellings for less than 30 consecutive days in the zoning district in which May’s property was located.

May continued to rent her property on a short-term basis. In August 2011, the County issued to May a criminal citation for violating Regulation 15.35.

In April 2012, May filed a lawsuit in Georgia state court. In her lawsuit, she argued that she had a “grandfathered” right under the County zoning ordinances to continue offering short-term rentals on her property. She also argued that application of Regulation 15.35 to her property was unconstitutional under the due process and equal protection clauses of the United States and Georgia Constitutions, and the privileges and immunities clause of the Fourteenth Amendment of the United States Constitution.

Ultimately, the state trial court concluded that May’s action was barred because: (1) she had failed to exhaust her administrative remedies by not seeking a rezoning and conditional use permit from the County before filing suit; and (2) Georgia Code § 5-3-20(a) barred May’s claims because she failed to challenge the adoption of Regulation 15.35 (on its face, or as applied to her property) within 30 days of its passage.

May appealed. The Georgia Court of Appeals denied her application for a discretionary appeal. May again appealed, and the Supreme Court of Georgia also denied review.

May then attempted an administrative remedy. She filed an application for rezoning with the County, which would allow her property to be rezoned for short-term rentals. She also asked the County to amend the zoning ordinance to allow short-term rentals by property owners who rented before enactment of Regulation 15.35. She also requested that the County declare her right to continue offering short-term rentals on her property. The County denied her request and her applications.

In May 2015, May filed a lawsuit against the County in federal district court. In that action, she again argued that she had a grandfathered right to

offer short-term rentals on her property. She brought a claim against the County under federal statute (42 U.S.C.A. § 1983), contending that Regulation 15.35 violated her “grandfathered constitutional rights.” She also challenged the County’s denial of her applications for rezoning or amendment and her request for a declaration of rights.

Finding there were no material issues of fact in dispute, and deciding the matter on the law alone, the district court granted summary judgment in favor of the County on May’s request for a declaration that she had a grandfathered right to rent her property. The district court found that issue had already been litigated and decided in May’s August 2011 criminal citation case. The district court also declined to exercise supplemental jurisdiction over May’s claims related to the County’s denial of her application for rezoning and amendment and her request for a declaration (leaving those only to be challenged in state court). Finally, as to May’s § 1983 claims that the County’s Regulation 15.35 violated her “grandfathered constitutional rights,” the district court determined that the *Rooker-Feldman* doctrine barred its review of May’s § 1983 claims.

The *Rooker-Feldman* doctrine provides that federal district courts and courts of appeal do not have jurisdiction to review state court decisions. The doctrine “applies both to federal claims raised in the state court and to those ‘inextricably intertwined’ with the state court’s judgment.” It applies as long as the party bringing the claims had a “reasonable opportunity” to raise the federal claims in state proceedings.

May appealed. She argued that the *Rooker-Feldman* doctrine did not apply here because her state court case was an “as applied” challenge to Regulation 15.35, while the federal challenge she was making differed in that in federal court she was now claiming that the enactment of Regulation 15.35 could not limit her “constitutional grandfathered right.”

**DECISION: Judgment of District Court for the Middle District of Georgia affirmed.**

The United States Court of Appeals, Eleventh Circuit, held that the *Rooker-Feldman* doctrine barred May’s § 1983 claim and her declaratory judgment request “because the crux of [her claim] was addressed in the first [state] civil case.” The court noted that “[e]ven if her § 1983 claim that she ha[d] a ‘vested constitutional right to continue renting [her property] on a short-term basis,’ [was] somehow distinct from an as applied challenge to the constitutionality of the Regulation 15.35 bar against her enjoyment of that right, that claim [was] inextricably intertwined with her claims from her first civil case. And so [was] her request for a declaratory judgment.” The court explained that both her § 1983 claim and her claim for declaratory relief were “based on her assertion that she ha[d] a ‘grandfathered right’ to rent her property on a short[-]term basis.” Thus, both claims would require finding that her claim of a “vested constitutional right” was not time barred under Georgia law for her failure to challenge Regulation 15.35 within 30 days of its passage. In other words, it would require a finding in federal district court “on the same claims that she

brought, and lost, in state court.” “So she [was] complaining of the same injury in both cases, and [was] implicitly seeking a rejection of the state court’s judgment that [Georgia Code § 5-3-20(a)] barred her request for relief.” Thus, although not “bill[ed]” as an “appeal of the state court judgment,” her federal court claims were “in substance just that,” found the court. The court concluded that *Rooker-Feldman* therefore barred federal review of May’s claims because all of her claims here were “inextricably intertwined” with those from the first state civil case.

See also: *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983).

See also: *Nicholson v. Shafe*, 558 F.3d 1266, 89 U.S.P.Q.2d 1911 (11th Cir. 2009).

See also: *Casale v. Tillman*, 558 F.3d 1258 (11th Cir. 2009).

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**Case Note:**

*May had alternatively argued that the court should adopt an exception to Rooker-Feldman, and find that it did not apply because the state court in the first civil case lacked subject matter jurisdiction (i.e., the authority to hear the specific subject matter of May’s case). The court concluded that even if it were to adopt such an exception, it would not apply here because the court in May’s first civil case had subject matter jurisdiction to determine that the 30-day state law time bar (Georgia Code § 5-3-20(a)) applied to May’s claims.*

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## **Use/Interpretation of Zoning Regulations—County Planning Director authorizes mining operation under construction permit**

County Board reverses, maintaining that a mining permit is instead required

Citation: *Croell Redi-Mix, Inc. v. Pennington County Board of Commissioners*, 2017 SD 87, 2017 WL 6381344 (S.D. 2017)

SOUTH DAKOTA (12/13/17)—This case addressed the issue of whether, under a county ordinance, a mining operation was properly permitted under a construction permit. The case also addressed the issue of whether the mining operation was exempt from permit requirements as a legal nonconforming use.

**The Background/Facts:** Since the 1970s, Perli Quarry (the “Quarry”) had been in operation in Pennington County (the “County”). The Quarry was a mining operation that extracted sand, gravel, and construction aggregate. At the time the Quarry began operating, the County had not yet adopted zoning ordinances. Zoning ordinances were eventually adopted and amended and updated, including in 2001 and 2010. Under those ordinances, the Quarry was designed an “A-1 General Agriculture District,” which allowed, among others, the following relevant uses: “[t]emporary quarries”; “the extraction of sand, gravel, or minerals,” provided that a Construction Permit is obtained in accordance with [the zoning ordinances]; and “[m]ining provided a Construction Permit is obtained in accordance with [the zoning ordinances].” The provision of a construction permit was governed by § 507(A) of the County zoning ordinance. Section 507(B) also permitted mining as authorized by a mining permit.

In 2015, Croell Redi-Mix Inc. (“Croell”) acquired the Quarry. Croell sought to “continue and expand mining operations” at the Quarry. The County Planning Department advised Croell to obtain a construction permit pursuant to § 507(A) of the County zoning ordinance. Croell applied for a construction permit to continue and expand its mining operation. The County Planning Commission approved the application and the Planning Director issued the construction permit.

Subsequently, area residents appealed the approval of the construction permit to the County Board of Commissioners (the “Board”). The County Board of Commissioners (the “Board”) reversed the approval of the construction permit.

Croell then appealed the Board’s reversal to circuit court. The circuit court found that the Board’s decision to reverse the issuance of the construction permit was “arbitrary” because it was based on “unfounded” assertions of area residents.

The Board appealed. On appeal, the Board argued that Croell’s proposed use of the Quarry in the A-1 General Agriculture District could not be authorized under a construction permit. The Board argued that, under the plain language of the zoning ordinance, a construction permit could not be issued for a quarry of the scope and duration intended by Croell. The Board argued that the mining of such a scope as proposed could only be permitted if a mining permit was obtained.

Again, § 507(A) of the County zoning ordinance allowed mining under a construction permit, subject to “any other” “more restrictive” provision that took precedent. Section 507(B) was a more restrictive provision, requiring a mining permit for extraction of any mineral or substance exceeding 100 cubic yards. Croell extracted more than 100 cubic yards.

Croell responded by noting the “historical interpretation, application, and implementation of the [County zoning ordinance] by staff and legal counsel,” which “historically and consistently” interpreted the zoning ordinance to allow mining such as Croell’s with only a construction permit and without obtaining a mining permit. Croell argued that historical inter-

pretation was entitled to deference here. Croell also contended that the mining-permit requirement of the zoning ordinance did not apply to the Quarry since it had been in operation prior to adoption of the zoning ordinance and was thus a legal nonconforming use.

**DECISION: Judgment of circuit court reversed.**

The Supreme Court of South Dakota rejected Croell's arguments and agreed with the Board. The court found that under the plain language of the zoning ordinance (§ 507(B)), Croell's intended use of the land required a mining permit. Thus, the court concluded that the Board had properly reversed the Planning Director's issuance of the construction permit for Croell's mining operation use at the Quarry.

In so concluding, the court explained that since Croell extracted more than 100 cubic yards, "[u]nder the clear language of § 507(B), Croell's intended use could not be authorized under a construction permit; a mining permit was required." Therefore, the court held that the Board "properly declined to issue a construction permit for the purpose of doing that which [was] prohibited under § 507(B), and the circuit court erred by reversing the Board's decision."

Rejecting Croell's argument that the Planning Commission and Planning Director's "historical interpretation" of the zoning ordinance—allowing mining with a construction permit—should be given deference, the court said that when the meaning of an ordinance is "unambiguous"—as the court found it was here—"the contrary interpretation of those administering the ordinance is not entitled to deference."

Regarding Croell's legal nonconforming use argument, the appellate court concluded that it was "not relevant." Croell's construction permit application did not simply seek to continue a nonconforming use, but sought to expand its operation to convert additional acres of land to use as a quarry that had not previously been used as a quarry. Thus, a mining permit was required, concluded the court.

See also: *Wegner Auto Co., Inc. v. Ballard*, 353 N.W.2d 57 (S.D. 1984).

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**Case Note:**

*On appeal, Croell had also challenged the standing (i.e., legal right to appeal) of the area residents to appeal the issuance of the construction permit. The court found that, under the zoning ordinance, anyone "affected" by "any action taken by the Planning Director in administering . . . Section 507(A) [of the County zoning ordinance, which governs construction permits,]" had standing to appeal to the Board. Here, the court found that the residents that had appealed to the Board were "affected" by the Planning Director's decision as they had claimed the mining operations affected them in the following ways: negatively impacted their enjoyment of their properties; contaminated local wells; ejected large amounts of dust onto their properties; decreased traffic safety; and reduced local tourism.*

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## Accessory Use—Nursery operators are cited for illegal “industrial manufacturing” of compost in violation of zoning ordinance

Nursery operators claim composting was not “manufactured,” and, in any case, was an authorized accessory use of their property

Citation: *State ex rel. Town of Tiverton v. Pelletier*, 2017 WL 6395807 (R.I. 2017)

RHODE ISLAND (12/15/17)—This case addressed the issue of whether composting activities on residential property amounted to “manufacturing” of compost on residential property, which was prohibited under the local zoning ordinance. The case also addressed the issue of whether the manufacture of compost on residential property was permitted as an “accessory use,” despite the local ordinance prohibiting such manufacturing activities in a residential zoning district.

**The Background/Facts:** James and Melissa Pelletier (the “Pelletiers”) owned a 30-acre property (the “Property”) in a residential zoning district in the Town of Tiverton (the “Town”). In their R-80 zoning district, raising crops commercially, including an associated greenhouse or nursery, was a permitted use. The Pelletiers operated a nursery on their Property.

In March 2009, the Pelletiers were served with a summons and complaint charging them with violating the Town’s zoning ordinance by manufacturing compost on the Property. Under the Town’s zoning ordinance, “industrial manufacturing, storing, processing, and fabricating activities” were prohibited uses in an R-80 zone. After a trial, the Pelletiers were found liable for manufacturing compost in an R-80 zone in violation of the zoning ordinance.

The Pelletiers appealed. They argued that the evidence did not establish that they “manufactured” compost on their Property. The Pelletiers admitted that materials (such as grass clippings, yard waste, and horse manure) were shipped from off-site to the Property for the purpose of composting. Witnesses for the Town had testified to, among other things, observing large piles of compost and the mixing of material with industrial equipment. However, the Pelletiers contended that their composting actions could not be categorized as “industrially manufacturing” because “once the material [was] mixed together, ‘nature takes over’ and compost develops naturally.” They also argued that the composting activities did

not amount to “industrial manufacturing” because the compost was not being packaged and sold as a product off-site. Alternatively, the Pelletiers contended that the processing of compost on their Property was a permitted accessory use because compost was used in the operation of a nursery, which was a permitted use in the R-80 zone.

**DECISION: Judgment of superior court affirmed.**

The Supreme Court of Rhode Island held that the Pelletiers’ conviction of violating the Town zoning ordinance by manufacturing compost on residential property was supported by sufficient evidence. Although the zoning ordinance did not define “manufacturing,” the court noted that it has been defined as “the production of articles for use from raw or prepared materials by giving the materials new forms, qualities, properties or combination whether by hand labor or machines.” The court found that the evidence established that the Pelletiers: procured truckloads of waste materials from off-site to be transported to their Property; actively combined those waste materials with heavy industrial equipment; and produced large quantities of finished compost that was ultimately used off-site through the Pelletiers’ landscaping business. The court emphasized that it found that the use of “heavy, noise-emitting industrial equipment coupled with delivery of truckloads of organic material . . . on a daily basis,” established the elements of “manufacturing” and “processing” that set the Pelletiers composting activities apart from the “average homeowner who engages in composting.”

In so holding, the court rejected the Pelletiers’ arguments that their composting activities could not be categorized as “industrial manufacturing.” The court said that, whether or not the Pelletiers were selling their compost for profit was “immaterial.” The court noted that the Town zoning ordinance entitled “Industrial uses” was devoid of any requirement that manufactured products be “packaged, shipped, and sold for profit.” Moreover, the court found that the plain meanings of “manufacturing” and “industrial” did “not necessarily involve retail activity.”

The court also rejected the Pelletiers’ argument that the processing of compost on their Property was a permitted accessory use because compost was used in the nursery, which was a permitted use in the R-80 zone. The Town zoning ordinance defined accessory use as a use of land or building “customarily incidental and subordinate to the principal use of the land or building . . . .” The court acknowledged that the use of compost in connection with a nursery use was allowed as an accessory use. However, the court distinguished such an accessory use of compost from “the [industrial] manufacturing, storing, and processing of compost” performed on a “large scale” by the Pelletiers. The “industrial manufacturing” of compost by the Pelletiers, found the court, was not allowed even as an accessory use since the zoning ordinance expressly prohibited “manufacturing, storing, processing, and fabricating activities” in an R-80 zone. Accordingly, the court held that manufacturing compost on the Pelletiers’ Property was not a permitted accessory use.

