

State-Level Legal Barriers to Adopting Affordable Housing Policies in Arizona



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Introduction

Several widely used policies can increase access to and the affordability of housing. However, many of these tools are preempted or limited by Arizona law. These tools include inclusionary zoning, rent control/rent stabilization, short-term rental regulation, and financing structures that can increase the supply of affordable housing, provide stabilization for the market, and add additional units. This brief will give an overview of these policies, discuss their legality in Arizona, summarize the pros and cons, and offer potential solutions to existing legal barriers.

Inclusionary Zoning

Inclusionary zoning policy requires constructing housing units that are affordable to low-to-moderate income people in a specified jurisdiction as part of development or redevelopment projects.¹ Jurisdictions can use this approach to increase the supply of affordable housing. Although the policy has been controversial since the 1970s, over 1,000 jurisdictions have adopted some form of inclusionary zoning. They have implemented it at various levels of government and with unique nuances.²

While some inclusionary zoning policies are mandatory, requiring developers to construct a certain number of units without incentives, others are voluntary, allowing developers to build a certain number of units in exchange for incentives that reduce expenses or make a project more profitable.³ These incentives include density or height bonuses, reduced or eliminated parking minimums, fee reductions, and expedited permitting.⁴ The number of units required to be built due to inclusionary zoning varies from 5% to 25% of the project's total number of units, but is often 10% to 15% of the total for both rental and for-sale projects.⁵ Some policies, such as those in Boulder, Colorado, require every residential development to have inclusionary units. In contrast, some places, such as Irvine, California, have policies that only require it for larger developments (e.g., 50 units or more).⁶ However, most inclusionary zoning policies apply to projects that build 10 or more units.⁷

Most inclusionary zoning policies have a limited affordability period. After that period, the affordable units can be converted to market-rate spaces. Affordability periods vary.⁸ A study of 600 inclusionary zoning policies found that about half had an affordability period between 30 and 39 years.⁹ Although municipal inclusionary zoning policies can work independently, they often work best through coordination among neighboring jurisdictions. Coordination can prevent the relocation of projects from one jurisdiction to a neighboring jurisdiction to avoid inclusionary zoning. For example, suppose a city implements a policy without the entire county implementing it. In that case, units may be built in the surrounding area to avoid the mandatory inclusionary zoning policy.

Although the intent of inclusionary zoning is to build affordable housing at the project site, many inclusionary zoning policies offer alternatives, including in-lieu fees and offsite construction. An in-lieu fee is a payment a developer can make instead of constructing affordable units.¹⁰ The revenues generated by in-lieu fees are often used to finance affordable units or rental or down payment assistance.¹¹ Offsite construction allows a developer to build affordable units elsewhere instead of incorporating the units into the proposed project.¹²

State Law Barriers to Implementation of Inclusionary Zoning

Arizona is one of only seven states that prohibit local governments from enacting mandatory inclusionary zoning.¹³ State statute prevents counties and municipalities from passing any land use regulation that makes development project approval contingent on the construction of housing that will be rented or sold at an affordable rate.¹⁴ Although Arizona does not allow cities to pass mandatory inclusionary zoning policies, cities can enact voluntary inclusionary zoning programs.¹⁵

In addition to preempting mandatory inclusionary zoning, two other state statutes — rent control preemption and the Private Property Rights Protection Act — may present obstacles to adopting mandatory inclusionary zoning. Arizona statute forbids restrictions on rent prices or rent increases. This preemption would most likely affect (1) aspects of inclusionary zoning policies that require a unit to be affordable to people earning a certain level of income and (2) the affordability period.¹⁶ Furthermore, the Private Property Rights Protection Act prevents state and local governments from enacting a land use law that reduces the fair market value of private property without providing just compensation to the owner.¹⁷ A mandatory inclusionary zoning policy would likely violate the act by restricting the use of private property.¹⁸ Specifically, requiring a residential development to include a certain number of affordable units could reduce the fair market value of the property and the income the property could generate. However, providing an incentive (e.g., increased density or height bonus) to offset the affordable units and permit greater use of the property may increase the property's fair market value and therefore not violate the Private Properties Rights Protection Act.

