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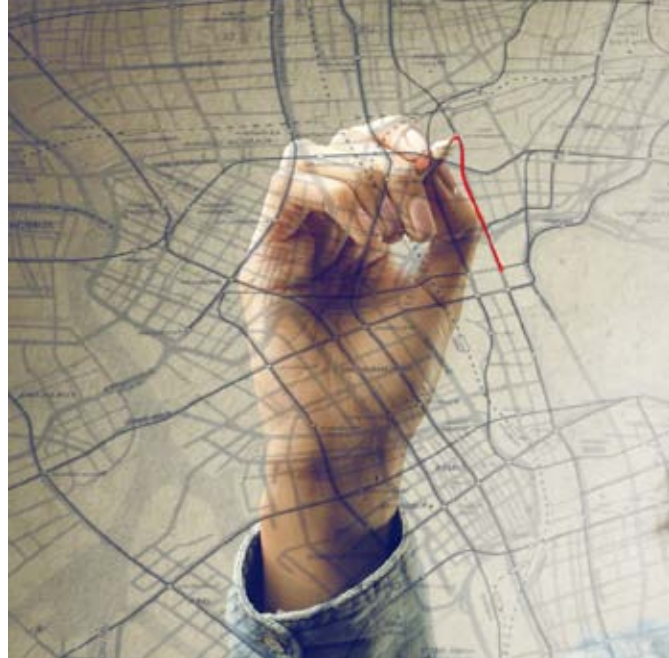
What's the Use?

Josef Filipowicz

In the summer of 1988, 9-year old Max Schilling of Wachtung, New Jersey, decided to earn some pocket money by doing what so many children had done before him: open a lemonade stand. He did so by building a seven-foot tall stand in front of his house and was soon averaging \$12.50 a day in sales. Shortly thereafter, local officials informed Max that he was in violation of the town's zoning code, as his stand was too tall and too close to the street. He had to shut down his operation as a result; otherwise a \$500 per day fine would have been imposed (Lammler, 2012).

There are more stories like Max's,¹ where various regulatory ordinances² prevent even the most innocent of entrepreneurial undertakings. Underlying his story in particular is the century-old practice referred to as zoning, which has shaped the development of cities across the globe. In general, zoning may be described as a series of bylaws that "[state] exactly: how land may be used; where buildings and other structures can be located; the types of buildings that are permitted and how they may be used; [and] the lot sizes and dimensions, parking requirements, building heights and setbacks from the street" (Ontario Ministry of Municipal Affairs and Housing, 2010). The

following article seeks to unpack the above anecdote first by tracing how and why zoning came about, as well as its various forms; second, by describing in more detail the disadvantages associated with this approach; and third, by exploring the existing and potential alternatives to zoning. It concludes that without a significant shift away from zoning as it currently exists, it will continue to impede innovation in land use, urban development, and entrepreneurship, as it did to Max.



Why Zoning?

Though regulation of both the physical form and the use of land has manifested itself in various ways throughout history, the modern proliferation of zoning as it is now practised stems from the landmark 1926 US Supreme Court ruling in *Village of Euclid v. Ambler Realty Co.*, wherein a small residential suburb of Cleveland sought to prevent the expansion of the city's industry within its limits, leading to a legal challenge by an industrial real estate developer (who lost the case). The decision by local authorities to prevent the development of industrial uses on the land owned by the developer (Ambler Realty) caused the value of the property to drop by three quarters, as non-industrial land was less in demand (US Supreme Court, 1926). It also sent a strong signal of official approval towards the practice of dividing land uses and regulating built form.³ The result of this scenario



Do regulators really know
know the “highest and
best use” of land?

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was replicated across
the US and other parts
of the industrialized
world, stemming from
the notion that uses or

density deemed undesirable by members of a community are to be kept apart, or prevented altogether.

Why Not Zoning?

Although the logic of keeping different uses apart is intuitive (e.g., that a factory expelling pollutants should be kept at a safe distance from where a population resides), the idea of zoning itself is founded (consciously or unconsciously) on the assumption that all possible uses of land are known and may be accounted for. Although an oil refinery or a heavy equipment manufacturer may obviously fall into the category of “industrial,” there are an incalculable and ever-evolving series of uses, densities, and forms that are not accounted for in traditional zoning codes. For example, a design company may wish to use a portion of its condominium to manufacture its designs (e.g., cell-phone covers) with a 3D printer—a use that arguably does not disturb surrounding units with undesired sounds, odours, or other negative externalities. Similarly, a retiree living in a single-detached home in a residential subdivision may



wish to supplement her income by selling wholesale goods to neighbours out of her garage, eventually transforming it into a shop with regular hours and a cashier. In these hypothetical scenarios, as with Max's lemonade stand, the natural (and productive) evolution of entrepreneurship is stunted due to the dated and subjective categorization of the complex patterns with which humanity occupies and uses space.

