

Enabling Better Places: A Coding Reform Roadmap for Bismarck

Most of today's zoning codes were written during the postwar housing boom, and while they may have accommodated that unprecedented growth, those codes had the unintended consequence of rendering illegal the kind of vibrant, walkable streets and neighborhoods that many find to be the most attractive and desirable. These codes pushed development to the outskirts of cities, raised transportation costs for residents, and contributed to the loss of rural land. The result is often in dispersed low-density development, under-used Main Streets and neighborhood centers, and overdependence on cars citywide.

AARP is particularly interested in making places more livable, walkable, and accessible. As part of this work, the Congress for the New Urbanism (CNU) and AARP team together to identify significant land use regulations that are barriers to these goals in order to create a roadmap for AARP state office advocacy.

For each analysis, we ask these questions:

- What are the most significant code barriers to better development?
- Where are the simplest code changes that would yield the biggest impact?
- How can we better equip the state office to take advantage of advocacy opportunities?

This analysis identifies eight problematic coding barriers in Bismarck and provides simple suggestions to minimize those barriers. This is not a comprehensive code audit, but a search for barriers that can be corrected with small changes to the code, for instance adding, eliminating, or clarifying code language.

As we investigated the existing codes for Bismarck, we looked specifically at barriers that were identified as priorities by the state AARP offices and local stakeholders – particularly housing access, pedestrian and street safety, and zoning regulations that limit development options.

The recommendations are presented roughly in the order of priority determined by our team:

1. Accommodate a wider variety of households in Bismarck
2. Regulate restrictive covenants that will apply to new neighborhoods
3. Improve clarity of regulations for each zoning district
4. Reform Bismarck's restrictions on "nonconforming" housing
5. Fill remaining gaps in Bismarck's network of sidewalks
6. Encourage "missing middle" housing in appropriate Bismarck locations
7. Permit accessory dwellings "by right," with adjusted standards
8. Reconsider one-way travel on major streets

Taken together or singly, we believe that these recommendations will allow a better urban form in Bismarck, increasing walkability, livability, and pedestrian safety.

Code Topic:

1. Accommodate a wider variety of households in Bismarck

Current Ordinance Provisions in Bismarck:

Bismarck’s zoning ordinance defines most housing types by the number of “dwelling units” that are being provided. Each dwelling unit may be occupied by only one family, a term which is defined in the ordinance as follows (relevant language in this definition is highlighted here):

“Family: One or more persons related by blood, adoption, marriage, or foster care for children, living and cooking together as a single housekeeping unit; or, a number of persons, but not exceeding four, living together as a single housekeeping unit, though not related by blood, adoption, marriage, or foster care for children. In accordance with the provisions of NDCC 25-16-13, a group home serving six or fewer developmentally disabled persons is classified as a family in all single-family residential districts (RR, RR5, and R5), and a group home serving eight.”¹

Suggested Improvements:

This definition of family makes a distinction between the same number of people living in one “dwelling unit” based on their relationship (or not) by blood, adoption, marriage, or foster status.

If this distinction were for a critical public purpose, it might justify the extreme difficulty Bismarck officials must face in trying to enforce such a personal matter. That difficulty aside, it needs to be acknowledged that many people living together in a single dwelling today are neither married nor related by birth, adoption, or foster status. Many others may not be pursuing a romantic relationship or even seeking companionship, but may still need or wish to share the expenses of maintaining a home or apartment. It seems well beyond the scope of zoning to govern personal living arrangements.

The current definition of “Family” would be improved if it were changed in this manner (with words being removed ~~struck-through~~):

“Family: One or more persons related by blood, adoption, marriage, ~~or foster care for children, or any other domestic arrangement,~~ living and cooking together as a single housekeeping unit; ~~or, a number of persons, but not exceeding four, living together as a single housekeeping unit, though not related by blood, adoption, marriage, or foster care for children.~~ In accordance with the provisions of NDCC 25-16-13, a group home serving six or fewer developmentally disabled persons is classified as a family in all single-family residential districts (RR, RR5, and R5), and a group home serving eight.”

Benefit of Suggested Improvements:

This simple change would broaden housing opportunities for Bismarck residents.

¹ Section 14-02-03 – Definitions, in Title 14 (Zoning)

Code Topic:

2. Regulate restrictive covenants that will apply to new neighborhoods

Background:

The placement of “restrictive covenants” on lots in new subdivisions is currently unregulated in Bismarck, except for racial restrictions which are outlawed by the federal government.

Restrictive covenants explicitly based on race were once commonplace across the country, but due to Supreme Court rulings and the Fair Housing Act of 1968, they are now forbidden. Yet other restrictive covenants with similar effects, essentially banning entire classes of people who cannot comply with exclusionary restrictions such as minimum house sizes, are now as commonplace as racial covenants once were.

Restrictive covenants are placed on land by developers prior to the sale of individual lots. In order to purchase a new lot, buyers essentially agree to these restrictions being in place permanently (because they will also apply to subsequent buyers of the same lot, with no clear expiration).

These restrictions are often unquestioned, based on the common view that “if you don’t like the restrictions, you have the right to purchase somewhere else.” This is not realistic for all citizens if the majority of the land experiencing population growth is zoned for single-family residential and is currently (and will in the foreseeable future be) subject to these permanent restrictions.

