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SPEAKERS

Anthony Sanders, Nolan Gray

A **Anthony Sanders** 00:24

Hello, and welcome to Short Circuit, your podcast on the federal courts of appeals. I'm your host, Anthony Sanders, Director of the Center for Judicial Engagement at the Institute for Justice. We're recording this on Friday, July 22, 2022. And today, we are recording a special Short Circuit. So sometimes when we talk about cases from the federal courts of appeals, we talk about zoning and what that thing means, what it does, why it might be constitutional or unconstitutional -- all too often, unfortunately, ruled constitutional. And then we go from there. But today, we have a special Short Circuit where we're not going to be looking at particular cases. But we're going to be talking about zoning itself, what it is, what it isn't, why it is so terrible, as our guest is about to tell us. So joining us here today is Nolan Gray. He is the research director for California YIMBY, a terrific organization, and an expert in land use regulation. He is currently completing a PhD in urban planning at the University of California, Los Angeles. And he's previously worked as a planner in New York City, and various other places, including the Mercatus Institute, and he's widely published author with work appearing in all kinds of outlets you have heard of The Atlantic, Bloomberg City Lab, The Guardian. But most importantly, for present purposes, he is the author of a brand new book called Arbitrary Lines, about what zoning is, what it isn't, and why we need to get rid of it. So Nolan, thank you for coming on. It's so wonderful to have you with us on Short Circuit.

N **Nolan Gray** 02:12

Thanks so much for having me, Anthony, and I'm a big fan of the Institute for Justice. So it's a pleasure to be here.

A **Anthony Sanders** 02:17

Well, great. And we can talk a little later, maybe about what types of things we should be doing at IJ to combat some of the downsides of zoning that you articulate in your book. Let's start at the beginning and give a bit of a broad overview. So people hear about zoning all the time in

their lives, they probably don't have a real good idea, though about the ins and outs of what it does. So tell us what zoning is, and why you wrote a book about it.

N Nolan Gray 02:52

So zoning is in this weird moment right now. And when I first started getting interested in zoning, it was a type of thing where if you're at a party and you say I research zoning, your conversation partner suddenly has to use the restroom. It's just this boring kind of topic that most normal, well adjusted people would rather avoid. And what's happened over the last, certainly, five years decade or so, is zoning has kind of been thrust onto the national stage in a big way. So you can't open the New York Times or The San Francisco Chronicle without seeing op eds about zoning. Presidential contenders, governors, city council members, are expected to have views on zoning. These come in, in varying qualities. And a lot of people are actually interested in zoning. Why I wanted to write the book, is I found that there were a few things kind of missing in this space. The first is that I found that a lot of people just didn't really have a very clear sense for what zoning was and what zoning wasn't. So commonly, I think people would just assume that zoning and city planning were interchangeable, and they're not they're very different. Or I would be making an argument for zoning liberalisation with maybe a city council member or a journalist who's new to the beat. And I would hear something like, "well, we need to do building inspections on new construction, how could you be arguing against that?" And it's like, well, of course, that's the building code. That's something very different from zoning. So one of the first main things I really wanted to do was to just write an explanation of what zoning is and where zoning comes from. And I would have people come to me and they would say, Nolan, you have zoning-pilled me, you've zoning-reform-pilled me, what do I need to read? To like, learn more about this? And I literally found myself recommending that people read Zoning for Dummies, those yellow and black instructional manuals. Not exactly something that would wet someone's intellectual curiosity. So the book is partly an accessible explainer of what zoning is where it comes from. I carefully defined zoning I think in a relatively conventional way, as set a set of local regulations that are enabled by state governments and promoted by the federal government, but are trying to do two things. First is segregate cities on the basis of land use. So of course, the big picture is like residential, commercial, industrial. But then within those categories, there's lots of subcategories. So in many US cities, it's illegal to build apartments. In most of the city, or in some residential zoning districts, you can have homes on a 5000 square foot lots in other residential zones, you have to have at least two acres, these roles as the title of the book probably implies, are somewhat arbitrary. And when they're not arbitrary, they're serving what I will argue as anti social objectives. The second big thing that zoning is doing is controlling density, regulating density, more often than not putting extremely strict caps on the amount of floor area that you can build, or the number of units that you can have on an individual property. And so, for reasons we will talk about in a bit. This is why US cities are so much different from cities in the rest of the world. Why our cities are very, very, very low density, very sprawling, generally very segregated. And in places like California and New York, but increasingly the rest of the country, very expensive.

A Anthony Sanders 06:17

So one thing that I didn't understand about zoning until I actually litigated a case that involves zoning, shortly after I joined IJ, was just how specific all of our land is around us. I think some people like you just saying they have a sense that well, it means you can build apartments over

here, but not over here. And some places you can farm and some places you can have a factory. And that kind of makes sense to a lot of people because they're like, Well, you wouldn't want a factory next to a school, for example. But what I realized when I did this lawsuit is when you start really looking at zoning maps, you realize what's this parcel here, you could have a dentist office, but you couldn't sell shoes, but this parcel right next door, you could sell shoes, but you couldn't have groceries and then across the street, you could have a four unit building, but not six, and then a next block, you know, it's something else. And then of course, it's just a lot of it really all you can do is farm or have a single family home, especially in the excerpts like where I live. And when it gets to that level of detail, and then even more than that about how big of a house you can have and all that kind of thing. I think it hits home to people what a problem zoning can be and how inflexible it can be. But why do people not have that image? Because so many Americans do own property, they know what they can do with their own property, you would think they would? Why hasn't that kind of sunk into the consciousness until maybe recently about just how drastic some of these zoning laws are?

