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### Reclaiming State Authority over Zoning Property

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## Reclaiming State Authority Over Zoning

Author : Ezra Rosser

Date : August 15, 2019

John Infranca, *The New State Zoning: Land Use Preemption Amid a Housing Crisis*, 60 **B.C. L. Rev.** 823 (2019).

In 2019, Oregon became the first state to pass legislation that essentially bans single-family zoning.<sup>1</sup> As states across the country struggle to respond to the housing affordability crisis, Oregon's actions do not stand alone. John Infranca's recent article, *The New State Zoning: Land Use Preemption Amid a Housing Crisis*, may have been published before Oregon's historic vote but it is essential reading for those interested in the future of zoning.

The article does a masterful job collecting examples of similar moves by states to preempt local zoning as a way to facilitate the construction of more dense housing. It also persuasively argues that states are going to increasingly use state preemption through state regulation as a way to respond to the housing affordability crisis.

As Infranca shows, there has traditionally been a great deal of deference to localities regarding zoning. But, state preemption is on the rise when it comes to housing construction because interest groups and state governments recognize the need to check local NIMBYism.

*The New State Zoning* is great not simply because it does a great job collecting material—the footnotes are fabulous and the examples are well presented—but also because it shows how state-level zoning efforts related to affordable housing are different in kind today than they were during the first wave of such state activity.

Infranca shows how the first generation of state land use interventions—the *Mt. Laurel* line of cases and legislative response, Massachusetts' development approval-tied "antisnob" ordinance, and California's imposition of affordability planning on localities—largely operated by piggy-backing on local zoning authority.

He argues that the new wave of state interventions we are witnessing today, in contrast, get their power by declaring that certain forms of more dense development can take place as a matter of right. This second generation of state interventions works "by directly displacing specific elements of local zoning," they "displace, rather than simply channel, local land use decision-making." (P. 886.)

The article provides in-depth coverage of changes in rules related to accessory dwelling units (ADUs) and the ways states are starting to encourage ADU development. Frankly, when I first came to the section on ADUs, I was skeptical that such a case study would add a lot to a strong article. There are good articles already out there about ADUs; indeed, Infranca wrote one of the better ones.<sup>2</sup> And, as a reader, I was more interested in what Infranca thinks more generally about YIMBYism and the rise of YIMBY groups as actors in the zoning space.<sup>3</sup> But the payoff for *The New State Zoning's* discussion of ADUs happens at the end of the article.

Infranca argues that because residents who otherwise support standard NIMBY policies can support ADUs under the banner of a right to use one's property, ADUs may create political space for greater density and more transformative zoning changes. Not only do ADUs potentially help cities deal with the high cost of housing by providing additional housing units, but they serve as a wedge which can help break the hold single family zoning has on urban space.<sup>4</sup>

We are entering a period of bipartisan appreciation of the connection between housing unaffordability and zoning restrictions.

For years, liberals emphasized particular market conditions and housing quality while conservatives focused on supply constraints. But just as the implied warranty and works like *Evicted* force conservatives to acknowledge the importance of quality, so too progressives are slowly being forced to reckon with how regulation impacts supply.<sup>5</sup>

As Infranca notes, in 2016 the Obama Administration released a report that “highlighted the national implications of local land use regulations” and called for lowering the many local land use barriers to housing development. (P. 826.) Put differently, as *The New State Zoning* convincingly argues, “the evidence is clear that [local restrictive] regulations drive up costs and that most cities are not moving to liberalize local zoning,” therefore, “state governments are justified in preempting overly restrictive local zoning.” (P. 885.) Local zoning is so ubiquitous and so accepted, that it is easy to forget a crucial component of the *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), holding, namely, that cities are exercising delegated authority.

Infranca’s article is a tremendous contribution, not only because it does such a wonderful job marshalling evidence in support of his argument that a new era of state zoning is upon us, but also because it shows the ways assertive state actions can be powerful tools to attack even seemingly intractable problems such as housing affordability.

1. See Laura Bliss, *Oregon’s Single-Family Zoning Ban Was a ‘Long Time Coming’*, **Citylab** (July 2, 2019); Laurel Wamsley, *Oregon Legislature Votes To Essentially Ban Single-Family Zoning*, **Nat’l Pub. Radio** (July 1, 2019).
2. John Infranca, *Housing Changing Households: Regulatory Changes for Micro-Units and Accessory Dwelling Units*, 25 **Stan L. & Pol’y Rev.** 53 (2014).
3. For more on YIMBYism see Kenneth A. Stahl, “Yes in My Backyard”: Can a New Pro-Housing Movement Overcome the Power of NIMBYs?, 41 **Zoning & Plan. L. Rev.** 1 (2018).
4. For great graphic depictions of the prevalence of single family zoning in many cities see Emily Badger & Quoc Trung Bui, *Cities Start to Question an American Ideal: A House With a Yard on Every Lot*, **N.Y. Times** (June 18, 2019).
5. See Benjamin Schneider, *Liberal America’s Single-Family Hypocrisy*, **The Nation** (May 8, 2019).

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