



**COLORADO HOUSING AFFORDABILITY PROJECT  
RESEARCH MEMORANDUM**

**COLORADO AUTHORITY TO REGULATE LAND USE  
AS A STATEWIDE CONCERN IN HOME RULE JURISDICTIONS**

March 22, 2023

**EXECUTIVE SUMMARY**

- Since 2010, residential construction in Colorado has failed to keep up with population and employment growth, resulting in historically low housing inventories and historically high housing prices. Restrictive zoning that prevents new housing development is a major contributor to the housing shortage. Research on housing supply constraints and economic growth indicate that: 1) zoning controls have prevented new housing construction that historically mitigated high housing prices; 2) high housing prices limit economic mobility; and 3) land use restrictions benefit older, richer homeowners at the expense of younger, poorer renters. Besides driving up the cost of housing, lack of supply affects economic growth in Colorado, distorts labor and job markets, and impacts environmental and natural resource quality. Besides driving up the cost of housing, lack of supply affects economic growth in Colorado, distorts labor and job markets, and impacts environmental and natural resource quality. Limited housing supply prevents Coloradans from living in communities with greater economic opportunity, constraining growth in industries that cannot find employees and restricting access to jobs for those who cannot afford the cost of living. Even for those willing or able to commute long distances to work, the lost productivity and environmental impacts—including degraded air quality and contributions to greenhouse gas emissions—resulting from the spatial mismatch between jobs and housing are significant when considered on a statewide basis.
- Matters that result in effects extending beyond municipal borders—including matters such as housing, statewide and regional economic development, and environmental sustainability—are, by definition, not purely local and, therefore, are appropriate for statewide regulation.
- To determine whether a matter is reserved purely for local control or is appropriate for regulation by the state, courts consider four factors: (1) the need for regulatory uniformity throughout the state, (2) the extraterritorial impacts of the local regulation at issue, (3) which entity, state or local, has traditionally regulated the area, and (4) to which entity, if any, the Colorado Constitution commits regulation.
- A statewide approach, based on a uniform set of expectations, is needed to establish that every community bears some responsibility for providing housing to support the state’s and regional economic development goals and to provide sufficient housing across a

variety of income levels. Such an approach also reflects the wide-ranging, statewide economic and environmental consequences of unaffordable housing and distorted residential development patterns.

- Exclusionary zoning that limits housing supply “restrict[s] the free market” and distorts regional growth patterns has extraterritorial effects.<sup>1</sup> The failure of some communities to allow the production of affordable forms of housing or subsidized housing for low-income Coloradans results in many extraterritorial impacts, including, but not limited to: the costs absorbed by neighboring jurisdictions in providing the needed housing (and expensive supportive services) that support the restrictive community’s workforce and economy; the environmental impacts associated with long commutes when housing is not located near jobs; and the segregation of communities by income and access to opportunity, which concentrates poverty and causes related societal impacts.
- The General Assembly has the authority to declare the public policy of the state, and that policy is accorded deference by courts. Zoning and land use in general has historically been determined to be a local and municipal matter unless a state statute explicitly provides otherwise. The state has exercised its jurisdiction and limited local authority on many matters that affect land use, including housing, oil and gas development, liquor and marijuana uses, and others.
- Based on an analysis of Colorado law as it relates to statewide regulation of matters traditionally left to local governments and the facts underlying Colorado’s current housing and climate crises, it is our position that housing affordability, economic development, and environmental sustainability are matters of mixed state and local concern and that the state has authority to set minimum requirements and limitations for local land use regulation, including in home rule jurisdictions, to allow greater production of housing, reduced greenhouse gas and other toxic emissions, and economic development.

## RESEARCH MEMORANDUM

**About the Colorado Housing Affordability Project:** The Colorado Housing Affordability Project (CHAP) is a diverse group of professionals and academics in urban planning, housing economics, public policy, law, and real estate development. Through our daily work and lived experience, we have witnessed the root causes and harmful effects of high housing costs in Colorado. Our motivation to establish CHAP was premised upon our collective personal and professional interest in achieving meaningful reforms to our state’s land use regulatory system to increase the supply of housing that is affordable for all Coloradans. CHAP has prepared several research papers regarding this topic, which are available at <https://cohousingaffordabilityproject.org/the-research/>. This Research Memorandum was prepared by CHAP with the collaboration, assistance, and research of the University of Denver Sturm College of Law and the Rocky Mountain Land Use Institute.

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<sup>1</sup> Land use reforms that remove the favored status of single-family development and prioritize the development of duplexes, triplexes, etc., would increase Colorado’s overall housing supply. See ROOT POL’Y RESEARCH, *supra* note 25, at III-2.

