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PRACTICE ON THE NEW FRONTIER

Reconsidering Zoning: Expanding an American Land-Use Frontier

By Jerold S. Kayden

This article intends to provoke a discussion about how the venerable tool of zoning may be adapted to create better-planned, better-designed American cities.

Consider it a menu triggering an appetite for new approaches, a template for seeing zoning as a surprisingly flexible implementation tool with a time-honored pedigree. A comprehensive regulatory tool covering all land within a territory, zoning has had a significant impact, for better and worse, on the design and quality of the built environment. With the ease of empirical, retrospective judgment, it is all too easy to criticize many of its outcomes, whether it be single-use, sterile districts or monolithic, faceless structures. But that same judgment demonstrates the power of zoning to influence at wholesale, rather than retail, scales the look, feel, and content of the built environment. Indeed, from the progressive planners of the early decades of the 20th century to New York City's zoning innovators of the late 1960s and early 1970s to the New Urbanists of today, individuals have commandeered this technique and wielded its power to advance their own design visions, with evident demonstrations of impact and even success.

This article identifies and examines significant themes that dominate, or should dominate, current debates about zoning, including the following:

- Who's got the power?
- Rule versus discretion
- To prescribe or not to prescribe: That is the question
- The "generic prescription": the emergence of form-based zoning
- Outcomes, not inputs
- Making the city beautiful
- Less is more
- The halfway house of market-based zoning
- Getting to yes–or at least something
- Embracing social equity
- How far is too far?

The article also explores specific technical innovations that illuminate the thematic debates. At times, arguments and techniques are presented in the extreme, in their purest form, leading the practical reader to shake her head at the apparent disconnect between purity and reality. Such cognitive dissonance is intended to stretch, temporarily, the thinking envelope, before the practical reader snaps back to everyday attention. Zoning philosophy, terminology, and technique are interwoven throughout the article, with newer techniques highlighted in boldface treatment.

Settling On a Baseline Definition

At a time of heightened, sometimes overblown, rhetoric about zoning, the starting point for this article is an agreed-upon, baseline definition to anchor further inquiry. Zoning controls what takes place on privately, sometimes publicly, owned land, principally through its trio of use (violin), shape (viola), and bulk (cello) restrictions on development. Use means residential, commercial, industrial, and so forth. Shape refers to the two- and three-dimensional configuration of development, on land and in the air. Bulk means the amount of building that goes on a unit of land. The precise approaches that zoning employs to control use, shape, and bulk, however, are left to the inventiveness of the implementer. Floor-area ratios replaced height and setback criteria as a primary dictator of commercial densities, for example. Performance standards suggested a qualitative approach different from absolute, quantitative rules. Yet, each of these easily falls into what is called zoning.

WELCOME TO *ZONING PRACTICE*

On the 20th anniversary of the inception of *Zoning News*, the American Planning Association has chosen to redesign this monthly publication to serve its readership better and inject some new excitement into the entire subject of zoning. To celebrate this new beginning, we are inaugurating a new periodic feature called "Theory & Practice" (see box on page 3). Our first refereed article is a paper first presented by the author at a conference for the planning directors of the 25 largest U.S. cities, held in October 2003 at the Harvard Design School, and co-sponsored by Harvard University, the Lincoln Institute of Land Policy, and APA. Revised and submitted specially for this issue of *Zoning Practice*, it provides a fresh, provocative look at zoning's potentials while challenging common assumptions about its limitations. We offer this special, longer edition of *Zoning Practice* as an introduction to the many topics we hope will excite you in coming months.

—The Editors

The reason to rehearse the obvious, then – that zoning controls use, shape, and bulk – is to assess whether planners need to think outside the box we label zoning to secure a better built environment, or whether tweaks or jolts to the existing zoning framework are adequate to the task. To some, the trio structure is outmoded, even retrograde, and they argue instead for a whole new approach and name for how planners should regulate land use. To others, however, the inadequacies of zoning rest more on problems with the music the trio has been given to play, rather than on the instrumental structure of the trio itself. Keep in mind that the trio can play Mozart, Beethoven, Stravinsky, or Stockhausen. Those knowledgeable about music understand just how different the outcome can be, using the same instrumental structure. Those familiar with the metaphor of architecture as frozen music can smile still more.

THEORY & PRACTICE

In this issue, *Zoning Practice* introduces a new dimension to our efforts to bring readers the newest and best material on zoning. Periodically, we shall publish refereed articles that have undergone review by selected panels of zoning experts in order to bring the best academic knowledge of zoning to bear on the most practical issues facing zoning practitioners. Although it may emerge in time, we have established no firm schedule for the frequency or timing of publication of these refereed articles. Our foremost goal is to marry academic wisdom with practical issues in order to enhance both. We welcome contributions and inquiries from potential authors, while we will also continue, in most issues, to publish the highly practical, non-refereed articles that have long been our trademark.

WHO'S GOT THE POWER?

An initial question for cities is whether they can innovate with new zoning approaches on their own authority, or whether they need express authorization in advance from their state government. In legal terms, the issue is whether the city is located in a Dillon's Rule state (named after a judge who wrote about the subject) or a home-rule state. In some cases, the question is whether the city has its own charter (San Francisco, for example). Within a Dillon's Rule state (Virginia, for example), the city must find within state legislation, normally the state's zoning act, language that expressly empowers the city to do the type of zoning it wants to do. Thus, a certain statutory provision will state that local governments may employ incentive zoning or planned unit developments, and cities follow that express provision to the letter. In home-rule states, however, local governments may think up and enact zoning techniques on their own authority, even in the absence of express state legislative language, as long as there is no state language expressly or implicitly forbidding what they seek to do.

Recent scholarship has suggested that Dillon's Rule states do not restrict local government as much as commonly believed, and home-rule states do not liberate as much as commonly hoped. Nonetheless, in theory, a planning department has more leeway to innovate within a home-rule rather than within a Dillon's Rule state. In practice, advice given by in-house planning department counsel or a city's legal department is often overly conservative, urging planners within either a Dillon's or home-rule state to hew closely to state legislation and not do anything unless expressly authorized. Since such lawyers, especially those outside the planning department, are more concerned with law, and less interested in policy, they have little to gain and much to lose by going out on the legal innovation limb. From a purely legal point of view, indeed, it might be easiest to say no, and all that suffers is innovation and the potential for a better way of securing an improved built environment. This serves as a reminder, then, that legal advice may be overly restrictive over a city's ability to innovate in the zoning area, one of the primary subjects of this article.

