

Comment on Anthony Downs's "The Advisory Commission on Regulatory Barriers to Affordable Housing: Its Behavior and Accomplishments"

Bernard H. Siegan
University of San Diego

Introduction

In 1982 President Ronald Reagan's Commission on Housing submitted recommendations for increasing the supply and reducing the cost of housing.¹ In the regulatory area, the commission's report stated that both objectives would be greatly advanced if the states and municipalities substantially deregulated land-use controls and the U.S. Supreme Court more strictly monitored municipal land-use regulations.²

Anthony Downs's description of the current situation suggests that little change has occurred since then in state and local land-use policies. But his study does not account for the impact of recent U.S. Supreme Court cases, which may be quite significant but, at this time, difficult to measure. As for the restrictive municipalities, they continue to reflect the exclusionary attitudes of homeowners, and the states have done little to limit their powers in this respect.³

However, as a result of the aforesaid judicial decisions, these local forces are less dominant than before. At least one consequence of these opinions is that, on March 15, 1988, President Reagan issued Executive Order 12630, which requires federal departments and agencies to consider the constitutional implications of their actions regulating property rights and to minimize interference with these rights.⁴

The Reagan Housing Commission was critical of the deference the Supreme Court then gave to local land-use regulation. In *Euclid v. Ambler Realty Co.*,⁵ the 1926 case that ruled zoning to be constitutional in principle, the Court held that "before [a zoning] ordinance can be declared unconstitutional, [it must be shown to be] clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare."⁶ Under this standard, municipalities could hardly do wrong, almost regardless of how burdensome and capricious the outcome. The commission urged

that the level of judicial review in zoning and other land-use cases be elevated to a higher standard of scrutiny.⁷

This has now occurred. In 1987, the Court decided two cases (discussed later in this commentary) that considerably lessened judicial deference toward land-use regulations. Neither concerned conventional zoning, but both did relate to the power of state and local legislatures and agencies to regulate the use of land. Although the rulings themselves are relatively sparse in language, they have been widely applied and cited by federal and state courts, and they signal a significant change in the Court's *Euclid* prospective.

Since these opinions, which were decided by 6-3 and 5-4 votes, three seats on the Court have changed. To an extent, judicial opinions of the High Court on matters of constitutional law reflect the individual views of the justices. It appears that the three new justices—Anthony Kennedy, David Souter, and Clarence Thomas—are as private property oriented as their predecessors, if not more so. Thus, although judicial forecasting is a risky endeavor, it is reasonable to assume that these justices are not likely to reverse the existing course of the Court.

State regulations

To encourage construction of housing for low- and moderate-income families, Downs calls for state regulations requiring or pressuring local zoning and building authorities to adopt policies and programs for this purpose (pp. 1124-1126). States would establish a standard quantity or target percentages of housing in every locality that would be economically available to low- and moderate-income households. A state agency would have power to override local government decisions to reject or delay applications to build this housing. The states would also provide localities and private groups with financial and technical assistance to help develop such housing. Government would thus seek to determine the course of the markets affected.

This prospective is virtually opposite to that espoused by the Reagan Commission, which urged elimination of all zoning regulations restricting housing development except those necessary to achieve vital and pressing governmental interests.⁸ The commission had stated that, with respect to land use, regulation was the problem, not the solution.⁹ Under its proposals, the only zoning role for the states with respect to housing would be a negative one: to limit

the zoning powers of the municipalities. Downs, on the other hand, would accord the states a new and important role in the zoning process, amounting to another tier of zoning authority. Thus, the planning and political forces that have frequently failed society at the local level would nevertheless be given substantial new powers and responsibilities at the state level.

Downs believes that every incorporated community has a moral obligation to bear a fair share of the burden of providing housing for an area's low-income residents. If it refuses to fulfill this obligation, the locality should be required to directly contribute economically, "through subsidy payments or taxes paid into housing trust funds, to the creation of such housing elsewhere" (pp. 1120).¹⁰ I would assume most municipalities would find it less costly to permit development in their territory than to pay for construction in other places.

The question arises, does it make economic sense to compel communities with high land costs to provide sites for subsidized low- and moderate-income housing? There is little correlation between location and decent housing (except in instances of highly adverse neighborhood conditions), yet location may greatly increase the cost of developing this housing. Moreover, the alternative of selecting only cost-efficient sites is not a very palatable one. In this event, state authorities would have to pick and choose to determine which municipalities must include low-priced housing and how much of it they must include. Political concerns would inevitably enter into these decisions, again resulting in economic waste.

