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# Getting Zoning for Manufactured Housing Right

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## **Abstract**

This working paper discusses zoning barriers to manufactured housing. Zoning is a poorly constructed system that allows local governments to restrict manufactured housing.

Zoning restrictions create unequal treatment, such as the exclusion of manufactured housing from single-family zoning districts. Judicial review is weak, but legislation can prohibit unequal treatment.

Courts usually uphold denials of manufactured housing and restrictive conditions for its approval.

Clear and objective defined standards should be required that should not discourage manufactured housing.

Statutes and zoning ordinances should prohibit restrictive design standards for manufactured housing, such as roof pitch and exterior treatment standards, and standards that require customized design treatment that may be difficult for manufactured housing to meet.

A support organization is needed that can provide litigation and legislative support to help manufactured housing advocates with zoning reform. Statutory reform proposals for legislative change should be included in local zoning ordinances.



## **About the Author**

**Daniel R. Mandelker** is the Howard A. Stamper Professor of Law Emeritus at WashULaw and is one of the nation's leading scholars and teachers on land use law. He is the co-author of a widely-used casebook on land use law, now in its ninth edition, and co-author of a comprehensive treatise on land use law, now in its sixth edition. He has also co-authored a casebook on state and local government law and a popular treatise on the National Environmental Protection Act. He is an emeritus member of the College of Fellows of the American Institute of Certified Planners and received the ABA Section on State and Local Government's Daniel J. Curtin Distinguished Lifetime Achievement Award. Professor Mandelker was the principal consultant and contributor to the American Planning Association's model zoning and planning legislation and the principal author of comprehensive planning amendments to the New Orleans city charter. He has served on task forces and as a consultant on land use and environmental issues for national, state and local governments as well as national associations. Professor Mandelker can be contacted at [mandelker@wustl.edu](mailto:mandelker@wustl.edu).

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# Getting Zoning for Manufactured Housing Right

## A. Introduction and Suggested Use of this Document

This paper is written with the assumption that manufactured housing is an integral part of a larger strategy to provide more affordable housing, and that current zoning practice and implementation is a major barrier to the availability of manufactured housing as a housing resource. It discusses zoning barriers that block manufactured housing, and includes examples of model legislation that can remove these barriers. Unequal treatment is a key issue. State and local legislators, interested citizens, and housing advocacy organizations are the intended audience.

## B. The Zoning Problem

“I don’t want them homes over here at all. Your home is ugly, and we don’t appreciate that home being here.” That’s the mayor of a city talking, and is typical of opposition to manufactured housing that excuses zoning barriers. As one recent report concluded, “[i]n jurisdictions where zoning was rated as a significant barrier, the probability of units having been placed was significantly lower than in jurisdictions where zoning was rated as a minor barrier.”<sup>1</sup> Almost all regulatory barriers had a statistically significant impact on the probability that manufactured housing would be allowed.<sup>2</sup>

This working paper discusses zoning barriers to manufactured housing and how they can be changed.<sup>3</sup> Zoning discrimination against manufactured housing cannot be tolerated, and this working paper provides legislative examples that eliminate zoning barriers and create a fair zoning system. After explaining the structure of zoning, the working paper discusses zoning barriers created by unequal treatment, zoning exclusion, the special exception, and design standards. I provide model statutes I prepared that can be adopted to remove barriers to manufactured. A statute taken from a legislative source is cited to that source.

We must first understand how zoning controls manufactured housing. Zoning almost everywhere is a local government responsibility, and zoning statutes allow local governments to decide how their zoning ordinance will regulate land use. There is little statutory control over content, only a

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<sup>1</sup> Casey J. Dawkins, Theodore Koebel, Marilyn Cavell, Steve Hullibarger The Home Team, David B. Hattis Building Technology Incorporated, and Howard Weissman Institute for Building Technology & Safety (IBTS, Regulatory Barriers to Placement of Manufactured Housing in Urban Communities, 21. 2011. Washington, D.C: U.S. Department of Housing and Urban Development. The probability rate dropped from 77.5% to 53.9%. [https://www.huduser.gov/portal/publications/affhsg/rb\\_mhpuc.html](https://www.huduser.gov/portal/publications/affhsg/rb_mhpuc.html)

<sup>2</sup> Id. at 39. Permitting systems had the greatest impact. Id. at 42.