N Nolan Gray 08:09

Yeah, that's a really great point. So that's another sort of thing you hear when you talk about zoning reform is someone will say, "Well, I don't want the oil refinery, opening up on my little suburban cul de sac." Of course, for reasons of just basic land economics. The oil refinery doesn't want to be on your cul de sac any more than you want it there. And in any case, for a very brief history that I offer in the book, a lot of cities already did. They would they would designate rules saying hey, if your some noxious uses that we know are going to be a problem. You can't be within so many feet of a residence or a school. So cities before zoning had these rules for things like slaughterhouses or tanneries or any sort of heavy industry that had a really high level of negative externalities. Maybe that's not the best way to solve that problem. But that probably solves like a large portion of the actual land use incompatibilities that people are really concerned about. And I think exactly to your point, a lot of what zoning does is not really worried about that extreme case of the oil refinery in the in the cul de sac, but exactly listing out on every single parcel in the city. What exactly in a commercial district what type of business is allowed on what parcel. And as you kind of mentioned, these are almost comical in their level of detail. I remember one of the last projects that I worked on when I was a city planner in New York was a doctor who wanted to hand the business over to his son but apparently they were operating, as a doctor naturally would do, a very small medical laboratory in the back just for bloodwork and stuff like that. But what do you know the zoning code he was in a C one dash one and if you want to have a medical laboratory, you have to do C two dash two. And these are kind of bizarre. Of course, this individual had to spend many times 10s of 1000s of dollars trying to get the zoning changed for this thing that everybody agreed was perfectly fine. So you're exactly right that what zoning does is it goes so much further beyond what we actually want out of our system of land use regulation. Or I think the residential point, which is really important to people. One way to approach planning would be to say there are areas that are broadly appropriate for residential development. And then there are areas that are broadly inappropriate. So you can you can identify, hey, like this is this is going to be an area where we're going to allow certain industrial uses, or this is going to be an area where there are extreme environmental considerations, of course, that these issues are complicated, and they're not clear cut. But you look at the residential zoning districts for a typical US city, and they will say, Okay, in this neighborhood, we're going to allow duplexes, but in this neighborhood, you have to have a home that's at least 2500 square feet, and has to sit on a half acre lot. This doesn't really serve any, I think, traditional function of government that most

people would recognize, this doesn't really serve a health safety welfare function, to maybe use some of the legal ease. This is essentially just a system of social segregation that we've inherited from from Progressive Era reforms.

A Anthony Sanders 11:15

Well, let's get into some of that history. So people often just don't really realize that before, really well into the 20th century, but definitely the turn of the 20th century, that zoning, as we think of it today really did not exist. So if we go back to that time, it's a long time ago. But it's not that long ago , a lot of the things that we have now we had then, we had electricity, we had gas, perhaps we didn't really have cars that much. But you know, we had transportation. So what did a city or even a suburb look like back then? For example, if I had a home, on a single family home, in a typical city in the year 1900, could my neighbor just build a 20 story building? If it could meet the building code? Or could my neighbor just start selling start a grocery store and just start selling groceries? And did that tick a lot of people off? Or was that just how life was and we just can't conceive of that in this day and age.

N Nolan Gray 12:31

So cities historically did have formed some forms of blindness regulation, as I was saying previously, right. So the most noxious uses would generally be segregated to a certain area usually kept outside of the city, or you had building materials regulations. So, requiring masonry to stop the spread of fires, for example. But the main constraints historically, particularly on density in cities, uses we're just casually intermingled in cities for basically all of human history, this notion of like having a place where you work and where you live, as being two discrete and separate places, is very much a modern sort of notion. And it's funny, because I think with the rise of remote work, we're actually returning to this, which is why so many teams are scrambling to amend their home based business ordinances. But so the use is casually intermingled, and I'm not meaning to present this as a utopia there were a lot of externalities. And there were a lot of conflicts that had to be resolved. And then density was, was largely controlled by two things, mobility, technology, and construction technology. So a city couldn't spread further out than a normal person could walk. Because that was the mobility technology. You'll watch like medieval fantasy movies, and people will be like, riding their horses around as if their cars, but very, very, very few people. And there was this great thread on Reddit. And it was like, "why are there no Roman parking lots?" It's hard for us to conceive of a life like that. But, the horizontal expansion of cities was constrained by mobility technology, and then the vertical expansion of cities, so building up, was constrained by building technology. So in the early 20th century, two things happened to kind of cracked that open. The first is, we think of the car as the thing that cracked open cities and allowed them to sprawl. But it was actually things like trolley cars or streetcars that originally started building the subdivisions and opening up suburbs that previously were the exclusive domain of people rich enough to maybe have a horse and carriage to middle and working class residents. And then of course, also building technology allows for us to build up so steel framing, elevators. And of course, during this period, there's also huge migration changes happening. So of course, lots of waves of people coming from from Southern and Eastern Europe, but then also internal migrations. So for example, the great migration of African Americans out of the south to the Midwest and Northeast and then increasingly the West coast. So cities are in a state of extreme flux. And I think that's certainly part of the story for why we get zoning. But I think there are