Current Code Provisions in Bismarck:

Bismarck’s current subdivision regulations contain an entire chapter of highly detailed regulations on subdividing land to create new neighborhoods.² Proposed subdivisions are regulated on the following subjects, along with many others:

- the continuity of new streets with existing streets
- the width of lots on cul-de-sac streets
- consideration of space for snow storage
- size, slope, and naming of streets
- drainage patterns
- maximum length of new blocks

Despite these extensive requirements, there are no rules whatsoever concerning the imposition of restrictive covenants by land developers.

² *Chapter 14-09 – Regulations Governing the Subdivision of Land, in Title 14 (Zoning)*

Suggested Improvements:

Most subdivision regulations are administered by staff members. The regulations are reasonably clear, requiring technical knowledge to interpret but not requiring judgment calls of the type that are reserved to elected officials when they approve legislation or consider rezoning requests.

Any limitations on restrictive covenants should follow the same model:

- The specific limitations should be adopted legislatively by elected officials after due consideration of the proposed language and after hearing from affected parties and the general public. The legislation would define restrictive covenants that would constitute “unlawful exclusionary housing practices” and then forbid such covenants from being placed on land being subdivided. For instance, the following requirements might be banned from restrictive covenants:
 - Any requirement that homes be larger than a certain minimum size.
 - Any requirement that homes and lots may never be subdivided.
 - Any requirement that establishes artificial limitations on family composition, such as homes being limited to single-family occupancy.
 - Other unnecessary housing restrictions could also be forbidden, such as restrictions on the placement of energy-saving equipment including solar panels and clotheslines.
- These limitations would be placed in Bismarck’s subdivision regulations, where they can be administered by staff at the same time as all other subdivision regulations.
- Notice of “unlawful exclusionary housing practices” could be required to be placed on plats of new subdivisions to provide notice to purchasers and future residents and to advise them against adding unlawful exclusionary restrictive covenants at a later date.

Benefit of Suggested Improvements:

“Restrictive covenants” are sometimes known by other names, such as “deed restrictions” or “Covenants, Conditions & Restrictions.” Regardless of terminology, they are potentially permanent restrictions on the future use of subdivided land.

Restrictive covenants often address the same subjects that are regulated by local governments through their zoning regulations. However, unlike local regulations, restrictive covenants cannot be amended over time to reflect changing economic and social conditions. They are imposed almost invisibly by private parties during the land development process, whereas local regulations require public hearings that often include contentious debates about competing values.

Many of the subjects included in restrictive covenants are the subject of fair debate. Decisions on these subjects are an important part of democratic society and should not be delegated to one-time decisions by land developers.

Code Topic:

3. Improve clarity of regulations for each zoning district

Background on Residential Zoning Districts:

Modern zoning was first imposed in Bismarck in 1924. Initially there were just two residential zoning districts, A and B. Zone A was to the west of a boundary along 9th and 12th Streets; Zone B was to the east.

In 1936, the zoning code was amended to create three residential zoning districts. Zone A was split; the easterly half of Zone A became Zone B – including the state capitol and most neighborhoods to the south. Former Zone B became Zone C.

In 1953, the zoning code established four residential districts: R-7; R-3.5; R-2.5; and RM.

Many of today's residential zoning districts originated in 1982 amendments:

- The R5 zone includes most of Zone A from 1936
- The R10 zone includes most of Zone C from 1936
- The RM30 zone includes most of Zone B from 1936

Current Code Provisions in Bismarck:

Most zoning districts allow primarily residential, commercial, industrial, or rural uses of land; occasionally a zoning district will be limited to public buildings or must remain natural (undeveloped).

In addition to that focus, a zoning code may divide its zoning districts into several types:

- Conventional zoning districts (such as the residential zones described above)
- Planned-development zoning districts, which are customized for individual tracts to accommodate a development form not otherwise allowed.
- Form-based zoning districts, which allow a greater range of land uses while regulating the physical form of buildings (such as their placement on a lot) more stringently.
- Overlays, which apply in addition to the base district to either add or subtract regulations for a clearly defined area.

Bismarck's current zoning ordinance contains examples of all four types. However, they are presented in the code in a way that does not help inexperienced code users understand the differences. Also, the official zoning map does not include even the general location of the overlay districts, despite their importance in regulating the use of land, and it does not include other special zoning requirements that are functionally equivalent to overlays.

Suggested Improvements:

Bismarck’s initial use of form-based zoning is limited to two zoning districts: Downtown Core (DC) and Downtown Fringe(DF). A separate recommendation from Blue Zones discusses how those districts should evolve.

Older neighborhoods north and south of downtown would also be better served by the creation of a new form-based zoning district that would match their physical layout and walkable location near the center of town. Another separate recommendation from Blue Zones presents that proposal in detail.

This recommendation addresses the remainder of Bismarck which presumably will retain the use of conventional and planned-development zoning districts, with occasional application of overlays.