## Standing—Nonprofit organization challenges rezoning of developers' parcels in city

Developer and city argue that nonprofit failed to prove it would suffer special damages from rezoning and therefore lacks standing to bring the challenge

Citation: *Cherry Community Organization v. City of Charlotte*, 2017 WL 5580339 (N.C. Ct. App. 2017)

NORTH CAROLINA (11/21/17)—This case addressed the issue of whether a nonprofit organization showed that it would suffer special damages from a proposed rezoning such that it had standing (i.e., the legal right) to seek declaratory judgment against the city and a developer challenging the rezoning.

**The Background/Facts:** Midtown Area Partners II, LLC (“MAP”) owned four parcels in and around the Cherry Community (“Cherry”) in the City of Charlotte (the “City”). Cherry was an historically African American neighborhood located in the Midtown Morehead Cherry District of the City. In August 2014, MAP submitted an application to the City to rezone the four parcels from general-use districts to mixed development-districts in furtherance of its plans to construct a mixed-use development.

The Cherry Community Organization (“CCO”) was a nonprofit organization that sought to “protect the residential character, safety, and stability of, as well as the affordable housing within [Cherry].” CCO opposed MAP’s rezoning application. CCO owned real property immediately adjacent to and/or in close proximity to MAP’s parcels. CCO complained that it would suffer from “special damages” from the rezoning “in the form of increased noise, traffic and parking, decreased visibility due to the height of the proposed project, diminution in the peaceful residen[tial] character of the Cherry neighborhood, and a reduction in the value of [CCO’s] real property.”

The City Council ultimately approved MAP’s rezoning applications. CCO petitioned the superior court, seeking declaratory judgment against the City and MAP. Finding there were no material issues of fact in dispute, and deciding the matter on the law alone, the trial court granted summary judgment in favor of the City and MAP, and dismissed the case with prejudice.

CCO appealed. As a threshold matter, the City and MAP asserted that CCO lacked standing (i.e., the legal right) to bring the declaratory judgment action.

**DECISION:** Judgment of superior court affirmed as modified.

The Court of Appeals of North Carolina agreed with the City and MAP, concluding that CCO lacked standing to bring the declaratory judgment action against the City and MAP.

In so concluding, the court explained that a party only has standing to challenge a zoning ordinance in an action for declaratory judgment when it “has a specific personal and legal interest in the subject matter affected by the zoning ordinance and . . . is directly and adversely affected thereby.” The court noted that although owning property immediately adjacent to or within close proximity to the subject property (as CCO did here with regard to the parcels MAP sought to rezone) did “bear some weight on the issue of whether the complaining party ha[d] suffered or [would] suffer special damages distinct from those damages to the public at large,” that was not “in and of itself sufficient to plead special damages.”

Here, examining the evidence submitted by CCO, the court found it was “insufficient to show that CCO ha[d] or [would] suffer any individual harm as a result of the rezoning such that CCO” could prove standing and survive the motion for summary judgment that had been brought by the City and MAP. Although CCO had alleged special damages, the court found that there was no “actual proof” of special damages. The court found that “CCO’s forecast of evidence of special damages consist[ed] of nothing more than conclusory, unsupported allegations that certain damages [would] ensue . . . .”

Having found that CCO failed to meet its burden of production of evidence that it would suffer special damages distinct from the rest of the community because of MAP’s rezoning, the court concluded that CCO failed to establish that it had standing to maintain its action for declaratory judgment. Accordingly, the court did not reach CCO’s remaining contentions and the merits of CCO’s appeal.

See also: *Cherry v. Wiesner*, 781 S.E.2d 871 (N.C. Ct. App. 2016), review denied, 369 N.C. 33, 792 S.E.2d 779 (2016).

## Zoning News from Around the Nation

### MASSACHUSETTS

The Woburn City Council recently voted to modify local regulations to extend to 12-months the immunity period that shields builders from having to modify construction plans to reflect recently adopted zoning ordinances. Previously, the exception was for a six-month period of time, which conflicted with a superseding state law.

Source: *Daily Times Chronicle*; <http://homenewshere.com>

### OHIO

The Newark City Council has passed a zoning ordinance allowing for

medical marijuana businesses in the city. The new ordinance applies to medical marijuana cultivators, processors, and dispensaries. Under the ordinance, any dispensary must be approved by the Newark Board of Zoning Appeals. The ordinance also limits the location of dispensaries by restricting them to “medium intensity business districts” and from within 1,000 feet of a school, church, public library, public playground or public park. A variance from the Board of Zoning Appeals could reduce that distance to 750 feet away from the restricted areas. The location of medical marijuana cultivators and processors would be limited to industrial districts. The businesses are also required to obtain a license from the City and pay an annual \$500 fee.

Source: *Newark Advocate*; [www.newarkadvocate.com](http://www.newarkadvocate.com)

## WISCONSIN

In late November, Governor Scott Walker signed into law the “Homeowners’ Bill of Rights.” The new legislation, consists of two bills: One bill “allows property owners to build on and sell lots of ‘substandard’ size if they were legal when created.” That bill also “prohibits local governments from merging adjacent lots that share the same owner without the owner’s permission and makes it easier for property owners to get conditional-use permits and variances, maintain nonconforming structures, and dredge private ponds.” The second bill “allows homeowners to appeal assessments when a homeowner refuses to let the assessor inside the house, and to hang the American flag even if condominium or homeowner association rules would prohibit it.”

Source: *The Heartland Institute*; [www.heartland.org](http://www.heartland.org)

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## Preemption/Aviation—Town says use of private heliport is prohibited under town zoning laws

Heliport owner contends state aeronautics code preempts zoning laws

Citation: *Roma, III, Ltd. v. Board of Appeals of Rockport*, 478 Mass. 580, 88 N.E.3d 269 (2018)

MASSACHUSETTS (01/08/17)—This case addressed the issue of “whether cities and towns may exercise their zoning authority to determine

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whether land in their communities may be used as a noncommercial private restricted landing area, here a heliport, or whether they may do so only with the approval of the [Division of Aeronautics of the Massachusetts Department of Transportation] because the exercise of such zoning authority is preempted by the [Massachusetts's] aeronautics statutes, G. L. c. 90, §§ 35-52 (aeronautics code)."

**The Background/Facts:** Ron Roma ("Ron") was a licensed helicopter pilot who regularly used his helicopter to travel to his "various family homes, business engagements, and other activities," but did not use the helicopter for any commercial purposes. One of those family homes, owned by Roma, III, Ltd. ("Roma"), was located on 1.62 acres of property (the "Property") in a residential zoning district in the Town of Rockport (the "Town"). Roma requested and received from the Federal Aviation Administration, a "determination of airspace suitability," recognizing the Property as a licensed private use heliport. Following an airspace review, Roma also received approval from the Division of Aeronautics of the Massachusetts Department of Transportation (the "Division").

In November 2014, Ron flew his helicopter to the Property. Soon thereafter, the Town's building inspector issued an enforcement order to Roma. That order stated that a heliport was "not allowed, either as a principal use of the property or an accessory use, in any zoning district in the [t]own," and that the use of Roma's Property for the landing of a helicopter was in violation of the Town's bylaw. The Town building inspector ordered "that the landing of helicopters on the property be stopped immediately" and that the "[f]ailure to comply with this order may result in fines of up to \$300 per day."

Roma appealed the enforcement order to the Town's Board of Appeals ("Board"). The Board ultimately denied the appeal. The Board explained that, under the Town's zoning bylaw, uses that were "not expressly permitted" were "deemed prohibited." Since the bylaws did not expressly authorize the use of land for a heliport, the Board concluded that Roma's use of the Property for a heliport was not permitted. The Board also concluded that the use of a heliport was not allowed as a "'customarily incidental' accessory use" or as an "accessory use normally associated with a one-family detached dwelling that is not detrimental to a residential neighborhood." Consequently, the Board determined that a heliport would need "some form of approval, variance and/or special permit."

Roma appealed the Board's decision to the Land Court. The Land Court judge determined that he was "constrained to apply" prior caselaw (*Hanlon v. Town of Sheffield*, 89 Mass. App. Ct. 392, 50 N.E.3d 443 (2016) (abrogated by *Roma, III, Ltd. v. Board of Appeals of Rockport*, 478 Mass. 580, 88 N.E.3d 269 (2018))), which interpreted the Massachusetts aeronautics code—G. L. c. 90, § 39B—"to indicate that a town may not enforce a zoning bylaw that would prohibit a private landowner from creating a noncommercial private restricted landing area on his or her property, unless the relevant bylaw had been approved by the [D]ivision." Here, the Town zoning bylaw had not been approved by the Division. Accordingly, finding there were no material issues of fact in dispute and deciding the matter on the law alone, the judge granted summary judgment to Roma.

The Board applied to the Supreme Judicial Court of Massachusetts for direct appellate review, which was granted.

**DECISION: Judgment of Land Court vacated and matter remanded.**

Abrogating (i.e., repealing) *Hanlon v. Town of Sheffield*, 89 Mass. App. Ct. 392, 50 N.E.3d 443 (2016) (abrogated by, *Roma, III, Ltd. v. Board of Appeals of Rockport*, 478 Mass. 580, 88 N.E.3d 269 (2018)), the Supreme Judicial Court of Massachusetts held that cities and towns in Massachusetts may exercise their zoning authority to determine whether land in their communities may be used as a noncommercial private restricted landing area. In other words, the court held that the state aeronautics code—G. L. c. 90, § 39B—did not preempt local zoning regarding noncommercial private restricted landing areas.

In reaching that conclusion, the court analyzed the statute. The court found that the first three paragraphs of § 39B required municipalities to apply to the Division for a certificate of approval before acquiring any property for “an airport or restricted landing area.” Paragraph four provided that § 39B did “not apply to restricted landing areas for non-commercial private use,” among other exceptions. The court found that to mean that “a private landowner who wishes to establish a noncommercial private restricted landing area does not need prior [D]ivision approval; the landowner simply needs to inform the [D]ivision in writing of its establishment, and ensure that it is not built or maintained in a manner that would endanger the public safety.” The court found that paragraph five allowed municipalities to enact rules and regulations governing “the use and operation of an aircraft at an airport or restricted landing area,” but such rules and regulations were only effective if approved by the Division.

Here, the Board had argued that since the fourth paragraph declared that § 39B did not apply to restricted landing areas designed for noncommercial private use, the fifth paragraph requiring Division approval of municipal rules and regulations on restricted areas did not apply to noncommercial private restricted landing areas.

The Supreme Judicial Court agreed with the Board. In agreeing, the court acknowledged that the “use and operation of aircraft” was governed by § 39B, but emphasized that the use of land, on the other hand, was traditionally regulated by municipalities under their zoning authority. Accordingly, concluded the court, “regardless of whether § 39B is the sole source of a city or town’s authority to regulate the ‘use and operation of aircraft,’ it plainly is not the source of a city or town’s authority to regulate the use of land.”

Roma had contended that, nevertheless, unless approved in advance by the Division, the Town’s zoning bylaw that prohibited the use of land to establish a noncommercial private restricted landing area was preempted by the state aeronautics code. Roma argued that a clear intent to preempt such local zoning enactments should be inferred “to prevent frustration of the legislative purpose of the aeronautics code.”

The court disagreed with Roma. The court explained both federal and state preemption analysis. Focusing on state law preemption, the court said that “a local regulation will not be invalidated unless the court finds a ‘sharp conflict’

between the local and State provisions.” Here, the court found that the legislative purpose of the aeronautics code of “foster[ing] . . . private flying” did not suggest a legislative intent to encourage the development of private heliports and landing areas on private property. Contrary, found the court, since land use regulation has long been recognized by the Legislature to be a prerogative of local government, the court concluded that it would “not infer that the enactment of the aeronautics code reflects a clear legislative intent to preempt all local zoning bylaws that might affect noncommercial private restricted landing areas based on the risk of frustrating the legislative purpose of fostering private flying.” Nor was the court “persuaded that the Legislature, by granting the [D]ivision ‘general supervision and control over aeronautics,’ [under] G. L. c. 90, § 39, intended to preempt all local land use regulation that might affect the use of land for private heliports.”

Accordingly, the court concluded that “there [was] no clear legislative intent to preempt local zoning enactments with respect to noncommercial private restricted landing areas, and that a city or town does not need the prior approval of the [D]ivision to enforce a zoning bylaw that requires some form of approval, variance, or special permit for land to be used as a private heliport.”

Thus, the enforcement order against Roma was upheld.

See also: *Town of Harvard v. Maxant*, 360 Mass. 432, 440, 275 N.E.2d 347 (1971).

See also: *Town of Wendell v. Attorney General*, 394 Mass. 518, 476 N.E.2d 585 (1985).

## **Historic District—Property owners raze and reconstruct house located in historic district but not individually listed on state or national historic registers**

Abutting neighbors sue, arguing new house violates state historic-district regulations, and seeking injunction for modifications to new house

Citation: *McDowell v. Sapienza*, 2018 SD 1, 2018 WL 285839 (S.D. 2018)

SOUTH DAKOTA (01/03/18)—This case addressed the issue of whether historic-district regulations applied to a property owner’s new home constructed in an historic district, despite the fact that the home was not listed on state or national historic registers.

**The Background/Facts:** The McKennan Park Historic District of Sioux Falls (“McKennan Park”) is a historic property listed on the national register of historic places. In 2014, Joseph and Dr. Sarah Sapienza (the “Sapienzas”)

purchased a house in McKennan Park. The house they purchased was designated an “intrusion” and “noncontributing property,” and it was not listed on the state or national registers of historic places. The Sapienzas originally planned to renovate the house, but ultimately decided to raze it and construct a new home on the property.

In furtherance of their plans, the Sapienzas submitted architectural renderings to the Board of Historic Preservation (the “Board”) of the City of Sioux Falls (the “City”). The Sapienzas disclosed to the Board that some changes may be made to the plans submitted. The Sapienzas also notified the Board that their home would be larger than the previous structure. Based on the information provided, the Board approved the Sapienzas’ proposal, and the City issued a building permit for the proposed construction.

In October 2014, the Sapienzas began constructing their new home. Construction of the home was complete in January 2016.

In the interim, in May 2015, owners of the property adjacent to the Sapienzas’ property—Pierce and Barbara McDowell (the “McDowells”)—sued the Sapienzas. The McDowells’ suit against the Sapienzas was based on theories of negligence and nuisance. Among other things, the McDowells alleged that construction of the Sapienzas’ home violated a state regulation governing new construction in historic districts—ARSD 24:52:07:04. ARSD 24:52:07:04 establishes standards for “[n]ew construction or additions within a historic district.” It covers numerous standards including, among others, the design, height, width, and proportion of such new construction.

The circuit court agreed that the Sapienzas home violated state historic-district regulations. The court entered judgment in favor of the McDowells. The court issued a mandatory injunction requiring the Sapienzas to modify their home to comply with the state regulation for historic districts.

