

2019

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Recommended Citation

Christopher Serkin, *Divergence in Land Use Regulations and Property Rights*, 92 Southern California Law Review. 1055 (2019)

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Thu Feb 6 16:27:38 2020

Citations:

Bluebook 20th ed.

Christopher Serkin, Divergence in Land Use Regulations and Property Rights, 92 S. Cal. L. Rev. 1055 (2019).

ALWD 6th ed.

Christopher Serkin, Divergence in Land Use Regulations and Property Rights, 92 S. Cal. L. Rev. 1055 (2019).

APA 6th ed.

Serkin, C. (2019). Divergence in land use regulations and property rights. Southern California Law Review, 92(4), 1055-[x].

Chicago 7th ed.

Christopher Serkin, "Divergence in Land Use Regulations and Property Rights," Southern California Law Review 92, no. 4 (May 2019): 1055-[x]

McGill Guide 9th ed.

Christopher Serkin, "Divergence in Land Use Regulations and Property Rights" (2019) 92:4 S Cal L Rev 1055.

MLA 8th ed.

Serkin, Christopher. "Divergence in Land Use Regulations and Property Rights." Southern California Law Review, vol. 92, no. 4, May 2019, p. 1055-[x]. HeinOnline.

OSCOLA 4th ed.

Christopher Serkin, 'Divergence in Land Use Regulations and Property Rights' (2019) 92 S Cal L Rev 1055

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DIVERGENCE IN LAND USE REGULATIONS AND PROPERTY RIGHTS

CHRISTOPHER SERKIN*

INTRODUCTION

For the past century, property rights—and in particular development rights—have been circumscribed and largely defined by comprehensive local land use regulations. As any student of land use knows, zoning across the country shares a common DNA. Despite their local character, zoning limits on development rights in almost every American jurisdiction share a deep family resemblance borne from their common origin in the Standard Zoning Enabling Act (“SZE”). Zoning for much of the twentieth century therefore converged around a core goal of separating incompatible uses of land as a kind of *ex ante* nuisance prevention.¹ Of course, zoning went much farther than the common law of nuisance, but its animating justification was to minimize the externalized impacts of certain kinds of intensive development.

For decades, zoning created a relatively stable and predictable system defining development rights and also neighbors’ expectations about what could be built nearby. While municipalities innovated on the margins, the shared approach meant that developers could easily assess the developable envelope and permissible uses for any property, and many became sophisticated at navigating local zoning ordinances to maximize development potential. This also resulted in equally stable political dynamics. By and large, developers and conservative property rights advocates were allies in opposing restrictive zoning, while community

*. Elizabeth H. & Granville S. Ridley, Jr. Professor of Law, Vanderbilt Law School. Christina Jeffcoat provided excellent research assistance.

1. For the seminal Supreme Court case recognizing the utility of zoning in this area, see *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387–89 (1926).

groups and pro-regulation liberals advocated for zoning to protect community character, in-place residents, and the environment.²

More recently, however, zoning has been changing. Even first principles are up for grabs, and land use regulations increasingly diverge from each other. Some municipalities today deploy zoning as a framework for bargaining with developers.³ Others focus on sustainable development, housing affordability, community preservation, and many other goals.⁴ The proliferation of new zoning goals means that property and development rights may now be strikingly different between jurisdictions. This is a period of increasing divergence in the substantive content of development rights across municipalities.

This trend towards divergence in land use regulations has not, however, resulted in the wholesale jettisoning of traditional approaches to zoning and land use regulation. In fact, while the goals may increasingly diverge, zoning's fundamental tools remain fairly consistent. Instead of wholesale divergence in zoning and development rights, what we are actually witnessing more closely resembles multimodal convergence, where zoning regimes coalesce around multiple points instead of a single goal.⁵

The question here is whether this divergence is beneficial on balance. Any divergence has its costs, primarily in the form of increased information costs for property owners and the deadweight costs of increased special interest group rent seeking. But it comes with benefits, too, as diversity in land use goals allows consumers to select their preferred set of property rights. Too little divergence and people are locked into regimes they may not want. Too much and information costs may grow too high.

Increasing divergence—or multimodal convergence—also explains

2. Christopher Serkin, *The New Politics of New Property and the Takings Clause*, 42 VT. L. REV. 1, 3–6, 13 (2017).

3. ROBERT C. ELLICKSON ET AL., *LAND USE CONTROLS* 95, 332–33 (4th ed. 2013) (discussing revenue related purposes of zoning and “dealmaking” by local governments); Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 837, 879 (1983) (discussing local governments’ desire to retain flexibility to bargain ad hoc with developers).

4. ELLICKSON ET AL., *supra* note 3, at 114–15, 121, 328, 858 (discussing local governments’ ability to zone for more purposes than originally anticipated in the SZEA and examples of local governments that use zoning to achieve sustainability, affordability, and preservation goals); *see also* Melvyn R. Durchslag, *Forgotten Federalism: The Takings Clause and Local Land Use Decisions*, 59 MD. L. REV. 464, 464–65 (2000) (discussing various municipal land use goals); Serkin, *supra* note 2, at 6–7 (comparing differing political attitudes toward environmental zoning versus rent regulations).

5. Thanks to Professor Edward Cheng for labeling the phenomenon of multimodal convergence.

some of the new political fights around zoning and property rights. Traditional conservative and liberal positions have become unsettled as progressives have increasingly blamed zoning for the affordability crisis in many cities.⁶ Some liberal groups, however, continue to embrace restrictive zoning because they prioritize environmental or community-preservation concerns or favor mandatory inclusionary zoning as a better response to affordability.⁷ Simultaneously, conservative suburbs that had previously rejected land use regulations in favor of a pro-growth agenda have had second thoughts and are deploying strict new limits on development partly to constrain the burden on congestible infrastructure like roads.⁸ In short, restrictive zoning and strong property rights are no longer at opposite ends of a single spectrum. Making sense of zoning's new landscape requires grouping land use regulations as focusing primarily on one of several different possible goals. These include, among others, affordability, environmental protection, aesthetics, historic preservation, community protection, fiscal concerns, and more invidious exclusion. Sometimes these are competing goals, and sometimes they are simply orthogonal to each other. This Article identifies the range of goals that local governments today pursue through zoning and then examines the costs and benefits of this new zoning reality.

I. ZONING'S COMMON ORIGIN

In our fragmented and diverse political system, the consistency of land use regulations between municipalities may seem surprising. In fact, however, zoning everywhere in the United States shares a common—and familiar—origin in the Standard Zoning Enabling Act (“SZE”).⁹ Promulgated in 1926 by the Department of Commerce, the SZE was

6. See Conor Friedersdorf, *San Francisco's Self-Defeating Housing Activists*, ATLANTIC (Dec. 29, 2015), <https://www.theatlantic.com/politics/archive/2015/12/san-francisco-is-confused-about-the-villain-thats-making-it-unaffordable/422091>; Ilya Somin, *Why More Liberal Cities Have Less Affordable Housing*, WASH. POST: VOLOKH CONSPIRACY (Nov. 2, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/11/02/more-liberal-cities-have-less-affordable-housing/?utm_term=.b355844b719a. See generally Vicki Been, *City NIMBYs*, 33 J. LAND USE & ENVTL. L. 217 (2018) (exploring increasing “Not In My Backyard” (“NIMBY”) policies in cities and the resulting effect on urban housing costs).

7. Serkin, *supra* note 2, at 14–15.

8. See Emily Badger, *The Bipartisan Cry of 'Not in My Backyard'*, N.Y. TIMES (Aug. 21, 2018), <https://www.nytimes.com/2018/08/21/upshot/home-ownership-nimby-bipartisan.html>; Mike Rosenberg, *Housing Construction in Local Suburbs Is at Historic Lows, While Seattle Is Setting Records*, SEATTLE TIMES, <https://www.seattletimes.com/business/real-estate/king-county-suburbs-slow-their-housing-growth-canceling-out-seattle-building-boom> (last updated Aug. 11, 2018, 12:49 AM).

9. A STANDARD STATE ZONING ENABLING ACT (ADVISORY COMM. ON ZONING, U.S. DEP'T OF COMMERCE, rev. ed. 1926).

designed as model legislation for states to adopt that would empower local governments to enact comprehensive zoning and land use regulations.¹⁰ The approach was a success. Following a tacit blessing by the Supreme Court in *Village of Euclid v. Ambler Realty Co.*,¹¹ almost every state in the country adopted some version of the SZEA within the ensuing decades, and zoning became ubiquitous.¹²

From that origin story comes a common set of concerns that zoning was meant to address. Zoning has long been seen as a kind of ex ante nuisance prevention.¹³ It separated incompatible uses of land before they arose, keeping factories out of residential neighborhoods during the urbanization and industrialization of the early twentieth century.¹⁴ And it protected single-family homes from more intensive uses, in effect stratifying much of the country into single-use zones. This had a pernicious underbelly, reinforcing divisions based on class and on race, keeping apartment buildings and other forms of multifamily housing out of more affluent single-family zones.¹⁵ Indeed, this is zoning's original sin.¹⁶ But this is also the fundamental justification that the Supreme Court endorsed

10. See, e.g., Christopher Serkin, *Existing Uses and the Limits of Land Use Regulation*, 84 N.Y.U. L. REV. 1222, 1232–33 (2009) (briefly describing the history of the SZEA and citing sources on the topic).

11. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394–95 (1926).

