

# ZONING PRACTICE

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## PRACTICE DEREGULATION



# Beyond Use Zoning: The Role of Deregulation in Housing Equity

By John Zeanah, AICP

It is unlikely anyone reading this needs an introduction to the decision made by Minneapolis to eliminate exclusively single-family zoning districts from its code. This bold step, recommended in the city's 2040 comprehensive plan initiated a series of national conversations about the legacy of single-family use districts, exclusionary zoning, and the role of land-use controls in promoting inequities in cities throughout the U.S.

This is a conversation whose time has come, no doubt. But arguably, this conversation has been part of planning's history from the beginning. For example, Judge David Westenhaver observed in his 1924 lower court ruling in *Ambler Realty Co. v. Village of Euclid*, the precursor to the 1926 U.S. Supreme Court decision that entrenched use zoning into the fabric of America, that the effect of zoning "is to classify the population and segregate them according to their income or situation in life" (297 F. 307, 1924). In 1953, California Justice Benjamin Rey Schauer observed "the device of zoning by ordinance was conceived as providing a method whereby discriminatory measures otherwise unlawful could be sustained" (40 Cal.2d 552, 1953). In 1971, President Richard Nixon released a statement on equal housing opportunity, including direction to the Attorney General to bring legal action "where changes in land use regulations are made for what turns out to be a racially discriminatory purpose" (Babcock and Bosselman, 1973).

Today, the efforts of Minneapolis and a handful of other cities have refocused this conversation to center on the preponderance of exclusively single-family residential zoning (i.e., single-family-only zoning). To be sure, focusing reform on single-family use zoning alone serves to loosen the grip the single-family home has had on local land-use policies in the U.S. for decades. But use zoning, or the component of zoning that

establishes permissible uses, is only one method to affect housing density, equity, and choice. Acknowledging the legacy of exclusionary policies must go beyond use zoning to effectively lead to change. After all, it is the limitation on "density of population," not "location and use" the Standard State Zoning Enabling Act advised would "make possible the creation of one-family residence districts."

This article explores various ways local policies restrict population density and constrain the supply of housing choices. It looks beyond single-family use zoning to consider how loosening other development regulations can encourage a variety of forms and patterns of housing. It covers zoning restrictions, such as accessory use standards and bulk regulations, and reviews how related codes, such as building codes, affect housing choices, including those in the "missing middle." Throughout, it presents examples of how some cities, including Memphis, where the author serves as planning director, have taken steps beyond use zoning to advance goals of housing equity in reforming codes and policies.

Previous issues of *Zoning Practice* have done a thorough job of illustrating opportunities to expand inclusionary zoning measures and fair housing policies. This article does not seek to repeat these recommendations. Alternatively, this article seeks to add to this literature by demonstrating avenues where deregulation can be a path to inclusionary policies to enable housing equity and choice.

## HISTORY

A generous view of zoning's origins leads us to understand the progressive reformers of the early 1900s found great concern in how U.S. cities were built, organized, and settled. Concerns were heightened over several

possible ills, among them industrial uses and their attendant externalities, encroachment of industrial and commercial uses into residential areas, and housing conditions of urban tenements and tenement dwellers. The U.S. Supreme Court in the *Euclid* decision recognized these issues in its majority opinion, drafted by Justice George Sutherland.

While this view may have merit, a more critical view may consider these restrictions as not merely removing the "pig in the parlor" back to its proper order and arrangement (272 U.S. 365, 1926). For example, Justice Sutherland goes on to deliver the equally colorful statement in the *Euclid* decision that apartments mixing with single family homes were no more than "mere parasites." Edward Bassett, one of the forefathers of modern planning, opens the section on zoning in his 1938 book *the Master Plan* by stating, "our pioneer community will find it wise to prevent multiple houses from being erected everywhere and will limit them to small districts" (Bassett, 1938). This, not to mention, the explicit attempts by cities and developers across the country to promote racial segregation through zoning codes (overturned in *Buchanan v. Warley* in 1917) and racially restrictive covenants (overturned 30 years later in *Shelley v. Kraemer* in 1948).