The Sapienzas appealed. On appeal, the Sapienzas argued that ARSD 24:52:07:04 did not apply to their property because their home was not listed on the state or national registers. They relied on ARSD 24:52:07:01, which provides that the regulations in ARSD chapter 24:52:07 “apply to historic properties listed on the state register or the national register, or both.” They interpreted ARSD 24:52:07:01 to limit ARSD 24:52:07:04’s application to new construction on individual properties already listed on the state or national registers. They also argued that the court abused its discretion in granting an injunction requiring modification of their home (as opposed to requiring them to pay monetary damages).

**DECISION: Judgment of circuit court affirmed in relevant part.**

The Supreme Court of South Dakota held that the State historic-district regulations applied to the Sapienzas’ new home constructed in the McKennan Park Historic District.

In so holding, the court disagreed with the Sapienzas’ interpretation of the historic-district regulations. The court explained that “although ARSD 24:52:07:01 indicates that the rules in ARSD chapter 24:52:07 apply to historic properties listed on the state or national registers, the McKennan Park Historic District itself is a ‘historic property’ that is ‘listed’ on the state and national registers.” The court said this was because the enabling statutes for ARSD

24:52:07:01 and ARSD 24:52:07:04 included historic districts within the statutory definition of “historic property.” (See SDCL 1-19A-2(3).) Therefore, explained the court, “ARSD 24:52:07:01’s reference to listed ‘historic properties’ cannot be read as language limiting the applicability of the chapter’s substantive regulations to individually owned historic properties.” Since McKennan Park itself was a listed historic property, and the Sapienzas’ individually owned property was within McKennan Park, the court concluded that even through the Sapienzas’ home was not individually listed on state or national registers, the State historic-district regulations still applied to the Sapienzas’ property. In other words, because the McKennan Park historic district was itself a “historic property” that was listed on state and national registers, the requirements of the State historic-district regulations (i.e., ARSD 24:52:07:04) applied to any new construction or additions within McKennan Park, including the Sapienzas’ new home construction.

The court also concluded that the issuance of the injunction requiring the Sapienzas to modify their newly-constructed home to comply with the historic-district regulations was warranted. In so concluding, the court explained that in determining whether an injunction requiring modification of the Sapienzas’ home was warranted; it had to look at: (1) whether an injunction was statutorily authorized under state law (SDCL 21-8-14); and, if so, (2) whether the circuit court’s decision to grant the injunction was an abuse of discretion.

The court found that an injunction was statutorily authorized in this case. The court noted that under SDCL 21-8-14(1), an injunction could be granted to prevent the breach of an obligation (i.e., here, the historic-district regulations), where “pecuniary compensation would not afford adequate relief.” Here, the court determined that pecuniary compensation would not provide adequate relief as the failure of the Sapienzas to construct their home in accordance with historic standards: (1) impaired the historical integrity of the McKennan Park historic district; (2) decreased the market value of the McDowells’ home; and (3) interfered with the McDowell’s use and enjoyment of their home. These “intangible harms” said the court, “are often not rectified by pecuniary compensation.”

Next, the court concluded that the circuit court had not abused its discretion in issuing the injunction. The court said this was because: (1) the Sapienzas caused the harm, which (2) was irreparable without the injunction because the undermining of the historic district could not be remedied by a payment of money to the McDowells; and (3) the Sapienzas’ acts “were not innocent mistakes,” as they chose to use a construction company unfamiliar with standards for historic districts, and submitted to the Board renderings that did not accurately reflect what they later built; and (4) the hardship to be suffered by the Sapienzas in modifying their newly-constructed home was not “disproportionate” to the benefit to be gained by the McDowells, whose privacy and use and enjoyment of their home was impacted by the Sapienzas’ home.

See also: *Vieux Carre Property Owners & Associates, Inc. v. City of New Orleans*, 246 La. 788, 167 So. 2d 367 (1964).

See also: *Faulkner v. Town of Chestertown*, 290 Md. 214, 428 A.2d 879 (1981).

See also: *A-S-P Associates v. City of Raleigh*, 298 N.C. 207, 258 S.E.2d 444 (1979).

See also: *Hoffman v. Bob Law, Inc.*, 2016 SD 94, 888 N.W.2d 569 (S.D. 2016).

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*Case Note:*

*The McDowells had also alleged that construction of the Sapienzas' home violated the City's chimney ordinance. The proximity of the Sapienzas' new home had caused the McDowells' home to fall out of compliance with the chimney ordinance's chimney height requirements (based on distance and height of adjacent structures), leaving the McDowells unable to use their fireplace. The circuit court agreed with the McDowells and ordered the Sapienzas to modify their home so that McDowells could use their fireplace. On appeal, however, the Supreme Court of South Dakota concluded that the chimney ordinance was a set back requirement, which regulated the height of chimneys on a structure and not the siting of structures on other properties. Although the Sapienzas' new home caused the McDowells' home to fall out of compliance with the chimney ordinance, the Sapienzas' home was not sited in violation of the chimney ordinance, found the court. As such, the court reversed the circuit court's contrary legal conclusion.*

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*Case Note:*

*The Sapienzas had asserted defenses of laches and assumption of risk. However, both the circuit court and the appellate court rejected those defenses.*

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*Case Note:*

*The McDowells had also sued the City for negligence. They had alleged that the City was negligent in issuing the building permit and permitting the Sapienzas to build a home that violated building regulations. The circuit court had agreed, concluding that the City owed a duty to the McDowells to properly enforce the historic-district regulation. But, the Supreme Court of North Dakota disagreed. It concluded that the duty to ensure compliance with permits—which allegedly was breached here—rested with the “individuals responsible for construction,” and not the local government. Moreover, the court found that the McDowells failed to establish the requirements for establishing a special duty owed by the City to the McDowells (i.e., that the City had actual knowledge that the Sapienzas' home would violate ARSD 24:52:07:04; that the McDowells relied on representations of the City to protect them; or that ARSD 24:52:07:04 set forth mandatory acts that the City undertook to protect the individual property owners in the historic district.) Thus, the court concluded that the circuit court erred in holding that the City owed a duty to the McDowells to ensure compliance with applicable building codes and regulations.*

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## Jurisdiction/School District—Town says school district's electronic sign violates town zoning ordinances

School district contends that it is immune from town's zoning ordinances

Citation: *Ravena-Coeymans-Selkirk Central School District v. Town of Bethlehem*, 156 A.D.3d 179, 66 N.Y.S.3d 534 (3d Dep't 2017)

NEW YORK (11/30/17)—This case addressed the issue of whether a school district was immune from a town's zoning ordinances.

**The Background/Facts:** In January 2015, the Ravena-Coeymans-Selkirk Central School District (the "School District") asked the Town of Bethlehem (the "Town") whether any local law would prohibit the School District from replacing an existing traditional sign at one of its elementary school located in the Town with an electronic message board sign. The Town informed the School District that the Town's zoning laws expressly prohibited electronic signs in the Town. The School District then applied to the Town for a variance in order to install the electronic sign (which had already been donated to the school). The Town denied the School District's variance application. However, the School District, nevertheless, installed the electronic sign. Consequently, the Town informed the School District that it was in violation of various provisions of the Town's zoning laws, and ordered the School District to remove the sign. The School District responded that, as a public school, it was not subject to local zoning requirements. Still, "[a]s a precaution," the School District appealed the Town's variance denial to the Town's Zoning Board of Appeals (the "ZBA"). The ZBA also denied the variance request, citing, among other things, traffic safety concerns.

Following the ZBA's denial of its requested variance, the School District filed an action for declaratory judgment with the county Supreme Court. The School District asked the court to declare that, as a public school, the School District was immune and exempt from compliance with the Town's zoning laws as they apply to the use of real property for school purposes.

The Town and the ZBA counterclaimed. They asked the court for an order directing the School District to remove the sign.

The Supreme Court rejected the School District's immunity argument, dismissed the School District's action, and directed that the School District to remove the electronic sign.

The School District appealed.

**DECISION: Judgment of Supreme Court affirmed as modified.**

The Supreme Court, Appellate Division, Third Department, New York, held that the School District was not immune from the Town's zoning ordinances.

In so holding, the court acknowledged that schools do enjoy some immunity from zoning regulations. The court said this was the case where New York's Education Law explicitly requires Education Department oversight of local school boards, such as with: the selection of building sites and erection or demolition of buildings on those sites (see Education Law §§ 401, 407, 408); the sale or acquisition of property (see Education Law §§ 402-405); health or safety conditions within the school (see Education Law §§ 409-409-1); or any use of a school building (see Education Law § 414). However, the court explained that the immunity School Districts have from local zoning regulations is "not so broad and absolute as [the School District] contend[ed]." Where local zoning regulations do not encroach on a state agency's authority, they are authorized and applicable to School Districts, held the court.

Here, the court found that the Education Department did not require review of sign placement, and the School District had not requested any Education Department review of its electronic sign placement. Hence, the court concluded that there was "no duplication of review—nor the possibility of conflicting determinations—by state and local entities," and there was no "encroachment by the Town or the ZBA on a state agency's authority."

Having concluded that the School District was not immune from the Town's zoning ordinances, the court next looked at whether the ZBA had properly denied the School District's request for a variance. The court concluded that the ZBA had properly denied the variance given that: the Town and the ZBA had not refused the School District the opportunity to install any sign, but just an electronic message center sign, which was prohibited in the Town and which also failed to comply with at least three additional size and location requirements of the signage provisions of the Town's zoning ordinance; and the ZBA had "provided rational reasons for its determination, including a concern for traffic safety due to the sign's brightness and potential to be more distracting and hazardous to passing motorists than an ordinary sign."

See also: *Cornell University v. Bagnardi*, 68 N.Y.2d 583, 510 N.Y.S.2d 861, 503 N.E.2d 509, 37 Ed. Law Rep. 292 (1986).

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*Case Note:*

*The School District had argued that, alternatively, it was entitled to immunity from local zoning laws in light of the "balancing of public interests" test. The court rejected that argument, stating that the balancing of public interests tests was generally applied in the case of competing localities and was "not necessary in relation to schools." Rather, with regard to schools, the court said that "the controlling consideration must always be the over-all impact on the public's welfare."*

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*Case Note:*

*Because the county Supreme Court had not made a declaration, the appellate court modified the judgment by declaring that the School District had not shown itself to be immune and exempt from the Town's zoning law in these circumstances.*

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*Case Note:*

*In its decision, the appellate court pointed to a state Court of Appeals case, which had held that schools are not fully exempt from zoning rules, particularly where the educational use “may actually detract from the public’s health, safety, welfare or morals . . . .” (See Cornell University v. Bagnardi, 68 N.Y.2d 583, 510 N.Y.S.2d 861, 503 N.E.2d 509, 37 Ed. Law Rep. 292 (1986).) The School District had argued that the Court of Appeals’ holding applied to only private schools. But, the appellate court disagreed.*

## Zoning News from Around the Nation

### CALIFORNIA

A gun rights group has reportedly filed a petition with the United States Supreme Court, asking the court to consider a Ninth Circuit Court of Appeals decision, which upheld an Alameda County zoning ordinance that prohibited gun stores from being located within 500 feet of certain areas, including residential zoning districts. In the appeal, the gun rights group maintains that the county zoning law is a violation of Second Amendment rights. The Ninth Circuit had rejected that argument, noting that there were locations in the county where guns could be purchased, and finding there is no constitutional right to sell guns.

Source: *Fox News*; [www.foxnews.com](http://www.foxnews.com)

### PENNSYLVANIA

Millcreek Township has reportedly “agreed to pay a resident \$23,396 to settle a federal lawsuit challenging township political sign regulations.” The Township also had earlier settled a separate, similar case for \$15,000. The residents had challenged an ordinance that capped the number of temporary signs allowed on property, including political signs. Under the terms of the recent settlement, the township zoning ordinance will be amended to eliminate the cap on temporary signs.

Source: *GoErie.com*; [www.goerie.com](http://www.goerie.com)

### MAINE

In June, Town of Kennebunk residents will vote on a proposed ban on all retail marijuana sales and operations in Town. The proposed zoning ordinance was approved by the Town’s Planning Board and Board of Selectmen. Last year, recreational marijuana became legal in Maine, and the state legislature is currently considering a proposal to extend a statewide ban on retail sales of marijuana until May 1 to give the state more time to craft regulations related to recreational marijuana. Previously, Governor Paul LePage vetoed a bill created by a bipartisan task force that would have addressed such regulation of recreational marijuana.

Source: *Bangor Daily News*; <https://bangordailynews.com>

# Zoning Bulletin

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## Use—Landowner contends the hosting of commercial events on farmland is permitted as of right under Rhode Island's Right to Farm Act

Township maintains that while statute identifies commercial events as valuable to the preservation of agriculture, it does not make them an as-of-right

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**“agricultural operation”**

Citation: *Gerald P. Zarrella Trust v. Town of Exeter*, 2018 WL 444298 (R.I. 2018)

RHODE ISLAND (01/16/18)—This case addressed the issue of whether, by enacting the 2014 amendment to a Rhode Island statute—subsection 4(a) of Rhode Island’s Right to Farm Act, G.L. 1956 chapter 23 of title 2—the Rhode Island General Assembly expanded the definition of “agricultural operations” to include the hosting of commercial events, such that such use was not subject to a municipality’s zoning control.

**The Background/Facts:** Gerald Zarrella (“Zarrella”) owned land in the Town of Exeter (the “Town”). Zarrella sought to use his farmland to host commercial events, including weddings for a fee. In 2011, the Town sued Zarrella to prevent him from using his farmland for such events. As a result of that legal action, the Town and Zarrella entered into an amended consent judgment that permanently enjoined Zarrella from “using and/or renting [his property] . . . for weddings for a fee or other commercial events.” The injunction ran with the land “until such time” that its terms were “superseded by statute.”

According to Zarrella that time came, and the injunction was superseded, when, in 2014, the Rhode Island General Assembly amended the second sentence of subsection 4(a) of Rhode Island’s Right to Farm Act, G.L. 1956 chapter 23 of title 2 (§ 2-23-4(a)). Prior to 2014, the second sentence of the statute provided that “the mixed-use of farms and farmlands for other forms of enterprise” were “recognized as a valuable and viable means of contributing to the preservation of agriculture.” The 2014 amendment added a list of such mixed uses for other forms of enterprise to include, among other things, “festivals and other special events.” Zarrella asserted that hosting commercial events—including hosting weddings for a fee—was the sort of “other special event[ ]” that the General Assembly recognized as “a valuable and viable means of contributing to the preservation of agriculture” with its 2014 statutory amendment. He argued that the 2014 amendment therefore rendered the 2011 permanent injunction that prohibited his hosting weddings for a fee on his property “a nullity, green-lighting his ability to host weddings for a fee on his farmland.”

With that argument, Zarrella attempted to obtain from the Town a zoning certificate that would allow him to host a “commercial fundraising event” on his farmland. The Town rejected Zarrella’s request for a zoning certificate. The Town maintained that the 2014 amendments to the second sentence of § 2-23-4(a) were simply a statement of policy, and not an expansion of the definition of “agricultural operations” permitted as of right under the statute. As such, the Town maintained that Zarrella’s use of his farmland to host weddings or “commercial fundraising event[s]” was a nonagricultural operation that remained under the Town’s control.

