Punching Down: Trends in State Preemption



Credit: Sports Art is a Knockout!

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Political Landscapes

Georgia

Gov: R

Senate: R (34/ 23)

House: R (101 / 80)

A.G.: R

SOS: R

U.S. Sen.: D & D

Arizona

Governor: D

Senate: R (16 / 14)

House: R (31 / 29)

A.G.: D

SOS: D

U.S. Sen.: D & I

Express Preemption Consequences in AZ

- Loss of state shared revenues. See A.R.S. § 41-194.01.
- At the request of any legislator (a "1487 complaint"), the AG must investigate the alleged violation of state law or the Arizona Constitution.
- "Maybe" violation = AG must file a special action. Municipality must post a bond equal to its state share for the preceding 6 months
- "Definite" violation = 30 days to cure. State Treasurer must withhold and redistribute share of state revenues until cured.

Consequences in AZ

Subject to other penalties in preemption statutes, e.g.:

- Any person or organization whose membership is adversely affected by an ordinance, regulation, tax, measure, directive, rule, enactment, order or policy that violates A.R.S. § 13-3108 may file a civil action against the municipality:
  - Municipality cannot assert as defenses: acting in good faith or on the advice of counsel
  - Prevailing plaintiff **must** be awarded (1) reasonable attorney fees and costs; (2) actual damages not to exceed $100K.
  - Knowing/willful violations subject to civil fines (up to $50K)

Express Preemption Consequences in GA

- Most often see loss of state funds, permits, grants, etc. used as punishment (often used as the “hammer” for noncompliance with state requirements)
- Otherwise, most preemptions act to just nullify conflicting local ordinance
- Statutes give ability for suit against city for enforcement with ability to collect fees

Tension Between State & Local Government is Not New*

*See Riverstone-Newell, "*The Rise of State Preemption Laws in Response to Local Policy Innovation*," 47 J. Federalism 3, 403-25 (2017).

- State government has historically delegated responsibilities (mandates) to local government, often without funds to pay for it (unfunded mandates)
- State government also limits local government flexibility to meet mandates as well as response to local issues
- Federal and state governments are often gridlocked or slow to solve problems – constituents turn to local government, initiatives, and referenda
- Nature of local government – nimble; can experiment and course-correct quickly
- Interest groups opposed to local policies turn to state government

State Preemption Generally

- Authorized by the Constitution
- Preemption (state prohibits action) distinguished from Conflict (state sets standards or minimum requirements; local regulation cannot conflict)
- Historically, preemption was used when policy necessitated a statewide regulatory scheme (e.g., uniform traffic laws, water use permits, building code, fire code)
- Newer trend is “special interest” preemption (“blanket bans” easier than coalition building)
- Even more recent trend is “culture war” or political preemption

Special Interest Preemption

- Powerful special interest groups have access to and the ear of legislators
- Preemption can eliminate unwanted local regulation efficiently and covertly
  - *Efficient – ready access to and influence on a small group of decision-makers (term limits consolidated power)*
  - *Covert – less public scrutiny of legislative action due to distance and dwindling media coverage; avoids facing angry constituents at a town hall meeting*

Special Interest Preemption in AZ

- Special interest preemption is also the most predominant type, similar groups as FL
- High percentage of lobbyist reports are incomplete
- Homebuilders, Goldwater Institute, ALEC, Mercatus Center, Brookings Institute, Cato Institute, Heritage Foundation, Urban Land Institute, realtors, NIMBYs/YIMBYs, unions, etc. – preemptions related to land use, zoning, building permits, inspections, fire apparatus roads, water conserving low-flow plumbing fixtures, energy use reports, inclusionary zoning, assured water requirements, private property rights

Special Interest Preemption in AZ

- Local taxes, fees, license requirements - Goldwater Institute, AZ Free Enterprise Club, Institute for Justice
- Second Amendment - NRA, National Shooting Sports Foundation, Taser/Axon, Ruger
- Industries – new technologies, telecom, cable, wireless, short-term rentals; food trucks; fireworks; retail business security; block chain nodes, mining, railroads
- Utilities – APS, SRP, Southwest Gas

