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# Neighborhood Conservation Districts

## THE NEW BELT AND SUSPENDERS OF MUNICIPAL ZONING

*William A. Fischel*<sup>†</sup>

### INTRODUCTION

In a comment about ten years ago, I argued that private land use regulation was a complement to rather than a substitute for public regulation.<sup>1</sup> By this I meant that private regulations should work hand-in-hand with public regulations, rather than as alternatives to one another. Robert H. Nelson had suggested that the rapid growth of homeowner associations since 1970 would displace zoning and related public land use controls at the municipal level.<sup>2</sup> His hope was that such displacement would free developers from the shackles of municipal regulation, which he—and I—expected to cause inefficiently low densities of homes and businesses.<sup>3</sup>

One of the problems with Nelson's plan was the difficulty of establishing private community associations in already-developed areas. Once an area is built up, neighbors are unlikely to agree to the covenants and related restrictions to establish a system of private governance.<sup>4</sup> This is why nearly all examples of successful homeowner associations are those that are initially set up by a developer, who then sells the lots to buyers who have no choice but to accept the covenants and governance structure.

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<sup>1</sup> William A. Fischel, *The Rise of Private Neighborhood Associations: Revolution or Evolution?*, in *THE PROPERTY TAX, LAND USE AND LAND-USE REGULATION* 273 (Dick Netzer ed., 2003).

<sup>2</sup> Robert H. Nelson, *The Rise of Private Neighborhood Associations: A Constitutional Revolution in Local Government*, in *THE PROPERTY TAX, LAND USE AND LAND-USE REGULATION*, *supra* note 1, at 256.

<sup>3</sup> William A. Fischel, *Does the American Way of Zoning Cause the Suburbs of Metropolitan Areas to Be Too Spread Out?*, in *GOVERNANCE AND OPPORTUNITY IN METROPOLITAN AREAS* 151 (Alan Altshuler et al. eds., 1999).

<sup>4</sup> Robert H. Nelson, *Privatizing the Neighborhood: A Proposal to Replace Zoning with Private Collective Property Rights to Existing Neighborhoods*, 7 *GEO. MASON L. REV.* 827, 828 (1999).

It now appears that this problem has been overcome by “neighborhood conservation districts,” which are in many ways similar to private regulations but do not require the consent of all property owners in the neighborhood. However, these new institutions have not become vehicles to facilitate neighborhood change, as Nelson had hoped. They are instead quite conservative—as their name implies—and are used to discourage redevelopment that is inconsistent with existing patterns. The quasi-privatization of land use in this case has been a vehicle to ramp up regulation, not release the energies of developers.

Beyond describing the major characteristics of the new conservation districts, I will speculate on why homeowners have increased the demand for regulation beyond what is provided by more traditional zoning mechanisms. Fragmentary evidence suggests that the main reasons have been growth in the value of housing and attempts by higher governments and the courts to interfere—as most communities view them—in the regulatory affairs of municipalities. In short, additional local regulation may be a response to attempts to shoehorn affordable housing, cell-phone towers, and group homes into existing neighborhoods.

## I. MUNICIPAL POLITICS AND ZONING

Because the occasion for this essay was a conference held at Brooklyn Law School in the City of New York, I need to explain why zoning in much of the rest of the nation might be different than in its largest municipality. The simplest and most widely used model of local political behavior is the one we learned in high-school civics: the majority of voters get their way. Economists and many political scientists have adopted this model and bent it to their purposes in analyzing public decisions. Known as the median voter model, it supposes that preferences for local public issues like zoning can be ranked on a scale of “least preferred” to “most preferred,” and that the voters in the middle of the scale—the median voter—prevail on every issue.<sup>5</sup> Thus, the voters who rank zoning on the middle of the scale—say, with some restrictions, but none so detailed as to forestall all development options—will get the zoning they want.

Studies of the relationship between municipal-service levels and the characteristics of local voters support the median

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<sup>5</sup> See generally Randall G. Holcombe, *The Median Voter Model in Public Choice Theory*, 61 PUB. CHOICE 115 (1989).

voter model, especially for cities and towns.<sup>6</sup> But it is somewhat less successful at the state and national level, and for larger cities and counties, because of the problems of rational ignorance (caused by the knowledge that one's vote has a very low chance of affecting the outcome of an election), the size and complexity of government, and the possibility that a heterogeneous electorate may have conflicting demands for government services and the taxes that pay for them. In these contexts, interest groups that speak for various constituencies, especially those who more directly profit from government activities, step in to displace the voters.<sup>7</sup>

