# 2022 Land Use Update:

# Resilience, Kicking SFR Zoning's S, EVs, & More

**June 3, 2022**

**9:00am - 4:30pm**

**Doubletree Hotel by Hilton -Phoenix-Tempe**
**Tempe, AZ**

**Presented by:**

STATE BAR OF ARIZONA

APA AZ
American Planning Association
**Arizona Chapter**
*Creating Great Communities for All*

RMLUI
ROCKY MOUNTAIN
LAND USE INSTITUTE

Jennifer Sonier, Professional Development Director

Continuing Legal Education

(602) 340-7346

# 2022 Land Use Update: Resilience, Kicking SFR Zoning's S, EVs, & More

**June 3, 2022**

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# 2022 LAND USE UPDATE
# JUNE 3, 2022 – DOUBLETREE INN TEMPE

| TIME | TOPIC | FACULTY |
|---|---|---|
| 8:30 a.m. – 9:00 a.m. | **REGISTRATION/CONTINENTAL BREAKFAST** | |
| 9:00 a.m. – 9:10 a.m. | **WELCOME** | Co-Chairs |
| 9:10 a.m. – 10:30 a.m. | **Insights into Economic and Community Resilience in a Changing World**<br>• Flexible tools to help businesses and the community grow and adapt<br>• Code and policy changes to address business and workforce needs<br>• Integrating equity, diversity, and inclusion in the resilience solution | **Moderator: Sandra Hoffman**, *City of Phoenix*<br>**Christine Mackay**, *City of Phoenix*<br>**Braden Kay**, *City of Tempe*<br>**Nicole Antonopoulos**, *City of Flagstaff* |
| 10:30 a.m. – 10:45 a.m. | **BREAK** | |
| 10:45 a.m. – Noon | **Beginning of the End of Single Family Residential Zoning?**<br>• Taking the S out of SFR Zoning<br>• The City of Tucson's Accessory Dwelling Units Ordinance<br>• Attempts to Enact By-Right Zoning Legislation in Arizona | **Moderator: Frank Cassidy**, *Frank Cassidy, PC*<br>**Arthur C. Nelson**, *University of Arizona*<br>**Koren Manning**, *City of Tucson* |
| Noon – 1:00 p.m. | **LUNCH PRESENTATION** *(Lunch included in registration fee)* | |
| | **Zoning Reform for Housing Affordability**<br>• How planners and lawyers can advocate for state and local legislative reforms to address the housing affordability crisis | **Introduction: Doug Jorden**, *Jorden Law Firm*<br>**Brian Connolly**, *Otten Johnson Robinson Neff + Ragonetti PC* |
| 1:00 p.m. – 1:15 p.m. | **BREAK** | |
| 1:15 p.m. – 2:15 p.m. | **Ethics for Planners and Lawyers**<br>• Presentation and Audience Discussion of Lawyer and Planner Ethical Issues | **Moderator: Sandra Hoffman**, *City of Phoenix*<br>**Jon Paladini**, *Pierce Coleman, PLLC*<br>**Jerry Stabley**, *APA-AZ Chapter President* |
| 2:15 p.m. – 2:30 p.m. | **BREAK** | |
| 2:30 p.m. – 3:45 p.m. | **Electric Infrastructure**<br>• Overview of City of Phoenix Draft EV Roadmap Process and EV Ready Building Codes and Developer Stakeholder Input<br>• Survey of legal issues impacting renewable energy development<br>• City of Tucson Electric Infrastructure Development Standards – Overview of Electric Vehicle & Solar Readiness Ordinances and the Streamlining of Solar Permitting through SolarApp | **Moderator: Doug Jorden**, *Jorden Law Firm*<br>**Karen Apple**, *City of Phoenix*<br>**Court Rich**, *Rose Law Group*<br>**Dan Bursuck**, *City of Tucson* |
| 3:45 p.m. – 4:30 p.m. | **Legislative and Case Law Update**<br>• 2022 Legislative Session<br>• Recent Arizona Cases | **Moderator: Frank Cassidy**, *Frank Cassidy, PC*<br>**Tom Dorn**, *Dorn Policy Group, Inc.*<br>**Tim Kinney**, *Timothy Kinney, PLLC* |
| 4:30 p.m. | **ADJOURN** | |

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Faculty Biographies

**NICOLE P. ANTONOPOULOS** currently serves as the Sustainability Director for the City of Flagstaff, Arizona. Nicole specializes in advancing climate action and developing effective programs and policies that catalyze long-term sustainability. She is responsible for growing the City's Sustainability Section from the ground up. The Sustainability Office now focuses on five programmatic areas including: energy efficiency, renewable energy, climate action, waste minimization, food systems, and community empowerment. Currently, she is leading the charge to fulfill Flagstaff's commitment to achieving carbon neutrality by 2030. Before joining the City of Flagstaff, Nicole served as the Program Manager for the Coconino County Sustainable Economic Development Initiative and the Outreach Director for the Texas Unit of Recording for the Blind & Dyslexic. Nicole holds a bachelor's degree in Anthropology from the University of Kansas, a Graduate Certificate in Geographic Information Systems and master's degree in Cultural Geography from Northern Arizona University. Nicole is the Urban Sustainability Directors Network Planning Advisory Committee Chair, and currently sits on Northern Arizona University's Climate Science and Solutions Advisory Board. When not at work, Nicole can be found with her backpack on exploring the great outdoors.

**KAREN APPLE** has over a decade of experience and knowledge in public policy issues and project management related to transportation and the environment. Karen joined the City of Phoenix Office of Sustainability, as the Electric Vehicle Program Manager in March 2020 and manages the planning and program development of projects that support the accelerated adoption of plug-in electric vehicles (EVs). This work includes: developing EV education and awareness initiatives, implementing the installation of charging stations for public, and City workplace and fleet use, implementing EV-ready building codes; coordinating with City departments to integrate EVs into the fleet, and continuing to collaborate with other local, regional, and state stakeholders and utility partners to increase EV adoption and decrease air quality emissions. Prior to joining the City of Phoenix Office of Sustainability, Karen served as a Project Manager/NEPA Planner with the City of Phoenix Aviation Department since 2005. Ms. Apple holds a Master's of Environmental Planning from Arizona State University and a Bachelor's of Science in Public Policy – Transportation from Indiana University's School of Public and Environmental Affairs.

**DANIEL BURSUCK** currently works as the Section Manager for Code Development for the City of Tucson Planning and Development Services Department. With a background in landscape architecture, urban design, and planning, Daniel's key areas of interest include the development of sustainable land use codes, adaptive reuse of aging suburbs, promotion of multi-modal transportation systems, and the creation of built environments that support healthy living. At the City of Tucson, Daniel has worked on the development of land-use codes and long-range corridor planning. His recent projects include the development of urban overlay zoning codes to address challenges along auto-centric corridors, land use code changes allowing for Accessory Dwelling Units, and the extensive overhaul of the City's Sign Code to bring it into compliance

with the Reed v. Town of Gilbert U.S. Supreme Court Case. Daniel received a Bachelor of Arts in Geography from the University of North Carolina at Greensboro, a Master of City and Regional Planning, from the University of North Carolina at Chapel Hill, and a Master of Landscape Architecture from Cornell University.

**FRANK J. CASSIDY** has a part-time solo Arizona law practice representing local governments. He has handled a wide range of land use, eminent domain, and public works construction matters since his 1982 graduation from the University of Arizona College of Law. Frank has practiced law in large and small private firms and three local governments, culminating with his October 2020 retirement from the full-time practice of law after serving as Marana Town Attorney for 17 years. He taught Land Use Law for 21 years as an adjunct lecturer at the University of Arizona and is a co-author of the State Bar of Arizona's handbook on ARIZONA LAND USE LAW. His wife Renée is a local real estate agent. Frank & Renée are blessed with three children and five grandchildren.

**BRIAN J. CONNOLLY** is a land use planner and lawyer with the Denver, Colorado law firm of Otten Johnson Robinson Neff + Ragonetti, P.C. There, he represents public- and private-sector clients in zoning, planning, development entitlements, and other complex regulatory matters. His practice encompasses a broad range of land use issues, including planned-unit developments, development agreements, and private covenants and restrictions. He also represents clients in land use and zoning litigation, initiatives and referenda associated with land use approvals, and real estate transactions. Brian has built a national reputation for his work on First Amendment issues related to local government regulation – including signs and outdoor advertising and other free speech issues – as well as fair housing matters in local planning and zoning, particularly in the area of housing for people with disabilities. In addition to representing clients in these areas, Brian's work has included filing a U.S. Supreme Court amicus curiae brief and serving as an expert witness in cases involving these and other land use topics. Brian is a frequent writer and speaker on land use law topics at regional and national conferences. He serves on the advisory board of the Rocky Mountain Land Use Institute and is the Chair of the American Planning Association's Planning and Law Division. Brian has served as the editor or co-author of three books addressing land use law topics, including the planning and local zoning issues associated with group homes for people with disabilities, and First Amendment issues associated with signs and advertising. In addition to his work at the firm, Brian teaches Land Use Planning as an Adjunct Professor at both the University of Colorado School of Law in Boulder and the University of Denver Sturm College of Law.

**TOM DORN**, President of Dorn Policy Group Inc., has a diverse background in government and politics at the federal, state, county, municipal, district and tribal levels. His firm represents numerous multi-national corporations, trade associations and government entities. Major clients include the Arizona Diamondbacks, 3M, Netjets, Cigna Healthcare, American Insurance Association, Macquarie Capital USA, McLane Company, American Medical Response, The CORE Institute, Arizona Bioindustry Association, HDR Engineering and Peabody Energy. Prior to starting Dorn Policy Group Inc. in November 2000, Tom was a Partner for three years at the Arizona public affairs firm Jamieson Gutierrez. There he was the chief legislative strategist and lobbyist for the firm's notable clients including America West Airlines, Cox Communications, Fiesta Bowl, Hitachi Data Systems, Reliant Energy, Southwest Student Services, Hopi Tribe and

the City of Tucson. From 1994 to 1997, Tom served as the State and Federal Lobbyist for the Arizona Department of Transportation where he was instrumental in the STEP 21 Coalition, a Washington D.C.-based effort to secure equitable highway financing nationwide. Tom also initiated development of federal legislation enabling the ultimate construction of the Hoover Dam Bridge now spanning the Colorado River. These significant policy efforts have led to subsequent opportunities for increased commerce along the CANAMEX Corridor and the future Interstate 11 connecting Phoenix and Las Vegas. From 1990 to 1994, Tom served Democrat Governor Rose Mofford as Legislative Director for the Arizona Department of Commerce where he advanced business legislation pertaining to international trade, housing, finance, economic development and sports promotion. He also served as Legislative Director for the Arizona State Land Department under Republican Governor Fife Symington where he advocated for policies relative to natural resource management, water, grazing leases, forestry, urban planning and environmental protection. Early in his career, Tom served as a Congressional intern Washington for the late Arizona Congressman Jay Rhodes and then as a Government Relations Assistant to legendary Arizona lobbyist, Ambassador P. Robert Fannin from whom he learned honor, knowledge, skill and tenacity are the pillars of successful advocacy. Tom holds both a Bachelor's degree in Political Science and a Master's degree in Public Administration from Arizona State University (ASU). He is active in numerous organizations including the Arizona Chamber of Commerce, Arizona Town Hall, Arizona Tax Research Association, and serves on the boards of the Arizona Highway Users and Paradise Valley Christian Preparatory. Tom has teenage daughters and lives in Phoenix.

**SANDRA HOFFMAN** currently serves as the Assistant Director for the City of Phoenix Planning and Development Department (PDD). Sandra supervises the Building Official, Office of Customer Advocacy, Technical Leads, Freeway Liaison and Light Rail Coordinator. She manages the plan review, inspections, and stakeholder coordination for several large projects in north Phoenix that will bring over 4.5 million total square feet of buildings and infrastructure; as well as over 3,000 workers. In addition, she oversees the Risk Management cases for the department, is the lead for PDD Emergency Management items, directs the Gated Alley Program, and is involved in multiple process improvements and outreach. Sandra is a member of the American Institute of Certified Planners and has been with the City of Phoenix since May 1999. Sandra serves on the American Planning Association, Arizona Chapter Board and is active in a variety of roles and has been a co-chair for the annual Land Use Conference for the past 6 years. She has a bachelor's degree in Landscape Architecture from the University of Arizona and a master's degree in Environmental Planning from Arizona State University. Sandra volunteers weekly at Saving Paws Rescue, a non-profit that helps predominantly German Shepherd and Malinois dogs. She also enjoys hiking and scuba diving.

**DOUGLAS A. JORDEN** is the founder of the Jorden Law Firm, P.C. Doug practices in the areas of land use, zoning, municipal law, real estate, environmental, and Native American law. Mr. Jorden's clients include local governments, developers, an industrial park located on Native American land, and other persons with real estate, land use, and environmental concerns. Mr. Jorden was town attorney in Paradise Valley, Arizona from 1978 to 1982, has served as Zoning Hearing Officer for the City of Phoenix and currently sits as a hearing officer for Maricopa County, Arizona on development-related matters. He has served as Chair of the City of Phoenix Environmental Quality Commission and Chair of the State Bar of Arizona Continuing Legal

Education Committee. Doug was on the Regional Advisory Board of the Rocky Mountain Land Use Institute based in Denver, Colorado for over 20 years and is co-author of Arizona Land Use Law, the treatise on Arizona zoning and land use law published by the State Bar of Arizona. He has lectured on land use and environmental issues on behalf of the State Bar of Arizona, the Arizona Planning Association, the League of Arizona Cities and Towns, the Arizona Department of Commerce and the Rocky Mountain Land Use Institute.

**DR. BRADEN KAY** is the Sustainability and Resilience Director at the City of Tempe. Braden works with city departments on reaching sustainability targets in energy, transportation, waste, water, land use, local food, housing, and social issues. He received a PhD from Arizona State's School of Sustainability for his dissertation work on stakeholder engagement and strategy building within the City of Phoenix. Previously, Braden managed community engagement, sustainability assessment and strategy building for the City of Phoenix's Reinvent Phoenix grant, which was funded by the U.S. Department of Housing and Urban Development's Sustainable Communities program. Braden has experience consulting municipal governments, non-profits, and corporations.

**TIMOTHY J. KINNEY** is an attorney in private practice based in Tucson, where he specializes in land use and commercial real estate law. He represents local businesses, developers, property owners, and stakeholders throughout Arizona. His land use representation includes compliance with local, state, and federal land use regulations as well as administrative issues and negotiations with local governments, agencies, individuals, and neighborhood organizations. He also serves as general counsel of an Arizona real estate development firm that focuses on complex transactions and public-private partnerships with local governments. Tim was named a 2019 southern Arizona "40 Under 40" by the Arizona Daily Star and is chair of the Southern Arizona committee of the Urban Land Institute, serving on ULI's Advisory Board and Management Committee. He also serves as chair of the board of Literacy Connects, one of Arizona's largest literacy nonprofits. Tim is admitted to practice in Arizona and in the District of Arizona. He received both his BA and JD from the University of Arizona.

**CHRISTINE MACKAY,** Phoenix Community and Economic Development director, has served the people of Phoenix since August 2014. She is responsible for leading and fostering an environment where businesses can create and retain jobs, make capital investment and reinvestment in the community, and connect our workforce to employers and training opportunities. During Mackay's tenure with the City of Phoenix, the department has facilitated the creation of over 75,000 high-value jobs, seen the average wage of those jobs increase from over $30,000 in 2014 to more than $70,000 in 2019, and closed deals with more than $20 billion in capital investment. Christine leads a department of over 55 full time staff that encompasses the full spectrum of economic development areas including: business attraction, business retention and expansion, community development, international relations, Sister Cities, the Phoenix Business and Workforce Development Board, administration, research, marketing, the City-owned Footprint Center and the Phoenix Biomedical Campus. In 2021, Christine was named as one of the Top 50 Economic Developers in the Country by Consultant Connect. She is a three-time honoree as "Economic Developer of the Year, Large Community" by the Arizona Association for Economic Development. Mackay was recognized as "Leader of the Year in Economic Development–Public Policy" by the Arizona Capitol Times, and "Industry Leader of

the Year – Economic Development" by Arizona Commercial Real Estate Magazine. She has also been on the list of the Arizona Business magazine's "50 Most Influential Women in Arizona." She is a member of the Economic Development Director's Team for Greater Phoenix, Maricopa Association of Government's Building a Quality Regional Community committee, Flinn Foundation Biosciences Roadmap committee, the International Economic Development Council (IEDC), Commercial Office Real Estate Executives (CoreNet), the Arizona Association for Economic Development (AAED), and the Arizona Business Incubator Association. Christine has nearly 25 years' experience in economic development overlapping 30 years of commercial real estate experience. Mackay has spent both her personal and professional life here in the Valley.

**KOREN MANNING** is Planning Administrator in the City of Tucson Department of Planning and Development Services where she leads a team of long-range planners working with community members to shape the future of Tucson. She and her team advance goals of sustainability, equity, and economic growth and promote vibrant, livable neighborhoods through corridor and neighborhood planning, code changes, rezoning, and historic preservation, guided by the goals and policies of Plan Tucson, the City's General and Sustainability Plan, and the direction of Mayor and Council. Koren was previously a Senior Planner and Team Leader in the Brooklyn Office of the NYC Department of City Planning. She received her Masters of Urban and Environmental Planning from the University of Virginia and a Bachelor's in Geography from the University of Arizona.

**PROFESSOR ARTHUR C. "CHRIS" NELSON** joined the University of Arizona College of Architecture, Planning and Landscape Architecture in 2014 as professor of urban planning and real estate development. He was formerly presidential professor and director of the Metropolitan Research Center at the University of Utah (2008-14), professor of urban affairs and planning as well as co-director of the Metropolitan Institute at Virginia Tech (2002-08) and professor of city planning and public policy as well as coordinator of the land development and urban policy programs at Georgia Tech (1987-2002). As the author of nearly 30 books and more than 400 other scholarly publications and PI/Co-PI of more than $50 million in grants, Nelson is ranked 9th nationally among more than 1,000 planning professors in the quality of published work based on scientific metrics. https://capla.arizona.edu/faculty-staff/arthur-c-nelson

**JON M. PALADINI** has been practicing law since 1993 and has practiced municipal law for nearly 25 years. Jon joined Pierce Coleman in August 2021 as part of the firm's municipal law team. Prior to joining Pierce Coleman, Jon was the City of Prescott City Attorney since January 2013. Jon's other municipal law experience include positions as Chief Deputy and City Attorney for the City of Glendale for over seven years, Assistant City Attorney for the City of Sedona for five years, and private practice municipal for various law firms. Jon has broad and deep experience and expertise in all facets of municipal law, including public records, open meetings and conflicts of interest, land use and zoning, annexations, elections, intergovernmental relations, ordinance drafting, legislative affairs and regulatory matters. Jon recently retired from the U.S. military after 22 years of service with the Arizona Army National Guard. In that role he has served four combat deployments to the Middle East and Afghanistan as well as numerous domestic operations deployments since 2000.

**COURT S. RICH** is Co-Founder of Rose Law Group and is Director of the firm's Regulatory and Renewable Energy Department. Court practices in the areas of renewable energy, utilities, municipal law, regulatory law, land use and zoning, administrative law, real estate, and handles administrative matters in front of the Arizona Corporation Commission, the Arizona Power Plant and Transmission Line Siting Committee, the Arizona Department of Real Estate, and lobbying at the State Legislature. Court serves as regulatory counsel for some of the largest solar companies and solar industry organizations in the United States. Court has extensive experience helping clients solve complicated real estate development and regulatory issues in all parts of the Valley and around the State of Arizona. Court has assisted clients in some especially unique development issues related to, utility services, floodplains, assurances, freeway and utility siting, as well as securing use permits, and variances where needed. On the regulatory front, Court has worked on numerous groundbreaking matters in Arizona including acting as lead counsel before the Arizona Corporation Commission for the largest solar energy industry groups in the country in matters relating to the future of distributed generation in Arizona. Court has negotiated numerous power purchase agreements and turnkey agreements for utility scale solar generation facilities with utilities including among others Arizona Public Service, Pacific Gas and Electric, and Tucson Electric Power. In addition, Court has drafted and negotiated solar service agreements, solar lease agreements, and solar purchase agreements for numerous distributed scale solar projects with a variety of off-takers. Court is a regular speaker and panelist on all things related to renewable energy. Court also has served as pro bono counsel for the Institute for Justice (representing a Winchell's Donut shop against first amendment abuse) and has been an associate scholar at the Goldwater Institute which published his policy brief, "Protecting Private Property Rights: The Case for Vested Property Rights."

**JERRY STABLEY** retired in June of 2014 after 30 years of public service. He was with Pinal County for eleven years and was the Planning and Development Director for six of those years. Prior to working for Pinal County, Jerry spent 19 years with the City of Scottsdale. While in Scottsdale, Jerry managed the following groups and projects: Project Coordination Group, Waterfront Project and Scottsdale Visioning. Jerry holds a Master's Degree from Arizona State, and a Bachelor of Science Degree from Penn State. He has been a member of the American Institute of Certified Planners (AICP) since 1989. He served as the Vice President for Professional Development for the Arizona Chapter of the American Planning Association (APA AZ) in 2013 and 2014. Jerry was recognized by his colleagues in the APA AZ as the Distinguished Professional Planner of the Year in 2013. He co-chaired the Mobile Workshop Committee for the 2016 National APA Conference in Phoenix. The Committee organized over 50 tours across the state. Jerry served as Interim Planning Director for Cochise County from April until October 2017, and for the City of Page from September to December 2018. He served as the Planning Manager for the City of Eloy from April 2019 until February 2021. He is currently the President of APA AZ and the President of the Casa Grande Elementary School District Governing Board.

# Why is Phoenix so Hot?

Community and Economic Development

CITY OF PHOENIX

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## Phoenix's Competitive Advantage

***...and then you put it all together***

Healthcare / Bioscience
Financial Technology &
Financial Services
Big Data
Cybersecurity
Robotics
Web/Software Development
Semiconductor Manufacturing
Aerospace and Defense
Autonomous Vehicles
Entrepreneurship
Circular Economy / Sustainability
Agri-Tech

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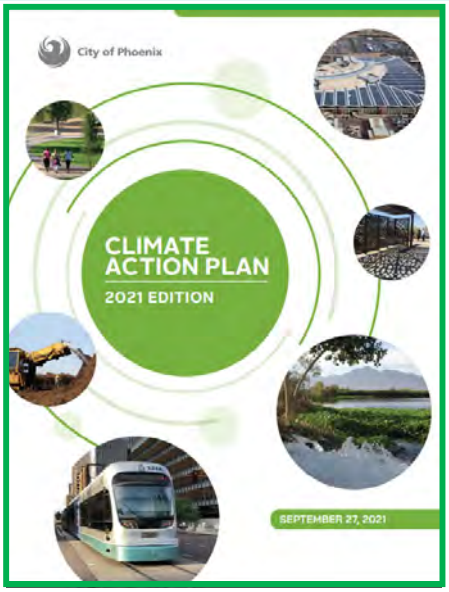
# Climate Action Plan

***Goals for the City, our Citizens and our Businesses***

- Transportation Sector
- Waste as a Resource
- Phoenix Resilience
- Financial Sustainability Initiatives
- Air Quality
- Local Food Systems
- Heat
- Water
- Equity and Environmental Justice

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# Talking Trash

***Resource Innovation and Solutions Network***


Global Institute of Sustainability and Innovation

**Resource Innovation and Solutions Network**


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## Creating a Cooler Phoenix

***Goal of Easing the Risk of Rising Temperatures - Planning for the future***

- Leading expert on urban heat
- Climate mitigation
- Cool Pavement
- Cooling the built environment
- Nature's Cooling System
- Tree and Shade Masterplan
- Technology Solutions


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## Agri-Tech – A Focus for Economic Development

***Innovation within the Ecosystem***

- Healthy Food for All
- Strengthening the Local Economy
- Agri-Tech;
  Local and Diverse Agriculture
- Sustainable Environment
- A Resilient Food System
- Food Deserts

City of Phoenix

**2025 Food Action Plan**

***Healthy Food for All***

***January 2020***

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# Del Rio Landfill

***Long Term City Landfill - Part of the Rio Reimagined***


Date: 3/6/2018
Not To Scale

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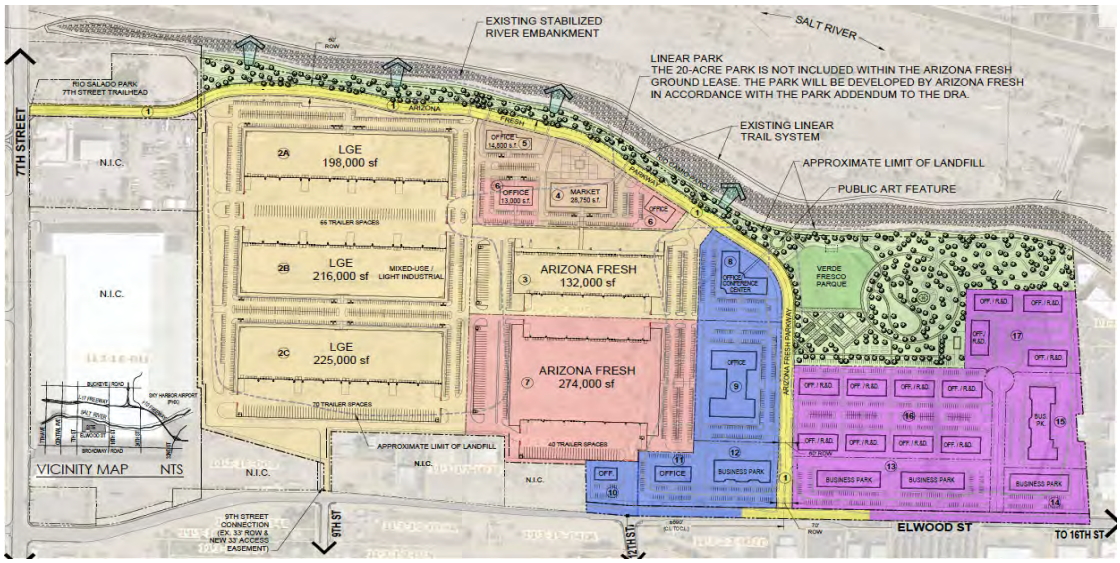
# Turning a Brownfield into a Healthfield

***Reuse of a former challenged site***

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# Arizona Fresh

***A Community Engagement Project***



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# Sustainability and Resilience Office

June 3rd, 2022

Tempe

Making waves in the desert

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# Tempe Climate Action Plan Update

## Highlight Actions Update

The Sustainability and Resilience Commission identified immediate highlight actions in the first plan that still need policy adoption and investment:

**Green Codes and Standards (Green Stormwater Infrastructure and International Green Construction Code adoption):**
To establish resilience to extreme heat in new construction . . . . . 16

**Transportation Demand Management and Mobility Hubs:**
To increase convenience of low carbon transportations options . . . . . 19

**Resilient Energy Hubs and Resilience Hubs:**
To increase community connections and the ability to support survival during disasters . . . . . 21

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# Climate Action Plan Update

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# Youth Climate Action

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# Climate Justice

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# Cool Cooridors

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# Resilient Energy Hubs and Resilience Hub


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# Electrification


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## Building Resilience in a Changing World

1. Building Regenerative Capacity
2. Sensing Emerging Risks
3. Responding to Disruption
4. Learning and Transforming

Continuous Feedback Loop


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## Climate Emergency Declaration

1. Strong neighborhoods
2. Clean energy sources
3. Managed consumption
4. Balancing

- Requires **leadership** and focused commitment
- Requires transformative **action**
- Requires **continuity** of decision-making
- Requires **improvement** of existing systems
- Requires a framework for action that is constantly **evolving**
- Requires sustained **investment**

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## Building Resilience

**Climate Advisory Groups**
Bringing community voices and participation into local climate action

- **Youth** Advisory Group
- **Business** Advisory Group
- **Equity** Advisory Group

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## BUILDING RESILIENCE

**Education and Workforce Development**

Education for residents: 170 registrations

Technical training: 16 local contractors and building professionals


Flagstaff warms up to climate-friendly heat pumps

Sean Golightly Apr 15, 2022 Updated Apr 15, 2022

Ramon Alatorre leans on a heat pump unit in the back garden of his Flagstaff home on Thursday.

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## BUILDING RESILIENCE

### Residential Sustainable Building Incentive

- Will reduce natural gas usage to ~ 1.5% of total building energy usage
- Will be located within a 5-minute walk of transit
- Will be 15% more energy efficient than the current City code
- Will provide more housing than standard zoning allows


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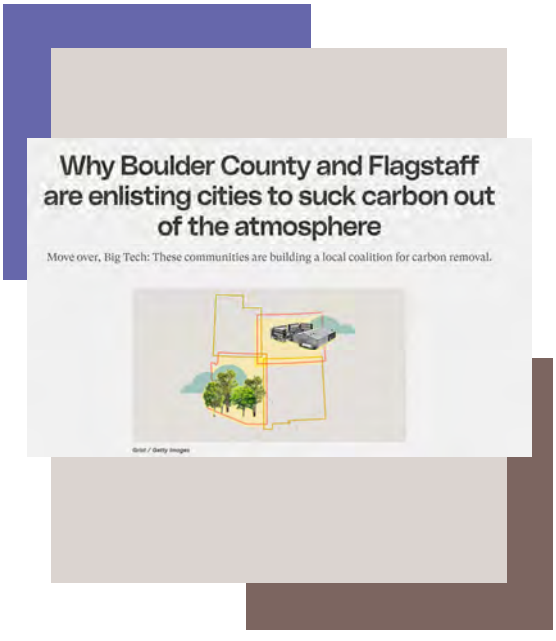
## BUILDING RESILIENCE

### Carbon Dioxide Removal (CDR)

Four Corners Coalition's mission is to accelerate CDR in order to both pull $CO_2$ out of the atmosphere and play a role in driving down the cost of currently expensive CDR technologies.

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# Thank you

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# Kicking the *S* out of SFR Zoning

Arthur C. Nelson, Ph.D., FAcSS, FAICP
Professor Urban Planning and Real Estate Development
University of Arizona

*Arizona Bar Association*

June 3, 2022

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# Outline

Market mismatch
Changing markets
Case studies in contrast
Preparing now for future shortages
More can be done
Key issues to address

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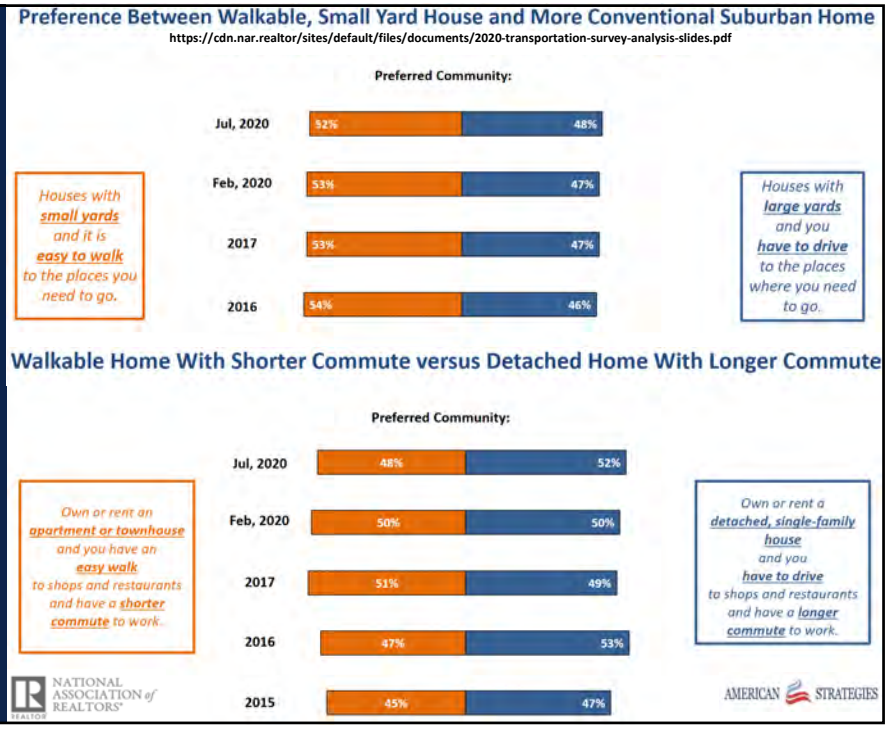
**National Association of Realtors' *Community Preference Survey***

70% want SFR until they see alternatives such as walkable communities:

**25%** want SFR large lot
**25%** want SFR small lot
**50%** want low-rise attached

But fewer than **20%** have low-rise attached, walkable.

**Missing Middle Housing Demand = All New Housing Built 2020-2050 and then some**

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# Housing Trends by Type, 2011-2019

*[American Housing Survey]*

| Occupied Type | Units 2011 | Units 2019 | Change | Share |
|---|---|---|---|---|
| Total | 114,833 | 124,135 | 9,302 | |
| Detached | 73,866 | 79,335 | 5,469 | 59% |
| **Middle Housing** | **26,127** | **26,772** | **645** | **7%** |
| *Townhouse* | *6,660* | *6,482* | *(178)* | *-2%* |
| *2-, 3-, 4-plex* | *8,973* | *9,118* | *145* | *2%* |
| *5 to 9 units* | *5,463* | *6,008* | *545* | *6%* |
| *10 to 19 units* | *5,031* | *5,164* | *133* | *1%* |
| 20 to 49 units | 3,702 | 4,706 | 1,004 | 11% |
| 50 or more units | 4,124 | 6,472 | 2,348 | 25% |
| Manufactured | 7,013 | 6,756 | (257) | -3% |

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# Living Space per Person by Age

| Householder Age | Square Feet per Person |
|---|---|
| Under 25 years old | 475 |
| 25 to 29 years old | 500 |
| 30 to 34 years old | 500 |
| 35 to 44 years old | 520 |
| 45 to 54 years old | 650 |
| 55 to 64 years old | 833 |
| 65 years old and over | **951** |

*Source*. American Housing Survey for 2017.

***Guess what's the fastest growing household group?***

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# Honey … I Shrunk Household Size
## *Case Study of Salt Lake City Upper Avenues*

| Upper Avenues | 2000 | 2018 | Change | Percent |
|---|---|---|---|---|
| Population | 6,918 | 6,446 | -472 | -7% |
| Housing | 2,679 | 2,775 | 96 | 4% |
| Persons per Unit | 2.58 | 2.32 | -0.26 | -10% |
| Housing units needed to **rebalance** Upper Avenues | | | | **300** |

Compared to 2000, the Upper Avenues has fewer children and people meaning →
**Unused school** capacity that is already paid for
**Unused sewer** capacity that is already paid for
**Unused water** capacity that is already paid for
**Unused fire/emergency medical** capacity that is already paid for

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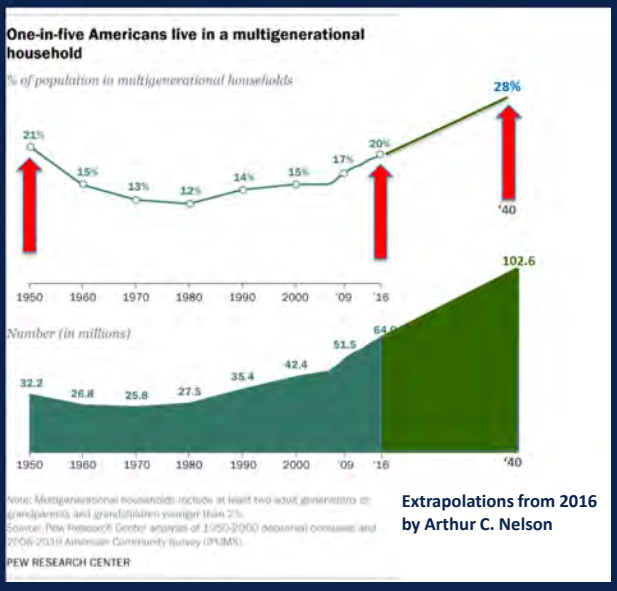
# Trends to Watch




**Extrapolations from 2016 by Arthur C. Nelson**

8

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# Headlines:
# Single Family Zoning Eliminated

"Minneapolis has officially eliminated single-family zoning"

"The Conservative Case for Ending Single-Family Zoning"

"It's Time to End Single-Family Zoning"

"Is Single-Family Zoning on the Way Out?"

"Death to Single-Family Zoning… and New Life to the Missing Middle"

https://www.strongtowns.org/journal/2020/7/7/abolish-single-family-zoning

9

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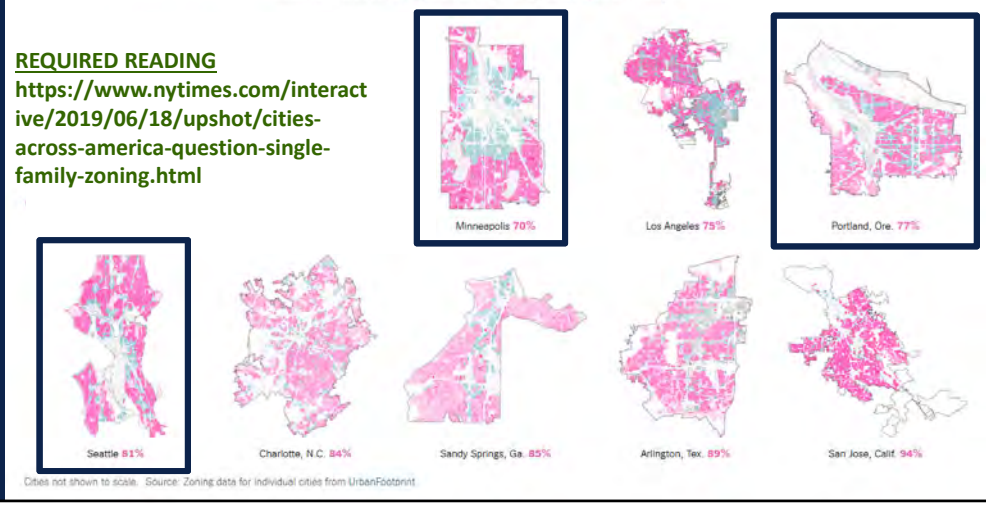
## *Cities Start to Question an American Ideal: A House With a Yard on Every Lot*

By EMILY BADGER and QUOCTRUNG BUI JUNE 18, 2019

Townhomes, duplexes and apartments are effectively banned in many neighborhoods. Now some communities regret it.

Residential land zoned for: detached single-family homes other housing

**REQUIRED READING**
https://www.nytimes.com/interactive/2019/06/18/upshot/cities-across-america-question-single-family-zoning.html




Cities not shown to scale. Source: Zoning data for individual cities from UrbanFootprint

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## Studies in Contrast

Minneapolis
Seattle
Oregon
Utah
California
Portland

11

11

## Minneapolis by the Numbers

| Year | Population | Housing Units | Persons/Unit |
|---|---|---|---|
| 1970 | 434,400 | 167,214 | 2.60 |
| 2020 | 442,069 | 196,649 | 2.25 |
| Change | 7,669 | 29,435 | **-0.35** |

***Plus the City is plumb outta space for new residential development.***

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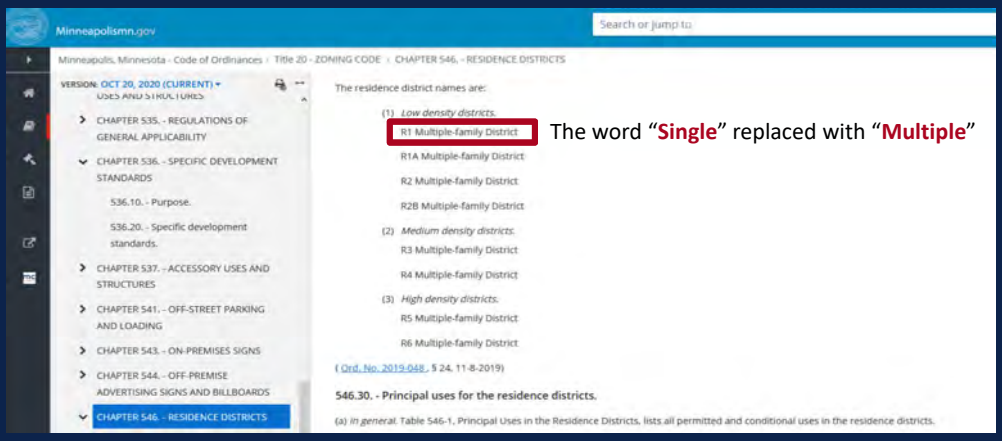
# The *(Elegant)* Minneapolis Solution




The word "**Single**" replaced with "**Multiple**"

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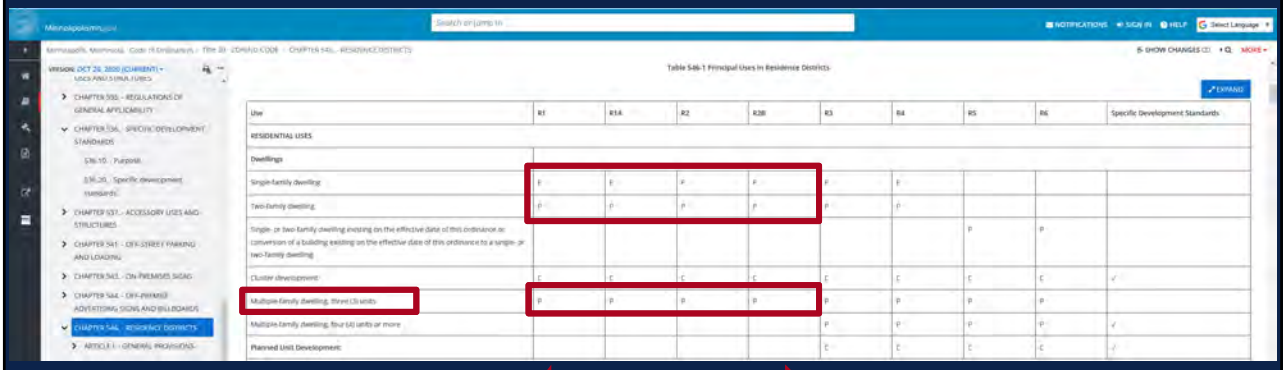
# What Did Minneapolis Actually Do?




**4-plexes not allowed**

14

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# What Did Minneapolis Actually Do?

| Feature | Action |
|---|---|
| Height limits? | No change |
| Impervious surface? | No change |
| Off-street parking | 1 space per dwelling unit, accessory dwelling units exempt* |
| Lot shape? | No change |
| Yards? | No change |
| Max. Floor Area Ratio | No change |

*3-unit structures with an ADU have the same practical parking requirements as SFR.

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# Minneapolis Early Results

**First Year Results in 2020**
Number of 2/3/4plex units added 2020 incredibly small = **44 units**
ADU's added 2020 = **10 units**

**Why so Anemic?**
Minneapolis zoning code has a **byzantine regime** of setback (front, back and side) requirements, height limits, and lot coverage requirements.

Twin Cities **home builders bifurcated** into:
- Single-family **subdivision & custom** single-family builders
- Distinctly **separate multifamily** building industry.
- = No suppliers of plexes on small infill lots.

**Other Local Market Nuances**
- No one wants a triplex that doesn't have a **garage**. It is Minnesota, after all.
- Local construction economics of rentals for 2nd and 3rd unit **do not pencil**, unlike owner-occupied homes

*Source*: Todd Graham, Twin Cities Metropolitan Council. May 2022.

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# What's in Seattle's Water?

**Expansion** of Accessory Dwelling Units (ADUs)
By-right **subject to** meeting design specifications in many SF districts ***but not all***.
Up to **2 ADUs** allowed →
- ***Tiny home*** in back yard
- Unit ***retrofit*** internally in the main structure

Maximum ADU size increased from 800 sq.ft. to **1,000 sq.ft.**
Building **height increased** slightly allowing for units over garages.


https://seattle.curbed.com/2019/7/1/20677616/backyard-cottage-mother-in-law-apartment-zoning

**Floor area ratio decreased** eliminating tear downs replaced by monster homes.
Expected to **add about 2,500** units over 10 years or 3% of projected growth.

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# Oregon's Statewide Mandate

HB 2001 (**Ivory Prize** Recognition)
"HB 2001 is focused on **increasing the supply** of '**middle housing**' in Oregon cities – not by limiting construction of single-family homes, but by allowing development of duplexes, triplexes, and quadplexes."
- Jim Rue, Director, Department of Land Conservation and Development

| **Medium Cities** | |
|---|---|
| All Oregon cities outside the Portland Metro boundary with a population between 10,000 and 25,000. | |
| **Middle Housing Requirement** | Duplexes to be allowed "on each lot or parcel zoned for residential use that allows for the development of detached single family dwellings." |
| **Large Cities** | |
| All Oregon cities with a population of more than 25,000, unincorporated areas within the Portland Metro boundary that are served by sufficient urban services, and all cities within the Portland Metro boundary with a population of more than 1,000. | |
| **Middle Housing Requirement** | Duplexes (as above) AND triplexes, quadplexes, cottage clusters, and townhouses "in areas zoned for residential use that allow for the development of detached single family dwellings." |
| **Flexibility** | *Medium and Large Cities "may regulate siting and design of middle housing required to be permitted under this section, provided that the regulations do not, individually or cumulatively, discourage the development of all middle housing types permitted in the area through unreasonable cost or delay."* |

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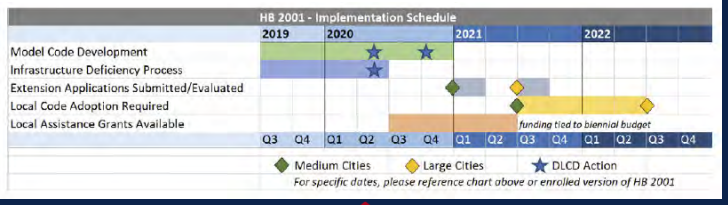
# Oregon's Statewide Mandate

| DLCD Required Rulemaking: | Middle Housing Requirements | |
|---|---|---|
| Who is affected: | Medium Cities | Large Cities |
| Significant dates: | DLCD Rules and model code adoption December 31, 2020 | DLCD Rules and model code adoption December 31, 2020 |
| Local Government Deadlines: | Local Government Adoption of model code or alternative June 30, 2021 | Local Government Adoption of model code or alternative June 30, 2022 |
| Effect of missed deadline: | Model code applies directly | Model code applies directly |

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# Oregon's Statewide Mandate

**Prohibits the establishment of *new* Covenants, Conditions & Restrictions or similar instruments that would prohibit middle housing or ADUs in a residential neighborhood.**

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# Oregon's Early Results

***[Full implementation in large cities by middle 2022]***

| Permitted Units | 2020 | 2020 Share | 2021 | 2021 Share | Change | Share |
|---|---|---|---|---|---|---|
| **Total** | **13,860** | | **18,508** | | **4,648** | |
| **Big Picture** | | | | | | |
| **Detached** | 5,506 | 40% | 5,457 | 29% | (49) | -1% |
| **All Attached** | 7,320 | 60% | 12,026 | 71% | 4,706 | 101% |
| **Middle Housing** | **1,859** | **13%** | **2,104** | **11%** | **245** | **5%** |
| ***Townhouse*** | *898* | *6.5%* | *1,009* | *5.5%* | *111* | *2%* |
| ***ADU*** | *545* | *3.9%* | *605* | *3.3%* | *60* | *1%* |
| ***Duplex*** | *301* | *2.2%* | *285* | *1.5%* | *(16)* | *-0%* |
| ***3-Plex*** | *26* | *0.2%* | *48* | *0.3%* | *22* | *0%* |
| ***4-Plex*** | *89* | *0.6%* | *157* | *0.8%* | *68* | *1%* |
| **Multi-Family** | **6,307** | **45.5%** | **10,812** | **58.4%** | **4,505** | **97%** |
| **Manufactured** | 188 | 1.4% | 135 | 0.7% | (53) | -1% |

*Source*: Ethan Stuckmayer, Oregon Department of Land Conservation and Development, May 2022.
Note: "Dozens of middle housing applications ready and **waiting for the new codes** to become effective".

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# Utah HB 82 (2021)

- Accessory dwelling units (ADUs) **internal** to a single-family dwelling are permitted uses.
- Cities **may prohibit** ADUs in 25% of their residential areas or 67% with public universities >10,000 students.
- Residence must be **owner-occupied**; No short-term rentals.
- Can **limit ADUs** to SFR lots >6k/sq.ft. + require parking pads.
- **Supersedes** existing and new Covenants, Conditions, and Restrictions (CC&Rs)


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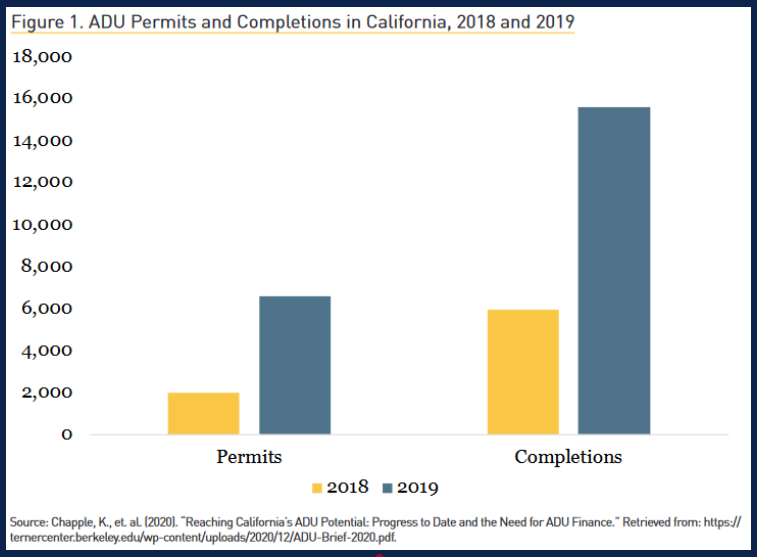
# California SB1069, AB2299, AB68, AB881, SB13 → ADU Expansions Since 2016

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# California SB 9 (2021) Duplexes By-Right (Sort of)[1]

- Allows for new, for-sale homes, through new subdivided lots, lot splits, or conversion of **SFR homes into 2-unit homes**.
- Title to individual units **expands financing options** over just ADUs.
- In theory, SB 9 opens-up new homeownership opportunities at **more attainable prices** who can apply for a traditional mortgage to buy the home.[2]
- Projected **700,000+ "market feasible"** units statewide with 127,000 in LA County.
- **Does not** supersede CC&Rs
- **Limitations**, qualifications, exclusions rampant.