<sup>3</sup> This working paper is based on Daniel R. Mandelker. 2016. "Zoning Barriers to Manufactured Housing," The Urban Lawyer 48:2, 239. [https://cpb-us-w2.wpmucdn.com/sites.wustl.edu/dist/a/3075/files/2021/12/Article-Final\\_-Zoning-Barriers.pdf](https://cpb-us-w2.wpmucdn.com/sites.wustl.edu/dist/a/3075/files/2021/12/Article-Final_-Zoning-Barriers.pdf) does This article is cited throughout as a reference for topics discussed in the working paper..

limited number of states have statutory requirements for zoning manufactured housing, and they may not cover all zoning barriers. Judicial review often is the only option, and courts do not usually disapprove restrictive zoning.

## **1. The Structure of Zoning: Unequal treatment and Exclusion**

Zoning as it affects manufactured housing is a complicated system. The most important distinction is the distinction between zoning by right that applies without administrative or legislative review, and zoning that requires a discretionary review process. An example of the first alternative is a zoning restriction that prohibits manufactured homes in single-family zoning districts. An example of the second alternative is a requirement for design review approval from an architectural review board.

Complications are created because zoning is not a well-constructed, integrated system. It is disjointed, confused, and illogical with many moving and unrelated parts. This disjointed structure allows local governments to restrict manufactured housing.

It is zoning's purpose that makes restrictive zoning for manufactured housing possible. Zoning's purpose is to separate land uses that can harm each other into separate zoning districts. Separate commercial and residential districts are an example. Separation provides the basis for the discriminatory treatment of manufactured housing, because local governments often assume that manufactured housing is a harmful use that requires exclusion or limitation.

Zoning districts are the building blocks of zoning. They have their origins in a model State Standard Zoning Enabling Act proposed by the U.S. Department of Commerce in 1926. Most states adopted the model law, and all zoning statutes use its structure. Zoning statutes authorize zoning districts and allow local governments to decide what uses are allowed in what zoning districts and with what restrictions.

Although zoning statutes do not require it, zoning districts in practice are almost always exclusive. Only a single use is permitted in each zoning district. Single-family land use districts, for example, permit only single-family homes and may exclude manufactured housing.

Exclusive single-family zoning districts created a constitutional controversy early in the history of zoning. The U.S. Supreme Court settled this controversy almost 100 years ago, when it upheld an exclusive single-family zoning district that excluded apartments in a Cleveland suburb.<sup>4</sup> The Court's decision contained language that viewed single-family zoning as a necessary protective measure that can prevent harmful intrusions, such as apartments. Courts usually consider manufactured housing a harmful intrusion.

Uses permitted in zoning districts are permitted by right, such as single-family homes in single-family districts. By right permission means that a use, such as a single-family home, is permitted

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<sup>4</sup> Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (upholding single family zoning district) <https://supreme.justia.com/cases/federal/us/272/365/>.

without any additional legislative or administrative review. Most zoning change, however, is not permitted by right and requires approval through a discretionary review. An example is a legislative rezoning from one zoning district to another to allow a different use, such as manufactured housing.

## **2. The Quality Issue: Preemption Under the National Manufactured Home Construction and Safety Standards Act of 1974**

Quality issues also provide opportunities for unequal treatment because over restrictive local building regulations can increase costs and can be applied unequally to manufactured housing. Conflicting local building regulations can complicate production.

Congress acted on this problem. Legislation adopted in 1974 and administered by the U.S. Department of Housing and Urban Development (HUD) established national building code standards that preempt local building standards that are inconsistent with the national code. The statute does not preempt local zoning.<sup>5</sup>

The adoption of the national statute and national code led to a marked improvement in quality in new manufactured housing, because it must comply with the code. State legislation for manufactured housing is often limited to housing built after the national code was adopted, and yet much of the manufactured housing stock predating this national code remains and has a lower quality. Legislation proposed in this working paper is not limited to manufactured housing built after the national code was adopted, but this limitation can be added.

