Modernization of Zoning

A Means to Reform

George W. Liebmann

As population density in America's eastern states and in other metropolitan centers has approached that of the developed countries of Europe, there has been mounting dissatisfaction with the existing zoning system. Restrictions imposed on businesses, landlords, and residents, as well as restrictions on new development, have severely limited the ability of existing metropolitan centers and suburbs to adapt to new needs and conditions.

One result of these restrictions is that it is difficult for developers to provide consumers with higher density, multiuse residences closer to employment centers. Thus, ever-greater quantities of land on the fringes of metropolitan areas and in the countryside have gone for residential use when they might otherwise have been maintained as open spaces, farms, or natural preserves. The existing zoning system also produces large quantities of single-family housing in a period in which changing demographics are increasing the demand for smaller apartments.

Another result of populations spreading over large areas in low-density housing developments is the geographic segregation of the elderly. Zoning makes it more difficult to keep aged parents close by and to care for them. Further, zoning creates serious inconveniences for residents by banishing convenience stores, offices, and social services from residential areas. And, of course, traffic congestion increases as residents who might prefer to live within walking distance of stores, theaters, or workplaces are forced to take to the roads.

In light of these problems, a reevaluation of zoning policy is needed.

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The German Origins of Zoning

Zoning, an idea perfected by the Germans, was introduced into America and promptly stripped of any beneficial features. In the 1920s the U.S. Department of Commerce drew up what was considered a model zoning enabling act. The model was principally the work of Edward Bassett and Alfred Bettman of the Ohio bar, who freely acknowledged their debt to the German experience. Then-Commerce Secretary Herbert Hoover heavily publicized the act and urged localities to adopt it. During the 1920s zoning became a kind of craze among municipalities. Thousands sought zoning information and eventually adopted the model zoning enabling act.

Yet there were significant differences between

"It's a good thing I built this place when I did. The new zoning law prevents any house from going over 75,000 calories."

the German and American approaches to zoning. German zoning had its roots in the desire of residents of an increasingly crowded country to conserve unspoiled land and to protect residences against noxious industrial and commercial uses. But German practice for example, permitted duplex housing even in the most restricted residential zones. Duplexes both conserve space and, among other things, allow the elderly to be close to their adult children who might wish to have their parents close by but not in the same house. Many American ordinances initially contained flexible zoning provisions that allowed duplexes. Among such ordinances was the Euclid, Ohio statute that was upheld by the U.S. Supreme Court in *Euclid v. Ambler Realty* that established the constitutionality of zoning. But the duplex feature has all but disappeared from most American ordinances.

The German practice subjected commercial uses in residential zones to performance standards allowing flexible land use. These permitted many forms of businesses and dwellings as long as they did not have certain adverse effects or consequences. For example, enterprises could be banned from an area if they released objectionable odors or noxious fumes. As economist and Nobel Prize winner F.A. Hayek wrote in his *Constitution of Liberty*: "Performance codes . . . impose less restrictions on spontaneous developments than 'specification codes' and are therefore to be preferred." The latter may at first seem to agree with our principles because they confer less discretion on authority. However, the discretion which performance codes confer is not of the objectionable kind. Whether or not a given technique satisfies the criterion of performance laid down in a rule can be ascertained by independent experts, and any dispute can be decided by a court. Nonetheless, in order to ease administration, and out of perhaps a justified mistrust of the integrity of zoning administrations, commercial uses were almost totally prohibited in American residential zones.

German zoning laws regulated residential areas through limiting the number of structures per acre; however, American zoning laws regulated residential areas through minimizing lot sizes and requiring residential structures to be a certain distance from thoroughfares.

Since their inception in the 1920s, American zoning laws have recognized constitutionally required variance. For example, when a government zones a parcel of property in such a way that all uses are barred, and as a result the property loses most or all of its value, the government is engaging in a taking of property. In such a case, in accordance with the Fifth Amendment to the U.S. Constitution, it would have to compensate the property owner for the loss. Further, in America, zoning has mostly been under the purview of municipal governments, while in Germany it traditionally has been the responsibility of the equivalent of American state governments. But coupled with insufficient judicial regard for the separation of powers, zoning in America gave rise to the evils of "legislative spot reclassification." In such cases, for example, a municipal council might rezone a particular parcel of land to satisfy a politically favored developer.

