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2021

Will Zoning Fix Itself?

Michael Lewyn

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ZONING AND LAND USE PLANNING

Will Zoning Fix Itself?

Michael Lewyn*

Most economists believe that cities must permit more housing to be built in order to curb rising rents and home prices.¹ Dense, multifamily housing is especially useful, because when many people live within walking distance of public transit, shops and jobs, more people can reach these destinations without driving, thus reducing carbon emissions and other forms of pollution.²

However, local zoning codes often prohibit any form of housing other than “single-family homes on substantial lots.”³ Even in renter-dominated cities, zoning often tightly restricts density: for example, Manhattan’s zoning is now so strict that 40 percent of its buildings could not be built under the current zoning code.⁴

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¹See Been, CITY NIMBYs, 33 J. Land Use & Envtl. L. 217, 227–29 (2018); Katherine Levine Einstein et al., Neighborhood Defenders 9 (2020).

²Id. at 10 (pointing out that 16 percent of U.S. greenhouse gas emissions come from cars and trucks); Been, CITY NIMBYs, 33 J. Land Use & Envtl. L. 217, 235.

³See Katherine Levine Einstein et al., Neighborhood Defenders 9, 11 (2020):

⁴See Quoc Trung Bui, 40 Percent of the Buildings in Manhattan Could Not Be Built Today, New York Times, May 20, 2016, at <https://www.nytimes.com/interactive/2016/05/19/upshot/forty-percent-of-manhattans-buildings-could-not-be-built-today.html>.

These regulations have generally become stricter over time,⁵ and are often especially strict in the most expensive housing markets.⁶ In theory, this problem is easily soluble—communities could upzone (that is, change their zoning codes to allow more housing) whenever housing prices got too high.⁷

But such upzoning is rare; when a landowner proposes to upzone a neighborhood to allow new housing, neighbors of the landowner will often fight the project.⁸ Even when neighbors do not completely quash new housing, they are often able to delay projects by persuading government to require additional studies before a zoning change is granted,⁹ or reduce housing supply by persuading politicians to allow fewer apartments than was originally planned.¹⁰ The “Not In My Back Yard” (NIMBY) activists who lobby against new housing are not always representative of their community, because commenters at zoning-related public meetings are disproportionately likely to be white homeowners.¹¹

So rents are higher than they need to be,¹² and our cities and suburbs are more car-choked than they need to be,¹³ because of zoning and NIMBYism. And because high housing

⁵See Been, CITY NIMBYs, 33 J. Land Use & Envtl. L. 217, 222; Elmendorf and Schanske, Auctioning the Upzone, 70 Case W. U. L. Rev. 513, 522 (2020) (suggesting that stricter zoning caused by increased home values in 1970s; as prices grew, homeowners became concerned about their investment, and were more willing to veto development which threatened that investment).

⁶See Katherine Levine Einstein et al., Neighborhood Defenders 9, 12 (2020).

⁷Id. at 12–13.

⁸Id. at 13–19.

⁹Id. at 17–18 (citing example).

¹⁰Id. at 25 (citing example).

¹¹Id. at 103–106.

¹²I note that NIMBYs claim that upzonings will not reduce housing costs— in other words, that the law of supply and demand is not connected to urban housing. I have criticized their arguments, both in the pages of this journal and in the public press. See Michael Lewyn, Deny, Deny, Deny, 44 Real Est. L.J. 558 (2016); Michael Lewyn, Supply and Demand Denialism, Planetizen, Feb. 10, 2015, at <https://www.planetizen.com/node/73728/supply-and-demand-denialism>.

¹³Similarly, some commentators defend NIMBYism by claiming that suburban sprawl is actually less environmentally harmful than develop-

costs exclude lower- and moderate-income households from affluent areas; zoning also contributes to racial segregation.¹⁴ Zoning restrictions in urban cores also make infrastructure more expensive for everyone, by pushing development to newly emerging suburbs where new infrastructure must be built to accommodate additional housing.¹⁵ And if those emerging suburbs are further away from public transit than existing neighborhoods,¹⁶ automobile traffic will increase, leading to more congestion and more pollution.¹⁷

So it might seem that there is no rational basis for the status quo. However, a recent article by law professor Christopher Serkin argues that NIMBY-dominated zoning is justifiable, because by slowing down neighborhood change, zoning protects homeowners' interest in relying on the status quo.¹⁸ Part I of this Article describes this part of Serkin's argument,¹⁹ and Part II and III critique it.