**Issue:** Whether the Colorado General Assembly has the power to set minimum requirements and limitations on local land use regulation by home rule municipalities pertaining to housing production and affordability, economic development, and environmental sustainability.

**Conclusion:** Land use policies that affect the supply and affordability of housing and relatedly, economic development and environmental sustainability, are a matter of at least mixed state and local concern justifying state regulation that sets minimum obligations for local governments to plan and zone for more affordable forms of housing.

### **Factual Background**

Since 2010, residential construction in Colorado has failed to keep up with population or employment growth, resulting in historically low housing inventories and historically high housing prices. This imbalance between supply and demand has caused a housing crisis that limits the ability of even moderate-income Coloradans to afford housing, to say nothing of those earning less than the median income.<sup>2</sup> Based on demographic projections, experts maintain that Colorado needs to build an average of over 40,000 units per year until 2030 to meet current housing needs, yet the state has only produced an average of 26,500 units per year since 2007.<sup>3</sup> The number of units needed per year is even higher to return the housing market to a functioning level and decrease housing prices statewide.<sup>4</sup>

It is now well-established that restrictive zoning that prevents new housing development is a major contributor to the housing shortage.<sup>5</sup> The academic literature on housing supply constraints and economic growth further indicate that: 1) zoning controls have prevented new housing construction that historically mitigated high housing prices; 2) high housing prices limit economic mobility; and 3) land use restrictions benefit older, richer homeowners at the expense of younger, poorer renters.<sup>6</sup>

Besides driving up the cost of housing, lack of supply affects economic growth in Colorado, distorts labor and job markets, and impacts environmental and natural resource quality. Limited housing supply prevents Coloradans from living in communities with greater economic opportunity, constraining growth in industries that cannot find employees and restricting access to jobs for those who cannot afford the cost of living. Even for those willing or able to commute long distances to work, the lost productivity and environmental impacts—including degraded air quality and contributions to greenhouse gas emissions—resulting from the spatial mismatch between jobs and housing are significant when considered on a statewide basis.<sup>7</sup>

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<sup>2</sup> See ROOT POL'Y RESEARCH, STATE OF COLORADO HOUSING RESEARCH I-12 (2021).

<sup>3</sup> See ROOT POL'Y RESEARCH, STATE OF COLORADO HOUSING RESEARCH II-1 (2021).

<sup>4</sup> *Id.* at II-2.

<sup>5</sup> See generally, *id.*; see also, COLORADO HOUSING AFFORDABILITY PROJECT ISSUE BRIEF NO. 1: LAND USE RESTRICTIONS' IMPACTS ON ECONOMIC GROWTH.

<sup>6</sup> COLORADO HOUSING AFFORDABILITY PROJECT ISSUE BRIEF NO. 1: LAND USE RESTRICTIONS' IMPACTS ON ECONOMIC GROWTH.

<sup>7</sup> COLORADO HOUSING AFFORDABILITY PROJECT ISSUE BRIEF NO. 3: LAND USE RESTRICTIONS' IMPACTS ON ENVIRONMENTAL SUSTAINABILITY.

Job and housing markets are typically regional, rather than local, in nature, with Coloradans often living in one community, working in another, and sometimes relying on a third for life's daily activities. Investments in public transportation and mobility infrastructure, including a significant regional investment in FasTracks in the Denver metro region, allow efficient and sustainable means of connecting housing to educational and employment opportunities, as well as other regional amenities. The development of transit-oriented communities around station areas across the region is important to leverage those investments in order to increase ridership, reduce pollution, provide equitable access to opportunities and, ultimately, support a functional economy. Conversely, exclusionary zoning policies in one part of the region undermine that transportation network, put pressure on other parts of the region to supply housing, including subsidized affordable housing, and can lead some communities to assume a disproportionate share of responsibility for housing and the social services to support low-income and very-low-income individuals.

Because job and housing markets are regional in nature and affect both Colorado's economy and its environment, the state has an interest in ensuring that the land use regulatory environment supports development to meet the demographic and economic needs of the state in ways that are sustainable and equitable.

### **Analysis**

Colorado's local governments, including cities, towns, and counties, come in two forms. *Statutory jurisdictions* are those that are enabled and governed by legislation enacted by the General Assembly, and the state enjoys a vast degree of control over the authority and activities of statutory cities, towns, and counties. There is no question that the General Assembly can limit or direct statutory jurisdictions to adopt and enforce land use regulations in a manner so as to support more housing production, economic development, and environmental sustainability.

