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LESS BUT BETTER ZONING, PART 1
THE PITFALLS OF PREFERENCE IN ZONING

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ABSTRACT

There are three essential elements that currently justify zoning regulations—public health, public safety, and public welfare. The first two have clear, meaningful definitions. The third does not. The concept of public welfare has been used to rationalize and justify all manner of bad policies, and it has led zoning, as a system, to fail in its attempt to provide holistic benefits to the public. This paper explains how rules designed to promote public welfare are not wholly inclusive and are ultimately based on preferences derived from local public-choice markets rather than from universal human needs. The paper concludes that the most effective zoning reform will focus on one of two solutions: either creating a more universal and measurable definition for public welfare (a daunting task) or removing it outright as a justification for zoning. Either solution will provide a stronger foundation for sensible reform. If left unaddressed, this vague concept will continue to protect and propagate the bad rules that plague our built environment.

JEL codes: R0, R1, R3, R5, D4, H0, H1, H3, H7, H8

Keywords: government, economic geography, location economics, real estate economics, urban economics, land development, land use patterns, land use regulation, zoning, city planning, urbanization

CONTENTS

INTRODUCTION

Within the context of the American zoning system, an important and fundamental question has been left ignored for too long: What is public welfare? No one seems to know. Yet it is one of the three foundational concepts regularly used to justify the policies found within each zoning code. In fact, the nebulous concept is the primary origin point for every rule that is currently scrutinized in reform efforts across the country. Density limits, parking minimums, and single-family residential zoning are stultifying regulations that are hardly connected to public health and safety needs. Public welfare, however, can be the basis for these rules and many more. Its flexibility is built on its meaninglessness. Public welfare can be, and regularly is, the basis for just about anything.

Any reform of a system, especially a regulatory system, must address the principal leverage point within it—the goals that precipitate the system's creation. For zoning, these goals ultimately result in the protection and promotion of public health, safety, and welfare. The broad and highly variable meaning of the term "public welfare" leads to a broad and highly variable set of objectives that are internally conflicted. Reform efforts are highly unlikely to create lasting improvements until this issue is addressed.

Zoning must become more like the technically derived codes that govern the rest of the built environment. To explain why, this paper demonstrates the unique nature of zoning by comparing it with the rest of the major rule sets that regulate land development in modern local governments. Then the paper addresses zoning's relevance and importance for promoting public health and safety.

In its latter half, this paper focuses on the troubling origin and evolution of the public welfare concept through multiple court challenges over the past century. When combined with the procedural methods used to amend zoning policies at the local level, the paper demonstrates the ways in which public welfare becomes a tool for

adopting and enforcing rules that are based on the preferences of the influential few—via public-choice markets—rather than the unilateral needs of the "public."

This is a deep-seated behavior and is procedurally reinforced at the local level. The paper concludes that any genuine reform of this system will require preemptive acts at the state or federal level to either eliminate public welfare as a justification for zoning or provide it a meaningful, measurable definition from which all existing rules will be reevaluated.

THE CITY'S TOOL KIT FOR REGULATING DEVELOPMENT

Land development regulations encompass a broad array of rules that govern every facet of the built environment. Conventional Euclidean zoning is perhaps the best known of these, but there are many others. Building codes, subdivision regulations, and a bundle of engineering standards have significant effects on the built environment too. Unlike zoning, these rules are empowered with a limited scope. In most states, the mandatory sections of building codes address only building construction practices that optimize fire and life safety.[1] Subdivision regulations focus on the surveying, subdivision, and dedication of private property. Engineering standards focus on physical improvements such as utility extensions, street construction, floodplain protection, and stormwater infrastructure. Unlike zoning, these various codes can be classified separately as technical standards for land development (see table 1).

TABLE 1. LAND DEVELOPMENT REGULATIONS

Technical	Building codes
	Nuisance codes
	Subdivision regulations
	Street standards
	Floodplain ordinance
	Stormwater ordinance
	Utility standards
?	Zoning

These are technical codes because technological innovation is the principal mechanism that leads to changes in the rules (e.g., mechanical building codes evolved with the introduction of HVAC systems). When a new technical practice is proven to be better at achieving the goal of fire and life safety, it can be considered for adoption. This is a high bar because, practically speaking, there are only so many ways to revolutionize building construction in the 21st century. These are rules, after all, not "best practice" guidelines. Rules transform the government's legal authority into clear, enforceable expectations. Builders must meet these expectations or their requests will be denied. So although innovations in certain approaches (e.g., three-dimensional [3D] printing technology) can create new ways of delivering a structure, the underlying rules are less concerned with the method and are focused instead on the performance. This is to say that no building code would mandate 3D printing practices; rather, the code could remain agnostic to 3D-printed buildings so long as structural integrity, safe usage, and other performative requirements were met.

This expectation is translated into requirements that are readily observed, measured, and refined as needed on the basis of objective data and expert consensus. The process is principally managed by the International Code Council, a private nonprofit organization that publishes a new standard every three years. This standard is reviewed by state and local jurisdictions and is often adopted in a perfunctory legislative pro-

cess. This process includes a forum for public discourse, but there are very few instances in which the community at large participates in that process. The work is narrow, technical, and boring.

So it is left to the experts. Local authorities are given significant trust in all regulations that are not called zoning. In return, these authorities stay in their proverbial lanes; they stick to the narrow scope and only introduce changes when it is necessary from the technical and performative point of view. Such changes are rare because, again, the underlying codes maintain a minimum standard.

It is important to note, however, that the process is not perfect. Lobbyists and industry competitors seek some level of regulatory capture in these technical standards. The community might not have much of a say on the topic of allowing cross-laminated timbers as a structural building component, but the timber industry and steel industry certainly do. The incentives to prohibit competing materials are quite high in these cases. Nonetheless, the process remains different from zoning, and even the industry players must navigate a more technically oriented, evidence-based, and fundamentally limited field of play.

It bears repeating: the threshold to change the requirements of a technical code is significant. To change the requirements of a technical code is to introduce a new definition for the minimum acceptable level of public health and safety. Such a standard must not only be better, but also be practically feasible, and it must yield proven, measurable, observable performance data in a variety of applications. And although many advocates find that such changes should occur more often, especially in the realm of transportation engineering, the conversation is inherently stymied by the necessary burden of proof that is often needed at the national scale, complete with reproducible data, analysis, testing, and consensus.

Zoning is different.

Although it began with relatively limited scope and content, zoning has evolved from its principal functions of restricting land use, building mass, and building height to include everything from parking to architecture, with many more elements in between. Zoning regulates such features in different ways depending on different zoning districts. There is no limit to the number of these districts either. The original 1916 New York City code had three districts, one of which was titled "unrestricted." More than a century later, the zoning code for Denver, Colorado, contains 155 districts, each categorized in seven major classes of prescribed "context" that control the future form and function of the affected areas.[2] In addition, none of these districts within any city or county is exactly the same as the next jurisdiction over. Denver's 100-plus districts stand in contrast to the adjacent cities. These districts and all the associated rules can change quickly. In fact, planners consider it to be a best practice to change some aspect of the zoning rules at least once a year. I have direct experience in making such changes in less than six weeks—practically overnight in the timescale of government procedure—with none of the technical rigor of other codes.