HUD considered zoning preemption in a 1997 Statement of Policy, but more extensive preemption is needed. The federal law should preempt zoning that prohibits or excessively restricts manufactured housing by requiring the equal treatment of manufactured housing in zoning ordinances, by requiring that manufactured housing should be designated as a permitted use in residential zones, by prohibiting special exceptions for manufactured housing in residential zones, and by prohibiting restrictive design review.

Manufactured home installation must also be regulated to prevent structural problems after a home is installed. Congress did not originally regulate installation under the federal statute, it was regulated in only a few states, and often was done improperly. HUD has now adopted installation standards, and states may adopt standards that equal or exceed the federal standards. States are required to adopt a law requiring installer licensing and training and installation inspection.

## **C. Unequal Treatment**

### **1. What Unequal Treatment Means**

Unequal treatment is a key issue in zoning for manufactured housing. Unequal treatment is created by zoning classifications because all zoning classifies land use. A typical zoning classification divides land uses into residential, commercial, and industrial uses, which courts

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<sup>5</sup> For discussion of the statute see Mandelker, *supra* note 3, at 241-247.



uphold. Restrictive zoning for manufactured housing can create unequal treatment that courts should not uphold.<sup>6</sup>

Here are examples of zoning requirements for manufactured housing that are not applied equally to site-built housing:

1. Exclusion from a municipality
2. Exclusion from all or some single-family zoning districts
3. Exclusion based on the age of manufactured housing
4. Limitation to specially designated zoning districts, such as rural and agricultural zoning districts
5. Limitation to manufactured housing parks
6. Minimum lot size requirements
7. Requiring a special exception for manufactured housing in a single-family zoning district
8. Refusing to approve a special exception for manufactured housing in a single-family zoning district
9. Rejecting rezoning to a district where manufacture housing is permitted, when rezoning for other uses to a district where they are permitted is approved
10. Refusing to approve a special exception, site plan approval, or certificate of appropriateness in an historic district for manufactured housing, when these approvals are granted for similar uses
11. Refusing to approve a subdivision for manufactured housing when similar subdivisions for site-built housing are approved
12. Minimum building size requirements that are not required for site-built housing
13. Design standards limited to manufactured housing
14. Denial of design approval for manufactured housing, when design approval is approved in similar circumstances for site-built housing
15. Dimensional requirements
16. Setback requirements
17. Landscaping requirements
18. Requiring elevation at grade level above a floodplain, excessive dormer lengths, storm shelters, and 300 square feet of public playground space for manufactured housing, when these requirements do not apply site-built housing

## **2. The Constitutional Basis for Challenging Unequal Treatment**

Problems can be created under the constitutional equal protection clause if the different treatment of different uses in zoning is unequal, but judicial review of unequal treatment in zoning is weak. Zoning is social and economic legislation, and courts apply a rational basis standard of judicial review to social and economic legislation that is satisfied even if there is disagreement about whether a classification is rational. Social and economic legislation also enjoys a presumption of constitutionality, which means that the party challenging the legislation has the burden of proof

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<sup>6</sup> For discussion of unequal treatment see Mandelker, *supra* note 3, at 247-254.

to show that it is unconstitutional. These rules weaken the possibility that a zoning ordinance classification that treats manufactured housing unequally will be held unconstitutional.

To understand the role of the courts in reviewing the constitutionality of a law under the equal protection clause it also is necessary to understand how judicial review functions. Assume a local government changes its zoning to exclude manufactured housing from single-family zoning districts. A lawsuit is brought to challenge the exclusion in a state or federal trial court.

The trial court will hear the case and testimony will be introduced that supports the constitutionality of the exclusion. It likely will include evidence on the negative effect that manufactured housing has on single-family housing in the zoning district.

