

5-15-1976

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Werner Z. Hirsch

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Recommended Citation

Werner Z. Hirsch *Exclusionary Zoning - An Unfair Target*, 3 Pepp. L. Rev. Iss. 3 (1976)
Available at: <https://digitalcommons.pepperdine.edu/plr/vol3/iss3/1>

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Exclusionary Zoning - An Unfair Target

WERNER Z. HIRSCH*

The problem of exclusionary zoning is a serious one; the number of jurisdictions that have enacted exclusionary ordinances to date is large and the number of cases filed in both federal and state courts involving such ordinances is also increasing. To effectively deal with the problem of exclusionary zoning, the rationale for such exclusionary enactments must be analyzed. This analysis reveals that the true targets for complaint are the underlying causes for these exclusionary enactments, not the zoning ordinances themselves.

In order to better understand these underlying stimuli, an historical background of zoning and exclusionary zoning will be presented. Against this foundation, inquiry will be made into the question of whether the primary stimulus of exclusionary zoning is the strong reliance of local governments on property taxation to finance people-oriented services. The judiciary's view and policy implications of local property taxation issues will be discussed. Finally, alternatives to local property taxation for the purpose of eliminating the source of exclusionary zoning will be proposed.

* B.S. University of California (1947); Ph.D. University of California (1949); Director: Institute Government and Public Affairs. Mr. Hirsch is Professor of Economics at University of California at Los Angeles.

I.

The impetus for government to control the use of land came relatively late in this country. This was due partly to strong notions of the sanctity of private property rights and partly to a great abundance of land which made land use conflicts less severe than in more crowded European nations. Predictably, the first attempts to regulate land use were made in the cities, and ordinances regulating building height and land use were passed in Boston and Los Angeles around 1909. More complex efforts to divide cities into districts, which permitted some uses and excluded others, were made in the following decade, and this technique of "zoning" was given the Supreme Court's approval in 1926.¹ At about the same time, the Commerce Department produced a Standard Zoning Enabling Act², which was adopted wholeheartedly by the states. Its key feature was complete delegation of zoning power to local jurisdictions. Given the limited function of zoning and the large distances between cities at the time, land use decisions made in one locality had little effect upon others. Thus, this large-scale delegation of power made a good deal of sense, for it gave control to those most familiar with and most affected by land use decisions.

The decades following the Standard Act saw a continuing refinement of zoning techniques designed to enable planners and local officials to better achieve the zoning goals of segregating inconsistent uses, preventing congestion and providing for the economical distribution of public services. Soon, however, zoning began to be used as a technique to achieve other more controversial goals. At quite an early stage it was realized that zoning could separate different racial and economic groups as well as different land uses.³ As the suburban explosion of the 1950's began to reach significant proportions, rural townspeople realized that zoning could be used to slow the influx into their jurisdictions. Large-lot zoning, minimum floor space requirements and trailer park bans proliferated. The late 1960's and early 1970's saw an awakening of environmental awareness, and zoning became a weapon in the battle to preserve open spaces and prevent what were perceived as unaesthetic housing tract developments. Recent movements to curb or halt

1. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

2. The Standard Zoning Enabling Act (U.S. Dept. of Commerce 1926), reprinted in 4 R. ANDERSON, *AMERICAN LAW OF ZONING* § 26.01 (1968), C. BERGER, *LAND OWNERSHIP AND USE* 612 (1968) and in 3 A. RATHKOPF, *THE LAW OF ZONING AND PLANNING* 100 (3d ed. 1960).

3. See *Buchanan v. Warley*, 245 U.S. 60 (1917), which invalidated an ordinance that had zoned some areas for black occupancy and others for white occupancy.

population growth in many suburban communities combine the two objectives of diverting suburban expansion away from the enacting community and preserving the community's aesthetic charm as a "small town" environment. The new land use control techniques which developed to achieve these objectives retain many traditional zoning methods, but often expand the old concepts of the purposes of land use regulations. Building moratoriums, population caps, open space zoning ordinances, "holding zones" and phased growth ordinances have sprung up in many places where population growth threatens.

