



OTTEN JOHNSON ALERT

Colorado Legislature Takes Up Zoning Reform

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Last week, a bill championed by Governor Jared Polis was introduced in the Colorado General Assembly proposing to limit local governments' ability to prohibit moderate-density housing in transit-oriented areas and single-family neighborhoods. The bill would also require local governments to plan for housing needs, and also contains provisions intended to support manufactured housing. If passed, the 106-page bill, which sets parameters for local governments' planning and zoning decisions, would depart from Colorado's heavily "local control"-oriented regulatory framework pertaining to land use and would reserve authority to the state government to limit the state's current patchwork approach to land use control.

The Colorado bill follows on recent legislative efforts in other states to loosen zoning restrictions in furtherance of more housing production. As housing costs have skyrocketed in recent years, states, including California, Oregon, Washington, Utah, and Montana, have focused efforts on reining in local zoning control, which can artificially limit housing production and impose significant costs and delays in the construction of housing. Although the Colorado proposal contains provisions requiring local governments to plan for housing needs and to permit moderate residential density in transit-served areas, the bill also would require local governments to permit so-called "missing middle" housing—duplexes, triplexes, rowhouses, townhouses, and accessory dwelling units—in areas of urbanized municipalities that currently only permit single-family residential uses.

Bill Summary

While the bill, which is caption SB23-213, covers a broad range of land use policies, it principally contains four parts:

1. **Housing Needs Analysis:** The bill tasks the Department of Local Affairs (DOLA) with conducting a housing needs assessment every five years that analyzes housing stock and current and future housing needs on statewide, regional and local levels. This assessment will serve as the basis for municipalities to create their own housing needs plans, including their plans to address affordability and displacement mitigation.
2. **Accessory Dwelling Units (ADUs):** ADUs are housing types that accompany single-family residences, such as mother-in-law suites, backyard cottages, or other, similar dwelling units. The bill requires local governments to allow ADUs as a use by right in any part of a municipality where single-unit detached dwellings are allowed as a use by right. The stated goal is to increase the housing supply and stabilize housing costs in already established neighborhoods and minimize impacts on infrastructure. As part of the bill, local governments would be prevented from establishing and enforcing more restrictive local laws and standards for ADUs than for single-unit detached dwellings, thus theoretically making construction and permitting of ADUs more feasible.
3. **Middle Housing:** In addition to ADUs, the bill further requires local governments to allow middle housing as a use by right where single-unit detached dwellings are allowed as a use by right as well. “Middle housing” is defined in the bill as single structures with two to six separate dwelling units, townhomes and cottage clusters of up to four detached dwelling units that share a common courtyard. Similar to the changes above for ADUs, local governments would be unable to enact more restrictive laws and standards for middle housing than for single-unit detached dwellings. There are similar goals here with middle housing to increase the housing supply and variety, and thus provide an avenue for more affordable housing options in the state.
4. **Transit-Oriented Areas and Key Corridors:** For areas in urban municipalities that are within one-half mile of a fixed-rail transit system, the bill would require those municipalities to zone transit-oriented areas to allow at least 40 residential units per acre for multifamily residential housing and at least 60 residential units per acre net density for mixed-income multifamily residential housing. The bill also would require DOLA to establish regulations for “key corridors,” including areas presently zoned for commercial or institutional uses with frequent transit service, to allow residential dwellings in these areas. These portions of the bill also restrict the ability of urban municipalities to require new off-street parking as part of such multifamily developments. The stated goal in the bill is to allow for

more affordable housing options in these transit-oriented areas and key corridors in order to allow residents to drive to work and services less, thus reducing transportation costs and greenhouse gas emissions.

The bill also covers a variety of other topics, such as loosening restrictions on manufactured and modular housing compared to site-built homes and prohibiting local governments from enacting and enforcing residential occupancy limits that differ based on the relationships of the occupants.

Legal Analysis

In Colorado, local land use control has historically been left to the discretion of local governments. The bill thus raises questions as to whether the state has the legal authority to preempt local regulation. Although this analysis depends on the local government's classification as statutory or home rule, in either scenario, we anticipate the state has authority to enact the measures in the bill.