two things here, that to my mind really, sort of are key part of the story. The first is that you have incumbent land owners realizing that new construction is going to sort of drive down the value of their asset. So, for example, if I own office space, or if I own a home, it's to some extent in my benefit, if I can stop more offices or more homes from being built. That's gonna increase the value of my asset. That's part of what's happening in lower Manhattan in 1916, where they're trying to place really tight restrictions on new development. And then the other example that I highlight the other one of the earlier earlier zoning codes is from Berkeley, where you read the Berkeley promotional materials, and it'll say something like, "Berkeley needs to adopt zoning, because we want to keep industry out of residential neighborhoods." And when you read that with modernized, and you think, okay, that makes a lot of sense, can't argue with that. And then you read the next paragraph. And it's like, well, what are those industrial uses that they're concerned about? They're concerned about Chinese laundries. And they're concerned about like dancehalls that they say, are bringing African Americans into the neighborhood. So it's actually this like, social segregation project that's sort of being smuggled in, under the guise of let's just get the smartest people in the room, a very technocratic kind of modernist notion, let's get the smartest people in the room and come up with a plan for what's going to happen on every single lot for the next 50 years. And out of that, you get the birth of modern zoning. Just to tie it into I think some of the legal things that are happening in this context. In 1917, Buchanan v. Warley makes it clear that cities cannot engage in explicit racial segregation. So of course, this involved Louisville, Kentucky, not exactly the proudest moment for my home state, adopting an ordinance saying African Americans cannot move on to predominantly white blocks. But they tried to say it's race neutral, because also whites can't move on to predominantly African American blocks. Of course, in a rare moment of clarity from this period, on the issue of race, the Supreme Court said, "no, we're just absolutely not going to, like entertain this."

A Anthony Sanders 17:14

case. We're in the case where Justice Oliver Wendell Holmes, by the way, drafted a dissent, but ended up for unknown reasons not dissenting, but obviously that there so

N Nolan Gray 17:26

I did no t know that that's really the same thing.

A Anthony Sanders 17:28

Yeah, he was very much a social Darwinist, including the majority doing whatever it wanted to do. But luckily, it went the other way. But then that caused this doing segregation by other means, which dovetails back with the rise of zoning at the time.

N Nolan Gray 17:48

Yeah. So that's exactly right. What cities are doing in the aftermath of Buchanan is they're saying, "Well, what are some other ways that we can try to have the government and trench segregation and enforce it, in many cases where it hadn't previously existed?" This is a really

fascinating history that you get some in the color of law, by Richard Rothstein, which inspired some portions of this book, is neighborhoods were integrating, to a certain extent, in this period. And there's a reason why these laws were adopted. But so what cities do is they pivot and they say, "Okay, well, if we zoned cities on the basis of class segregation, then that will maybe survive legal scrutiny." So they say, "Oh, we're not saying anything about the race of the person who can live in this neighborhood. But we're not gonna allow any construction in this neighborhood. That's not a single family home on a half acre lot." Well, if you can set parameters like that, that don't have any basis and health and safety and are purely saying you have to consume a lot of housing, you can indirectly regulate the type of person that can live in that neighborhood, on the basis of class. And then, of course, in the US context, that tracks pretty closely onto race. And so zoning spreads like wildfire, in this context, and then of course, is is held as constitutional in 1926.

A Anthony Sanders 19:11

Right, so that's the big plate case. Amber Realty versus City, a Euclid that that says that this is okay. Under the US Constitution. I want to bring that forward in a moment, but first, about the period before zoning, Rose, you said that it can be annoying, and that there were some squabbles as there has been for all of urban human history when you have one use next to another that maybe don't get along too well. Was nuisance law, pretty good at dealing with this, at least in the USA, the United States at that time, or could it have been better and maybe zoning wasn't the right solution, but was there were other ways we could tackle that that really weren't addressed, say, by our common law system at that time.

N Nolan Gray 20:04

Yeah, I would kick it over, I think to legal scholars on this issue. It strikes me that approaching this through the mechanism of nuisance is better, because it actually targets the specific thing that people are concerned about. And it deals with cases as they arise. And it gives you frameworks for assessing certain c onflicts. So in zoning, what we do is we say, "Well, there's the off chance that like if we allow commercial in this neighborhood, yeah, might be a corner deli, and we all like corner delis. But it could also be a bar, and then also that bar could be really noisy. So let's just solve the problem of noise through this like Rube Goldbergian system of use segregation." It's something that I think that this is kind of what I'm trying to get to. And I think what I think post zoning land use regulation looks like is to the extent that we can actually regulate the things that people care about regulate the actual externalities that have a long pedigree and the common law, things that we recognize, like, hey, there's some things neighbors can and can't do. And the case law will evolve as new cases emerge, and we'll figure it out together, I think it's just a generally a better way of doing it, as opposed to this model of, Okay, we're just going to put cities in a straitjacket. And it's going to be extremely hard to change that straitjacket. And we're going to try to foresee every possible conflict and how to mediate. And we're just going to mediate that by by saying it's almost like, right, you have two kids fighting. And the easiest solution to that is like, Okay, you're gonna sit over there, and you're gonna sit over there. And like, that solves it in the near term. But the fights just gonna happen again.

A Anthony Sanders 20:11

That lets the parents finish cooking dinner, but not much beyond that.

N Nolan Gray 21:39

Right, and then of course, the fight is going to emerge, as opposed to if you're like, "Okay, who did what you need to apologize to her or vice versa." I think that's just a generally better way to deal with these conflicts. Because this is another thing too, that I think we don't really think about enough. And Lanius regulation is really what we're concerned about is like edge cases, or marginal cases. So you know, as I kind of detail in the book, landmark, it's like naturally segregate the most incompatible uses to a large measure. Industry and, and heavily trafficked commercial, and quiet residential, these uses have different locational needs. So they generally self segregate. And the densities generally follow certain rules based on land prices. So it's generally pretty, like you gave the example of a high rise, a 20 story tower next to your home, you know, that happens for I mean, that happened in a really kind of hilarious case in Houston. But for the most part, you kind of see density when it's coming, you know that you're in the path of future growth. And it's going to be broadly speaking, incremental. So we kind of ignore the fact that land markets solved a lot of this private agreements among neighbors solved a lot of this nuisance. And what we're really concerned about with is kind of these edge cases. And I would contend that we've dealt with them in the worst possible way.