If one were to attempt a broad generalization about the historical development of the functions of zoning, one might say that what began as a tool to solve largely local problems of incompatible land uses and congestion can, and perhaps in part already has, become a means of solving much larger regional problems of population distribution and environmental preservation. This development has paralleled a large demographic shift of population first from rural areas to central cities and later from central cities to suburbs.

II.

There are various incentives which lead low income households to follow those of higher income into the suburbs. Among the most important stimuli is the fiscal advantage which can be obtained from such a move. Such an advantage accrues whenever local government relies on a revenue source that is not a *perfect* benefit tax, e.g., a property tax. Given the high *per capita* property value of many suburbs, public expenditures can be supported with a relatively low *ad valorem* tax rate.⁴ Thus, the owner of a struc-

4. For example, a central city might have a property value per household of \$20,000, and an actual property tax rate of 5% to raise \$1,000 per household. A suburban jurisdiction might typically have a higher property value per household, an example of \$50,000, and so an actual tax rate of 3% would raise \$1,500. A \$20,000 structure located in the suburb would generate only \$600 in tax revenues, while the occupant could receive the benefits of very high quality public services. Thus, there are strong incentives generated by the property tax for the location of low value structures outside the central city. Further, the additional household would impose costs on the suburban community of \$1,500 while paying only \$600. The \$900 difference must be assumed by other taxpayers. Consequently, there are important incentives for the initial suburban residents to attempt to exclude.

ture with low value could pay very little in taxes while receiving the benefits of high quality services. At the same time, this individual would probably impose on the local government costs of about the same magnitude as other members of the community.⁵

Given that each additional service recipient imposes costs on the local government, how will these additional costs be paid for? Where all residents of a community occupy similar dwellings, a tax based on the value of the dwelling will yield approximately the same revenue from each household. Some variation in the tax liability will result as house value varies, but these variations will be proportionate to benefits received from the community, since those occupying larger houses will tend to have larger families. Thus, where potential entrants have about the same income and tastes as present residents, the property tax is a fairly effective revenue raising instrument.

Where prospective entrants intend to utilize relatively small amounts of housing, it becomes unlikely that their property tax payment will be sufficient to cover the cost of locally provided public services. These costs would then have to be assumed by the other taxpayers in the community. For this reason, the residents of a high income jurisdiction will attempt to zone out low income households, or, more specifically, low value residences.⁶ Suburbs now are attempting to exclude more than before; this may be because decentralization of employment is a fairly recent phenomenon, or because fiscal advantages have only recently become more pronounced, or some combination of these two factors.⁷

5. There has been empirical evidence that no major economies of scale exist with regard to a number of services. W. HIRSCH, *THE ECONOMICS OF STATE AND LOCAL GOVERNMENT* (1970).

6. Increasing marginal cost assures that charging marginal cost to each resident will cause the community to cover total cost.

7. Traditionally, employment opportunities were largely confined to the Central Business District (CBD). A transport center such as a harbor or a freight yard motivated location of manufacturing close to this facility; movement of low value per ton goods away from rail or water centers was quite costly. Communication within the city was also costly, and as a result banking, advertising, government and other support industries tended to locate near the transport hub. Given centralized employment, all households found it desirable to reside near the town's center. Consequently, prices of land close to employment centers were bid up. With higher prices near the CBD, high income households who wished to consume large quantities of land found it efficient to incur greater commuting costs in order to save on housing. Low income households, on the other hand, typically found that the possible savings in housing expenditure from locating at a distance from place of employment would not outweigh increased transport costs, given the small amounts of land that they could afford.

With the advent of inexpensive communication, e.g., the telephone, and

The question of whether property tax incentives are sufficient to induce movement between jurisdictions has been investigated. Bradford and Kelegian provide econometric evidence that fiscal advantages are significant in explaining interjurisdictional mobility.⁸ Aronson and Schwartz tested their model of fiscally-induced movement to find that 69% of migration in the Fifties and 89% in the Sixties brought fiscal advantages to the mover.⁹ The basis for such models is that communities with relatively high tax bases can offer either lower *ad valorem* tax rates to provide a given level of public service, or better public services for a given tax rate, or some combination of the two. As a result, planning a particular level of housing consumption could reduce tax payments or increase public goods consumption, or both, by choosing a community with a very high average value of property.