Organization of Zoning Districts:

The Bismarck zoning ordinance provides regulations for its zoning districts sequentially in Title 14, as follows (with district types noted to the right):

14-04-01	RR - Residential District	CONVENTIONAL
14-04-01.1	RR5 - Residential District	CONVENTIONAL
14-04-02	RRMH - Rural MH Residential District	<i>[repealed in 1996]</i>
14-04-03	R5 - Residential District	CONVENTIONAL
14-04-04	RMH - MH Residential District	<i>[repealed in 1996]</i>
14-04-05	RMH - Residential District	CONVENTIONAL
14-04-06	R10 - Residential District	CONVENTIONAL
14-04-07	RM - Residential District	CONVENTIONAL <i>[contains an unmapped overlay]</i>
14-04-08	RT - Residential District	CONVENTIONAL
14-04-09	HM - Medical Facility District	CONVENTIONAL
14-04-10	CA - Commercial District	CONVENTIONAL
14-04-11	CB - Commercial District	<i>[repealed in 2006]</i>
14-04-12	CG - Commercial District	CONVENTIONAL
14-04-13	CR - Commercial District	<i>[repealed in 2006]</i>
14-04-14	MA - Industrial District	CONVENTIONAL
14-04-15	MB - Industrial District	CONVENTIONAL
14-04-16	P - Public Use District	CONVENTIONAL
14-04-17	A - Agricultural District	CONVENTIONAL
14-04-18	Planned Unit Developments	PLANNED DEVELOPMENT
14-04-19	FP - Floodplain District	OVERLAY <i>[not on zoning map]</i>
14-04-20	AN - Airport Noise Overlay District	OVERLAY <i>[not on zoning map]</i>
14-04-21.1	DC - Downtown Core District	FORM-BASED
14-04-21.2	DF - Downtown Fringe District	FORM-BASED

A better approach would be to explain the four types of zoning districts at the beginning of Section 14.04, then present the districts of each type together, rather than intermixing the types at random.

Some overlays may not be shown on printed copies of the official zoning map; the zoning ordinance should explain to readers where those overlay boundaries can be found. Any code provisions that are essentially overlays should be clearly shown on the official zoning map (both printed copies and on-line maps); an example from the current ordinance is a description of blocks in the RM30 district that allow single- and two-family homes in addition to multifamily residences.

Assignment of Allowable Uses:

In most zoning ordinances, the allowable uses of land are listed individually for each zoning district, or they are identified by “use groups” which are combinations of uses with similar characteristics.

“Use groups” are the preferred method. Attempts to list all potential uses for each zoning district are doomed from the outset, and only get worse over time as new types of businesses and residences are introduced.

The Bismarck zoning ordinance combines both methods, making it cumbersome for the layman to interpret. To complicate matters further, there are two types of “use groups”: a newer system for the two Downtown zoning districts and an older system for other districts.

The older system of use groups should be phased out; its contents have become obsolete, and it is confusing to apply in part because of its unhelpful titles for important groups, such as “Retail group A” and “Service group B.”

The best “use groups” identify allowable uses generally (for instance “Stores and Services”) but then delete certain troublesome uses that would otherwise fit in that group (for instance, convenience stores with long hours; or large grocery stores with special loading requirements). The potentially troublesome uses are allowed in fewer zoning districts.

With a coherent system of “use groups,” the allowable uses in each zoning district can be condensed from many pages for each zoning district to a matrix that shows the allowable zoning uses for many zoning districts on a single page. The differences (and similarities) between zoning districts become immediately apparent.

Regulatory Standards:

Most regulatory standards for each zoning district can also be presented in simple matrices rather than being spread across many dozens of pages.

For instance, a single matrix can present setbacks, lot sizes, and building heights for every residential zoning district. Footnotes can address special conditions, such as rear setbacks being different for lots that have rear alleys.

This tabular format is easier to understand and it showcases the differences (and similarities) between districts.

Various peculiarities in the formal definitions also need to be resolved, some just for clarity and others to move regulatory standards from the definition to the regulatory portion of the code:

- The definition of “Dwelling-Single-Family”³ describes minimum building widths and depth and minimum ceiling heights — none of which belong in a definition, and in this case, aren’t needed in the code at all.

³ Section 14-02-03 – Definitions

- “Density” is defined as the “number of families residing on, or dwelling units developed on, an acre of land.”⁴ Individual zoning districts regulate density with wording like this, from R10: “The maximum allowable density is ten (10) families per gross acre.” However, the zoning ordinance primarily regulates physical structures, such as the number of dwelling units per acre – and only peripherally may try to regulate who may live in a dwelling unit at a given moment in time (see recommendation #1). Thus definitions and regulations of density should address dwelling units, not occupants; and should be clear as to how “gross acre” is defined for this purpose – for instance does it include or exclude wetlands, public streets, detention ponds, etc.?

Benefit of Suggested Improvements:

With the adoption of Bismarck’s new comprehensive plan, many revisions will be needed to the city’s zoning regulations. This is an opportune time to modernize both their format and content.

⁴ Section 14-02-03 – Definitions

Code Topic:

4. Reform Bismarck’s restrictions on “nonconforming” housing

Background:

Zoning codes nearly always require that all NEW buildings, and expansions or changes to existing ones, must comply entirely with the latest codes. Zoning codes are often nearly as strict with existing uses of land or buildings, with the intention of keeping existing inappropriate uses from expanding, or in some cases from continuing beyond a fixed period.

Bismarck’s regulations on this subject apply only to “nonconforming uses,” unlike some cities which regrettably apply them to perfectly legal uses in buildings that don’t comply with every current dimensional regulation (such as setbacks, lot coverage, and building height).

Homes that have been built in the past 50 years are generally consistent with current zoning regulations because Bismarck’s regulations have changed so little over that period. However, some problems occur in older neighborhoods that were built up under one set of rules (or no zoning rules at all) but which later came to be regulated the same way as neighborhoods built under today’s rules.