These overt attempts to segregate population—by race and by use—were extended to include other restrictions. While on their face, efforts to control lot size, lot width, and building height may seem benign, communities began to push the limits on what minimums could be allowed and still be justified as legitimate advancement of health, safety, and general welfare. In some cases, courts have upheld minimum lot size requirements of as much as five to 10 acres (Juergensmeyer et al. 2018). These efforts were largely intended to suppress the supply of available housing to increase

cost and thus narrow the pool of buyers to those in upper-income strata.

Exclusionary zoning measures are often justified by arguments related to protection of community character or historic preservation. These are often makeweight defenses that employ otherwise legitimate values of form, pattern, and context to mask efforts to prevent diversification of population and demographics.

In addition to inequities associated with exclusionary policies, these measures often promote urban sprawl and stretch municipal resources to serve these new areas. In 2019, Memphis recognized this, having grown by 55 percent since 1970 to 324 square miles, with little corresponding rise in population. In addition to the adoption of a new comprehensive plan focusing new growth in the core and neighborhoods, the city voted to deannex five areas along its fringe, including four where large-lot, suburban patterns of housing had been developed.

In response to exclusionary zoning policies, many communities have turned to adding layers of inclusionary zoning policies on top. Typically, inclusionary zoning takes the form of carrot or stick. For example, a community may reward a developer a density bonus as an incentive to providing more affordable housing. On the other hand, the community may impose additional requirements on a development, such as mandating a set-aside of a certain percentage of housing designated as affordable. While inclusionary zoning plays an important role in maintaining affordability in well-functioning market environments, some cities and neighborhoods struggle with attracting new investment to trigger inclusionary measures. While these are important policies to keep on the menu, it is just as important that planners begin to address the complex entanglement of regulations that favor single-family residential and discourage housing options to begin with.

#### THE ROLE OF THE PLAN

While the authors of the Standard State Zoning Enabling Act may have written with different “purposes in view” than contemporary aims of planning, they established a standard that bears restating in the context of this discussion: “[s]uch regulations shall

be made in accordance with a comprehensive plan.” While the subject of this article is largely deregulation, rather than the creation of new restrictions, the same advice applies—“no zoning should be done without such a comprehensive study.”

The comprehensive plan’s role in enabling housing equity is not only to set the vision for the community, but to direct change in the physical patterns of development throughout the city. Today’s efforts to better incorporate equity into the comprehensive plan should not only account for historical measures responsible for creating inequity within the city, but also to direct communities on how to grow the geography of opportunity by leveraging the tools of plan implementation, including policy and investment. For the purposes of this article, we will assume a universal planning goal of promoting more housing options in more places.

To this end, any change in regulation should be considered comprehensively to understand all potential effects of the policy. In your community, you may decide

increasing housing access everywhere is worth any trade-off, such as the ability to control growth and density of population in certain areas of the city or the need to direct investment in areas where need is greatest. Either way, cities should be aware of what they give up through deregulation and how these decisions comport with the comprehensive plan.

Further, the comprehensive plan process is an ideal stage for planners to gather information to understand demographic changes and market dynamics present in their communities. These factors help cities to determine demand and how regulations may be enabling or constraining the community’s ability to meet demand. Practices like large-lot zoning were only successful in achieving exclusionary aims because demand for the end product elevated the value and priced out many households. But market demand is fluid.

In well-functioning markets, demand elevates sales prices above the cost of construction or renovation. Costs include



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➔ Recent infill housing construction near the University of Memphis on lots of 3,700 square feet have sold for more than double the average sales price of homes countywide.

not only materials and labor, but also cost of acquisition (including land) and property taxes. Limitations imposed by zoning restrictions and requirements imposed by building codes further apply pressure to costs of construction, though these may be less evident on the balance sheet. In lower-functioning markets, demand may not be able to push sales price above cost, creating a development gap.

The point here seems obvious. A shift in consumer preferences away from large-lot homes to smaller lots changes the market price of the two products. Where this happens, once exclusionary measures lose their effect. One takeaway of this reality is that viewing exclusionary regulations cannot assume one fixed, static set of consumer preferences. A second brings us back to the plan. Planning and implementation can contribute to change. Deregulation can invite that change.

## ZONING REGULATIONS

Let's begin this analysis with zoning by exploring some of the ways beyond use zoning planners can roll back regulations that may be restricting the ability to provide for housing equity and choice in communities. Each of the examples below are measures that may serve as either physical or financial constraints to creating more housing choices in cities.