12. See, e.g., Rose, *supra* note 3, at 848–49 & n. 29 (briefly describing history of zoning in the United States).

13. See, e.g., Brian Galle, *In Praise of Ex Ante Regulation*, 68 VAND. L. REV. 1715, 1724 (2015) (“[Z]oning laws restrict development before it results in unwanted burdens on neighbors, while nuisance suits impose liability after the damage has begun.”); G. Donald Jud, *The Effects of Zoning on Single-Family Residential Property Values: Charlotte, North Carolina*, 56 LAND ECON. 142, 142 (1980) (“One of the principal purposes of municipal zoning ordinances is to protect property owners from the deleterious external effects that may arise when incompatible land uses exist within the same neighborhood.”); Carol M. Rose, *Property Rights, Regulatory Regimes and the New Takings Jurisprudence—An Evolutionary Approach*, 57 TENN. L. REV. 577, 588 (1990) (“As land resources became more developed, we progressed from a regime of ‘anything goes’ with one’s landed property, to a regime of post hoc judicial control on ‘nuisances,’ to a regime of legislatively defined, ex ante regulation.”); Mariana Valverde, *Taking ‘Land Use’ Seriously: Toward an Ontology of Municipal Law*, 9 LAW TEXT CULTURE 34, 52 (2005) (identifying a “religion of incompatible land uses that was codified in the 1916 New York City zoning ordinance”).

14. See *Euclid*, 272 U.S. at 386–91 (analogizing a town’s ability to prevent industry from building in residential areas to the law of nuisances).

15. See *Ambler Realty Co. v. Village of Euclid*, 297 F. 307, 316 (N.D. Ohio 1924) (stating that the true purpose of separating single-family residences and apartment buildings was to further economic class divisions), *rev’d* 272 U.S. 365 (1926); Richard H. Chused, *Euclid’s Historical Imagery*, 51 CASE W. RES. L. REV. 597, 613–14 (2001) (discussing how the Supreme Court’s language in *Euclid*’s majority opinion created a negative, stereotypical image of apartment buildings, validating zoning as a way to segregate based on race and class).

16. Christopher Serkin, *Capitalization and Exclusionary Zoning*, INTERDISC. CTR. HERZLIYA (forthcoming 2019) (manuscript at 5) (on file with author).

in *Euclid*.¹⁷

Political fights emerged quickly. The mainstream arguments were not over the project of zoning, but instead over its implementation. Few people objected to the idea of using regulations to separate genuinely incompatible land uses. Indeed, the regulatory goal of minimizing externalities was consonant with both liberal and conservative convictions. But zoning's contours have been contested now for a long time. By and large, conservatives objected to regulatory restrictions on property rights and so have advocated for limited zoning that separates only the most conflicting uses. Others on the right have advocated for even more extreme regulatory minimalism, relying on private land use controls instead of zoning and invoking covenants and homeowners' associations as remedies for regulatory overreach.¹⁸ Liberals, on the other hand, embraced zoning. They were willing to take a more capacious view of the harms of neighboring uses and so promoted increasingly fine-grained land use regulations.¹⁹ The conventional understanding of attitudes towards zoning could therefore be presented along a simple spectrum from anti-regulation to pro-regulation.²⁰ Slowly over time, local governments moved beyond these narrow goals. Today, the underlying goals of many land use regulations have nothing to do with ex ante nuisance controls.

II. DIVERGENCE IN THE PURPOSES OF LAND USE REGULATION

Local governments have become increasingly creative about pursuing a variety of municipal goals through land use regulations, and zoning has become concomitantly more nuanced and sophisticated. The result is a more complex regulatory apparatus that owners must navigate to develop property in many jurisdictions. It has also resulted in widening fissures in the political fights over zoning. Although not always noticed, even by local officials and developers let alone by courts and scholars, the presumptive

17. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394–97 (discussing the effects of apartment buildings on single-family residences and concluding that as apartments come very near to being nuisances, it is within a municipality's police powers to exclude them from single-family residential areas); see also Chused, *supra* note 15, at 614.

18. The intuition appears to be that burdens imposed by voluntary associations, like the private governance of a homeowner's association, are preferable to public regulatory authority. It is not obvious why that should be since people can choose their local governments just as they can choose their residential subdivisions. For early endorsement of *more* but not exclusive reliance on nuisance law, see Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 682–83, 761–62 (1973).

19. See Serkin, *supra* note 2, at 6–7, 13.

20. WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS* 14–16, 18 (2001) (comparing “growth machine” jurisdictions with “homevoter” jurisdictions).

conservative opposition to land use regulations and liberal support has, in many cases, flipped.²¹ Odd political alliances dot the landscape of local land use disputes, with—for example—affordable housing advocates working alongside for-profit developers to resist restrictive zoning ordinances.

From a distance, the divergence in local uses of zoning creates what appears to be real instability. When the dispute over zoning was framed simply in terms of more versus less regulation, the stakes were predictable and relatively clear. But now with governments pursuing many different goals in their land use regulations—with apparent divergence in the *purposes* of zoning—this area of law appears quite chaotic.

Municipal land use regulations no longer converge around the central organizing goal of minimizing conflicting uses of property (if they ever truly did). This is not, however, a story of entirely disorganized divergence. The proliferation of goals still relies for the most part on conventional zoning tools, even if these tools are deployed somewhat differently. What one therefore observes, looking carefully, is multimodal convergence in land use controls. And identifying those various points of convergence can go a long way to discerning patterns in—and understanding the political stakes of—zoning fights wherever they occur. The first step, however, is to survey the many goals that land use regulations today can serve and how local governments tend to pursue them.

Many of the specific objectives are by now familiar. Scholars already distinguish between growth machine and homevoter jurisdictions.²² Advocates for sustainable development clash with NIMBYs (“Not in My Backyard”) and BANANAs (“Build Absolutely Nothing Anywhere Near Anything”) and are joined by California’s new YIMBYs (“Yes in My Backyard”).²³ It is easy to observe these fights on the ground and to see

21. For some recognition of these changes, see Been, *supra* note 6, at 219–23; Serkin, *supra* note 2, at 13–16.

22. See Been, *supra* note 6, at 218 (noting that cities have traditionally been viewed as “growth machines” and suburbs as favoring NIMBY policies to protect “homevoter” property values).

23. See Edward H. Ziegler, *Sustainable Urban Development and the Next American Landscape: Some Thoughts on Transportation, Regionalism, and Urban Planning Law Reform in the 21st Century*, 42 URB. LAW. 91, 92–99 (2010) (discussing the NIMBY’s opposition to sustainable development); Ben Lockshin, *Beyond NIMBY: Understanding Different Affordable Housing Advocates and Detractors (Part 1)*, GREATER GREATER WASH. (Sept. 26, 2017), <https://ggwash.org/view/64879/beyond-nimby-understanding-different-affordable-housing-advocates-detractors> (discussing the differences between NIMBYs and BANANAs); Alana Semuels, *From ‘Not in My Backyard’ to ‘Yes in My Backyard’*, ATLANTIC (July 5, 2017), <https://www.theatlantic.com/business/archive/2017/07/yimby-groups-pro-development/532437> (discussing the rise of YIMBY views in California in response to the need for high-density housing).

how much jurisdictions can diverge in their land use priorities. But instead of seeing these as one-off battles or through the realpolitik lens of interest-group conflicts, it is worth stepping back and canvassing the range of goals that local governments today pursue through their land use regulations.

Looking broadly, modern land use regulations often represent an effort to pursue one or more of the following goals. These are not mutually exclusive. Some are congruent with each other, but others are in inextricable tension. Many implicate a voluminous academic literature. They are presented here in only their most cursory outlines. The value of this Article is not in the exhaustive explication of any particular land use goal but instead in a broad survey of many of them together to identify the resulting content of the land use regulations that each of these goals tends to produce. What begins to emerge is a sense of real divergence in the objectives that local officials pursue through land use regulations, the implementation of which nevertheless converges around a few key zoning tools.

A. MINIMIZING HARMS FROM NEIGHBORS

Minimizing conflicting uses of property is the original justification for zoning, and conventional land use tools are well-suited to this goal by separating residential, commercial, and industrial uses. Debates persist over what counts as incompatibility and what sorts of externalized harms need to be regulated.²⁴ Nevertheless, this overarching goal—and the resulting approach to zoning—are straightforward. Indeed, this objective continues to dominate land use regulation in many suburbs, where residents continue to protect low-intensity residential development by minimizing incursions of more intensive uses.²⁵

24. See generally Holly Doremus, *Takings and Transitions*, 19 J. LAND USE & ENVTL. L. 1 (2003) (discussing the effects of changing morals, technology, and scientific understanding on land use regulations); William A. Fischel, *The Law and Economics of Cedar-Apple Rust: State Action and Just Compensation in Miller v. Schoene*, 3 REV. L. & ECON. 133 (2007) (concluding that the government should regulate land uses that harm uses with higher commercial values).

25. See Wayne Batchis, *Enabling Urban Sprawl: Revisiting the Supreme Court's Seminal Zoning Decision Euclid v. Ambler in the 21st Century*, 17 VA. J. SOC. POL'Y & L. 373, 379–80 (2010) (explaining that the single-use zoning structure exists in the majority of U.S. jurisdictions); Nicole Stelle Gamett, *Save the Cities, Stop the Suburbs?*, 116 YALE L.J. POCKET PART 192 (2006), <http://yalelawjournal.org/forum/save-the-cities-stop-the-suburbs> (discussing the persistence of single-use zoning in suburbs).

B. NEW URBANISM AND MIXED USE

In many other areas, however, the traditional view of incompatible uses has broken down. People increasingly seek mixed uses and walkable neighborhoods, preferring that vibrancy to single-use residential areas.²⁶ New urbanism champions these land use goals.²⁷ New urbanists may still accept at least implicitly the goal of separating incompatible uses, but they adopt a very different view of what counts as incompatible.

