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Against the Neighborhood Veto

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Zoning and Land Use Planning

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AGAINST THE NEIGHBORHOOD VETO

I. Introduction

American zoning often gives neighborhoods effective veto power over nearby real estate development. This “neighborhood veto” sometimes artificially reduces housing supply and urban density, thus making housing more expensive and making American cities more dependent on automobiles. This article criticizes the common arguments that neighborhood activists use to restrict development.

II. Background: How The Neighborhood Veto Works, And The Social Costs It Imposes

Ever since zoning became common in the 1920s, American cities and suburbs have used zoning to limit land uses and density.¹ Generally, such zoning has favored segregation of uses (that is, separating housing from commerce, or separating different kinds of housing or commerce from each other)²

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¹See, e.g. *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303, 4 Ohio L. Abs. 816, 54 A.L.R. 1016 (1926) (upholding zoning laws separating single-family housing from apartments and commercial uses); *Agins v. City of Tiburon*, 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980) (abrogated on other grounds by, *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005)) (upholding limits on population density).

²See *Harrington v. Town of Warner*, 152 N.H. 74, 81, 872 A.2d 990, 997 (2005) (“the fundamental premise of zoning laws is the segregation of land according to uses”); Joshua Yellin, *The Intersection Between Urban Agriculture and Form-Based Zoning: A Return to Traditional Planning Techniques*, 19 Hastings W.-N.W. J. Envtl. L. & Pol’y 83, 95 (2013) (“not only is housing separated from industry but low-density housing is separated from medium-density housing, which is separated from high-density housing. Medical offices are separated from general offices, which

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and strict limits on population density.³ Multifamily housing is more controversial, and more likely to be limited by zoning law, than single-family housing.⁴

Typically, zoning implements the biases not of a city as a whole, but of small neighborhoods within a city or suburb.⁵ Because current zoning usually restricts a parcel's land use and density, a landowner who wants to build more densely (that is, to build more housing than currently exists on the parcel) or to change a parcel's use must petition a city for a rezoning.⁶ When a landowner files such a petition, the city typically informs nearby property owners of its existence.⁷ These property owners generally oppose additional density.⁸

are in turn separated from restaurants and shopping . . .") (citation omitted).

³See William A. Fischel, *The Homevoter Hypothesis: How Home Values Influence Local Government Taxation, School Finance, and Land Use Policies* 230 (2005) ("existing residents [of many neighborhoods] worry that higher-density development of any sort will devalue their own homes. NIMBY anxieties . . . work themselves into long-term plans, which are then expressed as zoning ordinances"), 3 Edward H. Ziegler, Arden H. Rathkopf & Daren A. Rathkopf, *Rathkopf's the Law of Zoning and Planning*, § 51.10 (2011 ed.) ("minimum lot size" requirements common); Norman Williams, Jr., & John M. Taylor, *American Land Planning Law*, § 39.1 (describing minimum lot size requirements as "most common form of density control").

⁴See Kenneth A. Stahl, *Reliance in Land Use Law*, 2013 *Brig. Young U. L. Rev.* 949, 1013 (2013) (homeowners who dominate local zoning process "are particularly adverse to new multi-family or affordable housing").

⁵See Fischel, *supra* note 3, at 94 (both city and suburban governments generally responsive to neighborhood land use concerns).

⁶See Roderick M. Hills and David Schleicher, *The Steep Costs of Using Noncumulative Zoning to Preserve Land for Urban Manufacturing*, 77 *U. Chi. L. Rev.* 249, 269 (2010) (landowners "seeking to change zoning designations face opposition from neighbors who typically oppose any rezoning that increases density") (emphasis added); George L. Schoenbeck, *Illinois Zoning Law Six Years After Klaeren*, 97 *ILL. B.J.* 84, 85 (2009) (rezoning also "appropriate when a petitioner wishes to conduct a primary use not permitted in the property's current zoning district").

⁷See Stewart E. Sterk, *Structural Obstacles to Settlement of Land Use Disputes*, 91 *B.U.L. Rev.* 227, 238 (2011) ("Before a municipal body may effect any kind of zoning change . . . neighboring landowners must generally receive notice of the proposed change" followed by public hearings.).

⁸See Fischel, *supra* note 3, at 230.

