ZONING

BY: JAMES McKECHNIE
Senior Assistant City Attorney, Wichita Falls, Texas

Tiny Homes: A Practitioner's Guide

The "American Dream" has been home ownership since the Hoover Presidency.[1] Almost every American president since 1930s has pushed the dream of homeownership.[2] However, that dream was severely stunted by the 2008 economic crash. Enter tiny homes, which were made popular by several home improvement shows on television but are not a new phenomenon.[3] This article will address the history of tiny homes, how building codes and zoning ordinances regulate tiny homes, and what legal practitioners can do to allow the natural growth of tiny homes without sacrificing neighborhood aesthetics.

Tiny Homes: A History Tiny homes are not a new invention by any means, but rather, sprang from "a social movement where people are downsizing the space they live in" in order to live with less financial burden.[4] This idea further provides for a new vision of the American Dream in which all people can obtain homeownership in the face of exponential costs of rising housing.

It is difficult to narrow down exactly what a tiny home is, as there is no single definition. The Micro Showcase defines a tiny home as "any residential structure, foundation built or on wheels, with full utilities (electric/ water/ sewer) and living facilities (kitchen/ bed/ bath/ commode) designed for full-time occupancy that accommodates occupants at less than 300 ft per person."[5] Meanwhile, the American Planning Association defines them as "living a sophisticated lifestyle with less than 500 square feet."[6] It is safe to say that a tiny home is a house that is under 750 square feet attached to a permanent foundation.

According to the United States Census Bureau for 2015, the average American home was 2,500 square feet, with those surveyed stating 4,800 square feet as being most desirable. How did we go from wanting an average of 2,500 square feet to less than 750 square feet? The answer lies in rising home costs and the economic downturn. The global financial crisis of 2008 and the Great Recession wrecked the booming housing market. The failure of the housing market was wrought with multiple issues – subprime mortgaging, high debt-to-income ratio lending, and mistaken beliefs that home prices would only continue to rise.[7] As a result, nearly four million homes were foreclosed on each year during the Great Recession, with individuals either unable or unwilling to pay their mortgages based on the costs versus the value of their homes.[8] As individuals began losing their homes and some of their jobs as a result of the 2008 financial crisis, they began to scale back. Between 2006 and 2014, the share of United States households who rented rose to 35.5%.[9] As renters were unable to save money for traditional down payments, they turned to tiny homes as an alternative.

Tiny homes are not a new element of the American landscape. In post-World War II, William Levitt introduced a new concept to American neighborhoods: the suburb. Taking advantage of the need for more housing due to returning servicemen, Levitt used assembly-line construction to assemble prefabricated sections and pour concrete foundations, resulting in 2,000 units for Levittown, Long Island.[10] The Cape Code style structures were 750-square-foot cottages with two bedrooms, a living room, bathroom and kitchen.[11]

For years, tiny home communities have been used to house the homeless. In Portland, Oregon, Dignity Village is one of the first projects in the nation to create transitional housing for the homeless population.[12] The project was one in which city-owned land was donated for the production of the tiny home village. The purpose was to not only provide housing to the homeless, but to allow the homeless population to eventually graduate out of the tiny home village and back into society.[13]

Similar projects have sprung up in other states. Quixote Village in Olympia, Washington began providing 144-square-foot tiny homes as temporary housing for the homeless.[14] Each home had a toilet, bed, sink, and a front porch facing a shared green space.[15] In 2018, the City of Wichita Falls, Texas, approved a planned unit development for a project called Base Camp Lindsey. The idea is to create a tiny home village for homeless veterans or those at risk of becoming homeless.[16] The proposal included the construction of 58 dwelling units up to 240 square feet with access to community gardens, an on-site training center, and on-site professional servicing.[17] While these are excellent ideas, the question is how to make them a reality in a world of zoning and

building codes. We need to analyze the authority of zoning and the building codes and evaluate the steps to alleviate those restrictions.

Zoning and Building Codes

Village of Euclid v. Ambler Realty Co. established the authority for municipalities to promulgate zoning.[18] *Euclid* recognized the general right to zoning through the creation of zones for development and determining the hierarchy of preferred zoning districts.[19] Since then, the single-family zoned district has become the most protected zone.[20] Modern-day zoning is reflective of protecting the health, safety, welfare, and morals of a community and attempting to maintain the character and makeup of each zoning district while still allowing for development and natural change to occur.