New urbanist land use regulation therefore looks quite different from conventional Euclidean zoning. The regulatory regime still regulates land uses and development density, but it seeks vibrant and diverse uses instead of homogenous ones. In addition to some rigid use districts, then, it permits forms of mixed-use development.²⁸ Some zoning ordinances do this explicitly, predesignating certain zones for mixed use buildings.²⁹ Others do this through overlay districts or through special exceptions and variances.³⁰ The result is mixing more intensive and commercial uses with residential ones, often on arterial streets or in places located near mass transit.

C. ENCOURAGING GROWTH

Following Professors Harvey Molotch and William Fischel, land use literature has long divided municipalities into “growth machine” and “homevoter” jurisdictions.³¹ The former seek to attract development and mobile capital and to encourage investments in new local developments. But this can be further subdivided into a number of different specific

26. See, e.g., J. Peter Byrne, *The Rebirth of the Neighborhood*, 40 *FORDHAM URB. L.J.* 1595, 1596–97 (2013) (arguing that new urban residents seek vibrant, mixed-use neighborhoods).

27. Doris S. Goldstein, *New Urbanism—Planning and Structure of the Traditional Neighborhood Development*, 17 *PROB. & PROP.* 9, 9 (2003) (“New Urbanism is a land planning philosophy advocating compact, mixed-use, pedestrian-friendly development.”).

28. See *id.* at 10 (discussing how new urban developments separate residential and commercial sections but also allow a mixture of uses in residential sections).

29. For an example of explicit mixed-use zoning, see SEASIDE, FL., *CODE OF ORDINANCES* ch. 158, no. 83-10 (1983); Samantha Salden, *The Seaside Code: The Poster That Started It All*, SEASIDE RES. PORTAL, <https://seaside.library.nd.edu/essays/the-code> (last visited May 11, 2019) (discussing the Seaside Code as the first application of new urbanism in a form-based code).

30. Brian W. Ohm & Robert J. Sitkowski, *The Influence of New Urbanism on Local Ordinances: The Twilight of Zoning?*, 35 *URB. LAW.* 783, 785 (2003) (comparing flexible techniques such as overlay zoning to the rigidity of single-use districts); Scott B. Osborne, *Planning Issues in Mixed-Use Developments*, 21 *PRAC. REAL EST. LAW.* 29, 30 (2005) (discussing new urbanist zoning through conditional use permits and special zoning designations).

31. FISCHEL, *supra* note 20, at ix, 15–16; Harvey Molotch, *The City as a Growth Machine: Toward a Political Economy of Place*, 82 *AM. J. SOC.* 309, 309–10 (1976).

motivations. Most obviously, as the “growth machine” name implies, this pro-development attitude can reflect a straightforward desire to benefit the local development community. Builders, architects, realtors, lawyers, bankers, and others all have a strong financial interest in increased development activity.³² Others favor growth for its own sake. A growing city feels dynamic and vibrant, even as it puts pressure on existing communities.³³ Still others are more instrumental, favoring growth for the increased economic activity that it sometimes produces and also for the services and amenities that size brings, whether a restaurant, professional sports team, or symphony, to name just some of the most obvious examples.³⁴

Whatever the specific reason, this pro-growth agenda translates into a broad hostility to strict land use regulations. Municipalities that impose onerous regulatory hurdles are at a competitive disadvantage when it comes to attracting development and will expect to see development activity decrease, all else being equal. The resulting approach to zoning is therefore to minimize regulatory hurdles in order to encourage growth.

D. DISCOURAGING GROWTH

The opposite goal is also commonplace: discouraging growth. Just as some people seek growth for the amenities it brings, others may object because of increasing congestion or changes in municipal character that can accompany substantial new development.³⁵ It can also come simply from status quo bias.³⁶

32. S. Rodgers, *Urban Growth Machine*, in 12 INTERNATIONAL ENCYCLOPEDIA OF HUMAN GEOGRAPHY 40, 41–42 (Rob Kitchin & Nigel Thrift, eds., 2009) (describing the property investors, developers, financiers, etc. that make up the growth machine).

33. See OFFICE OF POLICY DEV. & RESEARCH, U.S. DEP'T OF HOUS. & URBAN DEV., ENSURING EQUITABLE NEIGHBORHOOD CHANGE: GENTRIFICATION PRESSURES ON HOUSING AFFORDABILITY 5–6 (2016), <https://www.huduser.gov/portal/sites/default/files/pdf/Insights-Ensuring-Equitable-Growth.pdf> (discussing the burdens of rapid urban growth on existing communities).

34. See William K. Jaeger, *The Effects of Land-Use Regulations on Property Values*, 36 ENVTL. L. 105, 112–17 (2006) (discussing how land use decisions can increase property values and “amenity” benefits); see, e.g., Scott Cohn, *New Insights on How Cities and States Stack Up in the Race to Win Amazon's \$5 Billion HQ2*, CNBC, <https://www.cnbc.com/2018/07/05/new-clues-on-how-cities-stack-up-in-the-race-to-win-amazons-hq2.html> (last updated July 10, 2018, 7:42 PM) (explaining that Amazon's criteria for new headquarters includes an area with more than one million people and urban locations that can attract and retain talent).

35. See Michelle Shortleeve, *Challenging Growth-Restrictive Zoning in Massachusetts on a Disparate Impact Theory*, 27 B.U. PUB. INT. L.J. 361, 380 (2018) (describing how municipalities use zoning to limit population growth, and thus constrain congestion and preserve community aspects).

36. Eric A. Cesnik, *The American Street*, 33 URB. LAW. 147, 173–84 (2001) (discussing how metropolitan planning is constrained by the status quo or the existing look and function of the area).

Again, whatever the specific motivation, the anti-growth agenda embraces zoning and land use regulations of all kinds. The clearest regulatory strategy to preserve the status quo is to erect as many regulatory hurdles as possible to prevent new development. Strict zoning requirements, including designating large areas of a municipality as effectively off-limits for development, are the most obvious techniques.³⁷ But adding new layers of regulation can be equally if not more effective. One study has demonstrated that every new regulation reduces building permits for multifamily units by 6%.³⁸ Historic preservation rules, strict subdivision ordinances, development impact fees, and so forth can also create an atmosphere hostile to development that drives growth elsewhere.

E. ZONING FOR TAX REVENUE

Zoning is increasingly bound up with issues of municipal finance. Sometimes this is direct, like using regulatory concessions as opportunities to raise money or develop infrastructure.³⁹ But more often, this is indirect, like using zoning to encourage land uses that have net positive budget impacts. Public schools, in particular, are often the largest expense for local governments and therefore drive land use decisions.⁴⁰

While normatively controversial, local governments often seek to exclude affordable housing because low-income households generate relatively little revenue and yet place significant burdens on municipal budgets through impacts on schools and other municipal services. On the flip side, local governments seek land uses that generate substantial tax revenue while creating few costs.⁴¹ Depending on the nature of the tax base, this often means seeking to attract high-valued homes for people with few if any school-aged children.

Traditionally, these dynamics have produced large-lot zones, limits or

37. See Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 390–92 (1977) (describing the various ways municipalities prevent all development in certain areas).

38. Kristoffer Jackson, *Do Land Use Regulations Stifle Residential Development? Evidence from California Cities*, 91 J. URB. ECON. 45, 54 (2016); see also Been, *supra* note 6, at 227–28.

39. See *infra* Section II.F.

40. ELLICKSON ET AL., *supra* note 3, at 649–50 (discussing the high public costs of public schools). For an analysis of the interplay between fiscal land use decisions and public schools, see Eric A. Hanushek & Kuzey Yilmaz, *Land-Use Controls, Fiscal Zoning, and the Local Provision of Education*, 43 PUB. FIN. REV. 559, 563–67 (2015).

41. See Paul G. Lewis, *Retail Politics: Local Sales Taxes and the Fiscalization of Land Use*, 15 ECON. DEV. Q. 21, 24–26 (2001) (arguing that the quest for retail development and its resulting sales tax revenue motivates California's land use decisions).

bans on multifamily housing, and other familiar, if troubling, forms of exclusionary zoning. By requiring housing that consumes more land per unit, a local government can reduce the amount of housing that can be built in any area and also can increase the land costs associated with housing, driving up prices. Admittedly, this dynamic has been shifting somewhat in recent years. Changing consumer preferences means that dense, mixed-use, multifamily development can sometimes be the most expensive, with new high-rise areas in cities like Nashville generating by far the most net tax revenue per square foot.⁴² Nevertheless, in much of the country and especially in suburbs, the conventional wisdom still holds. Those places still deploy large lot zoning and bans on multifamily housing in order to exclude lower-income households and to attract and retain housing for the affluent.⁴³

F. ZONING FOR FEES

A more direct form of fiscal zoning comes from the bargaining opportunity that land use regulations can represent. Several decades ago, Professor Carol Rose demonstrated that zoning can be seen through the competing lenses of planning and dealing.⁴⁴ Under the dealing model, land use regulations should be seen as a kind of opening offer. Developers then must petition governments for more permissive regulations—like increases in density—and provide certain financial or in-kind benefits in exchange for regulatory largesse. Some people view this as a kind of graft, others simply as a way of ensuring that developers internalize more of the costs of increased density.⁴⁵ Regardless, many local governments have become increasingly sophisticated about enacting land use regulations that create a framework for bargaining.

The most familiar example is the imposition of impact fees or exactions. These are explicit mechanisms by which local governments charge developers for the burdens of new development, either through

42. Christopher Serkin & Leslie Wellington, *Putting Exclusionary Zoning in Its Place: Affordable Housing and Geographic Scale*, 40 *FORDHAM URB. L.J.* 1667, 1684 (2013); SMART GROWTH AM., *FISCAL IMPACT ANALYSIS OF THREE DEVELOPMENT SCENARIOS IN NASHVILLE-DAVIDSON COUNTY, TN* 11 (2013), <https://smartgrowthamerica.org/app/legacy/documents/fiscal-analysis-of-nashville-develop-ment.pdf> (showing the tax revenue generated by the one high-rise area as compared to two other developments).

