

Unbundling Zoning

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Executive Summary

This paper investigates the case for abolishing zoning. Recent arguments for zoning abolition maintain that local governments can adequately regulate land use without the strict separation of permitted uses that characterizes modern zoning. The harms of zoning are consequential, and the case for abolishing zoning is stronger than it appears at first, because it does not imply abolishing other forms of land-use regulation. Meanwhile, zoning defenders counter that localities need to use zoning to preserve the integrity of residential neighborhoods. The debate hinges on political economy questions: Will zoning powers inevitably be abused, and would they be reconstituted in some other form if zoning were abolished? Evidence and theory both suggest that private land-use governance could be a non-exclusionary substitute for zoning, but transaction costs in setting up alternatives to zoning are significant. The paper concludes with proposals for “unbundling” zoning both functionally and spatially and making private land use governance work better.

KEY POINTS:

- In theory, private land-use governance is more adaptable and less capable of abuse than zoning. The case for abolishing zoning is stronger than it first appears.
- Zoning has crowded out private land-use governance in most places, and it would be difficult to create such mechanisms from scratch.
- “Unbundling” zoning by carving out its most useful functions into a more flexible format, allowing extremely local zoning opt-outs, and exempting certain kinds of private communities from zoning are more workable alternatives to simply abolishing zoning.

Introduction

The recent publication of three books has launched a new debate on whether zoning should be not just reformed but abolished. Last year saw the release of the leading zoning abolition treatise, *Arbitrary Lines: How Zoning Broke the American City and How to Fix It* by M. Nolan Gray, a professional city planner and UCLA Ph.D. student. As a planner, Gray may seem an unlikely leader of a charge to abolish zoning, but he makes a bright-line distinction between zoning and planning. Gray’s book followed the rerelease in a second edition of a long out-of-print study of Houston by attorney (and later law professor) Bernard Siegan, *Land Use Without Zoning*. Yale law professor emeritus Robert C. Ellickson has also written a new book outlining research findings in *America’s Frozen Neighborhoods*. Ellickson’s 1973 paper, “Alternatives to Zoning” was an early landmark in zoning skepticism, though in his new book, Ellickson explicitly endorses maintaining use zoning.

Today arguments for “zoning abolition” are going mainstream, with some “Yes in My Back Yard” (YIMBY) advocates picking up and running with formerly obscure academic arguments in the service of a pro-housing campaign. To be sure, many YIMBYs do not favor zoning abolition, but the idea is gathering adherents. It is no longer unusual to see claims that zoning is inherently racist, nor that it inevitably drives up housing costs, squashes economic growth, and walls off opportunity. These claims are not just coming from radical free-market scholars, but from progressive social justice advocates.

Why do they think zoning is so harmful, and what are the alternatives? I make the case here that the harms of zoning are significant, and that if zoning had never been invented, superior alternatives could have been adopted. But since zoning already exists, abolishing it could disrupt many property owners' expectations. Instead, I'll argue for splitting up zoning's different functions and setting up processes to reduce its spatial coverage- in favor of superior land-use governance regimes.

First, let's start with what zoning is, and what these advocates want to get rid of.

Zoning

Zoning is government regulation that separates land uses and limits densities. It says that, for instance, single-family houses belong over here, apartments over there, and commercial and industrial facilities somewhere else. Zoning regulates any piece of land based on where it lies on a zoning map, each district on the map corresponding to different regulations on uses, building and lot size and shape, and impacts. Zoning also limits how many "dwelling units," in planning lingo, are allowed on a given amount of land.

Zoning is a 20th century phenomenon. All developed countries have some form of land-use planning regulations, but Canadian and US zoning is distinctive in how strictly it separates residential from commercial uses, and single-family residential uses, in particular, from all other uses.

Zoning is not the sum of all land-use regulation. Some land-use regulations simply standardize legal procedures, for instance, subdividing land. Some reasonably describe where private roads that interface with public roads may and may not be built. Other regulations are commonsense limits on nuisances and pollution, like not putting a road-salt pile in an aquifer recharge area. Historic preservation ordinances regulate what can be built in historic neighborhoods and what can be done to historic buildings. Design review can make sure that new developments fit with neighborhood character. Finally, zoning has nothing to do with construction standards ("building codes") for safety or energy use.

Zoning abolitionists don't necessarily want to get rid of all these other forms of land-use regulation, but they often advocate reforms to them. Design review in particular comes in for a great deal of criticism, because, they say, aesthetic standards like granite curbing and bans on vinyl siding can be a regulatory backdoor to class exclusion. The "single-stair" movement seeks to reform building codes in a way that makes apartment buildings less costly to build, especially on small lots. Still, what zoning abolitionists focus on is getting rid of most mandatory use separation and density limits. In short, they want to export the Houston model.

Houston, Texas is the largest American city without zoning. It has a complex land development code, but it doesn't have zoning districts. It does regulate density through minimum lot sizes and maximum heights, but these limits are moderate and have relaxed even more over time. As part of the bargain to keep zoning out, the city helps enforce private covenants, which do protect single-family neighborhoods, but they don't cover much of the city individually, and less than one-quarter of it in aggregate. The one part of the Houston model that zoning abolitionists don't like is parking minimums, which have worsened sprawl.