The upshot of this model of politics is that land use regulation in the suburbs and small cities and towns is very likely to match the preferences of local residents. In other work I have claimed that the local voters who are both most numerous and most acutely interested in zoning issues are homeowners.<sup>8</sup> These "homevoters"<sup>9</sup> shape zoning to serve their interests in the suburbs and smaller cities. But zoning in the suburbs is also shaped by the fact that the municipalities are usually numerous, meaning that potential residents can "vote with their feet" and reject jurisdictions whose rules do not comport with their demands. This tends to homogenize voter preferences within communities and reinforces the median voter model, because those who have differing preferences from the majority will opt for other locations.<sup>10</sup>

The foregoing view of local politics implies that residents of smaller cities and suburbs ought to be more satisfied with their local zoning than residents of larger cities and counties. City residents have to tussle with development-minded interest groups within city politics, while suburban residents can make developers dance to the music of existing homeowners.<sup>11</sup> Tiebout-style migration—whereby households "vote with their feet" for their preferred public services—

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<sup>6</sup> Geoffrey K. Turnbull & Peter M. Mitias, *The Median Voter Model Across Levels of Government*, 99 PUB. CHOICE 119, 136 (1999).

<sup>7</sup> Heather Rose & Jon Sonstelie, *School Board Politics, School District Size, and the Bargaining Power of Teachers' Unions*, 67 J. URB. ECON. 438, 472-73 (2010).

<sup>8</sup> WILLIAM A. FISCHEL, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT, TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* 1, 4 (2001).

<sup>9</sup> *Id.* at 1.

<sup>10</sup> Fernando Ferreira & Joseph Gyourko, *Do Political Parties Matter? Evidence from U.S. Cities*, 124 Q.J. ECON. 399, 402 (2009).

<sup>11</sup> See GARY J. MILLER, *CITIES BY CONTRACT: THE POLITICS OF MUNICIPAL INCORPORATION* 86 (1981).

mitigates some of these problems<sup>12</sup>: People who like the mixed urban neighborhoods that were celebrated by Jane Jacobs<sup>13</sup> will buy or rent in big cities. Those with a yen for open spaces will accept the remoteness of exurban communities in exchange for very large lot sizes. And large numbers of people who want safe and pleasant streets that are separated but not too far from commercial districts will gravitate to the in-between suburbs, where most of the urban population now resides.<sup>14</sup>

Despite the sorting of households by neighborhood tastes, a great deal of uncertainty still exists about the character of neighborhoods. Even in places where commerce, class, and race are statistically mixed, many residents harbor anxieties about how the neighborhood may change.<sup>15</sup> As a result, one would expect to see some additional layers of regulation in communities experiencing higher levels of uncertainty and pressures for change. Higher uncertainty about neighborhood change can be measured across communities at any given time, say the year 2013, and it could manifest in changes in existing communities over time, say from 1990 to 2006.

## II. ADDITIONAL LAND USE CONTROLS

The once and future of land use regulation is the protective covenant. It preceded zoning regulations and made a comeback fifty years after zoning first gathered steam in the 1920s.<sup>16</sup> Covenants were initially elbowed aside by zoning because of legal and administrative difficulties and because covenants could not practically be applied to larger areas. Large-scale developers in southern California found that their units were less marketable when lower-quality development was parked adjacent to their protected neighborhoods.<sup>17</sup> Developers lobbied both state and (eventually) national officials to promote municipal zoning in order to protect their investments. On the other side of the coin, large cities such as

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<sup>12</sup> See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956); see also Eric J. Heikkila, *Are Municipalities Tieboutian Clubs?*, 26 REG'L SCI. & URB. ECON. 203 (1996).

<sup>13</sup> JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 220 (1961).

<sup>14</sup> Peter Mieszkowski & Edwin S. Mills, *The Causes of Metropolitan Suburbanization*, 7 J. ECON. PERSPECTIVES 135, 135-36 (1993).

<sup>15</sup> William A. Fischel, *Why Are There NIMBYs?*, 77 LAND ECON. 144, 144 (2001).

<sup>16</sup> ROBERT M. FOGELSON, *BOURGEOIS NIGHTMARES: SUBURBIA, 1870-1930*, at 110-11, 114 (2005).

<sup>17</sup> MARC A. WEISS, *THE RISE OF THE COMMUNITY BUILDERS: THE AMERICAN REAL ESTATE INDUSTRY AND URBAN LAND PLANNING* 21, 62-63 (1987).

