



Episode 932: Zoning: Do We Need It?

Guest: Ben O'Neill

WOODS: Ben, the other day I was doing an episode on housing and I just happened stumble across your article on zoning, which I'd never seen before, which is very thorough. And it occurred to me that in over 900 episodes, I've never talked about zoning, so I thought let's let Ben do the heavy lifting given that he's written this article on it. Of course I'm linking to it at TomWoods.com/932 if people would like to read it for themselves, but let's start off with the basic question about what is zoning after all. First of all, what purposes is zoning supposed to serve? Yeah, let's start with that. What's it all about?

O'NEILL: Yeah, sure. So look, this is something that people probably come across rarely. It's sometimes considered a fairly dry topic. So zoning generally, if you set aside the issue of who does it, zoning is effectively a kind of restriction that is placed on the allowable uses of a piece of land and places such restrictions as, for example, restricting building on that land to a certain kind of building, restricting the uses of buildings built on that land to a certain kind of purpose – for example, a zoning restriction might restrict land to being developed for residential use, for example, and prohibit its use for industrial or commercial purposes, for example. Or alternatively, a zoning restriction might limit the height of a building, for example, to a single story or a particular height in meters or feet or impose some other kind of restriction like that.

WOODS: Now, when you describe it that way, I think a lot of ordinary people see no problem with that, because they'll say, I don't want my neighborhood to have this or that feature in it, or, I don't want somebody down the street to have some crazy color house, and whatever, right? So they think that, Therefore, what else are you going to do other than zoning?

O'NEILL: Absolutely. Look, so I absolutely agree. That's perfectly sensible in many cases. There's often very good reasons why it's useful to encumber property titles with restrictions in favor of other people to prevent certain kinds of uses that might have negative effects to others. So I don't disagree with the view that restrictions on property use can be sensible in certain cases. But one issue that arises, I suppose, that's of interest to libertarians and political philosophers is who ought to be making those decisions, where those decision-making powers ought to lie, and so on.

WOODS: Yeah, so let's get into that. It turns out that in many, many, many cases where you have some perceived problem and you pull out a government textbook, the

textbook will explain, without even thinking about alternatives, how a coercive solution might work, because it's just taken for granted. We have some collective desire and we can't carry it out on our own; they just assume and then they explain how our elected officials could do it.

O'NEILL: That's right. "There ought to be a law," as they say.

WOODS: Yeah, exactly. I mean, this is true in so many cases where it turns out that, no, you actually could – For example, public goods, most common example. There's no way we could arrange for the provision of public goods, so therefore we need government provision of these goods. But there are many ways, it turns out, to provide public goods.

And one of these ways, by the way, would just be you bundle some of these goods into the benefits that you get from belonging to, say, a neighborhood association. In the same way that when I stay at a hotel, I don't separately pay for the elevator, I don't separately pay – maybe I separately pay for the laundry machines, let's say, but by and large, I don't separately pay for the comfortable lobby. These things are just bundled into what I pay to stay in the hotel. So in other words, you could bundle them into a neighborhood association that, for example, we'll have sewer services and we'll have a park and things like that.

But so in the case of zoning, we can also think in the same way, that we could arrange for these considerations to be taken care of together. But how could that be done? It's hard for people to imagine that. It's easy to imagine how the government could do it.

O'NEILL: Sure. So obviously the way the government does it is by creating legislation or regulations which simply stipulate restrictions on certain classes of property in certain areas. The alternative within the sphere of private property rights is to negotiate and create what are called restrictive covenants on property. And restrictive covenant is a term used in property law to refer to a case where a property owner agrees with some other person and makes a contract to restrict their own use of their property in some way, and that becomes not just a contractual right, but also a right actually attaching to the property so that the holder of the restrictive covenant is considered to have a proprietary interest in that property to the small extent that they're allowed to restrict certain things.

WOODS: Can you give us an example of this?