A Anthony Sanders 23:01

So we get zoning ruled constitutional. We move forward, I think the Depression and World War two kind of set things back a little bit from the regulator's point of view, perhaps, but then zoning really takes off in 50s 60s and 70s. When I've looked at zoning laws, and and a lot of zoning cases, and in legal work it often, especially when it's some kind of suburb, not an inner ring suburb, it'll be that the the town adopts some zoning ordinance in 1962. And what we have now is pretty close to what was in 1962 plus a lot of complexity. When is it that we get to the point where, "Okay, I get having uses over here uses over there maybe it's a clunky system, but it kind of makes some sense?" When does it get to this? Just, "WTF, what-is-this-code-even-doing-point?"

N Nolan Gray 24:03

Yeah, this is kind of a funny element of the story is that early on zoning is dramatically more liberal than anything we would recognize today. So like, so Berkeley case, which I talked about in the book, Berkeley does look quite a lot like a modern zoning code. But, the New York city zoning code is generally pretty flexible. But what happens over time is you start getting, just as with I think any sort of policy, a whole bunch of different rules added on to sort of put out little temporary fires, or to just tighten the rules in general. So you start getting things like parking mandates, which say, we're not going to allow any new construction unless there's two parking spaces per residential unit, or we're not going to allow a storefront unless there's a huge parking lot. Of course, you get really strict single family zoning and single family zoning, essentially just a better way to maybe put it it's just apartment prohibition zones, right. It's illegal to build apartments in And something like 90% of most US metro areas. So, of course, these rules get much stricter in the post war era, I talked about some of the sort of compelling theories for why that happened. There's this framework developed by urban economists

beneficial the homebuilder hypothesis, essentially, that we did a few things. So one, we, we structured tax policy to heavily encourage Americans to treat their home as an investment, and to basically park as much money as they could into this investment. So this is stuff like mortgage interest deduction, capital gains, exemptions, we made this like a very favorable investment. And then what, you know, people started behaving as if their home is their investment, and started pushing for policies that guarantee the continued growth and appreciation of that investment. Or I think another thing that is part of the story is the inflation in the 70s. So people are looking for safe places to park their wealth, and Land and Housing is one of those places. And so out of this, combined with other things that are happening in this time, you have kind of the birth of the modern environmental movement. Certainly there were great things that came out of that and unambiguous successes that came out of that. But there were also a lot of misguided rules that just made it very, very, very hard to build, and are radically hard to build in some of the places that would be best for the environment. So, we start getting things like environmental review layered on top of zoning, or we start getting stricter. For example, in 1961, New York City overhauls its zoning code, and basically dramatically reduces the actual capacity of New York City. And Los Angeles, of course, does something similar a few decades later. And part of its on this, like anti growth, or degrowth idea of like, we were going to save the earth by just allowing, not allowing housing to be built in cities. And then of course, what ends up happening is all that growth just goes to places out far out in the suburbs, or in places that where it's probably not the best place for the environment, like the Southwest or the southeast, we don't really solve the problem, and we just shift the nature of the problem.

A Anthony Sanders 27:07

Let's get into that the housing. So I know, it's not entirely a zoning question. But people today, of course, are often deathly afraid of changing the zoning around where they live, because they have so much money in their in their property. This is especially true 10 years ago, when people a lot of people were underwater, but it's really true at anytime. Not only the the policies that you talked about, but zoning itself before those kind of made you more worried about your your your housing value, I'm sure people were still not not thrilled if their housing value went went down. But do you have a sense of what that what that world was like, were people more into refurbishing their houses much because they know that it could drop in the next couple of years. And so you don't put all your eggs in your back in one basket, was it? Were they not as worried about? Like I said before, people moving next door? And is it that our mindset today and we'll get to this a little bit about reform, our mindset today is so hard, because we live in a different mindset, or was it, people were worried back then, it was a free country, and they knew that?

N Nolan Gray 28:36

That's a really interesting question. Two things come to my mind... So we'll talk about Houston, I assume at some point, but when I was down in Houston, the SparkNotes are, Houston is the only major American city that doesn't have zoning. And what do you know, it's the most affordable and diverse in the country. And part of the reason that he was doesn't have zoning is because it held three referenda on zoning, most US cities did not hold a referendum on zoning, it was just kind of quietly adopted. Houston held three referendum on zoning and it lost every single time. And whenever I'm down in Houston, I love to just ask people "Well, why does

Houston not have zoning?" And I want some ecological story or some like economic story or one of these just so stories and people always say to me, "Ah, I don't know people in Houston, just think you should be allowed to do what you want with your property." It's this very Texan-like. "I think, he's just like mind your own business." And if you don't like what your neighbor is doing put up hedges. To a certain extent, I think culture is is is a big part of it. And there is this cultural project happening in the in the Progressive Era of this notion of a healthy and successful family looks like that nucular family that's living in a single family home on a lot surrounded by a lawn that's like their little Potemkin, aristocratic estate. That's certain. And not only is that a cultural project, of course, but that's a Federal Housing Finance project, we basically build our entire planning and housing finance system around this idea of you're going to have a single family home on a large lot, and it's going to be your domain. I cite some of the work by planning scholar, Sonia Hirt in my book, and I think she's got a great book.

A Anthony Sanders 30:25

"Zoned in the USA"? Yeah, perfect book.

N Nolan Gray 30:29

Yeah, highly recommended. Definitely a good book. After you've purchased a few copies of arbitrary lines and have read that definitely a great book to look into. But so there's this cultural project. The other thing that your question made me think of was Japan. It's funny, because they call it US housing markets. Like the idea is so foreign to us that it's almost funny to call a house used. Like in the way you would say, a car. "I'm gonna go buy a used laptop."

A Anthony Sanders 31:03

Like going to Goodwill and get some old clothes.