Such rigor isn't required. This is one reason why zoning garners so much attention whereas other land development regulations continue with little scrutiny. There are many other reasons.

Again, zoning is different. Perhaps it shouldn't be.

DEFINITIONS

This paper contains several terms that are often loosely described in several different ways by the cited literature. To maintain clarity and significance for the most important concepts, basic definitions are provided below:

- **Zoning:** a regulatory system that divides a jurisdiction into districts (i.e., zones) in which unique regulations govern the way that the built environment is constructed and used.
- **Public health:** as related to the built environment, public health refers to the conditions by which the physical and mental health of people and their communities is protected and improved.
- **Public safety:** or "safety of the public," which means the protection of life, health, and property from any injurious condition, event, or action.
- **General welfare:** refers to the primary social interests of safety, order, and morals; economic interests; and nonmaterial and political interests.[3]
- **The city:** specific to this paper, the city is a municipal corporation that delivers a system of publicly funded and publicly provided services contained within the discrete geographic boundaries of its jurisdiction. Such services may include (but are not limited to) streets, utility infrastructure, parks, fire protection, policing, education, waste removal, transportation, water, electricity, libraries, and recreational programs.
- **The county:** specific to this paper, the county is an unincorporated territorial division empowered by the state government to deliver goods and services similar to the city, but with taxing authority inside and outside the city's jurisdiction.
- **Built environment:** the elements of the environment that are generally built or made by people.[4]

PUBLIC HEALTH, SAFETY, AND THE BUILT ENVIRONMENT

It is conventional wisdom that certain parts of a city are fundamentally safer and healthier than other parts. However, every facet of the built environment is a product of choice and the result of actions taken by planners, engineers, builders, and architects. Their work is centered on the need to preserve a baseline level of public health and safety for all who venture within the realm they fashion. An ideal city contains equal protections to all people in all parts. This means that every public street is designed for the health and safety of all who may use it, regardless of modality. Likewise, this means that clean water is safely provided to all who turn the tap. Waste is properly conveyed, stored, and treated. Blight is cleared. Noxious uses are abated to the point of zero negative health impacts to all who are in close proximity.

The modern city is successful when it provides these conditions at a good, and increasingly better, level of quality to all. Success is often a product of engineering and technology used at the point of construction. Such construction is governed by a city's regulations. Thus, our regulations have a tremendous impact on the built environment. One specific example is zoning.

Zoning is predicated on the notion that certain land uses, when operating in certain locations, inherently degrade public health and safety. Hog lagoons should not be placed near elementary schools. Coal-fired power plants should not be built next to an urban park. Houses should not be erected in floodways.

Setting aside these cartoonish examples, the basic wisdom is easy to understand: any land use that pollutes the air, water, or soil, or generates excessive noise, or produces or stores hazardous materials, or fosters any other negative impact (excessive light spillage, fumes, biological contagion, flooding, hoarding, overcrowding) on

unwilling participants and surrounding properties should be appropriately situated. Specifically, such uses should be located in such places and subject to such restriction that adverse effects on neighboring properties are minimized. Zoning districts can determine such locations and instill rules that minimize negative impacts to the fullest extent possible.

Landfills are a prime example. Every modern city relies on landfills for proper waste management. As a dangerous but critical necessity, such uses are thoroughly regulated to prevent any negative impact on the public.

When done correctly, the city benefits from the public service while avoiding the negative impacts that it brings. This is the power and value of zoning. Again, *when done correctly*.

Proper implementation is difficult and the technical demands continuously evolve as living standards rise. At the local level, this means that landfills and similar noxious uses are commonly seen—with hindsight—to be poorly located and inadequately designed by today's standards. The consequences are dire for those who happen to live near such uses. In practically every circumstance where such hazardous conditions have emerged, we can recognize the need for zoning, or at least the regulation of noxious uses. The simple preventive act of restricting noxious uses to remote hinterlands and then designing multiple redundancies for safe operation and containment is the best method for avoiding public health impacts.[5]

Both factors must be addressed: proper location and sufficient design. Zoning is the mechanism for restricting the location to its most suitable area, which is where my colleagues and I can help. When the proper areas are zoned for noxious uses, they will feature vast buffers of open space and agricultural properties that preserve a safe distance from other developments. The idea is simple in theory but easier said than done.

If an asphalt plant is established on the far edge of town, to be adequately removed from the suburban fringe, it stands to reason that future suburban development should keep its distance too. Yet there are too many instances where this has not occurred, instances where single-family homes somehow emerge in the areas once reserved for buffering and agriculture. This, too, is an example of improper implementation of a zoning code. In some cases, the noxious use is allowed too close to residential uses. In other cases, residential uses are allowed too close to preexisting industry.

The same is true for sensitive environmental lands (such as floodways, wetlands, and steep slopes). Proper distancing is vital[6] for preventing the degradation of habitat and water quality. Proper zoning is the solution.

These basic examples fit our intuitions of how to build a safe, healthy community. However, it should be noted that *most* land uses can work well together in the interest of public health and safety. This is why zoning commonly has a set of rudimentary land use distinctions such as "light" industrial uses versus "heavy" industrial uses. Light industry is defined in various ways across the country, but at its heart, it excludes raw processing (e.g., refining, smelting) and avoids the use of dangerous materials.[7] In other words, "light" industrial uses do not carry the same noxious impacts as "heavy" industrial uses. Thus, "light" industry can be located in many more places. Indeed, when focusing solely on public health and safety, it is safe to say that "light" industry can be located practically anywhere in the built environment so long as there is a sufficient level of site-specific conditions that preserve health and safety.

These examples hopefully establish the reasons why some form of zoning, as a regulatory tool, is necessary and ultimately inescapable. Even in the absence of conventional zoning practices, places such as Houston, Texas, still apply something akin to it. The city of Houston and the state of Texas readily acknowledge that certain uses are dangerous when placed too close to other uses. Both entities acknowledge that some parts of the natural environment are conducive to city-building and other places are not. Thus, the city of Houston implements a floodplain development ordinance, several historic districts, special designated transit corridors, a "green" corridor, and several other unique regulatory bundles that are specifically applied to certain geographic areas on the basis of a particular idea of "suitability" for each policy objective. Each example is heralded for a lack of land use restrictions. Nonetheless, each is an example of zoning policy. And although Houston may not specifically focus on land use as a basis for its regulation, it nonetheless relies on use-specific regulation for the more noxious uses that can threaten health and safety, all of which are administered by the Texas Commission on Environmental Quality. Even in Houston, this enforces the rationale that certain uses are a threat to surrounding areas and should be regulated uniquely.

When zoning is defined in this simple manner, we can attest that every American state and city as well as many townships and counties engage in some form of practice. It is important to recognize this because, otherwise, we can lose sight of the value this regulatory approach brings to public health and safety. Zoning regulations for public health and safety are easy to understand, justify, and refine. At this basic level, such zoning carries traits that can be very similar to the more technical standards highlighted in the introduction, and it can be implemented thusly. A zoning district that regulates noxious uses in a way that sufficiently protects public health and safety for one city, county, or state should be equally capable of doing the same in all other cities, counties, or states. Refinements to such a standard can be developed in the same technical, data-driven fashion described for the International Building Code. Such refinements can lead to a state-level or even national-level standard.

Effective policy of this nature is within reach. But it's not without fundamental changes to zoning's current framework.