Current Code Provisions in Bismarck:

Bismarck’s current zoning ordinance address “nonconforming uses” primarily in Section 14-03-09. Essentially, a use of land that is suddenly no longer allowed in a zoning district due to a change in regulations is deemed to be a “nonconforming use” and allowed to continue, provided it follows a lengthy set of rules, summarized as follows:

1. The owner must request a “certificate of occupancy” within 30 days after the use becomes nonconforming.
2. The nonconforming use cannot be expanded to a new building, or outside the existing building, or to an additional lot.
3. The building cannot be enlarged or altered unless the nonconforming use is discontinued. (However, a number of very complex exceptions are provided, for instance if the number of dwelling units would be decreased.)
4. If the building is heavily damaged, it cannot be rebuilt for the nonconforming use.
5. If the building is moved, it must be moved where the use would become conforming.
6. If the nonconforming use is changing, the new use must be conforming.
7. If the nonconforming use is discontinued for six months, all future uses must be conforming.
8. Certain high-impact nonconforming uses cannot be continued beyond one month to one year (such as trash dumps, auto junkyards, and sand/gravel mines).

Bismarck’s current zoning ordinance also provides some special regulations that apply only to residential lots that were created before 1953 or 1979, affecting minimum lot sizes and front setbacks.

Suggested Improvements:

Some of Bismarck’s rules governing nonconforming uses are unnecessarily strict.

For detrimental or truly noxious use in residential neighborhoods, this strictness is justified.⁵ If Bismarck officials identify any remaining detrimental uses, the existing list of uses that must be terminated should be expanded to include them.

However, the major effect of nonconforming regulations is to harm homes that have a second (or third or fourth) dwelling unit which became “nonconforming” when a change to Bismarck’s zoning disallowed all homes other than single-family. Significant zoning changes took place in 1936, 1953, and 1982.

Owners of these homes are stymied from openly maintaining and improving their homes and from renting out the additional units, even in neighborhoods that historically allowed additional units.

The biggest hurdle is whether the prior owner (at the time of rezoning) requested and obtained the required additional “certificate of occupancy, and then passed that certificate down to the current owner. The time period for doing so was so short (within 30 days after rezoning) that it is difficult to imagine many owners having become aware of this requirement and then acting promptly enough to comply. This extreme technical requirement places an unreasonable burden on many legitimate uses of private property.

Even for an owner who did manage to obtain the proper certificate, there are several other requirements that place severe limits on the owner’s ability to update the home as tastes change, and to rehabilitate the home to keep up with the ravages of time, and possibly to supplement the owner’s income by renting out space that the owner no longer needs:

- Limitations against routine upgrades to a home, such as adding a room, as well as restrictions against rebuilding after a fire, are unnecessarily burdensome when applied to uses that may not currently be allowed, but which are not injurious to neighborhoods where they historically were allowed.
- An owner who chose not to rent out a dwelling unit within the home for a period of six months may have lost the ability to ever rent that unit again. This type of rule is common in zoning codes, but is burdensome because there are many valid reasons for vacancies longer than six months – such as the owner being unable to find a suitable tenant during that period, or the space requiring a lengthy renovation, or the space being used by a family member instead of being rented out.
- Lenders sometimes demand written evidence from a local official that a building hasn’t been declared non-conforming before they will underwrite physical improvements to the building. (Insurers sometimes do the same when it may affect the cost or ability to replace a building.)

Bismarck already has a sub-category of nonconforming uses for detrimental uses to treat them more strictly than nonconforming uses that are benign, or even beneficial, to their neighborhoods. The remaining uses could also be subdivided so that unnecessary restrictions wouldn’t be applied so indiscriminately -- for instance, only uses with some potential for harm would be subject to the rule that a nonconforming use becomes illegal if it ceases for more than six months.

⁵ Section 14-03-09-9 – Nonconforming Use - Period of Continuance

A simpler solution would be to modify the requirements in Section 14-03-09 in this direction:

- Except for identified detrimental uses, eliminate the requirement that prior owners must have obtained a certificate of occupancy within 30 days after changes to the zoning map (or to allowable uses in a zoning district).
- Soften restrictions against expanding and rehabilitating homes that contain nonconforming dwelling units.
- Eliminate time restrictions on vacancies in additional dwelling units within a home.

Benefit of Suggested Improvements:

The purpose of nonconforming provisions is to avoid the continuation of existing uses that are harmful to neighbors or the community — while ensuring that new construction and rehabilitation complies with the latest codes to the maximum extent feasible.

This purpose can be accomplished without collateral damage to valuable housing if Bismarck calibrates its regulations. Nonconforming uses that are benign, or even beneficial, should no longer be treated as if their elimination was important to the public health, safety, and welfare — and certainly not treated with the harshness that detrimental or noxious nonconforming uses should face.⁶

⁶ *“Distinguishing Between Detrimental and Benign Nonconformities,” by V. Gail Easley and David A Theriaque, Zoning Practice (November 2009), published by the American Planning Association*

Code Topic:

5. Fill remaining gaps in Bismarck’s network of sidewalks

Background:

Sidewalks play important roles in the life of any community:

- As conduits for pedestrian movement and access, sidewalks enhance connectivity and promote walking.
- As public spaces, sidewalks activate streets, both socially and economically.⁷

Bismarck’s current sidewalk network is quite good, a result of continuing and concerted efforts by city officials that are enabled by excellent legislation by the state of North Dakota.