In the example given above, where costs outweigh sales price creating a development gap, the difference can be overcome by allowing additional units on a lot or within a structure. To be clear, addressing use zoning regulations are important to enabling this outcome. However, it is not the only way to enable this outcome, nor is single-family use zoning the only impediment in zoning codes to creating housing choice.

### Accessory Dwelling Units

Communities across the country have begun to look to accessory dwelling units (ADUs) as a way to increase housing supply without substantial change to regulations or community character. In fact, Minneapolis first found success relaxing ADU regulations before advancing to the step of eliminating single-family use zoning.

Minneapolis looked to other communities, such as Portland, Oregon; Seattle; and Santa Cruz, California, among others, as precedent for its own efforts to relax ADU regulations (Mukhija and Ling 2022). In many respects, comprehensively addressing ADU regulations can provide communities with what some researchers have called “a gateway to more ambitious land use deregulation and higher density in cities” (Mukhija and Ling 2022). Let's examine some key considerations for ADU reform that provide a window to housing reform more generally.

**Lot size:** In many communities, ADUs may be allowed by-right as accessory uses to single-family homes, but slow to develop due to minimum standards, such as lot size. Currently in Memphis's code, this minimum is 10,000 square feet—a floor that is ill-suited to promote density where it's most desired and most effective. Since 2018, over 20 ADUs proposed to be built on lots of less than 10,000 square feet applied for variances. All have been approved, and all but one without opposition. Following a recent housing study, the city is considering a change to this standard, dropping from 10,000 to 6,000 square feet to open up ADU development in virtually all single-family use districts, but more importantly, in areas the city has targeted for more dense housing around anchors (or centers) of new development activity. While this is progress for Memphis, other cities are leading the way, requiring even lower minimum lot size standards or removing this requirement from ADU regulations altogether.

**Parking:** Similar to minimum lot size, the requirement for additional parking for each ADU can be a constraint to creating otherwise allowed housing. In many communities, including Minneapolis, zoning code revisions have removed any additional parking requirement for ADUs. In Memphis, under consideration is a proposal to relieve these requirements as long as the ADU does not reduce overall parking on the lot below the code minimum. As an added measure of flexibility, the Memphis proposal would allow the height of the ADU to exceed the principal structure by 1.5 times (while staying within the district height limit) to allow for garage parking on the bottom floor with the living unit on the second floor.

**Principal use, number, attachment, and timing:** Finally, there are myriad other considerations when reviewing ADU requirements and opportunities for deregulation. Among them are whether to allow an ADU to be an accessory to single-family residence only or any residential use, to allow more than one ADU to occupy a lot with the principal structure; to allow ADUs to be attached or internal to the principal structure, and to allow the ADU to be constructed before the principal structure.

### Bulk Regulations

Bulk regulations can compound the exclusionary effects of single-family use zoning. Collectively, regulations, such as minimum lot size or lot area per dwelling unit, maximum height, and maximum floor area ratio, have a large influence on the cost per dwelling unit in a community.

**Minimum lot size:** Putting aside the recent focus on single-family use zoning, large lot minimum requirements have long been the prototypical example of exclusionary zoning practices. Developing communities—often, but not always suburban—used larger lots to drive up the cost of housing to control the socioeconomic makeup of the population. In this view of exclusionary zoning in practice, consumer preference for this type of housing was high, as families sought other geographic benefits of suburban living. Given this lens of market demand, inequity was created less by the exclusivity of the zone's use and more by the zone's lot size. The simple fix appears to be lowering the minimum. In 1998, Houston (well-known for lacking use zoning) lowered their minimum lot size to as low as 1,400 square feet (Gray and Millsap 2020). In some ways, lowering minimum lot size requirements to a standard of near elimination, such as this, follows similar logic to eliminating parking requirements: Let the market decide. Fifty years ago, the market displayed greater appetite for larger lots. Today, small-lot construction can reach the top of the market, where demand is high for more house and less yard in walkable urban neighborhoods. While adjusting minimum lot size requirements may have been one of the more influential moves to enabling housing equity at one time, today it likely helps more to avoid harm than it achieves good.