I. Defending the Indefensible

Serkin argues that even though a neighborhood's current

ment in already-dense urban places, I have responded to this argument as well. See Lewyn, *The Environmentalist Case for Sprawl- And Why It Fails*, 46 Real Est. L.J. 92 (2017); Michael Lewyn, *Is There An Environmentalist Case for Sprawl?*, December 14, 2016, at <https://www.planetizen.com/node/90248/there-environmentalist-case-sprawl>.

¹⁴See Been, *CITY NIMBYs*, 33 J. Land Use & Envtl. L. 217, 233-34 (numerous studies show positive relationship between restrictive zoning and racial and economic segregation).

¹⁵Serkin, *A Case for Zoning*, 96 Notre Dame L. Rev. 749, 765 (2020) (some infrastructure is cheaper in dense urban cores than in new suburbs; for example, the "more people served by a particular length of pipe, the lower the costs").

¹⁶See Adie Tomer, *Where The Jobs Are: Employer Access to Labor by Transit* 3-4, at <http://skilledwork.org/wp-content/uploads/2017/08/Brookings-Where-the-Jobs-Are.pdf> (in all regions of the United States, suburbs have less transit access than cities).

¹⁷See Serkin, *A Case for Zoning*, 96 Notre Dame L. Rev. 749, 775 (2020) (admitting that zoning causes congestion).

¹⁸See Part I *infra*.

¹⁹This is not Serkin's only defense of zoning; however, this article is focused on his defense of community character as a justification for zoning, rather than his other arguments. *Id.* at 785 (zoning protects property values), 794-98 (without zoning, homeowners would create zoning-like results through restrictive covenants). I hope to address his other arguments in an article to be written later this year.

property owners should not "be entitled to lock in the status quo"²⁰ they should be able to prevent change from happening "too quickly or dramatically"²¹ in order to "maintain stable community character."²² Why is such stability important? Because unwelcome change is a cost, and "therefore imposes burdens on in-place property owners in ways that zoning can reduce."²³ For example, residents of a community might expect X level of traffic when they move to the community, and increased density might lead to Y level of traffic, thus frustrating residents' expectations.²⁴ In other words, Serkin's argument for zoning is based on expectations: homeowners bought a house expecting one kind of neighborhood, and if the neighborhood changes, they have been unfairly surprised in some way.

Serkin admits that this sort of zoning punishes the general public in a wide variety of ways. In particular, he admits that by limiting the supply of housing, zoning makes housing more costly.²⁵ He also admits that if one neighborhood refuses to allow new development, the burden of growth is shifted to other neighborhoods.²⁶ If this occurs, some people will not be able to live in neighborhoods near their jobs, and will have to spend more time commuting from less convenient homes.²⁷ As a result, Americans excluded from pricy

²⁰Id. at 752-53.

²¹Id. at 753.

²²Id. at 771. Serkin's implicit assumption is that NIMBYism is successful in freezing community character. But to the extent that zoning makes a neighborhood more expensive, it of course changes community character even if not a single new house or apartment is built, by turning the neighborhood into a more upper-class area.

²³Id. at 772.

²⁴Id. at 773 ("People often choose where to live specifically because of the nature of the daily commute. Qualitative changes resulting from increased traffic can significantly interfere with those expectations.") Similarly, change might lead to overcrowded schools, id. at 772, or lead to aesthetic change that threatens "the look and feel of a place." Id. at 774.

²⁵Id. at 767 (admitting that zoning "is at the heart of the affordability crisis.").

²⁶Id. at 775 ("Preserving community character can push the burden of growth onto other places.").

²⁷Id.

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close-in neighborhoods will drive more,²⁸ which in turn means that they will create more traffic congestion, greenhouse gas emissions and other forms of pollution.

Thus, Serkin is sensitive to the costs of zoning. But rather than seeking to eliminate NIMBY power, he proposes to split the difference. In particular, he suggests that zoning should support slow neighborhood change, to give "property owners time to allow their expectations—their reliance on the community character—to change gradually and thereby reduces the disruption that comes from changes to a community."²⁹

Serkin also admits that when housing prices "grow to exorbitant levels,"³⁰ zoning generates "windfalls, which come at the expense of excluded outsiders."³¹ Thus, when homeowners' profits are "too large, more aggressive efforts to increase supply should be appropriate."³²

It seems to me that Serkin's effort to balance homeowner desires and broader social needs is based on trust: trust that most municipalities will allow just enough housing to control costs, and trust that when rents get out of control, municipalities will change their zoning laws to accommodate new supply. As will be shown below, neither of these propositions is supported by the events of the past decade or two.