Admittedly there are additional motivations for exclusion. Some jurisdictions, having reached an efficient scale, may wish to limit their size. However, this may be a secondary problem, since proper charging for public services would provide signals to possible

the prevalence of truck transport, the costs of non-central location of firms diminished. Firms could thus reduce land costs to themselves, and in the long run do likewise for employees, since workers could now reside on less expensive land without incurring transport costs. In this context, it is seen that centralized employment in the past has given rise to the current arrangement of people which involves almost complete segregation of jurisdictions by income. With decentralization of employment, the homogeneity of suburbs has now come under attack. Community size may, of course, be an independent source of intent to exclude. People may value the small town atmosphere, or the fact that they know everyone. Such concerns may be dealt with by constraints on the rate of growth or by subdivisions which divide the community into several separate entities. In other cases, the small town atmosphere that apparently is valued may actually be external benefits from current non-residential land uses. Here the issue becomes whether the residents have the right to constrain such land use. If not, the local government might be willing to purchase land which would otherwise be developed for housing and devote the land to parks, or simply lease it to non-residential users.

8. Bradford & Kelegian, *An Economic Model of Flight to the Suburbs*, 81 J. OF POLI. ECON. 566 (1973).

Bradford and Kelegian found that both the presence of the poor in the central business district and the fiscal burdens imposed on the middle class were significantly related to the dispersion of the middle and high income people in a metropolitan area.

9. Aronson & Schwartz, *Financing Public Goods and the Distribution of Population in a System of Local Governments*, 26 NAT'L TAX J. 137 (1973).

entrants when the community had exceeded its optimum population. Entrants then would find that they could obtain a more favorable tax benefit package in smaller communities and would look elsewhere. Thus, reliance on the property tax is likely, in this instance, to be a source of the desire to exclude.

Furthermore, an already homogeneous community may wish to maintain homogeneity in order to assure that new voters will favor the continuation of present policies. Again, the revenue raising device is a source of concern; if prospective entrants were confronted with the full cost of services they receive, they would have little incentive to locate in communities other than those in which present policies accommodate their own preferences for public goods.

Finally, exclusionary zoning may be a manifestation of racism—excluding low income households may be a device intended to keep out blacks and other minorities. While it is difficult to assess the extent of this last motivation, the local property tax appears to be a major transgressor.

III.

The New Jersey Supreme Court in *Southern Burlington County v. Township of Mount Laurel*¹⁰ saw that the true reason behind an exclusionary zoning plan was preservation of the local tax base. The court struck down the exclusionary zoning measure, while leaving intact the local property tax system which the court acknowledged imposed unequal burdens. Reform of the tax system was regarded as a task for the legislature.¹¹ But the inequalities resulting from use of the property tax as a basis for financing local communities have been successfully attacked in the court.

*Serrano v. Priest*¹² was a class action for a declaratory judgment that the California system of financing public schools through local property taxes violated the state and federal equal protection clauses. Reversing the trial court's dismissal for failure to state a cause of action, the California Supreme Court identified education as a fundamental right and declared that, as described in the complaint, the local property tax system invidiously discriminated against the poor and that a new method of financing would have to be found. Lower income communities were deemed to have no freedom of choice between devoting more resources to education as

10. *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713 (1975).

11. *Id.* at 187, 336 A.2d at 731.