Colorado municipalities are either statutory or home rule. Statutory jurisdictions only have the authority granted to them by the state, while home rule jurisdictions can adopt charter and ordinance provisions contrary to state statutes. Under certain circumstances, however, local charters and ordinances may be preempted by state statutes.

Whether state law preempts a local ordinance depends on whether the local ordinance involves a matter of statewide, local, or mixed state and local concern. This determination requires an analysis of four factors: (1) the need for statewide uniformity of regulation; (2) the extraterritorial impact of the local regulation; (3) whether the state or local governments have traditionally regulated the matter; and (4) whether the Colorado Constitution specifically commits the matter to either state or local regulation. In matters of purely local concern, a home rule ordinance supersedes a conflicting state statute. In matters of purely statewide concern, the state statute supersedes the local home rule ordinance. In matters of mixed state and local concern, the home rule municipal ordinance may coexist with a state statute, as long as there is no conflict between the ordinance and the statute, but in the event of a conflict, the state statute supersedes the conflicting provision of the ordinance. Further, a state statute can preempt local regulations expressly, impliedly, or by operational conflict. Express preemption occurs when the legislature clearly and unequivocally states its intent to prohibit a local government from exercising its authority over the subject matter at issue. Implied preemption occurs when a state statute impliedly evidences a legislative intent to completely occupy a given field by reason of a dominant state interest. Operational conflict occurs when a state statute and local ordinance contain provisions that are inconsistent or irreconcilable.

If the bill is enacted and a challenge results, proponents of the bill will argue that it preempts any conflicting local ordinances. They will argue that the bill's regulation and implementation of housing policies constitute a matter of mixed state and local concern because (1) uniformity of housing regulations is needed to address the statewide affordable housing crisis and ensure that regional housing markets equally share in the creation of affordable housing; (2) local housing regulations do create extraterritorial impacts, as communities that do not contribute to the production of affordable or middle income housing can effectively price lower income residents out of their jurisdictions and therefore exacerbate affordable housing issues in neighboring communities; (3) traditional regulation of the matter is split, as both the State and local governments have traditionally regulated different aspects of housing and land use matters; and (4) the Colorado Constitution does not specifically commit the matter to either the State or home rule jurisdictions. Challengers will point to Colorado's long history of local control over zoning. Resolution of any such challenge will depend on the specific provisions of the bill as enacted and the particular ordinances in question.

For a more detailed analysis of the legality of the bill, please see the Colorado Housing Affordability Project's [website](#) and the [Research Memorandum](#) on this topic.

Our Take

The proposed legislation is a significant attempt by state government to expand its involvement in land use regulation. However, there are several things that the bill does not do, and state and local leaders should consider other measures that have the potential to produce additional needed housing supply. Therefore, we offer the following non-exhaustive list of comments and suggestions:

- As our clients know full well, the most effective means of producing the amount of housing that Colorado requires is to do so at scale. We recommend that state and local leaders continue to consider opportunities to expedite and approve the development of larger-scale multi-family structures and master planned communities to allow for greater housing production that will meet immediate needs.
- Although zoning reform is one needed element of addressing Colorado's housing affordability crisis, state leaders should continue to consider other tools that will help to advance our need for more affordable housing. For example, the dearth of affordable housing throughout the state is in part due to high construction costs, and the state should therefore consider legislative or other regulatory measures to limit costs on development—particularly with respect to impact fees and other public improvements exactions. Delays in the permitting process for new housing could be addressed by state legislation that requires or encourages more efficient processing of development applications. The state could also

consider tax reforms that abate property taxes on projects that provide affordable housing, provide infrastructure assistance for infill projects, or mitigate local governments' reliance on sales tax revenues, which disincentivizes them from approving residential development. Additionally, state leaders could consider further reforms to construction defect legislation that limit developers' ability to construct for-sale condominiums, which are one of the most affordable forms of for-sale housing.

- Finally, we encourage state leaders to avoid taking steps to undermine the production of additional housing and investment in the housing market in Colorado, such as the legislature's efforts to repeal the statewide ban on rent control and efforts to further limit the efficacy of financing tools such as metropolitan districts.

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