If the case is appealed to an appellate court, that court will not take new testimony on whether the exclusion has a rational basis, and it should decide this issue based on evidence presented to the trial court. The appellate court instead can provide its own unsupported explanation for its decision, and often it is based on negative perceptions of manufactured housing that have no basis in the trial record and no basis in fact. One court, in a case where manufactured homes were excluded from single-family residential zoning districts, held that unequal treatment could be justified by public perception:

The issue, however, is not whether there is anything inherently different about manufactured housing, but whether there is a public perception in each of the Defendant communities that such a difference exists. If there is indeed a perception among the public in Silt, Salida, Fountain or Frederick that manufactured houses are incompatible with site-built houses, threaten the tax base or cause depreciation of market values of site-built homes, the municipalities are not required to perform studies to establish the correctness of such perceptions. Rather, the legislative branch of municipality is authorized to address those problems without assessing the validity of the public concerns.<sup>7</sup>

Outright hostility is obvious in other cases. As one court put it, “The indiscriminate placement of mobile homes within a municipality may undermine conservation of property values and stifle the development of a potential residential neighborhood.”<sup>8</sup>

Other courts provide similar reasons when they consider the unequal treatment of manufactured housing in zoning.<sup>9</sup> They have upheld a refusal to rezone, an exclusion from residential zones, a

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<sup>7</sup> Colorado Manufactured Housing Association v. City of Salida, 977 F. Supp. 1080, 1085 (D. Colo. 1997) (exclusion from residential zones)  
<https://law.justia.com/cases/federal/district-courts/FSupp/977/1080/2400400/>

<sup>8</sup> City of Lewiston v. Knieriem, 685 P.2d 821, 825 (Idaho 1984) (manufactured housing excluded from farm zone where single-family dwellings were allowed).  
<https://www.bing.com/search?q=City+of+Lewiston+v.+Knieriem&aqs=edge..69i57j69i11004.10574j0j4&FORM=ANAB01&PC=U531>

<sup>9</sup> For citations to cases see Mandelker, *supra* note 3, at 248 note 71.

limitation to manufactured housing parks and manufactured housing subdivisions, size limits, aesthetic regulations, time limits on permits,<sup>10</sup> and size and age requirements.<sup>11</sup>

### **3. Statutory Equal Treatment Requirements**

State legislation can prohibit the unequal treatment of manufactured housing and eliminate many zoning barriers.<sup>12</sup> Here is a statutory model:

A local government may adopt, apply, and enforce a requirement or exclusion in a zoning ordinance for manufactured housing, and the lot on which it is placed, only if the requirement or exclusion is adopted, applied, and enforced for all single-family and multifamily housing and the lots on which they are placed.

A statute can also prohibit requirements and exclusions limited to manufactured housing:

A municipality shall not adopt, apply, or enforce any requirement or exclusion in a zoning ordinance that is adopted, applied, and enforced only for manufactured housing.

Zoning ordinances can include restrictive requirements that apply uniformly to all residential housing, such as excessive minimum lot size requirements. They are not covered by an unequal treatment statute but should be attacked in court as examples of exclusionary zoning.

### **D. Exclusion**

Exclusion from all or part of a municipality is a common and restrictive zoning barrier. So are other exclusions, such as the exclusion of manufactured housing that is over a certain age.

Exclusion of manufactured housing from single-family residential zones is common.<sup>13</sup> Exclusion is usually from the single-family residential zone with the lowest residential density, and manufactured housing may be restricted to zoning districts that do not include housing, such as rural and agricultural zones or commercial zones.

Courts uphold these exclusions with reasons similar to the reasons they give for upholding any unequal treatment. They can include a claim that manufactured housing increases crime, limits growth potential, and has an adverse effect on the development potential of a neighborhood.

Legislation can prohibit the exclusion of manufactured housing from single-family residential districts by providing that manufactured housing is a permitted use in these districts:

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<sup>10</sup> Id., at 248, note 68.

<sup>11</sup> Id., at 260, notes 122, 123.

<sup>12</sup> For discussion of statutory equal treatment see id., at 251-254.

<sup>13</sup> For discussion of exclusion from residential zones see Id., at 254-261.

