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2016

The Roots of Expensive Zoning

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Zoning and Land Use Planning

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THE ROOTS OF EXPENSIVE ZONING

As urban rents (and in some cities, housing prices) have risen, highly restrictive zoning codes have become more controversial. In *Zoning Rules*, economist William A. Fischel describes the trend towards more restrictive zoning, the negative side effects of such growth restrictions, and some possible solutions to those side effects.

I. In The Beginning . . .

The first half of Fischel's book describes how zoning generally works, and discusses the history and economic impact of zoning. Zoning began in the 1910s, with ordinances in Los Angeles and New York City.¹ In 1924, a committee created by then-Commerce Secretary Herbert Hoover created the Standard State Zoning Enabling Act (SZEa), a model state law that authorized other local governments to enact similar codes.² SZEa authorized municipalities to create zoning districts, and to regulate the density of population and the appropriate use of structures within each district.³ States

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Review, *Zoning Rules! The Economics of Land Use Regulation*, by William A. Fischel (Lincoln Institute of Land Policy, 2015)

¹See William A. Fischel, *Zoning Rules: The Economics of Land Use Regulation* 163 (2015). In 1916, New York enacted the first "comprehensive" zoning ordinance—that is, one governing an entire city. *Id.* at 188. However, Los Angeles experimented with the creation of exclusive residential districts before the 1916 enactment of New York's ordinance. *Id.* at 187–88.

²*Id.* at 136–37.

³*Id.* at 138 (containing text of SZEa).

have universally adopted SZEALike statutes, and cities and suburbs have almost universally adopted zoning.⁴

Why did zoning become popular when it did? Fischel credits (or perhaps blames) trucks and buses. Before the invention of the truck, heavy industry was located near downtown railroad stations and docks because streetcars could not carry large amounts of freight.⁵ Between 1905 and 1920, the number of registered trucks in the United States doubled every year.⁶ As a result, industrial businesses could more easily locate outside downtown. Because homeowners believed that heavy industry devalued their property, they demanded zoning in order to exclude such businesses.⁷

Shortly thereafter, buses began to supplement and even replace streetcars in suburban neighborhoods.⁸ Before the rise of buses, apartments tended to be on streetcar lines, to take advantage of the convenience that streetcars offered to potential tenants.⁹ But the rise of the bus meant that transit companies could add bus service wherever apartments were built, which in turn meant that apartments could be built on blocks that had previously been dominated by single-family houses. Because homeowners also viewed apartments as dominated by lower-income commuters and thus unwelcome, they favored zoning in order to keep out apartments.¹⁰ In other words, zoning arose not as a top-down mandate from intellectuals or state governments, but as a grass-roots assertion by homeowners of “Not In My Back Yard (NIMBY)” sentiment.

From its birth, zoning limited the supply of apartments and (because zoning regulated density as well as land use)¹¹ smaller houses, and thus raised rents and housing prices.

⁴*Id.* at 34.

⁵*Id.* at 173–74.

⁶*Id.* at 175.

⁷*Id.* at 175–77.

⁸*Id.* at 175.

⁹*Id.* at 173.

¹⁰*Id.* at 175–78.

¹¹See, e.g., *Agins v. City of Tiburon*, 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106, 14 Env’t. Rep. Cas. (BNA) 1555, 10 Env’tl. L. Rep. 20361 (1980) (abrogated by, *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 125 S.

But in the mid-20th century, the effects of zoning, if not harmless, were at least equally distributed throughout the United States: housing prices were fairly similar among regions.¹² Fischel suggests that the large number of suburban governments meant that “[f]or every suburb that was dedicated to exclusionary zoning, there was a not-too-distant town that was more than willing to accommodate development.”¹³ So even though NIMBYism may have kept the poor out of rich neighborhoods, it rarely discouraged Americans from settling in bigger or more expensive cities. For example, in 1950, the median house in San Francisco was only 60% more expensive than the median house in Indianapolis.¹⁴ By contrast, today the average San Francisco house or condo is almost seven times as expensive as its Indianapolis counterpart.¹⁵

II. The Zoning Explosion

Over the past few decades, housing prices began to rise in large American coastal cities and their suburbs. What changed?