RULE VERSUS DISCRETION

A broad theoretical debate with deeply practical consequences is whether zoning should be grounded within a rule-based or discretion-based framework. Rule-based zoning, also known as "matter-of-right" or "as-of-right" zoning, announces by text and map what an owner can and cannot do with her parcel. To the extent they are necessary, approvals are ministerial, delivered by personnel often outside the planning department who determine only that the proposed development meets the express terms of the text and map. The only possibility for change is a zoning amendment or variance. Discretion-based zoning, on the other hand, vests case-by-case, substantive decision-making power in the hands of city planning and zoning officials and staff, who determine, proposal by proposal, and on the individual merits, what an owner may do.

Interestingly, this debate originally represented the key differentiating factor between the two great planning regulatory regimes in the world: the German/American zoning scheme (rule-based) and the British town planning scheme (discretion-based). Under England's Town and Country Planning Act of 1947, and successor acts, applicants need to obtain "planning permission" for most development activities, whereas standard American zoning states the rules in the abstract and in advance. Today, the British system has moved toward the as-of-right, rule-based model, while the American model has incorporated an enormous amount of discretion. They meet somewhere in the middle of the pond.

A review of American zoning shows that no home-grown system is purely rule-based or discretionary. Sometimes, smaller projects and other discrete categories escape discretionary review. Sometimes, an ordinance on its face may appear rule-based, but in fact no one can possibly build under the rules, so discretionary triggers are consistently pulled. Sometimes, the variance-granting body gives out so many variances, often illegally if one takes seriously the legal standard for a variance, that their aggregation begins to subvert the basic plan suggested by the otherwise as-of-right zoning.

What are the generic arguments for and against rule or discretion? The principal argument for the rule-based approach is that it provides predictability and certainty for developers and lenders who, over all else, prize these virtues unless the developer predictably and certainly cannot develop anything. Indeed, a predictable and certain zoning district allowing

de minimus development is not always treasured highly by those owning property within it. A second argument is that it is easier and cheaper to administer a rule-based system, since high-level administrators with expertise are unnecessary. Third, a rule-based system is less susceptible to the corruption of lobbying and politics, not in the sense of illegal bribery, but in the sense of allowing improper considerations to color a decision. Fourth, rules force planners to decide about planning in a more comprehensive, future-oriented way, rather than making things up as they go along. Fifth, planners too often are co-opted by developers in a discretionary system and concede more than they should.

The arguments for discretion revolve around a different take on planning and design. Discretion proponents might agree that rules produce certainty, but they deem certainty a minor virtue. First, discretion advocates cite the impossibility of reducing to rules the qualities that make for well-designed urban environments. When rules are stated, they say, developers provide letter-of-the-law compliance or find loopholes that, in either case, produce mediocrity. Second, discretion allows for an engagement with developers that, instead of co-opting the planner, fosters collaborative inventiveness absent from the rule-based approach. Third, discretion allows planners to secure exactly what they want, even if the owner does not want to produce it. Fourth, discretion is not as disliked as rule-based proponents may claim. Developers and their servants (lawyers, expediters, architects, planners, etc.) have invested much time learning the navigation skills needed for discretionary approval and are not as ready to jettison such skills to the nasty wind of rule-based zoning as developers' encomia to rules might otherwise suggest.

In an attempt to secure the virtues, without the vices, of each system, some practitioners attempt to marry the best of rules and the best of discretion. Here, the rules are, indeed, set forth clearly in advance, but the issue of determining whether the developer has met the rules is left to highly skilled planners and designers rather than building inspectors or inspection services department bureaucracies. In theory, the city planner must approve the project if it meets the rules, but she can urge the developer to do better than simply comply during review of the development proposal. Zoning laws sometimes refer to this process as "certification."

TO PRESCRIBE OR NOT TO PRESCRIBE: THAT IS THE QUESTION

Imagine the omniscient planner who lives in a world where zoning mandates precisely what the owner must build on her property. In the most extreme version of this world, the owner must build what zoning tells the owner to build, or she loses the property. In a less extreme version, the owner must build what zoning tells her to build if he builds anything at all. Of course, both of these approaches are more intrusive than most of today's zoning. To begin with, today's zoning (for this discussion, let's call it conventional zoning) does not interfere with the decision not to develop at all. Put another way, a vacant lot does not offend conventional zoning. Moreover, conventional zoning tends toward proscriptive, rather than prescriptive, mandates when the owner chooses to build. The rules most often tell the owner what she cannot do (proscribe), rather than what she must do (prescribe). Maximums beyond which the owner may not go are the rule, with more restrictive commands the exception. Thus, the owner may not exceed 10 FAR. The owner may not develop more than 10 units per acre. The owner may not build higher than 150 feet.

Conventional zoning shows glimpses of being prescriptive, however. Within the trio of use, shape, and bulk restrictions, use is the one most often treated prescriptively. For example, exclusively single-use zoning districts, rather than so-called "pyramidal" or "cumulative" use districts, constitute a prescriptive model, in that their rules dictate specifically what the use must be rather than allow the owner to choose to build, for example, less intensive uses (residential) in more intensive (manufacturing) districts. This is not an argument for single-use districts as a matter of good planning; it is only a factual statement that they are more prescriptive than proscriptive. Shape rules also provide tastes of prescription when they mandate "build-to-the-street-wall" or "zero lot line" development. Compare that with minimum setback rules (stating that the owner cannot build in the first 20 feet from the lot line, but may build anywhere starting from 20 feet back), which are proscriptive in nature.

How may zoning gravitate toward greater prescription? A first step would involve

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Compatibility can become a highly visible problem where height and bulk regulations do not accurately reflect existing uses.

ASK THE AUTHOR JOIN US ONLINE!

With the introduction of Zoning Practice*, the editors wish again to invite our readers to participate in our Ask the Author forums at http://www.planning.org/ZoningPractice/ask.htm. Although there will be no forum connected with this inaugural issue, we will renew the popular online forum from March 15-26 with Mark Wyckoff, FAICP, and Michele Manning,* AICP*, the co-authors of the lead article in our upcoming February issue. Beginning with that forum, the PDF version of* Zoning Practice *will be available online to subscribers only. Watch the APA website and the APA electronic newsletter* interact *for details. In addition, we will be adding some new web-based enhancements to the publication for the benefit of our readers. We hope you will enjoy our efforts to augment the benefits you receive from reading* Zoning Practice.

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increased reliance upon bounded maximum-minimum ranges. For example, zoning could require that a building be no larger than 10 FAR nor smaller than five FAR, no taller than 150 feet nor shorter than 100 feet, no closer to the front lot line than 10 feet nor deeper than 30 feet. A more robust, extreme prescription would squeeze out zoning's looseness and substitute a precise delineation of virtually every aspect of development, in effect rendering the announced zoning envelope no different than the building program set by the developer, except that in this case it is established as a requirement by public planners. Indeed, this would essentially obliterate the distinction between plan and regulation, a course not without risks, but one incorrectly assumed to be legally impossible by many planners.

