EQUITABLE HOUSING INSTITUTE

Promoting housing stability, fairness and affordability by combating exclusionary practices

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"Missing middle" housing and the Economic Fair Housing Act

Among the many problems that the proposed Economic Fair Housing Act (EFHA) would counteract are unreasonable restrictions on accessory dwelling units (ADUs) and other multi-unit residential lots ("missing middle" options) in American neighborhoods. The "zoning out" of those forms of housing in single-family neighborhoods generally is among the vast array of unwarranted regulatory restrictions that have led to this nation's crisis-level housing affordability problems.[1]

The EFHA would help solve the "missing middle" problem in two basic ways. First, it would ban regulatory barriers to housing opportunity comprehensively. Second, it could contain specific provisions that clarify the responsibilities of governments to correct unjustified barriers to "missing middle" forms of housing, especially in America's single-family neighborhoods.

1. Comprehensive ban on regulatory barriers to housing opportunity

A comprehensive ban on regulatory barriers to housing opportunity is essential to the necessary progress on "missing middle" housing options. There is such a plethora of unjustified, exclusionary rules and practices (actual and potential) that they cannot all be regulated specifically.[2]

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[1] *See, e.g.*, Emily Badger and Eve Washington, *The Housing Shortage Isn't Just a Coastal Crisis Anymore*, NY Times (July 14, 2022), posted at: https://www.nytimes.com/2022/07/14/upshot/housing-shortage-us.html.); John Infranca, *The New State Zoning: Land Use Preemption Amid a Housing Crisis*, 60 B.C. L. Rev. 823, 829 (2019) ("The breadth and depth of the housing crisis in communities throughout the country has made housing affordability a salient issue for a broader swath of the population, including young professionals and the businesses that seek to employ them."). *See generally, e.g.*, EHI, *Can the vast range of regulatory barriers to housing opportunity be deterred by an Economic Fair Housing Act (EFHA)?* (2023), posted at https://www.equitablehousing.org/images/PDFs/PDFs--2021-/EFHA_v_vast_range_of_RBHOs-EHI-web.pdf.

[2] "[L]ocal governments have a nearly infinite range of land use tools that can effectively block unwanted development." Housing policy expert Jenny Schuetz, quoted in RICHARD D. KAHLENBERG, EXCLUDED: HOW SNOB ZONING, NIMBYISM, AND CLASS BIAS BUILD THE WALLS WE DON'T SEE, 250 (PUBLICAFFAIRS, 2023) *See also, e.g.*, John Infranca, *Singling Out Single-Family Zoning*, 111 GEORGETOWN L.J. 659, 669 (2023) ("In some instances, regulations that remain in place, such as parking requirements or minimum lot sizes, reduce the potential for significant additional housing, and local governments can impose new regulations that undermine state legislation") (citing sources).

An EFHA (either statewide or federal) would provide a comprehensive ban and much more robust remedies than those in existing laws that have attempted to bring regulatory barriers to housing opportunity under control.[3] The EFHA would contain the same extensive remedies that already are available under the federal Fair Housing Act.[4] Those remedies have been used to end unnecessary governmental housing restrictions, both zoning and non-zoning, that had a disparate impact on people based on their race, gender, disability, and certain other factors.[5]

The Fair Housing Act has gone hand in hand with a substantial and fairly steady decrease in racial isolation in housing.[6] By contrast, there has been a dramatic increase in residential isolation of Americans by income level over the same period.[7]

Regulatory barriers to housing opportunity are a primary cause of that increase, by severely limiting the land available for, and the density of, new development. Those regulations also often impose other costly restrictions on new housing, such as high, up-front impact fees and extensive subdivision requirements.[8] Such barriers substantially hinder efforts under the Fair Housing Act to reduce residential isolation of minority

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[3] *See generally, e.g.,* Equitable Housing Institute (EHI), *Toward a comprehensive ban on exclusionary housing practices,* p. 37 (2019), posted at https://www.equitablehousing.org/images/PDFs/PDFs--2018-/EHI-Toward-comprehensive-ban-tech_edits-10-2020.pdf. (although numerous states have statutes that attempted to curb a wide range of regulatory barriers to housing opportunity: "None of those statutes provide to victims of economically exclusionary housing practices a personal right to raise a legal challenge to them. Also, none of those statutes includes a comprehensive ban on exclusionary housing practices.")

[4] 42 U.S.C. §§ 3601-3619 (Apr. 11, 1968, as amended).

[5] Fair Housing Act remedies include injunctive relief, restraining orders, civil monetary penalties, money damages, and discretionary awards of the litigation costs (attorney's fees, etc.) of people who must sue in order to overcome that economic discrimination. Enforcement proceedings may be brought by the U.S. Dep't of Housing and Urban Development, the U.S. Justice Department, or in private lawsuits *See* 42 U.S.C. §§ 3612 to 3614. *See also, e.g.,* EHI, *supra* no 3, pp. 10-14 (discussing those enforcement methods and proceedings).

[6] *See generally, e.g.,* EHI, *supra* no 3, pp. 7-8 (discussing studies finding approximately 4.5% decline in racial isolation of Black Americans per decade).