While mandatory inclusionary zoning is preempted, counties and municipalities can adopt voluntary inclusionary zoning. The statutes permit a local government to offer incentives to developers who volunteer to build affordable housing.¹⁹ Since developers would enter these arrangements voluntarily, state-level legal barriers do not apply. However, local jurisdictions should be aware of the Gift Clause, a constitutional requirement preventing public entities from giving donations or grants, including through subsidies and other expenditures, to private parties.²⁰ The Gift Clause requires expenditures to be made for a public purpose and demands that the expense does not far exceed the received benefits.²¹ An example of violating the Gift Clause occurred in *Englehorn v. Stanton*. In that case, Phoenix used a Government Property Lease Excise Tax (GPLET), which released the developer from paying approximately \$8 million in property taxes.²² It was determined that the \$8 million was not equivalent to the public benefit received. Therefore, cities need to be aware that expenditures and incentives given to private developers to offset inclusionary zoning policies must comply with this clause.

Pros and Cons of Inclusionary Zoning

Mandatory and voluntary inclusionary zoning have several notable benefits.

These policies have increased the supply of affordable housing in other jurisdictions.²³ A mandatory policy will create affordable units, and a voluntary approach with sufficient incentives can lead to developer participation and greater construction of affordable units.²⁴ For example, the mandatory policy in Montgomery County, Maryland, is credited with producing 14,029 affordable units between 1974 and 2014.²⁵ These affordable units were approximately 11% of the total rental units in Montgomery County in 2014.²⁶ In total, inclusionary zoning programs have produced over 110,000 affordable units.²⁷

Inclusionary zoning can also lead to increased integration of neighborhoods if affordable units are built throughout a county or city rather than segregated to one location.²⁸ However, this benefit may be diminished in policies that (1) permit offsite construction of units far from the project site or (2) allow in-lieu fees.²⁹

Furthermore, inclusionary zoning can provide a stable supply of affordable units over the long term, with longer affordability periods increasing affordable housing for decades.³⁰

While inclusionary zoning policies can place the burden of constructing affordable units on developers, the costs can be minimized or eliminated through offsets or incentives. These offsets and incentives, especially in the form of height or density bonuses or other variances, allow for greater use of the property. In addition, a study of inclusionary zoning policies found that if sufficient offsets are given, the policy does not negatively impact housing production.³¹

As with any policy, inclusionary zoning does have some adverse effects. A mandatory policy may lead to a decrease in housing production due to a project being less profitable or financially viable.³² A reduction in housing production would likely lead to an increase in housing costs overall due to lower supply in the market.³³ Therefore, developers need to be supplied with bonuses that alleviate the burden placed on them to overcome this negative impact.³⁴

Another challenge of inclusionary zoning is the oversight and complexity of administering the policy can be quite burdensome. The local jurisdiction would need to enforce the building of the affordable units and hold developers and property managers accountable to income restrictions after the units are built for a significant length of time.³⁵

Potential Solution to Arizona's Legal Barriers to Inclusionary Zoning

One potential policy option for Arizona is to remove the inclusionary zoning preemption and enact a policy similar to Florida, which allows local governments to create mandatory inclusionary zoning policies but requires them to fully compensate developers for any mandatory affordable units.³⁶ The Florida statute permits any incentive but specifically highlights density bonuses and eliminating or reducing fees.³⁷ A total of 26 local governments in Florida have adopted some form of inclusionary zoning policy, with 11 being mandatory policies and the remainder being voluntary.³⁸