Prescriptive zoning is amenable to either rule-based or discretionary approaches. A rule-based prescription could be imposed as a uniform prescription, a context-sensitive prescription, or a mapped, parcel-by-parcel prescription. In the uniform case, a zoning district would require that any building developed within that district have, for example, a footprint of 20,000 square feet on a lot size of 25,000 square feet, built to a bulk of 200,000 square feet, mixed-use, with the first floor active retail uses, the second through sixth floor office, and the remaining floors market-rate residential except for 10 percent devoted to affordable housing. Such an approach might satisfy hard-nosed believers in conventional zoning's legal principle of uniform treatment within districts, but it is unlikely that such cookie-cutter similarity would produce desirable urban planning results.

A large step away from the uniform is context-sensitive prescription, implemented through **contextual zoning**, that would mandate what could be built based on qualities of the site itself or, more likely, on what has already been built nearby. For example, the prescription could differ based on the type of lot: a corner lot could be subject to a different set of rules than a mid-block lot; lots with different street frontages would be subject to different prescriptions; and so forth. If the adjacent lot had a building with an "X" set of characteristics, then the prescription for the parcel proposed for development would follow one set of rules. If the adjacent lot had a building with a "Y" set of characteristics, then the prescription would shift to alternate rules; and so forth. Contextual zoning is sometimes called **neighborhood zoning**, in that it takes its regulatory cues on use, shape, bulk, and even aesthetic design, from what is now there. In one sense, contextual or neighborhood zoning may be understood as a technique of reverse engineering, where the zoning attempts to replicate what already works, at least as appreciated by neighbors. At the same time, from a citywide perspective, it may equally suggest a "not-in-my-back-yard" flavor.

Mapped, parcel-by-parcel prescription, implemented through **special districts**, would allow for maximum customization by specifying individually for each parcel precisely what public planners want. This is, in effect, plan as regulation, leaving little to the initiative of the owner. Note that the categories of uniform, context-sensitive, and mapped, parcel-by-parcel prescription rules are not mutually exclusive, and zoning may combine several of them into a new approach. **Traditional neighborhood development (TND) ordinances**, conceived by the New Urbanists, effectively employ lot-specific context-sensitive and mapped, parcel-by-parcel prescriptions, based on ranges and pinpoint rules, to implement their vision of a better built environment. Prescription is also achievable through a discretionary approval process, where the city reviews each proposal and rejects anything that does not fit with the plan conceived and, hopefully announced, by the public sector.

Objections to the prescriptive approach arise on legal and policy grounds. The legal arguments are least convincing. Although radical property rights advocates might allege a taking of private property in violation of the Fifth Amendment's just compensation clause, they would lose except for the exceptional case where the prescription rendered the owner's property worthless or too deeply interfered with the owner's distinct, investment-backed expectations. Another legal argument could spring from statutory (uniformity) and constitutional (equal protection) underpinnings of zoning that prefer consistent treatment of similarly situated property owners, a notion embodied in the very concept of a geographically contiguous zoning district where everyone within the same area is subject to the same rules on the same level playing field. The mapped, parcel-by-parcel prescription flies in the face of that concept. But to the extent that parcels are not similarly situated (are they ever?), and to the extent that planners can identify other reasonable arguments for treating parcels differently, the legal bar of uniformity is lowered.

The policy arguments are harder to dismiss. Prescriptive zoning might be called "presumptuous zoning" because it assumes planners know best. Developers and, arguably, the marketplace, cannot contribute their insights and innovations because the public planners have already mandated what the outcome will be. Do public planners know best? Should public planners so constrain the private market, with its imperfect yet demonstrable amplification of consumer preference and use of private designers and planners? Proscriptive zoning accompanies a less confident government viewpoint, with reliance on maximums controlling permissible use, shape, and bulk that give greater latitude to someone else's vision.

Prescriptive zoning furthermore runs the danger of failing because the market simply may choose not to cooperate. If the prescription is too onerous or unpleasant, owners may opt out completely, leaving their land in its existing state, refusing to upgrade or evolve. Even if only some owners decline to develop, the resulting jack-o-lantern pattern carved by a rule-based, non-contextual, parcel-by-parcel prescription may be unsatisfactory. Since it is unlikely that prescriptive zoning legally could force owners to develop or else, there is nothing government could do at that point to achieve its ideal plan.

THE "GENERIC" PRESCRIPTION: THE EMERGENCE OF FORM-BASED ZONING

Trendy and edgy, f**orm-based zoning** in its purest form abjures the regulation of use and places its full faith and credit in shape and bulk restrictions. Best understood as an amalgam of the intellectually rigorous urban design ideas of architectural theorists Colin Rowe and Aldo Rossi, coupled with a free-wheeling market-based ideology, form-based zoning takes the position that urban morphology, i.e., the physical form a city takes, is more important in determining the quality of the built environment than a deterministic attitude toward uses occurring within that form. In such a morphological city, function follows form. In zoning terms, the envelope itself, rather than the contents within it, is dominant.

An exercise of form-based zoning, then, could require that buildings be constructed to the front lot line, with a specified minimum width of building frontage, to a height of four to six stories, after which there is a prescribed set back, and so forth. Specification of form undoubtedly will influence use because some forms are more conducive to certain uses than to others. However, the zoning would say nothing about what goes into the building, so market forces would determine such uses. Of course, this is not the same as saying that planners are indifferent to the uses, just that the uses are to be an outgrowth of form, and getting that form correct is assumed sufficient to create a better city.

Mchael Davidson

Form-based zoning can be used to require that buildings be constructed to the front lot line.

Today, the pioneers of form-based zoning in reality employ a less pure, less formal, less ideological strain of the technique. What is most persuasive about form-based zoning, however, is its implicit critique that, more than any other traditional zoning element, use regulation has been least successful. Jane Jacobs is hardly alone in decrying the sterility of single-use environments, whether they be single-family suburban residential districts or high-density downtown office districts. One antidote would be a **mixed-use zoning** prescription that tells the market what it must do. Another is the generic prescription of form-based zoning that is nominally indifferent when it comes to use. If the market wants to have half-office, half-residential, then so be it.

Form-based zoning inspires thoughts of singular attention to the other members of zoning's trio. For example, what about use-based zoning, where uses are prescribed and form is ignored? Might that cast too much of a shadow? Or perhaps planners should worry about bulk alone, as the introduction of floor-area ratios partially did, rather than the deeply sculpted proscriptions of setbacks, yards, coverage, and the like.

OUTCOMES, NOT INPUTS

To this day, zoning has avoided qualitative standards that actually come far closer to describing what planners are really trying to accomplish than the descriptions encompassed by standard zoning vocabulary. For example, imagine a zoning district that required development that "contributes to a good neighborhood" or "adds to the diversity of urban living" or "generates social capital, civic democracy, and community values," without resort to the traditional zoning argot of use, shape, or bulk restrictions. But that would be impossible, say the planners, because it would be too difficult for developers to know, planners to assess, and courts to judge, just what all that soft stuff means. To be sure, even a fully discretionary zoning scheme would have trouble with such qualitative standards alone, because they are as ambiguous in their measurable realization as they are ambitious in their indulgent promise.