Special Interest Preemption in GA

- Special interest preemption has steadily risen in GA
- NRA - preemption of local gun and ammunition regulations
- Agriculture – taxation and regulation
- New Industries – Drone delivery services; short term rentals
- Technology – crypto and digital currency (mining and use), public safety
- Builders –land use, zoning, building permits & inspections, building materials, manufactured homes
- Nation Trends in GA –Homelessness, Sanctuary Policies

Political or "Culture War" Preemption

- The national phenomenon of the urban-rural divide (blue-red) plays out in GA and AZ
- National political groups use preemption to take on "progressive issues" that are seen in larger metro areas (e.g., sanctuary cities; DEI; LGBTQ issues; parental rights; plastic bags)
- State legislators perceive all local governments as "progressive," but perception is not reality – GA and AZ municipal office is non-partisan, but surveys of municipal officials indicate that D's vs R's is representative of Georgians and Arizonans generally

LAND USE & DEVELOPMENT "PREEMPTIONS"

Examples

Schools in AZ

- Charter schools must be classified the same as public schools (15-189.01)
  - *zoning*
  - *assessment of zoning fees*
  - *site plan fees*
  - *development fees*
  - *any required hearings*
  - *applications*
- Notwithstanding any other law, cannot assess impact fees from a school district or charter school (9-500.18).
  - *Does not include fees assessed or collected for streets and water and sewer utility functions*

Schools in AZ

- Can adopt zoning regulations that prohibit a charter school from operating within 1 acre of an existing single family zoning district (15-189.01)
- Cannot require minimum lot size larger than 1 acre for any nongovernmental primary or secondary school (9-462.01(K))
- Cannot enforce any ordinance, procedure, or process against a charter school that cannot be legally enforced against a school district (15-189.01)
- Must conduct hearings and administrative reviews involving charter schools on an expedited basis - 30 days for admin. reviews, 90 days for the public hearing process (15-189.01)

GA Housing Background: 2023-2024 Session

- 2021-2022: Build to Rent and Short-Term Rental Preemptions introduced. Ultimately did not pass.
- Attention grows on housing issue. Blame grows on local government on cost, red tape, time, etc.
- Housing Study Committee meets throughout interim
- Governor Kemp announces priority of “Workforce Housing” at annual legislative kickoff event
- Non-legislative housing task force formed and tasked with bringing forward a legislative package

Building & Construction in GA: 2023 / 2024 Session

- HB 461: Revised limitations on Building Permit Fees (Passed)
  - *Local Governments already limited in regulatory fee calculation*
  - *Costs of building inspection fees came under fire*
  - *Eliminated method of calculating building inspection fee*
  - *Local governments forced to revise fee schedules*
- HB 981: Cap on Building Inspection Fee for Agricultural Buildings (Failed)
  - Limit total fee to $500
  - Broad definition of agricultural buildings

Building & Construction in GA: 2023 / 2024 Session

- HB 517: Georgia Homeowner Opportunity Act (Failed)
  - Would have prohibited the adoption, or regulation of, 'building design elements' by local governments.
  - Building Design Elements are defined as: Exterior building color, Type or style of exterior cladding material, Style or materials of roof structures or porches, Exterior nonstructural architectural ornamentation, Location or architectural styling of windows and doors, including garage doors, The number and types of rooms, The interior layout of rooms, Types of foundation structures approved under state minimum standard codes, Covered parking, Structural square footage minimums greater than 1,200 square feet, Lot size minimums

Building & Construction in GA: 2023 / 2024 Session

- SB 121: Well Drilling Preemption (Passed)
  - Current law provided that no local government may require a single-family residential property or farm served by a private well to connect with or use the public water system
  - This bill provides local governments may not prohibit the installation of a well serving a single-family residence if the parcel is on one acre or more. Also prohibits local governments from banning the repair or maintenance of such wells
- HB 1146: Private Water Systems (Passed)
  - Requires EPD to issue permit to provide consumptive use of water without a letter of concurrence from any local government which might otherwise provide the service
  - Local government lacks the capability to provide the water service requested within a period of 18 months

Land Use & Growth Management in GA: 2023/2024 Session

- SB 213: Manufactured Home Replacement (Passed)
  - Prohibits local governments from levying any restriction on the replacement of a new mobile/manufactured home within a mobile home park, manufactured housing community, or other residential lands.
  - Requested several exceptions based health and safety, length of non-conforming use, deviation from residential
- SB 188: Regulation of Rental Subdivision (failed)
  - Also known as “Build to Rent”
  - Would have prevented local government from enacting or enforcing any restrictions on residential rental agreements of over 30 days.
  - As a result, the bill would preempt ability to regulate land use for the development and construction of corporate subdivisions for rental-only purposes.

