



Smarter Zoning for Fair Housing

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Summary

Exclusionary zoning is damaging equity and inhibiting growth and opportunity in many parts of America. Though the Supreme Court struck down expressly racial zoning in 1917, many local governments persist with zoning that discriminates against low-wage families — including many families of color.¹ Research shows that has connected such zoning to racial segregation, creating greater disparities in measurable outcomes.²

By contrast, real-world examples show that flexible zoning rules — rules that, for instance, that allow small groups to opt into higher housing density while bypassing veto players, or that permit some small areas to opt out of proposed zoning reforms — can promote housing fairness, supply, and sustainability. Yet bureaucratic and knowledge barriers inhibit broad implementation of such practices. To facilitate zoning reform, the Department of Housing and Urban Development should (i) draft model smarter zoning codes, (ii) fund efforts to evaluate the impact of smarter zoning practices, (iii) support smarter zoning pilot programs at the state and local levels, and (iv) coordinate with other federal programs and agencies on a whole-of-government approach to promote smarter zoning.

Challenge and Opportunity

Better zoning would enable fairer housing outcomes and boost growth across America. Economists across the political spectrum agree that restrictive zoning laws banning inclusive, climate-friendly, multi-family housing have made housing less affordable, increased racial segregation and damaged the environment. Model zoning codes drafted by HUD, together with technical assistance and federal grants under the new Unlocking Possibilities Program when it passes, would kickstart more innovative zoning techniques by avoiding the current political obstacles that limit zoning reform.

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The Biden-Harris Administration is actively working to eliminate exclusionary zoning in order to advance the Administration's priorities of racial justice, respect for working-class people, and national unity. But in many states with unaffordable housing, local politics have made zoning reform painfully slow and/or precarious. In California, for

¹ Kahlenberg, R.D. (2021). [Tearing Down the Walls: How the Biden Administration and Congress Can Reduce Exclusionary Zoning](#). The Century Foundation, April 18.

² Rouse, C.; Bernstein, J.; Knudson, H.; Zhang, J. (2021). [Exclusionary Zoning: Its Effect on Racial Discrimination in the Housing Market](#). Written Materials, June 17.

instance, zoning-reform activists have garnered significant victories. But a recently launched petition to limit state power over zoning might undo some of the progress made so far. There is an urgent need for strategies to overcome political gridlock limiting or inhibiting zoning reform at the state and local levels.

Fortunately, a suite of new smarter zoning techniques can achieve needed reforms while alleviating political concerns. Consider Houston, TX, which faced resistance in reducing suburban minimum lot sizes to allow more housing. To overcome political obstacles, the city gave individual streets and blocks the option to opt out of the proposed reform. That simple technique reduced resistance and allowed the zoning measure to pass. The powerful incentives from increased land value meant that although opt outs reached nearly 50% in one neighborhood, they were rare in many others.³ The American Planning Association similarly published a proposal to allow opt-ins for upzoning at a street-by-street level — a practice that would allow small groups to bypassing those who currently block reform in order capture the huge incentives of upzoning.

In fact, opt-ins and opt-outs are proven methods of overcoming political obstacles in other policy fields, including parking reform and “play streets” in urban policy. Opt-ins and opt-outs reduce officials’ and politicians’ concerns that a vocal and unrepresentative group will blame them for reforms. While reformers may fear that allowing exemptions may weaken zoning reforms, the enormous increase in land value created by upzoning in unaffordable areas provides powerful incentives for small groups of homeowners to choose upzoning of their own lots. And by offering a pathway to circumvent opposition, flexible smarter zoning reforms can expedite construction of abundant new affordable housing that substantially improves equity, opportunity, and quality of life for working-class Americans.

Absent action by HUD to encourage trials of innovative techniques, the pace of reform will continue to be much slower than it needs to be. Campaigners at state and local government level will continue to face opposition and setbacks. The pace of growth and innovation will be damaged, as bad zoning continues to block the benefits of mobility and opportunity. And disadvantaged minorities will continue to suffer the most from unjust and exclusionary zoning rules.