Sidewalks are located on both sides of most streets in Bismarck once adjoining land is developed. In 2016, there were 437 miles of sidewalks in Bismarck.⁸

Current Code Provisions in Bismarck:

Bismarck’s code of ordinances requires continuous concrete sidewalks along all public streets. Sidewalk widths vary from 4.5 feet to 6 feet.⁹

Adjoining landowners have a legal duty to construct and maintain these sidewalks.¹⁰

If landowners do not construct a sidewalk required by city code, the North Dakota Century Code allows cities to construct the sidewalks and then assess each landowner a proportionate share of the cost.¹¹ (Cities are not allowed to pay for these sidewalks through general taxation.¹²)

Bismarck has been using this authority primarily to fill gaps in the existing sidewalk network. In 2019, the city ordered the construction of dozens of relatively short gap-filling sidewalks citywide, to be paid for through assessments on adjoining landowners.¹³

⁷ “Sidewalks – A Livability Fact Sheet” by AARP; downloaded from <https://www.aarp.org/content/dam/aarp/livable-communities/livable-documents/documents-2014/Livability%20Fact%20Sheets/Sidewalks-Fact-Sheet.pdf>

⁸ *Bismarck–Mandan Bicycle + Pedestrian Plan*, Bismarck-Mandan Metropolitan Planning Organization, 2017

⁹ *Section 10-03-06 – Sidewalk Standards*, in Chapter 10-03 (Construction and Maintenance of Sidewalks and Driveways)

¹⁰ *Section 10-03-03 -- Duty of Property Owners to Maintain Sidewalks*, in Chapter 10-03 (Construction and Maintenance of Sidewalks and Driveways)

¹¹ *Sections 40-29-02 and 40-29-03*, in Chapter 40-29 of the North Dakota Century Code (Sidewalks)

¹² *Section 40-29-13 -- Sidewalks repaired or constructed in municipalities not to be paid for by general taxation – Exception*, in Chapter 40-29 of the North Dakota Century Code (Sidewalks)

¹³ *Ordered by the City Commission on July 9, 2019*

Suggested Improvements:

Bismarck officials should continue their successful program to fill gaps in the sidewalk network.

In addition to filling any remaining short gaps, the program should expand to fill longer gaps and to build sidewalks or paved trails on some important routes where none exist today.

Priorities should be established so that the most important gaps will be filled first. Bismarck's priorities might include:

- Sidewalk gaps leading to community gathering places such as schools, parks, trails, and senior centers.
- Sidewalk gaps near transit stops.
- Sidewalk gaps in and near business districts.
- Important sidewalk extensions identified in adopted bicycle and pedestrian plans.
- Areas or facilities where sidewalk improvements have been highlighted through Bismarck's Complete Streets initiative (for instance, where additional right-of-way becomes available during reconfiguration of travel lanes on major streets).
- Sidewalk gaps on streets with higher levels of traffic.

The minimum sidewalk widths that are currently in Bismarck's code¹⁴ should be examined again:

- The 4.5-foot minimum in single-family and two-family areas is barely adequate; there are very few cases where sidewalks should be less than 5 feet wide.
- In areas other than single-family and two-family homes, sidewalks currently must be 6 feet wide. This is often a good width; however, in busier urban areas (and suburban shopping districts), the 6-foot width should be maintained as a minimum "clear zone" so that sign poles, trash receptacles, and other street furnishings (including outdoor dining areas) never leave less than 6 feet for people walking.¹⁵

Benefit of Suggested Improvements:

The existence of a sidewalk does not guarantee a comfortable walking experience. Other factors also play important roles:

- High-speed traffic is a negative factor, as are driveways that carry vehicles across the sidewalk, and parking lots near the sidewalk.
- A row of street trees is a positive factor, as are buildings with doors and windows that face the sidewalk.

Yet without sidewalks, people walking are forced to share the street with vehicles, nearly always an unpleasant and unsafe experience. Bismarck should be proud of its sidewalk network and should continue filling its most significant gaps.

¹⁴ Section 10-03-06 – Sidewalk Standards, in Chapter 10-03 (Construction and Maintenance of Sidewalks and Driveways)

¹⁵ *Walkable City Rules: 101 Steps to Making Better Places*, by Jeff Speck, Island Press, 2018.

Code Topic:

6. Encourage “missing middle” housing in appropriate Bismarck locations

Background:

The Shape, Grow, and Thrive sections of the proposed Bismarck Comprehensive Plan (*Together 2045*) identify several goals and objectives about creating complete neighborhoods and providing more housing options.

Many people would like to live in a neighborhood environment, but would prefer something other than a detached single-family home or an apartment or condo in a housing complex.

“Missing Middle” housing refers to the in-between scale of buildings that current developers (and many local governments) have all but forgotten.¹⁶ These buildings, once common, are more intense than single-family detached houses but physically much smaller than garden apartment complexes or high-rises. These buildings typically have a limited footprint and height that complements traditional neighborhoods, and can help transition from single-family detached houses to more intense areas such as downtown, neighborhood business districts, and commercial corridors.

Missing Middle forms can provide housing choices not currently available, often at more affordable costs. They can also be designed and built in a context-sensitive form and scale for vacant lots or replacement homes. Missing Middle housing can take many forms—including some that exist in the



area today. (As always, context is important; not every form is appropriate in every neighborhood.)

To truly encourage the development of more housing options at a variety of rental and sales prices, Bismarck should change its zoning code to allow or actively encourage a broader range of housing types in key/targeted zoning districts or geographic areas. Currently, the Bismarck zoning districts that allow any multifamily dwellings are limited to a very small portion of the city. Improved regulatory tools are available that would allow the private sector to add “missing middle” housing in the desired locations.