Cities often defer to the wishes of these “not in my back yard” (NIMBY) activists, because in a small suburb (or even in a city council district within a larger municipality) even a few homeowners can make a difference in a close election.⁹

In addition, some cities have decided that the rezoning process does not adequately protect neighborhood interests, and have implemented special review procedures to amplify the NIMBY voice. For example,¹⁰ in 1976 New York City created neighborhood review boards, which have the right to comment upon new development proposals.¹¹ As neighborhood power over development has increased, housing construction in New York has slowed. During the 1990s, the housing stock in Manhattan increased by only 21,000 units; by contrast, the housing stock increased by 13,000 in 1960 alone.¹²

Although NIMBYism may benefit a project’s neighbors, it

⁹*Id.* at 94.

¹⁰New York is not unique in this regard; for example, Washington, D.C. and Atlanta also have neighborhood review boards. *See* Spring Valley-Wesley Heights Citizens Ass’n v. District of Columbia Zoning Com’n, 88 A.3d 697, 704, 303 Ed. Law Rep. 369 (D.C. 2013), as amended, (Mar. 27, 2014) (zoning commission must give “great weight” to Advisory Neighborhood Commission’s zoning views); *Moore v. Maloney*, 253 Ga. 504, 505, 321 S.E.2d 335, 336–37 (1984) (noting opposition of city’s “neighborhood planning unit” to rezoning, but not commenting on degree of weight to be given to its views); City of Atlanta, *Neighborhood Planning Unit*, available at <http://www.atlantaga.gov/index.aspx?page=739> (describing organizations).

¹¹*See* JULIE SIZE, NOXIOUS NEW YORK: THE RACIAL POLITICS OF URBAN HEALTH AND ENVIRONMENTAL JUSTICE 192 (2007) (community boards created by 1976 legislation); Sheila R. Foster and Brian Glick, *Integrative Lawyering: Navigating the Political Economy of Urban Redevelopment*, 95 Cal. L. Rev. 1999, 2033 n. 119 (2007) (describing boards, and noting that they may comment on all zoning actions). In addition, New York requires review not just by the community board, city council and mayor, but also by the borough president and the City Planning Commission—thus creating “multiple pressure points for anti-development activists to block developments.” John Mangin, *The New Exclusionary Zoning*, 25 Stan. L. & Pol’y Rev. 91, 100 (2014).

¹²*See* David Schleicher, *City Unplanning*, 122 Yale L.J. 1670, 1696 (1994). Community boards are not the only cause of reduced construction; rather, they are part of a pattern of steadily more restrictive urban zoning. *Id.* at 1695–98 (describing expansion of urban land use restrictions over past few decades, including “downzonings” to reduce neighborhood density and historic preservation regulations).

may impose costs upon the city as a whole. If a city council endorses NIMBY activists' attempts to limit housing supply, a city's housing supply is artificially stunted, thus causing rents and home prices to increase.¹³ Where housing prices are high, poor people are more likely to be homeless¹⁴ or to be segregated in a small number of less restrictive neighborhoods¹⁵ and middle-class people are forced into less expensive suburbs or small towns.¹⁶

Moreover, NIMBY-influenced limits on density make a city's residents more dependent on cars, because walking and public transit are, other things being equal, less practical in low density places. This is the case because if only a few houses can be built on a block near public transit, only a few houses can access such transit.¹⁷ Similarly, if only a few houses can be built on a block near shops and offices, only a

¹³See Fischel, *supra* note 3, at 230 (NIMBY-inspired regulation leads to "excessively high home prices").

¹⁴See Tracey Lien, *Inside San Francisco's housing crisis*, available at <http://www.vox.com/a/homeless-san-francisco-tech-boom> (describing relationship between high housing prices and homelessness).

¹⁵See Stahl, *supra* note 4, at 104 (restrictive zoning causes "a pattern of de facto segregation in which small, affluent, largely white suburbs are able to maintain their exclusivity with zoning barriers, while the poor, often minority, individuals excluded thereby are shepherded into deteriorating urban ghettos").

¹⁶See Schleicher, *supra* note 12, at 1693 (pointing out that "the richest and most productive regions . . . have seen huge price increases but no population increases" while less regulated regions "have seen huge population inflows"); Mangin, *supra* note 11, at 92 (because of anti-development regulation and the resulting high housing costs, [lower- and even middle-class families are] "migrating to low-housing cost (and low-wage) areas like Texas, Arizona or North Carolina.")