A local government shall not exclude single-family or multifamily manufactured housing from a single-family or multifamily residential zoning district, and manufactured housing is a permitted use in all single-family or multifamily residential zoning districts.

A local government can include a similar requirement in its zoning ordinance:

Manufactured housing is a permitted use in all single-family and multifamily zoning districts.

Statutes can do more and affirmatively require a local government to designate an adequate number of sites for manufactured housing:

Local governments shall designate an adequate number of readily available sites in their zoning ordinance for single-family and multifamily manufactured housing in locations similar to the locations that are available for single-family and multifamily conventional housing.

## **E. Exclusion as a Special Exception**

### **1. What a Special Exception Does**

All zoning legislation authorizes “special exceptions” from requirements included in a zoning ordinance.<sup>14</sup> “Conditional use” or “special permit” are alternate terms. A local board called a board of zoning adjustment typically grants special exceptions, but a local legislative body can have similar authority. A use designated as a special exception is approved in an administrative review process. Conditions can be and are usually attached.

Local governments decide what uses they want to classify as a special exception. The model Standard State Zoning Enabling Act does not provide guidance on this decision, but it is understood that the special exception is intended for land uses that can locate in a zoning district but require administrative review to consider problems that might require rejection, or conditions that mitigate these problems. A day care facility in a single-family residential district is an example because parking and the employment of off-site employees require special consideration. Special exceptions provide a middle ground between prohibited and permitted uses, but including a special exception in the zoning ordinance provides a presumption that it should be approved.

Local governments decide on what standards to include in a zoning ordinance as the basis for approving special exceptions. These standards are either mandatory or discretionary. A setback requirement is a mandatory standard. A discretionary standard gives a zoning board the flexibility to decide whether to approve or disapprove a special exception, but it must not be so vague that it delegates decisions on legislative policy to the zoning board.

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<sup>14</sup> For discussion of special exceptions see *Id.*, at 265-274.

A requirement that a special exception can be approved only if it is compatible with land uses in the adjacent area is a common discretionary standard. This requirement reinforces the purpose of zoning, which is to separate uses that can harm each other. Compatibility standards are judicially approved but do not have a clear meaning, and can be interpreted so that they allow a zoning board to make arbitrary denials. Here is an example of a compatibility requirement:

The special exception shall be compatible and consistent with the character of the zoning district and the area immediately adjacent to the special exception.

The harm prevention purpose of zoning is reinforced by an acceptable and common discretionary standard that requires a zoning board to consider the effect of a proposed special exception on the property values of adjacent property:

The special exception shall not affect the use and value of property in a substantially adverse manner in the immediate area of the special exception.

This discretionary standard also is ambiguous and has the same vagueness problem as the compatibility standard.

Local governments may try to achieve the widest possible discretion in considering special exceptions by adopting a general welfare standard:

The special exception shall not be injurious to the public health, safety, morals, or general welfare of the community.

This standard has not always been judicially approved, and allows unlimited discretion that creates opportunities for inconsistent and arbitrary decisions.

Administrative procedures for approving special exceptions in most states are basic. Most states, following the model Standard State Zoning Enabling Act, require only basic procedures that do not give an applicant a fair opportunity to present her case. Special exceptions should require adjudicatory procedures that include notice and a hearing, the right to cross-examination and a requirement for findings of fact. Only a few states have these procedures.

## **2. Case Law**

Courts usually uphold the denial of a special exception for manufactured housing, relying on the biased explanations they use when they uphold an exclusion of manufactured housing from single-family residential districts. In one case, for example, a developer intended to place five manufactured homes in a subdivision of 26 site-built and predominantly single-family brick homes. The court upheld a rejection of a conditional use permit for this project, the equivalent of a special exception, and said:

[I]t was determined that the aggregate placement of manufactured homes was not compatible with the character of the existing neighborhood, which is one that is

well-established and consists of modest, well-kept homes where all but one are brick-and-frame structures.... There was concern as to the long-term quality of manufactured homes and the effect that manufactured housing would have on property values, questions that went unanswered.<sup>15</sup>