In contrast, *home rule jurisdictions* are authorized by the Colorado Constitution to enact home rule charters. The Colorado Constitution grants broad authority to municipalities that meet the standards for and elect treatment as home rule jurisdictions.<sup>8</sup> With this broad grant of authority, the state intended to ensure home rule municipalities had "constitutionally-guaranteed independence from state control in [municipal] internal affairs."<sup>9</sup> However, matters that result in effects extending beyond municipal borders—including matters such as housing, statewide and regional economic development, and environmental sustainability—are, by definition, not purely local and, therefore, are appropriate for statewide regulation.<sup>10</sup>

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<sup>8</sup> See COLO. CONST. art. XX, § 6.

<sup>9</sup> *City of Longmont v. Colo. Oil and Gas Ass'n*, 369 P.3d 573, 579 (Colo. 2016).

<sup>10</sup> See *Town of Telluride v. Lot Thirty-Four Venture, L.L.C.*, 3 P.3d 30, 38-39 (Colo. 2000) (discussing the ripple effect of local housing ordinances on the state's housing supply and ultimately invalidating the local ordinance given the state's prevailing interest in consistent regulation of rent); see also Laurie Reynolds, *Local Governments and Regional Governance*, 39 URBAN LAWYER 483, 492 (2007), <https://www.jstor.org/stable/23801003>.

While the state has historically left many land use matters to local discretion,<sup>11</sup> based on an analysis of state law and consideration of the state’s interest in developing a consistent housing policy that supports Colorado’s economic, environmental, and equity goals, it is clear that the state has the power to set minimum limitations and requirements for local land use control—by both statutory and home rule municipalities—to address Colorado’s housing affordability crisis and support inclusive, sustainable growth.

### **I. Land Use Policies affecting Housing Supply are a Matter of Statewide or Mixed Concern**

To determine whether a matter is reserved purely for local control or is appropriate for regulation by the state, courts “weigh the relative interests of the state and the municipality in regulating the particular issue.”<sup>12</sup> This fact-intensive inquiry is assessed on a case-by-case basis and considers the totality of the circumstances.<sup>13</sup> Nevertheless, “[i]n light of the recognized legislative authority to declare the public policy of the state in matters of statewide concern, [Colorado courts have] accorded great weight to the General Assembly’s declaration that a particular matter is of statewide interest or concern.”<sup>14</sup>

The “pertinent factors” that guide a court’s inquiry examine (1) the need for regulatory uniformity throughout the state, (2) the extraterritorial impacts of the local regulation at issue, (3) which entity, state or local, has traditionally regulated the area, and (4) to which entity, if any, the Colorado Constitution commits regulation.<sup>15</sup>

Additionally, the Colorado Supreme Court has signaled that the aforementioned factors are “not an exhaustive list” and has also considered “any legislative declaration as to whether a matter is of statewide concern and the need for cooperation between state and local governments in order to effectuate the local government scheme.”<sup>16</sup>

Notably, state and local regulations may coexist where there is no conflict between them.<sup>17</sup> If a matter is found to be of either statewide or mixed concern, state law preempts any conflicting local ordinance,<sup>18</sup> and the General Assembly may legislate on the subject matter.<sup>19</sup> In such a circumstance, the municipality may regulate the same subject matter, but local regulations may

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<sup>11</sup> See *City of Northglenn v. Ibarra*, 62 P.3d 151, 159 (Colo. 2003) (“[T]he regulation of land uses has been a matter for local governments.”).

<sup>12</sup> *Webb v. City of Black Hawk*, 295 P.3d 480, 487 (Colo. 2013).

<sup>13</sup> *Longmont*, 369 P.3d at 580.

<sup>14</sup> *Nat’l Adver. Co. v. Dep’t of Hwys.*, 751 P.2d 632, 635 (Colo. App. 1988), *aff’d by* *Town of Telluride v. Lot Thirty-Four Venture, LLC*, 3 P.3d 30, 37 (Colo. 2000).

<sup>15</sup> *Id.*

<sup>16</sup> *Ibarra*, 62 P.3d at 156.

<sup>17</sup> *Longmont*, 369 P.3d at 579.

<sup>18</sup> *Id.*

<sup>19</sup> *City and Cnty. of Denver v. State*, 788 P.2d 764, 767 (Colo. 1990).

not conflict with state law.<sup>20</sup> In contrast, where a matter is found to be of purely local concern, a local ordinance will supersede a conflicting state statute.<sup>21</sup>

### **a. Uniformity**

A statewide approach, based on a uniform set of expectations, is needed to establish that every community that is large enough or located such that its land use and zoning regulations affect regional housing markets bears some responsibility for providing housing to support the state's and regional economic development goals and to provide sufficient housing across a variety of income levels. Such an approach also reflects the wide-ranging, statewide economic and environmental consequences of unaffordable housing and distorted residential development patterns. Just as a uniform statewide approach is required to produce "efficient and fair development" of oil and gas reserves, or address mined land reclamation, a consistent statewide approach is needed to ensure "efficient and fair development" of housing that promotes inclusive, sustainable growth by reducing environmental impacts, ensuring equitable access to housing that is affordable, and leveraging state investments in infrastructure.