1. For succinct details, see https://www.hklaw.com/en/insights/publications/2021/09/ca-gov-signs-landmark-duplex-and-lot-split-legislation-into-law.
2. For academic perspectives and projections, see https://ternercenter.berkeley.edu/wp-content/uploads/2021/07/SB-9-Brief-July-2021-Final.pdf

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**Even before Oregon's HB 2001, Portland was expanding housing supply through by-right retrofit advancing "Middle Housing"**


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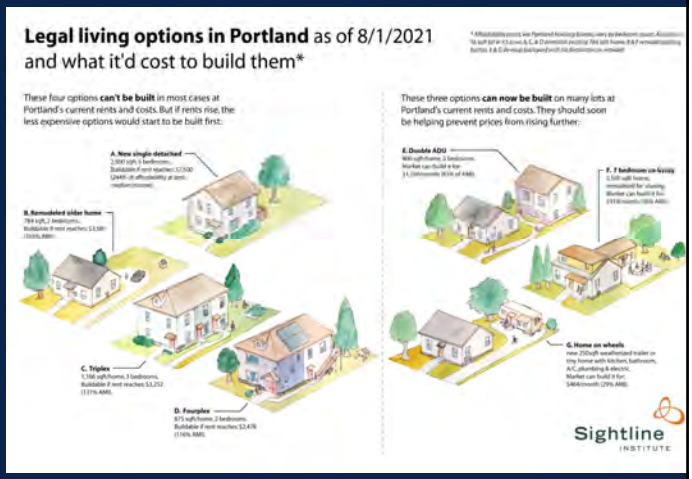
# Insights from an insider in a City in Stress—Portland

- On most lots, legalizing smallplexes **meaningless** for many years.
- The best way to make infill work is to **avoid demolition** because it's more expensive than retrofitting
- Flips are out; **plexification is in.**
- Affordable six-plex homes need **subsidies.**
- Portland has a **pressure release** valve when housing shortages get worse




https://www.sightline.org/2021/08/01/we-ran-the-rent-numbers-on-portlands-7-newly-legal-home-options/

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# More can be Done

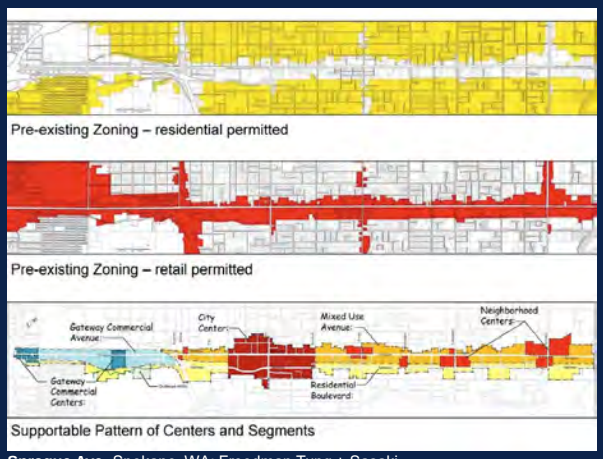
**Tools to reduce price pressure by increasing supply**

**Upzoning** based on excess facility capacity

Replace **excessive** commercially zoned land with Middle Housing & MF zoning

We are ***over-zoned*** in retail and commercial

Encourage/subsidize residential **co-development** with nonresidential




**Sprague Ave**, Spokane, WA: Freedman Tung + Sasaki

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# Key Issues to Address

**Where?**
- Everywhere or targeted areas?

**What** is allowed?
- ADUs only?
- If plexes, how many → 2, 3, 4?

**Separate** homes or only **internal**?
- Tiny homes allowed?

Building **height** increased such as allowing for a unit over the garage?
- Beware of fire insurance 35-foot rule

Get the **yards and land coverage** right.

**Parking?**
- How many off-street spaces/unit?
- How about permitted/reserved on street parking?

**Process?**
- Over-the-counter ("ministerial") or hearing ("quasi-judicial")?

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# Bottom Line

**We are under*plexed* in walkable neighborhoods.**

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# Expanding our housing toolkit

## Casitas in the City of Tucson

June 3, 2022

# Casitas: expanding the toolkit to meet our evolving housing needs

I. **The need** – why casitas

II. **The process** – how Tucson developed our ordinance

III. **The rules** – new regulations for casitas

IV. **The impact** – what's happening and what comes next

**Affordable Housing**

**Housing Options for Seniors**

**Climate Action and Resiliency**

# Why casitas?

# Accessory Dwelling Units

What is an Accessory Dwelling Unit?

- An Accessory Dwelling Unit (ADU) is an independent housing unit with its own **KITCHEN**, bathroom, living and sleeping space.
- These units are typically under 1,000 square feet and are accessory to a primary residence.

Also known as a:

- Casita
- Mother-in-law unit
- Backyard Cottage
- Carriage House

# Accessory Dwelling Units

## Types of Accessory Dwelling Units

ADUs can be detached, attached, or a separate space within the primary house

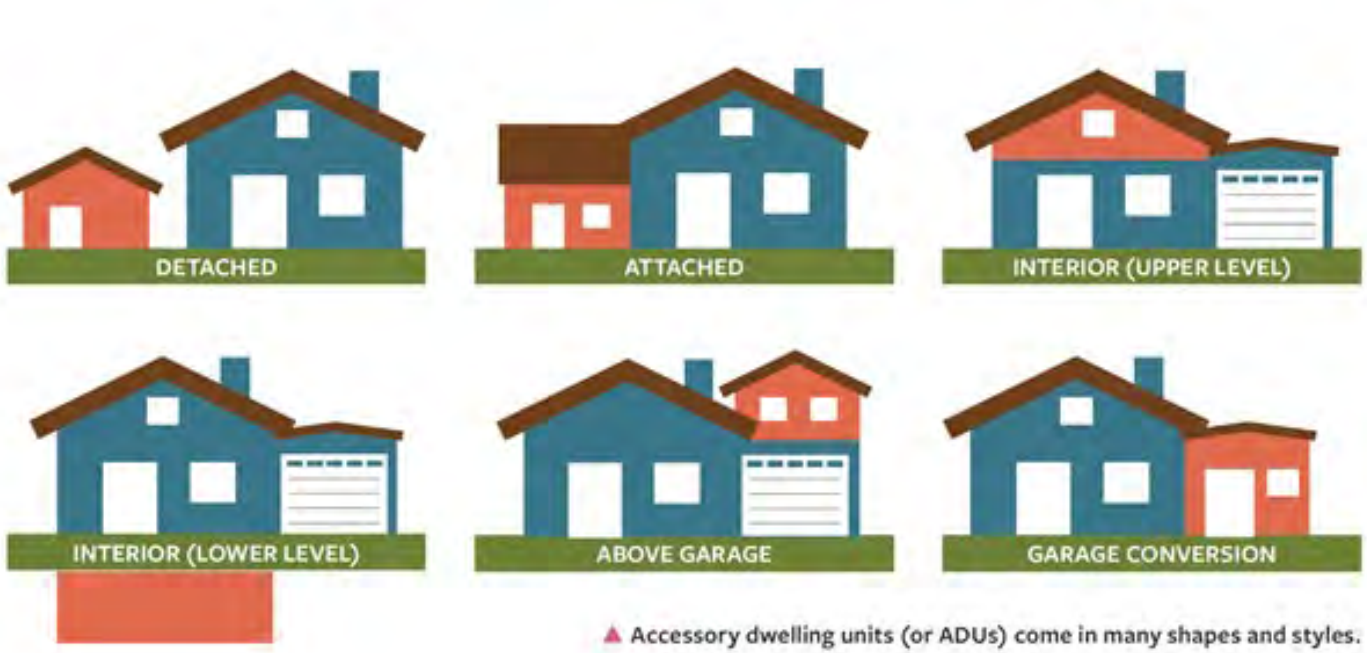



Image Source: The ABCs of ADUs: A guide to Accessory Dwelling Units and how they expand housing options for people of all ages (AARP)

# ADU Adoption

**Many jurisdictions allow and promote ADUs**

- Looked at Flagstaff, Tempe, Portland, and Minneapolis as case studies
- Some entire states have legalized ADUs including California, New Hampshire, Oregon
- Aspects that are regulated include number of units, maximum unit size, parking, occupancy and more
- Cities in California, such as Stockton, have developed model plans that are available for use by community members

# Existing Casitas in Tucson

Casita accessed from the alley or through an interior courtyard

# Existing Casitas in Tucson

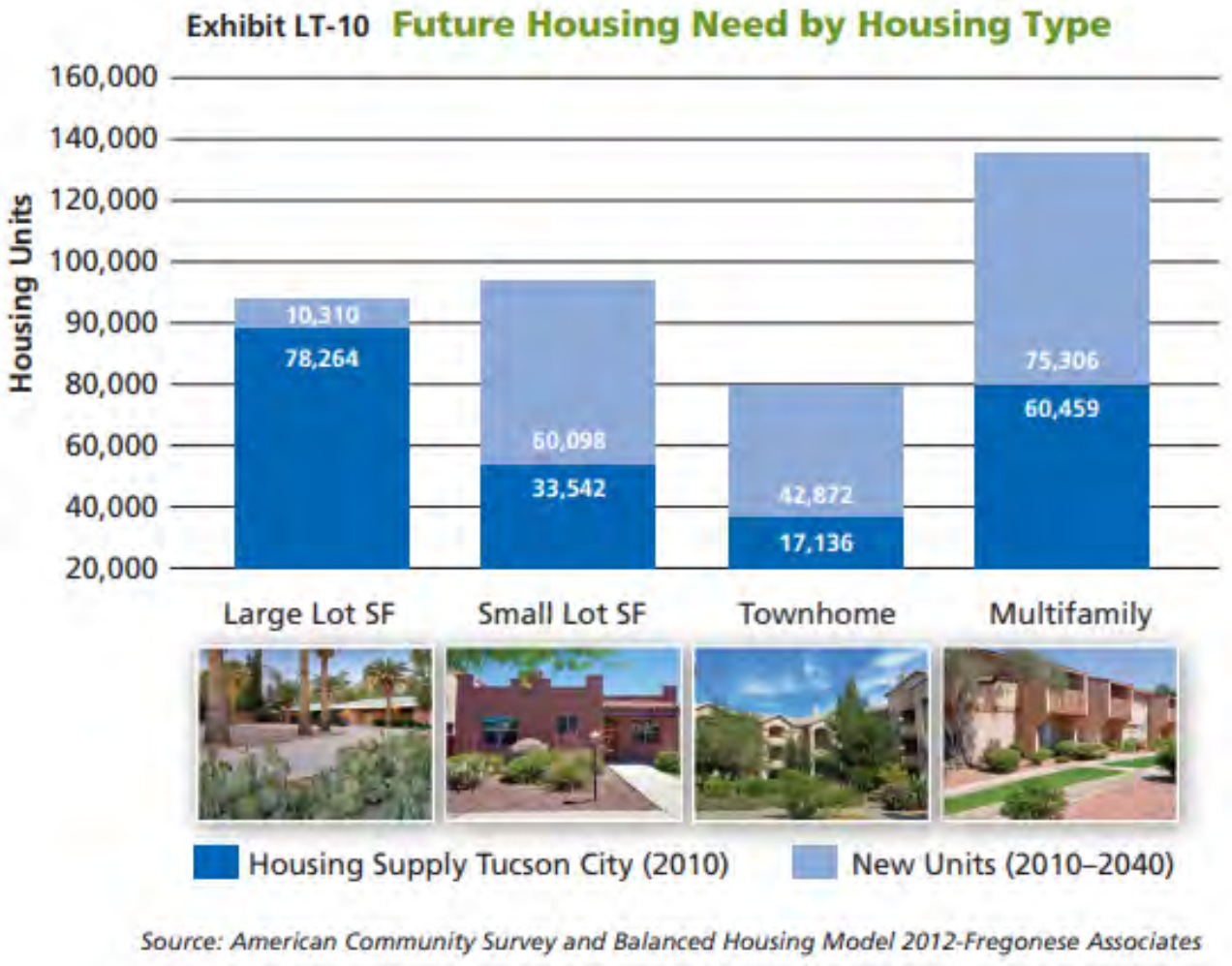
Attached guest house

# Existing Casitas in Tucson

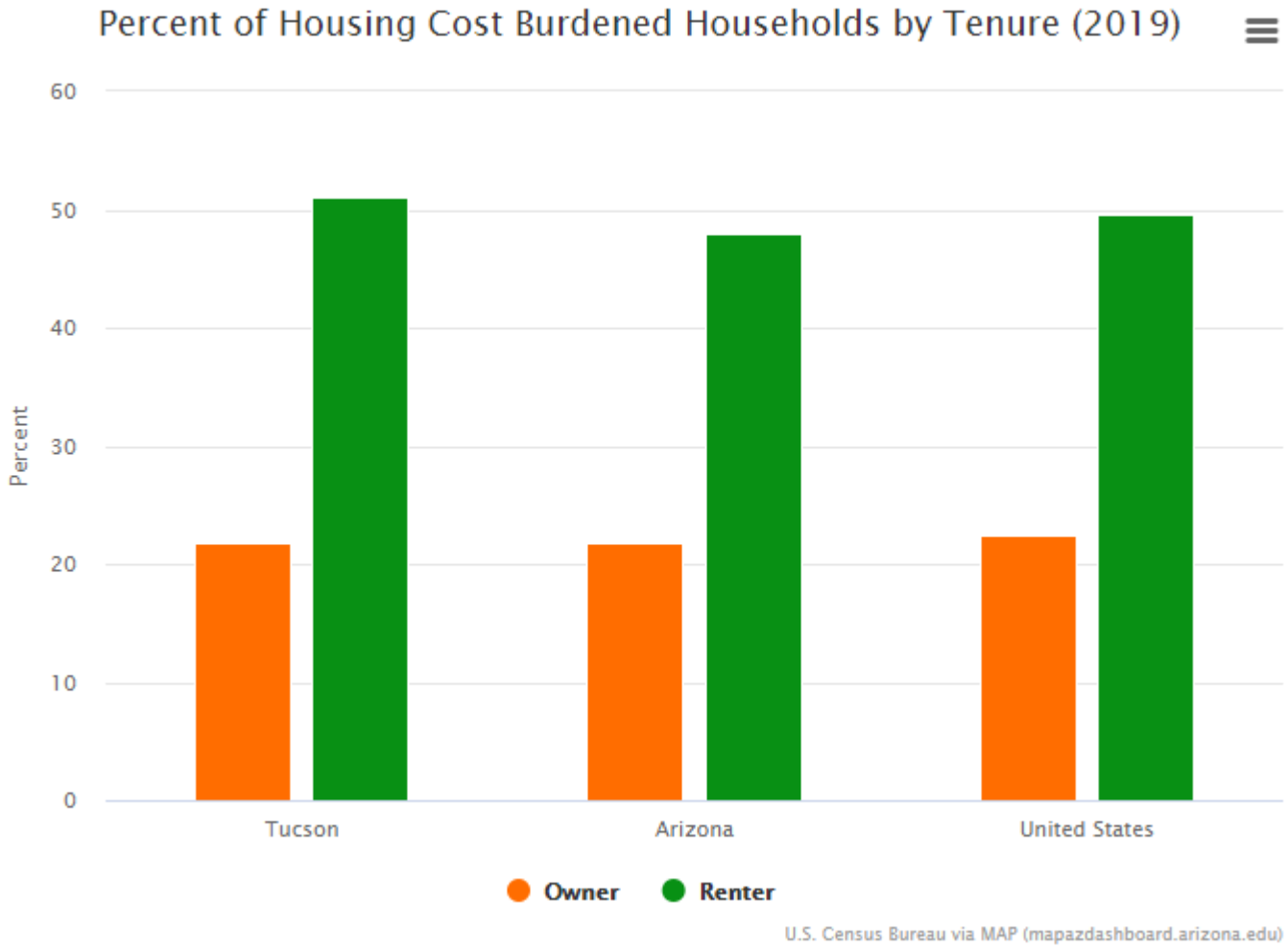
**Detached Guest House**

# Housing Needs

## Plan Tucson, City of Tucson General and Sustainability Plan (2013)



# Housing Need in Tucson




Source: Housing Market Study, https://mapazdashboard.arizona.edu/housing-market-study-overview

# Senior Housing

- **Tucson's population is aging**
  - The 2018 American Community Survey (ACS) found a 20% increase in older adult households over the 2013 survey completed five years earlier.
  - Older adult households (primary householder >65) make up 29.4% of all households in the Tucson area
- **Older adults are more likely to own their home than other age groups**
  - 81.2% of householders aged 65-74 and 82.9% of householders aged 75-84 own their home, the highest of any age bracket.

# How do ADUs provide affordable housing?

- Add to supply of housing for our community
- Market-rate ADUs tend to rent for less than is typical for the neighborhood where an ADU is located, promoting mixed-income neighborhoods[1]
- Smaller units can be lower cost to rent
- Units can also be developed and rented for lower costs using subsidies or incentives
- Units can provide additional income for homeowner, making homeownership more sustainable and promoting neighborhood stability
- Many units are not rented on the market, instead serving as housing for family members or friends

[1]Jake Wegmann & Karen Chapple (2014) Hidden density in single-family neighborhoods: backyard cottages as an equitable smart growth strategy, Journal of Urbanism: International Research on Placemaking and Urban Sustainability, 7:3, 307-329, DOI:10.1080/17549175.2013.879453

## Opportunity:

Casitas are found across Tucson

They have the potential to help meet our housing needs

## Challenge:

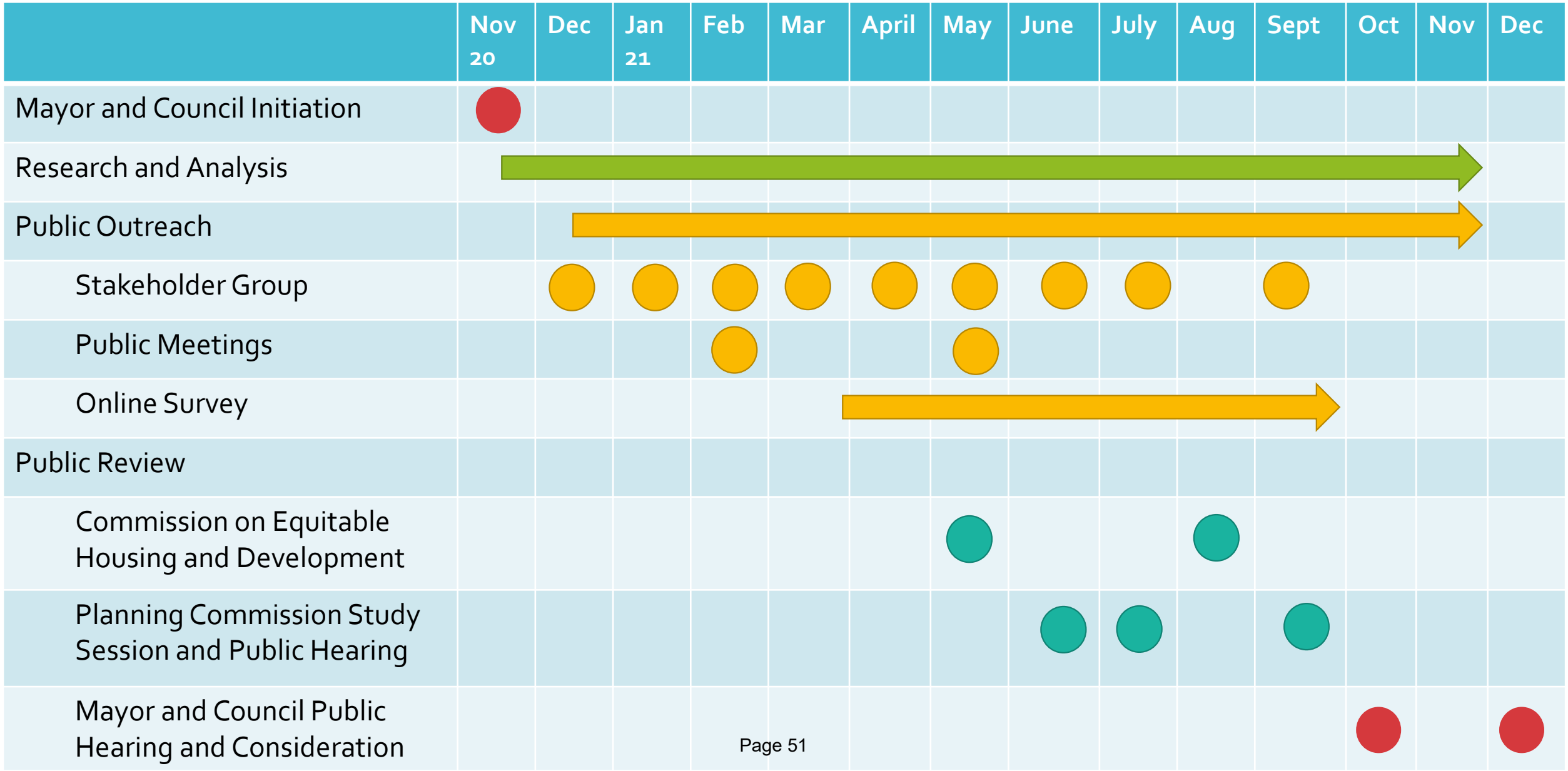
Accessory Dwelling Unit was not a defined term in the Unified Development Code (UDC)

The standards for accessory buildings and structures specifically stated that an accessory building shall not be a dwelling unit

Density limits and other regulations in most residential districts restricted where ADUs could be built

# The Process

# Timeline for ADU Code Amendment



# ADUs - What We Heard

**9 meetings of the 40-member stakeholder group**

**400+ people attended 3 public meetings in February & 4 public meetings in May**

**76 online comments received**

**559 survey responses received**

Mostly positive feedback with concerns about:

- ADU size – height and floor area
- Affordability
- Parking
- Owner occupancy / short-term rentals
- Sustainability and urban heat island effect
- Historic preservation

# Outreach Process

## 12-month public process to inform proposal

- 9 stakeholder meetings
- 7 public meetings with 400+ attendees
- 78 online comments
- 559 survey responses

## Planning Commission recommended approval 9-0

- Included:
  - Study session with 13 speakers at call to the audience
  - Public hearing held on two dates with 30 speakers
  - 100+ comments submitted to commission

## Mayor and Council Adoption

- Public Hearing and adoption in October 2021
- Request to reconsider
- Re-adoption in December 2021 with change to maximum ADU size

# Stakeholder Group

**Goals for code amendment as prioritized by stakeholder group:**

1. Increase the supply of affordable rental housing
2. Encourage flexible housing options for seniors who wish to age in place
3. Support multi-generational households
4. Support climate-resilient and sustainable infill development
5. Provide supplemental income to landowners and promote neighborhood stability
6. Retain neighborhood character while adding more housing options

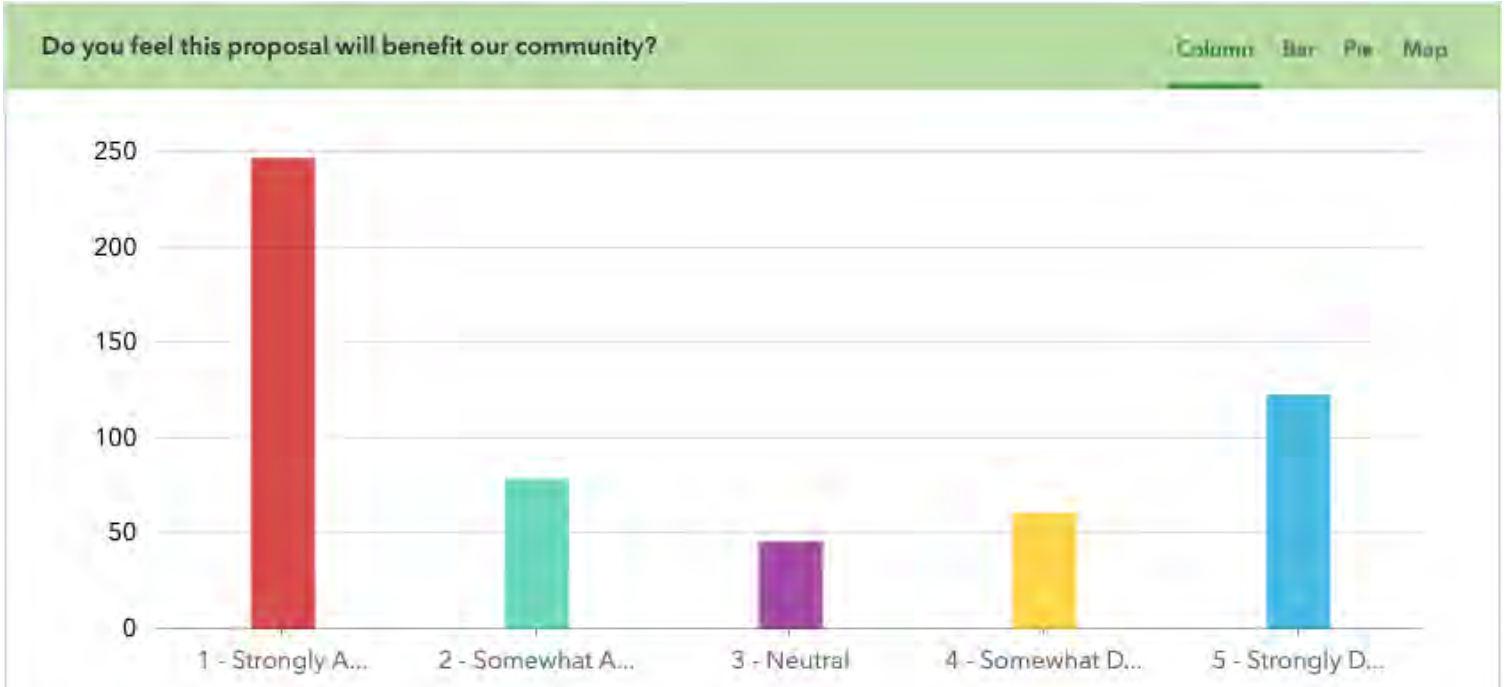
# What We Heard – Online Survey

## Supportive Comments

# What We Heard – Online Survey

## Concerned Comments

# Survey Results – do you feel this proposal will benefit our community?




Hide table

Empty categories | Sort

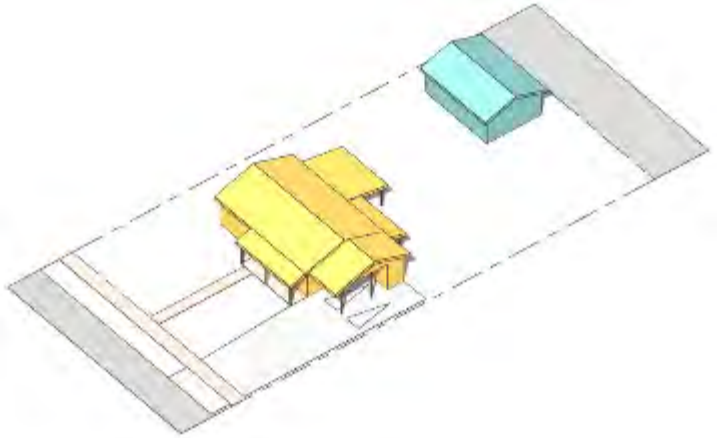
| Answers | Count | Percentage |
|---|---|---|
| 1 - Strongly Agree | 247 | 44.03% |
| 2 - Somewhat Agree | 79 | 14.08% |
| 3 - Neutral | 46 | 8.2% |
| 4 - Somewhat Disagree | 61 | 10.87% |
| 5 - Strongly Disagree | 123 | 21.93% |

Answered: 556 Skipped: 5

# The Rules

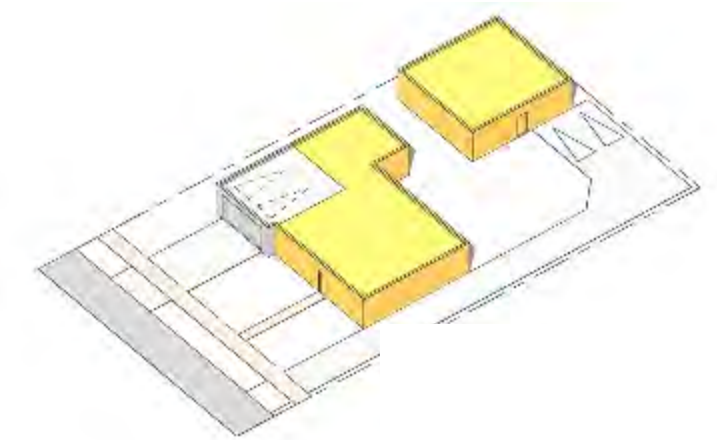
# What was allowed previously

## Sleeping Quarters



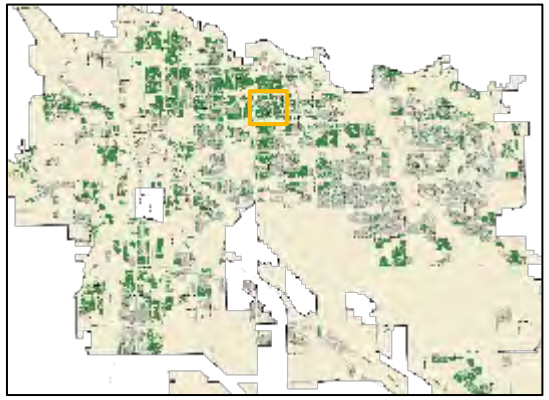
- Allowed on any residentially zoned parcel with residential use
- Size limited to 50% of size of principal structure
- Kitchenette allowed
- No additional parking required
- Max building height of 12’ unless attached to principal structure

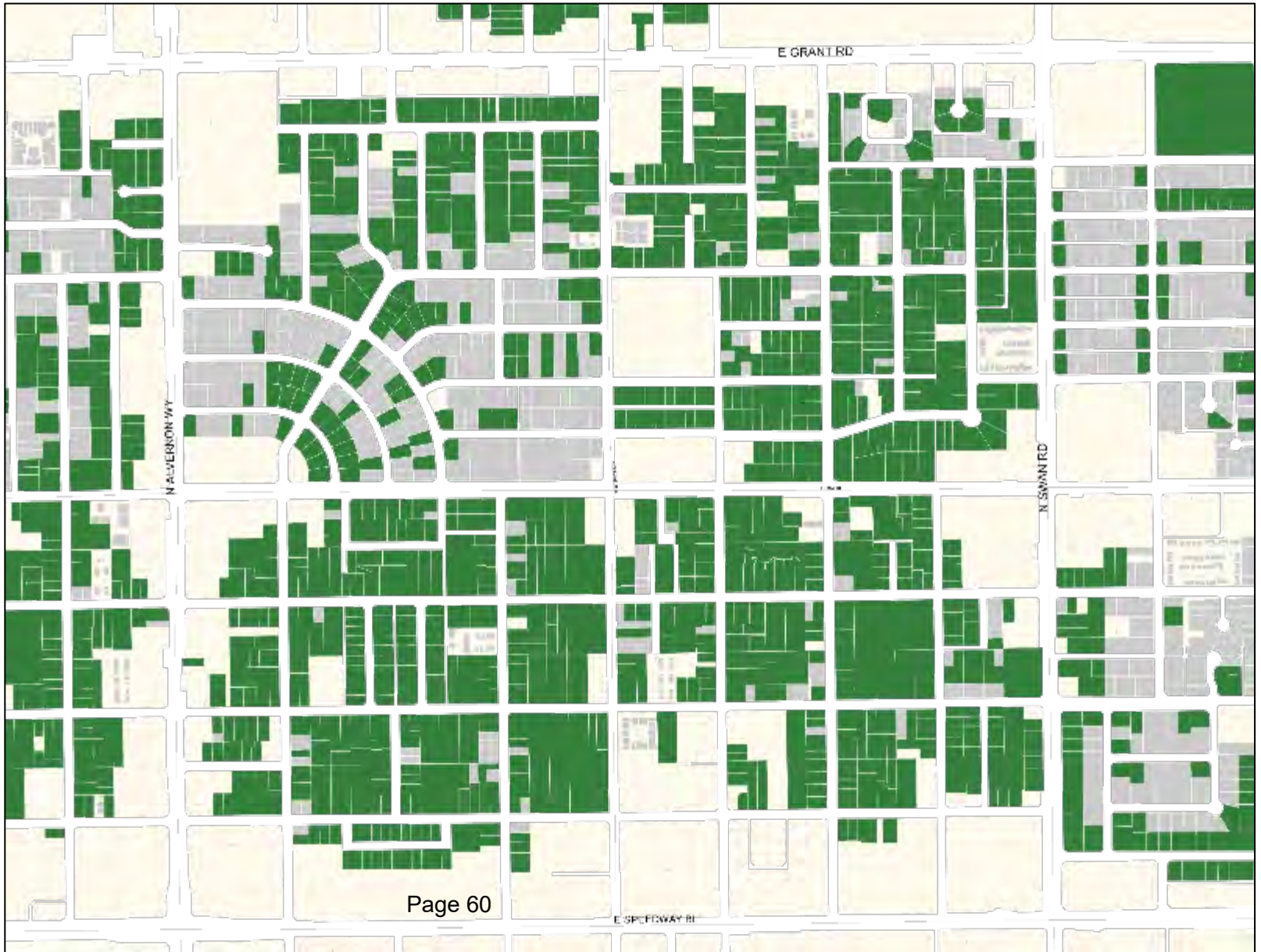
## Second Residential Units



- Allowed in R-1, R-2, & R-3 zones based on lot size
- No size limit (25% difference from primary structure in R-1)
- Full kitchen allowed
- Parking required
- Max building height same as primary dwelling (25’)

# Where were ADUs permitted previously?



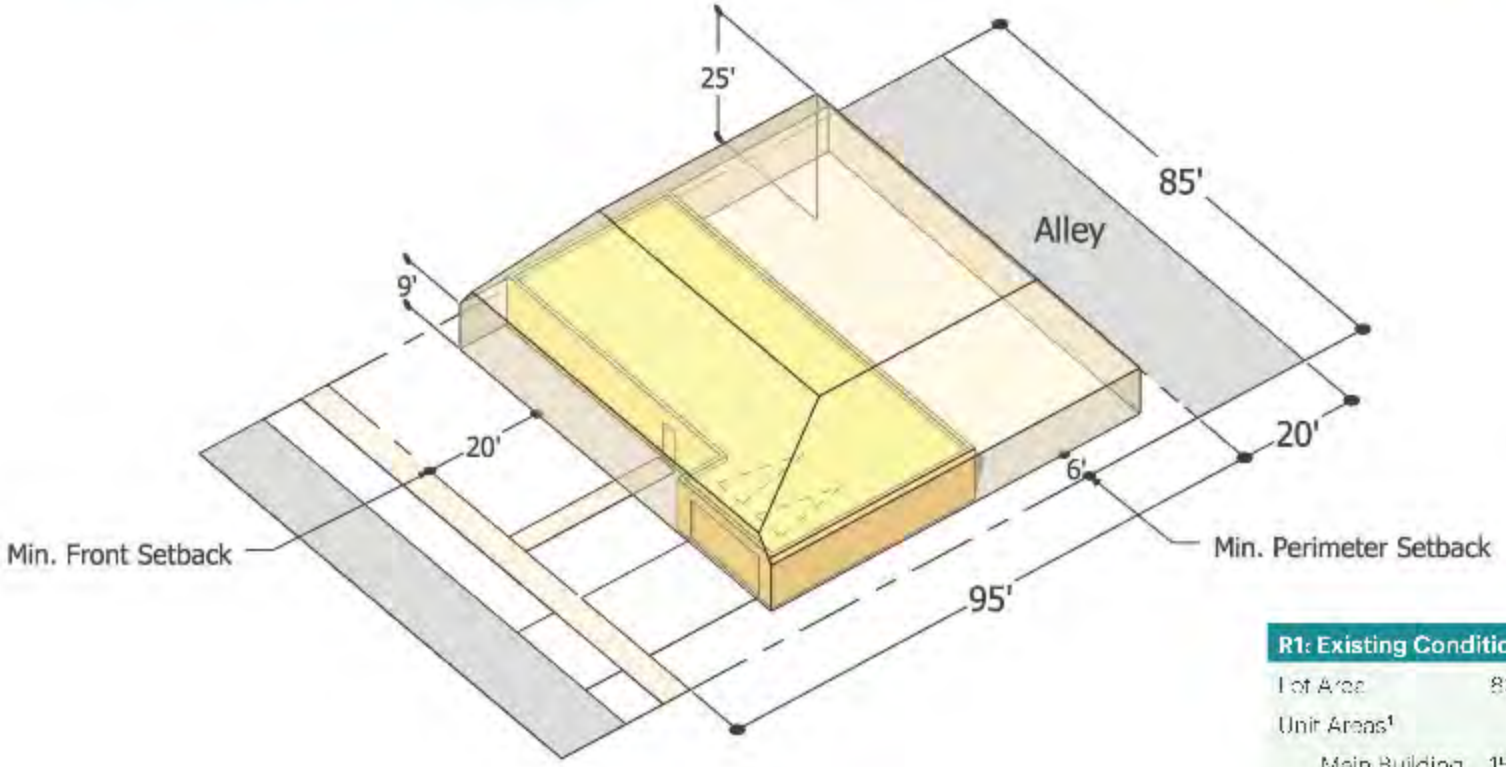



**According to Previous Regulations**

- Second Unit Permitted
- Additional Unit Not Permitted
- Non-Residential District

# Typical Tucson Neighborhood (R-1 Residential Zone)

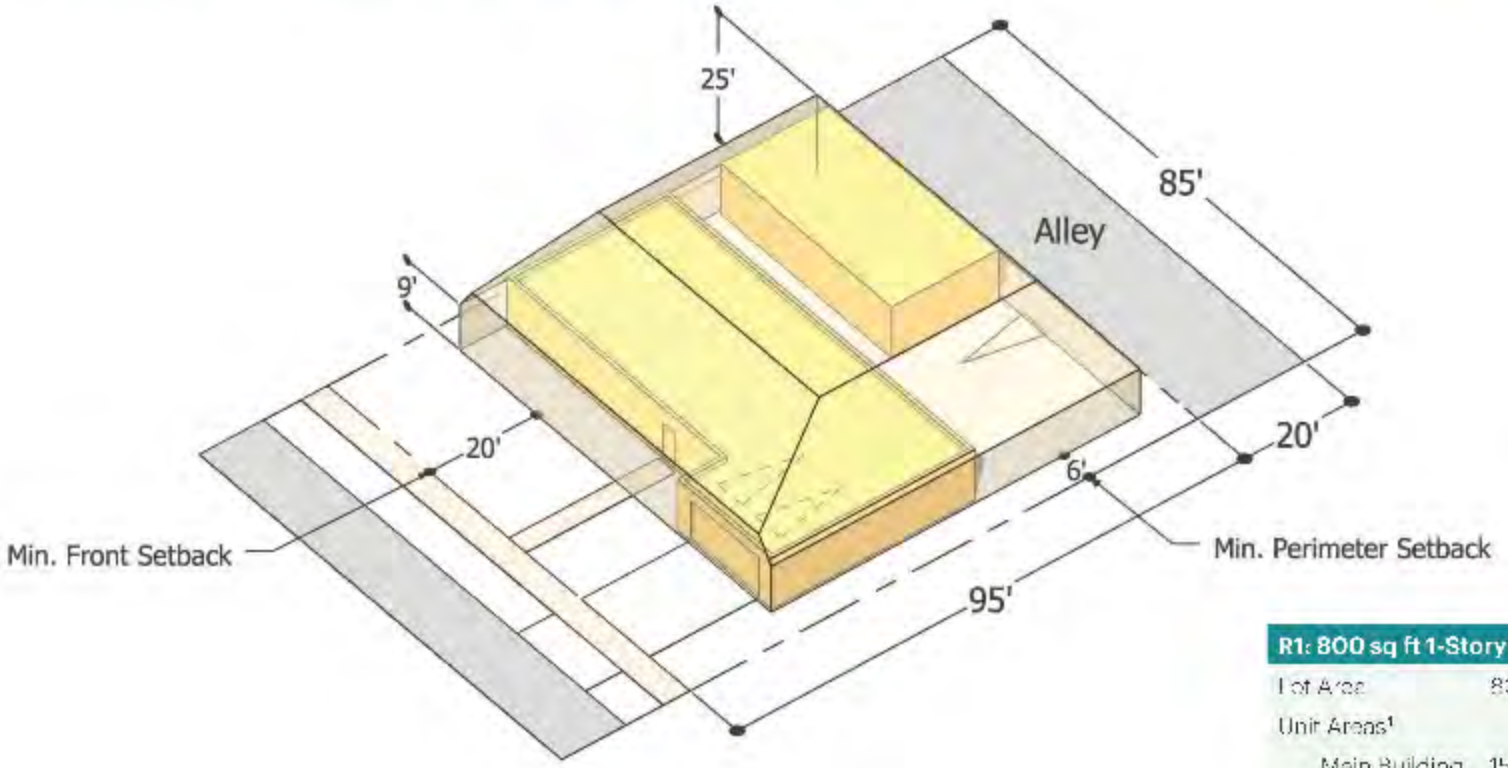
# R-1 Residential Zone – Existing Regulations




| R1: Existing Condition | |
|---|---|
| Lot Area | 8045 sq ft |
| Unit Areas[1] | |
| Main Building | 1526 sq ft |
| ADU | N/A |
| Bedrooms | |
| Main Building | 3 |
| ADU | N/A |
| Parking Spaces | |
| Garage | 2 |
| Surface | 0 |

[1] Habitable sq ft

# R-1 Residential Site with a Detached ADU




| R1: 800 sq ft 1-Story ADU | |
|---|---|
| Lot Area | 8075 sq ft |
| Unit Areas[1] | |
| Main Building | 1520 sq ft |
| ADU | 800 sq ft |
| Bedrooms | |
| Main Building | 3 |
| ADU | 2 |
| Parking Spaces | |
| Garage | 2 |
| Surface | 1 |

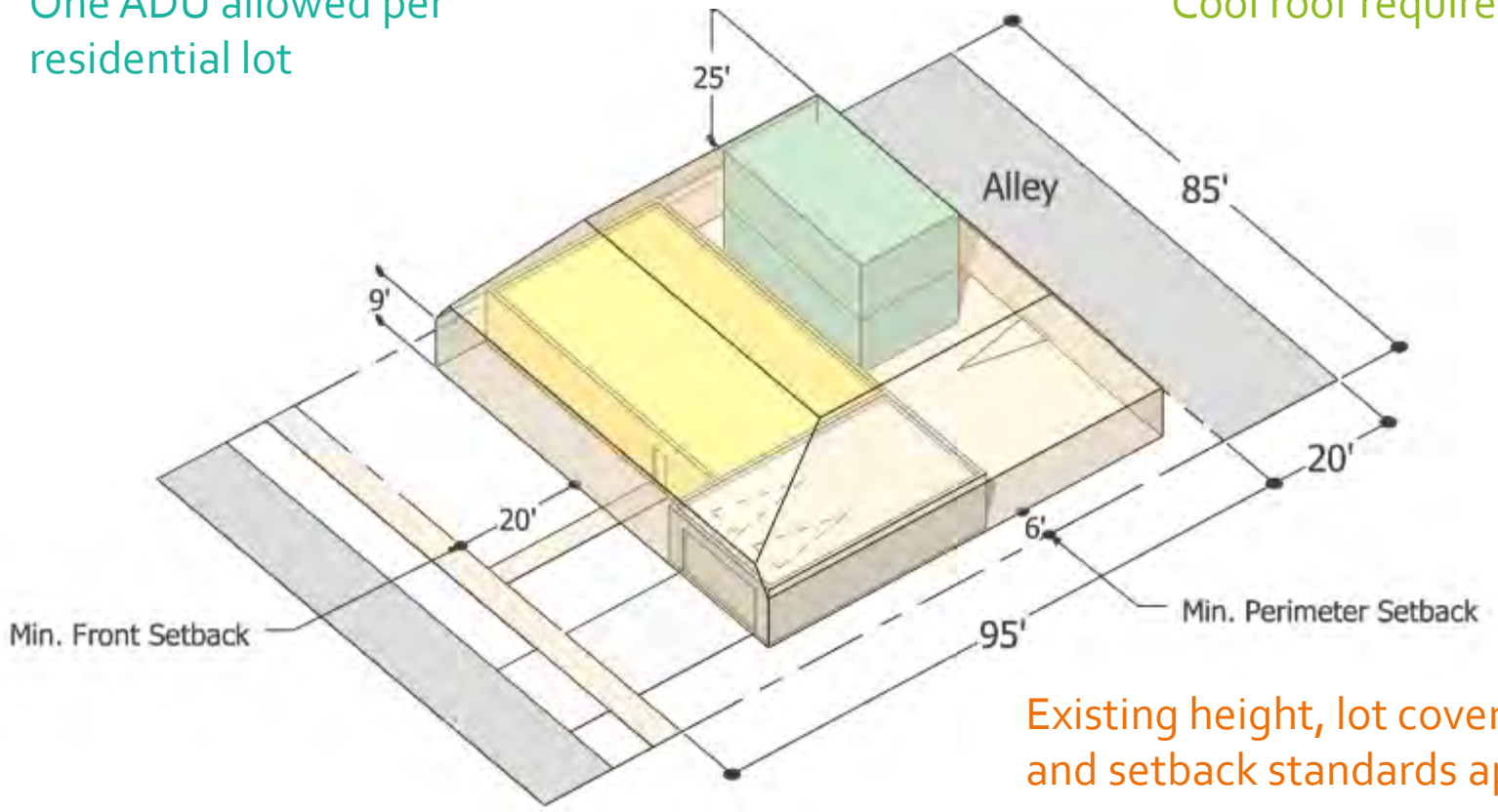
[1] Habitable sq ft

# Summary of ADU Proposal

1,000 SF maximum ADU on lots >7,000SF
750 SF on lots < 7,000SF

One ADU allowed per residential lot

Cool roof required

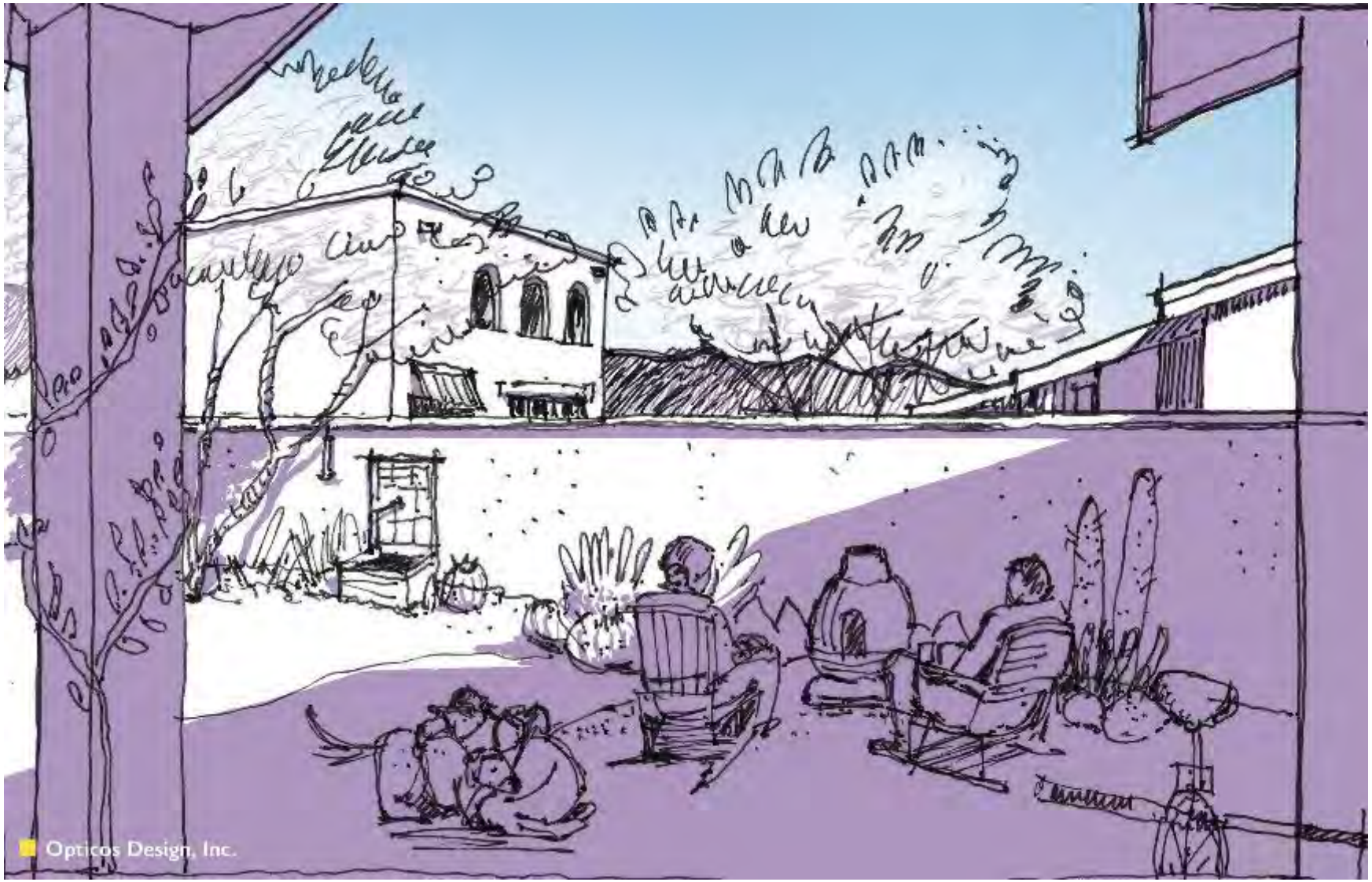



Existing height, lot coverage and setback standards apply

1 parking space required per ADU w/ reductions for transit access and use of on-street parking allowed