¹⁷See Joanna D. Malaczynski and Timothy P. Duane, *Reducing Greenhouse Gas Emissions from Vehicle Miles Traveled: Integrating the California Environmental Quality Act with the California Global Warming Solutions Act*, 36 Ecology L.Q. 71, 80 n. 44 (2009) (raising average density to nine units per acre could reduce vehicle miles traveled by 30% nationwide); See Robert H. Freilich, *The Land Use Implications of Transit-Oriented Development: Controlling the Demand Side of Transportation Congestion and Urban Sprawl*, 30 Urb. Law. 547, 552 & n. 18 (2009) (neighborhood must have at least seven units per acre to support regular transit service); Jed Kolko, *Making the Most of Transit: Density, Employment Growth, and Ridership Around New Stations* 16, available at <http://www.ppic.org/main/publication.asp?i=947> ("transit ridership falls considerably at distances beyond just one quarter-mile from a transit station").

few people can live within walking distance of those shops and offices. Such regulation-induced car dependence increases societal air pollution (because more commuters must drive more often) and forces Americans to spend more money than they might otherwise wish on automobiles.

III. Defenses of the Neighborhood Veto

Neighborhood activists may argue that they are trying to protect their neighborhoods from externalities- that is, “land uses that have harmful spillover effects on neighboring property.”¹⁸ For example, when a business pollutes air or water, it has imposed an externality upon everyone negatively affected by such pollution.¹⁹

In particular, NIMBYs tend to argue that new development near their homes will (1) increase traffic, (2) alter neighborhood character, 3) reduce property values, and (4) violate their reliance interest in the status quo. For the reasons stated below, city councils and reviewing courts should reject such arguments.

A. Traffic

A common NIMBY argument against new housing is that such housing would increase traffic congestion.²⁰ This argument can be used against any new housing or new business. Any new housing by definition adds residents to a neighborhood, and thus could possibly add cars and thus add congestion. Similarly, a new business might attract new customers, and thus could possibly add cars.

¹⁸Benjamin Harney, *The Economics of Exclusionary Zoning and Affordable Housing*, 38 Stetson L. Rev. 459, 466 (2009). More broadly, negative externalities are “costs imposed on a party by the actions of another party that are not borne by the acting party.” Richard D. Gary and Michael L. Teague, *The Inclusion of Externalities in Electric Generation Resource Planning: Coal in the Crossfire*, 95 West Virginia L. Rev. 839, 843 (1993).

¹⁹*Id.* at 844.

²⁰*See, e.g.* *Watson v. Mayflower Property, Inc.*, 223 So. 2d 368, 374 (Fla. 4th DCA 1969), writ discharged, 233 So. 2d 390 (Fla. 1970) (upholding zoning limiting density, based on city’s concerns about traffic congestion); *Storch v. Zoning Bd. of Howard County*, 267 Md. 476, 488, 298 A.2d 8, 15 (1972) (same); Jeffrey L. Sparks, *Land Use Regulation in Arizona After the Private Property Rights Protection Act*, 51 Ariz. L. Rev. 211, 232 (2009) (“Zoning that limits density may relate to transportation and traffic control.”).

However, this argument is often meritless, for two reasons. First, if new people mean new traffic, this means that new housing will add traffic *wherever* it is located. If new housing does not add traffic in the plaintiffs' neighborhood, it will add traffic in someone else's neighborhood.²¹ Thus, the claim that development equals traffic is a "beggar thy neighbor" argument—rather than eliminating the externality of traffic, it merely shifts the externality to another neighborhood and thus does not reduce society's total of negative externalities. Moreover, zoning decisions designed to exclude new housing may not even limit traffic in the excluding neighborhood: if restrictions on development keep people out of neighborhood A and force them to live in neighborhood B instead, neighborhood B's cars may drive through neighborhood A, thus increasing congestion in both neighborhoods.²²

Second, to the extent that NIMBY opposition to new development forces such development into "greenfield" sites (that is, undeveloped areas where there are few neighbors around to object to development, as opposed to places near existing development),²³ anti-density zoning may actually increase regionwide automobile traffic. Greenfield sites tend to be more automobile-dependent than existing neighborhoods, because they are further from urban cores that are

²¹*Cf.* Adam Millard-Ball, *Phantom Trips*, available at <http://www.accesmagazine.org/articles/fall-2014/phantom-trips/> (highway engineers' estimates of how many trips will be generated by new development often erroneous, because "most trips substitute for existing ones—they are diverted from existing locations as people change where they live, work, and shop in the light of new travel options.")