Beyond this fundamental assumption of uses, zoning also predicates itself on assumptions of demand. By designating swathes of towns, cities, and rural municipalities as residential, commercial, industrial, or other uses and forms, regulators are claiming to know how much of each is necessary, based on presumptions of "highest and best use"⁴ of land. The unfortunate result is that, unless zoning codes rapidly adapt



Ell Brown

Los Angeles, CA
is revising its
zoning code



Kumar Appa

Tom Haymes

Houston, TX
functions well
without a
zoning code

to real circumstances, certain uses less desired by prospective landowners and tenants are preserved, while other, more desirable uses are constrained, potentially leading to a supply (and, ultimately, price) mismatch. For example, commercially zoned lots in a city with a strong demand for residential and light-industrial space will likely be worth less per square foot than nearby housing or warehouses, in spite of their proximity. This is arguably the case in the greater Vancouver area, where real estate firm Avison Young reports early/mid-2014 vacancy rates for office, industrial, and multi-family housing property at approximately 9.7%, 3.7%, and 2.2% respectively, broadly exemplifying this mismatch in supply. Although zoning is not solely responsible for these distortions, the revision of it as it is practised would likely contribute to addressing them.



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Neighbourhood associations combined with certain regulations can substitute for zoning codes

Alternatives

As previously conceded, there is a strong case for curbing negative externalities generated by certain land uses, especially if these lower the land values of surrounding properties (Fischel, 2004). However the use of zoning as a mechanism for addressing these externalities contributes to a new set of arguably more severe consequences on the efficient and productive use of land. Some local governments are at least in part aware of this dilemma, and have developed strategies aimed at addressing it. The current comprehensive revision of the zoning code for the City of Los Angeles, dubbed *re:code LA*, is a good example

of the recognition of setbacks caused by “outdated” codes, with its March 2014 progress report recognizing that some zoning designations are obsolete, that small businesses often start from their owners’ homes (the revision specifically mentions garages), and that the notion of streamlining approvals for adaptive reuse of existing structures should be expanded to a wider array of uses. Similarly, the City of Vancouver designates some of its core industrial lands as “let go,” meaning a pragmatic loosening of zoning restrictions based on a variety of alternative uses (1995). For example, a brewery/restaurant may establish itself in an industrial zone that no longer suits the needs of many large-scale manufacturing or logistics companies. In permitting these changes, the City is recognizing the opportunities that stem from a more pragmatic approach to land-use regulation.

Beyond the adaptation of zoning to better reflect desired uses and densities, perhaps the best known example of a large city in the industrialized world that has developed without any zoning is Houston, Texas. Although the argument has been made that certain municipal regulations, combined with the influence of neighbourhood and homeowner associations, have a similar influence on land use as zoning, Houston provides an interesting case nonetheless (Qian, 2010). More generally, a 2012 study by Huang et al. furthers the case that US cities that have stronger land supply constraints (including residential land use regulations) are more vulnerable to boom-and-bust cycles in the real estate market. Advocates of Houston’s approach point to better housing affordability and a regulatory setting conducive to entrepreneurial innovation (O’Toole, 2014). Indeed, the average Houstonian household spent less on housing than the national average in 2011-2012 (United States

Department of Labor, 2013). Although it may not perform as highly on other indicators, Houston strengthens the case for the reconsideration of zoning as a widely accepted institution of municipal governance.

Conclusion

When traced from the desire by citizens to protect themselves from the negative effects of certain land uses, to the paid time of town officials being sent to prohibit a boy's lemonade stand, it becomes clear that the evolution of zoning has thrown the proverbial baby out with the bath water. Although its spread



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was grounded in the urban experiences of industrialization, zoning no longer resembles the contemporary entrepreneurial contexts of tech start-ups, online businesses, and other “clean” industries. Even if municipal zoning codes are comprehensively updated, these new codes will inevitably meet with the same issues of gradual obsolescence as current codes. The need

to address externalities without hindering entrepreneurial innovation is fundamentally incompatible with the assumptions underlying zoning; alternatives, though nascent, must be nurtured and accelerated by local decision-makers if they wish to position their jurisdictions to compete in the 21st century.

Notes

- 1 A map showing “The Government War On Kid-Run Concession Stands” was compiled by the Freedom Center of Missouri: <<http://www.mofreedom.org/2011/07/the-government-war-on-kid-run-concession-stands/>>.
- 2 Ordinances are the term commonly used in North American municipalities to represent bylaws or other local regulations.
- 3 The City of Regina defines built form as “the shape of buildings, not only individually, but as a collective. How buildings relate in terms of height, scale and character determines the extent to which they will define the public realm” (2009: 102).
- 4 This concept (also referred to as HBU) is often cited in the planning and real estate sectors.

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