A U.S. Supreme Court decision, *City of Cleburne v. Cleburne Living Center*,<sup>16</sup> provides an argument for not allowing denial of a special exception based on negative attitudes. In this case the Supreme Court reversed a denial of a permit for a group home for the disabled. Group homes required a permit, but not apartment houses, multiple dwellings, boarding and lodging houses and other similar uses. The city council denied the permit partly because a majority of the neighboring property owners had negative attitudes toward group homes. Applying rational basis review, the Supreme Court held that the denial violated equal protection:

Mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like.<sup>17</sup>

Cleburne considered a special permit for a group home for the mentally disabled, but it can apply to a denial of a special exception for manufactured housing that is based on negative attitudes, fear, and unsubstantiated zoning factors. An earlier case reversed a denial of a special use permit for a manufactured housing complex when the denial was based on community pressure against additional manufactured housing in an area zoned for manufactured housing.<sup>18</sup>

## **F. Reforming the Special Exception**

### **1. Prohibiting a Special Exception for Manufactured Housing**

The simplest and most necessary reform is a statute providing that a special exception cannot be used to prohibit manufactured housing. A statute that makes manufactured housing a permitted use in residential zones also prohibits a special exception. There is no rational basis for distinguishing manufactured from site-built housing, and therefore no rational basis for classifying manufactured housing as a special exception.

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<sup>15</sup> *Rolling Pines Ltd. Partnership v. City of Little Rock*, 40 S.W.3d 828, 834 (2001).  
<https://caselaw.findlaw.com/ar-court-of-appeals/1257732.html>

<sup>16</sup> 473 U.S. 432 (1985).  
<https://supreme.justia.com/cases/federal/us/473/432/>

<sup>17</sup> *Id.*, at 446.

<sup>18</sup> *Pleasant Valley Home Construction, Ltd. v. Van Wagner*, 363 N.E.2d 1376 (N.Y. 1977).  
<https://casetext.com/case/matter-of-pleasant-val-home-constr-v-van-wagner>

## 2. Changing Requirements for Special Exceptions

Changes are needed in the special exception if it applies to manufactured housing. Requirements that are applied unequally to manufactured housing should be prohibited:

A local government shall not subject single-family and multifamily manufactured housing to a requirement in a special exception, administrative permit, planning, or development process unless it is included in a special exception, administrative permit, planning, or development process that applies to conventional single-family or multifamily housing.

The statute should also require clear, objective, and defined standards that do not discourage manufactured housing.

A zoning board may only deny a special exception by considering standards that comply with the following requirements:

- (a) the standards shall be clear and objective on the face of the ordinance;
- (b) the standards shall identify objective factors, such as land use and density, that may be considered to decide whether the special exception is compatible with land uses in the surrounding area;
- (c) the standards shall not have the effect, either individually or cumulatively, of discouraging manufactured housing through unreasonable cost or delay.

Changes must also be made in the process for deciding whether to approve special exceptions. It must be a disciplined administrative process that includes findings of fact and reasons for the decision.

Conditions are usually attached to special exception approvals, and restrictive conditions can be as damaging to manufactured housing as denials. Conditions must not apply unequally to manufactured housing, must be related to the issues that are considered when a special exception is approved, and must not discourage manufactured housing through unreasonable cost and delay:

A local government shall not approve a special exception for manufactured housing with conditions that do not apply to conventional housing, shall only approve conditions that relate to the compatibility of the special exception with land uses in the surrounding area, and shall not approve conditions that discourage manufactured housing through unreasonable cost or delay.

The accepted rule is that the applicant has the burden to prove that a special exception should be granted. This rule should be changed. Because adopting a special exception requirement creates a presumption that the special exception should be granted, the burden of proof should shift to objectors to prove that the special exception should be denied after an applicant has introduced evidence showing that the special exception should be approved.

