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From the Selected Works of Michael E Lewyn

Spring 2017

The Obama Administration's Parting Shot

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Available at: <https://works.bepress.com/lewyn/124/>

Zoning and Land Use Planning

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THE OBAMA ADMINISTRATION'S PARTING SHOT

I. Introduction

Last September, the White House issued a policy paper, entitled "Housing Development Toolkit," discussing barriers to affordable housing,¹ as well as a variety of policies that might hold down housing costs. This article discusses the Obama Administration's paper in more detail.

II. The Problem

Since 1960, inflation-adjusted household incomes have increased by only 18%, but inflation-adjusted rents have increased by 49%.² The share of renters paying more than 30% of income for rent has doubled from 24% to 49%.³ This increase cannot be blamed on construction costs: since 1980, construction costs have been virtually unchanged, while housing prices have increased by over 50%.⁴

What went wrong? The Toolkit suggests that restrictive zoning is at least partially to blame. For example, Los Angeles was zoned to accommodate 10 million people (four times its population) in 1960, but today is zoned to accommodate only 4.3 million (only slightly more than its current population).⁵ The Toolkit mentions academic studies showing similar increases in regulation in Boston, New York City and

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¹The White House, *Housing Development Toolkit*, at https://www.whitehouse.gov/sites/whitehouse.gov/files/images/Housing_Development_Toolkit%20f.2.pdf ("Toolkit").

²*Id.* at 7.

³*Id.*

⁴*Id.* at 5.

⁵*Id.* at 6.

San Francisco;⁶ however, it would have been more persuasive had it responded to counterarguments that seek to blame high housing prices on increased demand rather than diminished supply.⁷

III. So What?

The most obvious negative side effect of high housing costs is of course the rise in homelessness; while homelessness has decreased nationwide over the past decade, it has increased in the most costly cities.⁸

The Toolkit suggests, however, that housing inflation has had more subtle results as well. For example, high housing costs may increase income inequality. High rents and home prices freeze less affluent workers out of high-cost cities, which means that workers cannot relocate to take advantage of economic opportunities in those cities.⁹ The Toolkit further suggests that this drag on mobility is a drag on national economic growth: according to one study, Gross Domestic Product would have been 10% higher in 2009 had housing costs been lower, because fewer workers in rich, high-cost regions mean lower output.¹⁰

Even those workers who choose to stay in high-cost regions must sometimes live far from their job in order to find housing that they can afford, increasing strains on mental health and increasing greenhouse gas emissions from long commutes.¹¹ By contrast, if housing was less heavily regulated, urban workers would be able to live in walkable areas near downtown, causing public transit use to rise and car-induced pollutants to decline.¹²

One common argument against new housing is that new housing leads to gentrification, as affluent new residents move to new houses and apartments, increasing housing

⁶*Id.* at 5.

⁷I have addressed such arguments in these very pages. See Michael Lewyn, *Deny, Deny, Deny*, 44 Real Est. L.J. 558, 564–71 (2016).

⁸See Toolkit, *supra* note 1, at 8.

⁹*Id.*

¹⁰*Id.*

¹¹*Id.* at 9.

¹²*Id.* at 10.

demand and driving up rents.¹³ But the Toolkit responds to this argument by suggesting that restrictive housing in affluent areas is a *cause*, rather than a result, of gentrification: when new housing is kept out of the richest, most politically powerful areas, it might flood into less politically powerful areas, which means those neighborhoods suffer any negative results from new housing without getting the benefit of lower citywide rents.¹⁴

Another argument against new housing is that government should create more affordable housing by subsidizing housing for the poor, rather than by allowing developers to build housing for the rest of society. The Toolkit responds to this argument by noting that high housing costs actually make government subsidies less practical: the higher the market rent, the more money it costs government to subsidize rents.¹⁵

IV. A Toolkit of Solutions

The Toolkit suggests a variety of remedies to America's affordability crisis, including (1) by-right development, (2) taxing vacant land, (3) streamlined permitting, (4) eliminating minimum parking requirements, (5) allowing high-density zoning, (6) allowing homeowners to build accessory dwelling units, (7) establishing density bonuses for lower-income housing, and (8) inclusionary zoning. Each of these issues will be addressed in turn.

