*S.B. 213: Land Use Bill Could Change How Local Governments Review New Housing Projects*

*BROWNSTEIN CLIENT ALERT, APRIL 4, 2023*

Colorado Gov. Jared Polis’ wide-ranging land use bill targeting housing affordability was introduced on March 22, 2023, as SB 23-213, sponsored by Sen. Dominick Moreno (D-Adams) and Reps. Iman Jodeh (D-Arapahoe) and Steven Woodrow (D-Denver). The ambitious bill would limit government oversight of certain types of housing projects built in Colorado’s most populated cities and remove their ability to restrict multifamily housing and development.

Municipal and county governments are mostly opposed to the bill, based on its encroachment into land use, which has traditionally fallen under local governance. Many housing advocacy groups such as YIMBY Denver and conservation groups such as Conservation Colorado, however, praise the bill for its perceived ability to address the state’s housing crisis.

However, it will likely take several years before developers notice meaningful differences. From a development perspective, perhaps the most powerful component of the legislation is the shift from discretionary approvals and criteria to objective standards for certain types of development. Given that the planning literature has identified a connection between subjective standards such as “compatibility” and “neighborhood character” and NIMBY-driven denials of new housing development, this change could be impactful if implemented. Some of these requirements kick in as early as Dec. 31, 2024.

Other provisions that may spur new housing development include requirements that local governments may not require new off-street parking for certain types of middle housing and multifamily development and may not impose requirements that make such development “infeasible.”

SIGNIFICANT STATE REGULATION

First, the bill relies heavily on the creation of numerous new regulations, model codes and methodologies by the Department of Local Affairs (DOLA). This includes a statewide methodology for estimating new housing needs and for allocating a pro rata share of housing to each jurisdiction; model codes for accessory dwelling units, middle housing, transit-oriented areas and key corridors; a “menu of affordability options”; a report on strategic growth objectives; reporting guidance and templates; and a menu of displacement mitigation measures.

Because the ultimate outcomes will rely so heavily on this rulemaking process, however, it is difficult to predict whether the bill, if adopted in its current form, is likely to deliver the desired outcomes. Further, with only about six weeks left in the legislative session and a wide array of interests angling to kill, modify or expand the bill’s provisions, what does end up passing may look nothing like the introduced version.

DELAYED IMPLEMENTATION

The earliest of DOLA’s deadlines is March 31, 2024, and the latest is June 30, 2027. During the time between the bill’s passage and the first deadline, DOLA is required to convene a multiagency advisory committee to assist it in preparing the various required regulations, codes and methodologies.

The first deadline by which any local governments are required to comply with any requirements of the bill is Dec. 31, 2024, when local governments subject to the mandatory/model code provisions must either modify their own codes or adopt the model code. Interestingly, DOLA’s deadline to promulgate the model codes is June 30, 2024, which gives local governments subject to the requirements approximately six months to either modify their own laws or adopt the model code.

THREE CATEGORIES OF REQUIREMENTS

The bill can be broken up into three main categories:

* regional housing planning and allocation;
* mandatory/model code components governing:
  + accessory dwelling units (ADUs)
  + Middle housing (two to six dwelling units in a single structure)
  + transit oriented development (TODs) areas
  + “key corridors”; and
* miscellaneous provisions related to a variety of topics such as manufactured housing and water planning.

The regional housing planning and allocation process includes a statewide housing needs assessment, and a requirement that each jurisdiction prepare plans and report to DOLA how they will meet their local and regional housing needs. DOLA will also have a fund of $15 million available to provide technical support to local governments to assist them in preparing these reports. Also, local government plans must be created and adopted using a public process.

For the mandatory/model code components, DOLA will promulgate a model code establishing certain minimum requirements as set forth in SB 23-213, and, by Dec. 31, 2024, each subject jurisdiction must either amend their own codes and regulations to meet the minimum standards, or adopt DOLA’s model code. In jurisdictions that fail to comply by the deadline, the model code will become immediately effective. This penalty may be the strongest example of state authority in the legislation.

The mandatory/model code requirements include:

* ADUs must be allowed as a use by right anywhere single-unit detached dwellings are allowed, and must be approved and administered using only objective standards.
* Subject jurisdictions must allow middle housing anywhere single-unit detached dwellings are allowed and use only objective standards and procedures.
* Requirements regarding transit-oriented areas apply only to Tier 1 municipalities. Multifamily housing with at least 40 du/acre of residential density must be allowed as a use by right within transit-oriented areas, and municipalities cannot require new off-street parking for multifamily housing within such areas.
* Tier 1 municipalities and rural resort job centers must comply with the requirements for key corridors, which include commercial corridors and corridors served by bus transit systems. Within such areas, DOLA will set a minimum residential density for multifamily housing and mixed-income multifamily housing as well as percentages of such housing that must be set aside for low- and moderate-income households.