Could the Houston model work for the rest of America? Arguments against zoning fall into three major buckets: zoning is useless, zoning is unjust, and zoning is irrational. Let's take each of these arguments

in turn before considering newer defenses of zoning and then assessing the strength of the cases for and against zoning.

Zoning Is Useless

So why abolish mandatory use separation? After all, no one wants smoke-belching factories in residential neighborhoods, right?

But zoning isn't truly needed to separate truly incompatible uses and regulate nuisances, says Gray. Where the common law of nuisance isn't enough, local ordinances can set standards for air, water, noise, and light pollution. And if nuisance ordinances aren't enough, the town can set a general rule establishing a minimum number of feet and a visual buffer between, say, a sexually oriented business and a residential lot or a church or a school. None of these solutions require drawing a map with "arbitrary lines" dictating which uses belong where.

Gray notes that clustering of business uses tends to happen naturally in the marketplace, because of the incentives of competition and consumer demand. For instance, the famous Hotelling Hypothesis holds that if you are opening a new retail business, the best place to locate, given your competitor's location, is right next to your competitor. For industrial uses, by contrast, locating close to transportation nodes like interfaces among expressways, railways, and ports makes the most sense, again leading to clustering.

Corner groceries, restaurants, and professional offices might want to locate in residential neighborhoods, but these uses aren't necessarily incompatible with a neighborhood feel and may even serve as a kind of amenity. At least one study has found that zoning's removal of retail shops from residential neighborhoods has damaged the retail opportunities of low-income households in central urban locations, since they often lack the ability to drive to strip retail or suburban shopping centers. A number of other studies find that nearby, but not immediately adjacent, retail stores- and even some types of industrial facilities - increase residential property values.

But if we got rid of zoning, would that mean that homeowners can no longer enjoy open space, tranquil streets, and high-quality public services?

Not necessarily, say the abolitionists. Private covenants are a possible alternative to zoning. They are important in Houston, where they were part of a political bargain that has kept zoning off the agenda since the last vote on the matter, in 1993. Higher-income neighborhoods use the covenants to manage density and preserve their residential character. In much of the city, covenants have expired, Gray argues because the residents of this area - more diverse by income, ethnicity, and race - value the convenience and job opportunities afforded by nearby commercial development and did not mind allowing the covenants to lapse.

Even when private covenants restrict density, they are not as harmful as zoning, Siegan points out, because they do not apply to vacant land. Moreover, they are subject to a kind of "market test": if they provide amenities that homeowners enjoy, they will enhance property values and will be renewed, but if they merely restrict development to no purpose, property owners will allow them to lapse. Finally, all but the very largest homeowners' associations are territorially much smaller than municipalities, leaving housing options for those who do not want to live in that environment.

Now, covenants are no panacea. Once upon a time, homeowners used racial covenants to try to keep their neighborhoods white-only. Some of the recent state housing reforms, like California's accessory dwelling unit (ADU) legislation, overrule private restrictions on housing density.

Are such restrictions justified? Nolan Gray offers one view in a personal communication: "I would like to see reform of private land use governance. You ask the average person how they feel about their HOA [homeowners' association], and they'll say, 'I hate it.' A lot of deed restrictions get adopted, and they renew in perpetuity unless you agree by unanimous consent to dissolve them. That is a horrible way to design HOAs. When these things do have popular consensus and buy-in [we should] respect them. The issue today is that a lot of people are subject to these things, and it's not obvious to me that people support them, or that they can change them as land-use preferences change over time."

Defenders of zoning contend that it is difficult to set up private covenants in already-established neighborhoods.

Defenders of zoning contend that it is difficult to set up private covenants in already-established neighborhoods. That is one reason why Dartmouth College economist William Fischel, *éminence grise* of zoning economics, supports zoning. In his book, *Zoning Rules! The Economics of Land Use Regulation*, Fischel points to a paper by economist Janet Furman Speyrer, which finds that in neighborhoods across city lines between unzoned Houston and the small, zoned cities of Bellaire and West University, being subject to zoning increases house prices about 10 percent, roughly the same benefit as being subject to a private covenant. Since there is a clear, if small, benefit to being subject to a private covenant, he reasons, the fact that some neighborhoods don't have them must mean that they face difficulties in setting them up, and zoning serves as a suitable substitute.

Fischel disputes that the expiration of covenants in Houston means residents don't want them. He points to evidence that the inner-city tax base in the city is "eroded" by commercial incursions into residential neighborhoods, with house price-per-room lower in the central, largely uncovenanted part of the city than in the largely covenanted outskirts:

Nevertheless, Ellickson contends that the benefits of private covenants usually disappear after about 40 years, according to the empirical research. While some covenants have value many generations after they are adopted, others result in an undesirable "freezing" of land uses. Ellickson gives the example of the Dead Mile on Los Angeles' Wiltshire Boulevard, part of the covenanted Hancock Park community. He advocates state legislation to require private covenants to obtain positive reaffirmation from property owners for renewal.