³ Gray, M.N.; Millsap, A.A. (2020). Subdividing the Unzoned City: An Analysis of the Causes and Effects of Houston’s 1998 Subdivision Reform. *Journal of Planning Education and Research*.

Plan of Action

The Department of Housing and Urban Development (HUD) should take the following steps to facilitate zoning reform in the United States:

1. Create a model Smarter Zoning Code

HUD's Office of Policy Development and Research, working with the Environmental Protection Agency (EPA)'s Office of Community Revitalization, should produce a model Smarter Zoning Code that state and local governments can adopt and adapt. The Smarter Zoning Code would provide a variety of options for state and local governments to minimize backlash against zoning reforms by reducing effects on other streets or blocks. Options could include:⁴

- Allowing a street or block to opt-in to upzoning by filing a verified petition signed by a qualified majority of the registered voters residing on that street or block.
 - If the petition is filed by the residents of a block of houses surrounded by streets, development pursuant to the upzoning should be required to leave untouched the fronts of the houses facing those streets (to minimize impact on residents whose lots are not included in the upzoning).
 - Residents can be given the option to attach a design code to their petition.
- Anti-displacement rules. Although most development through smarter zoning will likely happen in neighborhoods dominated by owner-occupied single-family homes, all resident renters should be protected by rules that preserve existing anti-eviction and rent-control provisions. Rules should additionally ensure that no development pursuant to smarter zoning can proceed unless renters are protected, and should include provisions to prevent evasion by landlords⁵
- Height restrictions and angled light planes to protect sunlight to other blocks.
- Setback rules that can be waived by adjacent homeowners to allow development of townhouses or multifamily units.

⁴ For more detailed suggestions, see: Myers, J. (2021). Smarter Zoning by Street and by Block. *Zoning Practice*, 8(21): 1–8.

⁵ See, e.g., section 65918.7 of California's SB827, proposed by state senator Scott Wiener in 2018. Available at https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB827.

- Compensation payable by a developer to adjoining residents who are adversely affected by development permitted under zoning reform.
- Establishment of controlled parking districts surrounding a street or block that votes to upzone, with free parking stickers issued to residents of adjoining streets to protect their parking access.
- Impact fees, tax increment local transfers,⁶ community-benefit agreements, or other methods to address spillover effects of new developments.
- Where appropriate, provisions to allow each local government to mitigate the scale of change. For example, local governments could limit opt-in upzoning to no more than four floors of housing in areas that are currently zoned exclusively for single-family homes.

A draft of a model Smarter Zoning Code could be developed for \$1 million and could be tested by seeking views from a range of stakeholders for \$5 million. The model code should be highlighted in HUD's Regulatory Barriers Clearinghouse.

2. Collect and showcase evidence on effectiveness and impacts of smarter zoning practices

As part of the list of policy-relevant questions in its systematic plan under the Foundations for Evidence-Based Policymaking Act of 2018,⁷ HUD should include the question of which types of zoning approaches, including smarter zoning, can best (i) help to address or overcome political and other barriers to meeting fair-housing standards, and (ii) support plentiful supplies of affordable housing to address equity and other issues.

HUD should also provide research grants under the Unlocking Possibilities Program,⁸ once passed, to evaluate the impact of Smarter Zoning techniques, suggest improvements to the model Smarter Zoning Code, and prepare and showcase successful case studies of flexible zoning.

Finally, demonstrated thought leadership by the Biden-Harris Administration could kickstart a new wave of innovation in smarter zoning that helps address historic equity issues. HUD should work with the White House and key stakeholder groups (e.g., the American Planning Association, the National League of Cities, the National Governors' Association) to host a widely publicized event on Planning for Opportunity and

⁶ Tax increment local transfers "transfer a portion of the increase in the tax base from any new development to nearby property owners, allowing them to personally benefit from new development and offset some of the lost value of their property." Source: Ikeda, S.; Hamilton, E. (2015). [How Land-Use Regulation Undermines Affordable Housing](#). Mercatus Center, November 4.

⁷ The relevant section is 5 USC 312.