Zarrella sued the Town, asking the court to make a declaration in his favor. The court denied Zarrella’s request for declaratory relief, instead ruling that the 2014 amendment to § 2-23-4(a) “merely set forth a list of encouraged uses of farms and farmland, which did not preempt the town’s authority to restrict nonagricultural operations such as hosting commercial events, including weddings for a fee.”

Zarrella appealed.

**DECISION: Judgment of superior court affirmed.**

The Supreme Court of Rhode Island also agreed with the Town, holding that the 2014 General Assembly amendments to the second sentence of § 2-23-4(a) was a statement of policy—setting forth a list of encouraged activities deemed “valuable and viable” with respect to “contributing to the preservation of agriculture”—and “would not and could not expand the definition of [as-of-right] agricultural operations.”

In so holding, the court analyzed the statutory language, finding it “clear and unambiguous,” and thus ascribing the “plain and ordinary meaning of the words of the statute.” The first sentence of § 2-23-4(a) defined “agricultural operations” to include “any commercial enterprise that has as its primary purpose horticulture, viticulture, viniculture, floriculture, forestry, stabling of horses, dairy farming, or aquaculture, or the raising of livestock, including for the production of fiber, furbearing animals, poultry, or bees . . .” And, again, with the 2014 amendments, the second sentence, of § 2-23-4(a) listed examples of mixed uses of farmland recognized as “valuable and viable means of contributing to the preservation of agriculture.”

The court concluded that there was “no dispute” that the hosting of a wedding for a fee was a “commercial activity” that did not fall under the “agricultural operations” enterprises set forth in the first sentence of § 2-23-4(a). The court also concluded that the hosting of a wedding for a fee was not an “agricultural operation” by virtue of the language contained in the second sentence of § 2-23-4(a). The court explained that even if hosting weddings for a fee fell within the ambit of the second sentence of the statute, that sentence was only “aspirational”—“a statement of policy preference”—and not “definitional.” Such a statement of policy preference did not, concluded the court, transform the nonagricultural use of a wedding for a fee into an “agricultural operation” allowed by right under the statute. Finding that hosting weddings for a fee was an activity that fell outside the statutory definition of “agricultural operations,” the court concluded that it was a “nonagricultural” activity that was subject to the town’s control. Thus, the court found that Zarrella remained bound by the 2011 injunction that enjoined him from using his farmland “for weddings for a fee or other commercial events.”

## Special Exception/Burden of Proof/ Preemption—Zoning board finds applicant need not prove “subjective and vague” special exception requirement

Objectors argue requirement is “specific and objective” and therefore had to be satisfied by applicant

Citation: *Berner v. Montour Township Zoning Hearing Board, 2018 WL 280464 (Pa. Commw. Ct. 2018)*

PENNSYLVANIA (01/04/18)—This case addressed the issue of whether zoning ordinance requirements were “specific and objective” such that a special exception applicant had the burden of showing the requirements were met, or were “subjective and vague” such that the applicant did not bear the burden of proving compliance with the requirement. The case also addressed the issue of whether a state statute—Pennsylvania’s Nutrient Management Act—preempted zoning ordinance requirements related to special exceptions for intensive agriculture uses so as to excuse a landowner’s compliance with the local zoning ordinance.

**The Background/Facts:** Scott Sponenberg (the “Applicant”) owned property in an agricultural zoning district in Montour Township (the “Township”). In April 2013, the Applicant filed an application for a special exception with the Township’s Zoning Hearing Board (“ZHB”) for a proposed intensive agricultural use. Specifically, the Applicant sought to construct a swine nursery barn with an under building for manure storage.

Under the Township’s zoning ordinance, “intensive agriculture,” including “hog raising,” was permitted by special exception, subject to specific requirements. One such requirement, under § 402(1)(E) of the Township zoning ordinance, was that such intensive agriculture uses “shall submit facility designs and legally binding assurances with performance guarantees which demonstrate that all facilities necessary for manure and wastewater management . . . will be conducted without adverse impact upon adjacent properties.” “Adverse impacts” were defined to include: “groundwater and surface water contamination, ground water supply diminution, noise, dust, odor, heavy truck traffic, and migration of chemicals offsite.”

Ultimately, the ZHB granted Applicant’s special exception request. The grant of the special exception was based, in part, on the ZHB’s determination that § 402(1)(E)’s special exception requirement was “subjective and vague” and therefore not a specific requirement that Applicant was required to satisfy to obtain special exception approval.

The ZHB additionally concluded that Pennsylvania’s Nutrient Management Act (“NMA”), 3 Pa. C.S. §§ 501-522, preempted § 402(1)(E)’s special excep-

tion requirement. A provision of the NMA provides that a municipal zoning ordinance may not prohibit or regulate the storage or handling of animal manure or nutrients “if the municipal ordinance or regulation is in conflict with [the NMA] and the regulations or guidelines promulgated under it.” Here, the ZHB concluded that § 402(1)(E) was in conflict with an NMA regulation that provided minimum standards for the “design, construction, location, operation, maintenance and removal from service of manure storage facilities.” (See 25 Pa. Code § 85.351.)

Russell and Donna Berner, Kendall Dobbins, Robert D. Clark, and Robert W. Webber (the “Objectors”) appealed the ZHB’s grant of the special exception to Applicant. The Objectors expressed concerns about the Applicant’s proposed use regarding odor, manure application, potential contamination of groundwater, disease, traffic, and diminution in property value. The Objector’s argued that the ZHB erred in granting the special exception based on its determinations that: (1) § 402(1)(E)’s special exception requirement was “subjective and vague” and therefore not a specific requirement that Applicant was required to satisfy to obtain special exception approval; and (2) the NMA’s regulations preempted § 402(1)(E)’s special exception requirement so as to excuse Applicant’s non-compliance with that provision.

The trial court upheld the ZHB’s decision.

The Objectors again appealed.

**DECISION: Judgment of Court of Common Pleas reversed.**

The Commonwealth Court of Pennsylvania agreed with the Objectors’ arguments. The court held that the special exception requirement of § 402(1)(E) of the Township’s zoning ordinance—requiring applicants submit facility designs and legally binding assurances with performance guarantees that demonstrate that all facilities necessary for manure management will be conducted without adverse impact on adjacent properties—was “specific and objective,” and therefore had to be satisfied by the Applicant (and was not so satisfied here). The court also held that the NMA regulation cited by the ZHB did not apply here, and therefore did not preempt or excuse Applicant’s compliance with § 402(1)(E)’s special exception requirements.

In so holding, the court explained that “a special exception is neither special nor an exception, but rather a use expressly contemplated that evidences a legislative decision that the particular type of use is consistent with the zoning plan and presumptively consistent with the health, safety and welfare of the community.” With regard to burden of proof, the court explained that an applicant for a special exception “has both the duty of presenting evidence and the burden of persuading the ZHB that his [or her] proposed use satisfies the objective requirements of the zoning ordinance for the grant of a special exception.” Once that burden is satisfied, it shifts to any objectors to the application, explained the court.

Here, the court found that Applicant “bore the burden of showing” he made the required submissions under § 402(1)(E). Contrary to the ZHB’s determinations, the court determined that § 402(1)(E)’s requirement that an applicant “submit facility designs and legally binding assurances with performance guarantees that demonstrate that all facilities necessary for, among other

things, manure and wastewater management and water supply will be conducted without adverse impact on adjacent properties” was “not subjective or vague.” Rather, the court found that the requirement was “a specific, objective one” that Applicant bore the burden of meeting.

The court explained that its determination that the language in § 402(1)(E) constituted a specific requirement rather than a subjective, general one, was “bolstered by the facts that”:

(1) the provision require[d] an applicant to make certain clearly identified submissions; (2) the requirement for [those] submissions, by its own terms, applie[d] only to certain, identified intensive agriculture uses such as Applicant’s proposed swine nursery rather than all intensive agriculture uses generally; and, (3) the provision expressly enumerate[d] the categories of adverse impacts that it is aimed at avoiding.

Since Applicant failed to prove he made the submissions identified in and required by § 402(1)(E), the court concluded that the ZHB erred in granting Applicant’s special exception application in part on that basis.

Moreover, in holding that the NMA regulation cited by the ZHB did not apply here, and therefore did not preempt or excuse Applicant’s compliance with § 402(1)(E)’s special exception requirements, the court noted that the NMA regulations identified by the ZHB as being in conflict with § 402(1)(E) applied only to “new manure storage facilities and the expansion of existing manure storage facilities, as part of a plan developed for a nutrient management plan [“NMP”] operation.” (See 25 Pa. Cod § 83.351(a).) Here, Applicant’s proposed use did not require the development of an NMP. Thus, the NMA regulation cited by the ZHB as preempting § 402(1)(E) did not, in fact, apply here, concluded the court. Because the cited regulation did not apply here, the court further concluded that the ZHB erred in determining that the regulation excused Applicant’s non-compliance with § 402(1)(E).

Thus, the court concluded that because Township zoning ordinance § 402(1)(E) was not preempted by the NMA or its regulations, and because Applicant bore the burden of proving he complied with § 402(1)(E) and did not do so, the ZHB erred in granting Applicant’s special exception regulations.

See also: *Bray v. Zoning Bd. of Adjustment*, 48 Pa. Commw. 523, 410 A.2d 909 (1980).

## **Preemption—City ordinance prohibits the loading of crude oil onto tankers in city harbor**

Oil pipeline operator contends ordinance is preempted by numerous federal and state laws

Citation: *Portland Pipe Line Corporation v. City of South Portland*, 2017 WL 6757556 (D. Me. 2017)

MAINE (12/29/17)—This case addressed the issue of whether a city zon-

ing ordinance prohibiting the loading of crude oil onto tankers in the city harbor and the building of new structures for that purpose was preempted by federal and state laws including: the federal Pipeline Safety Act, the federal Port and Waterways Safety Act, federal foreign affairs power, federal maritime law, and the Maine Oil Discharge Prevention and Pollution Control Law.

**The Background/Facts:** Since 1941, Portland Pipe Line Corporation (the “Operator”) has operated crude oil pipelines that stretch from the harbor in South Portland, Maine (the “City”), through New Hampshire and Vermont, and into Quebec, Canada, terminating at oil refineries in Montreal East. In 2007-2008, the Operator began proposing a “flow reversal project,” marketing its ability to transport oil from Canada to South Portland. Due to economic conditions, the proposed project was put on hold, but then revived again in 2012-2013.

In 2014, the City Council passed the “Clear Skies Ordinance” (the “Ordinance” or the “City Ordinance”). Among other things, the City Ordinance made the “storing and handling of petroleum and/or petroleum products” for the “bulk loading of crude oil onto any marine tank vessel” a prohibited use in the Commercial “C” and Shipyard “S” zoning districts in the City. The Ordinance further prohibited the construction, reconstruction, or alteration of facilities, structures, or equipment “for the purpose of bulk loading of crude oil onto any marine tank vessel” in the Commercial “C” zoning district, Shipyard “S” and Shoreland Area Overlay zoning districts in the City, as well as in the Industrial “I” and Non-Residential Industrial “INR” zoning districts in the City.

The Ordinance effectively stood as “as an obstacle to [the Operator’s] efforts to obtain permits and credibly market its services to transport crude oil from north to south.” Accordingly, the Operator challenged the validity of the Ordinance. (Joining the Operator in this challenge was the American Waterways Operators (“AWO”)—a nationwide trade organization that advocates for the interests of United States tugboat, towboat, and barge owners and operators.) Among other things, the Operator maintained that the Ordinance was preempted by various federal and state laws, including: the federal Pipeline Safety Act; the federal Port and Waterways Safety Act; federal foreign affairs power; federal maritime law; and the Maine Oil Discharge Prevention and Pollution Control Law.

Specifically, the Operator argued that Congress preempted the entire field of interstate pipeline safety through the Pipeline Safety Act (“PSA”) and its regulations. (See 49 U.S.C.A. §§ 60101 et seq., and 49 C.F.R. Part 195.) The Operator claimed that the Ordinance was preempted by the PSA “because the purpose of the Ordinance is regulating pipeline safety, which is a field covered by the PSA.” Alternatively, the Operator claimed that, at the least, the Ordinance was preempted by the PSA because the Ordinance effectively impacted “pipeline operations and related safety measures” because it directly regulated “how oil should be transported through the pipeline system.”

The Operator argued that the Ordinance was also preempted by the Port and Waterways Safety Act because that Act “occupies the entire field of ‘the operation of marine tanker vessels in U.S. harbors, including the loading and unloading of their cargo.’” (See Title II of the PWSA, 46 U.S.C.A. Ch. 37,

and the regulations thereunder, volumes 33 and 46 of the Code of Federal Regulations.)

The Operator also asserted that the Ordinance was preempted by the exclusive federal authority over foreign affairs because the Ordinance “profoundly interferes” with the federal policy around tanker operations, which “seeks to facilitate trade among nations and reach international solutions.” Similarly, the Operator asserted that the Ordinance was “preempted more broadly under Art. III, Section 2 of the [United States] Constitution and the Constitution’s embedded principal of federal maritime governance” under which “there is exclusive federal control over maritime activities.”

Finally, the Operator argued that the Maine Oil Discharge Prevention Law, also referred to as the Coastal Conveyance Act, preempts local ordinances “in direct conflict with this subchapter or any rule or order of the board or commissioner adopted under authority of this subchapter.” The Operator argued that since its license was issued via “[Maine] Department [of Environmental Protection] Order,” it therefore qualified as a “rule or order of the board or commissioner” that directly conflicted with the Ordinance.

Claiming there were no material issues of fact in dispute, and asking the court to decide the matter on the law alone, the City and the Operator each asked the court to issue summary judgment in their favor on the City’s preemption claims.

**DECISION: Summary judgment granted to the City with regard to the Operator’s preemption claims.**

The United States District Court for the District of Maine held that the City Ordinance—which prohibited loading crude oil onto tankers in the City harbor and building new structures for that purpose—was not preempted by the federal Pipeline Safety Act, the federal Port and Waterways Safety Act, federal foreign affairs power, federal maritime law, or the Maine Oil Discharge Prevention and Pollution Control Law.

More specifically, the court concluded that the City Ordinance was not a “safety standard” preempted by the federal PSA. The court explained that the Ordinance’s prohibition was not a “standard,” and that therefore it was possible to comply with both the PSA and the Ordinance. The court noted that no provision of the PSA or its regulations required pipeline operators to load crude oil. And, the Ordinance did not set competing levels, quantities, or specifications that made complying with both the PSA and the Ordinance more difficult. Furthermore, the court concluded that “Congress did not intend the PSA to preempt state and local authority to prescribe the location or routing of a pipeline facility.” (See 49 U.S.C.A. §§ 60104(c), 60104(e).)