In a personal communication, Gray supported Ellickson's side of the issue. If zoning-like restrictions are important enough for a neighborhood, he said, they should be able to reach unanimity on a covenant. But as a compromise or transitional policy toward abolishing zoning, it may be reasonable to allow block-by-block votes on keeping zoning elements. Apparently, Houston has done this, as well. Despite a lack of zoning, Houston has always regulated density, but in 1998 the city dropped its minimum lot size from 5,000 to 1,400 square feet inside Loop 610, effectively eliminating lot size as a density restriction there. In 2013 it

extended the reform citywide. Interestingly, though, the city allowed a block to vote by two-thirds to keep the old lot-size regulation, with a 40-year sunset clause.

In short, given market incentives and the availability of covenants and general local ordinances, the benefits of even the modest, traditional kind of zoning that merely separates commercial and residential uses are fragile and uncertain.

Zoning Is Unjust

Today, zoning is no longer confined to those traditional use-separation functions. Since the 1970s, many local governments have adopted much more aggressive zoning codes intended to limit housing development and growth. The costs of this new zoning model are hard to miss. Stricter zoning has been linked to housing undersupply, housing unaffordability, homelessness, out-migration, slower economic growth, lower overall social welfare, socioeconomic segregation, racial segregation, higher property taxes, air and groundwater pollution, longer commute times, lower marriage and fertility rates, and bigger rich-poor test score gaps. With all these downsides, how could the putative benefits of zoning possibly compensate?

Zoning defenders say that reforming the institution is a better alternative to abolishing it. Making that case requires a close comparison of costs and benefits. But what if zoning is unjust, or reforming it just isn't sustainable?

From a classical liberal perspective, zoning is a restriction on private property rights. Such restrictions are generally impermissible unless they have been consented to or are necessary to prevent harm to others. While many American towns and cities may have originated in compacts among the original families to settle them, they have always been incorporated by state government. Moreover, until the 1910s and 1920s they lacked the power to zone private property; state governments granted them that authority. Therefore, it is implausible that zoning can be defended as a wholly consensual arrangement. And as zoning abolitionists point out, you don't need zoning to legislate against harmful land uses.

Egalitarian liberals care about zoning's impacts on inequality, poverty, and social mobility. (Classical liberals care about relieving poverty and promoting upward mobility as well, of course, but they do not necessarily identify poverty or inequality with "injustice.")

Scholars hotly debate whether racism indelibly taints zoning's origins. The work of University of California at Merced political scientist Jessica Trounstein endorses the affirmative. While Trounstein hasn't openly endorsed zoning abolition, her research amounts to an egalitarian critique of the injustice of those "arbitrary lines" drawn by zoning.

In her book, *Segregation by Design*, Trounstein finds that zoning has always segregated and excluded out-groups, but the means have changed. In the first half of the 20th century, zoning maps were tools to exclude racial minorities — blacks in the South, Chinese in California — and lower-income households from high-quality public services that cities provided only to middle- and upper-income neighborhoods.

As suburbanization proceeded, however, within-city exclusionary zoning became less relevant than suburban exclusionary zoning. This latter kind of exclusionary zoning helped to wall off entire towns from racial minorities and the poor "to protect property values and restricted access to public goods."

As empirical support, Trounstine finds that wealthier, more Republican jurisdictions with higher per capita local government spending were more likely to adopt zoning in the 20th century. Population density and racial diversity didn't make a difference to this decision, but in a subsequent *American Political Science Review* article, Trounstine finds that whiter-than-average towns in metropolitan areas and whiter neighborhoods in California are more supportive of restrictive zoning today. Early zoning adopters then became more segregated by race and class than later ones, probably because long zoning experience makes for more complex and restrictive codes.

This is not to say that zoning necessarily has racist origins. Judge Glock of the Manhattan Institute notes that black community leaders were occasionally in the forefront of zoning efforts, and zoning emerged just as often in racially homogeneous contexts like New England as in racially diverse contexts. Zoning was often used for racist reasons in the early 20th century because the country was simply more racist then.

Still, the finding that stricter zoning increases socioeconomic and by extension ethnic segregation could now be considered "well-established." Gallup economist Jonathan Rothwell finds that more regulated metro areas are more segregated, and more segregated metro areas in turn have larger K-12 test score gaps between children from rich and poor families. My own work on New Hampshire finds that richer towns have stricter zoning, and strict zoning in turn drives lower-income households to towns with less strict zoning. New work by Harvard economist Matthew Resseger finds that Massachusetts multifamily zoning causes the black and Hispanic percentage of the population to be higher, relative to what it would be under single-family zoning.

People already seem to understand these effects of zoning. Gray says that in the 1962 and 1993 votes on zoning in Houston, higher-income, single-family neighborhoods tended to support it, while lower-income, racially diverse, and high-rental neighborhoods opposed it. A *Houston Post* survey gave a more nuanced picture, with "low-income blacks" and "low-mid-income whites" opposing zoning overwhelmingly and "affluent" and "predominantly Hispanic" voters opposing it narrowly. Middle-income whites and blacks favored zoning. Ideological reasons and Houston's willingness to devote public resources to enforcing deed restrictions may account for affluent voters' turn against zoning.