12. *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

opposed to lowering taxes, because the relatively low assessed valuation in poorer districts meant that even a high rate of taxation would produce a low overall yield.¹³ The case was remanded to the trial court for a final judgment on the merits. The California court was careful to point out that this reasoning does not apply to all municipal services,¹⁴ but it is well to note that the *Mount Laurel* court found "provision for adequate housing of all categories of people is certainly an *absolute essential* in promotion of the general welfare required in all local land use regulation."¹⁵

The reaction to *Serrano* has been mixed. The New Jersey high court¹⁶ has invalidated its state school financing system based on the local property tax, while the Michigan system has been upheld.¹⁷ A number of commentators have questioned whether the quality of education can be directly related to the amount of money spent. This was part of the basis of the United States Supreme Court decision in *San Antonio School District v. Rodriguez*,¹⁸ which found that financing education through the local property tax led to some inequities but refused to follow *Serrano* and find a violation sufficient to offend the federal equal protection clause. The Court spoke of the deference due to state financial organization.¹⁹ In fact, the Supreme Court has found that protection of the tax base is an acceptable basis for exercising the local control of development.

In *James v. Valtierra*,²⁰ the United States Supreme Court upheld the constitutionality of a California initiative measure requiring local referenda before approval of federally subsidized low income housing projects, saying that the procedure ensures that all the people of a community will have a voice in a decision which may lead to large expenditures of local government funds for increased public services and to *lower tax revenues*.²¹ In other words, preserving the local tax base is a permissible purpose in planning the

13. *Id.* at 594, 487 P.2d at 1248, 96 Cal. Rptr. at 608.

14. *Id.* at 614, 487 P.2d at 1262, 96 Cal. Rptr. at 622.

15. 67 N.J. at 179, 336 A.2d at 727 (emphasis added).

16. *Robinson v. Cahill*, 62 N.J. 473, 303 A.2d 273 (1973).

17. *Milliken v. Green*, 390 Mich. 389, 212 N.W.2d 711 (1973).

18. *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

19. *Id.* at 40-41.

20. *James v. Valtierra*, 402 U.S. 137 (1971).

21. *Id.* at 142 (emphasis added).

development of a housing plan for a municipality under the federal Constitution. However, the Supreme Court of New Jersey in the *Mount Laurel* decision, relying on its state constitution, found this an impermissible aim.²²

IV.

The local property tax, in the absence of some additional constraints, provides a number of distortions or inefficiencies. One efficiency consequence of the local property tax is that it does not impose full costs for services on individuals. Yet, only when individuals are confronted by the full cost that they impose on a local government can they seek out jurisdictions that meet their service demands; reasonably homogeneous communities emerge and local decisions can be reached without encountering major conflicts with individual preferences. Since the property tax does not impose full costs on each household, it will, in the absence of exclusionary zoning, create heterogeneity in communities and a mismatch between the local public services which individuals prefer and those which are received. This occurs because the developments most strongly attracted to high value-low tax rate communities will be those with high density and low value per household.

A second efficiency consequence of the property tax, were no exclusion to apply, is that builders will choose a location not simply on the basis of locational efficiency, but on the basis of fiscal advantages as well. Thus, resources are used not where they generate the greatest social value, but where the combination of output and tax advantage has the greatest value. The normal assurance that the market allocates resources to the most productive use is therefore sacrificed by the property tax.

A third efficiency consequence relates to the distortion that results from taxing only one type of property. Consumers will substitute consumption goods that are not taxed for those that are. Houses will tend to be less expensive and smaller under the property tax than they would be with a more neutral form of taxation.²³

22. *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel*, 119 N.J. Super. 164, 171, 290 A.2d 465, 469 (L. Div. 1972).

23. Those familiar with Hamilton's work will notice an apparent inconsistency between his work and ours, with Hamilton finding no tax distortion with particular zoning constraints in place. The discrepancy between his results and ours stems from the nature of the zoning constraint postulated. He deals with a minimum property value standard, while we deal with a minimum lot size requirement. The essential difference is that the latter constrains more rigidly the number of units that can be placed in a community. The large-lot zoning case depends upon capitalization or tax

Turning to distributional concerns, at first impression it appears that the property tax, in the absence of exclusion, accomplishes a redistribution from rich to poor. If this is the case, there are questions as to whether this would be a preferred redistribution scheme and whether the poor should be given the right to effect redistribution by locating in higher income jurisdictions. Clearly, this sort of redistribution, whether justifiable or not, is partial and very inaccurate; the poorest people, unable to pay moving expenses, would probably remain in the poor jurisdictions and many of the richest, living in old, wealthy and established jurisdictions, would be able to avoid the redistribution.

