

Here's Looking at Euclid

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Zoning and the American Dream: Promises Still to Keep edited by Charles M. Haar & Jerold S. Kayden. Chicago: Planners Press, American Planning Association, 1989. 400 pp., \$39.95

Municipal zoning in the United States is a creature of the 20th century. Originally endorsed by social reformers as a means of eliminating slums and alleviating congestion, zoning soon became the darling of developers and homeowners. Developers and real estate interests wanted to stabilize property values; homeowners wanted to protect the residential character of their neighborhoods. In 1916, at the urging of central Manhattan merchants worried about the encroachment of garment manufacturers into their retail shopping district, New York City passed the nation's first comprehensive zoning ordinance. Many other communities soon followed. By 1920, 82 of the 93 largest cities in the country had adopted zoning ordinances.

Until 1926, when the United States Supreme Court decided the landmark case *Village of Euclid v. Ambler Realty Company*, the constitutionality of zoning remained in doubt. Opponents charged that the height, use, and density controls at the heart of zoning laws were unconstitutional infringements on private property rights. Advocates argued that zoning protected suburban American homes from urban blight and commercial growth. In their view, zoning was a justifiable exercise of local police power to protect public health, safety, and welfare. The debate was settled in the *Euclid* case when Justice George Sutherland, speaking for a six-member majority of the Court, found the zoning ordinance of Euclid, Ohio, a Cleveland suburb, to be constitutional.

The influence of the *Euclid* decision cannot be overestimated. Euclidean zoning—similar to that embodied in the New York City ordinance of 1916—has been widely imitated across the country, profoundly affecting the physical development of American cities. In 1986, on the 60th anniversary of the Supreme Court ruling, the Lincoln Institute's Land Policy Roundtable met in Cambridge, Massachusetts, to discuss the legacy of *Euclid*. Many of the papers presented there, along with others that later developed from the discussions, have been collected in the volume *Zoning and the American Dream: Promises Still to Keep*. Edited by Charles M. Haar and Jerold S. Kayden, this 400-page, double-columned book contains 13 essays by as many planners, lawyers, sociologists, and economists. Justice Sutherland's opinion is reprinted in an appendix. The result is a readable, comprehensive, and scholarly overview of the *Euclid* case and post-*Euclid* zoning developments. (References to individual essays in *Zoning and the American Dream* are cited in the text by author's name and page number.)

Ironically, the *Euclid* ordinance, despite its enormous impact on ordinances elsewhere, was a poor test case for the constitutionality of zoning. Since 1912, the Ambler Realty Company had owned a 68-acre tract between a railroad line to the north

and a major east-west thoroughfare, connecting Euclid with Cleveland, to the south. Ambler had held the tract in anticipation of industrial development from the direction of Cleveland. When, in 1922, Euclid Village adopted its zoning ordinance, half of the tract was zoned residential, much to Ambler's dismay. The only district reserved for industrial use was a strip along the railroads that was far too narrow for practical development (Brooks, 5).

On behalf of Euclid Village, lawyer and zoning champion Alfred Bettman submitted a "Brandeis brief" (an appellate brief making use of economic and social surveys and studies) to the Court. Privately, however, Bettman held the view that "it was a piece of arbitrary zoning and on the facts not justifiable" (11, 29). Not only was the ordinance arbitrary, but its over-emphasis on the residential—the village considered itself a "residential suburb" (25)—was a departure from the typical American ordinance of the 1910s and 1920s. Except for the narrow industrial zone, most of the village was zoned for residential and business uses. Elsewhere, however, extravagant overzoning for commerce and industry was the norm (Feagin, 83). For example, Burbank, California, with a population of 20,000 in the mid-1920s, reserved enough business frontage for a population of 1.5 million. New York City zoned enough commercial and industrial space to accommodate 300 million employees (Rabin, 106; Williams, 280-81). In the opinion of L.B. Ryon, Jr., the secretary of Houston's short-lived City Planning Commission in the 1920s, a draft zoning ordinance of 1928 was guilty of "over-zoning" for business and industry.¹ Based on extraordinarily optimistic forecasts for urban growth, overzoning reflected local boosterism and a reluctance to interfere with vested interests (Williams, 280). Besides encouraging leapfrogging commercial and industrial growth unconnected with community development, overzoning contributed to inflated land values.² It also had a racial component. In such cities as St. Louis, where commerce and industry were overzoned and residential areas underzoned, business incursions into residential areas thus made vulnerable created slums and displaced blacks (Rabin, 108).