Fischel suggests that NIMBY-oriented restrictive zoning is a major cause of this price revolution, based on three indicia. First, the states where land use litigation has grown have been the states where housing prices rose most rapidly—a fact suggesting that those places have more litigation-

Ct. 2074, 161 L. Ed. 2d 876, 35 Env'tl. L. Rep. 20106 (2005)) (upholding minimum lot sizes for houses).

¹²*Id.* at 165.

¹³*Id.* at 205.

¹⁴See University of Virginia Library, *Historic City Files*, at <http://ccdb.lib.virginia.edu/ccdb/ccdb/view?year=historic&type=city&state=6%2C18&items=6002485%2C18001145&vars%5B%5D=2351> (median value of owner-occupied units was \$7436 in Indianapolis, \$11,927 in San Francisco).

¹⁵See *City Data*, at www.city-data.com (median Indianapolis house or condo worth \$116,400 in 2013, and median San Francisco house or condo worth \$778,000); National Association of Home Builders, *Housing Opportunity Index*, at <http://www.nahb.org/en/research/housing-economics/housing-indexes/housing-opportunity-index.aspx> (“HOI”) (showing similar variations in housing prices for metropolitan areas, which include suburbs as well as cities).

generating regulation.¹⁶ Second, we know that population growth is not the cause of exploding housing prices, because prices have failed to rise as rapidly in the high-growth South as in the coastal Northeast and West.¹⁷ Third, Fischel relies on anecdotal evidence from suburbs he is familiar with. For example, Acton, Mass. (an outer suburb of Boston) allowed one house per half-acre in the 1950s, but downzoned again and again in the 1960s.¹⁸ Today, the code allows only one house every two acres for large chunks of the city, and 10% of the city's land is zoned for agriculture (which means that no housing is allowed at all).¹⁹

In turn, the growth of housing prices has had a variety of negative effects. Obviously, the residents of high-cost regions are themselves worse off, because they have less money to spend on goods and services other than housing. Moreover, the national economy may have suffered as well. High housing costs deter low-income Americans from moving to job opportunities in high-cost areas. Fischel writes, based on the calculations of other theorists, that almost a third of the decrease in American economic inequality until 1970 was caused by migration of workers from poor states to rich states, and therefore suggests that high housing costs in rich states have stopped such equalization.²⁰ High housing costs may even increase energy use. California homes require less heating and cooling than those of less temperate regions.²¹ As a result, four of the five American cities with the lowest levels of electricity use are in that state.²² But because California cities are notoriously expensive,²³ some households

¹⁶See Fischel, *supra* note 1, at 165–66.

¹⁷*Id.* at 196.

¹⁸*Id.* at 262–64.

¹⁹*Id.* at 264.

²⁰*Id.* at 166–67.

²¹See Edward L. Glaeser and Matthew Kahn, *The Greenness of Cities* 41, http://www.hks.harvard.edu/var/ezp_site/storage/fckeditor/file/pdfs/centers-programs/centers/taubman/working_papers/glaeser_08_greencities.pdf (of the eight cities emitting less than 8 megawatt-hours of electricity per household, three are in California).

²²*Id.* at 21.

²³See HOI, *supra* note 15.

that might otherwise live in California live in less temperate (and thus more polluting) places.

III. What Went Wrong?

Fischel suggests that a variety of factors have caused the growth of NIMBYism. First, as interstate highways were built in the 1960s, jobs (especially blue-collar jobs) began to migrate to suburbia,²⁴ which in turn caused automobile ownership to rise.²⁵ As working-class people bought cars and commuted to suburban jobs, they were more likely to seek suburban housing- which in turn may have caused suburbanites to zone more restrictively in order to exclude the lower classes.²⁶

Second, fair housing legislation meant that suburbs could not explicitly exclude racial minorities—and even facially neutral zoning techniques that excluded the poor (such as prohibiting apartments and small houses) came under judicial scrutiny in some states.²⁷ In order to avoid lawsuits, suburbs simply decided to exclude all development from certain areas, reasoning that zoning an area for agriculture or some other “natural” use was less likely to attract judicial scrutiny than zoning for high-end housing that was affordable only to more affluent households.²⁸ This argument is supported by some empirical evidence: Fischel cites a study showing that in New Jersey, suburbs were especially likely to acquire land as “open space” if it had public sewerage available, and was thus an appropriate site for low-income housing—a fact that suggests that suburbs purchased such land in order to exclude such housing.²⁹

This suggestion would be more persuasive if there was a stronger correlation between exclusionary zoning litigation and exorbitant housing prices. As Fischel notes, the only

²⁴See Fischel, *supra* note 1, at 199–200.

