

INCLUSIONARY ZONING

REALTOR® Party
Hot Topic Alerts



Housing affordability is a problem for virtually every American city. The costs of housing continues to increase, while [incomes remain stagnant](#). The [U.S. Government](#) considers housing to be affordable when the cost is no more than 30% of a household's income, but this does not always reflect reality. In Los Angeles, for example, approximately [one in three renters](#) pays more than 50% of his or her income for rent.

The issue of affordable housing has been addressed in a variety of ways. One method that cities are using is [inclusionary zoning](#). Inclusionary zoning refers to a program, regulation, or law that requires or provides incentives to private developers to incorporate affordable housing in their developments.

In this Hot Topic Alert, we focus on zoning and other land use regulations. We look at the impact of zoning laws on real estate development and consider the general outline

of zoning laws. Various inclusionary zoning strategies are considered, along with the recent elimination of single-family zoning in [Minneapolis](#) and [Oregon](#). We also discuss "[missing middle housing](#)" in modern cities. Finally, we look at some of the ways REALTORS® are involved in advocacy related to local zoning and land use in their communities.

Zoning is government's tool for regulating land use. The [typical zoning ordinance](#) dictates how land can be used in different geographic areas within a city or county. The community is partitioned according to a master plan that sets out the permitted uses in specified areas. Industrial or other commercial uses will be concentrated in one area, while residential uses are kept in other parts of the community.

Zoning and land-use decisions in the United States are [highly decentralized](#). The decisions are usually made at the local level, subject to some control by the states. The extent of that

control depends on the law of the state. Most states grant at least some cities and counties considerable discretion in enacting local ordinances ("[home rule](#)"). Home rule may be limited to cities of a [certain population](#), or it may be optional, something to be [chosen by a city](#). Home-rule cities are subject to a charter adopted by the city, which is a type of constitution for the city. Under home rule, a community can do anything not specifically prohibited by the state constitution, state statutes, or the charter itself. Home-rule cities are given the [power to enact zoning ordinances](#), but are not explicitly required to do so. The major limitation on home-rule zoning is that the ordinances must be adopted according to a master or [comprehensive plan](#). The comprehensive plan [provides a framework or blueprint for land use in the community](#), and articulates the goals to be met by zoning ordinances. The plan is developed by the city, with input from local stakeholders.

A few states follow a more restrictive rule on municipal authority. This rule, known as "[Dillon's Rule](#)" after the author of an influential treatise on municipal government, holds that city and county governments have only the powers expressly granted to them by the state legislature or necessarily implied by those express powers, and the powers that are essential to the municipality's existence and functioning. In states that follow Dillon's Rule, [no zoning ordinance may be adopted](#) unless state law allows it. The ordinances that may be adopted are subject to limits. For example, [Missouri law](#) says that a zoning ordinance is limited to regulating "the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, the preservation of features of historical significance, and the location and use of buildings, structures and land for trade, industry, residence or other purposes." State law may also contain limitations on zoning codes, such as not allowing ordinances that [prohibit condominiums](#).

While most states and the federal government take a largely hands-off attitude towards local zoning, there are some areas in which state or federal laws override local ordinances. For example, zoning ordinances are subject to the Americans with Disabilities Act. [Regulations adopted under that Act](#) say that a city must "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity."

HOW DOES ZONING AFFECT HOUSING DEVELOPMENT AND CONSTRUCTION?

A zoning ordinance sets out limits on the permitted uses of land. A neighborhood may be zoned for residential use, but there will be further requirements, especially concerning [density](#). There may be a limit on the number of housing units per acre, or the types of apartment buildings may be limited. Some suburban communities have [zoning ordinances](#) that require residential properties to have a minimum lot size of one-half acre or more per family, or may require minimum building floor areas of 1,000 square feet or more. The City of Des Moines has proposed a comprehensive plan, known as [Des Moines 2040](#) that would require most homes built in Des Moines to have a full basement, a single-car garage, and a driveway. Minimum lot sizes for single-family houses would range from 7,500 to 10,000 square feet.

While zoning ordinances are enacted to promote livable and economically viable communities by balancing the needs of all community members, too much regulation may be counter-productive. Some [researchers have argued](#) that zoning and other land-use restrictions are responsible for driving up housing costs, particularly in high-demand areas such as New York City or California. Restrictive zoning [limits the supply of available housing](#), driving up the price and reducing affordability.