Other statutes that authorize the same, strong remedies as Fair Housing Act are associated with a reduction in the forms of discrimination they address. *See, e.g.,* EHI, *Making challenges to exclusionary housing practices feasible: The role of attorney's fees awards* (2019), posted at https://equitablehousing.org/images/PDFs/PDFs--2018-/Attys-fees-in_housing-related_litigation_EHI-memo-final.pdf.

[7] *See generally, e.g., id.*, pp. 6-7 (discussing a major study that found doubling, to 34%, in the share of Americans in major metropolitan areas who lived in predominantly "rich" or "poor" neighborhoods, between 1970 and in 2012 compared to 1970). (EHI Comp Ban)

[8] *See, e.g.,* Joint Ctr. for Housing Studies, Harvard Univ., *State of the Nation's Housing 2007*, p. 28, *available at* https://www.jchs.harvard.edu/publications/markets/son2007/index.htm:

> State and local regulations are among the principal culprits behind the nation's persistent affordability problems. By limiting the land available for and density of new development, as well as imposing impact fees and subdivision requirements that raise production costs, state and local governments make it difficult to build affordable housing.

groups, because most members of those groups are on the lower end of the income and wealth spectrums.[9]

2. Possible "missing middle" provisions in an EFHA

The second basic way in which an EFHA could promote "missing middle" housing is through specific provisions that clarify what constitute unreasonable restrictions on ADUs, duplexes and other multi-unit residential lots. An extensive, recent study of those restrictions concludes that the rationales for prohibiting more than one living unit on a lot in a single-family zoning district are "shaky."[10]

Various forms of "middle housing" were common in U.S. cities before zoning was adopted.[11] For example, ADUs were a common feature in single-family housing in the United States during the early twentieth century,[12] as were duplexes.[13] "In fact, until the 20th century, people with land built as many homes as they wished."[14]

However, by the time of the post-World War II housing boom, suburban development was the largest type of housing development, and it generally conformed to "Euclidean-type zoning codes." That is a system of land-use regulations developed in the United States that segregates zoning districts according to very specific uses.[15] Ultimately, most local jurisdictions prohibited construction of more than one living unit on lots zoned for single-family housing.[16] Those zones became the prevalent form of residential zoning across the United States.[17]

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[9] *See, e.g., id* pp. 7-8 (citing Douglas S. Massey and Jacob S. Rugh, *Segregation in Post-Civil Rights America: Stalled Integration or End of the Segregated Century*, ANNALS AM. ACAD. POL. SOC. SCI 2 (Mar. 8, 2016)), posted at.https://pubmed.ncbi.nlm.nih.gov/26966459/.

[10] Infranca *supra* n. 2, at 666-676. Also, the fact that little contemporary zoning reflects the approach espoused by zoning's early proponents—a comprehensive zoning regime grounded in careful consideration of a community's existing needs and future demands—"suggests that even the fragile, early legal arguments for single-family districting cannot withstand critique." *Id.* at 659-60.

[11] *See, e.g.*, Infranca *supra* n. 2, at 668-669 (citing Michael Anderson, *Oregon Just Voted to Legalize Duplexes on Almost Every City Lot*, Sightline Inst. (June 30, 2019), posted at https://www.sightline.org/2019/06/30/oregon-just-voted-to-legalize-duplexes-on-almost-every-city-lot/. .

[12] *See, e.g.*, Sage Computing, Inc., *Accessory Dwelling Units: Case Study*, p. 1 (June 2008) (report published by HUD PDR); AARP, *ADUs Are an American Tradition*, posted at https://www.aarp.org/livable-communities/housing/info-2019/adus-are-an-american-tradition.html (accessed August 4, 2023).

[13] *See, e.g.*, New Haven (Connecticut) Preservation Trust, *Stacked Duplexes: Preservation Guide* (between the early 1800s and the World War I era, stacked duplexes became one of the most popular and dominant house types in rapidly growing industrial centers throughout Connecticut), posted at https://nhpt.org/stacked-duplexes.

[14] AARP, *supra* n. 12 (multiple dwellings on a residential lot were common before zoning, including carriage houses, alley dwellings in cities, and automobile garages).

[15] *See, e.g.*, Sage Computing, *supra* n. 12; AARP, *supra* n. 12.

[16] *See, e.g.*, Sage Computing, *supra* n. 12 (prohibition on ADU construction).

[17] *See, e.g.*, Infranca, *supra* n. 2, at 666-667.

Further, the proponents of those districts generally have acknowledged that they are permissible only so long as the overall zoning scheme is fair to all the varied interests of the community and consistent with individual property rights.[18] But exclusionary zoning and other regulations that create unjustified barriers to housing opportunities are not fair—and they're not even lawful.

For example, the highest courts of numerous states have declared that exclusionary zoning is invalid under constitutional principles.[19] Also, numerous such courts have held that exclusionary zoning violates provisions of their state's zoning enabling act.[20] The same principles that make exclusionary zoning invalid apply equally to other unjustified

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[18] *See, e.g., id.* Infranca, *supra* n. 2, at 697 (quoting statements by leading early proponents of single-use, residential zoning districts); *See also, e.g.*, Herbert Hoover, *Foreword* to U.S. DEPARTMENT OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT (1926) ("This standard act endeavors to provide, so far as it is practicable to see, that proper zoning can be taken *without injustice* and *without violating property rights*.") (emphasis added).