The miscellaneous provisions in the bill include:

* deletion of certain state requirements for factory-built homes;
* barring local governments from using planned unit developments to evade the mandatory/model code requirements;
* a prohibition on local government occupancy limits based on the relationship of those living within the home;
* a requirement that all counties and municipalities include a water planning component in their comprehensive plans;
* a requirement that counties with a population greater than 250,000 must include a greenfield development analysis;
* easing state requirements for local governments to transfer property for use for affordable housing;
* disallowing local governments from imposing more restrictive standards on modular and manufactured housing than on traditional stick-built housing; and
* prohibiting private homeowners’ associations from implementing or enforcing rules that are contrary to the bill’s provisions.

APPLICABILITY

Each category of provisions applies to a slightly different set of local governments.

The regional housing planning requirements apply to “urban municipalities” and “rural resort job centers.” Urban municipalities are either Tier 1 or Tier 2. Tier 1 includes all the cities in the Denver region; north Front Range cities such as Greeley, Fort Collins, Loveland and Windsor; Pikes Peak cities such as Colorado Springs and Fountain; Grant Junction; and Pueblo. Tier 2 includes Dacono, Fort Lupton, Firestone, Frederick, Evans, Berthoud, Johnstown, Timnath, Eaton, Milliken, Severance and Monument.

Rural resort job centers include: Aspen, Avon, Breckenridge, Crested Butte, Dillon, Durango, Frisco, Glenwood Springs, Mountain Village, Silverthorne, Snowmass Village, Steamboat Springs, Telluride, Vail and Winter Park.

Once DOLA has created a methodology for assessing housing needs on a statewide, regional and local basis, including a methodology for allocating regional and local shares of the housing needs to local governments, each urban municipality and rural resort job center municipality must prepare and submit a housing needs implementation plan.

The four minimum standard areas each apply differently.

* For ADUs, the requirements apply to urban municipalities, rural resort region municipalities and non-urban municipalities (basically, all municipalities, but no counties).
* For middle housing, the requirements apply primarily to Tier 1 municipalities and, with some modifications, to rural resort job center municipalities.
* For transit-oriented areas, only Tier 1 municipalities must comply.
* For “key corridors” (bus transit, commercial corridors), Tier 1 municipalities and rural resort job center municipalities must comply.

Counties are minimally affected by the legislation. Rural resort region counties must participate in the regional housing needs planning process, and all counties must eliminate housing occupancy requirements and address additional items in their comprehensive plans, such as water.

STATE VS. LOCAL CONCERN

In Colorado, home rule municipalities can write their own rules on matters that are of “local concern” but must defer to state statute on matters of “state concern.” Colorado courts have generally held that land use and zoning matters are matters of local concern. Some land use related issues—like rent control, and oil and gas regulations—have been held to be matters of mixed state and local concern. In such cases, a home rule ordinance may coexist with a state statute, so long as there is no conflict, but must give way to state law in the event of a conflict.

The legislative declaration for SB 23-213 states that the matters it governs are matters of mixed state and local concern. However, Colorado courts have also held that saying it doesn’t make it so. Rather, the courts will look at several factors, such as impact beyond municipal boundaries, whether the matter is one traditionally regulated at the state or local level, and whether it is important for there to be statewide uniformity regarding the matter.

The legislative declaration for SB 23-213 is extremely long—approximately 20 pages. It cites numerous studies related to land use and housing issues and explains how housing markets expand beyond local government borders, in an obvious attempt to establish support for the state’s position that this should be a matter of mixed state and local concern.

If SB 23-213 does pass and get signed into law, and it is challenged by one or more local governments on this basis, then any implementation could be even further delayed.

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Recent Amendments:

[L.009](https://s3-us-west-2.amazonaws.com/leg.colorado.gov/2023A/amendments/F9DFE4D181087B5587258994006C4761/SB213_L.009.pdf) – this was presented as the most consequential amendment – it strikes part 3 of the bill; which requires upzoning only around certain areas (transit corridors, key corridors, etc.), as opposed to, areas that permit single family homes.

* Vote: 4-3 PASS

[L.011](https://s3-us-west-2.amazonaws.com/leg.colorado.gov/2023A/amendments/27B3B94008C2A704872589940063CA11/SB213_L.011.pdf) - updates the legislative declaration and allow smaller municipalities to opt out of the needs assessment.

* Vote 4-3 PASS

[L.012](https://s3-us-west-2.amazonaws.com/leg.colorado.gov/2023A/amendments/567027143F9E418B8725899400647592/SB213_L.012.pdf) - adds metropolitan planning organization to the board and creates two sub-committees (one for rural, and one for urban areas) to meet and provide feedback to large committee.

* Vote: 4-3 PASS

[L.029](https://s3-us-west-2.amazonaws.com/leg.colorado.gov/2023A/amendments/FD57C8E650F7C8E8872589950073DCAA/SB213_L.029.pdf) - ensures that when making an appointment to the board, reasonable efforts are made to ensure the appointment reflects the “geographic and demographic” diversity of the state.

* Vote: 4-3 PASS

[L.013](https://s3-us-west-2.amazonaws.com/leg.colorado.gov/2023A/amendments/ECFED606CCC01A928725899400640CC5/SB213_L.013.pdf) - inserts affordability strategy menu into the bill; ensures that the strategy is not left to the DOLA rule making process.

