

Report to the City of Berlin, New Hampshire Regulatory Audit: Land Use Policy Barriers to Housing Development



The City of Berlin received a Housing Opportunity Planning (HOP) Grant from the State of New Hampshire in 2023. The purpose of the HOP program is to help cities and towns analyze and update their land use regulations to support housing development. To carry out the scope of work set forth in the City's grant agreement with New Hampshire Housing, the City engaged Barrett Planning Group LLC for professional consulting services. The Regulatory Audit presented in this report fulfills the first major component of the City's HOP work plan. The purpose of the Regulatory Audit is to identify potential barriers to housing creation in the City's Zoning Ordinance, Site Plan Review Regulations, and Subdivision Regulations. This audit has identified several potential regulatory constraints in Berlin's land use regulations.

The Regulatory Audit focuses on processes that hinder, discourage, delay, or add additional costs to housing development. It is important to note that not all development barriers are inherently negative and not all should be removed. Every community has a range of interests and values that compete for a limited amount of land, and municipalities have the complex task of balancing equally valid and important interests. Environmental regulations, infrastructure capacity, and due process cannot and should not be compromised or removed in their entirety, and this audit does not imply that they should. While the audit identifies

barriers to housing in many forms, citing them does not mean that any interests they may protect are inferior to the purposes of housing creation. This audit should serve as a guide for Berlin to understand the barriers that do exist, to identify barriers that can be removed, and to draw attention to barriers that constrain housing production in ways that may not have been intended, or could be altered in ways that do not compromise the interests they protect.

In addition, the Regulatory Audit identifies areas where Berlin's regulations have not accomplished the housing-related goals identified in its Master Plan. The City also has not taken full advantage of the tools available under New Hampshire state law. While addressing direct barriers within its current land use regulations, Berlin can also further encourage housing development through these other state tools.

Finally, the Regulatory Audit presents both a review of the ways that Berlin's current regulations may hinder housing development and comments on how the City's land use policies do not make full use of the tools the City has to encourage housing development. Taken together, the observations and comments in the Regulatory Audit can help the City understand the current limitations and shortcomings of its land use regulations and opportunities to reduce or remove existing barriers.

Existing Zoning: Allowed Housing Types and Bulk Requirements by Zoning District

	RR	RS	RT	RG	DT	JG	BG	IB
Housing Types Allowed								
Single-Family Dwelling	Y	Y	Y	Y	-	Y	SE	SE
Two-Family Dwelling	SE	-	Y	Y	-	-	-	-
Multi-Family Dwelling	-	-	-	Y	Y	-	Y	SE
Manufactured Housing	Y	Y	Y	Y	-	Y	SE	SE
Manufactured Home Park	Y	-	-	-	-	-	-	-
Townhouse and Condominium	-	-	-	-	-	Y	-	-
Seasonal Dwelling	Y	-	-	-	-	Y	-	-
Dimensional Requirements								
Minimum Lot Size	2 acres	10,000 sq. ft.	10,000 sq. ft.	10,000 sq. ft. + 1,500 sq. ft. per additional dwelling	1,500 sq. ft.	2 acres	10,000 sq. ft. + 1,500 sq. ft. per additional dwelling	10,000 sq. ft.
Minimum Frontage	200 ft.	100 ft.	100 ft.	100 ft.	15 ft.	200 ft.	100 ft.	100 ft.
Minimum Front Setback	25 ft.	25 ft. or average	25 ft. or average	25 ft. or average	-	50 ft.	25 ft. or average	25 ft. or average
Minimum Side Setback	25 ft.	10 ft.	10 ft.	10 ft.	10 ft.	25 ft.	10 ft.	10 ft.
Minimum Rear Setback	25 ft.	25 ft.	25 ft.	25 ft.	-	25 ft.	25 ft.	25 ft.
Maximum Height	35 ft. 2.5 stories	35 ft. 2.5 stories	35 ft. 2.5 stories	35 ft. 2.5 stories	65 ft.	65 ft.	65 ft.	35 ft.
Maximum Impervious Coverage	25%	40%	40%	45%	-	75%	75%	75%