[19] Among those decisions are:

- *Southern Burlington Co. NAACP v. Mount Laurel* ("*Mount Laurel II*"), 92 N.J. 158, 456 A.2d 390, 415 (1983) (local land use "regulations that do not provide the requisite opportunity for a fair share of the region's need for low- and moderate-income housing conflict with the general welfare and violate the state constitutional requirements of substantive due process and *equal protection*") (emphasis added);
- *Appeal of Girsh*, 437 Pa. 237, 263 A.2d 395, 397-98 (1970) (if a township "is a place where apartment living is in demand," lack of provision for apartments in its zoning ordinance renders that ordinance unconstitutional);
- *Assoc. Home Bldrs. v. Livermore*, 18 Cal.3d 582, 557 P.2d 473, 488-89 (1976) (to be constitutional, a municipal zoning ordinance must reasonably relate to the regional welfare, including the interests of "[o]utsiders searching for a place to live in the face of a growing shortage of adequate housing");
- *Robert E. Kurzius, Inc. v. Upper Brookville*, 51 N.Y.S.2d 338, 414 N.E.2d 680 (1980), *cert. denied*, 450 U.S. 1042 (1981) ("A zoning ordinance will be invalidated on both constitutional and State statutory grounds if it was enacted with an exclusionary purpose, or it ignored regional needs and has an unjustifiably exclusionary effect").

[20] Among those decisions are:

- *Board of Sup'rs of Fairfax Cty. v. Carper*, 200 Va. 653, 107 S.E.2d 390 396-97 (Va. 1959) (county zoning ordinance, which downzoned the western two-thirds of a rapidly growing suburban county to two-acre minimum lots per dwelling, was invalid because it was unreasonable, arbitrary and bore "no relation to the health, safety, morals, or general welfare of the owners or residents of the area so zoned");
- *Builders Serv. Corp. v. Planning and Zoning Comm'n of East Hampton*, 208 Conn. 267, 545 A.2d 530 (1988) (town ordinance that required a minimum floor area of 1,300 square feet for new housing was invalid, because it served none of the purposes of zoning set forth in the state's zoning enabling act); and
- *Britton v. Chester*, 595 A.2d 492, 495-96, 499 (N.H. 1991) (municipality's zoning ordinance was "blatantly exclusionary," and thus violative of the state's zoning enabling act requirement that such ordinances promote the general welfare).

regulatory barriers to housing opportunities.[21] Zoning districts that cause those problems should be declared invalid.

With respect to legalizing ADUs, duplexes, and perhaps other "missing middle" housing types into single-family zoning districts, the devil is in the details. Generally, an EFHA would have to be enacted at the state or federal level, because most local governments have not shown the motivation or knowledge to reform their zoning and other land use rules sufficiently to remove their exclusionary effects. However, any statewide or federal ban should make sense as to each of the local jurisdictions affected.

a. Federal role in "missing middle" legal reform

A federal statute would be hard pressed to address the vast range of local activities as knowledgably as a government unit closer to those conditions. At the same time, the basic problems caused by regulatory barriers to housing opportunity are not isolated, local issues—they are nationwide.[22]

The federal government has a key role to play in clarifying the general principles that should guide land use regulation across the nation. States and localities often have failed to understand and apply sound general principles and best practices in their land use decision-making.

Actually, flawed federal guidance also has contributed to the current problems. For example, the basic blueprint for zoning laws nationwide is the Standard State Zoning Enabling Act (SZEA) drafted by a United States Commerce Department committee in the 1920's, [23] commended to all the states, and basically adopted by all of them.[24] Under that approach, tremendous deference has been given to local government decisions about housing and other land use matters, where those decisions are "fairly debatable."[25]

However, experience has shown that most homeowners routinely resist substantial, new residential development in their area.[26] Homeowners' opposition is quite powerful

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[21] *See, e.g., Mount Laurel II,* 456 A.2d 390, 441-42 (municipalities "at the very least, must remove all municipally created barriers to the construction of their fair share of lower income housing," such as "subdivision restrictions and exactions that are not necessary to protect health and safety.")

[22] *See generally, e.g.,* EHI, *supra* no 3, pp. 1, 3-9.

[23] *See, e.g.,* Advisory Committee on Zoning, U.S. Dept. of Commerce, *A Standard State Zoning Enabling Act,* (rev. 1926), posted at: https://www.govinfo.gov/content/pkg/GOVPUB-C13-18b3b6e632119b6d94779f558b9d3873/pdf/GOVPUB-C13-18b3b6e632119b6d94779f558b9d3873.pdf (emphasis added). .

[24] *See, e.g., Levin v. Parsippany-Troy Hills,* 82 N.J. 174, 411 A.2d 704, 707 (1980) (the SZEA "became a standard model in zoning codes adopted in the 1920s and 1930s across the United States") (citing authorities).