II. Does Gradualism Work?

In recent years, housing supply has grown in the U.S.—but grown too slowly to hold down rents. For example, in San Francisco, the leading city in the second most expensive metropolitan area in the United States,³³ only 5.4 percent of

²⁸Id. (if people forced by zoning to move further from jobs, this will lead to "increasing vehicle miles traveled, commute times, and traffic burdens on everyone else.").

²⁹Id. at 784.

³⁰Id. at 785.

³¹Id. at 785–86.

³²Id. at 786.

³³See Geoff Boeing and Paul Waddell, *New Insights Into Rental Housing Markets Across the United States: Web Scraping and Analyzing Craigslist Market Listings 14–15*, at https://www.researchgate.net/publication/306400541_New_Insights_into_Rental_Housing_Markets_Across_the_United_States_Web_Scraping_and_Analyzing_Craigslist_Rental_Listings (median regional rent per square foot tied for second highest in the

housing units were built after 2010.³⁴ The housing stock grew even more slowly in most of San Francisco's suburbs.³⁵ By contrast, demand for housing appears to have increased more rapidly. Regional population increased by 9 percent between 2010 and 2019,³⁶ while regional employment increased by over 20 percent between 2010 and 2019.³⁷ These figures may actually understate the growth in demand in San Francisco, because some people who might have preferred that city or its suburbs might have chosen another region in order to avoid the region's high rents. Not surprisingly, in the city of San Francisco, rents nearly doubled between 2000 and 2017³⁸—and one suburban county is even more expensive.³⁹

Similarly, in New York, the most expensive rental market

U.S.). The city of San Francisco's rents are higher than those of some but not all inner ring suburban counties. See United States Census Bureau, American Community Survey, Table B25031, at data.census.gov (median gross rent for a one bedroom apartment higher in San Mateo County but lower in Marin, Contra Costa and Alameda Counties).

³⁴See United States Census Bureau, American Community Survey, Table CP04, at data.census.gov ("ACS").

³⁵Id. (similar percentages in suburban counties were 4.3 percent in Contra Costa County, 4.2 percent in San Mateo County, and 2.1 percent in Marin County).

³⁶See Sarah Janssen, ed., *The World Almanac and Book of Facts 2021* at 622.

³⁷See Bureau of Labor Statistics, Databases, Tables & Calculators by Subject, at <https://data.bls.gov/pdq/SurveyOutputServlet> (labor force data for San Francisco-Oakland-Hayward, CA Metropolitan Statistical Area) (2.069 people employed in region in January 2010, while 2.54 million were employed in December 2019).

³⁸See Paragon Commercial Brokerages, *Compass Multi-Unit Res-Income Report*, at <https://www.bayareamarketreports.com/trend/bay-area-apartment-building-market> (rent rose from \$1874 in 2000 to \$3326 in 2017). By contrast, rents nationwide have grown by a little over 30 percent. See Pew Charitable Trusts, *American Families Face a Growing Rent Burden* 6–7, at <https://www.pewtrusts.org/-/media/assets/2018/04/rent-burden-report-v2.pdf>.

³⁹See ACS, United States Census Bureau, American Community Survey, Table CP04, Table B25031 at data.census.gov ("ACS") (median gross rent for a one bedroom apartment higher in San Mateo County but lower in Marin, Contra Costa and Alameda Counties). Cf. Metropolitan Transportation Commission, *Nine Bay Area Counties*, at <https://mtc.ca.gov/about-mtc/what-mtc/nine-bay-area-counties> (listing counties in region).

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in the United States,⁴⁰ housing supply grew at an equally glacial pace. In Manhattan, only 3.7 percent of housing units were built after 2010.⁴¹ New York's suburbs were even stingier: for example, in Long Island's Nassau County, only 2.4 percent of housing was built after 2010, and in Westchester County north of the city, only 3 percent of housing was built after 2010.⁴² Not surprisingly, rents rose: adjusted for inflation, Manhattan rents rose by 22.3 percent between 2006 and 2016, and by 20 percent in Brooklyn.⁴³ Since 1970, real housing prices have doubled in New York City.⁴⁴

Although New York and San Francisco are extreme cases, housing construction has slowed down in recent decades throughout the United States. During the 1970s, 17 million housing units were completed,⁴⁵ or roughly one unit for every 12 U.S. residents.⁴⁶ During the 2000s, about 15.6 million

⁴⁰ See Boeing and Waddell, *New Insights Into Rental Housing Markets Across the United States: Web Scraping and Analyzing Craigslist Market Listings* 14–15, at https://www.researchgate.net/publication/306400541_New_Insights_into_Rental_Housing_Markets_Across_the_United_States_Web_Scraping_and_Analyzing_Craigslist_Rental_Listings (New York market had highest rent per square foot).