In holding that the City Ordinance was not preempted by provisions of the federal PWSA and related regulations concerning tankers, the court noted that the Ordinance did not provide any duties or restrictions related to vessel navigation or traffic in ports. Further, the court found that the PWSA’s goals of protecting the environment and minimizing accidents was consistent with the Ordinance. While the PWSA preempted a field of regulation with respect to tanker safety standards and operations, the court found that the Ordinance had “at most an indirect effect on tankers and did not conflict with specific provi-

sions of PWSA such that preemption could be implied.” (See 33 U.S.C.A. § 1221 et seq.; 46 U.S.C.A. § 3701 et seq.) Moreover, the court found that even if the Ordinance was a “stricter safety regulation on transfer facilities than provided for in the PWSA, Congress expressly indicated that states and localities retained their power to enact such restrictions, and no provision of the PWSA suggested an intent to remove local control over the siting of transfer facilities.” (See 33 U.S.C.A. § 1221 et seq.; 46 U.S.C.A. § 3701 et seq.)

The court also held that, although the City Ordinance allegedly had the practical effect of preventing the Operator from importing oil from Canada, the Ordinance was not preempted by the federal foreign affairs power since: the Ordinance “did not explicitly target any particular foreign country”; “federal policy around tanker loading facilities explicitly contemplated stricter local regulations”; “federal policy on cross border pipelines was inconsistent”; “federal policy embodied in the Transit Pipeline Agreement between Canada and United States was one of anti-discrimination that did not implicate [the] [O]rdinance”; and the “State Department permit requirement for cross border pipelines did not indicate an intent to displace state and local authority over ports and oil transfer facilities.” (See 42 U.S.C.A. § 7511b(f)(4); 28 U.S.T. 7449.)

The Court further concluded that the City Ordinance was not preempted under federal maritime law since the Ordinance “only restricted on-shore facilities and conduct and did not regulate activity of tankers or sailors at sea.” (See U.S. Const. art. 3, § 2, cl. 1.) Moreover, the court found that the Ordinance “did not impermissibly ban federally licensed coastwise trade,” or “ban or wholly exclude licensed vessels from using its waterway.” Rather, the court found that the Ordinance “imposed the same restrictions on all vessels that might carry crude oil,” and thus “could not discriminate against federal licensees in favor of local vessels.” (See 46 U.S.C.A. § 9101; 46 C.F.R. Part 154, Subpart E.)

Finally, in finding that the City Ordinance was not preempted by the Maine Oil Discharge Prevention and Pollution Control Law, the court explained that the state statute “expressly contemplate[d] local restrictions consistent with the purposes of coastal protection unless there is a ‘direct conflict’ with the statute, regulation, or ‘order.’” While the Operator received a license from Maine’s Department of Environmental Protection (“DEP”), that license did not constitute a DEP “order” within the meaning of the preemption provision of the statute, found the court. If such a license did have a preemptive effect, noted the court, there would be “virtually no room for local regulation,” which would contradict the state statute’s savings clause, which contemplates local restrictions in addition to state conditions imposed through licenses. Moreover, the court concluded that its conclusion was “bolstered by the fact it [was] not impossible to comply with both the Ordinance and the License.” While the License certified that the Operator’s transfer equipment complied with the state requirements on transfer operations, either to unload or load oil products, the Ordinance only permitted loading or unloading of refined oil, and the unloading of crude oil. (See 38 Me. Rev. Stat. § 541 et seq.)

See also: *Philip Morris Inc. v. Harshbarger*, 122 F.3d 58 (1st Cir. 1997).

See also: *U.S. v. Massachusetts*, 493 F.3d 1, 2007 A.M.C. 1705 (1st Cir. 2007).

See also: *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 123 S. Ct. 2374, 156 L. Ed. 2d 376 (2003).

See also: *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 37 S. Ct. 524, 61 L. Ed. 1086, 1996 A.M.C. 2076 (1917).

See also: *Sawyer Environmental Recovery Facilities, Inc. v. Town of Hampden*, 2000 ME 179, 760 A.2d 257 (Me. 2000).

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**Case Note:**

*The Operator also contended that the City Ordinance: was void for vagueness; was inconsistent with the City's comprehensive plan; violated the Operator's equal protection rights; and violated the Commerce Clause of the United States Constitution. The court held that the Ordinance: was not void for vagueness; was not inconsistent with the City's comprehensive plan; and did not violate the Operator's equal protection rights. As to the Commerce Clause claim, the court held that fact issues precluded summary judgment on that claim. Specifically, the court could not determine whether the Ordinance discriminated against interstate commerce in violation of the Commerce Clause because it found genuine issues of material fact existed as to the "primary effect and primary purpose" of the Ordinance.*

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## Zoning News from Around the Nation

### CALIFORNIA

Recently introduced Senate Bill 827 would exempt housing projects within a 1/2 mile radius of a major transit stop or a 1/4 mile radius of a high-quality transit corridor from various municipal zoning requirements, "including maximum controls on residential density or floor area ratio, minimum automobile parking requirements, design standards that restrict the applicant's ability to construct the maximum number of units consistent with any applicable building code, and maximum height limitations, as provided."

Source: *California Legislative Information*; <https://leginfo.legislature.ca.gov>

### MASSACHUSETTS

With a goal of closing the gap between housing supply and housing demand, Governor Baker has proposed a bill that would allow municipal zoning ordinances that would "foster the creation of housing" to pass with a simple majority vote rather than the currently required two-thirds supermajority vote.

Source: *South Coast Today*; [www.southcoasttoday.com](http://www.southcoasttoday.com)

## VIRGINIA

Pending in the State Legislature, House Bill 1258 and Senate Bill 405 would require municipalities to automatically approve cell phone towers that meet certain parameters. Reportedly, the bills would require automatic approval of cell phone towers under 50 feet tall, and of communications equipment within 500 feet of an existing utility pole. The bills would also prohibit localities from requiring cell phone companies to collocate their equipment on existing towers.

Source: *Martinsville Bulletin*; [www.martinsvillebulletin.com](http://www.martinsvillebulletin.com)

# ZONING PRACTICE

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## PRACTICE ADAPTIVE REUSE



# Repurposing Single-Family Homes and Neighborhoods

By Jeffrey Beiswenger, AICP, and Zachary Tusinger

A wave of change is coming to single-family neighborhoods. Is your community ready?

This edition of *Zoning Practice* will outline strategies for addressing the changes that are likely to come to single-family neighborhoods nationwide, including the demographic changes that will drive housing booms in some communities and widespread vacancies in others, code enforcement tools for addressing vacant properties, strategies for reusing vacant parcels where demand for single-family homes has declined, and accommodating housing in those neighborhoods that are in demand.

## THE PAST AND FUTURE OF AMERICAN SUBURBS

Dramatic demographic changes are unfolding in the United States. This will continue to have a significant impact on the nation's existing and future housing supply. According to professor and demographer Arthur C. Nelson, FAICP, nearly half of all buildings that will be standing in 2030 do not exist today (Nelson 2013). The economic fortunes of cities will shape (and be shaped by) both the form and location of these new buildings. Employment opportunities are also changing—rapidly. From a peak in 1979, more than seven million manufacturing jobs have been lost, according to the Bureau of Labor Statistics, while 53 million jobs were gained in other sectors—including 33 million service-sector jobs (Worstell 2016). In the coming decades, the rise of widespread automation is expected to bring economic upheaval. Will jobs lost to automation be replaced? And where will these jobs be located?

Given this backdrop of seismic economic shifts, home-buying preferences are changing as well. Millennials are more likely to live with their parents, yet are also required to be more mobile than previous generations, given rapidly changing employment prospects. Millennials are also more burdened by debt than previous generations, and are delaying their first forays into the housing market (Lerner 2017). The combination of these macroeconomic and social

factors will serve to create a housing-supply mismatch in the single-family home market that may result in a surplus of single-family homes by 2030 and beyond.

The historical context for these changes is vital to our understanding of how communities are likely to evolve into the near future. In the postwar area, the demand for large neighborhoods of single-family homes was driven by the family formation that occurred from the silent generation (born from 1925 to 1945) as WWII ended and in the population boom that occurred afterward. Federal action in the form of large-scale highway building and the desire of this generation (and baby boomers) to own single-family homes in the suburbs fueled the expansion of suburban (and exurban) communities throughout the U.S.

According to a study by Arthur Nelson, the U.S. will have a surplus of approximately 28 million conventional (medium- to large-lot) single-family homes by 2030. This is primarily due to changing preferences for more small-lot and attached housing units (Nelson 2013). According to Nelson, the 2030 demand will wane for conventional, large-lot homes with a demand for only 32.6 million new units. In 2011, the supply of units was already more than 60.5 million—creating a supply-demand mismatch. Meanwhile, developers may need to catch up on the construction of attached and small-lot units. Additionally, multigenerational and multihousehold occupancies of single-family homes are becoming increasingly common. Few alternatives exist for those who cannot afford, or do not want, a large single-family home in the suburbs. The repurposing of single-family homes into multifamily dwellings, care homes, mixed use buildings, offices, and other uses is more common than ever, both with and without the appropriate zoning in place.

## Beyond Infill: Changing Neighborhoods and Density

As the housing market continues to heat up following the Great Recession, cities are facing new challenges. Increased housing

costs, a shortage of available homes in high-demand areas, and entire generations dealing with the effects of lost income and savings are leading to new pressures on the single-family neighborhoods that once formed the backbone of the American Dream. A half-century slide in the number of people living under one roof has ended and is beginning to reverse, with average household sizes inching up in many states. Increased densities challenge the placid character of suburban single-family neighborhoods. Since federal and state laws limit how much cities can regulate the number of individuals living under one roof, the solution must be multipronged.

Not only do challenges exist in rapidly depopulating communities, but also in hot coastal regions facing housing shortages. In the near term, many cities, particularly in the coastal regions, are dealing with high demand for housing of all types, including single-family homes. Consequently, costs are through the roof, and the rate of creation of new housing units in many markets is frustratingly slow.

## Missing Middle Housing

Part of the pressure on existing neighborhoods stems from the fact that in the U.S., housing is largely constructed in two forms: large, suburban style single-family homes, and large, mid-rise apartment complexes. This gap in housing types is what is often called the “missing middle:” duplexes, fourplexes, small multiplexes, live-work units, and bungalows. Missing middle housing, if properly designed, can bridge the gap between dense mid-rise residential neighborhoods and lower-density, auto-oriented neighborhoods. Missing middle housing has a small footprint and medium density (but is perceived as lower), and can be walkable. This type of housing preserves many of the community and neighborhood aspects of single-family homes, but allows for the added densities that are needed to reduce sprawl and retrofit American neighborhoods.

Vancouver, British Columbia, which is currently dealing with explosive housing

costs, recently released a 10-year housing strategy that has the potential to radically transform a city that is predominately made up of single-family houses, even though it is perhaps better known for its high rises. The strategy relies to a large degree on the creation of more missing middle housing. Of the 72,000 homes the city hopes will be created over the next decade, 4,000 are intended to be “laneway homes,” or accessory dwelling units. Another 10,000 of those are anticipated to be ground-level town houses, row houses, and other forms of medium-density infill grafted strategically into the city’s existing single-family neighborhoods (City of Vancouver 2017)

#### DEALING WITH VACANT HOMES

Due to shifting demographics and changing economic conditions, certain neighborhoods could see widespread vacancies of surplus single-family homes. Fortunately, tools are available for addressing these vacancies. During the foreclosure crisis of the late 2000s, effective tools were developed as entire neighborhoods were emptying. In the case of widespread foreclosures, the vacancies were often temporary. In the future, vacancies may be more permanent as demand for single-family homes dissipates in certain areas. The following tools can help keep vacant homes from falling into disrepair, or help find alternative uses for them.

#### Code Enforcement Tools—VPOs and Receivership

An effective tool to address vacant homes in your community is the vacant property ordinance (VPO). The tool can be easily incorporated into your municipal code, but also requires some enforcement capacity. Fees can be established to help offset some of the enforcements costs.

During the foreclosure crisis of the late 2000s, the VPO was developed and utilized by towns and cities nationwide to address the abandonment of homes and prevalence of bank-owned homes. Many communities adopted VPOs and code enforcement protocols to help minimize the impact of vacant properties. Doug Leeper, the code

enforcement division manager in Chula Vista, California, shepherded a vacant property registry and fee program through the approval process in 2007 (\$15.60). Leeper estimated that there were more than 9,000 foreclosed homes in Chula Vista during the housing crisis; the vacant property program registered more than 2,600 homes by 2007.

By 2009, more than 400 communities had adopted similar ordinances. Central to the ordinance is a requirement that vacant properties are registered by the city or in a national database accessible by the city. A small annual registration fee is required and properties are required to be maintained. Security must also be provided, with a contact number prominently displayed. If the worst-case scenario materializes in your community, and single-family homes become vacant faster than they



Ed Kohler, Flickr (CC BY 2.0)

⊕ VPOs are one tool that municipalities can use to minimize the impacts of vacant and abandoned homes.

can be absorbed by the market, a VPO is a good stop-gap measure.

A more aggressive approach is through a vacant building receivership ordinance. Referred to as “fix it or lose it” by the city of Baltimore, it provides a building official with the authority to petition the court for the appointment of a receiver to help raze, rehabilitate, or sell a vacant building. The city also has a “Vacant to Value” program that allows for property under city ownership to be transferred to a developer for improvements and eventual sale. Receivership has the potential to quickly address and remedy nuisance properties (City of Baltimore).

A key benefit to a more aggressive approach is that it prevents property speculators from sitting on dilapidated properties over an extended period. It also allows for the receiver to pass property to an organization or developer quickly, to put the property back to productive use. The ordinance also provides a mechanism whereby the jurisdiction can collect liens and penalties from delinquent property owners (Jacobsen 2015).

#### The Agrihood

The local food movement is alive and well in the U.S. In Detroit, a collection of forward-thinking advocates from the city’s urban agricultural community have turned vacant single-family homes and lots into community resources for urban agriculture. Detroit’s hard-hit north side has created a neighbor-

hood where agriculture is the centerpiece of a mixed use urban community. A formerly dense urban neighborhood now has a successful working farm at the center.

In 2004, Detroit had only 100 urban farms. By 2013 urban agriculture was recognized as a legal use in the city’s zoning ordinance. This reduced uncertainty and allowed existing urban farms to remain in place and expand. In 2016, there were approximately 1,400 urban farms in Detroit.

The Detroit ordinance establishes legal definitions for many urban agriculture uses, including aquaculture, aquaponics, farm stands,

farmers markets, greenhouses, rainwater catchment systems, hoop houses, orchards, tree farms, urban farms, and urban gardens. The ordinance operates as an overlay to the city’s existing zoning ordinance. The code includes standards for setbacks, lighting, maintenance, drainage, nuisance issues, noise, and hours of operation. Importantly, the ordinance grants legal nonconforming use status to all agricultural operations that predate the ordinance.