[25] *See generally, e.g.,* 6 ZONING AND LAND USE CONTROLS § 38.02 (2023) *(*"a finding that the effect of rezoning is fairly debatable, which means that the legislative action has some basis in reason, will foreclose any judicial action[.]"); *See also generally,* 8 ZONING AND LAND USE CONTROLS § 52.05 (2023) (in most states, rezoning decisions by the local governing body are considered legislative decisions).

[26] *See, e.g.,* John Infranca, *Differentiating Exclusionary Tendencies,* 72 FLA. L. REV.. 1271, 1273 (2020) (quoting WILLIAM A. FISCHEL, ZONING RULES!, pp. 300-301 (Lincoln Inst. of Land Policy, 2015)) ((the

because, for example, the local officials responsible for decisions on housing issues are either elected by the residents or appointed by those local elected officials.[27] Local voters and officials exert strong influence on state houses and Congress as well. So, the state and federal governments must overcome problems stemming from the U.S. Commerce Dept's SZEA.

Also, there is "overwhelming cultural power behind single-family homes" in the United States.[28] Many people consider them central to "The American Dream." Even the U.S. Supreme Court has lauded low-density residential zoning. For example, in one case involving a small village, the Court stated that zoning authority, one of government's police powers, "is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." [29]

Especially in light of the "American obsession" with single-family homes,[30] it is crucial to initial enactment of the EFHA not to deprive it of sufficient support by including in it overly controversial "missing middle" provisions. So, we have looked for state and local programs that have a track record of success, or that appear politically feasible, in fostering additional dwelling units in single-family zoning districts. States and localities will be looking for that kind of guidance. Our summary of the progress of "missing middle" initiatives is below.

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major financial stake that most homeowners have in their homes drives them to "worry excessively about infill developments that would make for less commuting and more convenient homes and jobs for most residents.").

[27] *See, e.g.*, Equitable Housing Institute (EHI), *Developing a better "carrot," to induce residents to support needed, new housing in their communities*, 1 (2018), posted at https://equitablehousing.org/images/PDFs/PDFs--2018-/Pursuing_win-win_solutions_with_local_residents.EHI-6-2018.pdf. Homeowners constitute more than 65% of American households, although the rate among Black Americans is much lower (44%). National Association of Realtors, *More Americans Own Their Homes, but Black-White Homeownership Rate Gap is Biggest in a Decade, NAR Report Finds*, posted at https://www.nar.realtor/newsroom/more-americans-own-their-homes-but-black-white-homeownership-rate-gap-is-biggest-in-a-decade-nar.

[28] E-mail from Prof. Emeritus William A. Fischel to EHI's President, Tom Loftus, and Prof. John J. Infranca (July 27, 2023) (mentioning American cinematic paeons to single-family homeownership, such as "It's a Wonderful Life" and "Miracle on 34th Street.")

[29] *Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974) ("A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs.") "Belle Terre is a village on Long Island's north shore of about 220 homes inhabited by 700 people. Its total land area is less than one square mile." *Id.*

Unlike the areas where "missing middle" housing generally has been advocated, Belle Terre was treated by the Court in isolation, not as part of an urbanized area. Also, the case did not involve a discrimination claim under the Fair Housing Act, and the tenants (college students) had another housing option on their campus.

See also Euclid v. Ambler Realty Co., 272 U.S. 365, 394 (1926) (In early zoning decision, U.S. Supreme Court declared that "the development of detached house sections is greatly retarded by the coming of apartment houses, . . . in such sections very often the apartment house is a mere parasite . . . .")

[30] Infranca, *supra* n. 2, at 666.

b. Status of missing middle housing in the United States

There has been a dramatic increase in the number of laws permitting ADUs and other forms of "missing middle" housing in single-family zoning districts, just in the last five years. Prominent examples include Portland, Oregon,[31] and that state as a whole;[32] California;[33] and Minneapolis, Minnesota.[34] Among the more recent efforts:

> In 2022, Maine passed legislation legalizing duplexes and accessory dwelling units statewide and allowing up to four units in certain areas. Other less high-profile efforts appeared during the same period in cities including Charlotte and Raleigh, North Carolina, and Charlottesville, Virginia. North Carolina, Virginia, and New York have introduced, but not passed, statewide measures to allow additional units in single-family districts. Smaller cities, from Northampton, Massachusetts, and Gainesville, Florida to Sheridan, Wyoming, and Walla Walla, Washington, have also considered or approved denser development in single-family zones.[35]

Other major cities that have new laws permitting ADUs in single-family zoning districts are Chicago, Miami and Seattle.[36] Ferver for loosening zoning restrictions, in order to allow multiple housing units on lots zoned single-family, has even reached the 4th least-densely populated State of the Union—Montana.

The Big Sky State's missing middle initiatives respond to its "pandemic-era housing boom," which "looks like a gold rush, complete with cash offers, no-look buys and bids

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[31] Christian Britschgi, *Portland Legalized 'Missing Middle' Housing. Now It's Trying to Make It Easy to Build* ("Britschgi 2022"), REASON, June 13, 2022 (Portland's 2020 Residential Infill Project drew "hearty praise at the time as the nation's most ambitious low-density zoning reform," but "the results thus far have been fairly modest, producing only about 100 additional units since the program went into effect in August 2021.")