PUBLIC WELFARE AND ZONING

Public health and safety provide a comprehensible basis for zoning regulation, but they are only two parts of a tripartite foundation. Glance at the beginning of an American zoning ordinance and you will likely find a purpose section that justifies the local code as a means for protecting public health, safety, and *welfare*. This is where the foundation starts to wobble.

Public welfare has no intuitive definition and no clear delineation. The term is slippery. Some refer to it as "public welfare" and others refer to it as "general welfare," which, as a variation, seems less specific yet more prevalent in the legal discourse. This appears to have been intentional. Consider Note #7 in the 1926 Standard State Zoning Enabling Act, which regards definitions of its terms in the following way:

> No definitions are included [in this policy document]. The terms used in the act are so commonly understood that definitions are unnecessary. Definitions are generally a source of danger.[8]

When talking about public/general welfare, one must ask: Who is counted among the public/generality? What does general welfare generally include?

The courts have wrestled with this question from the moment zoning, as an exercise of police power, was first challenged. In the landmark 1926 case *Village of Euclid v. Ambler Realty Co*., the US Supreme Court interpreted general welfare to mean local welfare, as in localized to the residents of the municipality: Euclid, Ohio. This meant that the uses proposed by Ambler Realty Company could be legally regulated (and ultimately prohibited) by the municipality to protect local residents from the potential impacts. The court found that the prohibitions were not considered arbitrary or capricious and did not appear, within the case itself, to pose some form of a "taking" or unfair diminution on the value of the subject property.

The notion that Ambler Realty's proposed industrial uses could have negatively affected public health and safety is relatively easy to understand. Supreme Court Justice George Sutherland delivered the majority opinion of the court, upholding Euclid's zoning ordinance, and wrote the following:

> The matter of zoning has received much attention at the hands of commissions and experts, and the results of their investigations have been set forth in comprehensive reports. These reports, which bear every evidence of painstaking consideration, concur in the view that the segregation of residential, business, and industrial buildings will make it easier to provide fire apparatus suitable for the character and intensity of the development in each section; that it will increase the safety and security of home life; greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections; decrease noise and other conditions which produce or intensify nervous disorders; preserve a more favorable environment in which to rear children, etc.[9]

But Justice Sutherland went further, ultimately venturing into the murkier realm of public/general welfare, where presumption and preference give shape to what a zoning ordinance should do. The primary holding from the Supreme Court is stated as follows:

> If they are not arbitrary or unreasonable, zoning ordinances are constitutional under the police power of local governments as long as they have some relation to public health, safety, *morals, or general welfare* [emphasis added].[10]

And to elucidate the idea of "morals, or general welfare," Justice Sutherland wrote the following:

> With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that, in such sections, very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities—until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances,

> apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances.[11]

At the time of this writing, I lived in an apartment complex, occupying one of more than 150 units on a six-acre tract of land surrounded by single-family neighborhoods. I find it difficult to process Justice Sutherland's opinion.

Justice Sutherland's general sentiment is shared among many today. I have lived in apartment complexes for most of my adult life, renting my home on an annual basis while serving my community as a local government administrator. Such a living arrangement has allowed me to do this work across two cities and two counties in the four major continental time zones. I have overseen the urban planning functions in the local governments I have served, and I have attended countless public meetings where thousands of residents have essentially fought against my housing arrangement. Such resistance was affirmed by the Supreme Court's 1926 majority opinion. When it came to the idea of "morals, or general welfare," the zoning ordinance was deemed an appropriate tool for protecting such interests. All for the sake of public welfare—specifically, the public that resided in the city that established the ordinance.

Nearly 50 years later, in *Oakwood at Madison, Inc. v. Township of Madison*, the New Jersey Supreme Court ruled differently. The specifics of the case involved a low-density zoning district that was deemed detrimental to general welfare because "general welfare does not stop at each municipal boundary."[12] The court therefore considered general welfare to be a regional consideration, not only for those who lived inside the township, but also for those who wished to live inside it. The low-density zoning that was deemed harmful in the district was so restrictive, and so prevalent, as to artificially limit the municipality's ability to provide for its "fair share" of the region's housing need. Such an artificial limit meant that the township "failed to promote reasonably a balanced community in accordance with the general welfare."[13]

Thus, the scope and applicability of general welfare changed—drastically—in New Jersey anyway. A zoning ordinance had to further the interests of living inside and outside the township. This was further affirmed in another New Jersey Supreme Court decision that arrived four years later in 1975. In *Southern Burlington County NAACP v. Mount Laurel*, the majority opinion states,

> So, when regulation does have a substantial external impact, the welfare of the state's citizens beyond the borders of the particular municipality cannot be disregarded and must be recognized and served.[14]

Yet, one year later, the Ninth Circuit Court of Appeals rejected the regional argument in its ruling on a different case: *Construction Industry Association v. City of Petaluma*. Here, the court determined that Petaluma, as a municipality, was justified in its action to prohibit new residential development in the interest of its residents but to the detriment of the region. To do so, the city had established a growth-restriction plan that limited multiunit housing construction to a maximum average of 500 units per year for the next five years. This brought the idea of general welfare back to its localized Euclidean roots. Petaluma's stated reasons for the restriction were delivered in a preamble that reads as follows:

> In order to protect its small town character and surrounding open spaces, it shall be the policy of the City to control its future rate and distribution of growth . . .[15]

. . . by placing limits on multiunit housing. The Construction Industry Association challenged this, and the 9th Circuit Court of Appeals upheld the city's policy. As stated in the majority opinion,

> The concept of public welfare was broad enough to uphold Petaluma's desire to preserve its small town character, its open spaces and low density of population, and to grow at an orderly and deliberate pace.[16]

In this case, zoning for preservation purposes was clearly for the benefit of those who had something to preserve, namely Petalumans. The preservation plan, which severely limited new housing construction, led to rising housing costs. The supply was limited as demand increased.

The decision in *Petaluma* returned the notion of public welfare to the local context at the region's expense. Furthermore, the court upheld the idea that regulations such as these could be used by the city to ensure that it would "grow at an orderly and deliberate pace." This is an important rationale to return to in a later section.

The concept of public welfare is further confounded by the fact that the term "welfare" can generally refer to anything that has a superficial connection to the status quo. The best definition that I can identify states that welfare is not only a matter of health and safety, which we can readily understand, but also a product of "order and morals; economic interests; and non-material and political interests."[17]

This can mean just about anything. The US Supreme Court said as much in the 1954 *Berman v. Parker* case:

> The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.[18]

The Pennsylvania Supreme Court expanded on this reasoning in its 1966 ruling on *National Land and Investment Co. v. Kohn*, where the court drew a distinction between public and private interests:

> Unfortunately, the concept of the general welfare defies meaningful capsule definition and constitutes an exceedingly difficult standard against which to test the validity of legislation. However, it must always be ascertained at the outset whether, in fact, it is the public welfare which is being benefited or whether, disguised as legislation for the public welfare, a zoning ordinance actually serves purely private interests.
>
> There is no doubt that many of the residents of this area are highly desirous of keeping it the way it is, preferring, quite naturally, to look out upon land in its natural state rather than on other homes. These desires, however, do not rise to the level of public welfare. This is