On the one hand, properly designed zoning could reduce some forms of congestion and raise property values. On the other, it takes away landowners' rights to use their land and often discriminates against the poor and racial minorities, even trapping their children in worse schools. That's an unattractive tradeoff.

Zoning Is Irrational

It gets worse. The most powerful zoning critique of all might have been made over 50 years ago by Bernard Siegan.

What's interesting about reading Siegan's book today is how little has changed. Even though the book was written with 1960s data, Siegan noted in his comparisons of unzoned Houston and zoned Dallas that zoning seemed to have little effect on the separation of incompatible uses but did have an effect in reducing housing supply and raising housing costs.

Siegan contended that the planning task in even a medium-sized city is unthinkably complex. "Questions of compatibility, economic feasibility, property values, existing uses, adjoining and nearby uses, traffic,

topography, utilities, schools, future growth, conservation, and environment have to be considered for countless locations, covering hundreds of square miles.” In the end, zoning boundaries and regulations were based on little more than “guesswork.”

When reviewing zoning ordinances, it’s impossible not to notice the prevalence of seemingly arbitrary, round numbers. Why do minimum lot sizes cluster at 40,000 square feet and at whole acres? Why do floor area ratios typically go to only one decimal (e.g., 0.1 or 2.0)? Why are all other dimensional regulations almost always specified in multiples of five or 10? Surely it would be a massive coincidence if thorough, scientific investigations had revealed that the optimal quantum in each of these cases corresponded to a round number. The unavoidable impression one gets from these texts is that regulators came up with arbitrary numbers that “sounded good” offhand.

Relatedly, Ellickson finds that zoning results in a “freezing” of land uses, especially once single-family zoning is adopted for a neighborhood. No matter how much the demand for housing grows, cities almost never voluntarily rezone single-family districts for higher densities. As a result, spatial land use patterns become highly distorted, as in Silicon Valley, where after the 1970s dense housing development could occur only in the remote-from-downtown Bayshore area, because it had not yet been developed for single-family homes.

Vanderbilt law professor Christopher Serkin defends zoning on the grounds that it slows the pace of neighborhood change. But if it freezes change entirely, as Ellickson documents in the vast majority of suburbs he surveys, is the collateral damage worth the benefit?

These spatial distortions undermine quality of life and positive agglomeration externalities – the phenomenon whereby workers and companies locating in the same place generate a disproportionately larger number of innovations because of their ability to network and share ideas. Because of those spatial distortions, people can’t live near work and shopping, and new businesses can’t locate near older businesses. In essence, zoning is central planning of land use, with all the “knowledge problems” that central planning inevitably runs into.

This knowledge problem seems hardest of all to overcome. Even if you could create an effective and well-balanced zoning code, it would be hopelessly out of date within a decade or two. Many communities haven’t significantly revamped their ordinances since the 1990s, or even the 1960s. Needless to say, the ordinances and master plans of those times never could have foreseen the housing bust of the 2000s, the rise of remote work, the global pandemic, the pervasiveness of online retailing, and the homelessness crisis of the 2020s, to name just a few phenomena that affect land use.

Variations and rezonings are how zoned communities routinely deal with these changes of circumstance. The criteria for a variance are restrictive, and Gray cites a figure of \$13,000 in costs to obtain a simple variance in Los Angeles. Yet major cities process hundreds or thousands of variance applications a year.

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Rezoning is even more difficult and can require a public vote.

Variations and rezoning mitigate the knowledge problem. Yet their cost and uncertainty still throw sand in the gears of adaptation to market circumstances. Furthermore, outside cities with well-funded professional planning staffs, they are costlier and more uncertain and take longer to secure. For example, in New England towns without city or town council forms of government, rezoning requires a public vote at the next annual ballot and are typically subject to supermajority thresholds if challenged by abutters.

More fundamentally, these workarounds inject broad-gauge discretion into a system that is supposed to be based on coherent planning. Yet in fact, vanishingly few zoning ordinances are closely tied to a comprehensive plan. America's first zoned city, New York, does not have a comprehensive plan at all. All those complex, detailed ordinances and maps start to look like our attempt to impose an illusion of certainty on a world that is fundamentally uncertain.

Because zoning so often entrenches injustice and so rarely responds to residents' changing needs, say the abolitionists, we should just get rid of it. How do defenders of zoning respond?

Defenses of Zoning

TAXES

The first line of defense for zoning is about taxes. In my home state of New Hampshire, I often hear this kind of argument: "If we allow people to build, it will bring in families with schoolchildren, and our property taxes will go up." Scholars have a theory about how local governments use "fiscal zoning."

Here's how it works. If you can ensure a minimum quality of construction for a particular type of development, you can make sure that that development "pays its own way" in terms of taxes needed for additional public spending. For example, commercial development doesn't add schoolchildren, but it may require new roads or police calls. Still, if it pays a lot more in property taxes than vacant land would — a virtual guarantee — it makes fiscal sense to allow it. A three-bedroom, single-family house, by contrast, might be attractive to families, and therefore you might want to make sure that this house is large enough and situated on a large enough lot, that it pays a high property tax bill to make up for the additional school spending likely required by this kind of household.