Zoning allows for municipalities to regulate uses within districts. As zoning districts are typically named, the uses can be self-evident; however, cities can and do limit those uses further by providing for specific uses and no more within the district. In single-family zoned districts, things such as spacing are typically regulated.[21] Further, zoning does allow for minimum lot size or minimum size restrictions for houses in different districts depending on the jurisdiction. In *Brian B. Brown Constr. Co. v. St. Tammany Parish*, the court upheld minimum lot sizes, explaining cities have the right to "control the orderly development of the community by regulating density."[22] In *Thompson v. City of Carrollton*, the court upheld an ordinance limiting homes to at least 900 square feet.[23] The landowner complained the regulation was not related to health, safety or morals. The court denied the landowner's appeal, citing the city had to a right to regulate based on the character of the neighborhood to promote the conservation of property values.[24] Further, in *N.A.A.C.P. v. City of Kyle*, the 5th Circuit upheld an ordinance requiring a home size of a minimum of 1,200 square feet.[25] In contrast, in *Senefsky v. Lawler*, the court rejected a similar argument where the city attempted to regulate homes under 1,300 square feet. The court was of the opinion the city could not maintain that the ordinance was related to health, safety or morals.[26] Depending on the jurisdiction, minimum square footage may be an option.

Building codes are another tool in the box to limit or to allow tiny homes. The International Building Code (IBC) applies in all 50 states.[27] In 49 states, the International Residential Code (IRC) also applies.[28] These codes help bring uniformity and consistency to the building process through a model code. Further, in some jurisdictions, the local government has control to adopt and amend the codes as they determine is fit for their city. For example, in Texas, the legislature has adopted the International Residential Code as it existed on May 1, 2001, but allows municipalities to adopt amendments made to the IRC after May 1, 2001.[29] The Texas legislature has made similar provisions for the IBC.[30]

Prior to 2015, the IRC had minimum square footage requirements for a dwelling unit. A dwelling unit is "a single unit providing complete independent living facilities for one or more person, including permanent provisions for living, sleeping, eating, cooking and sanitation."[31] The 2012 IRC had a minimum square footage requirement of not less than 120 square feet for every dwelling unit.[32] Beginning with the 2015 version of the IRC, the code committee reduced the minimum square footage requirements from 120 square feet to not less than 70 square feet.[33] The IRC committee made this change because they believed there was no technical, safety, or general welfare reason to require one room of at least 120 square feet.[34] This was a huge step in removing a hurdle for those who want to build tiny homes. However, for those cities that want to regulate tiny homes and that have been relying on the IRC for authority to do so, the amendment severely reduces their ability.

Progressive Steps to Allow Tiny Homes

While courts have been consistent in upholding minimum housing sizes, the changes to the IRC seem to show a trend toward allowing tiny homes to some degree. The question becomes how do municipalities regulate tiny homes while still maintaining the character and make-up of neighborhoods. One suggestion is to allow tiny home developments through the PUD process while requiring minimum square footage for in-fill development.

Planned Unit Development Solution

There are times when development does not fit neatly into the zoning districts of a city. A planned unit development or planned development district is designed to meet specific land use control issues. Specifically, a planned unit development is an option to allow development that may not quite fit into the traditional zoning districts. A planned unit development is a special district that deviates from normal *Euclidian* zoning by allowing a mix of residential, commercial, and even industrial uses on a specific parcel of land without the same normal districts of the underlying base zone.[35] This allows developers, with input from city planners, the ability to tailor their development to a specific project without regard to the traditional limitations that zoning can provide.

There are different ways in which a PUD can work. Some options retain the base zoning and create a floating zone on top, while others are an entire rezone from the underlying base zone to a new PUD zone. Within the new PUD, city planners are able to provide conditions better able to suit the development. For example, a reduction

Continued on page 30

in required parking, an increase in required green space, an increase in single-family housing density per lot, increased or decreased setbacks, additional screening, etc. might be potential conditions a PUD would be required to have. The idea is to create a zoned community in and of itself with its own special regulations tailored to that specific development.

How is this beneficial to tiny homes? For long-term large developments, it allows the city to guide the installation of a tiny home community to help minimize the perceived negative effects, such as tiny homes being considered "shanty towns" or the tiny home development being perceived as lowering the value of neighboring developments. Further, it allows for some unique development that may not be allowed under traditional zoning. As previously noted, Base Camp Lindsey in the City of Wichita Falls, Texas, is a tiny home community designed to house homeless veterans. The group wanted to have each home face green space and use walking paths to minimize vehicular traffic. The problem was the zoning ordinance required parking for single-family home uses.[36] The City was able to lessen the parking restrictions through the use of the PUD.[37] Further, minimum spacing requirements were added to maintain sanitary conditions and maintain the character of a neighborhood while providing for ample green space.[38] The overall response from the neighbors was positive due to the controlling features of the PUD.