> purely a matter of private desire which zoning regulation may not be employed to effectuate.[19]

Even so, in 1974, the US Supreme Court endorsed a city's power to further seemingly private interests when it upheld a policy in the village of Belle Terre, New York, preventing more than two unrelated individuals from living in the same single-family dwelling. Such an intrusive policy was deemed constitutional in the name of public welfare:

> The regimes of boarding houses, fraternity houses, and the like present urban problems. More people occupy a given space; more cars rather continuously pass by; more cars are parked; noise travels with crowds.
>
> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. The goal is a permissible one within *Berman v Parker*, *supra*. The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessing of quiet seclusion and clean air make the area a sanctuary for people.[20]

The implications of this ruling are manifested routinely in today's zoning practice. The *Belle Terre* decision may be the closest the Supreme Court has ever come to making a "capsule" definition of the public/general welfare concept. When it is combined with the *Euclid* opinion, we find that zoning is allowed to be highly presumptuous. It can consider any nonspecific assemblage of unrelated people, living in a detached house, to be a threat to "family values, youth values, and the blessing of quiet seclusion." It can invoke police powers to prohibit such assemblies. It can be highly parochial and can be justifiably used to exclude any use of property that is not considered single-family residential.

Such exclusionary practices are not a bug of the regulatory scheme. They are a feature. Single-family zoning is the principal method of expanding this vague notion we refer to as general welfare. Oddly enough, this is also the most popular area of current reform. This suggests that there are many who do not recognize a valid connection between single-family zoning and the localized concept of general welfare.

THE ENDLESS CYCLE: WELFARE, EXTERNALITIES, AND PUBLIC CHOICE

In recent years, cities and states across the United States have taken significant action to liberalize their zoning codes. They are making wholesale changes to exclusionary policies in the name of a broader notion of general welfare. Rules tied to public health and safety remain unaffected.

I trace the origins of the current reforms to a 2016 senate bill in California, SB 1069, to bolster accessory dwelling unit production.[21] Then, in 2018, a more expansive senate bill introduced by state Senator Scott Wiener, SB 827/50,[22] created a turning point. Senator Wiener's proposal called for the elimination of local density restrictions within a half-mile of a major transit stop. The reasons are many, but the goal was clear: Senator Wiener and his constituents wanted to eliminate an unnecessary barrier to housing. The bill failed repeatedly but heralded the start of a new wave of legislation. In the next year, 2019, Oregon Governor Kate Brown signed House Bill 2001,[23] effectively prohibiting single-family zoning across the state. In 2020, Minneapolis enacted new regulations eliminating single-family zoning as a major first step in implementing its new comprehensive plan. For the state of Oregon and the city of Minneapolis, the motivation was clear: both city and state had decided there were more effective ways to manage growth without the collateral damage that single-family restrictions cause, specifically the adverse effects on the *region's* general welfare for the sake of *local* benefits. That same year, the state of Montana made important reforms to allow multifamily residential development by right in urban areas of more than 7,000 residents.[24] In 2022, California made waves again when Governor Gavin Newsom signed Senate Bill 6, allowing residential development by right on property zoned for commercial use,[25] effectively preempting local authority when certain criteria and requirements were met.

These reforms were made possible by the acute housing needs that have arisen at the regional level. As those regional needs became more apparent, general welfare as a regional concept became more acceptable. This rationale is galvanized by a housing crisis that has made reform a pressing issue that legislators can no longer ignore, particularly at the state level. This is a new phenomenon and a welcome one. In my decades of service in local government, these recent reforms are a rare example of states telling municipalities to do less. This is quite different from the usual unfunded mandates.[26]

If these reforms continue, they will require greater scrutiny of the public welfare concept and an expansion of the rationale that has been applied to date. Planners, builders, designers, regulators, and legislators must all take a broader view of public welfare and make it more universal in its scope, which will make it less vaporous in its application and thus more logically consistent. Remember—the term already can be used to mean practically anything and has been used for everything.

The localized concept is currently our most powerful framework for understanding the majority of all zoning controls because it channels the Supreme Court's parochial and presumptuous view. In fact, in *Bilbar Construction v. Board of Adjustment*, the Pennsylvania Supreme Court held that minimum lot sizes, as a regulatory requirement, could be defended as a protective mechanism for public welfare, as "aesthetic considerations come within that realm."[27] I find this to be utterly absurd. Mandatory lot sizes for aesthetic purposes? Private property aesthetics for the sake of public welfare? Yet, as a planner, I do not want to lose the ability to regulate aesthetic concerns. Therefore, I must have a different—and better—justification. But each time I try to develop another reason to regulate such things, I face the fact that the risk of ugly buildings and bad architecture isn't nearly as important as the preservation of health and safety.

Public welfare, in any conceptual form, is ultimately subordinate to public health and safety. One hardly needs a Maslowian view of a hierarchy of human needs to recognize that health and safety are essential to the public welfare. In fact, welfare has always been more of an emergent quality that arises from many factors, some of which are related to the built environment but most of which are outside its confines.

Until this is made clear, and the regulatory system is reformed at the fundamental level, the current reform efforts will dissipate and zoning practices will regress to the pre-2018 mean. It is practically guaranteed. Or rather, it is procedurally destined.

After all, it isn't merely the vague foundational principle of public welfare that confounds reform. There are plenty of vague foundational principles in all manner of rule books. What truly exacerbates the problem is the hyperresponsive process that cultivates new policies built upon this vague concept. The process is noble, deliberate, and well intentioned, and it has carried enormous unintended consequences. As someone who has administered this process in many places, I have seen firsthand the powers it contains.

By state and local decree, every discretionary land use review case, every local zoning amendment proposal, and every local effort to write new plans for the community requires at least one conversation with the public at large. In my home city of Salem, Oregon, my colleagues and I extend ourselves well beyond the minimum requirements. Typically, we hold such conversations at least weekly and often daily. Our city's

award-winning comprehensive plan was created through more than 300 public meetings with community members, neighborhood associations, trade groups, and public school classrooms, among other organizations. Our most recent multifamily housing standards were drafted through 20 or so public meetings. Our rezoning hearings have at least three public meetings as well. At our best, we actively fashion the policy solutions in real time that are based on what the public tells us. It is an "at your service" style of governance where our experience is largely subservient to the participatory process.

This is consistent with all city and county practices. It is not an overstatement to declare that no major zoning-related action can occur without a public hearing or 10. How else would we ever truly know if public welfare is being maintained? This isn't the stuff of our more technical codes, all of which carry the narrow scope and technical considerations I previously covered, all pertaining to public health and safety. Again, public welfare can mean anything. Thus, my colleagues and I cannot responsibly make decisions without as much consultation as possible with anyone who feels like they might have a definition.

These mandated engagement processes are a formal representation of a classic public-choice market,[28] and through these mandated exchanges, zoning practice continues to evolve as a location-specific, preference-driven policy venture defined by its community in unique ways for the sake of what they (i.e., the ones who participate) define as public welfare.

No one could justify aesthetics for the sake of public health and safety. But for public welfare, which carries a definition that includes the *social interests of safety, order, and morals; economic interests; and nonmaterial and political interests*, such controls can stand firm provided they are established in a way that represents what the community desires. To capture that desire requires the process mentioned previously: a long, exhaustive process that rewards those who have the time, resources, and influence to advance their interests—specifically, existing homeowners.

