



Zoning Can Not Be Replaced by Deed Restrictions

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May 6, 2020

Zoning has been in America for over a century and acquired an increasingly bad reputation. Some objections to it are philosophical, such as its perceived violation of property rights; but others are based on real-world problems it creates—housing unaffordability, sprawl, etc. There’s a growing bipartisan call to reform or scrap the regulation.

One path to this is writing more permissive codes, a strategy I’ve described for *Catalyst* using the example of Bastrop, TX. Another is to replace zoning with city-backed deed restrictions. This has been touted as a way to use a private land-use paradigm in a public context. But I have an even bigger problem with deeds (at least in this context) than with zoning.

What’s the difference?

The distinction between zoning and deeds is that of public versus private regulation. Zoning codes are enforced by municipalities, and generally concern density and space usage. Deeds police this and more for private property and are often enforced by HOAs.

Common examples of deeded projects include condo buildings or single-family home subdivisions. Those latter projects are master-planned, and the infrastructure built, by developers. While the infrastructure is sometimes handed over to municipalities for ongoing maintenance, these neighborhoods are still essentially private, with common areas often subject to anti-trespassing laws for anyone not living there.

Enforcing deeds for both private condo and single-family home projects is a market outcome. People purchase property knowing the rules beforehand, and how (if at all) the rules can change. Deeded neighborhoods thus cater to people who may have a NIMBY impulse, and want stable neighborhoods. But that’s fine as far as I’m concerned, since the transactions are private, and everyone involved knows what they’re buying into.

Where deed restrictions replace zoning

Much deeded land is also subject to zoning. But in some rare cases, deed restrictions replace zoning, namely in Houston, where homeowners can organize for this in their neighborhoods. The tool was frequently used in past decades, to the point that deeds cover an estimated 25% of the city. They usually renew after 30 years, and unlike ones in private subdivisions, are enforced by the city. That means Houston taxpayers foot the cost of fielding complaints and filing lawsuits

against those who violate the deeds, creating an incentive to make the deeds strict. Those costs are usually about \$300,000 annually, according to [Texas Scorecard](#), making the entire concept quasi-public.

Benefits of the idea

Because there's still a private element to Houston's deeds, some market-oriented urbanists prefer the model. Nolan Gray notes in [Market Urbanism](#) that the city's deeds are more flexible than zoning, and geared more towards letting homeowners maximize their property values, rather than giving bureaucrats this control. More importantly, they lessen public calls for full-blown zoning.

“Deed restrictions perform a useful political function: they give those residents with the strongest preferences for restrictions the restrictions they crave,” writes Gray. “This allows Houston to avoid having to adopt citywide conventional land-use regulations.”

Randal O'Toole, of the Cato Institute, is even more supportive, viewing deeds, not as a necessary evil but good unto themselves. In a [ReasonTV documentary](#), he said deeds were among the property rights city residents should have if single-family zoning is removed from their neighborhoods.

Problems with the idea

But my first problem is that city-sanctioned deeds, while more flexible than zoning, have basically the same outcome. Homeowners detect financial or lifestyle benefits of low-density land-use and push for deeds that keep their neighborhoods like this.

Houston is an example. Centrally-located neighborhoods without deeds see a mix of dense housing styles (metro Houston often leads the nation in multi-family unit permits). But centrally-located ones *with* deeds, such as Houston Heights, usually enforce separated uses and single-family homes, ensuring a suburban character. This makes homes in the latter group more valuable, but also more exclusive—which is the very criticism placed on zoning.

Beyond actual outcomes, though, my objection is philosophical. To explain why, let's go beyond Houston and find a more extreme example: New York City.

Pretend New York copied the Houston model and gave homeowners the option to deed their neighborhoods. Pretend the first deed was made by homeowners in the Upper East Side, who authorized maximum heights and robust historic preservation, to increase values for their individual units. What's wrong with that?

Besides being exclusionary, it's an inappropriate capture of public resources by private interests. New York City's government, after all, enjoys the federal tax and monetary benefits of being an incorporated city. It uses those benefits, along with general taxation of residents, to service UES with streets, parks, garbage pickup, etc. New York state authorities also use tax revenue for this, most notably by running subways beneath UES. All these services inflate UES' property values.

The reason I dislike most government-imposed land-use restrictions is that they ignore this dynamic. They take neighborhoods that the public has collectively added value to, and make them exclusive to all but wealthy members of said public. City-sanctioned deed restrictions are merely the privatized version of this. They hand the benefit and control of public goods over to entrenched private interests (homeowners). The homeowners then use that control to keep out competitors, while micromanaging the land that is around—but not owned by—them.

At the root of my case against zoning and city-sanctioned deeds is this question: what are cities for?

Private communities (retirement communities, country clubs, unincorporated subdivisions, ect.) sit on private land and infrastructure; that means they serve a private member base, who should be able to decide their own guidelines.

But if a city fits the common definition of “public” (think New York, Houston, Miami, Spokane), then it should be open. That is: if it’s run by the government, serviced by publicly-funded goods, and receives federal grants and tax subsidies, then any person should be able to move there and live where they want, based on their negotiations with private sellers. Existing residents should no more be able to lobby for regulations that hinder these newcomers than Facebook and Twitter should be able to block competitive social media startups from the internet.

But zoning and city-sanctioned deed restrictions are two ways of granting this regulatory capture, giving government-backed protectionism to homeowners who have the benefit of money and incumbency. Neither of the regulations belong in cities.