²⁵*Id.* at 200 (83% of households owned cars in 1970, up from 59% in 1950).

²⁶*Id.* at 201 (“As jobs for both rich and poor became decentralized, the working poor were almost as inclined to live in a distant suburb as the rich.”).

²⁷*Id.* at 202.

²⁸*Id.* at 203.

²⁹*Id.* at 360.

states where either state courts or state legislatures have vigorously fought to open up the suburbs to moderate-income housing are New Jersey, Massachusetts, and Pennsylvania:³⁰ two high-cost states³¹ and one less expensive state (Pennsylvania). But high housing costs are hardly limited to those states.

Third, the rise of the environmental movement in the 1970s served as a handy excuse to exclude new housing: instead of stating that they wished to keep densities low to exclude the poor, anti-development activists could argue that they wished to preserve farmland and “open space” from development.³²

Fourth, the growth of regionalism actually increased NIMBY power over zoning. In the late 20th century, some regulation-oriented states adopted a “double veto” system: local governments had the right to veto new development, but the state (or a regional body) also had the right to veto development allowed by local governments. As a result, even pro-development communities were unable to allow much new housing; a NIMBY minority could appeal their decisions to higher levels of government.³³ By contrast, if the states had given state or regional government the power to veto *anti-development* local decisions, housing supply might have increased more rapidly. However, Fischel does not seek to correlate state power over zoning with high housing costs or overregulation, so readers do not really know whether “double-veto” states in fact have higher housing costs than other states. He does mention in passing that Vermont and Oregon have statewide double-veto systems;³⁴ these states

³⁰*Id.* at 360–62.

³¹*Id.* at 360 (“these two states have achieved some of the highest housing prices in the nation.”).

³²*Id.* at 205.

³³*Id.* at 206–07.

³⁴*Id.* at 54. He also mentions that Minneapolis and Miami have regional governments with some power over land use. *Id.* at 55. Housing prices in these regions are somewhat above average, but are hardly the highest in the nation. See HOI, *supra* note 15.

are somewhat more expensive than the average state, but are not the most expensive states.³⁵

Fifth, housing values began to explode in the 1970s as a result of inflation.³⁶ As a result, housing became a more important part of household wealth, rising from around 21 percent of net wealth in the 1960s to 30 percent in 1979.³⁷ As a result, homeowners might have become more concerned about the risk of development that might affect their house's value.³⁸

Some of these trends (such as housing price inflation) happened everywhere. So why are housing costs higher on the coasts than in the South? Fischel points out that western states such as California rely more heavily on voter initiatives, so local voters can more easily overrule pro-development zoning policies.³⁹ Although northeastern metropolitan areas lack such a rich tradition of voter initiatives, they tend to have highly fragmented governments with hundreds of small suburban towns.⁴⁰ The government of a suburb with only a few thousand residents is likely to be responsive to the desires of its homeowners;⁴¹ by contrast, a county with 600,000 people might be more responsive to the countywide or regionwide interest in affordable housing. On the other hand, southern states have less direct democracy and fewer small suburban towns, and are thus less responsive to homeowner interests in high property values.

³⁵See Proquest, *Statistical Abstract of the U.S., Table 1014: Owner-Occupied Housing Units—Value and Costs by State: 2014*, at <http://statab.s.proquest.com/sa/docview.html?table-no=1014&acc-no=C7095-1.20&year=2016&z=8A7A47BA8090A85AC67D8DF66820D24488696860&rc=1&seq=33&y=current>.

³⁶See Fischel, *supra* note 1, at 213.

³⁷*Id.* at 214.

³⁸*Id.* at 214–15.

³⁹*Id.* at 315.