43. Been, *supra* note 6, at 219–23.

44. Rose, *supra* note 3, at 882, 889–91.

45. See, e.g., Vicki Been, *Impact Fees and Housing Affordability*, 8 *CITYSCAPE* 139, 143–47 (2005) (discussing the advantages and disadvantages of development fees); Arthur C. Nelson, *Development Impact Fees: The Next Generation*, 26 *URB. LAW.* 541, 548–53 (1994) (addressing various objections to development fees).

prespecified legislated fees or ad hoc bargains.⁴⁶ But other zoning approaches also create bargaining moments for local governments. For example, some local governments place large amounts of land into holding zones, typically industrial or agricultural zones where no other uses are permitted.⁴⁷ These do not reflect the municipality's judgment about the highest and best use for the property but instead create such strict limits that anyone wanting to develop the property will have to seek a rezoning. Since property owners are rarely entitled to rezonings as of right, this gives municipalities discretion and so creates a meaningful opportunity to bargain for developer contributions to infrastructure, and so forth.

More generally, then, zoning ordinances can generate revenue either by imposing prespecified impact fees or by giving local officials discretion in land use decisionmaking. Vague zoning standards—like a requirement that development be “consistent” with existing community—allow local officials to deny land use applications.⁴⁸ This discretion therefore also allows officials to grant the applications but only upon certain concessions or contributions by the developer.

G. ZONING TO INCREASE PROPERTY VALUES

According to Professor Fischel's leading account of suburbs and small local governments, homeowners dominate the political landscape and are primarily motivated by property values.⁴⁹ Most homeowners' primary asset is their house, and so they are keenly interested in property values, seek policies and regulations that will increase local property values, and reward local politicians who provide them.⁵⁰

There is no magic zoning bullet that will automatically create higher values. Instead, the relationship between zoning and property values is dynamic and depends tremendously on local context. Nevertheless, it is generally the case that restricting the supply of developable land will tend to increase property values. In fact, it amounts to a kind of transfer from new entrants who have to pay higher housing costs to in-place residents

46. See Jim Rossi & Christopher Serkin, *Energy Exactions*, 104 CORNELL L. REV. (forthcoming 2019).

47. See Robert C. Ellickson, *The Role of Economics in the Teaching of Land-Use Law*, 1 UCLA J. ENVTL. L. & POL'Y 1, 7 (1980).

48. See Erin Ryan, *Zoning, Taking, and Dealing: The Problems and Promise of Bargaining in Land Use Planning Conflicts*, 7 HARV. NEGOT. L. REV. 337, 347–49 (2002) (noting the increasingly discretionary practice of land use decisionmaking).

49. FISCHEL, *supra* note 20, at 18.

50. *Id.* at 5–6.

who see their property values climb.⁵¹

This does not always work. Sometimes, depending on elasticity in local markets, strict regulations can produce economic stagnation. If demand for housing is weak or very responsive to price, then overly restrictive zoning can be self-defeating.⁵² But where demand is strong, as in many affluent and developed communities, restrictions on supply can increase property values for in-place property owners.

H. AFFORDABILITY

Not everyone benefits from rising property values. A countervailing pressure in many municipalities is the desire to encourage more affordable housing options.⁵³ Rents and home prices that are too high can drive out important members of the community—like teachers, government employees, artists, low-wage workers, and so forth—which can have adverse economic effects and can also deplete social capital.⁵⁴

Local governments have a number of tools at their disposal to address housing affordability, but each comes with limitations. Obvious, but much maligned, tools include rent regulation and the provision of public housing.⁵⁵ But land use regulations can also be deployed to encourage affordable housing. Inclusionary zoning, for example, offers developers density bonuses in exchange for developing some number of affordable units or sometimes requires a number of affordable units outright as a condition for building.⁵⁶ More generally, too, simply increasing the supply of any form of new housing can also put downward pressure on price.⁵⁷ Cities today are experimenting with ways of relaxing density limits in order

51. Vicki Been, “Exit” as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 483 (1991); Molly S. McUsic, *Looking Inside Out: Institutional Analysis and the Problem of Takings*, 92 NW. U.L. REV. 591, 625–26 & n.162 (1998).

52. Been, *supra* note 51, at 504, 509 (discussing how one community’s overly stringent regulation may result in an otherwise beneficial development being taken to a community with better regulatory policies).

53. See Been, *supra* note 6, at 227–29 (noting the contributions of restrictions on housing supply to the lack of affordable housing options).

54. Steven J. Eagle, “Affordable Housing” as Metaphor, 44 FORDHAM URB. L.J. 301, 306–21 (2017) (discussing the diverse economic and social benefits of affordable housing); see also KEITH WARDRIP ET AL., CTR. FOR HOUS. POLICY, THE ROLE OF AFFORDABLE HOUSING IN CREATING JOBS AND STIMULATING LOCAL ECONOMIC DEVELOPMENT 10–13 (2011), <https://providencehousing.org/wp-content/uploads/2014/03/Housing-and-Economic-Development-Report-2011.pdf>.

55. Serkin, *supra* note 16 (offering a tentative justification for rent regulation).

56. For an overview of inclusionary zoning, see Cecily T. Talbert et al., *Recent Developments in Inclusionary Zoning*, 38 URB. LAW. 701, 702–03 (2006).

57. See Vicki Been et al., *Supply Skepticism: Housing Supply and Affordability*, 29 HOUSING POL’Y DEBATE 25, 29 (2019).

to increase the supply of new housing and thereby address affordability. In 2018, New York, for example, changed its off-street parking requirements for certain kinds of buildings, dramatically increasing the number of residential units that could be developed on any given lot.⁵⁸ The most extreme example is the YIMBY movement in California, which pushed for a change in 2018 that would have all but eliminated density limits on residential development anywhere near mass transit.⁵⁹ This would have unlocked an enormous amount of development potential throughout California's cities. The measure failed, but there can be no doubt that affordability is motivating increasing political pressure.⁶⁰

Not everyone agrees that unlocking development potential will help with affordability. Indeed, it might seem that developing high-end market rate housing would *increase* not *decrease* local housing costs. But the law of supply and demand is powerful, and even market-rate housing eases the demand for more modest existing housing elsewhere in the municipality and so puts downward pressure on price. In 2019, Professor Vicki Been et al. surveyed the economic literature and concluded that unlocking supply, even without explicit inclusionary zoning requirements, helps make housing more affordable, whereas supply restrictions drive prices up.⁶¹ While responses remain controversial and contested, zoning for affordability involves lowering regulatory barriers, reducing development restrictions and unlocking increased development potential, or directly regulating price either through rent regulation or inclusionary zoning.

I. HISTORIC PRESERVATION

Although not squarely “zoning” in many places, historic preservation can motivate local officials who seek to protect buildings or neighborhoods of historic significance. Designating property as historically significant can create a new layer of regulatory oversight. It therefore triggers a kind of additional veto right that can make it more difficult to build.⁶² Historic preservation ordinances vary in their details and in their strength but

58. N.Y.C., NY, THE ZONING RESOLUTION, art. II, ch. 5 (2018), <https://www1.nyc.gov/site/planning/zoning/access-text.page>.

59. Benjamin Schneider, *YIMBYs Defeated as California's Transit Density Bill Stalls*, CITYLAB (Apr. 18, 2018), <https://www.citylab.com/equity/2018/04/californias-transit-density-bill-stalls/558341>.

60. *See id.*

61. Been et al., *supra* note 57, at 27–29.

62. *See* Vicki Been et al., *Preserving History or Restricting Development? The Heterogeneous Effects of Historic Districts on Local Housing Markets in New York City*, 92 J. URB. ECON. 16, 17 (2016) (“We find that construction activity falls in districts after designation, as expected given the rules accompanying designation.”).

generally require property owners to apply for a certificate of appropriateness when seeking to tear down or modify a structure designated as historically significant.⁶³

J. COMMUNITY PRESERVATION

More than historic preservation, community preservation motivates a significant amount of land use regulation. In fact, historic preservation is often a kind of rough proxy for the real concern of preventing displacement of the existing community. Development can threaten community in a number of different ways. Most directly, an influx of new residents can affect existing social ties and threaten existing social capital.⁶⁴ Development can simultaneously price some residents out of the neighborhood.⁶⁵ This gentrification—a perennial issue in local government and land use law⁶⁶—creates its own winners and losers. The former includes primarily in-place property owners; the latter includes renters. Nevertheless, people concerned with preserving the existing in-place community will usually object to development that changes the character of a place.⁶⁷

Some local governments have begun to experiment with community preservation directly, enacting community preservation ordinances that do not require a showing of historical significance but rather community significance to preserve a building.⁶⁸ Most use zoning's blunter tools, again seeking to restrict new development by erecting regulatory hurdles. While this can sometimes prove self-defeating, creating stagnation and capital flight, community members will often take that risk in order to protect their

63. For a description of zoning for historic preservation, see J. Dennis Doyle, *Historic Preservation Zoning in Maryland*, 5 MD. L.F. 100, 101–05 (1976).

64. See Catherine Hart, *Community Preference in New York City*, 47 SETON HALL L. REV. 881, 905 (2017) (explaining that the influx of high-income individuals into low-income communities “replaces local residents and deprives long-time residents of the stake they have built in their community”).

65. Been, *supra* note 6, at 242–44.

66. See SHERYLL CASHIN, *THE FAILURES OF INTEGRATION* 324–27 (2004); Rachel D. Godsil, *The Gentrification Trigger: Autonomy, Mobility, and Affirmatively Furthering Fair Housing*, 78 BROOK. L. REV. 319, 335–37 (2013) (discussing a more nuanced approach to gentrification).