Uniformity of regulation is necessary "when it achieves and maintains specific state goals."<sup>22</sup> The Colorado Supreme Court has frequently upheld statewide regulation of activities typically in the purview of local governments because of the importance of a uniform approach. Indeed, the Court has explicitly justified state regulation of issues related to housing because of the need for uniformity. In *Town of Telluride v. Lot 34 Venture, L.L.C.*, a case challenging local efforts to implement rent control as in conflict with a state law banning such regulation, the Court found that both the state and municipality have "significant interests in maintaining the quality and quantity of affordable housing in the state" and that ordinances like Telluride's can "change the dynamics of supply and demand in . . . the housing market."<sup>23</sup> The Court found that a "consistent" statewide approach to the question of rent control "encourages investment in the rental market and the maintenance of high quality rental units," which justified state preemption of local efforts to regulate the housing market.<sup>24</sup> Likewise, the Court determined that the state has a prevailing interest in regulating landlord-tenant relations because "uniformity fosters informed and realistic expectations [which] increase[s] the quality and reliability of rental housing[.]"<sup>25</sup> In *Telluride*, the Court noted that "both the municipality and state have *significant* interests in maintaining the quality and quantity of affordable housing in the state."<sup>26</sup> However, the fact that the General Assembly established a statewide ban on rent control as a matter of public policy

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Longmont*, 369 P.3d at 579 (quoting *Ibarra*, 62 P.3d at 580).

<sup>23</sup> *Telluride*, 3 P.3d at 38.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* (emphasis added).

demonstrated a prevailing state interest and supported the argument that, at a minimum, this was an area of mixed state and local concern justifying statewide regulation.<sup>27</sup>

Besides recognizing the need for uniformity in regulations affecting the housing market, the Court has approved statewide regulation of highway advertisements to ensure eligibility for federal funding;<sup>28</sup> has found an “overriding concern” in the uniform regulation of electricians “because electricians need uniform access to markets throughout the state;”<sup>29</sup> and overturned a local fracking ban where the “efficient and fair development of oil and gas resources” justified statewide regulation.<sup>30</sup>

On the other hand, statewide regulation of residency requirements for city employees was found *not* to implicate an issue of statewide concern because the Court could detect no pervading interest in uniformity of regulation.<sup>31</sup> In *City and County of Denver v. State*, the fact that each municipality already had its own terms and conditions for municipal employment, “such inconsistencies alone,” without more of a statewide interest, did not require finding the matter rose to the level of statewide concern.<sup>32</sup>

Although courts will evaluate the totality of the circumstances in determining whether the state has an interest in uniform regulation, the caselaw strongly supports Colorado’s authority to establish consistent requirements that local governments plan for and produce housing to meet a fair share of the state’s housing need. Just as the Court recognized in the *Telluride* decision, local land use laws affect the “dynamics of supply and demand . . . in the housing market” because the availability of an adequate and affordable supply of housing depends on zoning rules that have the effect of either excluding or enabling residential development.<sup>33</sup> Local zoning rules affect the type, location, and ultimately the cost of housing, and can prevent development that is needed to serve regional and state priorities. Indeed, a lack of uniformity in the expectations of local governments enables some communities to limit housing supply and restrict affordable forms of housing in favor of single-family home development. This “purely local” land use decision, however, pushes demand for housing on to neighboring jurisdictions, permeating municipal borders in the process.

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<sup>27</sup> *Id.*

<sup>28</sup> See *Nat’l Advert. Co. v. Dept. of Highways*, 751 P.2d 632, 635-36 (Colo. 1988).

<sup>29</sup> *City of Northglenn v. Ibarra*, 62 P.3d 151, 160 (Colo. 2003) (citing *Century Elec. Service & Repair v. Stone*, 564 P.2d 953, 955 (Colo. 1977)).

<sup>30</sup> *Longmont*, 369 P.3d at 581.

<sup>31</sup> See *City and County of Denver*, 788 P.2d at 768.