[32] Oregon House Bill 2001 (2019) removed regulatory barriers to "middle housing" options. OR. REV. STAT. §197.758. However, questions remain as to how much of an effect this law will have on reversing decades of discrimination and segregation in housing. The law does nothing to enforce compliance, or to mandate or incentivize the production of Missing Middle housing. *See, e.g.*, Sarah J. Adams-Schoen & Edward J. Sullivan, *Reforming Restrictive Residential Zoning: Lessons from an Early Adopter*, 30 J. AFF. HOUS. & CMTY. DEV. L. 161, 204 (2021).

[33] David Garcia & Muhammad Alameldin, *California's HOME Act Turns One: Data and Insights from the First Year of Senate Bill 9*, TERNER CENTER (January 18, 2023), posted at https://ternercenter.berkeley.edu/research-and-policy/sb-9-turns-one-applications/.

[34] Susan Du, *Plan to build triplexes in north Minneapolis runs into obstacles*, Minneapolis Star Tribune, April 10, 2023 (Despite City's 2040 Comprehensive Plan, which eliminated single-family zoning in 2019, zoning applications to build a multi-unit residence on a single lot are still being rejected despite neighborhood support, because zoning codes haven't been updated to align with the plan), posted at https://www.startribune.com/north-minneapolis-2040-plan-triplex-rejected/600264741/.

[35] Infranca, *supra* n. 2, at 668-669 (citations omitted).

[36] Cottage, *ADU Demand Remains Strong Across the West Coast*, posted at https://www.cotta.ge/resources/seattle-adu-report (accessed Aug. 11, 2023).

far over asking price."[37] A deep red state politically, Montana enacted four major zoning reform bills in May 2023—similar to reform bills in California—ironically because Montanans are "scared to death that" otherwise "we're going to be California."[38] Montana's new laws:

- Restore "landowners rights" to build accessory dwelling units anywhere in the State (Senate Bill 528);
- Require cities to permit duplex housing in all residential districts (Senate Bill 323);
- Prohibit local governments from passing building codes stricter than the state code (Senate Bill 406); and
- Require large cities to allocate space to house population growth, transform the development process in various ways, limit public hearings and make most affordable housing development by-right (Senate Bill 382).[39]

Given the strong trend in various states and localities toward permitting, or at least considering, "missing middle" housing provisions in single-family zoning districts, such a provision seems appropriate for statewide EFHA proposals generally. A "missing middle" provision of some kind may be feasible in a federal EFHA proposal too. (We discuss the federal issues further below.)

Again, the devil is in the details. Specific regulations are necessary to define each type of missing middle units that is permitted, and the required specifications for each type. That type of detail is necessary in order to avoid the wide array of regulatory obstacles that localities have created, and can create, to thwart the feasibility of multiple living units on a single lot. Examples are requirements for unduly small living units, unduly large lot sizes, excessive setbacks from lot boundaries, and unnecessary development fees.

Even where detailed regulations on the subject have been adopted, they have had to be amended in order to deal with complexities not adequately addressed in the initial versions. To illustrate the challenges, we offer examples from Oregon and California below.

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[37] Kriston Capps, *How YIMBYs Won Montana,* Bloomberg CityLab, April 28, 2023, posted at https://www.bloomberg.com/news/articles/2023-04-28/montana-s-yimby-revolt-aims-to-head-off-a-housing-crisis ("Out-of-town buyers sent prices soaring: Statewide, the average home sale price climbed from about $253,000 in March 2019 to $428,000 four years later, according to data from Zillow. The spike looks the same in industrial Billings in south-central Montana as it does in Polson, a small town on Flathead Lake in the state's northwest.")

[38] *Id.*

[39] Erica Sims, *California Solutions for Montana Problems*, Housing Forward Virginia, (July 27, 2023) posted at https://housingforwardva.org/news/fwd-192-montana-zoning-reform-housing/ (Senate Bill 382 also "requires local governments to upzone to provide significantly more density based on population projections for their community. The bill requires each locality to pick 5 out of 15 prescriptive policies to adopt including eliminating parking minimums, lowering setback requirements, and other lowering of development standards.")

i. Oregon

In 2019, Oregon enacted the first statewide "missing middle" law. It required larger cities to allow up to four units of housing on single-family zoned properties by 2022. [40] In response Portland, its largest city, enacted the Residential Infill Project ordinance in 2020.[41] which legalized the construction of two-, three-, and four-unit developments on almost all single-family-zoned properties. It also created a system of density bonuses that allows duplexes to be larger than single-family homes and three- and four-unit homes to be larger than duplexes."[42]

> The city also went above and beyond state law by allowing the construction of two ADUs—colloquially known as granny flats or in-law suites—on single-family lots and eliminating the requirement that new homes come with off-street parking.[43]

Portland's 2020 legislation contained certain restrictions that contributed to its limited, initial results. While it "legalized multiunit housing everywhere and created a system of density bonuses for those projects, it also shrank the maximum allowable size of structures in single-family zones."[44] The reforms also didn't allow four-unit structures to be larger than three-unit structures. "That's prevented fourplexes from including three-bedroom, family-sized units, thus limiting their appeal to developers and buyers alike."[45]

So, the Portland City Council passed amendments in June 2022 ("Residential Infill Project 2"), attempting to rectify such problems. The new rules reportedly increase the maximum size of four-unit structures enough to allow for modest, family-sized units.[46] Those rules also make it easier to divide individual lots into multiple properties and create townhomes on them.

ii. California

The Golden State "first required cities to permit ADUs in 1982, but cities and suburbs erected so many regulatory barriers that it was really hard to build a legal ADU, and most existing ADUs were illegal. It took another 34 years for the statehouse to get serious about ADU legalization."[47]

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[40] ORS § 197.758 (2019). *See also* amended ORS § 197.758 (taking effect Jan. 1, 2024); Britschgi 2022, *supra* n. 31.