It would be difficult to make a serious argument that all zoning laws and ordinances should be repealed. Rethinking and re-evaluating a community's zoning rules, however, does not mean that the value of zoning is being ignored.

INCLUSIONARY ZONING

Inclusionary zoning is a [market-based approach](#) to providing affordable housing. It requires or encourages developers to set aside/include a certain percentage of housing units in their projects for low- and moderate-income residents. Inclusionary zoning leverages private-sector development, minimizing the financial subsidies required to meet affordable housing goals. It also promotes several policy goals. In gentrifying neighborhoods, inclusionary zoning can help slow the displacement of low-income households. [Research shows](#) that inclusionary zoning also provides low-income families with access to low-poverty neighborhoods and better performing schools.

Inclusionary zoning is implemented in a variety of ways. In [New York City](#), developers are given a "floor area bonus" that allows them to construct a larger building if they set aside a certain percentage of units to be affordable (which the City [defines](#) as "when a household spends no more than 1/3 of its income on rent and utilities.). [Montgomery County, Maryland](#), requires that between 12.5 and 15% of the total number of units in every subdivision or high-rise building of 20 or more units must be moderately priced (defined as affordable to

households earning 65% of the Area Median Income (AMI) for garden-style apartments and 70% for high-rise apartments). Developments with fewer than 20 but more than 10 units are required to make a payment "in the amount of one-half (0.5) percent of the Purchase Price of each dwelling unit" to the Housing Initiative Fund in lieu of a moderately priced dwelling unit requirement on-site. See [Code of Montgomery County Regulations 25A.00.02.03](#).

Atlanta has designed an [inclusionary zoning plan](#) with the goal of promoting affordable housing for those who live and work in the city, and to keep Atlanta rents relatively affordable for working individuals and households within the income range of police, firefighters, teachers, city and county employees, and young professionals. The ordinance, which went into effect in January 2018, applies to all new multi-family rental developments with at least 10 units. Developers of all covered developments must set aside at least 10% of their units for incomes at or below 60% of, or 15% of their units for incomes at or below 80% of AMI. Developers who do not set aside units must pay a one-time in-lieu fee of 15% of AMI per unit that the developer has chosen not to provide. The in-lieu fees feed into a trust fund to be used for developing, rehabilitating, and/or reconstructing additional affordable housing units. A developer who builds the affordable units is offered incentives, such as 15% additional floor area ratio, reduced minimum parking space requirements, priority review of applications, or "major project status," which allows the developer to meet with representatives from city departments in order to identify issues and expedite the permitting process.

Chicago's [Affordable Requirements Ordinance \(ARO\)](#) requires developments subject to the ordinance to set aside 10% of residential units as affordable housing or to donate \$100,000 per required unit to the city's Affordable Housing Opportunity Fund. If a project receives financial assistance from the city, 20% of the units must be affordable. Projects are generally subject to the ARO if they include 10 or more



residential units and receive certain zoning changes, include land purchased from the city, receive financial assistance from the city, or are a part of a Planned Development in a downtown zoning district. The Chicago approach has [not proven successful](#). Developers subject to the ARO have preferred to pay the fees and have created only 450 affordable housing units since the enactment of the ARO in 2007.

[Developers](#) have raised concerns that overly restrictive inclusionary zoning requirements could backfire, making building new housing more expensive and burdensome, thereby discouraging new construction. Because inclusionary zoning is market based, it will be [ineffective if it is not profitable](#) for developers. Inclusionary zoning applies only to new construction or to renovations, so areas that see more market-rate development are the areas in which more affordable housing has been generated. It has been blamed for a reduction in the supply of affordable housing and the number of housing starts in the [suburban Boston area](#).

The Boston situation appears to be unique. Unlike Boston, most communities with inclusionary zoning have seen positive outcomes. [Nationwide research](#) shows that inclusionary zoning has increased the stock of affordable housing in the communities where it has been implemented. Most of the benefits of the increased housing stock have gone to residents with moderately low incomes, who are often ineligible for income-based housing assistance.