<sup>32</sup> *Id.* Notably, the court found the other factors weighing in favor of local control, such as a lack of “significant” extraterritorial impacts, and strong local interests in increasing the city’s tax base and having its employees nearby in case of an emergency. See *id.* at 769-72. The state’s interest in regulating municipal employee residency, on the other hand, was “inconsistent with the very policy advanced” by the state’s own constitution and thus failed to tip the balance in favor of the state in light of the other factors. *Id.* at 770.

<sup>33</sup> It is worth noting that other states that have faced similar housing crises to Colorado’s have identified a statewide interest in mitigating local regulatory impacts on regional and statewide housing markets, including California, Oregon, Washington, Maryland, and Utah.

This dynamic has significant economic, social, environmental, and fiscal impacts, both locally and statewide. Some communities, for example, exercise their “local control” to prioritize economic growth and job creation (often resulting in increased tax revenue), while others disproportionately bear the burden of providing housing for those very workers. Such costs absorbed by the neighboring community include infrastructure costs associated with residential development, expensive social services like schools, fire protection, and policing to support families, and taxpayer subsidies to provide access to affordable housing.

Because of this system of local control, many Coloradans are priced out of housing close to their place of employment, spend over 30% of their income on housing, and are relegated to the rental market without any realistic hope of establishing family stability and wealth through homeownership.<sup>34</sup> They can have no expectation of “uniform access” to a housing market that is affordable to them, and instead, have to travel long distances to find housing and employment opportunities. This “patchwork” approach to land use policy<sup>35</sup> results in the segregation of our communities by income and, often, race and ethnicity. It also prevents the “fair and efficient” development of compact, transit-oriented development to leverage the state’s investments in its transit infrastructure, resulting in sprawl and unsustainable growth patterns, as well as high air pollution throughout the Denver metro region. The state should be confident that its investments in transit will not be undermined by patchwork regulations on development that diminish the value of the entire network.

Of course, Colorado’s municipalities are diverse: they have different demographic and economic characteristics, they may be located in metropolitan regions or rural areas, and they may have different environmental features. Evaluating whether an issue necessitates uniform statewide regulation, however, does not necessitate a “one size fits all” regulatory approach to addressing Colorado’s housing, economic, and environmental needs. So long as classes of municipalities are treated evenhandedly, the General Assembly could determine that larger, more urbanized municipalities—which necessarily have different housing needs and whose regulatory decisions have different economic and environmental impacts than smaller jurisdictions’ actions—should have different obligations than smaller, rural municipalities. The ability of the General Assembly to regulate geographies according to their particular characteristics and impacts is exemplified by an appeals court’s determination that the Outdoor Advertising Act—which treats geographies differently for purposes of sign and billboard regulation based on their proximity to state and federal-aid highways—applied to home rule municipalities.<sup>36</sup> This approach is similar to pre-

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<sup>34</sup> See ROOT POL’Y RESEARCH, STATE OF COLORADO HOUSING RESEARCH I-6, I-10, I-12 (2021), [https://cohousingaffordabilityproject.org/wp-content/uploads/2021/11/Colorado-Housing-Research-Report\\_November-2021.pdf](https://cohousingaffordabilityproject.org/wp-content/uploads/2021/11/Colorado-Housing-Research-Report_November-2021.pdf).

<sup>35</sup> See Michael Stegman, *Eliminating Exclusionary Land Use Regulations Should be the Civil Rights Issues of Our Time*, JOINT CNTR FOR HOUS. STUD. (Aug. 19, 2019), <https://www.jchs.harvard.edu/blog/eliminating-exclusionary-land-use-regulations-should-be-the-civil-rights-issue-of-our-time> (explaining that the “patchwork” approach to local land use regulation “fails to recognize” the decades-long implications such reforms have had on housing prices).

<sup>36</sup> Nat’l Advert. Co. v. Dept. of Highways, 751 P.2d 632, 636 (Colo. 1988).



existing state law that requires uniformity among different classes of zoning districts, despite the fact that different districts can have different regulations.<sup>37</sup>

### ***b. Extraterritorial Impacts***

The second factor that courts examine in determining whether a matter is one of statewide or mixed concern, justifying preemption of local regulation, is whether a home rule municipality's action will have extraterritorial effect.<sup>38</sup> An extraterritorial impact is understood as a "ripple effect that impacts state residents outside the municipality."<sup>39</sup> However, it is not enough to find a ripple effect when those living outside of a municipality are impacted by municipal regulation— instead, "the extraterritorial impacts must have serious consequences for residents outside the city and be more than incidental."<sup>40</sup>