**Minimum area per dwelling unit:** A related, more problematic, standard is minimum lot area per dwelling unit. Created to achieve many of the same aims as large lot minimum requirements, lot area per dwelling unit imposes a multiplier effect when additional units are introduced, whether it be an ADU, attached dwellings such as a duplex or triplex, or multiple principal residential structures, such as a cottage court. Communities should also review minimum lot widths in residential zones to determine whether these also provide a barrier to enabling a variety of housing types.

**Maximum height:** In the time since Minneapolis made its famous code revision to open exclusively single-family neighborhoods to duplexes and triplexes, several commenters have observed the result has been underwhelming (Brasuell 2020). One of the chief flaws of Minneapolis's change, some have observed, was not addressing bulk regulations, such as lot size and height. It is important to remember one of the reasons Minneapolis made the decision to eliminate exclusively single-family zones was growth pressures within a fixed geographic footprint that is largely developed today. In developed cities and neighborhoods, conversions and rebuilds are likely to be more possible and prevalent than construction on raw land. So it is not too unexpected the change was not followed by a sizable wave in new construction of triplexes. Further, one of the key messages supporters used was that only unit count would change, community character would not. Duplexes and triplexes in formerly single-family neighborhoods would still have to fit within the same building size (Kahlenberg 2019). But to enable a policy aimed at creating more duplexes and triplexes, maximum height is an important barrier to consider. Based on the templates provided by Daniel Parolek in *Missing Middle Housing*, residential height maximums should start at 30 feet to fit a three-story structure. This height would be suitable for a single-family home or a triplex.

**Floor area ratio:** A final example of a restriction worth targeting in enabling housing equity through zoning code reform is floor area ratio (FAR), or if present in your community's code, minimum floor space.



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➔ Six-unit structures in Memphis can now be designed and built to International Residential Code standards.

While many communities do not have residential floor area ratio limits or have removed them from their codes, those that do could offer more opportunity for housing choice by raising maximum floor area ratio, similar to changes proposed by Sacramento, California, in its forthcoming general plan update (Herriges 2021). The draft land-use map, adopted alongside a recommendation to eliminate single-family use zoning, allows greater flexibility for builders to create more options using a maximum floor area ratio of 1.0, up from 0.7. Had the city left the maximum FAR at 0.7, it would have left in place a constraint on floor space largely incompatible with the building types promoted by the elimination of single-family use zoning.

#### BUILDING CODES

In November 2021, Memphis and Shelby County voted to roll back a significant, but lesser noted regulatory hurdle to building missing middle housing by locally amending

building codes to enable structures of three to six dwelling units to be reviewed by the city and county under the International Residential Code (IRC) rather than the commercial building code that normally applies to residential structures of three units or more.

Like most jurisdictions in the U.S., Memphis and Shelby County relies on the International Code Council's (ICC) standard codes for setting construction regulations. Currently, the International Building Code (IBC) defines many missing middle building types, such as triplexes and fourplexes, as commercial construction since they cross over the three unit or more threshold defined in the code. Following this more restrictive code can often undermine the financial feasibility for a missing middle project. Recognizing standard codes do not always address the economics of a building type, planners and code officials in Memphis and Shelby County set out to amend these codes locally as part their update to the 2021 codes.

The idea for making this change came out of the city’s *Memphis 3.0 Comprehensive Plan*. During this process, planners looked at several ways code restrictions prevent the development or redevelopment of walkable, urban communities. Plan recommendations addressed street widths and curb radii regulated by the fire code, use and lot sizes regulated by the zoning code, and building types regulated by construction codes.

The proposal’s success was also due in large part to leadership on the city and county’s building code advisory board by homebuilders, and one in particular who builds infill missing middle housing in walkable neighborhoods near downtown. After noting how much smoother his 11 cottage-court style residences moved through the regulatory process than two proposed live-work buildings and four quadplexes, the differences in how the commercial code and the residential code apply to small multifamily became clear. These real-life experiences helped the advisory board work with planners

and construction code officials to help make the case for building code changes.

