

ZONED OUT OF THE AMERICAN DREAM THE IMPACT OF LAND USE AND ZONING POLICY ON AFFORDABLE HOUSING

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The American Dream conceptualizes the ideals of democracy, liberty, equality, opportunity, and freedom that support a citizen's opportunity to achieve upward social mobility with minimal hindrance from government. According to the well accepted Maslow's Hierarchy of Needs, having a structure for warmth, rest, and security is a necessary precondition to a successful and satisfying life. Unfortunately, for large segments of the American public, the ability to secure decent, affordable housing is a difficult, if not impossible task.

It is no secret that the price of housing has exponentially increased over the last several years. This includes the cost of buying homes, building homes, and renting homes. In the last several years, the cost of purchasing a home has increased 55% (Forbes), the cost of wood products used for building homes has quadrupled (USDA), and nationally listed rents rose 15% (NPR). With the cost of housing on the rise, a major component of the American Dream — an affordable residence that will provide the foundation for upward mobility — is slipping out of reach for many Americans.

Affordable housing takes many forms: apartment buildings, townhome / cluster developments, new single-family homes on smaller lots, and housing for seniors. Unfortunately, the application of many zoning regulations in desirable communities, while seemingly harmless on their face, zone out opportunities for such affordable housing options. Such zoning regulations include prohibitions on apartments, townhomes, cluster homes and even small single family lots that make new residential development difficult if not impossible due to the development costs and the limited market demand for large homes on large lots.

Many young professionals and young families are not in a position to or do not have the time to maintain a home and a large lot, and seek out rental communities with the associated amenities. And with the qualification requirements and the cost of mortgages, home ownership is simply not an option. Unfortunately, in many desirable communities with good school districts, apartment communities simply do not exist or are very limited due to being zoned out. Additionally, with the aging Baby Boomer population, there is a growing need to provide housing for seniors, especially in active communities that provide engagement with the larger community. Many seniors today want to remain independent and active as long as possible, but no longer desire or have the ability to care for their properties. Large segments of seniors are also on fixed incomes, making affordable housing options in the communities where they have spent their whole life, limited or non-existent.

A founding principal of the United States is to provide a society where its residents can enjoy life, liberty, and the pursuit of happiness. There is nothing more critical to achieving those ends than providing opportunities for affordable housing. Affordable housing



further longer-term goals that the government should encourage such as economic viability, diversity, housing for service industries, and community stability. Instead of supporting the American Dream, the application of zoning laws in many communities is a large reason for it being out of reach for large segments of society. That needs to change.

Right to Property v. Exclusionary Zoning

Many property owners want to utilize their property for a use that is economically viable and in demand, such as providing affordable housing developments, whether for development of apartments or smaller lot residential subdivisions, both of which are in demand. Zoning regulations can be used as vehicle to ensure there are opportunities for affordable housing in a community.

Understanding how courts and localities treat property rights helps explain how exclusionary zoning policies are still in place. Property rights are important in Ohio. Article I, Section 19 of the Ohio Constitution, provides, that private property is to “be held inviolate, but subservient to the public welfare.” In *Norwood v. Horney*, the Ohio Supreme Court recognized that the right of property is a fundamental right. 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, ¶ 38. Further, the Court has recognized that zoning restrictions “are in derogation of the common law and deprive a property owner of certain uses of his [or her] land to which he would otherwise be lawfully entitled.” *Saunders v. Clark Cnty. Zoning Dept.*, 66 Ohio St.2d 259, 261, 421 N.E.2d 152, 154 (1981). Therefore, both the Ohio Constitution and the Ohio Supreme Court recognize the importance of property rights.