⁴¹ See ACS, United States Census Bureau, *American Community Survey*, Table CP04, at data.census.gov ("ACS").

⁴² Id. New York's urban outer boroughs were equally stingy. The post-2010 percentage of housing stock ranged from 2.6 percent (Staten Island) to 4.9 percent (Brooklyn).

⁴³ See NYU Furman Center, *State of Renters and Their Homes* 24, at http://furmancenter.org/files/sotc/SOC_2017_PART1_Citywide_Renters.pdf

⁴⁴ See Michael Hankinson, *When Do Renters Behave Like Homeowners?*, *High Rent, Price Anxiety, and NIMBYism* 2, at https://www.jchs.harvard.edu/sites/default/files/harvard_jchs_hankinson_2017_renters_behave_like_homeowners_0.pdf (working paper for Joint Center for Housing Studies of Harvard University).

⁴⁵ See United States Census Bureau, *New Residential Construction*, at https://www.census.gov/construction/nrc/historical_data/index.html ("Housing Units Completed" table) ("New Residential").

⁴⁶ In 1970, the U.S. had 203.3 million residents. See Janssen, *The World Almanac and Book of Facts* 2021 at 613.

units were completed,⁴⁷ or one for every 19 residents.⁴⁸ During the 2010s, only 10.8 million units were completed,⁴⁹ or one for every 28 residents.⁵⁰ Even at the peak of the late 2010s economic recovery, only 1.25 million units were completed⁵¹—below the average year during the 1970s or the 2000s.⁵² And as supply has dwindled, housing costs have increased: between 1960 and 2014, median rents increased by 64 percent in real terms nationwide, while real household incomes increased by only 18 percent.⁵³

It could be argued that the various economic downturns of the 21st century were primarily responsible for the decline of housing construction—but if this was true, construction of

⁴⁷See United States Census Bureau, New Residential Construction, at https://www.census.gov/construction/nrc/historical_data/index.html (“Housing Units Completed” table) (“New Residential”).

⁴⁸See Janssen, *The World Almanac and Book of Facts 2021* at 613 (U.S. had 281.4 residents in 2000).

⁴⁹See United States Census Bureau, New Residential Construction, at https://www.census.gov/construction/nrc/historical_data/index.html (“Housing Units Completed” table) (“New Residential”).

⁵⁰See Janssen, *The World Almanac and Book of Facts 2021* at 613 (U.S. had 308.7 residents in 2010).

⁵¹See United States Census Bureau, New Residential Construction, at https://www.census.gov/construction/nrc/historical_data/index.html (“Housing Units Completed” table) (“New Residential”) (2019 data).

⁵²See *supra* notes 45–48 and accompanying text (1.7 million units completed in average year during the 1970s, and over 1.5 million completed in average year during the 2000s).

⁵³See Andrew Woo, *How Have Rents Changed Since 1960?*, <https://www.apartmentlist.com/research/rent-growth-since-1960>. Purchase prices for houses have also increased rapidly. Between 1960 and 2020, the cost of the median house has increased from \$92,000 to \$298,600—a 223 percent increase. See Janssen, *The World Almanac and Book of Facts 2021* at 108. Cf. United States Census Bureau, *Historical Income Tables-Households*, at <https://www.census.gov/data/tables/time-series/demo/income-poverty/historical-income-households.html> (Table H-6) (during this period, median household incomes increased from \$29,943 to \$68,703, a 129 percent increase). However, homeowners’ pain has been mitigated by declining interest rates, which have allowed homeowners to pay less for their homes than rising purchase prices would suggest. See Kevin Graham, *Historical Mortgage Rates from the 1970s to 2021: Averages and Trends For 30-Year Fixed-Rate Mortgages*, Feb. 12, 2021, Rocket Mortgage, at <https://www.rocketmortgage.com/learn/historical-mortgage-rates-30-year-fixed> (describing trends).

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multifamily housing (which zoning often disfavors)⁵⁴ would have kept up with single-family construction. In fact, construction of multifamily housing decreased far more rapidly than construction of single-family houses. While construction of single-family structures decreased by about 16 percent between 1973 and 2019,⁵⁵ construction of duplexes and other structures with two to four units decreased by over 90 percent,⁵⁶ and construction of structures with five or more units decreased by 55 percent.⁵⁷

It could be argued that because U.S. population growth has slowed,⁵⁸ demand for housing has slowed as well. But as families have become smaller, U.S. household sizes have shrunk, from 3.29 persons per household in 1960 to 2.53 in 2020.⁵⁹ As a result, even though the American population grew by 83 percent between 1960 and 2020,⁶⁰ the number of households increased by 141 percent, from 53 million to 128 million.⁶¹ Moreover,⁶² demand for rental housing has increased more rapidly than demand for home ownership in

⁵⁴See Katherine Levine Einstein et al., *Neighborhood Defenders* 9, 11 (2020) and accompanying text.