N Nolan Gray 31:08

Imagine if like a friend's like, "Yeah, we just had another kid, were upgrading our house." And you're like, "Well, are you in the market for a new or a used house?" Because that's like one of the first questions you would ask if you're friends asking about like cars. There is this culture of like, yeah, you you rebuild a home when you move to a new place. And there's not this idea of, okay, this home is going to be this thing that I build and exist forever, and I'm going to make a whole bunch of money off of it. It's much more of a consumption good than an investment.

A Anthony Sanders 31:41

Interesting. Yeah. And I hadn't heard that before. I want to talk more about Houston, and reform. Let's talk a bit more about the rest of the world. So I learned a lot from that book by Sonia Hirt that, that we mentioned. And something that I kind of knew but didn't really think about before was that other than the USA, there are very few places that have the kind of zoning that we have. I think Canada and Australia have it a bit where you have a huge tracts of

property, say 90% of a city, where if you can have any housing at all, you can only have single family homes, but for example. But other countries also aren't terrific on property rights. The UK is is one example, I think you briefly mentioned in the book, where building something there requires specific planning permission, so they don't exactly have zoning, but it's still not that great. Japan, you said has a very good system. Are there other examples of where countries have kind of muddled along without zoning, but also in a way that respects people's property rights?

N Nolan Gray 32:59

Yeah, so most developed countries do something that kind of sort of looks vaguely like zoning. But as I think you were kind of suggesting there, US zoning is unique, I would say in two regards. The first is the extent to which the entire system is built around the single family detached home. So as I mentioned, in most US metro areas, something like 95% of residential, residential zoned areas, the only thing you can build as a detached single family home. And that wasn't such a problem when we had a lot of really cheap land. And you could just always build more subdivisions, and you'd be fine. The trouble is, of course, in a place like LA, or a place like New York City, any of that land that's within a reasonable commute of job centers has been built out. And now we're in a very difficult stage where a lot of new housing production has to be infill, you have to be able to take that single family home and maybe turn it into two or three townhouses. You have to be able to take that strip mall and turn it into maybe a five over one with shops on the ground floor and apartments over top. US zoning makes that extremely hard to do. And of course, as you said, the many Americas, Canada and Australia, sorry, guys. They've kind of similarly and what do you know, have extremely similar problems? But I think there's a lot of low hanging fruit here in terms of learning from abroad. So in Japan the system works very differently. There's a large role played by the national government. So the national government sets out the possible zoning districts that can be mapped, and then local governments map them. So that's one key difference here in the US, every single local government basically writes their own zoning code. And so you can't really know what you're allowed to build in a place like Chicago because you understand the Nashville zoning ordinance. These are completely different things, which is a huge constraint on development, a huge constraint on global or on national real estate markets. Because you're gonna have to hire a local attorney, it's good for good for land use attorneys. It's good for planners, you're gonna have to hire a local land use attorney and a local planner to tell you what you can and can't do. That's not the case in Japan, to a significant degree. Also too in Japan, even their most restrictive zoning district, yes, it may be there's a height limit of like three stories, but you can have small multifamily buildings, you can have single family homes, if you're a doctor you can see patients out of your home, as long as you're not causing a huge amount of traffic. You can do all these things that like traditionally happened in low rise residential neighborhoods. So that's an interesting model. I don't think that in the US, the federal government will or should play a large role in defining zoning districts like that, but state governments could do that. They could say to local governments, hey, here's the menu of zoning districts that you can map in a municipality in Kentucky. And you can map those based on local conditions. But, we need to all kind of color in the lines here. So we have a coherent, regulatory framework. Another interesting example is, as you were saying, in the case of the UK, it's like the joke about happy and unhappy families. Like every happy family is happy in the same way, every unhappy family is unhappy in a different way, every bad zoning system is bad in a different way. And in the UK they don't really bother so much with the zoning district framework, but everything is highly discretionary. Everything is sort of ad hoc, and somewhat arbitrary. But, if you want to look west, or East, depending on whether you want to be ideological or geographic about it. In a

case like France, if you look at a French zoning map, it would be almost unrecognizable to to someone who's trained in US zoning, there going to be a very small handful of zoning districts, they're going to have a lot of flexibility, they're going to be largely agnostic about how much floor area or the uses in any given property. And they're going to have relatively strict rules about what the building actually has to look like. So that's a different set of priorities. And it ends up being broadly more liberal. It's stricter on some margins, but it's probably more liberal. And I would contend that you can go to the average french city, and it's not going to be the end of the world. It's not quite Houston, but they're pretty nice cities.

A Anthony Sanders 37:10

Well, the wine has pretty good prices, too. So we've talked about what zoning is. You talk a lot in your book about what could be in the future, how one house zoning could be better. But really, you say, "Look, we just get rid of it." Easier said than done. But we kind of have to two goals there. The easier one and the harder one. Of course, anything in reform, it seems is hard. So what are some steps that cities can take today and feel free to give some examples about what's going on with, say in the YIMBY movement that I know a lot of our listeners are familiar with, that can make things better, even if we don't totally become Houston?