⁴⁰*Id.*

⁴¹*Id.* at 181–82 (noting that growth of zoning made fragmentation more desirable, because being part of small suburb gave homeowners more control over land use than being part of larger city).

But as Fischel himself points out, anti-development zoning is no longer limited to suburbia.⁴² For example, in 1960 Los Angeles was zoned to support 10 million people—that is, if every zone contained the maximum number of housing units allowed, the city could house 10 million people (four times its population at the time).⁴³ By contrast, today the city is zoned for roughly its current population, which means that almost any new construction will require a rezoning.⁴⁴ Similarly, New York City has created neighborhood review boards which have the right to comment upon new development proposals, thus making the NIMBY voice an official part of city government.⁴⁵ New York has also created other obstacles to development: for example, while in other cities a city council or mayor might ultimately decide the fate of a rezoning petition, in New York a borough president also has the right to review a rezoning, thus creating yet another avenue for neighborhood activists to lobby to block new housing.⁴⁶ Finally, the city bureaucracy on its own can propose downzoning a neighborhood; between 2003 and 2007 alone, the city downzoned about 40,000 parcels of land.⁴⁷ And San Francisco, a city even more expensive than New

⁴²*Id.* at 297–98.

⁴³See Greg Morris, *The Homeowner Revolution: Democracy, Land Use and the Los Angeles Slow-Growth Movement, 1965-92*, at 3, at <http://escholarship.org/uc/item/6k64g20f#page-1>.

⁴⁴*Id.* Cf. Fischel, *supra* note 1, at 43–44 (describing rezoning process).

⁴⁵Sheila 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).

⁴⁶See John Mangin, *The New Exclusionary Zoning*, 25 Stan. L. & Pol'y Rev. 91, 100 (2014).

⁴⁷See Furman Center for Real Estate and Development Policy, *How Have Recent Rezoning Affected the City's Ability to Grow?* 8, at http://furmancenter.org/files/publications/Rezoning_Furman_Center_Policy_Brief_March_2010.pdf (188,000 lots rezoned; 23% of these were downzoned). I notice that on balance, the city upzoned slightly more land than it downzoned. However, some of the alleged upzonings added parking requirements that can reduce a site's potential for new housing just as easily as a direct density restriction. *Id.* at 15.

York,⁴⁸ has “discretionary review”—which means that even if development otherwise conforms to the zoning code, the city bureaucracy can alter or veto the development based on its conception of the public interest.⁴⁹ San Francisco also prohibits most buildings of more than two stories outside downtown, and requires voter approval for tall buildings near the downtown waterfront.⁵⁰ Not surprisingly, all three cities now have unusually high rents and housing prices.⁵¹ The growth of restrictive zoning in large cities suggests that jurisdiction size is no longer a major factor.

IV. Where Do We Go From Here?

Fischel acknowledges that zoning has raised housing prices, and discusses a variety of remedies. He begins by discussing the possibility of increased judicial scrutiny of local regulation, focusing on the Takings Clause of the federal Constitution. The Takings Clause requires compensation for overly restrictive government regulations, based on a balancing test that weighs the economic harm to a landowner (including the landowner’s investment-backed expectations) against the character of the government action.⁵² The meaning of these concepts is unclear; as a result courts have been reluctant to hold that zoning regulations were compensable takings.⁵³ Fischel accordingly concludes that the Takings

⁴⁸See Sean Caperis et al., *Renting in America’s Largest Cities* 10, at http://furmancenter.org/files/CapOneNYUFurmanCenter_NationalRentalLandscape_MAY2015.pdf

⁴⁹See City and County of San Francisco, Planning Department, *Permit FAQ & Glossary*, at <http://www.sf-planning.org/index.aspx?page=2754>.

⁵⁰See *Map of building height ordinances in SF*, at <http://imgur.com/Tn7CSTX>; John Wildermuth and John Cote, *S.F. Voters OK Prop. B on waterfront development*, San Francisco Chronicle, June 4, 2014, at <http://www.sfgate.com/bayarea/article/S-F-voters-OK-Prop-B-on-waterfront-development-5526983.php>.

⁵¹See Caperis et al., *supra* note 48, at 10 (comparing rents of various cities); HOI, *supra* note — (comparing housing prices).