If, under Downs's proposals, a municipality zones certain land for lower-income housing, this use would have priority over any other use at the designated location. However, classifying land for housing whose development almost always requires subsidy may frequently do little more than remove the land from the market. This is because subsidies are quite scarce.

Moreover, even if subsidies are available, there is the question of whether market demand exists to support the proposed social engineering. Not all communities are desirable living places for less affluent people. Commercial facilities in the suburbs are oriented toward the consumer taste preferences and credit practices of higher income levels. The absence of public transportation and the ownership of probably one older automobile will considerably reduce the mobility of families with low income. New kinds of ghettos may be created without the conveniences, familiarities, and amenities of the old ones. Given the choice, many people may prefer the older

sections of the city. A recent *Wall Street Journal* article reveals that black middle-class families are often quite hesitant to move to the suburbs.¹¹

Regulations requiring that new housing projects contain a specified percentage of low- and moderate-income units—referred to as inclusionary zoning—would reduce the economic feasibility of such projects and impede housing development. Density bonuses would decrease this problem; however, because such compensations are often insufficient, less housing will likely be produced overall although some of it would be for lower-income persons.¹²

Supply is critical to consumer welfare. The larger the supply of any item, the lower the price and, usually, the greater the variety. Zoning has been harmful to low- and moderate-income families primarily because it has limited housing development.

Low- and moderate-income families do not require new construction to obtain decent housing. Millions of people in these income brackets reside in comfortable housing that has been previously occupied. The only housing available to these families may be used, but then so is most of the housing that is purchased in this nation, some by the richest in the land. The emphasis should be on enabling poor people to exercise upward mobility by removing the barriers to improved housing.

The erection of new homes or apartments provides better housing not only for those who will occupy it, but also for many others who will be able to occupy the housing that will be vacated as a result. The leading study of these occupancy changes was made in the mid-1960s by the Survey Research Center at the University of Michigan.¹³ Conducted in 17 metropolitan areas, this study determined that for every 1,000 new housing units built, there are over 3,500 relocations, of which an average of 330 are by families defined as poor and 950 are by moderate-income families, the next lowest income category.¹⁴ All these moves will be made presumably to better housing on the assumption that “if they move, they benefit.” The moves begin in the wealthier areas and extend to the poorest.¹⁵ Lesser-income families will thus move closer to suburban places of employment.

By limiting housing development, zoning also harms the financial welfare of workers in construction and related industries, consequently reducing their ability to acquire more decent and better-located housing. Generally, greater production results in the

employment of larger numbers of people, and salaries and wages rise as the percentage of employed people increases.

As a practical matter, compelling every locality to zone land for low- and moderate-income housing might prove harmful to the goal of more housing. The quid pro quo these cities and towns are likely to exact is unrestricted power with respect to the balance of their zoning authority. Understandably, some municipal lawyers have advised their clients to classify small areas for lesser-income housing on the theory that, by adjusting zoning to provide for this public need, the locality would be immune to other governmental or judicial attacks on its zoning ordinances.

Thus, the Ninth Federal Circuit Court of Appeals, in upholding the severe growth restrictions of Petaluma, California, justified its decision, in part, on the basis of the small amount of zoning for low-income housing provided in the city's plan;¹⁶ the court noted that the city had allowed for about 50 units of such housing annually. Yet Petaluma's controls on the whole probably excluded 10 to 15 times that number of conventional units annually.

Instead of promoting new regulatory schemes, housing advocates should emphasize zoning deregulation as the best solution to affordability problems. Such educational efforts have already proven successful in helping deregulate other areas of the economy. To educate the judges, private and public housing advocates should file friend-of-the-court briefs in cases contesting zoning restrictions on housing development to explain the issues from a housing perspective.

Legal action

In two decisions issued in 1987, the U.S. Supreme Court significantly limited municipal land-use powers. *First English Lutheran Church of Glendale v. County of Los Angeles*¹⁷ held that landowners are entitled to compensation when an ordinance temporarily or permanently denies them all use of their land. The ordinance at issue prohibited construction in a flood-prone area. *Nollan v. California Coastal Commission*¹⁸ held that, for a land-use regulation to be valid, it must substantially advance a legitimate state interest.