Los Angeles found that without stable zoning, residential development would “move to the nuisance” and pressure city officials to displace industry through regulation.<sup>18</sup> This process threatened the city’s industrial development, resulting in lost tax revenue and unemployment. In response, Los Angeles developed comprehensive zoning to provide secure and separate locations for industry and residences.<sup>19</sup> By 1930, almost all major cities had implemented zoning that promoted stable expectations about future development.<sup>20</sup> Covenants had largely fallen into disuse, displaced by zoning.<sup>21</sup>

The private covenant made a comeback in the 1970s on two fronts. The first was its application to multi-unit apartment dwellings that were owner-occupied as condominiums.<sup>22</sup> Inflation in the 1970s begat an increase in local rent-control regulations, and developers of new apartment units dealt with this by selling their units as owner-occupied housing, which was not subject to rent control.<sup>23</sup> Nevertheless, the role of the apartment owner and his on-site “super” eventually needed to be replaced, and developers therefore created the condominium association (composed of the units’ owners) in order to manage common areas and provide and enforce local regulations.

The second front came as developers transferred the experience of condominium associations to new communities of owner-occupied housing units. Although the units were usually free standing, developers found that marketing them was more profitable if they were endowed with homeowner associations and constitution-like rules for governance. The great improvement of the homeowner association was that it provided for active management of common areas and for enforcement of rules. It was also possible for homeowner associations to modify their constitutional rules without the

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<sup>18</sup> *Hadacheck v. Los Angeles*, 239 U.S. 394, 397 (1915); Kathy A. Kolnick, *Order Before Zoning: Land Use Regulation in Los Angeles, 1880–1915*, at 246–47 (May 2008) (Ph.D. dissertation, University of Southern California) (on file with Digital Library).

<sup>19</sup> Kolnick, *supra* note 18, at 246–47.

<sup>20</sup> William A. Fischel, *An Economic History of Zoning and a Cure for Its Exclusionary Effects*, 41 URB. STUD. 317, 319 (2004).

<sup>21</sup> Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 714–19 (1973).

<sup>22</sup> See, e.g., ROBERT JAY DILGER, *NEIGHBORHOOD POLITICS: RESIDENTIAL COMMUNITY ASSOCIATIONS IN AMERICAN GOVERNANCE* 51 (1992).

<sup>23</sup> See, e.g., David P. Sims, *Out of Control: What Can We Learn From the End of Massachusetts Rent Control?*, 61 J. URB. ECON. 129 (2007).

unanimity that traditional covenants required, which enabled them to respond more efficiently to unforeseen changes.<sup>24</sup>

Despite the rise of homeowner associations in the 1970s, they did not displace zoning regulations. Indeed, homeowner associations often monitor local zoning and send representatives to zoning and planning hearings.<sup>25</sup> In this role, the associations strengthen zoning: they provide belt-and-suspenders support for new development by supplementing zoning. In economic terms, zoning and community associations seem to be complements, not substitutes.<sup>26</sup>

Older neighborhoods that were developed without covenants and homeowner associations had to rely on traditional zoning to protect their homes from unforeseen events. Indeed, the transaction costs of obtaining the agreement of all property owners within most neighborhoods would be prohibitive.<sup>27</sup> Economists are apt to point out the holdout problems that give rise to these costs: if almost all other residents agree to restrictions on otherwise permissible nonconforming development, the remaining landowners are in a position that raises the option value of their property. An apartment building surrounded by single-family units might generate rental profits greater than one surrounded by other apartment buildings. In my experience, however, the transactions costs stem less from deliberate holdouts than from the difficulty of contacting property owners<sup>28</sup>: Some may live in a different state or country. Some may live in nursing homes. Some may disagree on terms with co-owners. And some may find it difficult just to understand the nature of the proposed deal.

In small, relatively homogenous communities, homeowners can rely on public zoning to adjust to new conditions. Even in smaller towns where neighborhoods differ substantially, the multidimensional log rolling of small-town life and norms of reciprocity stay the hand of collective opportunism.<sup>29</sup> For example, although it might benefit the tax

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<sup>24</sup> ROBERT H. NELSON, PRIVATE NEIGHBORHOODS AND THE TRANSFORMATION OF LOCAL GOVERNMENT 10 (2005).

<sup>25</sup> Barbara Coyle McCabe, *Homeowners Associations as Private Governments: What We Know, What We Don't Know, and Why It Matters*, 71 PUB. ADMIN. REV. 535, 537 (2011).

<sup>26</sup> Rachel Meltzer & Ron Cheung, *Homeowners Associations and the Local Land Use Regime: Substitutes or Complements?*, 46th Annual AREUEA Conference Paper (Nov. 29, 2010), available at <http://ssrn.com/abstract+1717024>.

<sup>27</sup> WILLIAM A. FISCHER, DO GROWTH CONTROLS MATTER? 14 (1990).