A. By-Right Zoning

The Toolkit claims that most "development goes through a discretionary review process prior to approval, such as public hearings or local legislative actions."¹⁶ As an alternative, the Toolkit endorses "by-right development [which] allows

¹³See, e.g., Sarina Triangle, *City Council Fears Broken Promises, Gentrification with De Blasio's Rezoning Plan*, at <http://cityandstatenyc.com/articles/politics/new-york-city/city-council-fears-broken-promises-gentrification-with-de-blasios-rezoning-plan.html#.WDdMVNIrLIU>.

¹⁴See Toolkit, *supra* note 1, at 9.

¹⁵*Id.* at 10.

¹⁶*Id.* at 14.

projects to be approved administratively when proposals meet local zoning requirements.”¹⁷

The Toolkit’s description of the status quo is unnecessarily imprecise. It is true that in at least one high-cost city (San Francisco), all development is subject to discretionary review.¹⁸ However, it is more common for zoning ordinances to allow “by-right” development for development conforming to existing zoning, but to include so many regulations that most large-scale development will rarely conform to every rule, which in turn means that developers must often request a rezoning.¹⁹ For example, New York City does allow as-of-right development when such development complies with the zoning code.²⁰ But because the city has so many different types of zones,²¹ such development proposals often will not comply since presumably there are SOME cases where a proposal does comply with existing zoning. Nevertheless, the Toolkit’s broader argument makes sense: if cities had simpler zoning codes and fewer permit applications required a rezoning, development would be simpler and more housing would be built.

B. Vacant Land

Since 2000, the number of vacant residential units has increased from 7 million to 10 million.²² The Toolkit points out that vacant lots harm surrounding neighborhoods and

¹⁷*Id.*

¹⁸See Michael Lewyn, *The Roots of Expensive Zoning*, 45 Real Est. L.J. 256, 263–64 (2016).

¹⁹See Noah M. Kazis, *Public Actors, Private Law: Local Government’s Use of Covenants to Regulate Land Use*, 124 Yale L.J. 1790, 1802–03 (2015) (although “discretionary, negotiated review of land use proposals is increasingly common . . . [m]ore commonly, municipalities simply impose extremely restrictive zoning rules governing what may be built as-of-right, without discretionary action by the government, and wait for developers to seek variances, rezonings, or other forms of discretionary relief.”).

²⁰See NYC Planning, *Zoning Process*, at <http://www1.nyc.gov/site/planning/zoning/zoning-process.page>.

²¹See NYC Planning, *Residence Districts: Overview* at <https://www1.nyc.gov/site/planning/zoning/districts-tools/residence-districts-r1-r10.page> (zoning code designates ten basic types of districts for housing alone, as well as numerous subdistricts within those categories).

²²See Toolkit, *supra* note 1, at 15.

“represent lost housing opportunities.”²³ The Toolkit also discusses remedies for the harm caused by vacant lots, noting that many cities impose special fees upon the owners of vacant lots, while Dallas acquires vacant lots and sells them to nonprofit groups, which then build housing on these lots.²⁴

These ideas do not seem particularly controversial; however, I am not sure how closely related they are to the scourge of high rents. As a matter of common sense, it seems to me that a landowner is most likely to leave a lot vacant when it cannot sell the land for very much- a problem more common, I suspect, in low-cost cities than in expensive cities such as New York or San Francisco.

C. The Permit Process

The Toolkit quite properly points out that “lengthy permitting processes restrict long-run housing supply.”²⁵ It notes that some cities and states have sought to expedite permitting. For example, Austin expedites permit review for developers of low-income housing, and Massachusetts has suggested model permit practices for localities.²⁶ These practices seem noncontroversial; however, I wish that the Toolkit had explained the obstacles to speedy permits- that is, why cities often fail to make speedy permit decisions, and why remedies to this problem might be controversial.