Linkage Fees: An Alternative to Inclusionary Zoning

Imposing linkage fees to create affordable housing is a measure taken by some jurisdictions as an alternative to inclusionary zoning.³⁹ A linkage fee is a fee charged to the developer to pay for community needs that result from the additional development.⁴⁰ A linkage fee is often imposed on residential development but can be assessed against commercial and industrial projects as well.⁴¹ These fees vary in cost and applicability. Several development types are sometimes exempt from the fee, including additions to or remodels of single-family homes, businesses under 1,500 square feet, places of worship, and higher education and healthcare buildings.⁴² The fee is calculated based on how many people will need affordable housing as a result of the project because they can no longer afford to live in the area due to rising costs.⁴³ Some linkage fee policies allow developers to construct affordable housing units instead of paying the fee.⁴⁴

Linkage fees are also known as impact fees, development fees, or development impact fees. Arizona state law allows local governments to charge impact fees.⁴⁵ However, Arizona statutes do not permit using impact fee revenue in connection with affordable housing. Instead, it must be used for public services, including infrastructure, public safety facilities, libraries, parks and other recreational facilities.⁴⁶ Additionally, any fee must be proportional to the increased burden on a local government in providing necessary public services.⁴⁷ A study examining the relationship between development and increased costs in delivering additional essential public services can establish a reasonable relationship and determine the linkage fee.⁴⁸ Removing the use restriction on local governments and allowing them to use linkage fees to pay for affordable housing would increase affordable units.

Like inclusionary zoning, linkage fees are a direct method to construct additional affordable housing units. The fees generated could provide financing to build additional units. Another benefit of linkage fees is that a strong market can withstand the increased cost without slowing production, if the fee is a limited profit percentage and not a flat rate.⁴⁹

Nevertheless, linkage fees also have some downsides. First, there is a possibility that linkage fees could cause land values to decrease, a liability under Arizona's Private Property Rights Protection Act, because the owner would have to pay the fee if or when they decided to develop the land.⁵⁰ In addition, a linkage fee that is too high may slow housing production, limiting supply availability.⁵¹ Lastly, linkage fees may do little to promote the development of affordable housing outside high-poverty areas compared to inclusionary zoning, which typically covers construction in every neighborhood.⁵² Linkage fees create a pot of funding controlled by the municipality that is often allocated through a city council process. That political process can mean the affordable housing funds from linkage fees, unlike housing required by inclusionary zoning, are directed to regions where the existing community is accepting.

Rent Control

Rent control limits the amount that a landlord can charge for rent. Although initially enacted in the 1920s, rent control has been implemented throughout the last century.⁵³ These policies range from imposing strict cost ceilings to rent stabilization.⁵⁴ Only 182 municipalities have rent control regulations limiting strict cost ceilings, and all of them are in New York, New Jersey, California, Maryland, or Washington, D.C.⁵⁵ However, the movement towards rent stabilization measures is becoming more common. Rent stabilization limits how much a landlord can increase rent after a tenant has a lease in place. For these policies, a landlord can typically freely set the rent while a unit is unoccupied. However, once a tenant moves into the unit, the landlord can only increase the rent by a limited percentage. Oregon and California have recently adopted these stabilization methods.

In 2019, Oregon passed the nation's first statewide rent control policy.⁵⁶ The policy limits how much a landlord can increase a tenant's rent, limiting the increase to no more than 7% plus inflation within 12 months.⁵⁷ This limitation does not apply to week-to-week tenancies but covers most tenancy agreements except for units built in the last 15 years.⁵⁸

Similarly, California adopted a statewide rent control measure in 2020, limiting landlords to an increase of 5% plus the cost of living. But in total the increase cannot exceed 10%.⁵⁹ Unlike Oregon, California's law places an absolute maximum on how much the rent can increase. Both policies allow a landlord to freely set the rental price when a unit becomes unoccupied.⁶⁰

State Law Barriers to Implementation of Rent Control

In Arizona, the state preempts local governments from enacting rent control, with the only exception being when a unit is owned, financed, subsidized or insured by a municipality or state agency.⁶¹ In addition to the state preemption, the Private Property Rights Protection Act may also present a legal barrier to rent control in Arizona, making the government liable for reducing a property's fair market value by lowering its actual and potential income generation.