As several contributors to *Zoning and the American Dream* note, the primary beneficiaries of zoning are the suburbs (Randle, 41; Abeles, 123-24, 152-53). Bedroom communities and middle- and upper-class neighborhoods within cities have used zoning to maintain their stability and residential character. Even in the absence of zoning, suburbs have usually benefited from the imposition of restrictions by subdivision developers. Deed restrictions offer protection similar to that of zoning ordinances, with the difference that the owners of restricted property, not the city, must sponsor any litigation against violators.³ Another limitation is that deed-

restricted neighborhoods may have no legal recourse against incompatible uses adjacent to the restricted area, nor can they prevent the exercise of the power of eminent domain by governments or public utilities.⁴ Furthermore, zoning avoids the "free rider" problem often associated with deed restrictions. Holdouts in a neighborhood can frustrate the majority of residents who wish to create or enforce restrictions that apply to all neighborhood properties (Nelson, 301).

Sometimes local administrative decisions may create conflicts with deed restrictions. In Houston, for example, the seven-member Housing Board of Appeals has granted permits for mobile homes in neighborhoods whose deed restrictions prohibit them.⁵ State law may also preempt private deed restrictions. Texas permits group homes for retarded adults in any neighborhood, whether the restrictions prohibit them or not, so long as the homes meet licensing requirements, house no more than six people, and are not within half a mile of another such home.⁶ Sections of unzoned cities without deed restrictions are unprotected against incursions and incompatible uses except where specific ordinances provide otherwise.⁷

Low-income and minority groups are frequently the victims of zoning. As noted, zoning maps can be drawn in such a way as to invite industries into poorer neighborhoods, a practice that Yale Rabin has termed "expulsive zoning" (Rabin, 101). Moreover, the ordinances themselves may contain minimum lot sizes and other terms that effectively exclude racial minorities from wealthier sections of the community (107). By excluding apartments from certain areas—a practice endorsed by *Euclid*—zoning can discriminate against persons normally associated with apartment dwelling, namely members of ethnic or racial groups, young people, or those whose ways of life are considered different (Williams, 288). According to a 1982 federal report, zoning and other local land-use controls drive up housing costs by 30 percent and keep millions of low- and moderate-income Americans from owning a home (Nelson, 307). Reversing the exclusionary effect of zoning is surely one of the "promises to keep" alluded to in *Zoning and the American Dream*.

Poor neighborhoods fare less well than rich ones when confronted with incompatible land uses. In zoned and unzoned cities alike, local newspapers thrive on stories of neighborhoods pitted against any number of internal or external threats to their tranquillity (Abeles, 123). One of the antagonists may be the city or state government itself attempting to create or enforce land use regulations (Wolf, 253). In the Houston area in recent years, controversy has arisen over the placement of a proposed monorail line, a racetrack, a

parking garage, family day-care homes, billboards, a psychiatric hospital for state prison inmates, hospices, halfway houses and probation offices, a home for head-injury patients, a group home for troubled boys, power lines, road widening and resurfacing projects, landfills and dumps, group homes for the mentally retarded, sexually oriented businesses, refineries, cellular telephone towers, and natural gas wells.⁸ Although the outcome varies from case to case, the glare of publicity ensures that the views of all interested parties are aired. Considered less newsworthy are the interests of those in the central city and in the lower-income districts. It is an unpublicized fact that 12 of the 13 city-operated waste disposal facilities in Houston are located in a black or Hispanic neighborhood. This pattern constitutes de facto zoning on the part of city officials.⁹

Zoning has been accused of being behind the times. Current "socioeconomic and governance realities" have moved far beyond the ability of legislative bodies and courts to respond (Wolf, 262). It has been argued, for example, that urban real estate investment decisions commonly create social costs (Feagin, 78). These costs, which may include disruption of ground and surface water flow, pollution, housing destruction, and increased city service expenditures, have traditionally been shifted onto third parties and communities as a whole (78, 97). Instead of requiring developers to meet these social costs, however, city officials have routinely offered subsidies to important developers to attract them to the city. In Houston, the city council has approved a "free port exemption" that exempts taxes on business inventories destined to leave the state within 175 days. Both Houston and Harris County have tax abatement programs for industry. In 1988, Houston and Harris County granted tax abatements for eight company moves or expansions that were expected to create a total of 4,908 new jobs. Companies receiving tax abatements in the Houston area have included a newspaper recycling plant, a laboratory supply company, and companies specializing in computers, chemicals, steel, medical packaging, and diaper manufacturing.¹⁰