O'NEILL: Absolutely. So suppose for example that you had a group of residents in, for example, an apartment complex, and they all decided that it would be beneficial to have a rule against pets, say, or maybe just big pets like dogs and cats. Maybe they will let you have fish or something. In that kind of circumstance, if the relevant property owners agreed, obviously they could simply just not have pets, but of course then there's no guarantee that if someone sells their apartment to a new person or has a tenant over, that that person will necessarily abide by that agreement.

So what they could do to create an enforceable entitlement is to each exchange restrictive covenants on the property that says that each person that's a party to this effectively has a right to prevent others from using their property in a way that would violate that agreement. And that would then become a partial proprietary interest that each person has in the property of each other person, and that proprietary interest would actually attach to the property title. So for example, if I'm one of the apartment owners, I would have a very small, partial proprietary interest in everyone else's apartment insofar as I have this restrictive covenant, and they would have a corresponding proprietary interest in my apartment insofar as they would have a corresponding restrictive covenant.

WOODS: All right, so in other words, what you're saying is that a private arrangement like this can mimic without coercion the kind of solution that a government might impose, right?

O'NEILL: Essentially, yes. There are slight differences, I guess, in terms of perhaps levels of unanimity that you might require and so on and where the locus of decision-making is, but yes, effectively you can mimic the kinds of arrangements that exist in zoning laws through private restrictive covenants.

WOODS: Okay, so then let's talk about this: if that's the case, then is it the case that only morally sensitive libertarians would really care about this, given that, if the outcome is going to be the same in both cases and it's just a matter of procedure – either private property owners make the arrangement or government makes the arrangement – a lot of pragmatic people are not going to care? So there must be some other differences between the public and private arrangement of zoning.

O'NEILL: Sure, and that's a reasonable response. If it can mimic the results, then the obvious question is: what's the purpose of the change?

WOODS: Right.

O'NEILL: And the purpose of the change effectively is that we know from economic theory and historical evidence that often the locus of decision-making, of who's actually in charge of making decisions makes a huge difference to outcomes and how they're exercised and in whose benefit they're exercised. So for example, the economist Thomas Sowell has written a book called *Knowledge and Decisions*, and he talks over a lot of contexts about how much of a big difference it makes whether a particular right to do something is vested in the private parties that are actually affected by that activity versus when the same decision-making power is vested in some third party where that third party doesn't suffer any negative consequences if a bad decision is made.

So in the context of zoning, the issue is that if this zoning power is within the power of the government as opposed to private property owners, that effectively is a case where you have these third-party decision-makers, namely politicians and bureaucrats, making decisions about property uses that affect residents. But of course those politicians and bureaucrats suffer no discernible negative consequence if they make decisions that are harmful, and that's a very big difference in incentives.

WOODS: Okay, now let's look at the flip-side of this. Let's look at a way that somebody might argue that the government approach is actually better. And one way you might do that is by thinking about – and again, I'll draw an analogy to other sorts of examples that people use: the building of the roads. They say in order to build roads, you need to get long stretches of land, and to get those stretches of land, you're going to have to negotiate in many cases with existing property owners, and there could be that one, lone holdout who just will not give up the property, and this disrupts the building of the road. So the road might have to have a curve in it – and apparently this is the most unmanageable, unimaginable outcome for some people. But anyway, they say that you could have a holdout who makes life difficult.

Well, likewise with zoning, I could imagine a situation where a neighborhood is zoned in a particular way, but then there could be all kinds of demographic changes. Maybe there's a lot of population pressure. Maybe in light of new conditions, you might want to have different zoning regulations. And with a government solution, I could quickly impose new requirements, whereas in a private arrangement, I'd have to go around to every single person. So again, with a libertarian, you might say, Well, you know, you do want to consent of everyone, so that's an inconvenience you have to live with. But most people, again, are pragmatic and non-ideological and they would just say that your approach seems clumsy.