N Nolan Gray 38:01

Yeah, no. So I think in the near term reform makes a lot of sense. And we can get, we can get a lot of the benefits of non zoning, just by getting 70% of the way there. So, you know, all across the country, cities, states, and now the federal government are having big picture conversations about this what reforms need to happen. I would say, let's start like different level of government here, like local governments, theoretically are in the driver's seat on zoning, they've been delegated a huge amount of power by state governments. Best case scenario, I think a lot of local governments can say, "Hey, let's start cracking open our zoning codes and figuring out what kind of community do we actually want to be, we want our city to remain an affordable and equitable and accessible place, and what rules stand in the way of that?" So for example, a policy like single family zoning, which prohibits any multifamily construction, or any townhouse construction and huge portions of our cities. A lot of cities are kind of reevaluating their policy, Minneapolis, of course, abolished it, and they're sort of tinkering with some of the rules to make it work. So they've just sort of gotten rid of the policy, or a policy like minimum parking requirements, where the government forces developers to build parking spaces that they might not otherwise have built. A lot of cities are just wholesale scrapping these policies, or at the very least, reducing the burden or exempting maybe areas where it's most obvious that you don't need a whole bunch of off street parking, like in a walkable neighborhood or near transit. And we're used to thinking of these things as like coastal issues. Fayetteville Arkansas is a great example of this, of a city that eliminated parking requirements for new commercial development. And what it did was it allowed for some of these historical pre zoning properties, maybe like Main Street Style developments that never could have been occupied because the parking mandate would have required that the occupant buy the properties on either side of that storefront and demolish them and turn them in the parking lots. We're actively mandating that people destroy main streets and otherwise they just sit vacant. Or another policy here that also Arkansas Fayetteville has done quite well on in a whole bunch of cities, Ann Arbor. My hometown of Lexington recently passed an ordinance: accessory dwelling units. So saying to people that you are allowed to, if you want,

take your unused attic or your unused garage or your unused spare bedroom, and you can turn that into an extra apartment and you can rent that out. Historically, that was how maybe retirees were able to stay in their home afford to stay in their home. That was how young families were able to afford to buy a home is they take an extra unit and they rent it out. That's, of course illegal to do in most US cities today. And that's some of the low hanging local reform. I will say that the politics at the local level are very difficult. Because at the local level, a lot of zoning politics are going to be shaped by the extremely atypical people who will show up at like a 10am public hearing on a Tuesday. I'd highlight this research in the book, it won't surprise you to learn that these people don't at all represent the community, but they play a huge role in shaping the policy that we get. And these people generally tend to be very opposed to new development. So I think it's tough to make a lot of these reforms at the local level. And that's why I think states have a role to play. I'm a little bit more comfortable going with the full legalese for the for the IJ audience, but local governments are creatures of the state. Their zoning powers are delegated to them by state governments and state governments can and should say, "Okay, hey, we're gonna put guardrails on how you use this power. We're not gonna allow you to use this power in a way that maybe totally strips people of their rights to do what they like what their property. We're not going to allow you to use his power in a way that's blatantly exclusionary or segregationist." So here in California, we're having these conversations, where the state government saying, "Hey, like, we're just gonna set statewide rules for accessory dwelling units. If a homeowner wants to build an ADU, and it looks like this, you gotta give them their permits." And so we've seen a building boom of that type of development. Or we're experimenting with what's called the regional housing needs assessment program, where the state government says, "Hey, based on demographic growth, and economic growth, your housing, your local government should be at least allowing X number of units." Not forcing anyone to build anything, not saying that local governments have to go out and build it. But if a developer comes to you and says, "Hey, you know, I want to build this thing." You need to give some deference. So that's some of the conversations were happening now. The last piece of it, which I think is still sort of up in the air remains to be seen if it's going to be fully realized is federal involvement. I generally think that the federal government probably doesn't have a huge role to play in issues like land use planning. But so long as the federal government's giving out a lot of money for things like community development block grants, or surface transportation grants, I think it's reasonable for the federal government to say, "We want to see some we want to see some zoning reform, we want to see some progress on these regulations that are standing in the way of, of housing affordability and equity." Or if the front agreements going to give out money for a new transit station, I think it's perfectly reasonable for them to say, "Hey, like maybe the neighborhood next to the new transit stops, should not be zoned to not allow apartments." These are reasonable things that the federal government can do on the margins to sort of nudge local governments to reform policies that in many cases, the federal government aggressively pushed.

A Anthony Sanders 43:15

And one small example, that is something we've pushed for years at IJ, since the Kelo case in 2005. And that's that any federal money going to a local government, for redevelopment can't be used for economic or for eminent domain for economic development, Private to private transfers. This sounds like it's in the same vein, if a measure like that could be adopted. I know you're not a lawyer, but I'd be curious of your thoughts on how the courts particularly maybe the state courts, could be involved in some of these issues. I don't think a state court is going to come in and find zoning unconstitutional tomorrow, though, if they do, it's going to be an IJ

case, I'm sure. But we're pushing a number of cases right now on on really aggressive rules on the margins, such as minimum lot sizes, or minimum house sizes that say you have to have a house way bigger than then a small family needs in a certain community. Where do you see the courts fitting into that effort?

N Nolan Gray 44:27

Yeah, well, I'm a little bit out of my element here, but I've never been afraid of sounding stupid. So let's do this. I would say back to basics. I think Euclid v. Ambler is a highly dubious decision. This is of course, the case where Justice Sutherland somewhat infamously referred to apartments as mere parasites. I think the connection between what the village of Euclid and what basically every American city now does, the connection between that and traditional police powers is extremely tangential -- very dubious. And I would add, somebody was tweeting about this the other day before Euclid was decided, state courts had a ton of disagreement about this. I think it was something like three, State State Supreme Court's had basically said no single family zoning is obviously not an appropriate use of the police power. And we're just going to strike it down. Even in the Euclid case, it was it was Justice Westenhaver in an earlier decision, who basically called out exactly what... He was like, "You're trying to put cities in a straitjacket" I use that phrase earlier. It's in his decision. It's a very good decision. He's calling out essentially that when you're trying to put cities in a straitjacket, this is obviously just an attempt to impose segregation on cities. And government has no basis engaging in this type of regulation. So back to basics, I think the whole legal basis for zoning is very dubious. And it's an extremely unsympathetic case. But you know, I think there are things that we can do on the margins. I think the most extreme applications, like what you were talking about, with minimum home sizes or minimum lot sizes, there is no health safety, welfare basis for these rules. It is purely saying if you are not wealthy enough, you're not allowed to live in this area. Actually, I think the case with parking mandates is interesting, because to the extent that like, a whole bunch of traffic, can be interpreted as a nuisance, we're actually like, mandating that the developers engage in a sort of behavior that has negative externality, we're forcing you to build parking that you might not otherwise have built, and then that's going to generate a bunch of traffic that actually doesn't post costs on neighbors.