## G. Design Standards

### 1. Design Standards for Manufactured Housing

Design standards for residential development are a major feature of land use programs in many municipalities.<sup>19</sup> Their objective is to improve the appearance of residential housing in order to avoid the design monotony that often dominates residential development. Design standards for manufactured housing were a reaction to the early single-wide mobile home, a narrow, rectangular dwelling that was small in size, had a flat metal roof and had metal siding. They are one of the most obstructive regulations that create a barrier to manufactured housing because they can create costs that make manufactured housing economically impossible.

Despite this problem, some state statutes authorize design standards limited to manufactured housing, or make design standards an exception to a statutory requirement that manufactured housing must receive equal treatment in zoning. The design standards for manufactured housing that are included in a Nebraska statute illustrate the restrictive standards that legislatures can adopt:

[A local government may] require that manufactured homes meet the following standards:

- (i) The home shall have no less than nine hundred square feet of floor area;
- (ii) The home shall have no less than an eighteen-foot exterior width;
- (iii) The roof shall be pitched with a minimum vertical rise of two and one-half inches for each twelve inches of horizontal run;
- (iv) The exterior material shall be of a color, material, and scale comparable with those existing in residential site-built, single-family construction;
- (v) The home shall have a nonreflective roof material which is or simulates asphalt or wood shingles, tile, or rock; and
- (vi) The home shall have wheels, axles, transporting lights, and removable towing apparatus removed.<sup>20</sup>

Design standards like the Nebraska design standards prohibit or raise the cost of manufactured housing. These standards do not have an acceptable aesthetic basis. What is the aesthetic justification for non-reflective roof material, nine hundred square feet of floor area, or the roof pitch requirement?

The Nebraska design standards also raise constitutional problems. One problem is whether local aesthetic design regulations are constitutional. This issue has been settled affirmatively in most states. There also is an unequal treatment problem. Design standards limited to manufactured

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<sup>19</sup> For discussion of design standards see Mandelker, *supra* note 3, at 261-265.

<sup>20</sup> Neb. Rev. Stat. Ann. § 19-902(2)(a). Any additional standards must be uniform. *Id.*, § 19-902(2)(b). <https://nebraskalegislature.gov/laws/statutes.php?statute=19-902#:~:text=%282%29%20%28a%29%20The%20city%20council%20or%20village%20board,United%20States%20Department%20of%20Housing%20and%20Urban%20Development.>



housing can create an unfair classification that violates the constitutional equal protection clause. Equal treatment can be required by legislation.

## **2. Community-Based Design Standards**

Local governments can avoid the inequality problem by adopting design standards that apply uniformly to all residential dwellings in a community, including manufactured housing. A common basic standard is a look-alike standard that requires all new housing to look like housing in the surrounding area. Courts have upheld this standard in a few cases, but it can have a restrictive impact on manufactured housing. It would prohibit manufactured housing in a neighborhood of brick homes or in neighborhoods that have a distinctive design, for example, such as English Tudor or Dutch Colonial.

Another type of basic design standard is a dissimilarity or not-look-alike standard. This type of standard is intended to achieve variety in design, and requires that new housing must not look like any other housing in the immediate area. Its effect on manufactured housing will depend on how much variety there is in housing that is adjacent.

More difficult problems are presented by design standards that require customized design treatment. They may be difficult for manufactured housing to meet because manufactured housing has standardized design features. This design standard is an example:

Residential homes shall incorporate articulation of all facades, including variation in building massing, roof forms, and wall planes, as well as surface articulation.<sup>21</sup>

Residential design ordinances may also require design review by an architectural review board that decides whether to approve a design. Design review presents the typical problems created by any discretionary review procedure, including opposition to the design that is presented for approval, delay in making decisions, and the possibility of arbitrary decisions because design standards can be vague.

## **3. Reforming Design Standards**

Reform of design standards must consider design standards that apply to all residential housing as well as design standards for manufactured housing. Equal treatment statutes invalidate only design standards that apply to manufactured housing.