O'NEILL: Sure. Look, I think the holdout problem is I think vastly overstated. And I should say there's nothing within the idea of restrictive covenants between property owners that necessitates creating arrangements that require unanimity to change. So for example, even now you see that within private apartment buildings, the standard way in which they are legally constituted is that each apartment owner owns their own apartment, but in all other aspects of the building – the corridors, the elevators, the lobby, etc. – are common private owned in common. And generally, there's some kind of agreement for a kind of body corporate type arrangement, where each property owners owns some shares in the body corporate, and then there's some kind of internal rules for how decisions are made, whether that's by majority vote or by some other procedure. So there's certainly no necessity that things have to be arranged in a way that requires unanimity in order to change any existing rule.

Generally what does exist, though, within those types of arrangements is that each owner preserves certain kinds of inalienable entitlements which can't be taken away from the other property owners. So for example, in an apartment building, it's very common that while a majority vote could perhaps change the rules of what color we want to paint the corridors and what kind of carpet we want to lay in the common areas and whether we want to have a pinball machine in the game room and hardwood floors in the lobby, people can't by majority vote simply vote away the entitlements within a person's apartment, for example.

So as I say, there's no necessity for unanimity in those rules, and it would be entirely possible to develop ownership structures which allowed changes in rules by something less than unanimous consent if that was thought to be impractical. And look, I'm I guess myself one of those kinds of practical-type people who agrees that in many cases requiring unanimous consent for every little change will be impractical, and so it may be that property owners may wish to get together and form some alternative type of body corporate-type arrangement.

WOODS: All right, I have a few more things I want to ask you, but before we do that, let's thank our sponsor.

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The other day I did an episode on housing and what some of the artificial factors might be that have made housing particularly expensive in certain areas in the country in the U.S. here and, in particular, in a number of cities. Now, there can be perfectly acceptable reasons, of course, that housing is expensive. There's just a great demand to live in a place that has a lot of amenities. But we all know that there's more to it than that, and the "more to it" aspect tends to be left out.

So recently, Bernie Sanders, whom you can safely ignore where you are in your part of the world but we have to endure all of the time, was talking about how expensive it is to live in many urban areas. Isn't it a shame that it's so hard for people who earn minimum wage to be able to get adequate housing, particularly in a lot of cities? And so instead of showing the kind of curiosity somebody might have about this – I wonder what it is that's making housing so expensive, if there is anything that might be fixed, something we might look at that might be causing this – no interest in that at all. Just raise wages, was his answer. And of course, one response to that is: what does this have to do with employers at all? If you want to help people, then just give them money. Why bring their employer into this? The employers are already making them better off by giving them a paycheck, unlike Bernie Sanders, so why should they have to bear the burden?

Anyway, so I talked a bit about this, and I mentioned zoning as being one of the factors that can artificially raise the price of housing, but I'm going to now place the burden on you to explain exactly what is the mechanism by which zoning could make housing more expensive than it would be otherwise?

O'NEILL: It's probably very difficult – there's a lot of possible causes for increases in cost of housing, and I suspect zoning is probably one of the less serious factors compared to things like direct taxes and regulatory burdens on, for example, the building of houses and so on. But one of the things zoning laws do do, which I suppose certainly has a possibility of affecting prices, is – well, firstly, it does restrict property uses within a certain area and often in quite an inflexible way, or at least inflexible in the sense that changes in those rules often require quite drawn-out, bureaucratic procedures.

One of the things you do see in regard to government control of zoning which is very interesting is that very commonly you'll have an area, for example, that is zoned in a particular way which prevents, for example, industrial building or commercial building. A politically connected corporation, usually some kind of property developer, will buy up the site and own the site, and obviously they can buy it up at a relatively low cost if it has these various restrictions on it because it's less valuable with those restrictions. And then through lobbying of the government and often some nice political contributions, they can grease the wheels a little bit and obtain a change in the zoning laws.

And effectively this is a kind of rent-seeking activity. This is a kind of wealth transfer whereby politically connected groups are able to buy up land at a lower, suppressed cost due to zoning restrictions, pay political lobbying money, and then have zoning changed to allow them to make the land more valuable. Now, I'm not sure that that will necessarily have a very large overall effect on prices, but certainly it will mean that certain individual buyers and sellers will get a raw deal, and politically connected groups are likely to gain from rent seeking in that way.