There are additional benefits to inclusionary zoning. [Children living in areas covered by inclusionary zoning](#) do better in school, either because they are attending better schools, or because their living situations are more stable. Affordable housing options are often [created in low-poverty areas](#), which allows disadvantaged families to move to those areas. This can improve health outcomes for lower-income residents and encourage [social and economic integration](#).

The detrimental effects to developers can be softened by careful crafting of the inclusionary zoning ordinance. Most ordinances contain some form of [incentive](#) to developers that can offset some of the cost of providing affordable housing units. A developer could designate units as affordable for [higher-income levels](#), thus allowing tenants to be charged more for rent. Some cities allow developers to pay an “in lieu” fee instead of constructing affordable units. In [San Jose](#), developers who do not make at least 20% of their units affordable have the option of paying a fee of \$125,000 for each required affordable unit that was not constructed, to meet the 20% minimum.

Some ordinances vary the requirements for affordable housing, based on the location of a development, or based on the type of construction. [Fairfax County, Virginia](#)—home of the nation’s first inclusionary zoning ordinance—allows developers to increase the density of a project according to the number of affordable units offered. In California, [state law](#) gives developers an incentive to include affordable and senior housing in projects by allowing them up to a 35% increase in project densities, depending on the amount of affordable housing provided.

Inclusionary zoning does have many critics. Many [oppose it on philosophical grounds](#), believing that it is wrong to regulate private development. Others oppose it because they believe it to be [ineffective](#), or no more effective than existing housing programs. There are still others who harbor the [mistaken belief](#) that affordable housing will increase crime in the neighborhood.

Philosophical objections are difficult to counter. The concerns about effectiveness and crime, however, can be addressed through [better communication](#) between planners, developers, and residents. Improved communication to address concerns can also help planners design plans that are more effective and that accommodate the needs and concerns of all stakeholders.

BUT IS IT LEGAL?

Zoning regulations are, at least in theory, local matters. There are, however, limits to how much control local governments may exercise in this area. Some states have recently enacted laws that prohibit municipalities from enacting inclusionary zoning ordinances.

Indiana enacted an [inclusionary zoning ban](#) in 2017. The ban prohibits municipalities and counties from enacting zoning ordinances that would have the effect of “requiring real property to be designated or reserved for lease or sale to a group of occupants, owners, or residents classified by income or assets.” The law, which was supported by the [Indiana Apartment Association](#), also prohibits local governments from requiring developers to agree to designating or reserving units as a condition of approval of a building or land use permit, a land use petition, or any plats. Inclusionary zoning was not common in Indiana, but city government in Bloomington was [reportedly considering](#) such an ordinance.

In Wisconsin, a prohibition against inclusionary zoning took effect in April 2018. [The law](#) prohibits local governments from enacting, imposing, or enforcing “a zoning ordinance . . . regulation, or policy that prescribes that a certain number or percentage of new or existing residential dwelling units in a land development be made available for rent or sale to an individual or family with a family income at or below a certain percentage of the median income.” A panel of the Wisconsin Court of Appeals had previously [ruled in 2006](#) that the City of Madison’s inclusionary zoning ordinance ran afoul of Wisconsin’s prohibition against rent control ordinances, but a proposal in [Milwaukee](#) attempted to get around that prohibition by saying that inclusionary zoning would apply only to projects that receive public financing. The new law includes no exception for publicly funded projects, leaving the future of the Milwaukee proposal questionable, at best.

A [Florida law](#) regarding affordable housing was amended to limit inclusionary zoning, and sets out requirements for a lawful ordinance.

The law, which went into effect on June 28, 2019, allows counties to adopt inclusionary zoning ordinances, but says that any such ordinance must “provide incentives to fully offset all costs to the developer of its affordable housing contribution.” Incentives could offer the developer density or intensity bonus incentives or more floor space than allowed under the current or proposed future land-use designation or zoning, reduced or waived fees, such as impact fees or water and sewer charges, or other types of incentives.