[41] Portland, Oregon, Ordinance No. 190093 (2020).

[42] Britschgi 2022, *supra* n. 31.

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] Henry Grabar, *You Can Kill Single-Family Zoning, but You Can't Kill the Suburbs*, Slate (Sept. 17, 2021), posted at https://slate.com/business/2021/09/california-sb9-single-family-zoning-duplexes-newsom-housing.html.

"It wasn't enough to say [that ADUs] were allowed. Lawmakers had to be proactive about eliminating setback requirements, reducing impact fees, wiping away owner-occupancy requirements—those were all separate bills."[48] Those bills became law starting in 2016.

Another major step was the enactment in 2021 of Senate Bill (SB) 9, which allows homeowners throughout the state to split their lots or convert homes to duplexes, regardless of local zoning. "The law raises the possibility that many single-family homes currently protected by zoning could be replaced by two units—or even four, if owners split their lots and build duplexes on each half."[49]

SB 9 applies generally to lots of 2,400 square feet or more in single-family residential zones with urbanized areas or urban clusters (as designated by the U.S. Census Bureau).[50] Among its other provisions:

- Each parcel resulting from a lot split may not be smaller than 40 percent of the lot area of the original parcel;
- A locality cannot impose any standards that would preclude the construction of up to two units or physically precluding either of the two units from being at least 800 square feet in floor area;
- Side and rear setbacks of four feet are allowed;
- Lot splits generally cannot require demolition or alteration of an affordable housing unit;
- A locality may provide that the owner of a split lot must intend to occupy one of the housing units as their principal residence for the first year.[51]

However, SB 9 would allow new development in only 5.4 percent of California's single-family-home parcels, according to a study by a housing policy center at the University of California–Berkeley.[52] "That's partly thanks to a combination of loopholes in the law, including protections for existing renters and exemptions for historic districts and fire hazard zones. Building duplexes at scale is all but prohibited by the bill's condition that the same owner can't split adjacent lots." [53]

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[48] *Id.*, quoting David Garcia, Policy Director at the Terner Center for Housing Innovation at the University of California–Berkeley, and a co-author of the Center's initial impact analysis of that legislation.

[49] *Id.*

[50] Ben Metcalf, *et al.*, *Will Allowing Duplexes and Lot Splits on Parcels Zoned for Single-Family Create New Homes?*, p. 5, Table 1 (Terner Center for Housing Innovation, 2021), posted at https://ternercenter.berkeley.edu/wp-content/uploads/2021/07/SB-9-Brief-July-2021-Final.pdf. That statute does not apply, however, to historic districts or historic homes (as defined by the state or local government) or high fire zone areas. *Id.*

[51] *Id.*

[52] *Id.*, p. 9

[53] Grabar, *supra* n. 47.

"Another problem facing missing middle home construction is a whole thicket of non-zoning rules and practices that assume new construction will either be single-family homes or larger apartment buildings."[54] SB 9, for example, "legalized duplexes and lot splits on single-family zoned properties. But missing middle builders report that some utility companies in the state will only allow one metered connection per single-family property."[55]

"[T]he largest limitation by far is simply that lightly densifying most parcels won't pencil: Buying and building in California is expensive. Once you take development costs into account, SB 9's territory narrows from 6 million to 410,000 parcels."[56] Those high costs are due largely to inflated land prices resulting from regulatory barriers to housing development. Sizeable, up-front impact fees, gentrified building and housing code requirements, and other questionable regulatory requirements also drive up the costs of producing even modest housing.

"With respect to duplexes, municipalities can (and probably will) throw up a number of obstacles to stifle SB 9's impact, including height limits, floor-area ratio rules, minimum lot sizes, and development fees."[57] Such issues will have to be addressed by further state legislation, "overriding local politicians who fear homeowner revolts and relish the power they wield to issue exemptions to strict zoning laws."[58] Only a catch-all provision that bans regulatory barriers to housing opportunity across the board can cover and inhibit the vast range of local requirements that can stifle needed new housing unnecessarily.

c. Accessory Dwelling Units (ADUs)—path of least resistance?

There has been more progress legalizing and adding ADUs in single-family zoning districts than there has been adding duplexes and denser new housing types in those districts.[59] As mentioned, ADU's were common in single-family neighborhoods before zoning.

ADUs seem to be the path of least resistance, as a way to add housing units in "built-out" single-family neighborhoods. "Given ADUs' newfound popularity, legalizing them can be a relatively light lift for politicians."[60] The "gentle density" they provide can avoid

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[54] Christian Britschgi, *Despite Multiple States Abolishing Single-Family-Only Zoning, Very Few Duplexes and Triplexes Are Being Built*, ("Britschgi 2023"), REASON, March 14, 2023, posted at https://reason.com/2023/03/14/despite-multiple-states-abolishing-single-family-only-zoning-very-few-duplexes-and-triplexes-are-being-built/.