Land Use & Growth Management in GA: 2023 / 2024 Session

- HB 514: Housing Regulation Transparency Act (Failed)
  - Restricts locally enacted development moratoriums on residential properties.
  - Would have placed a six-month limitation on zoning moratoria
  - Restrict zoning and planning fees to be used solely to fund the operation of zoning administration.
  - Moratoriums could not be extended unless the local government is responding to the following:
    - A natural disaster, A state of emergency, Health or safety concerns, Judicial order, A third-party - or internal engineering study
- HB 1122: Short-Term Rental Preemption
  - Grandfathered in use of properties as STVR, preventing local governments from banning/reducing in jurisdiction
  - Limited local governments ability to discontinue property as STVR for various violations

Land Use & Growth Management in GA: 2023 / 2024 Session

- SB 435: Community Development Districts (Failed)
  - Provided the framework and implementation for community development districts to build and to maintain public infrastructure.
  - The new entities would have specified governmental powers, including the ability to issue bonds and to levy ad valorem tax assessments for purposes of paying the costs of such infrastructure and bonds.
  - The approval of the creation of these entities would lie with the local governing authority, which would also retain general governmental and zoning power over the area within the district.

Housing & Zoning Preemption in AZ: 2024 Session

- 57 land use/"housing" bills were proposed
- HB2570 (planning; home design) – **vetoed**
  - *Eliminated single-family zoning*
  - *Included a wide range of preemptions (e.g., design, building materials, density, etc.)*
- SB1665 (development permits) – **failed**
  - *Gave developers the right to use/select third parties for plan review and inspections (at the city's cost?)*

Housing & Zoning Preemption in AZ: 2024 Session

Failed:

- HB2261 (minimum parking)
- HB2533 (building permits)
- SB1112 (home design)
- HB2597 (residential planning)
- HB2259 (removal of rent control preemption)
- SB1563 (transit-oriented development)

Housing & Zoning Preemption in AZ: 2024 Session

Failed:

- HB2734 (public hearings)
- HB2584 (building materials)
- HB2096 (cottage homes)
- SB1606 (residential lease communities)
- HB2384 (expedited processing; development requests)

Housing & Zoning Preemption in AZ: 2024 Session

Passed:

- HB2297 (adaptive reuse, multifamily)
- HB2720 (ADUs)
- SB1162 (ministerial review, reporting)
- HB2721 (middle housing)
- HB2210 (annual reporting)
- Other “affordability” bills
  - *HB2846 hoophouses; polyhouses* 🪴
  - *HB2325 backyard chickens* 🐣

Housing & Zoning Preemption in AZ: 2024 Session

HB2297 (passed)

By Jan. 1, 2025, municipalities of 150,000 or more:

- Must allow multifamily or adaptive reuse on 10% of existing commercial, office or mixed-use buildings subject to exemptions
- Cannot require CUP, PUD, rezoning, or other discretionary review
- Subject to restrictions on parking authority
- Cannot withhold demolition permits in some cases
- May designate “excluded areas” every 10 years

Housing & Zoning Preemption in AZ: 2024 Session

HB2720 (passed)

Accessory dwelling units (ADUs) are allowed **"by right"** **in cities above 75K** as follows:

Single family (SF) parcel/lot size	ADUs allowed per lot/parcel	Size
Lot is <1 acre	1 attached ADU + 1 detached ADU	Lesser of: 75% of the gross floor area of the existing SF dwelling or 1000 SF
Lot is 1 acre or more	1 attached ADU + 1 detached ADU	
Lot has at least 1 restricted-affordable ADU (defined)	1 attached ADU + 2 detached ADUs	