Portland, Oregon, has incorporated urban agriculture into the zoning ordinance with the express intent of connecting local food production to the community at a

neighborhood level. The zoning updates include clear definitions of several land-use types, including:

- market gardens (or orchards) where food is grown to be sold
- community gardens, where several individuals collaborate to grow food
- food membership distribution sites, farmers markets

The focus of amendments to the Portland zoning code was to legalize these activities in all zoning districts, while adding performance standards to address possible impacts.

Urban agriculture can be applied to suburban areas, as well. Sacramento County, a mixed urban/suburban county in California, adopted a new urban farm ordinance in 2017. The ordinance permits market gardens, small farms on vacant property, and urban ag stands to sell produce, eggs, honey, and other goods on the site of an urban farm or garden. The ordinance also allows egg-laying hens and ducks on parcels as small as 10,000 square feet, and permits beehives.

Urban agricultural concepts can breathe new life into urban and suburban neighborhoods. These concepts have applicability all over the U.S. as changing demographics and socioeconomic conditions reduce the demand for inner city and large suburban lots. (For more information, see “Urban Agriculture as an Emergent Land Use,” *Zoning Practice*, August 2014: [planning.org/media/document/9006887](http://planning.org/media/document/9006887).)

#### GENTLE INFILL

Thus far, we have focused on strategies for unwanted homes and lots in single-family neighborhoods, and how to use code enforcement and site acquisition tools to help address impacts, encourage reuse of structures, or provide alternative uses for the structure or land. What about areas where new housing supply is needed, but the existing homogenous single-family neighborhood is not meeting the market or social demand for new housing, particularly workforce housing? One concept that is gaining traction is “gentle infill,” where infill development is compatible with its surroundings to achieve urban design goals and produce more housing.



Jason Meredith, Wikimedia. (CC BY 2.0)

Some municipalities explicitly encourage larger, more expensive homes with minimum dwelling unit requirements.

Zoning codes are typically full of provisions that prohibit housing through scale and density constraints. Some jurisdictions even have minimum dwelling unit sizes with the express intent of encouraging larger, more expensive homes. Market solutions, in the form of smaller units, can be facilitated with zoning changes and respond to demand for missing middle housing.

In 2009, the town of Mammoth Lakes, California, recognized that infill could be a way to bring more development and vitality to town, particularly with respect to workforce housing. It adopted a Community Benefit/Incentive Zoning Policy (CB/IZ). The idea behind the CB/IZ was to provide development incentives (zoning flexibility, impact fee reductions, etc.) in exchange for community benefits such as workforce housing.

A draft *Downtown Revitalization Action Plan* was presented to the town council in September 2017. This plan includes an “incremental development overlay ordinance” and includes concepts such as:

- expedited planning and permit processing
- allowing shared parking, off-site parking, and other creative parking solutions
- code flexibility for smaller projects,

particularly with regard to existing non-conformities

- preapproved building prototypes (e.g., mixed uses, housing types, etc.) to shorten the review process

Microunits that can be built off-site and brought in on wheels can also play a role in a gentle-infill strategy, particularly as temporary or permanent workforce housing. Microunits can be used as accessory dwelling units, part of multiunit clusters, or as freestanding “skinny” homes on small leftover parcels. Consultant Darin Dinsmore helped Truckee, California, implement this incremental infill process to transform an auto-oriented corridor into a mixed use community by allowing opportunity sites to develop with street-fronting uses such as offices, retail buildings, mixed use buildings, and town houses. In addition to zoning flexibility, a key component of this approach is cost containment—allowing fee reductions or waivers to allow these projects to be built with less cost.

Dinsmore and others argue for permit streamlining, permit fee reductions, parking reductions, and other “breaks” to incentivize infill development. Riverside, California,

has embraced this approach by creating a Residential Infill Incentive Program. It targets underutilized parcels in suburban and rural residential zones that are 21,780 square feet or larger. Properties that qualify are eligible for fee reductions to make additional residential development less expensive in areas where existing infrastructure is in place (City of Riverside).

Davis, California, has taken a much different approach to help facilitate infill development. Instead of providing financial or processing incentives, the city prepared a helpful guide to infill development, including principles and expectations. This document is still in draft form, but is publicly available (see References). This guide recognizes the complexity of infill development and seeks to help developers navigate the process to ensure that high-quality infill is ultimately built (City of Davis).

#### Accessory Dwelling Units

For years, accessory dwelling units (ADUs) have been a cost-effective way to increase the housing supply. These smaller housing units, either within the existing footprint of a home or in a small accessory structure, were traditionally created with the purpose of housing extended family members nearby. They are generally a good way to increase the density in low-density neighborhoods, while at the same time providing supplementary income for home owners. While some cities have embraced accessory dwelling units, others have put up roadblocks and tried to ban them all together.

Recognizing their potential to limit sprawl and provide additional affordable housing, many states and jurisdictions have taken steps to ease the path for home owners to build accessory dwelling units. At the end of 2016, California enacted a sweeping law streamlining the process whereby cities should approve them, as well as reducing the fees associated with them.

Given the high cost of housing in California, the number of applications for ADUs has exploded in many jurisdictions, including Santa Barbara. ADUs may become one of the key fixtures for a “post-suburban city” where the modern household is not just the traditional nuclear family, but full of many generations, multiple unrelated adults living together, college students moving back home for longer periods of time, and home

owners looking for additional cash flow to keep up with housing and living costs (Loudenback 2017).

Cities outside of California are making significant progress, as well. Arlington, Virginia, recently rewrote its regulations to allow for an easier process for home owners to construct and license ADUs after only 20 eligible home owners successfully obtained licenses over an eight-year period (Sullivan 2017). Perhaps no city has seen as much success in promoting or building ADUs as Portland, Oregon. In 2016, the number of ADUs approved (615) was tantalizingly close to the number of single-family homes approved (867) (Law 2017).

This is in stark contrast to just a decade ago, when Portland approved 30 times more single-family home permits than permits for ADUs. As the number of lots available for single-family homes decreases, and as demand for housing remains strong, the economics of maximizing the buildout of a single-family lot by adding an ADU become more profound. With administrative and fee changes that the city has made for processing ADU permits, it becomes even cheaper than it otherwise might have been. Portland exempted ADUs from impact fees for roads, parks, and utilities in 2010 and has since renewed that exemption twice. Even with the recent boom, there is considerable development potential remaining throughout the city as well. Portland State University recently calculated that there are approximately 70,000 single-family lots in the city that could add an ADU. (Law 2017)

#### Additions and Garage Conversions

One of the biggest limiting factors to how many people can live in a single-family home is the number of bedrooms it is permitted to have. Adding additional bedrooms has traditionally been relatively easy. In some cases, it’s a matter of adding a wall or subdividing a room. In other cases, the additional bedroom(s) can take the form of an addition to the home. In still other circumstances, there may be underused or uninhabitable space that can be claimed, like a garage, attic, or basement. In the past, this has been a straightforward process: As long as you obeyed setbacks and floor area ratio requirements, all you needed was a building permit.

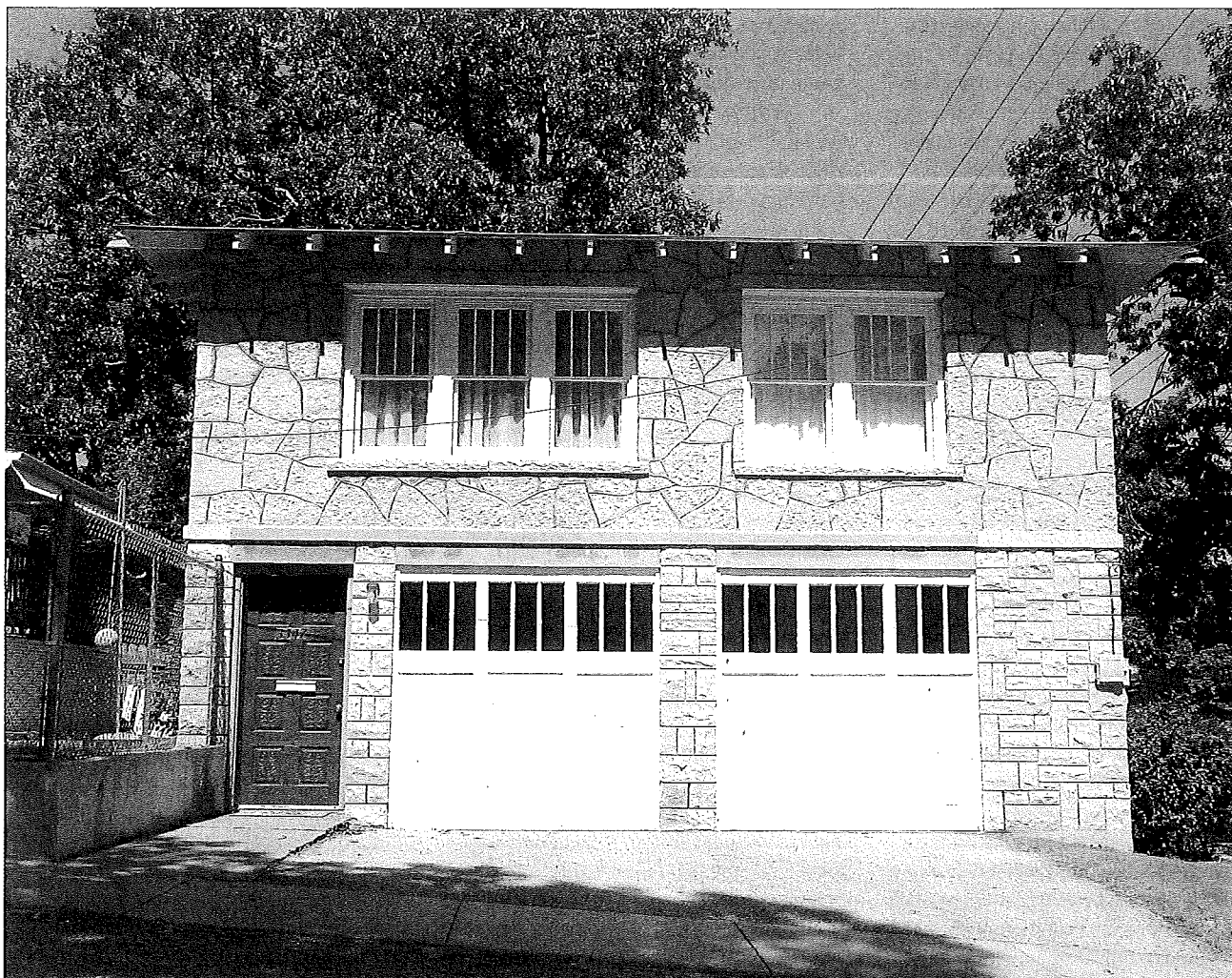
Some cities concerned about overcrowding and its effect on on-street parking in neighborhoods have instituted limits and greater oversight. Berkeley, California, has instituted new restrictions on additional bedrooms that would require reviews and permits before increasing the number of bedrooms on a residential parcel beyond four. Davis, California, similarly requires additional off-street parking for homes with five or more bedrooms. It is probably no coincidence that both cities are college towns with burgeoning student populations. San Luis Obispo, another California college town, regulates high-occupancy residential uses where there are more than six adults living together in one housing unit. This includes greater oversight and higher off-street parking standards.

Another method for increasing the living space in a home is to convert all or part of a garage, either into additional rooms for the main unit or as part of an ADU. The new California state laws for streamlining ADU approval contemplate existing garages as one option for home owners. Finishing garages (or in some parts of the country attics or basements) may often be a more affordable option for adding living space than an expensive addition or freestanding ADU. As driving habits and car ownership levels change, and as (some) cities relax off-street parking requirements, garage conversions may increasingly be part of the reimagining of single-family neighborhoods.

#### Short-Term Rentals

A pressure on single-family neighborhoods is the rise of the sharing economy and short-term rentals. In popular tourist areas, a well-run Airbnb can generate more money for a home owner than might otherwise be generated through a long-term residential lease. Some recent data has shown that spikes in Airbnb listings can be linked to increases in the monthly cost of rent. This encourages property owners to withdraw their properties from the housing market and rent them out as short-term rentals.

The impact of short-term rentals is more profound than just shrinking the home supply and increasing the cost of rent. Airbnbs and other short-term rentals have the potential to drastically change the character of existing single-family neighborhoods. Imagine—suddenly the



Abe Ezekowitz/Wikimedia (CC SA-3.0)

home next door has a different someone living there two, three, or four nights a week. Different cars come and go. There's the constant shuffle of luggage and people in and out of the home. People unfamiliar with the neighborhood or sound ordinances host parties. Now imagine that the neighborhood has multiple short-term rentals (maybe it's a popular vacation area and has a view). Now it's not just one house on the block that has become transient in nature, but three. Suddenly the neighborhood begins to lose its cohesion.

Unlike ADUs, short-term rentals have only recently been a regulatory concern. Some cities have prohibited them completely, with Healdsburg, California, a popular wine country destination concerned about the cost of housing and proliferation of vacation homes, being a prime example. Cities like Sonoma, California, have limited how many short-term rental permits can be issued, while

➤ Converting garages into accessory dwelling units is a popular and effective way to adapt to increased demand in single-family neighborhoods.

others, like New York City, have significantly increased their regulation and oversight.

Regulations for short-term rentals can be tailored to fit the unique needs of the community. So far, there is no one set of best practices. Rohnert Park, California, wanted to maintain the character of its suburban-style residential neighborhoods that were beginning to experience pressure from the proliferation of nearby wine country short-term rentals. The city crafted an ordinance in 2017 that banned whole-house rentals, yet still allowed single-room rentals subject to certain conditions. The city felt this compromise still allowed residents to supplement their incomes through short-term rentals, but helped to maintain the housing supply and preserve neighborhood character.

### Multigenerational Housing

The American Planning Association estimates that by 2040, more than 20 percent of the population will be over the age of 65 and over 28 percent of the population will be under the age of 18. Combined, this is nearly half of the total population (Hodgson 2011). It is expected that more and more of these persons will live in multigenerational households. Younger adults are also living at home for longer periods than in the past.

Zoning codes need to be adjusted to accommodate multigenerational households. In 2013, AARP calculated that 51 million American live in multigenerational homes (Abrahms 2013). This is 16.7 percent of the U.S. population. Some builders have begun to recognize this, and are building

dwelling unit typologies that can accommodate more than one household. Others offer two master suites, or dens that can be converted into a bedroom. By making sure that a bedroom and a bathroom are on the first floor, these developments appeal to multigenerational households with elderly parents who may not want or be able to climb the stairs. In response to demographic changes and the related housing demand, a developer in Huntington Beach, California, scrapped plans for a 23-acre, single-family neighborhood and instead designed a multigenerational neighborhood with a mix of small homes, town houses, and carriage houses with dwelling units designed to accommodate home-based businesses. The neighborhood was intentionally designed to allow for young families, downsizing baby boomers, their aging parents, and their boomerang adult children to all live together nearby.