²²However, this is most likely to be the case in certain circumstances: where neighborhood A has some destination worth visiting, or where drivers can cut through neighborhood A in order to reach some destination worth visiting.

²³See Anne Marie Pippin, *Community Involvement in Brownfield Redevelopment Makes Cents: A Study of Brownfield Redevelopment Initiatives in the United States and Central and Eastern Europe*, 37 Ga. J. Int'l & Comp. L. 589, 596 (2009) (greenfields are "pristine, undeveloped land typically located in low density suburban areas"); Andrea Wortzel, *Greening the Inner Cities: Can Federal Tax Incentives Solve the Brownfields Problem?*, 29 Urb. Law 309, 315 (1997) (greenfields are "undeveloped sites in suburban or rural locations").

often the hub of public transit networks.²⁴ Thus, shifting housing or commerce to greenfields would cause regionwide vehicle miles traveled to *increase*, because some people who might not drive to jobs or shops if they lived in a more compact area would become full-time drivers in a greenfield neighborhood. And even if the number of drivers remained constant, vehicle miles traveled would increase if greenfield sites were further from shops and other destinations, thus forcing people into longer commutes.²⁵

B. Neighborhood Character

NIMBYs also may argue that new housing or commerce is inconsistent with a neighborhood's existing character.²⁶ This argument, like arguments based on congestion, has no logical stopping point: any new housing or commerce changes neighborhood character to some extent.

Like congestion-related arguments against new housing, the "neighborhood character" argument is essentially a "beggar thy neighbor" argument: if additional density changes neighborhood character, and this change is an externality, anti-density zoning merely shifts that externality to whichever city or neighborhood is the most permissive.

²⁴See JON C. TEAFORD, *THE METROPOLITAN REVOLUTION: THE RISE OF POST-URBAN AMERICA* 10 (2006) (historically, transit lines converged downtown, and as number of automobiles increased, "the prospects for downtown-centered public transit worsened").

²⁵I note that this seems to be the case; neighborhoods far from downtown in fact tend to be less likely than urban areas to be within walking distance of most destinations. See, e.g. Jack Roming, *Walk this way: Close-to-home amenities prove draw as more people leave their cars parked*, Morning Call, Jan. 3, 2014, available at <http://articles.mcall.com/2014-01-03/features/mc-walkability-sunday-real-estate-0105-20140103-1-walkability-easton-main-street-initiative-valley-community> (citing examples); Walkscore, *Richmond, Virginia*, available at <http://www.walkscore.com/VA/Richmond> (neighborhoods near downtown have highest scores, according to website rating neighborhoods on walking distance to amenities); Walkscore, *Boise, Idaho*, available at <http://www.walkscore.com/ID/Boise-City> (same); Walkscore, *Hamilton, Ontario*, available at <http://www.walkscore.com/CA-ON/Hamilton> (same).

²⁶See William D. McElyea, *Playing the Numbers: Local Government Authority to Apply Use Quotas in Neighborhood Commercial Districts*, 14 Ecology L.Q. 325, 349 (1987) (courts "have recognized the preservation of neighborhood character as a proper and primary purpose of zoning and have upheld the exclusion of uses detrimental to a neighborhood's character").

If zoning causes new housing to shift to greenfield sites, the latter area's character will change far more radically than would that of a more urban site: a large apartment building will change a cornfield far more drastically than it will change a neighborhood full of houses or small apartment buildings. And if no development is allowed anywhere, the law of supply and demand will ensure that rents and land values rise, causing a very different type of change in neighborhood character as middle-class buyers and smaller businesses are priced out of neighborhoods.

Moreover, the public policy in favor of reducing pollution actually supports changing the character of many American neighborhoods. In recent decades, many suburbs and neighborhoods have been built in a way that forces their residents to drive automobiles in order to reach any conceivable destination. For example, newer areas tend to be less compact than older areas,²⁷ and thus less likely to have public transit or other amenities within walking distance of housing.²⁸ These automobile-dependent areas are essentially machines for generating both greenhouse gas emissions and other forms of automobile-induced pollution.²⁹ Thus, preserving such places in their current automobile-dependent form

²⁷See Patricia E. Salkin and Amy Lavine, *Land Use Law and Active Living: Opportunities for States to Assume a Leadership Role In Promoting and Incentivizing Local Options*, 5 Rutgers J.L. & Pub. Pol'y 317, 320 (2008) ("residents of older neighborhoods often lead more active lifestyles than residents in newer, lower density developments" because older areas "have higher densities of housing and commercial space [and thus] are more conducive to walking and bicycling").