Housing & Zoning Preemption in AZ: 2024 Session

In addition to the "by right" provisions, all ADUs are allowed the following under HB2720:	
Locations	Must allow where SF is allowed
Frontage, lot coverage, height	Must treat ADU like SF
Setbacks (rear, side)	Cannot require more than 5 feet
Exterior design, roof pitch, finishing materials	Cannot require ADU to match SF
Parking	Cannot require additional parking or "in lieu parking fees"

Housing & Zoning Preemption in AZ: 2024 Session

HB2720 (passed)

Applies to all ADUs:

- Must approve ADUs administratively, “shot clocks” apply
- Cannot require long term lease for ADUs
- Cannot require “familial, marital, employment or other preexisting relationship”
- Must allow ADUs to be used as vacation rentals*
  - *Can require owner to reside on the property, but only if the ADU was constructed after Sept. 14, 2024*
  - **Local authority to regulate vacation rentals has been severely limited since 2016*

Housing & Zoning Preemption in AZ: 2024 Session

HB2720 (passed)

- Must amend zoning codes by Jan. 1, 2025
- **Penalty:** ADUs will be allowed on all lots or parcels zoned for residential use "without limits"

Housing & Zoning Preemption in AZ: 2024 Session

SB1162 (passed)

- All municipalities must amend codes by Jan. 1, 2025, to allow the following for "residential zoning applications"*:
  - *30 days for admin. completeness, 15 days for resubmittals*
  - *180 days to approve/deny*
  - *One-time 30-day extension for extenuating circumstances or 30-day extensions if requested by the applicant*
  - *Exempts existing historic districts, PADs*
  - **"Residential zoning applications" is not defined*
- Starting Jan. 1, 2025, all municipalities >30K must publish/submit annual housing needs assessment and annual report

Housing & Zoning Preemption in AZ: 2024 Session

HB2721 (passed)

In all municipalities ≥ 75,000:

- Multi-plex homes and townhomes are allowed "by right":
  - *On all SF lots within 1 mile of central business district*
  - *On at least 20% of any new development ≥10 acres*
- Cannot discourage middle housing
- Penalty for failure to amend codes by Jan. 1, 2026: middle housing allowed "by right" without limitations on all lots zoned for SF residential use

On the 2024 Ballot in AZ

HCR2023 property tax; refund; nuisance enforcement

- Until Jan. 1, 2036, allows annual refunds of primary property taxes for a municipality's failure to enforce laws prohibiting camping, obstructing public thoroughfares, loitering, panhandling, public urination or defecation, public consumption of alcoholic beverages, or possession of illegal substances
- Burden is on the municipality to prove its actions are lawful
- Reasonable expenses incurred by the owner to mitigate the nuisance
- State Treasurer must withhold state shared revenues until refund is issued
- Conflicts with the AZ Constitution

On the 2024 Ballot in AZ

SCR1041 ballot measures; challenges

- Any person to bring an action in superior court to contest the constitutionality of an initiative measure that violates the U.S. Constitution or AZ Constitution at least 100 days before the election
- Prohibits the SOS or other officer from certifying or printing the measure on the ballot if a court enters a judgment within 100 days before the election
- Allows any party to appeal to the AZ Supreme Court within 5 calendar days of judgment

What's next in GA?

Preemptions to increase housing stock (not just affordable)

- Increased private options to traditional government functions
- Tighter regulation over local decision making process
- Incentivized builder friendly local regulation
- State agency review of local ordinances deemed to impact specific sectors
- Short Term Rentals
- Conflict between Housing and Farm/timber land

What's next in AZ?

- More preemptions
  - *"By right" zoning, shot clocks*
  - *Parking*
  - *Setbacks*
  - *Lot size & coverage*
  - *"Aesthetics"*
  - *Building materials*
  - *MF on church property*
  - *Employee housing*
  - *Undergrounding requirements*
- Tax increment financing
- Sober living homes
- Water

75% of Land in American Cities is Reserved for Single Family Zoning* – Are Cities Fueling the Housing Problem?