Pros and Cons of Rent Control

A significant benefit of a rent control policy is the predictability it provides tenants. Under a policy where rent increases are limited, tenants can anticipate the amount their rent will rise when it is time to renew a lease. This predictability leads to less tenant turnover and greater stability for tenants, landlords, and communities.⁶²

Rent control policies can be crafted to allow increases similar to what would happen under unregulated market conditions.⁶³ Oregon's policy attempts to do this by permitting an annual increase of 7% plus inflation.⁶⁴ Thus, while keeping a level of consistency for tenants, landlords can still respond to some market demands.

The downside to rent control is the likelihood of landlords converting rental units to for-sale units to avoid rent controls.⁶⁵ An examination of a rent control policy in San Francisco found the policy led to a 15% reduction in rental housing supply and a 5.1% increase in rents across the city due to the lack of supply.⁶⁶ While the controls placed on rental agreements can benefit tenants who are currently occupying units (indeed, tenants generally in the short-term), the policy is likely to negatively impact affordable housing over the long term.⁶⁷ Additionally, another study found that initial renters had less mobility; they stayed in place with lower rent rather than moving.⁶⁸ The conversion of rental units to for-sale units may also further increase neighborhood segregation, inadvertently reducing opportunity.⁶⁹

Potential Solutions to Arizona's Legal Barriers to Rent Control

As renters struggle to pay their rent, one alternative would be to have the government subsidize rent or provide a tax credit to offset the total cost of rent. Another option is an incentive program for landlords to not increase the rent in their properties.⁷⁰ For instance, if a landlord didn't increase the rent, their property taxes or utilities could be frozen or reduced in price.⁷¹ A program in Minneapolis reduces the tax rate by 40% for 10 years if the unit is kept affordable.⁷² Although this would not create a massive impact in the Arizona market due to already low property taxes, it would stop landlords from increasing rent when prices increase for them as an owner.

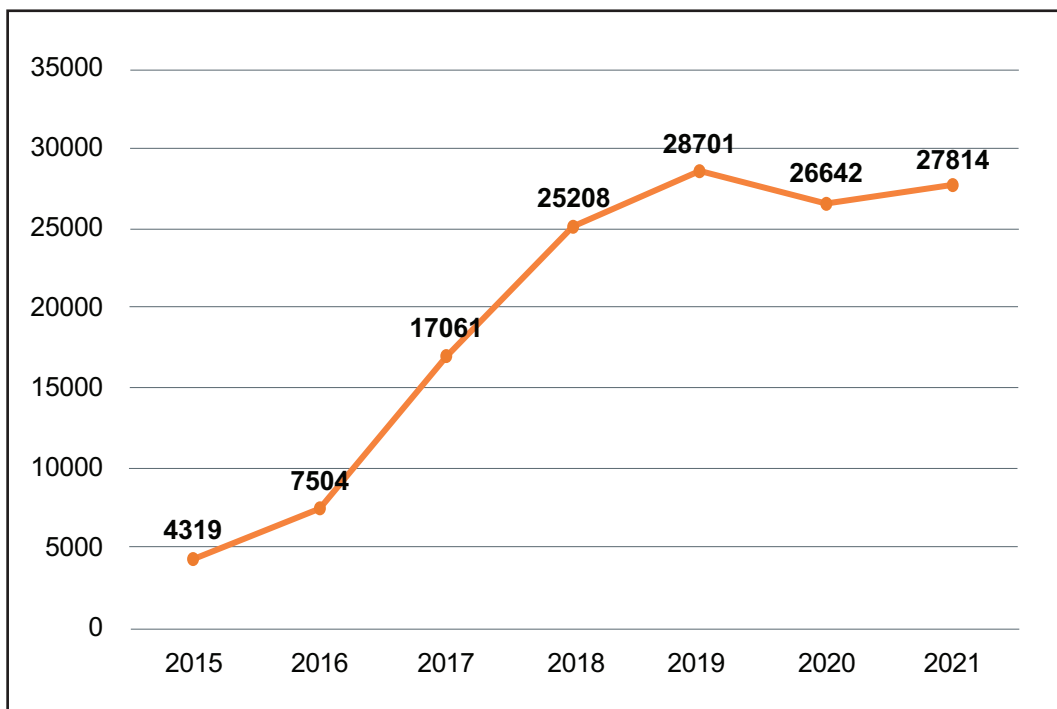
Short-Term Rentals

Short-term rentals are an entire housing unit, private room or guest house that is rented for a short period, generally less than 30 days. These units have become popular in the last decade because of online platforms that connect homeowners with travelers.