A Anthony Sanders 46:49

Let me ask you a question about the traffic because I think it gets to a common objection that I hear about getting rid of a lot of these zoning mandates. And that's that the city and say, planning for or mandating parking spots, or saying you can only have so many units on on a parcel, or you can only have single family homes, what they're really doing is they're trying to not have overcrowding in that area. Or if you do bring people to the area, you need to have a spot for them because otherwise there's overcrowding and parking spots on the street or whatever. And that goes to things like not having to build too many schools, because we're gonna have too many people here or not having to build more roads or expand the sewers or what have you. And so it's all just planning for growth. And that's why if we didn't have zoning, and then you had, you know, duplexes, triplexes, whatever, in any lot, you would have too many people. And then you would have to build too many things. What is the best response to that objection that I think is really lying low in a lot of people's heads who haven't thought about this too deeply?

N Nolan Gray 48:03

Yeah, no, to give you an example, I would have cases in New York City, where I would be the project lead on an application to maybe build apartments. And people would say, "How can you be allowing this to be built? I can barely find a parking space on my street, and you're going to bring more people into my neighborhood?" Or they would say, "How can you be allowing this thing to be built? My commuter bus into Manhattan is already completely full. Standing room only, and sometimes the bus passes me up." Yeah, I actually think these are really, really compelling concerns that people have with growth, which is where I think, you know, the more positive wing of my project comes in. I think, actually, planners do need to develop ways of number one, regulating actual impacts. So, like in the book, I give the example of noise. Which, noise is a huge urban quality of life issue. And maybe historically, the best way we could have solved it was just with the strict segregation. I'm a little skeptical. But now we can be really sophisticated about measuring it and engaging in enforcement, or I think what you're getting on here is the public realm of public services. So you're right, new growth does require expansions or improved efficiency with public services. There's two ways to solve this problem. You either can just stop all growth in a particular area to accommodate whatever the existing capacity or public service capacity is, or you can increase public service capacity and better manage the public realm to accommodate that growth. We've tried basically a century of doing the first thing, and it hasn't really worked that well. And it's also going to be a huge problem as we have to engage in a lot more infill development. I would contend what planning needs to be much more focused on and this is where I'm not being, particularly doctrinairily libertarian. But I think it's actually very important governments sit down and say, "Okay, What's the population growth going to be? What's the economic growth going to be? What kind of public services based on the expected demographic profile, what investments do we need to be making public infrastructure and public services today to accommodate that growth." Rather than the way we do it today, which is we say, "Okay, this is the public service capacity we've got, and we're just not gonna allow that apartment because then we will have to maybe expand the school." Now, I will say, I think a really important thing here is part of what's gone so wrong with planning in the United States is planner are planning civil service spend so much time micromanaging development on private lots. We have our planners counting up the parking spaces for strip malls, we have our planners, desperately trying to keep for plexes out of cul de sacs. And then meanwhile, we have like extremely negligent maintenance of like the public realm, most US cities don't have the streets plan. Many US suburbs don't have a plan for for building suburbs in an incremental and sort of accessible way. This sort of basic nuts and bolts of what you would think planning should be doing, we don't do nearly as much of it in part because so much of our planning capacity is spent micromanaging development in the private realm, just to bring it back. I mean, and make this concrete the parking thing. So when mass car ownership first starts to become the norm, we have this problem of like, all these people own cars, and they don't have anywhere to put them. So they parked them on the street, and the street gets completely full, and people are cruising for parking, which causes a lot of traffic. There are two ways to solve this problem. The first is you actually manage the on street parking, and you say, okay, we're going to try to assess maybe market prices, if you want to park on the street we're going to rate, we're going to increase or lower the price of parking to where we have basically 80% occupancy. So you know, you're always going to find a spot, it might be more expensive, but sometimes these days, it might be cheaper. And you can do that as residential permits. For people that live locally, you can bet you can solve the on street parking problem with efficient management. But instead, what we do is we say, well, we're just going to solve this problem by forcing developers to build insane amounts of parking. So like, okay, yeah, like we could just manage the on street parking correctly. But we can just make this developer build a giant parking garage, and she doesn't really have any choice. So she has to do it. And then all those

departments have to be more expensive, but whatever, because, you know, people will pay it. You know, I would contend that like better public management of the better management of the public realm, and better planning for public services are the way to solve the challenges of growth, rather than just saying, Well, we're just not gonna grow at all.

A Anthony Sanders 52:28

It's funny how, even for a lot of people, that's the immediate answer. M y dad who grew up in the UK told me once that in London, I think the early 60s, they they finally put in parking meters. And there were huge protests about that, because, you know, they felt it was your right to park on the street as long as you want without any cost. And I think that follows us to today's suburbs.

N Nolan Gray 52:58

Well, it's just one more thing on the parking thing. I mean, it's funny, because you'll have someone who will like spend 30 minutes cruising the block looking for parking, and that's like, "Oh, there's actually a parking space, where you're trying to go and it's like, maybe 250 for an hour." And then somebody will spend 30 minutes cruising for free parking. It's like, unless you value your time at like, $5 an hour, you should probably just pay for the free parking. Like this is actually improving your quality of life. But it's like the the old Seinfeld quote. Where he makes a joke: parking is like sex. Yes, I could go pay for it. But why would I when I if I apply myself, I might be able to get it for free. People have this mentality about parking of like, "Oh, I will never pay for.... I'm just a schmuck if I pay for it, even if I spent hours searching for it." Rather than spend like $10.