On multiple occasions, the Colorado Supreme Court has found sufficient extraterritorial impact to support statewide regulation of various matters. For example, where a local fracking ban may have encouraged other municipalities to adopt similar local fracking bans "which could ultimately result in a de facto statewide ban."<sup>41</sup> In such a circumstance, the Court found "that the state's interest in the efficient and fair development of oil and gas resources . . . suggests that [a local] fracking ban implicates a matter of statewide concern."<sup>42</sup> Extraterritorial impacts have also been found where a local ordinance banning bikes could possibly "creat[e] a patchwork of local and state rules contrary to the state legislation's wording and intent."<sup>43</sup> Furthermore, local efforts to impose costs on railroads have been determined to have extraterritorial impacts because such regulation may result in reduced or terminated services to areas outside of the municipality.<sup>44</sup>

In *Telluride*, the Court explicitly recognized the extraterritorial effects of local regulation in the housing market and, therefore, the need for a statewide approach:

Managing population and development growth is among the most pressing problems currently facing communities throughout the state. Restricting the operation of the free market with respect to housing in one area may well cause housing investment and population to migrate to other communities already facing their own growth problems. . . . The fact that the Telluride ordinance is an affirmative effort to mitigate that impact does not change the fact that *the growth of the one community is tied to the growth of*

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<sup>37</sup> C.R.S. § 31-23-302 (2022).

<sup>38</sup> *Telluride*, 3 P.3d at 38.

<sup>39</sup> *Ibarra*, 62 P.3d at 161.

<sup>40</sup> *Longmont*, 369 P.3d at 581 (quoting *Ibarra*, 62 P.3d at 161) (internal quotation marks omitted).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Webb v. City of Black Hawk*, 295 P.3d 480, 491 (Colo. 2013).

<sup>44</sup> *Denver & Rio Grande W. R.R. Co. v. City and Cnty. of Denver*, 673 P.2d. 354, 358-59 (Colo. 1983).

*the next*, thereby buttressing the need for a regional or even statewide approach.<sup>45</sup>

If local fracking and bike bans, as well as ordinances aimed at controlling rent locally, have been found to lead to extraterritorial impacts, clearly exclusionary zoning that limits housing supply, “restrict[s] the free market,” and distorts regional growth patterns has extraterritorial effects.<sup>46</sup> The failure of some communities to allow the production of affordable forms of housing or subsidized housing for low-income Coloradans results in many extraterritorial impacts, including, but not limited to: the costs absorbed by neighboring jurisdictions in providing the needed housing (and expensive supportive services) that support the restrictive community’s workforce and economy; the environmental impacts associated with long commutes when housing is not located near jobs; and the segregation of communities by income and access to opportunity, which concentrates poverty and causes related societal impacts.

Finally, the state itself, in its 2022 Research Report on Land Use In Colorado, has acknowledged that local land use regulations have extraterritorial impacts because such local regulations implicate “regional commuting patterns, regional socioeconomic equity, wildlife habitat, trans-boundary air pollution . . . and state and regional infrastructure needs.”<sup>47</sup>

### ***c. Traditional Regulation: State vs. Local***

The third factor courts consider to determine whether statewide regulation is necessary is which entity has traditionally regulated the area — the state or the municipality.<sup>48</sup> Traditionally, Colorado municipalities regulate their own land use and exercise zoning powers within their municipal borders.<sup>49</sup> Zoning and land use in general has been determined to be a local and municipal matter unless a state statute explicitly provides otherwise.<sup>50</sup> However, the state has exercised its jurisdiction on many matters that affect land use and zoning regulations. As previously discussed, the Colorado General Assembly has regulated housing, including landlord-tenant relationships generally<sup>51</sup> and localities’ ability to implement rent control more specifically.<sup>52</sup> State law also generally prohibits discrimination by local governments in housing.<sup>53</sup> And most recently, the state authorized local governments to implement rent control on new

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<sup>45</sup> *Telluride*, 3 P.3d at 39 (emphasis added).

<sup>46</sup> Land use reforms that disfavor single-family development and prioritize the development of duplexes, triplexes, etc., would increase Colorado’s overall housing supply. See ROOT POL’Y RESEARCH, *supra* note 25, at III-2.

<sup>47</sup> COLO. ENERGY OFF. & DEPTS. OF TRANSP., LOC. AFFS., PUB. HEALTH & ENV’T, & NAT. RES., LAND USE IN COLORADO: A RESEARCH REPORT ON CHALLENGES, OUTCOMES, BENEFITS AND POLICY TOOLS 6 (2022) [hereinafter LAND USE IN COLORADO 2022 REPORT], <https://energyoffice.colorado.gov/sites/energyoffice/files/documents/FINAL%20Land%20Use%20Research%20Report%207.19.22%20-%20For%20Release.pdf>.

<sup>48</sup> *Longmont*, 369 P.3d at 580.

