

PERSPECTIVE

America's Sordid History of Exclusionary Zoning

Volume 44, Number 21

November 20, 2020

By James Burling

In the summer of 1910, a successful Yale-educated attorney named George W.F. McMechen and his schoolteacher wife moved to an upscale neighborhood in Baltimore, Maryland. After all, McMechen had achieved the American dream; he and his wife were well-respected, affluent professionals, and they wanted their home to reflect their success. But there was a problem. While his new neighbors were all white, McMechen and his family were all black.

When the move became known, all hell broke loose, and America embarked on a century-long effort to keep minorities out of “nice” white neighborhoods. That effort has been largely successful; segregated housing patterns predominate to this day, and minority populations have been stymied in their desire to achieve the American dream of affordable housing and homeownership.

Shortly after McMechen's move, Baltimore adopted the nation's first overtly racial segregation zoning law. First, there were protests and intimidation. And most significantly, there was a citizen's petition asking the city fathers to “take some measures to restrain the colored people from locating in a white community and proscribe a limit beyond which it shall be unlawful for them to go.” The city council was happy to oblige. Six months after the McMechen family bought their new home, and by a party-line vote, the Democrat-majority



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city council adopted the nation's first racial zoning law.

Under this new law, African Americans were not allowed to move into predominantly white neighborhoods. In a cynical hat-tip to equality, whites similarly could not move into minority neighborhoods. A violation of the new law could result in fines and jail time. The law caught on like wildfire throughout the South and in the border states. Despite attempts by real estate interests to undo the Baltimore law, it remained on the books until 1917. That is when the Supreme Court struck down one of the copycat laws which had been adopted in Louisville, Kentucky.

After agitation from some poor whites and a local newspaper, Louisville had fallen in line with Baltimore and over a dozen other cities. It adopted “An ordinance to prevent conflict and ill-feeling between the white and colored races in the city of Louisville, and to preserve the public peace and promote the general welfare, by making

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reasonable provisions requiring, as far as practicable, the use of separate blocks, for residences, places of abode, and places of assembly by white and colored people respectively.”

In Louisville, the recently created National Association for the Advancement of Colored People (NAACP) and local white real estate agents combined forces to set up a test case that managed to reach the United States Supreme Court. In *Buchanan v. Warley*, 245 U.S. 60 (1917), the Justices unanimously held that the law was unconstitutional because it deprived private property owners of a valuable property interest — the right to sell to a buyer of one's choosing. It was a great coup because only several years earlier, the Court had upheld the noxious principle of “separate but equal” in *Plessy v. Ferguson*, 163 U.S. 537 (1896).

But that was hardly the end of the story. Several cities tried end-runs around the Louisville ruling, using ruses such as suggesting that their zoning was not to promote segregation, but to prevent marriages between different races — supposedly turning zoning laws into marriage laws. In time, in some cases, after a long time, those laws too were struck down.

But the segregationists learned. The rising profession of city planners who harbored deep-seated prejudices against immigrant and minority populations created new zoning laws that were silent on race. The first comprehensive zoning law was adopted in New York City in 1916 at the request of Fifth Avenue merchants, who wanted to keep Jewish tenements and garment factories out of their neighborhoods. Unlike the single-subject ordinance in Baltimore, this one cataloged the entire city with precision, saying exactly what could be built where. Thus, some blocks were set aside for low-density residential neighborhoods, others for business and still others for apartments of certain set heights. Naturally, keeping apartments out of some areas also kept poor people and immigrants out, but that was never the stated goal. These racially-neutral in name zoning laws likewise spread across the nation.

One such comprehensive zoning effort landed in Euclid, Ohio, a rural suburb of Cleveland. Euclid's law set

aside large swaths of its 16 square miles for low-density single-family homes. Minimal land was available for either industry or apartments. But the law said nothing about race or immigrants; it was purportedly all about maintaining Euclid's rural character from the nuisance of industry and multi-family housing.

Ambler Realty Company owned 78 acres in Euclid that were ideally situated to take advantage of the industrial growth that was spilling over from Cleveland. But when the new zoning law set aside most of that land for residential use, Ambler sued. A federal trial judge struck down the law, suggesting that “the true object of the ordinance in question is to place all the property in an undeveloped area of 16 square miles in a strait-jacket ... the result to be accomplished is to classify the population and segregate them according to their income or situation in life.” But in a testament to the pervasive racism of the day, the judge didn't necessarily think that was a bad thing. He continued by saying that if the Louisville law, with its supposedly admirable purpose of preventing the mixing of races, was unconstitutional, then surely the Euclid law, which didn't even mention race, must also be unconstitutional. The judge felt compelled to add, “The blighting of property values and the congesting of population, whenever the colored or certain foreign races invade a residential section, are so well known as to be within the judicial cognizance.”

The Supreme Court took up the *Euclid v. Ambler Realty* case in 1926. Justice George Sutherland, considered to be a stalwart conservative, joined the progressives and wrote an opinion upholding the law. He held that Euclid was well within its rights to enact a zoning law because preventing incompatible uses was the same as avoiding any other kind of nuisance. Moreover, the courts had no business second-guessing a town's decision: “A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard,” Sutherland wrote. “If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.”