⁵⁵See United States Census Bureau, *New Residential Construction*, at https://www.census.gov/construction/nrc/historical_data/index.html (“Housing Units Completed” table). (“New Residential”) (1.197 million completions in 1973, 903 million in 2019).

⁵⁶Id. (123,500 completions in 1973, 9000 in 2019, and no completion of over 11,000 units in any year after 2010).

⁵⁷Id. (779,800 completions in 1973, 342,900 in 2010). 1970s construction of such units averaged about 509,000 per year—higher than in any year since 1986.

⁵⁸Cf. Janssen, *The World Almanac and Book of Facts* 2021 at 199 (birth rate per 1000 people decreased from 23.7 in 1960 to 16.7 in 1990) and 613 (population increased from 151.3 million to 226.5 million between 1950 and 1980, or roughly 50 percent; by contrast, between 1980 and 2010, population increased by another 82.2 million, or roughly 36 percent).

⁵⁹See Statista, *Average number of people per household in United States from 1960 to 2020*, at <https://www.statista.com/statistics/183648/average-size-of-households-in-the-us/#:text=The%20population%20of%20the%20United,%2C%20are%20two%2Dperson%20households>.

⁶⁰See U.S. Population by Year at <https://www.multpl.com/united-states-population/table/by-year> (180.67 million in 1960, 330.66 million in 2020).

⁶¹See Statista, *Average number of people per household in United States from 1960 to 2020*, at <https://www.statista.com/statistics/183648/av>

recent years. The national home ownership rate declined from 67.2 percent in 2000 to 63.4 percent in 2015.⁶³

Serkin's defense of zoning is based on the idea that local governments can be trusted to allow just enough change to keep housing prices stable. But in fact, this does not seem to have been the case in recent decades.

III. Can Zoning Correct Its Own Excesses?

As noted above, Serkin admits that when rents reach New York or San Francisco levels, local governments should allow more housing.⁶⁴ This could happen if zoning was self-correcting—that is, if local governments responded to rising rents by upzoning aggressively enough to bring housing costs down to more normal levels. Some evidence suggests that this is possible: for example, in 2018 the Minneapolis City Council voted to allow four-unit dwellings throughout the city, and to upzone some major streets as well.⁶⁵ Similarly, in 2019 Oregon began to require cities to allow four-unit dwellings in areas zoned for single-family dwellings, and a few other cities allow accessory dwelling units next to houses.⁶⁶ It is too soon, however, to know whether these reforms will significantly increase housing supply.⁶⁷

But evidence from the most expensive cities suggests that rather than leading to saner zoning, high rents actually increase NIMBYism. In particular, a study by Harvard

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⁶²See Janssen, *The World Almanac and Book of Facts 2021* at 199 (birth rate per 1000 people decreased from 23.7 in 1960 to 16.7 in 1990).

⁶³Id. at 108.

⁶⁴See *supra* notes 30–32 and accompanying text.

⁶⁵See Elmendorf and Schanske, *Auctioning the Upzone*, 70 Case W. U. L. Rev. 513, 517 (2020).

⁶⁶Id. Cf. Daniel Herriges, *Will 2021 Be The Year Zoning Reform Reaches Critical Mass?*, Strong Towns, Mar. 4, 2021, at https://www.strongtowns.org/journal/2021/3/4/will-2021-be-the-year-zoning-reform-reaches-critical-mass?utm_content=bufferb1726&utm_medium=social&utm_source=facebook.com&utm_campaign=buffer&fbclid=IwAR3-Hu7zm_FT8h2hHGvSgtKMF5jj15iuS6fRas4kY2GAPW9BfUOcAwU27ko (describing similar proposals in other cities).

⁶⁷Elmendorf and Schanske note, however that no city has significantly upzoned low-density residential neighborhoods. Id. at 517–18.