¹⁶ Valuable information about Missing Middle housing is provided by Opticos Design, Inc at: <https://missingmiddlehousing.com/>

Current Code Provisions in Bismarck:

Bismarck's current zoning ordinance defines a multifamily dwelling as:

*"A building containing three or more dwelling units or a group of two or more buildings on a single parcel with each containing at least two dwelling units."*¹⁷

This definition fails to distinguish between "missing middle" house-sized residential buildings, such as triplexes, quadplexes and small courtyard apartment buildings, and:

- larger block-sized mid-rise buildings with dozens of dwellings, or
- large suburban apartment complexes with hundreds of dwellings in multiple buildings spread across a large parcel.

These smaller house-sized residential forms were once common across the country, but are now forbidden from all but the most intense neighborhoods or mixed-use areas in Bismarck because they are grouped into the "multifamily dwelling" definition in the zoning ordinance.¹⁸

The vast majority of land in Bismarck is currently assigned to zoning districts that only allow one detached single-family house on each lot (regardless of how large the lot may be). Exceptions include the R10 district, which also permits duplexes and rowhouses; and the RM district, which is specifically "established as a district in which the principal use of land is for multifamily dwellings and similar high-density residential development."¹⁹ Each RM district has a designated density cap (measured in dwelling units per acre); this crude cap fails to take into account a range of other building characteristics, such as overall building footprint and frontage length, that directly affect the scale and intensity of housing, and thus its suitability for particular neighborhoods.

The Bismarck zoning ordinance provides specific development standards for townhouses and rowhouses (which are not the same) within RM districts, but not for multifamily buildings in general. Most zoning district standards are limited to minimum lot area and width; maximum lot coverage; minimum front, rear, and side yard setbacks; and maximum building height.^{20 21 22}

It is impossible to predict the resulting built form when regulations depend primarily on setbacks, lot coverage, and density. As lot sizes increase, the permitted building footprint can increase proportionally, as long as the minimum setback and maximum coverage and density are maintained. In a redevelopment context, this can often encourage teardowns and lot consolidation in order to achieve the maximum development permitted based on the height and density limitations, regardless of the character and development pattern of the surrounding area. Similarly, the density cap indicates the number of dwelling units (or families) permitted on a parcel, but provides no indication of the size of each dwelling, and therefore no indication of overall building size. (For example, a building with 10 two-

¹⁷ Chapter 14-02-03. Definitions; see: Dwelling–Multifamily; Dwelling–Multifamily High Rise; Dwelling–Two-Family; Row House; and Townhouse

¹⁸ The code does include a specific definition for multifamily high rise: "A building containing over three dwelling units with a height of over sixty feet."; along with separate definitions for rowhouse and townhouse that are almost identical, basically attached single-family units with private entrances on adjoining lots, with the only distinction being the arrangements of front and rear entrances.

¹⁹ 14-04-06. R10 Residential District and 14-04-07. RM Residential District

²⁰ 14-04-07. RM Residential District, Sections 3-10 pp.179-180

²¹ There are contextual exceptions for front yard setbacks, based on the average setbacks of nearby reference lots, for lots platted before 1979.

²² For buildings greater than two stories, additional side and rear yards setbacks of 10 feet per additional story are required.

or three-bedroom units would be considerably larger than a building with 10 studio or one-bedroom units, even though they will be calculated as having the exact same “density.”)

These types of standards seemingly authorize new buildings in some neighborhoods even if they would disrupt the existing context and fabric, yet forbid even the most benign missing middle housing types in most of Bismarck.

Suggested Improvements:

Bismarck should reorganize its zoning classifications for housing that contains more than one dwelling unit. Instead of lumping most types into a single definition of “multifamily dwelling,” there would be several defined terms. The new terms would be differentiated primarily on the resulting physical form and scale, which would be controlled by new development standards for each housing type. Revisions to the zoning ordinance would then assign each group to appropriate zoning districts.

- For instance, the zoning code could define four groups of multifamily housing:
 - Lower-intensity missing-middle housing types (see diagram on Page 1)
 - Higher-intensity missing-middle housing types (see diagram on Page 1)
 - Mid-rise multifamily housing (comparable to “multifamily” in the current code)
 - High-rise multifamily housing (which is already defined in the zoning code)
- The new missing-middle groups would refer to individual housing types, such as those shown on the diagram on Page 1.
- Each of those types would have its own development standards set forth in the zoning code to directly regulate the form and character of that type. These standards could:
 - Require that the fronts of new buildings face the street and sidewalk and provide windows and doors, instead of blank walls or garage doors facing the sidewalk.
 - Limit parking locations; for instance, prohibit parking lots between the front of a building and the sidewalk, and provide most access to parking from side driveways (or from the rear where there are alleys).
 - Include maximum limits on lot size, building footprint, and width or frontage length. Such standards would discourage excessive consolidation of lots and would maintain the overall development pattern of small to moderate-sized buildings that fit in with existing homes and/or provide a gradual transition within a short distance to adjacent commercial or mixed-use areas.

These standards could be calibrated for infill/redevelopment, based on existing neighborhood features like lot size and building rhythm and character; or they could be more generic and thus better suited for use in completely new neighborhoods.

Benefit of Suggested Improvements:

Bismarck’s current zoning treats almost all housing more intense than a duplex as if it were the same. Inappropriate new buildings can have a destabilizing effect on neighborhoods; in the absence of appropriate zoning standards, this can occur legally anywhere “multifamily dwellings” are allowed, simply through the acquisition and demolition of existing homes and then consolidating lot to accommodate a large apartment complex. This can promote disinvestment by other owners, disrupting stable neighborhoods.