Economists debate how successful or desirable fiscal zoning is. One view holds that it is effective, at least in places where local spending is largely drawn from local property taxes. If so, the property tax becomes something like a user fee and doesn't suffer from the inefficiencies that other taxes have. This is called the "benefit view" of property taxes.

The alternative perspective, the "capital tax view," holds that the property tax is a redistributive, distortionary tax on wealth that induces large efforts at avoidance. If property taxes cause these effects, then clearly something has gone wrong with fiscal zoning.

An influential paper by Federal Reserve economist Byron Lutz uses a natural experiment to test these different views. It finds, in essence, that when property taxes are used to fund benefits for the town where the tax is collected, the benefit view roughly holds, but when property taxes are used to fund redistribution to other towns, they act more like a capital tax, and new development flees the higher-taxed areas.

But how applicable is this finding? Lutz's research was done on New Hampshire, one of the most fiscally decentralized states in the country. In most states, state government funds a large chunk of school budgets out of state taxes, and federal funding adds to this. When localities no longer fund their own services mostly out of their own taxes, it breaks the connection between development and the tax burden.

Even fiscal zoning sympathizer William Fischel acknowledges this. He blames California's acute housing shortage in part on the 1971 and 1976 Serrano state supreme court decisions, which centralized school finance. Once school finance was centralized, homeowners saw no benefit from high local property taxes, and 1978's famous Proposition 13 rebellion was the result. Once local property tax burdens were no longer significant, and education was mostly state-funded, California homeowners saw less reason to grow their property tax base by allowing land development of any kind, and exclusionary zoning took off. To be sure, other factors helped drive exclusionary zoning in California as well, including the growth of the environmental movement in the 1970s, resulting in the California Environmental Quality Act (CEQA) and the California Coastal Commission, which have suppressed housing development. Fischel also notes that the availability of the local ballot initiative in California helps limit the kinds of cozy pro-developer deals more common in the Eastern U.S., which, however corrupt they may be, do often facilitate development.

Similarly, Ellickson connects Texas' pro-growth orientation to its lack of a state income tax and heavy dependence on property taxes, combined with the fact that unincorporated areas of counties are unzoned under state law. When housing developments pay lots of taxes toward local services, it gives local voters a reason to support housing development. (While restrictive zoning can increase the value of already-built residences and parcels with development rights, it dramatically reduces the value of land that is no longer developable and the value of real property overall.

But most states are in a situation more like California's than New Hampshire's or Texas'. Furthermore, incentives to exclude purely for the sake of driving home values higher may have caused zoning to go far beyond the tax burden-minimizing point. Northeastern Illinois University economist Ryan Gallagher has two papers showing that many communities are not using fiscal zoning well.

The first looks at municipalities and school districts from around the United States and finds that property tax burdens are lower where there is more multifamily housing. Furthermore, the residential assessed value per student tends to be higher for apartments than single-family houses. These findings suggest that single-family zoning causes higher property burdens, yet it remains ubiquitous.

The second paper performs a quasi-experimental analysis of the effect of large-lot zoning on residential value per student in Massachusetts municipalities. It finds a negative relationship; in other words, large-lot zoning drives down assessed value and therefore increases property tax burdens, relative to small-lot zoning. The reason is that "small dwellings, although valued less than larger dwellings, house disproportionately fewer school-aged residents than larger dwellings do."

Thus, much zoning today is too strict to reap the benefits of property-taxes-as-user-fees. But what if zoning could be reformed, rather than abolished? Isn't the possibility of fiscal zoning nevertheless an advantage to keeping the tool around?

When I asked Nolan Gray this question, he replied that first, fiscal zoning makes a kind of "Faustian bargain" with segregation. When people sort into jurisdictions based on their tastes for public services, the

wealthy tend to sort together, and the poor tend to sort together. Do we want to pay that price? (Perhaps: some degree of segregation could be valuable for both sides, if the alternative is forcing the poor to pay a price for high-quality services that they cannot afford.) Second, an alternative solution is simply to get the fiscal mechanisms right. Why not use user fees instead of property taxes? Finally, people might not be very good at figuring out which types of development are fiscal positives, and which are not. Fiscal impact studies, which land use boards often demand from developers, rarely yield clear and credible results.

I will argue in the Assessment section that state legislatures can authorize new forms of far-reaching private land-use governance that match development benefits to costs in away that is more adaptable and incentive-compatible than the crude tools of zoning.

POLITICS

What most divides zoning defenders and zoning abolitionists might be whether the political system can get zoning right. The former believe that with the right incentives, local voters will stop trying to use zoning as an exclusionary tool and instead use it for its beneficial purposes. The latter think zoning is essentially unreformable.

Zoning defenders propose to reform its worst aspects by changing the rules of the game. Fischel has advocated several policy solutions to exclusionary zoning over the course of his career. A sampling follows.

First, he has argued for state requirements that local governments compensate landowners for certain “regulatory takings.” When a new zoning restriction reduces the value of the land that someone owns, usually by eliminating or reducing the right to develop that land, that can be considered a regulatory taking (Fischel’s conception of compensable takings is narrower). Under current Fourth Amendment jurisprudence, governments must compensate property owners only when they eliminate all economically viable uses of the land. States are free to establish higher standards, but few have. Arizona has the strictest such requirement, and it has given local governments pause when they consider down-zonings.