²⁸See *supra* note 17 and accompanying text (discussing relationship between transit and density). In addition, these areas are often automobile-oriented in other ways. For example, newer suburbs often lack sidewalks, and have streets that are too wide to comfortably cross on foot. See Robert Puentes, *First Suburbs in the Northeast and Midwest: Assets, Challenges, and Opportunities*, 29 Fordham Urb. L.J. 1469, 1471 (2002) (noting newer developments often lack sidewalks, unlike older suburbs, which were "built when sidewalks were the rule, not the exception"); John M. Barry, *Form-Based Codes: Measured Success Through Both Mandatory and Optional Implementation*, 41 Conn. L. Rev. 305, 307 (2008) ("narrow streets" are one of several "central features of older cities that have largely disappeared").

²⁹See Maggie L. Grabow et. al., *Air Quality and Exercise-Related Health Benefits from Reduced Car Travel in the Midwestern United States*, available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3261937/> (study

is likely to generate continued pollution. By contrast, if infill development changes neighborhood character by adding housing that is close enough to public transit stations and bus stops to increase transit ridership, or is close enough to shops and offices to enable people to walk to these places, such development actually mitigates the harms caused by low-density development.³⁰

C. Property Values

NIMBYs also argue that low-density zoning stabilizes property values, by keeping out undesirable land uses or by reducing competing sources of housing.³¹ Courts have generally agreed that the protection of property values is in fact a legitimate purpose of zoning.³²

Homeowners' obsession with property values should not always be indulged, because many American communities have been *too* successful in bolstering land prices. For example, in San Francisco, housing prices have increased by nearly three times the national average (or about 458%) between 1960 and 2000- yet rather than building additional housing to meet demand, the city added just 269 housing units in 2011.³³ San Francisco's sluggish supply and high prices are related to its rogue's gallery of regulations, including:

showing that reduced car travel would lead to reduced pollution); Reid Ewing et. al., *Growing Cooler: The Evidence on Urban Development and Climate Change* 9 available at <http://www.smartgrowthamerica.org/documents/growingcoolerCH1.pdf> (linking reduced vehicle travel to reduced pollution; in particular, pointing out that if more compact development reduced vehicle mileage 20-40%, nationwide transportation-related greenhouse gas emissions would decreased by 7-10%).

³⁰I note, however, that this argument is not applicable to all infill development: some infill development does little to increase walkability or access to public transit, either because it is not located near shopping or public transit, or because it is designed in a way that discourages walking (for example, a subdivision without sidewalks or with overly wide streets).

³¹See Fischel, *supra* note 3, at 230.

³²See Stahl, *supra* note 4, at 984 ("Ever since zoning's legitimacy was established in the early part of the century, courts have repeatedly cited the protection of property values as one of zoning's central purposes.").

³³See Mangin, *supra* note 11, at 99.

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* Minimum lot sizes and similar restrictions on density.³⁴

* Aggressive height limits. While some cities are full of high-rises, zoning law forbids buildings of over two stories in most of San Francisco outside downtown.³⁵ And the city now requires voter approval for developments near the downtown waterfront that exceed existing height limits.³⁶

* Minimum parking requirements that, by requiring off-street parking, force landowners to build parking on land that could otherwise be used for housing.³⁷

* Open space requirements that are particularly burdensome upon owners of smaller apartments. For example, in the city's medium-density zones, a developer must provide 60 square feet of private open space or 80 feet of shared open space per unit³⁸ in other words, about 15–20 percent of residential square footage for a 400-square-foot studio, and even more for the smallest apartments.

* Design guidelines that require a fixed percentage of new units to be comprised of two-bedroom units (which presumably will take up more land, and thus cost more, than smaller units).³⁹

* The city's "Discretionary Review" policy, which means that even if a building project meets all code requirements,

³⁴Charles Joshua Gabbe, *Looking Through the Lens of Size: Land Use Regulations and Micro-Apartments in San Francisco* 10, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2478499.

³⁵See *Map of building height ordinances in SF*, available at <http://imgur.com/Tn7CSTX>.

³⁶See John Wildermuth and John Cote, *S.F. Voters OK Prop. B on waterfront development*, San Francisco Chronicle, June 4, 2014, available at <http://www.sfgate.com/bayarea/article/S-F-voters-OK-Prop-B-on-waterfront-development-5526983.php>.