Some of the primary challenges to building missing middle housing types found in the International Building Code pertain to fire separations and sprinkler requirements, loading and shared egress, and requirements for separate mechanical, electrical, and plumbing drawings. Adding to the complexity of the code, and thus cost to build, is elevated permit fees for projects classified as commercial, rather than residential. Finally, homebuilders on the code’s advisory board pointed out the likelihood a commercial builder would build small multifamily residential is low, as is the likelihood a homebuilder would be familiar with building from the IBC. This mismatch between builders and codes was also identified by Parolek in *Missing Middle Housing*.

To address changes needed and concerns raised regarding making this change at the local level, Memphis and Shelby County made the following adjustments:

- Modify the scope and definitions of the IBC and IRC to apply the residential code and all subject provisions to three- to six-unit structures.
- Remove the sprinkler requirement for buildings with two-hour fire rated walls and floor/ceiling assemblies. Alternatively, communities may consider allowing required sprinklers to tie into the building’s domestic water.
- Limit public spaces to shared means of egress, but allow upper-floor residences to share common egress.
- No longer require separate mechanical, electrical, and plumbing drawings.

In taking the first step eliminating single-family use zoning, Minneapolis inspired many other communities to adopt their example and build on it further by addressing other bulk regulations that may otherwise prevent new housing types from moving forward. Similarly, Memphis has attempted a first step to define small-scale multifamily, such as triplexes and fourplexes, as residential under the building code. This subjects these structures to less complex regulation, but opportunity for more widespread change is yet to be realized.

This action, like Minneapolis’s, is not without challenges. First, not all states in the U.S. allow local jurisdictions to make their own amendments to the “pure code.” Even those that do may still need to answer to a state agency on whether local amendments will be accepted or permitted to continue. Second, many code officials view adopting the ICC codes in their pure form as important measures toward the goal of disaster resilience for cities and counties. Given most jurisdictions across the U.S. adopt the ICC’s standard building codes, planners should work with construction officials in their communities to not only consider how code changes similar to Memphis’s example can be made at the local level, but to gather support for lobbying ICC to make changes in the “pure code” in a future release to better enable missing middle housing through the IRC, while limiting any tradeoff of resilient construction.

## CONCLUSION

Despite the recent focus on rolling back historical exclusionary zoning practices



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➡ New triplexes built to mirror adjacent single-family homes in Memphis stand at 32 feet in height.

by eliminating single-family-only zoning, decisions around single-family use do not stand alone as barriers to housing choice. As this article has demonstrated, other zoning restrictions such as accessory uses and bulk and dimensional requirements and other areas normally outside the purview of planners, such as building codes, can be modified to better enable housing equity.

Even beyond zoning and building regulations, property tax laws that assess small-scale multifamily at higher rates on par with large multifamily or commercial buildings disincentivize lower apartment unit counts. Utility connection requirements that place higher cost burden on small-scale multifamily can have the same effect. Off-street parking requirements can constrain both physical and financial viability of siting a small-scale multifamily building on an infill lot. Each of these, on top of zoning

and building constraints, add costs to the project. Without sufficient demand, these additional costs can render housing choice impractical and unbuilt.

Each of us in the planning profession have a responsibility to consider how development policies and regulations in our communities enable housing equity and expand housing choices in more places. Planners should make these considerations as they are preparing the comprehensive plan. Consider population and market dynamics and how these changes influence demand on housing types present in your communities. Consider how goals of housing equity and choice impact other plan goals. Consider use zoning throughout your community and how it supports or works against these goals. Most importantly, work across agencies, disciplines, and the community to go beyond use zoning. There's more standing

in our way to create more equitable communities for tomorrow.

## ABOUT THE AUTHOR

John Zeanah, AICP, is Director of the Memphis and Shelby County Division of Planning and Development. He leads a cross-functional division responsible for planning, zoning, and development services. Among his accomplishments, Zeanah led the development and adoption of the *Memphis 3.0 Comprehensive Plan*, the city's first comprehensive plan in 40 years and winner of the American Planning Association's Daniel Burnham Award of Excellence for a Comprehensive Plan in 2020 and a Charter Award from the Congress for the New Urbanism in 2021. Zeanah earned his Master of City and Regional Planning degree from the University of Memphis, where he now teaches land-use controls as an adjunct faculty member.

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# HOW CAN DEREGULATION SUPPORT HOUSING EQUITY?

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