No owner-occupancy requirement

# Key concern - ADU size and height




2-story ADU – view from adjacent property

# Key concern - ADU size and height

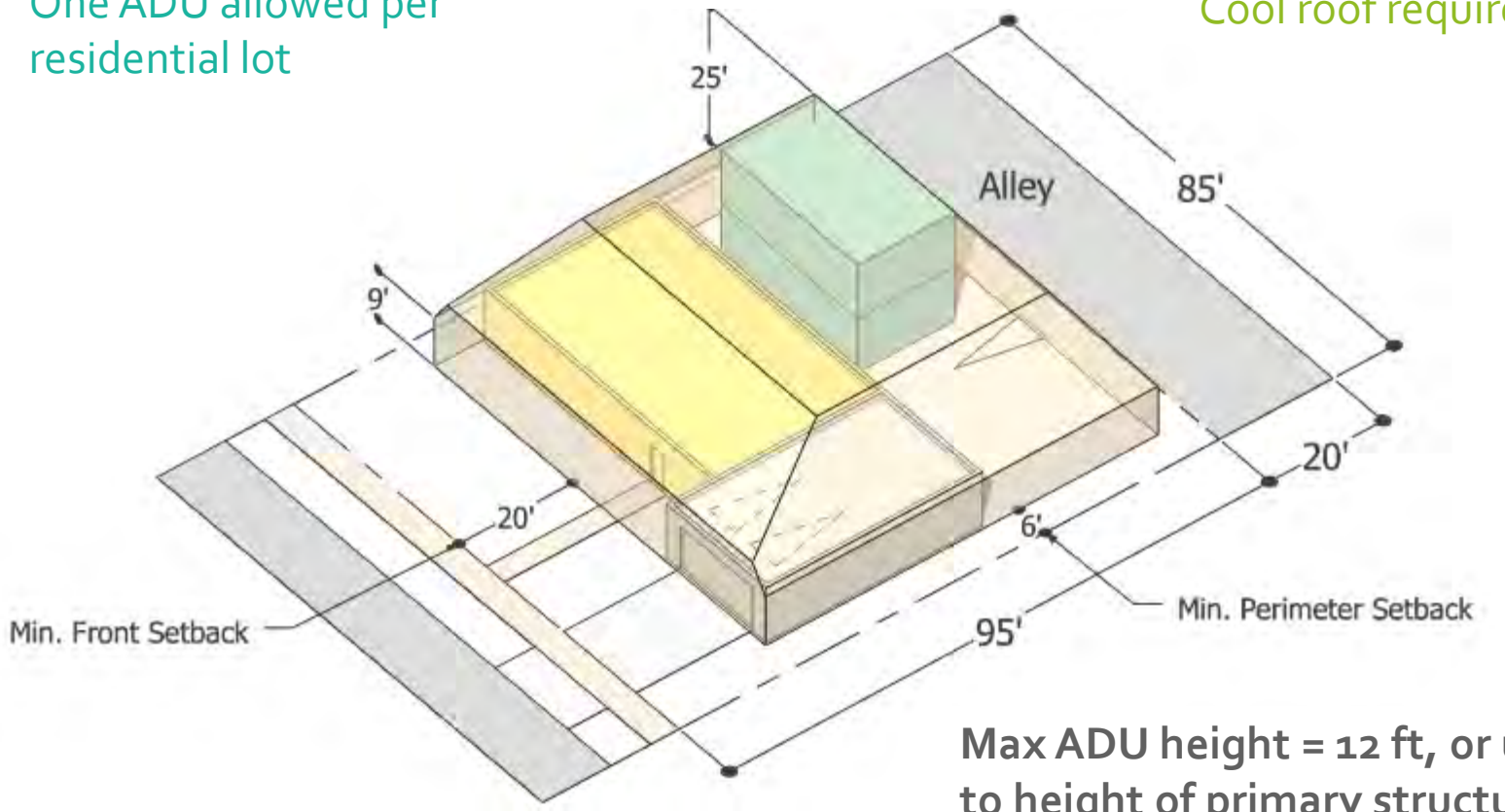

1-story ADU – view from adjacent property

# Where we ended up – M&C changes to maximum size and height

**Maximum ADU size = 10% of lot size, up to 1,000sf (all lots allowed min 650 sf ADU)**

One ADU allowed per residential lot

Cool roof required




**Max ADU height = 12 ft, or up to height of primary structure**

1 parking space required per ADU w/ reductions for transit access and use of on-street parking allowed

Existing lot coverage and setback standards apply

No owner-occupancy requirement

# Zoning is not the only barrier – ADU Supportive Programs

**Strategies:**

- Partner with Cuadro/Pima County Community Land Trust to conduct outreach and provide technical assistance to low- and moderate-income households
- Working with HCD on use of CDBG funds for rehab assistance
- Work with community partners such as AIA to develop model plans that can be used to bring down costs

1-Bedroom Garage Conversion + Modern-Inspired + Warm Neutral

Image courtesy of: LA MAS, https://www.mas.la/affordable-adus

## Amnesty for unpermitted ADUs and guest houses

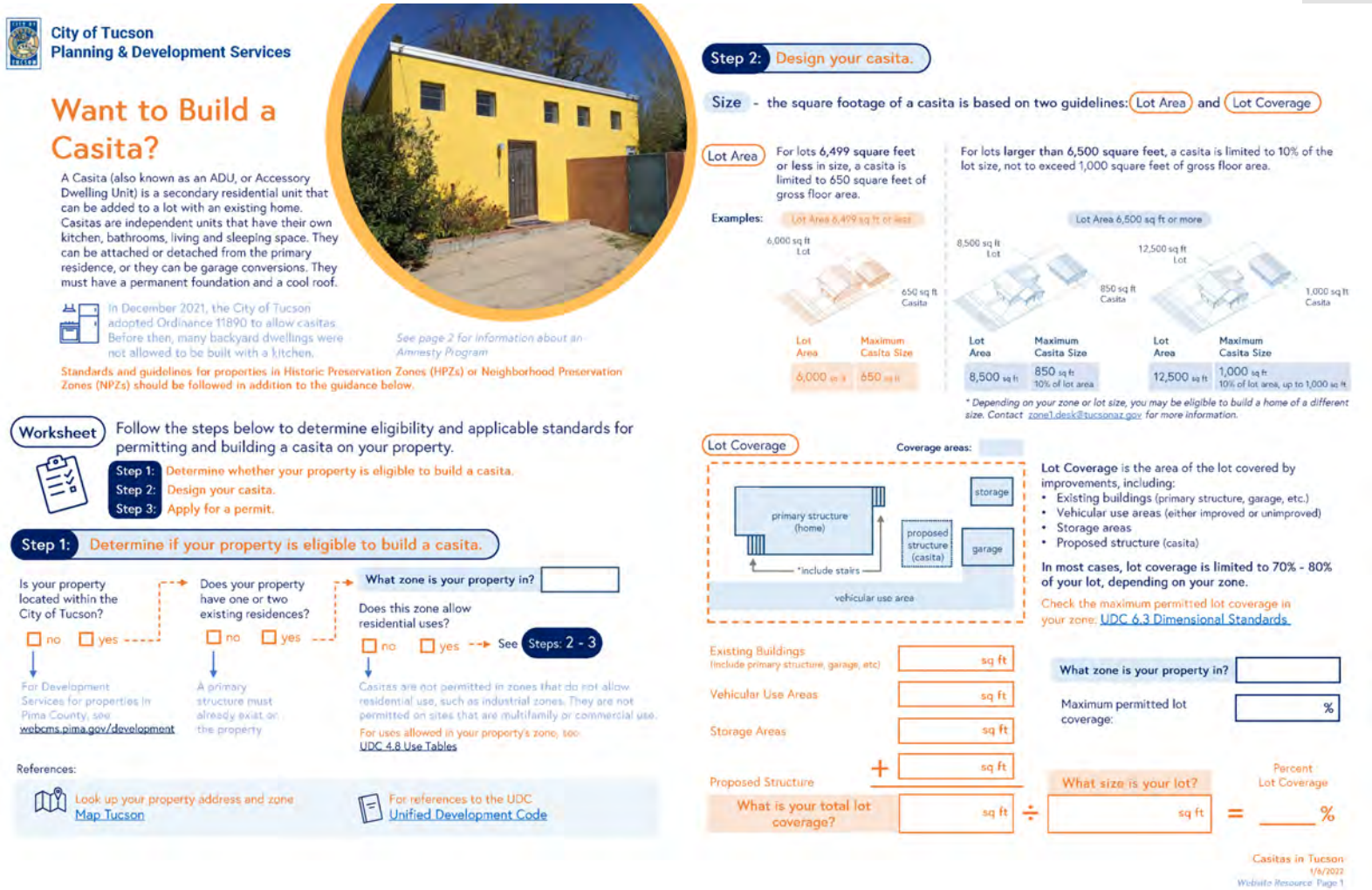
Amnesty program to be developed to create incentives to bring unpermitted ADUs into conformance with code and to convert existing guest quarters into ADUs

Flexibility to meet building code – focus on life safety

# The Impact

# Implementation

- Educational materials
- Outreach sessions
- 23 applications for ADUs have been submitted since new regulations were adopted
- Challenge: incentive remains to classify as "guest house" for financial reasons (impact fees, utility costs)



City of Tucson
Planning & Development Services

Want to Build a Casita?

A Casita (also known as an ADU, or Accessory Dwelling Unit) is a secondary residential unit that can be added to a lot with an existing home. Casitas are independent units that have their own kitchen, bathrooms, living and sleeping space. They can be attached or detached from the primary residence, or they can be garage conversions. They must have a permanent foundation and a cool roof.

In December 2021, the City of Tucson adopted Ordinance 11890 to allow casitas. Before then, many backyard dwellings were not allowed to be built with a kitchen.

See page 2 for information about an Amnesty Program

Standards and guidelines for properties in Historic Preservation Zones (HPZs) or Neighborhood Preservation Zones (NPZs) should be followed in addition to the guidance below.

Worksheet — Follow the steps below to determine eligibility and applicable standards for permitting and building a casita on your property.

Step 1: Determine whether your property is eligible to build a casita.
Step 2: Design your casita.
Step 3: Apply for a permit.

Step 1: Determine if your property is eligible to build a casita.

Is your property located within the City of Tucson? ☐ no ☐ yes → For Development Services for properties in Pima County, see webcms.pima.gov/development

Does your property have one or two existing residences? ☐ no ☐ yes → A primary structure must already exist on the property

What zone is your property in? ☐

Does this zone allow residential uses? ☐ no ☐ yes → See Steps: 2 - 3

Casitas are not permitted in zones that do not allow residential use, such as industrial zones. They are not permitted on sites that are multifamily or commercial use.

For uses allowed in your property's zone, see UDC 4.8 Use Tables

References:

Look up your property address and zone: Map Tucson

For references to the UDC: Unified Development Code

Step 2: Design your casita.

Size - the square footage of a casita is based on two guidelines: Lot Area and Lot Coverage

Lot Area — For lots 6,499 square feet or less in size, a casita is limited to 650 square feet of gross floor area.

For lots larger than 6,500 square feet, a casita is limited to 10% of the lot size, not to exceed 1,000 square feet of gross floor area.

Examples:

Lot Area 6,499 sq ft or less

| Lot Area | Maximum Casita Size |
|---|---|
| 6,000 sq ft | 650 sq ft |

Lot Area 6,500 sq ft or more

| Lot Area | Maximum Casita Size |
|---|---|
| 8,500 sq ft | 850 sq ft, 10% of lot area |
| 12,500 sq ft | 1,000 sq ft, 10% of lot area, up to 1,000 sq ft |

* Depending on your zone or lot size, you may be eligible to build a home of a different size. Contact zone1.desk@tucsonaz.gov for more information.

Lot Coverage

Coverage areas: primary structure (home), proposed structure (casita), storage, garage, *include stairs, vehicular use area

Lot Coverage is the area of the lot covered by improvements, including:
- Existing buildings (primary structure, garage, etc.)
- Vehicular use areas (either improved or unimproved)
- Storage areas
- Proposed structure (casita)

In most cases, lot coverage is limited to 70% - 80% of your lot, depending on your zone.

Check the maximum permitted lot coverage in your zone: UDC 6.3 Dimensional Standards

Existing Buildings (include primary structure, garage, etc) ____ sq ft
Vehicular Use Areas ____ sq ft
Storage Areas ____ sq ft
Proposed Structure + ____ sq ft
What is your total lot coverage? ____ sq ft ÷ What size is your lot? ____ sq ft = Percent Lot Coverage ____ %

What zone is your property in? ☐
Maximum permitted lot coverage: ____ %

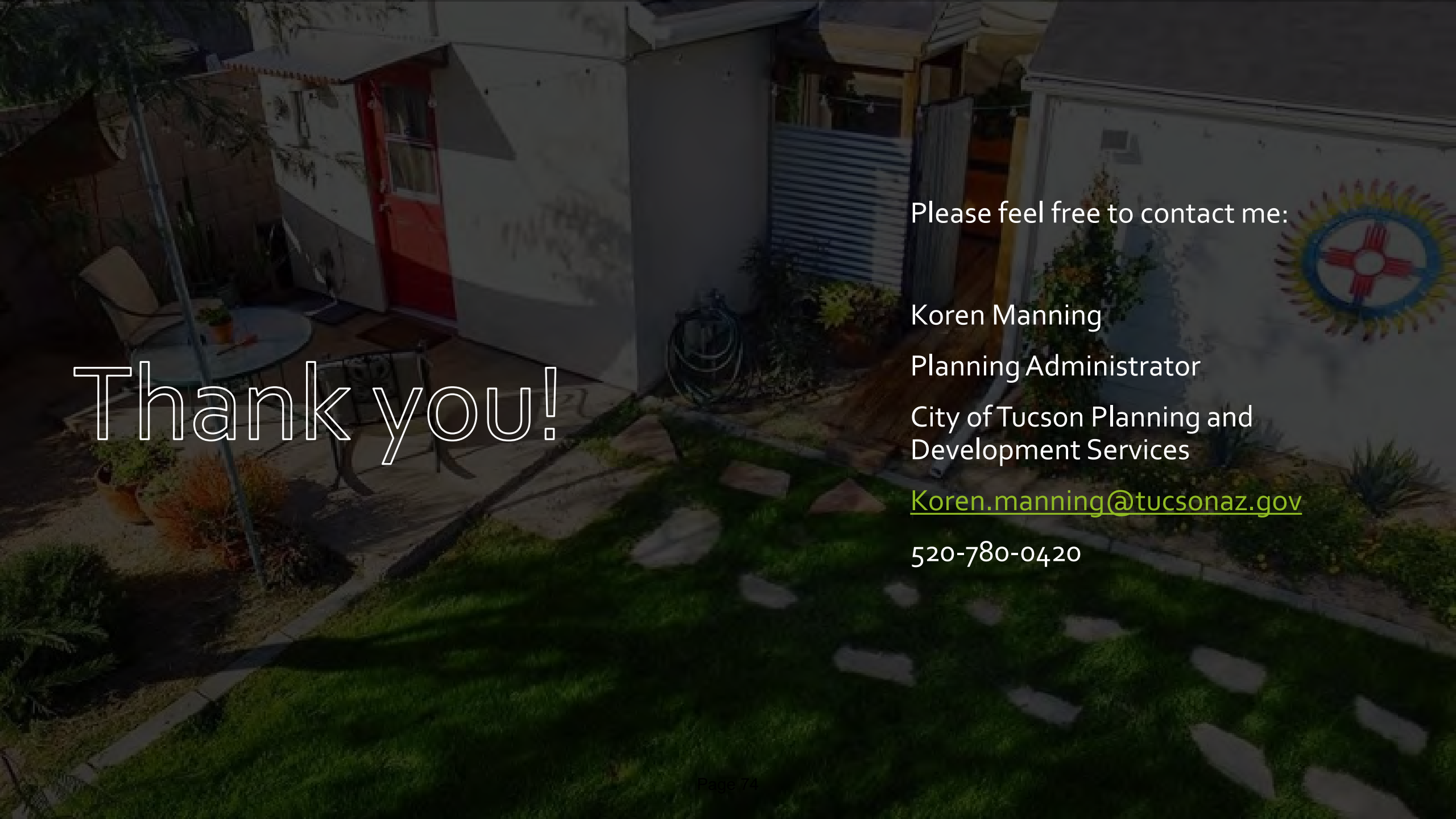
Casitas in Tucson
1/6/2022
Website Resource Page 1

# Next Steps for ADUs

- Model Plan library
  - Free or low-cost building plans
- Community partnerships
  - Education and outreach
- Building code flexibility
  - Utility meters
- Amnesty program
  - Avenues to legalize previously unpermitted units
- Financial assistance
  - Assist low-income homeowners with repairs to bring units up to code

# Ongoing work to support housing affordability

- ADUs are just one of many approaches Tucson is taking to address housing affordability and housing supply
- Other existing tools
  - Overlays to promote transit-oriented development
  - Inclusionary housing option
  - Infill tools – Flexible Lot Development
- Future steps to increase housing diversity and supply
  - Zoning flexibility for affordable housing: reduced parking, etc.
  - Senior housing/co-living needs
  - Refine and expand our infill tools



# Thank you!

Please feel free to contact me:

Koren Manning

Planning Administrator

City of Tucson Planning and Development Services

Koren.manning@tucsonaz.gov

520-780-0420

COLORADO HOUSING
AFFORDABILITY PROJECT

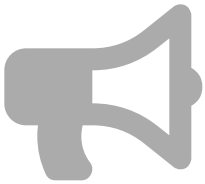


TAKE ACTION

# Working to Make Housing Affordable for Coloradans

Unaffordable housing is hurting our economy and our communities.

WHAT WE WANT TO DO HOW WE WANT TO DO IT

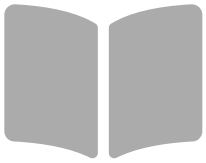


## OUR PLATFORM

Tackling all of the problems that contribute to Colorado's high housing costs is a big task. CHAP's initial area of focus is: removing zoning barriers to the development of affordable forms of housing.

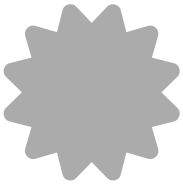
## THE ISSUES

Colorado's economy continues to grow, yet housing construction has not kept up. This hurts all of us, particularly lower- to middle-income workers.



## THE RESEARCH

Research shows that unaffordable housing slows economic growth, changes the makeup of our neighborhoods, and hurts the environment by promoting sprawl and traffic. Building housing in the right places in our communities is a win-win for our families, our communities, and our economy.



## TAKE ACTION

Addressing Colorado's affordability crisis is a big task. Join the Colorado Housing Affordability Project's advocacy efforts!

The mission of the Colorado Housing Affordability Project (CHAP) is to research, educate, and advocate for effective policy measures to ensure that adequate housing is affordable to all Coloradans.

# Housing Affordability Challenges in Colorado

Colorado faces significant housing affordability challenges. Our state continues to attract new residents and jobs. With this growth has come ever-increasing housing prices. The high cost of housing is apparent throughout Colorado's large cities, suburban areas, and even some of our small towns.

Employers have struggled to attract service industry workers due to the lack of affordable housing, young professionals cannot afford starter homes in our metropolitan areas, and—at the extreme end of the affordability crisis—we see increasing evidence of homelessness in many of our communities.

LEARN MORE ABOUT THE ISSUES

# Not Sure Where to Start?

Tackling all of the problems that contribute to Colorado's high housing costs is a big task. Therefore, we have chosen one area of focus: removing zoning barriers to the development of affordable forms of housing.

VIEW COLORADO ISSUES & PROPOSALS

CONTACT US WITH QUESTIONS

COLORADO HOUSING AFFORDABILITY PROJECT

# Working to Make Housing Affordable for Coloradans

Unaffordable housing is hurting our economy and our communities.

WHAT WE WANT TO DO

HOW WE WANT TO DO IT

# Meeting the Housing Affordability Challenge

***Making The Case for State and Local Zoning Reform***

Brian J. Connolly

*Otten Johnson Robinson Neff + Ragonetti, P.C.*
*Denver, Colorado*

Presentation to the 2022 Arizona Land Use Update

# We have a housing affordability problem.

Blogs Economists' Outlook

# Housing Affordability Conditions Take a Hit in March

May 6, 2022 By: Michael Hyman

At the national level, housing affordability declined in March compared to the previous month according to NAR's Housing Affordability Index. Compared to

The New York Times

## *The Californians Are Coming. So Is Their Housing Crisis.*

Is it possible to import growth without also importing housing problems? "I can't point to a city that has done it right."

Give this article 1.5K

**Real Estate** Rentals Recently Sold Homes

REAL ESTATE

# Home affordability worsens — but not everywhere, report finds

By Michele Lerner

May 12, 2022 at 5:30 a.m. EDT

MAY 13, 2022 · DENVER VOICE EDITOR

## Denver's Housing Affordability Index Reached a Record Low in April

By Robert Davis

HOUSING

## Housing in Boulder County — and across Colorado — is expensive. But affordable homes are more than a fantasy.

Even with myriad solutions on the table, and many people eager and able to make change, closing the affordability gap is proving to be a monumental task

Lucy Haggard 3:01 AM MDT on May 27, 2021

HOUSING

## Crested Butte purchases hotel for seasonal workers as it declares housing an emergency

Rooms in the $2.3 million Ruby Bed & Breakfast will be available to six seasonal employees in both the public and private sector.

Colorado Public Radio 4:53 PM MDT on Jun 13, 2021

By Paolo Zialcita, *CPR News*

The Town of Crested Butte has declared its housing shortage, an issue plaguing several of Colorado's mountain communities, a local disaster emergency.

According to city officials, there is a severe lack of affordable housing unit available for workers. Crested Butte Community Development Director Troy Russ said that's preventing businesses vital to the town's livelihood from staying open.

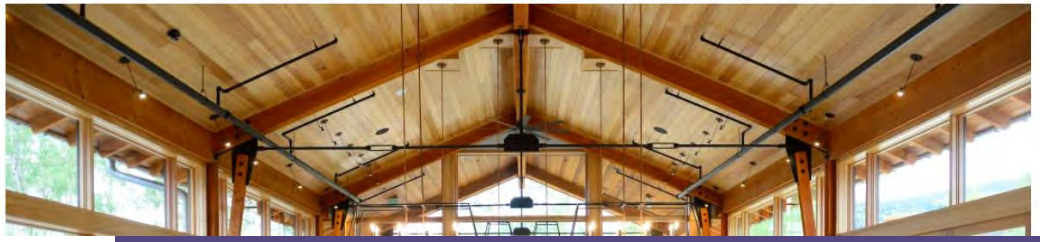
THE DENVER POST

Real Estate | Colorado's median single-family home price hits...

BUSINESS › REAL ESTATE • News

## Colorado's median single-family home price hits $600,000 in April

Gap between metro Denver and rest of state is narrowing



BUSINESS

# Why Phoenix—of All Places—Has the Fastest Growing Home Prices in the U.S.

## Median Owner Income and Median Home Value, 2000-2019

| | Median Owner Household Income | | | Median Home Value | | |
|---|---|---|---|---|---|---|
| | 2000 | 2019 | % change | 2000 | 2019 | % change |
| Focus areas | | | | | | |
| Colorado Springs | $56,300 | $86,033 | 53% | $143,300 | $269,800 | 88% |
| Jefferson County | $67,258 | $101,466 | 51% | $184,200 | $397,700 | 116% |
| Larimer County | $59,785 | $91,475 | 53% | $168,200 | $363,800 | 116% |
| Mesa County | $41,872 | $66,526 | 59% | $113,800 | $227,000 | 99% |
| Routt County | $60,271 | $86,736 | 44% | $246,200 | $535,300 | 117% |
| Counties (50,000+ population) | | | | | | |
| Adams County | $54,691 | $85,826 | 57% | $141,700 | $307,600 | 117% |
| Arapahoe County | $65,274 | $97,708 | 50% | $166,000 | $358,200 | 116% |
| Boulder County | $71,595 | $110,377 | 54% | $231,000 | $497,300 | 115% |
| Douglas County | $86,955 | $133,472 | 53% | $237,600 | $468,700 | 97% |
| Eagle County | $73,138 | $99,156 | 36% | $300,900 | $562,300 | 87% |
| El Paso County | $56,759 | $87,054 | 53% | $143,600 | $275,000 | 92% |
| Garfield County | $55,410 | $85,509 | 54% | $185,300 | $360,600 | 95% |
| La Plata County | $49,875 | $82,821 | 66% | $174,500 | $395,600 | 127% |
| Pueblo county | $39,806 | $61,714 | 55% | $93,100 | $164,600 | 77% |
| Weld County | $51,443 | $87,247 | 70% | $136,600 | $299,000 | 119% |
| Cities (50,000+ population) | | | | | | |
| Arvada | $62,907 | $101,153 | 61% | $173,200 | $384,500 | 122% |
| Aurora | $55,312 | $82,713 | 50% | $139,700 | $290,000 | 108% |
| Boulder | $71,063 | $117,808 | 66% | $272,200 | $700,000 | 157% |
| Broomfield | $70,605 | $115,689 | 64% | $182,200 | $413,500 | 127% |
| Castle Rock | $73,453 | $123,173 | 68% | $184,300 | $422,100 | 129% |
| Commerce City | $41,104 | $92,799 | 126% | $109,600 | $320,100 | 192% |
| Denver | $52,589 | $95,179 | 81% | $160,100 | $390,600 | 144% |
| Fort Collins | $61,532 | $95,423 | 55% | $164,000 | $367,900 | 124% |
| Grand Junction | $43,254 | $69,113 | 60% | $114,000 | $237,100 | 108% |
| Greeley | $50,009 | $76,419 | 53% | $129,600 | $247,700 | 91% |
| Lakewood | $59,057 | $87,972 | 49% | $169,000 | $364,800 | 116% |
| Longmont | $61,254 | $95,716 | 56% | $173,800 | $362,500 | 109% |
| Loveland | $55,235 | $83,155 | 51% | $154,500 | $313,900 | 103% |
| Parker | $76,389 | $130,338 | 71% | $194,000 | $420,000 | 116% |
| Pueblo | $36,474 | $56,087 | 54% | $85,800 | $141,000 | 64% |
| Thornton | $59,994 | $91,781 | 53% | $152,100 | $322,200 | 112% |
| Westminster | $63,870 | $92,[illegible]5% | | $165,600 | $340,900 | 106% |

Source: ACS and Root Policy Research.

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Source: ACS and Root Policy Research.

# The problem is caused (in part) by lack of housing supply.

# Sustained period of low interest rates

PERSONAL FINANCE

## Will Higher Interest Rates Finally Cool The Red-Hot Housing Market?

**Robert Farrington** Senior Contributor ⓘ
*I write about personal finance, college and student loan debt.*

Follow

May 6, 2022, 10:15am EDT

Listen to article 9 minutes

0

Pretty much everyone knows the Fed raised interest rates a half a point in early May, but what does that really mean? For the most part, the Fed has been planning to inch up rates in order to deal with record inflation, which means it hopes to stem the rise in prices we're seeing on nearly

# Demographic trends


**Age Distribution, Colorado, 2000-2019**

| | | | | 2000-2010 | | 2010-2019 | |
|---|---|---|---|---|---|---|---|
| | 2000 | 2010 | 2019 | # Change | Ann. % | # Change | Ann. % |
| Children (<18) | 1,109,219 | 1,228,042 | 1,260,379 | 118,823 | 1.0% | 32,337 | 0.3% |
| Young Adult (18-25) | 432,837 | 489,551 | 561,374 | 56,714 | 1.2% | 71,823 | 1.5% |
| Working Adult (25-65) | 2,378,742 | 2,777,938 | 3,095,464 | 399,196 | 1.6% | 317,526 | 1.2% |
| Retired (>65) | 417,987 | 554,203 | 845,526 | 136,216 | 2.9% | 291,323 | 4.8% |
| Total Employment | 2,684,437 | 2,785,672 | 3,465,676 | 101,235 | 0.4% | 680,004 | 2.5% |

Source: DOLA.

# Construction costs and supply chain issues

Source: 6abc.com

# Demand for second homes, investment properties


Source: secondhomevail.com

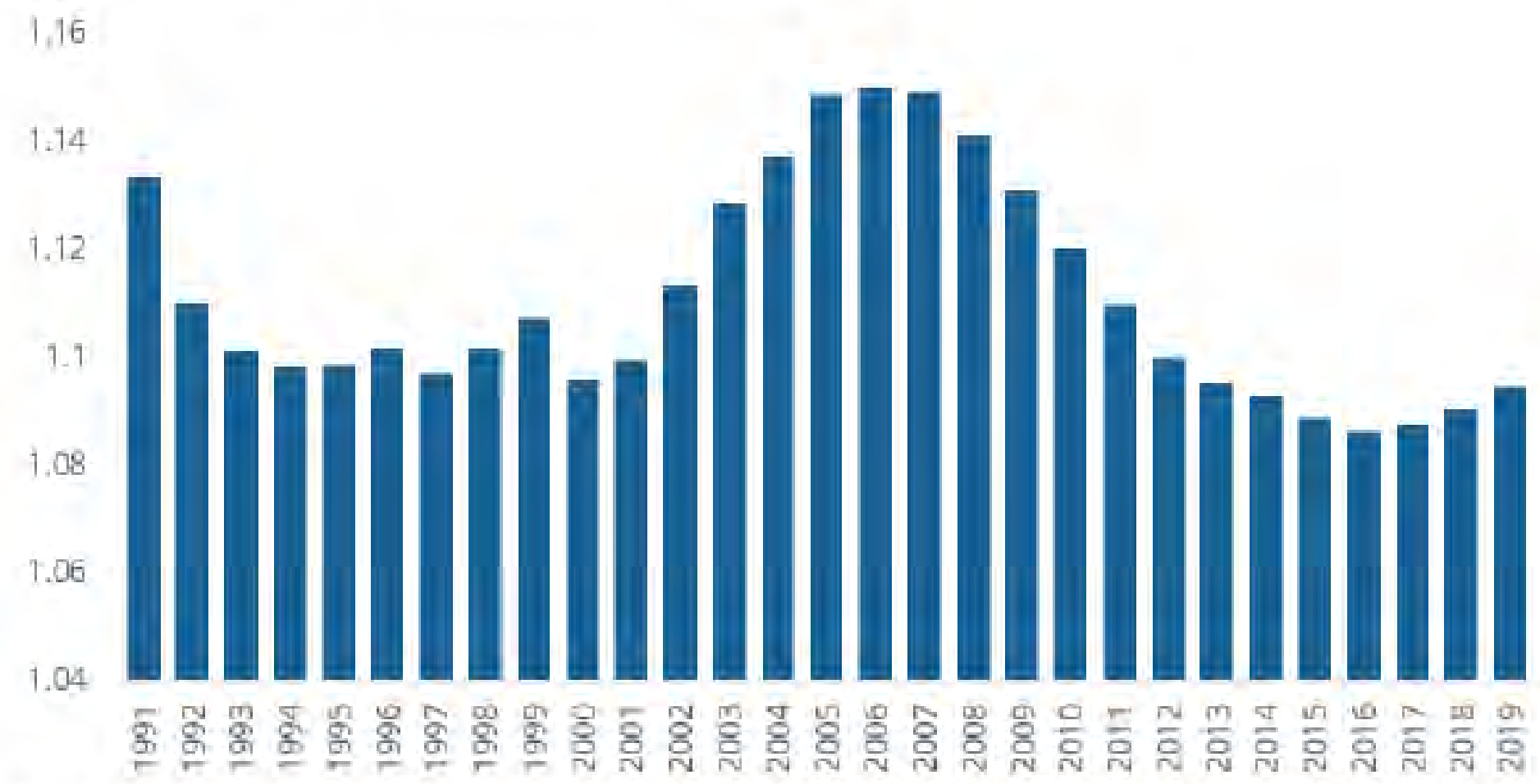
# Undersupply of housing

# Population, Households, and Housing Units, Colorado, 1990-2019

| | | | | | 1990-2000 | | 2000-2010 | | 2010-2019 | |
|---|---|---|---|---|---|---|---|---|---|---|
| | 1990 | 2000 | 2010 | 2019 | # Change | Ann. % | # Change | Ann. % | # Change | Ann. % |
| Population | 3,304,042 | 4,338,801 | 5,050,332 | 5,763,976 | 1,034,759 | 2.8% | 711,531 | 1.5% | 713,644 | 1.5% |
| Households | 1,282,488 | 1,674,523 | 1,981,010 | 2,254,405 | 392,035 | 2.7% | 306,487 | 1.7% | 273,395 | 1.4% |
| Housing units | 1,477,349 | 1,835,015 | 2,218,698 | 2,467,730 | 357,666 | 2.2% | 383,683 | 1.9% | 249,032 | 1.2% |

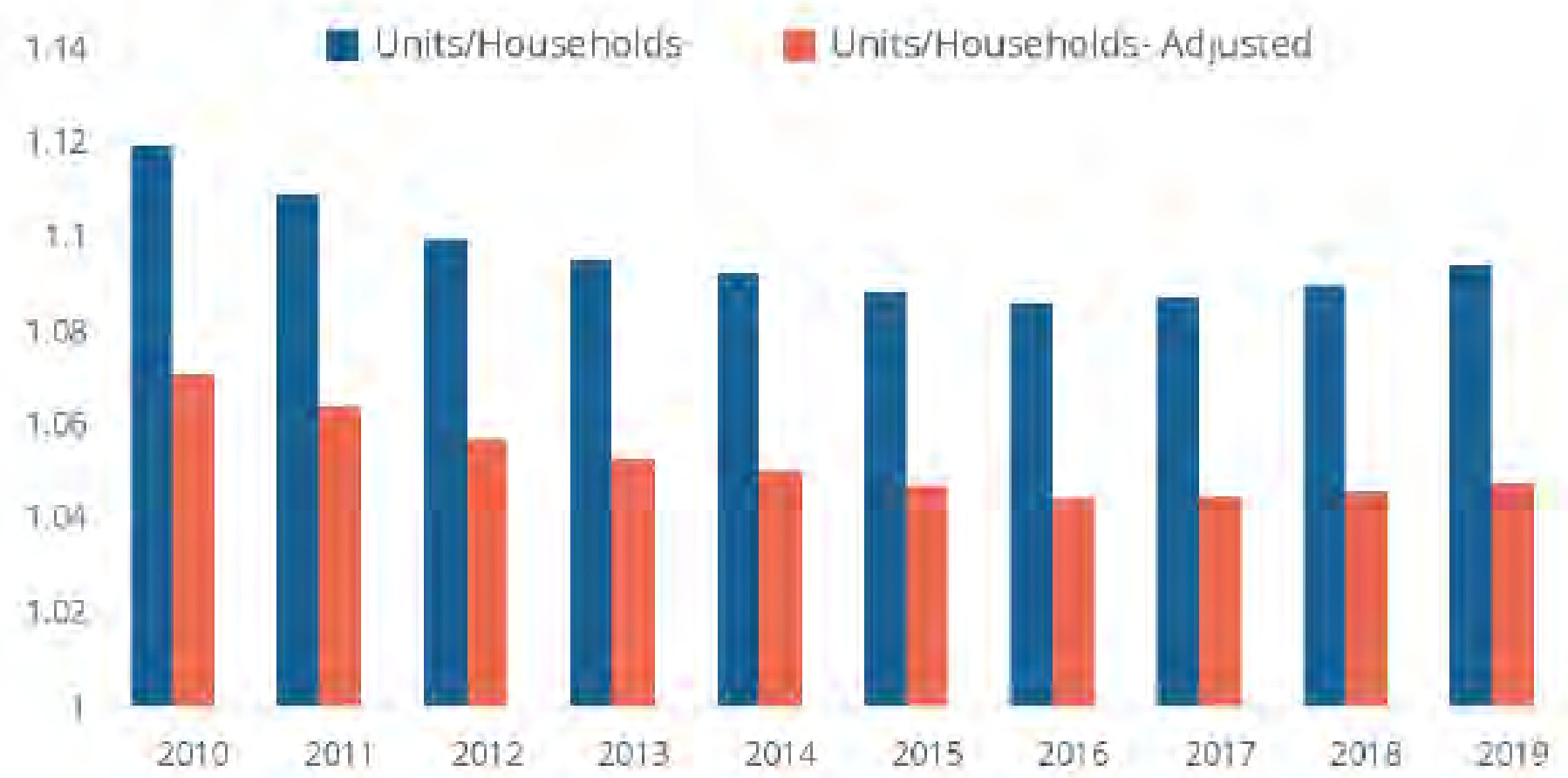
Source: DOLA.

## Ratio of Housing Units to Households




Source: DOLA Colorado State Demography Office and Root Policy Research.

## Ratio of Housing Units to Households in Colorado, Adjusted for Seasonal Vacancies




Note: Share of vacancies for recreational use are extrapolated from ACS 5-year estimates.

Source: DOLA Colorado State Demography Office, ACS 5-year estimates, and Root Policy Research.

# The problem isn’t going away.

**Figure II-22. Projected Growth in Households and Housing Units Needed**

Note:
Share of vacancies for recreational used extrapolated from ACS 5-year estimates. Forecasted growth in seasonal vacancies as share of total vacancies was calculated using a linear forecast using trends from 2010-2019.

Source:
DOLA Colorado State Demography Office, ACS 5-year estimates, and Root Policy Research.

MARSHALL FIRE

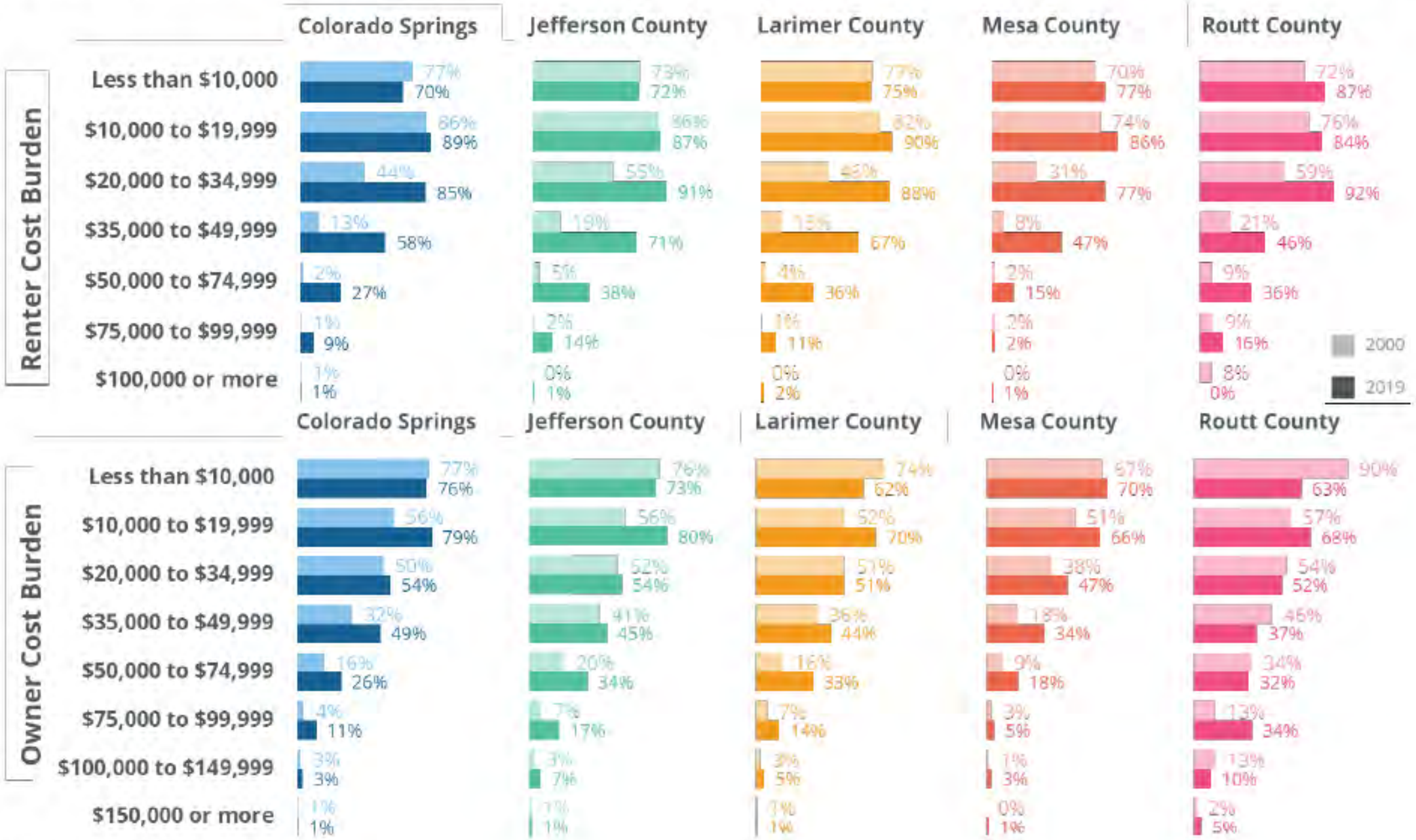
# For those who lost it all in the Marshall fire, finding new homes is an uphill battle

Boulder County already faced a brutal housing shortage. That was before hundreds of homes burned.

David Gilbert 4:50 AM MST on Jan 7, 2022

# The crisis is most acute for lower- and middle-income households.

## Share of Households Experiencing Housing Cost Burden by income and tenure, Focus Areas, 2000-2019




Source: ACS and Root Policy Research.

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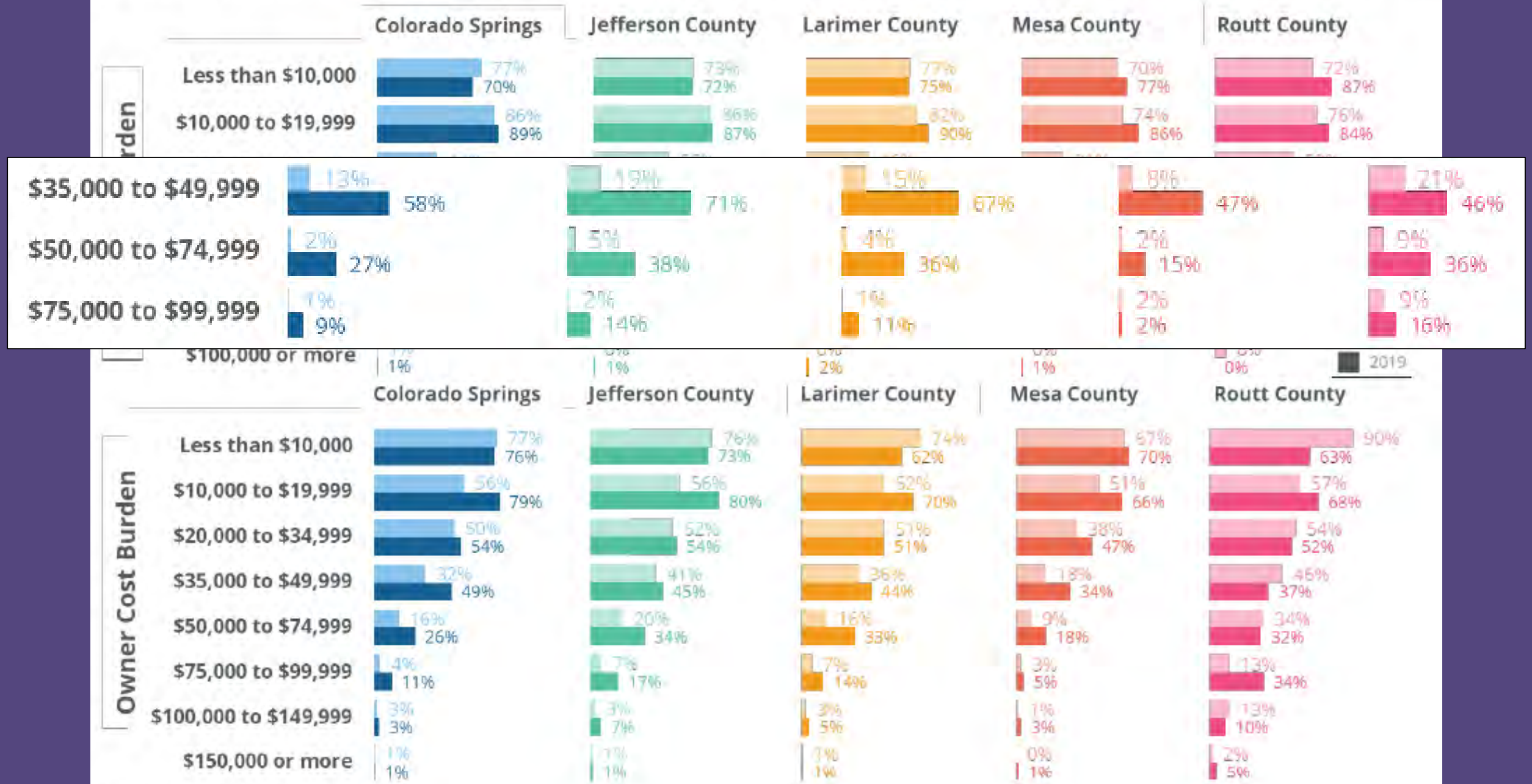


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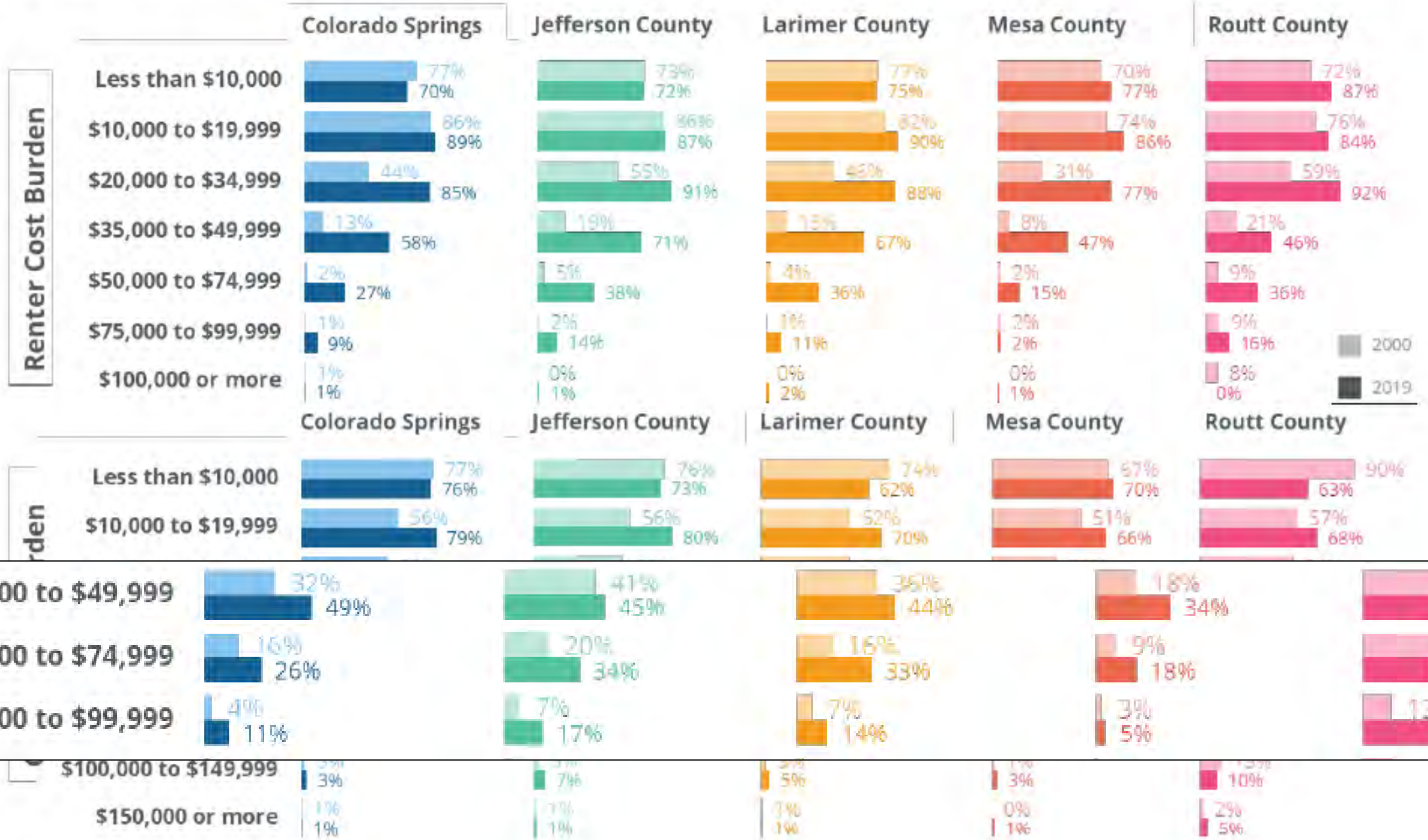



Source: ACS and Root Policy Research.