A major goal of zoning in Germany was to limit despoliation of the countryside. Only recently has this become a concern in the less-crowded United States. Facilitating development in designated urban areas was an objective of the German system. But when zoning was introduced in America, the more generous provisions for citizen and neighborhood involvement

allowed zoning to be used as a way to discourage development in built-up areas, and to defend the status quo. Ernst Freund, the first prominent American analyst of administrative law, as early as 1929 eluded: ". . . the [American] national temperament which at present combines the lowest degree of local attachment with the highest degree of sensitiveness as to neighborhood associations. There is a subtle psychology about this sensitiveness; I think it is connected with our democratic institutions; where you haven't got natural class distinctions you make them artificially. . . . People [in Europe] do not mind a little store around the corner a bit. When you go to Vienna you find that the palace of one of the great aristocratic families has a big glass work display room on the lower floor. We wouldn't have that in this country because it is not comfortable to our ideas."

Thirty years later Jane Jacobs, author of the *Death and Life of Great American Cities*, commented on the same phenomenon: "Middle income projects as they age tend to contain a significant (or at least articulate) proportion of people who are fearful of contact outside their class."

Many features of zoning such as minimum lot and yard sizes, and setbacks that result in particularly adverse effects are permitted, if not mandated, by the model zoning enabling act adopted by thousands of municipalities since the 1920s. Such features are still in effect today in all states save Florida and Oregon. Oregon has a unique "urban limit" system, somewhat resembling the German one, while Florida has an elaborate and cumbersome new "growth management" system involving multiple bureaucracies.

Added Bureaucracy

Since the 1920s, the model zoning enabling act has been supplemented with a model subdivision enabling statute developed by the Commerce Department. This model act, also adopted by thousands of municipalities, recommended the creation of local planning commissions separate from zoning boards of appeal. Such commissions have added more bureaucratic and political barriers to property use by citizens, complicated the permitting process, and resulted in even more confused and contradictory patterns of land use.

For example, George Lefcoe, a professor of law at the University of Southern California, tells us that "A student of the development process in the city of Los Angeles discovered in trying to obtain approval for a simulated subdivision that it took 18 months to clear because 36 different offices were involved in the process. There were 12 forms and 87 supporting documents to be submitted according to 31 different instruction sheets, none of which explained the entire process from beginning to end."

Changes Affecting Zoning

The low rate of automobile ownership prior to World War II coupled with abundant mass transit surrounding most large cities, concealed the ultimate adverse consequences of zoning practices. However, population growth and the explosion of tract housing began to create problems in the early 1960s. Three other phenomena combined with zoning to cause these problems to reach the crisis stage:

- **The Interstate Highway System.** The construction of the Interstate Highway System which started in the late 1950s, brought larger areas within commuting range of metropolitan areas. Mileage driven by motor vehicles approximately doubled from 1960-80.
- **Changing family structure.** Existing zoning laws and dramatic changes in family structure created serious misallocations of housing stock by preventing it from being adapted properly. The average number of persons per household declined from 3.14 in 1970 to 2.76 in 1980, 2.69 in 1985, and 2.63 in 1993—a decline of 16 percent in 23 years. The number of persons over age 14 living alone increased from 7.1 million in 1960 to 23.6 million in 1993. The number of households comprised of six or more persons declined from 6.8 million in 1965 to 3.4 million in 1993. During the period 1970-78, the life expectancy of a woman 75 years old increased 57.5 percent. The percentage of men never married increased from 17.3 to 24.9 from 1960-93; the corresponding figure for women is 11.9 to 19.4 percent. The percentage of women between the ages of 25 and 29 who had never married increased from 10.5 in 1960 to 33.1 in 1993. The percentage of women age 65 or older with no spouse present and who live with adult children or other relatives declined from 58 in 1950 to 29 in 1970, and to 17 in 1993. Eighteen million dwelling units had 2.5 rooms per person or more in 1982. A Maryland study commission noted in 1985, "Whereas the number of one and two family

"You passed your monthly sanitation inspection, but you still need to provide separate restrooms for males and females."

households [in Maryland] grew by 140 percent between 1960 and 1980, the number of efficiency one- and two-bedroom units constructed increased by only 54 percent."

- **Intrasuburban traffic.** The migration of offices and industry to the suburbs has created intrasuburban traffic problems. This has made continuation of the previous patterns of development encouraged by zoning laws even less appropriate. As Jane Jacobs notes, "Wherever people are thinly settled . . . or wherever diverse uses occur infrequently, any specific attraction does cause traffic congestion. . . . The moment work is introduced into the mixture, even in a suburb, the equilibrium is lost. . . . The more territory which is dull, the greater the pressure of traffic on lively districts."