Calibrated standards such as those suggested above would provide greater predictability as to the character of future infill and redevelopment. These changes would improve long-term stability for neighborhoods, while encouraging current owners to reinvest and improve their properties.

These changes would distinguish high-density multifamily housing from missing-middle types, which themselves can either lower intensity or high intensity types . The lower intensity types can be appropriate in many urban neighborhoods, even those dominated today by single-family homes.

By clearly defining housing types based on form and character, Bismarck’s zoning would help increase the housing supply in appropriate contexts, both by maintaining the existing neighborhood scale and by accommodating a wider range of housing options. Clear and appropriate standards for these building forms would ensure that all new missing-middle buildings become integral parts of their neighborhoods rather than out-of-place “developments.”

Context-sensitive development standards would allow for small-scale intensification while maintaining the pedestrian scale in areas where the existing street and block network already includes sidewalks, and in some cases bike lanes, thus promoting walkability and multi-modal transportation options.

Code Topic:

7. Permit accessory dwellings “by right,” with adjusted standards

Current Code Provisions in Bismarck:

Bismarck’s zoning ordinance provides for the creation of Accessory Dwelling Units (ADUs)²³ as a “Special Use” in **Chapter 14-03-08, Section y, Accessory Dwelling Units**. The stated purposes are to provide a broader range of housing options, make better use of existing infrastructure, and preserve the character of single-family neighborhoods.²⁴

An applicant for an ADU must obtain approval from the planning and zoning commission through the discretionary “Special Use” process. The proposed ADU must meet a specific list of requirements before “Special Use” approval can even be considered; some of these requirements are more restrictive than the standards for the principal dwelling on the same lot.

Specifically, ADUs must comply with regulations regarding site development, size, height, entrances, parking, occupancy, and ownership.²⁵ Specific limitations for ADUs include: (underlining added for emphasis)

- An ADU must be “accessory” to a single-family dwelling in certain residential and agricultural zoning districts (currently only in R5, R10, RM, RR, RR5 or A districts)
- Owner occupancy of either the principal or accessory dwelling is required for at least 6 months of the year (this requirement carries forward to all future owners)
- ADUs must be between 300 and 800 square feet; an ADU inside the principal dwelling is further limited to 40% of the gross floor area of the principal dwelling (excluding the floor area of an attached garage)
- Building height is limited to twenty (20) feet, or the height of the principal dwelling, whichever is less
- At least one on-site parking space is required, in addition to any parking required for the principal dwelling (exceptions may be permitted upon submission of a parking plan demonstrating why the extra parking space is not needed)
- A rooftop deck or balcony is not permitted within 25 feet of a side or rear lot line

Applying for “Special Use” approval requires submission of the following documents, which may require professional assistance to complete, in addition to paying a fee and appearing at the public hearing:

- Submission of a building plan (and a site plan if new construction is involved)
- A parking plan (if a parking exception is requested)

²³ *The Bismarck zoning ordinance defines an Accessory Dwelling Unit (ADU) as follows: “A separate and complete dwelling unit established in conjunction with, but clearly subordinate to, the principal single-family dwelling unit, whether within the same structure as the principal unit or within a detached accessory structure on the same lot or parcel. An accessory dwelling unit contains one bedroom, kitchen and bathroom facilities, and a separate exterior entrance.”*

²⁴ *Section 14-03-08.4.y.1. Intent (of Accessory Dwelling Units)*

²⁵ *Ibid, 3. Requirements for All Accessory Dwelling Units*

Suggested Improvements:

The code states that Bismarck is interested in increasing the range of housing options by allowing ADUs. However, despite the stated purposes and the desire for more housing options even in single-family neighborhoods, the process for approval and some of the standards actually impede the creation of ADUs, even in many Bismarck neighborhoods where such units had historically been allowed and where some affordable housing would be most desirable — older walkable mixed-use neighborhoods, neighborhoods near transit corridors, and other neighborhoods that are close to neighborhood shopping and services.

As to process, homeowners within the zoning districts where ADUs might be allowed are still required to file a detailed application and go through a discretionary review process to obtain the required “Special Use” approval. This step requires knowledge of the system by the property owners, as well as staff and planning and zoning commission time for the review of each application individually.

In order to encourage more ADUs, the first step is to streamline this process by making ADUs permitted “by right” in the designated areas. Or, at a maximum, ADUs could be administratively reviewable by city staff (the Bismarck zoning code already specifies that small animal veterinary clinics, another “Special Use,” can be approved administratively).²⁶ Either approach would remove the uncertainty of discretionary review and would considerably reduce the time required to determine if an ADU might even be approved on any given lot.