<sup>49</sup> *Id.* at 581.

<sup>50</sup> *Voss v. Lundvall Bros.*, 830 P.2d 1061 (Colo. 1992)

<sup>51</sup> See C.R.S. § 38-12-101, et seq. (2022).

<sup>52</sup> C.R.S. § 38-12-301 (2022).

<sup>53</sup> C.R.S. § 24-32-502 (2022).

construction, provided that they adopted new land use policies from among a menu of state-identified options.<sup>54</sup>

The General Assembly has regulated land use in many other ways as well.<sup>55</sup> State law governs the location of liquor stores,<sup>56</sup> marijuana facilities,<sup>57</sup> and extensively regulates the permitting of mining facilities.<sup>58</sup> The Vested Property Rights Act, for instance, dictates the procedures and the terms upon which local governments can agree to protect a landowner’s development rights against subsequent changes to the localities’ land use controls, and even requires local governments to pay damages for impairing those rights.<sup>59</sup> Moreover, the General Assembly has explicitly limited the right of local government to regulate land use in a number of areas. Besides the preemption of regulations affecting mineral development, state law prevents local governments from excluding or prohibiting state-licensed group homes and homes for elderly persons<sup>60</sup> and has established that local governments may not use their land use authority to exclude manufactured homes that otherwise satisfy building codes.<sup>61</sup> The Regulatory Impairment of Property Rights Act likewise tells local governments how they must govern land use and prohibits them from imposing certain kinds of conditions on land use approvals,<sup>62</sup> and the state’s adequate water supply laws require local governments to evaluate and verify adequacy of water supply in the course of vetting land use applications.<sup>63</sup>

Colorado’s regulation of oil and gas, and preemption of municipal regulation in that area, is particularly instructive. State law preempts local land use regulations that unduly limit the development of oil and gas resources, and the Supreme Court has confirmed that oil and gas development is a matter of mixed statewide and local concern.<sup>64</sup> In effect, state law has preempted local land use authority by permitting “by-right” development of oil and gas resources, even within municipal limits. Both oil and gas and housing development are property rights- and land use-related matters. The General Assembly’s prohibition of undue local limitations on much-needed housing would therefore parallel earlier statutory enactments relating to oil and gas development and would be well aligned with controlling precedent. In many ways, the state’s interests in providing sufficient housing for a growing population, ensuring economic development, and avoiding the negative air quality and environmental

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<sup>54</sup> C.R.S. § 29-20-104 (2022).

<sup>55</sup> C.R.S. §§ 24-67-101; 24-67-105 (2022).

<sup>56</sup> C.R.S. § 44-3-313(1)(e) (2022).

<sup>57</sup> C.R.S. §§ 44-10-301 *et seq.* (2022).

<sup>58</sup> C.R.S. § 34-32-112 (2022).

<sup>59</sup> C.R.S. §§ 24-68-101 *et seq.* (2022).

<sup>60</sup> C.R.S. § 31-23-301(4) (2022).

<sup>61</sup> C.R.S. § 31-23-301(5) (2022).

<sup>62</sup> C.R.S. §§ 29-20-201 *et seq.* (2022).

<sup>63</sup> C.R.S. §§ 29-20-301 *et seq.* (2022).

<sup>64</sup> C.R.S. § 34-1-305(1) (2022); *see also* *City of Longmont v. Colo. Oil & Gas Ass’n*, 369 P.3d 573, 581 (Colo. 2016).

Recent legislative amendments have allowed more municipal regulation of oil and gas development, but have not overridden the Supreme Court’s underlying determination that oil and gas development is a matter of mixed statewide and local concern.

impacts of a lack of housing supply are even more compelling than the state’s interests in ensuring uniform regulation of oil and gas development.

While local governments have traditionally regulated the use of land in Colorado, it is clear that the state has used its authority to regulate land use—and establish minimum standards for local regulation of land use—as it relates to housing, zoning classifications, and land use approvals, in a number of different contexts. Setting standards for local governments that require planning and zoning to increase housing supply and overall affordability across income levels is consistent with prior state legislative enactments.