State Arrogation of Authority

These developments in part account for the so-called quiet revolution in land-use policy. In response to these developments, state governments have exercised growing control over the power to zone that normally would be exercised by municipal governments.

Perhaps a more important reason for state government intervention has been environmentally motivated concern about the conversion of agricultural, forest, and scenic coastal lands to residential and commercial uses. Environmental interest groups have found it easier to secure land-use restrictions from state governments.

Only in Oregon has there been significant, though belated appreciation of the indispensable connection between deregulation in developed areas and protection of less-developed, pristine areas. Specifically, Oregon has favored density regulation, facilitated development within urban limit lines, and eliminated discrimination among housing types based on forms of ownership, or the number of families residing in them.

A Developers' Bill of Rights

If zoning restrictions must be maintained, the least that states and municipalities can do is allow maximum flexibility for land use. This would allow for an increase in the supply and a reduction in the cost of housing in developed areas, as well as areas that owners wish to develop. To this end, a series of provisions constituting a "Developers' Bill of Rights" can guide policymakers in efforts to reform zoning. Such a list

should include the following recommendations:

1. Abolish planning commissions whose responsibilities overlap with those of zoning boards. Authority over zoning subdivision, building, and housing-code enforcement should be vested in one agency with the power to subdelegate. This reform would establish uniform standards and speed up appeals of zoning decisions, eliminating delays and jurisdictional conflicts. Such an approach was recommended in the American Law Institute Model Land Development Code developed in the 1970s.

2. In developed and populated areas in which a more diverse mix of commercial and residential facilities is appropriate, zoning permits should automatically take effect within 180 days of application, unless denied by zoning authorities for clear, well-defined reasons in zoning guidelines. Such areas might include cities, municipalities of a certain size, enterprise zones, urban renewal areas, and commercial redevelopment areas. This automatic permitting feature, as practiced in Oregon, places the burden of stopping land use by an owner on the government and would cut delays which can be as long as 18 months.

3. Eliminate minimum lot size, setback, and yard requirements. If policymakers feel they need to avoid overcrowding, a better approach would be to establish a general ceiling on population density, minimum amounts of floor area per inhabitant, and standards to allow light and air into an area. Current prohibitions on clustering of houses and use of garden apartment and row-house designs contribute to sprawl, increased costs, and wasted land.

4. Duplex homes and accessory apartments should be permitted in all new residential construction. Housing options such as these allow elderly persons to live near their adult children without intruding on their children's privacy. Such construction is a major component of housing policy and policy for the elderly in both Germany and Japan. Since 1982 a California state law has required municipalities that have not already limited such units to certain areas, to grant permits for second residential units.

Dolores Hayden, a feminist critic of the existing zoning system, forecast that "over two or three decades most of the single family housing stock and most of the R-1 [single-family] neighborhoods will change to reflect the basic demographic shifts the U.S. faces. . . . The adaptation of suburban house forms to new uses is as inevitable as was the adaptation of brick row houses and brownstones and the introduction of mixed uses, higher densities, and new building types that accompanied it."

5. In areas other than those zoned for industry, zoning should be cumulative. In other words, any use permitted in a more protected zone may be carried on in a less protected one, thus allowing mixed-use development. Office and commercial areas that normally are considered "less protected," such as apartments that are usually allowed in "more protected" areas, should be permitted over shops. Downtown commercial areas under more flexible zoning no longer would need to become deserts every evening after employees flee to the suburbs.

6. In new residential developments above a certain minimum size (e.g., five acres), zoning regulations should permit convenience stores, health clinics, restaurants, day-care centers (as in Michigan), and demand-response transportation facilities such as taxicab services and car rental agencies. Restaurants and convenience stores should be permitted in existing apartment buildings where they obviously serve the convenience of residents. In addition, signs not visible from public roads should be permitted.

If policymakers fear that the existing transportation infrastructure could be strained from too much commercial activity in residential areas, they can place a floor-area limit of a percentage of the total area on commercial activities. One commentator has noted the paradox that, "The very settlements we admire and crowd on to on holidays would be illegal under any zoning ordinance now in existence."

An especially welcome method of allowing a mix of facilities in residential areas would be to give homeowners, condominium, and cooperative housing associations, in accordance with their bylaws, authority to operate or contract for such facilities. This increase in local control over neighborhoods of strangers without traditions would help to forge real communities.