D. Minimum Parking Requirements

As automobiles became more common, municipalities began to require commercial landowners to provide off-street parking for tenants and visitors. In 1946, only 17% of cities had enacted such regulations- but by 1951, 71% of cities had done so.²⁷ Today, such minimum parking requirements are virtually universal.²⁸

These regulations make housing more expensive; parking may cost between \$5,000 per space (for a surface parking lot) and \$60,000 (for an underground space)-costs that may

²³*Id.*

²⁴*Id.*

²⁵*Id.*

²⁶*Id.* at 16.

²⁷See Donald C. Shoup, *The High Cost of Free Parking* 22 (2005).

²⁸*Id.* at 25.

be passed on to renters.²⁹ The Toolkit cites a study in Seattle finding that parking requirements increase rental costs by 50%.³⁰ The Toolkit points out that these costs are especially punitive for lower-income households, because these families tend to own fewer vehicles, and thus do not benefit as much from government-mandated parking.³¹

The Toolkit also gives examples of cities that have fought to make these requirements less burdensome: it notes, for example, that Seattle has eliminated minimum parking requirements in center-city areas with the most frequent transit service, Denver has reduced parking quotas for low-income housing, and Minneapolis has reduced parking requirements for areas near transit stops.³² California has overridden local zoning codes to reduce parking requirements for low-income housing near public transit.³³

Although the Toolkit's analysis seems persuasive, it leaves open one key question: if minimum parking requirements increase housing costs, why not abolish them everywhere? However, a more detailed analysis would have required the Toolkit to respond to the arguments for such requirements.³⁴

E. Density

The Toolkit suggests "zoning code changes that allow for the development of higher-density and multifamily housing."³⁵ This is certainly a worthy reform, because building more residences on an acre of land increases overall regional housing supply, thus lowering housing prices.

However, the Toolkit does not explain how much deregulation is appropriate, nor does it explain what (if anything)

²⁹ See Toolkit, *supra* note 1, at 16.

³⁰ *Id.* at 17.

³¹ *Id.* at 16.

³² *Id.* at 17.

³³ *Id.* See also Melanie Curry, *Governor Signs Bill to Reduce Parking Requirements Near Affordable Housing*, at <http://cal.streetsblog.org/2015/10/12/governor-brown-signs-bill-loosening-parking-requirements-for-affordable-housing/>.

³⁴ I have addressed this issue in more detail at Michael Lewyn, *What Would Coase Do?* (About Parking Regulation), 22 Fordham Envtl. L. Rev. 89 (2010).

³⁵ See Toolkit, *supra* note 1, at 17.

state governments should do if local governments fail to follow its advice. Perhaps the Toolkit's authors thought that such advice is unnecessary, and that cities might be motivated to follow its advice based on the clarity of its reasoning. But local politicians have strong incentives to oppose new housing. To the extent that new housing succeeds in holding down rents and housing costs, it makes the property of existing homeowners less valuable; thus, local governments elected by those homeowners have a strong incentive to constrict housing supply. And even if a region's citizens agree in principle that more housing is necessary, they may wish that housing to be built in other neighborhoods or municipalities, causing housing to be built only in a few neighborhoods with limited political power. In addition, the Toolkit does not instruct policymakers how to respond to the most common objections to new housing.³⁶

F. Accessory Dwelling Units

One way of adding new housing to a neighborhood is by allowing accessory dwelling units (ADUs)—that is, self-contained units located on the property of single-family homes.³⁷ The Toolkit endorses ADUs, because they increase citywide housing supply and allow young adults to live near their parents (or seniors to live near their children) while retaining some independence.³⁸ It adds that some cities have encouraged ADUs, and that the state of California has streamlined unspecified state regulations to promote ADU construction.³⁹ However, the Toolkit does not discuss possible objections to ADUs,⁴⁰ how policymakers should respond to those objections, or whether states should preempt anti-ADU local regulations.

G. Density Bonuses and Affordable Housing

In addition to endorsing increases in overall housing sup-

³⁶Cf. Michael Lewyn, *Against the Neighborhood Veto*, 44 Real Est. L.J. 82, 86–96 (2015) (discussing, and responding to, major objections to new housing).

