Zoning Rules Create Affordability and Economic Benefits

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Increasingly, municipalities across the United States seek to create affordable housing for their constituents. Some regulatory zoning schemes targeting affordability, like transferable density units and development credits, have been around for years, while others, like allowing more properties to be used for rental purposes, are relatively new (or at least new to some jurisdictions). Developers may leverage some such regulatory schemes into opportunities to offset hurdles like increased materials costs. However, developers and their counsel will need to review any new zoning regulatory schemes carefully as some rules that are nominally designed to address affordable housing and otherwise spur development may not do so in practice.

At their core, many zoning regulations designed to make housing more affordable seek to increase the density of units within a jurisdiction. Putting more units in a smaller area of real property will theoretically make housing more accessible within that area, thereby reducing the prices of dwelling units in that area overall. Experts are mixed on the results of such approaches.

A Closer Look

Efficacy aside, one such tactic to promote affordability is to permit accessory dwelling units on otherwise single-family parcels of real property. While specific definitions vary, an accessory dwelling unit is generally an attached or a detached residential dwelling unit constructed on a parcel of real property that already contains a primary residence. Such an accessory dwelling unit should provide full living facilities (e.g., bedroom, bathroom, kitchen, living area) to its occupants separate from those living facilities provided in the primary residence.

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Some jurisdictions have long implemented and expanded zoning regimes to encourage the use of accessory dwelling units. California, for example, first implemented statewide statutes related to accessory dwelling units decades ago. *See e.g.*, Cal. Gov. Code § 65852 et seq. The state continues to promote the use of accessory dwelling units, at least for the time being, such as by offering state-level funding, See e.g., Cal. Health & Safety Code § 50515.03. The state also continues to update its accessory dwelling unit-statutory regime regularly, demonstrating that the policy remains top-of-mind for lawmakers.

Other jurisdictions have only recently implemented zoning provisions permitting widespread use of accessory dwelling units and have not done so with the same level of detail as California. For example, the Metropolitan Council of Nashville, Tenn., recently approved a detached accessory dwelling unit overlay district to permit the construction of detached accessory dwelling units in certain single-family zoning districts. *See* Metropolitan Council Ordinance BL2021-620 ("Nashville DADU Ordinance"). One express goal of the Nashville DADU Ordinance is to address the "relative lack of affordable housing in the center-city of Nashville." Id. Likewise, the city of Gainesville, Fla., added accessory dwelling units as a permitted use within various zoning districts, including single-family zoning districts, just within the past few years. *See* City Commission Ordinance No. 190988 ("Gainesville ADU Ordinance").

Nashville, Tennessee. The Nashville DADU Ordinance provides a prime example of the types of pitfalls that may face a business or individual who seeks to take advantage of new "affordability" regimes. For example, the Nashville DADU Ordinance requires that any new detached accessory dwelling units with the detached accessory dwelling unit overlay district must comply with such standards as those related to "lot area, setbacks, bulk & massing, design, and access." *See* Nashville DADU Ordinance.

Suppose a particular parcel of property on which a detached accessory dwelling unit may be technically permitted is not large enough for a detached accessory dwelling unit to be installed on such parcel in compliance with applicable setback lines. In that case, the new regime will not practically benefit such parcel. In

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other words, the new regime will not increase affordability for a jurisdiction if the parcels to which the regime may nominally be applied cannot technically comply with the regime's requirements. Of course, such hurdles are not unique to Nashville.

State of California. For comparison, the extensive California accessory dwelling unit-statutory regime includes at least certain language that appears to reduce obstacles using accessory dwelling unit regimes. Among other things, Section 65852.2 of the California Government Code provides that an application for an applicable accessory dwelling unit should be "approved ministerially without discretionary review or a hearing."
Such language implies that a local government should not be permitted to bar the construction of an accessory dwelling unit based on immeasurable, discretionary factors. Of course, California (at the state level) still gives local governments the discretion to require accessory dwelling units to comply with setbacks and technical requirements.

Gainesville, Florida. At the other end of the spectrum, the Gainesville ADU Ordinance imposes relatively few restrictions on accessory dwelling units. Instead, the ordinance broadly permits accessory dwelling units within residential zoning districts, without requiring that a special overlay be applied to such residential parcels. However, as in those rules described above, the City Commission still does require that accessory dwelling units comply with setbacks and technical requirements.

Conclusion

The foregoing analysis merely scratches the surface of the referenced ordinances and statutes but can be applied to new and existing zoning regulatory schemes across the country. Such regimes may include, among other things, blanket increases in permitted density, loosened restrictions on short-term rentals, or development incentives offered in exchange for the construction of affordable housing units. By carefully reviewing the language of any new zoning regulatory scheme, developers may find a viable strategy for capitalizing on affordability-based zoning changes.

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In doing so, such persons may find unique opportunities to increase their projects' density and profitability. While accessory dwelling units are not independently transferable, even a larger scale developer may still benefit by offering units that are more attractive to potential buyers (such as by offering a source of passive income) thereby commanding higher prices.

Other affordability-based zoning changes would likely offer additional opportunities. In each case, developers and their counsel will need to review each specific zoning rule at issue to determine how and whether compliance with the rule will be technically and economically feasible and beneficial.

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