* Vote: 4-3 PASS

[L.014](https://s3-us-west-2.amazonaws.com/leg.colorado.gov/2023A/amendments/B087FE93C1D30D608725899400644201/SB213_L.014.pdf) - clarifies “local inclusionary zoning ordinances” as references back to inclusionary zoning bill.

* Vote: 4-3 PASS

[L.015](https://s3-us-west-2.amazonaws.com/leg.colorado.gov/2023A/amendments/62174E7AE6EE845787258994006433EB/SB213_L.015.pdf) - specifies what types of communities are subject to displacement/disproportionate impact  (Sen. Gonzalez offered a conceptual amendment that removes the exemption for rural resort communities)

* Vote: 7-0 PASS

[L.033](https://s3-us-west-2.amazonaws.com/leg.colorado.gov/2023A/amendments/724DDF1F126CCA0C87258995006EB82F/SB213_L.033.pdf) - creates a qualitative feedback process for displaced and disproportionately impacted communities to offer feedback to the committee.

* Vote: 4-3 PASS

[L.016](https://s3-us-west-2.amazonaws.com/leg.colorado.gov/2023A/amendments/B401D161B0D8AA3C87258994006453DC/SB213_L.016.pdf) - aligns the timeline for municipalities to adopt requirements related to infill housing and impact studies, etc.

* Vote: 4-3 PASS

[L.017](https://s3-us-west-2.amazonaws.com/leg.colorado.gov/2023A/amendments/DBAE8066B1E1BAEA872589940064B3FE/SB213_L.017.pdf) - simplifies the standards to develop ADU’s; and ensure “use by right” does not apply to rural resort job centers. (Sen. Roberts said to avoid short term rentals)

* Vote: 4-3 PASS

[L.027](https://s3-us-west-2.amazonaws.com/leg.colorado.gov/2023A/amendments/FDB6A7E4CA01A07F872589950055174B/SB213_L.027.pdf) – permits ADU development, as a “use by right,” in unincorporated areas of counties and on agricultural land.

* Vote: 4-3 PASS

[L.028](https://s3-us-west-2.amazonaws.com/leg.colorado.gov/2023A/amendments/C60206E28847031287258995004F7D85/SB213_L.028.pdf) – this amendment will address septic and setback requirements created by L.027

* Vote: 4-3 PASS

[L.018](https://s3-us-west-2.amazonaws.com/leg.colorado.gov/2023A/amendments/3F5659B86C6BA7CB872589940064FEE4/SB213_L.018.pdf) - updates definition of “rural resort job centers” and adds a new menu of affordability options for rural resort job centers to comply.

* Vote: 4-3 PASS

[L.020](https://s3-us-west-2.amazonaws.com/leg.colorado.gov/2023A/amendments/D3AE76CC34CCB184872589940065526B/SB213_L.020.pdf) – adds and clarifies definitions of “brownfield,” “greenfield,” “bus rapid transit,” “cottage cluster,” “displacement,” “key corrido’s,” “local governments,” etc.

* Vote: 4-3 PASS

[L.032](https://s3-us-west-2.amazonaws.com/leg.colorado.gov/2023A/amendments/FB16B8848D7FDC4887258995006E9550/SB213_L.032.pdf) - updates the definition of “displacement” and “gentrification.”

* Vote: 4-3 PASS

[L.023](https://s3-us-west-2.amazonaws.com/leg.colorado.gov/2023A/amendments/D3022CD30F08B827872589940065F59D/SB213_L.023.pdf) - creates process for municipalities to inform DOLA it doesn’t have sufficient infrastructure and ensure that municipal master plans align with state objectives.

* Vote: 4-3 PASS

[L.024](https://s3-us-west-2.amazonaws.com/leg.colorado.gov/2023A/amendments/E712D174B5A6863B8725899400646BF0/SB213_L.024.pdf) - renames the “greenfield land analysis” to “buildable land analysis.”

* Vote: 4-3 PASS

[L.034](https://s3-us-west-2.amazonaws.com/leg.colorado.gov/2023A/amendments/34F33B5E1ADC540187258995007F16FE/SB213_L.034.pdf) - puts a 10 year sunset provision to allow the legislature to review the impact of the policy at the end of 10 years.

* Vote: 7-0 PASS

[L.010](https://s3-us-west-2.amazonaws.com/leg.colorado.gov/2023A/amendments/3617BE6DA5A737D187258994006D5910/SB213_L.010.pdf) – (offered by Sen. Kirkmeyer) strike below amendment which is supported by CML.

* Vote: 3-4 LOST

[L.026](https://s3-us-west-2.amazonaws.com/leg.colorado.gov/2023A/amendments/16F37E417CFFEA678725899400694D32/SB213_L.026.pdf) – requires municipalities to hold an election, to approve the adoption of SB 213, prior to any provision of the bill applying to a municipality.

* Vote: 3-4 LOST