A Anthony Sanders 53:45

Yeah, I think that might just be a hang up, some guys have to but... in any case let's close maybe on your end of your book, where you get a little bit more radical and say, "We're just going to get rid of zoning." Now, how we get rid of zoning is a very complicated and political economy question that we won't solve today. But assuming that could be something that could be done, I'd love for you to say like what would be left? It doesn't sound like we would just have a total anarcho capitalist society if zoning disappeared. So what would cities do? What laws would we still have that would affect us? And you know, what would planners like you used to be at City Hall do and would it really be that scary?

N Nolan Gray 54:39

Yeah. So, in terms of like, operationalizing this, I think the first thing that we can be doing is stopping the spread of zoning. So I think if a municipality wants to adopt a new zoning ordinance, they should have to write that ordinance, people should be able to look at what's in that ordinance. There should be a public referendum and an even, ideally, a presidential election year, and locals can vote on it. I mean, this is an incredible power that municipalities have. And in most states, so far as I'm aware in all states, local governments capacities, things without actually putting it to a vote. I think zoning in contexts like, particularly in the Sunbelt,

and the Mountain West and the South, new suburbs are incorporating and being formed, and they're adopting new zoning codes that essentially spread a lot of the problems that we've talked about today. I think state governments can tomorrow just say, "Hey, if a local government wants to impose these rules, you have to put it to a referendum." And as we've seen in the context of Houston, and some of the other cities in southeast Texas, when you do that, these policies actually just aren't that popular, and they don't clear muster. It's not to say that a municipality would never adopt zoning, I can certainly imagine that some would. But that would at least stop the spread of these policies that are deeply dysfunctional. Now what what happens when we when we enter the Promised Land and we abolish zoning? I think you're exactly right, that people have this notion of like, it's going to be that free for all of the oil refineries in the cul de sacs. But, first, I say, as I was kind of detailing earlier, there's a lot of natural landing segregation that happens. City should supplement that with, I think, stronger rules that regulate actual nuisances, and, well established negative externalities, things like noise, smoke, traffic-generation,light, we all know this stuff. And it's the kind of stuff that people you know, literally, in the case of light, are kept up at night by. Cities need to be doing a better job of actually planning the public realm. So this is this is where I think Lokeren has a very important role to play of planning out the streets planning out those parks having a plan for the growth of the city, having a sense for how the population is going to change over time, and what that means for school funding or what that means for public service provision. But then, on top of all this, and this is what I think is really interesting about the Houston case, is people engaged in quite a lot of self organization to fill in the gaps. So, I think part of why we got zoning is that a minority of certain urban context really wants actually strict rules. They want to live on that block. That's all single family homes, detached homes on large lots. I'm not the type of urbanist that does is that. My thinking, though, is what's the proper way for a person like that, to have those preferences satisfied? I don't think it's appropriate for the government to come in and say, "Hey, we're going to subsidize and sort of assume the enforcement of your land use preferences. But if you want to get all your neighbors together, and voluntarily opt into something like this, that's fine, we'll respect it." And that's what's made Houston work. And I think that's why Houston actually never adopted zoning was because they had most of the people who wanted something like zoning already went out and got it on their own and are paying at least part of the cost through things like deed restrictions. Now, again, I'm not trying to present like deed restrictions as this perfect, great thing. Of course, historically, they were used for racial exclusion. Shelley v. Kraemer, of course, rendered that no longer an issue, but sure some people there might be certain class animosities that are baked into these things. But the question is, how do you deal with these preferences in a way that does the least damage? And I think, yielding some room to deed restrictions in the case of Houston has helped to keep the broader regulatory framework in Houston, extremely liberal. And I mean, that in the traditional sense of very few and very light rules. And so on a typical lot, yeah, there are these little pockets, where people have deed restrictions. And it looks like a typical r1 zone. And it's, it's large, single family homes on large lots. And if you tried to build anything else, the neighbors are going to swarm you with litigation. But in the vast majority of the city of Houston, you can kind of do what you like, with the property. You can take that single family home and turn it into two or three townhouses, you can take that that empty strip mall, which you now see all across the country, with the rise of E commerce, you can take that empty strip mall and turn it into an apartment building. And it's not this big ordeal like it is in other zone cities. So it's a mix of I think prudent public regulation, a sort of respect for the some of the self organizing aspects that are inherent into cities. And then also a recognition that people actually have the capacity to solve these problems on their own. And that we don't need to do this whole game that we've been doing for the past 100 years, where we put cities in a straitjacket, and don't let them change and don't let them evolve to meet changing needs. I mean, I think that's what's gone so wrong, is that as you say, so many of these ordinances

were written 50-60 years ago. And cities are literally not able to change and adapt to changing needs. And that's why you get people sleeping in tents in a place like Los Angeles. That's why you get working class families that are forced to move out of New York because the city couldn't grow and take all those people on. And so, I think there's a there's a critical element of this project where I'm saying, zoning is broken and hasn't worked. But, I'm trying to do something, I think, constructive here. I'm trying to say, "We can do better. We can build a system of blindness regulation that gets us what we want, but without all of these spillover problems."

A Anthony Sanders 1:00:04

Wonderfully said, and if we do get to that place and people are still unhappy, there's always next door where they can go and air their grievances. The book again is "Arbitrary Lines: how zoning broke the American city and how to fix it" by Nolan gray. Nolan, it has been fabulous having you on and we look forward to what other work you got with California YIMBY and and your own writing. And thanks so much.

N Nolan Gray 1:00:36

Thank you, Anthony. It's been a pleasure.

A Anthony Sanders 1:00:38

And to everyone else, we will be back with our regular format in a future episode. And for now, I want everyone to get engaged.