The lovely thing about a compensation requirement is that it forces a government to consider whether a new regulation is worth the cost. Suppose you think it would be nice to protect some views by limiting home-building. Are those views worth the foregone value of the housing? That seems like a worthwhile calculation to make, rather than simply passing regulations that could destroy far more social welfare than they create.

The main problem with a generous regulatory taking compensation requirement is that it can encourage strategic threats of socially disapproved land uses. A landowner who has no intention of developing a lot may threaten to do so in order to elicit a purchase of the development rights from a local government. This is a general problem with Coasean bargaining over externalities. The solution is to reduce the amount available for compensation, perhaps 50 percent of the reduction in value from the loss of development rights.

Another solution that Fischel has proposed is a federal or state residential capital gains tax. As three Boston University political scientists have laid out, the opposition to new housing generally comes from “neighborhood defenders” worried about their own home values. If the motivation for squelching new housing supply is the desire to maximize one’s own home’s value, then taxing the capital gain from selling that

home could dampen that motivation (or enhance it, depending on whether income or substitution effects are stronger). This solution doesn't address the fear that one's home's value will fall, however. To dampen that fear-based motivation, we would need something Fischel has also proposed: home-value insurance, which doesn't currently exist on the market.

If the demand for exclusionary zoning comes from centralized school finance, another solution would be decentralizing the funding for schools and other local services, as Glock has proposed. That might require state constitutional amendments regarding the many state court decisions on school finance. As an alternative way to secure fair opportunity for low-income families, states could pass open-enrollment laws and change school financing formula not to reward exclusionary jurisdictions with low assessed value per capita, but inclusive jurisdictions with higher proportions of low-income students.

These solutions might not be enough. My research has found a negative externality of strict zoning on nearby communities. As one community in an area down-zones (i.e., reduces allowable residential density), others nearby become more likely to follow suit. They don't want to have to "take the burden" of new housing in the region. This arms-race dynamic suggests that some state preemption of the most stringent zoning provisions may be necessary.

The strongest political argument that zoning defenders make is that talk of "abolishing zoning" will confuse and alienate voters. After all, zoning has been around for generations in most communities. Many homeowners take it to be part of their property rights in their home. We can try to educate homeowners about all the benefits they will enjoy from relaxing zoning, such as the right to build in-law apartments and to subdivide their land, rights that will benefit even those who choose not to exercise them by raising the value of their land.

But it's hard to deny that some people are just averse to change. Ellickson agrees that status quo bias is a major source of opposition to new development, even commercial development. Yet the fact that residential development is usually more difficult than commercial development suggests that self-interested motivations are important as well, or perhaps just a general dislike of people. We can decry this anti-density preference as misanthropic, but it remains a political reality that we must deal with.

In the end, none of the proposed solutions to exclusionary zoning that would retain the zoning power seem capable of ending the practice. The only way to cease exclusionary zoning would likely be to transfer zoning authority fully to the state or federal level. But that solution would exacerbate the knowledge problem: nearby residents really do have local knowledge that could improve planning and zoning decisions. The problem is how to elicit that knowledge in an impartial manner to make decisions for the good of the whole community, not just anti-growth homeowners. If that proves an impossible task, perhaps zoning should be abolished.

ASSESSMENT

The case for abolishing zoning everywhere is unconvincing. The one argument zoning abolitionists have no completely convincing response to draws on residents' reliance interests: they have made costly decisions based on the expectation that zoning rules would be in place, and in some cases, it would be unjust to upset those expectations.

Again, zoning is popular in most places where it already exists. Gray points out that when put to a popular vote, new zoning ordinances often fail, as in Houston and other Texas cities. In New England town meetings, however, new zoning ordinances require a public vote, and they have eventually succeeded in most of these towns. And proposals to abolish longstanding zoning, as in Peterborough, New Hampshire recently, have always been decisively defeated.

Throughout the country, people continue to move to zoned jurisdictions. To be sure, in places like Texas, development often hops over city lines into unincorporated areas that lack zoning. All the same, the near-ubiquity of zoning in fast-growing cities and the widespread demand for the types of controls that community associations impose on land use suggest that land-use governance is valuable to many Americans. Indeed, the largest private city in America – Irvine, California – has public zoning in addition to private land-use controls (but its code is also noteworthy in allowing “attached residential” (multifamily) development on essentially the same standards as single-family residential).

I often hear from otherwise pro-property-rights voters that local zoning isn’t so bad, because people agreed to the rules when they moved in. They seem to think of zoning as a kind of private land-use governance, which it emphatically is not. As we have seen, local officials often lack the incentives and information necessary to manage land use for the maximum benefit of the whole community.

It might be tempting to point out that one drawback of public land-use governance is that it can change or go away at any time. But if we’re considering the case for zoning abolition from the perspective of a state or local official with authority to put forward legislation to abolish zoning, then we should concede that making land-use governance more chaotic to teach voters a lesson is not justified on the basis of social welfare or protecting what many residents consider to be their vested property rights.