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University fellow Michael Hankinson shows that residents of high-cost cities (especially renters) are far more pro-NIMBY than other Americans. The Hankinson study was based on numerous surveys of renters and homeowners. One such survey asked a national sample of homeowners and renters about their support for new residential buildings near their homes. The homeowners were significantly less likely to support a new building within 1/8 mile of their homes than a similar building two miles away.⁶⁸ By contrast, renters were equally supportive of both types of buildings.⁶⁹

But the author of the study then divided the results by city. Among renters in the most expensive quintile of cities (that is, those with average rent over \$2247)⁷⁰ the study found that renters, like homeowners, were much less likely to support housing within 1/8 mile of their homes than similar buildings two miles away.⁷¹ By contrast, in the least expensive cities, renters were actually more likely to support nearby housing than faraway housing.⁷²

A survey of residents of notoriously costly San Francisco⁷³ revealed more extreme results. The survey asked respondents whether they would support a ban on most market-

⁶⁸ See Hankinson, When Do Renters Behave Like Homeowners?, High Rent, Price Anxiety, and NIMBYism 12, at https://www.jchs.harvard.edu/sites/default/files/harvard_jchs_hankinson_2017_renters_behave_like_homeowners_0.pdf (among homeowners, "market-rate housing experiences an 8 point drop in support while affordable housing has a 12 points drop in support, compared to identical buildings proposed for 2 miles away").

⁶⁹ Id.
⁷⁰ Id. at 14.

⁷¹ Id. at 13 (noting that among renters, there is a "12 percent decrease in support" for buildings 1/8 mile away, compared to buildings 2 miles away). Such NIMBYism was limited to market-rate housing; renters were just as likely to support lower-income housing near them as lower-income housing two miles away. Id.

⁷² Id. at 14.

⁷³ See Geoff Boeing and Paul Waddell, New Insights Into Rental Housing Markets Across the United States: Web Scraping and Analyzing Craigslist Market Listings 14–15, at https://www.researchgate.net/publication/306400541_New_Insights_into_Rental_Housing_Markets_Across_the_United_States_Web_Scraping_and_Analyzing_Craigslist_Rental_Listings_and_accompanying_text (San Francisco area tied for second most expensive region in United States).

rate housing within their neighborhood.⁷⁴ 62 percent of renters supported the ban, as opposed to only 42 percent of homeowners.⁷⁵ Even among renters who supported a citywide increase in housing, 52 percent favored this proposal.⁷⁶

In sum, where rents are high, renters become NIMBYs too. Why? One clue is that renters, unlike homeowners, are far more likely to support lower-income housing (also known as “affordable” housing) in their immediate neighborhoods than market-rate housing.⁷⁷ Renters’ willingness to accept low-income housing suggests that perhaps renter NIMBYism is driven less by abstract concerns about community character than about fears of displacement by more affluent tenants. Even though renters may believe in the abstract that more housing equals lower rents, the same renters may also believe that a new building in their own neighborhood (a) will make the neighborhood more attractive, and thus increase local rents⁷⁸ and/or b) will be such a miniscule addi-

⁷⁴See Hankinson, When Do Renters Behave Like Homeowners?, High Rent, Price Anxiety, and NIMBYism 16, at https://www.ichs.harvard.edu/sites/default/files/harvard_ichs_hankinson_2017_renters_behave_like_homeowners_0.pdf. In particular, the survey asked respondents whether they would support a ballot proposition similar to Proposition I, a local initiative that allowed new housing in San Francisco’s Mission District only if it “a) consisted of fewer than 6 units or b) were composed entirely of units set aside for low- and middle-income residents.” Id. at 15.

⁷⁵Id. By contrast, San Francisco renters overwhelmingly supported new housing in other people’s neighborhoods. 84 percent of renters (and 73 percent of homeowners) supported a 10 percent increase in citywide housing supply. Id.

⁷⁶Id. at 16.

⁷⁷Id. at 11 (homeowners slightly more hostile towards affordable housing; however, proximity to housing affects their views far more than difference between market-rate and affordable housing), 12 (renters more likely to support affordable housing nationwide), 14 (renters much less likely to support market-rate housing in high-cost cities than they are to support affordable housing; this is less true in less expensive cities).

⁷⁸Id. at 4 (“the new building may signal to other developers that your neighborhood is an undervalued investment. Your landlord may see the new building and consider renovating her own, leading to your eviction. In the end, while the new condominium may marginally ease prices citywide, it may also attract demand locally, driving a spatially localized rise in rent.”).

tion to the citywide housing supply that it will not reduce citywide rents.⁷⁹

It logically follows that rather than being self-correcting, zoning risks creating a vicious circle: strict zoning causes rising rents, causing a widespread fear of gentrification and displacement, causing even stricter zoning, causing even more rent increases.