Consider the following observation from Ryan Avent, author of *The Gated City*:

> When a group of NIMBYs lobbies the government to restrict development on a piece of land, the private cost to the NIMBY group members is low—just the time to circulate petitions and attend council meetings—and the benefits are high—statutory protection of the neighborhood in its current, preferred state.[29]

Importantly, the cost of these actions is low not only for the so-called NIMBYs,[30] but also for the public administrator. My colleagues and I have far less of a challenge on our hands when we say "no" to something. It makes our jobs much easier. That isn't the core motivation, however. We have an ethical and legal responsibility to say "yes" only when something meets the minimum specification. We also have the responsibility (and the incentive) to make sure that our specification meets the community's demands (i.e., the demands of the strongest public-choice market force). And finally, as is always the case with a public-choice market, we have the incentive to make sure that the community's demand is supported by the most influential parties involved in the discussion. This is often the mayor and the council, but it can include small advocacy groups too.

Indeed, the central purpose of the planner's job in a modern city is to deeply understand these

demands and to reflect those demands through the specifications we write and uphold. This is why policy making in the zoning world is an exercise in public-choice polling and market analysis. Any text amendment requires a grassroots campaign. We regularly assemble focus groups, create surveys, generate keyword analysis, harvest feedback on multiple draft prototypes, and test public sentiment until sufficient public favor is secured. To do otherwise is to face almost certain doom. I speak from experience. No local zoning action can withstand the disfavor of the influential few. Zoning is a democratic contest in which whatever is popular is what we will consider preferred, and when it is preferred, it is enforced.

This is how a homeowners association (HOA) operates. As a collective, such associations assemble the members to make decisions on how they will regulate themselves and others inside the community. All community members are invited to participate. All possible rules and requirements are within reach so long as a certain number of the members support them.

The local government, of course, is not an HOA, and simple majority referendums are not required to establish zoning. This is because zoning is supposed to protect against greater concerns. What, exactly, are those concerns? Here are the most common themes that I have regularly observed over tens of thousands of discussions:

- Density
- Traffic
- Viewsheds
- Open space, access to light and air
- Aesthetics
- Property values
- Character

Some of these themes (such as traffic) correlate with public health and safety. When they do, land development regulations are capable of preventing negative impacts through proper standards. In fact, I cannot think of a single instance in which a development proposal was ever even considered for approval while possessing some inherent risk to health and safety. But public welfare? That is not settled so easily—not without some manner of debate and discretion. Zoning regulations attempt to prescribe a set of standards that essentially define what it means to build in a way that promotes public welfare, but those standards are usually too confining. Most development proposals seek some manner of variance from density, traffic, viewshed, aesthetic, and open space standards.

This leads to a discretionary review. And the discretion is typically handled by a review board (e.g., the city council). Most zoning cases that reach the final discretionary review stage are subject to a single defining question: Does the proposal protect and advance public welfare?

Good planners do their best to make sure that the answer is "yes" before sending the case to the board. Their reasons will be clear, based on preestablished criteria, and supported by findings of fact. To do so, it is important to have clarity on what is entailed in each of these themes. For example, what does it mean for traffic to be handled in a way that advances public welfare? This is not an easy question to answer.

Again, land development regulations are powerful and critical tools for creating a built environment that handles traffic in an optimally safe fashion. Street improvements, circulation patterns, modal splits, driveway locations, sight triangles, traffic calming, and projected volumes become important variables in assessing the public health and safety impacts. This is where

the conversation starts. It does not proceed until such features are properly designed for health and safety.

Yet even when design improvements have been adequately defined, plans revised, and traffic demonstrably mitigated to a responsible degree, the complaints continue. Understandably so, because public welfare remains the ever-present, unsolvable concern. I have heard many people speak very eloquently about why a development's sidewalks, driveways, turn lanes, and intersections need to be revised or removed or added even though all the engineers from both the private and public realms certify that the proposed design meets all necessary and sensible standards. In many cases, I find myself agreeing with the complainants. In every case, I do so from a standpoint of preference. I never have proof that the ideas are better for health and safety. No one does. I just know that I would like something that is a little different. And this is all that is needed because, when it comes to preference and public welfare, data are not required. Many development proposals are altered at the review board to satisfy a preference rather than a requirement. It is a discretionary approval, after all.

Aside from traffic, future property value is the most common concern the discretionary board must face. The topic has been derided for decades among zoning's detractors who see property value as a function of callous greed. This critique misses the fundamental truth: "public welfare," as it is generally defined and upheld in many court rulings, is a central element of purpose for any zoning ordinance. Thus, property values are a valid legal concern.[31] Indeed, it might be the most data-driven, objective expression of the inherently flawed public welfare concept. A few scraps of comparative data are all that people need to demonstrate how a proposed four-story, mixed-use building could diminish the property value of their neighboring home, thereby threatening their idea of public welfare. More elegant arguments may eschew this point and focus instead on preserving the "character" of an area, but, forgive the cynicism, it all boils down to projected resale value.

In fact, the notion of "character" is the latest innovation in the dialogue and has been used to justify a certain type of development in one place as well as deny the very same in another similar place. The term should be considered synonymous with public welfare as it seems to harness all the aforementioned concerns and judge them for better or worse in a context-sensitive, location-specific fashion. This typically means that single-family neighborhoods possess a character that should be preserved and all other areas have a character that can be changed. Multistory buildings? Multifamily uses? Retail stores? Factories? Offices and schools? Those have a character that is best suited elsewhere. The concept is endlessly recursive, especially when used in a "form-based" code that separates something like single-family residential into many more categories. "Character" can be used to distinguish estate homes from cottages or cottages from porch-and-stoop. This is where zoning adopts certain style guidelines and builds an architectural vocabulary that declares one type of home frontage illegal and another type allowed.

"Character" is a term of art in this case. And like all art, it is a function of style, preference, and expression. Character implies that a built environment should have a particular identity or visual appeal. Architects and planners have embraced this in terrific ways, creating new regulatory frameworks to deliver the ideal—namely, form-based codes. I've written several of them myself. Doing so has allowed me to be the stew-

ard of a curated brand identity for a given area, creating the "look and feel" that fits my sensibilities. I'm not proud of this anymore.

These are the elements of our zoning discourse. I can attest that each of these elements can be used for, or against, any development in any place. To some, this work has been considered a profound overreach of police powers. To others, it is a brilliant method for making sure the town doesn't go to pot. The trouble is that both perspectives have merit because, in all cases, the justification for such regulation comes from the way it extends some version of what we consider to be *public welfare*—whichever version you prefer.

I used the term "preference-driven" earlier to describe this work. This is because preferences are relativistic and individualized and thus compatible with the dialogue around public welfare. This is not the case with public health and safety, and this is why technical codes have a more uniform approach (table 2). This is what makes zoning different.

TABLE 2. LAND DEVELOPMENT REGULATIONS

Technical	Building codes
	Nuisance codes
	Subdivision regulations
	Street standards
	Floodplain ordinance
	Stormwater ordinance
	Utility standards
Preferential	Zoning

THE CITY'S LIMITS

Preference drives the public welfare conversation. It is a difficult thing to manage in a regulatory process, yet the talk of preference is the principal feedback loop for the local government's zoning code. Many practitioners work on it exclusively.