What the naïve, “zoning as property right” comment suggests, however, is that the rules regulating land use are valuable to many people, and if zoning had never been available, they would have supported restrictive covenants in their neighborhoods. But the existence of zoning over several generations has atrophied private, smaller-scale alternatives. By relying, perhaps inappropriately, on the zoning power, property owners have not seen a reason to adopt private methods of governing land use. Abolishing zoning could create an unpopular vacuum of regulation. There is no way to undo this bad equilibrium with a snap of the fingers.

If we can’t abolish zoning, yet zoning is fatally flawed and unreformable, what’s the alternative? Perhaps we can peel away the unworkable parts of zoning piece by piece, while encouraging more flexible and dynamic alternatives to take their place. The next section considers alternatives to zoning in ascending order of ambition.

Policy Solutions

UNBUNDLING ZONING

The two main problems with zoning are inflexible separation of uses and arbitrary and often harmful density restrictions. Unbundling the different functions that zoning serves could solve both in different ways.

One straightforward way to make land-use governance more flexible and responsive to market conditions is to abolish zoning districts and to replace these “arbitrary lines” with a series of ordinances restricting

incompatible land uses from moving near each other. Thus, for instance, it makes sense to prohibit noisy or polluting industrial uses or adult entertainment venues from moving close to existing residences, but it does not make sense to prohibit housing development near existing industry. This is precisely one way of creating affordable housing: buyers and renters will be willing to pay less for homes near industrial uses, but poorer households might be willing to make this tradeoff if the alternative is lacking money for gas or food, or becoming homeless. Building a wider range of housing options is the main way better land use can combat poverty, and allowing residential use near industrial use expands those options.

Under this approach, existing residential neighborhoods would remain secure from intrusion by undesirable uses. In fact, some neighborhoods that lie near existing zoning district boundaries may gain additional security. But large, sufficiently buffered, undeveloped parcels could be readily put to new uses wherever they lie, without the costs and delays of variances and rezonings.

To encourage more experimentation while dealing with the knowledge problem, it might be advisable to decentralize land-use governance even further, to the neighborhood or block level.

So much for the inflexible separation of uses in zoning. What about arbitrary density restrictions?

To encourage more experimentation while dealing with the knowledge problem, it might be advisable to decentralize land-use governance even further, to the neighborhood or block level. Neighborhoods could “upzone” by allowing new uses, reducing dimensional minimums, or raising dimensional maximums by a simple majority vote. But if they want to “downzone,” they will need to get the support of the whole town and compensate landowners who can document loss of property value. The idea is to tilt the institutions toward allowing more freedom, while requiring a broader consensus to take away freedom. (Some states also have a protest procedure that triggers supermajority requirements for zoning changes if a sufficient number or size of landowners object to the proposed ordinance. A possible reform is to make these requirements applicable only to downzonings.)

Decentralizing land-use governance is often thought to prompt ever-more exclusion. Indeed, wherever counties are the primary zoning authority, rather than municipalities, zoning seems to be less strict. But this neighborhood-zoning proposal would mostly rule out new avenues to exclusion, while reaping the benefits of more flexible, small-scale decision-making that can adjust to the changing circumstances of the market. Along similar lines, Nelson, Christensen, and Norcross proposed residential improvement districts on the model of business improvement districts that could take over land-use governance and street-level services, especially in poor, inner-city neighborhoods, with the consent of a supermajority of existing owners (they believed the transaction costs in getting unanimity would be too high).

Along similar lines, John Myers of the group London YIMBY has proposed letting individual streets upzone themselves by a supermajority vote, to a height cap. Property owners on the street would enjoy the benefits of higher property values from their development rights, giving them an incentive to vote for upzoning.

Parcels that abut more than one street would not be eligible, and there would be compensation procedures for shadows cast on rear-abutting properties.

It remains to be seen whether block- or neighborhood-option upzoning would result in a significant amount of upzoning. As mentioned in the Defenses of Zoning section downzoning seems to be contagious across municipalities in the same labor market area. But it could be that municipalities are still too large for “cartel-breaking” incentives to kick in, especially given collective action problems among many voters. The optimal scale of land-use governance, provided land-use governance is to be provided through public, democratic processes, is far from clear a priori. Yet there is clearly some level, between that of the individual parcel and of the municipality, at which the benefits of upzoning to area property owners outweigh the costs: after all, allowing individual parcels to set their own zoning is the same as not having zoning at all.

Alternative Private Governance

COMMUNITY ASSOCIATIONS

Could community associations, suitably reformed, be exempted from zoning?

Community associations are private communities formed by deed restrictions that often include a monthly fee for community services and an elected board that can make rules for land use and aesthetic features of front yards and home facades. They are often criticized for being exclusionary and contributing to the problem of frozen land uses and costly housing in the same way that zoning does. Ellickson’s ideas for reforming them so that they truly serve the interests of their members are sound, but as he also points out, these associations are usually much smaller in scale than municipalities. Therefore, their contributions to exclusion are likely to be far less.