According to Robert Nelson, formerly of the Department of the Interior, "The evolution of suburban land-use controls has effectively transformed the suburban neighborhood into a new form of collectively owned private property. . . . The transaction costs of repurchasing rights held by the community are very high. . . . Grant the development neighborhood independence from

outside government control over its land use and let the neighborhood decide for itself—through some collective mechanism—how to respond to the pressures of outside market forces."

Similarly, the late Allison Dunham of the University of Chicago Law School once observed, "The small unit of government serves as an effective check on tendencies to interfere with private choices. . . . Planning in the United States does not yet seem too conscious of the possibility that the price mechanism is a more adaptable and flexible method of land-use allocation than a flexible plan administered by an inflexible administrator."

As Nelson observed: "If Residential Community Associations (RCAs) were to become the prevailing mode of social organization for the local community, this development could be as important as the adoption in the United States of the private corporate form of business ownership. Two basic collective forms of private property ownership then would exist: the RCA form for residential property and the corporate form for business property."

What is needed is a market free of regulatory absurdities, whose contours and limits are defined by immediately effective law, declared by the only appropriate forum—the state legislature.

7. Zoning statutes should permit home offices and telecommuting in residential zones, which are growing rapidly with the telecommunications revolution.

8. So long as density and other general requirements are met, ordinances should be precluded from discriminating against proposed new residential structures on the basis of the number of housing units contained in them. The enabling act should make clear, as with the "right to develop" at established densities in Germany, that zoning ordinances are regulations of physical development and its physical consequences—they are not vehicles for discriminating among housing types having similar environmental effects.

9. Similarly, municipalities should be denied the right to distinguish between developments of similar physical characteristics on the basis of tenure or form of ownership, for example, condominiums, owner-occupied, and rental units. This will not and is not intended to preclude the market from making such distinctions, for example, by transforming rental units into condominiums. There will and should continue to be separation of income classes resulting from differing permitted densities, land costs, and qualities of construction—that is to say, market forces. And it is likely that much of the most desirable and most protected land will be devoted to forms of tract housing development. The thrust of the legal change is simply to avoid precluding the market from making available and popularizing less land-consuming forms of development. As Henry Richmond, an Oregon zoning expert has observed, "If Congress were to pass a law that 83 percent of General Motors cars had to be Cadillacs (on the theory that this is the kind of car people 'dream of') a lot of congressmen would probably lose their jobs. Yet local officials all over the country have adopted exactly this kind of 'we know best' law for housing—a commodity that is certainly more critical to people than a car."

10. Costly, landwasting housing-subdivision mandates with extravagant street-width requirements, imposed in an era of large, gas-guzzling cars, should be amended to reflect the realities of a compact and even subcompact era.

11. The use of lump-sum impact fees assessed to each newly constructed unit by subdivisions should be limited by precluding use of such fees in areas with already established infrastructure in which reuse or infill—for example, filling vacant lots—is the goal. This can be done by allowing these fees to become part of the mortgageable home price by closing costs separately charged at settlement; by providing for deferral of fees until the house has been built and sold, so that the fees need not be included in construction financing; and by precluding fees for purposes not reasonably related to demands for infrastructure generated by a project. Such fees are a favored device for transferring tax burdens to newcomers.

12. The use of state and local transfer taxes, which frequently amount to 2 or 3 percent of the cost of a new home, should be strictly limited. Such taxes are often dedicated specifically to open spaces and parklands. But it is incongruous to impose taxes on transactions in urban renewal and already developed areas that aim to attract growth.

13. State and municipal governments should strictly limit the use of building moratoria. The usual justification for a moratorium is that the infrastructure cannot handle a population increase. But frequently such moratoria have little to do with physical development problems and more to do with meeting social or political needs. The American Law Institute has produced a Model Land Development Code that would allow a moratorium only in cases of real danger to public health and safety, and only when less restrictive means have been exhausted.

Conclusion

The proposed changes do not require any reduced use of large-lot tract development. Rather, they permit developers in the market to reduce land waste through clustering of housing and greater apartment and condominium construction. These proposals permit developers, homeowners, and neighborhood associations to provide for denser use of subdivisions through mixed-use development, and accessory and duplex housing. They reduce delays due to the need for multiple and uncoordinated development permits, and restrict the government's use of transfer taxes and arbitrary building moratoria that make development costly and unpredictable.