³⁷See Gabbe, *supra* note 34, at 11. Admittedly, a developer could have both more parking and more housing if it built parking below apartments, rather than building parking spaces on the same level as apartments. However, underground parking is more expensive than surface parking. See Todd Litman, *Parking Management: Comprehensive Implementation Guide* 18 tbl. 7 (2010) available at http://www.vtpi.org/park_man_comp.pdf. (downtown surface parking lot costs \$3000 for construction, while underground parking lot costs \$25,000 for construction).

³⁸See Gabbe, *supra* note 34, at 12.

³⁹*Id.* at 13.

the city may “determine that modifications to the proposed project are necessary in order to protect the public interest.”⁴⁰

* California’s Environmental Quality Review Act (CEQA), which requires local governments to review (among other things) rezoning requests to ascertain their possible environmental impacts.⁴¹ Even if a city finds no significant environmental impact, the city must study the project and issue a “negative declaration”⁴²—a process that creates six months of added delay.⁴³ If the city finds that a full-fledged environmental impact report is necessary, the process will take a minimum of eighteen months.⁴⁴ For a developer, “time is money”⁴⁵ because a developer may be paying interest on a construction loan while its project is being studied by a city.⁴⁶

Each of these restrictions limit or delay housing construction and thus increase the cost of housing. Not surprisingly, housing prices in San Francisco continue to rise; the average housing unit costs more than \$800,000, more than ten times median household income.⁴⁷ This problem is not limited to large cities such as San Francisco. For example, Sausalito,

⁴⁰City and County of San Francisco, Planning Department, *Permit FAQ & Glossary*, available at <http://www.sf-planning.org/index.aspx?page=2754>.

⁴¹See *City of Carmel-By-The-Sea v. Board of Supervisors*, 183 Cal. App. 3d 229, 242–44, 227 Cal. Rptr. 899, 908–09 (6th Dist. 1986).

⁴²*Id.* at 241, 227 Cal. Rptr. at 907.

⁴³See San Luis Obispo County, California, *CEQA Frequently Asked Questions*, available at <http://www.slocounty.ca.gov/planning/environmental/CEQAQuestions.htm> (six months cited as norm), San Francisco Planning Department, *Environmental Review Process Summary 4*, available at <http://www.sf-planning.org/modules/showdocument.aspx?documentid=8631> (process may take “six to twelve months or longer based on factors such as changes in the proposed project, staff case load, supplemental data requirements, whether the document is appealed, and—where consultant work is required—quality of work.”)

⁴⁴*Id.* at 5.

⁴⁵Stewart Sterk, *Environmental Review in the Land Use Process: New York’s Experience with SEQRA*, 13 Cardozo L. Rev. 2041, 2084 (1992).

⁴⁶See Chad Lamer, *Why Government Policies Encourage Urban Sprawl, and the Alternatives Offered by New Urbanism*, 13 Kan. J. L. & Pub. Policy 391, 402 (1994).

⁴⁷See City Data, *San Francisco, California* available at <http://www.city-data.com/city/San-Francisco-California.html>; *supra* note 33 and accompanying text (describing long-term trend of increased costs). One could

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California, a suburb of San Francisco,⁴⁸ granted between 1.4 and 13.6 permits per 10,000 people yearly since 2000—more than San Francisco, but still fewer than the statewide average. Sausalito's median housing unit costs over \$900,000.⁴⁹

Local NIMBYs are especially likely to oppose rental housing⁵⁰—precisely the type of housing that is currently most likely to be in short supply. Between 2006 and 2012, the supply of multifamily units increased by only 1.6 million, while the number of renters increased by over 5 million.⁵¹ In addition, 1.9 million rental units were demolished between 2001 and 2011.⁵² As a result of these trends, the national rental vacancy rate (8.3%) is at its lowest point since 2000.⁵³

While the supply of multifamily housing has stagnated, rents have increased throughout the United States. Between 2000 and 2014, median household income has increased by

argue that the law of supply and demand somehow does not apply to housing, and that there is thus no relationship between regulation and increased prices. But historically, one purpose of zoning has been to increase housing prices; defenders of the status quo cannot plausibly claim that zoning both does and does not increase housing prices. See *supra* notes 31–32 and accompanying text. Moreover, there is a strong correlation throughout the United States between housing construction and housing prices: cities with less new construction tend to have higher prices. See Jed Kolko, *5 Truths of Tech-Hub Housing Costs*, available at <http://www.trulia.com/trends/2014/02/price-and-rent-monitors-jan-2014/> (chart in paragraph 5 shows correlation); Edward L. Glaeser and Joseph Gyourko, *The Impact of Zoning on Housing Affordability* 19–21, available at <http://www.law.yale.edu/documents/pdf/hier1948.pdf> (discussing issue in more detail).