Together these decisions place a burden on land-use regulators to provide considerable justification for their rules. It is not enough for

government merely to show, as was often the practice under *Euclid*, that it is implementing the police power. In these 1987 decisions, the Court set forth rulings and reasoning worthy of note:

1. The standard for determining validity required by *Nollan* embodies two tests: first, whether in adopting a land-use regulation the government is seeking to achieve a legitimate state interest; and second, whether the regulation substantially effectuates this interest. Both tests are common in rights jurisprudence litigation, in which a court seeks to determine if a particular regulation violates a person's constitutional rights. In contrast to *Euclid's* presumption of regulatory validity, *Nollan* requires that the government bear the burden of proving the validity of its actions.

Although it is difficult to define precisely what a legitimate state interest is, the Court is more likely to find it exists when the objective is to promote a public rather than a private interest. Thus, if the legislative purpose is simply to transfer property or property rights from A to B for the benefit of B, the interest advanced would be a private one, probably not valid under this kind of test. On the other hand, protecting public health and safety is a legitimate state interest.

Restricting the use of land to exclude from the locality would-be residents with low incomes or to curry political or financial favor with a special interest group, as often occurs in zoning, might not qualify as a legitimate state interest. According to the report of the Reagan Commission, "exclusion [by land-use regulation] is clearly not an acceptable governmental interest."¹⁹ Exclusionary laws might well violate the constitutionally protected right to travel.²⁰ To be sure, legislators always insist their purpose is to promote the common good when, in fact, it is not. However, courts are not bound by the legislature's stated intentions under the standard of review applied in *Nollan*.

2. In the *Nollan* case, the Supreme Court determined that the regulation failed the second test of the standard. It struck down the California Coastal Commission's requirement that the Nollans convey to the public an easement paralleling the coast, which the land adjoined, as a condition of obtaining a demolition permit for an existing bungalow they planned to replace with a new house. The Court reasoned that such an easement did not substantially advance the alleged state interest of making the ocean both visually and "psychologically" accessible to the public. The Court might have ruled differently on the second test had the

required easement been perpendicular to the coast, extending from it to the road fronting the lot. Such an easement would more likely achieve the Coastal Commission's purposes.

3. In a footnote in *Nollan*, the Court discussed but did not decide the issue of disproportionate impact raised in the case.²¹ The commission claimed that allowing the Nollans to build their house without dedicating the easement would result in a row of homes between the ocean and the road that would prevent travelers on the road from being aware of the proximity of the ocean. The Court replied that if the Nollans were being singled out to bear the burden of California's attempt to remedy this problem even though they had not contributed to it more than other coastal landowners, the state's action—even if otherwise valid—might violate the takings clause²² or the equal protection clause. "One of the principal purposes of the takings clause is 'to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'"²³

The Court's observations are relevant to ordinances that limit or tax new development because of the alleged inadequacies of existing facilities or services. Thus, congested roads may become more congested with the arrival of newcomers, but the problem is not solely attributable to the newcomers; rather, it is due to the development of the entire locality.

4. In *First English*, the county of Los Angeles argued that to increase the risk that a taking would be found and government required to pay for it would chill the planning and regulatory process. The Court agreed, but asserted that

[S]uch consequences necessarily flow from any decision upholding a claim of constitutional rights; many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities and the Just Compensation Clause of the Fifth Amendment is one of them. As Justice Holmes aptly noted more than 50 years ago, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."²⁴

Because of the two Supreme Court decisions, it might be difficult for municipalities to sustain exclusionary measures such as large lot or large unit zoning or growth controls. At the very least, these decisions mandate much more caution from the localities in regulating private property. The judicial position they represent appears to

offer the most promising relief for the problem of exclusionary zoning.

This federal position contrasts with that of some state courts, which have applied the reasoning of *Southern Burlington County NAACP v. Township of Mount Laurel*,²⁵ a New Jersey Supreme Court decision holding that the state constitution requires each municipality to zone land for low- and moderate-income housing. These state decisions establish rules that suffer from the same problems associated with state laws requiring this kind of zoning, as previously discussed. The two U.S. Supreme Court decisions follow a conceptually different approach, one consistent with deregulating zoning.

The failure of government regulation

There never has been a scarcity of well-intentioned plans to remove the limitations and excesses of the private economic market. Anthony Downs proposes dispersing low-priced housing development contrary to market dictates, and he justifies his proposals on the moral obligation of each locality to provide housing opportunities for poorer people.

