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PRACTICE EQUITY



A Framework for Promoting Equity Through Zoning

By Elizabeth Garvin, JD, AICP

Zoning is broken. There is a discussion taking place right now, in real life and spurred by housing (un)affordability, urban gentrification, and overall societal change, about whether local zoning should be replaced or even eliminated (Manjoo 2019). On social media sites, in newspapers, and in scholarly discussion, people who care very deeply about their communities are examining the long-term results of zoning, and they don't like what they see. The growing consensus seems to be to blame zoning.

Blaming zoning, though, is too simple a conceptualization of the problem. Eliminating zoning, as some propose, for a newer or better approach will most likely substitute a different unfair result for the current unfair result. The development patterns that zoning creates in our communities are a result of the local inputs and decisions made by residents, planners, and elected officials. "Zoning" does not make land-use decisions, communities do. We do. And we can make zoning do something different.

This article assumes that zoning is here to stay. The following sections (1) try to understand why modern zoning has worked the way it has (what's broken?); (2) identify development outcomes that would be more equitable for local communities; and (3) determine what we need to change to get there.

ZONING DOES WHAT IT IS DESIGNED TO DO

Let's back up a minute and put zoning into historical perspective. The British system of law is more than 900 years old. The American system of law is around 250 years old (post-Revolutionary War), and zoning is about 100 years old. It is a relative newcomer in the overall legal scheme of things. And like all laws in our system, it is open to interpretation and change.

The Legal Scope of Zoning

The purpose of zoning is to restrict some of the rights of property owners for the purpose of protecting the public welfare. The concept of zoning as a means to accomplish this was not enabled by either our federal constitution or most state constitutions, although

some have been amended over the years to address land-use issues. Without explicit authority to create zoning regulations, courts and commentators found support for zoning in the local governmental exercise of their police powers. Police powers are granted by the state to local government for the purpose of adopting laws that protect the public health, safety, and general welfare.

To help state and local governments better define how to use this authority within the bounds of the law, model enabling legislation was created. The first models were copied from one state to another until a U.S. Department of Commerce advisory committee on zoning prepared the Standard State Zoning Enabling Act (SZEa) (APA 2002). Published in 1924 and revised and reissued in 1926 (roughly the same time that *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926) was moving through the courts), the SZEa specifically enabled municipal use of zoning to regulate buildings, lots, density, site layout, and use through the establishment of districts. Districts could be used to regulate the "erection, construction, reconstruction, alteration, repair, or use of buildings, structures, or land." According to the SZEa, districts had to be internally "uniform" or consistent in the regulation of buildings, but different districts could include different regulations.

The SZEa was adopted by all 50 states and still forms the basis for zoning authority in most (APA 2002). The SZEa grant of authority reaches well beyond uses and it has been interpreted to permit a wide range of zoning requirements that are not specifically identified in the 1926 language, including concepts as broad as growth management (*Golden v. Planning Bd. of Ramapo*, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972)) and standards as current as short-term rental restrictions (*Whitman v. City of San Buenaventura*, 2d Civil No. B289106 (Cal. Ct. App. Mar. 21, 2019)). Some states have refined and updated their zoning authority since 1926; it does not appear, though, from a cursory search of

the planning literature, that any states have reduced their zoning authority to focus only on uses.

Sidetracked by Euclid

The wide range of zoning purposes identified by the SZEa collapsed into a single purpose in the wake of *Euclid*. Zoning gained an elevator speech: "The purpose of zoning is to separate uses." Like all elevator speeches, this one so oversimplifies the range of outcomes that zoning can achieve that it would have been better had we all taken that elevator ride in silence.

Euclid is both a landmark case in American land-use law and easily the biggest contributor to this limited understanding and use of zoning. *Euclid*, planners and planning attorneys will all remember, is the case where the U.S. Supreme Court upheld zoning as a legal tool for addressing incompatible land uses. Humans, on the whole, don't do well living in proximity to a range of industrial uses. Better for both, the logic went, if they are separated. Following the *Euclid* decision, local zoning took hold and spread. Local governments across the country established local zoning ordinances. Most of which, sticking with the perceived legal safety of *Euclid*, Ohio's approach, focused on separating the places where people live from uses that could potentially cause harm.