# One Issue – Two Related Problems

Supply Shortages for Moderate Income Households

- Recent, dramatic increases in cost burdened, **low-moderate income** households (60-100% AMI)
- Market delivery of housing that is affordable to moderate income households has **slowed dramatically**
- Housing unit types that are most affordable—namely small, multi-unit projects—are some of the least likely to be constructed
- Limited housing construction is due in part to land use regulation

Persistent Lack of Lower Income Housing

- Persistently high cost burden for **low income** households (<60% AMI)
- Market has **never delivered** housing that is affordable to low income households
- Massive public or philanthropic investment is required in order to support the construction and maintenance of housing that is affordable at this income level
- Land use regulation may have some impact, but should be paired with funding

# Two Related Problems

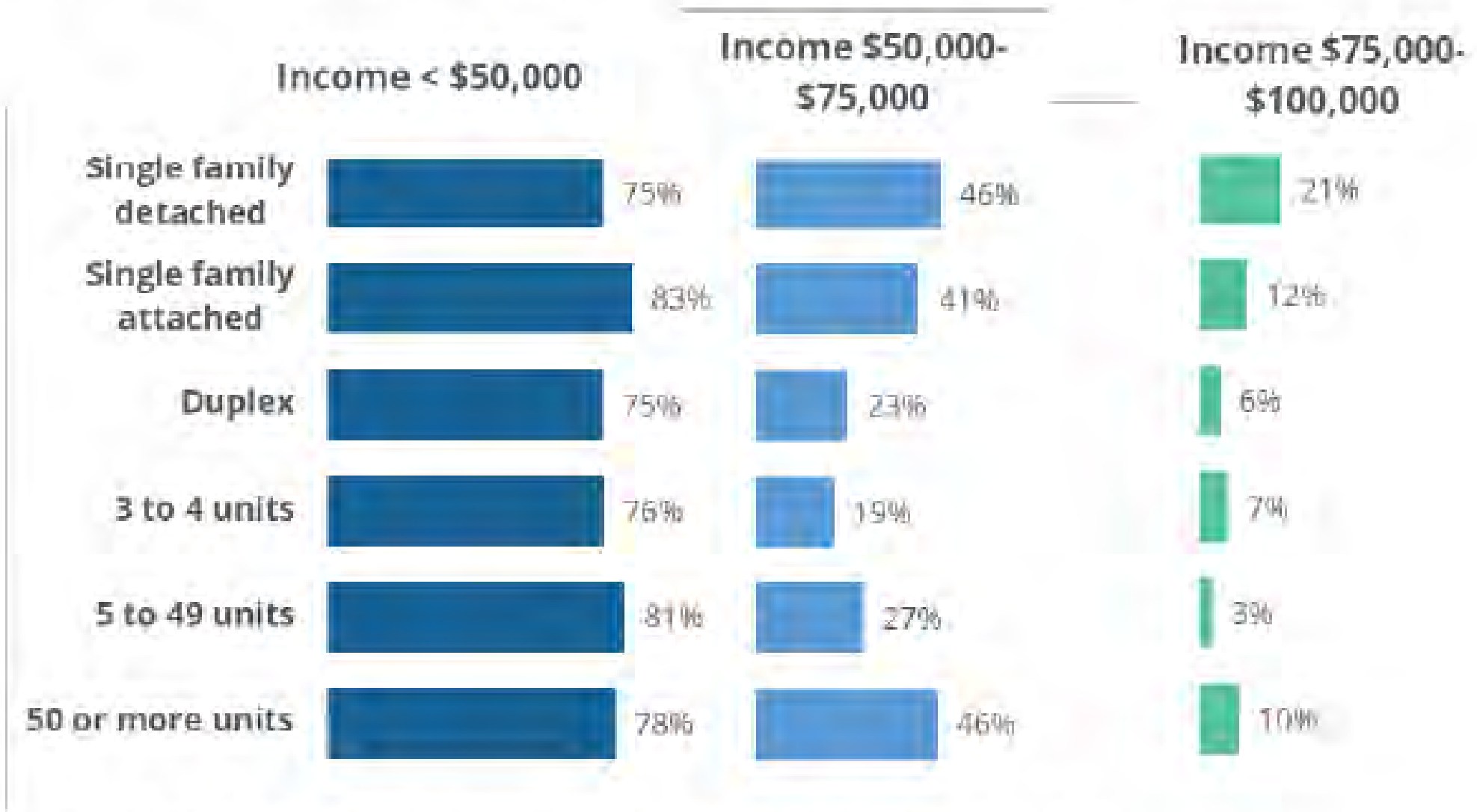
- Lack of housing supply for moderate income households means…
  - Moderate income buyers and renters spend too much income on housing, limiting economic growth and access to opportunity
  - Essential employees are unable to afford housing, limiting employers' ability to attract and retain workers
  - Moderate income buyers and renters occupy units that would otherwise be occupied by lower-income households—reduces supply for lower-income households and increases displacement risk

# Two Related Problems

- Lack of housing supply for low income households means…
  - Shortages of workers in Colorado's core industries (tourism, entertainment) and to support economic growth for higher-wage industries: workers in professional services and technology depend on an adequate supply of workers in childcare, education, food services, and household services
  - Lack of housing stability:  low income households face eviction, homelessness, hunger, etc.
  - Lack of access to opportunity (i.e. education, essential services, etc.)

# We are not building affordable forms of housing.

# Renter Cost Burden, by Income and Housing Type




Source: IPUMS USA, University of Minnesota, www.ipums.org and Root Policy Research.

# Owner Cost Burden, by Income and Housing Type


Source: IPUMS USA, University of Minnesota, www.ipums.org and Root Policy Research.

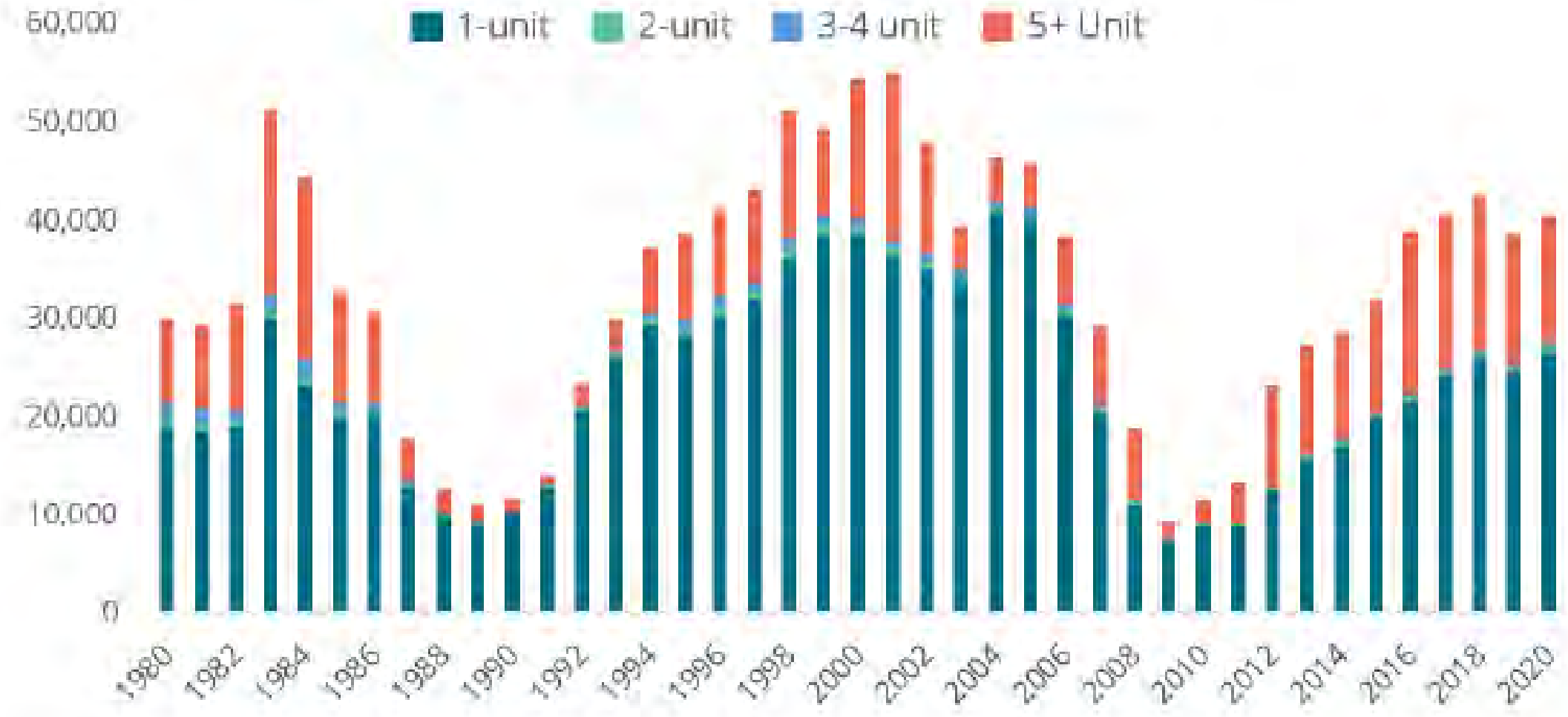
# Median Home Value by Housing Type and Single Family Value Premium

| Category | Median Home Value | | | | Single Family Detached Value Premium | | | |
|---|---|---|---|---|---|---|---|---|
| | 1990 | 2000 | 2010 | 2019 | 1990 | 2000 | 2010 | 2019 |
| Housing Type | | | | | | | | |
| Single family detached | $85,000 | $162,500 | $275,000 | $350,000 | 0% | 0% | 0% | 0% |
| Single family attached | $72,500 | $137,500 | $187,500 | $281,000 | 17% | 18% | 47% | 25% |
| Duplex | $85,000 | $162,500 | $225,000 | $300,000 | 0% | 0% | 22% | 17% |
| 3 to 4 units | $62,500 | $112,500 | $162,500 | $240,000 | 36% | 44% | 69% | 46% |
| 5 to 9 units | $57,500 | $112,500 | $162,500 | $210,000 | 48% | 44% | 69% | 67% |
| 10 to 19 units | $42,499 | $95,000 | $137,500 | $200,000 | 100% | 71% | 100% | 75% |
| 29 to 49 units | $47,500 | $95,000 | $137,500 | $225,000 | 79% | 71% | 100% | 56% |
| 50+ units | $77,500 | $112,500 | $187,500 | $300,000 | 10% | 44% | 47% | 17% |

Note: Nominal dollars.

Source: IPUMS USA, University of Minnesota, www.ipums.org and Root Policy Research.

# Building Permits by Units in Structure




Source: U.S. Census Building Permits Survey, and Root Policy Research.

# We do not allow affordable forms of housing to be built.

HOUSING

# Town of Vail moves to condemn parcel where Vail Resorts plans affordable housing project

The Vail town council moved toward preventing any development on the acreage where Vail Resorts plans to spend $17 million on affordable housing, citing impacts to a herd of bighorn sheep

**Jason Blevins** 4:10 AM MDT on Apr 20, 2022

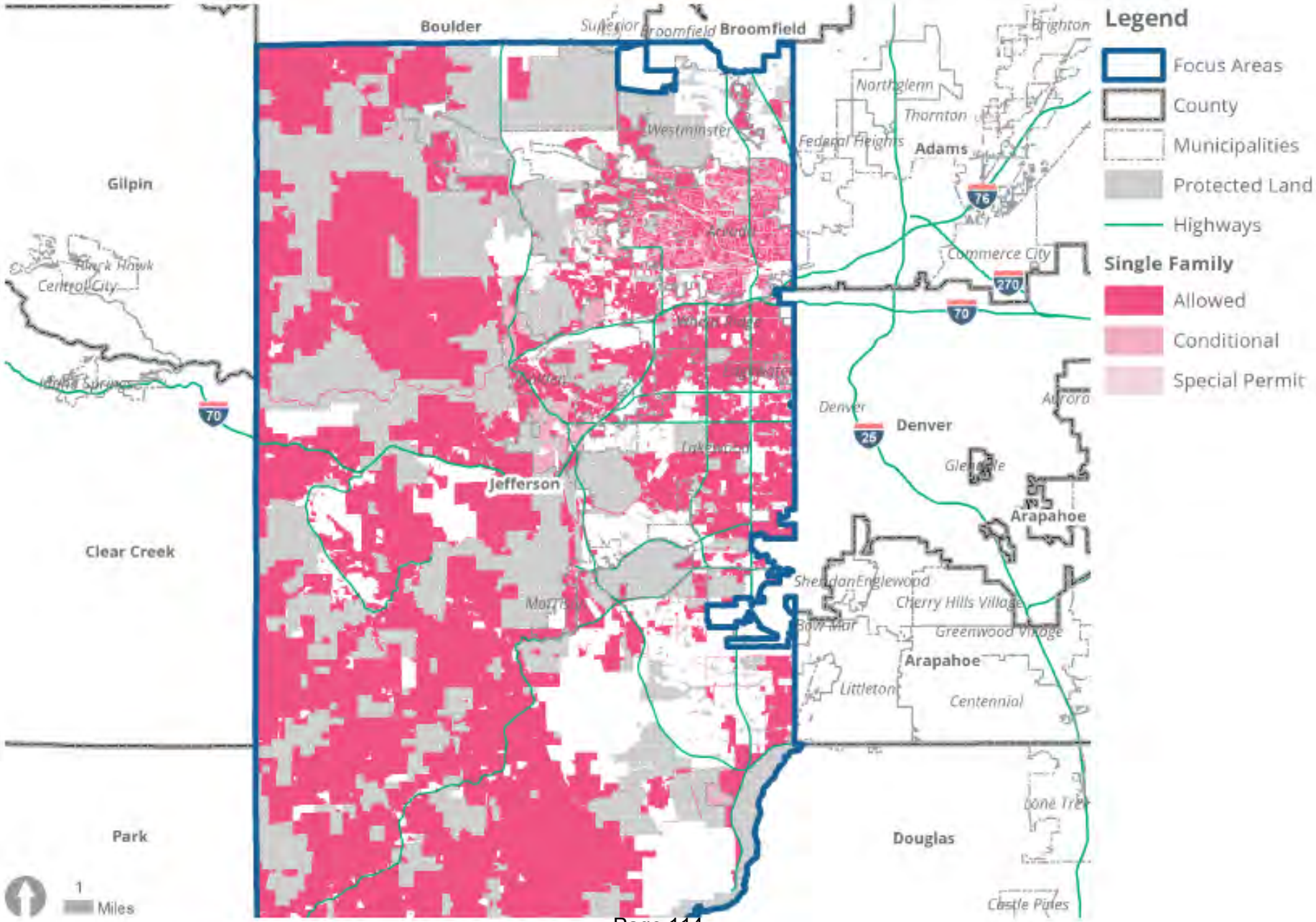
HOUSING

# Aspen suspends new home construction permits as it drops the hammer in the name of affordability

Aspen emergency ordinance also cut off new short-term rental permits as the posh Pitkin County ski town wrestles with lack of workforce housing.

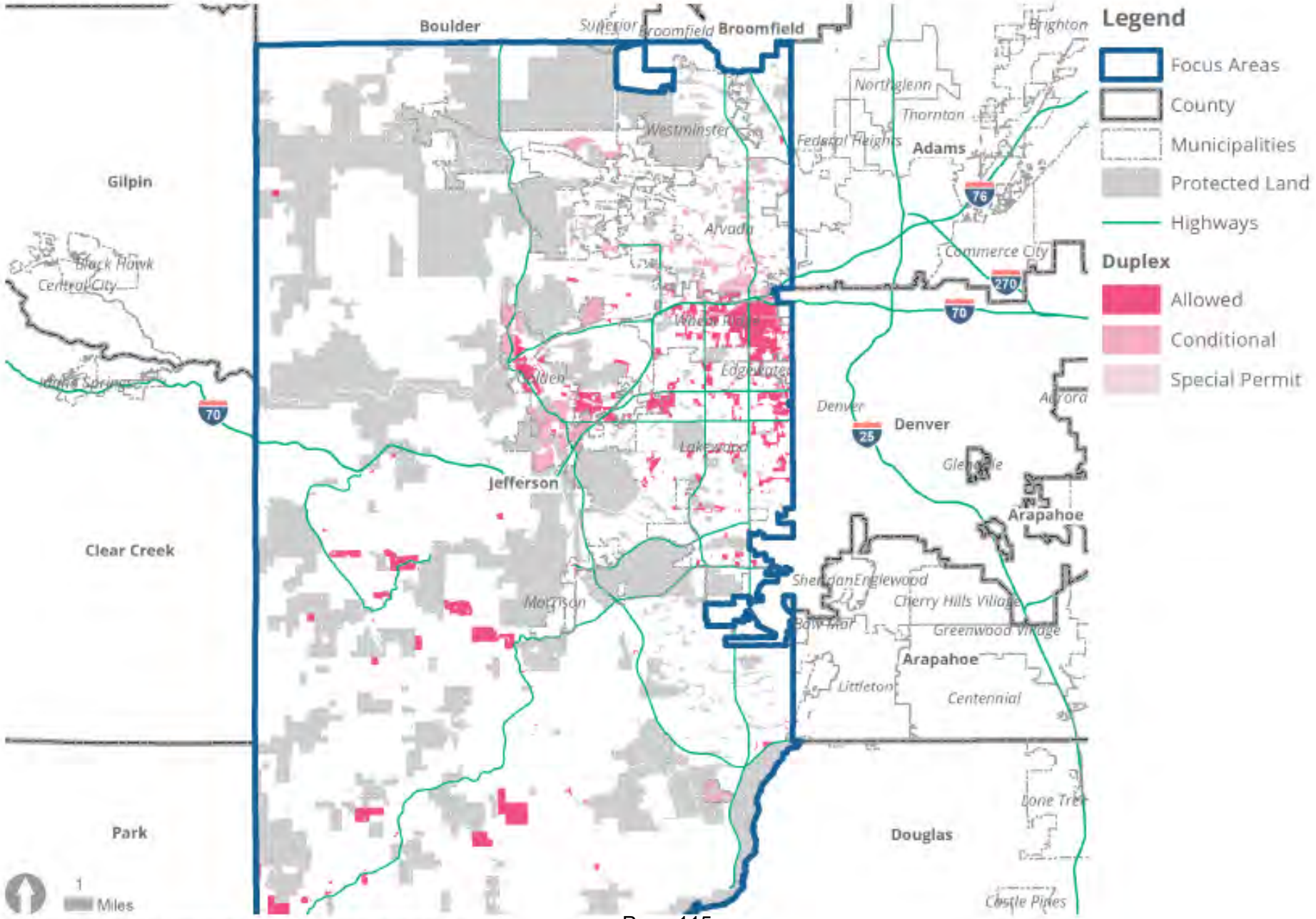
Jason Blevins 4:00 AM MST on Dec 9, 2021

## Figure III-9. Areas Zoned to Allow Single Family Residential, Jefferson County



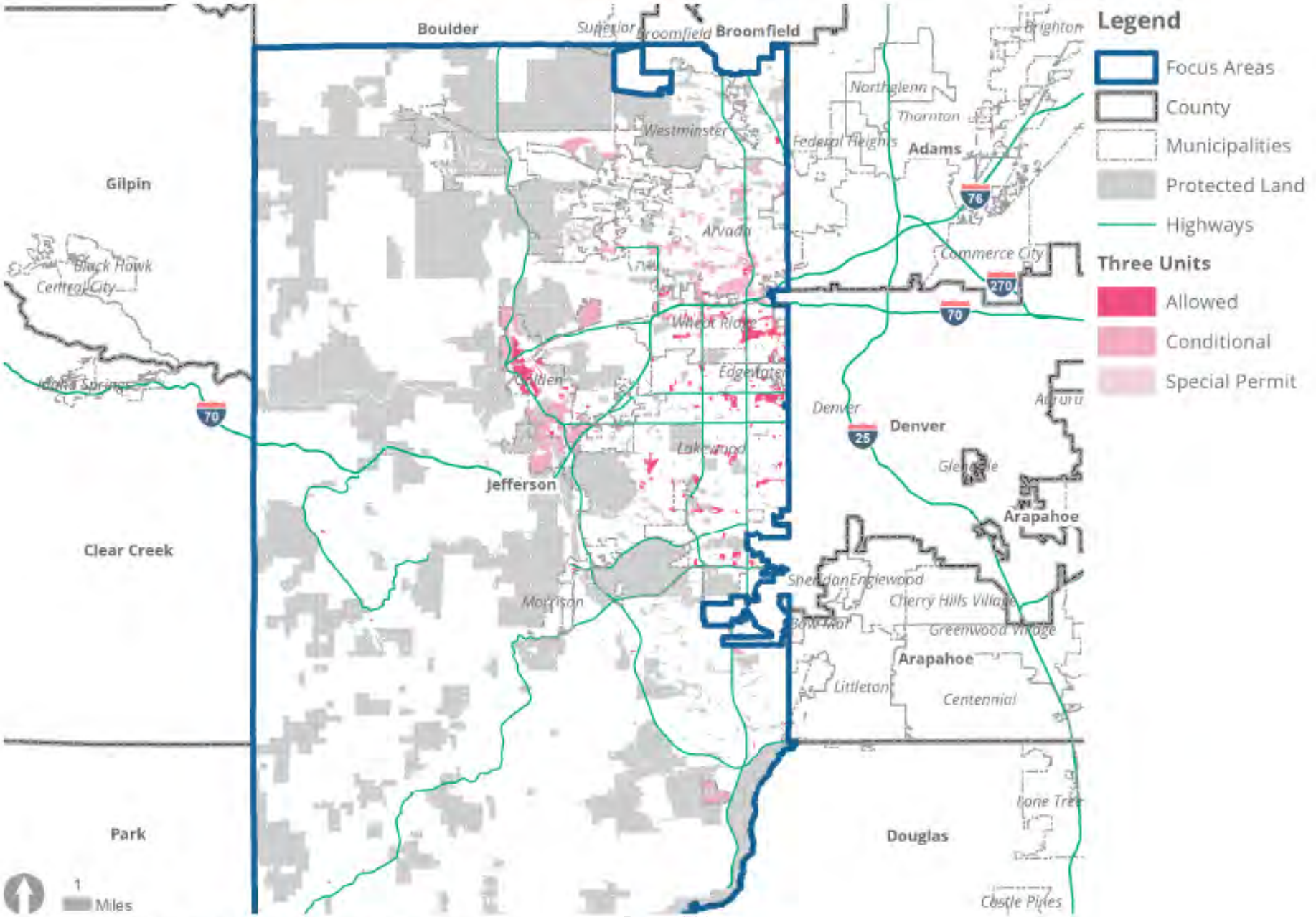

Source: Root Policy Research and DU Student Research Team.

## Figure III-10. Areas Zoned to Allow Duplex Residential, Jefferson County



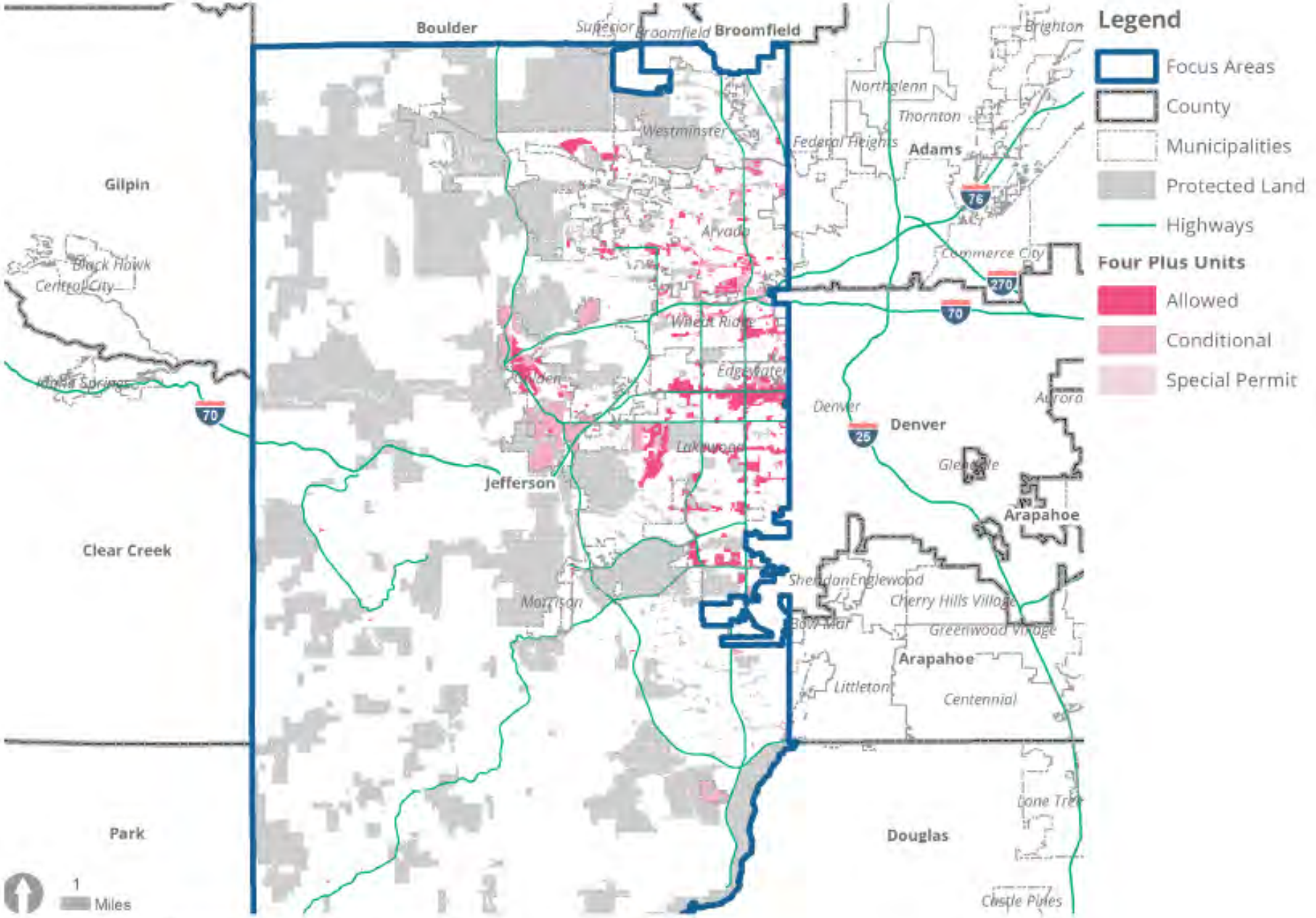

Source: Root Policy Research and DU Student Research Team.

## Figure III-11. Areas Zoned to Allow Triplex Residential, Jefferson County



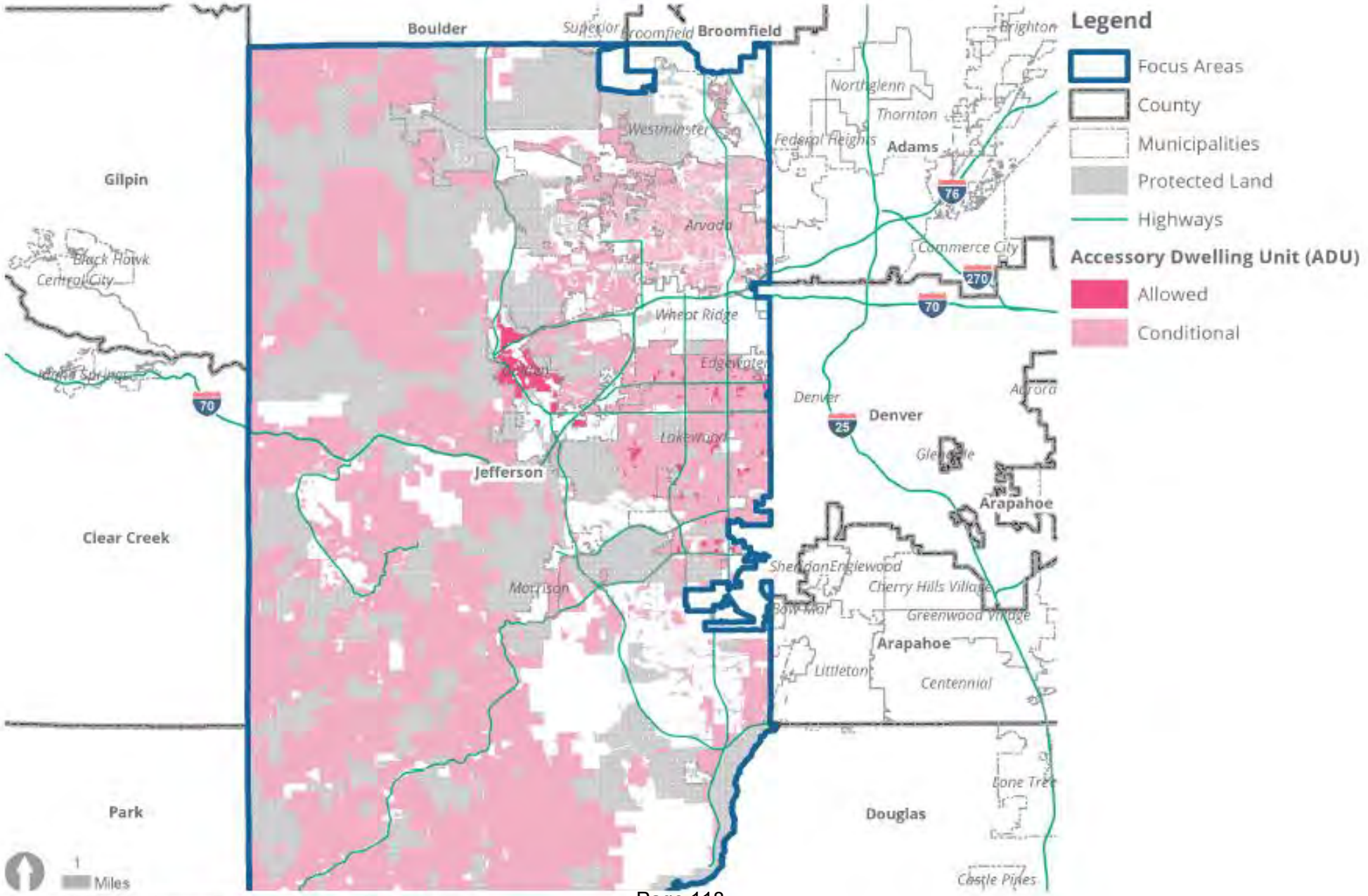

Source: Root Policy Research and DU Student Research Team.

## Figure III-12. Areas Zoned to Allow Four or More Residential Units, Jefferson County




Source: Root Policy Research and DU Student Research Team.

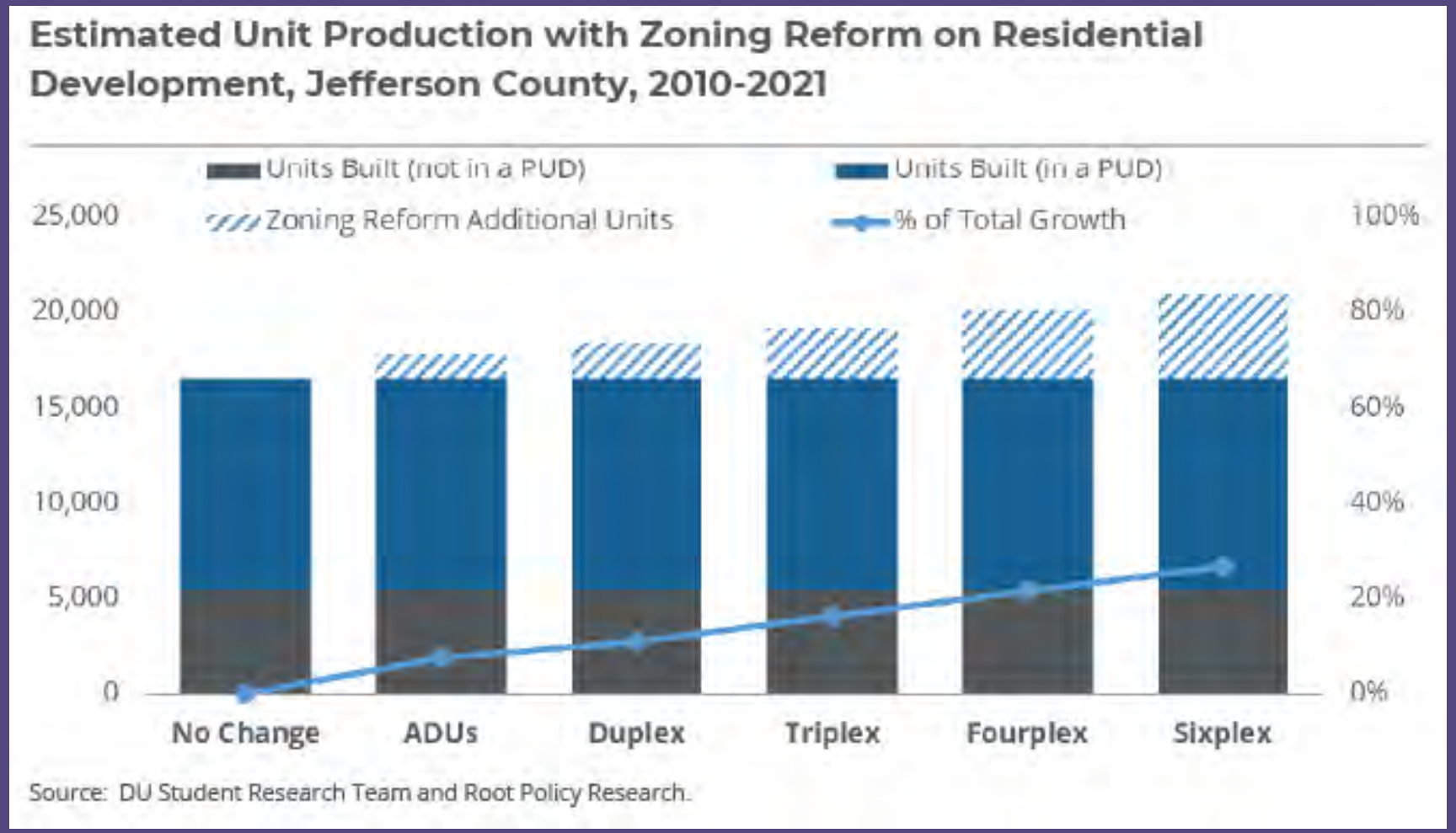
## Figure III-13. Areas Zoned to Allow Accessory Dwelling Units (ADUs), Jefferson County



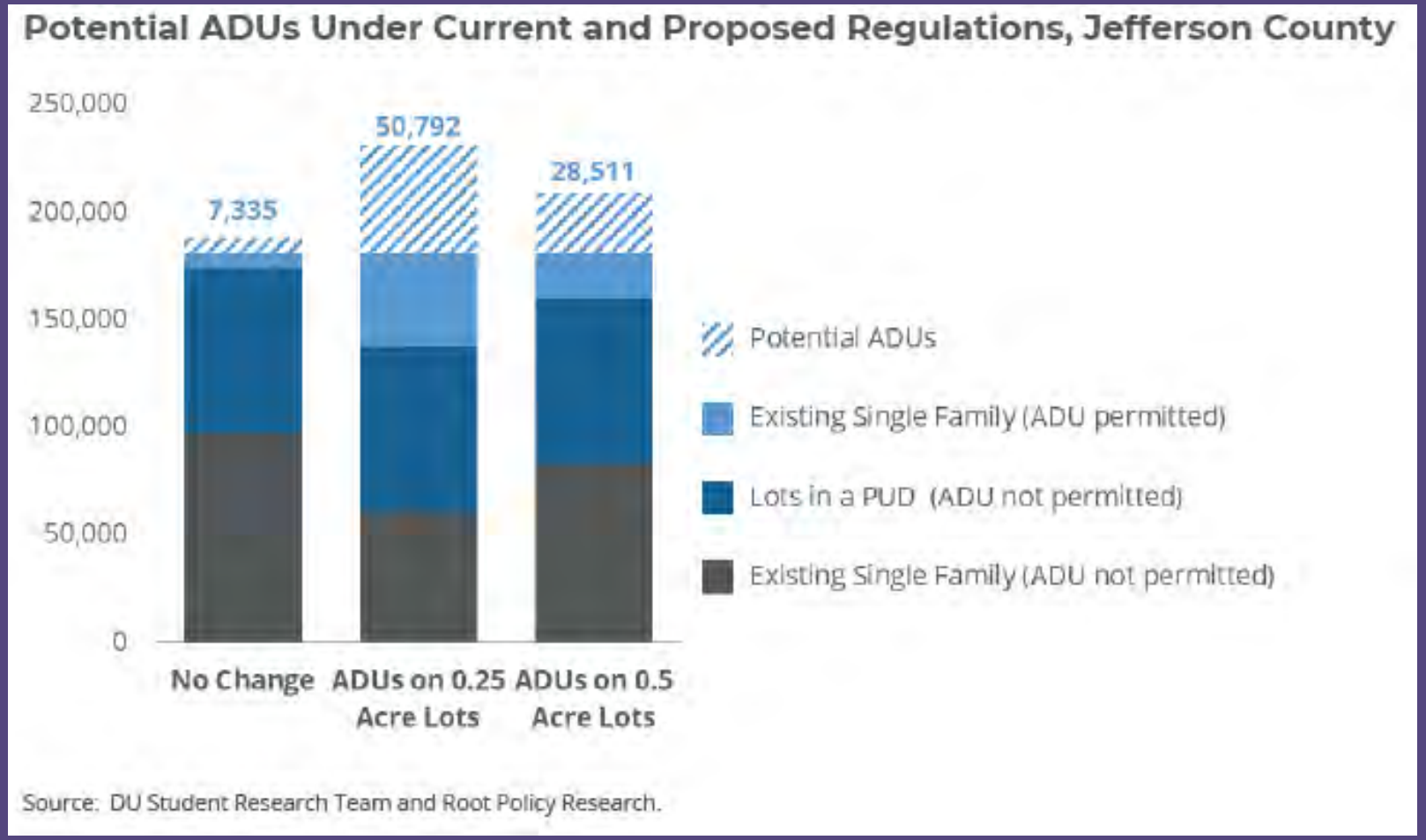

Source: Root Policy Research and DU Student Research Team.

# Zoning reform would make a difference.

# Substitute “plexes” for single-family detached on large lots



# Allow ADUs on large lots

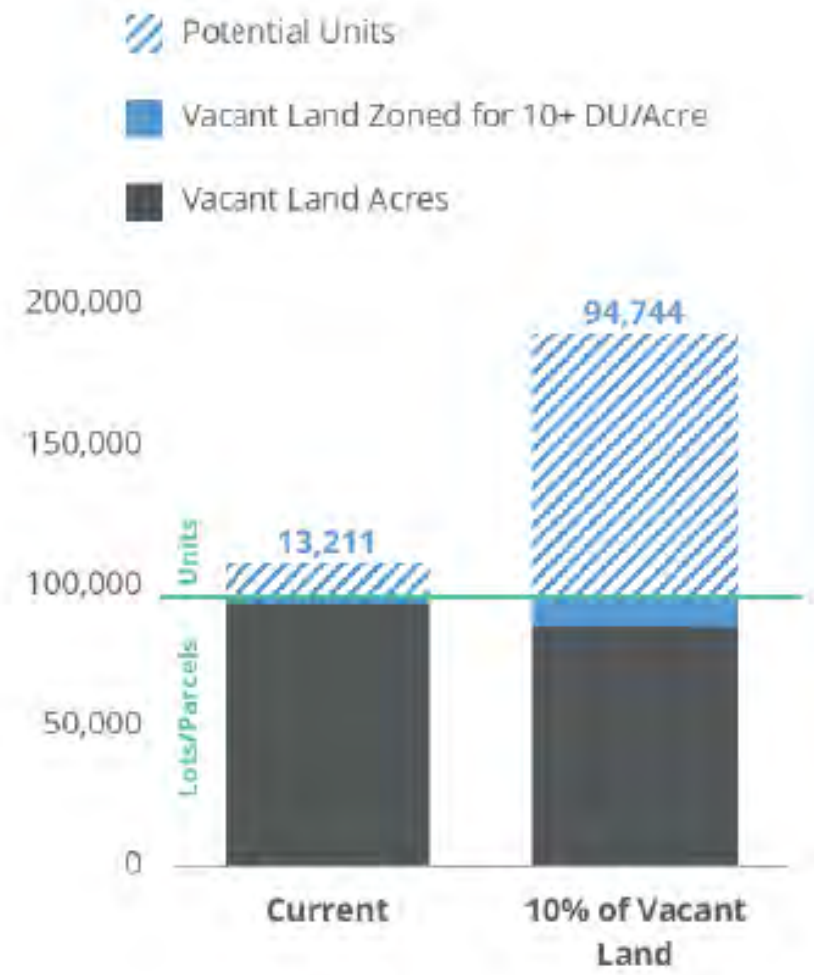


# Zone 10% of developable land for 10 dwelling units/acre

**Figure III-42.**
**Estimated Share of Land Zoned to Allow 10+ Dwelling Units per Acre, Jefferson County**

Note:
PUDs not included.

Source:
DU Student Research Team and Root Policy Research.



# Advocating for Change.

# Voter Sentiment

ECONOMY ELECTION 2022

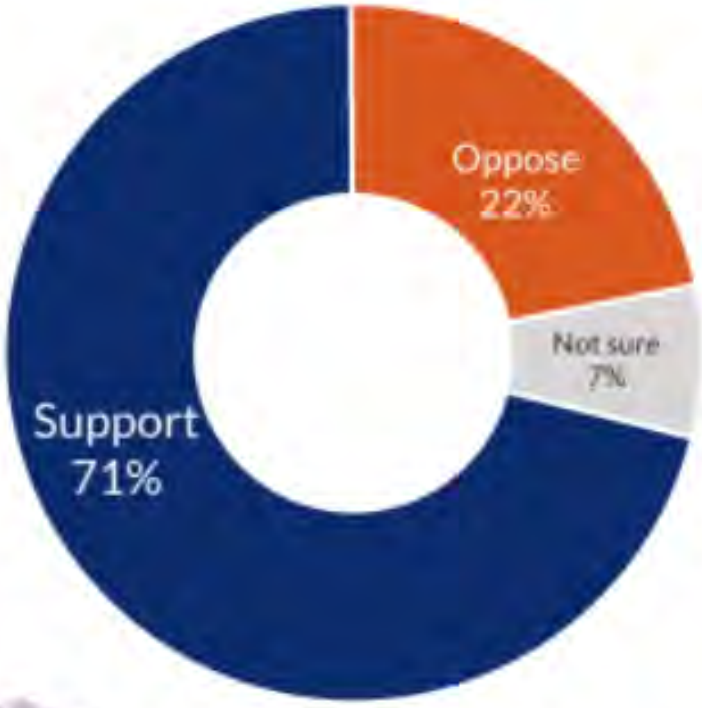
BRIEFLINE

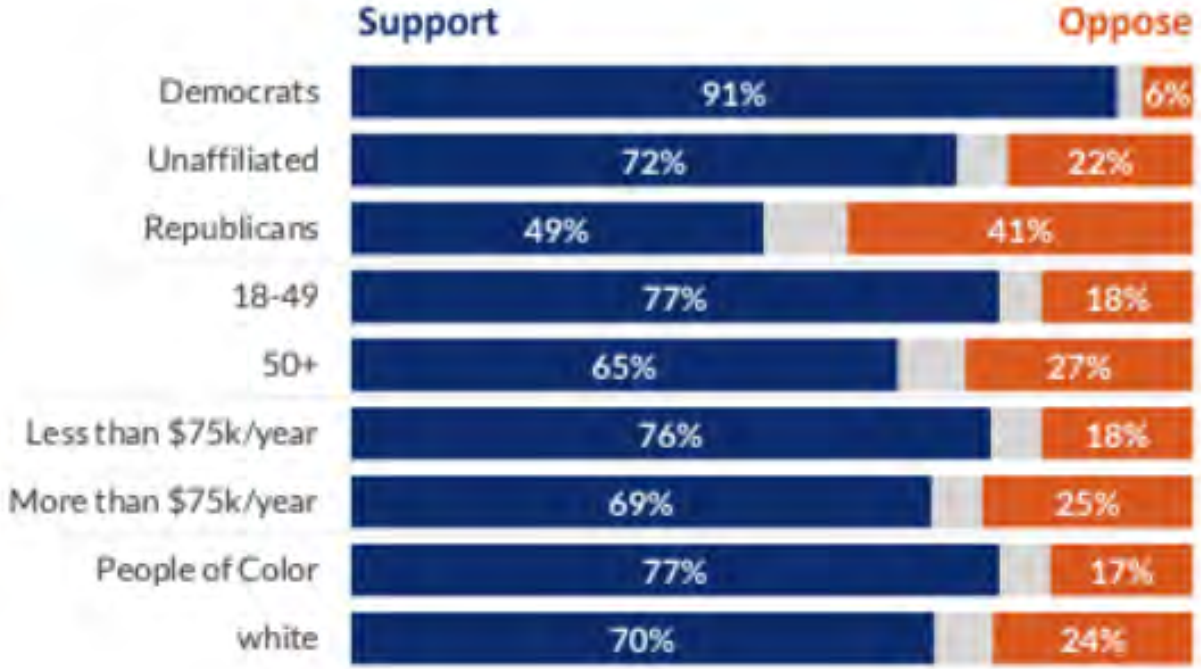
# Housing costs top list of Colorado voters' concerns, poll finds

BY: **CHASE WOODRUFF** - MAY 24, 2022 5:00 AM

# By 3-to-1, Voters Support Building Affordable Housing in Their Community

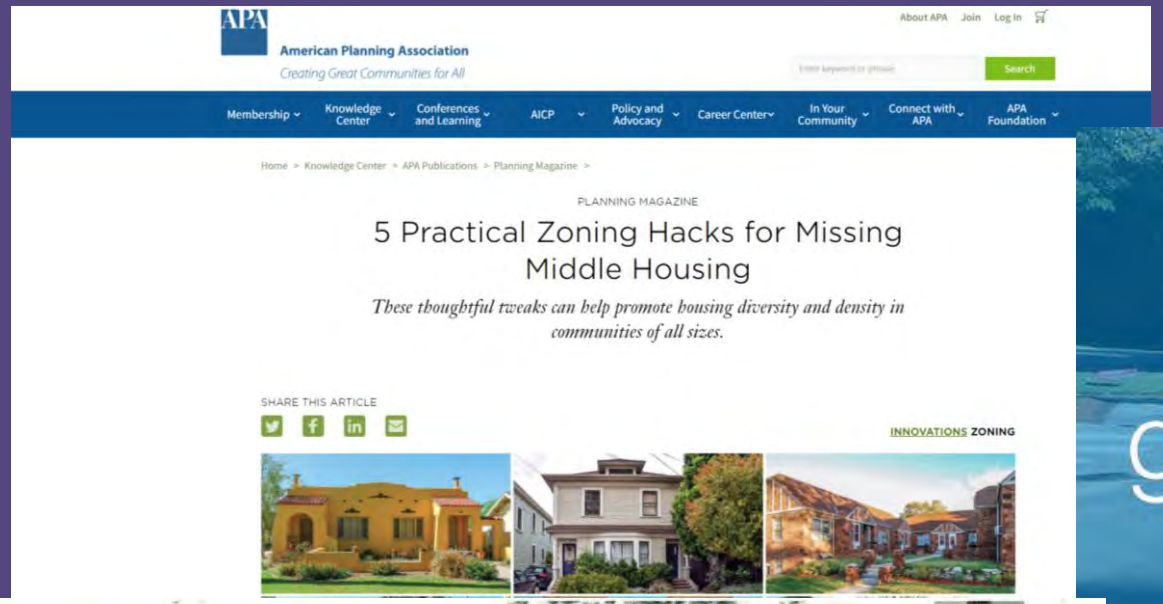
*Would you support or oppose **building affordable housing in your community**?*




KEATING

# Coalition Building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PLANNING MAGAZINE
5 Practical Zoning Hacks for Missing Middle Housing
These thoughtful tweaks can help promote housing diversity and density in communities of all sizes.
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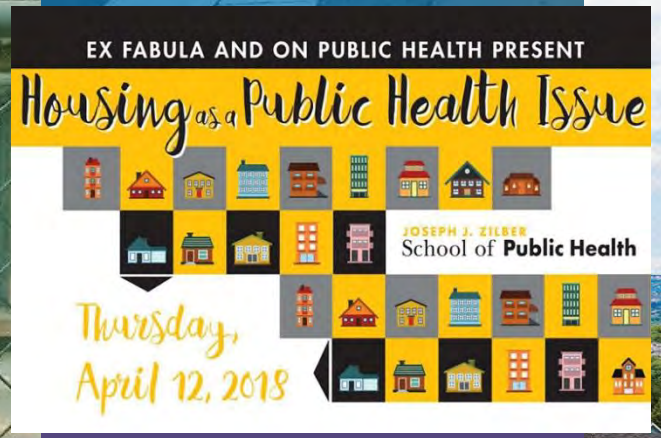
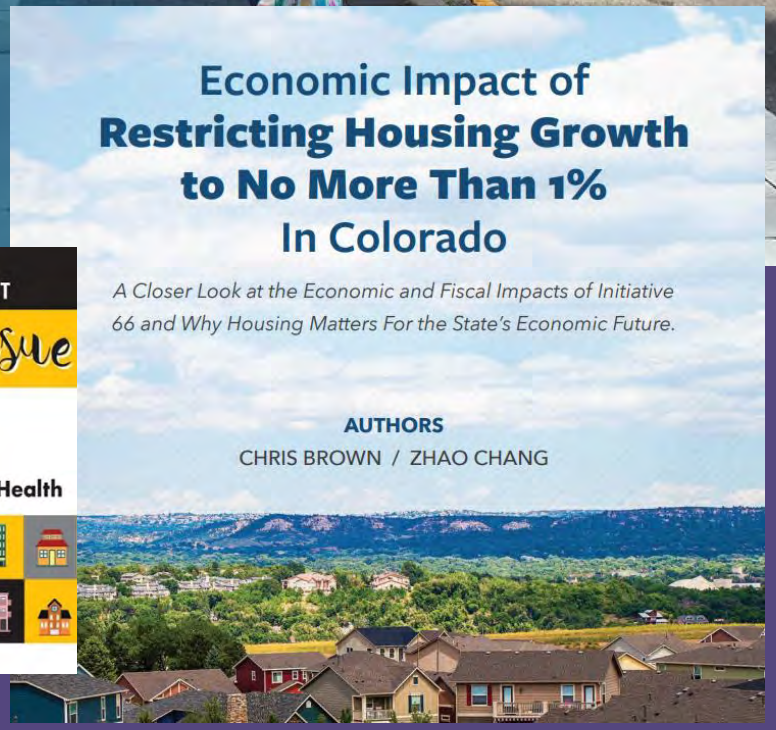
Smart growth and climate change
STATE LAW


FIGHT FOR OUR HUMAN RIGHT TO HOUSING
GREENPEACE


EX FABULA AND ON PUBLIC HEALTH PRESENT
Housing as a Public Health Issue
JOSEPH J. ZILBER School of Public Health
Thursday, April 12, 2018


Economic Impact of
Restricting Housing Growth to No More Than 1%
In Colorado
A Closer Look at the Economic and Fiscal Impacts of Initiative 66 and Why Housing Matters For the State's Economic Future.
AUTHORS
CHRIS BROWN / ZHAO CHANG

# Education

# Confronting Opposition

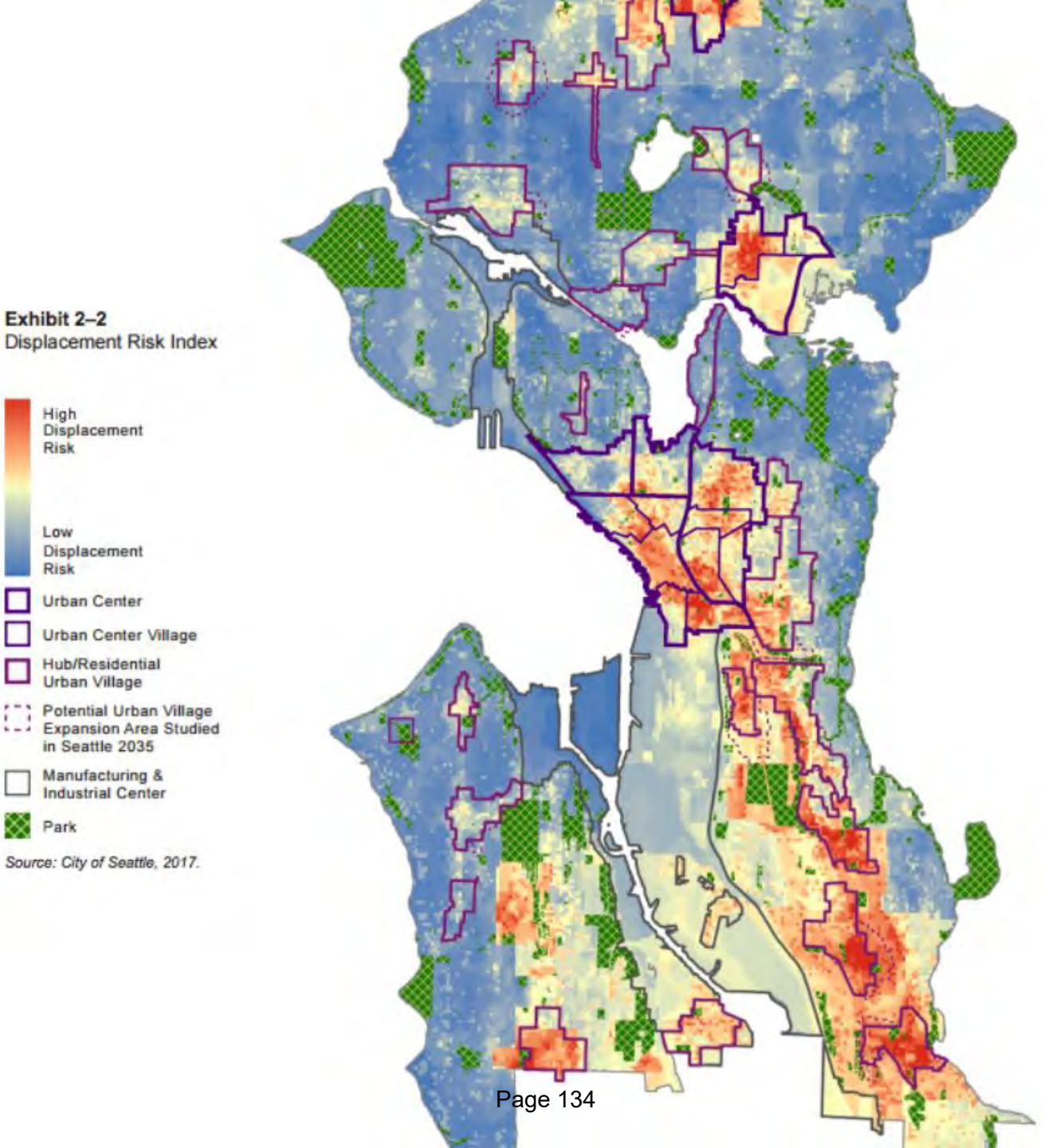
# “Local control solves everything”

# A Regional Approach is Needed

- Housing is a regional issue requiring regional solutions
  - One local government's decision-making cannot provide a policy response to a regional problem
- Decisions made by one locality can negatively or positively impact the entire region
- Experience from states that have faced earlier housing affordability challenges suggests that entirely-local policy responses fail to address the problem
  - Colorado's current system has not yet produced an adequate response to the housing crisis
  - Colorado ranks near the bottom of most affordability rankings; recent local policy responses have not changed this

“Your solution is gentrification and displacement”

**Exhibit 2–2**
Displacement Risk Index




*Source: City of Seattle, 2017.*

# The CHAP Platform.

# CHAP Platform

*What should be required:*

- Planning for housing needs
- Transit-oriented development

*Plus, choose 3 of these:*

- Accessory dwelling units
- Eliminating single-family zoning
- Expedited approvals for affordable housing
- Reduced parking for affordable housing
- Reduced fees for affordable housing
- Medium-density housing

# Successes and Failures.

# Go advocate.

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**ER 1.11. Special Conflicts of Interest for Former and Current Government Officers and Employees**

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

(1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

(2) negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially.

