Controlling the Locals from the Top Down and the Bottom Up for Housing

Author : Shelby D. Green

Date : December 1, 2020

Christopher S. Elmendorf, Beyond the Double Veto: Housing Plans as Preemptive Intergovernmental Compacts, 71 **Hastings L.J.** 79 (2019).

Zoning has long-been regarded as quintessentially a local matter. And, states usually defer to local governments believing that they have better information about local conditions, preferences, and practices. In his article, Professor Elmendorf shows how those preferences and powers often operate to undermine state interests, particularly in ensuring housing opportunities for all its needy residents.

In July 2020, President Donald Trump thrust the issue of zoning for housing on the national scene when he proudly announced: “I am happy to inform all of the people living their Suburban Lifestyle Dream that you will no longer be bothered or financially hurt by having low income housing built in your neighborhood.” The announcement came after the Department of Housing and Urban Development repealed the “Affirmatively Furthering Fair Housing” (“AFFH”) mandate, adopted by former President Obama, in fulfillment of the aims of the Fair Housing Act of 1968.

That “Suburban Lifestyle Dream” (and its exclusive character) was first enabled by ordinances prohibiting blacks from living in certain neighborhoods. After those ordinances were struck down by the Supreme Court in Buchanan v. Warley, 265 U.S. 60 (1917), as a violation of the privileges and immunities clause of the United States Constitution, homeowners retooled with deed covenants that prohibited the sale of property to persons who were non-white.

When the Supreme Court ruled in Shelley v. Kraemer, 334 U.S. 1 (1948), that judicial enforcement of those covenants violated the equal protection clause, local governments stepped in with facially neutral zoning ordinances to keep out affordable housing. As President Trump hints, these measures had a disproportionate impact on the poor and people of color.[1]

We have come to see that zoning affects not only neighborhoods, but the lives of people; barriers to housing development exacerbate inequality, excluding many from the economic, social and cultural benefits of communities. As Professor Elmendorf shows, the problem of housing is a cat and mouse game, with states imposing requirements and local governments coming up with stratagems to evade them.

The game seems to have begun in the 1960’s with the “Quiet Revolution,” when states intervened in local land-use decisions, at first out of concern about uncontrolled growth and the environmental impacts from development. In some cases, states stripped local governments of the power to ban outright certain land uses, but leaving them the power to regulate discrete perceived harms associated with those uses.

Development opponents who had lost a local battle could now use state law to go over the head of the local planners. This created what has been described as the “Double Veto.” This second chance was used by anti-development interests to block important development such as housing.

Professor Elmendorf shows that some states' assumptions were wrong, such as their underlying assumptions about the connections between projected populations and housing targets. In other ways, states displayed naiveté, for example by presuming that local governments would act in good faith, when they could "*legitimately*" kill a housing project on the pretext of design, scale, and public benefits issues.

He wades through the various models of intervention. In the East, the *Mt. Laurel* doctrine, fashioned by the New Jersey supreme court, requires local governments to meet their "fair share" of the low-income housing needs or suffer the "builder's remedy," a judicial or administrative proceeding giving developers certain exemptions.

States in the West typically set quantitative targets for affordable housing units and some require local governments to enact and periodically update a comprehensive plan or "housing element," that explains how they will meet their share of the housing needs based upon projected population growth. Localities without a compliant plan might lose state funds, but traditionally, they would not face the builder's remedy.

Professor Elmendorf's exhaustive analysis of the administrative and practical problems with both models, reveals that it is not enough to just tinker with the local regulatory baselines for housing development. Instead, states must strong-arm local governments to block retrogressive stratagems, including bad-faith exercises of permitting discretion.

He proposes a framework modeled after the enforcement scheme under the Voting Rights Act of 1965. Under this model, changes to voting rules had to be pre-cleared by the Department of Justice.

Requiring local governments to pre-clear permitting rules would function like a preemptive statewide zoning and development code; negotiated with the state, out of public view, in an administrative setting and codified as a component of the locality's own general plan. The housing element then acquires *de jure* status as local law that controls permitting by local governments in reaching their housing quotas. The plan resembles a preemptive and self-executing intergovernmental compact.

Applying pressure from above, the state would use the threat of fiscal penalties to compel local governments to periodically revisit and liberalize their entire framework for housing development, including zoning maps, development standards and fees, and permitting procedures. This top-down pressure would encourage bottom up measures, by subtly shifting the balance of local policymaking authority toward more housing-tolerant factions, while giving these factions some cover from challenges by housing opponents.

What the article so cogently reveals is the seeming intractability of the housing problem, one that needs aggressive and sustained efforts to resolve. Yet, in his model, Professor Elmendorf stops short of giving states the power to rewrite the housing element, relegating them to the threat of withholding funds in case of withdrawals from the pact. But, why so? Surely, state legislatures can curtail local powers if they would frustrate larger state interests.

Professor Elmendorf's analysis and model could and should be extended to the critical sphere of housing. All citizens are entitled to have their governments exercise police powers to serve the public safety, health, and general welfare. Ensuring access to housing comports with this power, but barriers to access do not. Local governments that have and continue to resist affordable housing may have to forfeit some zoning powers. Housing, one of the most urgent of human needs, is still being withheld from those who need it and by those in the position to ensure it.

1. *See for example*, *Huntington Branch, N.A.A.C.P. v. Huntington,* 844 F.2d 926 (2d Cir. 1988).

Cite as: Shelby D. Green, *Controlling the Locals from the Top Down and the Bottom Up for Housing*, JOTWELL (December 1, 2020) (reviewing Christopher S. Elmendorf, *Beyond the Double Veto: Housing Plans as Preemptive Intergovernmental Compacts*, 71 **Hastings L.J.** 79 (2019)), https://property.jotwell.com/controlling-the-locals-from-the-top-down-and-the-bottom-up-for-housing/.