Basic to this approach is the conviction that enhanced protection of undeveloped land is possible and tolerable only if measures are taken to reduce housing costs in areas designated for development. Also basic to this approach is a belief that desirable development is best fostered by predictability and certainty in the law—by the rule of law in the Hayekian sense: uniform rules laid down in advance—and not by further movement toward a system of discretionary planning permission.

These proposals emphasize certainty, equality among subdivisions, and respect for market forces. To the extent to which developers are equipped with new freedoms, the law at least will no longer hinder the ability of society to adapt to the changes in family structure.

These proposals conspicuously omit court- or government-ordered introduction of low-income housing in residential neighborhoods. Such experiments have resulted in decades of litigation, school busing, and other failed schemes. Low-income housing consumers will benefit from the legalization of duplexes and accessory apartments, and from elimination of building type and tenure limits on land-use decisions.

The creation of any new housing unit, and particularly any new rental unit, ultimately benefits low-income consumers because of the phenomenon of "filtering." As Bernard Siegan of the University of California, San Diego has pointed out, "The construction on the average of 1,000 new units, both houses and apartments, makes it possible for a total of about 3,500 moves to occur to different and likely better housing conditions." What is most needed in this sphere are not good intentions, but clear rules. What is also needed is not "a statewide forum in which the state government, the courts, local planners and politicians, citizens and private and public interest groups all participate in making broad choices about the future of the state after a decade of controversy and compromise within this forum," but rather a market free of regulatory absurdities, whose contours and limits are defined by immediately effective law, declared by the only appropriate forum—the state legislature.

Selected Readings

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Readings

The Dioxin Drama

Dying from Dioxin: A Citizen's Guide to Reclaiming Our Health and Rebuilding Democracy
by Lois Marie Gibbs
(South End Press, 1995) 362 pp.

Reviewed by Michael Gough

Lois Gibbs, organizer of the Love Canal Homeowners' Association and the "mother of Superfund," and a number of her colleagues have written *Dying from Dioxin: A Citizen's Guide to Reclaiming Our Health and Rebuilding Democracy*.

We are all dying, but not from dioxin. Gibbs's recommendations will not allow us to reclaim our health which, so far as I know, has not been lost. Her recipe for rebuilding democracy includes shutting down industries and services that pollute, and levying taxes on any surviving businesses in order to fund worker retraining programs.

This is a bad book, filled with misstatements and half-truths. It will surely find readers among those who believe that environmental toxins are a major cause of human misery and disease; those who want to get even with "the system"; and those who are looking for explanations of disease and death that no expert can provide. Those familiar with the technical, legal, and governmental issues surrounding dioxin might want to read the book to understand Gibbs's tactics. I suggest that those readers borrow the book from a library.

Readers of Michael Fumento's book *Science under Siege* will recognize Gibbs's tactics. They worked at Love Canal. Blame everything on a specific evil, Love Canal, and say it over and over again. They worked for the passage of Superfund. Blame every conceivable health effect on a more general evil, waste dumps, and say it over and over again. Dioxin is the next logical step in Gibbs's move from the specific to the general; it is literally everywhere and produced in worrisome amounts, according to Gibbs, by just about every human activity. I can summarize her discussion of the science: Dioxin can cause every disease known to man, and it is doing so right now across America.

The first part of the book purports to discuss what scientists know about dioxin, and it is largely based on the Environmental Protection Agency's (EPA) 1994 "Dioxin Reassessment." To understand the misrepresentations in Gibbs's book, it is helpful to know something about the $6 million, four years in-the-making, 2,000-page reassessment. Academic scientists wrote the first seven and a half chapters that summarize toxicologic and epidemiologic findings. A friend of mine characterized them as "book reports." EPA scientists wrote the rest of the nine-chapter report, and they translated the material in the earlier chapters into a "risk characterization." The characterization claims that exposures to dioxin that are only 10 to 100 times higher than the exposures we all encounter every day can cause a multitude of human diseases, including cancer.

Gibbs glosses over the review of the dioxin reassessment conducted by the EPA's Science Advisory Board (SAB): "*The SAB disagreed with the EPA only in its interpretation* of some of these scientific findings." (Emphasis added.) Indeed. The SAB disagreed only with the parts written by the EPA.

The SAB said that the EPA's risk characterization chapter has "a tendency to overstate the possibility for danger," and faulted it because "important uncertainties . . . are not fully characterized." The board said that the EPA's cancer risk estimate "suffers from its reliance on the

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