**Comment**

[1] This Rule prevents a lawyer from exploiting public office for the advantage of a private client. It is a counterpart of ER 1.10(b), which applies to lawyers moving from one firm to another.

[2] A lawyer representing a government agency, whether employed or specially retained by the government, is subject to the Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in ER 1.7 and the protections afforded former clients in ER 1.9. In addition, such a lawyer is subject to ER 1.11 and to statutes and government regulations regarding conflicts of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. It is the lawyer's duty to determine the individual or entity authorized to give informed consent on behalf of a governmental entity. In most cases, the appropriate individual will be the chief legal officer for the governmental entity, for example the Attorney General, county attorney, or city attorney, as opposed to an agency head or managerial-level employee.

[3] This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government

agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. The provisions for screening and waiver in paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. Because of the special problems raised by imputation within a government agency, paragraph (c)(1) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.

[4] When the client is an agency of one government, that agency should be treated as a private client for purposes of this Rule if the lawyer thereafter represents an agency of another government, as when a lawyer represents a city and subsequently is employed by a federal agency. The question whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See ER 1.13, Comment [6].

# 02-05: Conflict of Interest; Former Government Lawyers; Administrative Proceedings; Imputed Disqualification; Screening

9/2002

This Opinion discusses the general conflict analysis for government lawyers switching to private practice that may involve representing private clients against the lawyer's former government agency.

**FACTS[1]**

The inquiring attorney recently left the Attorney General's Office to join a private law firm that represents clients before various state agencies. While employed by the Attorney General's Office, the inquiring attorney represented several state agencies in regulatory and administrative law matters. The inquiring attorney anticipates being asked to represent clients whose interests are adverse to a state agency the inquiring attorney represented while with the Attorney General's Office, as well as clients whose interests are adverse to individuals or entities who were involved in administrative proceedings in which the inquiring attorney took part while employed by the Attorney General's Office. The inquiring attorney seeks general guidance about whether it is ethically permissible to represent such clients.

QUESTION PRESENTED

Under what circumstances may a former government lawyer represent clients in matters involving a government agency the lawyer formerly represented?

RELEVANT ETHICAL RULES

ER 1.7. Conflict of Interest: General Rule

* * * *

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

ER 1.9. Conflict of Interest: Former Client

A lawyer who has formerly represented a client in a matter shall not thereafter:

* * * *

(b) use information relating to the representation to the disadvantage of the former client except as ER 1.6 would permit with respect to a client or when the information has become generally known.

ER 1.11. Successive Government and Private Employment

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(b) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.

* * * *

(d) As used in this rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

(e) As used in this rule, the term "confidential government information" means information which has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.

RELEVANT ARIZONA ETHICS OPINIONS

Ariz. Op. 85-6 (ethics/opinionview.cfm?id=307)
Ariz. Op. 89-04 (ethics/opinionview.cfm?id=589)
Ariz. Op. 89-08 (ethics/opinionview.cfm?id=593)
Ariz. Op. 93-07 (ethics/opinionview.cfm?id=429)

OPINION

A former government lawyer's conflict of interest obligations are generally found in ER 1.11. *See* ABA Formal Ethics Op. 97-409 (concluding that ER 1.11 supplants, rather than supplements, ER 1.9(a), although ER 1.9(b) remains applicable to former government lawyers); *cf.* 1 Geoffrey C. Hazard & W. William Hodes, *The Law of Lawyering* § 15.4 at 15-13, 15-14 (3rd ed. 2000) (arguing that a former government lawyer's conflict of interest obligations should be analyzed under both ER 1.9(a) and ER 1.11(a)).[2] The purpose of ER 1.11 is to "prevent[] a lawyer from exploiting public office for the advantage of a private client." ER 1.11 Comment; *see also Security General Life Ins. Co. v. Superior Court,* 149 Ariz. 332, 334, 718 P.2d 985, 987 (1986) ("This rule is intended to prevent conflicts of interest that arise in the 'revolving door' between government and private practice.").

Ethical Rule 1.11(a) prohibits a former government lawyer from personally "represent[ing] a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation." Because the purpose of the Rule is to prevent exploitation of government office, "there is no requirement that the [private] representation be adverse to the government or its interests, as there is in other conflicts of interest rules; *even representation congruent to the interests of the former client is banned, absent consent by the government*." Hazard & Hodes, *supra* § 15.4 at 15-11—15-12 (emphasis in original).

"Matter" is defined in ER 1.11(d) as including "any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties." That definition codifies the definition given in ABA Formal Op. 342, which defined the term as:

> contemplat[ing] a discrete and isolatable transaction or set of transactions between identifiable parties (footnote omitted). Perhaps the scope of the term "matter" may be indicated by examples. The same lawsuit or litigation is the same matter. . . . By contrast, work as a government employee in drafting, enforcing or interpreting government or agency procedures, regulations, or laws, or in briefing abstract principles of law, does not disqualify the lawyer . . . from subsequent private employment involving the same regulations, procedures, or points of law; the same "matter" is not involved because there is lacking the discrete, identifiable transactions or conduct involving a particular situation and specific parties (footnote omitted).

ABA Formal Op. 342 (1975), *quoted in* Hazard & Hodes, *supra* § 15.5 at 15-15.

To have participated "personally and substantially" in a matter, a government lawyer must have "become personally involved to a material degree in the investigative or deliberative process regarding the transactions in question." *Security General,* 149 Ariz. at 334, 718 P.2d at 987 (citing ABA Formal Op. 342).[3]

Conflicts under ER 1.11(a) may be waived by a government agency, subject to statutory or regulatory restrictions. ER 1.11(a). It is the former government lawyer's duty to determine the individual or entity authorized to give informed consent on behalf of a governmental entity. In most cases, the appropriate individual will be the chief legal officer for the governmental entity - e.g., the Attorney General, county attorney or city attorney - as opposed to an agency head or managerial-level employee.

If a former government lawyer is barred by ER 1.11(a) from personally representing a client and the conflict has not been waived, that conflict is not imputed to lawyers in the former government lawyer's firm. *Id.* The firm may represent the client so long as the former government lawyer is "screened from any participation in the matter and is apportioned no part of the fee therefrom" and "written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule." *Id.[4]*

In addition to considering whether he or she was "personally and substantially" involved in the same "matter" for which a new client seeks representation, the former government lawyer must consider whether ER 1.11(b) applies. ER 1.11(b) precludes a former government lawyer who acquired "confidential government information about a person" while employed by the government from representing "a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person." ER 1.11(b).

"Confidential government information" is defined narrowly in ER 1.11(e) as information (*i*) "which has been obtained under governmental authority," (*ii*) "which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose," and (*iii*) "which is not otherwise available to the public." Moreover, ER 1.11(b) "operates only when the lawyer is [sic] question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer." ER 1.11 Comment. In short, "if the [former] government lawyer does not have information about a particular party *that she learned only because of her position in the government,* Rule 1.11(b) should not apply." Hazard & Hodes, *supra* § 1.7 at 15-22 (emphasis in original).

Unlike conflicts under ER 1.11(a), a conflict under ER 1.11(b) is not waivable. *Annotated Model Rules of Professional Conduct* at 182. If a former government lawyer has a conflict under ER 1.11(b), the conflict is not imputed to his or her firm so long as the former government lawyer is screened in accordance with ER 1.11(a). *Id.*

The last question that a former government lawyer must address in deciding whether to represent a private client on matters involving a governmental entity he or she formerly represented is whether ER 1.9(b), which prohibits a lawyer from "us[ing] information relating to the representation [of a former client] to the disadvantage of the former client except as ER 1.6 would permit," precludes the lawyer from taking on the new representation. As the ABA's Standing Committee on Ethics and Professional Responsibility explained in Formal Op. 97-409, a former government lawyer representing clients against a government agency he or she formerly represented may be subject to disqualification if, in the new representation, he or she would be required to use or reveal confidences of his or her former government client.

> Although Rule 1.9(c)[5]does not provide for automatic disqualification by virtue of a lawyer's prior representational activities, its restrictions on the use or disclosure of a former client's confidences may effectively disable a lawyer from undertaking a new representation under certain circumstances (footnote omitted). If a lawyer has information relating to the prior representation of her government client that would necessarily be used or revealed in a new client's cause, but which her former client will not allow her to use or reveal, her obligations to her former client under Rule 1.9(c) would almost certainly be deemed to "materially limit" her representation of the new client under Rule 1.7(b). Not only could her inability to use or reveal her former government client's confidences compromise her competence and zeal in the new representation, but she would be subject to a disqualification motion by her former government client based on her knowledge of its confidences.
>
> * * * *
>
> Accordingly, the lawyer could not undertake the new representation unless the former government client consented to waive the confidentiality barrier posed by Rule 1.9(c).

Formal Op. 97-409, *quoted in ABA/BNA Lawyers' Manual on Professional Conduct, Ethics Opinions 1996-2000* at 1101:157. While not defining what "information relating to the representation" might trigger a former government lawyer's obligation under ER 1.9(b), the Opinion noted that "general knowledge of policies and practices of her former agency, gained through employment by or representation of that agency," would ordinarily not be considered disqualifying under ER 1.9(b). *Id.* at 1101:157 n. 17.

If a former government lawyer has a conflict under ER 1.9(b), that conflict would not be imputed to his or her firm, and other members of the firm could undertake the representation so long as the former government lawyer is screened in accordance with ER 1.11(a). *Id.* at 1101:158.

CONCLUSION

The inquiring attorney may ethically personally represent clients in matters involving state agencies the inquiring attorney formerly represented so long as the following conditions are met: First, the matter for which a new client seeks representation is not one in which the inquiring attorney personally and substantially participated while employed by the Arizona Attorney General's Office. If so, the inquiring attorney can only represent the new client if the former government client consents to the representation. Second, the inquiring attorney does not possess confidential government information that could be used to the disadvantage of a party opposing the new client. Third, the representation of the new client will not require the inquiring attorney to use the former government client's confidential information. If so, the inquiring attorney can only represent the new client if the former government client consents. If the inquiring attorney is ethically precluded from personally representing the new client, the inquiring attorney's firm may represent the client so long as the inquiring attorney is screened

in accordance with ER 1.11(a) and prompt written notice is provided to the inquiring attorney's former government client.

---

[1] **Formal Opinions of the Committee on the Rules of Professional Conduct are advisory in nature only and are not binding in any disciplinary or other legal proceedings.** 

[2] Other state and federal laws also may impose restrictions on a former government lawyer's ability to represent clients in matters involving a government agency the lawyer formerly represented. *See* A.R.S. § 38-504(A); 18 U.S.C. § 207. An analysis of those statutes is outside our jurisdiction.

[3] The former government lawyer should also consider whether the representative of a private client creates an "appearance of impropriety." *See, e.g., Romley v. Superior Court,* 184 Ariz. 223, 227, 908 P.2d 37, 41 (App. 1995); *Turbin v. Superior Court,* 165 Ariz. 195, 199, 797 P.2d 734, 738 (App. 1990).

[4] The Comment to ER 1.11 notes that the firm need not "give notice to the government agency at a time when premature disclosure would injure the client," but that notice should be given "as soon as practicable in order that the government agency will have a reasonable opportunity to ascertain that the [former government] lawyer is complying with ER 1.11 and to take appropriate action if it believes the lawyer is not complying." ER 1.11 Comment.

[5] ABA Model Rule 1.9(c) is the equivalent to Ariz. ER 1.9(b).

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Michelle N. Stinson

## ER 1.0. Terminology

**(l)** "Tribunal" denotes a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party's interests in a particular matter.

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**ER 3.3. Candor Toward the Tribunal**

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by ER 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

**Comment**

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See ER 1.0(m) for the definition of "tribunal

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause; the lawyer must not mislead the tribunal by false statements of law or fact or evidence that the lawyer knows to be false.

**Representations by a Lawyer**

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare ER 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a

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reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in ER 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with ER 1.2(d), see Comment [10] to that Rule. See ER 8.4(b), Comment [2].

**Legal Argument**

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction which has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

**Offering Evidence**

[5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. Counsel first must attempt to persuade the accused to testify truthfully or not at all. If the client persists, counsel must proceed in a manner consistent with the accused's constitutional rights. See State v. Jefferson, 126 Ariz. 341, 615 P.2d 638 (1980); Lowery v. Cardwell, 575 F.2d 727 (9th Cir. 1978). The obligation of the advocate under the Rules of Professional Conduct is subordinate to such constitutional requirements. See also Comment [9].

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See ER 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].

**Remedial Measures**

[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client or another witness called by the lawyer offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by ER 1.6. It is for the tribunal then to determine what should be done - making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See ER 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus, the client could in effect coerce the lawyer into being a party to fraud on the court.

**Preserving Integrity of Adjudicative Process**

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

**Duration of Obligation**

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

**Ex Parte Proceedings**

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in an ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

**Withdrawal**

[15] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by ER 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see ER 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by ER 1.6.

## 06-03: Limited Scope Representation; Confidentiality; Coaching; Ghost Writing 7/2006

An attorney who limits the scope of representation and coaches the client or ghost writes papers must direct the client to be truthful and candid in the client's activities. While an attorney is not required to disclose to opposing counsel that the attorney is providing limited-scope representation, the attorney must maintain client confidentiality if doing so.

**FACTS**

The inquiring attorney practices primarily family law. The attorney is reorganizing her practice to provide only limited-scope representation. The client would represent herself in most interactions with an opposing party or counsel, with the lawyer's assistance, including court appearances. The inquiring attorney would not ordinarily disclose the representation to the opposing party or counsel.

**QUESTIONS PRESENTED**

1. Must an attorney providing limited services to a client advise either opposing counsel or an unrepresented opposing party of the limited-scope representation?
2. May an attorney limit services to "coaching" the client?
3. May an attorney limit services and only represent the client in a deposition?

**RELEVANT ETHICS RULES**

**ER 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer**

....

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

**ER 1.3 Diligence**

A lawyer shall act with reasonable diligence and promptness in representing a client.

**ER 1.6 Confidentiality of Information**

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted or required by paragraphs (b), (c) or (d) or ER 3.3(a)(3).

....

**ER 3.3 Candor Toward the Tribunal**

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

....

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by ER 1.6.

....

**ER 4.1 Truthfulness in Statements to Others**

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by ER 1.6.

**ER 4.2 Communication With Person Represented by Counsel**

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

**ER 4.3 Dealing With Unrepresented Persons**

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

**RELEVANT ARIZONA ETHICS OPINIONS**

Ariz. Ethics Op. 05-06 (http://myazbar.org/Ethics/opinionview.cfm?id=525)

**OPINION**

In Ariz. Ethics Op. 05-06, this Committee explained that limited-scope representation as authorized by the Ethics Rules does not require disclosure of the limited-scope attorney's role to a tribunal. This opinion addresses the responsibility of the lawyer to others.

> **1. Must an attorney providing limited services to a client advise either opposing counsel or an unrepresented opposing party of the limited-scope representation?**

A lawyer must act with candor toward a tribunal, ER 3.3; be truthful in dealing with others, ER 4.1(a); and disclose material facts in order to avoid assisting a client's criminal or fraudulent act, ER 4.1(b). A lawyer may not counsel the client to act otherwise. ER 1.2(d). Accordingly, the lawyer providing limited services must direct the client to act in the same way the lawyer would be required to act.

The attorney's duty to disclose the limited-scope representation to opposing counsel is guided by ER 4.1. The rule requires an attorney to refrain from making a false statement of material fact or law to a third person. ER 4.1(a). Thus, the attorney complies with this rule by making only true statements to opposing counsel. Unlike disclosure to a court, ER 4.1(a) does not place an affirmative duty on the attorney to advise opposing counsel of the limited-scope representation unless it is to avoid assisting the client with a criminal or fraudulent act and then only if permitted by ER 1.6. In fact, unless required to do so by the rules, e.g., E.R. 1.6., an attorney may not disclose information pertaining to the limited representation unless authorized to do so by the client. Disclosure of the limited scope may indeed adversely affect the client's situation. Also, ER 1.6(a) allows disclosure when disclosure is impliedly authorized in order to carry out the representation.

If the attorney is authorized by the client to disclose the limited-scope representation, ER 4.2 may impose upon opposing counsel a duty to refrain from contacting the client about the subject of the representation, "unless the lawyer has the consent of the other lawyer or is authorized by law to do so." The limited-scope attorney should provide opposing counsel with explicit instructions, after consultation with the client, as to when opposing counsel may communicate about the subject of the representation with the client. The ground rules could include directions about whom the opposing counsel should contact and on what matters, to whom and where opposing counsel should send pleadings, correspondence and other notices, and whether the attorney is authorized to accept service for the client. This notice can be accomplished without disclosing the fee agreement. If the limited-scope representation is later revised or expanded it should be disclosed to the opposing counsel to meet the requirements of ER 4.1 and ER 4.2.

## 2. May an attorney limit services to "coaching" the client?

A transaction, negotiation, court appearance or deposition involves interaction between the clients, or the lawyers for the clients, as well as with the court in litigation. A client may seek a lawyer's assistance in preparing for a negotiation or oral argument. Such a client may even request the lawyer's presence during the event so that the lawyer can help deal with developments or simply buttress the client's presentation. A range of activities may constitute coaching the client in the legal activity.

Coaching may sometimes delay the dispute-resolution process. An attorney-coach should avoid unreasonably delaying the process. If the client cannot make decisions without first consulting the attorney, then that client may not be suitable for limited-scope representation.

Coaching can occur during mediation, at a settlement conference or in litigation. The attorney should be guided by ER 4.1 and ER 3.3 when deciding whether the judge, mediator, or opposing counsel should be informed of the limited-scope representation. Attorneys in Arizona must be aware that coaching in litigation, if done in the courtroom, may be considered an appearance by the court. Except for experimental Rule 9(B), Arizona Rules of Family Law Procedure, presently there are no provisions in the applicable procedural rules allowing an attorney in Arizona to make a limited appearance. Experimental Rule 9(B) provides on a three-year trial basis for an appearance in compliance with ER 1.2 on matters including protective orders, establishment or modification of child support, temporary orders, and qualified domestic relations orders. Rule 97 authorizes Family Law Form 1 "Notice of Limited Scope Representation."

## 3. May an attorney limit services and only represent the client in a deposition?

There is no ethical limitation to a limited-scope attorney representing the client at a deposition. The legal question whether this activity constitutes an appearance in the action is outside the scope of the Committee's jurisdiction. The obligations of a lawyer appearing at a deposition do not change depending on whether the scope of representation is limited.

**CONCLUSION**

An attorney who provides limited-scope representation to a client does not have an affirmative duty to advise opposing counsel of the limited-scope representation unless it is to avoid assisting the client with a criminal or fraudulent act and then only if permitted by ER 1.6. In an appropriate case and under appropriate circumstances, an attorney may limit services to "coaching" a client. Because coaching may occur at a mediation, at a settlement conference or in litigation, the attorney should be guided by ER 4.1 and ER 3.3 when deciding whether the judge,

mediator, or opposing counsel should be informed of the limited-scope representation. Finally, an attorney may limit services and only represent the client in a deposition, but should be aware of whether doing so constitutes an appearance in the case.

## 90-20: Impartiality and Decorum of the Tribunal

12/1990

Ethically proper for attorney working with Arizona Center for Law-Related Education to communicate with judicial officer on matters wholly unrelated to litigation matters before the court. Such communications are not ex parte contacts.

### FACTS

The inquiring lawyer has been working with the Arizona Bar Foundation's Arizona Center for Law-Related Education regarding development and expansion of law-related education in the state. Law-related education programs often team judges and lawyers together in programs.

Cases from the inquiring lawyer's law firm are assigned to judges with whom the inquiring lawyer would like to work on law-related education programs. The situation may also arise where one of the inquiring attorney's cases is assigned to a judge with whom the attorney is working on a project.

### QUESTION

May an attorney, with ethical propriety, communicate with a judge regarding law-related education programs at a time when the attorney (or a member of the attorney's law firm) has cases pending before the judge?

### ETHICAL RULES INVOLVED

**ER 3.5. Impartiality and Decorum of the Tribunal**

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or an official of a tribunal by means prohibited by law;

(b) communicate ex parte with such a person except as permitted by law; or

*****

### CODE OF JUDICIAL CONDUCT PROVISIONS INVOLVED

**Canon 2. A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities**

*****

B. A judge should not allow his….social, or other relationships to influence his judicial conduct or judgment…..nor should he convey or permit others to convey the impression that they are in a special position to influence him….

**Canon 3. A Judge Should Perform the Duties of His Office Impartially and Diligently**

*****

**A. Adjudicative Responsibilities.**

*****

(4) A judge should accord to every person who is legally interested in a proceeding, or his lawyer; full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte applications concerning a pending or impending proceeding....

(See 17A A.R.S. Rules of the Supreme Court, Rule 81, Code of Judicial Conduct, at pp. 508-510.)

**RELEVANT PRIOR ARIZONA OPINIONS**

Opinions Nos. 87-2 (January 20, 1987) and 87-17 (July 27, 1987).

**OPINION**

The inquiring attorney's basic concern is that communication with a judicial officer about a law-related education program may be perceived as an ex parte communication under ER 3.5 This committee, however, believes it is clear that the only ex parte communications forbidden by ER 3.5 are those concerning the pending or impending proceedings before the court. Communications with a judicial officer on matters wholly unrelated to litigation matters before the court are not ex parte communications. If they were, judges would, as a practical matter, be precluded from conversing with any lawyers, either socially or through professional associations or bar committees.

This view is consistent with our prior opinions, wherein we have determined that ER 3.5(b ) prohibits an attorney from communicating ex parte with a judge concerning a case pending before the judge, whether the subject of the communication concerns the merits of the case or merely a procedural or ministerial matter. See our Opinions Nos. 87-2 (January 20, 1987) and 87-17 (July 27, 1987). This committee is unwilling to extend the reasoning of those opinions to communications unrelated to any pending or impending matter before the judge.

The working relationship that may develop between a judge and an attorney through work on law-related education or, for that matter, on bar committees, raises issues which are more akin to those in the area of judicial ethics regarding the appearance of fairness and the need for disqualification, rather than ex parte communication. For example, a judge and an attorney may develop a close friendship through working together on law-related education programs. The judge may have to consider disclosing this relationship to opposing counsel in litigation if the judge thought that, because of such a relationship, his or her impartiality might reasonably be questioned under Judicial Canon 3. Moreover, under certain circumstances, a judge may have to consider disclosing contacts with opposing counsel on unrelated matters, such as law-related education programs or bar committee work, simply to avoid the appearance of impropriety as required by Judicial Canon 2.

**Formal Opinions of the Committee on the Rules of Professional Conduct are advisory in nature only and are not binding in any disciplinary or other legal proceedings.**

## 87-17: Communication 7/1987

Attorney may not have ex parte communications with a hearing officer or administrative law judge for purposes of resolving procedural matters unless expressly permitted by law.

### FACTS

The inquiring attorney serves as an administrative law judge. He does not have a secretary. As a consequence, he must do all his own scheduling of appointments, issuing subpoenas, setting deadlines for filings, and accepting such filings. He is concerned because our Opinion No. 87-2 prohibits all ex parte contact between lawyers participating in a case and judges therein, including administrative law judges. He would like to be able to contact lawyers directly for the limited purpose of scheduling hearings or performing other ministerial or clerical tasks.

### QUESTION

May an attorney have ex parte communications with a hearing officer or administrative law judge, whether such contact is initiated by the attorney or the administrative law judge, for purposes of resolving procedural matters, so long as the merits of any case are not discussed?

### ETHICAL RULE INVOLVED

ER 3.5(b). Impartiality and Decorum of the Tribunal

### OPINION

ER 3.5(b) of the Rules of Professional Conduct prohibits a lawyer from communicating ex parte with a judge except as permitted by law. This rule is identical to ABA Model Rule 3.5(b). A review of Arizona cases reveals no case which expressly permits ex parte communication for ministeral or clerical purposes. In McElhanon v. Heng, 151 Ariz. 403, 728 P.2d 273 (1986), certain examples of ex parte communications which were permitted by law were listed. These exceptions include contacts authorized by A.R.S. SS 14-3301 et seq.; A.R.S. S 12-213(A); Rule 65(d), Rules of Civil Procedure (16 A.R.S.); and the federal bankruptcy act, 11 USCA SS 101 et seq.

Cases in other jurisdictions have dealt primarily with DR 7-110 of the Code of Professional Responsibility, the predecessor to current ER 3.5(b). Most of these cases are concerned with the appearance of impropriety which, while perhaps understood, is no longer a specific consideration. These cases include People v. Conte, 304 N.W.2d 485 (Mich. App. 1981); In Re Johnathan S., 88 Cal. App. 3d 468, 151 Cal. Rptr. 810 (1979); People v. District Court, 560 P.2d 828 (Colo. 1977), Chicago, M., St. P. & Pac. R. v. Washington State Commission, 67 Wash. 2d 802, 557 P. 2d 307 (1976);Williams v.Farmers Insurance Group, 720 P.2d 598 (Colo. App., 1985).

The reasons for the prohibition against ex parte communications are clear. Without such a prohibition the communicant might gain an unfair advantage in litigation by influencing the judge, however innocently, while the other party is unable to rebut. Many of the cases which discuss the issue turn on whether the ex parte communication tainted the proceedings in such a manner as to require reversal of a lower court's decision. State v. Perkins, 141 Ariz. 278, 686 P.28 1248 (1984); State v. Mincey, f41 Ariz. 425, 687 P.26 1180 (1984); Western Gillette Inc. v. Arizona Corporation Commission, 121 Ariz. 541, 592 P.2d 375 (App. 1979). Other cases, involving disciplinary proceedings, or reversal of a lower court's decision, stressed the appearance of impropriety. People v. District Court, 560 P.2d 828 (Colo. 1977); Chicago, M., St. P. & Pac R. v. Washington State Commission, supra; Heavey v. State Bar, 131 Cal. Reptr. 406, 551 P.2d 1238 (1976). In People v. Conte, 104 Mich. App. 73, 304 N.W. 2d 485 (1981), an ex parte telephone communication occurred between the prosecutor and a Court of Appeals judge. It was not disputed that the communication did not involve the merits of the case. Nevertheless, the court held that the communication violated the spirit of DR 7-110(B).

There are two predominant themes throughout the cases. The prohibition against ex parte communications is designed to (1) insure the fairness of judicial proceedings, and (2) guard against the appearance of any impropriety to the end that the integrity of the judicial system may be preserved.

Given the wording of ER 3.5(b), which prohibits ex parte communication between lawyer and judge except as permitted by law, there seems little room to compromise. Nevertheless, there appear to be alternatives. Conference calls can be arranged. Communications could be in writing, addressed to all parties. The judge may establish a routine status conference with all parties present to settle administrative matters. As a final alternative, the administrative law judge may apprise the other party of any ex parte communication, allowing the other party time to be heard, and thus lifting the communication out of the realm of ex parte communications. The later alternative clearly should be used only for procedural matters.

Ex parte communication of any kind between a lawyer and a judge is prohibited by ER 3.5(b) unless permitted by law. The instant case is not one in which ex parte communication is specifically permitted by law. Nevertheless, the administrative law judge may, by contacting the non-communicating party and allowing her or him to be heard on a procedural matter, lift the communication out of the ex parte realm. Such communications must be limited to purely procedural matters.

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**ER 1.13. Organization as Client**

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action or refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the

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lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of ER 1.7. If the organization's consent to the dual representation is required by ER 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

**Comment**

**The Entity as the Client**

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by ER 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by ER 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by ER 1.6.

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph (b) makes clear, however, that when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonable necessary in the best interest of the organization. As defined in Rule 1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

[4] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer

reasonably believes to be of sufficient importance to warrant doing so in the best interests of the organization.

[5] Paragraph (b) also makes clear that when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

**Relation to Other Rules**

[6] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under ERs 1.8, 1.16, 3.3 or 4.1. Paragraph (c) of this Rule supplements Rule 1.6(d) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not modify, restrict, or limit the provisions of Rule 1.6(d)(1)-(5). Under paragraph (c) the lawyer may reveal such information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. It is not necessary that the lawyer's services be used in furtherance of the violation, but it is required that the matter be related to the lawyer's representation of the organization. If the lawyer's services are being used by an organization to further a crime or fraud by the organization. Rules 1.6(d)(1) and 1.6(d)(2) may permit the lawyer to disclose confidential information. In such circumstances Rule 1.2(d) may also be applicable, in which event, withdrawal from the representation under Rule 1.16(a)(1) may be required.

[7] Paragraph (d) makes clear that the authority of a lawyer to disclose information relating to a representation in circumstances described in paragraph (c) does not apply with respect to information relating to a lawyer's engagement by an organization to investigate an alleged violation of law or to defend the organization or an officer, employee or other person associated with the organization against a claim arising out of an alleged violation of law. This is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.

[8] A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b) or (c), or who withdraws in circumstances that require or permit the lawyer to take action under either of these paragraphs, must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

**Government Agency**

[9] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of lawyers may be more difficult in the government context. See Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and

assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope. Government lawyers also may have authority to represent the "public interest" in circumstances where a private lawyer would not be authorized to do so.

[10] A government lawyer may have an obligation to render advice to a government entity and constituents of a government entity. Normally, the government entity, rather than an individual constituent, is the client. Some government lawyers may also be elected officials or the employees of elected officials who have statutory obligations to take formal action against individual constituents under certain circumstances. The government lawyer, therefore, must clearly identify the client and disclose to the individual constituents any limitations that are imposed on the lawyer's other legal obligations. See ER 1.2(c) and related comments. Further, where a conflict arises between a constituent and the government entity the lawyer represents or between constituents of the same government entity, the lawyer must make the identity of the client clear to the constituents and determine which constituent has authority to act for the government entity in each instance.

**Clarifying the Lawyer's Role**

[11] There are times when the organization's interests may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[12] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

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## ER 2.1. Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

### Comment

### Scope of Advice

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

### Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under ER 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under ER 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

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## ER 3.9. Advocate in Non-adjudicative Proceedings

A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of ERs 3.3(a) through (c), 3.4(a) through (c), and 3.5.

### Comment

[1] In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body must deal with it honestly and in conformity with applicable rules of procedure. See ERs 3.3(a) through (c), 3.4(a) through (c), and 3.5.

[2] Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. However, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.

[3] This Rule only applies when a lawyer represents a client in connection with an official hearing or meeting of a governmental agency or a legislative body to which the lawyer or the lawyer's client is presenting evidence or argument. It does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency or in connection with an application for a license or other privilege or the client's compliance with generally applicable reporting requirements, such as the filing of income-tax returns. Nor does it apply to the representation of a client in connection with an investigation or examination of the client's affairs conducted by government investigators or examiners. Representation in such matters is governed by ERs 4.1 through 4.4.

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# 2022 Land use Law Update
# June 3, 2022

## Ethics for Land Use and Government Attorneys

Jon Paladini
Of Counsel
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jon@piercecoleman.com

American Planning Association
Arizona Chapter
*Creating Great Communities for All*

RMLUI
ROCKY MOUNTAIN
LAND USE INSTITUTE

STATE BAR OF ARIZONA

# 2022 Land Use Law Update
# June 3, 2022

**Agenda**

- ER 1.11 Former Government Attorneys
- ER 1.13 Organization as Client
- ER 2.1 Advisor
- ER 3.3 Candor to the Tribunal
- ER 3.5 Ex Parte Contact
- ER 3.9 Advocate in Non-adjudicative Hearing


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# 2022 Land Use Law Update
# June 3, 2022

**ER 1.11. Special Conflicts of Interest for Former and Current Government Officers and Employees**

A lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.


2017's Best Urban Planning Memes - planning peeps



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# 2022 Land Use Law Update
# June 3, 2022

## ER 1.11. Special Conflicts of Interest for Former and Current Government Officers and Employees

May personally represent clients in matters involving former public entity if:

- The matter is not one in which the attorney personally and substantially unless former government client consents to the representation
- Cannot possess confidential government information that could be used to the disadvantage of a party opposing the new client
- Representation of new client will not require attorney to use the former government client's confidential information. If so, the inquiring attorney can only represent the new client if the former government client consents.

Urban Planning Career Ladder - planning peeps

# 2022 Land Use Law Update
# June 3, 2022

**ER 1.13. Organization as Client**

(a) Lawyer represents the organization acting through its duly authorized constituents (Manager or Council).

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization.

# 2022 Land Use Law Update
# June 3, 2022

**ER 3.3. Candor to the Tribunal**

**ER 1.0. Terminology**

**(l)** “Tribunal” includes legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party's interests in a particular matter.


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# 2022 Land Use Law Update
# June 3, 2022

**ER 3.3. Candor to the Tribunal**

(a) Cannot knowingly:

(1) make a false statement of fact or law or fail to correct a false statement of material fact or law
(2) fail to disclose legal authority known to be directly adverse to the position of the client and not disclosed by opposing counsel


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# 2022 Land Use Law Update
# June 3, 2022

**ER 3.5. Impartiality and Decorum of the Tribunal**

A lawyer shall not:

(a) seek to influence official of a tribunal by means prohibited by law

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

(d) engage in conduct likely to disrupt a tribunal.


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# 2022 Land Use Law Update
# June 3, 2022

**ER 3.5. Impartiality and Decorum of the Tribunal**

A government lawyer may be called upon to advise the tribunal after another lawyer in the same office has advised the other government constituent about the matter, or while another attorney from the same office appears before the tribunal. Advice given by the lawyer to the tribunal does not constitute impermissible ex parte contact, provided that reasonable measures are taken to ensure the fairness of the administrative process, such as using different attorneys to advise and represent the two constituents and screening those lawyers from one another or strictly limiting the lawyer's advice to the tribunal to procedural matters. In no event can the same lawyer both provide advice to the tribunal and appear before it in the same matter, even if the advice is limited to procedural advice.


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# 2022 Land Use Law Update
# June 3, 2022

**ER 3.9. Advocate in Non-adjudicative Proceedings**

A lawyer representing a client before a legislative body or administrative agency in a non-adjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of ERs 3.3(a) through (c), 3.4(a) through (c), and 3.5.

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In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body must deal with it honestly and in conformity with applicable rules of procedure.


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# 2022 Land Use Law Update
# June 3, 2022






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# AICP Ethics

## (Code Update)

Prepared by Jim Peters, AICP Ethics Officer

Entire Rule Text Added June 2022

1

# A Few Ethical Questions

**As posed by Michael Schur, creator of "The Good Place" TV series**

- **What are we doing?**
- **Why are we doing it?**
- **Is there something we could do that's better?**
- **Why is it better?**




2


# APA's Ethical Principles in Planning

Adopted in 1980 by the American Planning Association; rev. 1992

*Guidelines for advisors, advocates, and decision makers in the planning process*

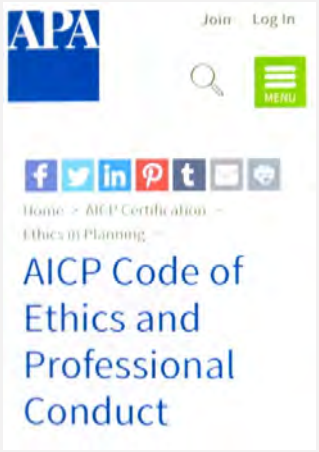
**1. Serve the public interest**

**2. Maintain high standards of integrity and proficiency**

**3. Improve planning competence**



3




# AICP's Ethics Code

Adopted in 1948 by the American Institute of Planners; rev. 1959, 1970, 1978, 1991, 2005, 2016, 2022

**A. Aspirational Principles**

**B. Rules of Conduct**

**C. Advisory Opinions**

**D. Complaints of Misconduct**

**E. Discipline of Members**



4

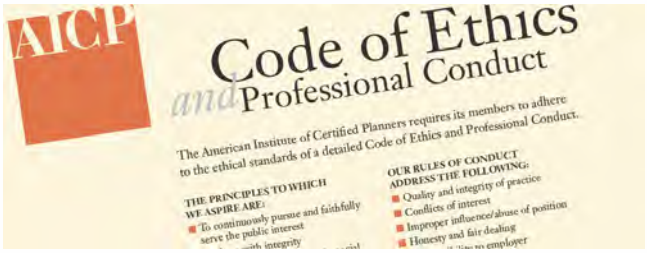
# Key Aspects of the Code Update (2022)

**A. Aspirational Principles**

- Organization
- Cultural biases
- Equity foundation of plans
- Promoting ethics

**B. Rules of Conduct**

- Organization
- Discrimination/Harassment
- Ethics investigations
- Claiming credit






5

Prior Headings

# Aspirational Principles

Section A
of the *AICP Ethics Code*

Our Overall Responsibility to the Public

Our Responsibility to Our Clients and Employers

Our Responsibility to Our Profession and Colleagues



6

New Headings

## Aspirational Principles

Section A
of the *AICP Ethics Code*

**People who participate in the planning process shall:**

1. Continuously pursue and faithfully serve the public interest
2. Do so with integrity
3. Work to achieve economic, social, and racial equity
4. Safeguard the public trust
5. Improve planning knowledge and increase public understanding of planning activities



7

New Headings

## Rules of Conduct

Section B
of the *AICP Ethics Code*

**The 24 Rules to which certified planners can be held accountable have been reorganized under these new headings:**

1. Quality and Integrity of Practice
2. Conflict of Interest
3. Improper Influence/Abuse of Position
4. Honesty and Fair Dealing
5. Responsibility to Employer
6. Discrimination/Harassment
7. Bringing an Ethics Charge/Cooperation with Ethics Officer



8

## Major Revisions
# Rules of Conduct

**Rule 3 – amended to include "work to be performed under the direction of another professional."**

We shall not accept work beyond our professional competence, but may with the understanding and agreement of the client or employer, accept such work to be performed under the direction of, another professional competent to perform the work and acceptable to the client or employer.

**Rule 5 – added "or pressure" to "direct (or pressure) other professionals…"**

We shall not direct or pressure other professionals to make analyses or reach findings not supported by available evidence.

**Rule 8 – added "make full disclosure of potential conflict part of the public record…"**



9

## Major Revisions
# Rules of Conduct

**Rule 8 – added "make full disclosure of potential conflict part of the public record…"**

We shall not perform work on a project for a client or employer if, in addition to the agreed upon compensation from our client or employer, there is a possibility for direct personal or financial gain to us, our family members, or persons living in our household, unless: a) our client or employer, after full prior written disclosure from us, consents in writing to the arrangement; and b) we make full disclosure of the potential conflict part on the public record at every public meeting and in all written reports related to the work.

**Rule 9 – eliminated "if prohibited by law" from the end of "engaging in private communications when planner makes a binding, final determination."**

As public officials or public employees, we shall not engage in private communications with planning process participants if the discussions relate to a matter over which we have authority



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Major Revisions

# Rules of Conduct

**Rule 11 – combined old Rules 11 and 13 regarding soliciting employment through false claims and "implying an ability to improperly influence decisions."**

We shall not solicit prospective clients or employment through use of false or misleading claims, nor shall we, in the conduct of our work, imply an ability tnfluence decisions

**Rule 16 – added "credit" to seeking "professional recognition (, credit,) or acclaim" for others' work**

We shall not use the product of others' efforts to seek professional recognition, credit, or acclaim intended for producers of original work

**Rule 18 – clarified definitions of employment and added "in no case shall a planner engage in any outside work that would create an actual conflict of interest."**



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Major Revisions

# Rules of Conduct

**Rule 18 – clarified definitions of employment and added "in no case shall a planner engage in any outside work that would create an actual conflict of interest."**

We shall not, as employees, undertake other employment in planning or a related profession, whether or not for financial remuneration, without having made full written disclosure to the employer who furnishes our pay and having received subsequent written permission to undertake additional employment, unless our employer has a written policy permitting such employment without consent. In no case shall a planner engage in any outside work that would create an actual conflict of interest.

**Rule 20 – replaced "shall not unlawfully discriminate" with "shall not commit or ignore an act of discrimination or harassment."**

We shall not commit or ignore an act of discrimination or harassment.



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Major Revisions

# Rules of Conduct

**Rule 21 – added requirement to cooperate with an ethics investigation, even if not the subject of the complaint**

We shall not withhold cooperation or information from the AICP Ethics Officer or the AICP Ethics Committee if a charge of ethical misconduct has been filed against us or if it is determined by the Ethics Officer or Ethics Committee that we have information/knowledge relevant to a charge filed against another AICP member.

**Rule 23 – combined old Rules 23 and 24 to ensure ethics process is not used "for any inappropriate purpose."**

We shall not use the AICP ethics process for any inappropriate purpose, including threatening to file, or filing an ethics charge against another planner for personal, pecuniary, or professional gain or filing of a meritless complaint against another planner.



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# Ethical Misconduct Cases in 2021

**18 Cases Dismissed**

No preliminary charge filed (13 cases); Preliminary charge filed (5 cases).

**6 Cases Result in Disciplinary Actions**

(Two) Confidential Letters of Admonition for "wrongful conduct:" 1) for plagiarism and 2) for sexual harassment .

Public Letter of Admonition for "misstating facts" and "using others' efforts to seek professional recognition."

Indefinite Suspension of AICP credential for a repeat offense of "wrongful conduct," this time involving text messages containing derogatory comments about a city council member.

Revocation of AICP credential for working two public jobs simultaneously—without having notified either employer.

Permanent Revocation of AICP and FAICP credentials for continuing to use these credentials after they were revoked in 2017 for the conviction of a "serious crime."



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# Ethics Topics in 2021

**Based on misconduct cases and informal inquiries**

*The most commonly cited Rules of Conduct were: #4 (outside employment; new #18), #1 (accurate information), and #7 (confidential information; new #13).*




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# AICP Code of Ethics and Professional Conduct

## Principles to Which We Aspire and Our Rules of Conduct

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1

## Disclaimer:

This session has been created to provide general education regarding the AICP Code of Ethics. Though examples, sample problems, and question and answer sessions are an important part of illustrating application of the code's provisions, all certified planners should be aware that "Only the Ethics Officer [Chief Executive Officer of APA/AICP] is authorized to give formal advice on the propriety of a planner's proposed conduct." (AICP Code of Ethics, Section C3). If you have a specific question regarding a situation arising in your practice, you are encouraged to seek the opinion of the Ethics Officer."

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2

# Mayor and Susan

Principle 4c

Do not let any official action be influenced by personal relationships

Principle 4e

Avoid a conflict of interest or even the appearance of a conflict of interest in accepting assignments from clients or employers.

Rule 15

We shall not misstate our education, experience, training, or any other facts which are relevant to our professional qualifications.

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# Denise and Ray

Principle 4a

Deal fairly with all participants in the planning process.

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4

# Bill Boliver

Rule 23

We shall not use the AICP ethics process for any inappropriate purpose, including threatening to file, or filing an ethics charge against another planner for personal, pecuniary, or professional gain or filing of a meritless complaint against another planner.

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5

# Susan and Ray

Principle 4g

Neither seek nor accept any gifts or favors, nor offer any, under circumstances in which it might reasonably be inferred that the gifts or favors were intended or expected to influence a participant's objectivity as an advisor or decision-maker in the planning process.

Rule 7

We shall not, as public officials or employees, accept from anyone other than our public employer any compensation, commission, rebate, or other advantage that may be perceived as related to our public office or employment.

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6

# Bill Boliver #2

Rule 13

We shall not disclose or use to our advantage, nor that of a subsequent client or employer, information gained in a professional relationship that the client or employer has requested be held inviolate or that we should recognize as confidential because its disclosure could result in detriment to the client or employer., except when disclosure is required: (1) by process of law, or (2) to prevent a clear violation of law, or (3) to prevent a substantial injury to the public.

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# Thank you!

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8

# Scenario:

You hire an open space consultant. The consulting firm's accounting software is set up to charge a maximum of 40-hours per week. The project consistently takes the consultant 60-hours per week. Therefore, the consultant is basically donating (giving) your town 20-hours per week of time on the project. Is this ethical? Does this give the consultant an advantage in the future over the others in the selection process?

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9

## Principle 4a

Deal fairly with all participants in the planning process.

## Principle 4g

Neither seek nor accept any gifts or favors, nor offer any, under circumstances in which it might reasonably be inferred that the gifts or favors were intended or expected to influence a participant's objectivity as an advisor or decision-maker in the planning process.

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10

The not yet ready to be on the Planning Commission Players:
Susan Ross AICP, Planning Director
Mayor Jim McCarthy: Dan Folke
Denise LeFleur, Mayoral candidate: Sarah Meggison
Ray Covey AICP, Parks Director
Robin Smith, Commercial real estate developer: Sandra Hoffman
Narrator: Jerry Stabley

Narrator:
Now we go to Pleasantville, a modestly-sized city with a small town feel, located just outside of metro Atlanta. Susan Ross, AICP is a planning director in her third year on the job has a staff of 20; her portfolio includes typical planning responsibilities as well as permit operations.

Pleasantville has a strong mayor form of government with a very popular mayor, Jim McCarthy, who is in his second four-year term. He has made it clear to everyone that he is going to run for a third term. The city continues to experience a modest amount of development— with both steady job and population growth.

Susan is working in her office when the Mayor pays her a visit.

Susan:
Good morning Mayor, this is an unexpected pleasure!

Mayor:
Well Susan, I just wanted to stop by to see how everything is going! You know how much I value the planning work your staff does. I think it is essential to our city's future, just as it is important for any well-run business.

Susan:
Thank you Mayor, I know that your family has been in business in Pleasantville for many decades.

Mayor:
Yes, our hog raising facility is the envy of Peach County.

Susan:
How is the work going on the July 4 fundraiser?

Mayor:
I am proud to say that this will be 5th year I have organized this event. Last year, we brought in over $1 million for the Foundation for Disadvantaged Children!

Susan:
Our downtown city park sure has served as a great home for the event.

Mayor:
That is true!

By the way, I was talking to Joe at the barber shop yesterday. He told me that you both graduated from Arizona State. I am sure when we interviewed you that you told us that you were a University of Georgia bulldog!

Narrator:
Two dozen businesses sponsor the event, including major design firms, to the tune of $10-50,000. Most of the sponsors are also political supporters of the mayor. Almost all of the work for the event is done by volunteers, including some city employees. There is a well-known expectation that directors of city agencies plus their top staff each donate at least $100. Susan makes a substantial contribution every year and "encourages" her top direct reports to attend and make the $100 "suggested" donation. Other staff are encouraged to attend as well and make whatever donation they are comfortable with.

***What are the ethical dilemmas here?***

***In the best of all worlds, how should this expectation have been handled?***

***Barring that, what should Susan have done when asked?***

***Slide***

Narrator:
Denise LeFleur has announced that she will oppose the Mayor. She is discussing her concerns about the event with the Parks Director, Ray Covey.

Denise:
Everyone knows about Mayor McCarthy's political and business ties with the event sponsors and the fact that city staff donate and run the event.

Ray:
Since it is held in a city park, we need to have city staff there to assure the safety of the attendees and to protect city property

Denise:
I also understand that the mayor has never applied for a permit.

Ray:
Ms. LeFleur, the Mayor does not need a permit because it is a city event,

Denise:
How can it be a city event; all the proceeds are run through the private foundation!

Ray:
We do not control where the money goes after it is collected.