WOODS: There are particular types of zoning in Seattle that apparently are so onerous and that have in fact had the effect of limiting supply that even in Seattle, where there's no economic knowledge whatsoever, people have said, Gee, maybe this is limiting supply and thereby raising prices. So there is that.

O'NEILL: Yeah.

WOODS: But on the other hand, we have a place like Houston. And my understanding is that Houston is about as close as you can expect to get to what libertarians are talking about when it comes to zoning, and it turns out that I don't think they have, shall we say, escort services next to the local elementary school. It seems to be working out all right.

O'NEILL: Yeah. Well, there was actually quite a famous – well, famous within zoning law articles – paper written on Houston, and this has been an instance that's been examined in academic literature on zoning. And yeah, it's interesting you say brothels aren't opening up next to little children's schools. One of the concerns that people do sometimes express is that kind of thing, that perhaps businesses and industries would open up in highly inappropriate places which cause damage.

And I think in assessing that question, people just need to be, first of all, a little bit realistic about what is in the best interests of the owners of those kinds of businesses. So one of the points I make in my article is that it would be probably a pretty poor-planning brothel owner who would attempt to open up a brothel near a children's preschool in a neighborhood like that where there's a lot of children around, simply because it's not in their own best interest. They're less likely to attract clientele if their business is located in a spot that makes people feel uncomfortable visiting.

And so I think some of these possible problems that people raise really are quite unrealistic ideas, simply because it's not in the interests of a brothel owner, for example, to open up next to a children's school. It's not in the interests of a big aluminium smelting plant to open up in a residential district. It's not in the interests of a big property developer to build a massive skyscraper in a sleepy suburban area. All these things involve potential worries where a developer would have to be mad to build that kind of facility in that kind of area. It's not in their interests to do so. So there's already a natural disincentive for that not to happen.

WOODS: No doubt, and I agree that that kind of concern certainly is exaggerated. But you raise examples in your article of fears that people might have, for example, maybe some – well, this would be maybe a ridiculous example, but I buy a house and then some time later an airport is built next to me, and the noise is absolutely

deafening. Or a coal-fire power station is opened nearby and I have to now deal with the pollution and stuff. How do you handle that kind of thing?

O'NEILL: Right. Well, libertarian theory has generally said that if you pollute another person's property, that that constitutes an invasion of their property rights. So when you use your own property, you're required to do so in a way that preserves the use and enjoyment of the property rights of others around you.

And there's also generally been this doctrine of a kind of "first person there has the prerogative" kind of thing, so if you have your house built somewhere and you're enjoying the peace and quiet, for an airport to open up right next to you and create so much noise that you can't enjoy your household, that would be regarded generally within libertarian theory as an invasion of your property rights – even though they obviously don't come onto your land, in fact, and don't invade your land in a physical sense, even the noise pollution from that airport, if it was sufficiently loud to stop you enjoying the use of your property, that would be regarded as a form of pollution, which is regarded as a form of invasion of property. And that would either be simply prohibited by libertarian law, or it would require them to pay you compensation or buy you out or something like this. For example, Murray Rothbard's written a couple of papers about the way that libertarian property rights deal with cases of pollution, and that's basically it as I've just expounded.

WOODS: You say that if you have government-enforced zoning that this can crowd out voluntary approaches to these sorts of problems. What's the mechanism by which they get crowded out? Is the idea that everybody starts thinking that these sorts of issues are inherently political issues, they have to be dealt with coercively, so the imagination that you might have exercised about how to figure out voluntary solutions is just absent?

O'NEILL: Yeah, that's part of it. I suppose like in any area of governance, once the government becomes the kind of monopolist that deals with this issue, people simply become used to the fact that this is not an issue that they have any control over and that those kinds of alternative solutions just fall off the radar. That's part of it, but I don't think it's the full story.