#### ***d. Colorado Constitutional Grants of Authority***

While the Colorado Constitution grants broad powers to home rule municipalities, it does not expressly enumerate “zoning” or “land use” as a specific municipal power.<sup>65</sup> The specific grant of authority simply states that a locality “shall always have, power to make, amend, add to or replace [its] charter” as it pertains to “local and municipal matters.”<sup>66</sup> So long as the municipality’s ordinances regulate a “local and municipal matter,” the Colorado Constitution states that the municipal regulation will supersede any conflicting law.<sup>67</sup>

Notably, the Colorado Constitution’s broad grant of home rule authority is significant, but it is not dispositive.<sup>68</sup> This constitutional grant of authority simply restates the principal that purely local matters are subject to local control; however, this grant of authority does not extend to matters that are of mixed or statewide concern.<sup>69</sup> To supersede the “command” of Article XX, Section 6, the state must demonstrate a “sufficiently weighty state interest in superseding local regulation” in an area traditionally committed to local regulation.<sup>70</sup> Given the twin climate and housing affordability crises facing Colorado, the state’s interests in providing housing for a growing population, contributing to economic development, and ensuring environmental sustainability are weighty interests. As the above examples show, activities that may have at one time been matters of purely local concern can change to become matters of mixed state and local concern when extraterritorial impacts become serious and significant portions of the state’s population are affected. The fact that the Colorado constitution does not name either zoning or land use as matters of purely local control, provides the General Assembly the authority to legislate to protect Colorado’s citizens from the unintended consequences of treating housing as a purely local matter. Where, as here, the Colorado Constitution has neither committed or granted a specific subject of regulation to either local or state control, the Court has found the matter to be one of mixed concern.<sup>71</sup>

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<sup>65</sup> See *Nat’l Advert. Co. v. Dept. of Highways*, 751 P.2d 632, 635 (Colo. 1988).

<sup>66</sup> See COLO. CONST. art. XX, § 6.

<sup>67</sup> *Id.*

<sup>68</sup> *City and Cnty. of Denver v. State*, 788 P.2d 764, 771 (Colo. 1990).

<sup>69</sup> See *City of Longmont v. Colo. Oil and Gas Ass’n*, 369 P.3d 573, 579 (Colo. 2016).

<sup>70</sup> *Id.*

<sup>71</sup> See *id.* at 581.

### ***e. Other Considerations Weighing in Favor of Statewide Regulations***

The General Assembly has the authority to declare the public policy of the state, and that policy is accorded deference by courts.<sup>72</sup> Courts thus consider “any legislative declaration as to whether a matter is of statewide concern and the need for cooperation between state and local governments in order to effectuate the local government scheme.”<sup>73</sup> Although not conclusive in determining whether a matter is of local, statewide, or mixed concern, a legislative declaration on the matter “will be afforded deference in recognition of the legislature’s authority to declare the public policy of the state in matters of statewide concern.”<sup>74</sup> In asserting its authority to regulate housing in Colorado, the General Assembly can and should include a strong recitation of statewide interests and legislative findings about the need for a uniform approach to address the housing crisis, as such findings will insulate the legislation from future attack.

## **II. Conclusion**

Based on an analysis of Colorado law as it relates to statewide regulation of matters traditionally left to local governments and the facts underlying Colorado’s current housing and climate crises, the state has a strong argument that, at a minimum, housing affordability, economic development, and environmental sustainability are matters of mixed state and local concern and that the state has authority to set minimum requirements and limitations for local land use regulation, including in home rule jurisdictions, to allow greater production of housing, reduced greenhouse gas and other toxic emissions, and economic development. The state has a prevailing interest in uniformity of regulation to promote a functional housing market and more affordable housing and to maintain environmental sustainability. Restrictive zoning at the local level causes extraterritorial impacts to neighboring jurisdictions. Policy matters relating to land use and housing have traditionally been regulated at both the state and local levels, supporting the notion that local land use regulations have not historically been a purely local concern. Nor does the Colorado Constitution specifically grant zoning powers to local government. Additional action from the Colorado General Assembly, such as declaring the issue to be one of statewide concern, would further support a finding in favor of statewide regulation.

Finally, we note that the above discussion concerns the state’s authority to enact land use regulation for the purposes we have discussed. However, the strength of the state’s arguments will vary with the specific proposal. Legislation facilitating transit-oriented development for, example, carries system-wide benefits, with stronger arguments for state intervention. The same is true of faster approval procedures, where the state’s interest in creating predictable, uniform procedures statewide is substantial, and the local interest in process alone is comparatively weak. At the opposite end of the spectrum, legislation that directs a single locality to set aside a large tract of land for affordable housing would encroach upon local interests without obvious

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<sup>72</sup> See *Nat’l Adver.*, 751 P.2d at 635.

<sup>73</sup> *City of Northglenn v. Ibarra*, 62 P.3d 151, 156 (Colo. 2003).

<sup>74</sup> *City of Telluride v. Lot Thirty-Four Venture*, 3 P.3d 30, 37 (Colo. 2000).

uniformity or extraterritorial benefit. With that in mind, we encourage careful, proposal-specific review under the factors above.