As neighborhood associations proliferate, they confront the financial temptation to be the first to develop as density increases. It can be quite lucrative for the existing owners to sell to developers looking to build multifamily housing at scale. An oft-noted result in the literature is that as the number and diversity of zoning jurisdictions rises in a metropolitan area, their monopoly power and the likelihood that they all maintain an exclusionary cartel fall. Once one community starts high-density development, its neighbors will have an incentive to follow suit, or lose all their rents once the exclusionary cartel breaks down.

Finally, one reason that we see so many exclusionary community associations today is that their regulations add to zoning. Therefore, there is a selection effect: the types of buyers looking to live in a community association today are those that like lots of rules. But if community associations were exempted from zoning, then it is plausible that property owners will put together ones that offer fewer rules with more freedom and more financial opportunities.

Community associations are still subject to some of the problems that afflict democratic governance in general. Voter turnout in elections to association boards is typically low, many property owners are uninformed about the issues, and there’s a collective action problem in holding board members accountable and adjusting land-use rules to the benefit of the whole community.

SINGLE-OWNER COMMUNITIES

Enter single-owner communities-definition?. Because they have a single owner, these communities have a clear residual claimant on any increment in land value that governance reforms can produce. They also don't suffer from a collective action problem in discovering and implementing these reforms: the owner has every incentive and ability to do so. A private community owner has incentives to set up rules for land use and patterns of development that provide the value-maximizing balance of amenities and opportunities for residents and commercial tenants. The concept is inspired by the work of Spencer Heath and Spencer Heath MacCallum.

Can single-owner communities be given land-use governance autonomy? The Georgist "Ardentowns" of Delaware have implemented this model in a residential setting, and for largely commercial development, Disney's Reedy Creek Improvement District serves as a partial example. Celebration, Florida, widely admired for its New Urbanist aesthetic, was developed by Disney as a single-owner community within the Reedy Creek Improvement District with mixed residential and commercial uses, but lots are now individually owned. Irvine, California, owned by the Irvine Company, has already been mentioned.

A downside of these communities is that they do not allow residents to own the land they live on. Many people want to own property. But renewable, long-term leases that can be inherited can provide a high degree of security of tenure. Currently, the demand for this kind of tenure may be artificially suppressed by mortgage incentives, from government-backed loans to the mortgage-interest deduction, and by legal barriers to recognizing and enforcing very-long-tenure leases. Furthermore, it is still difficult for housing consumers to build an alternative form of real estate equity by investing in real estate investment trusts, which could serve as owners of such communities.

State legislation could authorize or require local governments to exempt from municipal land-use regulation sufficiently large and buffered tracts with a single owner (a person or corporation). These private communities would be responsible for funding their own public services and therefore also exempted from municipal taxation, preventing any externalization of the fiscal costs of development. They could be charged an impact fee if development requires improvements on collector and arterial roads outside the development, and they could be charged tuition for any students that go to local public schools. State-level environmental standards would still apply to developments in these communities.

Requiring a minimum size and buffer could ensure that land uses in these communities do not harm neighbors outside the community. The buffer could be an area where local zoning authority still prevails, not necessarily "open space" preserved from development. After all, developing those spaces could end up being in the interest of the neighbors.

Exempting single-owner private communities from local land-use regulation is perhaps a far-future idea, but so is ending zoning altogether. The private community alternative also does little to expand density in already-developed areas. For that, the former idea of neighborhood-option upzoning is likely to be necessary.

Thus, allowing private communities to form and gain exemptions from zoning is one way to erode zoning gradually without the political risks of a frontal assault and without losing the undeniable advantages that many households perceive from zoning.

Conclusions

The zoning of today too often excludes, segregates, suppresses growth, and fails to keep up with the changing needs of the community. The case for abolishing zoning completely is much stronger than it seems at first glance. Abolishing zoning would not imply abolishing all land-use regulation, just arbitrary use districts and density restrictions. Moreover, the zoning reform proposals on the table would, with few exceptions, fail to address the thorniest problem of all with the institution: the way zoning freezes land uses and cannot adapt to rapidly changing market conditions.

At the same time, it is telling that where they exist, private covenants often create zoning-like features. Many people strongly prefer to keep zoning-like rules around. A strong state-level check on local zoning excesses could make the institution work better, but it also substitutes legislative judgment for local decision-making. Meanwhile, openly campaigning to abolish zoning is a surefire losing strategy in America's suburbs, and often cities and small towns, too. Is there a way to get the benefits of decentralized governance, such as responsiveness to local needs, without the exclusionary effects of untrammelled local zoning?

Rather than abolishing zoning, we can talk about ways of letting small communities opt out of zoning. States can provide a mechanism for neighborhoods to upzone by majority vote. They can also let landowners in a sufficiently large, contiguous area opt out of local zoning, by unanimous consent and with various guarantees against the externalization of costs onto neighbors.

It does not pay to be complacent. Gray is probably right that zoning could loom even larger as a cause of national economic and social distress in the coming years, as land suitable for large-lot, detached, single-family houses close to jobs starts to run out even in the formerly affordable Sunbelt. During the pandemic, the whole country saw a taste of what buyers and renters in West Coast and Northeastern housing markets have experienced for a decade or more. We can't let a national housing shortage become the new normal. That means we're going to have to rethink how zoning works in America.

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