<sup>28</sup> I once explored the possibility of doing this in my neighborhood to forestall the conversion of a home to apartments.

<sup>29</sup> ROBERT C. ELLICKSON, ORDER WITHOUT LAW 182 (1991).

base to allow a commercial development in a neighborhood that does not want it, the development may not happen because other residents typically know at least some of the threatened neighborhood residents through local schools, civic organizations, and private clubs.<sup>30</sup>

A threatened neighborhood in a larger polity is less secure for several reasons. Neighborhood residents are less likely to know people elsewhere in a larger city or county. Development interests are more likely to hold sway in city councils and planning commissions.<sup>31</sup> And the overall size of government makes it less likely that government officials will know much about their constituents and vice versa. To counter this, cities have some institutions that specifically protect neighborhoods. For example, city councils are often elected by wards rather than at large, and city service administration and planning districts are often divided into distinct regions or neighborhoods, whose residents get a special voice in city-council and planning-board proceedings.<sup>32</sup> Nevertheless, the literature on the political economy of planning and city governance supports the idea that larger cities are more pro-development than their suburbs.

### III. HISTORIC DISTRICTS

Historic districts provide one way for a distinct neighborhood to establish additional land use regulations that are resistant to citywide changes. They became popular in the 1970s and seem to have been an offshoot of the landmark-preservation movement, whose poster child was the demolition of Penn Station in New York City. In response to that decision, the U.S. Supreme Court validated uncompensated preservation designations in *Penn Central Transportation Co. v. City of New York* in 1978,<sup>33</sup> and most state courts went along with the idea that regulations designed to preserve the outer shell of buildings constitute legitimate exercises of the police power.<sup>34</sup>

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<sup>30</sup> FISCHER, *supra* note 8, at 200-02.

<sup>31</sup> Harvey Molotch, *The City as a Growth Machine: Toward a Political Economy of Place*, 82 AM. J. SOC. 309, 320 (1976).

<sup>32</sup> Mark Schneider & Paul Teske, *The Antigrowth Entrepreneur—Challenging the Equilibrium of the Growth Machine*, 55 J. POL. 720, 732 (1993).

<sup>33</sup> 438 U.S. 104, 138 (1978).

<sup>34</sup> See generally Daniel T. Cavarelo, *From Penn Central to United Artists' I & II: The Rise to Immunity of Historic Preservation Designation from Successful Takings Challenges*, 22 B.C. ENVTL. AFF. L. REV. 593, 594, 616 (1995).



Historic districts—in which entire blocks of buildings were subject to preservation and hence made extra-resistant to neighborhood change—soon spread and were similarly validated by the courts. Owners of individual historic landmarks often resisted official designation, however, because the additional restrictions occasionally triggered costs that exceeded compensatory tax breaks and the benefit of free advertising.<sup>35</sup> But owners of most buildings in historic *districts*, on the other hand, obtain net benefits from the added security against zoning changes, and groups of property owners often seek historic designation as a result. Indeed, studies have shown that such designation raises their property values as compared to undesignated neighborhoods.<sup>36</sup>

Historic districts thus emerged as one way to protect a neighborhood from the risks of unwanted change while also avoiding the prohibitively high transaction costs involved in forming a legally binding homeowner association after neighborhoods had actually formed.<sup>37</sup> But historic districts have some drawbacks. One is the requirement that the district actually be historic, although this is less of a problem than it might seem. For example, buildings do not have to be centuries old. Indeed, fifty years will often do—and sometimes even less than that.<sup>38</sup> A good number of urban neighborhoods can therefore qualify.

The more serious difficulty with historic districts is that they offer excessive protection from change. Residents in some localities fear that future modifications of their own property may be unduly restricted.<sup>39</sup> In these districts, even relatively minor alterations, such as the installation of new windows, are

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<sup>35</sup> Paul K. Asabere et al., *The Adverse Impacts of Local Historic Designation: The Case of Small Apartment Buildings in Philadelphia*, 8 J. REAL EST. FIN. & ECON. 225, 227 (1994).

<sup>36</sup> Edward Coulson & Michael L. Lahr, *Gracing the Land of Elvis and Beale Street: Historic Designation and Property Values in Memphis*, 33 REAL EST. ECON. 487, 488 (2005); Deborah Ann Ford, *The Effect of Historic District Designation on Single-Family Home Prices*, 17 AM. REAL EST. & URB. ECON. ASS'N J. 353, 361 (1989).

<sup>37</sup> Hannah Wiseman, *Public Communities, Private Rules*, 98 GEO. L.J. 697, 712-16 (2010).