Preventing this particular harm, though, ensured that early zoning was designed to reinforce both the separation of uses and the separation of communities. Over time, we have used zoning to create walls and fortresses that separate income groups, racial groups, gender groups, and people of different ages and abilities. To reimagine the role of zoning, we need to understand how to draft better zoning and realign the role it plays in our communities. We already have models of zoning approaches that are not strictly use based, including smart growth, sustainable development codes, performance zoning, and form-based codes. And we know that there is still a broad grant of authority to draw from to move our local zoning codes to produce different outcomes.

CHANGING DIRECTION: TOWARD GREATER EQUITY IN ZONING

To think in metaphors, zoning is more like an app and it is producing the outcomes that we have programmed into it for the past century. And if we see it as an app, this outcome is part of the algorithm that “runs” zoning code. So, let’s change the algorithm.

To reset the zoning algorithm, we need to identify both different inputs and a different outcome. It is probably easier to start by identifying the new outcome: more equitable development and development processes in our communities. APA’s Planning for Equity Policy Guide defines equity as “just and fair inclusion into a society in which all can participate, prosper, and reach their full potential. Unlocking the promise of the nation by unleashing the promise in us all” (APA 2019). For the purposes of changing our approach to zoning, APA’s identification of inequity is useful:

- **Disproportionality.** When the outcomes of a project or plan create or amplify disparities in only part of a community, the disproportionate impacts can lead to further social and economic impairment of some groups while others receive the full benefit of the effort.
- **Institutionalized.** Inequity is often embedded in methods that justify systemic policies, ignore negative outcomes and disproportionate impacts, and do not extend adequate support to the affected areas and their residents.

Like APA, communities across the country have also been considering what more equitable planning would look like. Portland, Oregon, for example, has a broad policy in its *2035 Comprehensive Plan* that calls for the city to: “[e]nsure plans and investments promote environmental justice by extending the community benefits associated with environmental assets, land use, and public investments to communities of color, low-income populations, and other under-served or under-represented groups impacted by the decision. Maximize economic, cultural, political, and environmental benefits through ongoing partnerships.” Similarly, but in a somewhat more targeted approach, the Athens-Clark County, Georgia, *2018 Comprehensive Plan* has number of goals that include equity, such as the land-use

goal of “[a] vibrant and physically attractive community with a variety of places and equitable access to parks, open space, and other community gathering places. Development and redevelopment—with redevelopment as a priority—are well considered, appropriately placed, and have a positive and thoughtful economic, social, and environmental impact.” This goal is supported by specific equity strategies such as: “[c]reate a menu of appropriate incentive options that encourage responsible redevelopment of existing land uses and that guide new development to follow a shared community vision of equity and sustainability,” and policies, including: “[d]evelop zoning standards and incentives to develop and/or redevelop quality multifamily options for a diverse group.”

To turn these policies into equity outcomes, they need to be redrafted into regulatory language. Many policies have multiple potential regulatory approaches, including both standards and procedures, so local planners will need to consider which specific aspects of the zoning code need to be changed in order to move the outcome from status quo to greater equity.

REIMAGINING ZONING AS EQUITABLE ZONING

Equitable zoning will look different in communities of different sizes, locations, and populations. In each of the following sections we identify how an equity policy can be moved into one or more zoning regulations or processes.