"Y" = Permitted by-right

" - " = No Permitted

"SE" = Permitted by Special Exception or Special Use



Analysis of Impediments to Housing Development

Topic 1: Unit Density Limitations

Topic	Findings and Observations
Inconsistent allowance of two-family and attached single-family dwellings.	<ul style="list-style-type: none"> • Within the Jericho Gateway District, two-family dwellings are not a permitted use, while attached single-family dwellings and townhouses are permitted by-right. • Townhouses and other forms of single-family attached dwellings are only permitted in the Jericho Gateway District. This use is excluded from districts like the Downtown and Residential General districts, where other forms of multi-family housing are allowed, and whose purpose statements identify them as targets for higher-density residential development. • Limiting Two-family and single-family attached dwellings in areas where similar or denser forms of housing are allowed can cause confusion on what housing types are allowed, and limits the use of a housing type that could provide additional housing choice in these districts.
Minimum Lot sizes in the Residential General Zoning District does not align with the existing conditions in the District	<ul style="list-style-type: none"> • The minimum lot size in the RG district is 10,000 square feet for 1 unit, plus an additional 1,500 square feet for each additional unit. • This is twice the minimum lot size required in the RT and RS Districts, and makes a majority of lots in the RG District nonconforming with the Zoning Ordinance. Based on accessor's records, less than a quarter of all residential structures in the RG District have the amount of land required by the Zoning Ordinance even for single-family homes. This is even more pronounced when considering multi-family dwellings in the district, with over ninety percent of two-family dwellings nonconforming, and over ninety-five percent of three family dwellings nonconforming in this district. • Nonconforming lots create additional burdens for the creation of new housing, or even the repaid and rehabilitation of existing structures. To do substantive rehabilitation or reconstruction work on these properties would require a variance from the Zoning Board of Appeals. This discourages builders and property owners from improving their homes, creating new housing units, or even rehabilitating currently derelict properties. • Additionally, given that most lots in the RG District are 5,000 square feet, creating lots that comply with the Zoning Ordinance would require the purchase of adjacent lots, and the demolition of any existing homes on that lot. This would result in a net loss of homes in the District.



Topic 2: Limits and Restrictions on Accessory Dwelling Units (ADUs)

Topic	Findings and Observations
Exclusion of Detached Accessory Dwelling Units	<ul style="list-style-type: none"> In all Zoning Districts, Berlin only permits Attached ADUs. Allowing only Attached ADUs limits the choices available to homeowners seeking to create an ADU on their property, leading to the creation of fewer ADUs overall. Attached ADUs frequently require renovation and modification of the existing dwelling, which adds additional difficulties and potential costs for the homeowners, making them less appealing than Detached ADUs for many homeowners.
Limit of 1,200 sq. ft. for accessory buildings in the RS, RT, and RG Districts	<ul style="list-style-type: none"> Within the Residential Single-Family, Residential Two-Family, and Residential General districts, there is a cap of 1,200 square feet for all accessory structures on a single parcel. As Berlin does not currently allow ADUs to be in a separate structure from the primary dwelling, this can cause confusion about the applicability of this requirement to attached ADUs. Should the City choose to allow Detached ADUs in the future, this would mean that to construct an ADU of 1,000 square feet, the current maximum allowed size for an ADU, a homeowner would only be allowed 200 square feet of area for all other Accessory Structures. This would limit the number of ADUs created, as it would force homeowners to choose between construction of an ADU, and other useful accessory structures, even when they would not exceed the maximum impervious surface coverage on their property.
All accessory buildings of over 800 square feet require a Special Exception	<ul style="list-style-type: none"> Berlin's Zoning Ordinance requires that any accessory structure of over 800 square feet seek a Special Exception. As Berlin does not currently allow ADUs as a separate structure, this can cause confusion on whether attached ADUs of over 800 sq. ft. trigger this requirement. Should the City choose to allow Detached ADUs in the future, this requirement would discourage Detached ADUs, as a Special Exception would be required to construct an ADU that met the City's current maximum by-right size of 1,000 square feet.



Topic 3: Restrictions on Development in the Jericho Gateway District

Topic	Findings and Observations
Exclusion of Two-Family Dwelling	<ul style="list-style-type: none"> While the Jericho Gateway District allows single-family dwellings with an attached ADU, townhouses and condominiums, this district does not allow two-family dwellings. While a similar form could be allowed in the form of two attached townhouses, the exclusion of a housing type which is listed as a separate use in other sections of the Zoning Ordinance implies that this is not an allowed use, creating unnecessary confusion. This is a form of housing that does not differ in density from the housing options already allowed, but would provide for greater housing variety and options which are in line with the stated purpose of the Zoning District.
Deep Setbacks	<ul style="list-style-type: none"> The Jericho Gateway District, which has the stated purpose of “integrating residential with retail and recreational uses in close proximity to one another,” has the same minimum lot size, and the same or deeper setbacks required in the Rural Residential District, the least dense of Berlin’s five other residential Zoning Districts. Within the Jericho Gateway District, the minimum lot size is 2 acres, and the minimum setbacks are 50 feet in the front, and 25 feet in the side and rear. These minimum lot sizes and setbacks are larger than those in place in the Residential Single-Family, Residential Two-Family, and Residential General Zones. Large minimum lot sizes, and deep setbacks create more separation between uses, and create an area which feels more spread out, with individual uses feeling less like they are in close proximity. By setting the lot and setbacks to match the most rural areas of Berlin, the Jericho Gateway Zone makes the execution of its intended purpose more difficult by forcing development to be more spread out, and preventing the close proximity of residential, retail and recreational uses.