At the same time, the very idea, if not use, of what may be termed **performance zoning** inspires different ways of thinking about the overall regulatory approach. If the trio of use, shape, and bulk is endlessly malleable, playing Stravinsky as well as Beethoven, it is also undeniable that this framework has a certain sterile quality to it, remaining divorced on its face from the human aims planning seeks to achieve. Performance zoning says to the owner that government does not care how she achieves a given standard, as long as it is achieved. Thus, if the owner can do heavy industrial uses while not exceeding a specified decibel count, then go to it. If the owner can build a 100-story office tower without casting a shadow, then do it. Even neo-classical economists would have a natural affinity for performance zoning, at least to the extent that it allows the private market, and thus the forces of efficiency, to find the

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Industrial areas such as power plants were among the earliest zoning targets for environmental performance standards.

least costly way of achieving a given outcome. Can zoning go beyond noise and shadow performance standards to demand excellence, without specifying to the private developer how to get there?

MAKING THE CITY BEAUTIFUL

Along with technological evolutions, market preferences, cultural proclivities, and artistic creativity, zoning has a significant impact on the physical appearance of the built environment. That impact may be intentional, in the sense that public planners intend to produce a certain visual outcome that they believe is attractive, comforting, stimulating, or even challenging. That impact may be unintentional, in the sense that it is not the purpose, but is surely the effect, of zoning to influence physical appearance. In recent years, zoning has become more aggressive about intentionally regulating the physical appearance of the built environment. Through **design review** procedures, often accompanied by **design guidelines**, planners have exercised authority over the art, as well as science, of architecture.

Specifically, design review is normally an aspect of zoning review where a local government body exercises discretionary review over the physical appearance of a proposed development. That government body may be a stand-alone, specially constituted body made up of appointed members who represent articulated disciplines, professions, expertises, associations, organizations, and/or geographic areas; or it may be part of an existing planning or zoning body with the design review function embedded as part of its overall responsibilities. The design review body assesses proposed developments case by case, and issues decisions that can be enforced, or that simply may be recommendations advanced up the food chain to the local legislative body or mayor.

Design-review decision makers across the country are guided by a remarkably similar set of legal standards. The standards do not claim to pursue beauty as such, nor would they, to the extent that beauty is perceived to be in the eye of the beholder. Instead, the standards demand that proposed development be in conformity, compatible, harmonious, consistent, or not incongruous with the context or character of the surrounding neighborhood. Design-review laws commonly list design attributes against which to measure such conformity, including architectural style, material, façade treatment, color, proportion, scale, setbacks, height, massing, roof line, building tops, cornice lines, ornamentation, and fenestration.

From a legal point of view, aesthetics-based zoning is almost universally accepted. The U.S. Supreme Court has approved aesthet-

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Design review has been a key tool for planners in regulating the physical appearance of the urban environment.

ics alone as a legitimate object of police power regulation, and most states today interpret their state constitutions as equally permitting attainment of this goal. The more interesting question is whether design review and guidelines truly achieve a more pleasing or stimulating physical environment, or whether, in theory and practice, planning efforts to secure better aesthetic outcomes are misguided. The answer is as much philosophical as empirical. Some private designers believe that public control over design is antithetical to the creative process, an interference with design as artistic venture. Many describe the results of design review as a monotonous, lowest-common-denominator built environment that, in service of conformity with context, is bereft of adventure, challenge, or whimsy. Public planners would claim that design review equally often rescues cities from mediocrity, forcing developers to meet higher artistic standards than they otherwise would. Context may not be all, they say, but if aesthetics-based zoning can help secure a sense of place in new architecture, even at the cost of occasionally reining in the promise of wild adventure, then it is worthwhile.

LESS IS MORE

The mandatory prescriptive approach enjoys its antipode in what some call flexible zoning, but what might be more accurately called **no zoning**. Here, government exercises no police power land-use regulatory oversight over the use and development of land, within parts or all of a city. This is not the same as saying there are no legal restrictions whatsoever. Land in Houston, that notorious poster child for no zoning, is actually riddled with private legal restrictions and subject to public regulations of various kinds that effectively control much of what is developable on land. Still, Houston properties are not encumbered by conventional zoning, and the results are there for all to see. Some see great difference, especially in the jumble of uses located cheek-by-jowl at the neighborhood level and the observable absence of a pedestrian-friendly public realm. Others are surprised at the degree to which the city's downtown resembles zoned downtowns in other parts of the Southwest and South.

Whatever the empirical judgment in Houston, the "no zoning" approach has never gained traction in other American cities. It is one thing for Houston, with legacy as destiny, to continue in that tradition, although it is worth observing that Houston itself consistently steps to the zoning brink, most recently with consideration of neighborhood-based restrictions on building form. Understandably, it declines to call such potential restrictions zoning for fear of committing singular identity suicide. Elsewhere, however, too many people have too much of a stake in the existing zoning system to believe that their city could throw out the baby with the bath water. No one truly trusts a private developer or neighborhood to plan for itself, for fear that such self-interest would contradict other stakeholder interests. In short, the "no zoning" experience in Houston stands foremost as an ideological beacon for private property advocates rather than a practical alternative for urban land-use regulation.

Land in Houston, that notorious poster child for no zoning, is actually riddled with private legal restrictions and subject to public regulations of various kinds that effectively control much of what is developable on land.

The "no zoning" approach has wider appeal, however, when it comes to considering areas where economic development is the overriding goal. Taking a cue from the British experience with enterprise zones and America's copycat empowerment zones, cities could waive zoning, other regulations, and local taxes within a defined geographic zone, to encourage development, especially job-producing development. Empirical evidence from British and American zones suggests a less-than-robust outcome, however, with development activities often shifted from a non-qualifying location to a qualifying one without an increase in net jobs within the city.

THE HALFWAY HOUSE OF MARKET-BASED ZONING

Lurking between mandated prescriptive zoning and no zoning are efforts where cities use zoning as carrot rather than stick to encourage the private real estate market to act in desired ways. Although conceptually revolutionary when first introduced in the late 1950s, the market-based technique of **incentive zoning** has subsequently experienced counter-revolutions and revisionist thinking as some of its flaws have become apparent. Under incentive zoning, cities dangle financially valuable zoning concessions to encourage developers to provide desired public amenities. Typical incentives include density bonuses; height, setback, yard, and coverage waivers; and parking ratio reductions, all designed either to increase revenue (more rentable or sellable space) or reduce costs (more cost-efficient floor layouts, for example). Typical amenities may be divided into urban design (plazas, arcades, parks, streetscape improvements, better design), cultural (arts, museums, libraries), and social (affordable housing, day care centers) categories, although even market-provided uses such as retail facilities and restaurants are sometimes encouraged.