67. The built environment is also important for community preservation, even independent of the financial pressures that can come from gentrification. As Professor Carol Rose observed decades ago, buildings can be important for constituting community, and indeed preservation efforts should be evaluated to that end. See Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473, 488–91 (1981).

68. See William A. Fischel, *Neighborhood Conservation Districts: The New Belt and Suspenders of Municipal Zoning*, 78 BROOK. L. REV. 339, 347–49 (2013) (discussing community preservation techniques other than those based on historic status).

social capital and communities. There is no doubt that concerns about the fragility of existing communities motivate a significant amount of restrictive zoning.

K. AESTHETIC REGULATION

Today, in many places, the motivation for many land use regulations appears to be as much aesthetics as anything else. Neighbors are concerned about the impact of new development on the look of their neighborhood for its own sake and often oppose development primarily because they think it will be ugly.⁶⁹

Sometimes, this concern is explicitly included in zoning ordinances by requiring architectural review.⁷⁰ Such architectural review provisions tend to create greater homogeneity in building design, often specifying a narrow list of appropriate architectural styles for any new buildings.⁷¹ Homogeneity does not ensure beauty, of course, and can in fact create the opposite.⁷² But it is a proxy for uncontroversial buildings and so minimizes aesthetic outliers.

Some jurisdictions have also turned away from traditional use-based zoning ordinances to form-based codes instead. As their name implies, these codes focus on the particular form that buildings can take—on bulk, shape, and so forth—instead of on the permitted uses. These often impose quite specific design requirements that function like de facto aesthetic regulations.⁷³

L. ENVIRONMENTAL PROTECTION: SUSTAINABLE DEVELOPMENT

We have now long understood the important role that land use regulations can play in climate change.⁷⁴ Real estate development

69. See, e.g., Dan Grossman, *Think Those Slot Homes in Denver Are Ugly? You're Not Alone*, 9 NEWS, <https://www.9news.com/article/money/personal-finance/real-estate/think-those-slot-homes-in-denver-are-ugly-youre-not-alone/73-490912391> (last updated Nov. 10, 2017, 2:44 PM) (discussing Denver residents' aesthetic opposition to homes described as "Minecraft characters, Lego characters," and "robots").

70. See Shawn G. Rice, *Zoning Law: Architectural Appearance Ordinances and the First Amendment*, 76 MARQ. L. REV. 439, 446–48 (1993) (discussing the ways that architectural appearance ordinances can limit the aesthetics of communities).

71. *Id.* at 446 (describing architectural appearance ordinances as limiting "excessive dissimilarity" and requiring "conformity" or "harmony" (citations omitted)).

72. See EDWARD SCISSORHANDS (20th Century Fox Dec. 6, 1990).

73. For a description of form-based codes, see NICOLE STELLE GARNETT, HOOVER INST., *UPSCALING THE NEIGHBORHOOD* 18–32 (2018), https://www.hoover.org/sites/default/files/upscaling_the_neighborhood_revised_final_garnett_0.pdf.

74. For an overview of this dynamic, see generally David Markell, *Climate Change and the*

contributes significantly to carbon emissions. The sprawl associated with single-family residential suburbs is much more carbon intensive than dense development closer to people's jobs and to commercial centers.⁷⁵

Energy conservation is a backdrop for many discussions about new development. This can translate directly into land use regulation. Zoning that minimizes sprawl and that encourages denser development near transportation will lower carbon emissions.⁷⁶ Indeed, this is the explicit goal of sustainable development, which has generated an enormous amount of zoning activity and scholarly interest.⁷⁷ The blueprint for sustainable development remains contested, but experts broadly agree that urban living produces much less carbon than suburban and rural living. They therefore favor increasing density in the urban core while discouraging the land-consuming sprawl that has characterized development for much of the past century.⁷⁸

M. ENVIRONMENTAL PROTECTION: ANIMALS AND HABITATS

A related motivation for land use regulation, especially in rural areas, is more traditional environmental protection and specifically the protection of environmental resources like wetlands. Wetland regulations are often administrated at the state level, rather than the local level.⁷⁹ Nevertheless, they function as sometimes dramatic limits on development. Other kinds of environmental regulations have a similar effect. Septic regulations can prove more restrictive than zoning in controlling density in rural areas without municipal wastewater.⁸⁰ Explicit environmental review through the National Environmental Policy Act ("NEPA") or its state analogues also

Roles of Land Use and Energy Law: An Introduction, 27 J. LAND USE & ENVTL. L. 231 (2012) (discussing the effect that "land use, energy efficiency, and mobile and stationary source emission reduction approaches" can have on climate change).

75. See REID EWING ET AL., SMART GROWTH AM., MEASURING SPRAWL AND ITS IMPACT 18–19 (2002), <https://www.smartgrowthamerica.org/app/legacy/documents/MeasuringSprawl.PDF>.

76. Patricia E. Salkin, *Sustainability and Land Use Planning: Greening State and Local Land Use Plans and Regulations to Address Climate Change Challenges and Preserve Resources for Future Generations*, 34 WM. & MARY ENVTL. L. & POL'Y REV. 121, 147–56 (2009) (surveying regulatory land use techniques meant to increase sustainability).

77. See, e.g., John R. Nolon, *An Environmental Understanding of the Local Land Use System*, 45 ENVTL. L. REP. 10215, 10220–21 (2015).

78. Other kinds of less conventional responses are possible as well. For an example of one, see Rossi & Serkin, *supra* note 46.

79. See George F. Gramling, III, *Wetland Regulation and Wildlife Habitat Protection: Proposals for Florida*, 8 HARV. ENVTL. L. REV. 365, 377–78 (1984).

80. See Christopher Serkin, *Public Entrenchment Through Private Law: Binding Local Governments*, 78 U. CHI. L. REV. 879, 913 (2011) (discussing how building infrastructure with limited capacity can be more controlling than zoning).

shape large-scale development.⁸¹

Other municipalities focus environmental efforts on wildlife habitat. The most sophisticated efforts involve taking an inventory of animal pathways and then seeking to create habitat connectivity by preventing development that interferes with those pathways.⁸² Wildlife overlay districts seek to preserve critical habitat and to promote ecological health. More often, however, local governments pursue what is better characterized as aesthetic environmentalism. The goal is to promote a community character that includes vegetation, trees, open space, and a general sense of nature, regardless of the actual impact on wildlife or natural resources. Proponents often object to cookie-cutter suburbs and promote more large-lot development that preserves a more rural feel.

The result for zoning is increased restriction on development, but the location for these restrictions is motivated by a concern for natural resources and not by aesthetics, community character, and so forth.

N. ECONOMIC INTERVENTION

Zoning and land use controls can be an important if sometimes problematic tool for local governments to affect economic outcomes. At the most parochial level, land use regulations can be used as a kind of economic protectionism for in-place businesses by excluding competition.⁸³ Prohibitions on new entrants, coupled with grandfather protection for existing businesses, can create a kind of regulatory mini-monopoly. This can look like pure rent seeking or just naked economic favoritism for in-place businesses.⁸⁴ Sometimes, however, local governments can justify anti-competitive zoning on broader economic grounds. For example, some local governments have tried to use zoning and land use controls to exclude large box stores like Wal-Mart, ostensibly to preserve smaller businesses and downtown commercial areas, and the positive externalities they generate.⁸⁵

81. See Bradley C. Karkkainen, *Whither NEPA*, 12 N.Y.U. ENVTL. L.J. 333, 349 (2004) (arguing that environmental-informative requirements function as regulatory penalties, creating incentives to upgrade environmental standards early in projects).

82. *Critical Paths for Vermont Wildlife*, NAT'L WILDLIFE FED'N, <https://www.nwf.org/Our-Work/Habitats/Wildlife-Corridors/Northeast> (last visited May 12, 2019).

83. See, e.g., *Ensign Bickford Realty Corp. v. City Council of Livermore*, 137 Cal. Rptr. 304, 309 (Ct. App. 1977); *Sprenger, Grubb & Assocs., Inc. v. City of Hailey*, 903 P.2d 741, 748–49 (Idaho 1995).

84. See *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 466–67 (7th Cir. 1988).

85. A downtown commercial district may generate significant positive effects, which a big-box store at the edge of town can threaten. See Scott L. Cummings, *Law in the Labor Movement's*

Local governments can also use zoning to pursue specific economic goals. For example, noncumulative zoning in industrial areas is best understood as a kind of subsidy for industry by keeping property values lower for industrial land.⁸⁶ In other instances, local governments can create what amount to aspirational zones for uses they seek to attract—like New York City creating a new biomedical zone.⁸⁷ And even more broadly, local governments may use land use regulations to try to generate agglomeration surplus through a sufficient density of a particular kind of business or industry: think, here, of tech in Silicon Valley; insurance in Hartford, Connecticut; theater on Broadway; and so forth.⁸⁸ These places and industries may all have their own specific land use needs, and local governments are often especially solicitous of these industry-driven zoning requirements.⁸⁹

O. EXCLUSION AND SEGREGATION

In addition to the more-or-less principled justifications for land use regulation identified above, there are also more overtly pernicious ones that are important to acknowledge. Zoning can be used to exclude disfavored groups or businesses. This is most obvious and familiar in the context of racially motivated zoning. Although explicitly race-based zoning is clearly unconstitutional and illegal, exclusionary zoning often has a racially discriminatory impact, if not motivation. Because this can be so difficult to detect and to prove, it remains widespread.⁹⁰ For example, opposition to affordable housing or simply to less expensive multifamily housing may well be motivated for some people by racial animus.⁹¹ The political fights

Challenge to Wal-Mart: A Case Study of the Inglewood Site Fight, 95 CALIF. L. REV. 1927, 1948–52 (2007).