One of the things that's very common – and you'll notice this, for example, in local governance elections. People tend to think that government zoning makes their rights safer and that government zoning makes it less likely that bad kinds of buildings will occur nearby to them. But in actual fact, in many ways, it makes it more likely that those things are going to happen.

And one of the common patterns you see is in local governance, aside from – if you take out, for example, the big banks and finance centers who are big political contributors, what you often find in small local government elections is that the biggest donors to the major parties are usually property developers. And part of the reason for this is that the zoning laws themselves create the capacity for political groups to extort money from property developers by effectively requiring them to pay political contributions in order to get favorable zoning outcomes.

And in fact, if you have a look at the academic literature, even some of the academics that are in favor of government zoning laws very freely concede this. They say that, Look, zoning imposes an alleged restriction on property use, but that restriction can be bought out in certain ways, including by making political contributions. And so they recognize – even the people in favor of this stuff recognize that one of the ways property developers commonly get around restrictions is they become major donors to the political parties, and then those donors cost them a fraction of the amount they gain when they buy up land, have the government rezone for them, and then build, for example, an airport or something else in a place where it's perhaps really going to upset residents.

So that's a very real danger, and this kind of thing does happen. You might be in your house in a sleep little area that is very quiet and there's huge, big paddocks of land nearby that are just owned and restricted in their zoning, and then some major property developer comes along, buys them, makes contributions to the local government, becomes a major donor, has the area rezoned to allow it to become an airport, and boom, they build, and you're out of luck.

WOODS: So you would be in much better shape if you simply accepted the ideas of libertarian law and we implemented this in society. Everybody's property would be more secure, and the shape of their neighborhoods would be more secure and predictable than it would be if somebody with political influence can simply more or less change it on a dime.

O'NEILL: Yeah, well, certainly if these things were done by restrictive covenants, it would certainly allow you the capacity to try to negotiate restrictive covenants which would prevent, for example, someone building an airport right next to your house. And if you were able to obtain a restrictive covenant of that kind, that would then be a genuine property right that you hold, and so now if some property developer comes along and wants to build an airport there, it's not bureaucrats and politicians that they have to convince; it's you. You have an enforceable property right to prevent them doing that. And if they want to do that, they have no choice; they've got to buy you out. They've got to negotiate with you and they've got to find some way for you to give your consent or they've got to buy you out. So I feel that that's a much stronger enforcement mechanism and it gives property owners much more safety and much more security long term over protecting the use and enjoyment of their property.

WOODS: Well, I'm going to link people, as I say, to your article "How Zoning Rules Would Work in a Free Society" from all the way back in 2009 – how about that? – at – in fact, almost to the day eight years ago, because it was mid-June 2009 – at TomWoods.com/932 if people would like to read more. But it fills an important gap here because we always want to at least think about how it would be possible to do things that people would like to see happen but yet without the state, because I think sometimes some libertarians think that because the state is providing something, therefore it's not desirable or necessary.

O'NEILL: Sure.

WOODS: And I know there are some highly individualistic libertarians who – I mean, they're not even all that interested in private solutions to these sorts of things. They're

really, I want to have my pink house and you can't stop me, sort of thing. But there are reasons that people collectively decide to do things –

O'NEILL: Absolutely.

WOODS: – and some of them can be totally legitimate.

O'NEILL: And in fact, we don't really have to be very imaginative at all of what this private solution might be, because we already observe it. We already observe, for example, if we do look around at things like apartment buildings and things where there are body corporate arrangements and there are collective ownerships of common property combined with individual ownerships of parts of that property like apartments, for example. So really this doesn't require much imagination so much as simply looking around at those small spheres where those kinds of private negotiations and private ownership rules already do exist and seeing what kinds of things people already do, and then simply extrapolating that and saying, Well, I guess, possibly you could do that for other things and you might get similar kinds of beneficial results.

WOODS: Well, Ben, I appreciate your time today and figuring out how to schedule this with you being in Australia and me being in the U.S., so thanks so much for doing it.

O'NEILL: Always a pleasure, thank you.