⁵²*Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124, 98 S. Ct. 2646, 57 L. Ed. 2d 631, 11 Env’t. Rep. Cas. (BNA) 1801, 8 Env’tl. L. Rep. 20528 (1978).

⁵³See Fischel, *supra* note 1, at 333–34 (judges deferential to local governments), 345 (explaining difficulty of ascertaining economic losses).

Clause “is likely to remain at the edges of zoning reform because its boundaries are not judicially manageable.”⁵⁴

Fischel instead focuses⁵⁵ on what he believes to be the root cause of the popularity of restrictive zoning: homeowners’ concerns about property values. He suggests that if home ownership was a less important part of homeowners’ financial portfolios, restrictive zoning would be less popular.⁵⁶ For example, he suggests that the federal government could apply capital gains taxes to all profits from home sales, thus limiting the economic payoff from homeownership.⁵⁷ However, this proposal might discourage homeowners from selling their houses, thus actually reducing the for-sale housing supply.

Moreover, the link between homeownership and restrictive zoning is not tremendously strong—so perhaps protection of property values is just one of many reasons for NIMBYism. For example, New York, San Francisco and Los Angeles all have unusually low home ownership rates⁵⁸—but

⁵⁴*Id.* at 328.

⁵⁵In the last few pages of his book, Fischel also mentions a few other policies that he thinks may also be relevant to growth controls, such as growth boundaries limiting new development to existing suburbs, “environmental justice” rules designed to limit pollution in low-income areas, and the Supreme Court’s exactions doctrine. *Id.* at 365–67. But because he only gives a paragraph or two to each issue rather than giving them extensive treatment, I have chosen not to address his discussion of these questions.

⁵⁶*Id.*

⁵⁷*Id.* at 354–59 (discussing this proposal, as well as other tax-related proposals). Fischel also has several other tax-related proposals. He suggests limiting the mortgage interest deduction to the cost of a starter home, in order to reduce “the demand for moving up or building oversize mansions.” *Id.* at 354–55. However, he does not explain how this proposal will reduce homeowners’ interest in rising property values. He also suggests limiting the deduction to owner-occupied housing (as opposed to second and third homes). *Id.* at 354. But I am not sure that absentee owners are as aggressively anti-development as owner-occupiers, so I question whether this proposal is likely to lead to liberalized zoning.

⁵⁸See Governing, *Homeownership Statistics for Metro Areas*, at <http://www.governing.com/gov-data/other/homeownership-statistics-data-for-metro-areas.html> (listing homeownership rates by region).

as noted above, these cities have unusually restrictive zoning and unusually high housing prices.⁵⁹

Why? Because NIMBYs are motivated not just by fears about property values, but by less tangible fears about traffic and neighborhood character.⁶⁰ It may be that the real motivation behind such fears is social status: one who thinks of her neighborhood as having a unique character may feel that a loss of social status if the neighborhood changes.⁶¹ Since these motives can affect renters as well as owners, it follows that property values are just one of many possible motivations for NIMBYism.⁶² If even renter-dominated places have high levels of NIMBYism, higher taxes on homes might not be a tremendously effective strategy.

V. Conclusion

Fischel's book has many interesting suggestions about the roots of NIMBYism; however, his discussion of solutions to the problem is a bit less comprehensive than his discussion of its growth- and perhaps awaits his next book.

⁵⁹See *supra* notes 43–51 and accompanying text.

⁶⁰See, 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 density limits based on concerns about congestion); *Heffernan v. Missoula City Council*, 2011 MT 91, 360 Mont. 207, 214–15, 255 P.3d 80, 88 (2011) (city opposed new development based on concern that additional population density “can have a significant negative impact . . . on neighborhood character”).

⁶¹See Benjamin Ross, *Dead End: Suburban Sprawl and the Rebirth of American Urbanism* 102 (2014) (discussing status as motivation for opposition to new housing).

⁶²*Id.* at 94 (noting infinite variety of anti-development arguments: “There’s too much parking or too little. If houses are proposed, offices are what the neighborhood needs; if offices, houses would be better. Property values will go down; we will be priced out of our homes.”).