⁸ Up for Growth Action. (2021). [Latest Build Back Better Package Retains Commitment to Unlocking Possibilities Program](#). November 4.

Growth. The event would showcase proven, innovative zoning practices that can help state and local government representatives meet housing and growth objectives.

3. Launch smarter-zoning pilot projects

Subject to funding through the Unlocking Possibilities Program, the HUD Secretary should direct HUD's Office of Technical Assistance and Management to launch a collection of pilot projects for the implementation of the model Smarter Zoning Code. Specifically, HUD would provide planning grants to help states, local governments, and potentially other groups improve skills and technical capacity needed to implement or promote Smarter Zoning reforms. The technical assistance to help a local government adopt smarter zoning, where possible under existing state law, should cost less than \$100,000; technical assistance for a state to enable smarter zoning on a state-wide basis should cost less than \$500,000.

4. Promote federal incentives and coordination around smarter zoning

Model codes, evidence-based practices, and planning grants can help advance upzoning in areas that are already interested. The federal government could also provide stronger incentives to encourage more reluctant areas to adopt smarter zoning. It is lawful to condition a portion of federal funds upon criteria that are “directly related to one of the main purposes for which [such funds] are expended”, so long as the financial inducement is not “so coercive as to pass the point at which ‘pressure turns into compulsion’”.⁹ For instance, one of the purposes of highway funds is to reduce congestion in interstate traffic. Failure to allow walkable urban densification limits the opportunities for travel other than by car, which in turn increases congestion on federal highways. It would therefore be constitutional for the federal government to withhold 5% of federal highway funds from states that do not enact smarter zoning provisions. Similarly, funding for affordable home care proposed under the Build Back Better Act will be less effective in areas where exclusionary zoning makes it less affordable for carers to live. A portion of such funding could be withheld from states that do not pass smarter zoning laws. Similar action could be taken on federal funds for education, where unaffordable housing affects the supply of teachers, and on federal funds to fight climate change, because sprawl driven by single-family zoning increases carbon emissions.

HUD's Office of Fair Housing and Equal Opportunity should consult with other federal bodies on what federal funding can be made conditional upon participation by state and local governments in smarter zoning programs, as well as on when implementing such conditions would require Congressional approval. HUD should similarly consult with other federal bodies on creative opportunities to incentivize smarter zoning through existing programs. If Congress does not wish to amend the law, it may be possible for other agencies to condition funding upon implementation of smarter

⁹ South Dakota v. Dole, 483 U.S. 203, cited in National Federation of Independent Business v. Sebelius, 567 U.S. 519.

zoning provisions at state or local level. Although smarter zoning will also benefit existing residents, billions of dollars of incentives may be needed for the most reluctant states and local governments to overcome existing veto players to get more equitable zoning.

Conclusion

Urgent reform is needed to address historic damage caused to equity by zoning rules, originally explicitly racist in language, that remain economically exclusionary in intent and racially discriminatory in impact. By modeling smarter zoning practices, demonstrating their benefits, providing financial and technical assistance for implementation, and conditioning federal funding upon adoption, HUD can accelerate and expand adoption of beneficial flexible zoning reforms nationwide.

Frequently Asked Questions

1. Why expend effort on flexible smarter zoning as opposed to more traditional, sweeping zoning reforms?

Many proposed zoning reforms that, if implemented, would go the furthest to improve equity and provision of fair housing have encountered considerable political challenges in areas where exclusionary zoning is most prevalent and damaging. Flexible zoning reforms may have apparently less sweeping impacts than traditional zoning reforms, but are also far more feasible in practice. Providing additional ideas to help overcome those political barriers may be a powerful way to unlock improvements in equity.

2. Would giving small groups the power to opt into upzoning really produce additional housing? Would giving small groups the power to opt out considerably weaken zoning reforms?

