

Senate Commerce Committee

Aaron Jones 271-2609

HB 410-FN, limiting local authority to adopt restrictions on the building and development of residential properties.

Hearing Date: April 10, 2025

Time Opened: 10:41 a.m.

Time Closed: 11:13 a.m.

Members of the Committee Present: Senators Ricciardi, Murphy, McGough, Fenton and Reardon

Members of the Committee Absent : Senator Innis

Bill Analysis: This bill prohibits the local adoption of extraordinary restrictions on residential property unless the restriction is narrowly tailored to serve a compelling government interest in public health or safety.

Sponsors:

Rep. Read

Who supports the bill: Representative Ellen Read, Representative Joe Alexander, Representative Calvin Beaulier, Samuel Hooper (Institute for Justice), Nick Taylor (Housing Action NH), Natch Greyes (BIA), Haley Demers, Sayre Moskwa, Lois Ann Cote, Sarahlynn Williams, Laura Sokoloski

Who opposes the bill: Representative Susan Porcelli, Brodie Deshaies, Carol Schutte, Jacqueline Richter-Menge, John Stadler, Nomi Stadler, Janice Mathews, Timothy Cook, Lynn Cook, Francesca Heap, Jeff Johnson, Jane Aitken (CNHT), Bernadette Theriault, Zachary Theriault, Rachel Webb

Who is neutral on the bill: Charles Gardner (Mercatus Center)

Summary of testimony presented in support:

Representative Ellen Read

- There was a Supreme Court decision about 100 years ago, *Village of Euclid v. Ambler Realty Company*, which stated that zoning ordinances were legitimate if they were directly tied to the health and safety of the community, not arbitrary aesthetics.
- Representative Read said much of the state's zoning ordinances were exclusionary.

- Under this bill, there would be a bucket of extraordinary restrictions on residential property, but it would have to fall under the constitutional scope of health and safety. Those specific extraordinary restrictions would be subject to strict scrutiny standards.
- Representative Read emphasized zoning laws could be enacted, but they must prove they are for the health and safety of the residents.
- In the list of extraordinary restrictions, tiny homes would be allowed if there were minimum square footage requirements of more than 200 square feet. Another extraordinary restriction would be lot size requirements greater than 5 gross acres, or 0.5 gross acres if it is served by municipal water and sewer.

Samuel Hooper, Legislative Counsel, Institute for Justice

- Mr. Hooper said this bill would not conflict with the other housing bills that have been considered this session.
- Strict scrutiny has not been used on private property rights, but nothing said it could not be used, especially during a severe housing crisis.
- Similar legislation is being considered in Montana and Arkansas. Mr. Hooper said it is on the cutting edge of housing and zoning reform.
- This bill would set clear statewide guidance on what is an extraordinary restriction on private property rights.

Representative Calvin Beaulier

- Representative Beaulier said this bill was a compromise, and it struck an appropriate balance.
- The original purpose of zoning, especially health and safety, was maintained.
- This bill would create a category known as an extraordinary restriction on residential property. It would maintain a municipality’s discretion as long as it is within the guardrails laid out in this bill.
- **Senator Murphy** said they have passed bills that say towns cannot do certain things. He asked if this might backfire by allowing cities and towns to use this as a workaround for other housing legislation that has passed.
 - **Representative Beaulier** said not all legislation. This bill could be a stopgap, and it would create an extraordinary restriction category where items can be added to the list.

Representative Joe Alexander

- This bill would create a ceiling of extraordinary things that towns and cities could not do.
- Representative Alexander said other housing bills would complement this bill, and they would not conflict.
- Line 22 would allow an LLC for a homeschooling pod, so Representative Alexander said this was a school choice bill. It would allow children to be

educated in any zone because there are towns that say you cannot educate a group of children in a home.

- **Senator McGough** asked if they should wait to solve the housing crisis, or should they embrace innovative free market solutions.
 - **Representative Alexander** said absolutely. If the Committee changed the effective date to upon passage, he would not be opposed.

Natch Greyes, Business and Industry Association

- Under the current system of property rights, an individual has a bundle of rights.
- An individual can control what happens with their property. This includes not only what can be built, but the kind of activity that can occur.
- There are two instances where individuals cannot do things with their discrete land.
 - First, rights are voluntarily given away through a private covenant, which is reported in a deed or with other neighboring properties to create a homeowners' association. These are voluntary agreements between landowners, and they specify certain things, such as the color a house could be.
 - Second, there are restrictions on the right of control through government intervention.
- Under the Fifth Amendment, no person can be deprived of life, liberty, or property without due process.
- In 1926, the Supreme Court said it was a fundamental right that was subject to strict scrutiny.
- The *Euclid* case legalized zoning, and it dealt with block zoning.
- Since then, Mr. Greyes said there have been thousands of case citations in every state.
- In 2009, the South Dakota Supreme Court stated in the *Armstrong* case that the "United States Supreme Court has long held the invasion of private property by the government is not unlimited". Zoning restrictions are allowed "for the purpose of promoting health, safety, or the general welfare of the county."
- Zoning and governmental action, even if it is by the local government, is no longer a voluntary agreement, but it is a restriction on private property rights.

Summary of testimony presented in opposition:

Brodie Deshaies, New Hampshire Municipal Association

- Mr. Deshaies said that Sections 1 and 2 were very concerning because someone must determine if the zoning restrictions have met strict scrutiny standards. Voters do not have the expertise to make the determination if a zoning ordinance meets strict scrutiny.

- This bill would be a mandate that is not enforceable because the legislative body could enact ordinances that run counter to it.
- The strict scrutiny standard is reserved when the government has violated a constitutional right, not land use regulations or zoning ordinances. Mr. Deshaies said there are no constitutional rights at stake over zoning restrictions.
- This bill would cause long-term litigation that will be costly for developers and municipalities.
- Mr. Deshaies said there was no adjudicatory process set up within this bill, and he was unsure how towns would comply with it.

Neutral Information Presented:

Charles Gardner, Research Fellow, Mercatus Center

- Mr. Gardner said restrictive zoning laws have put the acquisition of property out of reach for many individuals.
- New Hampshire has high housing costs and a shortage of housing due in part to the obstacles posed by local policies.
- This bill would establish a new framework by assessing property rights to a higher degree of legal scrutiny.
- Mr. Gardner said the term “strict scrutiny” does not appear in this bill.
- This bill would ensure municipalities exercised their opinions more responsibly. It also would allow appeals to be made to local zoning boards.
- **Senator Murphy** asked if anything in this bill would override the ability of individuals to enforce a covenant.
 - **Mr. Gardner** said he did not believe anything superseded covenants on land. He believed the courts would find the private agreement through a contract was valid.