From June 2015 to June 2021, short-term rental listings in Arizona have increased 706%, showing just how much short-term rentals have exploded.⁷³

In June 2021, Arizona's short-term rentals had an average stay of 3.3 days, an average cost of \$282.15 per night, and an occupancy rate of 67.7%.⁷⁴ At these averages, an owner could collect over \$5,750 a month for a short-term rental.⁷⁵ This cost is significantly higher than the monthly average long-term rent of \$1,059 in Tucson or \$1,808 in Scottsdale.⁷⁶

Average Number of Short-Term Rental Listings in Arizona



Source: "AirDNA Data," 2021, <https://www.airdna.co/airdna-data-how-it-works>.

A frequent criticism of short-term rentals is they remove long-term housing units from the market, decreasing overall supply. For example, a study of short-term rentals in Boston found a 0.4% increase in rental rates when Airbnb listings grew by 12 units in a census tract.⁷⁷ The study also found a correlation between increased Airbnb listings and a decrease in the supply of long-term housing units in a census tract.⁷⁸ Another study found that when Airbnb listings in a ZIP code increase by 10%, there is a 0.42% increase in rental prices and 0.76% increase in home prices, with more considerable price growth occurring when a ZIP code has a greater proportion of rental housing.⁷⁹ The negative impact of short-term rentals on housing stock is even higher in rural areas, where housing units are less likely to be replaced than in urban and suburban areas.⁸⁰

Few states have short-term rental regulations other than applying hotel or transient occupancy tax on short-term rentals. Significant constraints on short-term rentals beyond taxation are often implemented locally, with a few states preempting counties and municipalities from enacting regulations.⁸¹ One unique regulation was enacted in New York City in June 2020. The law requires online lodging marketplaces (e.g., Airbnb, Vrbo) to provide information about the host of a short-term rental unit.⁸² The shared information includes the name, address, email, and phone numbers of a host and the length of stays for each unit booking.⁸³ The adoption of this law caused a significant decrease in short-term rental listings for both entire units and private rooms because property owners who failed to share this information were removed from the rental platforms.⁸⁴ In November 2020, before the law took effect, there were 36,253 short-term rental listings through Airbnb, and by December 2020, that number dropped to 11,345.⁸⁵ During the same period, the number of long-term housing units and long-term room rentals increased significantly.⁸⁶

State Law Barriers to Controlling Short-Term Rentals

In Arizona, state law has preempted local governments from adopting any additional regulations on short-term rentals.⁸⁷ However, Arizona does have several statewide rules on short-term rentals. The law prevents short-term rentals from being used for parties — events that would typically require a permit or license — or nonresidential uses.⁸⁸ State law also allows local governments to enact a law requiring an owner of a short-term rental to give the local government contact information for the person responsible for complaints concerning the property.⁸⁹ In addition, state law does subject short-term rentals to taxation.⁹⁰ These taxes are paid by the online lodging marketplaces and include state tax, transient lodging taxes at the municipal level, and sales taxes at the municipal level.⁹¹ However, each municipality determines its tax percentage.⁹² For instance, Scottsdale has a 5% tax rate.⁹³

Arizona state law also requires short-term rentals to get a transaction privilege tax license.⁹⁴ The license number must be displayed on every advertisement for the short-term rental, including on the short-term rental listing on online lodging marketplaces.⁹⁵ However, compliance and enforcement with this requirement are unknown.