Incentive zoning may be administered by rule or discretion. In a rule-based system, the incentives and amenities are expressly and precisely delineated in the zoning text, and the developer receives the zoning concession as a matter of right if she provides the amenity as described. In a discretionary system, the incentives and amenities are only broadly described in the zoning text, while the specific details are hammered out in project-by-project negotiations between the city and the developer. In either case, to make the bargain economically viable, the real estate financial value of the zoning incentive must equal or exceed the real estate financial cost (capital and operating) of providing the amenity.

In theory, incentive zoning should be limited to circumstances where the incentive is necessary, sufficient, but not excessive, to secure the private sector's cooperation. The incentive should be necessary because, if the city could obtain the amenity without it, it would be better off. It is all too easy to forget

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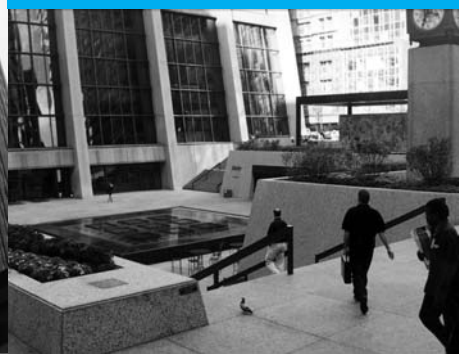
Jason Wittenberg

Cities like Minneapolis (above and left) and Chicago (below) have used incentives to induce developers to provide skyway connections, indoor public open space, and plazas, among other amenities.



Marya Morris

that, as legally authorized evasions of otherwise applicable zoning limits, incentives such as greater bulk or height carry with them social costs of increased congestion and potential loss of light, if not air. To avoid this effect, some cities have proposed or utilized a two-step minuet in which they downzone first, then offer an incentive that returns the owner to the original zoning. This dance is not only disingenuous as an exercise of incentive zoning, but also raises legal difficulties under applicable constitutional law.

What are the criteria for the "necessary, sufficient, but not excessive" test? Necessary means the developer would not voluntarily provide the amenity but for the incentive, and the public sector cannot force the developer's hand. For example, a city cannot require an amenity whose cost would bankrupt the development. A city may encounter legal objections if it requires an amenity whose connection to a harm or need generated by the proposed development is unproved. A city should not mandate the provision of public amenities if the creation of such mandatory climate would otherwise damage its economic vitality. "Sufficient, but not excessive" means that an incentive must give the developer a reason, but not too much of a reason, to engage in the transaction.

In reality, incentive zoning has often failed one or more of the test criteria. At times, the incentives have been far in excess of those sufficient to stimulate the desired private behavior, resulting in a windfall for developers. At times, the public sector could have required the provision of the amenities without incentives, thereby avoiding the social costs accompanying the excess bulk or height. At times, even when the incentive was necessary to stimulate the desired private behavior, its social cost, especially to neighbors next to the now larger building, has been excessive. At times, the quality of the amenities themselves, provided and managed as they most often are by the private sector, has been disappointing from the beginning, or over time. In short, the bloom is off the incentive zoning rose.

GETTING TO YES–OR AT LEAST SOMETHING

In the early days of zoning, to the extent that regulators enjoyed discretionary authority, they generally had two responses to developers proposing a new building: yes and no. Starting mid-century with the greater use of special permits, and now a standard feature of large project review, today's repertoire of regulatory responses has expanded by fifty percent: yes, no, and maybe. That last response is the opening line in an extended discretionary review process that resembles a negotiation. The developer submits a development proposal from which she is prepared to negotiate downward and laterally. Her chits are modifications to size, shape, use, and other traditional zoning concerns, as well as provision of public benefits that lubricate the political environment for approval. Some of these public benefits genuinely mitigate harmful aspects of the proposed development and as such deserve the sobriquets of "mitigation" and "related amenities." For example, a developer agrees to build a transit stop or added roadway capacity to accommodate users of her proposed development. Indeed, many of these mitigation measures might be required by parallel environmental reviews. Other proffered benefits, however, appear less to be mitigation and more to be "payoff" to secure approval from important constituencies. How about a nice community center, winks the developer, or perhaps a set-aside of jobs or housing for nearby residents? Such benefits may not even be described in the zoning ordinance or legal documents recording the public approval.

Shannon Armstrong

One growing area of attention for zoning negotiations concerns the reuse of abandoned big box retail stores (see *Zoning News*, July 2001).

The use of negotiated zoning raises important legal and policy questions. On the legal side, the provision of "unrelated" benefits is unlikely to be challenged by the developer who enthusiastically or reluctantly agrees to the conditions. However, it could be challenged by constituencies in the city who are left out of the deal or are still intent on stopping the development altogether. To the extent the state zoning statute or local ordinance is murky on authorization for this sort of deal-making, the lawsuit may have extended legs.

From a policy viewpoint, this widespread practice engenders mixed reviews. On the one hand, the idea that everything is on the table and that parties can create a win-win outcome by expanding the pie of considerations, and that both sides can make a Coasean bargain (named after the Chicago Nobel-prize-winning economist, Ronald Coase, and his article, "The Problem of Social Cost"), would be applauded not only by "Getting to Yes" enthusiasts, but by neo-classical economists as well. On the other hand, the practice raises concerns about whether projects that should be turned down on the basis of physical planning criteria are being approved on the basis of buyoffs for selected neighborhood constituencies, or even for citywide benefits unrelated to the proposed development's impact. Furthermore, unlike formal incentive zoning where the terms of the deal are there, for better or worse, for observers to evaluate, negotiated zoning lacks the baseline elements of a matter-of-right development from which the negotiation proceeds. Nothing is fixed in advance, so the to-ing and fro-ing of the negotiation becomes untethered to fixed, transparent criteria. At its worst, negotiated zoning becomes a free-for-all that undermines confidence in the entire system of land-use regulation.

EMBRACING SOCIAL EQUITY

One of the most interesting changes to zoning over the past 25 years has been the expansion of its purposes from traditional physical planning to social equity goals. Indeed, in big cities more than suburbs, zoning has conceptually, if not empirically, moved from "exclusionary" to "level playing field" to "inclusionary" in its approach to those less well-off in society, especially with regard to housing. In its 1926 *Village of Euclid v. Ambler Realty Company* (272 U.S. 365) decision, the U.S. Supreme Court celebrated Euclid's decision to separate single-family from multi-family housing, referring to apartment houses as mere parasites attempting to suck advantages from single-family neighborhoods. The suburban experience of zoning, even today, might still be characterized as one of exclusion, where zoning's use, shape, and bulk instruments are played to make development of affordable housing difficult, if not impossible. The inclusionary efforts of today are hardly dominant, but they are increasingly found in larger cities across the country and reflect the realization that zoning, along with more direct public subsidies, has the possibility of contributing to the affordable housing pot.