Gentrification: Make Zoning a More Dynamic Process

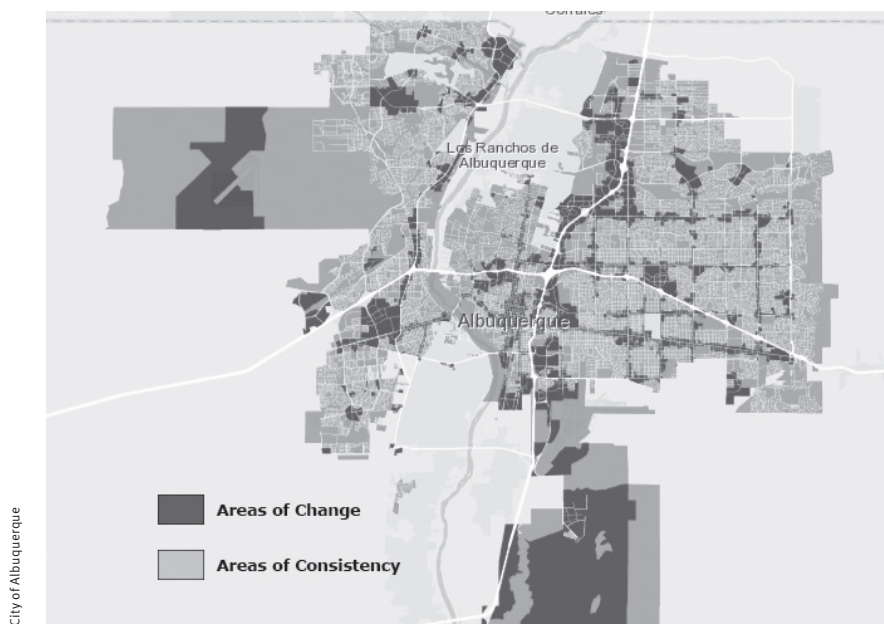
The Planning for Equity Policy Guide provides a list of definitions for gentrification that focus the key themes of rapid redevelopment, increasing property values, and displacement of current residents and neighborhood culture. What role does zoning play in supporting gentrification? Zoning helps to define what “could” be developed on the property, creating the opportunity for undervalued property to be purchased and redeveloped at a much higher value. This can be through permitting larger structures or more density by right, allowing changes in development character from mixed use neighborhood business to single-use multifamily or commercial, or even just encouraging the speculative ownership disinvestment waiting game that allows

properties to go unused and upzoned for faster sale.

Option 1: Retrofit Zoning to Better Reflect Built-Out Neighborhoods. Communities can make two key changes to their current zoning to protect areas that will likely be subject to gentrification in a hot real estate market. The first change is to update the zoning in areas that are at risk for gentrification to a zone district that reflects the size, scale, and character of the current neighborhood. We treat zoning as a “one and done” process when it should evolve with the community. Not infrequently, a community puts a zone district in place anticipating development change that doesn’t happen, while also still permitting development that is “something else.” Something else develops (or stays) but the original zoning is left in place. A frequent example of this is multifamily zoning applied to a single-family neighborhood.

The problem is not that is happened, the problem is that it wasn’t fixed, particularly in the context of promoting zoning equity. Where there is a neighborhood with low property values and a disconnect between the current building scale and the permitted zoning, we are creating a target for redevelopment. Correcting the zoning to reflect the built-out scale and use mix of the neighborhood will not stop redevelopment, but it will limit the types of development that can take place by right and can trigger a public discussion process for new development that is out of character. This approach would allow the neighborhood to place limits on intrusion from large-scale development, preserve affordable small business commercial space, and help maintain housing stock that is currently occupied. This could be accomplished in one of three ways: revisions to the currently applicable zone district, creation and application of a new zone district, or creation of an overlay zone that corrects the out-of-scale standards.

Option 2: Invite Neighborhoods into the Zoning Process. The second change in how we use zoning is found in the process of correcting the existing zoning. The Planning for Equity Policy Guide includes a list of community engagement and empowerment policies that can be met in the creation of a thoughtful community outreach process to create and apply new zoning regulations, either for a specific neighborhood or for a group



➡ Albuquerque's 2017 *Comprehensive Plan* divides the city into Areas of Change and Areas of Consistency. The city's Integrated Development Ordinance requires new subdivisions in residential districts identified as Areas of Consistency to match the existing lot size and setback pattern, with the intention of protecting older, established neighborhoods from speculative redevelopment (§14-6-5-1(C)(2)).

of areas that might be subject to gentrification. One of the big problems with outreach in zoning is that engagement takes place too late in the process. If planners do not engage with the members of a neighborhood until the mandatory public hearing prior to adoption, they have missed the opportunity to collect input and feedback during the drafting process that will make the zoning update meaningful. An excellent starting place for considering how to more fully engage a community in a zoning process can be found in the PAS Report *Planning with Diverse Communities* (Garcia et al. 2019).

Environmental Justice

The U.S. Environmental Protection Agency defines environmental justice as: “[t]he fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies” (2019). In very broad terms, development practices related to housing, land use, infrastructure, and sanitation have resulted in lower-income neighborhoods

being “overburdened by pollution” (Eley 2016). That summary is rather euphemistic—the outcome of being overburdened by pollution was the end result of zoning approvals that allowed both developers and decision makers to walk down the path of least resistance when it came to oversight of both difficult and important projects.