Pros and Cons of Short-Term Rental Controls

Arizona's preemption prevents local governments from enacting short-term rental regulations or limitations. Without a state preemption, local governments would have flexibility to regulate the number, location, and uses of short-term rentals in addition to limiting the number of short-term units per owner. For example, San Francisco only permits a property owner to operate a short-term rental if the unit is the owner's primary residence for at least 275 nights a year.⁹⁶ Cambridge, Massachusetts, similarly limits rentals by only allowing owners to rent units adjacent to an owner-occupied property.⁹⁷

Local regulations on short-term rentals can increase the number of long-term ownership and rental units available on the market. As seen in New York City, regulating short-term rentals can increase the long-term housing supply.⁹⁸

However, enacting any regulation on short-term rentals may be limiting the rights an Arizona owner has over their property and thereby violating the Private Properties Rights Protection Act. Additionally, laws restricting or prohibiting short-term rentals in a jurisdiction would eliminate a way for property owners to earn supplemental income. A broad policy limiting short-term rentals could negatively impact people renting out a spare bedroom or their own home while traveling, not just individuals and businesses with large short-term rental portfolios. However, local regulations could be crafted to permit homeowners to rent out their own homes, adjacent units, or a few units while discouraging the conversion of larger properties or complexes to short-term rentals. Additionally, local governments could adopt regulations to enforce prohibitions against "party houses." Scottsdale recently put together a task force to identify recommendations related to concerns about short-term rentals.⁹⁹

Potential Solutions to Arizona's Legal Barriers to Controlling Short-Term Rentals

Allowing communities to determine how short-term rentals should operate would allow local governments to address the aspects of short-term rentals that are problematic for their region.

The state would have to eliminate the short-term rental preemption to allow local jurisdictions to implement additional rules in their jurisdiction. These regulations could include a minimum distance between short-term rentals, enforcement of the transaction privilege license requirement, and license revocation for repeated violations of the law.

Additionally, cities could tax short-term rentals and use the funding to provide affordable housing. In Arizona, 14 of 91 cities do not have a transaction privilege tax.¹⁰⁰ The remaining 77 cities have transaction privilege taxes that range from 1% to 7%. Tucson charges a flat rate of \$4 per room.¹⁰¹ Given the volume and cost of short-term rentals in Arizona, a 5% tax rate could bring in over \$5 million per year.¹⁰²

Tax Increment Financing (TIF)

Tax increment financing (TIF) is a tool used by municipalities to encourage development in a particular area.¹⁰³ Typically, an area is declared “blighted” and targeted for redevelopment, placing it under a special tax district encompassing the blighted area and surrounding properties.¹⁰⁴ Over a set time, a portion of the property taxes collected from within the TIF district is placed into a fund to subsidize development and construction within the district.¹⁰⁵

TIFs can be limited to where and how they are implemented, meaning TIFs can be used for certain types of development.¹⁰⁶ For example, Minnesota has created TIF districts specifically to encourage affordable housing, called Housing TIF Districts.¹⁰⁷ Under a Housing TIF District, funds must be spent to finance affordable housing or directly related public improvements.¹⁰⁸ Up to 20% of the square footage developed can be allocated for uses other than low-to-moderate income housing.¹⁰⁹ Similarly, Maine permits the use of TIFs but requires that they be used to fund affordable housing.¹¹⁰

State Law Barriers to Tax Increment Financing

While TIFs are widely used across the country, Arizona is the only state where new TIFs are not permitted.¹¹¹ Arizona used to allow municipalities to seek TIF district authorization from voters, but that allowance was repealed by the state legislature in 1999.¹¹²

Only one TIF exists in Arizona — the Rio Nuevo Multipurpose Facilities District in Tucson.¹¹³ Voters approved this TIF district in November 1999, and it was allowed to stand despite the change in state law.¹¹⁴ Unlike most TIF structures, the Rio Nuevo TIF tax is generated from an additional sales tax within the district rather than an increase in property tax.¹¹⁵

