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## State Interventions in Local Zoning

Author : Ezra Rosser

Date : October 27, 2020

Anika S. Lemar, *The Role of States in Liberalizing Land Use Regulations*, 97 **N. C. L. Rev.** 293 (2019).

In what has been described as an “[emerging consensus](#)” and pejoratively labeled an “[elite libertarian consensus](#),” there is growing scholarly recognition that land use overregulation is hurting the country by [limiting the supply](#) and increasing the price of housing. By highlighting state-level interventions that succeeded in checking local zoning authority, Professor Anika Lemar’s article makes a valuable contribution to the fight against excessive zoning limitations.

Professor Lemar’s article weaves together seemingly disparate examples—family day care homes, manufactured housing, small-scale residential alternative energy, and group homes—and explains what made those state-level assertions of authority succeed. Given how entrenched is the presumption that zoning is necessarily local and the related resignation among academics that state and regional approaches to zoning are doomed to fail, Lemar’s work is cause for celebration.

The article begins by differentiating between two types of state interventions in local land use regulation: those that limit local autonomy, what Lemar and [others](#) call “displacing interventions,” and those that do not. This useful taxonomy highlights to readers that not all state interventions are created equal when it comes to checking zoning barriers.

State procedural interventions—such as unenforced planning requirements and duplicative environmental reviews—impose procedural requirements but not in a way that allows states to check local governments. Similarly, requirements that projects be approved first at the local level and then at a regional level, a “double veto” intervention, serves to create additional barriers to construction or use of land.

The sort of interventions starting to get scholarly attention recently are those that limit local autonomy. Unfortunately, as Lemar highlights, most forms of clawback interventions—when the state take back land use regulatory authority from local governments as contrary to larger state interests—“are much touted by quite rare in practice” (P. 302.)

The final type identified in the article, deregulatory interventions (which in some cases might be categorized as federally preempted areas of land use regulation), carve out certain matters as inappropriate for local and state regulation.

Society is in a rare moment in which exclusionary zoning is getting attention. Some of that attention might be the result of scholarship about property and race, particularly Richard Rothstein’s *[The Color of Law: A Forgotten History of How Our Government Segregated America](#)* (2017). But the rising cost of housing in economically vibrant cities and coasts probably is the largest driver.

Lemar’s article contributes to our understanding of the dynamics of local land use regulation at just the right moment by showing how, with the right conditions and with special interest or bureaucratic support, states can assert their authority to permit some forms of land use that localities might otherwise block. There is a long history of courts and scholars looking at local antagonism to manufactured housing and group homes. But by combining examples of state intervention in those areas with similar interventions targeting local limits on family day care homes and small-scale alternative energy examples, Lemar is able to develop a larger theory about what sort of state interventions work.

The story *The Role of States in Liberalizing Land Use Regulations* tells is not of blanket state-level displacement of local authority, instead it is of tailoring. Partial displacement combined with a continued role for local government regulation at the margins.

Lemar contends this approach works because it provides a way to balance state interests (backed by special interests, including the interests of state regulators) with local competency. One could of course explain it in other ways—perhaps as a face saving device or even a way for local governments to permit locally undesirable land uses while also providing them political cover—but the most important point is that this combination of displacing intervention and limited local tailoring works. It somehow has permitted states to reclaim some land use regulatory authority despite scholarly pessimism that such a shift could ever occur.

This article sits comfortably alongside the writing of other scholars working on [innovative theoretical models](#) for balancing state and local zoning interests, but it is more of a ground up rather than top down contribution. And that is its strength. Lemar's expansive research into the state laws surrounding her four examples provide both a strong base of support for her claims and a model for the sort of detail-oriented work that moves between the macro and the micro that is a hallmark of the best scholarship.

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