The most celebrated social equity zoning techniques are **linkage** and **inclusionary zoning**. Under these programs, cities ask developers to provide or pay for affordable housing and other redistributive social benefits, normally as a condition for development approval, less often as part of a purely volun-

tary incentive zoning scheme. Sometimes the developer receives a zoning bonus of extra density to soften the financial impact of the required affordable units. Specifically, linkage programs require developers of large office buildings to construct affordable housing or contribute money to a city-administered housing trust fund. The linkage amount may range from two to three percent of total development cost, payable in the early years of the development. Smaller office buildings are often exempt from the requirement. The word "linkage" appears to refer variously to a conceptual relationship between the central business district and the neighborhoods, between offices and housing, or between wealth and poverty.

More widely employed across the country, inclusionary zoning requires developers of market-rate housing to provide or pay for affordable housing. A typical inclusionary zoning requirement might be 10 percent, meaning that a developer must provide one unit of affordable housing for every 10 units of market-rate housing, although affordable requirements have extended as high as 25 percent in some jurisdictions. The zoning specifies whether the units must be provided on-site or may be located off-site. Generally, the affordable units must be of a similar external quality as the market-rate units.

Legal and policy questions persist about the validity and sagacity of linkage and inclusionary zoning. To begin with, many state zoning acts do not expressly authorize such programs, so local governments have to enact them on their own home-rule authority. Furthermore, the programs may have constitutional vulnerability. Proponents would do well to demonstrate that there is a relationship (nexus) between some harm to, or need for, affordable housing generated by the market-rate development, and that the linkage or inclusionary zoning obligation is roughly proportionate to that harm or need. In the case of linkage, cities could show that office development impacts affordable housing by, for example, accommodating newly resident employees who to some degree increase the demand for housing of all types and, in the short run, render affordable housing less affordable. From an efficiency viewpoint, neoclassical economists would scoff at the basic premise. The question is whether judges would be receptive to an equity/distributive economic argument.

Inclusionary zoning is dicier. Here, the argument goes, market-rate housing developers have harmed or created a need for affordable housing, yet any student of Economics 101 knows that increasing supply of housing should decrease, or at least not increase, the price of all housing. One available argument for inclusionary zoning is that market-rate housing occupants create a demand for services rendered by lower-income employees, and that a city may choose to assure that housing affordable to such workers is available within the jurisdiction.

A second argument cuts to the heart of the matter. A city wants to maintain or increase demographic diversity, a laudable and constitutionally approved goal (see the U.S. Supreme Court's decisions on affirmative action in *University of California Regents v.*


Jason Wittenberg


Jason Wittenberg

Jason Wittenberg


Marya Morris

Affordable housing projects from the Twin Cities area (upper row and lower left) and Portland, Oregon.

Bakke, 438 U.S. 265 (1978) and the University of Michigan cases, *Grutter v. Bollinger*, 123 S.Ct. 2325 (2003), and developers of strictly market-rate housing decrease diversity by adding only to the higher-end stock. Once again, cities must make the planning case demonstrating that building market-rate housing does not free up, one for one, affordable units, as "housing filtering" theory could argue. At the end of the day, cities would be wise to perform planning studies to show that they are justified in imposing the linkage or inclusionary zoning burden on developers within their communities.

are expressly disallowed – is social equity zoning. Whether the market can be made to cooperate is another story.

HOW FAR IS TOO FAR?

In 1981, U.S. Supreme Court Justice Brennan penned the notorious phrase, "After all, if a policeman must know the Constitution, then why not a planner?" Since then, planners have wondered how much policemen really have to know. The Federal Constitution's Fifth Amendment and state constitutional corollaries command that private property not be taken for public use without paying just compensation,

The U.S. Supreme Court has issued a number of opinions creating an impression among some that zoning and other land-use restrictions are vulnerable to takings challenges and that government could be saddled with unanticipated financial liability . . . that impression could chill traditional, let alone innovative, zoning efforts.

Social equity zoning need not be confined to linkage and inclusionary zoning. For example, statewide efforts that require each growing community to provide its **fair share** of affordable housing might potentially benefit big cities if the state requirements offer suburban communities a buyout option through which they "purchase" their way out of their in situ fair share obligation through affordable housing payments to big cities. Moreover, social equity zoning need not be confined to affordable housing. Taking a page from the environmental justice movement, zoning might take note of the existing and anticipated distribution of public and private facilities that benefit or burden neighborhoods (like police stations, libraries, parks, sewage treatment facilities, etc.), and make sure there is a fair, equitable distribution of such facilities. Some cities have enacted fair share laws outside zoning, but there is no reason that zoning itself could not take this into account. Finally, zoning for uses most beneficial to lower-income workers – for example, exclusive **manufacturing zoning districts**, where the only permitted use is manufacturing, and loft conversions and other popular evolutions

another phrase for full fair market value. Starting in 1987, the U.S. Supreme Court has issued a number of opinions creating an impression among some that zoning and other land-use restrictions are vulnerable to takings challenges and that government could be saddled with unanticipated financial liability. Taken to heart, that impression could chill traditional, let alone innovative, zoning efforts.

Happily for planning, that impression is generally inaccurate. The constitutional tests continue to favor governmental exercise of regulatory authority. Under the takings clause, government action conclusively effects a taking only if it denies an owner all economically viable use of her land, measured as a diminution in value to zero. If the government action causes less than a 100 percent wipeout, then the owner must demonstrate to the court a dramatic economic impact and interference with distinct investment-backed expectations, and that the character of the government's action is deeply flawed. Although this test is to be applied case-by-case by judges, and although it is hardly a certain, absolute, outcome-determinative rule to apply, the treasure chest of federal and state cases provides a decent feel for how courts might react in a given fact pattern. Can government downzone? Absolutely. How much of a downzoning is acceptable? A lot, although changing the zoning from 15 FAR to open space is unlikely to pass constitutional muster. What about changing from 15 to five? Probably fine, although 15 to 10 would be better. What about inclusionary zoning, linkage, and similar programs? No problem under this version of the takings test, unless the owner is put in a real economic bind (note that there are other aspects of the Constitution that might be implicated by social equity zoning). What about changes to other use, shape, and bulk restrictions? Not to worry. In sum, the law continues to favor government zoning action exercised to advance the public interest.