Denise:
I see. I will be holding an event in June which will raise funds for the Children's hospital. I am on the board of the hospital which is run by the Caring Corporation. I will expect to have the same assistance from staff as the mayor receives. I will also be asking every city employee who donates to the Mayor's event to donate to this event.

Narrator:
***How should Ray and Susan handle this request?***

***Slide***

Narrator:
Robin Smith is a commercial real estate developer. She is a $50K supporter of the mayor's event and is also the foundation board chair.

Robin:
Thanks for meeting with me, Susan. I am proposing to build a supersized Piggly Wiggly on Route 20 on the edge of town. Now I know the land includes a federally and locally designated wetland, but the Mayor has told me that that will not be a problem.

I am going to finance the project entirely through private means without the use of public money. I know that staff can approve many permits and that you have a major role in all permitting actions. That is why I am glad you are the Director because I know you are a strong supporter of economic development for Pleasantville. Please keep this confidential until I can have some initial meetings with key community members.

Susan:
Thank you for sharing your plans with me. The city has an environmental review process that includes an option for a city Finding of No Significant Impact (FONSI) that's a part of the conditional use permit process required for all disturbances of wetlands in the city. I will let Bill Boliver, the city's environmental officer know about this project and will ask him to keep it confidential for the time being.

I make the final recommendations to the city council after staff review and then an action by the council is required.

Narrator:
Susan is concerned about the political/business ties with the proposed Piggly Wiggly and is letting the Mayor know.

Susan:
Mayor, I have not seen an application yet, but I believe I should turn the wetlands issue over to an administrator from the Georgia Department of Environmental Conservation. They would then make the FONSI recommendation to city council.

Mayor:
I don't agree with that approach, and I have to question your loyalty to the city. Don't you trust me or your staff? Don't you support economic development for Pleasantville? What if this store ends up in Easttown?

***Does Susan have the ability to turn over this issue to a state agency?***

***Should she turn it over?***

Narrator:
Susan and Ray are meeting in Susan's office

Susan:
I was thinking about turning the Piggly Wiggly wetlands issue over to an administrator from the Georgia Department of Environmental Conservation. Instead, we are going to hire a consulting firm as an independent third party to carry out the environmental review.

Ray:
Thanks for keeping me in the loop. I was talking to Bill Boliver, the city's environmental officer, at the reception for AICP members. He told me that he was so unhappy with your decision that he was considering filing an ethics charge against you!

Narrator:
***What is Bill Boliver's ethical issue?***

***Slide***

Narrator:
Susan and Ray are chatting in the lunch room.

Susan:
I just finished the RFP for the outside firm to handle the environmental review. I set it up so the review panel will be myself, and the public works and economic development.

Ray:
I have heard from a couple of local engineering and planning firms. They are interested. You know, I think two are major contributors to the mayor's July 4 event. One of them also sponsors the annual holiday party that attracts community leaders, elected officials, public agency staff and design professionals.

Susan:
That party is certainly the "see and be seen" event of the holidays. You and I attend each year, along with the other directors and top staff. And they don't charge a fees or ask for a donation.

***Should the director attend?***

***Should the consulting firm (headed by an AICP planner) invite the three directors on the selection committee, or exclude them this year?***

Narrator:
Early in the new year, the contract has been awarded to the firm that sponsors the holiday party, and Bill Boliver has decided to explore other job options while still employed by the city.

In one job interview with a rival to the firm that was awarded the contract, he implies that he probably can secure a contract from a well-funded coalition that seeks both to block the big-box project and to strengthen the city's environmental standards

Both the project and wetland have become political issues in this year's mayoral and city council elections. The job applicant touts his knowledge of the city, also noting that he has maintained his own file of city documents on his home computer. He also suggests that some of the anti-project information on the coalition's website came from him. The interviewer is also AICP.

***Ethical Issues?***

***What should the AICP member interviewer do?***

***Slide***


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## EV Ad Hoc Committee

- Established by Mayor Gallego on June 25, 2021
- Comprised of one City Council member and 14 members
- Develop an EV Roadmap – strategies and recommendations
- Established three subcommittees:
- SC1 – Education, Outreach and Equity
- SC2 – Public, Workplace and Home Charging Infrastructure
- SC3 – City Fleet and City Charging Infrastructure
- Supported by multiple City Departments
- Sunsets end of June 2022

2

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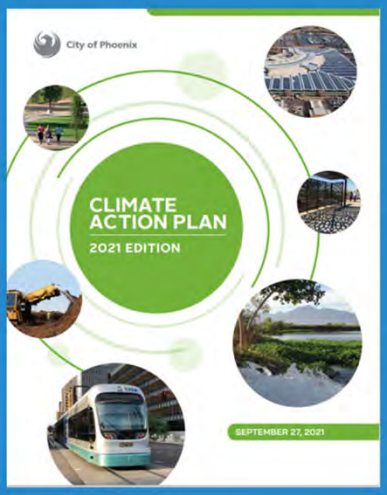
# Climate Action Plans Goals

## Electric Vehicle 2030 Goals

Support 280,000 electric vehicles in the community

- Conduct education & outreach campaign
- Install 500 EV charging ports
- Explore electric vehicle building codes
- Acquire 200 light duty electric vehicles
- Implement equity principles

Approved October 12, 2021

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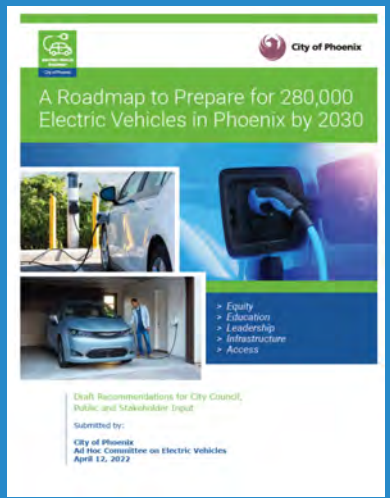
# Draft EV Roadmap Overview




**PURPOSE OF THE ROADMAP**

Establish strategies to:

- Prioritize Equity
- Conduct EV Education and Outreach
- Increase EV Ownership
- Accelerate Installation of EV Charging Infrastructure
- Lead by Example in City Operations

**COMMUNITY INPUT AND OUTREACH TIMELINE**

April and May 2022

**FINAL AD HOC RECOMMENDATIONS**

June 2022

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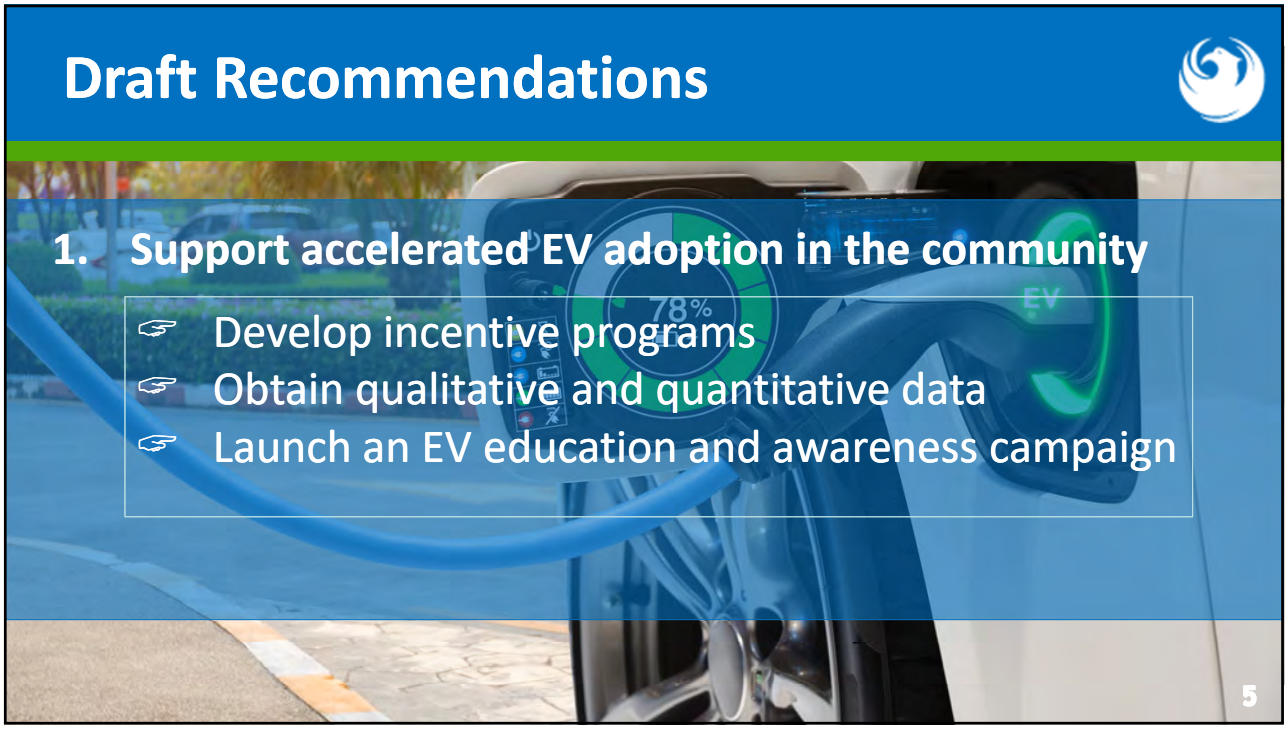
# Draft Recommendations



## 1. Support accelerated EV adoption in the community

- Develop incentive programs
- Obtain qualitative and quantitative data
- Launch an EV education and awareness campaign

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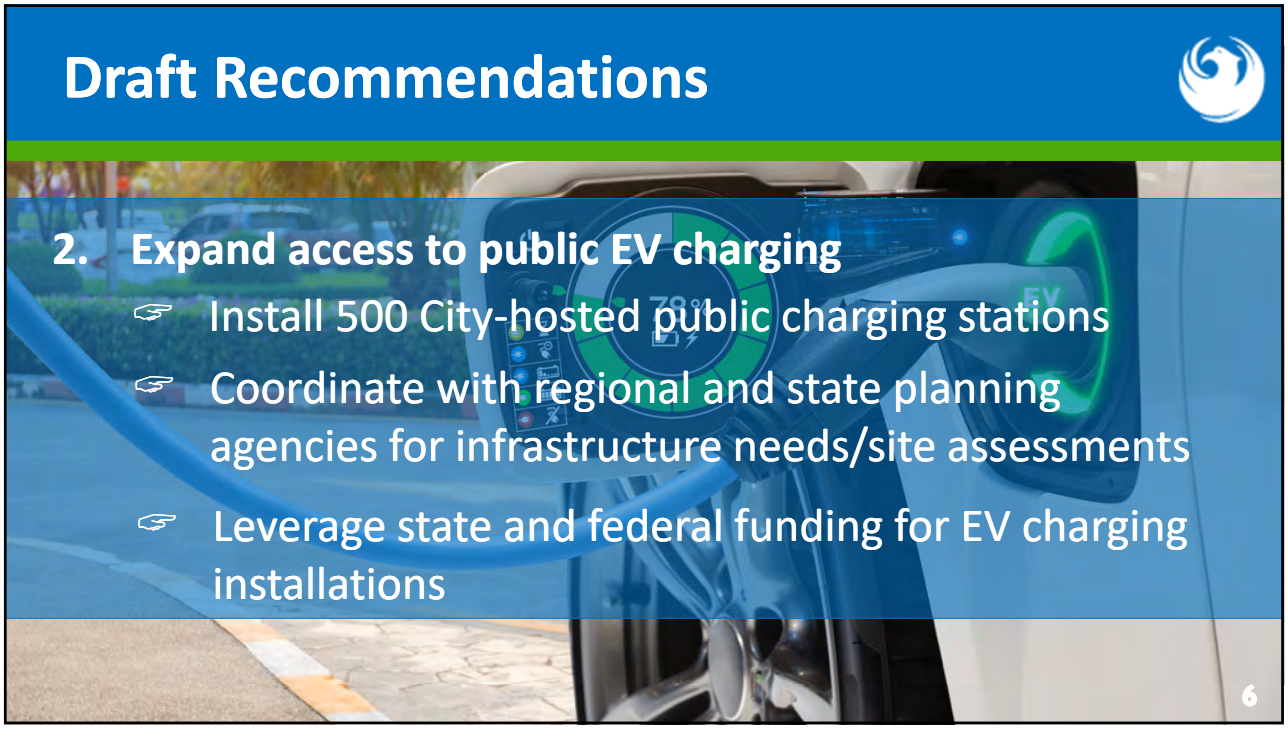
# Draft Recommendations



## 2. Expand access to public EV charging

- Install 500 City-hosted public charging stations
- Coordinate with regional and state planning agencies for infrastructure needs/site assessments
- Leverage state and federal funding for EV charging installations

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# Draft Recommendations

**3. Support access to home, business, workplace charging**

- Investigate opportunities for streamlined permitting
- Leverage best practices from other comparable cities for future EV Building Codes and Zoning Ordinance language
- Continue to coordinate with development community and utilities

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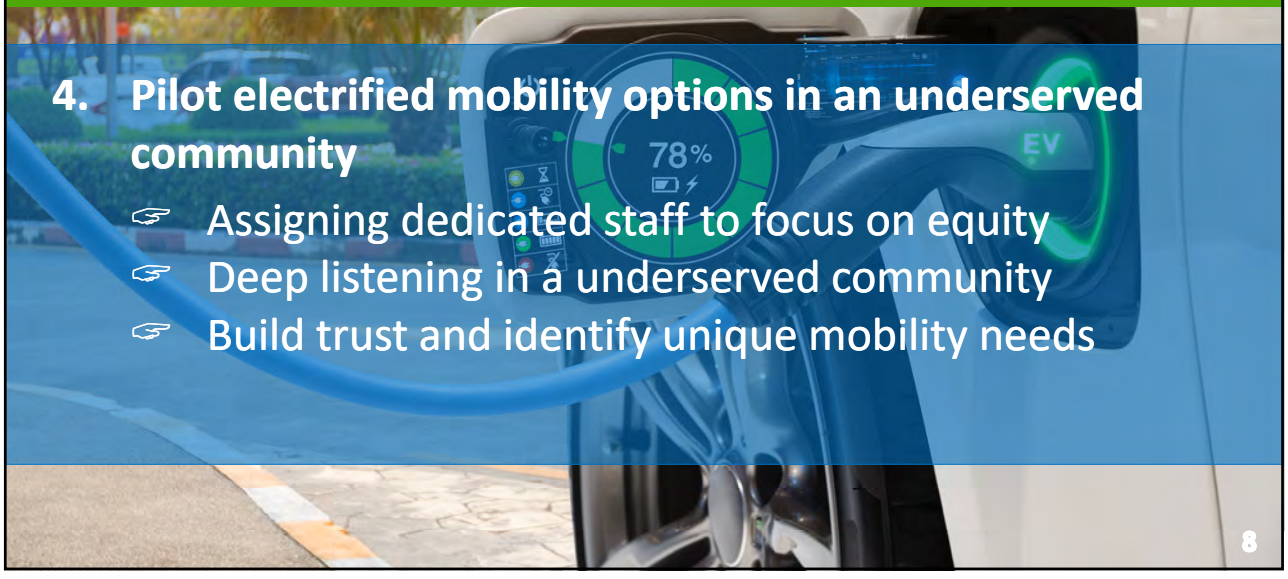
# Draft Recommendations



**4. Pilot electrified mobility options in an underserved community**

- Assigning dedicated staff to focus on equity
- Deep listening in a underserved community
- Build trust and identify unique mobility needs

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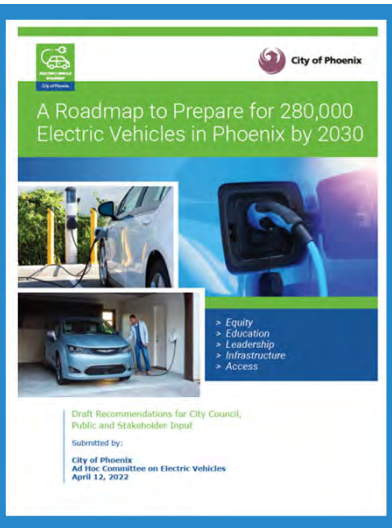
# City of Phoenix - EV Roadmap




**www.Phoenix.Gov/electricvehicles**

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# EV Charging Basics and EV Ready Building Codes

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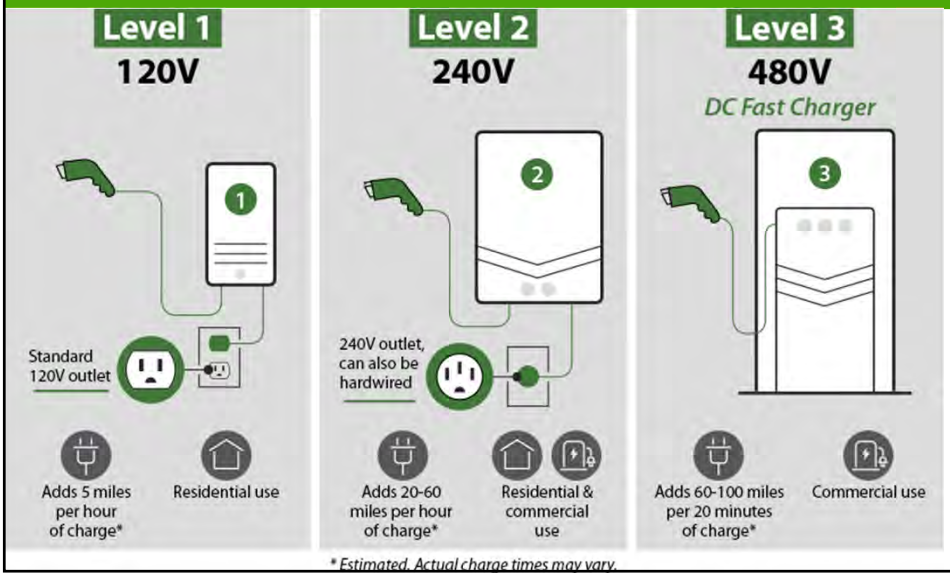
# Types of EV Chargers




**Three main categories of EV chargers.**
Level 1 are least expensive.
Level 2 tend to cost $1,000 - $5,000.
Level 3 (or DC Fast Chargers) are $45-$150k.

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# EV Building Code Definitions

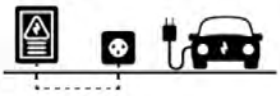
Basic definitions:

**EV-Capable Parking Space**: Electrical Panel Capacity & Conduit

- Install panel capacity and conduit (raceway) to accommodate the future build-out of EV charging with 208/240 V, 40-amp circuits.
- Rationale: Provide hard-to-retrofit elements during new construction while minimizing up-front cost.

**EV-Ready Parking Space**: Install full circuit

- Full circuit installations include 208/240V, 40-amp panel capacity, raceway, wiring, receptacle, and overprotection devices similar to a dryer circuit.
- Rationale: Full circuits are plug-and-play ready and minimize total costs and additional barriers to installing Electric Vehicle Supply Equipment (EVSE).



**EV-Installed**: Install EV Charging Station (also known as Electric Vehicle Supply Equipment or EVSE).

- Install charging stations during new construction.
- Rationale: Provide a visible signal that building supports EV charging and reduce future EV charger installation costs to zero.

**EV Cost Estimates for Parking Spaces**

**EV-Capable**
New Build = $300
Retrofit = $2,500
Savings = $2,200

**EV-Ready**
**New Build = $1,300**
**Retrofit = $6,300**
**Savings = $5,000**

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# Questions?

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City of Phoenix – Office of Sustainability
EV Program Manager
Karen.apple@phoenix.gov

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ELECTRIC VEHICLE ROADMAP
City of Phoenix

City of Phoenix

# A Roadmap to Prepare for 280,000 Electric Vehicles in Phoenix by 2030

- *Equity*
- *Education*
- *Leadership*
- *Infrastructure*
- *Access*

## Draft Recommendations for City Council, Public and Stakeholder Input

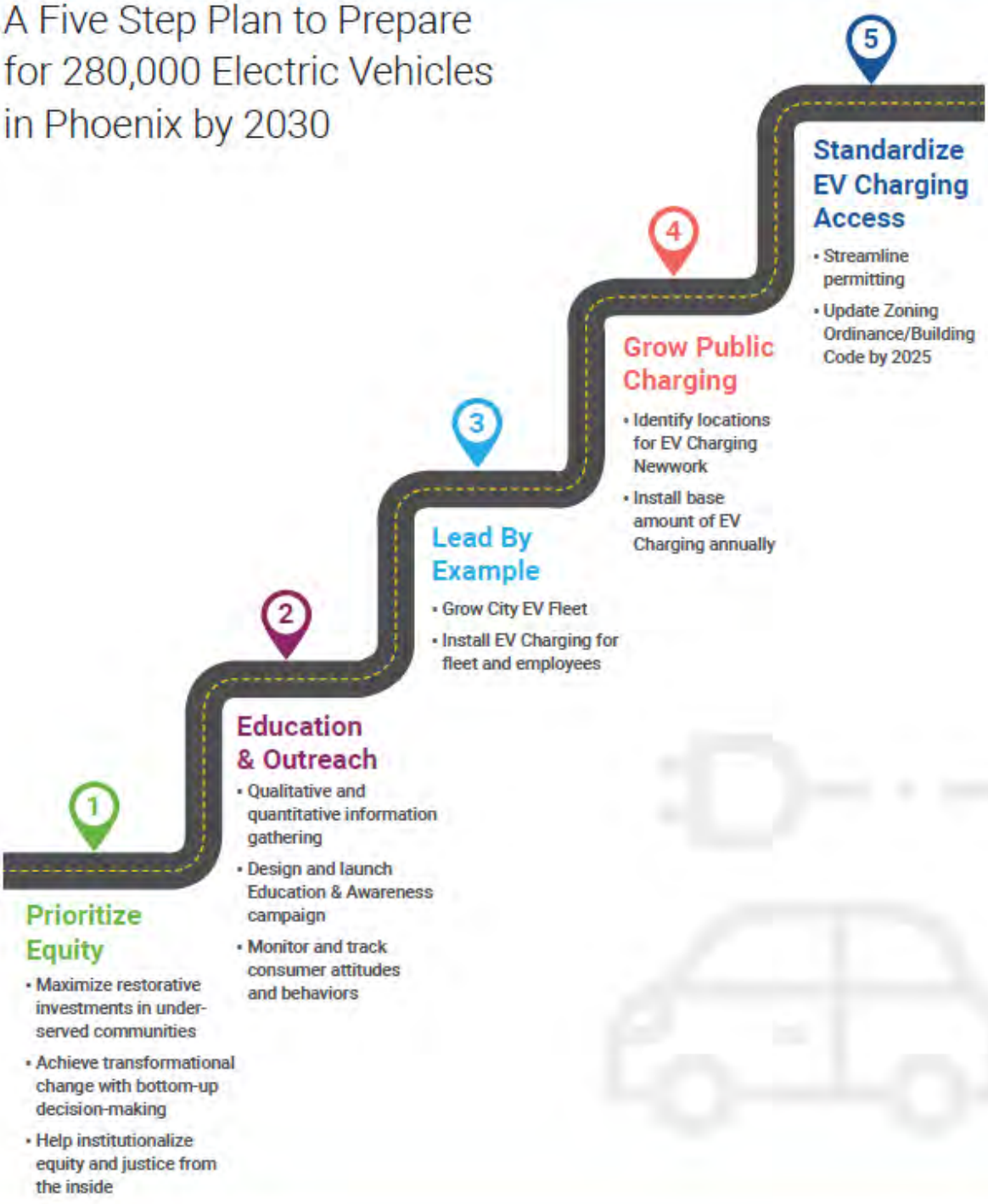
Submitted by:

**City of Phoenix**
**Ad Hoc Committee on Electric Vehicles**
**April 12, 2022**

City of Phoenix

# Roadmap 2030

## A Five Step Plan to Prepare for 280,000 Electric Vehicles in Phoenix by 2030



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## Acknowledgements

The City of Phoenix Ad Hoc Committee on Electric Vehicles was established by Mayor Gallego on June 25, 2021 and consists of one member of City Council and 14 members of the public.

- Councilwoman Yassamin Ansari, Chair
- Autumn Johnson, Public Interest Policy Advocate, Tierra Strategy
- Caryn Potter, Utility Program Manager, Southwest Energy Efficiency Project (SWEEP)
- Catherine O'Brien, Electric Vehicle Lead, Salt River Project
- Clark A. Miller, Professor & Director of the Center for Energy & Society, Arizona State University
- Columba Sainz, Community Advocate
- Court S. Rich, Director, Renewable Energy and Regulatory Law Department, Rose Law Group
- Delbert Hawk, President of the International Brotherhood of Electrical Workers Local Union 640
- Jason Smith, Energy Innovation Program Consultant, Arizona Public Service (APS)
- Katherine Stainken, Senior Director of EV Policy, Electrification Coalition (EC)
- Kathy Knoop, Manager, Vehicle Grid Integration Solutions, General Motors
- Lisa M. Perez, Public Affairs Consultant
- Omar Gonzales, Manager of State and Local Government Affairs, Nikola Corporation
- Tim Sprague, Owner/Partner, Habitat Metro
- Vianey Olivarria, State Co-Director, CHISPA Arizona

To accomplish its work, the Ad Hoc Committee established three subcommittees (SC):

| **SC1 - Education, Outreach & Equity** | **SC2 - Public, Workplace and Home Charging Infrastructure** | **SC3 - City Fleet and City Charging Infrastructure** |
|---|---|---|
| **Sub-Committee Members**:<br>• Councilwoman Ansari<br>• Omar Gonzales<br>• Clark Miller<br>• Vianey Olivarria<br>• Lisa Perez | **Sub-Committee Members**:<br>• Omar Gonzales<br>• Autumn Johnson<br>• Catherine O'Brien<br>• Court Rich<br>• Tim Sprague<br>• Jason Smith<br>• Caryn Potter | **Sub-Committee Members**:<br>• Councilwoman Ansari<br>• Kathy Knoop<br>• Caryn Potter<br>• Katherine Stainken<br>• Delbert Hawk |

The Committee was hosted by Deputy City Manager Karen Peters and the City's Office of Sustainability staff Mark Hartman, Karen Apple, Michelle Litwin and Darice Ellis. City Departments including Public Works, Planning and Development, Public Transit, Information Technology Services, Aviation, Phoenix Convention Center, Parks and Recreation, Law, Community and Economic Development, Street Transportation, the City Manager's Office, the City Attorney and the Office of the Mayor supported the work of the committee and provided input into the draft roadmap.

# Executive Summary

Mayor Kate Gallego announced the launch of the *Ad Hoc Committee on Electric Vehicles* in June 2021 with a mandate to identify recommendations that would help accelerate the transition to electric vehicles (EVs) as described in the City's recently adopted Climate Action Plan. Led by its chair, Councilwoman Yassamin Ansari, the Ad Hoc Committee is preparing recommendations in the form of an "Electric Vehicle Roadmap to 2030" and this document serves as its initial draft--for which the committee is seeking Council and community input prior to making its final recommendations in June 2022.

As background, the current market desire for the electrification of transportation is both a national and global phenomenon. Businesses, governments, and the public are all signaling a strong future demand for EVs, and almost all EV Manufacturers have declared plans for a transition to fully electric offerings within the coming decade. However, this market shift, fueled by a desire for better air quality, a reduction in carbon emissions, and a reduction in vehicle operating and maintenance costs, has significant implications for cities: how do cities prepare for forthcoming public demand for EVs and the associated EV charging infrastructure, both at home, on the road, and, more importantly, how do they prioritize investments in historically underserved communities to provide equitable low-carbon transportation options?

Cities and other market players can provide support for a just transition to EVs through implementing policies, programs and initiatives that remove barriers to EV adoption and satisfy public and business need for services in a low-carbon future. Based on state and national forecasts, that future may include up to 280,000 EVs on the road in Phoenix by the year 2030.

To facilitate the transition to EVs, the City's Ad Hoc Committee on Electric Vehicles has put forward six recommendations in the draft roadmap for City Council and public input:

## 1. Adopt guiding principles for City action

Guiding principles signal Council support for developing EV policies and programs and for investments that will accelerate the transition. The following principles are recommended by the Ad Hoc committee:

a. Prioritize early action.
b. Prioritize investments in underserved communities.
c. Actively pursue federal grants and other funding opportunities.
d. Seek partnerships with businesses, utilities, and other stakeholders.
e. Invest in the electrification of the City's fleet and corresponding charging infrastructure, as well as installing workplace charging infrastructure for city employees.

## 2. Support accelerated EV adoption in the community

Although vehicle manufacturers, dealers, utilities, and other EV advocates will be promoting and encouraging EV adoption in general, there are barriers to EV adoption in the region including lack of access to charging infrastructure and myths and misconceptions about EVs and their use. The Ad Hoc committee recommends the following to address these and other barriers to adoption:

a. Assign dedicated staff to focus on public education, outreach & business training.
b. Launch qualitative and quantitative data gathering to inform future actions.

c. Launch a robust EV education and awareness campaign that clarifies the benefits of EVs, dispels myths, provides resources (such as vehicle buying guides and information on charging infrastructure), and identifies the best applications for EVs.

**3. Expand access to public EV charging**

a. Work with cities, regional planning agencies and the state on a *regional EV Infrastructure needs assessment and siting recommendations* for public EV charging stations.
b. Leverage local, state and federal funding to install 500 City-hosted public charging stations by 2030 including installing a minimum number of EV charging stations each year in parks, city parking facilities and in rights-of-way.

**4. Support access to home, business and workplace EV charging**

a. Investigate opportunities to streamline the permitting process for installing workplace, business, home, and multi-family EV charging stations.
b. Develop proposals for EV Ready building codes and zoning ordinances for stakeholder input and future adoption.
c. Work with utilities on developing an education program specific to builders, developers, and businesses.

**5. Develop and pilot a local model of e-mobility investment in an underserved community**

a. Assign dedicated staff to focus on equity and build relationships with community leaders and advocates.
b. Develop an understanding of the unique mobility needs of underserved communities and design solutions to meet those needs.
c. Launch a local model of e-mobility investment in an underserved (“front-line”) community as recommended by community leaders and advocates.

**6. Lead by Example**

a. Evaluate infrastructure/power needs and financial resources to support the transition of light-duty vehicles to EV.
b. Adopt a “preferred purchasing policy for EVs” provided it meets the business needs and is in a similar price range to a non-electric vehicle model from a life-cycle cost perspective (.i.e., accounting for savings in fuel costs and maintenance).
c. Pilot electrification in medium and heavy-duty equipment such as transit buses, refuse trucks, and street sweepers to better understand electric equipment operating characteristics.
d. Proactively install supporting charging infrastructure to prepare for future adoption of EVs in the City fleet.
e. Identify City employee charging needs and provide access to charging infrastructure to City employees to meet demand.
f. Implement training of employees for EV driving, EV charging and EV maintenance prioritizing employee change management to achieve effective employee engagement.

The following report contains additional details on the specifics and timeline of these six recommendations. The Ad Hoc committee will be seeking Council and community input on these recommendations in April and May 2022 and will present a completed Electric Vehicle Roadmap to 2030 with updated recommendations for City Council consideration in June 2022.

# Proposed Electric Vehicle Roadmap to 2030

## Introduction

### Electric Vehicles ("EVs")

The term EV encompasses several different types of vehicles. Specifically, all EVs can be plugged-in and powered solely by electricity; however, some are also powered by an internal combustion engine (ICE) using gasoline or conventional fuels. Many models of light duty vehicles such as passenger cars are available on the market today, but new applications for medium- and heavy-duty (e.g., buses, delivery vans, refuse collection, street sweepers, and long-haul trucks) are being manufactured and starting to appear in the marketplace.

The up-front purchase price of an EV is typically more than a comparative ICE vehicle due to the high cost of the large battery, but the incremental cost can often be offset from a "life-cycle" perspective (i.e., by including the savings from reduced maintenance and the avoidance of the use of gasoline). However, as technology advances and battery manufacturing capacity increases, the upfront EV cost is likely to decrease. According to a March 25, 2021 Bloomberg New Energy Finance Hyperdrive Daily article, EVs should be cheaper to buy on average than ICE vehicles in about five years; that's the point at which EVs will reach price parity with ICE vehicles. Price parity refers to the point at which an automaker can build and sell an EV with the same margin as an ICE vehicle, assuming no subsidies are available.

Table 1: EV Types

| Vehicle Type | Description | Example |
|---|---|---|
| Plug-In Hybrid Electric Vehicle (PHEV) | PHEVs are powered by an ICE (internal combustion engine) and an electric motor that uses energy stored in a battery. The vehicle can be plugged into an electric power source to charge the battery. PHEVs can travel on either electricity or gasoline. The all-electric range of a PHEV can be from 10 to over 50 miles, depending on the model. | Chevrolet Volt  |
| Battery Electric Vehicle (BEV) | BEVs use a battery to store the electric energy that fully powers the motor. A BEV does not have an ICE. BEV batteries are charged by plugging the vehicle into an electric power source. The range of a BEV on a full charge can be over 500 miles, depending on the model. | Nissan Leaf  |

Table 2: Other Electrified Vehicles

| Micro-Mobility Examples | Description | Example |
|---|---|---|
| Electric Bicycle (E-Bike) | Bicycle with an electric motor used to assist propulsion. Electric bicycles use rechargeable batteries and can travel up to 15 to 20 mph. Many bikes can assist the rider's pedal-power and/or can add a throttle. |  |
| Electric Scooter (E-Scooter) | Device weighing less than one hundred pounds, with handlebars and an electric motor that has a maximum speed of 20 mph. |  |
| **Medium and Heavy-Duty Examples** | **Description** | **Example** |
| Electric Street Sweeper | Powered by an electric motor with the advantages of no tailpipe emissions. Street Sweepers are used to control dust and improve air quality, so the electric option aligns well with this purpose. |  |
| Electric Transit Bus | Transit buses powered by an electric motor enable transit agencies to significantly reduce operating costs while delivering clean, quiet transportation to the community. |   |

## Benefits of EVs

The City of Phoenix supports the use of different transportation options for City employees, residents, and visitors - including biking, walking, public transportation, carpooling, and vehicle sharing. However, given the large geographical area of the city, in many circumstances, a private vehicle can be the most convenient option for navigating around the community. EVs are recommended over gasoline- and diesel-powered vehicles with internal-combustion engines (ICE) as they better support the City's air quality, climate, transportation, and sustainability goals as outlined in the City's climate action plan.

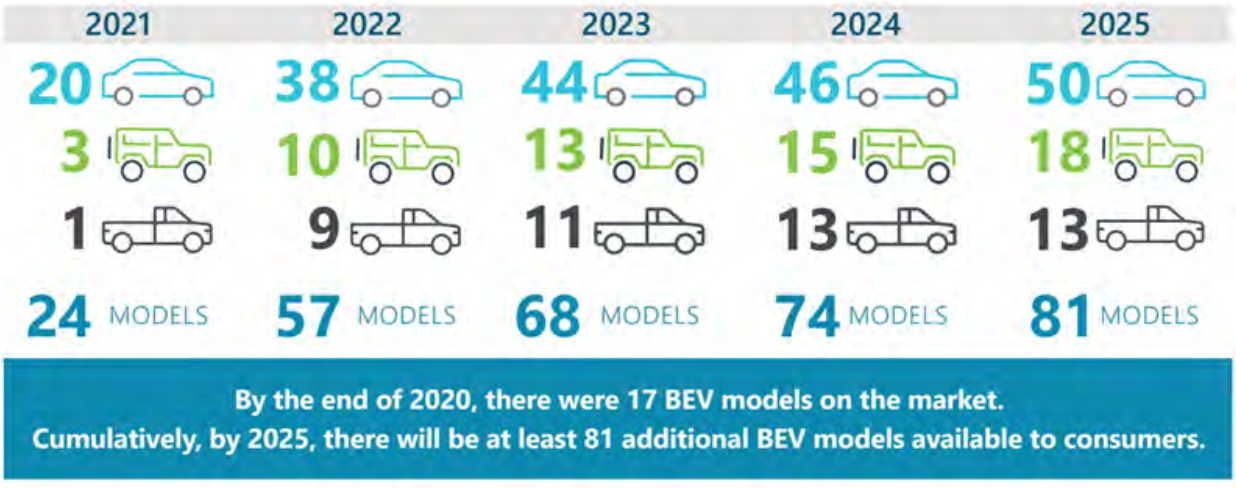
The benefits of EVs include:

- EVs have little or no tailpipe emissions (depending on the type of vehicle), so they reduce local air pollution, global GHG emissions, and improve public health.
- Regardless of the electricity generation mix, EVs have much lower greenhouse gas (GHG) emissions than ICE vehicles, and they have the ability to continually lower emissions as the electricity generation mix gets cleaner.
- The cost to charge an EV can be less than 10 percent of the price of the equivalent amount of gasoline and can even be lower if using utility time-of-use rates. The U.S. Department of Energy's (DOE) eGallon tool provides a general cost comparison based on U.S. averages.
- EVs, particularly BEVs, which do not have an ICE, require very little maintenance. Because of the lower maintenance and fuel costs, EVs have a lower lifetime cost of ownership than conventional ICE vehicles.

## Supply of Electric Vehicles

While EVs currently represent less than two percent of all light-duty vehicles in the U.S., vehicle manufactures are investing in EV technology and some manufacturers suggest an all-EV future. In 2022, there were approximately 225 light duty EV makes and models available on the market and 57 were exclusively battery electric vehicles (BEVs), as shown in Figure 3.

*Figure 3: Battery Electric Vehicle models being added to the light-duty market.*



## National EV Funding Efforts

There are several notable EV initiatives underway at the national level. The US Department of Transportation (DOT) Federal Highway Administration (FHWA) is establishing a national network of alternative fueling and charging infrastructure along national highway system corridors. There are several designated corridors within Phoenix, including I-10 and I-17. While this designation does not guarantee funding for projects, it may give I-10 and I-17 priority for future funding. Table 2 provides an overview of federal incentives available as of June 2022, including a description and funding amounts.

*Table 2: Federal EV Funding Initiatives*

| Funding Source | Funding Amount | Description |
|---|---|---|
| Qualified EV Tax Credit | Up to $7,500 per vehicle | A tax credit is available for the purchase of a new qualified EV, with the amount based on each vehicle's battery capacity and the gross vehicle weight rating. The credit will begin to be phased out for each manufacturer after 200,000 qualified EVs have been sold by that manufacturer for use in the US. To date, all Tesla and GM models have met the 200,000 EVs sold and do not qualify for the tax credit. |
| Federal Transit Administration Low or No Emission Vehicle Program | Varies up to a total of $84.45 million available annually | State and local governments are eligible to receive program funds to purchase or lease zero-emission and low-emission transit buses and supporting fueling facilities. |
| Infrastructure Investment and Jobs Act (IIJA) | Formulary EV charging program funds up to $5 billion over five years and various EV charging and refueling competitive grants available, up to $2.5 billion over five years. There is also other funding across other sectors. | Formula program provides funding to States to deploy publicly accessible EV charging infrastructure. Competitive grant programs provide funding to local governments to strategically deploy publicly accessible EV charging infrastructure along designated alternative fuel corridors or publicly accessible areas.<br><br>Other funding includes Clean School Bus Program, Grants for Buses and Bus Facilities, Surface Transportation Block Grant Program, Congestion Mitigation and Air Quality Improvement Program and the Carbon Reduction Program. |

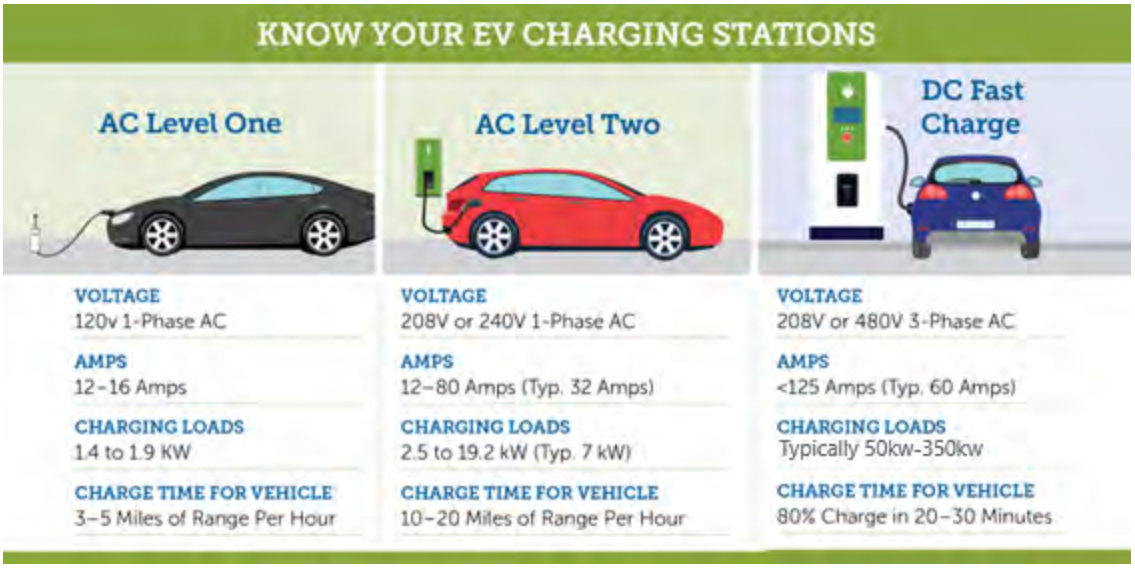
## Electric Vehicle Charging

Charging equipment for EVs, also called electric vehicle supply equipment (EVSE), is available in different levels based on how quickly it can charge the vehicle's battery. The time needed to fully charge an EV will vary based on the size of the battery, how depleted the battery is, and the electric current of the EV charging equipment.

### Light-Duty Vehicle Charging

EV drivers have the flexibility to charge at a variety of locations, including home (single-family and multi-family), work, and other destinations such as shopping centers, restaurants, and fleet parking facilities. Figure 1 highlights the three levels of charging and operational characteristics. Level 1 EV chargers are mostly used in single-family homes, Level 2 EV chargers are also used in single-family as well as commercial and multi-family buildings, and Level 3 DC Fast Chargers are primarily used for vehicle fleets located at commercial properties and along interstate corridors.

*Figure 1: Representative Operational Characteristics of EV Chargers for Light-Duty Vehicles*




Most EV charging occurs at home. However, there are some challenges with installing EV charging infrastructure in multi-family developments, including access to reliable parking, billing, sufficient power supply, and ownership concerns. Workplace charging is a significant opportunity for City of Phoenix and Phoenix's employers, as workplace charging helps increase the convenience of driving electric for employees and encourages charging during off-peak hours. Similarly, access to public charging is a key factor in decreasing range anxiety and increasing the convenience of driving EVs in the region.

## Approach of the Ad Hoc Committee

When developing the recommended policies and programs for consideration, the following core principles were identified:

**Equity**—Ensure equity principles are incorporated into policies and programs to make EVs affordable and accessible to underserved, disadvantaged communities, to better understand their mobility needs, and to identify solutions to meet those needs.

**Financial Resources**—Identify potential funding opportunities provided by the federal government through grants, direct or formulary/competitive allocations, local utilities incentive programs, city budget allocations, and vendor offerings to assist in covering the cost of EV fleet transitions and EV charging infrastructure.

**Partnerships and Relationships**—Leverage and engage community, business, and utility stakeholder partnerships and establish new relationships with local community agencies, community groups, nonprofits, businesses, and residents to identify needs and resources to create innovative solutions.

**Policy Options**—Include and request early and continued feedback and involvement from City departments in development of EV policies and programs to ensure they are aligned with resources and goals.

## Roadmap Assumptions

In recognition of technology availability, current and forecast trends, this EV Roadmap focuses on actions in the near term for light-duty passenger vehicles and trucks (SUVs, crossovers, and pickup trucks), for personal use and fleet use cases. Heavy-duty equipment has different considerations from light-duty vehicles when it comes to electrification. As technology advances in the medium- and heavy-duty sector, the City will pilot test opportunities and collaborate with manufacturers on solutions. For example, although viable solutions are still under development, hydrogen fuel-cell propulsion systems have the potential to service the heavy-duty sector.

A second assumption is that although EV Models have been announced, mass-market availability may not happen until after 2024. However, based on manufacturer declarations, the number of EV Models available for purchase will overtake the number of internal combustion engines (ICE) prior to 2030.

## Current State of Electric Vehicles in Phoenix

The City's 2021 Climate Action Plan includes goals for EV adoption, EV charging equipment deployment, and the incorporation of equity principles. The current state of EVs in Phoenix includes the following challenges and opportunities:

- Current citywide goals for EV adoption are in line with the federal government's 2030 goals for nation-wide EV adoption–projecting up to 50% of car sales to be EV by 2030.
- The City currently does not have the number of EV chargers, nor the supporting infrastructure, to support Phoenix's target numbers of EVs for the public, the city's fleet, or workplace users.
- Federal funding and grants are being made available and will assist in the planning and deployment of EV charging infrastructure.
- Other cities are implementing EV policies, programs, and practices that can be leveraged to increase EV adoption, support, and awareness.

## Current Light-Duty EV Adoption Rates

Phoenix residents and businesses are adopting EVs; however, adoption rates must accelerate to achieve the 2030 EV goals identified in the City's 2021 Climate Action Plan.

The Maricopa Association of Governments (MAG) forecasts plug-in electric vehicles (PEV) will increase significantly at a compound growth rate of 36.4% from 2021 to 2029[1]. Similarly, the Arizona Statewide Transportation Electrification Plan set a goal of 1.1 million EVs in the State by 2030 which, when downscaled to the City of Phoenix, translates to approximately 250,000 vehicles by 2030[2].

One of the primary obstacles to more widespread adoption of EVs is range anxiety due to the limited network of EV charging stations, including along highway corridors throughout the National Highway System. According to national survey data, 78 percent of Americans believe that finding an EV charging station is at least moderately difficult. Of drivers who are not planning to buy or lease an EV when they purchase their next vehicle, 48 percent reported concerns about not enough public charging stations.

As of April 2021, there were approximately 38,000 publicly accessible EV charging stations nationally with approximately 79,000 charging outlets (i.e., a charging station typically has two outlets–to charge two vehicles at the same time). Figure 6 identifies the location of DC Fast charging stations in the US.

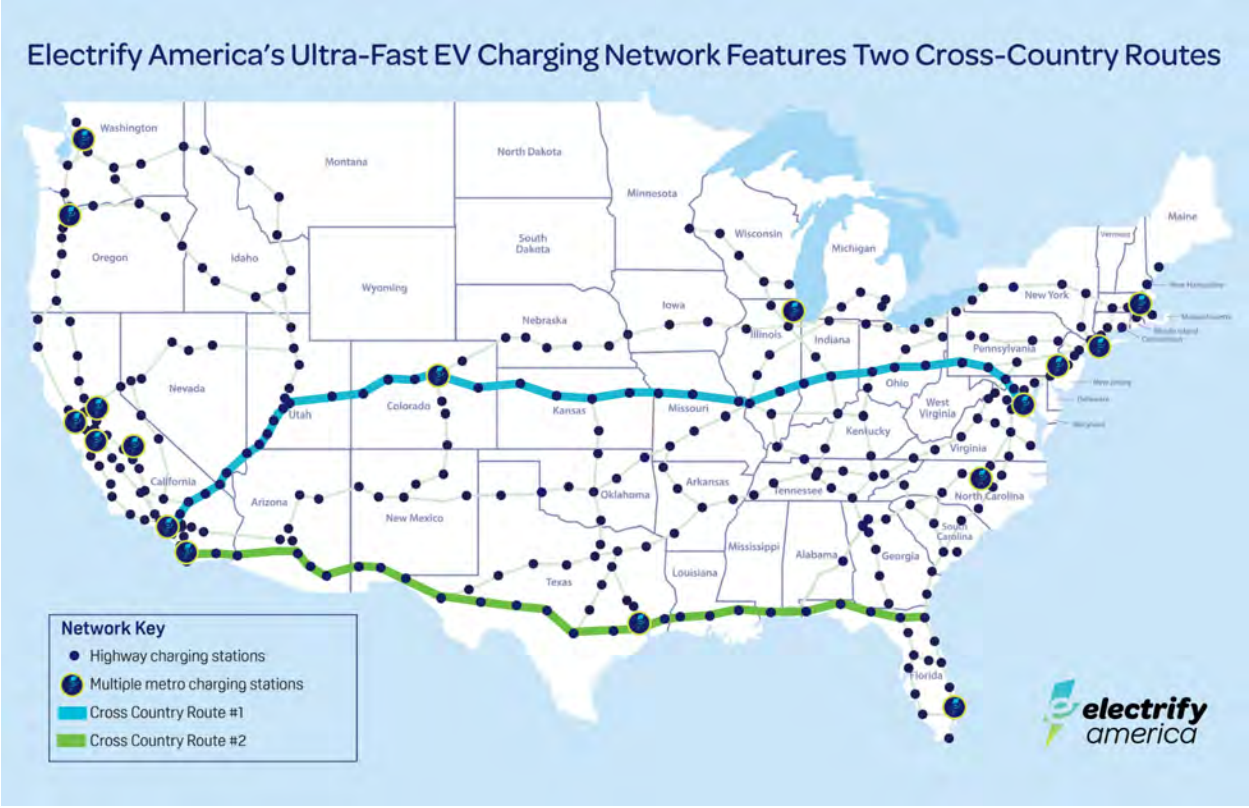
Figure 6: DC Fast Charging Stations in the Continental U.S

To expand this national network, the current Bipartisan Infrastructure Law is providing $7.5 billion in new funding to expand the charging network nationwide over the next five years with the goal to have a DC fast-charge station (DCFC) every 50 miles along U.S. highways.

[1] Maricopa Association of Governments Battery Electric Vehicle (EV) Modeling Support Task - 2021
[2] https://illumeadvising.com/files/Arizona-Phase-1-TE-Report-Final.pdf

More specifically, Electrify America has added 600 DCFC sites (with over 2600 charging ports) over the last three years and has targeted two cross-country routes and a number of interstate highways for national connectivity including the I-10 and the I-17.

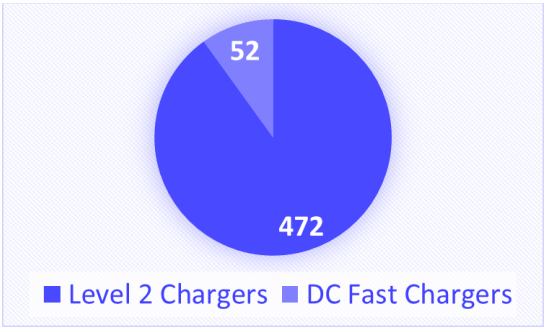
Figure 7: DC Fast Charging Stations installed by Electrify America




## Public EV Charging Ports in Phoenix

- According to the *Alternative Fuels Data Center* (AFDC), 472 Level 2 public charging ports and 52 direct current fast charging ports (DCFC) are located in Phoenix as of February 2022, as shown in Figure 8. The Level 2 EV chargers comprise 90% of the available public EV charging ports, while DCFCs comprise 10% of the available public accessible ports.