## CONCLUSION

Where do single-family neighborhoods go from here? Riding the waves of change, both demographic and economic, will be key for the survival and evolution of these neighborhoods over the coming decades. In areas where population and financial trajectories might otherwise point toward disinvestment, the full toolbox should be available to practitioners to guide the next stage of development: code enforcement, receivership, and urban agriculture are all possibilities. At the other end of the spectrum, where there is pressure for greater densities, municipalities should be prepared to see increasing numbers of short-term rentals, home additions, and accessory dwelling units. In some cases, practitioners should be prepared to guide single-family neighborhoods toward more complete transformations—walkable neighborhoods with a mix of single-family and multifamily

development. Regardless, today's single-family neighborhoods will look very different in the coming years.

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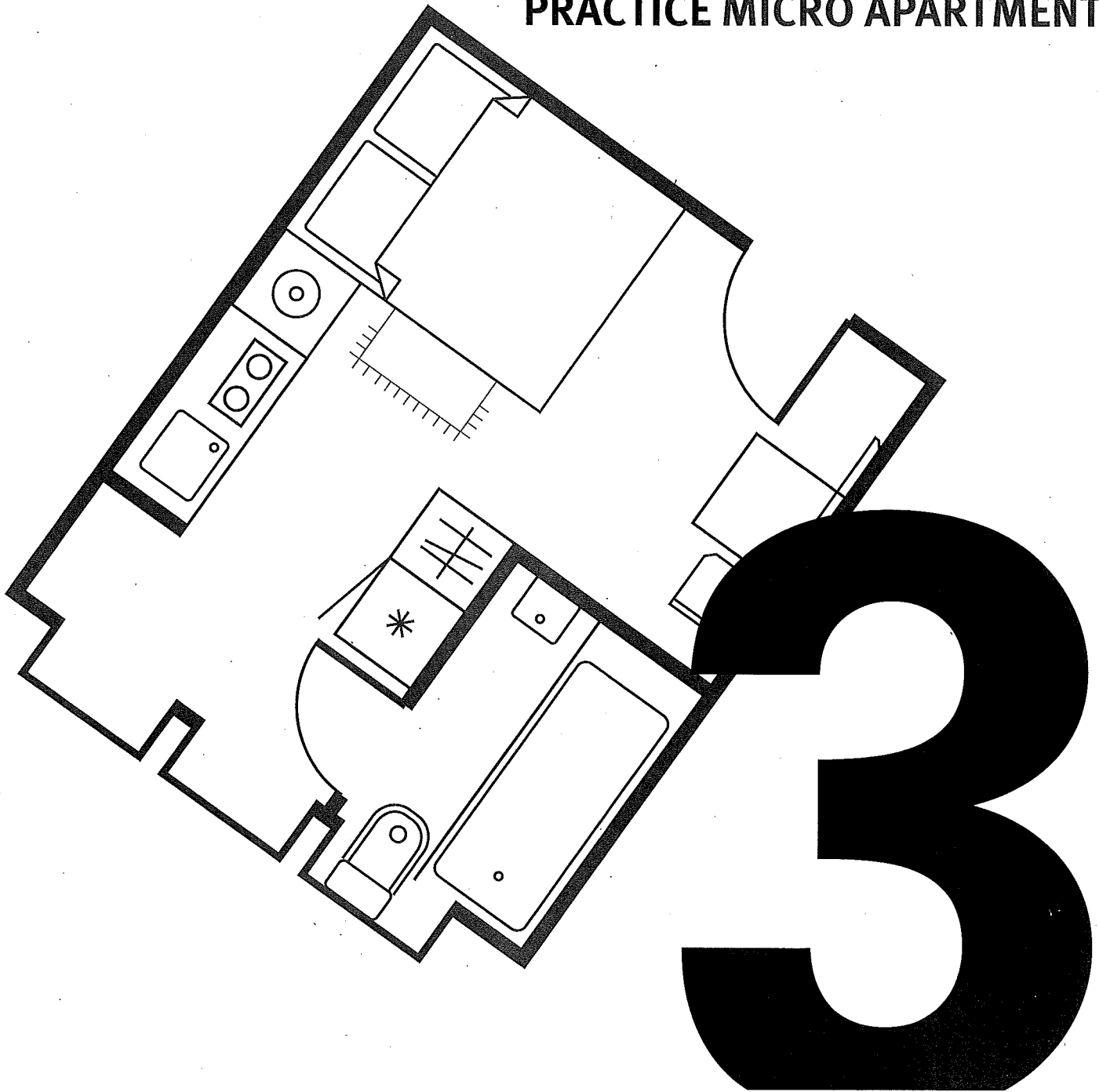
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## PRACTICE MICRO APARTMENTS



# Zoning for Micro Apartments

By David Morley, AICP

There are few symbols of consumption as conspicuous as a giant new home. But “living large” isn’t for everyone. Over the past several years, interest in small living spaces has inspired widespread media coverage of tiny houses (see the November 2015 edition of *Zoning Practice*) and micro apartments.

While there is no authoritative definition of micro apartment, most commentators reserve this label for new multifamily residences with less than 400 square feet of living space. Typically, these are efficiency dwelling units (also known as “studio” apartments) with a single combined living, dining, and sleeping room. Even though 400 square feet is smaller than most two-car garages, this is considered spacious in some markets. Consequently, the more relevant concept is size relative to market norms. The term “micro apartment” is probably saved for efficiency units that are at least 20 percent smaller than the average size in the area (i.e., a specific neighborhood, district, or city).

Few communities address micro apartments (or an analogous term) explicitly in their zoning codes. However, many zoning codes make it physically impossible or financially infeasible to build very small efficiency dwelling units. The purposes of this article are to highlight why rising demand for micro apartments may merit zoning changes, and to summarize how a small number of cities have amended their codes to add definitions, use permissions, and additional standards to sanction smaller dwelling units than would otherwise be permissible.

## THE MARKET FOR MICRO APARTMENTS

The primary forces driving demand for very small apartments in cities are demographic changes and real estate market dynamics. The maturation of millennials (those born between about 1982 and 2004) and the retirement of the baby boomers (born between 1946 and 1964) has changed demand for housing in many urban neighborhoods. These large generations are driving population growth in many cities, and so far, housing markets have been slow to respond to pent-up demand.

## Demographic Change

In 1957—at the height of the postwar baby boom—the average household size in the U.S. was 3.33 persons. By 2017, this number had fallen to 2.54 persons (U.S. Census Bureau 2017a). The reasons are clear: An increasing percentage of women are choosing to delay or forgo marriage and childbirth in favor of educational attainment and career advancement.

However, smaller families haven’t typically led to smaller homes. In fact, the average size of a newly constructed single-family home in the U.S. increased from 1,660 square feet in 1973 to a peak of 2,687 square feet in 2015, a more than 60 percent gain (U.S. Census Bureau 2017b). This doesn’t tell the whole story, though.

Between 1960 and 2017, the percentage of single-person households increased from 13 to 28 percent (U.S. Census Bureau 2017a). The trend is more dramatic in large cities. According to the most recent estimates, people living alone account for 33 percent of all households in the 25 most populous cities (U.S. Census Bureau 2017c). Generally,

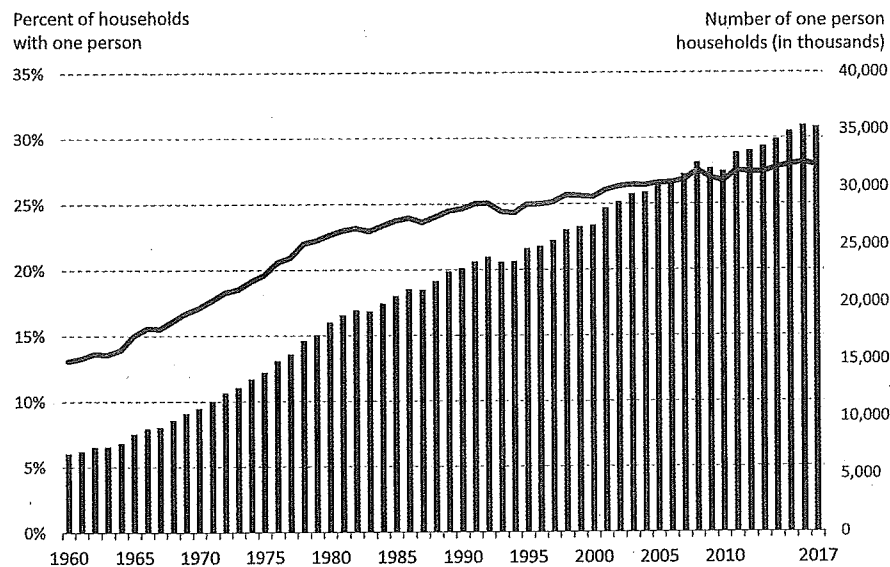
these individuals are not the target market for new detached single-family residences. In these cities, 57 percent of single-person householders are renters, and this figure jumps to 87 percent for householders under the age of 35.

## Market Dynamics

As the percentage of single-person households increases, we need significantly more dwelling units to house the same number of people. In cities with growing populations, this means more multifamily residences. For built-out cities, the math only works if you can fit more units in the same building footprint. And that’s exactly what’s happening.

Across the country, the average unit size for large multifamily developments is dropping, and efficiency apartments have shrunk the most (Otet 2016). In 2006, the average size of an efficiency apartment in a building or complex with more than 50 units was 614 square feet. By 2016, this had fallen to 504 square feet, an 18 percent decrease.

According to an Urban Land Institute survey of current micro-apartment residents, 82

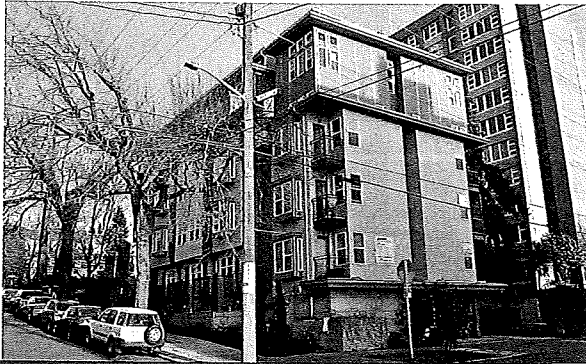


Source: U.S. Census Bureau, Current Population Survey, Annual Social and Economic Supplements, 1960 to 2017.

U.S. Census Bureau

Living alone used to be relatively uncommon in the U.S.

Joe Mabel, Wikimedia (CC BY-SA 3.0)



③ This micro-apartment building in Seattle's Capitol Hill neighborhood has 60 units with private bathrooms and kitchenettes.

percent did not start out looking for a micro apartment (Carey et al. 2015). Rather, they chose their residences as a trade-off for lower rents; proximity to work or school, neighborhood amenities, and transit; the ability to live alone; internet service; and unit finishes.

The target market for micro apartments are single men and women under the age of 34, currently living with roommates, and earning less than \$40,000 per year (Carey et al. 2015). Market research indicates that most of these individuals rent micro apartments when they are new to a career or city, and that they graduate to larger units after a year or two. These units seem especially attractive to entry-level technology and new media industry workers (Carey et al. 2015).

#### Micro apartments versus single-room occupancy units

While there are no formal distinctions among different types of very small multifamily residences, real estate professionals routinely draw distinctions between single-room occupancy (SRO) units geared toward very-low-income residents, and micro apartments aimed at young professionals. SRO units typically rent by the day, week, or month, and do not have kitchens. Meanwhile, contemporary micro apartments generally lease by the year (or school semester) and have in-unit kitchens or kitchenettes (i.e., refrigerator, microwave, and sink). However, in some cases the built form and internal space configuration can be very similar for both.

Individual micro-apartment projects can vary considerably in terms of unit features and communal amenities. Some

New SRO projects haven't gained as much media attention as market-rate micro-apartment projects; however, in some cities, public housing authorities and nonprofit developers have shown renewed interest in SROs as "housing-first" for individuals experiencing homelessness. Contemporary SROs may provide in-unit kitchenettes, and often incorporate communal spaces for cooking, eating, or socializing. In these cases, the key physical distinction between micro apartments and SRO units are the quality of the finishes.

#### PLANNING FOR MICRO APARTMENTS

The reasons for supporting micro-apartment projects go beyond satisfying existing market demand. However, careful planning is necessary to assess the likely effects of regulatory changes and to address community concerns.

#### The Benefits of Micro Apartments

All other factors equal, per-unit housing costs decrease as unit size decreases and project density increases. Consequently, micro-apartment projects can increase housing choice and affordability in tight housing markets. Beyond the benefits to individual residents, micro apartments in pedestrian- and transit-friendly locations make more efficient use of existing

projects incorporate a range of design solutions to make units seem larger, including built-in furniture and storage areas, high ceilings, large windows, and movable walls and kitchen islands. Others place the emphasis on communal facilities, such as shared kitchens, dining areas, and gathering spaces. At the top of the market, some buildings offer both.

infrastructure and public services, consume less energy, and have a lower carbon footprint than larger residences.

Micro apartments can also be part of a local economic development strategy to attract and retain young professionals. Expanding opportunities for people to live near downtown jobs and amenities can be attractive to current and prospective employers who need access to an educated workforce.

#### Assessing Market Conditions

Not every housing market is ripe for micro-apartment development. Furthermore, what qualifies as a micro apartment in one market may seem roomy in another. Before considering regulatory changes to facilitate micro-apartment development, it makes sense to assess the local housing market, to determine the likely effects of permitting dramatically higher density residential development on housing costs in the community, and to gauge how much smaller apartments would need to be to make a micro-apartment project "pencil out" for developers.

For communities with low housing demand, regulatory changes will likely have little to no effect on development outcomes or housing costs. On the other hand, making micro apartments legal in communities with very high housing demand relative to existing development opportunities may have the unintended consequence of raising housing costs across the board as property owners and developers see the potential of higher rents per square foot.

This same relationship between housing demand and existing development opportunities will also partly determine the



Ted Ebran, Flickr (CC BY-SA 2.0)

③ The luxury Channel apartment building in Washington, D.C., includes more than 150 micro apartments with sizes ranging from 337 to 358 square feet.

size threshold for micro-apartment development. However, there are other important factors to consider, such as the difference in development costs between wood-frame and concrete- or steel-framed buildings. Many local building codes only permit wood-frame construction for buildings up to 75 feet tall. Taller buildings also typically require additional fire safety features. To finance the leap to concrete- or steel-framed construction, developers may need to squeeze more units per floor.

#### Addressing Community Concerns

Sometimes existing residents will express concerns about any new project or policy proposal that will increase residential density. The most common concerns are related to traffic, parking, and community character.

Because micro apartments are most attractive to young professionals with lower-than-average rates of car ownership, conventional traffic and parking concerns may be unfounded. However, the popularity of on-demand ride services among young professionals can lead to traffic problems associated with curbside pickups and drop-offs. Here, and in areas where the existing infrastructure is over capacity, it is important to evaluate site design, infrastructure improvement, and transportation demand-management alternatives before encouraging or allowing micro-apartment projects.

Often the most productive strategy for addressing fears about community character is to keep discussions focused on the objective physical characteristics of projects, rather than the demographic characteristics

of potential residents. This can help planners and local officials identify site and exterior building design priorities to mitigate aesthetic impacts.