As described earlier, the accommodation of group preferences makes a local government operate much less like the classic idea of a public institution, monolithic and opaque, and more like a retail service. Inside these organizations, we regularly refer to our residents and applicants as "customers." We aim to please. This is a terrific attitude when helping a patron sign up for a library card or pay a tax bill.

It is far less useful, and often detrimental, with zoning—or any other regulatory function. When it comes to creating policy, upholding policy, or assessing a policy's effectiveness, customer service—as a mentality—drives us toward existential confusion. Regulators cannot satisfy everyone. Regulators cannot be the very best customer service providers. Regulators cannot adopt the attitude that the customer is always right. Satisfaction cannot be guaranteed.

People usually agree with this idea when it's stated so plainly. People can see zoning administrators as referees for the game, not the players inside it. And like referees, we are subject to all manner of criticism.

So it goes. The more experienced practitioners are used to it. Elected officials, however, can struggle under the strain. Particularly when they face the usual barrage of testimony at a public hearing.

Anyone who has orbited a planning-related debate at the local government level can recall council sessions where residents speak for or against a proposal for hours at a time. These meetings are a requirement for many land development projects and are intended to expose decision makers to all the potential concerns their residents might harbor. The direct face-to-face exchange is occasionally theatrical and always influential.

Council members rightly sympathize with the people who speak up, and they react with amendments and motions and alterations to placate the vocal crowd. They try to make everyone happy. It is a natural tendency, and it pulls the council members into a customer service mentality. They aim to please even when procedural requirements and strict quasi-judicial criteria limit their creativity.

And what, exactly, are they trying to resolve? It isn't always clear. Land use cases come with staff reports that are hundreds of pages long. Technical presentations hinge on language that is not easily understood by laypeople. Cases have mezzanine approvals, from land use to land subdivision to attached variances and appeals. The complexity of information, the varying levels of understanding among the elected body, and the ability of shrewd advocates to shift the discussion can lead to significant confusion and weariness. And for what? I have directly managed cases that were debated into the wee hours of the night on the question of preserving, or not preserving, a small grove of trees on the site of a future retail outlet. Or the allowable frontage architecture for a future warehouse. Or the setbacks for new duplexes built near a golf course. In cases like these, the hearing centers on a very small question (to vary, or not vary, from a design standard), and yet hours of testimony will argue something deeper and, legally speaking, irrelevant. I don't criticize the people who take time to engage in the process. I just wish the process weren't so flawed.

In any event, these hearings overwhelm decision makers and professionals alike, myself included. They often lead to poor decisions too. Council bodies are given an enormous amount of discretion and the ultimate power to decide when it comes to land use approvals (i.e., rezoning requests). Such power carries a great deal of social pressure. Entire election campaigns can be decided by the way a councilor votes on a big box store or an apartment complex.

Woe to the councilors who have a controversial land use case in their district. They will seldom think of anything else. All their energies will be directed toward the effort of threading a needle between competing concerns. Not for health or safety but rather for the preferred version of public welfare.

In fact, residents often think that these zoning issues are the only reason a city council exists. There are many more items on a council's agenda, but it all feels mundane by comparison. Remove land use and zoning debates from the regular council docket and the meeting would be much shorter, sparsely attended, and unremarkable. Special issues would still arise, of course—they always do—but it seems that land use and zoning are the only lines of local government service that consistently deliver public attention (and acrimony) to the town hall.

Councilors might wish to rebalance these priorities but often cannot because their agendas remain packed with rezonings and subdivision reviews. Capital improvements, new budget initiatives, and marquee civic projects are given the short shrift. The community at-large (i.e., customers) has less interest in those things when some private development is proposed near its neighborhood.

It is all very understandable. It is all procedurally reinforced.

Any effective zoning reform must cut through these reinforcements. This is extremely unlikely at the local level. I have seen only one elected body—the city council of Salem, Oregon—take the bold stance to extricate itself from any of its land use review authority.[32] It took an acute housing crisis, progressive leadership, an

extremely capable staff, and the backing of an excellent statewide planning framework to make such a thing possible. That combination of ingredients does not exist in most places.

It shouldn't be necessary either. In fact, of all the contributing factors that led to Salem's progressive actions, I consider the statewide planning framework to be the most essential. Thankfully, a state framework is the most feasible aspect for future reform.

THE STATE'S CAPACITY

Having worked in several states as a local government administrator, I have seen varying levels of state involvement in local land development policy. When issues center on environmental impacts, in which coordination is vital across political boundaries, the state's role as an environmental regulator has been essential. It is no exaggeration to say that many local jurisdictions would neglect to govern stormwater, wastewater, emissions, and regional highway systems with the same consistency and effectiveness. The state systems are not perfect, but they are certainly better than the most immediate alternative.

In most arenas of land development policy, the local jurisdiction maintains direct responsibility for fulfilling the policy objectives. The state provides guidance for doing so.

However, there are certain occasions when a state agency might have a more direct role in land development. I first learned of preemption when dealing with oil and gas development in Colorado. Like many administrators along the Front Range in 2015, my staff and I faced a wave of fracking proposals at the suburban edge of our county that year, and I can still recall the confusion that hung over us when we found out that we, the zoning administrators, didn't have direct regulatory authority for when and where drilling operations would be conducted. The state of Colorado considered oil and gas development to be a matter of state interest and thus governed it through a permitting process administered by a state agency. At the county level, my staff and I had a very limited role. We could exact impact fees (to cover the repair costs from heavy truck traffic), regulate lighting and noise, and require a few other design elements related to "compatibility" (e.g., fences and tree plantings to screen the visible appearance of wells).

Frankly, I was relieved. My staff comprised highly trained professionals, but none of us were equipped to deal with the health and safety considerations of oil fracking near suburban homes—

all of which relied on groundwater wells. This isn't an example of a minor bureaucrat passing the buck; this is an instance of me admitting what I didn't know and couldn't do. Colorado's permitting agency employed scientists, engineers, and attorneys specialized in the matter. They gave us terrific guidance on how to handle our responsibilities and worked steadily to keep us and the community informed of their process. With additional help from our esteemed third-party attorney, the state and county worked together to show that preemption was an effective and necessary thing. I hesitate to imagine how difficult those cases would have been had we, the county, dealt with it on our own.

Local government professionals are reluctant to say it outright, but the state is better equipped for handling certain aspects of land development. Or rather, it can be. When it works well, the state possesses a greater level of expertise for its specific purpose and is properly empowered with a greater level of authority to advance that purpose in an efficient, consistent manner. The only real trouble is when the state's scope is too broad or its policies too vague. Just like the rest of us.

I saw it firsthand in Oregon. After a few short months working in the system, I came to realize that the state's Department of Land Conservation and Development, along with the state's Building Codes Division, provided the sort of policy foundation and leadership that I didn't know was needed at the local level. Neither are perfect, but both agencies have delivered terrific examples of how state-level policy and procedure can ensure that rules are better formed (e.g., the state's imperative for "clear and objective" standards), efficiently administered (e.g., the state's "120-day rule"), and judiciously enforced (e.g., state appeal processes to remand or overturn errant decisions made by local bodies).