86. Roderick M. Hills, Jr. & David Schleicher, *The Steep Costs of Using Noncumulative Zoning to Preserve Land for Urban Manufacturing*, 77 U. CHI. L. REV. 249, 253–56 (2010) (acknowledging the prevalence of the use of noncumulative zoning for these purposes but ultimately arguing against it).

87. TRANSWESTERN, NEW YORK CITY LIFE SCIENCE MARKET 5 (2017), https://download.transwestern.com/public/Media/NY-Life-Science-Outlook_2Q2017.pdf.

88. See Roderick M. Hills & David Schleicher, *Planning an Affordable City*, 101 IOWA L. REV. 91, 115–16 (2015) (“Many cities have no adequate substitutes, because they create agglomeration economies that rivals cannot duplicate.”).

89. Broadway enjoys a special zoning district. For an interesting overview of New York’s zoning code, see Allison Meier, *How Zoning Laws Shaped New York City over the Last Century*, HYPERALLERGIC (Dec. 14, 2016), <https://hyperallergic.com/341092/mastering-the-metropolis-mcny>.

90. See Donald J. Smythe, *The Power to Exclude and the Power to Expel*, 66 CLEV. ST. L. REV. 367, 397–99 (2018) (analyzing the continued use of exclusionary zoning by local governments).

91. See, e.g., Timothy J. Choppin, *Breaking the Exclusionary Land Use Regulation Barrier: Policies to Promote Affordable Housing in the Suburbs*, 82 GEO. L.J. 2039, 2054 (1994) (“Discrimination, both racial and economic, is one reason suburban residents oppose affordable housing.”).

over such housing are therefore often accompanied by charges of racism and can be bitter and ugly.⁹²

Table 1 summarizes the different municipal goals described in this Section and the resulting implications for zoning.

92. See Mick Dumke, *Amid Affordable Housing Dispute, Conservatives Seek a Home on the Northwest Side*, CHI. SUN-TIMES (May 23, 2018, 10:48 AM), <https://chicago.suntimes.com/news/affordable-housing-chicago-northwest-side-gop-conservative-republicans-northwest-side-jefferson-park-illinois-policy-institute> (describing a political fight over a proposed affordable housing project in Chicago).

TABLE 1. The Uses of Zoning

<i>Local Goal</i>	<i>Land Use Objective</i>	<i>Zoning Approach</i>
Minimizing harms from neighbors	Segregating incompatible uses	Traditional use-based zoning
New urbanism	Encouraging transit-oriented and mixed-use development	Encouraging density and combined residential and commercial uses in prespecified areas
Encouraging growth	Reducing zoning and regulatory barriers to development	Relaxed zoning restrictions
Discouraging growth	Increasing regulatory barriers to development	Density limits and other regulatory hurdles
Fiscal Zoning	Discouraging uses that have a negative revenue impact	Density limits to exclude multifamily housing
Zoning as bargaining	Imposing impact fees and creating bargaining moments requiring discretionary approvals	Density limits and creation of discretionary approvals
Zoning to increase property values	Reducing supply of developable property	Density limits and other regulatory hurdles
Affordability	Increasing housing supply and increasing density and multifamily housing	Relaxed zoning restrictions and the creation of inclusionary zoning regimes
Historic preservation	Preventing destruction of older structures and preserving historical character of neighborhoods	Strengthened zoning restrictions and historic preservation rules
Community preservation	Maintaining existing social capital and community ties	Strengthened zoning restrictions and other regulatory hurdles
Aesthetic regulation	Maintaining or enhancing the look and feel of an area	Aesthetic regulation, historic preservation, and form-based codes
Environmental protection: carbon reduction	Increasing density, reducing building size, and reducing vehicle miles traveled	Encouraging density
Environmental protection: animals and habitats	Preserving open space and critical habitats	Large-lot zoning and preservation of designated environmental resources
Economic Intervention	Pursuing a particular economic outcome	Industry-specific zoning
Exclusion and segregation	Keeping out unwanted people and businesses	Strengthened zoning restrictions

What should be immediately apparent is the extent of convergence in the resulting approaches to zoning, even as land use objectives continue to diverge. Clearly, Table 1 obscures, through simplification, important limits on the extent of convergence. New urbanists, for example, will not favor relaxed zoning restrictions in all of the same places, or in the same way, as environmentalists. Nor are these interests mutually exclusive, even in the same person or political body. Someone can prioritize aesthetic concerns in one place and affordable housing in another in the same municipality. There is nothing inherently inconsistent in those views.

Indeed, questions of location and scale create persistent tensions in each of these approaches. Increased density in one place might increase property values but make other parts of the municipality more affordable. Local renters who might find themselves priced out of that particular neighborhood might therefore object, even though the effect of increased supply is to improve affordability.⁹³ Similarly, favoring density, transit-oriented development, or a more urban mixed-use streetscape does not mean favoring those elements everywhere. They can conflict with concerns over historic or community preservation in particular locations in ways that are not internally inconsistent.

III. EVALUATING MULTIMODAL CONVERGENCE

A. THE COSTS AND BENEFITS OF DIVERGENCE

The diverging goals of land use regulations—and the resulting property and development rights that they circumscribe—create both costs and benefits. They also create new political alliances that can make the real stakes of zoning fights increasingly opaque. Being clear eyed about these dynamics allows for a more careful assessment of the changing landscape of land use regulations.

The most obvious cost of the proliferation of land use goals comes from the difficulty in navigating divergent regulatory regimes. When zoning codified the straightforward goal of separating incompatible uses of property, it was relatively easy for property owners and developers to anticipate ahead of time what uses would be permitted on any particular property. Comprehensive plans gave a sense of the municipality's preferences and priorities, while the zoning ordinance prescribed broad categories of uses and densities that it would allow. A developer seeking to build new multifamily housing or a new commercial center would look for

93. See Been et al., *supra* note 57, at 25–27.

property with the right physical and regulatory characteristics to decide what land to buy and where to develop. And this process was relatively transparent.

Divergence in land use goals can obscure some of zoning's signaling and channeling functions. Today, the content of the zoning ordinance does not necessarily reveal the municipality's underlying purposes and goals and so can make the regulatory treatment of land more opaque. The fact that property is zoned as agricultural, for example, does not necessarily mean the municipality is hostile to development there. It might mean, instead, that local officials are open to a rezoning for a price.⁹⁴ Likewise, the fact that development will require a normally routine special use permit, or a less routine variance, does not mean a developer should expect to get it if the development will occupy land that local officials believe is important for habitat or the local officials are simply opposed to growth. In other words, divergence in the underlying purposes of land use regulations—especially in specific locations within a municipality—means that it can be difficult for property owners and developers to know ahead of time what uses will be permitted in any particular place. The contours of property rights and development potential are therefore rendered at least partially obscure.

Divergence in land use regulations creates another cost, too, in the form of special interest group rent seeking.⁹⁵ Support for—or opposition to—some land use approval can now include special interest group pressure from many different directions. Those interventions are costly themselves, but they can also create a more complex and less transparent set of choices for local officials. The results can be less effective regulations, whether judged by efficiency, by public preference, or any other metric.

There are benefits of the seeming divergence, however. Most importantly, multiplicity in land use regulations can allow people to better satisfy their individual preferences by choosing to live in a place that pursues their particular regulatory priorities. And they will not always choose to live in the place where their property rights are the most

94. See Rose, *supra* note 3, at 862–63, 897; see also Melanie Yingst, *Commission OKs Rezoning of Properties*, TROY DAILY NEWS (June 14, 2018), <https://www.tdn-net.com/news/43184/commission-oks-rezoning-of-properties> (discussing an Ohio local zoning commission's decision to rezone two agricultural properties to allow residential development of the area).

95. See generally Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986) (discussing interest-group rent seeking).

expansive. Indeed, it is quite to the contrary. While no one likes to be told what they can and cannot do on their own property, almost everyone likes being able to tell neighbors what they can do on theirs. Many people will willingly trade greater restrictions on their own land for equivalent restrictions on their neighbors. The proliferation of common interest communities, many of which are subject to much more burdensome property restrictions than any local zoning ordinance would ever impose, is proof that many people prefer this trade-off.⁹⁶ Just as people can choose to live in a place with good public schools, or low taxes, or mass transit, or lots of open space, regulatory priorities can be important selection criteria for homeowners.

Relatedly, satisfying consumers' regulatory preferences facilitates Tieboutian sorting.⁹⁷ This has structural benefits. Desirable regulatory regimes will be capitalized into property values, at least to some extent. That provides an important feedback mechanism for local governments seeking to satisfy consumer preferences. Where regulatory choices are limited to the binary options of "more" or "less," price becomes an unhelpful or even perverse signal. More regulation will tend to restrict supply and so drive up prices, all else being equal. The pressure from sorting will always favor more restrictive zoning. But in a world of multimodal convergence, where local governments pursue a variety of regulatory objectives, sorting starts to generate meaningful price signals in property values. For example, the fact that many local governments have sought to brand themselves as "green" cities, partly through their land use regulations, demonstrates at least their perception of the benefits of such sorting.⁹⁸

In theory, then, the proliferation of attitudes towards land use regulations, as well as the regulations themselves, should allow for consumers to satisfy their regulatory preferences and to purchase the bundle of property rights that they want. To the extent they are visible to outsiders—sometimes an unrealistic assumption—land use priorities allow for more efficient sorting.⁹⁹

96. See 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, 833 (1999) (arguing that the proliferation of common interest communities demonstrates their appeal).

97. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 417–20 (1956).