This view is also supported by recent political trends in expensive New York City,⁸⁰ where political leaders now seem hostile to market-rate housing. For example, Scott Stringer, a leading candidate for mayor,⁸¹ proposes to require that 25 percent of all housing be affordable to lower-income renters⁸² in any development with over 10 housing units, even if the unit was authorized by existing zoning.⁸³ Assuming that these "affordable" units would be unprofitable for a developer to build, a developer subject to this policy would have two options: either raise rents on other tenants (which would make housing less affordable for most tenants) or have lower profits. The latter scenario is no doubt unappealing to developers, who as a result may choose to (a) build in places with more lenient laws than New York or (b) choose to invest

⁷⁹ *Id.* This conclusion is also supported by the fact that renters who were more anxious about rising rents tended to be more likely to oppose market-rate housing. *Id.* at 14.

⁸⁰ See Boeing and Waddell, *New Insights Into Rental Housing Markets Across the United States: Web Scraping and Analyzing Craigslist Market Listings* 14–15, at https://www.researchgate.net/publication/306400541_New_Insights_into_Rental_Housing_Markets_Across_the_United_States_Web_Scraping_and_Analyzing_Craigslist_Rental_Listings; and accompanying text.

⁸¹ See Sally Goldenberg, *Yang tops latest poll in mayor's race*, Politico, Feb. 10, 2021, at <https://www.politico.com/states/new-york/albany/story/2021/02/10/yang-tops-latest-poll-in-mayors-race-1362601> (Stringer one of only three candidates supported by more than 8 percent of voters).

⁸² In particular, he proposes that rents be so low that someone making 60 percent of median income pay no more than 30 percent of income in rent. See Samar Kurshid, *Scott Stringer is Putting Affordable Housing at the Center of His Mayoral Pitch-What's His Vision?*, Gotham Gazette, September 22, 2020, at <https://www.gothamgazette.com/city/9760-scott-stringer-affordable-housing-mayor-campaign-2021>.

⁸³ *Id.*

their capital in other ways.⁸⁴ Thus, Stringer's proposal is likely to reduce housing supply.⁸⁵ The Democratic front-runner, Andrew Yang,⁸⁶ is not as hostile to new market-rate housing as Stringer, but does not wish to be soon as promoting such housing either: his web page says that he favors "expanding our affordable housing stock"⁸⁷ but does not mention upzoning or other policies that would increase the supply of market-rate housing.⁸⁸

If New York's mayor is somehow incapacitated, the next officeholder in line is the Public Advocate.⁸⁹ Public Advocate Jumaane Williams, like Stringer, supports making upzonings more difficult and time-consuming. In particular, he proposes that applications for significant upzonings require a "racial disparity study."⁹⁰ This study would have to include a wide variety of data about the area to be rezoned, such as

⁸⁴ Admittedly, it is unclear to what extent Stringer's proposal would reduce developer profits. However, the Urban Land Institute claims that if a city requires a developer to build affordable units, development is usually profitable only if the city provides other incentives for development, such as subsidies or relaxation of other regulations. See Urban Land Institute, the Economics of Inclusionary Development IX at <https://uli.org/wp-content/uploads/ULI-Documents/Economics-of-Inclusionary-Zoning.pdf>.

⁸⁵ Cf. Joe Cortright, Inclusionary Zoning: Portland's Wile E. Coyote moment has arrived, City Observatory, March 9, 2021, at <https://cityobservatory.org/inclusionary-zoning-portlands-wile-e-coyote-moment-has-arrived/> (suggesting that similar policy in Portland has led to reduced housing construction).

⁸⁶ See Goldenberg, Yang tops latest poll in mayor's race, Politico, Feb. 10, 2021, at <https://www.politico.com/states/new-york/albany/story/2021/02/10/yang-tops-latest-poll-in-mayors-race-1362601>.

⁸⁷ See Yang for New York, An Affordable City, at <https://www.yangfornewyork.com/policies/an-affordable-city>.

⁸⁸ With one possible exception: the page says Yang favors "co-living and allowing for single-room occupancy (SRO) living spaces." Id. It is unclear, however, whether he expects the private market to produce such housing, or whether he favors subsidizing or mandating such housing.

⁸⁹ See Jumanne D. Williams, Duties of the Public Advocate Office, at <https://www.pubadvocate.nyc.gov/about#duties-of-the-office/>.

⁹⁰ See Kathryn Brenzel, City Council bill demands racial disparity study for some rezonings, The Real Deal, Jan. 8, 2021, at <https://therealdeal.com/2021/01/08/city-council-bill-demands-racial-disparity-study-for-some-rezonings/>. The bill would extend this requirement to upzonings affecting over 50,000 square feet. Id.