*Figure 8: EV Public Charging Ports by Type, Phoenix, February 2022*

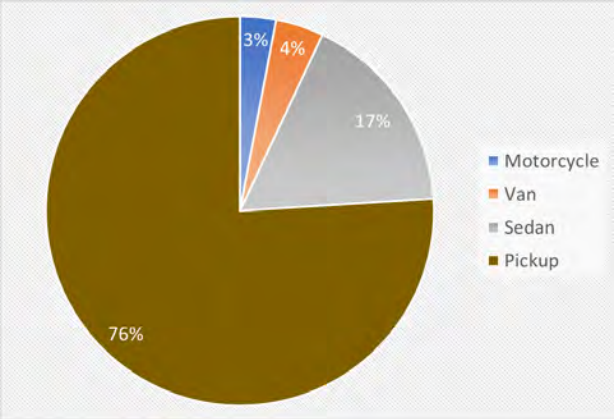


- The *EV Infrastructure Projection Tool* (EVI-Pro) from the US Department of Energy calculates that 280,000 electric vehicles would require 3,000 Level 2 charging ports and 430 DC Fast Chargers (DCFC) in the city by 2030--approximately six times the current number of public Level 2 charging ports.
- The ratio of Level 2 EV charging ports versus Level 3 DC Fast Charge (DCFC) has been initially forecast at a 6-to-1 ratio but this ratio may change over time based on market needs.
- Based on the above ratios, it is estimated that 500 publicly accessible EV charging ports are needed on City properties by 2025 (although this number will be modified over time based on EV market activity). This could be roughly allocated by installing 200 charging ports in City garages and approximately 300 for on-street charging.

## City of Phoenix Fleet EVs, and Fleet and Employee EV Charging Ports

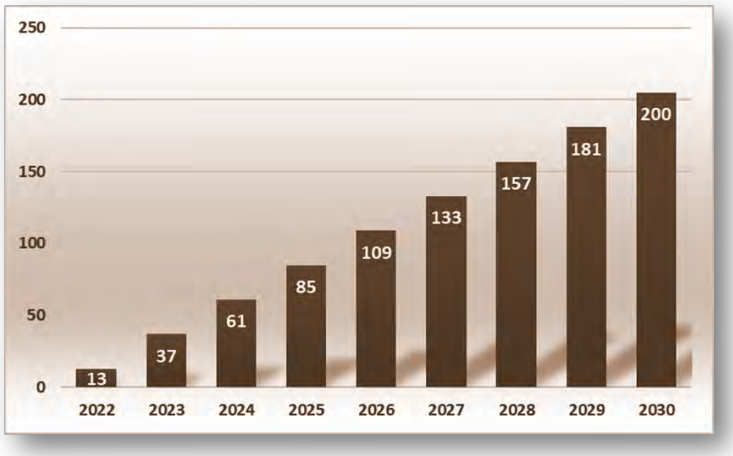
The City of Phoenix operates and maintains approximately 7,700 light, medium, and heavy-duty vehicles in its fleet. Of the approximate 7,700 total fleet vehicles, 3,837 are classified as light duty vehicles. As shown in Figure 9, the majority of the light duty fleet is pick-up trucks.

*Figure 9: City of Phoenix Light Duty Fleet Vehicles*




As of February 2022, the City of Phoenix currently has 13 EVs in the light duty fleet–nine sedans and four motorcycles. In the next eight years, the City has a goal to transition 200 light duty gas powered vehicles to EVs. In order to reach this goal, on average, the City needs to transition approximately 24 EVs a year. Figure 10 identifies the current number of EVs and a sample path to the 2030 EV fleet goals.

*Figure 10: City of Phoenix sample path to the 2030 EV Fleet Goal*




## Strengths and Opportunities

The 2021 Climate Action Plan set ambitious targets for EVs for 2030:

- Accelerating EV action to support 280,000 electric vehicles citywide by 2030
- Support for 3,500 public and workplace charging stations citywide
- a target of 200 EVs in the City Fleet

In support of these goals, several other market players are helping the transition to the electrification of transportation:

- Electric utilities have ambitious EV goals, incentives, and dedicated staff to accelerate the transition to EVs with a target of over 1.1 million EVs in the state by 2030.
- The federal government is providing $7.5B in funding for EV Charging infrastructure in the recently signed Bipartisan Infrastructure Law.
- Electrify America (electrifyamerica.com) is investing $1 billion in additional EV Infrastructure on national highways using funds from the *Volkswagen Environmental Mitigation Trust Settlement ("VW Settlement")*.
- Vehicle manufacturers are shifting priorities toward continued research and development, and expansion of EV models and capabilities in the market.
- And, lastly, polling by the American Lung Association indicates that Arizona residents are supportive of the electrification of transportation[3].

## Barriers to EV adoption[4]

- actual and perceived costs of EV purchasing/ownership
- limited number of EVs currently available
- lack of EV-ready building codes and limited access to EV charging in multi-family buildings
- current limitations of EVs (range and performance) for meeting business and personal needs
- range anxiety partially due to current lack of charging infrastructure
- cost of adding EV charging infrastructure to existing multi-family buildings
- lack of public knowledge and experience with EVs & EV Charging equipment

[3] https://www.lung.org/media/press-releases/lung-association-az-supports-renewable-energy
[4] As identified in The Arizona Statewide Transportation Electrification Plan

# GOALS AND STRATEGIES

## 1. PRIORITIZING EQUITY

As the Ad Hoc committee developed recommendations to accelerate the adoption of electric vehicles across the city, they emphasized the importance of also ensuring those recommendations addressed the unique mobility needs of historically underserved communities. EV Equity does not translate to simply providing electric vehicle charging in these communities, but instead, identifies residents in underserved communities, conducts listening sessions to understand their unique mobility needs, and implements solutions to meet those needs.

In recent years, City outreach to underserved communities has seen significant benefit from partnering with community-based organizations (CBOs) to connect outreach directly with those community voices that can articulate the needs of the local residents and businesses. As programs and infrastructure are rolled out in these underserved communities, the City should be deliberate in its outreach, and be hearing back from community members that the process was inclusive, and that their input was incorporated into solutions.

The Ad Hoc Committee outlined a collaborative approach to center justice and embed equity through investment in underserved communities. The equity priorities are based on the federal *Justice 40*[5] goals and principles:

1. Maximize restorative investments in underserved communities.
2. Achieve transformational change with bottom-up decision-making (community input).
3. Help institutionalize equity and justice from the inside (policies that prioritize equity).

| | Summary of Equity Recommendations (in line with Best Practice) | Year |
|---|---|---|
| 1. | Assign dedicated staff to focus on equity and build relationships with community leaders and advocates | 2022 |
| 2. | Develop an understanding of the unique mobility needs of underserved communities and design solutions to meet those needs. | 2023 |
| 3. | Launch local model of e-mobility investment in an underserved (“front-line”) community as recommended by community leaders and advocates. | 2024-2025 |

[5] *Justice40* is an interagency initiative led by the White House Environmental Justice Interagency Council (IAC), which is convened by the Council on Environmental Quality (CEQ). Based on its original vision, its purpose is to ensure that 40% of the benefits of federal investments flow to disadvantaged communities.

## Detail Recommendations

### By December 2022

**Hire or assign a dedicated staff member focused on equity as part of a citywide EV team to implement the following actions.**

- Identify underserved ("front-line") communities, existing disparities in Phoenix, and equity metrics
- Adopt guiding principle to invest at least 40% of mobility/electrification funding in underserved communities
- Identify compensation desired and funding source(s) for community participants.

### By December 2023

- Identify key communities and investment priorities leveraging data, for example, create an Environmental Justice (EJ) Screening tool with the following features:
    - Model of community collaboration and accountability;
    - Integrated progress metrics;
    - Multilingual, user-friendly, and accessible;
    - Open to feedback from the community, ready to modify the tool as needed.
- **Identify measurable metrics** and manner of reporting for clear reporting and evaluating processes to ensure accountability and transparency

### By December 2025

- Launch local model of micro-mobility investment in an underserved community
- Launch investment targeting priority communities (for example, 25% of projects to be located in the boundaries of, and benefit individuals living in, disadvantaged communities.

**Example**: Community workshops reach deep in community through trusted partners. Each community can articulate its particular mobility needs—EV Car Shares, eUber, eBikes, eScooters, Cool Corridors, etc., and a program is designed and launched to meet those specific needs in a prioritized community.

# 2. ACCELERATE PUBLIC ADOPTION OF ELECTRIC VEHICLES

## 2a: Education and Outreach

**Goal**: Launch a robust public education & awareness campaign to help meet the climate action plan goal of 280,000 electric vehicles registered in the City of Phoenix by 2030.

| | Summary of Education & Outreach Recommendations | Year |
|---|---|---|
| 1. | Assign dedicated staff to focus on Public Education, Outreach & Training | 2022 |
| 2. | Launch a qualitative and quantitative public data gathering | 2022 |
| 3. | Launch Public EV Education & Awareness Campaign | 2022 |

**Detailed Recommendations:**

### By December 2022

- **Support/expand ideas for federal funding opportunities** (Bipartisan Infrastructure Law).
- **Assign staff** to coordinate ongoing Education & Outreach.
- **Identify robust approach** to gathering information on public views and sector-specific mobility needs (e.g., small business, underserved communities, and workers) for Year 2 implementation.
- **Identify goals and scope** of an Education & Outreach program considering equity.
- **Identify funding** needed to support a broad education & awareness campaign.
- **Propose recommendations for future of Public Input.**

### By December 2023

- **Launch qualitative and quantitative information gathering phase** leveraging tools such as surveys, workshops, focus groups, and street teams to shape design of education and outreach strategy to identify barriers to adoption of EVs and public understanding of the benefits (Fall 2022)
    - Include community/business needs for the time-of-day charging
    - Track and include incentives for participation from disadvantaged communities (e.g., gift cards) varying time of outreach to accommodate schedules
    - Integrate educational materials into information-gathering process
- **Launch "Phase 1" education and awareness campaign** in English and Spanish that may include flyers, bill inserts, webinars, phone banks, newspaper ads, billboards, TV, and ride-&-drive events, outreach to students, listening sessions, an engaging EV101 video, etc.
    - Explore possible partnerships with local media (print/cable/tv) to assist with outreach efforts including publications/media in Spanish.

- Increase awareness of the real estate development community and property owners on the benefits of incorporating ESVE in their properties.
- **Launch program to monitor public attitudes** related to EVs by sector (dual-language, disadvantaged communities, and workers).
- **Develop business and employee guidance and education around EVs**
    - Create a business-friendly information clearinghouse to educate developers and owners on how to easily install EV charging infrastructure.
    - Create guidance for those businesses wanting to install EV charging at their sites.
    - Launch an employee and business workplace electric vehicle charging stations (EVSE) awareness and education program.

## By December 2025

- **Continue to track changes** in public attitudes towards EV to identify barriers to adoption—including distribution of EV sales and revenue generated from sales tax.
- Review metrics and data from "Phase 1" to identify strengths and weaknesses to be considered when updating the "Phase 2" plan.
- **Launch "Phase 2" education and awareness campaign for broader engagement.**

## 2b: Public Charging Infrastructure

**Goal**: Install at least 500 public EV charging stations on City properties or rights-of-way (ROW) by 2030, prioritizing equity.

| | Summary of Recommendations for Public Charging Infrastructure | Year |
|---|---|---|
| 1. | Work with cities/MAG/State on a regional EV Infrastructure needs assessment & siting recommendations for public EV Charging stations | 2022 & 2023 |
| 2. | Leverage local, state and federal funding to install 500 City-hosted public charging stations by 2030 | 2022-2030 |

### Detailed Recommendations

#### By December 2022

- Conduct solicitation to engage consultant(s) or assign staff to collect data, identify potential charging locations and begin investigative work on future actions listed below.
- Incorporate e-bike considerations as part of mobility planning.
- Identify collaborative multi-city and regional EV charger bulk purchase opportunities on a local, state, and national level to lower upfront equipment cost (i.e., driveevfleets.org, other cities, MAG).
- Assign permanent staff role that will coordinate ongoing and long-term EV charging implementation, maintenance, and investments.
- Work with third-party charging service providers (CSP) to explore funding options:
    - Hosting third-party owned charging infrastructure on City property or in ROW in place of City-owned infrastructure where such makes economic sense and limits risk.
    - Sponsorship/advertising/branding options for charging stations (to offset costs as well as provide a potential revenue stream).
    - Private/public partnership business models.

#### By December 2023

- Work with cities/MAG on a regional EV Infrastructure needs assessment & siting recommendations
- Identify potential locations for the proposed 500 public charging stations with a plan to complete by 2030 that considers equity and charging time. While Level 1 charging can cost-effectively address workplace charging needs in some cases, Level 2 or Level 3 charging equipment will also be needed at specific locations. The City should explore partnerships with nearby businesses that could provide charging or needed parking spaces to better optimize pre-existing parking structures.
- Work with City departments to identify and recommend parking locations for the City fleet.

- Create recommendations for on-street charging in City right-of-way (ROW) to assist equity and support EV charging capability for nearby multi-family buildings. Design and safety standards will need to be considered for ROW permitting and approval.
- Explore new policies with third-party collaborators to support public charging:
    - Expand current policies to include EV Charger advertising revenue (i.e., LED screens) and co-branding to fund future EV charging infrastructure and offset network fees and electricity costs.
    - Explore policy that determines charging rates for customers charging on City property or in ROW—to incentivize charging during "off-peak" daytime charging (also noting lower carbon impact). Work with utilities to identify "off-peak" times.
- Evaluate and implement pilot programs citywide for medium/heavy duty fleet to demonstrate new EV service equipment (EVSE) providers
    - Coordinate with utilities to perform a utility analysis of grid capacity and load management to identify opportunities for ROW charging that leverage existing infrastructure (such as streetlight infrastructure for EV charging)
- By June 2023, install 20 new EV Charging ports on City property/ROW

## By December 2025

- install new EV Charging ports on City property/ROW to reach 300 charging stalls in the ROW by the end of 2025.

## 2c: Workplace, Business, and Multi-Family Charging Infrastructure

## Goal:

- Enable at least 500 workplace and business chargers by 2030
- a minimum of 20% of total EV chargers to be installed near and at small businesses and small commercial buildings.

| | Summary of Recommendations for Workplace & Business Charging | Year |
|---|---|---|
| 1. | Recommend opportunities to streamline the permitting process for installing workplace, business and multi-family electric vehicle supply equipment (EVSE) | 2022 |
| 2. | Develop proposals for EV Ready building codes and zoning ordinances for stakeholder input | 2022-2023 |
| 3. | Support education and outreach program specific to businesses | 2022-2024 |

**Detailed Recommendations**

### By December 2022

Explore opportunities for streamlined permitting for multi-family and commercial installation of EVSEs.

**Justification:** Making EVSE permitting quicker and more efficient will encourage faster deployment of EV charging facilities. In a world where jurisdictions are competing to attract private investment in EV infrastructure, jurisdictions that make it the quickest and easiest will be the focus of early adoption. Further, a streamlined process will reduce the burden for City staff as the number of these projects increase and take up more and more staff time. Multi-family may include ground-floor retail that requires access to EV charging infrastructure.

### By December 2023

Develop proposals for EV Ready building code and zoning ordinance updates to support EV Ready updates with the following attributes:

- Work with the development community for input on the recommendations.
- Establish definitions and standards for EV charging or make-ready equipment as part of a future update to the Phoenix zoning ordinance.
- Explore policies, procedures and potential code updates that would facilitate the installation of EV charging equipment or make-ready equipment in existing buildings without requiring a site plan or zoning approvals.

- Explore minimum requirements and/or incentives for inclusion of EV ready parking spaces on new multi-family residential, commercial, office, and industrial development as part of a future update to the Phoenix zoning ordinance.
- Study the development of an incentive or development standard bonus program to encourage installation of EV charging infrastructure in new development and large expansions.

Justification: Requiring EV spaces in new construction while providing bonuses for additional spaces balances "carrot and stick" forces to ensure new buildings in Phoenix are future-ready. This will reduce burden for City staff and will speed adoption while lowering adoption costs for businesses and other end users.

## By December 2025

Support education program to install new EV charging ports in small and large businesses and multi-family buildings.

## 2d: Single-Family Home Charging Infrastructure

### Goals:

- Implement EV-building code or EV-zoning ordinance for all new single-family developments by 2025
- Include complementary EV requirements for major renovations

| | Summary of Recommendations for Home Charging Infrastructure | Year |
|---|---|---|
| 1. | Develop proposals for single-family home EV Ready building codes and zoning ordinances for stakeholder input | 2022 |
| 2. | Recommend streamlining the EV charger permitting process for retrofit and major upgrades of single-family homes | 2022 |
| 3. | Produce an EVSE installation guide identifying the process | 2023-2024 |
| 4. | Implement code language for EV-building code/zoning ordinance | 2024-2025 |

**Detail Recommendations**

**By December 2022**

a. Identify utility & City monetary & non-monetary incentives that could encourage increased EVSE adoption.
b. Work with APS in consideration of its ongoing Transportation Electrification Implementation Plans (TEIPs), as well as SRP in consideration of its 2035 Sustainability Goals.
c. Develop draft language for EV building code for public and developer input.
d. Develop a list of stakeholders for future outreach relating to EV charging standards and proposals. Stakeholder lists may include but are not limited to design and development professionals (home builders, community members, EV charging and energy efficiency professionals, and NGOs.)
e. Streamline the EV charger permitting process for retrofit and major upgrades of single-family properties within identified parameters.
    - Include opportunities/incentives for developers and builders to provide for future proofing and incentives to offset the cost of electrical conduits on new single-family developments with funding from sources outside of the planning and development permit process
    - Include input from building and development stakeholders regarding best practices for EV charging implementations.

**By December 2023**

- Engage local electrical engineers to analyze the best design practices for efficient single-family installations of EVSE.

## By December 2025

Finalize and present through public hearing process code language for EV Building code / zoning ordinance and final city council decision.

# 3. LEAD BY EXAMPLE

## 3a: City Fleet – Purchase of Light-Duty Vehicles

**GOAL**: Purchase 200 Light Duty Electric Vehicles in the City Fleet across all departments by 2030
(Goal is based on the City of Phoenix approved Climate Action Plan)

| | Summary of Recommendations for City Fleet - Light Duty | Year |
|---|---|---|
| 1. | Develop criteria for replacing existing internal combustion engine-equipped vehicles with EVs when due or nearly due for replacement | 2022 |
| 2. | Evaluate financial resources to support the transition of light-duty vehicles to EV. | 2022 |
| 3. | Update procurement agreements necessary to purchase light-duty EV vehicles–leveraging cooperative contracts to purchase a wide variety of vehicles | 2022 |

**Detailed Recommendations**

### By December 2022

- **Develop criteria** for replacing existing internal combustion engine-equipped vehicles with EVs when due or nearly due for replacement if EVs meet the business needs considering:
  - savings that can be realized through EV fleet requiring lower maintenance and lower fuels costs than internal combustion fleets.
  - required ranges to meet operational needs, miles traveled per day, anticipated advances in technology for medium and heavy-duty models, and total cost of ownership.
  - EV fleet transition purchasing policies that prioritize EV as a first-choice option, where applicable.
  - Vehicle availability/delivery coincides with available, installed charging infrastructure.
  - funding opportunities to support capital expenses.
  - replacement cycles prioritizing replacements based on vehicle age, mileage, maintenance costs, and other relevant replacement criteria.

- Establish EV Steering Committee of City staff to oversee citywide transition to electric fleet.
- Identify funding plan to purchase light-duty EV vehicles as replacements for ICE vehicles recognizing that the up-front purchase price for EV vehicles may be higher than ICE vehicles. Pursue funding from public and private sources including federal opportunities.
- Update fleet vehicle procurement agreements regularly to ensure a wide variety of EV procurement options.
- Train vehicle operators and fleet technicians on proper EV vehicle operation and maintenance.

### By December 2023

- Utilize a professional consultant, as necessary, to perform an infrastructure needs assessment and assist in development of transition strategy.
- Update fleet vehicle procurement agreements regularly to ensure a wide variety of EV procurement options.
- Train vehicle operators and fleet technicians on proper EV vehicle operation and maintenance.
- Pilot fleet programs, including medium and heavy-duty vehicles.
- Decide on initial model purchases and leverage citywide contracts and cooperative agreements for vehicle purchase or leases, in alignment with available vehicle charging infrastructure.

## By December 2025

- Evaluate potential locations of charging infrastructure compared to vehicle purchase schedule.
- Work with utilities to develop alternative charging rates and cost sharing opportunities.
- Pilot fleet programs, including medium and heavy-duty vehicles.

### EV Fleet Planning Tools

The Electrification Coalition recently launched its Dashboard for Rapid Vehicle Electrification (DRVE) tool--an open source tool that can be used by prospective fleet managers to better estimate costs associated with light-duty, medium-duty and heavy-duty fleet electrification.

The National Association of State Energy Officials is working with state agency leads under the Volkswagen Environmental Mitigation Trust Settlement to develop a shared database of alternative fuel vehicle fleet data and associated charging infrastructure. The database, hosted by NREL's Livewire program, will allow states to upload and aggregate common economic, energy and emissions data from fleet purchases or infrastructure investments funded through the VW settlement trust. This data can then be leveraged by states as they work to support the adoption of electric vehicles and other alternative fuel vehicles.

## 3b: City Fleet – Medium & Heavy-Duty Vehicles

**GOAL**: Evaluate the performance of newly introduced electrified medium and heavy-duty vehicles for the city fleet.

| | Summary of Recommendations for City Fleet - Heavy Duty | Year |
|---|---|---|
| 1. | Utilize the strategy of pilot testing for new models of medium and heavy-duty EV or other zero emission fuels, to evaluate performance | 2023 |
| 2. | Develop criteria, if applicable, for replacing existing internal combustion engine equipped heavy-duty vehicles with EVs (or other zero emission fuel) | 2023-2024 |

**Detailed Recommendations**

### By December 2022

- **Develop criteria** for replacing existing internal combustion engine equipped vehicles with EVs when due or nearly due for replacement if EVs meet the business needs considering:
  - required ranges to meet operational needs, miles traveled per day, anticipated advances in technology for medium and heavy-duty models, and total cost of ownership.
  - local, state, and federal funding opportunities to support capital and operating expenses.
  - current replacement cycles prioritizing replacements based on vehicle age, mileage, and maintenance costs.
  - a process for keeping an up-to-date list of eligible replacement options as new models come to the market--not only listing replacement options but also timelines and availability.
  - regularly schedule meetings with fleet vendors.

**Heavy Duty Charging Connector**

Vehicle manufacturers, charging station developers, and the scientific research community are currently engaged with testing and developing a global Megawatt Charging System (MCS) standard for HD EV charging. There is a desire in the HD EV trucking sector to avoid the costs and confusion associated with the lack of a single, standard connector for LD EV charging. The Charging Interface Initiative (CharIN), a non-profit association focused on e-mobility solutions, is leading the development of this inlet hardware and connector technology in concert with the EV industry.

## 3c: Charging Infrastructure for City Fleet

**GOAL**: Install light-duty EV Charging Infrastructure at city facilities to support the charging of 200 city fleet vehicles by 2030.

| | Summary of Recommendations for Charging Infrastructure for City Fleet | Year |
|---|---|---|
| 1. | Evaluate infrastructure/power needs and the required financial resources to support the transition of light-duty vehicles to EV. | 2022 |
| 2. | As infrastructure is installed, develop necessary operations and maintenance procedures. | 2023 |
| 3. | Install 30 or more Fleet charging ports in City facilities | 2023 |
| 4. | Install 70 or more Fleet charging ports in City facilities | 2024 & 2025 |
| 5. | Install 100 or more Fleet charging ports in City facilities | 2025-2030 |

**Detailed Recommendations**

### By December 2022

- Develop a City Operations EV Fleet Charging strategy that includes:
    - guidance for selecting EV charger types (networked or non-networked) based on data desired (tracking of mileage, maintenance schedules, department charges).
    - recommended rates of installation in advance of the purchase of EVs (just-in-time versus mass upgrades and future-proofing infrastructure through oversizing) that considers lead time needed for permits.
    - an approach for “managed charging” and guidelines for fleet use that minimizes utility costs and demand charges/peak times and leverages energy storage and microgrids including potential to use third-party owned systems to lower costs and reduce risk.
    - utility grid resiliency and charging station infrastructure–who operates, maintains, responds for emergency operations should there be malfunctions or outages. Explore how discretionary charging could be curtailed in power emergencies.
    - best practice approaches such as the Department of Energy Alternatives Fuels Data Center EVSE tool to calculate a number of L1/L2/DCFC and/or combinations needed for fleet use.

- Request to hire or train technical experts to project manage all electrical installs and electrical upgrades and permits and utility coordination.

## By December 2023

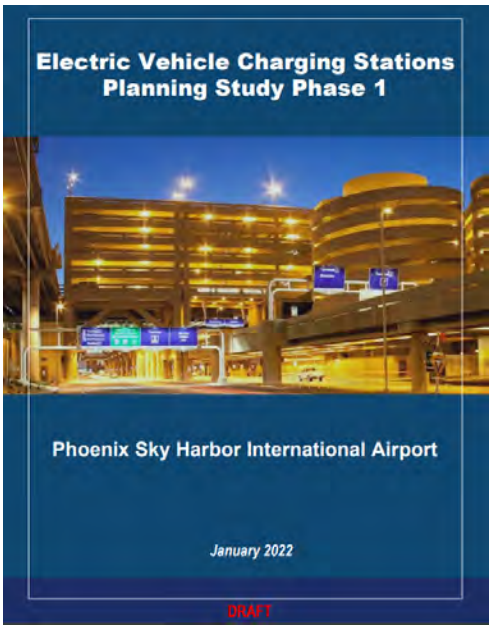
- Implement training of employees for EV driving, EV charging and EV maintenance prioritizing employee change management to achieve effective employee engagement.
- Install a minimum of 30 charging ports and associated electrical and infrastructure upgrades at City facilities with capacity for additional charging capability in the future, with maintenance contract (or many more if federal funding is available).

## By December 2025

- Install a minimum of 70 new chargers and associated electrical and infrastructure upgrades at City facilities with capacity for additional charging capability in the future with maintenance contract (or many more if federal funding is available)

### Planning Process for EV Charging at Sky Harbor Airport

Sky Harbor Airport has unique service demands including short- and long-term parking requirements for passengers and employees. Sky Harbor has an EV Charging Station Planning Study and a Capacity Demand Study underway that will inform infrastructure needs through 2030. The initial recommendations from these studies are not included alongside these recommendations except for forecasts for conversions of Aviation's light-duty vehicle fleet.



## 3d: Charging Infrastructure for Employees

**GOAL**: Build-out EV charging infrastructure for City employees to use at the workplace to meet employees' current charging needs by 2025 based on ongoing employee EV surveys.

| | Summary of Recommendations for Charging Infrastructure for City Fleet | Year |
|---|---|---|
| 1. | Undertake EV Infrastructure needs assessment for employee charging | 2022-2023 |
| 2. | Install 30 or more employee charging ports in City facilities | 2022-2023 |
| 3. | Install 70 or more employee charging ports in City facilities | 2023-2024 |
| 4. | Install 70 or more employee charging ports in City facilities | 2024-2025 |

**Detailed Recommendations**

### By December 2022

- Recommend Level 1 charging provided at no cost when available and Level 2 provided as initially free charging with an annual review to explore the viability of moving to cost recovery for employee EV charging and parking--exploring user fees versus City-paid as an incentive for sustainable commuting.
- Recommend locations and timing for rollout of employee/workplace charging.
- Adopt an Employee EV Etiquette Policy to maximize use of Level 2 and Level 3 charging infrastructure (i.e., vacate parking stalls when the charging session is complete).
- Provide guidance on level and type of charging infrastructure to be installed (Level 1 or 2 and DCFC, and networked vs non-networked).
- Explore incentives to encourage daytime charging and EV purchases.
- Create an employee EV survey that asks current employees who drives an EV, and who is planning to purchase in the next year, 3 years, and 5 years, and which times they are parked and in which lots (i.e., some employees may work evening hours or off-peak hours).
- Identify the number of current parking spaces per City building and the electrical service capacity at that location.
- Create a partnership with local utilities to identify EV charging rates that would apply.
- Identify guidance from the Internal Revenue Service (IRS) that allows for/ does not allow for EV employee charging as a tax-deductible benefit. If the IRS does not allow this as a tax-deductible benefit (like a subway card / metrocard / bike commuting card), then propose to City Council for EV charging to be an employee benefit.

### By December 2023

- Identify collaborative multi-city EV charger bulk purchase opportunities across US and/or Valley to lower upfront equipment cost (i.e., driveevfleets.org, other cities, MAG).

- Secure ongoing annual City funding to support City employees having access to EV charging by 2025 and identify opportunities that will enable ongoing expansion of EV charging through 2030 for employees.
- Purchase EV charging stations, either through any identified group-buy opportunities or through a stand-alone Request for Proposals (RFP).
- Install EV charging stations for City employees by 2025 based on results of employee EV survey.

## By December 2025

- Re-issue Employee Survey
- Identify any further collaborative multi-city EV charger bulk purchase opportunities across US and/or Valley to lower upfront equipment cost (i.e., driveevfleets.org, other cities, MAG).
- Secure ongoing annual City funding to support 100% of city employees having access to workplace EV charging by 2030.
- Purchase EV charging stations, either through any identified group-buy opportunities or through a stand-alone RFP.

# Appendix 1

# Glossary of Terms

***TYPES OF VEHICLES AND OPERATIONAL TERMS***

**(ZEV) Zero-Emission Vehicles:** ZEVs are vehicles that produce no tailpipe emissions of any criteria pollutant (or precursor pollutant) or greenhouse gas emissions from the onboard source of power, such as some plug-in hybrid electric vehicles (PHEV), battery-electric vehicles (BEV), and hydrogen fuel cell vehicles.

**(EV) Electric Vehicles:** EVs are a broad category that includes vehicles powered, at least in part, by electricity and uses a battery to store energy that powers the motor. Unless otherwise noted, EV refers to all plug-in vehicles in this report, including PHEVs and BEVs.

**(BEV) Battery-Electric Vehicles:** BEVs also known as a pure electric vehicle or an all-electric vehicle, contains batteries which can be charged externally, and store recovered braking energy. It uses an electric motor to power the vehicle. (Examples: Tesla Model 3, Chevrolet Bolt, Nissan Leaf)

**(PHEV) Plug-in Hybrid Electric Vehicles:** PHEVs are vehicles with both an internal combustion engine and electric motor that can be powered either by gas or electricity through a rechargeable battery. PHEVs may be zero-emission vehicles if they're operated entirely as EVs but are not true ZEVs because the hybrid mode includes use of an internal combustion engine. (Examples: Chevrolet Volt, Chrysler Pacifica, Mitsubishi Outlander)

**(FCEV) Fuel Cell Electric Vehicles:** Vehicles that produce electricity using hydrogen gas and produce no harmful tailpipe emissions, just water vapor.

**(ICEV) Internal Combustion Engine Vehicles:** ICE vehicles have an engine that is powered by a fossil fuel (gas or diesel) in which the combustion of a fuel occurs with an oxidizer in a combustion chamber. This type of vehicle is associated with tailpipe emissions.

**Regenerative Braking:** A method of braking used by an EV in which the energy that would have been lost as heat energy during braking is captured using a traction motor and stored in the battery.

**Battery Management System:** An electronic system within an EV that manages battery parameters such as state of charge, state of battery, maximum and minimum limits of energy. It also protects the battery by controlling energy flow to and from the battery.

**Lithium-Ion Battery:** Commonly used battery material used to power an EV.

***ELECTRIC VEHICLE CHARGING TERMS***

**(EVSE) Electric Vehicle Supply Equipment:** Refers to all of the equipment associated with transferring electric energy to a battery or other energy storage device in an electric vehicle. This includes hardware, including connectors, fixtures, devices, and other components. This is commonly called a charging station.

> **Level 1:** AC Level 1 EV charging (often referred to simply as Level 1) provides charging through a 120-volt (120V) single-phase AC plug (a typical wall outlet) at 12-16 amps. Level 1 EV chargers

provide about 3-5 miles of range per hour of charging. This type of charging is usually done at home.

**Level 2:** AC Level 2 EV charging offers charging through 240V (typical in residential applications) or 208V (typical in commercial applications) single-phase electrical service (like a dryer plug) at 12-80 amps (typically 32 amps). Level 2 EV chargers provide about 10-20 miles of range per hour of charging.

**(DCFC) Direct-current fast charging:** DCFC equipment (typically 208/480V AC three-phase input and less than 125 amps), enables rapid charging at a rate of at least 25 kW, with newer chargers rated up to 350 kW. Most commonly, DCFC can provide about 125 miles in 20-30 minutes.

**Fleet Charging:** EV charging infrastructure to accommodate a light-, medium- or heavy-duty fleet. Fleet charging infrastructure may consist of Level 2 and DC Fast Chargers based on fleet operator's needs.

**Employee/Workplace Charging:** EV charging infrastructure provided by an employer for employee use while at work.

**Public Charging:** Public EV charging covers a wide range of situations where an EV driver could potentially charge when away from home or work. Examples: libraries, parks, shopping centers, museums.

**Bidirectional Charging:** An EV charger that can flow charge to a battery and from battery to grid, vehicle and home.

**State of Charge:** State of charge is the level of charge of an electric battery relative to its capacity. The units of State of charge are percentage points (0% = empty; 100% = full).

**Range:** The total distance an EV can travel on one full charge before the battery needs to be recharged.

**Range Anxiety:** Range anxiety is the fear that an EV has insufficient range to reach its destination and would thus strand the vehicle's occupants. Studies show that driving range is one of the primary barriers to EV adoption.

***EV EQUITY TERMS***

**EV Equity:** EV equity is increasing access to and use of EVs among low- and moderate-income individuals to reduce impacts of climate change attributed to greenhouse gas emissions and health impacts attributed to air quality emissions.

***MOBILITY TERMS***

**Bike Share:** Bike share is a service where bicycles are available for shared use to individuals on a short-term basis.

**Car Share:** Car share is a service that gives members access to an automobile for short-term use — usually by the minute, hour, or day.

**E-Bike:** E-bikes are bicycles with an electric motor that can be used for propulsion. There are a few different types of e-bikes:

> **Class 1:** The electric drive on the e-bike is only activated by pedaling and ceases to provide assistance once the e-bike reaches 20 mph. Unless otherwise specified, the term e-bike refers to Class 1 pedal-assist e-bikes.
>
> **Class 2:** The electric drive on the e-bike can be activated through a throttle element and may also be activated through pedaling with top speeds limited to 20 mph.
>
> **Class 3:** The electric drive system on the e-bike is activated by pedaling and ceases to provide assistance once the e-bike reaches 28 mph.
>
> **Class 4: Motorcycle/Moped:** The electric drive system is activated by pedaling or throttle. These e-bikes can reach top speeds above 28 mph.

**Micromobility:** Use of a low-speed travel mode or use by a single person and includes use of e-scooters and bikes to travel distances five miles or less and often to or from another mode of transportation (bus, train, car).

**Multimodal:** Characterized by several different travel modes or options.

**On Road:** On-Road vehicles means any motor vehicle intended for use on the road, being complete or incomplete, having at least four wheels and a maximum design speed exceeding 15 mph.

**Off Road:** Off-Road Vehicle means any vehicle while it is being operated on a road not maintained by a federal, provincial, state, or local agency**,** not including entrance or departure ways to private property, or any vehicle which cannot be licensed to drive on a public road and is designed and manufactured primarily for off-road usage.

**Shared Mobility:** Shared use of a travel mode.

**(TNCs) Transportation Network Companies:** Programs, like ride-hailing apps, that provide prearranged and on-demand transportation services for compensation by connecting drivers of personal vehicles with passengers through mobile applications.

**Transit Vehicles:** Vehicles which carry passengers or public riders. It does not include school buses or charter buses.

***FLEET-RELATED TERMS***

**LDV: Light-Duty Vehicles:** Any Class One or Two motor vehicle designed primarily for transportation of persons and having a design capacity of twelve persons or less with a Gross Vehicle Weight Rating of 8,500 or less. This includes sedans, full size pick-ups and minivans.

**MDV: Medium-Duty Vehicles:** Any Class Two to Six motor vehicle having a Gross Vehicle Weight Rating between 8,500 and 26,000 pounds.

**HDV: Heavy-Duty Vehicles:** Any class Seven and above motor vehicle having a Gross Vehicle Weight Rating over 26,000 pounds.

**SUV:** Sport Utility Vehicle

***ELECTRICITY AND ENERGY RELATED TERMS***

**Ampere (Amp):** A unit used to measure electric current (how fast an electric current flows), usually used in the context of EV charging (i.e., a 50-amp EV charger).

**Kilowatt (kW):** The basic measurement of an EVs power that is generated by its batteries. Kilowatts = 1,000 watts)

**Kilowatt/hour (kWh):** The kilowatt-hour (kWh) is a unit of energy and is commonly used as a billing unit for energy delivered to consumers by electric utilities. A kWh is a measure of how much energy you're using. It doesn't mean the number of kilowatts you're using per hour. It is simply a unit of measurement that equals the amount of energy you would use if you kept a 1,000-watt appliance running for an hour. If you switched on a 100-watt light bulb, it would take 10 hours to rack up 1 kWh of energy. While a 50-watt item could stay on for 20 hours before it used 1 kWh.

**Volt:** A measure of the electromotive force that drives electrons through a circuit (pressure).

**Demand Charges:** There are two parts to a commercial electricity bill: Energy charges are based on the total amount of electricity you use, while demand charges are based on your highest "peak usage". These demand charges are determined by the highest 15-minute average usage recorded on your demand meter that month. Demand charges are applied to help pay-down the costs of maintaining the utility's delivery system (the power lines) and preserve power availability for all customers across the grid. Additionally, demand charges are intended to incentivize customers to both reduce their peak energy usage and shift their energy usage to non-peak times of day.

**Managed Charging**: Relies on communication signals from a utility to be sent to a vehicle or charging device to control charging events. Managed charging programs fall into two categories: passive and active. Passive programs focus on altering customer charging behaviors. One way to achieve this is using time-varying rates to incentivize customers to charge during less expensive off-peak hours. Active managed charging programs provide utility companies with the capability to determine and/or control charging time, scale, and location to manage peaks or absorbing excess renewable generation.

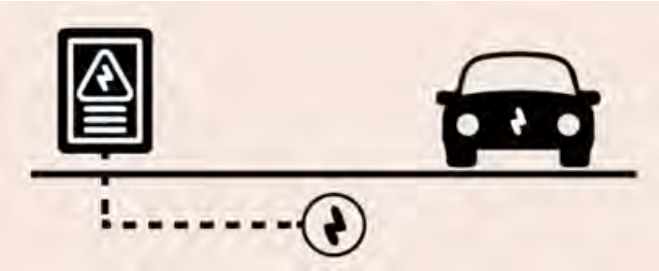
**Off-Peak Charging:** Charging your EV at certain lowest cost off-peak hours, usually during nighttime hours.

**Renewable Energy:** Energy sources that naturally replenish, such as solar or wind power.

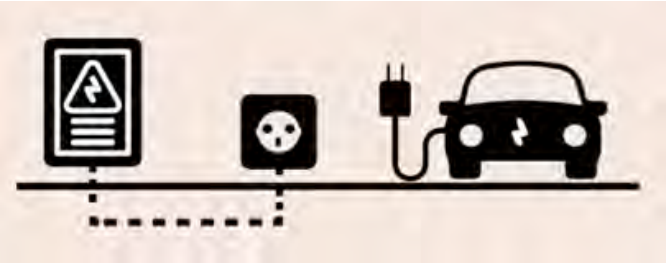
***EV BUILDING CODE-RELATED TERMS***

**EV Infrastructure Building Codes:** Require parking in new buildings to include the electrical equipment necessary to enable installation of electric vehicle (EV) charging stations. EV building codes give more people the option to drive an EV by increasing the number of charging stations and by bringing down charger installation costs by 75% or more compared to installing EV chargers during a building retrofit.

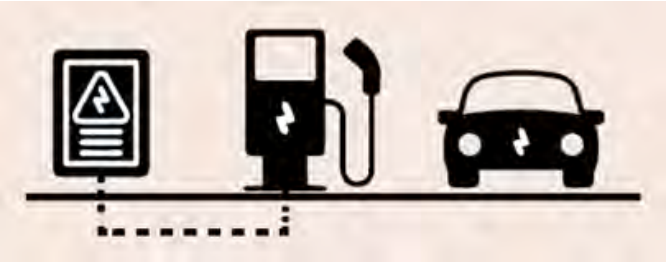
**EV-Capable:** Install electrical panel capacity with a dedicated branch circuit and a continuous raceway from the electrical panel to the future EV parking spot.



**EVSE-Ready Outlet:** Install electrical panel capacity and raceway with conduit to terminate in a junction box or 240-volt charging outlet.



**EVSE-Installed:** Install a minimum number of Level 2 EV charging stations.



***CLIMATE-RELATED ACRONYMS:***

**CAP:** Climate Action Plan
**GHG:** Greenhouse Gas such as Carbon Dioxide that contributes to global warming through the absorption of infrared radiation.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1. Clean Energy Requirements
2. Utility Scale Solar and Battery Development
3. Rooftop Solar and Battery Development
4. Electric Vehicle Infrastructure Development

Issues Covered

2

# Clean Energy Requirements

What Does Arizona Law Require?

3

# Utility Scale Solar and Battery Development

1. Why are there so many solar and battery projects seeking entitlements?
2. Issue Facing Utility Scale Developers
   a. Location, Location, Location!
   b. Transmission Line Right of Way
   c. Site Access
   d. Zoning

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# Rooftop Solar and Battery Development

- Issues Facing Rooftop Solar and Battery Developers
  1. Permitting
  2. Utility Rate Design

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# Electronic Vehicle Development

- Issues Facing EV Infrastructure Development
  1. Where do people charge?
  2. Permitting
  3. Regulation

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# City of Tucson Electric Infrastructure Development Standards

## Overview of Electric Vehicle & Solar Readiness Ordinances and the Streamlining of Solar Permitting through SolarApp

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## Agenda

- Electric Vehicle Development Standards
  - Electric Vehicle Roadmap
  - One- and two- family residential development
  - Multi-family and commercial development
- Solar Development Standards
  - Solar readiness ordinance
  - Streamlined review via SolarApp

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## Electric Vehicle Development Standards

- Electric Vehicle Roadmap
- One- and two- family residential development
- Multi-family and commercial development

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## City of Tucson Electric Vehicle Readiness Roadmap


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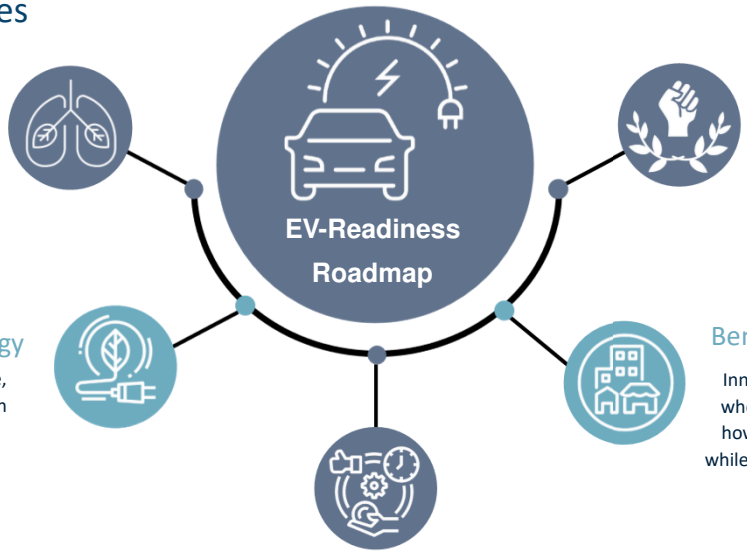
## Guiding Principles




### Promote clean air

Clean air that protects public health, our natural environment and sustainable economic growth.

### Ensure a healthier future

A process that values equity, access, and healthier communities and environment.

### Accelerate clean energy

Energy that is affordable, reliable and carbon neutral.

### Benefit economy wide

Innovation in how we move, where we live and work, and how we power our economy while limiting adverse impacts in our communities.

### Prove effective

Solutions that are integrated, durable, credible, and actionable.