The problem, however, is not as simple as that. In the last fifty years, the availability of fiscal advantages in suburban communities has provided strong incentives to locate expensive properties in these areas. The attraction of the upper and middle income household into the suburbs and out of the city has been the source of the fiscal crisis of today's cities. However, there is no reason to expect that fiscal crises would not recur. Each generation of affluent Americans tends to locate in new jurisdictions, leaving the old suburbs to decay just as the central city did before.²⁴ The result would be costly movement of households and unnecessarily rapid depreciation of housing capital. That this will occur is evidenced by the problems now being experienced by some of the older suburbs. The point here is that redistribution is limited by successive rounds of fiscally induced movement and when redistribution does occur, it occurs only at a cost in terms of reduced allocative efficiency.

Another consideration relates to the incidence of the property tax. Normally, it is assumed that the tax is entirely shifted to eventual occupants, since the supply of housing is, in the long run,

advantages to produce the homogeneity result, whereas homogeneity under Hamilton's zoning scheme does not require capitalization.

It has been suggested that the minimum lot requirement is equivalent since efficiency will match large lots with large houses. However, under a system of lot size constraints there is no reason to expect a stable relationship between land and non-land factors in the production of housing services. Hamilton, *Zoning and Property Taxation in a System of Local Governments*, 12 URBAN STUDIES 205 (1975).

24. P. MORRISON, *THE CURRENT DEMOGRAPHIC CONTEXT OF NATIONAL GROWTH AND DEVELOPMENT* 5514 at III (1975).

quite competitive.²⁵ However, a supplier of housing would not pass on the benefits of any unusual tax advantages that his unit possessed. Even if "balanced" communities could be assured, redistribution is not assured. The rental payment or the sale price of a structure is determined in a competitive market. Therefore, tax benefits applying to fairly few properties would not be passed on to consumers as long as their next best alternative is to buy or rent downtown, where tax rates are high and services are poor. Where a community's favorable tax base allows greater *per capita* expenditures for public services, rent would be bid up by tenants to reflect these advantages. In short, as long as prices are determined in a competitive market and the marginal units remain in areas offering an unfavorable tax benefit package, the occupant would receive little or no benefit. The consumer gets what he pays for and little more; the tax advantages accrue to the initial owner, that is, builders who manage to acquire the rights to "balance" a community by their action. One needs only to look at who the litigants are in exclusionary zoning cases to assess the merits of this last argument.

V.

It has been shown that heavy local reliance on property taxes can produce inefficiencies, an erratic redistribution of wealth and a clamor for exclusionary ordinances. The poor are given incentives to "invade" higher income jurisdictions; the rich "act in self-defense" in seeking to protect the homogeneity of their communities. Failure to allow high income communities to defend their status has several shortcomings: (1) reduction of choice in the consumption of public goods; (2) locational inefficiency resulting from people choosing areas not only for advantageous location but also for fiscal reasons; and (3) the instability of aging communities. Moreover, builders of low cost structures are likely to capture much of the benefit of a fiscal transfer which would exist until an equilibrium is obtained.

Excluding devices may remedy some of the difficulties raised by the local property tax, yet they themselves may create both inefficiencies and distributional problems. Such devices include large-lot zoning, annual quotas and entry fees. All three instruments can be so designed as to counteract some of the inefficiencies associated

25. Heinberg and Oates, *The Incidence of Differential Property Taxes on Urban Housing: A Comment and Some Further Evidence*, 23 *NAT'L TAX J.* 92 (1970).

with local property tax financing. An entry fee based on the capitalized value of the difference between the property tax revenue for a given unit and the lump sum tax which would support the local government could solve most of the problems without introducing new ones.

Without special attention, however, exclusionary ordinances themselves can inhibit efficient resource allocation and reduce the opportunity of various income groups to locate in a given municipality—a distributional concern. Thus, local exclusionary zoning is merely a manifestation of a potential evil. The origin and, therefore, the ultimate transgressor is the local property tax.