98. See Denise Ryan, *The \$31b "Green" Branding of Vancouver*, VANCOUVER SUN (Jan. 31, 2016), <http://www.vancouversun.com/business/green+branding+Vancouver/11686117/story.html>.

99. See Tiebout, *supra* note 97, at 418.

The tension between predictability and clarity in property rights on the one hand and satisfying diverse preferences on the other creates a meaningful limit on the goals that local governments should be able to pursue and how they pursue them. Too much divergence and information costs become too high. But too little and more people will be stuck in regimes that do not actually reflect their interests. Multimodal convergence therefore represents a surprisingly appropriate compromise between the certainty of unidimensional land use goals and more chaotic divergence. It also means that not everyone in a municipality must agree on the same goals to still be able to agree on an approach to zoning. The fact that different substantive goals can produce the same attitude towards zoning in a particular dispute means that more people can satisfy their regulatory preferences with fewer options.

This is not to say that the extent of the observed divergence that exists today is appropriate. It may be too great, and so the information costs are already too high. Or it may not be enough, and people are being forced into regulatory regimes that do not satisfy their preferences. This is, fundamentally, an empirical question, and one that would require further exploration to try to resolve. The observation here is simply that some degree of divergence is desirable, and that multimodal convergence reflects a kind of tacit compromise between an overly rigid set of land use goals and a regulatory free-for-all.

Multimodal convergence also provides a useful way of thinking about political alignments and narratives in contemporary land use fights. It explains why many land use disputes today involve such unlikely bedfellows. For example, the motives of the growth machine and affordable housing advocates may be very different, but their view of zoning may be quite consistent.¹⁰⁰

These dynamics also make it more difficult to understand the “real” stakes of many land use disputes. Does opposition to multifamily housing in a particular place come from concern about habitat loss, from aesthetic preferences, or from racist opposition to the likely low-income residents who are predicted to move in? Any of those views would be consistent with a vote against the new development.

The purpose of highlighting these dynamics is not, ultimately, to favor one over another. Appropriate concerns in one place may be entirely inappropriate somewhere else. But bringing awareness to the diversity of

100. Serkin, *supra* note 2, at 13–15.

goals that can be implicated by modern land use disputes should allow for more explicit evaluations of the trade-offs in any zoning decision. Even if the motivation for restrictive zoning is aesthetic, for example, it is important to recognize the impact on affordability. Conversely, encouraging growth may help affordability or create opportunities for agglomeration, but with the possibility of burdening infrastructure beyond what it can easily support and displacing in-place local residents.

But these dynamics do reveal that different groups sometimes end up advocating for land use regulations against their expressed interests. These groups are either being disingenuous about their actual motivations or are mistaken about how different substantive policies translate into land use regulation. The survey of land use goals in the previous part makes it easier to identify these unexpected positions and to explore alternative explanations.

B. AN EXAMPLE: NASHVILLE'S MUSIC ROW

Consider a recent land use fight in Nashville, Tennessee. There is nothing particularly special about this example. Indeed, its point here is its banality—if interesting local color. Nor does it implicate every different interest identified above. But it does reveal the complicated goals of modern land use controversies.

Nashville's Music Row is two long, multiblock streets near and roughly parallel to the campus of Vanderbilt University. Its name comes from the many recording and music studios located along these long strips.¹⁰¹ The buildings, however, look residential and are an eclectic hodgepodge that includes craftsman-style bungalows from the first half of the twentieth century, some modern buildings, and a few small office buildings. Increasing development pressure, however, has led to the redevelopment of many of these music-industry uses into new apartment buildings.¹⁰² This has led to heated conflict over the future of Music Row,

101. See Jessi Maness, *The History of Music Row: 60 Years of Greatness*, SPORTS & ENT. NASHVILLE (Oct. 13, 2015), <http://sportsandentertainmentnashville.com/the-history-of-music-row-60-years-of-greatness>.

102. See, e.g., Michelle C. Kroft, *Show Your Support—Help Save Music Row at the Rally the Row Event July 24th!*, HIST. NASHVILLE, INC. (July 16, 2018), <http://historicnashvilleinc.org/show-your-support-help-save-music-row-at-the-rally-the-row-event-july-24th> [<https://perma.cc/UVK8-R89Z>] (“Since 2013, 43 buildings with music industry connections have been demolished—most to make way for apartment buildings.”); see also Margaret Renkl, *The Day the Music Died*, N.Y. TIMES (Jan. 21, 2019), <https://www.nytimes.com/2019/01/21/opinion/nashville-music.html> (outlining the gentrification of Music Row).

culminating in a two-year building moratorium that recently ended.¹⁰³

FIGURE 1. Music Row



At first glance, fights over the future of Music Row look entirely conventional. Groups arrayed against the development include NIMBY neighbors as well as preservationists. One of the most hard-fought development battles on Music Row concerned RCA Studio A. In 2014, when a developer announced plans to tear down and redevelop the property, singer-songwriter Ben Folds wrote an open letter to the musical community imploring that the building be saved.¹⁰⁴ He listed the musicians who recorded hit records there, including The Beach Boys, Dolly Parton, Jewel, Kesha, Hank Williams Jr., and many, many others. Folds was himself the tenant at the time, and he organized an aggressive and ultimately successful effort to buy the building and preserve it as a recording studio.¹⁰⁵

While Studio A was saved through a voluntary transaction for \$5.7 million, other building and redevelopment plans remain fiercely contested

103. See Tony Gonzalez, *Music Row Apartments Halted, Prompting New Study*, TENNESSEAN (Feb. 12, 2015 6:44 PM), <https://www.tennessean.com/story/news/local/2015/02/12/music-row-apartment-plan-halted-prompting-study/23324495>.

104. Open Letter from Ben Folds, owner of Grand Victor Sound (June 24, 2014), <https://musicrow.com/2014/06/ben-folds-open-letter-rca-studio-a-to-be-sold>.

105. See Richard Fausset, *Deal Saves Historic Nashville Studio*, N.Y. TIMES (Oct. 3, 2014), <https://www.nytimes.com/2014/10/04/us/deal-saves-historic-nashville-studio.html>.

by preservationists. But historic preservation is an awkward fit because many of the buildings are not historical in any way. The historic preservationists are focused less on the buildings than on the musical history that they represent. In fact, it appears that their interests are not about preserving the architecture but are instead about preserving the music industry more broadly. One preservationist, for example, articulated the agenda this way: “We can’t just sit back and let Nashville’s unique history be destroyed and its present-day musical culture lost.”¹⁰⁶

Other opposition to development appears to be more about preserving the community’s character than about any historic resources.¹⁰⁷ One longtime bartender said of the development on Music Row: “It’s not Nashville anymore. It used to be a little place, with a little airport, that had some fantastic music and big personalities and millions of different stories. Now it’s a metropolis, this is a big city.”¹⁰⁸ Others have focused their opposition on the associated infrastructure burdens and, in particular, on traffic.¹⁰⁹ Indeed, traffic has become a flashpoint in Nashville. There is no consensus about how to address it, but many people oppose all new development until a plan is in place.¹¹⁰

106. Jessica Nicholson, *National Trust for Historic Preservation and Historic Nashville to Hold Rally the Row Event*, MUSIC ROW (July 20, 2018) (quoting Carolyn Brackett, Senior Field Officer, National Trust for Historic Preservation), <https://musicrow.com/2018/07/national-trust-for-historic-preservation-and-historic-nashville-to-hold-rally-the-row-event> [<https://perma.cc/2DR2-6QU6>]; see also *id.* (“We have to act now to save this place that is iconic and historically priceless.” (quoting Trey Bruce, Vice President, Historic Nashville)).

107. See, e.g., NASHVILLE METRO. PLANNING DEP’T, MUSIC ROW DETAILED PLAN app. (2016) [hereinafter MUSIC ROW DETAILED PLAN], https://www.nashville.gov/Portals/0/SiteContent/Planning/docs/MusicRow/Music%20Row%20Detailed%20Plan%20Draft%20Recommendations__withAppendix.pdf (Survey 1 Responses Organized by Question) (listing comments from survey respondents about preserving Music Row, including: “To me, the individual buildings create an overall feel that binds the community. It’s humble and full of character.”).

108. Nikki Junewicz, *Historic Buildings in Danger in Music Row Redevelopment Proposal*, FOX 17 NASHVILLE (May 20, 2018) (quoting Jonathan Long, local bartender), <https://fox17.com/news/local/historic-buildings-in-danger-in-music-city-row-redevelopment-proposal> [<https://perma.cc/HDK4-RGL3>].

109. See MUSIC ROW DETAILED PLAN, *supra* note 107, at app. (“GROW[TH] SHOULD NOT OCCUR BY BUILDING . . . That would only worsen the traffic and will be less inviting for tourism.”); see also E-mail from John Dotson, Parks Broker, e-Pro, to Planning Commissioners (Dec. 6, 2016, 11:40 AM), <https://www.nashville.gov/document/ID/cdd7797e-1ed5-49c7-8e20-7fc9ef4fd8a9/December-8-2016-public-comments-received-through-December-7> (“We are most concerned about traffic, parking and infrastructure.”).

110. See, e.g., MUSIC ROW DETAILED PLAN, *supra* note 107, at app. (commenting the following on getting around Music Row: “[I]nfrastructure should be considered BEFORE approval of millions of square feet of new construction, not after.”). Cf. Hiroko Tabuchi, *How the Koch Brothers Are Killing Public Transit Projects Around the Country*, N.Y. TIMES (June 19, 2018), <https://www.nytimes.com/2018/06/19/climate/koch-brothers-public-transit.html> (discussing the support and opposition for a new transit plan in Nashville and other cities across the United States).