There was little doubt that Justice Sutherland's pigs in the parlor were the apartment-dwelling immigrant and minority populations moving into “nice” white

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neighborhoods. As Sutherland claimed, “very often the apartment house is a mere parasite, constructed to take advantage of the open spaces and attractive surroundings created by the residential character of the district . . . 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.”

The ramifications of the Court's decision reached far beyond the ordinary suburb of Euclid. The language used by the Supreme Court in affirming Euclid's zoning ordinance turned out to open the floodgates to bigoted exclusionary zoning laws around the United States for decades to come. This was not bigotry with an iron fist. It was a more subtle bigotry that wore a velvet glove while writing and defending the pages of the nation's zoning codes. What started in Baltimore, and died in Louisville, was reincarnated in Euclid.

Within a few years, the federal and state governments adopted policies that made racial and economic segregation the law of the land — and not just in the South. Large-lot single-family zoning was everywhere, and such exclusionary zoning made it more difficult for the less affluent to afford nice homes in the suburbs. The federal government, through its home loan programs, forced banks to redline minority and integrated neighborhoods — essentially making it impossible to finance, buy, or build nice homes in the inner cities. Housing assistance programs were virtually all confined to assisting whites in moving into racially restricted whites-only developments. The few minority projects that were approved were often in less desirable areas and woefully inadequate to meet demand. Many developments financed with federal loan guarantees required the inclusion of racially restrictive covenants so that a white homeowner could not sell to an African American and sometimes not to a Jew, even if he wanted to. The apparent combined purpose of these laws was to keep what was white white, and what wasn't yet built, also white.

By preventing minorities from moving outside the inner cities, the land on which they could build and live was limited. With limited housing and land supply, and unsatisfied demand, America's housing policies had the

perverse result that minorities often paid more for less. While mandated discriminatory lending, restrictive covenants and redlining are relics of the past, the pervasiveness of large-lot single-family zoning has gone mostly unchallenged.

There have been a few exceptions. A few decades ago, the New Jersey Supreme Court ruled that Mount Laurel Township must allow for some degree of working-class housing. But after the town attempted to slow-walk any reforms, the Court in 1983 weighed in again, holding that, “After all this time, Mount Laurel remains afflicted with a blatantly exclusionary ordinance.... Papered over with studies, rationalized by hired experts, the ordinance at its core is true to nothing but Mount Laurel's determination to exclude the poor.” The town mayor's defense to the *New York Times* was to say, “We'd just like to see our town develop in a nice way.” New Jersey's solution was to permit the private sector to force exclusionary (or recalcitrant) towns to allow “affordable” housing developments, by seeking judicial relief and enforcement through lawsuits called “builders' remedies”. It went so far as to establish a statewide agency, the “Council on Affordable Housing”, which was labeled a colossal failure and was unceremoniously abolished several years ago by New Jersey's last Governor. Decades after the *Mount Laurel* decision, New Jersey (along with about 49 other states), continues to struggle with exclusionary zoning to this day. With the rise of environmentalism, the problem has grown only worse. In some regions of the country, it is nearly impossible to build homes without running into a buzz saw of environmental litigation. Whether it be an argument over wetlands, open space views, or habitat, the motivation is the same: maintain the status quo and stop building new homes.

In California, for example, the California Environmental Policy Act allows virtually anyone to sue over any discretionary project approval — such as a variance needed to build new homes. If there is any opposition to a home building project, creative NIMBYs can find some environmental issues that can guarantee litigation delays that can last years and sometimes decades.

Getting such a variance in the face of neighborhood

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opposition is itself nearly impossible, forcing home builders to employ an army of lawyers to get their permits. A few years ago, in a book on zoning and land use planning, *The Zoning Game Revisited* the authors Richard Babcock and Charles Siemon remarked that lawyers “in other states have joked about why a developer would sue a California community when it would cost a lot less and save much time if he simply slit his throat.”

Time is money, and home builders must calculate whether it makes more sense to lawyer up or to abandon the project. In the first instance, the homes will cost more. In the second, every other home will cost more. Not even the California legislature has figured out how to repeal the law of supply and demand.

The inability to build an adequate supply of housing in the face of environmentally tinged NIMBYism is especially rampant on the progressive coasts, where demand for housing outstrips supply by more and more every year. Affordability has become a pipe dream. For those who don't double or triple up already overcrowded small spaces, for those who cannot tolerate

super-commutes lasting five or six hours a day, and for those who cannot even find a bed in a shelter, there is often only one final option: living in the streets. The mostly minority homeless populations that are becoming the backdrop of urban living are the legacy of America's reaction to George McMechen's bold move into an affluent white Baltimore neighborhood. It is a reaction that has gone on long enough.

It's time to rethink how we plan and zone our neighborhoods. Landowners must be given back the right to build the homes that the market demands. Landowners may be required to mitigate for traffic and other real impacts, but they should not be held hostage to ever escalating community wish lists. Landowners should have a clear and enforceable roadmap for regulatory compliance. They should not be subject to endless years of litigation from NIMBYs who will use the courts to nitpick even the best projects to death. Only when we begin to build enough housing can we expect prices to reach an equilibrium with demand. Only then will working class families once again enjoy the American dream rather than the new American nightmare. •



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