- “The invisible laws that led to America’s housing crisis,” CNN (August 5, 2023): https://www.cnn.com/2023/08/05/business/single-family-zoning-laws/index.html
- “Cancel Zoning,” The Atlantic (M. Nolan Gray, June 21, 2022): https://www.theatlantic.com/ideas/archive/2022/06/zoning-housing-affordability-nimby-parking-houston/661289/
- “The Hottest Trend in U.S. Cities? Changing zoning rules to allow more housing,” NPR (Laurel Wamsley, February 17, 2024): https://www.npr.org/2024/02/17/1229867031/housing-shortage-zoning-reform-cities
- “Zoning, Land-Use Planning, and Housing Affordability,” Cato Institute (Vanessa Brown Calder, October 18, 2027): https://www.cato.org/sites/cato.org/files/pubs/pdf/pa-823.pdf
- Housing Opportunity Through Zoning Reform, American Planning Association 2024 Policy Priority: https://www.planning.org/policy/priorities/

Who is taking the plunge?

- Eliminate or “open up” single family zoning – Minneapolis, Oregon, Houston
- “Missing Middle” or Light Touch Density – Oxford, MS, Austin
- “Adaptive Reuse” (converting under-used commercial and industrial) – Florida Live Local Act? NYC, Pittsburgh, LA
- ADU’s – CA, VT, NH
- Parking reform – Buffalo, Seattle, San Diego

Local Land Use & Zoning Reform is Not a Silver Bullet

- "Zoning Changes Have Small Impact on Housing Supply," Governing (Jared Brey, April 10, 2023): https://www.governing.com/community/zoning-changes-small-impact-on-housing-supply-affordability-study.
- "New studies provide further evidence that zoning reforms work," Forbes (Aug. 28, 2023) (referencing studies of CA's ADU reform, mandatory planning for housing needs, and requirement for state processing of permits if city fails to meet housing targets) https://www.forbes.com/sites/adammillsap/2023/08/28/new-studies-provide-further-evidence-that-zoning-reforms-work/#:~:text=These%20studies%20show%20that%20zoning,Montana%2C%20Texas%2C%20and%20Vermont.
- "No single policy will increase housing affordability," Urban Institute (Yonah Freemark, April 8, 2024) (discussing need to linking zoning reforms with increased subsidies) https://www.urban.org/urban-wire/no-single-policy-will-increase-housing-affordability-we-need-comprehensive-strategy
- Judge Glock, Two Cheers for Zoning (American Affairs Nov. 20, 2022) https://americanaffairsjournal.org/2022/11/two-cheers-for-zoning/
- Jenna Davis, The double-edged sword of upzoning (Brookings, July 1, 2021) (noting upzoning can lead to gentrification in the short term and more study is need on long term impacts) https://www.brookings.edu/articles/the-double-edged-sword-of-upzoning/

Local Land Use & Zoning Reform is Not a Silver Bullet

- Just making it legal doesn't mean it will be built
  - *Big obstacles remain*
  - *Availability of financing*
  - *Effect of interest rates and market cycles on housing starts*
  - *Availability of skilled labor necessary for construction*
  - *Presence of developers in the community with necessary resources, skill sets, and motivation to build*
- Daniel Herriges, The Current State of the YIMBY Movement: 3 Takeaways from YIMBYTown 2024, Strong Towns Journal (March 6, 2024) https://www.strongtowns.org/journal/2024/3/6/the-current-state-of-the-yimby-movement-3-takeaways-from-yimbytown-2024#:~:text=Since%20then%2C%20the%20booming%20Texas,and%20allowing%20taller%20and%20denser

Preparing for your Next Legislative Session

- Be proactive
- Self-assess your local codes and approval processes
- Collect and analyze data
- Educate your residents
- Be familiar with the “messaging” of key special interest groups in your state

Preparing for your Next Legislative Session

- ADU Model State Act and Local Ordinance (AARP)
- Accessory Dwelling Units Act (ALEC)
- Homelessness Crisis Mitigation Act (ALEC)
- Stop Squatters Act (ALEC)
- Housing Opportunities Made Easier (HOME) Act (Institute for Justice)
- Housing Affordability: Overview and Model Legislation (Texas Public Policy Foundation)
- Housing Reform in the States: A Menu of Options for 2024 (Mercatus Center)

Preparing for your Next Legislative Session

- NAHB's 10-point plan
- Federal level
  - *2024 Reducing Regulatory Barriers to Housing Act*
  - *Manufactured Housing Community Sustainability Act*

QUESTIONS/DISCUSSION

- Experiences from other states
- Thoughts on the role of cities in addressing housing challenges



THANK YOU!