Design standards for all residential housing that require customized design can present difficulties. They can create a barrier to manufactured housing but they are invalid only if a court does not accept their aesthetic purpose or if they are too vague. Legislation can provide some protection for manufactured housing by prohibiting design standards that can cause unreasonable cost or delay:

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<sup>21</sup> Antioch, California, Citywide Design Guidelines, Single Family Residential, § 6.1(c), p. 6-8 (2009).  
<https://www.antiochca.gov/fc/community-development/planning/Chapter-6-Residential-Design-Guidelines.pdf>

A local government may not adopt design standards that have the effect, either individually or cumulatively, of prohibiting or discouraging manufactured housing through unreasonable cost or delay.

Examples of design standards that can violate the unreasonable cost prohibition are a standard requiring manufactured housing to be comparable to adjacent conventional housing or that require excessive roof pitch standards. The unreasonable delay requirement would prohibit a design standard that does not include timely decision requirements for design review.

Design issues can be managed by creating a zoning district limited to manufactured housing. The district can be available for manufactured housing on individual lots or for manufactured housing developments. Design standards adopted for the district should be limited to standards that manufactured housing can meet. Here is a statutory provision:

A local government may adopt a residential zoning district in which manufactured single-family and multifamily housing is the only permitted use. The district may not consist of an individual lot or scattered lots, but must be a defined geographic area. It shall include only design standards for manufactured single-family and multifamily housing that do not create unreasonable cost or delay.

Planned unit development (PUD) is another zoning alternative that can be used for manufactured housing. It is a discretionary review process in which a local government approves a development plan for a PUD that controls how the PUD will be developed. A manufactured housing development can be approved as a PUD. The advantage of a PUD is that the local government can adopt customized development and design standards in a development plan that are appropriate for each manufactured housing project.

## **H. Creating a Zoning Strategy for Manufactured Housing**

Zoning is a complex, disorganized system that allows local governments to make biased land use decisions with little judicial control that discriminate against manufactured housing. Reform is needed. A support organization that provides litigation and legislative support assistance for reform efforts can be a valuable resource.

Litigation support should include making information available on pending trial and appellate litigation, pending trial and appellate briefs, and studies and reports that can provide resources for defending manufactured housing. Support should also include help with case selection, periodic meetings, and coaching that provides instruction for litigation advocacy.

Legislative support should include making legislative models and supporting documentation and studies available for proposed legislation, and advice on legislative advocacy.

Legislative change can occur at the state and local government levels. This working paper includes a number of state statutory proposals with recommendations for changes in zoning ordinances. The following recommendations suggest how several of these statutory recommendations for manufactured housing can be included in zoning ordinances:

1. Manufactured housing should be a permitted use in all residential zoning districts.
2. A special exception should not be required for manufactured housing.
3. If a special exception is required, the ordinance should not include restrictive standards limited to manufactured housing. Vague standards that can allow arbitrary denials of special exceptions for manufactured housing should not be included. A “compatibility” standard is an example. The model legislation for special exception standards that is included in this working paper can be a guide for acceptable special exception standards in a zoning ordinance. They should objectively identify the issues a zoning board should consider when it decides whether to approve a special exception.<sup>22</sup>
4. Complete and disciplined administrative procedures should be provided for reviewing special exceptions that will provide an adequate opportunity for participation by all parties and adequate controls on decision-making by zoning boards. A model administrative procedures act adopted by the American Bar Association provides a model for similar procedures at the local level.<sup>23</sup>
5. Restrictive design standards that apply only to manufactured housing should not be included.
6. Design standards should not require customized designs that are difficult for manufactured housing to meet because they prohibit or discourage manufactured housing through unreasonable cost or delay.
7. Zoning districts can be adopted that are limited to manufactured housing. They can be standalone or overlay districts that accommodate individual manufactured homes and manufactured housing developments. Design standards should accommodate design possibilities that manufactured housing can provide.

Restrictive zoning creates serious barriers to manufactured housing, which is an important affordable housing resource. Zoning reform is needed that can create a zoning system in which manufactured housing is treated fairly and equally.

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<sup>22</sup> The model legislation is reproduced on page 10, supra.

<sup>23</sup> Joint Task Force of the State and Local Government and Administrative Law and Regulatory Practice Sections of the American Bar Association, Model Statute on Local Land Use Process (2008).  
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