[55] *Id.*

[56] Grabar, *supra* n. 47.

[57] *Id.*

[58] *Id.*

[59] Emily Hamilton and Abigail Houseal, *A Taxonomy of State Accessory Dwelling Unit Law*s, (Mercatus Center, March 2023) ("Legalizing accessory dwelling units (ADUs) has been the most common way state policymakers have taken action to make more, lower-cost housing feasible to build").

[60] Shelby R. King, *Why ADUs Can't Solve the Nation's Housing Crisis*, Shelterforce, May 17, 2022, posted at https://shelterforce.org/2022/05/17/why-adus-cant-solve-the-nations-housing-crisis/. The article explains:

"the difficulty most lawmakers have getting affordable housing developments funded[.]"[61]

In fact, many homeowners seem to prefer—or at least not object to—a right to create an ADU on single-family lots. Homeowners have certain incentives to create ADUs. They can be rented out, thus helping the homeowner pay the mortgage and other household expenses. Or, they can be used to house elderly family members or provide for people in need. Or all of the above! ADU permitting in California is increasing rapidly.

> More than 23,000 ADU permits were issued in California [in 2022], compared with fewer than 5,000 in 2017 — which was around when ADU permitting began to take off thanks to legislative and regulatory changes in the state. The state now requires faster permit approval by localities, and establishes that cities must allow ADUs of at least 850 square feet — though many are much bigger.[62]

However, new housing units don't do much good for low- and moderate-income people looking for permanent housing, if those units are turned into Airbnb-type short-term rentals for visitors So, some jurisdictions have prohibited those sorts of rentals, except inside the primary home.[63]

For example, the Los Angeles City Council adopted an ordinance in December 2018 that establishes a regulatory framework to restrict short-term rentals to one's primary residence.[64] Homeowners in the city can rent ADUs that are outside their home only for periods of more than 30 days, and their tenants must be low- and moderate-income people, or "friends, family or even their own grandmothers — harking back to the original 'granny flat' moniker."[65]

"In fact, ADUs have become mainstream enough that in February the White House held a webinar singing their praises, and just yesterday the Biden administration published an action plan restating the federal government's commitment to "exploring avenues to help lenders pilot and scale renovation and construction financing for ADUs—particularly for low- and moderate-income homeowners."

[61] *Id.* ("By legalizing ADUs, local lawmakers can claim they're addressing the housing shortage without tackling larger issues such as the glaring need for funding more public housing, creation of units affordable to very-low-income renters or currently unhoused people who require additional services, and/or revamping inclusionary zoning or tax credit allowances.")

[62] Erica Werner, *'Granny flats' play surprising role in easing California's housing woes*, Wash. Post, May 21, 2023, posted at https://www.washingtonpost.com/business/2023/05/21/adu-granny-flat-california-housing-crisis/. "A number of other bills are being debated in Sacramento, including one by Assemblymember Phil Ting (D) that would allow property owners to sell their ADUs separately from their main houses." *Id.*

[63] *Id.*

[64] Los Angeles City Planning Dept., *Home-Sharing*, posted at https://planning.lacity.org/plans-policies/initiatives-policies/home-sharing (discussing Ordinance CF 14-1635-S2, which among other things requires hosts who wish to engage in short-term rentals to register with the City and post their registration number on all advertisements. Hosts must adhere to all requirements and must use the online portal to register).

[65] Werner, *supra* n. 62.

Despite the restrictions on Airbnb-type rentals in Los Angeles, ADU permitting is taking off there.

> Los Angeles dwarfed other [California cities in 2022] in ADU permitting, issuing 7,160 in 2022, compared with 662 in San Diego, the city with the next-highest total of ADUs. By comparison, just 1,387 permits were issued in L.A. last year for single-family homes. The number of ADU permits issued in L.A. was second only to the 13,400 permits issued for multiunit structures.[66]

An ADU program like that in LA. may be the least challenging missing middle option that can gain acceptance in most localities and still put a definite dent in a serious housing shortage for low- and moderate-income people. ADUs are no panacea for the housing supply problem.[67] But they are part of the solution.

d. Possible "missing middle" provisions in a federal EFHA

Prescribing requirements for missing middle programs warrants particular sensitivity at the federal level. State and local laws permitting "missing middle" units in single-family zoning districts are generally in their infancy and often need to be amended, in order to address complexities not initially covered, or not covered adequately.

Community size also has been an important consideration in creating appropriate "missing middle" programs for different local areas. For example (as mentioned), Oregon provides different requirements for communities of between10,000 and 25,000 people versus communities with greater populations. [68] California's SB 9 applies only in localities with urbanized areas.

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[66] Werner, *supra* n. 62.