Nonetheless, the perception, if not reality, of a more favorable property rights jurisprudence, coupled with the emergence of a politically active property rights-libertarian movement, has made planners more cautious in their application of restrictive zoning measures. What might public planners do to address these concerns? At minimum, planners should review in advance the economic impact of a proposed zoning change on affected property owners, to be sure such measures do not deeply upset long-standing, reasonable expectations. Although there is no bright-line rule that says one percent is the minimum reasonable return on investment that is constitutionally required, one might expect judges to intervene at some point along the way.

A more innovative approach would rescue **transfer of development rights (TDR)**, that much-discussed, little-used technique that tantalizingly promises to redress the constitutional value-wipeout problem by creating an avenue to valorize otherwise unusable property rights. Under TDR, property owners are permitted to sell their once zoning-authorized, now restricted development rights to owners of other parcels who seek them. Depending on the aggressiveness of the city planners and their legal counsels, the development rights could be transferred to adjacent parcels, transferred to any parcel within a geographically defined receiving district that includes or does not include the sending

parcel, or transferred anywhere within the city. Owners of receiving parcels would then be allowed to build more than they otherwise would be allowed to build under their applicable zoning, with some sort of cap in place to guarantee that the receiving parcel's development is not too wildly out-of-pitch with the zoning for the surrounding area.

TDR does more than slice the Gordian knot of compensating for regulatory burdens without debiting public accounts. It changes the way planning currently conceptualizes zoning per se. By untethering development rights from their initially assigned geographic locations, TDR liberates zoning from its parcel-by-parcel orientation. Now, those same zoning air rights float above the city, waiting to be captured by land-based market forces. Indeed, this extreme articulation of TDR is but a small step away from a zoning scheme where development rights reside not with property owners, but within a public development rights bank that periodically auctions such rights to the highest bidder. That is, indeed, zoning for sale at its most provocative.

CONCLUSION

This article has sought to discuss some of the crucial issues and technical innovations in the zoning field in cities today. To be sure, there are many more worthy of exploration. Why not integrate zoning with economic development, as have the French with their ZACs and Boston with its Boston Redevelopment Authority? How about a better link between zoning and the capital budget? Should not zoning cover, and direct, the location and development of publicly financed facilities like city halls, libraries, police stations, and the like? Why not zone for transit-oriented development, or have zoning for transportation corridors? Should not zoning demand green buildings that meet LEED (Leadership in Energy and Environmental Design) standards and promote sustainable patterns of development? Indeed, is it not time to integrate zoning and environmental impact reviews and end overlapping, duplicative review processes that needlessly consume private and public sector resources? And do building and fire codes sometimes undercut zoning even as they promote safety?

Is it not time to recognize that development approval by variance is becoming too much the rule, and too little the exception? How often can it be said, "To zone is human, to enforce divine?" Why is historic preservation almost uniformly handled separately from zoning, to the point where neighborhood groups often seek the end-run intervention of landmarks preservation commissions to save their neighborhoods from new development, even when the historic nature of the area is dubious or at best on the margins?

What about better ways to deal with parking and signs? Do cities really have to live with adult entertainment? Are planners doing a good enough job of comprehensive planning, in a timely, periodic manner, or are comprehensive plans themselves passé? Does zoning encourage or discourage adaptive reuse? Have zoning districts squeezed out unnecessary property rights expectations derived from unrealistic, overly generous bulk envelopes? Do lot mergers and loose parcelization undermine standard bulk controls? Then there is regional zoning for smart growth, even if the basic organization of local governments militates against it. And what is this new idea offered by New Urbanism based on the transect, and how does it relate to zoning?

Finally, does anyone really know completely what their local zoning ordinance contains? Have cities created monsters of substance and process, like the Internal Revenue Code, that make even experts fumble at finding the answer, and make intelligent participation all but unattainable for the average person? Is the Internet an answer, even when many have no access to it, and how well have planners integrated such technologies with zoning? When was the last time the city conducted a zoning audit to determine how well its ordinance was doing? Would a regulatory reconsideration lead to a codification to simplify the text?

These are some of the additional issues this article could consider in depth. Cities across the country face zoning challenges that differ based on such divergent features as their history, economics, politics, climate, and culture. Attempts to boil down zoning to a set of generic issues run the risk of detaching the technique from its true roots: a means to an end, with the end uniquely suited to a unique physical environment. But framing the discussion through a fixed set of ideas and technical applications can lead to comparisons and, ultimately, to flexibility and innovation as larger cities in America, and the thousands of smaller cities and towns and villages, along with the 50 states, experiment with this long-validated, much disputed, approach to regulating the behavior of the built environment.

NEWS BRIEFS

GRAVE ISSUES TRUMP ACCESS TO TRACT

By Dane Matthews, AICP

What began as a routine planned unit development (PUD) for the Tulsa Metropolitan Area Planning Commission, and the applicant, ended up being anything but routine. PUD 600, developed by Ashton Creek Village, LLC, involved 34 agriculturally zoned acres. The developer requested rezoning to office light (OL), single-family residential (RS-3), and PUD (an overlay zone) at a very marketable corner in southeast Tulsa. To the west and northwest are long-established cemeteries. The PUD envisioned two development areas, Tracts A (an office community) and B (a townhouse development). A large floodplain bisects Tract A, which fronts on and would have access to East 91st Street, a four-lane secondary arterial. Tract B lies to the south of A and would be landlocked without an access easement. The alternatives involved an easement on the west side of the Rolling Oaks Cemetery west of Tract A or through it. The former easement was part of the PUD, but the latter was not part of the conceptual plan.

The planning commission and city council approved the PUD. As part of the development process, a Phase I environmental assessment was done. It indicated no barriers to development. It was only when the mowing contractor did a walk-through prior to mowing and discovered a deteriorated grave marker that trouble surfaced. The marker was in the path of the proposed access easement critical to Tract B, the townhouse development.

The contractor contacted various funeral homes in the area to determine whether any records of gravesites on the property existed. Under provisions of the Oklahoma Embalmers

Association, scrupulous records must be kept of any body buried or otherwise disposed of in the state. Neither Calvary Cemetery, to the west of Tract B, nor Rolling Oaks Cemetery, north of Tract B and east of the access easement, showed any platted plots south of the floodplain, which is where the marker, and presumably, the gravesite, was. (In Tulsa and probably other cities, cemetery plots are platted like subdivision lots.) Therefore, no body was officially at the site of the grave marker. Yet upon further investigation, it was clear that what appeared to be human remains had lain undisturbed for decades beneath a soil surface. No records existed of any graves, and the marker was old enough to have become illegible.

Further investigation revealed that the State Banking Commission was the entity to be notified. A staff member of that agency, the state cemetery examiner, deals with cemetery identification when a trust is involved, as provided for in Oklahoma statutes. It was determined that there was, in fact, a burial plot or plots under the marker, although unrecorded. This left the developer with a few choices, most of which involved time and money. Jeff Levinson, the developer's attorney, says, "There are many times when an owner can know too much about a tract to be developed."