⁴⁸See City Data, *Sausalito, California*, available at <http://www.city-data.com/city/Sausalito-California.html> (town 7.4 miles from San Francisco).

⁴⁹*Id.* (median house or condo valued at \$928,705; mean detached house costs \$1,100,950).

⁵⁰See Timothy Polmateer, *How Localism's Rationales Limit New Urbanism's Success And What New Regionalism Can Do About It*, 41 Fordham Urb. L.J. 1085, 1119 (2014) (“Local citizens are particularly skeptical of changes towards multi-family housing.”).

⁵¹See Joint Center for Housing Studies, *State of the Nation's Housing* 24 (2014) available at <http://www.jchs.harvard.edu/research/publications/state-nations-housing-2014> (“State”).

⁵²*Id.* at 25.

⁵³*Id.* at 22–23.

25.4%, while rent has increased by 52.8%.⁵⁴ Nationally, the percentage of renters paying more than 30% of their income for housing jumped from 38% in 2000 to 50% in 2010.⁵⁵ 27% of renters (including 71% of renters earning under \$15,000) now pay more than half their incomes in rent.⁵⁶ Because the poorest people are most likely to rent rather than own housing, this shortage of rental units contributes to American homelessness.⁵⁷

The discussion above assumes that zoning in fact successfully props up property values. But this is not always the case; the recent recession caused a sharp decline in property values across the nation, which local zoning laws were unable to prevent.⁵⁸

D. Reliance

Another argument for NIMBY-oriented regulation is that it protects homeowners' reliance interest in the status quo. For example, Bradley Karkkainen argues that when someone buys a house, he or she intends to purchase not only the property, but part of the "neighborhood commons"⁵⁹ that is, community-owned property "such as public schools, public recreational facilities, and public transportation facilities"⁶⁰ as well as "intangible qualities such as neighborhood ambience, aesthetics, and the physical environment."⁶¹

According to Karkkainen, changes in a neighborhood's

⁵⁴See Krishna Rao, *The Rent is Too Damn High*, available at <http://www.zillow.com/research/rent-affordability-2013q4-6681>.

⁵⁵See Annie Lowrey, *With Rental Demand Soaring, Poor are Feeling Squeezed*, New York Times, Dec. 9, 2013, available at http://www.nytimes.com/2013/12/10/business/economy/the-poor-are-squeezed-as-rental-housing-demand-soars.html?pagewanted=all&_r=0.

⁵⁶See State, *supra* note 51, at 34 (307,000 starts in 2013, up from 109,000 in 2009, but far below 670,000 in 1985).

⁵⁷See William Tucker, *Zoning, Rent Control and Affordable Housing* 3-4 (1991) (among largest American cities, "higher rents correlate with more homelessness" and "cities with low vacancy rates have significantly more homeless people").

⁵⁸See Stahl, *supra* note 4, at 1018.

⁵⁹Bradley Karkkainen, *Zoning: A Reply to the Critics*, 10 J. Land Use & Envt. L. 45, 69 (1994).

⁶⁰*Id.*

⁶¹*Id.*

density or land use,⁶² by changing the physical environment, reduce the value of neighbors' interest in the "commons" because "the neighborhood is taking the first step toward becoming something other than the neighborhood where [the residents] chose to live."⁶³ In other words, a neighborhood's residents purchase homes in reliance on neighborhood pattern X, and therefore should have veto power over changes that turn neighborhood X into someplace different.

This argument should not justify the status quo, for two reasons. First, it rests on a circular chain of logic: legislators create zoning rules that freeze existing neighborhood densities and land uses, causing neighborhood residents to rely on those rules, which on turn allegedly (according to Karkkainen) justifies the continued existence of the very same zoning rules. By contrast, if zoning were nonexistent or more permissive, neighborhood residents might subjectively expect more change and rely less on the status quo.

Second, the argument that a neighborhood's residents should have veto power over anything that changes the "neighborhood commons" proves too much. Karkkainen admits that government facilities such as public libraries and public transit are part of the "neighborhood commons." Does that mean that neighborhood residents should have veto power over closing and opening of libraries and bus lines, regardless of citywide needs?