Environmental laws in zoning are triggered primarily in the placement of polluting or hazardous uses (facility siting), but also in requirements for and investments in stormwater management, and in the provision of water and sewer infrastructure. There is a significant body of scholarly work on the issue of environmental justice. And, like many planning-related issues, a great deal of thought has been devoted to policy approaches to achieving environmental justice and not as much effort is placed into converting those policies to regulatory strategies.

Two changes to how we identify the districts in which uses are permitted might be helpful in support of more equitable outcomes. The first change is to tighten up, clearly define, and specifically limit the uses permitted by right in heavy commercial and industrial districts. The second change is to refine the conditional (or similar) use review process to specifically include equity review criteria.

Option 1: Take a More Specific Approach to Allocating Industrial Uses in the Use Table. The current best practice for use allocation in zoning codes (yes, there is one) is to broadly define use categories and permit the full range of uses in a general category in a district. For example, we no longer list beauty shops, barber shops, and laundromats as permitted uses, instead allowing all of these uses in the category of “personal services.” Many similar uses have nearly identical planning impacts, and there is no reason to list all of them in a zoning code when the substitution of one use for another in a given location will not matter, as is the case for most retail or personal service uses. This is not the outcome, though, when considering heavy impact and industrial uses.

The range of impacts for substituting industrial uses can be much wider, so the uses should be considered more carefully. A typical heavy industrial district might allow “heavy industrial uses” by right, which could range from a contractor’s service yard to a waste incineration plant. While many communities have spent years refining use tables to distinguish antique stores from flea



➡ In 2017, San Francisco created the Calle 24 Special Use District for the Calle 24 Latino Cultural District to protect neighborhood-serving stores, restaurants, and institutions as well as murals (Planning Code §249.59).

markets from art galleries, many do not give that level of attention to industrial uses until somebody wants to open a landfill.

To change this approach, we first need to identify the “major impact” that the community wants to regulate, which could be either (1) the individual industrial uses or (2) the types of impacts that a use could produce (e.g., water pollution, air pollution, or ground vibration). Then for each major impact item, we would establish use-specific and location-specific standards that would reflect our equity criteria. These should be objective, measurable criteria that are uniformly applicable and should be designed to address new major uses and changes to major uses.

For example, the zoning code could include criteria such as: “No neighborhood (or area with a 10-mile radius) will be burdened with more than one major impact use,” or “Existing residential, mixed use, or commercial zoning may not be rezoned heavy industrial for the purpose of locating a major impact use,” or “Structural changes to nonconforming major uses require at least 50 percent of the nonconformity to be brought into conformance with current regulations.”

Another option for better allocating uses is to make major impact uses subject to conditional (or whatever the higher level of use review is called in your jurisdiction) and then add equity criteria to the conditional use process. Again, this needs to be specific and measurable criteria, like those described in the previous paragraph, not a general policy statement like “Ensuring equitable distribution is a preferred result.” There are communities who do not have review criteria included in their conditional use review process; consider this a gentle reminder that adding review criteria is beneficial to helping decision makers avoid a challenge of arbitrary decision making. The second gentle reminder is that once the review criteria are in place, they need to be used consistently.

Option 2: Identify Opportunities to Improve Conditions Over Time. If zoning has a secret superpower, it is the ability of future zoning to require improvements in past zoning approvals. This weird time machine aspect of zoning is very much overlooked and underutilized and is usually lost somewhere in the nonconformity regulations. Why? Despite what we are all taught in

planning school—when a community identifies a use or structure as a nonconformity it will “go away” over time—the reality is that nonconformities rarely go away. Instead they become frozen in time. Nonconforming status, especially for a structure, makes it hard for property owners to maintain, redevelop, and reinvest in the property.

Instead of designating a use or structure as nonconforming when new or revised regulations are adopted, communities have the option of taking a more flexible approach, requiring the owner to bring the use or structure into partial or complete compliance with the new regulations at any point that a new zoning or building approval is issued for the site. Sometimes called trigger provisions or proportionate compliance requirements, a zoning code can include the requirement that if a property owner is doing “x” amount of work on the site, the site will be brought into “x” amount of compliance with new or changed regulations. This approach is seen most often as applied to parking or landscaping standards, but it can be applied much more extensively. In an environmental justice context, it could be used to address on-site improvements, such as increased buffering, or off-site impacts, such as improving streets that have been degraded by heavy truck traffic.

