

R.I.P., as-of-right zoning

*Don't it always seem to go, that you don't know
what you've got 'til it's gone.*

— Joni Mitchell, Big Yellow Taxi

Death should always be mourned, the more so when that death is of a loved and valued one which happened slowly, through inattention. So it is with as-of-right zoning, an aspect of development that over roughly three decades has softly and suddenly vanished away, taking with it our control over affordable housing costs and our ability to execute a national housing policy – and raising preservation from afterthought to national imperative.

When the low-income housing tax credit was created, a little more than twenty-five years ago, the majority of affordable housing was developed as-of-right. Because zoning was sufficient unto itself, a developer could identify and option a plot of land, go to city hall and check the zoning plat (back then physical paper, not a Web site), and find everything precisely defined. Density, maximum heights, street setback requirements, ingress and egress, utility infrastructure – it was all spelled out in black and white. Those clear boundaries – this is In, that is Out – meant certainty: satisfy the zoning and you satisfied all the laws. File the plans, pull the permit, and break the ground. Certainty meant both speed and economy, and that meant development.

Life was simple. Life was good.

Too good, perhaps, for it made developers complacent, and too simple, for it attracted accoutrements. First came the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (formerly known as Superfund), and environmental quality review. Then wetlands, which wrought EPA – and all its state-level siblings. Then came water or sewer moratoria. Traffic impact studies. Historic districts, and their inchoate offspring the “conservation district,” whose only rule seemed to be “keep everything exactly as it was when I moved in.” City-wide downzoning that at a stroke rendered most of the buildings non-conforming and grandfathered. Topping it all was the gradual encroaching permanence of urban renewal authorities, entities that instead of sunseting when the city was “renewed”



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settled comfortably into a mayor-driven individual case-by-case review of every new development in every high-value urban location.

Ills from Urbanization

The river on which floated all these legislative boats was and is America's increasing urbanization, and the increasing clout that cities hold. As we move warm, wet, and west, the American economy is likewise being remade by effectively infinite broadband. Far from dispersing the population, these two trends are concentrating people in cities – and not just our megacities. In every state, secondary and tertiary cities are gaining people share at the expense of suburban and rural areas, and they are gaining economic share (relative to the suburbs) faster than that.

Urbanization means two things: infill and verticality. *Infill* because as land within the city becomes more valuable, empty lots are no longer tolerable. *Verticality* because to house more people atop the same footprint, buildings must go higher, even if that means demolishing what's there now to build a stronger foundation for a higher tower.

Both these trends kill as-of-right zoning. Infill means addressing brownfield and environmental issues. Verticality means busting through zoning limits. Meanwhile, density means abutters. Abutters mean variances.

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Variances mean hearings. Hearings mean delay.

Delay costs money.

Whether the neighbors' concerns are valid or frivolous, political dynamics mean the neighbors must be placated by reducing the overall development scale or by offering something "for free." As any developer knows, that means "paid for by the development," and *that* means, as any allocator knows, "funded by a boost in government subsidy resources."

Warfare and Dance

For urban developers, the entitlement/approval process has become a combination of siege warfare and kabuki dance. Girding its loins, the developer lays protracted siege to the Zoning Board of Appeals by wheeling out batteries of lawyers, consultants, architects, and advisors, who lob PowerPoint salvos during set-piece public hearings. Opponents of affordable housing hide their bigotry and snobbery behind useful volunteer human shields, who totter forward earnestly, crying, *We're not anti-affordability, we just want to protect [insert beloved local feature here]*. The developer counters this tactic with a feint, proffering a master plan bigger, denser, and vaster than it expects to get, so the neighbors can lop off five floors, add a bike path, require public-access rights to the complex's clubhouse and swimming pool, and declare they have saved the community from the heartless outsiders.

In most of America, developers eventually win their sieges, though at fearsome expense so that by the time the legal reviews have been won, feasibility (and hence affordability) has been lost. These defensive tactics also raise the per-unit cost of every new affordable apartment, meaning fewer units statewide, making housing more expensive for everyone. In a few NIMBYite bastions, the communities are sufficiently galvanized and entrenched behind obstructive laws that they can repel all assaults. California's Environmental Quality Act (CEQA) has become the ultimate force field that keeps out all intruders.

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Combine these forces, and *there can no longer be a national housing strategy*. No matter what Washington says, Brookline and Berkeley and La Jolla can thwart it. This is fundamentally inequitable – and the fact that it is most fearsome in some of the country's most sanctimonious communities only makes it worse.

Affordable housing is a public good. It is also a core element of urban infrastructure. So the whole metropolis benefits when there is enough affordable housing. But if *some* well-connected and well-heeled communities can opt out of their share, then only a few communities carry the burden (including, say, of public schools) for the whole metro area.

A Small Silver Lining

From this cloud of anti-development there is only a small silver lining – what I call the production/preservation paradox. The same communities that will fight you for years to *prevent* a developer from bringing new affordable housing *in* to a community will similarly fight to prevent that same developer from taking *existing* affordable housing *out* of that community.

Even funnier is this: *if* a development loses its status as a "preservation" transaction, then it instantly loses its grandfathering from (say) parking requirements, height restrictions, or architectural treatments, and it cannot be rebuilt. Thus it becomes imperative to preserve a few sticks or bricks at all costs, if only to keep the precious grandfathering alive, in zoning if not in physicality.

For the sake of our nation's economy, we have to reclaim as-of-right zoning (perhaps by statewide or national overrides based on inclusionary-zoning principles). As this will probably take a decade, in the meantime we had best preserve anything and everything we can, or we won't know what we had 'til it's gone. **TCA**

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