Inclusionary zoning ordinances may soon face constitutional limitations. A case that was filed with the U.S. Supreme Court, [Cherk v. Marin County](#), questions the constitutionality of Marin County’s inclusionary zoning ordinance. The [argument](#) made is that the limitations on the use of property are an unconstitutional “taking” of the property without compensation. The Court has not yet decided whether it will hear this case, but since the Court has [recently declined to review](#) state court decisions upholding the constitutionality of inclusionary zoning ordinances, many observers wonder if the new members of the Court will prove more receptive to considering the constitutional argument this time.

ENDING SINGLE-FAMILY ZONING?

In October 2019, the city of Minneapolis adopted a new comprehensive plan, known as [Minneapolis 2040](#). The plan is an effort to achieve a number of economic, civic, and environmental [goals](#). One of those goals is to allow all residents of the city to “afford and access quality housing throughout the city.” One of the ways the city hopes to reach this goal is also the most controversial way. Effective January 1, 2020, the city will no longer have areas zoned for single-family housing. Housing with up to three units may be constructed in any area zoned for residential uses, without obtaining a variance or special permit.

Between 2010 and 2016, the population of Minneapolis grew by more than 37,000 residents but added only around 12,000 housing units. The supply of housing was

limited by, among other things, restrictive zoning ordinances. [Seventy percent](#) of the residential land in Minneapolis was reserved for single-family housing, placing limits on the construction of new, denser developments. In addition, the strict zoning ordinances were criticized as contributing to the [racial inequities](#) in the city. Racially discriminatory zoning is unlawful, but the city's zoning map was [largely unchanged](#) from the days when discrimination was allowed, and which, according to the City, "still contributes to disparities communities of color and indigenous people experience today such as, access to commercial goods and services, quality housing, and public transportation."

The repeal of single-family zoning has received wide-ranging praise. [HUD Secretary Ben Carson](#) has praised Minneapolis 2040, saying that he would like to see more cities follow the city's example. Secretary Carson said that there seems to be a ["very strong" correlation](#) between zoning restrictions and regulations and housing prices. The [New York Times Editorial Board](#) called the elimination of single-family zoning "simple and brilliant," and something that "deserves wide emulation by other American cities."

Repeal of single-family zoning also generated strong opposition. [Opponents claimed](#) that the repeal would "bulldoze" neighborhoods, by allowing developers to "replace bungalows and duplexes with cheap and ugly modern buildings and destroy the charm and character of our neighborhoods." Others made the argument that [increased density](#) does not necessarily equal increased affordability. While the opposition to the repeal remained in place, a [lengthy public outreach program](#) helped to dispel many of the misconceptions about the plan, making enactment go more smoothly.

Other jurisdictions have taken steps to eliminate restrictive zoning rules. [Seattle](#) approved an ordinance to allow higher density and adopt affordable housing requirements for development in 27 "urban villages" in the city. [Oregon](#) took an even broader approach,

prohibiting single-family zoning in cities with a population of more than 25,000. Townhouses, cottage clusters of four or more detached units, and duplexes, triplexes, and quadplexes are allowed in areas zoned for residential uses. Single-family zoning is a long-standing rule in most American cities. The realities of the contemporary housing market, however, call for a rethinking of that rule.

IN SEARCH OF THE "MISSING MIDDLE"



When you travel through older city residential neighborhoods, you may notice something interesting: they are not made up of just single-family homes. The neighborhood mix includes duplexes (twin homes, or two flats) and small two- or three-story apartment buildings, as well as detached houses. The multiple unit buildings are located on lots that are about the same size as the lots with single-family houses, and blend in seamlessly with the rest of the neighborhood.

When you see buildings like this, you are seeing what is being called "middle housing," because it [sits in the middle of the spectrum](#) between detached single-family homes and mid-rise to high-rise apartment buildings, in terms of form and scale. While a mix of housing types was once common in city neighborhoods, financing issues and development patterns have combined to make the mix rare in post-1940s neighborhoods; therefore it is now considered to be "missing." A focus on the missing middle is a [strategy](#) to help meet the growing demand for urban living by providing diverse housing options that support urban communities. Neighborhoods that include the missing middle

can help [provide the density](#) needed to support local businesses and to make transit viable without feeling as dense as an area of nothing but multi-unit buildings. Missing middle housing is generally more affordable, as it is simpler and less expensive to build than larger scale housing development and is highly marketable to a range of buyers from millennials to boomers.