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"eviction filing rates, median household incomes, and median rent and home prices within a half-mile radius of the project area."⁹¹ The study would have to project rents for all residential units created by the rezoning, and would have to identify how the petitioner would mitigate any "identified disparities or displacement risk."⁹²

This proposal would build on New York's State Environmental Quality Review Act (SEQRA), which creates an environmental review process for major rezonings.⁹³ Under SEQRA, an environmental impact statement (EIS) is required whenever a rezoning would "add a significant number of businesses or housing units."⁹⁴ The environmental review process sometimes takes years to complete, because even after an initial EIS is completed, an opponent of a project can challenge the EIS as inadequate, call for a supplemental EIS, or even challenge the supplemental EIS as inadequate.⁹⁵ Such delay makes development more expensive, because a developer will often be paying interest on loans during the environmental review process.⁹⁶ If the city added a "racial review process" to environmental review, NIMBY opponents of new housing would be able to spend years challenging developers' racial disparity studies as inadequate, just as they currently challenge environmental impact statements as inadequate. A leading supporter of the proposal admits as much, stating that it would "inject more of the community's voice in the city's environmental review process"⁹⁷—in other words, it would give NIMBYs more power to delay projects. Although many rezonings would eventually

⁹¹Id.

⁹²Id.

⁹³See Lewyn, How Environmental Review Can Generate Car-Induced Pollution: A Case Study, 13 Sustainable Dev. L. & Pol'y 16, 16–17 (describing SEQRA generally), 17–18 (environmental impact statement required whenever rezoning significantly affects population or neighborhood character) (2014).

⁹⁴Id. at 18.

⁹⁵Id. at 19.

⁹⁶Id.

⁹⁷Sadeef Ali Kully, Council Could Force the City to Study the Racial Impact of Rezoning, City Limits, Dec. 4, 2019, at <https://citylimits.org/2019/12/04/council-could-force-the-city-to-study-the-racial-impact-of-rezonings/>.

survive such “racial review,” it would nevertheless make housing development more time-consuming and thus more costly.⁹⁸

In sum, zoning is not self-correcting: some of the most expensive cities seem to be stuck in a vicious circle, because high rents have created public concern about gentrification and displacement, which in turn has accelerated NIMBYism, which in turn is likely to lead to even slower growth in housing supply, causing rents to continue to rise in the long run.⁹⁹ Thus, the current zoning system might not be able to accommodate consumer demand for less expensive housing.

IV. Conclusion

Serkin correctly notes that zoning benefits homeowners in neighborhoods with strict zoning but creates a variety of negative side effects such as higher housing costs and longer commutes. But rather than endorsing radical zoning reform, he suggests that American zoning can adequately balance homeowners’ interests against the public interest in more

⁹⁸The major argument for racial impact studies is that upzonings lead to gentrification which leads to displacement of Blacks and/or other people of color. See Erik Enquist, Dubious gentrification study will backfire on New York City, *The Real Deal*, Feb. 26, 2021, at <https://therealdeal.com/2021/02/26/dubious-gentrification-study-will-backfire-on-new-york-city/>. In particular, supporters of the bill rely heavily on a study by Churches United for Fair Housing, claiming that after a 2005 upzoning, Latino population in two northern Brooklyn neighborhoods declined. *Id.* But this study is incomplete, for two reasons. First, Latino population had been falling in those neighborhoods since 1990, long before the rezoning. *Id.* Second, other Brooklyn neighborhoods that did not upzone also became whiter. *Id.* Moreover, a variety of scholarship shows that construction of new housing actually reduces demand for other nearby housing, making displacement unlikely. See Kate Pennington, Does Building New Housing Cause Displacement? The Supply and Demand Effects of Construction in San Francisco 6, at https://www.dropbox.com/s/oplls6utgf7z6ih/Pennington_JMP.pdf?dl=0 (concluding that “building new market rate housing actually benefits incumbent tenants by reducing rents, evictions, and the risk of moves to poorer zipcodes” and citing other studies with similar results).

⁹⁹After reading this, one might ask: what is my alternative? In a book published some years ago, I made the following rather utopian proposal: Where home prices reach a certain level, government “may no longer regulate the density of housing in areas zoned for any housing at all.” Michael Lewyn, *Government Intervention and Suburban Sprawl* 84 (2017) (emphasis omitted). I also address a variety of more modest reforms that other commentators have proposed, as well as arguments against this proposal. *Id.* at 85–93.

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abundant, cheaper housing. It seems to me, however, that this is more easily said than done: when zoning causes housing costs to spiral out of control, the public is actually less likely to support new housing than in a more affordable city.