For these proposals to obtain the force of law, the legislative and administrative authorities must adopt necessary laws and regulations to implement them. However, the record of the political process in this respect has not been very good. The perfect plan is often quite imperfect by the time it emerges from the pressures and compromises of the legislative process, whether it be on a local or higher government level, and it might be ravaged still more as administered. It is possible that the courts may lay some or much of the plan to rest.

Professor Ronald Coase, 1991 Nobel prize winner in economics, was for a long time the editor of the *Journal of Law and Economics*. That journal has published numerous studies on economic regulation, and Coase concludes:

The main lesson to be drawn from these studies is clear; they all tend to suggest that the regulation is either ineffective or that, when it has a noticeable impact on balance the effect is bad, so that consumers obtain a worse product or a higher-priced product or both as a result of the regulation. Indeed, this result is found so uniformly as to create a puzzle; one would expect to find in all these studies at least some government programs that do more good than harm.²⁶

Coase believes that, in theory at least, there is no reason why government regulation cannot improve on market processes. He states, however, "My puzzle is to explain why these occasions seem to be so rare, if not non-existent."²⁷

Economic history (as set forth by Coase) and zoning experience (the not-in-my-backyard—NIMBY—syndrome) together strongly suggest that new forms of zoning regulation are not likely to be more successful in achieving their objectives than were the existing ones. The same probably holds true for the substantial changes in zoning that Downs advocates. His efforts may well be counterproductive, for reasons I have explained in the first section above.

Author

Bernard H. Siegan is distinguished professor of law at the University of San Diego School of Law and has authored or edited eight books. A member of the National Commission on the Bicentennial of the Constitution, he has also served as a member of President Ronald Reagan's Commission on Housing and as a consultant to the U.S. Department of Justice, the Department of Housing and Urban Development, and to the Federal Trade Commission. He was also a member of the U.S. Advisory Team on Bulgarian Growth and Transition, authoring its recommendations for a proposed Bulgarian constitution.

Endnotes

1. President's Commission on Housing, *Final Report* (Washington, DC: U.S. Government Printing Office, 1982). The author was a member of this commission and chairman of its regulations committee.
2. *Ibid.*, 177-82.
3. Downs blames special interest groups in addition to homeowners for the adoption of ordinances that raise housing costs in highly urbanized communities (pp.1115-1116).
4. 53 *Federal Register* 53 (1988).
5. 272 U.S. 365 (1926).
6. 272 U.S. at 395. The Court excepted from this broad standard cases in which "the general public interest would so far outweigh the interests of the municipality that the municipality would not be allowed to stand in the way." *Id.* at 390. Nonetheless, few cases were resolved under this rule.
7. President's Commission on Housing, 200.
8. President's Commission on Housing, 199-201.

9. *Ibid.*
10. Increasing the tax burden for moral or other purposes raises a host of issues beyond the scope of this commentary.
11. Gregory A. Patterson, "Black Middle Class Debates Merits of Cities and Suburbs," *Wall Street Journal*, August 6, 1991, B1, col. 3.
12. See Robert C. Ellickson, "The Irony of 'Inclusionary' Zoning," in *Resolving the Housing Crisis*, ed. M. Bruce Johnson (Cambridge, MA: Ballinger Publishing Co., 1982), 135-87.
13. J. E. Lansing, C. W. Clifton, and J. N. Morgan, *New Homes and Poor People: A Study of Chains of Moves* (Ann Arbor, MI: University of Michigan Survey Research Center, 1969).
14. *Ibid.*, 41, 68.
15. *Ibid.*, 19, 20.
16. *Construction Industry Association of Sonoma County v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975).
17. 482 U.S. 304 (1987).
18. 483 U.S. 825 (1987).
19. President's Commission on Housing, 200.
20. See *Construction Industry Association of Sonoma County v. City of Petaluma*, 375 F.Supp. 574 (N.D. Cal. 1974), holding that Petaluma's growth restrictions violated the right to travel, reversed on other grounds, 522 F.2d 897 (9th Cir. 1975).
21. 483 U.S. at 835, n. 4.
22. As stated in the Fifth Amendment of the U.S. Constitution, "private property [shall not] be taken for public use without just compensation."
23. 483 U.S. at 835, n. 4, quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960).
24. 482 U.S. at 321, quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).
25. 67 N.J. 151, 336 A.2d 713 (1975).
26. Ronald Coase, "Economists and Public Policy," in *Large Corporations in a Changing Society*, ed. J. Fred Weston (New York: New York University Press, 1974), 184.
27. *Ibid.*