[67] *See e.g.,* King, *supra* n. 60 ("while ADUs' infill potential and comparatively cheaper development and rental costs make them attractive, they alone can't solve the nation's housing crisis. Even if ADUs became legal and permittable in every city in every state, they can't be built or delivered quickly enough to supply the millions of units the nation needs, for several reasons. First, they're built piecemeal, as single units, and at the whims of private homeowners. . . . Even if all zoning barriers were removed and every homeowner who wanted to build an ADU could legally do so, ramped-up production couldn't match multifamily apartment complexes in terms of sheer capacity and scale").

Another concern about ADUs is the difficulty ensuring that safety and health requirements, and proper landlord/tenant relations, are being maintained in those scattered, individual housing units. Presumably, it would be easier to monitor conditions in apartment buildings or condominiums than in individual ADUs.

[68] About 800 U.S. cities had a population of 50,000 or more, as of July 2022. U.S. Census Bureau, *Annual Estimates of the Resident Population for Incorporated Places of 50,000 or More, Ranked by July 1, 2022 Population*, posted at https://www.census.gov/data/tables/time-series/demo/popest/2020s-total-cities-and-towns.html. Another 741 incorporated communities had populations between 25,000 and 50,000, and 1,572 had populations between 10,000 and 25,000, as of July 1, 2019. Statistica, *Number of cities, towns and villages (incorporated places) in the United States in 2019, by population size*, posted at https://www.statista.com/statistics/241695/number-of-us-cities-towns-villages-by-population-size/.

Missing middle alternatives that don't already have a sufficient track record of success could be evaluated, and perhaps strengthened, through rulemaking under a federal EFHA after its enactment. However, it may not be too soon to define programs that would be deemed compliant with a federal EFHA for different types of localities—without preempting stronger programs by those localities or their states.

Doing so should not insulate a locality or other government unit from liability for other regulatory barriers to housing opportunity. Nor should a government unit automatically be deemed in violation of the statute if its program varies from an EFHA "safe harbor" provision. But such a provision could add clarity to a local government's legal responsibility regarding missing middle housing programs.

In any event, the exclusionary zoning and non-zoning rules and other practices that can limit the effectiveness of missing middle initiatives are so many and varied that the blanket ban on regulatory barriers to housing opportunity that the EFHA provides will be necessary.

CONCLUSIONS

The proposed Economic Fair Housing Act (EFHA) would apply powerful new remedies for unreasonable restrictions on the creation of accessory dwelling units (ADUs), duplexes and other multi-unit residential lots in neighborhoods zoned for single-family housing. Those zoning districts are the prevalent form of residential zoning in the United States. They generally have prohibited multiple living units on a single lot and are largely responsible for crisis-level shortages of housing across the United States.

The EFHA would promote "missing middle" housing in two basic ways. First, it would ban regulatory barriers to housing opportunity comprehensively—the same way that the federal Fair Housing Act bans regulatory housing barriers that have a disparate impact on people based on their race, disability or certain other non-economic characteristics.

Such a ban is crucial to controlling the vast range of zoning and non-zoning regulatory barriers to housing opportunity. There is such a plethora of unjustified, exclusionary rules and practices (actual and potential) that they cannot all be regulated specifically.

Second, an EFHA could contain specific provisions that clarify the responsibilities of governments to correct unjustified barriers to "missing middle" forms of housing, including in established, single-family neighborhoods. Those forms of "middle housing" were common in single-family neighborhoods before zoning.

Generally, an EFHA would have to be enacted at the state or federal level, because most local governments have not shown the knowledge or motivation to reform their zoning and other land use rules sufficiently to remove their exclusionary effects. However, any statewide or federal ban should make sense as to each of the local jurisdictions affected.

The federal government has a key role to play in terms of clarifying the general principles that should guide land use regulation across the nation. States and localities often have

failed to understand and apply sound general principles and best practices in their land use decision-making.

Recently, laws permitting "missing middle" housing in urban, single-family zoning districts have been enacted in at least four states and various major cities. Many other cities and states are considering enacting such laws, In the circumstances, a provision containing similar permissions seems appropriate for a statewide EFHA in the other states.

Particular sensitivity is warranted at the federal level in prescribing requirements for "missing middle" programs, given the vast range of different conditions in various states and localities across the United States. "Missing middle" requirements of a federal EFHA arguably should be based on programs with a track record of success applicable to a wide range of localities.

There has been more progress legalizing and adding ADUs in single-family zoning districts than duplexes and denser housing types. ADUs seem to be the path of least resistance as a way to increase the number of housing units in established single-family neighborhoods.

The apparent success of the Los Angeles ADU program, which bans their use as short-term, Airbnb-type rentals for visitors, except inside the primary home, is particularly encouraging. ADUs are no panacea for the housing supply problem. But they are part of the solution.

It may be unduly difficult to devise, at the federal level, a comprehensive set of missing middle requirements applicable to all towns, cities, or other local areas nationwide. However, it may be feasible to define, or incorporate by reference, in an EFHA specific programs that would be deemed satisfactory (a/k/a "safe harbors") for certain types of localities under the statute.

A "safe harbor" provision should not insulate a locality or other government unit from liability for other regulatory barriers to housing opportunity, and the lack of a program that meets the "safe harbor" criteria should not automatically constitute a violation by the locality (or state) involved. But such a provision could add clarity to a local government's legal responsibility regarding missing middle housing programs.

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