Because of this framework, zoning is better in Oregon than in any other state in which I have served. It is still frustrating, but better. And at the heart of the frustration, I find the same confounding issues that exist at the local level—vague purpose and overly broad scope delivered on the pretense of "public welfare" and discretionary, interpretative rules. Mission creep infects even the best agencies, and the errors at the state level often come from the well-intentioned mistake of trying to do too much on behalf of local jurisdictions that themselves are trying to do too much.

Fewer, but better, design solutions are within reach. It started with the state's liberalization of residential zoning—a proper trailblazing effort that is so very on-brand for Oregon. This was probably the largest instance of state preemption that I've ever seen firsthand. It was naturally billed as a response to the housing affordability crisis, but it should be seen as recognition that exclusionary land use policies do nothing to directly protect health, safety, or the more global concept of public welfare.

If the state were to continue along this path, it would soon acknowledge that the global concept of public welfare is so essentially vast and so nebulous as to be an emergent property of adequate health and safety. Thus, to ensure that global public welfare continues, the state should merely ensure that zoning's twin foundational pillars—public health and safety—are secure. The implication is already present in the existing policy leadership, in that by ensuring that housing is built in a healthy, safe manner (à la the state-mandated building code), public welfare is naturally available to all. So there is no more need for exclusionary single-family residential zoning. Such a harsh and arbitrary restriction seems unnecessary.

But if you take this rationale one step further, you will find yourself asking why there

would be any density limit of any kind. After all, if one to four dwelling units per lot are now considered permissible by right in Oregon, why not five units? Or 20?

I cannot find a direct, statistical relationship between residential density and public health and safety.[33] The only good explanation I have for why the limit is kept to four units instead of five units is because the legislature felt that five was less preferred. This gets us back to the confusion of preference-driven policy rooted in the weird concept of welfare. I am trying to avoid redundancy, but it should be made clear that the very worst of Oregon's state actions on land development come from the state's effort to do what cities already do poorly (i.e., regulate through vague goals).

State agencies perform best when focused on a more limited, more technical purview. State policies are more effective when delivered with clear, objective standards. The same is true for local governments.

However, as stated earlier, local governments are procedurally captured by their public-choice markets. It is foolhardy to expect a local government to limit its own scope, curtail its powers, or liberate its zoning ordinances when the influential minority is made up of single-family homeowners who demand the opposite. Local governments can hardly raise enough fees to support basic services, let alone tackle a topic as byzantine as this.

When my former city of Columbia, Tennessee, failed to raise its wastewater fees to repair a failing sewer system, the EPA took over the administrative responsibilities and invoked a series of penalties to force the city to fix its problem. My colleagues on the executive team had tried for decades to prevent the situation. The elected body (and its understanding of the public-choice market) wouldn't buy it. Not until they had to: the issue wasn't one of knowledge, as the councilors knew they needed to fix the issue. Yet they also felt they needed a federal scapegoat to take the blame for the solution (i.e., a resident's increased monthly bill). This wasn't the wanton action of a negligent elected body. They acted in accordance with the local public-choice market's demands. This made the EPA's actions essential to progress. The issue (a failing sewer system destroying public health for the noninfluential) would have only continued to worsen without intervention.

Our cities and counties know that they need to do something about our land development crises. I suspect that most elected officials are weary of zoning. Once they've spent a few years dealing with the practice, they find the same arbitrary rules and unanswered questions. Many solutions are available to them, all of which come with significant political costs. They need a scapegoat of sorts to foot the bill.

Oregon, California, and many other states are developing reforms that strip certain exclusionary policies from local jurisdictions. To do this effectively, these states write the new, preemptive standards in a generic fashion that is more clear, objective, and limited in scope. Whether intentional or not, these reforms drift away from the preferential approach and move toward a more technical style. This seems inescapable given the state's inherent capacity limitations; it cannot craft preference-driven, handcrafted policies to satisfy the influential few at every local jurisdiction. Better yet, it doesn't have to.

So far, these interventions have been piecemeal and limited to specific, acute concerns with housing supply. It should go further. A full framework and a new model should be developed instead. Rather than the incremental adminis-

trative approach, we should apply a designer's mindset to the more central problems that zoning presents.

What would zoning be if it were kept strictly in the realm of public safety and health? What would our policies contain when public welfare is subordinated and all preference-driven, hyperlocal regulations were removed? What, at that point, would be the point of zoning?

A LESSER SCOPE AND A BETTER RESULT

Thanks to the technical codes that already exist, zoning would have little relevance to the private realm. Noxious land uses would continue to be regulated with context-sensitive, location-specific use restrictions as there is a direct connection to public health and safety. But building setbacks? Density restrictions? Parking minimums? Parking maximums? Single-family exclusionary zoning? These and many more rules have no direct correlation to public health and safety that is not already addressed through existing technical codes. Thus, they would be removed from the code.

The public realm, meanwhile, would become the central focus as it remains a major factor in public health and safety. Zoning regulations would help determine the placement, design, and function of parks, open space, streets, and other rights-of-way. This is the original function of city planning and has been tragically subordinated to the broader public welfare–customer service dynamic of modern zoning administration.

Zoning is an important mechanism for initiating site-specific exactions. Depending on the existing system needs, especially for something like an incomplete street, new development would be liberalized in its private realm. In exchange, it would contribute more to the public realm that it relies upon.

In other words, zoning would become the means by which local governments would mitigate the impact of noxious uses while also requiring new development to contribute proportionately to the public realm with new street improvements and other exactions.

I have developed a model code to further demonstrate how these ideas could manifest. The code is mercifully brief (six rules with some space for context-sensitive subsections) and will be explained in a separate paper. It certainly will not be perfect, but it will be better at achieving its aim of greater public health and safety with a more complete, safer public realm that would be available to all. Welfare will follow.

Best of all, the model code will be built on a singular, measurable goal that will give everyone a better way to test its effectiveness. Each test will require specific methods, reproducible results, and an approach for refinement that we normally find in technical codes.

CONCLUSION

Zoning is confusing because its underlying purpose is confused. Without a narrower goal, it is highly unlikely that our cities will ever really understand what a successful policy is supposed to achieve. As it stands now, every jurisdiction has its own approach and philosophy to land development, and this fragmentation leads to restrictions for some property owners based on the preferences of other property owners.

These preferences know no bounds. Housing shortages demonstrate this clearly. Residential units are being placed in whatever area has the most willing (or preoccupied) collection of neighbors. When those outlets are exhausted, the housing capacity suddenly diminishes—not for a lack of buildable area, but for a lack of amenable neighbors. In places such as California and Oregon, where housing inventories are mandated by the state, analysis leads to talk of housing targets for all jurisdictions, along with talk of "the fair share." This is the point at which a community—even an entire city—starts to see new housing as some kind of bitter pill it must swallow.

When managed properly, a city should be a steady platform of public infrastructure and services that can naturally scale with growth and thus be agnostic toward growth. When dealing with "fair share," we maintain the poor image of the city as an HOA. The fair-share debate is akin to an HOA deciding if it will allow new membership. Such odd behavior will continue so long as the current system remains.

State preemption of local government zoning has a long runway ahead of it. The idea that single-family residential zoning can be abolished proves that there is little to no immediate health or safety risk inherent in the rule change. In fact, the burden of proof is on the rules themselves—if done away entirely, would density restrictions *at any level* create any direct detrimental effect to public health and safety? Again, if four is fine, why not five or 10 or 50? As long as the infrastruc-

ture is sufficient, or made sufficient through the development, what issue remains?