While PUDs are an excellent tool for new large-term development, they do not necessarily provide a great framework for infill development. Infill development is the process of developing vacant or under-used parcels within existing urban areas that are already largely developed.[39] While minimum square footages are generally allowed, hard baselines per district may not be the best option moving forward. One option is to require minimum square footages per zoning district but allow for a conditional use permit or special use permit to deviate on a case-by-case basis below that minimum threshold. The conditional use process allows for tiny homes to come before the Zoning Board to request a permit to be built. It further allows the Zoning Board to maintain control and provide input over the in-fill development while still allowing for the city to continue down a path of being progressive and open to this new trend.

It is hard to say whether this is a trend that will eventually fizzle out or if this is the future of development due to rising home prices. While the market economy will continue to dictate the housing market, cities should be as proactive as possible when it comes to the tiny home phenomenon. Economically it might not make sense to place tiny homes on expensive in-fill lots, but it does not hurt for cities to provide a mechanism to make that a possibility. It is large scale tiny home developments where cities may see an uptick in want or need. That is where the PUD can provide significant oversight while still providing for a new, prospective development to occur.

Here are the quick takeaways:
--Check your municipality's adopted International Residential Code. Post-2015, the IRC was amended to reduce the required square footage from 120 to 70 for a dwelling unit thus removing the protection that some cities relied upon.
--Minimum housing square footage can be appropriate depending on the jurisdiction but allow for built-in relief via the conditional use permit or special use permit.
--The planned unit development or planned development district can produce a long-term solution to tiny home developments while still allowing a city to maintain character and aesthetics for neighboring developments.
--Market economy will always control. Cities can provide for all types of regulations but if the market is not there to support tiny home development, it will never get off the ground and thus never need regulation. Try to get a pulse on the home economy in your city.

Endnotes

1. Emily Keable, *Building on the Tiny House Movement: A Viable Solution to Meet Affordable Housing Needs*, 11 U. St. Thomas J.L. & Pub. Pol'y 111, 112 (2017).
2. *Id.* at 118; *see* Priya S. Gupta, *The American Dream, Deferred: Contextualizing Property After the Foreclosure Crisis*, 73 Md. L. Rev. 523, 535 (2014); *see also* President Barack Obama State of Union, https://millercenter.org/the-presidency/presidential-speeches/january-28-2014-2014-state-union-address (Jan. 28, 2014); President Bill Clinton, State of the Union, https://millercenter.org/the-presidency/presidential-speeches/january-19-1999-state-union-address (Jan. 19, 1999); President Ronald Reagan, State of the Union https://millercenter.org/the-presidency/presidential-speeches/january-25-1984-state-union-address (Jan. 25, 1984).
3. *Tiny House, Big Living* (DIY Network 2014); *Tiny Home Nation* (FYI 2014); *Tiny Home Builders* (HGTV 2018).
4. Katherine M. Vail, *Saving the American Dream: The Legalization of the Tiny House Movement*, 54