Cities are taking different approaches to encourage the missing middle. Minneapolis has recently launched a [pilot program](#) that will provide financial assistance to develop 3- to 20-unit residential housing. City funding takes the form of no-interest loans that can be drawn on a reimbursement basis every 30 days for hard and soft costs. Loans are secured with a declaration of covenants or a 0% interest mortgage and a note to ensure affordability for 30 years. Other cities are making changes to their zoning ordinances to allow for higher density. [Austin](#) adopted a comprehensive plan that encourages missing middle housing by loosening the compatibility standards that restricted missing-middle housing because of its size, architecture and density. [Olympia](#) developed a sweeping plan to encourage the missing middle, by allowing accessory dwelling units, permitting a variety of housing types, and promoting different densities in neighborhoods. The Olympia plan has, however, been blocked by the Washington Growth Management Hearings Board, which ruled that the city did not thoroughly consider potential environmental impacts as required under the [State Environmental Policy Act](#), and did not comply with the state's [Growth Management Act](#) by not anticipating impacts of the plan on the environment, public facilities, and public services.

Whatever path cities take to reach it, the missing middle offers real potential for creating and preserving viable, affordable neighborhoods.



GGAR Housing Forum

REALTOR® INVOLVEMENT

Local REALTOR® associations are working to promote new attitudes towards zoning that will help with goals such as developing more affordable housing choices and creating dense, walkable neighborhoods.

In Greenville, South Carolina, the Greater Greenville Association of REALTORS® (GGAR) joined with several community organizations to host a [housing forum](#) that addressed the need for housing in Greenville. The forum, which was funded in part by an NAR [Housing Opportunity Grant](#), discussed the existing local land-use and zoning codes that inhibit construction. The goal of the forum was to show city administrators what could be achieved if zoning policies were updated. The forum featured a talk by Karen Parolek of [Opticos Design](#), a California-based design firm that is well known for its work on “missing middle” housing. Chris Bailey, Government Affairs Director for GGAR, said that “there’s strong momentum moving forward.” He noted that the Greenville City Council has already agreed to cut all permitting fees by 50% on housing projects under \$169,000. “Now if we could just get them to reduce a handful of codes... That’s the kind of low-hanging fruit we’ll be going after in the short term, the baby steps that will make it easier to provide the housing our city needs.”

In San Diego, the [Pacific Southwest Association of REALTORS®](#) (PSAR) has partnered with [Circulate San Diego](#), a regional advocacy organization that works on issues relating to housing supply, transit-oriented development,

and sustainable growth. The two organizations, with the help of a [Smart Growth Action Grant from NAR](#), collaborated to recommend changes to the city's [Bonus Density Program](#). The Bonus Density Program gives eligible developers an increase in development density in exchange for setting aside a percentage of the units being built as affordable housing. The changes recommended by PSAR and Circulate include [added capacity for developers](#) who include deed-restricted affordable homes in their developments, and concessions from development standards that will streamline the permitting process and encourage the development of affordable homes near transit.

REALTOR® involvement is making a difference, by helping to advocate new and innovative strategies for affordable housing.

Hot Topic Alerts are prepared for NAR by Legal Research Center, Inc.

To view other Hot Topic Alerts,
visit REALTOR® Party website at www.realtorparty.realtor.

If you have questions or concerns, please contact
Wendy Penn
Email: WPenn@nar.realtor
Phone: (202) 383-7504

ADDITIONAL STATE & LOCAL RESOURCES

State Issues Tracker: Database with over thirty real estate related issues and state laws. Examples include: Transfer Taxes, Seller Disclosures, Broker Lien Laws, Foreclosure Procedures, Sales Tax on Services, Licensing Requirements & Maintenance, etc.

White Papers: Comprehensive reports prepared for NAR on issues directly impacting the real estate industry. Examples include: Rental Restrictions, Land Banks, Sales Tax on Services, State & Local Taxation, Building Codes, Hydraulic Fracturing, Foreclosure Property Maintenance, Climate Change, Private Transfer Fees.

Growth Management Fact Book: Analysis of issues related to land use and modern growth management topics include: density – rate of growth, public facilities and infrastructure, protection of natural resources, preservation of community character, and affordable housing.
All available on REALTOR® Party website under the *State & Local Resources* tab.