<sup>38</sup> NORMAN TYLER ET AL., *HISTORIC PRESERVATION: AN INTRODUCTION TO ITS HISTORY, PRINCIPLES, AND PRACTICE* 140 (2d ed. 2009).

<sup>39</sup> Sarah Schweitzer, *Starbucks Proposal Highlights Historic Concerns: Demolition Plan Renews Calls for More Protection*, BOS. GLOBE, Aug. 23, 2007, at GNW.1 (“The creation of neighborhood conservation districts is needed, advocates say, because towns such as Merrimack, NH have rejected the more stringent form of preservation—so-called local historic districts—out of fear that the regulation would stifle development.”).

subject to the review of a commission.<sup>40</sup> Commission members are usually drawn from the ranks of preservationists rather than one's fellow neighbors, so they are less likely to be sympathetic to the need for an additional bedroom or an expanded garage. According to preservationist principles, this is as it should be. One rationale for historic districts is that individual owners and the local neighborhood may underappreciate the building's historical value.

Another drawback of historic districts is that considerable intellectual controversy surrounds the issue of historic preservation of buildings. For example, most buildings that were built a century ago, or even fifty years ago, have endured considerable modification before being designated "historic." As a result, it is often not clear what period of their development is to be preserved.<sup>41</sup> And at least some urban theorists have questioned the wisdom of any mandatory preservation of neighborhoods.<sup>42</sup> Indeed, the conventional role of cities has usually been as future-oriented engines of change, not museums of the past.<sup>43</sup> Architects such as Rem Koolhaas worry that excessive zeal for preservation might stifle ongoing creativity in their profession.<sup>44</sup>

#### IV. NEIGHBORHOOD CONSERVATION DISTRICTS

The gap between consensual neighborhood covenants and citywide zoning is, for reasons suggested in the previous section, imperfectly filled by historic districts. Partially filling this gap are neighborhood conservation districts, which have become popular since the early 1980s.<sup>45</sup> These districts differ from traditional zoning districts, with their SR-2 (single residence) and GR-1 (multifamily) designations, in that conservation districts provide additional restrictions (and sometimes, exceptions) to a geographic area that is not necessarily contiguous with zoning boundaries. For example, a neighborhood conservation district may consist of several contiguous city blocks, some of which are designated SR-2 and others GR-1.

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<sup>40</sup> Adam Lovelady, Note, *Broadened Notions of Historic Preservation and the Role of Neighborhood Conservation Districts*, 40 URB. LAW. 147, 148-54 (2008).

<sup>41</sup> TYLER ET AL., *supra* note 38, at 18.

<sup>42</sup> See EDWARD GLAESER, TRIUMPH OF THE CITY: HOW OUR GREATEST INVENTION MAKES US RICHER, SMARTER, GREENER, HEALTHIER, AND HAPPIER 263 (2011).

<sup>43</sup> *Id.*

<sup>44</sup> Nicolai Ouroussoff, *An Architect's Fear that Preservation Distorts*, N.Y. TIMES, May 24, 2011, at C1.

<sup>45</sup> Lovelady, *supra* note 40, at 154.

The neighborhood conservation district usually applies additional rules for development and modification of homes, but it typically does not exempt them from the standards of the zoning district where they are located. Thus a home in the SR-2 district of the city might be required to have a thirty-foot setback from the street line and be no more than thirty-five feet high. Additional rules concerning the placement of garages, size of windows, and type of roofing could be imposed, which would not be applied to homes outside the neighborhood conservation district.

The districts themselves are usually established as the result of neighborhood activism.<sup>46</sup> In many cases, the catalyst for a neighborhood conservation district is the demolition of an existing building and construction of a new structure that is consistent with existing zoning laws but is regarded by existing residents as inappropriate for the neighborhood.<sup>47</sup> The city's planning and zoning department usually does not seek to establish subdistricts. Several cities, however, seem to have established procedures for setting up neighborhood districts.<sup>48</sup> They usually require that the buildings in the area have something in common.<sup>49</sup> The common elements do not have to be historical: they could be a consistent architectural style, a common street layout, or a local community focal point such as a park or a school.<sup>50</sup> They could also simply be a neighborhood that is undergoing some development pressures that residents collectively want to resist.<sup>51</sup>

In most cases, a neighborhood conservation district is an overlay zone, which adds some restrictions to the designated area without changing its underlying zoning.<sup>52</sup> One example of overlay zones is a flood-plain zone, which establishes additional restrictions to reduce flood damage.<sup>53</sup> Overlay zones do not establish independent neighborhood authority over rezoning or development proposals but are instead administered by the city's existing zoning and planning apparatus. The very

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<sup>46</sup> ELIZABETH DURFEE HENGEN WITH CAROLYN BALDWIN, N.H. DIV. OF HISTORICAL RES., NEIGHBORHOOD HERITAGE DISTRICTS: A HANDBOOK FOR NEW HAMPSHIRE MUNICIPALITIES 8 (2008), available at [http://www.nh.gov/nhdhr/documents/neighbors\\_hert\\_handbook.pdf](http://www.nh.gov/nhdhr/documents/neighbors_hert_handbook.pdf).