When governments focus solely on health and safety, most density restrictions seem arbitrary. When the other zoning rules are subjected to the same scrutiny, the arbitrariness worsens.

Not that it matters. Cities cannot easily remove such arbitrary rules if they do not have the strong support of the influential local body politic. This is why preemption is necessary. States occupy a much larger political market where such local preference-driven interests are diffuse and systemic action is possible. Also, states occupy much greater capacity for technical expertise and police power, which is why states tend to provide the public health and environmental safety regulations that zoning should continue to incorporate.

The ultimate objective at the local level should be to apply land development regulations in a manner that is protective, uniform, and beneficial to all. As in, anyone: visitor, resident, property owner, prospective owner.

Time and again, the introspection leads to the same basic conclusion: zoning is a confused, and often destructive, form of governing. Yet it is essential too—some of it, anyway. The only way to find the vital few elements that are truly beneficial is to study the system at the core, at its central thesis. Doing so shows that public welfare, as a unifying concept, is quite divisive, is mostly built on preference instead of necessity, and is, itself, unnecessary.

NOTES

1. Some local building codes have expanded to include environmental and energy-efficient requirements as well. These rules are typically packaged as modules or addenda to existing building code publications. For example, the International Code Council, which publishes the widely used International Building Code, provides model codes that have been incorporated into some city and county codes and expands their scope beyond basic building, fire, and life safety.
2. Denver's "Summary of Zone Districts" web page includes seven major thematic groups, which house a total of 155 districts. See "Zone District Descriptions and Definitions," City and County of Denver, https://denvergov.org/Government/Agencies-Departments-Offices/Agencies-Departments-Offices-Directory/Community-Planning-and-Development/Denver-Zoning-Code/Zone-Descriptions#section-2.
3. Derived from State v. Hutchinson Ice Cream Co., 168 Iowa 1, 10, 147 N.W. 195, 199, L.R.A. 1917B, 198, 202 (1914), *aff'd*, 242 U.S. 153, 37 S. Ct. 28, 61 L. Ed. 217 (1916) (quoting Ernst Freund, The Police Power, Public Policy and Constitutional Rights §§ 9, 15 (1904)).
4. Michael Davidson and Fay Dolnick, *A Planners Dictionary* (PAS Report 521/522, American Planning Association, Chicago, April 1, 2004).
5. Ideal distances should be at least 3,280 feet (1 km). See P. O. Njoku, J. N. Edokpayi, and J. O. Odiyo, "Health and Environmental Risks of Residents Living Close to a Landfill: A Case Study of Thohoyandou Landfill, Limpopo Province, South Africa," *International Journal of Environmental Research and Public Health* 16, no. 12 (2019): 2125.
6. For wetlands, distances range from 50 to 500 feet, often based on the criticality of the subject area to a broader system. See James M. McElfish Jr., Rebecca L. Kihslinger, and Sandra S. Nichols, "Planner's Guide to Wetland Buffers for Local Governments," Environmental Law Institute, March 2008, https://www.epa.gov/sites/default/files/2014-03/documents/final_40.pdf.
7. Davidson and Dolnick, *Planners Dictionary*, 231.
8. State Standard Zoning Enabling Act (U.S. Gov't Printing Off. 1926).
9. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).
10. *Euclid v. Ambler Realty Co.*, 272 U.S. at 395–96.
11. *Id.*
12. Oakwood at Madison, Inc. v. Twp. of Madison, 117 N.J. Super. 11, 21 (Super. Ct. Law Div. 1971).
13. *Id.* at 20–21.
14. S. Burlington Cnty. N.A.A.C.P. v. Mount Laurel Twp., 67 N.J. 151, 336 A.2d 713 (1975). This important distinction between a regional versus a local context for general welfare was first studied by Howard Allen Weiner, "General Welfare and 'No-Growth' Zoning Plans: Consideration of Regional Needs by Local Authorities," *Case Western Reserve Law Review* 26 (1975): 215.
15. Constr. Indus. Ass'n of Sonoma Cnty. v. City of Petaluma, 522 F.2d 897, 902 (9th Cir. 1975).

16. *Id*. at 908–9.
17. My definition is greatly inspired by Vernon A. Vrooman, "Legal Concept of General Welfare," *Notre Dame Law Review* 10 (1932): 42.
18. Berman v. Parker, 348 U.S. 26, 33 (1954).
19. Nat'l Land and Inv. Co. v. Kohn, 419 Pa. 504, 530–31 (1966).
20. Vill. of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974).
21. Accessory Dwelling Units, S.B. 1069, 2015 Leg., Reg. Sess. (Cal. 2016).
22. Transit-Rich Housing Bonus, S.B. 827, 2017 Leg., Reg. Sess. (Cal. 2018), and More HOMES Act, S.B. 50, 2019 Leg., Reg. Sess. (Cal. 2019).
23. Middle Housing Choices, H.B. 2001, 80th Leg. Assemb., Reg. Sess. (Or. 2019).
24. Housing Development Bill, S.B. 245, 66th Leg., Reg. Sess. (Mont. 2020).
25. Middle Class Housing Act, S.B. 6, 2021 Leg., Reg. Sess. (Cal. 2022).
26. John Infranca, "The New State Zoning: Land Use Preemption amid a Housing Crisis," *Boston College Law Review* 60 (2019): 823.
27. Bilbar Constr. v. Bd. of Adjustment of Easttown Twp., 393 Pa. 62, 141 A.2d 851 (1958).
28. I refer to public-choice markets as an extension of public-choice theory. In economics, this is a theory to explain how rational actors operate in the realm of politics. Self-interested groups negotiate with one another to craft agreements for sufficient mutual gain, leading to compromises that are essentially no different than the free exchange of money for goods—only this time it is influence, support, or passivity in exchange for acceptable policies. For me, this theory is best illustrated in the following articles: G. S. Becker, "A Theory of Competition among Pressure Groups for Political Influence," *Quarterly Journal of Economics* 98, no. 3 (1983): 371–400, and Sam Peltzman, "The Economic Theory of Regulation after a Decade of Deregulation," *Brookings Papers on Economic Activity* 20 (1989): 1–59.
29. Ryan Avent, *The Gated City* (Kindle Single, August 2011), chap. 7.
30. "Not in my backyard" (NIMBY) is a derogatory term that I do not use again. It's better to see these individuals as "neighborhood defenders," as coined by Katherine Levine Einstein, David M. Glick, and Maxwell Palmer, *Neighborhood Defenders: Participatory Politics and America's Housing Crisis* (Cambridge, UK: Cambridge University Press, 2019).
31. *Berman v. Parker* included monetary value as an element of welfare.
32. In 2019, the Salem City Council made two watershed decisions in the land use arena. First, it voted to allow up to eight units of residential construction by right for properties in the urban core (i.e., removing its previous discretionary powers); second, it eliminated minimum parking standards for the same area. In 2022, the council also voted to allow broad mixed-use zoning for most of the city, eliminating a great deal of the exclusionary zoning that had limited the city's residential capacity for decades.
33. Norman Wright, "Beyond the Density Standard," *Zoning Practice*, November 2012, https://www.planning.org/publications/document/9006909.

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