No work could proceed until the developer chose one of the available options. The first was to try to identify the persons buried there, in order to notify their family members. DNA testing is possible only if a person with matching DNA is registered. With no more guidance than a very old burial site, it seemed highly unlikely that a match could be found. "The location of unidentified corpses renders a property virtually unusable," Levinson says.

The second choice was to purchase individual graves and caskets for each of the bodies (if they could be isolated) and relocate them. This would also entail notifying any family members, which had already been ruled out. Ultimately, the developer chose not to develop the area in question, but to donate the land to Rolling Oaks Cemetery, thereby omitting it from Tract B. Another access point was designated through Tract A, but with a double-wide gate into Tract B, as required by the city fire marshal. Development on the PUD is now underway, some five years after the original application was filed. Development of offices on Tract A is proceeding, with Tract B to follow.

By all accounts, the developer did everything he should have. If there are lessons to be learned, they are to be wary of developing adjacent to a cemetery, and to know what entity your state designates to be notified in case of unexpected bodies. Furthermore, once a grave or the semblance of one is discovered, all work should cease.

Dane Matthews, AICP, is principal regional planner for the Indian Nations Council of Governments in Oklahoma.

THE END OF LAKEWOOD'S WEST END?

Barry Bain, AICP

A political uprising over the use of eminent domain for redevelopment has cost the mayor of Lakewood, Ohio, her job. The plan was overturned in a referendum by an exceptionally narrow margin, and it put the Cleveland suburb under scrutiny on the CBS television show, 60 Minutes, as well as in several newspapers across the nation. The politically divisive West End project failed while winning 49.88 percent of the vote last November, and Mayor Madeline Cain won only 46 percent of the vote in her failed bid for reelection. Voter turnout was approximately three times the norm in previous municipal elections.

What triggered such controversy? For starters, Lakewood, with about 56,000 residents, is a classic inner-ring suburb, located just west of Cleveland along Lake Erie. Like many other such suburbs throughout the nation, it faces many fiscal challenges related to replacing its aging sewer lines, water mains, streets, and other public infrastructure as well as providing community and educational facilities within the means of a stagnant or declining tax base.

Tom Bier, director of the Center for Housing Research and Policy at Cleveland State University's Levin College of Urban Affairs, noted this scenario in a report to the city during a meeting in June 2002. "Because the decks are stacked so heavily against [inner-ring suburbs]," he reported, "it is crucial that communities like Lakewood take proactive measures to maintain and strengthen their condition and standing in the region, or they will erode. While there is a great deal of attractive housing and many other positive amenities in Lakewood, there is also a

strong pattern of out-migration, not unlike other older suburbs."

One obvious way to combat a stagnant tax base is to redevelop and improve older areas of the city so that they include high revenue-generating land uses such as upper-income housing, entertainment facilities, retail stores, and a variety of services. The city of Lakewood attempted this in the West End neighborhood, which consists primarily of single-family houses, most built prior to 1940, with some multifamily and commercial uses The neighborhood street pattern provides a clear break from the dominating grid of surrounding areas. The neighborhood's geographic location made it a prime target for redevelopment. The southern edge sits atop bluffs overlooking the scenic Rocky River, and other locations afford views of Lake Erie. The scenic vistas would be a strong selling point for high-end residential units.

The city proposed a mixed-use project for the area. According to the "Lakewood Ohio West End Development" report, the project was to include a full-scale bookstore, a movie theater, a wide variety of family and fine dining restaurants, a diverse collection of local, regional, and national fashion and home furnishing retailers, some unique to the Cleveland market, and at least 200 condominiums. The latter, not currently available in Lakewood, would attract and keep young professionals and empty nesters in the city. The report further states that the project's financial benefit would produce $100 million in new investment that, in turn, would provide a much needed increase in tax revenue as well as spur new development.

Implementing the project required vacating and demolishing many of the neighborhoods' single-family houses and business establishments through the use of eminent domain, which the city attempted to use by declaring the neighborhood blighted in order acquire land. Several West End neighborhood residents, however, were not willing to move. They challenged the city's definitions of blight and, therefore, the use of eminent domain.

The word blight traditionally conjures up images of housing in a woeful state of disrepair, dangerous code violations, crime, litter-strewn streets, vermin, and a proliferation of vacant and abandoned structures. In Lakewood, however, Mayor Cain noted that the city uses the word blight in the statutory sense, where it is defined according to specific conditions and attributes. James Saleet, an opposing resident, noted on 60 Minutes that the city's definition of blight included houses that lack such amenities as three bedrooms, central air conditioning, and attached garages. Because most of the homes were built in the first half of the 20th century, the majority of structures in the city would fall into this definition of blight.

The result of this dispute over definitions? A heated fight that pitted opposing residents against their city government. The city government maintained that redevelopment was necessary for Lakewood to remain an economically viable community. Some residents were happy to accept the above-market offer for their properties, but a coalition of opposing residents challenged the city's definition of blight. They also questioned whether it was appropriate to use eminent domain to seize property from an owner and give it to a developer for the sole purpose of increasing tax revenue.

Zoning Practice attempted to contact city planning officials, but they declined to comment because of pending litigation. Saleet and other residents are suing the city over the blight criteria. The residents are receiving legal assistance from the Institute of Justice, a libertarian public interest law firm. The lawsuit is pending in the Cuyahoga County Court of Common Pleas, but may be dropped if the new city administration rescinds the blight ordinance.

ZONING REPORTS

EXPANDING HOUSING OPPORTUNITY IN WASHINGTON, DC: THE CASE FOR INCLUSIONARY ZONING

Radhika K. Fox and Kalima Rose, principal authors. PolicyLink. Fall 2003. 51 pp. Available online at www.policylink.org/pdfs/DCIZ.pdf.

This is a well-argued report documenting the need for mandatory inclusionary zoning standards to meet the need for affordable housing in the nation's capital, a notoriously high-cost housing market. It details the pros and cons of various regulatory devices and offers a series of eight specific recommendations for revising the district's zoning ordinance to achieve effective administration of the proposed requirements. Also included are reviews of existing practices in other jurisdictions.

SUBDIVISION REGULATIONS: PRACTICES & ATTITUDES

Eran Ben-Joseph. Lincoln Institute of Land Policy. 2003. 68 pp. Working Paper available online at http://web.mit.edu/ebj/www/LincolnWP.pdf.

Although this paper could have benefited from better editing, it is full of good numerical insights into prevailing practices and attitudes among both developers and planners with regard to subdivision approvals. One of the most persistent themes throughout the working paper is the tendency for more affluent communities to impose stricter and more costly regulations on new subdivisions than is the case with middle- and lower-income communities, with the likely result of tilting housing costs upwards with exclusionary results.

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WHAT IS THE FUTURE OF ZONING?

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