<sup>47</sup> Lovelady, *supra* note 40, at 180.

<sup>48</sup> *Id.* at 156.

<sup>49</sup> *Id.* at 154.

<sup>50</sup> *Id.*

<sup>51</sup> HENGEN, *supra* note 46, at 8.

<sup>52</sup> *Id.*

<sup>53</sup> AMY DAIN, RESIDENTIAL LAND-USE REGULATION IN EASTERN MASSACHUSETTS: A STUDY OF 187 COMMUNITIES 18 (2005).

existence of the overlay district, however, refocuses the attention of citywide administrators and board members toward the concerns of neighborhood members, and the usual public-notice procedures for such zoning changes and building permits ensure that the district's residents are informed.

Some neighborhood conservation districts establish an additional review of development by a newly created standing committee, which is partially comprised of neighborhood residents.<sup>54</sup> These committees are interesting because they resemble the boards of homeowner associations that private developers set up to govern common areas in condominiums and planned communities. But those private governing bodies had to be established without any dissenters among property owners. This meant that the initial developer had to own all the land at the start. The remarkable aspect of neighborhood districts is that they can be established with less than unanimity among property owners—sometimes with only a majority vote of the city council or its electorate.<sup>55</sup>

The powers of the neighborhood conservation district's governing body are typically more modest than those of a private community association. One major limitation is that its decisions can be appealed to some public authority—typically the city's planning board and the elected city council.<sup>56</sup> For example, if the neighborhood review committee rejects a proposed front-yard garage that otherwise conforms to underlying zoning rules, the would-be garage builder can appeal that decision to city authorities and potentially to the court system. But to do so, one must start with the lowest level of regulation and exhaust all remedies before appealing further, which would be a time-consuming and expensive task. The neighborhood conservation district functions in large part like a private community association, albeit having arisen not from private property law but from public police power regulation.

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<sup>54</sup> See, e.g., HENGEN, *supra* note 46, at 10.

<sup>55</sup> See *id.* (city council or townwide vote); see also CAMBRIDGE HISTORICAL COMM'N, NEIGHBORHOOD CONSERVATION DISTRICTS IN CAMBRIDGE (Oct. 2002), available at [http://www2.cambridgema.gov/historic/ncd\\_brochure.pdf](http://www2.cambridgema.gov/historic/ncd_brochure.pdf) (The city council votes after findings of neighborhood committee are presented.); Cambridge Historical Comm'n, *Historic Districts and Neighborhood Conservation Districts in Cambridge, MA*, CAMBRIDGEMA.GOV, <http://www2.cambridgema.gov/historic/districts.html> (last visited Feb. 2, 2013).

<sup>56</sup> HENGEN, *supra* note 46, at 14; Lovelady, *supra* note 40, at 157.

## V. WHY THE DEMAND FOR MORE LOCAL REGULATION?

The development of neighborhood conservation districts parallels several other decentralizing developments in municipal governance. In some ways, they resemble the business improvement district (BID), where property owners are willing to be burdened with additional taxes in exchange for additional municipal services.<sup>57</sup> As in the neighborhood conservation district, the formation of BIDs does not require unanimous consent of the neighborhood's property owners.<sup>58</sup> Another parallel trend is the charter-school movement, which establishes self-governing schools within standard city school districts, though in that case the local residents do not pay additional taxes.<sup>59</sup>

All of these approaches—BIDs, charter schools, and neighborhood conservation districts—represent subdivisions of existing municipal functions. I would characterize them as small umbrellas within the city's larger umbrella, and all of them have become especially popular within the last twenty or thirty years. The common denominator among these approaches is localized dissatisfaction with the citywide provision of a local service.<sup>60</sup> They are almost always generated by bottom-up political activity.<sup>61</sup> The citywide government seems to accommodate them somewhat grudgingly, and scholarly commentary has criticized them for their seeming withdrawal from traditional government oversight.<sup>62</sup>

One explanation for their rise, then, is the same explanation for suburban municipal incorporations in the twentieth century that has created the municipal collar—some would say noose—that surrounds most large American cities.<sup>63</sup> Homeowners and other property owners demanded different levels of public services than those provided in the central city

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<sup>57</sup> Richard Briffault, *A Government for Our Time? Business Improvement Districts and Urban Governance*, 99 COLUM. L. REV. 365, 366 (1999).