Topic 4: Administrative Processes

Topic	Findings and Observations
Inconsistent use of Townhouse and Single-Family Attached Dwelling	<ul style="list-style-type: none"> The Jericho Gateway District includes as a permitted use “townhouses or condominiums,” and the Planned Residential Development Option includes “single-family attached dwellings or townhouses.” These are the only places in the Zoning Ordinance where attached single family dwellings or townhouses are a permitted use, and the wordings imply that townhouses are a separate use from attached single-family dwellings. However, there is no definition for townhouses in the Ordinance. They are only referenced within the attached single-family dwelling definition as a type of attached single-family dwelling. This inconsistency creates confusion about what forms of housing are actually allowed. As townhouses are a form of attached single-family dwelling with no separate definition, and only townhouses are listed as a permitted use within the Jericho Gateway District, this appears to indicate that other forms of attached single-family dwellings are not permitted. The inconsistent use and separation of townhouses and attached single-family dwellings creates confusion about what types of housing are actually permitted, and makes the intention of the Zoning unclear.
Planned Development as a Special use	<ul style="list-style-type: none"> To take advantage of the Planned Development option, a developer must apply for both a Special Use Permit, and a Comprehensive Plan Approval, in addition to Subdivision and Site Plan Review. This means that in practice, a developer must submit four applications, one of which is a Special Exception, increasing the administrative hurdles, and adding uncertainty to the review process. This makes developers less likely to use the Planned Development option, due to the increased administrative hurdles relative to a standard subdivision, and the additional Board discretion given by requiring a Special Use.
Residential uses excluded from counting privately lease off-site parking spaces towards parking requirements	<ul style="list-style-type: none"> Within the Zoning Ordinance, non-residential uses are allowed to meet off-street parking requirements through on-site parking, public parking within 600 feet of the site, and private leased off-site parking spaces within 600 feet of the site. This provides developers with a number of options for meeting their parking requirements, many of which do not require the use of land on the site. However, the Zoning Ordinance specifically excludes residential uses from counting public and privately leased off-site parking spaces within 600 feet of the site from being counted towards a project’s parking requirement. This reduces the options available for residential uses, making the construction of on-site parking more likely. This rule takes away an option for residential uses which is available to other uses, and leads to the creation of more on-site parking, even if alternatives are available.



Topic 5: Under-Utilization of Tools Allowed Under New Hampshire State Law

Topic	Findings and Observations
Use RSA 674:21 Innovative Land Use Controls	<ul style="list-style-type: none"> • Under New Hampshire law, municipalities are allowed to adopt Ordinances which grant a number of land-use related powers and tools. These tools are referred to as “Innovative Land Use Controls,” and they authorize municipalities to adopt the below provisions: <ul style="list-style-type: none"> • Timing Incentives • Phased Development • Intensity and use incentives • Transfer of density and development rights • Planned Unit Development • Cluster Development • Impact Zoning • Performance Standards • Flexible and discretionary zoning • Inclusionary Zoning • Impact fees • Village plan alternative subdivision • While Berlin has adopted some of these tools, including the Planned Unit Development and Cluster Development options, there are several tools Berlin is authorized to use which it is currently not. • Adopting some of these Innovative Land Use Controls could help Berlin’s Zoning better allow it to meet its housing needs. • Adoption of one or more of these tools could give Berlin addition options to encourage development and redevelopment of housing, and maintain the physical infrastructure density requires.



Topic	Findings and Observations
Use of RSA 79-E Tax Relief	<ul style="list-style-type: none"> • Under RSA 79.E., municipalities are authorized to adopt ordinances to encourage development and redevelopment through short-term property tax relief for certain forms of construction and rehabilitation. • Berlin has already adopted one 79-E District, which allows for tax relief for development within parts of the downtown. However, discussions with developers indicated that the Zone did not include some areas where it could see additional use, and would continue to meet the requirements for a 79E Zone. • In addition to the 79-E Zone already adopted by Berlin, which is focused on downtown revitalization, the passage of the 79-E:4-c Housing Opportunity Zone in 2022 allows municipalities to award tax assessment relief for up to 10 years within a geographic area for housing projects where at least one third of the housing units are designated as Workforce Housing Units, or for households with an income of 80% of the Area Median Income. • Investigation of this 79-E District was included as an action item in Berlin’s current Master Plan. • Adoption or expansion of 79-E Zones within Berlin could help to encourage housing development for lower-income households, which might not otherwise be produced due to the high construction costs seen in Berlin and the North Country.
Progress towards Berlin’s Master Plan actions related to housing	<ul style="list-style-type: none"> • Berlin’s 2022 Master Plan has a number of recommendations relating to housing and zoning Issues, which could be beneficial to the City. Adopting these recommendations will help Berlin move closer to the vision identified in the Master Plan. • The City has made progress on some of these actions already, but there are still some that are outstanding. • In particular, the City has identified the creation of a Housing Trust in Berlin, working to allow small units, co-housing and other alternative housing options in the City, investigation of the new Housing Opportunity 79E District, and developing a form-based code for the Downtown as goals to be pursued which have not yet been accomplished.