What are some of the policy implications? Since the local property tax provides a major incentive for local exclusionary zoning, its replacement by other taxes, preferably lump sum taxes, might be considered. But replacing local property taxes by a user charge, for instance, poses serious equity problems. Many services, such as education, may produce substantial inter-jurisdictional external effects, or may be regarded to be essential to the equality of opportunity to which our society commits itself. However, the equity problem of lump sum taxes might be mitigated if all households were assured some minimum income. This could be done with the aid of a negative income tax—a means of maintaining the personal income of citizens distinguished by no characteristic other than their poverty. A partial step toward this approach was taken in 1964 when a minimum standard deduction was introduced with the aim of exempting from the federal income tax the minimum income necessary to lift a family out of poverty. To benefit from this tax relief, however, it is necessary to receive an adjusted gross income at least as large as the poverty guideline.

Milton Friedman in 1962 proposed a negative income tax.²⁶ Under his scheme, citizens would continue to compute taxable personal income in the present manner. When taxable income was positive, a positive tax liability would be incurred. However, if taxable income were negative—personal exemptions and deductions exceed adjusted gross income—then a negative tax liability would be incurred on that base and a transfer payment equal to that

26. M. FRIEDMAN, *CAPITALISM AND FREEDOM* (1962).

negative tax liability would be received. In this manner every household could be assured a minimum adjusted gross income of hypothetically four, five or six thousand dollars a year. For each dollar of earnings the transfer is reduced, for instance, by 50% so as not to reduce a person's ability and, therefore, incentive to earn more.²⁷

A proposal similar to Friedman's was made by James Tobin.²⁸ It called for the federal government to provide family allowances entitling every man, woman and child to a \$400.00 transfer payment each year. Thus, a family of four would be guaranteed a \$1,600 minimum cash flow. A 33½% marginal tax rate is applied to each dollar of cash receipts from all sources other than the allowance.

Putting a floor below every taxpayer's income through a negative income tax has proved administratively and otherwise feasible, based on a large scale experiment in New Jersey.²⁹ Whether it would work in the long run on a nation-wide scale remains to be seen. Likewise, it is not clear how difficult and expensive it would be to use a negative income tax both to supplement the wages of low wage earners and to support families with no income at all.

Such major tax revisions are neither demanded nor likely to come about merely for the sake of dealing with local exclusionary zoning. However, there are many other reasons why such changes might evolve; should they provide lower income floors than those discussed above, a partial substitution of lump sum taxes for property taxes could be contemplated. Even in the absence of a negative income tax, local governments could replace the property tax with a user charge to finance such services as refuse collection, street cleaning, street repair and possibly even parks and recreation.

Alternatively, state and federal governments could allow a percentage of a person's payment to local government to be credited against tax liabilities, with this percentage varying inversely with income. As a result, the effective price of local public services for low-income households would be reduced. Either scheme would have the advantage of permitting the individual to have a high degree of autonomy with regard to the choice of local public services, including schools.

In the last analysis, it is taxes which bend the twig and mold the shape of our economic tree in general and of suburban growth in

27. The two major policy decisions about a negative income tax scheme relate to the guarantee level and tax rate at which other income is taxed and earnings thereby reduced.

28. J. TOBIN, *ON IMPROVING THE ECONOMIC STATUS OF THE NEGRO* (1965).

29. *WORK INCENTIVES AND INCOME GUARANTEES* (J. Pechman & P. Timpane eds. 1975).

particular. Rules about exclusionary zoning can fertilize or freeze, stimulating or retarding suburban growth and homogeneity of communities; but it is the tax system by which government, albeit at times inadvertently, decides the direction pursued by suburban communities. No tax is more potent in this respect than the local property tax. If the nation decides that the tendency of wealthy suburbs to build solid walls around themselves is to be considered a sordid, intolerable act, neither statutory nor common law regulating exclusionary zoning are likely to combat the tendency as effectively as tax policy can.