If micro apartments are dramatically smaller than existing multifamily units, some community members may also worry about how they may affect potential occupants. While there is research supporting the idea that overcrowding negatively affects psychological well-being, these studies, generally, focus either on public housing residents or housing-instable families sharing tight quarters. If this research bears any relevance for contemporary micro-apartment projects, it is likely limited to highlighting the importance of ensuring access to adequate natural light and guarding against overoccupancy of individual units.

#### REGULATORY BARRIERS TO MICRO APARTMENTS

Fundamentally, state and local building codes determine the absolute lower limit on dwelling unit size through minimum habitable space standards. Most state and local building codes in the U.S. are rooted in the International Code Council's International Building Code (IBC). The most recent version of the IBC stipulates that efficiency dwelling units in new multifamily buildings must contain a living room with at least 220 square feet of floor area (which does not include space devoted to closets or bathrooms) (§1208.4). Very few state and local building codes permit dwelling units smaller than this.

One notable exception is California's Health and Safety Code, which explicitly



Rhododendrites, Wikimedia (CC BY-SA 4.0)

Westminister Arcade in Providence, Rhode Island, is the oldest indoor shopping center in the U.S. In 2013, developers converted the top two floors to 48 residences, most of which are sized between 225 and 450 square feet.

authorizes cities and counties to adopt ordinances permitting efficiency dwelling units as small as 150 square feet (§17958.1). Additionally, the International Property Maintenance Code (IPMC) requires existing single-occupancy efficiency units to have only 120 square feet of clear floor area of habitable space (§404.6). At least one locality, Grand Rapids, Michigan, uses this standard to set an absolute minimum size for new micro apartments (§5.6.08.B.3.f).

Beyond a building code's habitable space requirements, many local zoning codes include provisions that establish an explicit minimum floor area for dwelling units of different types. The minimum dwelling unit size is virtually always more restrictive

#### SELECT DEMOGRAPHICS OF CITIES WITH ZONING STANDARDS FOR MICRO APARTMENTS

City	State	2016 Est. Population	2010 Population	2010 Density (pop. / square mile)	2016 Percentage of Single-Person Households	2016 Percentage of Crowded Housing Units <sup>1</sup>	2016 Percentage of Highly Rent-Burdened Households <sup>2</sup>
Grand Rapids	MI	196,445	188,040	4,236	30.3	1.1	47.3
Hartford	CT	123,243	124,775	7,179	38.8	3.7	41.4
Miami	FL	453,579	399,457	11,136	38.1	3.0	54.6
Oakland	CA	420,005	390,724	7,004	32.4	4.7	42.1
Seattle	WA	704,352	608,660	7,251	38.6	2.0	34.5
Springfield	MO	167,319	159,498	1,952	37.6	1.0	39.5
West Palm Beach	FL	108,161	99,919	1,807	39.0	2.5	49.3

1. Housing units with an average of at least 1.51 occupants per room.  
2. Households paying 35 percent or more of income for gross rent.

## EXAMPLES OF USE DEFINITIONS FOR MICRO APARTMENTS

City	State	Use Definition
Grand Rapids	MI	<i>Micro-Unit:</i> A dwelling unit, included as part of a multiunit development and located in a Mixed-Use Commercial zone district, with a total gross floor area of no more than 475 square feet.
Hartford	CT	<i>Efficiency/Micro-Unit:</i> A dwelling unit with at least 300 square feet and no more than 500 square feet of usable floor area, and only one combined living and sleeping room. The unit may also have separate rooms containing only kitchen facilities or bathroom facilities.
Miami	FL	<i>Micro Dwelling Unit:</i> A small Multifamily Residential Dwelling Unit type that shall include sanitary facilities and kitchen facilities.
Oakland	CA	<i>Micro Living Quarters:</i> [O]ne or more rooms located in a multiple-tenant building having an average net floor area of 175 square feet, but a minimum size of 150 square feet of net floor area, and occupied by a permanent residential activity. Bathroom facilities, which include toilet and sink, as well as shower and/or bathtub, are required to be located within each individual Micro Living Quarter. Cooking facilities are not allowed to be located within each individual Micro Living Quarter, and shared kitchen facilities are required within close proximity on the same building floor.
Seattle	WA	<i>Small Efficiency Dwelling Unit:</i> [A] dwelling unit with an amount of square footage less than the minimum amounts specified for Efficiency Dwelling Units in the Seattle Building Code, and that meet the standards prescribed in §23.42.048.
Springfield	MO	<i>Micro-Efficiency Multifamily Dwelling Unit:</i> A dwelling unit with a total floor area of 400 square feet or less.
West Palm Beach	FL	<i>Micro-Unit:</i> [A] small residential unit with a total square footage between 300 square feet and 549 square feet, with a fully functioning kitchen and bathroom.

than what would otherwise be allowed by the local building code (otherwise, the standard would be pointless).

Additionally, many zoning codes require a minimum lot area per dwelling unit for each zoning district. These minimum lot area requirements combine with required setbacks and maximum heights to create a minimum dwelling unit size that may vary lot by lot but is, again, virtually always more restrictive than habitable space requirements in the local building code.

Other zoning standards present indirect barriers to micro-apartment development. Minimum off-street parking requirements increase per-unit development costs and set a practical limit on the amount of space developers can devote to dwelling units, as do minimum open space or common area requirements. And multifamily development standards that stipulate a maximum percentage of efficiency units or a minimum average unit size make micro-apartment-only buildings impossible.

### ZONING STANDARDS FOR MICRO APARTMENTS

The author has identified seven cities in the U.S. that define and regulate a use analogous to micro apartments in their zoning codes (see table above). While these jurisdictions are all principal cities of metropolitan statistical areas, they are not similarly populous or dense. Based on the most recent American

Community Survey estimates, all seven have a higher percentage of single-person households than the national average (28.1 percent). Five of the cities are growing at a rate faster than the national average (4.7 percent), have a higher percentage of crowded housing units than the national average (1.1 percent), or have a higher percentage of highly rent-burdened households than the national average (40.7 percent).

### Use Definitions

Defining micro apartments as a distinct use can be helpful if the community wants to single out these units for special zoning treatment. However, if micro apartments are subject to the same use permissions and development standards as other multifamily dwelling units (or other efficiency units), there is no clear benefit to adding a new definition to the zoning code.

While numerous popular press articles have spotlighted existing or planned micro-apartment projects in New York; Chicago; San Francisco; Seattle; Denver; Boston; Washington, D.C.; Portland, Oregon; Providence, Rhode Island; and Chattanooga, Tennessee, only one currently defines micro apartments as a distinct land use. Seattle added a definition and use-specific standards for “small efficiency dwelling units” in 2014 after developers had already built several small-scale

micro-apartment projects with shared kitchens (taking advantage of existing standards for congregate residences) in relatively low-density residential areas. In this case, the city moved to check an existing development trend. For other cities, the motivation seems to be to facilitate a type of development that was previously either explicitly prohibited or extremely impractical due to district-specific development standards.

None of these cities use the term “micro apartment” in their codes, and there is no clear consensus alternative analogous term (see table below). Four define analogous terms—in part—based on a maximum size, and four define them—in part—based on a minimum size. Five require in-unit kitchens, and one prohibits in-unit kitchens. Three define analogous terms—in part—based on their location within specific zoning districts.

Communities that want to define micro apartments as a distinct use should consider adding a simple modifier to an existing defined term in its zoning code (e.g., “dwelling unit, micro”) and placing the new definition near the modified term in a section of generally applicable definitions or a section explaining use classification. This will help project applicants find the definition quickly. Clarify the distinguishing characteristics of the new use, but do not incorporate use permissions or use-specific standards into the definition.

## Use Permissions

Defining micro apartments as a distinct use makes it easy for the community to single out these units for special treatment in tables or lists of use permissions by zoning district. For some cities, the goal may be to permit micro apartments in zoning districts that do not otherwise allow multifamily development. For others, the goal may be to limit micro apartments to a small number of transit- or pedestrian-oriented districts. There are three basic types of use permissions in zoning: by right (or as-of-right), ministerial, and discretionary.

Permitting micro apartments by right sends a clear signal to potential developers that these units are desirable in a certain zoning district. This approach presents applicants with the fewest hoops to jump through before obtaining zoning approval.

Requiring a ministerial approval for micro apartments communicates that the community is generally supportive of these units in a certain zoning district, but this support is conditional upon compliance with objective standards intended to minimize negative impacts on proximate uses. This approach gives planning staff an opportunity to review an application before the planning director or zoning administrator issues an “over-the-counter” permit. Often, communities use ministerial approval processes to confirm that a particular application conforms to use-specific standards (see additional standards discussion below).

Permitting micro apartments subject to a discretionary use permit (often referred to as a conditional, special, or special exception use permit) indicates that the community is potentially supportive of these

units in a certain zoning district, provided the specific spatial and operational characteristics of the use do not pose compatibility problems. Discretionary approval processes typically involve one or more public hearings before the local legislative body, planning commission, or zoning board renders a final decision on an application. Because the longer approval time frame and a greater degree of uncertainty can discourage some applicants, discretionary use permissions work best for locations or circumstances where objective standards are likely to be insufficient to ensure compatibility.

Interestingly, only four of the seven cities noted that define a term analogous to micro apartments in their zoning codes include these terms in their enumerations of use permissions (see table below), although in one of the three remaining examples, the city’s use definition specifies permissible zoning districts. Six cities permit micro apartments in at least one district by right or ministerial approval. The other requires all micro-apartment projects to apply for a discretionary use permit. However, if the project is sited on less than one acre and does not require an environmental impact report, the planning director can render a decision, and a public hearing is not mandatory.

Communities that want to include district-based use permissions for micro apartments in their zoning codes should consider permitting these units either by right or with a ministerial approval in all pedestrian-oriented districts that allow multifamily residences. While these projects have significantly higher unit densities than conventional multifamily buildings, the number of residents per acre does not, typically,

increase proportionally. Furthermore, based on the demographics discussed above, micro-apartment households are less likely to own cars or enroll students in local schools.

## Additional Standards for Micro Apartments

Many contemporary zoning codes limit use permissions with use-specific development or operational standards. By codifying objective additional standards for specific uses, the community can permit a wider range of uses without relying on discretionary use permits to ensure compatibility. In some cases, use-specific standards apply only in certain zoning districts, while in other cases the standards apply community-wide.

The most common use-specific standards in contemporary zoning are off-street parking requirements. Typically, communities require every land use to provide a minimum amount of off-street parking on-site. However, a growing number of communities stipulate the maximum amount of off-street parking for various uses (with or without also specifying a minimum).

All seven cities noted that define a use analogous to micro apartments in their zoning codes have adopted use-specific, off-street parking standards (see table on page 7). Four of the cities require a minimum amount of off-street parking; the other three cap the amount of off-street parking.

Beyond off-street parking standards, there is little consistency from place to place regarding other use-specific zoning standards. Six cities include an explicit minimum unit size. Five require on-site bicycle parking. Three include site-specific locational restrictions, such as transit proximity or inclusion within an overlay district. One stipulates

## USE PERMISSIONS FOR MICRO APARTMENTS

City	State	Defined Use	Permitted in One or More Districts	
			By Right or Ministerial Approval	Subject to Discretionary Use Permit
Grand Rapids	MI	Micro-Unit	X <sup>1</sup>	
Hartford	CT	Efficiency / Micro-Unit	X	
Miami	FL	Micro Dwelling Unit	X	
Oakland	CA	Micro Living Quarters		X
Seattle	WA	Small Efficiency Dwelling Unit	X <sup>2</sup>	X <sup>2</sup>
Springfield	MO	Micro-Efficiency Multifamily Dwelling Unit	X <sup>1</sup>	X <sup>1</sup>
West Palm Beach	FL	Micro-Unit	X	

1. Use permissions do not distinguish between the defined use and other multifamily dwelling units.

2. Use permissions do not distinguish between the defined use and other dwelling units.

## USE-SPECIFIC STANDARDS FOR MICRO APARTMENTS

City	State	Defined Use	Minimum Size	Off-Street Parking Standards	Additional Standards
Grand Rapids	MI	Micro-Unit	120 square feet clear floor area (2015 IPMC)	Min.: 0.5 space/unit	§5.6.08.B.3.f
Hartford	CT	Efficiency/Micro-Unit	300 square feet	Max.: 2 spaces/unit	§3.3.1.A(5)(a)
Miami	FL	Micro Dwelling Unit	275 square feet	Max.: 1.1 spaces/unit	§6 Table 13
Oakland	CA	Micro Living Quarters	150 square feet	Min.: 0.25 space/unit	§17.101C.055
Seattle	WA	Small Efficiency Dwelling Unit	220 square feet	Min.: 0.5 space unit	§23.42.048.B
Springfield	MO	Micro-Efficiency Multifamily Dwelling Unit	220 square feet habitable space (2012 IBC) <sup>1</sup>	Min.: 1 space/unit	None
West Palm Beach	FL	Micro-Unit	300 square feet	Max.: 0.55 space/unit	§94-106(a)(8.a)

1. Not addressed in zoning code.

minimum sleeping area space and kitchen and bathroom facilities requirements. One stipulates common area space and management requirements. And one requires on-site car- and bicycle-sharing stations and a monthly per-unit contribution to the city's trolley fund.

Communities wondering if they should include use-specific standards for micro apartments in their zoning codes should consider whether local building code requirements are sufficient to protect the health, safety, and welfare of occupants. Think about how district- or building-form-specific development standards are likely to affect the physical possibility and financial feasibility of micro-apartment projects. Identify any locations within permissible zoning districts that would be inappropriate for micro-apartment projects. If full in-unit kitchens are not required by definition, specify how much space developers must devote to shared kitchens and the location of those kitchens. Either let the market determine how much parking is needed on-site or base minimum

off-street parking requirements on the likely demographics of micro-apartment households. Finally, consider whether increasing usage of on-demand ride services merits dedicated space for pickups and drop-offs.

### CONCLUSIONS

Despite widespread media coverage in the past five years, micro-apartment development in the U.S. is rare. Currently, demand for very small units seems to be concentrated in the urban cores of large cities with a shortage of affordable rental housing for young, single professionals. In highly stressed housing markets, zoning reforms targeted at making micro-apartment projects legally permissible, physically possible, and financially feasible may lead to dramatic increases in housing supply. However, these reforms may not require singling out micro-apartment development for special zoning treatment. In some cases, the only necessary reform may be eliminating minimum unit size requirements or off-street parking standards.

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David Morley, AICP, is a senior research associate with the American Planning Association in Chicago, where supports APA's applied research efforts; develops, organizes, and participates in educational sessions and workshops; and writes for APA publications. Morley also coedits *Zoning Practice* and *PAS QuickNotes*, a series of briefing papers that explain planning basics to public officials and engaged citizens.

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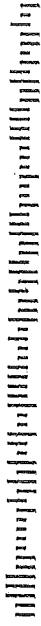
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