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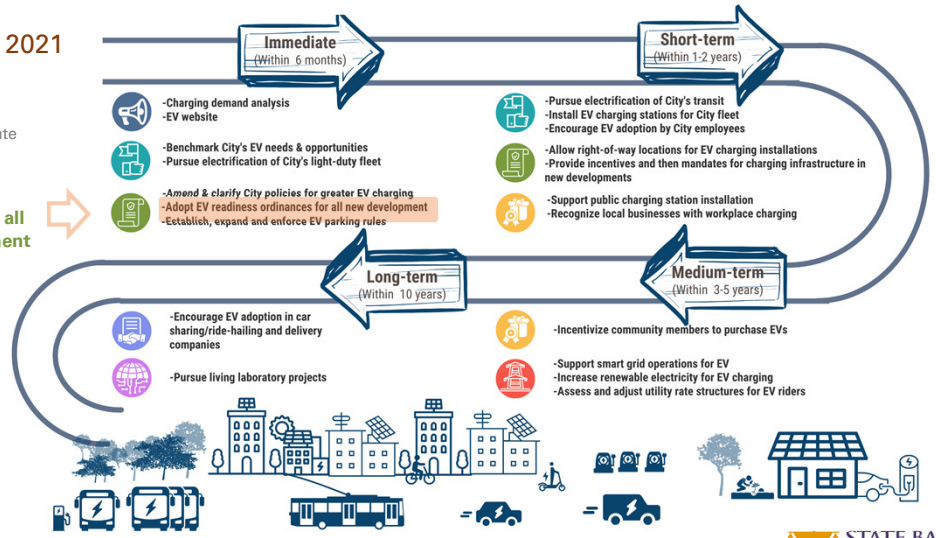
## EV Roadmap

Adopted April 2021

Item for immediate action:
**Adopt EV readiness ordinances for all new development**

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# National Trends

## Market Availability

**50** EV models available today

**130** EV models expected by 2023

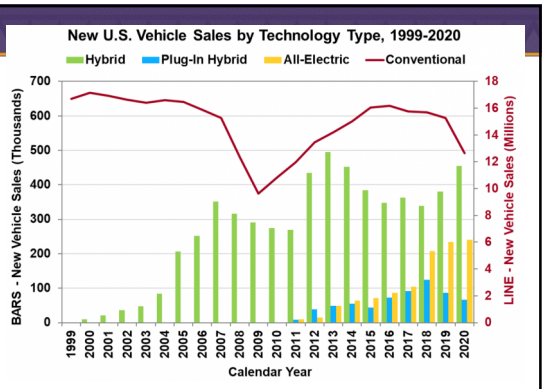
**± 5 years** According to one study, EVs should be cheaper to buy on average than combustion vehicles in about 5 years, without subsidies

**± 15 years** 6 Major automakers (Ford, GM, Volvo) pledged to phase out new gas and diesel vehicles by 2035-2040

*New building lifespan average starts at 30 years*

## Federal Priority

- 50% EV share by 2030
- Acceleration and deployment of EV tech, charging infrastructure, alternative fuel corridors, EV jobs prioritized in Electric Vehicle Charging Action Plan




EPRI.com eei.org energy.gov pewresearch.org Transportation Energy Data Book April 2021

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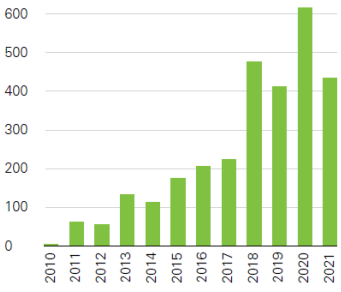
# EV Ownership

**National EV Share**
**2%**
**2018 – 2020**

About **one in 300** vehicles in the Tucson Metro Area is an EV

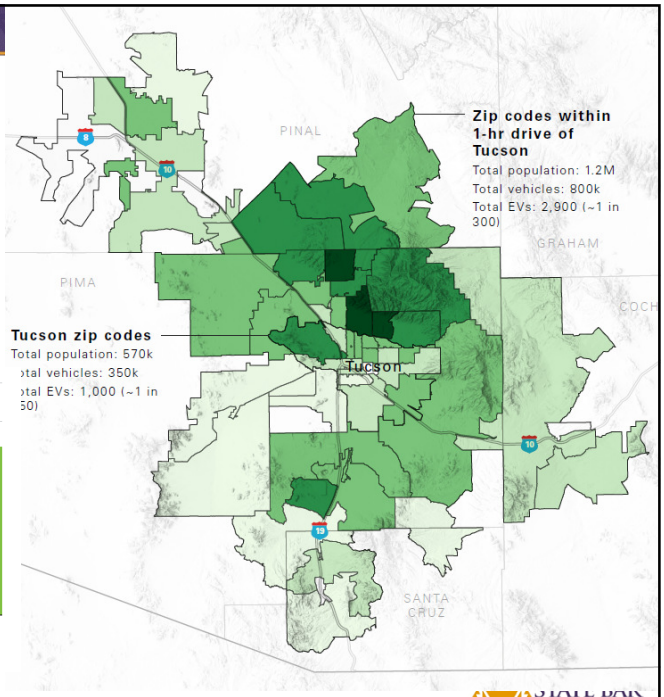
Around **1,000 EVs** are registered within the City of Tucson itself

**Total Electric Vehicles by Model Year**
Registered in Zip Codes within a 1-hour drive of Tucson




**Newer models** outnumber older ones, suggesting stronger EV sales in recent years

**More affordable models** of EVs make up the majority, like the Model 3 Tesla and the Nissan Leaf.

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# Peer City Research


**Arizona**

**Tucson** 0% - >1%
*Incentive only:* Total parking spaces -1 for every 1 EV station, up to 25%

**Phoenix** 3% - 4%
EV Roadmap in development

**Mesa**
Likely similar to Phoenix
*Incentive only:* Compact parking spaces +1% for every 2 EV stations, up to 25%

| | EV Ownership | EV Requirements | | Stations | Outlets | Conduit | Incentives |
|---|---|---|---|---|---|---|---|
| Albuquerque, New Mexico, 2021 | 2% | All New Development, 200+ spaces | 2% | 2% | | | 1 EV Station = - 2 Spaces |
| Miami Dade, Florida, 2019 | 2% | Multi-family, 9+ spaces | 20% | | 20% *10% phase in 2019* | | |
| Salt Lake City, Utah, 2018 | 2.5% | Multi-family | ~25% | 1:25 | 20% | 4% *All ADA Spaces EV Capable* | |
| San Jose, California, 2020 | >20% | Non-residential | 50% | 10% | | 40% | |
| | | Multi-family & Hotel | 100% | 10% | 20% | 70% | |

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# Charging Habits & Patterns

**Expanding the infrastructure network will help make EVs a viable option for all drivers, even those without garages**

## Charging at home

- More than 80% of EV drivers charge their cars at home
- It requires no (waking) time, no detours, and is gentler on the battery than high speed charging

## Charging at multifamily buildings

- About half of Americans do not have access to a dedicated off-street parking space for overnight or low cost EV charging

## Charging at workplaces

- Employers can help increase the convenience and affordability of driving electric for their employees

## Public charging

- Public charging stations can increase the daily useful range of EVs
- Public charging stations should typically be located where vehicle owners are highly concentrated and parked for long periods of time, such as shopping centers, airports, hotels, government offices, and other businesses

realpage.com/blog/multifamily-housing-and-ev-charging-stations/

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# Proposal Goals

**In addition to furthering the goals outlined in the EV Roadmap**

**Ensure equitable access** to the benefits of advancing technology, cost savings, and environmental benefits of EV adoption

**Provide significant cost savings** by avoiding extensive future retrofits to add EV charging infrastructure in the future

**Implement baseline requirements** at various commercial locations, based on visitation frequency, parking time, and diverse users

**Require the most usable readiness for the least cost** in building lifetimes to span the next 30 years and beyond

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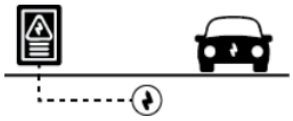
# EV Readiness

future

## EV Capable Conduit



**EV Capable Conduit**
+ electric capacity
+ "pre-wired"
= **future** EV parking space

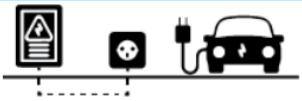
- Includes hard to retrofit elements during new construction
- Minimizes upfront costs

Trenching / conduit . . . . . **$20 – $41 per linear ft**
Electric upgrades . . . . . **$0 – $27,500 per lot**

Retrofits. . . . . **300% more on average**

ready to use

## EVSE Ready Outlet



**EVSE Ready Outlet**
+ electric capacity
+ wiring
+ outlet
= **ready to charge** EV parking space

- Ready to "plug in"
- Infrastructure can still be upgraded

NEMA 14 – 50 outlet . . . . . **$15 – $50 per space**
Trenching / conduit . . . . . **$20 – $41 per linear ft**
Electric upgrades . . . . . **$0 – $27,500 per lot**

## EVSE Installed Station

**EVSE Installed Station**
+ electric capacity
+ wiring
+ charging station
= **ready to charge with controlled access** EV parking space

- Most visible commitment to EV charging

Charging station. . . . . **$500 – $4,100 per space**
Trenching / conduit . . . . . **$20 – $41 per linear ft**
Electric upgrades . . . . . **$0 – $27,500 per lot**

swenergy.org bea.gov/ energysolutions.com

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# EV Ready for new Single Family Residential

On June 22, 2021, The City of Tucson M&C adopted an amendment to the building code requiring EV Readiness in new single family residential. This amendment:

- Outreach conducted over a two-year period – recommended by code and climate committees
- Applied to one- and two-family dwellings
- Was based on code development by the International Code Council to align with future code amendments to other jurisdictions nationally
- Specified a 40 amp outlet to be universal to the majority of electric vehicles currently on the market
- When adopted, M&C directed staff to address multi-family and commercial

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# Stakeholder Engagement


*Adoption of EV Ready requirement for 1 and 2 family residential

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# Proposal

Requirements are for new construction or existing expansion thresholds in the UDC

| | Total EV Requirement | Level of EV Readiness: Stations | Outlets | Conduit | + Incentives | Summary |
|---|---|---|---|---|---|---|
| Multifamily | 25% | | 10% | 15% | for each; or additional = 1 less space | outlets & conduit required<br>• EV drivers most likely to charge at home.<br>• Residents' regular use possible to manage without stations |
| Commercial<br>Includes office use | 20% | | 5% | 15% | for each; or additional = 1 less space | outlets & conduit required<br>• The regularity and duration of a work shift is next preferred for charging.<br>• Employees' regular use possible to manage without stations |
| Retail<br>Includes food & beverage service use | 10% | 5% | 5% | | for each additional = 2 less spaces | stations & outlets required<br>• Shorter dwell times than home or workplace<br>• Public charging stations can increase the daily useful range of EVs<br>• Stations are appropriate interface for varied EV drivers/visits |

*Exception: Retail uses with less than 100 motor vehicle parking spaces are exempt from required EVSE.*

= 1 parking space

**Reductions possible up to 30% reduction of required lot size**

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# EV Ready for new Multi-family and Commercial

Require EV Readiness in **new** multifamily and commercial development and provide incentives for additional infrastructure beyond minimum standards.

| Proposed MULTIFAMILY .....25% | | Proposed COMMERCIAL .....20%<br>Includes Office Uses | | Proposed RETAIL .....10%<br>Includes Food & Beverage Service Uses | |
|---|---|---|---|---|---|
| Stations | 0% | Stations | 0% | Stations | 5% |
| Outlets | 10% | Outlets | 5% | Outlets | 5% |
| Conduit | 15% | Conduit | 15% | Conduit | 0% |

*Exception: Retail uses with less than 100 parking spaces exempt from EV Requirements*

**Requirements are for new construction or existing expansion thresholds in the UDC**

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## Solar Development Standards

- Solar readiness ordinance
- Streamlined review via SolarApp

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## Solar Readiness Ordinance

Adopted by M&C in 2009, the Solar Ready Ordinance requires all new residences to be solar ready for electric photovoltaic (PV) and hot water.

New residential homes must:

- Provide space available for solar equipment (panels, meter, disconnect & inverter)
- Include PV load entry on Service Load Calculation
- Space on electric panel reserved for PV
- Installation of solar water heating system or conduit and setup for for installation of solar water heating system

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## Solar Permit Streamlining via SolarAPP+

Collaboration between National Renewable Energy Laboratory (NREL), City of Tucson, Pima County, and industry stakeholders to set up a streamlined solar permitting process.

Goals of this project:

- Shorter review times
- Increased staff efficiency
- Simplified process for applicants

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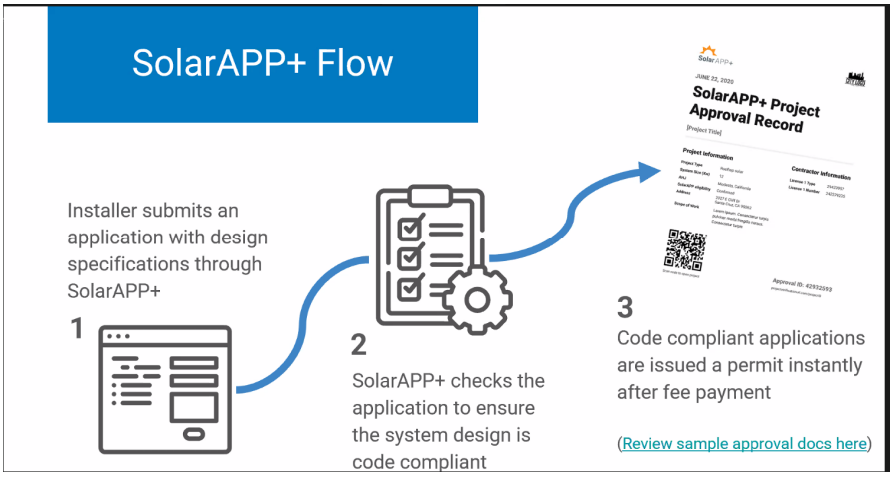
## How SolarAPP+ works

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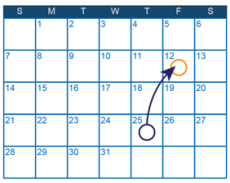
# Preliminary feedback from SolarAPP+

**Shorter project timelines**



SolarAPP+ projects have been permitted, installed, and inspected around 13 days sooner than traditional projects

Based on differences in median durations

**Staff time savings**

SolarAPP+ has saved over 3,000 hours of jurisdiction staff time through automated permit reviews

**Improved inspections**

SolarAPP+ projects have been about 9% less likely to fail inspections than traditional projects

Based on data from 7 jurisdictions

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CITY OF TUCSON

PLANNING & DEVELOPMENT SERVICES

# Questions?

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# Legislative Update

June 3, 2022

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APA AZ American Planning Association Arizona Chapter

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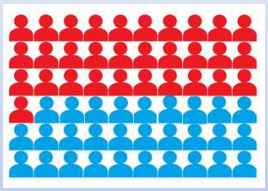
# 2022 Legislature

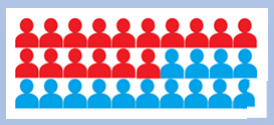
## House of Representatives

Republicans – 31
Democrats – 29



## Senate

Republicans – 16
Democrats – 14



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# Session Snapshot

Day – 131
Bills Introduced – 1780
Bills signed into law – 229
*Subject to change

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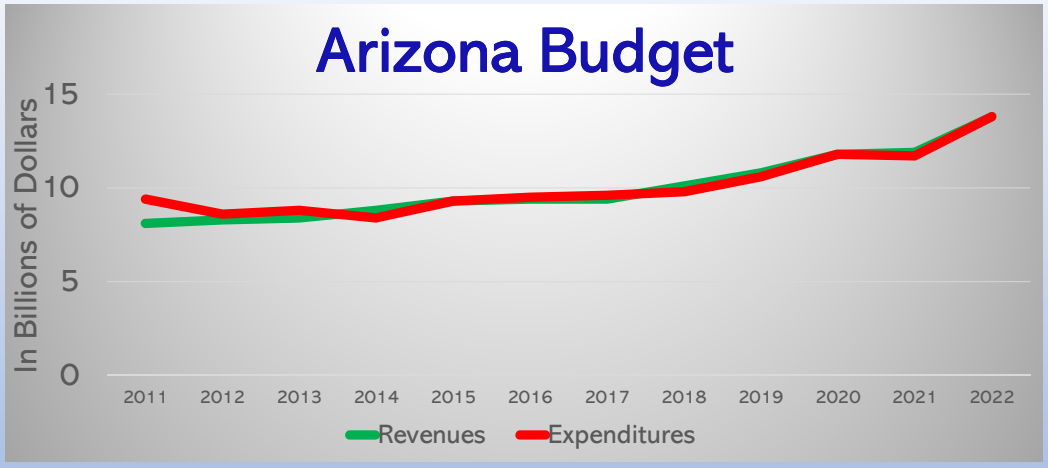
# Arizona Budget




- FY 2021 – $13.8 billion
- Proposition 208 – Dead
- Likely surplus of $5.1 billion

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# Transportation Issues

- S1239 APPROPRIATION; WIDENING; I-10 (Chapter 218).
- APPROPRIATION; STATE ROUTE 24; CONNECTOR 3/9 from Senate appropriations do pass.
- TRANSPORTATION TAX; ELECTION; MARICOPA COUNTY 2/10 from House transportation with amendment #4153.
- APPROPRIATIONS; ADOT; TIER 2 STUDIES 3/16 from Senate appropriations with amendment #4762.

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# Water Issues

- H2037: COUNTIES; POWERS; WATER SUPPLY PROJECTS 4/22 (Chapter 164).
- H2055: HARQUAHALA NON-EXPANSION AREA; GROUNDWATER TRANSPORTATION 3/22 from Senate rules okay.
- H2549: STORED WATER; CERTIFICATES; IMPACT; ACCOUNTING 2/24 retained on House COW calendar.
- H2725: ARIZONA WATER AUTHORITY 2/9 referred to House natural resources-energy-water.

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# Housing/Homelessness Issues

- H2610: AFFORDABLE HOUSING; PROJECT UNIT SIZE 4/26 passed Senate 25-1.
- H2674: HOUSING SUPPLY STUDY COMMITTEE 4/25 (Chapter 185).
- 2805: EXTENSION; LOW-INCOME HOUSING TAX CREDIT 2/8 referred to House ways-means and appropriations committee.
- S1117: AFFORDABLE HOUSING; PROJECT UNIT SIZE 3/8 referred to House ways-means.
- S1581: DEPARTMENT OF HOUSING; HOMELESSNESS 3/24 House appropriations amended; report awaited. From House appropriations with amendment #4856.

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# Land Use Issues

- H2482 MUNICIPALITY; GENERAL PLAN; ADOPTION; AMENDMENT (Chapter 166).
- H2579 RESIDENTIAL ZONING; PARK MODEL TRAILERS (Chapter 182).
- S1594 ANNEXATION; PRE-ANNEXATION AGREEMENTS (Chapter 215).
- H2151: LAND DIVISION; ACTING IN CONCERT 2/24 retained on House COW calendar.
- H2234: VACATION RENTALS; SHORT-TERM RENTALS; ENFORCEMENT. 2/16 from House Commerce do pass.
- H2554: COUNTIES; LAND DIVISIONS; SURVEYS 5/18 retained on Senate COW calendar.

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# Case Law Update 2021-22

Presented by
Timothy Kinney, Esq.

STATE BAR OF ARIZONA

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## Selected Cases

1. *Town of Florence v. Florence Copper Inc.,* 493 P. 3d 891 (App. 2021).
2. *Ray & Lindsay - 11, LLC v. Town of Gilbert,* 499 P.3d 335 (App. 2021).
3. *S. Ariz Home Builders Association v. Town of Marana*, 497 P.3d 1032 (App. 2021).
4. *Henry v. City of Somerton*, WL 2514686 (D. Ariz. June 17, 2021).
5. *State of Arizona v. Arizona Board of Regents,* No. CV-21-0134-PR (Ariz. April 5, 2022).
6. *Bennett v. City of Kingman*, WL 2439290 (D. Ariz. June 15, 2021) (unpublished).
7. *City of Austin v. Reagan National Advertising of Austin, LLC*, 596 US. __ (2022).

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## *Town of Florence v. Florence Copper Inc.,* 493 P. 3d 891 (App. 2021).

*A local jurisdiction cannot set aside a development agreement with a private entity by enacting a contrary ordinance.*

- Town annexed property in 2002 and entered pre-annexation development agreement granting owner vested right to operate a copper mine as well as right to develop residential uses.
- Town rezoned property in 2007 to allow denser residential development.
- New owner of property, Florence Copper, wished to continue using property for mining purposes despite Town's opposition.
- Town sued in 2013 to declare mining a prohibited use.

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## *Town of Florence v. Florence Copper Inc.*

- Town argued the superior court erred because it did not defer to the Town's laws and procedure in determining zoning for the property.
- The court ruled the Town's zoning decisions are subject to review.
- The court ruled the Town "fully and formally embraced the Development Agreement" in 2003.
- The court was simply enforcing the plain terms of the development agreement and subsequent zoning decisions did not void the development agreement.

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## *Ray & Lindsay – 11, LLC v. Town of Gilbert,* 499 P.3d 335 (App. 2021).

*Development agreements authorized by ARS § 9-500.05 are distinct from involuntary assessments under ARS § 9-243 and therefore do not abate after 10 years if affected property is not developed after 10 years.*

- Owner of property entered development agreement in 2005 where the Town promised to construct certain public improvements and the owner promised to reimburse the Town for its share, and the Town would receive a lien to ensure payment.

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## *Ray & Lindsay – 11, LLC v. Town of Gilbert*

- Ray and Lindsay ("RL") acquired the land in 2016, which was still undeveloped.
- RL argued the Town must remove its lien because it was an assessment under ARS § 9-243(C) and had therefore abated.
- The court disagreed, because development agreement are authorized under ARS § 9-500.05, not under § 9-243.
- RL next argued the reimbursement requirement was an involuntary assessment under § 9-243.
- The court ruled the plain language of the statutes are clear that all reimbursement obligations are pursuant to the development agreement statutes, and the development agreement had been negotiated and mutually agreed to.
- Finally, the parties agreed to a time limitation in the development agreement as allowed by statute, and therefore the reimbursement obligation was not involuntary.

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## *S. Ariz Home Builders Association v. Town of Marana*, 497 P.3d 1032 (App. 2021).

*Town did not violate state law by assessing development fees solely against future development where the infrastructure was designed to primarily benefit future development even if the infrastructure also benefits current customers.*

- Town took possession of Marana Water Reclamation Facility ("WRF") from Pima County in 2012.
- Town made improvements to WRF in 2013.
- Town issued bonds to fund the acquisition and improvements and commissioned infrastructure improvement plans (IIPs) for sewer and water impact fees.

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## *S. Ariz Home Builders Association v. Town of Marana*

- The Town effectively replaced 2013 fees with new water impact fees in 2017.
- Phase 1 of WRF improvements were operational in 2018.
- SAHBA sued Town seeking declaratory judgment that new impact fees were unlawful because "imposing 100% of the WRF acquisition cost on new development is disproportional" since existing users also benefit.
- The court held the fees do not violate statute simply because it happens to serve existing development as well as future development.
- The court also held the fees were not disproportional.
- The AZ Supreme Court accepted review and will hear oral arguments June 30.

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## *Henry v. City of Somerton*, WL 2514686 (D. Ariz. June 17, 2021).

*City zoning ordinance treated church on less than equal terms with non-religious assemblies when requiring CUP.*

- City zoning ordinance required a CUP for religious assemblies, but not social clubs.
- Plaintiff rented space and began work on the space without seeking CUP or building permits.
- City issued criminal citations, later dropped due to investigations by DOJ and Arizona Attorney General.
- Plaintiff then sued City under Arizona Free Exercise of Religion Act (FERA), § 1983, for malicious prosecution, and that the CUP requirement was a prior restraint.

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# *Henry v. City of Somerton*


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# *Henry v. City of Somerton*

- The court held Plaintiff's prior restraint claim was not ripe. They needed to actually apply for a CUP and be denied first.
- The court then concluded the CUP requirement treated religious uses on less than equal terms with non-religious assemblies and therefore violated FERA.
- Finally, there was no evidence of selective enforcement and that the prosecution of Plaintiff was supported by probable cause, and was therefore not malicious prosecution.
- Plaintiffs have appealed decision to 9th Circuit.

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## *State of Arizona v. Arizona Board of Regents*, No. CV-21-0134-PR (Ariz. April 5, 2022).

(1) to initiate an action under A.R.S. § 42-1004(E), there must be an applicable tax law to enforce;

(2) the Attorney General may bring a quo warranto action under A.R.S. § 12-2041 to challenge the unlawful usurpation or exercise of a public franchise; and

(3) a public-monies claim brought by the Attorney General is subject to the five-year statute of limitations described in A.R.S. § 35-212(E).

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## *State of Arizona v. Arizona Board of Regents*

- ABOR entered into agreement with Omni for it to construct and operate a hotel and conference center on property owned by ABOR at ASU.
- The Omni Deal includes construction of a new hotel, conference center, and parking lot.
- Omni has option to lease the hotel and conference center from ABOR for sixty years and to purchase the property at the end of the lease term for a nominal fee.
- Because property owned by ABOR, as a state entity, is tax-exempt, Omni would not pay the property taxes a private hotel and conference center would otherwise pay during the lease term.

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Image courtesy of Omnihotels.com

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# *State of Arizona v. Arizona Board of Regents*

- Omni would pay ABOR prepaid rent of $5.9 million and annual rent during the lease term totaling more than $118 million.
- ABOR also agreed to pay Omni up to $19.5 million towards constructing the conference center, which Omni would otherwise fund, in exchange for seven days' use of the center annually.
- The Attorney General filed a three-count complaint against ABOR in 2019 seeking to void the transaction or subject the property to taxes.

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## *State of Arizona v. Arizona Board of Regents*

- The Attorney General argued that the ABOR-owned property was subject to taxation; thus, the property must either be taxed or the agreement voided.
- The Attorney General argued that he had the authority to bring the claim under § 42-1004(E), which mandates that the Attorney General "shall prosecute in the name of this state all actions necessary to enforce this title [42] and title 43." The referenced titles include Arizona's tax laws.
- The court ruled there is no enforcement action the Attorney General can take under § 42-1004(E) because there is no tax to enforce.
- For a conveyance to be made to evade taxation, there must be a tax to evade in the first place, and here there was none.

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## *State of Arizona v. Arizona Board of Regents*

- The Court then decided the text of ARS § 12-2041(A) allows the Attorney General to bring claims under this statute, but because the purpose of the Omni Deal was not to evade taxes, Count II failed.
- Count III survived, however, because the Attorney General properly alleged the Omni Deal was not for the benefit of the state, but Omni.
- Finally, the Court ruled the Attorney General's public-monies claim was subject to the five-year statute of limitations set forth in ARS § 35-212(E) and not a one-year statute of limitations in ARS § 12-821.
- Surviving counts were remanded.

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## *Bennett v. City of Kingman*, WL 2439290 (D. Ariz. June 15, 2021) (unpublished).

*Denial of CUP application does not constitute a compensable taking.*

- Plaintiff owns property in Kingman, with part being used for storage units, part vacant.
- City rezoned property in 2005, prohibiting storage use on vacant part.
- Plaintiff applied for CUP to allow storage use, which was granted.
- Plaintiffs received two extensions of CUP, but City denied a third.

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## *Bennett v. City of Kingman*

- In 2017 Plaintiffs applied for new CUP, which was denied.
- Plaintiffs sued City for violation of federal and state takings clauses, violation of their vested rights, due process violations, and breach of contract.
- Court ruled there was a genuine issue of material fact regarding Plaintiff's vested rights claim based on detrimental reliance for original CUP.
- There was no compensable taking based on Plaintiff's mere expectation of additional income.
- No due process violation because City conducted public hearings.

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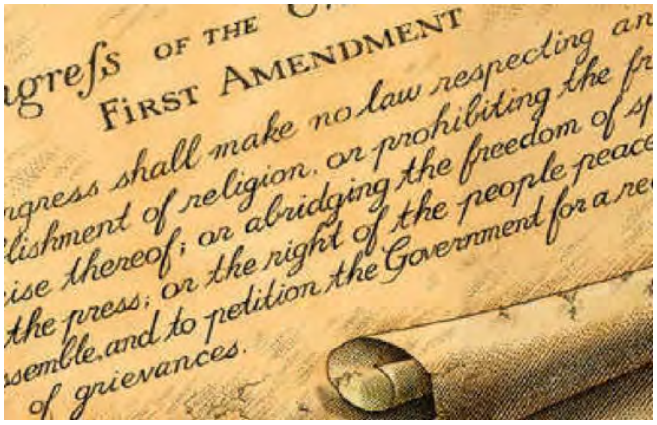
## *City of Austin v. Reagan National Advertising of Austin, LLC*, 596 US. __ (2022).

Decided April 21, 2022.

Clarifies *Reed v. Town of Gilbert*, 576 U.S. 155 (2015).

Reagan owns billboards in Austin. The City denied its applications for permits to digitize some of its billboards.

Reagan sued the City, alleging the City's prohibition against digitizing off-premises signs, but not on-premises signs, violated the First Amendment.

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## *City of Austin v. Reagan*

- District court held that the challenged sign code provisions were content neutral under *Reed v. Town of Gilbert*, reviewing the City's on-/off-premises distinction under intermediate scrutiny, and found that the distinction satisfied that standard.
- The Court of Appeals reversed, reviewing the sign code under strict scrutiny.
- It found the on-/off-premises distinction to be facially content based because a government official had to read a sign's message to determine whether the sign was off-premises. Reviewing the City's on-/off-premises distinction under strict scrutiny, it held the City failed to satisfy that onerous standard.

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## *City of Austin v. Reagan*

- The Court held unlike the sign code in *Reed*, Austin's sign ordinances do not single out any topic or subject matter for differential treatment.
- A sign's message matters only to the extent that it informs the sign's relative location.
- Thus, the City's on-/off-premises distinction is more like ordinary time, place, or manner restrictions, which do not require the application of strict scrutiny.
- The Court's precedents and doctrines have consistently recognized that restrictions on speech may require some evaluation of the speech and nonetheless remain content neutral.

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## *City of Austin v. Reagan*

- The Court's determination that the City's on-/off-premises distinction is facially content neutral did not end the First Amendment inquiry.
- Evidence that an impermissible purpose underpins a facially content-neutral restriction may mean that the restriction is nevertheless content based.
- Moreover, to survive intermediate scrutiny, a restriction on speech or expression must be "narrowly tailored to serve a significant governmental interest."
- Because the Court of Appeals did not address these issues, the Court remanded them.

STATE BAR OF ARIZONA

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# Summaries of Select Land Use Cases (2021-2022)[1]

## I. *Town of Florence v. Florence Copper Inc.,* 493 P. 3d 891 (App. 2021).

*A local jurisdiction cannot set aside a development agreement with a private entity by enacting a contrary ordinance.*

Summary: The Town of Florence ("Town") annexed a large parcel of property in 2002 and entered a pre-annexation development agreement (the "Development Agreement") with its owner ("Merrill"), granting him and his successors a vested right to operate a copper mine on the parcel, along with assurances the owner could also develop the property for residential uses. By its terms and under Arizona law, the development agreement could be amended only with both parties' consent. The Town later rezoned the property in 2007 to allow the owner to build more homes on the property, with the owner's consent - a change from industrial to residential zoning. Then in 2013, no longer happy with the prospect of a copper mine within city limits, the Town sued Florence Copper, Inc. ("FC"), the original owner's successor in interest, asking the superior court to declare mining a prohibited use despite the pre-annexation development agreement. The superior court ruled against the Town, which then appealed from the final judgment and attorney fee award in favor of FC.

The Town contended the superior court erred for several reasons. First, the Town argued the superior court "was compelled under the separation of powers doctrine to defer to the Town's laws and procedure in determining the zoning for the Property" because the Arizona legislature delegated the Town its zoning authority under A.R.S. §§ 9-462 to -462.08. The Court was not persuaded. Local governments do not possess absolute power over zoning decisions; those decisions are subject to judicial review. See, e.g., *Cardon Oil Co. v. City of Phoenix*, 122 Ariz. 102, 104 (1979) ("When zoning power is used in such a way that the attempted regulation amounts to a 'taking' of property, the zoning ordinance runs into direct conflict with [Ariz. Const. art. 2, § 17.]"); see also *City of Tucson v. Whiteco Metrocom, Inc.*, 194 Ariz. 390, 394, ¶ 10 (App. 1999) (cities do "not have vested rights in [their] zoning powers, and the state can reduce or condition those powers").

Second, the Town argued the superior court erroneously "substituted [its] judgment for that of the legislative bodies responsible for passing zoning regulations," and criticized the 2003 Development Agreement and 2003 Plan as a "developer utopia" that "undercut[s] the health, safety and welfare component of zoning." But the court only found the Town and Merrill voluntarily entered into a 35-year binding development agreement, and then ordered the Town to perform its contractual promises, citing both A.R.S. § 9-500.05 and the Contract Clause of Arizona Constitution. Ariz. Const., art. 2, § 25. And the Town's current description of the 2003 Development Agreement contradicts the terms of that agreement, which characterizes the 2003 Plan as "in the best interest of the Town and the health, safety and welfare of its residents," and as promising "significant benefits to [the] Town."

[1] Summaries taken from text of respective opinions. Some text edited for brevity, readability, and some citations shortened. See opinions for full text.

Arizona law does not foist development agreements on local governments, A.R.S. § 9-500.05(A), and the Town could have negotiated further concessions from Merrill if so desired. See Shelby D. Green, Development Agreements: Bargained-For Zoning That is Neither Illegal Contract Nor Conditional Zoning, 33 Cap. U.L.Rev. 383, 394, 407 (2004) ("[A] municipality is able to set definite conditions that govern the process of development, thus limiting the potential negative impacts from the development on neighboring land and the community."). Whatever its current opinion, the Town fully and formally embraced the Development Agreement and 2003 Plan. See Rathkopf's, § 44:16 ("Development agreements are authorized by state legislation in order to promote the general welfare by allowing a reasonable balancing of the public and the private interest in ascertaining with reasonable certainty the requirements that must be met for a specific development project.").

The Town also contended the superior court disregarded Arizona law that requires municipalities to enlist public participation in the zoning processes. See A.R.S §§ 9-462.03, -462.04. The Court disagreed. The court simply enforced the plain terms of a development agreement, itself the product of Arizona law. Having agreed to the Development Agreement in 2003, the Town must comply with its terms. The Court affirmed the superior court's judgment.

## II. *Ray & Lindsay – 11, LLC v. Town of Gilbert,* 499 P.3d 335 (App. 2021).

*Development agreements authorized by ARS 9-500.05 are distinct from involuntary assessments under ARS 9-243 and therefore do not abate after 10 years if affected property is not developed after 10 years.*

Summary: In 2016, Ray and Lindsay, LLC ("RL") acquired vacant land on the corner of Ray and Lindsay Roads. Eleven years earlier, in 2005, the prior owner of the land had entered a development reimbursement agreement with the Town of Gilbert under A.R.S. § 9-500.05, which expressly bound all successors and ran with the land. Under the agreement, the Town promised to construct certain public improvements required for a proposed development of the land, the landowner promised to reimburse the Town for a proportionate share of the resulting costs, and the Town would receive a lien on the land to ensure payment. RL later insisted it was not required to reimburse the Town and sued for a declaratory judgment recognizing that the development reimbursement agreement was an assessment, which had abated under A.R.S. § 9-243(C), and the Town must remove its lien. The superior court held the development agreement was not an assessment and dismissed the lawsuit. The Court affirmed because development agreements are authorized and governed by A.R.S. § 9-500.05, and not circumscribed as assessments under A.R.S. § 9-243.

Although the reimbursement requirement was in a development agreement authorized by § 9-500.05, RL argued it was an involuntary assessment under § 9-243.

An assessment under § 9-243 is a targeted mechanism for Arizona towns to finance public improvements by shifting the construction costs for streets and sidewalks from public coffers to the local businesses and landowners that benefit from the improvements. See A.R.S. § 9-243(B) ("If the council determines that such streets are necessary before the development of the property, the council may order these improvements to be constructed by the town at its

expense and the expense shall be assessed against the property."); A.R.S. § 9-243(A) (sidewalk construction). These assessments are compulsory and do not require the assent of a business or landowner. See A.R.S. § 9-243(A), (B). The legislature imposed various limitations on the assessment power, including a limited shelf life to protect businesses and landowners from having to pay for streets and sidewalks they never need or use: "Any assessment under this section shall abate if the property has not been developed within ten years of the assessment." A.R.S. § 9-243(C). And the legislature established a mechanism for businesses and landowners to appeal the assessments to the superior court. See A.R.S. § 9-243(D) ("The determination of necessity by the council resulting in the assessing of property under this section may be appealed by any aggrieved party to the superior court.").

By contrast, a development agreement under § 9-500.05 is a contract between a developer and local government. "By authorizing cities and towns to enter development agreements, the legislature expanded the land-use toolbox of local governments to attract large investments from developers who demand more certainty and less risk—sheltering the developers from oscillating public preference and unpredictable political winds." *Town of Florence v. Florence Copper Inc*., __ Ariz. __, 2021 WL 1099043 at *4 (Ariz. App. Mar. 23, 2021). As relevant here, Arizona cities and towns may negotiate and enter broad development agreements on the "[c]onditions, terms, restrictions and requirements for public infrastructure and the financing of public infrastructure and subsequent reimbursements over time." A.R.S. § 9-500.05(H)(1)(g).

Unlike an assessment, mutual assent is needed to enter and amend a development agreement. See A.R.S. § 9-500.05. And unlike an assessment, the legislature did not limit the permissible duration of development agreements; the burdens and benefits of development agreements inure to "successors in interest and assigns," and they cannot be terminated without mutual assent. A.R.S. § 9-500.05(A), (C), (D).

The Court held RL's argument failed under the plain language of the statutes governing assessments and development agreements. First, the legislature expressly limited the abatement restriction in § 9-243(C) to "any assessment under this section." A.R.S. § 9-243(C) (emphasis supplied). But development agreements are covered in a different section—§ 9-500.05. At a minimum, if the legislature intended abatement to apply to development agreements, it could and would have stated that it applies to all reimbursement obligations "under this title." *State ex rel. Fox v. New Phoenix Auto Auction, Ltd*., 185 Ariz. 302, 308 (App. 1996) (citing A.R.S. § 1-213) (recognizing the importance of "the legislature express[ing] itself using its own technical terms," like "section").

Second, the Town neither "require[d]" nor "order[ed]" GPI and RL to reimburse the construction costs and described under § 9-243(A) and (B). Instead, the Town and GPI voluntarily negotiated and mutually agreed to the reimbursement requirement as a "condition[], term[], restriction[] [or] requirement for public infrastructure" under § 9- 500.05(H)(1)(g). And RL did not allege the development agreement was void or voidable as the product of duress or otherwise.

Third, unlike a time-limited assessment under § 9-243(C), the legislature recognized that parties to a development agreement may agree on "[t]he duration of the development agreement." A.R.S. § 9- 500.05(H)(1)(a).

Because the reimbursement agreement was a development agreement under § 9-500.05, and not an assessment under § 9-243, the Court affirmed.

### III. *S. Ariz Home Builders Association v. Town of Marana*, 497 P.3d 1032 (App. 2021).

*Town did not violate state law by assessing development fees solely against future development where the infrastructure was designed to primarily benefit future development even if the infrastructure also benefits current customers.*

Summary:

In 2012, the Town took possession of the Marana Water Reclamation Facility ("WRF") from Pima County in exchange for assuming the County's debt on the WRF of approximately $16.4 million. In 2013, the Town made improvements to increase the secondary treatment system to 500,000 gallons per day and planned future expansions to 1,500,000 gallons per day. The Town also replaced other equipment to enhance effluent purity levels, aiming to recharge reclaimed water to accrue reclaimed water storage credits under Arizona groundwater management provisions.

In 2013, the Town issued bonds to fund the acquisition and expansion of the WRF, resulting in an annual $1.8 million debt service commencing in 2016. The Town also commissioned a pair of infrastructure improvement plans ("IIPs") related to acquisition costs and expanding or improving the WRF "to determine the capital improvements that are required to meet the next ten year's growth for each benefit area."

In 2017, the Town posted for comment the IIPs for new sewer impact fees ("2017 Sewer Impact Fee") and new water impact fees ("2017 Water Impact Fee") and adopted those fees in conjunction with a capital improvement project called for in the Master Plan. The 2017 fees effectively replaced the 2013 Fees because the Town's resolution approving the new assessments "amended" the 2013 Fees.

In June 2018, Phase 1 was completed and operational, meaning the new secondary treatment facility was in place and functioning. In August, SAHBA filed a complaint against the Town requesting declaratory judgment that the impact fees were unlawful under ARS § 9-463.05 because "imposing 100% of the WRF Acquisition Cost on new development is disproportional," since the improvements would also benefit existing users. Both parties filed motions for summary judgment, the first addressing whether SAHBA's complaint was barred by a statute of limitations, and the second relating to the validity of the Town's exactions. In March 2020, the trial court issued a ruling that SAHBA's action was "not time-barred under Arizona's statute of limitations," and that the Town's "enactment of 2017 fees conforms with the requirements of" § 9-463.05. SAHBA appealed.

The Court held, reading the statute as a whole and giving meaning to all its provisions, a development fee does not violate applicable law simply because the project, undertaken to serve new development and involving necessary public services, happens to serve existing development as well. As the trial court observed, § 9-463.05 "charges cities and towns with meeting an extensive compliance procedure so that the overriding goal of balancing the cost . . . is fair." That the upgrades and modernization to the WRF incidentally improve the processes serving existing residents does not make the development fees unlawful when such upgrades were only undertaken so that the WRF would have the capacity to provide necessary public services to new development.

The resulting recharge credits directly benefit new development by providing a means to satisfy the 100-year assured water requirement necessary for authorization and construction of new development. Put another way, the project was not undertaken to provide a higher level of service to existing development as prohibited by § 9-463.05(B)(5)(d). Per the IIPs, the level of service for existing and future customers for both sewer and water will be the same. See § 9-463.05(B)(4) ("Costs for necessary public services made necessary by new development shall be based on the same level of service provided to existing development in the service area."). The Court thus concluded the Town did not levy the fees for an improper purpose under § 9-463.05(B).

SAHBA further complained the development fees were "disproportionate" in violation of § 9-463.05(B)(3), because the Town failed "to calculate a reasonable proportionate allocation of costs between existing and future development." The cost of that project is not a burden "all taxpayers of [the] municipality should bear equally." Under a narrow construction of the Town's powers here, the Court found no disproportionality in the challenged impact fees.

The Court affirmed the trial court's ruling in favor of the Town. The AZ Supreme Court accepted review and will hear oral arguments June 30.

## IV. *Henry v. City of Somerton*, WL 2514686 (D. Ariz. June 17, 2021).

*City zoning ordinance treated church on less than equal terms with non-religious assemblies under State law when requiring CUP.*

Summary:

In 2016, Stephen Henry rented a space along West Main Street in the City of Somerton, AZ (the "City"). Mr. Henry intended to start a church in the space. Because of its location, the church was legally obligated by the City's zoning ordinance ("Ordinance") to obtain a Conditional Use Permit ("CUP") before opening. All entities classified by the Ordinance as a "conditional use" were required to obtain a CUP. This included religious assemblies, schools, and day cares, among others. At least eleven entities along Main Street obtained CUPs, three of which were churches. Other uses, such as fraternal organizations and social clubs, were permitted uses and did not need a CUP under the Ordinance. Henry did not apply for a CUP, and went ahead making tenant improvements in the space without seeking building permits.

The City issued criminal citations for the unpermitted work and failure to seek a CUP. Around the same time the City was notified by the Department of Justice that it was investigating whether the CUP requirement violated the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). The City therefore dropped the criminal citation regarding failure to obtain a CUP.

The Arizona Attorney General then informed the City it was investigating whether the CUP requirement violated Arizona's Free Exercise of Religion Act ("FERA"). The City then removed the requirement that religious assemblies obtain a CUP to operate, and dropped the remaining criminal citation relating to work without a permit.

Plaintiffs then sued the City under FERA, under § 1983 for violation of their First Amendment rights, malicious prosecution, and that the CUP requirement was a prior restraint on their rights of free exercise.

The court concluded that the prior restraint claim was not ripe, and therefore Plaintiffs had no standing for the claim. To assert this claim Plaintiffs had to apply for a CUP and receive a negative decision. Since they had never done that, the court dismissed this claim.

The court next addressed Plaintiff's claim under FERA, concluding that the CUP requirement treated the church on less than equal terms with nonreligious assemblies. FERA generally provides that "[g]overnment shall not impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly." Since the Ordinance did not require that nonprofit fraternal or social club organizations apply for a CUP, the court concluded that it treated the church on less than equal terms, and granted summary judgment for this claim to the Plaintiffs.

The Court also ruled the City officials had qualified immunity against liability, that there was no evidence of selective enforcement of the CUP, and that the prosecution against Plaintiff was supported by probable cause and therefore did not constitute malicious prosecution.

Plaintiffs have appealed to the 9th Circuit as of April 28, 2022.

## V. *State of Arizona v. Arizona Board of Regents*, No. CV-21-0134-PR (April 5, 2022).

*(1) to initiate an action under A.R.S. § 42-1004(E), there must be an applicable tax law to enforce; (2) the Attorney General may bring a quo warranto action under A.R.S. § 12-2041 to challenge the unlawful usurpation or exercise of a public franchise; and (3) a public-monies claim brought by the Attorney General is subject to the five-year statute of limitations described in A.R.S. § 35-212(E).*

Summary:

At issue was the scope of three statutes the Arizona Attorney General invoked to challenge an agreement between the Arizona Board of Regents (ABOR) and a private company for it to construct and operate a hotel and conference center on property owned by ABOR. The agreement outlined various terms of what has collectively been referred to as the "Omni Deal."

The Omni Deal includes construction of a new hotel, conference center, and parking lot on land owned by ABOR at Arizona State University's ("ASU") Tempe campus.

The agreement gave Omni an option to lease the hotel and conference center property from ABOR for sixty years and to purchase the property from ABOR at the end of the lease term for a nominal fee. Because property owned by ABOR, as a state entity, is tax-exempt, Omni would not pay the property taxes a private hotel and conference center would otherwise pay during the lease term; instead, Omni would pay ABOR prepaid rent of $5.9 million and annual rent during the lease term totaling more than $118 million. ABOR also agreed to pay Omni up to $19.5 million towards constructing the conference center, which Omni would otherwise fund, in exchange for seven days' use of the center annually.

The Attorney General filed a three-count complaint against ABOR in January 2019 seeking to void the transaction or subject the property to taxes. ABOR moved to dismiss Counts I–III, and the tax court granted those motions after finding that the Attorney General lacked the authority to bring each claim. The court of appeals affirmed the tax court's judgment, *State v. Ariz. Bd. of Regents*, 251 Ariz. 182, 190 (App. 2021), and the Attorney General timely petitioned the Supreme Court.

The Attorney General argued that the ABOR-owned property on which the Omni hotel and conference center is to be built was subject to taxation; thus, the property must either be taxed or the agreement voided. The Attorney General argued that he had the authority to bring this claim under § 42-1004(E), which mandates that the Attorney General "shall prosecute in the name of this state all actions necessary to enforce this title [42] and title 43." The referenced titles include Arizona's tax laws. The tax court dismissed Count I for lack of authority because there was no tax for the Attorney General to enforce. The court of appeals affirmed, and the Supreme Court agreed. There is no enforcement action the Attorney General can take under his § 42-1004(E) authority because there is no tax to enforce. For a conveyance to be made to evade taxation, there must be a tax to evade in the first place, and here there was none.

Next, the Court reviewed the Attorney General's authority to bring claims II and III against ABOR which were pursuant to ARS § 12-2041(A). Under the quo warranto statute, § 12-2041(A), the Attorney General may bring an action "against any person who usurps, intrudes into or unlawfully holds or exercises any public office or any franchise within this state." The Court ruled the text of the statute allows the Attorney General to bring the claim under this statute.

However, because the Omni Deal was not made to evade taxes, it was not an unlawful exercise under 12-2041(A) and therefore the claim failed. The Attorney General's other claim, however, does survive because it properly alleges the Omni Deal is not for the benefit of the state, but for Omni. This count was remanded to the trial court.

Finally, the Court ruled the Attorney General's public-monies claim was subject to the five-year statute of limitations set forth in ARS § 35-212(E) and not a one-year statute of limitations in ARS § 12-821. This count was also remanded to the trial court.

## VI. *Bennett v. City of Kingman*, WL 2439290 (D. Ariz. June 15, 2021) (unpublished).

*Denial of Conditional Use Permit application does not constitute a compensable taking.*

The Bennetts ("Plaintiff") own a five-acre property in Kingman, Arizona (the "City") with a storage unit business on the part of the property, and the remaining land being undeveloped (the "Property"). In 2005 Kingman rezoned the Property and prohibited storage use on the undeveloped part of the Property. In 2012, Plaintiff learned about the rezoning and in 2013 applied for a Conditional Use Permit ("CUP") to build additional storage units on the undeveloped part of their property. The City granted a CUP that would expire in one year if the Plaintiff did not obtain a building permit within this time. The City then approved two one-year extensions of the CUP. In 2016, Plaintiff applied for a third extension, which was rejected following a public hearing and comments about the negative effects of the proposed project from nearby property owners. In 2018, Plaintiff applied for a new CUP which the City rejected. In January 2019, the Bennett's sued the City asserting violation of the federal and state Takings Clause, vested rights violations, a due process violation, and breach of contract.

First the court considered Plaintiff's mandamus relief request to void the 2005 rezoning of the Property. Because of the venue of the action, and because the City was neither an "officer or employee of the United States" nor an "agency thereof," the court denied the special action request. The court then considered whether any claims were barred by a two-year statute of limitations and concluded that only the claims that arose from the events that occurred within two years of the lawsuit survived.

Regarding Plaintiff's Takings claim, the court concluded that an interest in a particular use may constitute a protected property interest if it "has vested in equity based on principles of detrimental reliance." Plaintiff spent a considerable amount on plans and surveys in anticipation of construction, and so the court concluded that there was a genuine issue of material fact whether the Plaintiffs' interest in the CUP vested based on detrimental reliance. There was no detrimental reliance when Plaintiff applied for a new CUP in 2018.

The court then decided whether the City's action constituted a compensable taking and employed the *Penn Central* factors to "compare the value that has been taken from the property with the value that remains in the property" and to see if Plaintiff had "distinct investment-backed expectations." The court concluded that Plaintiff's mere expectation of additional income from expanded storage did not establish a taking. In addition, expansion was contingent on their ability to secure financing and obtain building permits. Therefore, the court determined that Plaintiff did not have distinct investment-backed expectations and granted summary judgment on the federal Takings claim to the City.

The court then granted summary judgment on all remaining claims to the City. The due process claim arising out of the adoption of the 2005 rezoning ordinance was barred by the statute of limitations, and the court agreed with the City that no procedural or substantive due process violation existed because the City "conducted a hearing, received input from the community and made a reasoned determination," when it denied the CUP extension and CUP renewal applications.

Plaintiffs appealed to the 9th Circuit on June 29, 2021, but status of appeal is unknown. It does not appear Plaintiffs have filed in state court.

## VII. *City of Austin v. Reagan National Advertising of Austin, LLC*, 596 US. __ (2022).

*City's sign code did not violate First Amendment for distinguishing between on-premises and off-premises signs. The Court of Appeals' interpretation of Reed—to mean that a regulation cannot be content neutral if its application requires reading the sign at issue—is too extreme an interpretation of this Court's precedent. The distinction is more like ordinary time, place, or manner restrictions, which do not require the application of strict scrutiny.*

Syllabus from Opinion:

Like a great many jurisdictions around the country, the City of Austin, Texas (City), specially regulates signs that advertise things that are not located on the same premises as the sign, as well as signs that direct people to offsite locations. These are known as off-premises signs. The City's sign code at the time of this dispute prohibited construction of new off-premises signs. Grandfathered off-premises signs could remain in their existing locations as "nonconforming signs," but could not be altered in ways that increased their nonconformity. On-premises signs were not similarly restricted.

Respondents, Reagan National Advertising of Austin, LLC, and Lamar Advantage Outdoor Company, L. P., own billboards in Austin. When Reagan sought permits to digitize some of its billboards, the City denied its applications. Reagan filed suit in state court, alleging that the City's prohibition against digitizing off-premises signs, but not on premises signs, violated the First Amendment's Free Speech Clause. The City removed the case to federal court, and Lamar intervened. The District Court held that the challenged sign code provisions were content neutral under *Reed v. Town of Gilbert*, 576 U. S. 155, reviewed the City's on-/off-premises distinction under intermediate scrutiny, and found that the distinction satisfied that standard. The Court of Appeals reversed. It found the on-/off-premises distinction to be facially content based because a government official had to read a sign's message to determine whether the sign was off-premises. The court then reviewed the City's on-/off-premises distinction under strict scrutiny, and it held that the City failed to satisfy that onerous standard.

Held: The City's on-/off-premises distinction is facially content neutral under the First Amendment.

(a) *Reed* held that a regulation of speech is content based under the First Amendment if it "target[s] speech based on its communicative content," i.e., if it "applies to particular speech because of the topic discussed or the idea or message expressed." 576 U. S., at 163. The Court of Appeals' interpretation of *Reed*—to mean that a regulation cannot be content neutral if its application requires reading the sign at issue—is too extreme an interpretation of this Court's precedent.

(1) In *Reed*, the town of Gilbert, Arizona, adopted a comprehensive sign code that applied distinct size, placement, and time restrictions to 23 different categories of signs, giving more favorable treatment to some categories (such as ideological signs or political signs) and less favorable treatment to others (such as temporary directional signs relating to religious events, educational events, or other similar events). The Court rejected the contention that the restrictions were content neutral because they did not discriminate on the basis of particular viewpoints, reasoning that "a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter." 576 U. S., at 169. Unlike the sign code in *Reed*, the City's sign ordinances here do not single out any topic or subject matter for differential treatment. A sign's message matters only to the extent that it informs the sign's relative location. Thus, the City's on-/off-premises distinction is more like ordinary time, place, or manner restrictions, which do not require the application of strict scrutiny.

(2) This Court's precedents and doctrines have consistently recognized that restrictions on speech may require some evaluation of the speech and nonetheless remain content neutral. Most relevant here, the First Amendment allows for regulations of solicitation, and speech must be read or heard to determine whether it entails solicitation. See *Heffron v. International Soc. for Krishna Consciousness, Inc.*, 452 U. S. 640. Moreover, the Court has previously understood distinctions between on-premises and off-premises signs to be content neutral. See *Suffolk Outdoor Advertising Co. v. Hulse*, 439 U. S. 808 (order dismissing appeal); Mem*bers of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U. S. 789. Underlying these cases and others is a rejection of the view that any examination of speech or expression inherently triggers heightened First Amendment concern. Rather, content based regulations are those that discriminate based on "the topic discussed or the idea or message expressed." *Reed*, 576 U. S., at 171.

(3) Reagan's counterargument relies primarily on a sentence in *Reed* recognizing that "[s]ome facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose." 576 U. S., at 163. Reagan contends that the City's sign code defines off-premises signs on the basis of function or purpose and is therefore content based and subject to strict scrutiny. This stretches *Reed's* "function or purpose" language too far. *Reed* held that subtler forms of content discrimination cannot escape classification as content based simply because they swap an obvious subject-matter distinction for a function or purpose proxy. That does not mean that any classification that considers function or purpose is always content based. Reagan's reading of *Reed* would contravene numerous precedents and cast doubt on the Nation's history of regulating off-premises signs.

(b) This Court's determination that the City's on-/off-premises distinction is facially content neutral does not end the First Amendment inquiry. Evidence that an impermissible purpose or justification underpins a facially content-neutral restriction may mean that the restriction is nevertheless content based. Moreover, to survive intermediate scrutiny, a restriction on speech or expression must be "narrowly tailored to serve a significant governmental interest."

*Ward v. Rock Against Racism*, 491 U. S. 781, 791. Because the Court of Appeals did not address these issues, the Court leaves them for remand and expresses no view on the matters.

972 F. 3d 696, reversed and remanded.