³⁷See John Infranca, *Housing Changing Households: Regulatory Challenges for Micro-Units and Accessory Dwelling Units*, 25 Stan. L. & Policy Rev. 53, 54 (2014).

³⁸See Toolkit, *supra* note 1, at 17.

³⁹*Id.*

⁴⁰See Infranca, *supra* note 37, at 66.

ply, the Toolkit endorses policies focused on “affordable housing” (that is, housing affordable to lower-income persons).⁴¹ One such policy is density bonuses- that is, “granting projects in which the developer includes a certain number of affordable housing units the ability to construct a greater number of market rate units than would otherwise be allowed.”⁴²

At first glance, these policies may seem noncontroversial, because they allow a developer to increase both the lower-income housing supply and the market-rate housing supply. But density bonuses might create some long-term risks. First, a community that strongly desires lower-income housing may set artificially low density caps in order to encourage developers to build such housing. Second, the existence of density bonuses encourages affordable housing advocates to favor strict density regulation, because the stricter the regulations, the more incentive developers have to build lower-income housing to avoid those regulations. Thus, a policy of regulation combined with density bonuses is a less-than-ideal solution: it leads to more housing construction than regulation alone, but might nevertheless lead to less housing construction than more aggressive deregulation.

H. Inclusionary Zoning

Similarly, the Toolkit suggests “inclusionary zoning” in order to promote affordable housing. Inclusionary zoning “require[s] or incentivize developers to build below-market-rate homes . . . as part of the process of developing market-rate housing developments.”⁴³ Such policies have been implemented in nearly 500 local jurisdictions⁴⁴ and have

⁴¹See The Economic Times, *Affordable Housing*, at <http://economictimes.indiatimes.com/definition/affordable-housing> (defining term as housing “affordable by that segment of society whose income is below the median household income”).

⁴²See Toolkit, *supra* note 1, at 17.

⁴³Lisa A. Sturdevant, Separating Fact From Fiction to Design Effective Inclusionary Zoning Programs 1, at <http://media.wix.com/ugd/19cfbe9a68f933ed6c45bfb5f8b7d2ef49dda0.pdf>.

⁴⁴See Toolkit, *supra* note 1, at 18.

produced between 129,000 and 150,000 affordable housing units nationwide.⁴⁵

In theory, inclusionary zoning might reduce the overall housing supply, because a developer might lose revenue by building lower-priced affordable units and make up for that loss by either by building fewer overall units, or by raising rents and prices for market-rate units. Relevant scholarship is divided on whether this has in fact occurred.⁴⁶

Some studies suggest that inclusionary zoning is most effective where it avoids this problem by allowing developers to offset the costs of affordable housing in some way— for example, through the sort of density bonuses discussed above⁴⁷ or through tax incentives. For example, the Toolkit endorses Seattle’s program creating tax exemptions on new multifamily buildings that set aside 20–25% of their units for affordable housing.⁴⁸ Such tax subsidies are likely to be politically popular, but of course may cost cities tax revenue.

V. Conclusion

The Toolkit certainly points state and local governments in the right direction, by discussing the harmful results of zoning codes that limit housing supply and by suggesting a variety of reforms.

However, the Toolkit could have been more useful had it been a little more detailed. In particular, the Toolkit could have addressed the boundaries of state and local policymaking: if each locality’s citizens prefer that housing be built in another neighborhood or locality, nothing will get built. So how aggressive should a state be in encouraging municipalities to do what is good for the city or region as a whole? In addition, the Toolkit criticizes a variety of regulations, but fails to address the counterarguments justifying those regulations. Because the Toolkit fails to give policymakers the intellectual ammunition they need to defend deregulation, it is to some extent a missed opportunity.

⁴⁵See Sturdevant, *supra* note 43, at 2.

⁴⁶*Id.* at 7 (admitting that some studies have found such results, but asserting that more rigorous studies disagree).

⁴⁷*Id.* at 9.

⁴⁸See Toolkit, *supra* note 1, at 18. The Toolkit also mentions Philadelphia’s policy of tax abatements for new residential housing generally. *Id.* at 19.