Pros and Cons of Tax Increment Financing

One benefit of TIF is the financing it provides for housing does not burden an existing municipal budget. Additionally, TIFs are primarily used for multifamily and affordable housing development, not single-family homes. The property value of a multifamily property is significantly greater than the value of single-family properties, meaning multifamily development generates substantial tax income that can be used for further development within the TIF district. Therefore, enacting a TIF can facilitate the exponential growth of housing units within a region. The state government can restrict the use of TIFs, limiting the scope to building affordable housing, as Minnesota and Maine have done.¹¹⁶

A significant drawback of TIF is that it can reduce the allocation of funding to regular recipients of property tax revenues, such as school districts and county governments.¹¹⁷ By re-routing some TIF tax revenue to future development within the district, normal recipients of property tax revenue do not immediately benefit financially from the district's property value increases.¹¹⁸ However, when implementing TIF, a state government can limit how municipalities use it and, for instance, prevent public schools from any reduction in funding.¹¹⁹

Another con of TIF is the potential gentrification of the area where a TIF is created. As a result of the TIF, rents may rise, leading residents to move in search of cheaper housing.¹²⁰ However, if the TIF is created for affordable housing development, this should not be the result.

Finally, a recurring criticism of TIF is the lack of oversight and the lack of new development. Historically, the management of TIF funds has had little, if any, oversight, with funds going to a special fund rather than the general fund.¹²¹ In addition, critics argue that it does not bring in new development but merely causes development to relocate.¹²² To address these critiques, the state government could require a municipality to have oversight of TIF projects and submit an assessment that the development would not otherwise occur without the funding assistance from the TIF district..

Potential Solutions to Arizona's Legal Barriers to Tax Increment Financing

Allowing for the use of TIF can provide significant revenue to municipalities for economic development generally, restricted to the financing of affordable housing. The state can require TIF plans to include management methods and reporting requirements that make the TIF plan more likely to succeed while still providing an additional tool to finance affordable housing.¹²³

Industrial Development Authorities (IDAs)

An Industrial Development Authority (IDA) is a government-created nonprofit corporation with limited corporate powers and is a political subdivision of the state.¹²⁴ Each Arizona county and municipality, and the Arizona Finance Authority or Board of Regents, may have one active IDA.¹²⁵ The powers of IDAs are designed to promote and facilitate economic development through financing methods.¹²⁶

Industrial development authorities are permitted to facilitate multifamily rental projects and finance the development, acquisition, or improvement of single-family housing.¹²⁷

State Law Barriers to Industrial Development Authorities

Only some IDAs can make loans to low- and moderate-income people for the development of single-family housing.¹²⁸ To be eligible for this authority, an IDA has to be created by a county or municipality with a population greater than 7% of the state population as determined by the decennial U.S. census.¹²⁹ Currently, this lending authority is limited to IDAs created by Maricopa County, Pima County, Phoenix, and Tucson.¹³⁰ Removing this population restriction would permit every IDA the option to finance single-family housing development and improvement for low-to-moderate income people. IDA lending authority for financing affordable housing in the form of single-family homes may be impactful in rural areas.

Pros and Cons of Industrial Development Authorities

The most significant advantage of IDA financing is that it can be layered with financing from other sources — such as TIF, Low-Income Housing Tax Credits, and Housing Trust Fund dollars — to provide substantial financial assistance to housing developments.

One drawback of IDA financing is that the demand for IDA funding far outweighs fund capacity. Many projects that seek IDA funding are turned down or pushed off for future consideration.

Potential Solutions to Arizona's Legal Barriers to Industrial Development Authorities

Allowing IDAs to operate beyond the higher population areas of Arizona could increase the variability of housing produced in smaller communities. For more rural locations where single-family home development is favorable to multifamily development, a change in state law could allow for single-family home development, acquisition, and improvement. Allowing new financing tools in less-populated areas could positively affect the development of affordable housing and create opportunities for joint projects and assistance from multiple agencies and jurisdictions, increasing the overall housing supply.

Endnotes

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- ¹⁶ Ariz. Rev. Stat. § 33-1329(A).
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