Ironically, however, the practical application of law **undermines** the importance of property rights in Ohio. The current case law provides that local governments may regulate the use of property as long as the regulation substantially advances public health, safety, and/or general welfare. *Goldberg Cos., Inc. v. Richmond Hts. City Council*, 1998-Ohio-207, 81 Ohio St. 3d 207, 213, 690 N.E.2d 510, 514. Additionally, the current case law curiously imposes a greater burden of proof on a person challenging the constitutionality of zoning actions. Unlike the typical preponderance of evidence burden, courts require individuals challenging the constitutionality of local zoning regulations to establish “beyond fair debate” that such regulations do not substantially advance

a legitimate governmental interest. *Jaylin Investments, Inc. v. Moreland Hills*, 107 Ohio St.3d 339, 2006-Ohio-4, 839 N.E.2d 903, ¶ 10. The beyond fair debate burden is the equivalent of beyond a reasonable doubt in criminal proceedings.

In sum, Ohio analyzes the fundamental right to property under the easy-to-meet rational-basis test. Even more challenging is the fact that the zoning has a presumption of validity and to overcome such presumption, a property owner has to meet a burden of proof equivalent to beyond a reasonable doubt. This often results in the courts upholding exclusionary zoning regulations. Even where a landowner may request a variance from such use (i.e. prohibition on multi-family development) and area restrictions (large lot and low density restriction), the decision to grant such is typically made by an administrative board (such as a board of zoning appeals) acting in a quasi-judicial capacity. This board is comprised of volunteers in the community that usually have no technical expertise or training as it relates to property or land use matters. Further, these individuals may face political pressure from residents or groups in the community that oppose a project, and many times are their neighbors or friends. While the motives of community members may vary, wariness of renters and increased density is a common theme. The fact is the prohibition of apartments and smaller lot sizes have no real causal connection to furthering the public health, safety, and welfare. This is most evident in the number of growing and vibrant communities throughout our Country that have densities of 10, 20, or more units per acre.

Often times, landowners must turn to the courts in an attempt to exercise their fundamental property rights. The odds are against landowners by the time they arrive at the courts, as their burden is high, while the burden for the local government to justify its regulation of property is relatively nonexistent. Despite the fact that property rights in Ohio are fundamental, under the current jurisprudence, it is not difficult for a locality to superficially argue that a zoning regulation bears a substantial relationship to the public health, morals, and safety. Localities may justify their zoning restrictions by stating that the purpose is to maintain the “character of the community” or even “aesthetics.” On the other hand, the landowner must present substantial evidence and experts to demonstrate why

the restriction fails to bear a substantial relationship to the exercise of police power. See, i.e., *Shemo v. Mayfield Hts.*, 88 Ohio St.3d 7, 11, 722 N.E.2d 1018, 1023 (2000). Thus, local governments have broad authority to enact zoning that diminishes the opportunities for affordable housing developments, without much burden of demonstrating how it relates to the exercise of police power. Meanwhile, landowners seeking to provide affordable housing bear a great burden. While the burden is not insurmountable, it requires strategic planning, preparation, and the wherewithal for a complicated and many times difficult court battle. So much for property being a fundamental right!

Although it is not easy to challenge these regulations, it is not impossible. A successful challenge typically requires exposing the improper motivations, inconsistencies and arbitrariness of the governmental entity in their zoning decisions and calling attention to the lack of support for the concerns that allegedly form the basis of the exclusionary zoning. Even if challenges are possible, things



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need to change. Jurisprudence and policies that eliminate the rote deference given to local government regulation of private property, and instead require the government to show substantial proof that the land use policy is narrowly tailored to substantially advance an important government interest are critical to not only protecting the fundamental constitutional right of property ownership, but also providing for more opportunities for affordable housing.

Conclusion

Housing is no longer affordable, and that is a crisis. Communities need to address these affordable housing concerns, notwithstanding opposition that does not want or does not recognize the need for affordable housing options. Local officials need to be aware that the enforcement of certain zoning restrictions can inhibit the affordability of housing. And Ohio courts should recognize that the Ohio Supreme Court has declared property right to be fundamental under the Ohio Constitution, and give less deference to government when it

is seeking to regulate such fundamental right. Both policymakers and courts have the power and the constitutional framework to require more from local government regulation and more liberty to use property without unjustified governmental interference, which will in turn provide more affordable housing opportunities. Until then, the fight will go on to protect fundamental property rights and further the American Dream.



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