This approach is incremental in nature and may not lead to change quickly (unless it is teamed with a funding source, such as some of the brownfields programs), but it is at least a pathway to change rather than a guarantee of no change. If a community uses both of the suggested environmental justice updates to the zoning code in tandem—establishing a more detailed set of standards and requiring incremental improvements to conditions over time—there will be a more complete record of the requirements that were approved for the use and structure originally so that each change will be easier to document and to attach appropriate updated standards.

Climate Change and Resilience

The Planning for Equity Policy Guide states that “[c]limate change means that planners and the populations for whom we plan will be confronted with hazardous conditions, repetitive losses, and shocks that may not be endurable.” Rethinking how we create communities to work with this new reality

is referred to as climate resilience, and it has a slightly more positive spin on our climate-impacted future. Equity and climate resilience planning share a need to understand and address how our vulnerable, low income, and marginalized community members will be impacted by climate change.

Option 1: Compact Development Addresses Multiple Climate Resilience Considerations.

Old school and still cool. Literally, in this category. Requiring compact development (preferably higher density and mixed use) is a best practice for climate resilience to address wildfire, extreme heat events, drought, and when designed in conjunction with low impact development stormwater standards, extreme precipitation events. What is the benefit to compact development? Keeping the structures closer together allows more opportunity to design for community-based approaches to some of events that climate resilience plans for, such as extreme heat. Compact development can be easier and more efficient to shade with either structures or trees; can more easily spread the benefit from small-scale alternative energy, such as wind or solar that could still work during a utility brownout; and may require less overall pavement, limiting the overall heat island effect. Some research has shown that compact development gives off less heat energy to the surrounding air than more dispersed development (EPA 2001). Newly constructed compact developments can also benefit from the use of cool and energy saving construction materials.

Nice from an environmental perspective, and also nice from an equity perspective. Compact development is typically more walkable than sprawl, meaning that vehicle ownership may not be necessary where work and day care are within walking distance. A network of compact development is also easier to serve with public transportation. Mixed use, compact development can also be designed to include emergency community cooling centers, such as a theater or community center, for those who do not have air conditioning, along with medical facilities and local emergency services. And while this article is not focused on affordable housing, research seems to show that compact development may support the expansion of housing opportunities in a community.

Compact development can be encouraged through zoning by the creation of a

compact or mixed-density/mixed use zone district type and through the use of form-based code. Compact development requires the creation of smaller lots, reduction of setbacks or the use of build-to lines, and increases to maximum heights to accommodate taller structures.

Depending on your local zoning code, the overall lot coverage standards may also need to be adjusted. More than just encouraging compact development, it can also be incentivized through expedited development approvals, height or square footage bonuses for mixed use development, and public-private partnerships to address infrastructure costs.

Option 2: Quantify the Positive Returns of Green Spaces in Our Built Environment.

Climate resilience requires changes to our built environment and incorporating more of our natural environment into our communities is very beneficial. Trees, in particular, are excellent climate multitaskers.

And while the trees are keeping things cooler, communities can also consider the use of strategically placed “non-built” spaces that are enjoyable when the weather is nice and functional for stormwater and flood mitigation when the weather is less pleasant. Good landscaping standards that include native and xeric plants materials combined with water conserving irrigation standards help landscapes live through periods of drought. Overall, landscaping approaches can be adapted to address just about every category of climate resilience, including extreme heat, wildfire, flooding, drought, and extreme precipitation.

Incorporating improved landscaping, public places (hardscape), public parks (greenspace), and trails into a community can also help accomplish some of the public spaces and places policies in the Planning for Equity Policy Guide. In many communities, significant changes to the overall amount of landscaped area and park space that citizens experience during their daily routines could be accomplished through revisions to landscape standards that focus on street trees, perimeter landscaping, and parking lot landscaping. Changes to landscape regulations are not nearly as challenging to draft as the changes to the use standards described in the environmental justice section would be, but this approach does not seem to be front line in

the equity discussion. Experience tells me that this is because green spaces and public spaces are one of the first things that are negotiated out of a development approval in communities that place low value on these amenities. Many developers see trees and landscaping as an afterthought that is completed last. Some business owners dislike trees because they block signs, and public-sector staff often find landscaping regulations difficult to enforce because landscaping is not the enforcement officer’s area of expertise. And where development negotiation is taking place during the town council meeting, decision makers often believe that the site landscaping is pretty but not functional, so it becomes a bargaining chip in the design negotiations.