Taking the "neighborhood commons" idea further, a neighborhood's racial and religious composition certainly affects a neighborhood's ambience just as much as lot size or the existence of rental housing nearby. For example, if enough religiously observant Jews move into the neighborhood, the retail environment will change dramatically; many shops will close on Saturday (because Saturday is the Jewish Sabbath, and the most observant Jews do not shop on that day), existing restaurants will be replaced by those observing Jewish dietary laws, and women's clothing shops will start to sell wigs and long skirts instead of trousers

⁶²*Id.* at 72 ("changes in density, as well as shifts from residential to commercial or industrial uses" are "disruptive of a neighborhood's character because they are inconsistent with current uses of the neighborhood commons.")

⁶³*Id.* at 73.

(because many Orthodox Jewish women do not wear pants or short skirts, and cover their hair after marriage).⁶⁴ So if homeowners should have a collective veto power over any change in the neighborhood commons, it logically follows that they should have veto power over their neighbors' religion- obviously an absurd result.⁶⁵

IV. Solutions

If the neighborhood veto has increased housing costs, and air pollution, what can be done about it? This enormous topic is beyond the scope of this brief article. It seems to me, however, that modifications to the zoning process come in three broad categories:

- * Large-scale reforms such as the elimination of zoning. A somewhat more modest (but still radical) solution might be a statewide law eliminating the most expensive or pollution-producing types of regulation- for example, by abolishing density and parking regulations.⁶⁶

- * Small-scale reforms designed to make homeowners willing to tolerate a little more development. For example, William Fischel suggests that developers bribe homeowners to accept rezonings by offering "home value insurance" designed to protect homeowners from the risk of declining property values.⁶⁷

- * Less judicial deference towards local zoning. The common law of zoning generally upholds all zoning decisions

⁶⁴See *McDonough v. Nassau County Bd. of Co-op. Educational Services*, 2007 WL 3124550, *1 (E.D. N.Y. 2007) (noting in passing that when plaintiff employed at Orthodox Jewish school, principal "implored her not to wear short sleeves or pants, that is, to dress in a manner consistent with the traditions of orthodox Jews"); Taffy Brodesser-Achner, *For Some Actors, Stylists See Hairpieces*, *International Herald Tribune*, March 27, 2012, at 11 ("My sisters, who are Orthodox Jews, began to cover their hair with wigs as soon as they married, as is their custom.").

⁶⁵Of course, such a rule would be unconstitutional as well- but readers who followed the "neighborhood commons" argument to this extreme conclusion would presumably be willing to support a constitutional amendment that allowed such rules.

⁶⁶See Michael Lewyn, *You Can Have It All: Less Sprawl and Property Rights Too*, 80 Temp. L. Rev. 1093, 1107-1119 (2007).

⁶⁷See Fischel, *supra* note 3, at 268-70.

that are fairly debatable.⁶⁸ Courts have applied this rule in a highly deferential manner, giving homeowner-dominated local governments carte blanche to follow the wishes of their constituents.⁶⁹ Courts could scrutinize local regulation more closely, holding that those regulations most likely to raise rents and increase automobile dependence are not in fact fairly debatable.⁷⁰

IV. Conclusion

The “neighborhood veto” over land use decisions has artificially constricted population density and the supply of housing, thus increasing housing costs and facilitating automobile-dependent suburban sprawl. The traditional arguments for the neighborhood veto are flawed. Concerns about “traffic” and “neighborhood character” are “beggar thy neighbor” arguments: if new residents are not allowed in one neighborhood, they (and the traffic and other changes they create) will merely shift to another neighborhood. Another argument for the NIMBY veto is that restrictive zoning is necessary to preserve property values- but skyrocketing rents suggest that in many cities, zoning has been *too* successful in achieving this objective. A neighborhood’s homeowners may claim that they have relied on the status quo- but restrictive zoning only facilitates such reliance.

⁶⁸See, e.g., *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 388, 47 S. Ct. 114, 71 L. Ed. 303, 4 Ohio L. Abs. 816, 54 A.L.R. 1016 (1926) (“If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.”); *McMahon v. City of Dubuque, Iowa*, 255 F.2d 154, 159 (8th Cir. 1958) (applying standard to rezoning decisions).

⁶⁹See Stahl, *supra* note 4, at 983–87.

⁷⁰See Fischel, *supra* note 3, at 272, 282–83 (describing New Jersey and Pennsylvania courts’ attempts to limit “exclusionary zoning”).