<sup>58</sup> *Id.* at 457.

<sup>59</sup> James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2075 (2002).

<sup>60</sup> One such example is public safety. See Leah Brooks, *Volunteering to be Taxed: Business Improvement Districts and the Extra-Governmental Provision of Public Safety*, 92 J. PUB. ECON. 388 (2008).

<sup>61</sup> HENGEN, *supra* note 46, at 3.

<sup>62</sup> See, e.g., Briffault, *supra* note 57, at 457; Paul Teske et al., *Local School Boards as Authorizers of Charter Schools*, in BESEIGED: SCHOOL BOARDS AND THE FUTURE OF EDUCATION POLITICS 130 (William G. Howell ed., 2005).

<sup>63</sup> JON C. TEAFORD, *CITY AND SUBURB: THE POLITICAL FRAGMENTATION OF METROPOLITAN AMERICA, 1850–1970*, at 79 (1979).

that sought to annex them. In the early part of the century, before zoning became available, municipal independence was costly because small suburbs had no way to resist or manage the inevitable urban growth. City services—schools, water, sewer, fire and police protection—looked attractive if your town was going to become a city anyway.<sup>64</sup> But after zoning became available, many suburbs decided they did not have to become so urban, after all. They could remain residential, establish their own public schools, and control their own growth.<sup>65</sup>

Municipalities and school districts hardly ever subdivide after they are formed.<sup>66</sup> Thus, residential developments that were built within a preexisting municipality had to accept the level of services provided by the city, which might be controlled by political forces that were not always sympathetic to new residents. One interpretation of the neighborhood conservation district is that it represents a partial secession from the governance of the larger city. And this might be acceptable to most elected officials. For example, a working-class city might want to prevent its professional-class residents from moving to a more affluent municipality, so one way of appeasing them would be to provide residents of the upper-class blocks greater control over land use within their neighborhood.<sup>67</sup> Thereafter, the higher-income residents of the more protected neighborhood would be less concerned over city officials' inclination to bring in job-creating land uses—that is, uses that have some adverse spillovers but are desired by the working-class majority. The working-class majority would get the fiscal benefits of taxes on higher-value properties in the affluent neighborhood, and the more affluent residents could enjoy living in a diverse community as well as the benefits of an urban location instead of a white-bread suburb.<sup>68</sup>

A more difficult question is why neighborhood conservation districts have become increasingly popular in recent years. My theory is that threats to homeowners' real estate values have increased in the past forty years. The threats

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<sup>64</sup> Fischel, *supra* note 20, at 325-26.

<sup>65</sup> *Id.* at 322.

<sup>66</sup> FISCHEL, *supra* note 8, at 27.

<sup>67</sup> In *City of Bellevue v. East Bellevue Community Council*, an upper-income unincorporated area agreed to annexation by the city of Bellevue, Washington, on the condition that it have veto power over zoning changes by the city. 983 P.2d 602, 604 (Wash. 1999).

<sup>68</sup> See Karen A. Danielsen et al., *Retracting Suburbia: Smart Growth and the Future of Housing*, 10 HOUSING POL'Y DEBATE 513, 518-19 (1999).

are partly the result of increases in real estate values in cities, which have encouraged developers to press for changes in use and for increases in density. The increased values are not entirely the product of the late housing bubble. Larger cities have also become more attractive because of the steady decline in violent and other crime over the past two decades.<sup>69</sup> Homebuyers who would otherwise have fled to the suburbs reexamined cities, and as a result, higher-quality, well-established urban residential districts became more popular.

The other trend promoting neighborhood conservation districts has been the attack on local zoning by higher governments and the court system, as well as by changes in planning ideology.<sup>70</sup> Many of these trends affected suburban and small-town municipalities, as well as larger cities, which is why even some of the former may have adopted neighborhood conservation districts despite the greater responsiveness of suburban public officials to their homeowner-constituents. The federal government has adopted several rules that override the authority of local governments: group homes for the disabled cannot be excluded from residential neighborhoods;<sup>71</sup> cell-phone towers must be accommodated somewhere, not just excluded;<sup>72</sup> and churches must be allowed to expand their operations despite local zoning.<sup>73</sup>

The courts have also played a role in modifying local zoning authority. The *Mount Laurel* cases in New Jersey declared that exclusion of low-income housing must cease and that the remedy was to override local zoning that prohibited apartments.<sup>74</sup> While other state courts have not embraced New Jersey's comprehensive statewide remedy, many have cited

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<sup>69</sup> See Amy Ellen Schwartz et al., *Has Falling Crime Driven New York City's Real Estate Boom?*, 14 J. HOUSING RES. 101, 131-32 (2003).