U. Louisville L. Rev. 357, 358 (2016); The Tiny Life, *What is the Tiny House Movement*, http://thetinylife.com/what-is-the-tiny-house-movement/ (last visited Jun. 18, 2019).
5. Micro Showcase An Overview, https://microshowcase.com/microdwell/microhousing-an-overview/ (last visited June 17, 2019).
6. Donald L. Elliot & Peter Sullivan, *Tiny Houses, and the Not-So-Tiny Questions They Raise*, Am. Planning Assoc. Zoning Prac. Guide, November 2015 at 2.
7. Robert Samuelson, *What Caused the Housing Bubble*, Real Clear Politics (Feb. 2, 2015), https://www.realclearpolitics.com/articles/2015/02/02/what_caused_the_housing_bubble_125463.html; John V. Duca, *Subprime Mortgage Crisis*, Federal Reserve History (Nov. 22, 2013) https://www.federalreservehistory.org/essays/subprime_mortgage_crisis.
8. Adam J. Levitin & Susan M. Wachter, *Explaining the Housing Bubble*, 100 Geo. L.J. 1177, 1181 (2012).
9. Professor Lisa T. Alexander, *Bringing Home the Right to Housing to Advance Urban Sustainability*, 4 Tex. A&M J. Prop. L. 67, 72 (2017); *see also* Ingrid Gould Ellen & Brian Karfunkel, *Renting in America's Largest Metropolitan Areas*, NYU Furman Center & Capital One 4 (Mar. 8, 2016), http://furmancenter.org/news/press-release/national-affordable-rental-housing-landscape-in-americas-largest-metro-area.
10. Keith Aoki, *Race, Space, and Place: The Relation Between Architectural Modernism*, Post-Modernism, Urban Planning, and Gentrification, 20 Fordham Urb. L.J. 699, 782 (1993).
11. Witold Rubczynshki, *The Pioneering "Levittowner,"*' Samuel Zell and Robert Lurie Real Estate Center , Wharton School, University of Pennsylvania http://realestate.wharton.upenn.edu/wp-content/uploads/2017/03/556.pdf (last visited June 17, 2019).
12. Professor Lisa T. Alexander, *Bringing Home the Right to Housing to Advance Urban Sustainability*, 4 Tex. A&M J. Prop. L. 67, 72 (2017); Andrew Heben, *Tent City Urbanism: From Self-Organized Camps to Tiny House Villages* 134-35 (2014).
13. Alexander, *supra* note 12 at 72.
14. *Id.* at 76.
15. *Id.*
16. Wichita Falls, Tex. Ordinance 20-2018 (May 1, 2018).
17. *Id.*
18. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926)
19. *Id.*
20. Farley v. Zoning Hearing Bd. of Lower Merion Tp., 161 Pa. Cmwlth. 229, 241, 636 A.2d 1232, 1238 (1994) ("preservation of the character and integrity of single-family neighborhoods, prevention of undue concentration of population, prevention of traffic congestion and maintenance of property values" are all legitimate purposes of zoning); City of Miramar v. Bain, 429 So. 2d 40, 42 (Fla. Dist. Ct. App. 1983) (city required the removal of front yard fence); Brevard County v. Woodham, 223 So. 2d 344, 349 (Fla. Dist. Ct. App. 1969) (rezone of single family district to commercial would constitute a spot zone).
21. Tex. Loc. Gov't Code Ann. § 211.003(a) (West, Westlaw through 2019 Sess.).
22. Brian B. Brown Const. Co. v. St. Tammany Par., 17 F. Supp. 2d 586, 590 (E.D. La. 1998*); citing* Clark v. County of Winnebago, 817 F.2d 407, 408 (7th Cir.1987).
23. Thompson v. City of Carrollton, 211 S.W.2d 970, 971 (Tex. Civ. App.—Texarkana 1948, no writ).
24. *Id.*
25. N.A.A.C.P. v. City of Kyle, Tex., 626 F.3d 233, 238 (5th Cir. 2010) (holding NAACP lacked standing to sue because they could not show a disparate impact on the minimum house size).
26. Senefsky v. Lawler, 307 Mich. 728, 742, 12 N.W.2d 387, 390 (1943).
27. *See* Code Adoption Map, Int'l Code Council (Feb. 7, 2017), https://cdn-web.iccsafe.org/wp-content/uploads/Code_Adoption_Maps.pdf.
28. *Id.*
29. Tex. Loc. Gov't Code Ann. § 214.212 (West, Westlaw through 2019 Sess.).
30. Tex. Loc. Gov't Code Ann. § 214.216 (West, Westlaw through 2019 Sess.).
31. International Residential Code § 202 (Int'l Code Council 2015).
32. International Residential Code § R304.1 (Int'l Code Council 2015).
33. International Residential Code § R304.1 (Int'l Code Council 2012).
34. Ciara Turner, *It Takes A Village: Designating "Tiny House" Villages As Transitional Housing Campgrounds*, 50 U. Mich. J.L. Reform 931, 944 (2017); citing Stephen A. Van Note & Sandra Hyde, *Significant Changes to the International Residential Code* 46-47 (2015).
35. Patricia E. Salkin, *Standards for planned development districts*, 3 Am. Law Zoning § 24:5 (5th ed.).
36. Wichita Falls, Tex. Ordinance 20-2018 (May 1, 2018).
37. *Id.*
38. *Id.*
39. *Infill development: An Overview*, Municipal Research and Services Center (June 22, 2018) http://mrsc.org/home/explore-topics/planning/development-types-and-land-uses/infill-development-completing-the-community-fabric.aspx.