Finally, additional opposition comes from community groups who worry about affordability.¹¹¹ Any new construction in and around Music Row is likely to be very expensive. Many people worry that any new housing will be unaffordable, and that this will displace current residents. Housing costs in Nashville have been skyrocketing, putting particular pressure on affordable housing. According to one study, Nashville has lost 18,000 affordable housing units since 2000, and 44% of Nashville renters are housing-cost burdened.¹¹² Opponents of new development often focus on affordability as a central objection.¹¹³

On the opposite side are developers who see a significant financial opportunity in the Music Row redevelopment.¹¹⁴ Their interests are predictable. But the City also sees a substantial fiscal upside. Not only does new development generate more property tax revenue, but also its net fiscal impact is even more positive. Where dense urban infill has occurred nearby, the net tax revenue per square foot is dramatically higher than anywhere else in the metro area because of the relatively low cost of building out infrastructure and the high property values.¹¹⁵ This, coupled with the City's generally lax approach to land use regulation, makes redevelopment of Music Row appear all but inevitable, despite the interests aligned on the other side. Whoever wins, the controversy seems entirely predictable and conventional.

111. See OFFICE OF THE MAYOR MEGAN BARRY, HOUSING NASHVILLE: NASHVILLE & DAVIDSON COUNTY'S HOUSING REPORT 11–12, 40–42 (2017) [hereinafter NASHVILLE HOUSING REPORT], <https://www.nashville.gov/Portals/0/SiteContent/MayorsOffice/AffordableHousing/Housing%20Nashville%20FINAL.pdf>; see also MUSIC ROW DETAILED PLAN, *supra* note 107, at app. (commenting the following concerning how to strengthen the Music Row community: “Affordability. Nashville can’t chase out all of us median income people . . .”).

112. NASHVILLE HOUSING REPORT, *supra* note 111, at 11, 16.

113. See David Plazas, *The Costs of Growth and Change in Nashville*, TENNESSEAN, <https://www.tennessean.com/story/opinion/columnists/david-plazas/2017/01/29/costs-growth-and-change-nashville/97064252> (last updated Jan. 10, 2018, 6:50 PM) (discussing how the development boom in Nashville has led to increasingly high housing costs); Stephen Trageser, *Music Row Development and Neighborhood Character*, NASHVILLE SCENE (Sept. 25, 2018 3:00 PM), <https://www.nashvillescene.com/news/pith-in-the-wind/article/21024081/music-row-development-and-neighborhood-character> (“[W]ith Nashville real estate prices as high as they are today, the chances of [neighborhood business] finding a comparable spot nearby seem slim.”) (discussing the pressure to develop Music Row and its effect on existing businesses).

114. Staff Reports, *Music Row Project Lands \$12.8M Permit*, NASHVILLE POST (Apr. 4, 2018), <https://www.nashvillepost.com/business/development/article/20999454/notes-music-row-project-lands-128m-permit> (reporting that a development company has obtained a permit to build a Music Row office building expected to be worth \$35 million).

115. SMART GROWTH AM., *supra* note 42, at 10–11 (analyzing the significantly positive fiscal impact and tax benefit of the Gulch, a dense infill development, compared to two other Nashville developments).

A closer look at the stakes, however, reveals a more complicated dynamic, and one that is increasingly representative of modern land use fights. Consider, first, the effect on traffic: a central source of opposition. This is a perplexing reason to oppose redevelopment. Music Row is adjacent to Vanderbilt and in the heart of the City. Yes, new residential buildings will increase local traffic to some extent, but it should marginally reduce traffic in the City more broadly. It is not exactly transit-oriented development since there is no meaningful transit in Nashville. But it is development that is closer to the places people work and play and so will result in fewer vehicle miles traveled. Traffic has a lot of political valence, and it makes tactical sense for opponents to use it as a reason to push back against development, but it seems misguided as a basis for objecting new buildings on Music Row. For this same reason, those concerned with sustainable development should favor dense infill in places like Music Row over suburban sprawl. This also reduces development's total carbon footprint.

Increased housing costs citywide are also a poor reason to oppose the redevelopment of Music Row. While new housing may well precipitate a change in the character of the particular neighborhood and increase prices there, the best evidence demonstrates that adding supply will decrease median property values in the City and increase affordability. This is true even if the new housing stock is exclusively market rate and expensive. Such is the power of supply and demand.¹¹⁶ Opposition to new development by immediate neighbors on grounds of affordability is rational if parochial—what Professor Been has labeled “City NIMBYs.”¹¹⁷ Opposition based on concerns about housing costs throughout the city makes little sense.

There are countervailing peculiarities on the other side as well. Focusing on the fiscal impact of redevelopment, tax implications are only part of the story. Many business leaders and politicians have argued that it is in Nashville's economic interest to preserve the music industry.¹¹⁸

116. See Emily Hamilton, *Three Lessons from Nashville's Building Boom*, MARKET URBANISM (Apr. 27, 2018), <http://marketurbanism.com/2018/04/27/three-lessons-nashvilles-building-boom> (“While there's no way to legislate that great music will continue to come out of Music Row, the best way to make Nashville a good place for up and coming artists is to allow for new housing construction that will allow affordable neighborhoods to stay that way.”) (arguing that development has kept rents in other neighborhoods more affordable).

117. See Been, *supra* note 6, at 242–43.

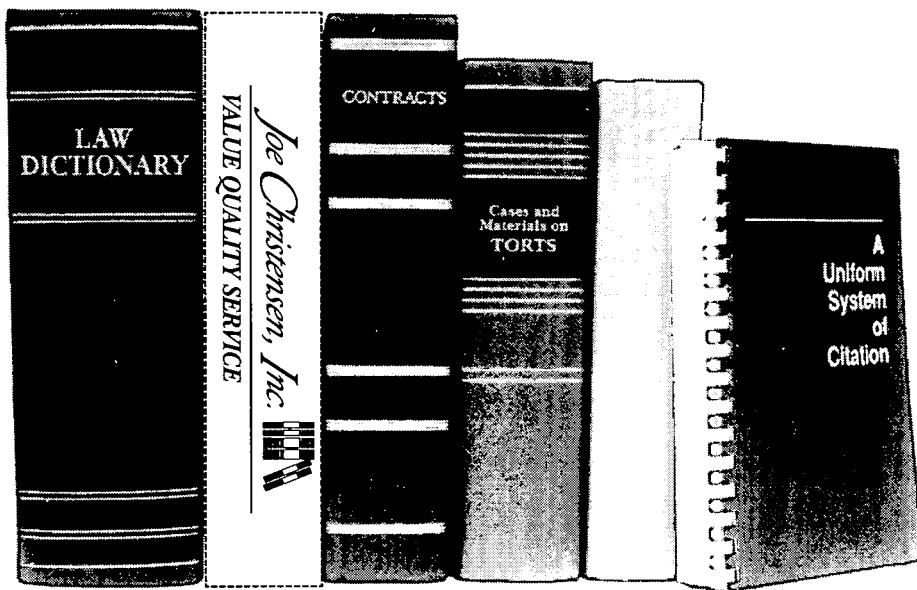
118. See Patrick Sisson, *On a Mission to Preserve Nashville's Music Row*, MERIDIAN, <https://www.meridian.net/tennessee/2016/11/10/13592846/nashville-live-music-row> (last visited May 12, 2019) (describing the outsize impact Music Row has had on Nashville's economy).

Preventing redevelopment of Music Row means that music studios do not need to compete with residential developers and so amounts to a kind of subsidy for the music business. There are agglomeration economies that come from the clustering of music studios in one particular area: musicians and songwriters frequently collaborate throughout the day, musicians record together, industry executives meet and do business in person up and down Music Row.¹¹⁹ And, as traffic problems worsen throughout the city, the value of spatial proximity is only increasing.

Yes, market pressures demonstrate that the property is more valuable as residential or mixed-use development. Putting the property to a higher and better use unlocks value, by definition. However, the music industry produces significant benefits—positive externalities—for the City as a whole and should perhaps be preserved for that reason. It generates significant economic activity and also creates a kind of identity that attracts businesses and residents. If those benefits exceed the marginal value of redevelopment, then the City has a fiscal reason to subsidize the industry and prevent redevelopment, even if that means missing out on some increased tax revenue.

None of this reveals what the right answer is for Nashville. But it does demonstrate how the stakes of modern land use and zoning fights often go far beyond the traditional proregulation and antiregulation camps. It also reveals how different groups' interests do not converge around any singular goal. Instead, different constituencies are motivated by very different underlying goals. Ultimately, people choose to live, to work, and to invest in Nashville for very different reasons. Some like the small-city feel of the place, others the music industry, still others the statewide emphasis on property rights and economic liberties, and others the appealing and new housing stock in increasingly dense mixed-use neighborhoods. But ultimately, these are all different views that can be reflected in different land use policies. Allowing Nashville to make decisions about which goals it will prioritize will give voters and property owners the opportunity to pursue or protect those aspects of the city that they most want.

119. See CAROLYN BRACKETT & RANDALL GROSS, NAT'L TRUST FOR HISTORIC PRES., *A NEW VISION FOR MUSIC ROW 15* (2016), <https://www.nashville.gov/Portals/0/SiteContent/Planning/docs/MusicRow/Music%20Row%20Recommendations%20Report%20April%202016.pdf> ("Like in the early days of Music Row, many industry leaders and participants still walk between offices and meet up for lunch, networking, contracting, or collaboration.").



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Is Published Bimonthly by the Students of
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Gould School of Law
699 Exposition Blvd.
Los Angeles, California 90089-0071
Periodicals Postage paid at Los Angeles, California
and additional offices

Subscription \$36.00 per year

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SOUTHERN CALIFORNIA LAW REVIEW

2018

VOLUME 92

2019

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