In addition to streamlining the process, the following specific changes to the standards should be considered:

- **ADUs shouldn't be limited to lots with single-family homes.** An ADU would be equally valuable, and equally inconspicuous, if built on a lot with a duplex or townhouse / rowhouse — whether freestanding, as garage apartments, or as English basement units — while still maintaining the character and respecting the style and scale of the surrounding neighborhood.
- **An extra parking space should not be a standard requirement for ADUs.** In many locations, an extra parking space could be provided easily. However, in older, pre-auto era neighborhoods, lots are typically smaller and often are constrained by the location of the existing home and/or mature trees — often without room for an extra parking space that meets today's standards. Even though there is a process for obtaining a parking exception, each additional risk added to the “Special Use” process is another impediment that might discourage homeowners from pursuing an ADU.
- **Remove or refine current restrictions on ADUs that do not apply to the principal dwelling on the same lot** (e.g. height, setbacks, square footage, balconies, roof decks, etc.). For example:
 - The special 20-foot height limit for ADUs would likely prevent the creation of garage apartments, especially when the principal dwelling has only a single story. This is true even when the zoning district allows the principal dwelling to be up to 40 feet tall (as in the R5 and R10 districts).
 - Depending on how terms are defined or standards are interpreted, limitations on balconies and decks within 25 feet of a property line could unnecessarily restrict

²⁶ Section 14-03-08.1, Permanent Uses (Administrative Approval)k

ADUs above garages (also ADUs that are accessed from a rear alley, and ADUs that are placed near the rear lot line).

- The minimum square footage seems unnecessarily limiting, particularly in terms of keeping costs down and/or for building a detached accessory unit on a small lot in a zoning district such as R5, where lot coverage is already limited to 30%. Building codes already address residential safety requirements. There are numerous plans available for “tiny houses” that are below the 300-square-foot threshold.

Benefit of Suggested Improvements:

As evidenced by their inclusion in the current code, Bismarck officials clearly recognize that ADUs are a valuable tool for adding scattered small apartments into residential neighborhoods. ADUs can allow more people to live within walkable, mixed-use neighborhoods without owning a car, and they are an important supplement to the difficult task of finding locations to create larger pockets of affordable housing in new buildings.

Improving Bismarck’s rules for ADUs would have these additional benefits:

- ADUs can help intensify transit-supported neighborhoods, better taking advantage of the city’s current (and future) investment in transportation and other infrastructure.
- By not requiring additional parking for an ADU, the number of lots where ADUs could be constructed is increased, while decreasing development costs.
- ADUs can increase affordability for first-time homeowners or can help older residents stay in their homes, because the ADU can provide additional income to assist with mortgage payments or housing maintenance.
- By simplifying the process and avoiding unnecessary impediments to providing ADUs, their development will be incentivized at no cost to government agencies (and with a potential savings in staff time and effort) through code changes that would carry out already-adopted public policy in support of ADUs.

Additionally, the ADU Model State Act and Local Ordinance developed by AARP provides a complete overview of why ADUs are such a vital piece of the future development in cities in addition to two versions of ADU policies – a minimal version as well as an ‘optimal’ state act. More information can be [found here](#).

Code Topic:

8. Reconsider one-way travel on major streets

Background:

Like many American cities, Bismarck converted several major streets from two-way to one-way traffic, presumably to improve through traffic flow and expedite commuters arriving and departing downtown. Unfortunately, this approach all too often succeeds beyond expectations, improving vehicular traffic flow and increasing speeds at the expense of all other modes of transportation and overall street life, creating what many urbanists today have dubbed “traffic sewers.” (One-way changes are usually accompanied by synchronizing traffic signals and sometimes by removing on-street parking and any other feature that might be considered a hindrance to the free flow of automobiles.²⁷)

Studies have also shown that one-way streets often have a detrimental effect on downtown retail shopping districts. There are several variables at play, including high-speed traffic creating pedestrian un-friendly environments, and existing stores suddenly being located on in-bound streets (inconvenient for commuters heading home) – or vice versa.

Current Code Provisions in Bismarck:

Street lane configurations and traffic patterns are typically addressed in either the subdivision regulations or a master street or thoroughfare plan. Bismarck’s current subdivision regulations are located in Chapter 14-09 of the zoning ordinance; they are silent on the matter of one-way streets.

Decisions on converting existing streets to one-way or two-way travel are typically made on a case-by-case basis as a matter of public policy, completely outside the regulatory environment.

Suggested Improvements:

Bismarck should re-evaluate restricting travel to one-way on major streets, particularly in and near downtown. This can be coordinated with planned updates to the zoning regulations to implement the new comprehensive plan, ***Together 2045***. One of the consistent goals of the comprehensive plan is to improve safety and connectivity for all modes of transportation. Although it may not be feasible to revert all one-way streets to two-way travel, consideration should be given in the context of the city’s complete streets policy and the evaluation and utilization of the North Dakota DOT’s “Best Practice Guide for Active and Public Transportation” as advocated by ***Together 2045***.

²⁷ For more history on this subject, see ***Walkable City: How Downtown Can Save America, One Step at a Time***, Jeff Speck, “The One-Way Epidemic”, pp. 177-181

Understanding the overall street network and the way the streets and blocks function in Bismarck is an important first step. In addition to their transportation role, streets also provide the framework for redevelopment and future growth. Changes to the character and function of today's one-way streets will influence whether they can improve as excellent pedestrian environments – with vital retail districts and mixed-use neighborhoods that include desired residential addresses – or will remain primarily as high-speed automobile thoroughfares.

Benefit of Suggested Improvements:

Restoring one-way streets to two-way travel has been shown to increase traffic safety for drivers and pedestrians alike.²⁸ In addition, studies have shown that the change improves the retail business environment, as well as increases convenience for regular users, reducing the need to “circle the block” and other such practices that a one-way street network typically imposes on drivers.

²⁸ **Walkable City Rules: 101 Steps to Making Better Places**, Jeff Speck, Part VIII, “Optimize Your Driving Network”, pp. 85-97, includes a description of business, safety, and convenience benefits, as well as a discussion of “best practices” and issues to consider when reverting one-way streets to two-ways.