<sup>70</sup> These trends are described and discussed in William Fischel, *The Evolution of Zoning Since the 1980s: The Persistence of Localism*, in PROPERTY IN LAND AND OTHER RESOURCES 259-87 (Daniel H. Cole & Elinor Ostrom eds., 2012).

<sup>71</sup> See Patricia E. Salkin & John M. Armentano, *The Fair Housing Act, Zoning, and Affordable Housing*, 25 URB. LAW. 893, 893-94 (1993) (discussing the Fair Housing Act, 42 U.S.C. §§ 3601-3619 (1988)).

<sup>72</sup> See Steven J. Eagle, *Wireless Telecommunications, Infrastructure Security, and the NIMBY Problem*, 54 CATH. U. L. REV. 445, 459-66 (2005) (discussing the Telecommunications Act of 1996, 47 U.S.C. § 332 (1996)).

<sup>73</sup> See Stephen Clowney, Comment, *An Empirical Look at Churches in the Zoning Process*, 116 YALE L.J. 859, 866-67 (2007) (discussing the Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000, 42 U.S.C. § 2000cc (2006)).

<sup>74</sup> See S. Burlington Cnty. NAACP v. Twp. of Mt. Laurel, 336 A.2d 713 (N.J. 1975) (*Mount Laurel I*); S. Burlington Cnty. NAACP v. Twp. of Mt. Laurel, 456 A.2d 390 (N.J. 1983) (*Mount Laurel II*); The Hills Dev. Co. v. Twp. of Bernards, 510 A.2d 621 (N.J. 1986) (*Mount Laurel III*).

*Mount Laurel* approvingly.<sup>75</sup> Several state governments, most notably Massachusetts, have required local governments to rezone for low- and moderate-income housing.<sup>76</sup> These cases are in part the product of a legal movement to make suburban living more accessible to low-income families and people of color.<sup>77</sup>

Finally, planners have advocated for changes to local zoning practices. The “smart growth” movement that has become popular among the planning profession has attacked low-density development in the suburbs and urged higher-density infill development within established city neighborhoods.<sup>78</sup> The environmental movement has endorsed higher-density city development to reduce carbon emissions from automobiles and single-family homes.<sup>79</sup> And the exclusion of development from rural farmland has pushed at least some homebuilders back into cities.<sup>80</sup> Economists have urged that local zoning be overridden in order to promote higher densities than local zoning allows.<sup>81</sup>

All of these trends have put traditional zoning techniques under stress. The diversity of neighborhoods in larger cities makes homeowners in vulnerable neighborhoods nervous about infill development and other pressures for change. By building on the historic-preservation model, neighborhood activists continue to develop zoning innovations that resist these trends or at least modify them to suit local circumstances. Like politics, all zoning is local.

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<sup>75</sup> See, e.g., John M. Payne, *The Unfinished Business of Mount Laurel II*, in *MOUNT LAUREL II AT 25: THE UNFINISHED AGENDA OF FAIR SHARE HOUSING* 7 (Timothy N. Castano & Dale Sattin, eds., 2008); see also MICHAEL ALLAN WOLF, *THE ZONING OF AMERICA* 143 (2008).

<sup>76</sup> See generally LYNN FISHER, CHAPTER 40B PERMITTING AND LITIGATION: A REPORT BY THE HOUSING AFFORDABILITY INITIATIVE (MIT Ctr. for Real Estate, Cambridge, MA, June 2007) (describing operation of 40B).

<sup>77</sup> See, e.g., CHARLES M. HAAR, *SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES* 3 (1996).

<sup>78</sup> See generally F. KAID BENFIELD ET AL., *SOLVING SPRAWL: MODELS OF SMART GROWTH IN COMMUNITIES ACROSS AMERICA* (2001) (case studies of 35 communities that authors classified as having smart growth policies).

<sup>79</sup> Zusha Elinson, *Smart-Growth Policy Splits Environmentalists*, N.Y. TIMES, Nov. 5, 2010, at A21, available at <http://www.nytimes.com/2010/11/05/us/05bcshort.html> (Sierra Club endorsed high rise development plan in Berkeley, CA).

<sup>80</sup> See Virginia McConnell et al., *Zoning, TDRs and the Density of Development*, 59 J. URB. ECON. 440, 446 (2006).

<sup>81</sup> See, e.g., Edward L. Glaeser & Bryce A. Ward, *The Causes and Consequences of Land Use Regulation: Evidence from Greater Boston*, 65 J. URB. ECON. 265, 278 (2009).