Not all cities are oblivious to the social costs inflicted by new development. Santa Monica, California, for example, requires developers to provide low- and moderate-income housing, day care centers, and public parks (97). This requirement, known as linkage, is one of several innovative land-use techniques that have grown in popularity in recent years. Similarly, subdivision regulations may require subdivision developers to dedicate land for streets and parks, to make cash payments—known as impact fees—in lieu of such dedications, and to provide other public amenities and services (Kayden, 239-40; Wolf, 271). Inclusionary zoning means that residential developers are asked to set aside units of affordable housing (Kay-

den, 244; Wolf, 269). In making these demands upon developers, municipalities have treated zoning as a transferable property right, for sale at the right price (Nelson, 304). The creation of futures markets for pollution permits and wetland credits is a more recent example of development rights treated as a commodity.¹¹

These techniques, however, have generated opposition from those who believe that individual property owners are disproportionately burdened with the costs of addressing society's ills, costs which are generally unrelated to development activities (Kayden, 244). In the 1990s, affected landowners will probably look more often to the courts for relief. The Rehnquist Court has provided an opening, suggesting in *Nollan v. California Coastal Commission* (1987) that judges may be required to scrutinize land-use decisions by local governments with greater care (244; Williams, 293). The deferential approach to local governmental decision-making—one of the most enduring legacies of *Euclid*—may have run its course.

As it plans its own zoning ordinance, Houston can learn much from the cumulative experience of more than 60 years of zoning. In 1926, the realities of a changing world, which included immigration and congestion, the altered role of the family, and new property interests, required Justice Sutherland's flexible response (Randle, 54). The realities of 1991 require a similar degree of flexibility on the part of local legislators and zoning administrators. Before adopting a zoning ordinance, Houston should develop a comprehensive plan that takes a long-range view of the city's future and takes account of all segments of society. The ordinance itself should be comprehensive, yet flexible enough to respond quickly to changes in society. The growing population of the city—expected to double in 20 years, by one forecast—is such a change.¹² An excessive zeal for regulation should not be allowed to push the price of land out of the reach of middle- and lower-income groups, whose numbers are growing the most rapidly. Companies benefiting from tax abatements should be required to meet the social costs they create and to provide other kinds of benefits to the city in return. Environmental, regional, and preservationist concerns should be addressed thoroughly in the zoning ordinance. Nuisance law should be systematized and enforced through the planning department. In seeking the American dream for its citizens, Houston may find *Euclid's* spirit of accommodation to be a useful guide. ■

Notes

- Houston Chronicle*, October 7, 1928.
- Daniel Schaller, *Garden Cities for America: The Radburn Experience* (Philadelphia: Temple University Press, 1982), pp. 65-66.
- In Houston, the city has the authority to enter these lawsuits on the side of the plaintiffs, but the city's policy has been one of selective enforcement. Very often neighborhoods have had to proceed on their own against alleged violators.
- See generally Archie Henderson, "Land Use Controls in Houston: What Protection for Owners of Restricted Property?" *South Texas Law Review* 29 (October 1987), pp. 131-87.
- Houston Chronicle*, January 14, 1988.
- Houston Post*, November 4, 1989; *Houston Chronicle*, April 20, 1991, May 1, 1991.
- In Houston, specific ordinances regulate salvage and wrecking yards, neighborhood garages and body shops, billboards, signs, and sexually oriented businesses, among other land uses. Under the common law of nuisance, land uses that constitute nuisances may also be prohibited. Businesses applying for building permits, certificates of occupancy, and business licenses must sign affidavits pledging that their operations do not violate recorded deed restrictions. Houston also has a development ordinance and an off-street parking ordinance.
- Houston Chronicle*, June 25, 1990, August 3, 1989; *Houston Post*, July 2, 1990; *Houston Chronicle*, June 8, 1989, April 11, 1991, April 5, 1991, May 18, 1991; *Houston Post*, July 3, 1991; *Houston Chronicle*, March 20, 1991, September 6, 1990; *Houston Post*, December 25, 1990; *Houston Chronicle*, January 3, 1991, September 13, 1990, August 13, 1991, August 22, 1990; *Houston Post*, November 4, 1989, May 1, 1991; *Houston Chronicle*, March 15, 1991, August 4, 1991; *Houston Chronicle*, January 25, 1991; *Houston Post*, April 7, 1991; *Houston Chronicle*, January 6, 1990.
- Beth Anne Shelton et al., *Houston: Growth and Decline in a Sunbelt Boomtown* (Philadelphia: Temple University Press, 1989), pp. 90-91.
- Houston Chronicle*, November 8, 1990, August 21, 1988, June 27, 1990, November 29, 1988, November 16, 1988, February 29, 1988, July 15, 1987, March 16, 1987, August 21, 1988.
- Houston Chronicle*, July 17, 1991, August 25, 1991.
- Houston Post*, November 2, 1990.

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