To be clear, there is no suggestion to give small groups the power to opt into zoning that is more restrictive than current rules. Flexible zoning reform can often be more powerful than traditional zoning reform. Members of the Squamish Nation recently demonstrated the enormous power of economic incentives to upzone when 87% voted to approve the construction of 6,000 new homes on their territory.¹⁰ Similarly, a large fraction of the residents of Houston — recognizing that upzoning could make their properties more valuable — did not choose to opt their blocks out of recent zoning reform.¹¹ Incentives for apartment owners to vote for redevelopment under the

¹⁰ Halliday, M. (2020). [The Bold New Plan for an Indigenous-Led Development in Vancouver](#). *The Guardian*, January 3.

¹¹ Gray, M.N.; Millsap, A.A. (2020). [Subdividing the Unzoned City](#).

TAMA 38 scheme in Israel accounted for 35% of the new homes built in Tel Aviv in 2020.¹²

If no individual landowners wanted to gain the economic benefits of being permitted to develop their lots, there would be no demand from others for zoning rules to stop development from proceeding. Most existing processes governing upzoning give disproportionate weight to the opinions of vocal but unrepresentative groups who want no change, even in areas where a large majority would otherwise support reform. Direct democracy at very small scales can let small groups of residents bypass those veto players and capture the economic benefits of allowing more housing.

3. Why would any state or local government implement flexible smarter zoning?

Many state and local leaders are aware of the enormous equity and growth benefits that better, more inclusionary zoning can deliver. However, such leaders are often frustrated by political and public resistance to simple upzoning attempted via traditional zoning processes. Smarter zoning techniques can allow upzoning to proceed in the many blocks and streets where it is popular, without being frustrated by the resistance from the few residents among whom it is not.

4. Would smarter zoning practices crowd out more sweeping zoning reforms?

Smarter zoning proposals are designed to supplement and assist traditional zoning reforms, not replace them. “Opt-in” zoning mechanisms are designed to allow opt-ins only to more equitable upzoning, not to more exclusionary zoning, so they cannot make matters worse. Similarly, “opt-out” mechanisms only apply where the promoters of an ambitious new pro-equity reform want a way to overcome strong political resistance to that specific reform.

Another objection is that smarter zoning might be seen to perpetuate local zoning control. But existing local zoning processes are structured to block change and empower local veto players. By contrast, smarter zoning techniques are designed so that groups who wish to capture the economic benefits of upzoning can use direct democracy to bypass existing veto players, in a way that has proven successful in other fields. Where smarter zoning is imposed by state law, it can hardly be said to be entrenching local control. And in any case, existing state powers to override local zoning will remain, as will the potential for future federal action on zoning.

5. Could smarter zoning policies harm renters?

Not if designed correctly. As explained above, smarter zoning codes can and should include strong provisions to protect renters.

¹² Myers, J. (2021). [How Tel Aviv Boosted New Homes by Half – and What It Tells Us about Fixing Housing](#). CapX, June 25.

6. How quickly could HUD and EPA develop a Smarter Zoning Code?

An initial draft of a model Smarter Zoning Code could likely be produced within three months. Testing with stakeholders should take no more than six months, meaning that a final code could be published by HUD within one year of the effort beginning.

7. Who is likely to object to smarter zoning?

- Officials wedded to traditional zoning processes may not wish to try innovative methods to improve equity, but smarter zoning proposals have been published by the American Planning Association and have little risk of harm.
- Resistance will arise from some residents of areas with exclusionary zoning. However, such resistance will be less than the resistance to universal upzoning mandates. And this resistance will be counterbalanced and often outweighed by the support of the many residents drawn by the economic benefits of upzoning for them and their families.
- Advocates of aggressive zoning reform may complain that smarter zoning is not sufficiently assertive. One response to this objection is that federal powers to impose such upzoning are highly constrained by political gridlock and partisanship. Smarter zoning is a politically feasible way to advance equitable zoning in the near term, while the campaign for broader national zoning reform continues in the long term.

About the Author



John Myers is a housing campaigner and researcher who has written extensively on housing equity and the need for zoning reform to ensure more equitable housing. He previously worked as an attorney and in finance. His most recent work, *Smarter Zoning by Street and by Block*, was published by the American Planning Association in the August 2021 issue of *Zoning Practice*.

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