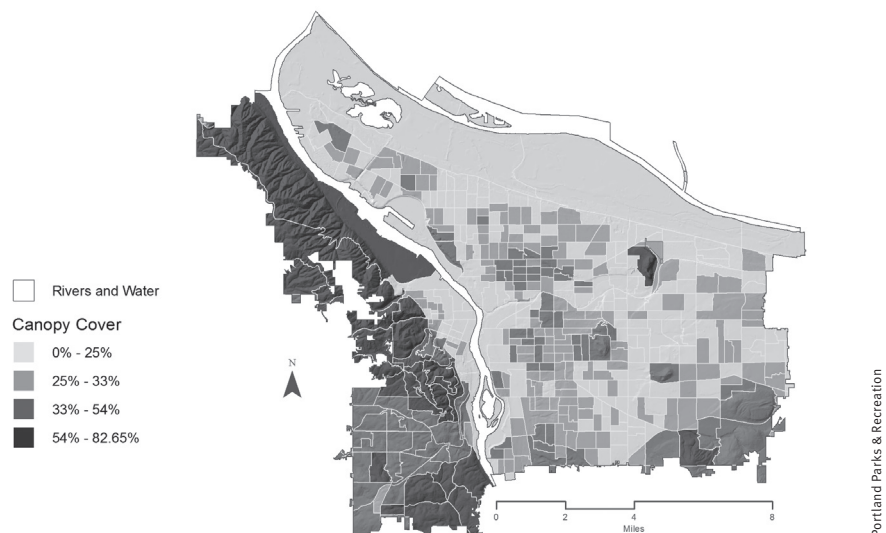
Cue the Lorax, in the form of identifying and quantifying the positive financial returns of green space to a community. There is no rule that zoning has to be adopted without education or commentary, and providing local decision makers with an education about the measurable benefits of landscaping can be very eye-opening. The economic benefit of trees can be found in numerous studies, such as the study that showed Berkeley, California; Bismarck, North Dakota; Cheyenne, Wyoming; Fort Collins, Colorado; and Glendale, Arizona spend

\$13–\$65 annually per tree, but experienced benefits of \$31–\$89 per tree (McPherson et al. 2005).

Similarly, The Trust for Public Land did a study that shows parks can be valued in multiple ways, including increases to surrounding property values, tourism value, direct use value, health value, community cohesion value, reduced costs for stormwater management, and removal of air pollution (Harnick and Welle 2009). Portland, Oregon, went one step further and prepared a detailed study about a more equitable urban forest that took a GIS-based look at the relationship between tree canopy and neighborhood composition. The study team found a measurable correlation between tree canopy and income, shown in the illustration below (Portland Parks & Recreation 2018).

So if the cost/benefit of trees, parks, and public spaces has been studied for years and is valuable information, why isn’t this information included in zoning codes? This is most likely because zoning is legal in nature and older zoning codes still read like legislation. This is one place where old-school is problematic.

A more helpful approach to a thoughtful decision-making process might instead be to incorporate relevant information into



The percentage of urban tree canopy cover in Portland, Oregon, is significantly lower in areas with higher percentages of populations of color and populations with limited English proficiency. In response, the city is targeting tree-planting efforts in neighborhoods with more low-income residents.

the zoning code through purpose or intent statements. The purpose statement(s) can be both simple and meaningful, such as “we recognize both the quality of life and financial benefits provided to our community by conserving the existing tree canopy.”

ZONING EQUITY NEXT

Incorporating equity considerations into zoning codes is not a new idea but it is not yet a well-defined idea and is probably hampered by a narrow understanding of how zoning can work. As more communities incorporate equity policies into their comprehensive plans, we hope to see planners take the next step and convert the policies into standards and regulations. This needs to include a

more critical look at both the inputs and outcomes of zoning.

Achieving more equity will require planners to focus more on the neighborhood building and supporting functions of zoning than the use-separating function. This might mean creating new zone districts that mix structures and uses at a range of scales; undertaking a targeted, proactive rezoning process in neighborhoods that could be harmed through gentrification; making zoning processes more inclusive; and, yes, rethinking the use section of the zoning regulations.

Zoning is not only not broken, it can be a very powerful tool to achieve equity outcomes if it is reprogrammed correctly.

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